COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1430 **Cir. Ct. No. 2006FA6891**

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

IN RE THE MARRIAGE OF:

KIMBERLY C. HYING,

JOINT-PETITIONER-RESPONDENT,

V.

MARTIN B. HYING,

JOINT-PETITIONER-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Martin Hying appeals pro se a post-divorce remedial contempt order that was entered against him due to his repeated

violations of previous court orders. He challenges the order on several grounds. We reject his arguments and affirm the order.

¶2 Martin and Kimberly Hying were divorced in November 2007. They have one child, age two and one-half at the time of the divorce. Since the dissolution of their marriage, the issues of their child's placement and custody have been reviewed as provided by the parties' marital settlement agreement, which was incorporated into the judgment of divorce. The circuit court entered a written order modifying the child's placement and custody on February 22, 2010 (hereafter "placement order").[1]

¶3 On March 5, 2010, the circuit court held a hearing on an allegation that Martin was in contempt of the court's placement order. The court concluded that Martin had violated the order because he took the child to a doctor when it was not an emergency.[2] Accordingly, the court entered a written order on June 18, 2010, requiring Martin to pay Kimberly's attorney fees for bringing the contempt motion as well as the guardian ad litem's fees for appearing at the hearing.

¶4 On June 18, 2010, the circuit court held another hearing on allegations that Martin was in contempt of court. Pursuant to a stipulation between the parties, the court entered a written order on July 8, 2010, adjourning the contempt motions against Martin for ninety days, with the understanding that

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[1] Martin appealed the placement order in appeal No. 2010AP914. On April 6, 2011, this court affirmed that order. *See* ***Hying v. Hying***, No. 2010AP914, unpublished slip op. (WI App April 6, 2011).

[2] Paragraph 1 of the placement order provides Kimberly with exclusive decision making authority regarding the child's healthcare.

they would be dismissed if there were no further violations. The court also entered a separate written order that same day, addressing Martin and Kimberly's access to the child's therapy records, the terms of the child's placement, and the requirement that Martin pay the fees he owed to the guardian ad litem.

¶5 On September 7, 2010, the circuit court held yet another hearing on allegations that Martin was in contempt of court. The court continued the matter until December 15, 2010, at which time both parties testified. After hearing testimony from the parties, reviewing relevant statutes and cases, and considering the attorneys' proposed findings of fact and conclusions of law, the court issued an oral decision on February 4, 2011, finding Martin in contempt of court. It then entered a written order on March 30, 2011.

¶6 In its written order finding Martin in contempt, the circuit court cited the following behavior which violated previous court orders: (1) taking the child to the dentist without Kimberly's approval; (2) enrolling the child in soccer without Kimberly's approval; (3) attending activities for the child (*e.g.*, dance dress rehearsals, swim lessons) that were not open to the public; (4) giving the child baths immediately before her transition to Kimberly; (5) failing to call Kimberly five minutes before returning the child; (6) failing to allow Kimberly

and the child to leave a public event before leaving himself; and (7) failing to pay Kimberly's attorney and the guardian ad litem fees as ordered by the court.[3]

¶7 The circuit court made two other determinations of note in its written order. First, it concluded that Martin had engaged in overtrial by refusing to comply with previous court orders. Second, it found that Martin's continuous, willful, and intentional disregard of the placement order required the court to make limited modifications to ensure that the best interests of the child were met.

¶8 Based upon these determinations, the circuit court ordered Martin to pay both Kimberly's attorney and the guardian ad litem reasonable attorney fees attributable to overtrial. It further ordered that all of the placement transitions be arranged and facilitated by Professional Services Group. Finally, it ordered Martin to serve 150 days in the House of Corrections unless he purged the contempt by paying the fees owed to the respective parties. Martin now appeals the March 30, 2011 order.[4]

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[3] Paragraph 1 of the placement order provides Kimberly with exclusive decision making authority regarding the child's healthcare. Paragraph 6 of the placement order provides Kimberly with exclusive decision making authority regarding the child's activities. Paragraph 7 of the placement order provides that a non-placement parent may not attend a non-public activity of the child's. Paragraph 10 of the placement order provides that Martin would not give the child baths immediately before her transition. The additional placement terms put in place by the July 8, 2010 order require that a parent who is delivering the child at the end of a placement period shall call the other parent five minutes before returning the child and that if the parties are attending a "public event" with the child, the parent with placement will leave the event with the child before the non-placement parent. Finally, three of the four prior orders directed Martin to pay attorney fees to either Kimberly's attorney or the guardian ad litem or both.

[4] In his appendix, Martin includes multiple orders that occurred after he filed his notice of appeal. Because these orders are not properly before this court, we do not address any arguments relating to them.

¶9 On appeal, Martin presents several challenges to the circuit court order.[5] He questions the court's authority to act in this case while the matter was under appeal. He questions the court's ability to impose the purge condition that it did. He questions the court's determination of overtrial in the case. Finally, he questions the court's exercise of discretion in several instances.

¶10 Whether the circuit court had authority to act in this case involves the interpretation and application of statutes, which are questions of law that we review de novo. *See* ***Hefty v. Strickhouser***, 2008 WI 96, ¶27, 312 Wis. 2d 530, 752 N.W.2d 820.

¶11 Whether the circuit court's granting of a purge condition exceeded its authority is also a question of law that we review de novo. ***State ex rel. Larsen v. Larsen***, 165 Wis. 2d 679, 682-83, 478 N.W.2d 18 (1992).

¶12 Whether excessive litigation occurred resulting in overtrial is a mixed question of fact and law. ***Zhang v. Yu***, 2001 WI App 267, ¶11, 248 Wis. 2d 913, 637 N.W.2d 754. Whether excessive litigation occurred is a question of fact, and the circuit court's findings on the matter will not be reversed unless they are clearly erroneous. ***Id.*** Whether the facts as found constitute unreasonably excessive litigation resulting in overtrial is a question of law. ***Id.***

¶13 Finally, discretionary decisions, are reviewed for an erroneous exercise of that discretion. ***Madison Metro. Sch. Dist. v. Circuit Court for Dane***

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[5] In presenting these challenges, Martin also makes arguments that he failed to raise in the circuit court. We decline to address those arguments in this opinion. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (issues not preserved generally will not be considered on appeal).

Cty., 2011 WI 72, ¶34, 336 Wis. 2d 95, 800 N.W.2d 442. We will affirm a court's discretionary decision if it "'examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion which a reasonable judge could reach.'" ***Id.*** (citation omitted).

¶14 Martin first contends that the circuit court erred when it conducted a hearing on a matter under appeal. Martin notes that the record in this case was transmitted to this court for resolution of appeal No. 2010AP914. Accordingly, he argues that the circuit court lacked authority to act in this case until that appeal was resolved and the record was returned.

¶15 The Wisconsin Statutes provide circuit courts with authority to act in matters under appeal in several instances, including when it comes to the enforcement of its orders and holding those in contempt for failing to comply. For example, WIS. STAT. § 808.07 (2009-10)[6] provides that "[a]n appeal does not stay the execution or enforcement of the judgment or order appealed from except as provided in this section or otherwise expressly provided by law." Moreover, WIS. STAT. § 808.075(4)(d)9.-10. allows the court to enforce payment or financial obligations, including attorney fees, in cases under WIS. STAT. Ch. 767 through the power of contempt. Given these provisions, the circuit court had authority to exercise its jurisdiction over Martin and enforce its previous orders.[7] Likewise, it had authority to enforce Martin's payment obligations to Kimberly's attorney and

[6] All references to the Wisconsin Statutes are to the 2009-10 version.

[7] The fact that Martin was appealing one of the orders (the placement order) from which he was found in contempt does not alter our analysis. After all, a party may be held in contempt for failing to obey a court order even if that same order is clearly erroneous. ***Anderson v. Anderson***, 82 Wis. 2d 115, 118-19, 261 N.W.2d 817 (1978).

the guardian ad litem through its powers of contempt. Consequently, we reject Martin's first argument.

¶16 Martin next contends that the circuit court erroneously exercised its discretion by failing to review the authoritative record before rendering its decision. Again, Martin notes that the record in this case was transmitted to this court for resolution of appeal No. 2010AP914.

¶17 Although it is true that the circuit court did not possess the record at the time of its decision, it does not follow that it erroneously exercised its discretion in ruling without it. As noted in its written order, the court was "provided with copies of all orders and transcripts necessary for it to render a decision on issues before it." The court then lists those orders and transcripts that it relied upon.[8] Reviewing those documents, which are contained in the record, we are satisfied that the court examined the relevant facts necessary to reach its decision. Accordingly, we find no erroneous exercise of discretion.

¶18 Martin next contends that the circuit court erroneously determined that his actions had resulted in overtrial. He notes that he was represented by counsel and denies that he engaged in any unnecessary litigation.

¶19 The overtrial doctrine may be invoked in family law cases when one party's unreasonable approach to litigation causes the other party to incur extra and unnecessary fees. *See* ***Ondrasek v. Ondrasek***, 126 Wis. 2d 469, 484, 377

[8] In its written order, the circuit court also lists the statutes and case law it relied upon. Additionally, it indicates that it reviewed historical data contained in the judgment roll, the parties' testimony, and the attorneys' proposed findings of fact and conclusion of law.

N.W.2d 190 (Ct. App. 1985). Here, the circuit court's determination of overtrial was grounded in Martin's repeated violations of previous circuit court orders. These violations prompted multiple contempt motions and hearings, which caused both Kimberly's attorney and the guardian ad litem to incur unnecessary fees. Based on the circuit court's reasoning, which is supported by the record, we find no error in the determination of overtrial.

¶20 Martin next contends that the circuit court erroneously exercised its discretion when it failed to consider his ability to pay fees owed to Kimberly's attorney and the guardian ad litem when establishing the willful nature of the alleged contempt. In support of his argument, he cites his subsequent filing for Chapter 7 bankruptcy, which occurred a month after the court's oral decision.

¶21 At the contempt hearing, the circuit court learned through Martin's testimony and financial statement that he made over $90,000 a year and had approximately $57,119.32 in his 401K. Despite these resources, Martin had not made any payments to Kimberly's attorney or guardian ad litem as required by previous court orders. The court listened to Martin's excuses[9] for not paying and found him not to be credible. Based upon this credibility determination[10] and the information that was before the circuit court at the time of the hearing, we find no erroneous exercise of discretion.

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[9] Not all of Martin's excuses were financial. Indeed, he admitted to the circuit court that he was not paying the guardian ad litem's bills in part because, in his view, the guardian ad litem was engaging in "contemptuous behavior" for interfering with his access to the child's therapy records. Of course, as Kimberly's attorney explains in her brief, the guardian ad litem was not authorized to provide the child's therapy records to Martin due to the July 8, 2010 court order denying their access to both parents.

[10] We defer to the circuit court's credibility determinations. WIS. STAT. § 805.17(2).

¶22 Martin next contends that the circuit court erred when it imposed immediate imprisonment as a remedial sanction unless he purged the contempt by paying the fees owed to the respective parties.[11] Martin complains that the timing of the court's order, which was issued on a Friday afternoon, had the practical effect of requiring him to spend three days in jail because he lacked access to a bank or visitors until the following Monday.

¶23 Remedial sanctions must be purgeable. *See* ***Diane K.J. v. James L.J.***, 196 Wis. 2d 964, 969, 539 N.W.2d 703 (Ct. App. 1995). The purge conditions must be feasible and within the contemptor's power to meet. ***Larsen***, 165 Wis. 2d at 685; ***State ex rel. V.J.H. v. C.A.B.***, 163 Wis. 2d 833, 845, 472 N.W.2d 839 (Ct. App. 1991).

¶24 Reviewing the circuit court's purge condition in this case, we are satisfied that it met these criteria. Although Martin may have encountered some initial difficulties in arranging the required payments, the feasibility of the court's purge condition is reflected in the fact that Martin successfully made the payments within several days of the order.

¶25 Martin next contends that the circuit court erroneously exercised its discretion in ordering that all of the transitions of the child be arranged and facilitated by Professional Services Group. Martin maintains that the order is

[11] Martin did ask for 24 hours to make arrangements to have the payments made. The circuit court denied this request, stating, "you've had months; and quite frankly, with [the guardian ad litem's] fees, years to comply with the Court's order. You will now have to meet your purge while incarcerated."

unnecessary and questions the ability of Professional Services Group to carry it out.

¶26 We conclude that the circuit court properly exercised its discretion in modifying the placement order in such a manner. The modification was justified by Martin's continuous, willful, and intentional disregard of the previous placement order. If Martin does not believe that the Professional Services Group can carry out the court's order, he can move the court to modify the order to allow for a different organization or person to facilitate the placement exchanges.

¶27 On a final note, we take this opportunity to briefly address the attacks that Martin makes on the circuit court and the other attorneys involved in this case. In his brief, he accuses them of various transgressions, including acting with prejudice and engaging in felonious behavior. We caution Martin that he must stop these unfounded allegations. Disagreeing with an outcome is one thing but, as we have remarked on other occasions, venom, arrogance, and ad hominem attacks are inexcusable and will not be tolerated. *See* ***Strook v. Kedinger***, 2009 WI App 31, ¶6, 316 Wis. 2d 548, 766 N.W.2d 219.[12]

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[12] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").