COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP841 **Cir. Ct. No. 2001FA6696**

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

IN RE THE MARRIAGE OF:

MARIA OKUNEVA RATH,

PETITIONER-APPELLANT,

V.

DAVID RATH,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Order reversed and cause remanded with directions.*

¶1 WEDEMEYER, J.[1] Maria Okuneva Rath appeals from an order finding her in contempt in a post-divorce family court proceeding. Rath contends

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06).

that the trial court erroneously exercised its discretion when it held her in contempt based solely on her attorney's letter to a psychologist retained by her ex-husband, David Rath. She also argues that: (1) the letter itself did not form a proper basis for a contempt finding; (2) the contempt finding violated her right to free speech; and (3) the trial court failed to afford her a due process hearing. Because the trial court erroneously exercised its discretion by finding Maria in contempt without first conducting an evidentiary hearing, we reverse the contempt order and remand for a due process hearing.[2]

BACKGROUND

¶2 On October 23, 2002, Maria and David were granted a judgment of divorce and both parties were awarded joint legal custody of the minor child, Peter, who had been born on June 19, 2001. Several years later, David filed a motion seeking to modify custody and placement of Peter. Relative to that proceeding, the trial court entered a scheduling order dated April 11, 2006, setting forth dates for David and Maria to submit expert witness reports. The order also required that both parties cooperate with all psychological evaluations.

¶3 David moved the court to amend the scheduling order as he did not comply with the deadline with respect to an expert witness report. The trial court issued an order dated October 3, 2006, extending the dates with respect to the expert witness reports.

[2] Based on our disposition, we need not address Maria's free speech claim. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938).

¶4 Upon notification that David had retained psychologist, Cathy J. Crandell to conduct a psychological evaluation, Maria contacted Crandell's office to schedule an appointment. On October 6, 2006, Maria's attorney, Thomas Kuehl, sent a letter to Dr. Crandell making certain requests with respect to recording and sharing of the psychological evaluations. The letter was carbon copied to David's attorney, the guardian ad litem, and Maria. The last portion of the letter stated: "By way of a copy of this letter, I am notifying Mr. Rath's attorney and the guardian ad litem for Peter so that they can determine if they have any objection to the foregoing procedure" and "Can you let me know if the foregoing recommendation meets with your approval prior to you undertaking this assignment?"

¶5 On October 11, 2006, David filed a motion for contempt, seeking the imposition of sanctions against Maria for failure to cooperate with the psychologist. The motion was heard on October 19, 2006. Without conducting an evidentiary hearing, the trial court held Maria in contempt based solely on the letter Kuehl wrote to Dr. Crandell. Maria was ordered to pay $1205 to David's attorney. A final order on the contempt issue was entered January 12, 2007.

¶6 On January 25, 2007, Maria filed her motion for reconsideration. The trial court declined to hear the motion and Maria now appeals.

DISCUSSION

¶7 As noted above, Maria contends that the trial court erroneously exercised its discretion when it found her to be in contempt of court without conducting an evidentiary hearing. She also asserts that Kuehl's letter did not constitute contempt and the trial court's finding violated her right to free speech. David responds that the letter was contemptuous and caused Dr. Crandell to

withdraw from the case. He also contends that Maria should be held accountable for her attorney's conduct and it would be unfair for him to have to pay expenses resulting from the contemptuous letter. This court concludes, based on the review of the record that the trial court erroneously exercised its discretion by finding Maria in contempt without first conducting an evidentiary hearing.

¶8 In remedial contempt actions, the trial court is obligated to hold an on-the-record evidentiary hearing "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).'"[3] ***Evans v. Luebke***, 2003 WI App 207, ¶24, 267 Wis. 2d 596, 671 N.W.2d 304. In ***Evans***, this court held that the procedures contained within WIS. STAT. § 785.03(1)(a) for imposing remedial sanctions "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." In ***Evans***, this court held that "unsworn hearsay assertions are of course insufficient to support judicial findings in the absence of a stipulation." ***Id.***, ¶25 n. 13.

¶9 The record in the instant case reveals that the trial court did not conduct an evidentiary hearing to determine if Maria intentionally disobeyed,

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

resisted or obstructed the authority, process or order of a court. The motion hearing transcript contains only David's attorney's unsworn representations and Kuehl's statements. In fact, Kuehl stated on the record that he was fully responsible for the letter in question. Because the trial court did not conduct an evidentiary hearing, Maria was not able to testify as to her actions relative to the letter. Did she ask Kuehl to send the letter? Did she authorize Kuehl to send the letter? Did she even know about the letter before she received a carbon copy of it? The answers to these questions are not in the record. We do know that the letter suggests Maria complied with the court's order instructing her to cooperate with the psychological evaluation, as the letter states that Maria had already called Dr. Crandell to set up an appointment.

¶10 David argues that Maria should be held accountable for her attorney's actions, citing ***Johnson v. Allis Chalmers Corp., et al***, 162 Wis. 2d 261, 284, 470 N.W.2d 859 (1991) and a handful of other cases. None of these cases, however, involve imputing to the client the contemptuous actions of the attorney. In ***Johnson*** the attorney failed to comply with scheduling and discovery orders. Moreover, the ***Johnson*** case was overruled in part by ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶61, 299 Wis. 2d 81, 726 N.W.2d 898. Our supreme court held that:

> it is an erroneous exercise of discretion for a circuit court to enter a sanction of dismissal with prejudice, imputing the attorney's conduct to the client, *where the client is blameless*. To the extent that *Johnson* can be interpreted as concluding that the client's conduct is irrelevant or that a dismissal with prejudice is warranted even when the client is blameless, then that part of *Johnson* is overruled.

Id. (emphasis added and footnote omitted).

¶11 The same reasoning applies in the instant case. It is an erroneous exercise of discretion to impute Kuehl's action to Maria *if* she is blameless. We do not know if Maria is blameless because the trial court failed to conduct an evidentiary hearing to determine her involvement. The trial court could not make any specific findings of fact with respect to Maria's involvement because she never testified. Moreover, the trial court utilized solely unsworn statements, including hearsay, in reaching its conclusion. Such statements are insufficient to support judicial findings in remedial contempt proceedings. Accordingly, we reverse the order and remand for an evidentiary hearing necessary to comply with due process.

¶12 On remand, this court also instructs the trial court to address Maria's reconsideration motion with regard to whether the letter itself constituted contempt. In doing so, this court notes that at the time the letter was sent, there was no order prohibiting direct contact with expert witnesses. Moreover, the letter appears to this court to be making requests, rather than issuing directives, and, based on the fact that it was sent to all parties, with the final portion of the letter asking whether the requested procedure was acceptable, does not appear to be an act of intentional disobedience.[4]

¶13 Findings of contempt rest in large part on the trial court's factual findings. *See* ***State v. Rose***, 171 Wis. 2d 617, 623, 492 N.W.2d 350 (Ct. App. 1992). The crucial findings include whether the party found in contempt was able to comply with the order and whether the refusal to comply with the order was

[4] Given what appears to have resulted in a contentious proceeding, it may have been wiser for Kuehl to make the requests to David's attorney or the court first instead of contacting the expert directly. Likewise, David's attorney could have responded to the letter by declining Kuehl's request instead of immediately filing a contempt motion. Attorneys make decisions at any given moment based on the facts available to them at a time. Not all decisions are perfect.

"willful and with intent to avoid compliance." ***Evans***, ¶24, n.12. In the instant case, the trial court could not properly assess the critical findings because no evidentiary hearing was conducted.

¶14 Based on the foregoing, we reverse the order of contempt and remand to the trial court with directions to conduct an evidentiary hearing and for other proceedings necessary to comply with the dictates of this opinion.

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

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