COURT OF APPEALS
DECISION
DATED AND RELEASED

January 18, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1345

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

IN RE THE MARRIAGE OF:

MARY C. PENTINMAKI,

Petitioner-Respondent,

v.

OLIVER A. PENTINMAKI, JR.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(h), STATS. Oliver A. Pentinmaki, Jr., appeals from an order finding him in contempt of court for his willful and unexcused failure to return his children to his former wife, Mary C. Volker's, home at agreed upon times. The court also found that Volker was not in contempt of court when she failed to make the children available for placement with Pentinmaki on December 31, 1994, but that Pentinmaki was entitled to compensatory time with the children.

Pentinmaki argues that: (1) because the contempt order is not supported by credible evidence, the trial court erroneously exercised its discretion when it found him in contempt of court for his failure to return the children at an agreed upon time; (2) the court subjected him to punitive contempt rather than remedial contempt because he cannot fulfill the purge conditions; and (3) the trial court erred when it refused to permit Attorney William Pangman to separately represent the children. We conclude that the court did not erroneously exercise its discretion when it found Pentinmaki in contempt of court because the record supports the court's findings. Also, the court did not err when it rejected Attorney Pangman's request to represent the children. We also conclude that the court did not erroneously exercise its discretion when it ordered Pentinmaki to return the children after placements "on time" and at the end of Volker's driveway. However, we conclude that the court erroneously exercised its discretion when it ordered Pentinmaki to pay for the guardian ad litem fees as a purge condition because the court did not make a finding that he can pay these fees and Pentinmaki has averred that he is indigent. Accordingly, we affirm in part and reverse in part, and order the trial court to strike the purge condition from the contempt order which requires Pentinmaki to pay the guardian ad litem fees. No costs to either party.

BACKGROUND

Oliver Pentinmaki and Mary Volker were divorced in 1990. This appeal is one of many since that date. In January 1995, both Pentinmaki and Volker filed orders to show cause and contempt motions arguing that the other violated the provisions of their custody and placement orders. Volker has sole legal custody and primary placement of their two children. Pentinmaki has physical placement on every Saturday from 9:00 a.m. to 9:00 p.m.

At a hearing on March 3, 1995, the trial court heard evidence by Volker that she agreed to permit Pentinmaki to take the children on an overnight camping trip on the weekend of Friday, November 4, 1994. Pentinmaki picked up the children at 6:00 p.m. on Friday and was to return them at 4:00 p.m. on Sunday, November 6. He did not return the children until between 7:30 p.m. and 7:50 p.m. on Sunday, and did not call to inform Volker of any delay.

Volker also testified that she and Pentinmaki agreed that on Friday, November 11, Pentinmaki would pick up the children at 6:00 p.m. and return them on Saturday, November 12 at 9:00 p.m. Pentinmaki did not return the children that Saturday evening because he claimed he was ill, but agreed to return the children before 9:00 a.m. the following Sunday morning so that the children could attend church and Sunday School. Pentinmaki did not return the children until about 11:00 a.m. on Sunday. Pentinmaki did not contact Volker to inform her that he would be late. Volker also testified, and Pentinmaki admitted, that Pentinmaki was in the habit of dropping off the children at the end of the street when he returned them to Volker's home. She also testified that she sent a letter to Pentinmaki on December 17 to cancel a December 31 placement and told him to contact her to arrange an alternative placement.

Pentinmaki testified that he did not have an agreement with Volker with regard to when the children would be returned on those two weekends and that he brought the children home on the November 4 weekend after the camping trip and dinner. He testified that on the November 11 weekend, he became sick, and was unable to return the children on Saturday and could only do so on Sunday. He said he dropped off the children at the end of Volker's street to avoid contact with Volker. As for the December 31 placement, he stated that he did not contact her to arrange an alternative placement because he wanted to avoid a confrontation.

The trial court found Pentinmaki in contempt of court for failing to return the children to Volker on time during the November 4 and 11 weekends. The trial court found Volker not in contempt for her failure to make the children available to Pentinmaki on December 31, but found that Pentinmaki was entitled to compensatory time. The court did not impose a sanction, but ordered that Pentinmaki could purge himself of the contempt by: (1) dropping off the children at Volker's home "on time"; (2) dropping off the children at the end of Volker's driveway; and (3) paying the guardian ad litem fees of $695. Pentinmaki appeals.

CONTEMPT

We review the trial court's use of its contempt power for an erroneous exercise of discretion. ***State ex rel. N.A. v. G.S.***, 156 Wis.2d 338, 341, 456 N.W.2d 867, 868 (Ct. App. 1990). The limited scope of our review of discretionary rulings is well settled.

> Generally, "[w]e will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). Indeed, "[b]ecause the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary determinations." ***Schneller v. St. Mary's Hosp.***, 155 Wis.2d 365, 374, 455 N.W.2d 250, 254 (Ct. App. 1990), *aff'd*, 162 Wis.2d 296, 470 N.W.2d 873 (1991).
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> To determine whether the trial court properly exercised its discretion in a particular matter, we look first to the court's on-the-record explanation of the reasons underlying its decision. And if that explanation indicates that the court looked to and "considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree." ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (footnote omitted).

Steinbach v. Gustafson, 177 Wis.2d 178, 185-86, 502 N.W.2d 156, 159 (Ct. App. 1993).

A finding of contempt rests on the trial court's factual finding that the person wilfully and intentionally violated a court order. *See* ***In re B., L., T. and K.***, 171 Wis.2d 617, 623, 492 N.W.2d 350, 353 (Ct. App. 1992). The court's findings of fact in a contempt proceeding are conclusive unless clearly erroneous. *See* ***Town of Seymour v. City of Eau Claire***, 112 Wis.2d 313, 318, 332 N.W.2d 821, 823 (Ct. App. 1983). Because our review of the court's

discretionary determination is deferential, we must look to facts supporting that determination. *See* ***Wisconsin Pub. Serv. Corp. v. Krist***, 104 Wis.2d 381, 395, 311 N.W.2d 624, 631 (1981).

The evidence with respect to whether the parties agreed upon a return time is disputed. Volker testified that she and Pentinmaki reached an agreement about when he would return the children. She explained that she told her son who, in turn, relayed the message to Pentinmaki that the children were to be returned by 4:00 p.m. on Sunday, November 6, and by 9:00 p.m. on Saturday, November 12. In both cases, Pentinmaki did not return the children at the agreed upon time. Volker also testified that she did not make the children available to Pentinmaki on December 31, but that she sent a letter to him in advance and told him to contact her to arrange for another time to see the children. He never contacted her to make alternative arrangements.

Pentinmaki contended that no such agreement was ever reached about the time he was to return the children. He stated that he returned the children as soon as the camping trip ended on November 6 and that an illness prevented him from returning them on time on November 12. He testified that when Volker called him at 10:00 p.m. on November 12, he told her that he was ill and that she could retrieve the children from his home. He stated that he did not contact Volker because he was afraid of her and regularly dropped them off at the end of the street to avoid a confrontation.

From this testimony, the trial court found that the parties reached an agreement as to when Pentinmaki was to return the children on both the November 4 and 11 weekends. The court also found that Pentinmaki failed to return the children at that time "without reasonable cause or explanation." The court found that Pentinmaki had agreed to a return time based upon Pentinmaki's testimony about the pick-up times for both weekends and his testimony that he is particular about pick-up and return times. The court also found that Pentinmaki did not attempt to contact Volker on both occasions to explain that he would be late or to request a later return time, and that he showed a consistent pattern of returning the children late from his placements and dropping them off at the end of the street. The court also found that Volker gave reasonable advance notice to Pentinmaki about the December 31 placement and his failure to contact her about another time was unreasonable. From these facts, the court concluded that Pentinmaki was in contempt of court for his willful and unexcused failure to return the children at the agreed upon

times, but that Volker was not in contempt for her failure to make the children available to Pentinmaki on December 31.

Apparently, the trial court believed Volker's testimony and not Pentinmaki. The trial court, and not this court, judges the credibility of witnesses and the weight of their testimony. ***Estate of Wolff v. Town Board***, 156 Wis.2d 588, 598, 457 N.W.2d 510, 513-14 (Ct. App. 1990). The record supports the court's finding of contempt because there is credible evidence showing that Pentinmaki knew that the children were due home at a certain time, yet he failed to return them at that time. Accordingly, the court did not erroneously exercise its discretion when it found him in contempt of court.

PURGE CONDITIONS

The trial court has the inherent authority to grant conditions which allow contemnors to purge their contempt outside of complying with the court order which led to the contempt. ***State ex rel. Larsen v. Larsen***, 165 Wis.2d 679, 685, 478 N.W.2d 18, 20 (1992). But if a court grants a purge condition, the purge condition should serve remedial aims, the contemnor should be able to fulfill the proposed purge, and the condition should be reasonably related to the cause or nature of the contempt. ***Id.***, 478 N.W.2d at 20-21. In other words, the purge provision must clearly spell out what the contemnor must do to purge his or her contempt, and that action must be within the power of the contemnor. ***N.A.***, 156 Wis.2d at 342, 456 N.W.2d at 869.

The first purge condition requires that Pentinmaki return his children "on time" and not any later.[1] Pentinmaki argues that because of the distance between the parties' homes, he cannot always return the children "on time." We disagree. This purge condition is reasonably related to the cause of the contempt and is not impossible for Pentinmaki to fulfill. Pentinmaki should be able, at all times, to approximate how long it will take him to get to Volker's home. If he is not sure, he should give himself some extra time and leave for Volker's home a little early. This is a common way many people ensure they

[1] The trial court order specifically provides that Pentinmaki "will drop the children off on time at the expiration of his placements. By the use of the term, `on time', the court does not mean five minutes late; the court means `on time.' Failure to return the children `on time' runs the risk of the imposition of sanctions."

will arrive at a place "on time." We conclude that this purge condition is clear and is within Pentinmaki's power to fulfill.

The second purge condition requires that Pentinmaki drop off the children at the end of Volker's driveway. Pentinmaki argues that he cannot fulfill this condition because it would put him at risk of a confrontation with Volker. We reject Pentinmaki's argument that this is a valid reason why he cannot fulfill this condition. Pentinmaki may very easily drop off the children at the end of the driveway and quickly leave thereby avoiding any potential conflict. We conclude that this purge condition is clear and is within Pentinmaki's power to fulfill.

The third purge condition requires that Pentinmaki pay the guardian ad litem fees of $695 within thirty days of the date of the order. Pentinmaki argues that he cannot fulfill this condition because he is indigent. He notes that by order dated June 29, 1995, we agreed to waive his filing fee on appeal because he averred that he is indigent. The trial court did not make any finding that Pentinmaki can pay these fees. We cannot determine whether paying the guardian ad litem fees is within Pentinmaki's power. Accordingly, the court shall strike this condition from the contempt purge order.

CHILDREN'S REPRESENTATION

Finally, Pentinmaki argues that the trial court erred when it refused to allow Attorney William Pangman to represent the children. The children are entitled to a guardian ad litem who is appointed by the court to represent their best interests. The guardian ad litem is an advocate for a child's best interests, functions independently, and considers, but is not bound by, the wishes of the minor child or the positions of others as to the best interests of the minor child. Section 767.045(4), STATS. This means that the guardian ad litem does not represent a child *per se* but represents the concept of the child's best interest. ***Wiederholt v. Fischer***, 169 Wis.2d 524, 536, 485 N.W.2d 442, 446 (Ct. App. 1992). If the children are to be represented by an attorney independent of the guardian ad litem, Volker, as their sole legal custodian, makes the decision as to whom will represent them. Attorney Pangman was not hired by Volker, but was apparently contacted by Pentinmaki. Thus, Attorney Pangman has no right to appear on behalf of the children. The court did not err when it refused to permit Attorney Pangman to represent the children.

Because both parties have prevailed in part, no costs will be awarded to either party.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.