COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP619 **Cir. Ct. No. 2003FA153**

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

IN RE THE MARRIAGE OF:

TONY K. STEINMANN,

PETITIONER-RESPONDENT,

V.

ROSE M. MENNELLA, F/K/A ROSE M. STEINMANN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

¶1 NETTESHEIM, J.[1] Rose Mennella, f/k/a Rose Steinmann, was jailed for contempt for willful noncompliance with the terms of the property division the circuit court ordered after she and Tony Steinmann were divorced. On appeal, Rose contends the court's contempt finding was error because the court: (1) refused to consider all the evidence she sought to introduce explaining why she had not complied with the judgment of divorce, (2) wrongly found her able to pay, (3) issued improper purge conditions, and (4) used remedial contempt in a punitive fashion.

¶2 We placed this appeal on hold pending resolution of Rose's appeal of the underlying judgment of divorce, No. 2005AP1588. By an opinion issued this same day, we have affirmed that judgment in its entirety. We now affirm this order as well because Rose's proffered justifications for noncompliance all relate to her attempts to negotiate an uncertain IRS liability that is irrelevant to her obligation to comply with the divorce judgment and, because we conclude the circuit court's determinations were proper regarding Rose's ability to pay, the purge conditions and remedial contempt.

BACKGROUND

¶3 Rose's and Tony's ten-year marriage was dissolved by divorce in December 2004. During their marriage, the parties acquired numerous valuable assets, including waterfront property on Lake Michigan and Marco Island, Florida. Much of their lifestyle was made possible by Rose's solely owned business, Dairy Source, Inc. Early in their marriage, the parties executed a Limited Marital

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

Property Classification Agreement which provided, among other things, that all assets owned by each party were to remain that party's individual property.

¶4 The written divorce decision was rendered April 26, 2005. The circuit court divided the parties' property, awarding nearly $3 million to each. Some of the assets simply had to be divided to accomplish the property division, others first had to be sold, and still others were to be sold and the proceeds split equally if within thirty days Rose did not exercise the option of buying out Tony's share.

¶5 Significant to this appeal is an IRS audit, of which the circuit court was aware, that still was ongoing at the time of the divorce. The audit came about as a result of a $1.35 million settlement the parties received in a lawsuit involving Tony, Rose and Dairy Source and Tony's former employer. The parties did not report the settlement to the IRS. At the time of the divorce, the tax, interest and penalties owed the IRS and the Wisconsin Department of Revenue stood at approximately $4.5 million.[2]

¶6 Rose's tax attorney, Dan Geraghty, filed an appeal with the IRS in November 2004 and met twice with an IRS appeals officer in mid-2005. Geraghty was able to negotiate the tax liability due the IRS down to approximately $1.4 million if the parties would agree to an immediate settlement. Rose's divorce attorney said the goal was to "come up with a plan to pay the IRS utilizing the marital estate."

[2] At a later hearing, Rose testified that another issue that arose on the IRS audit contributed to the amount of the tax liability.

¶7 On June 6, 2005, Rose moved for reconsideration of the divorce judgment and for a stay pending appeal. The circuit court summarily denied her motion and suggested she might request a stay from the court of appeals. On June 16, Rose filed a Notice of Appeal of the divorce judgment, and filed motions in the circuit court and the court of appeals for a stay pending appeal. In August, both courts denied the motions.

¶8 On January 4, 2006, Tony sought a contempt order, alleging Rose had refused to comply with the divorce judgment and had impeded the sale of the waterfront properties by filing a lis pendens on them. Rose responded with motions for a stay pending appeal, for reconsideration and for an order directing the sale of property for tax obligations. She also sought relief from the judgment since, she asserted, the full extent of the tax liability now was known. Rose also moved for Judge Gibbs to recuse himself because, among other reasons, she believed he had "uncontrollable anger" toward her for not following the order to sell her home.

¶9 The contempt hearing was held on February 3 and 16, 2006. The court denied the recusal motion at the outset but declined to address the remaining motions because only Tony's Order to Show Cause had been scheduled. Rose's attorney had filed the motions without formally scheduling them with the court, a practice Rose's attorney had been warned against. The court therefore limited Rose to presenting a defense.

¶10 As to the contempt, Rose admitted that she had not yet complied with numerous provisions of the divorce judgment. For example, she had not yet: listed either waterfront property for sale; executed a quitclaim deed on a boat slip awarded to Tony; taken any action to transfer Tony's fifty percent interest in a

Thrivent financial fund; made any equalization payments as to the Thrivent fund or any of the personal property; liquidated the Corvette, SUV or pontoon boat and still had them in her possession; given Tony possession of the personal items awarded him; or made any payment toward credit card debt. She also had filed a lis pendens on the waterfront properties and on the boat slips on the advice of her divorce and tax attorneys and the IRS appeals officer. Rose maintained that she was not willfully defying the court's orders regarding property division but only was trying to preserve the marital estate so as to satisfy the tax debt in an orderly manner. She testified that she now was prepared to abide by the mandates of the divorce judgment.

¶11 The circuit court rejected her defense as "ridiculous." It concluded that Rose simply was stalling and had deliberately opted not to follow the judgment because she had determined it would be to her advantage "to go a different way." The court implicitly found that she would have the ability to pay if she would "[s]ell these things" as she had been ordered. The court thus found her in contempt and sentenced her to an immediate six-month jail term with work-release privileges, subject to numerous purge conditions.

¶12 Rose moved for a stay and for release from jail pending appeal. At a hearing on the motion on April 12, 2006, Rose testified that she had signed a listing contract for the Marco Island lot but had not lifted the lis pendens. The court denied the motion. Rose appeals.

DISCUSSION

¶13 In January 2006, Tony filed the order to show cause for contempt, claiming that Rose did virtually nothing since the April 2005 judgment of divorce to substantively comply with its property division dictates. Rose contends that the

circuit court's contempt finding was erroneous on several grounds, namely that it (1) deprived her of her statutory and due process rights to show the contempt was not willful, (2) wrongly found her able to pay, (3) levied purge conditions that contradicted the divorce judgment and the evidence, and (4) improperly used remedial contempt to punish her. We address each in turn.

¶14 Contempt of court is intentional disobedience to the authority, process or order of a court. WIS. STAT. § 785.01(1)(b). A person may be held in contempt for failure to pay where that failure is willful and contemptuous and not the result of an inability to pay. ***Van Offeren v. Van Offeren***, 173 Wis. 2d 482, 498, 496 N.W.2d 660 (Ct. App. 1992). We review a circuit court's use of its contempt power to determine whether the court properly exercised its discretion. ***Benn v. Benn***, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999).[3] Determining the type of remedial sanctions to impose for contempt also is a discretionary determination. ***Id.***; *see also* WIS. STAT. §§ 785.02 and 785.04(1).

¶15 Rose first argues that the circuit court's exclusion of some of her evidence explaining why she had not complied with its order effectively abridged her due process and statutory rights to a hearing. *See* ***Evans v. Luebke***, 2003 WI App 207, ¶24, 267 Wis. 2d 596, 671 N.W.2d 304 (due process entitles an alleged contemnor to an on-the-record hearing), and WIS. STAT. § 785.03(1)(a) (remedial sanction may be imposed after notice and hearing). She asserts that the court

[3] Citing ***Evans v. Luebke***, 2003 WI App 207, ¶16, 267 Wis. 2d 596, 671 N.W.2d 304, Rose asserts that whether the court followed proper procedures in exercising its contempt power is a question of law to be reviewed de novo. ***Evans*** involved determining whether WIS. STAT. § 805.03 or WIS. STAT. ch. 785 authorized the court to find the alleged contemnor in contempt, and so required the reviewing court to engage in statutory construction. ***Evans***, 267 Wis. 2d 596, ¶¶18-20. Here, however, Rose's challenge really centers only on whether the circuit court properly exercised its discretionary contempt power under ch. 785.

excluded her evidence relating to willfulness, refused to hear her pending motions regarding the tax liability and made conclusions without hearing proffered evidence.

¶16 We reject out of hand Rose's claim that she was denied a meaningful hearing. The contempt hearing spanned two days. The circuit court allotted the parties an hour on the first day and had "all day set aside" on the second. The continued hearing yielded a 220-page transcript. The transcripts of both are replete with Rose's testimony or her attorney's statements that her noncompliance was tied to ongoing negotiations in the IRS matter and attempting to justify the noncompliance as an effort to preserve the marital estate.

¶17 Nor are we persuaded that the circuit court's evidentiary rulings deprived Rose of presenting her case. Rose sought to admit "Exhibit 2," a series of correspondence with Tony and his counsel proposing certain negotiations to avoid risking withdrawal of the proposed IRS settlement. She argues that, had the court admitted the exhibit, it would have learned about the "extensive and ongoing discussions regarding the best manner to satisfy the … tax liability," that Tony initiated some of the negotiations, and that she was trying to "comply with the Judgment of Divorce *and* satisfy the unpaid tax liability" left "inexplicably" unapportioned in the judgment of divorce.[4]

¶18 A circuit court's determination to admit or exclude evidence is a discretionary decision that will not be upset on appeal absent an erroneous

[4] We addressed the last point in Rose's appeal from the judgment of divorce and will not revisit it here. We will say only that the circuit court observed, and we agreed, that the IRS audit was at that point incomplete and the circuit court was not obligated to speculate on its eventual outcome.

exercise of discretion. ***Kettner v. Kettner***, 2002 WI App 173, ¶14, 256 Wis. 2d 329, 649 N.W.2d 317. A court need not exhaustively analyze each piece of evidence, but it must articulate its findings and reasoning. ***Goberville v. Goberville***, 2005 WI App 58, ¶7, 280 Wis. 2d 405, 694 N.W.2d 503.

¶19 The circuit court permitted Rose's tax attorney, who authored some of the correspondence and negotiated the IRS settlement, to testify at length on the tax matter. Moreover, Rose already had afforded the court an opportunity to review most of the correspondence comprising Exhibit 2 when she included it as appendices to her affidavit in support of the motions the court declined to hear. The excluded exhibit simply would have reiterated that she had not complied with the judgment because she was trying to satisfy the tax liability.

¶20 The circuit court acknowledged the reality of the tax liability from the outset, but refused to indulge Rose's position that it excused her noncompliance:

> Maybe those [tax issues] are absolute legitimate concerns, but there's a Court Order here. There is no stay of that and unilaterally determining that you're not going to follow a Court Order and saying I'm justified because this is some sort of … shooting one's self in the foot … is not trying to comply.

The court then advised Rose:

> We are going to pick this up again on February 16th. I'm telling you now I expect this Order to be followed…. You've got thirteen days to work on it. Get working because when you come back in, the Order is the Order, the decision is the decision, and the Judgment is the Judgment.

The continued hearing demonstrated Rose's continued noncompliance aimed at "preserving [the marital estate] so that it could be disposed of in an orderly fashion in the face of the IRS claim." The court observed that Rose had other options

which simultaneously would have "resolve[d] the tax problem and compl[ied] with the judgment," but that she instead engaged in a deliberate strategy of "stonewalling" as she pursued a course of action she considered more advantageous to herself. We see no misuse of discretion.

¶21 We also conclude the circuit court acted within the bounds of its discretion regarding Rose's other motions. The court refused to hear them because Rose's attorney had not formally scheduled them with the court but himself had filled in the date and time to coincide with the scheduling of the contempt hearing. The court was not bound to consider these improperly filed motions. To ensure its efficient and effective functioning, a court has the inherent authority to sanction a party for failing to comply with procedural rules. *See* ***Halko v. Halko***, 2005 WI App 99, ¶13, 281 Wis. 2d 825, 698 N.W.2d 832; *see also* WIS. STAT. § 805.03 (a court may make such orders as are just in regard to a party's failure to comply with statutes governing procedure). We hold that none of these rulings constructively denied Rose a hearing. Moreover, Rose has not demonstrated what new or added information would have been introduced at a hearing on her other motions that was not presented in her defense of the contempt motion.

¶22 We now turn to whether Rose's defiance of the judgment was willful. *See* ***Van Offeren***, 173 Wis. 2d at 498. The circuit court had before it an order to show cause for contempt alleging that Rose had not complied with the dictates of the divorce judgment. Rose admits that her efforts went toward minimizing the tax obligation, but laments that while Tony has received in excess of $770,000 in cash and was awarded $2000 monthly maintenance, he has yet to shoulder any of the tax burden. Obeying a court order, even if one disagrees with

it, is not optional. We have already affirmed the property division in the underlying divorce case, No. 2005AP1588, deflating Rose's argument that uncertainty regarding apportionment of the tax liability called for a re-division of the marital estate. The sole issue on this contempt motion was whether Rose complied with the underlying orders, not whether she thought alternate terms were more equitable. Her push to work out what she felt was a fairer allocation of the IRS tab is relevant to the contempt hearing only in that it showed a purposeful disregard of her legal obligations. The court evidently did not, nor was it obliged, to accept Rose's testimony that she did not intend to defy its orders or that she thought she was in compliance. The credibility of witnesses and the weight to be attached to that evidence is a matter uniquely within the discretion of the finder of fact. ***Laribee v. Laribee***, 138 Wis. 2d 46, 54-55, 405 N.W.2d 679 (Ct. App. 1987). That implicit finding is supported in the record, and we will not disturb it. We easily affirm the circuit court's conclusion that Rose acted willfully.

¶23 The other aspect of a contempt finding is that the alleged contemnor's failure to comply may not be caused by an inability to pay. ***Van Offeren***, 173 Wis. 2d at 498. We disagree with Rose's contention that the circuit court took no evidence in that regard. Rose herself testified that her bank had approved a loan and that she would be able to accomplish it within a few days because "[the money is] there. I just [have] to get it from them." She also testified that she had sold nothing she was ordered to sell, leading the court to observe that her ability to pay was "entirely within her own control and her refusal to follow the Judgment of Divorce. There's plenty of money if you would have sold Marco." The proposed listing contract for the Marco Island property recited a selling price of $2.58 million. Rose defended her decision not to list the waterfront lots, saying she was fearful they would be saddled with an IRS lien.

However, Geraghty, her tax attorney, had testified that no lien had been placed against the property and there was no certainty that one would be. The court acknowledged "there's an IRS problem. I would say that the fastest way to take care of that is to get cash. The fastest way to get cash? Follow the Court Order. Sell these things." The record supports the finding that Rose's failure to comply was not driven by an inability to pay.

¶24 Rose next contends that the circuit court erred because it ordered purge conditions which contradicted both the judgment of divorce and the evidence at the contempt hearing. This argument also fails. A sanction need not be purgeable only through compliance with the original court order. *See* ***Diane K. J. v. James L. J.***, 196 Wis. 2d 964, 969, 539 N.W.2d 703 (Ct. App. 1995). A court instead may provide purge conditions as an alternative means for a contemnor to remove the sanction. ***Id.*** The purge conditions imposed by the court must be feasible and reasonably related to the cause or nature of the contempt, ***State ex rel. V.J.H. v. C.A.B.***, 163 Wis. 2d 833, 845, 472 N.W.2d 839 (Ct. App. 1991), and must be within the circuit court's discretion. ***Benn***, 230 Wis. 2d at 308. The purge conditions here abided by this law.

¶25 As an example of a contradictory purge condition, Rose contends the court found her in contempt for not giving Tony some of his personal property and allowed her to purge only by giving him the property even though the judgment awarded him only "the personal property in his possession." The judgment, however, incorporated the parties' marital agreement and it awarded Tony all of his individual property, which included "all personal effects." Rose also challenges the purge conditions on the basis of her testimony that she and Tony agreed on an alternate vehicle swap, that the boat slip has generated no rent, and that Tony has not honored a maintenance credit he was ordered to pay. However,

an alleged "behind-the-scenes" agreement, notably still not executed, does not translate into a misuse of the circuit court's discretion. The same must be said for Rose's argument about the lack of rental income for some limited period of time, and Tony's noncompliance with the judgment. Moreover, we note that this case was about Rose's—not Tony's—alleged contempt. The inescapable facts of this case showed that Rose had not complied with the judgment and her excuses were feeble and not credible.

¶26 Rose also argues that although she finally had signed a listing contract on the waterfront properties as ordered, the court then raised the bar. She says that the court virtually demanded that she give up her legal rights by requiring her to "either pay the cash [to Tony] or abandon her lis pendens to enable the sale of the properties." We disagree. The court plainly informed her that keeping the lis pendens was her right and her choice: "If you want to keep the lis pendens on there, be my guest. *It's your right*. If you think you can sell that, go for it. If you have to lift them to sell them, whatever. *You decide*." (Emphasis added.) It also cautioned her, however, that a property encumbered by a lis pendens may be difficult to sell:

> [Y]ou decide what you have to do to cooperate in the sale of these properties…. And when … I'm satisfied that there's a listing contract and that that property is in an actual posture to sell, then I will consider that condition purged; but, otherwise, you're paying the cash.

The circuit court simply spelled out Rose's options regarding this purge condition, including at what point it would be considered satisfied. This approach was well within the court's discretion.

¶27 Finally, Rose submits that the circuit court used remedial contempt to punish her. She contends remedial sanctions were inappropriate for "violations

that she promised to satisfy" or conditions with which she "was prepared to comply." Again we disagree.

¶28 Remedial contempt is imposed to ensure compliance with court orders. *See* WIS. STAT. § 785.01(3). The sanction must be purgeable either through compliance with the original court order or through a purge condition. ***Diane K. J.***, 196 Wis. 2d at 969. Punitive contempt, by contrast, is aimed at preserving a court's general authority. *See* § 785.01(2). While remedial contempt serves only to enforce the rights of a litigant, punitive contempt is used to discipline a party for its contumacious conduct. ***Diane K. J.***, 196 Wis. 2d at 969. Whether a court misuses its discretion by issuing one type of sanction in the other type of contempt proceeding is a question of law we review de novo. *See* ***id.*** at 968.

¶29 Although the contempt hearing was held nine months after the divorce decision, Rose admitted not yet: listing either waterfront property for sale; executing a quitclaim deed on the boat slip; transferring Tony's interest in the Thrivent fund; making equalization payments; liquidating the vehicles; giving Tony possession of the personal items awarded him; or making any payment toward credit card debt. Rose's noncompliance with the judgment was still ongoing at the time of Tony's motion for contempt. WISCONSIN STAT. § 785.01(3) permits the imposition of a remedial sanction "for the purpose of *terminating a continuing* contempt of court." (Emphasis added.) That Rose was "prepared" to do any of these things does not alter the fact that she had not done them. The contempt order was to address the enforcement of Tony's rights, not to punish Rose. The sanctions were properly remedial.

CONCLUSION

¶30 The issue at the contempt hearing was whether Rose had complied with the judgment of divorce and, if not, whether her refusal to reply was willful and not as a result of an inability to pay. We agree with the circuit court that the IRS matter was of little relevance to Rose's obligation to obey the judgment of divorce. We recognize that a potential tax liability of this magnitude is no trifle even, we imagine, to the well-heeled. We note, however, that the IRS audit came about as a result of a marital decision not to report as income a significant legal settlement. The chickens now have come home to roost. Rose's choice to ignore the court's valid judgment is no less willful simply because it is founded in an effort to negotiate a settlement and craft for herself a less painful way to satisfy the tax liability.[5]

By the Court.—Order affirmed.

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

[5] We would make the same observation if Tony had been found in contempt for failing to comply with the judgment. But one party's alleged contempt does not excuse the other's established contempt.