

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 22, 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. 2016AP1407

Cir. Ct. No. 2011FA535

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

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

JEAN M. KEARNS N/K/A JEAN M. BREUER,

PETITIONER-APPELLANT,

v.

STEVEN M. KEARNS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Washington County:
JAMES G. POUROS, Judge. *Affirmed.*

¶1 REILLY, P.J.¹ Jean M. Breuer appeals from a trial court order holding Steven M. Kearns in contempt for his failure to make a final cash payment as directed under the property division portion of the parties’ marital settlement agreement (MSA). Breuer challenges the propriety of the court’s sanction. Breuer brought this case to us as a one-judge notice of appeal, under WIS. STAT. § 752.31(2). Under subsec. (2), the only applicable paragraph is para. (h), applicable to “[c]ases involving contempt of court under [WIS. STAT.] ch. 785.” Sec. 752.31(2)(h). We review a court’s use of its contempt power under an erroneous exercise of discretion standard. *Benn v. Benn*, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999). Based on our standard of review, we conclude that the trial court did not err in its choice of sanctions.

FACTS

¶2 Kearns and Breuer were divorced in March 2013, after almost thirty years of marriage. At the time of the divorce, Steven was self-employed and Breuer worked as a laborer. The parties owned multiple real estate holdings, numerous business interests, and substantial debts. The judgment of divorce incorporated the parties’ MSA, which the circuit court found was “fair and reasonable.”

¶3 At issue is the portion of the MSA addressing a cash settlement to be made by Kearns to Breuer as part of the property division. To equalize the parties’ property division, the MSA provided:

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.

Husband shall pay to Wife the sum of \$1,000,000.00 Dollars as follows: \$100,000.00 within 30 days (or sooner, if he can arrange the loan before that); \$400,000.00 by December 31, 2013; and the balance of \$500,000.00 by December 13, 2014. These payments will be an unequal property division, and, in part, in lieu of an award of maintenance and not taxable to Jean nor deductible by Steve.²

The MSA further provided that two condominiums owned by the couple in Florida, as well as Kearns' interest in Matrix Title Company, LLC,³ would secure the payment of the cash settlement. The MSA decreed that “[i]f Husband does not pay Wife by December 31, 2014 all of the money owed to her, she is awarded the two Florida condominiums ... plus Husband’s interest in Matrix Title Company, LLC.”⁴

¶4 Kearns did not make the \$400,000 payment due in December 2013, and Breuer filed a motion for contempt. The parties reached a settlement, memorialized by written order of the court, providing that Kearns would sell certain real estate and pay the proceeds plus interest and attorneys’ fees to Breuer. Kearns made the \$400,000 payment in accordance with the agreement in January 2015.

¶5 The parties thereafter signed a stipulation addressing the remaining \$500,000, which amended the final payment date from December 13, 2014, to

² The MSA provided that “[a]ny payment that is missed by more than 30 days shall accrue interest at the statutory rate from the day it was originally due.”

³ Kearns owns a fifty percent interest in Matrix. The trial court found “there was insufficient proof presented at the evidentiary hearing for the Court to find a value for a 50 percent interest in Matrix Title.”

⁴ Maintenance was also held open to secure the cash settlement payment.

December 31, 2015, with “[a]ll other terms and conditions of the [MSA] and Judgment of Divorce” in full force and effect.

¶6 Unbeknownst to Breuer, in July 2015, Kearns sold one of the Florida condominiums. Kearns used the proceeds to make a \$275,000 payment to Breuer. On December 31, 2015, the final deadline, Kearns mailed a \$45,000 check to Breuer, which was short of the \$225,000 remaining owed. Breuer did not cash the check and sent a demand letter requesting that Kearns transfer his fifty percent interest in Matrix Title, LLC, as well as the two Florida condominiums to her. In response, Kearns secured loans to cover the remaining \$180,000 owed to Breuer, and filed a motion asking the court to order Breuer to “accept the final payment for property division under the judgment of divorce.” Kearns admitted that he “was unable to pay the full principal balance due by December 31, 2015,” but claimed that enforcing the MSA “would be highly unfair ... given the substantial payments I made on principal and interest.” Breuer responded with her own motion to enforce the judgment of divorce, seeking a court order: (1) requiring Kearns to transfer his interest in Matrix Title, LLC, and the remaining Florida condominium to Breuer; (2) holding Kearns in contempt for selling the Florida condominium; and (3) awarding costs and expenses.

¶7 The court held an evidentiary hearing on the competing motions. The trial court found “the testimony of Kearns not credible,” that “complying with the divorce judgment was not acted upon by Kearns as a priority,” that “Kearns has intentionally failed to comply with the judgment of divorce by failing to make property division payments timely,” and that “Kearns willfully and intentionally violated the judgment by selling one of the Florida condos.” The court also found that “Kearns had the ability to pay Breuer and he chose to take other financial steps for his own benefit instead” and that Breuer “has been damaged because she

has less in the way of physical assets as security and less protection for herself from the debts that are Kearns' responsibility.”⁵

¶8 The court ordered Kearns arrested and committed to jail for three months, but stayed it to allow Kearns to comply with the purge condition of paying the remaining \$225,000 with interest.⁶ The court did not order Kearns to transfer his interest in Matrix Title, LLC, or the remaining Florida property, citing “[i]ts concern that transferring Kearns' interest in Matrix Title to Breuer would not be fair to either party” and “[i]ts concern that the transfer of the remaining Naples, Florida condo to Breuer would be problematic.”

DISCUSSION

¶9 Breuer claims that the trial court failed “to impose the remedy contained in the Judgment of Divorce” and asserts that the court effectively modified the judgment of the court “by allowing [Kearns] to make a late-payment rather than forfeit the property.” Kearns argues that the court's sanction was a proper remedy to enforce the MSA and judgment of divorce. We agree that the court had the discretion to order the transfer of Matrix Title, LLC, and the Florida properties as a sanction. However, we also agree that the court had discretion

⁵ The trial court found that Breuer still had “approximately \$2,500,000 of exposure on the unpaid debt to PNC Bank, N.A., and according to Kearns' own testimony,” PNC intends to eventually pursue Breuer on the debt. We are not clear from the court's decision or from the MSA whether the two Florida properties and Kearns' interest in Matrix Title, LLC, remain as security should PNC pursue Breuer for the debt, but we do note that the MSA held maintenance open “for the purposes of securing ... [Breuer's] removal from all liability associated with any debts.”

⁶ The trial court also ordered another Florida property to “stand as security ... substituted in place of the improperly and unauthorizedly sold condominium” and awarded attorneys' fees.

under WIS. STAT. § 785.04(1) to impose the sanction that it did, and that the court's exercise of discretion was not erroneous. *See Benn*, 230 Wis. 2d at 308.

¶10 Breuer argues that the trial court is prohibited from utilizing contempt of court to enforce the judgment of divorce, but she fails to point us toward statutory authority or case law substantiating that claim.⁷ Whether the trial court adhered to the proper procedures in exercising its contempt powers is a question of law we review independently. *Evans v. Luebke*, 2003 WI App 207, ¶16, 267 Wis. 2d 596, 671 N.W.2d 304.

¶11 The court's contempt power "stems from the inherent authority of the court," but is subject to limitations set by the legislature. *Frisch v. Henrichs*, 2007 WI 102, ¶32, 304 Wis. 2d 1, 736 N.W.2d 85 (citation omitted). Under WIS. STAT. § 767.78(2), "[i]f a person has incurred a financial obligation and has failed within a reasonable time or as ordered by the court to satisfy the obligation," the party may be "subject to contempt of court under [WIS. STAT.] ch. 785." A financial obligation under § 767.78 includes "an obligation for payment incurred under ... [WIS. STAT. §] 767.61," which pertains to property division. Sec. 767.78(1). Contempt of court is defined as intentional "[d]isobedience, resistance or obstruction of the authority, process or order of a court." WIS. STAT.

⁷ The cases referenced by Breuer, *Washington v. Washington*, 2000 WI 47, ¶15, 234 Wis. 2d 689, 611 N.W.2d 261, and *Rotter v. Rotter*, 80 Wis. 2d 56, 62-63, 257 N.W.2d 861 (1977), both involve situations where the agreement was silent as to the issue before the court or as to the remedy, which Breuer admits are distinct from the facts in this case, and do not preclude a court from finding a party in contempt of court where the judgment includes a remedy. In fact, WIS. STAT. § 767.78 suggests that contempt of court is the appropriate method to enforce a financial obligation as to property division. *Compare* WIS. STAT. § 767.77 (providing list of appropriate remedies for noncompliance with a payment obligation, including execution of the order or judgment and contempt of court, but statute not applicable to financial obligations under WIS. STAT. § 767.61), *with* § 767.78 (stating that the remedy for failing to satisfy financial obligation incurred under § 767.61 is a show cause order for contempt of court).

§ 785.01(1)(b); *Krieman v. Goldberg*, 214 Wis. 2d 163, 169, 571 N.W.2d 425 (Ct. App. 1997) (“A person may be held in contempt if he or she refuses to abide by an order made by a competent court.”).

¶12 The trial court found that Kearns failed to comply with the terms of the cash settlement provision in the MSA, and neither party challenges the court’s finding. As Kearns failed to satisfy a financial obligation under WIS. STAT. § 767.61 by the deadline ordered by the judgment of divorce, he was properly subject to remedial sanctions under WIS. STAT. §§ 785.02 and 785.04(1).

¶13 We review a trial court’s use of its contempt power as well as the type of remedial sanctions ordered under an erroneous exercise of discretion standard. *Benn*, 230 Wis. 2d at 308; *see also* WIS. STAT. §§ 785.02, 785.04(1). “We look for reasons to sustain a discretionary ruling.” *Board of Regents-UW Sys. v. Decker*, 2014 WI 68, ¶19, 355 Wis. 2d 800, 850 N.W.2d 112; *see also Stan’s Lumber, Inc. v. Fleming*, 196 Wis. 2d 554, 573, 538 N.W.2d 849 (Ct. App. 1995) (we may independently search record for reasons to support court’s exercise of discretion).

¶14 To hold a party in contempt, the trial court must find that the party “is able to pay and the refusal to pay is willful and with intent to avoid payment.” *Goldberg*, 214 Wis. 2d at 169 (citation omitted); *see also* WIS. STAT. § 785.01(1). Here, the trial court made these specific findings, noting that “Kearns had intentionally failed to comply with the judgment of divorce by failing to make property division payment timely” and that “Kearns had the ability to pay Breuer and he chose to take other financial steps for his own benefit instead.” The record supports the court’s findings, and we see no reason to upset the court’s discretionary determination.

¶15 When examining the actual sanctions imposed, we note that family court is a court of equity, and, as such, it is able “to make a flexible and tailored response to the needs of a particular” couple. *Lutzke v. Lutzke*, 122 Wis. 2d 24, 36, 361 N.W.2d 640 (1985). As our supreme court in *Washington v. Washington*, 2000 WI 47, 234 Wis. 2d 689, 611 N.W.2d 261, explained,

[T]he legislature and the courts recognize that a final division of property in a divorce judgment does not always resolve all matters between the parties and that remedial action by the circuit court may be needed to effectuate the objectives of the final division without disrupting the finality of the judgment.... [WISCONSIN STAT. §] 767.01(1) vests in the circuit courts the authority to do all things “necessary and proper” in actions affecting the family and “to carry [the courts’] orders and judgments into execution.”

Washington, 234 Wis. 2d 689, ¶14 (third alteration in original). The trial court in this case did not reopen the judgment of divorce nor did it modify the property division. Judge Poulos presided over the parties’ divorce proceedings from the beginning of the case, and it is clear to this court that he merely construed the judgment of divorce to clarify the parties’ intent—that Breuer receive her \$1,000,000 equalization payment, with interest and attorneys’ fees. *See id.* at ¶20 (“Numerous divorce cases demonstrate that after a final division of property, problems may arise that require the circuit court to construe a final division of property in a divorce judgment, in order to effectuate the judgment.”). We conclude that the trial court properly and reasonably exercised its equitable powers to implement the intent of the parties. We will not overturn the court’s exercise of discretion.

By the Court.—Order affirmed.

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

