COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2687 **Cir. Ct. No. 1999FA1978**

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

IN RE THE MARRIAGE OF:

WILLIAM J. TOMAN,

PETITIONER-APPELLANT,

V.

PAMELA A. POLENZ,

RESPONDENT-RESPONDENT.

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

Before Lundsten, P.J., Dykman and Deininger, JJ.

¶1 LUNDSTEN, P.J. This case involves a violation of a post-divorce modification to a placement order. The court-ordered modification specified that the father, William Toman, may not permit contact between his children and William's girlfriend.[1] William argues that the no-contact modification to placement was improper because the circuit court applied an erroneous legal standard and because, under the correct standard, the facts do not support the imposition of a no-contact provision. William also argues that the circuit court erred when it sanctioned him under the contempt statutes. William argues that the sanction imposed was not remedial in nature and, therefore, not authorized as a "remedial sanction" under WIS. STAT. §§ 785.01 and 785.04 (2003-04).[2] Finally, William argues that the circuit court improperly ordered him to pay his ex-spouse, Pamela Polenz, her attorney's fees under the contempt statute. We affirm the circuit court's decision to modify the placement order by adding the no-contact provision. However, we reverse the circuit court's order imposing a sanction under § 785.01 and the related order requiring William to pay Pamela's attorney's fees. For reasons explained in our opinion, we remand for further proceedings on the issue of attorney fees.

Background

¶2 William and Pamela married in 1990 and were divorced on November 1, 2001. They have two children, one born in 1991 and the other in

[1] William, in his appellate brief, refers to Dawn Noble as his "girlfriend." We will generally refer to Dawn by her first name.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

1993. At the time of the divorce, William and Pamela agreed to joint custody with roughly equal placement.

¶3 Three years before the divorce, in November 1998, William met Dawn Noble. Shortly after meeting, William and Dawn became "involved" with each other. When they met, Dawn had alcohol and cocaine abuse problems.

¶4 At the time of the divorce in 2001, Pamela was concerned about the children having contact with Dawn. William agreed to a "no contact" provision in a temporary placement order, providing that the children have no contact with Dawn. Later, William was successful in having the no-contact provision lifted. For approximately six months in 2002, Dawn and her two children resided with William. During this time, Dawn had regular contact with William's children when he had placement.

¶5 In July 2002, there were physical altercations between William and Dawn, resulting in William being charged with battery and disorderly conduct. William entered a plea and successfully completed a first offender's program. Dawn and her children moved out of William's residence in August of 2002, but William and Dawn continued seeing each other off and on. Dawn continued to have drug and alcohol problems.

¶6 On February 12, 2004, Pamela moved for modification of the physical placement order, seeking reinstatement of the no-contact provision. Pamela alleged that Dawn continued to have a serious drug abuse problem, that because of Dawn's problems Dawn had relinquished placement of her own children, and that William had told Pamela that Dawn was moving back in with him. Pamela's motion requested that the court issue an order modifying

placement so that William could only have placement "at times when Dawn is not present."

¶7 A hearing on Pamela's placement modification motion was held on April 16, 2004. After taking testimony, the circuit court granted Pamela's motion and ordered "an absolute ban" on contact between the children and Dawn. The court provided that William can have the no-contact provision removed if he is able to show that Dawn has been drug- and alcohol-free for a "substantial period" of time.

¶8 On July 7, 2004, Pamela moved the court for a "remedial contempt" order. In an affidavit attached to that motion, Pamela averred that William committed a contempt of court by violating the court's no-contact order. An evidentiary hearing was held, and the circuit court found that William intentionally violated the court's no-contact order by allowing Dawn to have contact with the children. The court ordered that the next time William allowed contact between Dawn and the children, William would serve 48 hours in jail. In addition, the court ordered William to pay Pamela's attorney's fees related to pursuing the contempt action.

Discussion

A. The "No Contact" Placement Modification

¶9 Acting on Pamela's request, the circuit court modified the placement order so that it placed on William's placement time the condition that he not allow contact between the children and his girlfriend, Dawn. As subsequently amended, the order provides that William may seek to have the no-contact modification

lifted if he shows that Dawn has been drug- and alcohol-free for a "substantial period" of time.[3]

¶10 William argues that the no-contact modification was improper because the circuit court applied an erroneous legal standard and because, under the correct standard, the facts do not support the imposition of a no-contact provision. We address these topics in the sections below. We conclude that the legal standard applied by the circuit court was at least as favorable to William as the standard William now argues should have been applied. We also conclude that, under that standard, the evidence supports the circuit court's no-contact modification.

1. The Legal Standard

¶11 A court may place conditions or restrictions upon physical placement with a parent that are "just and reasonable" and in the best interest of the child. WIS. STAT. §§ 767.24(1) and 767.24(5)(am); *see also* WIS. STAT. §§ 767.325(3) and 767.325(5m). "However, because freedom of association is constitutionally protected, a court may not base a placement decision on a parent's nonmarital sexual conduct or relationship with a third party absent" a showing that it would have a "significant adverse impact on the child." ***Helling v. Lambert***, 2004 WI App 93, ¶8, 272 Wis. 2d 796, 681 N.W.2d 552.

[3] Pamela made her request for a modification to the placement order under WIS. STAT. § 767.325, an apparent reference to § 767.325(3) authorizing a modification that "does not substantially alter the amount of time a parent may spend with his or her child." William's challenges to the modification order only relate to the harm-to-the-children standard applied by the court and the record support for the modification under the correct harm-to-the-children standard.

¶12 William takes issue with the legal standard that the circuit court used for "harmful to the child." He argues that the prohibition on contact between Dawn and his children must be supported by evidence showing that danger to the children is "direct and currently present." We conclude that the circuit court applied a standard that is at least as favorable to William as the one William now argues should have been applied.[4]

¶13 The circuit court placed the burden of proof on Pamela, and wrote that it was applying the following standard:

> A parent is entitled to permit contact between his children and his significant other so long as there is not specific evidence that the relationship would have a significant adverse impact on the children. That standard comes from ***Schwantes v. Schwantes***, 121 Wis. 2d 607, 625, 360 N.W.2d 69 (Ct. App. 1984). The standard was recently approved in ***Helling v. Lambert***[, 2004 WI App 93, ¶8, 272 Wis. 2d 796, 681 N.W.2d 552].

In applying this standard to the facts here, the circuit court concluded that contact between Dawn and the children "will have a substantial adverse impact" on the children. We do not perceive how the standard the circuit court applied is less favorable to William than the one William asserts should have been applied, that the danger to the children must be "direct and currently present."

¶14 William cites to ***Gould v. Gould***, 116 Wis. 2d 493, 342 N.W.2d 426 (1984), and ***Koeller v. Koeller***, 195 Wis. 2d 660, 536 N.W.2d 216 (Ct. App. 1995), in an effort to show that the circuit court improperly relied on mere speculation

[4] On appeal, Pamela is *pro se*. We do not refer to Pamela's legal arguments because her brief is, for the most part, limited to factual arguments.

that contact with Dawn would harm the children. We briefly comment on these two cases.

¶15 In ***Gould***, the supreme court concluded that the circuit court erred in modifying a custody award under a prior statutory scheme. Pertinent here, the supreme court concluded that the circuit court erroneously based its decision on the risk of harm in the distant future when the child was older. ***Gould***, 116 Wis. 2d at 496-97, 501-02. In ***Gould***, there was no possibility of current harm to the child supporting the requested modification. In contrast, the circuit court here applied a standard requiring the danger of current harm.

¶16 William's reliance on ***Koeller*** is similarly misplaced. In ***Koeller***, this court addressed whether WIS. STAT. § 767.24(3) or § 767.325 authorized a court to issue a "prospective" and "contingent" custody award. *See* ***Koeller***, 195 Wis. 2d at 661-63. A mother with custody sought a contingent order awarding custody to her sister if the mother became incapacitated or died because the mother had cancer and the children's father had a history of mental illness. The circuit court granted the mother's request. We reversed the order, explaining:

> We do not see how the power to order a change of custody that is to take place at some unknown time in the future, upon the occurrence of some stated contingency, may be necessarily implied or inferred from the authority granted to the court by either § 767.24(3) or § 767.325, Stats. Not only is the key statutory language cast in the present tense but the plain underlying purpose of these provisions is to permit the court to assess the effect of historical *and present* factors upon the child's well-being in order to determine the type of custodial arrangement that will best serve his or her interest.

Id. at 667. We find nothing in ***Koeller*** that is inconsistent with the standard applied by the circuit court here.

2. Application of the Standard to the Facts in This Case

¶17 We review a circuit court's decision to modify placement under the erroneous exercise of discretion standard:

> Whether to modify a placement or custody order is directed to the trial court's discretion. We affirm a court's discretionary determination when the court applies the correct legal standard to the facts of record and reaches a reasonable result. Our task as the reviewing court is to search the record for reasons to sustain the trial court's exercise of discretion….
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> ….
>
> In reviewing a trial court's determination on physical placement and custody, we accept the court's factual findings unless they are clearly erroneous. The trial court, sitting as the trier of fact as it does in a custody dispute, decides the credibility of the witnesses, and, when more than one reasonable inference may be drawn from the credible evidence, we accept the inference drawn by the trial court.

Hughes v. Hughes, 223 Wis. 2d 111, 119-20, 128, 588 N.W.2d 346 (Ct. App. 1998) (citations omitted). We have already addressed whether the circuit court applied a correct legal standard. Thus, what remains is determining whether the circuit court erroneously exercised its discretion. Whether phrased in terms of "a significant adverse impact," as articulated by the circuit court, or in terms of a "direct and currently present" danger, as articulated by William, we conclude that the evidence supports the circuit court's exercise of discretion.

¶18 The circuit court's oral and written comments reflect that it was concerned both about the children's safety and their mental health. The court found that Dawn was an exotic dancer, whom William met at a strip club, with longstanding and substantial drug and alcohol problems, including cocaine addiction. The court found that Dawn had not been able to stay "clean and sober"

and that she had numerous police contacts. The court relied on incidents of domestic violence in July 2002 involving Dawn and leading to William's arrest for battery and disorderly conduct. The court observed that William's children were present, but sleeping, during one of these altercations. The court expressed concern that Dawn did not have placement of her own children and that she had recently moved from Wisconsin to Florida and then from Florida to Connecticut. The court considered William's children's vulnerable ages—ten and twelve years old—and opined that contact with Dawn put the children at risk of exposure to the "drug culture." The court also believed that seeing their father in a relationship with a drug user sends a message to the children that it may be "okay to use drugs." Finally, although the court found that William was a "very adequate and caring" parent, the court also found that William's judgment was "clouded" when it came to Dawn.[5]

¶19 William takes issue with some of these findings, and we discuss his arguments below. Also, William directs our attention to testimony that is favorable to his abilities as a parent and to testimony suggesting that Dawn is not a danger to the children. Our task, however, is to look for reasons to sustain the circuit court, and that is not a difficult one, given the record before us.

[5] William complains that the circuit court improperly relied on a belief that the modification hearing included testimony that one of Dawn's children called the police because the child thought Dawn was locked in a bathroom using drugs. The court inferred from this testimony that if Dawn "does not have enough control to not use drugs in the presence of her children, she will not be able to control the addiction and may well use drugs in the presence of [William's] children." But William points out that there was no such testimony. We agree. When Pamela's attorney asked a question on this topic, William's attorney objected, the court went off the record, and, when questioning resumed, Pamela's attorney moved on to a different topic. Therefore, we will ignore this inference by the circuit court.

¶20 First, the circuit court's finding that Dawn has had "numerous contacts with the police over the past several years" is supported by Pamela's testimony at the hearing that she had read "numerous police reports" and her assertion that there was a "huge history of a lot of police records" involving Dawn.[6] In addition, a Wisconsin Circuit Court Access report was submitted at the hearing. The report shows that from November 1998 until July 2003, shortly before Dawn moved to Florida, thirteen court actions were filed against Dawn. These actions include two criminal misdemeanors, one criminal traffic, five non-criminal traffic, two non-traffic ordinance violations, and three small claims actions. We note that the report of court actions only reflects police contacts that resulted in charges. Thus, the fact that there are just three criminal charges against Dawn does not undercut the reasonable inference that Dawn had several other police contacts.

¶21 Second, the record supports the reasonable inference that Dawn's addiction problems were the source of serious friction between William and Dawn, causing William, on at least one occasion, to strike Dawn and, on multiple occasions, to temporarily end his relationship with Dawn. Pamela testified that William's relationship with Dawn was an "on-and-off again relationship" with lots of struggles. William's own testimony indicates that he stopped permitting the children to see Dawn because of Dawn's problems. Indeed, just two months prior to the modification hearing, William had plans to have Dawn move in with him, but then changed his mind because of Dawn's failure to maintain participation in a

[6] The police reports themselves are in the record, but they were not admitted at the modification hearing and we do not consider them. Rather, we consider only Pamela's assertion that Dawn is the subject of numerous police reports because there was no objection to this testimony.

formal drug rehabilitation program. In July 2002, William was charged with battery and disorderly conduct based on two altercations with Dawn, occurring approximately one week apart. Dawn's children were present during both altercations. During the first incident in July, William's children were present, but sleeping. According to Pamela, after the events of July 2002, William kept the children and Dawn apart until November 2003, when William told Pamela that he no longer saw a problem with Dawn being around the children "for a few hours here and there." William told Pamela that his change of mind occurred because Dawn had gone from being a "daily crack user to an occasional [user]." William told Pamela that this was the last time he was going to give Dawn a chance.

¶22 Third, as of the time of the modification hearing, there was no reason to believe that Dawn had her addiction problems under control. William's testimony and his statements, as related by Pamela, show that Dawn abused alcohol and cocaine throughout the time he knew her. According to William's testimony, Dawn had been "clean" for only two months prior to the hearing. Also, William himself did not believe that Dawn was in effective drug treatment. Dawn had told William that she was willing to go into a formal drug treatment program and, under those circumstances, William thought it would work for Dawn to move in with him. But when Dawn changed her mind and "decided to stay with the approach [she was] taking with the hypnotherapy, with the daily prayer and Bible reading, … [William] decided that that would not work out."

¶23 Fourth, the severity of Dawn's drug problems is evidenced by the fact that she relinquished placement of her own two children and moved around the country in the months leading up to the modification hearing. At the time of the modification hearing, one of Dawn's children was living with the child's father in Stoughton and one was living with Dawn's grandmother in Janesville.

According to William, Dawn's children were not living with her because of Dawn's drug use "last year and prior." Sometime before November 26, 2003, Dawn moved to Florida, telling William it was too cold in Wisconsin and that she needed a fresh start. Dawn moved from Florida to Connecticut in early January 2004, and was living there at the time of the April 2004 modification hearing. William did not know whether Dawn planned to move back to Wisconsin. There was no indication in the testimony that Dawn was prepared to regain placement of her own children.

¶24 Finally, much of William's own testimony is a double-edged sword. In his attempt to show that he was appropriately dealing with Dawn's addictions, William made it clear that he considered Dawn unstable and potentially dangerous to the children. At the time of the modification hearing, William thought the children should not have contact with Dawn unless he was present. He also testified he would not let the children ride in a car that Dawn was driving. William testified that he had no intention of living with Dawn in the future. He said that Dawn would need to show him that she is "serious about addressing her drug problem and that this approach she's taking is going to work over the longer term before I could give any chance in our relationship." William characterized Dawn's drug use as a "huge problem for her."

¶25 William makes several specific arguments challenging various aspects of the circuit court's decision. He states there is no evidence that prior contact with Dawn, including a period of time when Dawn lived with William, harmed the children. It is true that no one testified about the effect Dawn had on the children, but that does not mean the children were unaffected or, more to the point, that they were not at serious risk of harm.

¶26 William asserts there is no suggestion that he is not a fit parent or that he will not act to shield his children from the negative aspects of Dawn's addictions. To the contrary, William notes, the circuit court found he is a "very adequate and caring" parent. But, as recounted above, the circuit court also found that William's judgment regarding Dawn is "clouded." It is all too common that parents, who are otherwise caring and careful, make poor relationship choices that put their children at risk. Further, William's argument that he is able to shield the children from Dawn's drug use fails to come to grips with the fact that Dawn is unlikely to warn William that she is about to have a relapse. The circuit court could reasonably conclude that Dawn was still unstable and that William would not be able to reliably anticipate Dawn's bad behavior and protect the children from it.

¶27 William takes issue with the circuit court's reasoning that the children might get the message that William's relationship with a drug user means that it is okay to use drugs. William argues that this reasoning is flawed because the circuit court's order does not prohibit William from having a relationship with Dawn and does not prohibit the children from knowing about the relationship. Thus, according to William, the order does not reach the children's knowledge that their father is in a relationship with a drug user. But the circuit court could reasonably conclude that there is a difference between knowing about the relationship and being directly exposed to it. The court could also reasonably infer that, if the children knew a judge had ordered them not to see Dawn because of her drug problems, it would be less likely that they would get the wrong message.

¶28 Although we may not have made the same choice, we conclude that the record supports the circuit court's discretionary decision to impose the no-contact provision.

B. Remedial Sanction under Chapter 785

¶29 About three months after the court imposed the no-contact provision, Pamela moved the court for a "remedial contempt" order. In an affidavit attached to that motion, Pamela asserted that William violated the no-contact modification by arranging for both Dawn and the children to be present at a family reunion in Nebraska.

¶30 At the hearing on Pamela's contempt motion, the testimony and argument largely addressed whether William intentionally violated the no-contact modification or whether he thought he was keeping within the letter of the order. The circuit court found that William intentionally violated the order. That finding is not contested on appeal.[7]

¶31 The court did not impose a forfeiture or jail time immediately for the violation. Instead, the court ordered that the next time William permitted contact between the children and Dawn, William would serve 48 hours in jail, from a Friday evening to a Sunday evening, without work release privileges. William challenges this order. To better understand the court's order and why we agree with William that we must reverse it, we recount the arguments of the parties and the court's reasoning.

¶32 At the contempt hearing, William's attorney argued that they should not proceed because Pamela was alleging a *past* violation, not a continuing

[7] The violation the court found was not the one alleged by Pamela in her motion. The court found that William violated the order by permitting both the children and Dawn to attend a back-yard cookout. Because of this, William also argues that imposition of the sanction was improper because he received insufficient notice. Because we reverse the contempt sanction order for other reasons, we need not address the notice issue.

violation. His attorney argued that jailing William would not qualify as a remedial sanction because William would not have the "keys to the jailhouse door." That is, jail time would punish William for a past non-continuing violation that he could not terminate while in jail. William's attorney argued that such jail time would be purely punitive and, under WIS. STAT. §§ 785.01(2) and 785.03(1)(b), Pamela was not a party authorized to initiate a proceeding for a punitive sanction.

¶33 Pamela's attorney argued that Pamela was not seeking a punitive sanction, but the attorney also did not specify the sanction sought. Pamela's attorney argued only that the purpose of the motion was to terminate a continuing contempt of court, that is, to stop William from permitting contact between the children and Dawn. Similarly, the children's guardian ad litem did not specify a possible remedial sanction, but advised the court that it could proceed because "we know that regularly we" come before a court asking it to find someone in contempt for failing to abide by parts of divorce judgments, such as failing to return the children on time or some other "past incident," and the parties in such a situation do not rely on the district attorney or the Attorney General to bring those actions.

¶34 The circuit court determined that it could proceed and treat Pamela's motion as one for a remedial sanction. After finding William in contempt for a past violation and informing him that he would spend a weekend in jail if he again violated the no-contact provision, the court explained that jail is a permissible sanction because William committed a contempt of court and imprisonment is an available remedial sanction under WIS. STAT. § 785.04. Addressing William's concern that he did not have the "keys to the jailhouse door," the court concluded: "[William] can purge that sanction by continuing in compliance with the order."

Plainly, the circuit court's purpose was to deter William from violating the "no contact" placement condition in the future.

¶35 We first observe that the circuit court properly concluded that William committed a contempt of court. William intentionally disobeyed a court order, and such conduct fits the definition of contempt of court under WIS. STAT. § 785.01(1)(b). William does not challenge the circuit court's finding that he disobeyed a court order when he permitted his children to have contact with Dawn.

¶36 WISCONSIN STAT. § 785.01(3) defines "remedial sanction" as "a sanction imposed for the purpose of terminating a continuing contempt of court." Thus, the question here is whether the court was authorized to issue a remedial sanction order providing that, if William again allowed contact between the children and Dawn, William would serve 48 hours in jail.[8]

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[8] WISCONSIN STAT. § 785.04(1) lists available remedial sanctions:

> **(1)** REMEDIAL SANCTION. A court may impose one or more of the following remedial 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.

(continued)

¶37 The court's apparent reasoning was that William had the keys to the jailhouse door in the sense that he could avoid jail altogether by simply complying with the order. However, under the order, if William is sent to jail for a future violation, he will not be in jail for a continuing violation. Instead, he will be in jail for what will be, at the time he enters jail, a past violation. During time William is in jail, he would not even have physical placement of the children. Consequently, although the court's threat of jail time may have a deterrent effect on future violations, the imposition of the jail time would be punishment for a *past* violation and, therefore, not a remedial sanction. In the words of the statute, the jail time would not be a "sanction imposed for the purpose of terminating a continuing contempt of court." WIS. STAT. § 785.01(3).

¶38 In ***State ex rel. N.A. v. G.S.***, 156 Wis. 2d 338, 456 N.W.2d 867 (Ct. App. 1990), we explained that imprisonment for a defined period of time does not qualify as a remedial sanction because a predetermined amount of imprisonment is not imposed for the purpose of terminating a continuing violation:

> If the sanction provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order." The conditional nature of the punishment renders the relief civil in nature because the contemnor "can end the sentence and discharge himself at any moment by doing what he had previously refused to do."
>
> Remedial contempt looks to present and future compliance with court orders, and the sanction must be purgeable through compliance. The purge provision must clearly spell out what the contemnor must do to be purged,

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> (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.

> and that action must be within the power of the person. *Thus, it is often said that contemnors "hold the keys to their own jails."*
>
> A sentence limited to imprisonment for a definite period is permitted only in a punitive sanction proceeding. The unconditional nature of the punishment renders the relief criminal in nature because the defendant "cannot undo or remedy what has been done nor afford any compensation" and the contemnor "cannot shorten the term by promising not to repeat the offense."

Id. at 341-42 (citations omitted; emphasis added).

¶39 Here, the circuit court's order plainly contemplates that if William, on some future occasion, permits contact between the children and Dawn, and the circuit court finds that such contact has occurred, William will spend a weekend in jail. We must reverse the order because the jail time would not be remedial in nature.

C. Attorney Fees Relating to the Contempt Proceeding

¶40 After the circuit court found William in contempt for allowing contact between the children and Dawn, the court ordered William to pay Pamela's attorney's fees relating to the contempt proceeding.[9] WISCONSIN STAT. § 785.04(1)(a) authorizes courts to order "[p]ayment 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." This provision has been interpreted as authorizing an award of attorney fees and other litigation costs against the party found in contempt. *See*

[9] The circuit court also ordered William to pay the fees of the guardian ad litem, but William's appellate brief effectively ignores this issue. The only mention of the guardian ad litem fees we find is in William's statement of the issues presented. There is no mention of the fees in the fact or argument sections of his brief. Accordingly, we do not separately address the guardian ad litem fees.

Town of Seymour v. City of Eau Claire, 112 Wis. 2d 313, 320, 332 N.W.2d 821 (Ct. App. 1983).

¶41 William agrees that, in a contempt action under WIS. STAT. ch. 785, a court may award attorney fees to the prevailing party in an amount equal to the reasonable fees incurred prosecuting the contempt. But William argues that the award of attorney fees was not proper here because the conduct Pamela alleged, both prior to and during the contempt hearing, was not amenable to a remedial sanction under ch. 785.

¶42 Pamela's contempt motion alleged a specific past violation involving a family reunion. At the contempt hearing, Pamela introduced evidence of a more recent incident in which William permitted contact between the children and Dawn in his back yard. As we have seen, these were not continuing violations that could be cured with the remedial sanction of imprisonment. Apart from the attorney fees award itself, authorized by WIS. STAT. § 785.04(1)(a), nothing in the record, including the arguments of Pamela on appeal and her attorney before the circuit court, suggests that William's contempt could be addressed with any remedial sanction. We think it apparent that if throughout a contempt proceeding it appears that the only available sanction under the contempt statute is paying the litigation costs of the party alleging contempt, there is no point in holding a contempt hearing, and litigation costs should not be imposed on the party alleged to be in contempt.[10] If a party is to be subjected to a statutory contempt proceeding, it seems obvious that there must be a statutory remedial sanction that

[10] At least not under the authority of the contempt statute, a topic we address in ¶¶44 and 45.

could possibly flow from the proceeding, apart from an award of costs to the party alleging contempt.

¶43 We stress that our conclusion is based on the fact that there was no suggestion here, either before or during the contempt hearing, that there was an available remedial sanction, apart from ordering William to pay Pamela's litigation costs. In other actions, it might appear that there are available remedial sanctions, even if such does not turn out to be the case. We do not address such a situation.

¶44 We conclude that the circuit court was not authorized to award attorney fees under the contempt statutes, but we do not conclude that the court was powerless to order William to pay Pamela's litigation costs relating to the proceeding. As discussed elsewhere in this opinion, the circuit court properly amended the placement order to include the no-contact provision. When a dispute arose over the meaning of this order, and when Pamela believed that William was violating the order, she was entitled to bring the dispute and alleged violation to the circuit court's attention and have the dispute resolved. For the most part, that is what happened here. After hearing testimony about William's behavior, and after hearing William's argument as to why his behavior did not violate the no-contact order, the court told William that it rejected his "Clintonesque" reading of the order and found that William intentionally violated the order when he invited Dawn to a back-yard event attended by his children. This action reduced the likelihood that William would commit additional violations.

¶45 We also observe that the hearing might ultimately lead to other action by the court. For example, under appropriate facts, a court has the authority to eliminate placement time with a parent who does not comply with placement

conditions. *See* WIS. STAT. § 767.325(4) ("[A] court may deny a parent's physical placement rights at any time if it finds that the physical placement rights would endanger the child's physical, mental or emotional health.").

¶46 Although treated as a contempt proceeding by the court and the parties, much of the substance of the proceeding was appropriate as a non-contempt proceeding. We conclude, therefore, that even if Pamela had not cast her motion as one for remedial contempt, it would have been appropriate for her to bring William's alleged violation to the court's attention and have the court resolve the party's dispute. This being true, ordering attorney fees relating to the proceeding may be appropriate under the court's general authority to apportion attorney fees in family law matters. *See* WIS. STAT. §767.262; ***Holbrook v. Holbrook***, 103 Wis. 2d 327, 343, 309 N.W.2d 343 (Ct. App. 1981). We remand for the circuit court to exercise its discretion whether to award attorney fees under § 767.262.

Conclusion

¶47 We affirm the circuit court's placement modification order prohibiting William from allowing contact between the children and Dawn. We reverse the court's order providing that the next time William violates the no-contact provision in the placement order, he will serve 48 hours in jail. We also reverse the award of attorney's fees because the circuit court incorrectly relied on its authority to award attorney fees under the contempt statutes. However, we remand for further proceedings on the attorney fees issue because the circuit court may choose to exercise its discretion to award attorney fees under WIS. STAT. § 767.262.

¶48 No costs 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.