COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1490 **Cir. Ct. No. 2003FA478**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN RE THE MARRIAGE OF:

ARLENE THOMSON,

PETITIONER-APPELLANT,

V.

ANDREW J. CICERO,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] Arlene Thomson appeals pro se from an order modifying the purge conditions of a prior contempt finding issued in the context of a legal separation case involving her former husband, Andrew Cicero. Arlene had been found in contempt for disobeying a trial court order prohibiting her from unilaterally encumbering a residence which was an asset of the marital estate. We hold that the trial court properly considered all relevant factors when modifying the purge condition and therefore did not misuse its discretion. We affirm this portion of the order.

¶2 The trial court also rejected Arlene's request that the court address property division issues unrelated to the contempt proceeding. The court did so because the parties' prior stipulation, incorporated into the original judgment of legal separation, had resolved those matters. Again seeing no misuse of discretion, we also uphold this portion of the order.

BACKGROUND

¶3 Arlene and Andrew met in 1997, two years after Andrew had won $5.6 million in the Wisconsin Lottery. Back then, Wisconsin did not permit winners to take their prize in a single payment. The law changed a few years later, and Andrew elected to convert his annuity payments to a $2.1 million lump-sum buyout. *See* WIS. STAT. § 565.28(2). Pursuant to what turned out to be incorrect professional advice, Andrew reported the amount as a capital gain instead of ordinary income on his 2000 federal income tax return.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version.

¶4 In 2001, Arlene and Andrew built a house (the Ridgefield Road property) and moved into it in 2002. In July 2002, Andrew learned that the IRS had audited his 2000 income tax return and that he owed approximately $400,000 in back taxes and penalties as a result of mischaracterizing the lottery winnings.

¶5 Arlene and Andrew married in August 2002. Arlene then falsely told Andrew that an attorney she consulted advised her that the only way to shield her from liability for the debt and to protect the Ridgefield Road property was to get a legal separation and transfer title of the property to her. Arlene told Andrew that when the tax matter was settled, they would cancel the separation and quitclaim the house back to Andrew. Andrew took the bait and transferred his interest in the residence to Arlene. In fact, Arlene had no liability on the premarital debt. By the time Andrew discovered the truth, the parties were legally separated and Arlene refused to follow through on her promise to quitclaim the property back to him.

¶6 On Andrew's motion, the circuit court reopened the judgment of legal separation and, among other things, forbade either party from mortgaging or encumbering the Ridgefield Road property without the other's advance express written agreement. The court also ordered Arlene to pay insurance and utilities as long as she solely occupied the residence. When she failed to do so, the court ordered Arlene to execute a quitclaim deed to the Ridgefield Road property, converted the legal separation to a divorce decree, added Andrew's name to the Ridgefield Road property title and granted him exclusive authority to negotiate and complete its sale.

¶7 Andrew received an offer to purchase the Ridgefield Road property and, while preparing for the closing, discovered that at some point before his name

had been added back on the title Arlene had used the property to secure a $45,000 bank loan in violation of the court order barring the parties from encumbering the property without the other's consent. Andrew moved to have Arlene found in contempt and for remedial sanctions pursuant to WIS. STAT. ch. 785. On March 15, 2006, the circuit court granted Andrew's motion for remedial contempt and ordered Arlene, represented by counsel, to serve six months in the county jail, purgeable by obtaining full satisfaction of the mortgage. However, the court stayed commencement of the confinement order pending an April 13 review hearing to give Arlene a chance to satisfy the mortgage before the April 21 closing.

¶8 At the April 13 hearing, Arlene, now appearing pro se, admitted doing nothing to meet the purge term. Nonetheless, the circuit court permitted her to try to explain her conduct. Finding her testimony not credible, her behavior toward the court contemptuous and that she had committed a fraud, the court ordered her to begin serving her sentence. The court also scheduled a hearing to review the purge term once the property was sold.

¶9 The closing occurred as planned on April 21. Andrew used his own money to satisfy the mortgage Arlene had taken out. On April 24, the circuit court conducted the hearing to determine whether to modify the purge conditions. The court found that Arlene owed Andrew $55,359.73 due to the illicit mortgage and resultant attorney fees, and that Andrew was in need of the money awarded. After considering Arlene's objections, the court found that she was employed, made approximately $28,000 annually, had been paying $300 per month on the note and was able to continue to pay at least that amount. The court awarded judgment to Andrew for $55,359.73, modified the purge conditions by ordering Arlene to pay Andrew at least $300 per month toward the $55,359.73, and allowed Arlene to be

released from jail upon proof that she made the first $300 payment. Finally, the court rejected Arlene's request that the court address some property division issues, ruling that those matters had been previously resolved by stipulation between the parties and were unrelated to the contempt matter before the court. Arlene appeals.

DISCUSSION

¶10 A circuit court may impose remedial sanctions for contempt of court. WIS. STAT. § 785.02. We review a circuit court's use of its contempt power for an erroneous exercise of discretion. ***City of Wis. Dells v. Dells Fireworks, Inc.,*** 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App.1995). We review a discretionary decision by examining the record to determine if the court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***Benn v. Benn***, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999). The key findings are that the person is able to pay and the refusal to pay is willful and with intent to avoid payment. ***Krieman v. Goldberg***, 214 Wis. 2d 163, 169, 571 N.W.2d 425 (Ct. App. 1997).

¶11 A purge provision must clearly spell out what the contemnor must do to be purged, and that action must be within the power of the person. ***State ex rel. N.A. v. G.S.***, 156 Wis. 2d 338, 342, 456 N.W.2d 867 (Ct. App. 1990). We review the court's decision to impose sanctions, as well as the particular sanction it chooses, for an erroneous exercise of discretion. ***Schultz v. Sykes***, 2001 WI App 255, ¶8, 248 Wis. 2d 746, 638 N.W.2d 604. Whether an act is within the contemnor's power is a finding of fact. ***State ex rel. N.A.***, 156 Wis. 2d at 343.

¶12 In fashioning a sanction appropriate to the situation, a circuit court has the power to establish alternate conditions which, if met, will purge the contempt. *See* ***Benn***, 230 Wis. 2d at 311. If the purge condition is a money payment, the amount must be sufficient to compensate for the loss suffered due to the contempt. *See* WIS. STAT. § 785.04(1)(a). The court may modify a purge condition if it concludes that the original one was not feasible or not reasonably related to the cause or nature of the contempt. ***State ex rel. V.J.H. v. C.A.B.***, 163 Wis. 2d 833, 845, 472 N.W.2d 839 (Ct. App. 1991).

¶13 Here, the factual findings underlying the contempt finding were that Arlene intentionally disobeyed a court order; that she was the "architect of this entire financial debacle" by taking out for her own purposes a $45,000 mortgage on the Ridgefield Road property without Andrew's express written agreement; that the legal separation litigation was a pretext engineered by Arlene as a fraud on the court; and that her efforts to explain away her actions were totally incredible.

¶14 The original purge condition permitted Arlene to avoid the contempt sanction if she fully satisfied the mortgage prior to the closing on the property. Arlene does not dispute that she failed to satisfy this condition. As a result, the circuit court modified the purge order by requiring Arlene to pay Andrew $300 a month toward the more than $55,000 she owed him. As we have noted, a court may modify a purge condition if the original condition is no longer feasible. ***State ex rel. V.J.H.***, 163 Wis. 2d at 845. That was the very situation confronting the court here. Instead of Arlene satisfying the mortgage per the original purge order, Andrew himself had satisfied the mortgage in order to complete the closing. Thus, the modification was not only proper, but necessary.

¶15 In addition, the modified purge order was supported by the evidence. Arlene was gainfully employed and had demonstrated an ability to pay the $300 monthly payment. The court also found that Andrew had incurred attorney fees due to Arlene's contempt by encumbering the property, that the fees were reasonable in amount and that Andrew had a need for the money Arlene owed him, all appropriate considerations when a court awards attorney fees. *See* ***Ably v. Ably***, 155 Wis. 2d 286, 293, 455 N.W.2d 632 (Ct. App. 1990).

¶16 We will not set aside a circuit court's findings of fact unless they are clearly erroneous, and we must give due regard to the circuit court's opportunity to judge the parties' credibility as witnesses. ***State ex rel. N.A.***, 156 Wis. 2d at 343; WIS. STAT. § 805.17(2). None of the findings are clearly erroneous. By her own account, Arlene knew she was violating a court order when she took out the mortgage loan without Andrew's knowledge or consent. She acknowledged doing "nothing" to satisfy the initial purge condition. The modified purge, a $300 monthly payment, is a sum Arlene already has shown she can manage. It will chip away at the amount she owes Andrew for her illicit loan and his attorney fees in recouping it, and clearly is related to the cause or nature of the contempt. *See* WIS. STAT. § 785.04(1)(a).

¶17 Purge conditions have been termed the "keys to the jail house door." ***State ex rel. V.J.H.***, 163 Wis. 2d at 843. The circuit court could have stood fast on the purge condition it first ordered and insisted upon Arlene satisfying the mortgage by a lump sum payment. Instead, the court provided Arlene another hearing and extra time to comply. When she failed, the court ultimately modified the purge condition to reflect the current situation, fixed Andrew's damages, and determined Arlene's financial ability to comply with the modified purge order. The "keys" here are reasonable, and it is realistic to require Arlene to use them to

avoid jail. *See* ***id.*** The modified purge condition represents an appropriate exercise of discretion.

¶18 As a separate and final matter, Arlene apparently still disputes who paid for what during the construction, landscaping and furnishing of the Ridgefield Road property, and who was entitled to what property upon the divorce. Not only is this water long since over the dam, it also is irrelevant to the contempt order that is before us.

¶19 The focus of this matter was solely whether to modify the purge condition resulting from Arlene's flouting of a court order, not the parties' agreed-upon property division. The property division issues were previously resolved. In August 2003, the parties executed a marital settlement agreement that divided their assets, and the circuit court incorporated the agreement into the judgment of legal separation. Post divorce judgment, Arlene sought an order requiring Andrew to turn over to her various items awarded to her in the judgment, and in February 2006 the parties stipulated to the disposition of furniture still in dispute. When Arlene continued to pursue those issues during these contempt proceedings, the court observed that the property issues already had been litigated.[2]

¶20 Arlene misses the mountain for the molehill. When Arlene persisted on this issue during these contempt proceedings, she was reminded of the parties' earlier agreement regarding disputed items of personal property. Undeterred, Arlene insisted that she still wanted to address "the furniture issue." After

[2] The circuit court also held that by her contemptuous conduct and the incredibility of her testimony, Arlene had waived any right to further contest any issue relating to the parties' personal property. We need not address this aspect of the court's ruling since we hold that the property dispute was not proper grist for this contempt hearing.

allowing both Arlene and Andrew to speak, the court expressed amazement that Arlene continued to "worry about a mirror and a bar stool" when her liberty was at stake. Given Arlene's "inadequate" answers on the furniture matter and the court's "major problems with [her] credibility and [her] moves throughout this whole thing," the court stated that it was disinclined to spend any more time on the matter.

¶21 We see no error. The circuit court gave Arlene substantial leeway. The parties stipulated to the disposition of their furniture, and the stipulation was incorporated into the judgment of legal separation. Arlene did not challenge that agreement when the separation was converted to a judgment of divorce. We agree that Arlene has waived the right to challenge the property award. *See* ***Allen v. Allen***, 78 Wis. 2d 263, 270, 254 N.W.2d 244 (1977) ("A failure to make a timely objection constitutes a waiver of the objection.").

¶22 Arlene's challenge to the property division because Andrew may have retained certain items awarded to her also is irrelevant to this contempt proceeding. Andrew's noncompliance, if any, with the court's order does not entitle Arlene to ignore the order prohibiting encumbering the property. The court properly found Arlene in contempt, properly set an appropriate purge condition, and properly modified that condition in light of the altered situation. A circuit court may fashion "such orders … as are just" for the "failure of any claimant … to obey any order of the court." WIS. STAT. § 805.03. Finally, the court properly declined to revisit the property allocation. We affirm the order in its entirety.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.