COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1905 **Cir. Ct. No. 2004FA412**

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

IN RE THE FINDING OF CONTEMPT IN MARK EMMETT GILBERT V. THERESA NOELLE GILBERT:

MARK EMMETT GILBERT,

APPELLANT,

V.

THERESA NOELLE GILBERT,

RESPONDENT.

APPEAL from an order of the circuit court for St. Croix County: EDWARD F. VLACK III, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Mark Gilbert appeals a contempt order. He asserts: the circuit court erred by finding him in contempt; his former wife's contempt motion was barred by the doctrines of laches, estoppel, and unclean hands; the court's sanction was improper; and the court erred by denying his recusal motion. We reject Mark's arguments and affirm.

BACKGROUND

¶2 Mark and Theresa Gilbert were married in 1994 and divorced on September 28, 2005. Mark is an attorney and Theresa is a paralegal. They have three minor children.

¶3 Prior to their divorce, both parties submitted financial disclosure statements, as required by WIS. STAT. § 767.27(1) (2003-04).[2] In Mark's financial disclosure statement, he listed his one-third interest in his law firm. For its value, Mark stated "3 years ago, we sold a 1/3 interest for $300,000.00." Mark also averred that his 2005 monthly average gross income, as calculated from January to June, was $10,257.50. He explained that his monthly salary varied greatly and, in a supplemental financial disclosure statement, stated that his average monthly salary over the last thirty-two months equaled $4,050.63.

¶4 Pursuant to the marital settlement agreement, which was incorporated into the divorce judgment, Mark received his one-third interest in his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Pursuant to 2005 Wis. Act 443, § 121, the legislature renumbered and slightly modified WIS. STAT. § 767.27. The current version of that statute is found in WIS. STAT. § 767.127.

law firm. Theresa received $200,000 to $300,000 in marital equity. Mark also agreed to pay $1,000 per month in child support.

¶5 Although statutorily required, the judgment did not state that the parties must annually exchange tax return information. However, the judgment did require the parties to report a substantial change in income.

¶6 In 2009, Mark moved to modify child support. We assume that as a result of the child support modification proceedings the parties exchanged tax returns because, also in 2009, Theresa discovered Mark's 2005 tax return showed his gross income for the year was $424,785. Mark's increase in gross income was attributable to class action lawsuit fees he received following the September divorce.

¶7 Theresa brought a motion for contempt, alleging Mark failed to disclose his interest in the class action lawsuits in his financial disclosure statement and failed to report a substantial change in income. In response, Mark asserted he had disclosed his one-third interest in the law firm and the class action lawsuits were assets of the firm that did not need to be separately listed. He also contended Theresa knew about the class action lawsuits. As for his alleged failure to report an increase in income, Mark argued he was not required to report the class action fees as an increase in "income" because they were "assets" that had been divided by the parties' marital property agreement. He contended that if he

had been required to report the fees as income available for child support, it would have violated the double counting rule.[3]

¶8 Mark, in turn, brought a contempt motion against Theresa, alleging she had failed to report a substantial change in income. Specifically, he contended that Theresa, who was unemployed at the time of their divorce, accepted a job on the day of the couple's divorce and failed to report her increase in income as required by the divorce judgment.

¶9 The court held a two-day evidentiary hearing on the parties' contempt motions and, following briefing by the parties, issued a fifty-five page decision and order. In its decision, the court determined Theresa's contempt motion was not barred by the doctrines of estoppel or laches, and Mark was in contempt of court for failing to provide a complete financial disclosure of his interest in the class action lawsuits and for failing to report a substantial change in income. The court also held that Theresa was in contempt for failing to report a substantial change in income, and a remedial sanction against Mark was appropriate.

¶10 In support of its determination that Mark failed to provide a complete financial disclosure, the court reasoned that "the information about the class action suits that [Mark] had in his possession on September 28, 2005" was not completely disclosed in his financial disclosure statement, supplemental financial disclosure statement, or at the hearing before the court commissioner.

[3] Generally, the double counting rule prohibits an asset from being counted once in the marital property agreement and once as income available for support. *See* ***Kronforst v. Kronforst***, 21 Wis. 2d 54, 64, 123 N.W.2d 528 (1963).

The court reasoned that, irrespective of whether Mark independently provided Theresa with information about the class action lawsuits or whether the lawsuits were mentioned at the final hearing, Mark failed to make a complete financial disclosure to the court.

¶11 In regard to the court's determination that Mark failed to report a substantial change in income, the court reasoned that, even assuming the class action fees were "assets" that had been divided by the marital property agreement, the fees were still "income" as defined by WIS. ADMIN. CODE § DWD 40.02,[4] and thus should have been reported. The court further elaborated that it—not the party—determines whether the double counting rule applies and whether certain income is available for child support. The court then determined the double counting rule would not apply in this case.

¶12 The court sanctioned Mark for his contempt, opting to craft its own sanction. Determining it was Mark's children who were entitled to benefit from Mark's unreported change in income, the court placed a $119,397 constructive trust on Mark's real estate for the benefit of his children's post high school education and named Theresa as the trustee. The court explained the $119,397 amount represented thirty-three percent of the income Mark received between September 28, 2005 and December 31, 2005.

[4] WISCONSIN ADMIN. CODE ch. DWD 40 was renumbered chapter DCF 150 under WIS. STAT. § 13.92(4)(b)1. and 635 Wis. Admin. Reg. 37 (November 30, 2008).

DISCUSSION

¶13 Mark asserts: the circuit court erred by finding him in contempt; Theresa's contempt motion was barred by the doctrines of estoppel, laches, and unclean hands; the court's sanction was improper; and the court erred by denying his recusal motion.[5]

I. Contempt

¶14 Mark argues the circuit court erred by finding him in contempt for failing to disclose his interest in the class action lawsuits, contrary to WIS. STAT. § 767.27(1) (2003-04), and for failing to report a substantial change in income, contrary to WIS. STAT. § 767.263(1) (2003-04)[6] and the divorce judgment.

¶15 At the outset, one of Mark's arguments in support of his assertion that the court erred by finding him in contempt for failing to make a complete financial disclosure is that he cannot be found in contempt for the mere violation of a statute.[7] *See* WIS. STAT. § 785.01(1)(b) (contempt results from the intentional disobedience or obstruction of a court process or order). We, however, do not need to reach that issue because, as will be discussed below, we conclude the circuit court properly found Mark in contempt for violating its judgment, which

[5] Mark also makes additional arguments in his statement of the facts that were not repeated or developed in his argument section. We will not consider them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 Wis. 2d 633 (Ct. App. 1992).

[6] Pursuant to 2005 Wis. Act 443, § 113, the legislature renumbered and slightly modified WIS. STAT. § 767.263. The current version of that statute is found in WIS. STAT. § 767.58.

[7] Mark makes additional arguments in response to this contempt basis; however, because we conclude the other contempt basis was proper, we do not address these arguments. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989).

required him to report a substantial change in income. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (we decide cases on narrowest possible grounds).

¶16 The divorce judgment provided, in relevant part:

> Both parties shall notify the appropriate County Child Support Enforcement Agency … and the other party, within 10 days, … of any substantial change in the amount of his/her income such that his/her ability to pay child support is affected. Such notification of any substantial change in amount of income will not automatically result in a change of the order unless a revision of the order is sought and is shown to be justified.

¶17 On appeal, Mark renews his argument that the class action fees were "assets" that had been divided by the parties' marital property agreement and, as such, he was not required to report them as "income." He contends that if he had been required to report the fees as income available for child support, it would have violated the rule against double counting.

¶18 We disagree. Assuming the class action lawsuits were assets that had been divided by the parties' property agreement, which we note the circuit court never determined,[8] we conclude Mark would have been required to report the fees for two reasons. First, the divorce judgment required Mark, without

[8] The circuit court, as the finder of fact, determined the record was unclear as to whether the parties intended to include the class action lawsuits in the property division or whether they intended to treat the lawsuits as future income—though the court noted it was "lean[ing] toward a finding that the class action suits are income." Specifically, the court reasoned that, although Mark had disclosed his one-third interest in his law firm, his interest in the class action lawsuits had not been separately disclosed and the final marital agreement made no reference to them. The court also observed that, at the final hearing before the court commissioner, Mark referred to the class action lawsuits as assets while the commissioner referred to them as income.

exception, to report a substantial change in income. Income, as defined by WIS. ADMIN. CODE § DCF 150.02(13), would have included the class action fees.[9]

¶19 Second, it is the circuit court—not the party—that determines whether income is available for support or whether the double counting rule applies. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 182-83, 560 N.W.2d 246 (1997). The double counting rule is a flexible rule based on equity and fairness. ***Id.*** at 180, 183. The circuit court is required to carefully exercise its discretion to determine whether income from an asset should also be available for support. ***Id.*** at 183. Here, irrespective of whether the class action fees were "assets," Mark was required, and failed, to disclose his increase in income.

¶20 Moreover, even if the class action fees were assets, the circuit court determined the double counting rule would not apply in this case and, as such, the fees were income that should have been available for support. In support, the court relied on ***Cook***. In that case, when determining whether a parent's pension, which had been divided by the marital property agreement, should be considered income available for child support, our supreme court noted that it was "convince[d]" that the "'double-counting' rule does not apply in the context of child support."[10] ***Id.*** at 180. Rather, the court determined that whether an income

[9] WISCONSIN ADMIN. CODE § DCF 150.02(13)(a) defines gross income, in relevant part, as "[s]alary and wages" and "[a]ll other income, whether taxable or not, except that gross income does not include [child support, foster care payments, kinship care payments, and public assistance benefits]." WIS. ADMIN. CODE § DCF 150.02(13)(a)1., 10.

[10] The court reasoned that because the child receives nothing from the property division, when considering the pension at issue, it was counting the pension "for the first time between the parent and the child." ***Cook v. Cook***, 208 Wis. 2d 166, 181, 560 N.W.2d 246 (1997).

stream remains available for support is a fact-sensitive inquiry that depends on equity and fairness. ***Id.*** at 180, 183.

¶21 Mark objects to the court's reliance on ***Cook***, arguing ***Cook***'s rationale applies only in the context of pensions. He asserts that because the class action fees were divided by the marital property agreement, there is an absolute bar against double counting. We disagree. First, his argument improperly assumes the court determined the class action fees were in fact divided by the marital property agreement. Second, the court in ***Cook***, when making its determination that the double counting rule was flexible, referenced ***Maley v. Maley***, 186 Wis. 2d 125, 519 N.W.2d 717 (Ct. App. 1994). ***Cook***, 208 Wis. 2d at 181-84. In ***Maley***, 186 Wis. 2d at 128, the court determined it would be unfair for the gain realized from the sale of a building that had been awarded to the father in the property division to be treated as income available for support because his proceeds from the sale were less than the value attributed to the property in the property division. The ***Cook*** court's rationale, therefore, does not apply solely in the context of pensions, and the double counting rule continues to be based on equity and fairness. *See* ***Cook***, 208 Wis. 2d at 181-84.

¶22 Finally, Mark argues that, even if we determine the fees should have been reported as income available for child support, the circuit court never determined he *intentionally* violated the court's judgment. He contends that because he mistakenly believed the fees constituted assets that he was not required to report, he cannot be held in contempt.

¶23 Mark provides no legal authority in support of his "mistake" argument. Therefore, we will not consider it. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). As for his contention that the court

failed to explicitly determine he intentionally violated the court's judgment, we conclude the court implicitly concluded the violation was intentional. This is especially true given the court's admonishment to Mark regarding the drafting of the divorce judgment. The court observed that the *one* requirement Mark excluded from the divorce judgment was that the parties annually exchange tax returns. Had Mark exchanged tax returns with Theresa in 2005, this issue would have been resolved earlier. The court rejected Mark's argument that he overlooked this one provision, observing his argument "rings hollow and reflects on his credibility and candor with the Court."

II. Laches, Estoppel, and Unclean Hands

¶24 Mark argues Theresa's contempt motion should have been barred by the doctrines of laches, estoppel, and unclean hands. As a result, he argues the contempt order should be vacated. We disagree.

¶25 The doctrine of laches provides that a party who delays in making a claim may lose his or her right to assert that claim. ***Zizzo v. Lakeside Steel & Mfg. Co.***, 2008 WI App 69, ¶7, 312 Wis. 2d 463, 752 N.W.2d 889. The elements of laches are: "(1) unreasonable delay by the party seeking relief; (2) lack of knowledge or acquiescence by the party asserting laches that a claim for relief was forthcoming; and (3) prejudice to the party asserting laches caused by the delay." ***Id.*** Here, the circuit court determined Theresa "did not have the 2005 income information from [Mark] until 2009 and brought this claim soon thereafter." We conclude the doctrine of laches does not bar Theresa's contempt motion.

¶26 The doctrine of estoppel, also known as equitable estoppel, may be applied when "the inaction or action of a party induces reliance by another to that other person's detriment." ***Nugent v. Slaght***, 2001 WI App 282, ¶19, 249 Wis. 2d

220, 638 N.W.2d 594. Here, Theresa is not estopped from bringing her contempt motion. She brought her contempt motion in 2009, after Mark disclosed his 2005 increase in income. As the circuit court reasoned, "[A]ny reasonable person would have recognized that further litigation would be forthcoming once that information was divulged, so there could not have been any reliance, nor detriment to [Mark]."

¶27 "Clean hands" is an equitable doctrine which can be used to deny relief to a plaintiff if "the things from which the plaintiff seeks relief are the fruit of its own wrongful or unlawful course of conduct." ***S & M Rotogravure Serv. v. Baer***, 77 Wis. 2d 454, 467, 252 N.W.2d 913 (1977). Theresa did not prevent or discourage Mark from disclosing or reporting the class action fees; therefore, the "clean hands" doctrine does not apply.

III. Remedial Sanction

¶28 Mark next argues the court erred by imposing a remedial sanction. In support, he first asserts his contempt was not "continuing." *See* WIS. STAT. § 785.01(3) (A remedial sanction is a "sanction imposed for the purpose of terminating a continuing contempt of court.").

¶29 We conclude Mark's contempt was continuing for purposes of WIS. STAT. § 785.01(3). In ***Frisch v. Henrichs***, 2007 WI 102, ¶¶6, 23, 304 Wis. 2d 1, 736 N.W.2d 85, the father failed to provide the mother with a copy of his tax returns, as required by the divorce judgment. The mother moved for contempt against the father, alleging he failed to make the requisite financial disclosures. ***Id.***, ¶¶14, 26. However, before a contempt finding could be made, the father made the financial disclosures to the mother. ***Id.***, ¶26. The ***Frisch*** court, nevertheless,

determined the father's contempt was continuing and remedial sanctions were proper. ***Id.***, ¶¶47, 53, 61. The court reasoned:

> [H]is production of documents came too late to undo the problems he had created by failing to produce the documents on time …. Failure to *timely* produce income information 'as required' was really the essence of [the father's] contempt because it shielded him from exposure to regular, contemporary court-ordered modifications of child support. If [he] had supplied the information timely, he would likely have been paying more support than he did. By his repeated failures, [the father] deprived [the mother] of the information necessary to seek the periodic modification of support she was entitled to request under the law, and he deprived the court of its authority to timely modify its child support order. The contempt was continuing because [the father's] failure to comply with the court order deprived [the mother] of her ability to utilize traditional remedies in the law.

Id., ¶47.

¶30 Similar to ***Frisch***, in this case, Mark's failure to report a substantial change in income, as required by the divorce judgment, shielded Mark from a child support modification motion and deprived Theresa of her ability to request modification. As a result, Mark's contempt was continuing for purposes of the imposition of remedial sanctions.[11] *See* ***id.***

¶31 Mark next argues the circuit court had no authority to issue a sanction related to his children. He asserts WIS. STAT. § 785.04 "requires that the sanction address injury to a 'party' in the litigation" and contends that because his children were not parties to the litigation, the court's sanction should be vacated.

[11] ***Frisch v. Henrichs***, 2007 WI 102, ¶¶61-63, 304 Wis. 2d 1, 736 N.W.2d 85, also held that a purge condition and a remedial sanction could be one and the same.

¶32 Mark's argument appears to conflate WIS. STAT. § 785.04 and WIS. STAT. § 785.03(1)(a). Section 785.03(1)(a) provides that only the "person aggrieved by a contempt of court may seek imposition of a remedial sanction." If the court determines a person is in contempt, it is then authorized, under § 785.04, to issue one of the following sanctions:

> (a) Payment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court.
>
> (b) Imprisonment if the contempt of court is of a type included in s. 785.01 (1) (b), (bm), (c) or (d). The imprisonment may extend only so long as the person is committing the contempt of court or 6 months, whichever is the shorter period.
>
> (c) A forfeiture not to exceed $2,000 for each day the contempt of court continues.
>
> (d) An order designed to ensure compliance with a prior order of the court.
>
> (e) A sanction other than the sanctions specified in pars. (a) to (d) if it expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

WIS. STAT. § 785.04(1).

¶33 Here, Theresa brought the contempt motion, and the court determined Mark was in contempt and opted to impose remedial sanctions. Determining a payment to Theresa would be inappropriate and it was Mark's children who really were entitled to benefit from Mark's unreported change in income, the court crafted its own sanction, which it was permitted to do pursuant to WIS. STAT. § 785.04(1)(e).

¶34 Mark next argues the court had no authority to place a constructive trust on his real estate as a remedial sanction. He contends the remedies authorized by WIS. STAT. § 785.04 are the exclusive remedies available and

"§ 785.04 does not contain language giving the circuit court the authority to sanction [him] by imposing a constructive trust on his non-marital residence." Mark, however, ignores WIS. STAT. § 785.04(1)(e), which allows a court to impose a sanction other than specified by statute.

¶35 Mark next contends the court had no authority to name Theresa as a trustee of the constructive trust. He asserts that, pursuant to WIS. STAT. § 767.27(5) (2003-04), the penalty for nondisclosure of an asset is a constructive trust "with the party in whose name the assets are held declared the constructive trustee." Mark, however, overlooks that, while his sanction is very similar to the penalty outlined in § 767.27(5) (2003-04), he was sanctioned under WIS. STAT. § 785.04.

¶36 Finally, Mark argues the circuit court erred by imposing a remedial sanction against only him and declining to sanction Theresa. The determination of whether to impose a remedial sanction is left to the discretion of the circuit court. *See* WIS. STAT. § 785.03(1)(a) (court "*may* impose a remedial sanction") (emphasis added). "We will not reverse a discretionary determination by the [circuit] court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶30, 326 Wis. 2d 640, 785 N.W.2d 493 (citation omitted).

¶37 The court found Theresa in contempt for failing to report a substantial change in income. However, the court declined to issue a sanction against Theresa because, although she was in technical violation of the divorce judgment, the reporting provision in the judgment did not conform to the language from the final marital agreement. Specifically, the court observed the final marital agreement required only Mark to report a substantial change in income, yet the

divorce judgment, which was drafted by Mark, extended this requirement to Theresa.

¶38 Conversely, the court determined a sanction was appropriate for Mark because he failed to "fully disclose his financial circumstances, [failed] to provide notice of the substantial income he received … and, among other things, his candor to the Court regarding the preparation of the judgment." We conclude the court properly exercised its discretion when determining sanctions should be imposed only against Mark. *See* ***id.***

IV. Motion for Substitution or Recusal

¶39 Mark argues the circuit court erred by denying his motion for judicial substitution or recusal. Specifically, Mark contends the judge should have recused himself because he failed to disclose that he was once a client of the law firm that employs Theresa and where Theresa's attorney is a partner.[12]

¶40 Theresa contends we lack competency to review this argument because Mark fails to identify a timely appealed written order in which the judge denied his motion for recusal or motion for reconsideration. She points out that the judge denied Mark's original motion for recusal in a written order on October 26, 2010, and denied his motion for reconsideration orally on November 8, 2011. She argues the deadline for appealing the October 26, 2010 order has passed and the oral decision denying the motion for reconsideration was never reduced to writing. She also asserts that, contrary to WIS. STAT.

[12] The record indicates the law firm represented the judge in one case that was initiated in 2000 and dismissed in 2002.

RULE 809.19(2)(a), Mark has failed to include in his appendix any orders, findings, ruling, decisions or opinions of the circuit court relative to any decision regarding recusal or substitution.

¶41 In his reply brief, Mark merely states "Judge Vlack's denial of the Renewed Motion for Disqualification or Recusal is referenced at p. 4 of his written order." To the extent this is an argument that we have competency to review the court's denial of his motion for recusal, it is undeveloped. *See* ***Pettit***, 171 Wis. 2d at 646-47. Further, we reject Mark's contention that a single reference to an oral ruling in the decision's procedural background section is sufficient. We also agree with Theresa that we do not have jurisdiction to review oral decisions that have not been reduced to writing. *See* ***State v. Malone***, 136 Wis. 2d 250, 257-58, 401 N.W.2d 563 (1987). Regardless, a motion for reconsideration does not extend the deadline for appeal. ***Silverton Enters., Inc. v. General Cas. Co. of Wis.***, 143 Wis. 2d 661, 665-66, 422 N.W.2d 154 (Ct. App. 1988).

¶42 However, even if we were to discuss this argument on the merits, Mark has failed to offer any legal analysis explaining why the court erred by denying his motion for recusal. He merely offers citations to WIS. STAT. § 757.19 and SCR 60.04(1)(a) and (4) and outlines factual situations he contends show the court was prejudiced against him. We will not abandon our neutrality to develop legal arguments. ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

By the Court.—Order affirmed.

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