COURT OF APPEALS DECISION DATED AND FILED

May 17, 2006

Cornelia G. Clark
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. 2005AP3065

Cir. Ct. No. 1990PA506

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

IN RE THE PATERNITY OF STEPHANIE C. DOBNER:

EUGENE MAKOWKA,

PETITIONER-RESPONDENT,

V.

KIM DOBNER,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Reversed and cause remanded with directions*.

¶1 ANDERSON, J.[1] Kim Dobner appeals from orders holding her in contempt for disobedience of a physical placement order, imposing six months in the county jail as a remedial sanction and allowing her to purge the contempt finding by returning the parties' teenage daughter to Eugene Makowka. She faults the court for finding her in contempt despite her numerous defenses, violating her due process rights by failing to ascertain if she wished to be represented by counsel and informing her she could be imprisoned if found in contempt, and denying her the opportunity to appear by telephone at the hearing on her motion to vacate the finding of contempt. At the minimum, due process requires the circuit court to conduct an evidentiary hearing to determine if Dobner had the ability to comply with the physical placement order and the reasons for her failure to comply with the order. We reverse the orders because Dobner was not afforded that evidentiary hearing.

¶2 The child was born June 17, 1989. Makowka voluntarily admitted that he was the father and a judgment of paternity was entered on October 12, 1990. The judgment provided that the parties were to share joint legal custody and primary physical placement was with Dobner. On May 3, 1993, an order transferring physical placement to Makowka was entered; Dobner was awarded periods of temporary physical placement, including four to six weeks every summer.

¶3 At the end of the 2005 summer physical placement, Dobner allegedly refused to return the child to Wisconsin. In response, Makowka filed an

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

order to show cause. A hearing was conducted on September 22, 2005. Makowka and his attorney appeared in person; Dobner appeared pro se by telephone. Makowka's attorney made a statement alleging that Dobner refused to take the child to the Las Vegas airport for a prearranged flight home. Dobner responded that the child did not want to return to Wisconsin because she had been the victim of a "horrific crime" while residing with her father. Without conducting an evidentiary hearing, the circuit court stated:

> Let's understand a few things, Ms. Dobner. Sixteen year olds have rights in Wisconsin. We appoint attorneys for them, but they don't run my court with their wishes. This child must be returned to Wisconsin immediately. You are in contempt of my court order, since I'm the family judge, for not returning that child. The penalties for contempt under Chapter 785 of our statutes is six months in jail, $2,000 fine or any combination thereof.[2] I expect the child to be on an airplane or any way you can get that child back as soon as possible until there's a further court order.

---

[2] WISCONSIN STAT. § 785.04 provides:

> **Sanctions authorized. (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.
>
> (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.

> If you wish to start a proceeding in which to modify the placement of this child, do so immediately. The child will be represented by an attorney in this court. You may get an attorney of your own choice. You and the child may not have the same attorney.
>
> ….
>
> Based on your statements, I am finding you in contempt of court. You must return the child immediately as I've ordered. Failure to return the child, you may be imprisoned or fined, it's my decision at this point. You will be incarcerated in the Racine County Jail for six months until you purge my—your contemptuous acts and you may purge it by returning the child pursuant to the court orders.

¶4 A Remedial Contempt Order, memorializing the circuit court's statements, was entered the same day. Dobner then hired an attorney who filed a motion to vacate the finding of contempt. After a brief hearing the circuit court denied the motion.[3] Dobner appeals.

¶5 In her appeal, Dobner asserts three errors. First, she asserts that "the trial court abused its discretion by finding [her] in contempt despite the defenses she raised at [the] hearing and despite the new factor of being confined to a walker that she raised in her motion to vacate [the] contempt order."[4] Second, she complains the court violated her due process rights by proceeding with the contempt hearing without ascertaining if she waived her right to be represented by counsel and informing her that she could be incarcerated if found to be in contempt. Finally, she contends that the court erroneously exercised its discretion

[3] Dobner did not appear at the hearing because the circuit court refused to approve her appearance by telephone.

[4] The terminology used when reviewing a trial court's discretionary act has been changed from "abuse of discretion" to "erroneous exercise of discretion" but the substance of the standard of review remains the same. ***City of Brookfield v. Milwaukee Metro. Sewerage Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

by refusing to permit her to appear telephonically at the hearing on her motion to vacate the finding of contempt.

¶6 We begin with our recent summary of contempt in ***Frisch v. Heinrichs***, 2006 WI App 64, ¶¶26-27, __ Wis. 2d __, __N.W.2d __:

> Contempt of court is disobedience to the very authority, process or order of a court, and includes acts such as the refusal to produce a record or document. Contempt can be punished in two ways. A punitive, or criminal, sanction punishes a past contempt of court for the purpose of upholding the authority of the court. A punitive sanction also requires that a district attorney, attorney general or special prosecutor formally prosecute the matter by filing a complaint and following procedures set out in the criminal code. It is imposed less to address the private interests of a litigant than to discipline a party for contumacious conduct.
>
> A remedial, or civil, sanction, by contrast, is imposed to ensure compliance with court orders for the purpose of terminating a continuing contempt of court. It comes about not at the behest of a prosecutor, but upon motion of the party aggrieved by the noncompliance. In addition, a remedial contempt sanction must be purgeable through compliance with the original court order. (Citations omitted.)

¶7 We will first address Dobner's due process arguments. Relying on ***State v. Pultz***, 206 Wis. 2d 112, 556 N.W.2d 708 (1996), she argues that before a court can proceed with a contempt hearing, it must inform a party appearing pro se that he or she is entitled to counsel and, if indigent, that counsel will be paid for by the court. In addition, she argues that the court must warn the party of the potential of incarceration. We disagree because ***Pultz*** is limited:

> We reaffirm that when a defendant's liberty is threatened in a *remedial contempt action brought by the government*, the court must advise the defendant of his or her due process right to appointed counsel, if the defendant cannot afford counsel.

Id. at 131 (emphasis added). This is a private action to enforce an order modifying physical placement in which no governmental entity has an interest. As a result, Dobner is not entitled to the forewarnings required when a remedial contempt action is initiated by a governmental entity. Because we are an error-correcting court, we cannot accept Dobner's invitation to radically expand a potential contemnor's due process rights. *See* ***Winkelman v. Kraft Foods, Inc.***, 2005 WI App 25, ¶25, 279 Wis. 2d 335, 693 N.W.2d 756, *review denied*, 2005WI 134, 282 Wis. 2d 720, 700 N.W.2d 272.

¶8 Dobner raises another due process concern, albeit in context of her complaint that the circuit court erroneously exercised its discretion by finding her in contempt despite her numerous defenses. She maintains that the trial court failed to articulate findings based upon sworn testimony. She points out that in lieu of an evidentiary hearing, the court entertained presentations from the parties. She cites ***Howard v. Howard***, 269 Wis. 334, 69 N.W.2d 493 (1955), as a case in which the supreme court "reversed contempt findings when the record was in such a state that the essential finding of willful contempt could not have been made."

¶9 In ***Evans v. Luebke***, 2003 WI App 207, ¶24, 267 Wis. 2d 596, 671 N.W.2d 304, we reversed a finding of remedial contempt where the circuit court had not conducted an evidentiary hearing:

> Upon the filing of a motion seeking remedial sanctions for contempt, an on-the-record hearing must be held "for due process purposes." *See* ***Mercury Records Prods., Inc. v. Economic Consultants, Inc.***, 91 Wis. 2d 482, 504, 283 N.W.2d 613 (Ct. App. 1979). The evidence adduced at the hearing must support resultant findings of fact that the contemnor engaged in "intentional … [d]isobedience, resistance or obstruction of the authority, process or order of a court." WIS. STAT. § 785.01(1)(b). No evidentiary proceedings were conducted in this case, nor were facts stipulated to on the record that would support the necessary findings. We conclude that the lack of evidentiary

> proceedings, as well as the absence of proper findings to support the imposition of sanctions, violate both the requirements of ch. 785 and of due process. *See* WIS. STAT. § 785.03(1)(a) ("The court, *after notice and hearing*, may imposе a remedial sanction …." (emphasis added)); ***Dennis v. State***, 117 Wis. 2d 249, 261, 344 N.W.2d 128 (1984) ("[S]tatutory requirements and due process require that the defendant be aware of what he [or she] must answer to so that he [or she] can be prepared to offer proof and explanation showing his [or her] good faith efforts to comply with the court's orders."). (Footnote omitted.)

¶10 As in ***Evans***, we conclude that the circuit court failed to follow procedures under WIS. STAT. § 785.03(1)(a) for imposing remedial sanctions. "Those procedures require, at a minimum, notice that sanctions for contempt are being sought, and in the absence of stipulated facts, an evidentiary hearing sufficient to permit the court to make specific findings regarding whether the alleged contemnor intentionally disobeyed its orders." ***Evans***, 267 Wis. 2d 596, ¶25.

¶11 On remand, if Makowka wishes to pursue his claim that Dobner is in noncompliance with the physical placement order, there must be timely notice to her that reasonably conveys information about the hearing so she can prepare a defense and make objections. *See* ***Schramek v. Bohren***, 145 Wis. 2d 695, 704, 429 N.W.2d 501 (Ct. App. 1988). The court must conduct an evidentiary hearing at which Makowka has the burden to prove to the court that Dobner has not complied with the physical placement order. Once Makowka has met his burden, it is incumbent on Dobner to offer a satisfactory explanation of the noncompliance.[5] ***Kaminsky v. Milwaukee Acceptance Corp.***, 39 Wis. 2d 741, 159

---

[5] A finding of remedial contempt requires the thing ordered to be in the power of the person ordered. ***Town of Seymour v. City of Eau Claire***, 112 Wis. 2d 313, 318, 332 N.W.2d 821 (Ct. App. 1983).

N.W.2d 643 (1968). At the conclusion of the hearing, the court must make findings of fact supported by competent evidence that Dobner engaged in "intentional … [d]isobedience, resistance or obstruction of the … order of a court." WIS. STAT. § 785.01(1)(b).

¶12 Although we have disposed of this case, we will address Dobner's complaint that the circuit court erroneously exercised its discretion when it denied her request to appear telephonically, because it is likely to recur. Whether or not to permit Dobner to appear by telephone at subsequent hearings is within the sound discretion of the circuit court. *See* ***Town of Geneva v. Tills***, 129 Wis. 2d 167, 176, 384 N.W.2d 701 (1986). In the exercise of that sound discretion, the court is guided by WIS. STAT. § 807.13(2):

> **(2)** EVIDENTIARY HEARINGS. In civil actions and proceedings, including those under chs. 48, 51, 55 and 880, the court may admit oral testimony communicated to the court on the record by telephone or live audiovisual means, subject to cross-examination, when:
>
> (a) The applicable statutes or rules permit;
>
> (b) The parties so stipulate; or
>
> (c) The proponent shows good cause to the court. Appropriate considerations are:
>
> 1. Whether any undue surprise or prejudice would result;
>
> 2. Whether the proponent has been unable, after due diligence, to procure the physical presence of the witness;
>
> 3. The convenience of the parties and the proposed witness, and the cost of producing the witness in relation to the importance of the offered testimony;
>
> 4. Whether the procedure would allow full effective cross-examination, especially where availability to counsel of documents and exhibits available to the witness would affect such cross-examination;

> 5. The importance of presenting the testimony of witnesses in open court, where the finder of fact may observe the demeanor of the witness, and where the solemnity of the surroundings will impress upon the witness the duty to testify truthfully;
>
> 6. Whether the quality of the communication is sufficient to understand the offered testimony;
>
> 7. Whether a physical liberty interest is at stake in the proceeding; and
>
> 8. Such other factors as the court may, in each individual case, determine to be relevant.

By the Court.—Orders reversed and cause remanded with directions.

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