COURT OF APPEALS
DECISION
DATED AND FILED

July 19, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2016AP530 **Cir. Ct. No. 2015FA436**

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

IN RE THE FINDING OF CONTEMPT IN
IN RE THE MARRIAGE OF:

JOSEPH T. SHEPPARD,

PETITIONER-RESPONDENT,

V.

SARAH E. SHEPPARD,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

¶1 HAGEDORN, J.[1] Sarah E. Sheppard appeals from an order of the circuit court affirming its decision to find her in contempt. As part of divorce proceedings between Sarah and her husband, Joseph T. Sheppard, Sarah was ordered by the circuit court to return the couple's child to Wisconsin. She has admittedly failed to do so. On appeal, Sarah challenges the contempt order on multiple grounds. She complains that the order to return the child to Wisconsin was not clear. She also asserts the hearing itself was problematic because she did not have proper notice, the court did not allow her to appear by telephone, the court failed to conduct an evidentiary hearing, and she was entitled to appointed counsel. We find no error with the proceedings and affirm.

BACKGROUND

¶2 Sarah and Joseph have been married since 2008. They have one minor child—D.S. Joseph petitioned for divorce on May 1, 2015. That same day, the court commissioner issued an order that provided, among other things, that D.S. "be returned to the State of Wisconsin immediately." Sarah responded by sending a letter dated June 25, 2015, to the circuit court asserting that she fled with D.S. to New Jersey as a result of domestic violence. Attached to the letter was a New Jersey restraining order which prohibited Joseph from having any contact with Sarah. Sarah's letter also stated that Sarah planned to keep D.S. in New Jersey permanently and that she lacked the financial means to make a trip back to Wisconsin.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶3 After a hearing on July 1, 2015 where Sarah appeared pro se telephonically, the family court commissioner entered a temporary order indicating that Sarah expressed no intention of returning to Wisconsin and reserving a decision on temporary legal custody and physical placement. On July 7, 2015, the circuit court appointed a guardian ad litem (GAL) for D.S.

¶4 On August 12, 2015, another hearing before a court commissioner was held. Sarah again appeared pro se by telephone. According to the minutes from the hearing, the GAL recommended that D.S. be returned to Wisconsin because Wisconsin was D.S.'s home state. The minutes further state in relevant part: "Child shall return to WI no later than Aug 30, 2015. GAL rec. is adopted." These minutes were not signed by the court commissioner, and no separate order appears in the record.

¶5 At Joseph's request, the circuit court held a hearing on September 2, 2015, for de novo review of the original temporary order. Sarah appeared pro se at this hearing by telephone as well. During the hearing, Joseph's attorney explained that "the Court Commissioner ordered the child returned to the State of Wisconsin" and Sarah had not done so. In light of her noncompliance, Joseph's counsel requested the circuit court enter an order "enforceable in New Jersey" that would allow Joseph or his father to retrieve D.S. from New Jersey. Upon being asked by the court when she planned to comply with the orders and return D.S. to Wisconsin, Sarah was equivocal:

> SARAH SHEPPARD: I'm talking to the Women's Resource Center in an attempt to figure out finances to be able to return as well as a place to return to as I do not have a support system in Wisconsin, I only have a support system here in New Jersey.
>
> THE COURT: Well, if the child isn't, so to speak, returned forthwith, my purpose would be to allow either

> Mr. Sheppard or Mr. Sheppard's parent to go to New Jersey and pick up the child and bring him back and give you time to make your arrangements to get here and set it—set the matter for hearings after you're back in Wisconsin. But at this point the child has to be returned. So I need a date from you as to when you will be back or I'll permit retrieval….
>
> SARAH SHEPPARD: As I said I'm still talking to Women's Resource Center about that. As of right now I don't have specific dates.
>
> THE COURT: I'm not being critical, I'm just saying that orders are orders. And people have to work around orders which are difficult once in a while but this is—and this is one of those cases.

After this interchange, the court made clear that D.S., who was admittedly with Sarah, must be returned to Wisconsin no later than September 16, 2015.

¶6 The court memorialized its oral decision in a written order—dated September 17—which provided that D.S. "shall be returned to the State of Wisconsin on or before September 16, 2015." The written order further declared that "Wisconsin is the home state jurisdiction for [D.S.] pursuant to [WIS. STAT. §] 822.21(1)(a)."

¶7 The September 16 deadline came and went, and Sarah did not return D.S. to Wisconsin.

¶8 Another hearing was held before a family court commissioner on October 20, 2015. Sarah—still not present in Wisconsin and still pro se—appeared by telephone at the hearing. That same day, Joseph filed a motion for remedial contempt accompanied by a sworn affidavit from Joseph's attorney. The affidavit asserted that Sarah had not complied with the court order to return D.S. to

Wisconsin and requested that the court enter a remedial contempt order to compel Sarah to do so.[2] The order resulting from this hearing acknowledged the circuit court's prior order commanding Sarah to return D.S. to Wisconsin and indicated that she had yet to comply with that order.[3] The order also noted that Sarah was asked point blank if she intended to return the child, and Sarah failed to respond. The court commissioner observed that "[r]easonable inferences can be drawn based on the lack of response." Accordingly, the court commissioner certified the matter to the circuit court for a finding of contempt. The order commanded Sarah to appear in person at the contempt hearing. It also provided that Sarah "does not have the permission [of the court commissioner] to appear by telephone for the hearing." The court commissioner set November 24, 2015, as the date for the contempt hearing. The court commissioner also reminded Sarah that "she can still return the child to the State."

¶9 On November 23, 2015—one day before the contempt hearing—Sarah, with the assistance of Legal Action of Wisconsin, filed a "motion for appointment of counsel."

¶10 The contempt hearing took place on November 24, 2015, as scheduled. Sarah did not appear. The court observed that "the family court commissioner … advised Ms. Sheppard that she would have to appear personally" and—despite that order—Sarah "made no attempt to contact me for relief from

[2] The motion did not specify a date for the hearing on the motion; the date was chosen during the hearing that same day.

[3] These minutes were signed by the court commissioner. *See* WIS. STAT. § 807.11(1). Sarah concedes the court commissioner's signature on a minute sheet is sufficient to constitute an order.

that order and she does not appear today." Joseph's counsel proceeded to argue that Sarah should be found in contempt because she had intentionally defied the court's order to return D.S. to Wisconsin, and even averred that Joseph and his father had unsuccessfully attempted to retrieve D.S. from New Jersey. The court determined as follows:

> My view is Ms. Sheppard is in about as gross a violation of court orders as you can get. I say that because she not only has participated in the past but was aware of my position and I was under the impression she was somewhat cooperative ….
>
> ….
>
> I will then upon the request find … Ms. Sheppard in contempt of court for failing to obey particularly the September 17th, 2015, order to return the child to Wisconsin.

The hearing was followed by a written order that found Sarah's "intention is to defy prior court orders and to refuse to comply with Wisconsin as the home state jurisdiction and return with [D.S.] to the State of Wisconsin." The order also provided that Sarah could purge her contempt by returning D.S. to Wisconsin. Although the transcript is silent, the circuit court stated in a subsequent proceeding that it denied Sarah's motion for appointment of counsel at this November 24 hearing. Sarah agrees that the "circuit court summarily denied her motion at the contempt hearing."

¶11 Sarah, newly represented in a limited capacity by Legal Action of Wisconsin, filed a motion to vacate the court's finding of contempt. The circuit court held a hearing on the motion on February 2, 2015. Sarah participated by telephone and argued through counsel that the contempt order should be vacated because of certain procedural defects in the original divorce filing, the order from

the September 2, 2015 hearing was "confusing," and the court should have heard her motion to appoint counsel prior to finding her in contempt. Joseph opposed the motion, and, in response to Sarah's suggestion that she was confused and thought that Joseph would go to New Jersey to pick up the child, Joseph's attorney averred that Joseph's father had already made the trip, but Sarah refused to comply and allow D.S. to return. The court then asked the GAL whether the contempt order should be reversed. The GAL responded:

> Well, as the record and the Court indicated, I'm the second [GAL] on this case starting in October of 2015. It's my understanding that it's been determined that this Court has initial child custody jurisdiction …. I've never had access to the child, to his medical records. I have some but they're from 2008.… It's virtually impossible to make any recommendations as you indicated regarding best interest of the child. But in order to make such recommendations, it's necessary for me, I believe, to have the child returned to Wisconsin. District Attorney has not filed an interference with custody … to the best of my knowledge. The mother won't voluntarily return the child to Wisconsin. I don't know what other recourse there is other than contempt proceedings to return the child.

¶12 Following the hearing, the court entered a written decision denying Sarah's motion to vacate the contempt order and appoint counsel. The court found that Sarah had no right to appointment of counsel, constitutionally or otherwise, following consideration of Sarah's financial disclosures, the "paucity of evidence which Sarah has submitted to this Court," the age of the parties, and "the issues involved in this proceeding." The order also acknowledged the New Jersey

restraining order, but concluded that it did not affect the validity of the circuit court's order to return D.S. to Wisconsin.[4]

¶13 Another hearing was held on March 14, 2016, concerning Sarah's motion for appointment of counsel. Sarah—again represented by Legal Action—participated at that hearing by telephone. She admitted she understood that she had been ordered to return D.S. to Wisconsin but had not done so out of safety concerns and insufficient finances. The court then clarified Sarah's understanding of its orders.

> THE COURT: You understand Ms. [Sheppard], I've ordered you to return to Wisconsin or have the child returned to Wisconsin.
>
> MS. SHEPPARD: Yes.
>
> THE COURT: All right. It's my understanding from the attorneys representing Mr. Sheppard that you have refused to do either of those; is that correct?
>
> MS. SHEPPARD: Due to safety concerns, yes.

The court then asked the GAL for his "position." The GAL responded that Sarah's argument that it was unsafe for her or D.S. to return to Wisconsin was unfounded because "Wisconsin courts and agencies provide the same safety that the New Jersey courts and agencies could provide and therefore I don't find that to be a valid excuse at this time." The court was unpersuaded by Sarah's reasons for not returning D.S. to Wisconsin or allowing D.S. to be returned, and it reaffirmed its previous orders. The court again declined to appoint counsel for Sarah. Sarah appeals.

[4] The circuit court additionally observed that the New Jersey order was "entered as a default" and did "not reflect Joseph was served with the notice of Sarah's application" for the order or the order itself.

DISCUSSION

¶14 Sarah raises multiple issues with the circuit court's finding of contempt. She insists that she lacked notice of the contempt hearing, and the circuit court erroneously exercised its discretion by refusing to allow her to appear by telephone at the hearing (despite never requesting that she be allowed to do so). She also argues that the order she is accused of violating was insufficiently clear. Sarah then turns to the contempt hearing itself, maintaining that the circuit court did not conduct a proper evidentiary hearing and thus had no evidence upon which to base a contempt finding. She additionally argues that her due process rights were violated because the court refused to appoint counsel prior to finding her in contempt. All of these arguments are without merit.[5]

¶15 Sarah's argument that she lacked notice of the contempt hearing is a nonstarter. The due process "notice" requirement of WIS. STAT. § 785.03(1) is satisfied if the alleged contemnor (the disobedient party) is "given notice in open court of a contempt hearing." ***Noack v. Noack***, 149 Wis. 2d 567, 572, 439 N.W.2d 600 (Ct. App. 1989). Sarah, by her own admission, was present by telephone at the October 20, 2015 hearing before the commissioner where the date for the contempt hearing was set. As in ***Noack***, we conclude that Sarah makes "no colorable argument" that she lacked notice of the contempt proceedings.[6] *See* ***id.***

[5] On appeal, Sarah argues that we should treat as conceded various arguments Joseph failed to fully respond to in his pro se brief. We decline to do so.

[6] To the extent she argues that the motion was never filed, she fails to develop the argument and we do not address it. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). We do note that the circuit court, after locating the motion for contempt in the court file, found that "clearly it was filed."

¶16 We similarly reject Sarah's argument that the court erred by not allowing her to appear telephonically. Whether a party may testify or offer arguments telephonically is within the court's discretion. *See* ***Town of Geneva v. Tills***, 129 Wis. 2d 167, 176, 384 N.W.2d 701 (1986) (whether to allow a party to testify telephonically is left to the discretion of the circuit court); *see also* WIS. STAT. § 807.13(1)-(2) (court "may permit any oral argument by telephone"). The circuit court did not refuse a request to appear telephonically at the November 24 hearing; Sarah made no such request and admits as much. It is clear that Sarah knew how to make such a request because she did so previously.[7] Nor does the record reflect any objection to the family court commissioner's order requiring her to appear in person. Essentially, Sarah is asking that we reverse the circuit court for failing to raise the issue of telephonic appearance sua sponte upon Sarah's failure to appear in person as required. She advances no supporting authority for this proposition. As Sarah does not identify any other error, we conclude that the circuit court did not erroneously exercise its discretion.

¶17 Sarah further argues she is excused from complying with the court's order because it was vague—more specifically, that she cannot be found in contempt because the order lacked any "clear and unambiguous directive for Sarah to bear sole responsibility in returning [D.S.] to the state of Wisconsin." Sarah does not contest the propriety of the September 2, 2015 directive or subsequent written order on any other ground.[8] The written order provided that D.S.—who

[7] Sarah admits that she has made multiple requests to appear telephonically.

[8] Notably, she does not take any issue with the circuit court's determination that Wisconsin was the home state jurisdiction or the propriety of the order to return D.S. to Wisconsin. Nor does she argue that the New Jersey restraining order is inconsistent with the circuit court's directive that D.S. be returned to Wisconsin.

was clearly in the custody of Sarah—"shall be returned to the State of Wisconsin on or before September 16, 2015." Because D.S. was in Sarah's custody, this order clearly and unequivocally obligated Sarah to bring D.S. back to Wisconsin or otherwise provide for that to happen.

¶18 The hearing offers further clarity. When viewed in context with the court's oral directive at the hearing that "the child has to be returned" and Sarah would have to "work around" the practical difficulties occasioned by that directive, the written order was abundantly clear. The only logical reading of the order is that Sarah was required to return D.S. to Wisconsin or make arrangements for D.S. to return by other means. To illustrate, when, following a discussion regarding the disrepair of a son's bedroom, a father tells his son, "Your room must be cleaned today," the directive is clear and unequivocal. The son will gain little headway by arguing the next day that the directive, as a technical matter, failed to specify who should do or otherwise arrange for the cleaning. The order here was no less clear.

¶19 Turning to the November 24, 2015 contempt hearing, Sarah takes issue with the lack of testimony at the hearing and argues that Joseph failed to prove that Sarah had the "financial ability to return [D.S.] to Wisconsin" and was therefore able to comply with the order. She maintains that the court based its ruling upon only the "unsupported arguments" of Joseph's counsel and the court's "own opinions." We disagree.

¶20 WISCONSIN STAT. § 785.03(1)(a) provides that an "aggrieved person" may seek a remedial sanction for contempt of a court order.[9] This is what Joseph did. ***Evans v. Luebke***, 2003 WI App 207, ¶¶22-23, 267 Wis. 2d 596, 671 N.W.2d 304. A remedial sanction (as opposed to a punitive one[10]) is "imposed for the purpose of terminating a continuing contempt of court"—in this case, Sarah's refusal to return D.S. to Wisconsin per the court order. WIS. STAT. § 785.01(3); *see also* ***Luebke***, 267 Wis. 2d 596, ¶22.

¶21 Prior to finding a party in contempt under WIS. STAT. § 785.03(1)(a), the court must conduct a hearing on the record to satisfy due process. ***Luebke***, 267 Wis. 2d 596, ¶24. The alleged contemnor must be given an opportunity to offer "proof and explanation showing his good faith efforts to comply with the court's orders." ***Id.*** (quoting ***Dennis v. State***, 117 Wis. 2d 249, 261, 344 N.W.2d 128 (1984)). A finding of contempt rests on the circuit court's factual finding that the alleged contemnor "intentionally disobeyed [the court's] orders." ***Luebke***, 267 Wis. 2d 596, ¶24 n.12, ¶25. We will not reverse a circuit court's factual findings unless clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶22 Although a person may not be punished for failing to comply with an impossible order, the alleged contemnor bears the burden "to offer some

[9] Contempt is the "intentional … [d]isobedience, resistance or obstruction the authority, process or order of a court." WIS. STAT. § 785.01. Thus, the basic elements of contempt are (1) the existence of a valid court order, (2) the alleged contemnor had knowledge of that order, and (3) the alleged contemnor disobeyed that order. 17 AM. JUR. 2D *Contempt* § 13 (2014).

[10] A punitive sanction is "a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court." WIS. STAT. § 785.01(2). The procedure for granting such sanctions is provided for in WIS. STAT. § 785.03(1)(b). "The district attorney of a county, the attorney general or a special prosecutor appointed by the court may seek the imposition of a punitive sanction." ***Id.***

satisfactory explanation of his failure to comply with the court's specific and direct order." ***State v. Balistrieri***, 55 Wis. 2d 513, 523, 201 N.W.2d 18 (1972) (quoting ***Kaminsky v. Milwaukee Acceptance Corp.***, 39 Wis. 2d 741, 747, 159 N.W.2d 643 (1968)). Thus, "other than a prima facie showing of a violation of the order, the burden of proof is on the person against whom contempt is charged to show his conduct was not contemptuous."[11] ***Joint Sch. Dist. No. 1, Wis. Rapids v. Wisconsin Rapids Educ. Ass'n***, 70 Wis. 2d 292, 321, 234 N.W.2d 289 (1975); *see also* ***Balaam v. Balaam***, 52 Wis. 2d 20, 30, 187 N.W.2d 867 (1971); ***State v. Rose***, 171 Wis. 2d 617, 623, 492 N.W.2d 350 (Ct. App. 1992). The inability to perform as directed by a court order is an affirmative defense in contempt proceedings; the party seeking remedial sanctions need not prove that the alleged contemnor had the ability to comply. *See* ***Kaminsky***, 39 Wis. 2d at 747.[12]

¶23 Regardless of any evidence adduced during the November 24 hearing itself,[13] the previous court records already contained ample evidence of Sarah's contempt. And during a contempt hearing, the circuit court may take judicial notice "of its own records." 17 AM. JUR. 2D *Contempt* § 178 (2014) ("A court hearing a contempt charge may take judicial notice of its own records and prior opinions in litigation interconnected with the matter before it."); *see also*

[11] However, "the burden [of proof] is on the state in punitive, or criminal, contempt." ***State v. Rose***, 171 Wis. 2d 617, 623 n.5, 492 N.W.2d 350 (Ct. App. 1992).

[12] AMERICAN JURISPRUDENCE explains that once the elements of civil contempt have been proven (i.e., that (1) a valid order existed, (2) the alleged contemnor knew of the order, and (3) the alleged contemnor disobeyed that order), "the burden shifts to the alleged contemnor to demonstrate inability to comply without regard to intent." 17 AM. JUR. 2D *Contempt* §§ 13, 180 (2014).

[13] Sarah maintains that the affidavit of Joseph's counsel was not evidence and further insists that the court received no other evidence. Because we conclude that Sarah's contempt was demonstrated by other portions of the record, we need not address this contention.

Johnson v. Mielke, 49 Wis. 2d 60, 75, 181 N.W.2d 503 (1970) ("Generally, a court may take judicial notice of its own records and proceedings for all proper purposes."). Sarah was ordered to return D.S. to Wisconsin by September 16, 2015, per the September 2 hearing and resulting order. The record also includes the court commissioner's order from October 20, 2015—over a month after the deadline to return D.S. This order indicates that Sarah had failed to do so as of that date. And when asked whether she intended to comply with the circuit court's order, Sarah declined to answer. This evidence, combined with her continued absence from Wisconsin, was more than enough for the circuit court to conclude that she was in violation of its order.

¶24 Contrary to Sarah's assertion, Joseph bore no burden to prove that she was able to comply with the court's order. The record revealed that she violated the September 2 order, and Sarah has admitted multiple times that this is true.[14] Sarah insists that she lacked the ability to comply and that safety concerns prevented her from doing so. Again, however, the burden was on Sarah to show a reason for her continued noncompliance. And because she failed to meet her burden of proof at the hearing—notably, by not appearing or even requesting appearance by other means—she failed to meet that burden. Accordingly, the circuit court had more than sufficient evidence to find Sarah in contempt.

¶25 Finally, we reject Sarah's argument that she was entitled to appointed counsel as a matter of due process. This argument comes in two varieties. Although she admits that the rule does not directly apply to her case,

[14] In addition to her silence when asked whether she intended to return D.S. and her admission during the March 14, 2016 hearing, Sarah admits in her brief-in-chief that D.S. "continues to live in New Jersey with" her.

Sarah first implores that we extend the bright-line rule enunciated in ***State v. Pultz***, 206 Wis. 2d 112, 556 N.W.2d 708 (1996), because her liberty is at stake.[15] Second, she argues that the multifactor test outlined by the United States Supreme Court in ***Lassiter v. Department of Soc. Servs.***, 452 U.S. 18 (1981), and adopted by the Wisconsin Supreme Court in ***Piper v. Popp***, 167 Wis. 2d 633, 647, 482 N.W.2d 353 (1992), entitles her to appointed counsel. Whether due process required the court to appoint counsel is a question of law we review de novo.[16] ***Pultz***, 206 Wis. 2d at 119.

¶26 ***Pultz*** does not support Sarah's claim. ***Pultz*** declined to apply the case-by-case balancing approach of ***Lassiter*** and instead established a "bright-line rule" that a defendant has a right to appointed counsel when his or her liberty "is threatened by a remedial contempt action *brought by the government*." ***Pultz***, 206 Wis. 2d at 126, 131 (emphasis added). The decision reaffirmed the rule in ***Ferris v. State***, 75 Wis. 2d 542, 546, 249 N.W.2d 789 (1977), which provided that "where the state in the exercise of its police power brings its power to bear on an individual through the use of civil contempt … and liberty is threatened … such a person is entitled to counsel." Thus, a key part of the rationale for the blanket rule was "to protect litigants against unpredictable and unchecked adverse governmental action." ***Pultz***, 206 Wis. 2d at 129 (citation omitted). In contrast to the situation in ***Pultz***, this contempt action was not initiated by the state or an arm

[15] Sarah admits that she is requesting an expansion of ***State v. Pultz***, 206 Wis. 2d 112, 556 N.W.2d 708 (1996), beyond the government context.

[16] Circuit courts also possess inherent authority to appoint counsel, a decision we review for an erroneous exercise of discretion. *See* ***Joni B. v. State***, 202 Wis. 2d 1, 11, 549 N.W.2d 411 (1996). We do not understand Sarah to be making this argument. To the extent she does, we affirm the court's decision not to appoint counsel.

of the state, nor is the state a party to this action. Therefore, the concern regarding "unpredictable and unchecked adverse governmental action" is not present, and ***Pultz*** does not apply. Furthermore, creating a new, bright-line rule requiring appointment of counsel in all civil contempt proceedings where the alleged contemnor's physical liberty is threatened is clearly inconsistent with the recent United States Supreme Court decision in ***Turner v. Rogers***, 564 U.S. 431 (2011). There, the Court unequivocally stated that "the Due Process Clause does not always require the provision of counsel in civil proceedings where incarceration is threatened." ***Id.*** at 446. For these reasons, we decline Sarah's invitation to drastically expand ***Pultz***'s per se rule.

¶27 We also conclude that Sarah was not entitled to appointed counsel under the due process balancing test. The Supreme Court has explained that whether due process requires appointment of counsel for an indigent civil defendant is determined "by examining the 'distinct factors' that this Court has previously found useful in deciding what specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair." ***Turner***, 564 U.S. at 444 (citation omitted). These factors include:

> (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]."

Id. at 444-45 (quoting ***Matthews v. Eldridge***, 424 U.S. 319, 335 (1976). In ***Piper***, the Wisconsin Supreme Court adopted this three-factor test. ***Piper***, 167 Wis. 2d at 647. The court further noted that under this balancing test, requiring the circuit

court "to appoint counsel for an indigent litigant in a civil case is the exception, not the rule." ***Id.***[17]

¶28 The private interest affected (factor 1) is the potential loss of liberty, which is, of course, a substantial concern. We do, however, note that Sarah may purge her contempt and avoid potential imprisonment at any time by returning D.S. to Wisconsin or by arranging for Joseph (or a representative) to pick up D.S.

¶29 Under the second factor, we consider the risk that proceeding without counsel will lead to an erroneous deprivation of Sarah's liberty. Sarah concedes that she violated the order; that much was never really in doubt. As to her assertion that she was unable to comply, this issue is not so complex that Sarah "can fairly be represented only by a trained advocate." *See* ***Gagnon v. Scarpelli***, 411 U.S. 778, 788 (1973). Sarah's task to avoid being found in contempt was merely "to offer some satisfactory explanation" for her admitted failure to comply. *See* ***Balistrieri***, 55 Wis. 2d at 523 (citation omitted). The issues here are simple. She can communicate her financial situation to the court without specialized counsel. She can relay her safety or other fears without counsel. And she can make arrangements and show a willingness to transfer her child back to Wisconsin

[17] The court acknowledged that ***Lassiter v. Department of Soc. Servs.***, 452 U.S. 18 (1981), could be read as suggesting a "presumption in favor of an indigent litigant's right to appointed counsel [where] the indigent may be deprived of physical liberty." ***Piper v. Popp***, 167 Wis. 2d 633, 646, 482 N.W.2d 353 (1992). As the defendant's liberty was not threatened, ***Piper*** had no occasion to address ***Lassiter***'s statements further. The court did, however, note that the "application and effect of the presumption and the balancing test set forth in ***Lassiter*** are not totally clear." ***Piper***, 167 Wis. 2d at 647. Subsequently, the United States Supreme Court clarified that ***Lassiter*** was "best read as pointing out that the Court previously had found a right to counsel '*only*' in cases involving incarceration, not that a right to counsel exists in *all* such cases," and declined to presume that indigent litigants in contempt proceedings have a right to appointed counsel. ***Turner v. Rogers***, 564 U.S. 431, 442-43 (2011). Thus, Sarah is not entitled to a presumption of counsel here.

without counsel. The risk of an erroneous deprivation of liberty is quite small. As the circuit court found, it appears that Sarah simply does not want to comply with the court's order.

¶30 Finally, under the third factor, Joseph has a strong interest in resolving the contempt proceedings and having D.S. returned to Wisconsin so the divorce case and associated placement proceedings can finally move forward. His spouse has run off with his child; it is hard to imagine more at stake for him. Appointing counsel could further delay the resolution of these important issues. Moreover, the State has an interest in applying public funds in a prudent manner and avoiding the expense of appointed counsel where, as here, such protections are unnecessary. In view of the general simplicity of the issues and the countervailing interests, we conclude that due process does not entitle Sarah to an appointed attorney paid for at public expense.[18]

CONCLUSION

¶31 Sarah was and remains in contempt of the circuit court's order to return D.S. to Wisconsin. She admits this, and the records supports the circuit court's finding to that effect. Sarah failed to appear at the contempt hearing to explain her noncompliance, and has yet to persuade the circuit court that she is unable to comply with the order. Additionally, we are unconvinced that

[18] Sarah also argues that the circuit court erroneously exercised its discretion by failing to hold a hearing on her motion to appoint counsel prior to holding her in contempt. She does not, however, develop a coherent legal argument explaining why. *See* ***Pettit***, 171 Wis. 2d at 646-47. In any event, because we find she has no right to appointed counsel as a matter of law, we also fail to see what remedy would lie for any failure to have a hearing on a motion that was appropriately denied.

appointing counsel is compelled by the constitution. Therefore, we affirm the circuit court's order finding her in contempt.

By the Court.—Order affirmed.

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