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DISTRICT II

August 30, 2023

To:

Hon. Barbara H. Key
Circuit Court Judge
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Kelly Schremp
Clerk of Circuit Court
Marathon County Courthouse
Electronic Notice

Kristen Elizabeth Lonergan
Electronic Notice

Jeffrey S. Decker
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2022AP410	In re the marriage of: Amber M. Foley v. Jeffrey S. Decker (L.C. # 2012FA544)
2022AP1271	In re the marriage of: Amber M. Foley v. Jeffrey S. Decker (L.C. # 2022FA151)

Before Neubauer, Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jeffrey S. Decker appeals from an order denying his motion seeking to hold his ex-wife, Amber M. Foley, in contempt for denying him periods of physical placement of their child as provided in the parties' divorce judgment. Jeffrey contends the circuit court erred in denying his motion because Amber violated the terms of the divorce judgment by denying him physical placement of their child at various times before bond conditions imposed in a separate criminal case filed against Jeffrey barred him from having contact with the child. Based upon our review

of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We affirm.

Jeffrey and Amber are parties to a divorce judgment entered in December 2012 that awarded Amber primary legal custody and placement of their children and awarded physical placement to Jeffrey on certain days. On January 4, 2022, Jeffrey sought an order to show cause as to why Amber should not be found in contempt for intentionally violating the divorce judgment by denying him contact with one of the children. According to his supporting affidavit, Amber denied Jeffrey access to the child on several days in 2017 and 2019, and from December 3, 2021 up to the time he sought the order to show cause. At the time Jeffrey sought the order to show cause, he was subject to bond conditions in a criminal case that prohibited him from having contact with Amber but that allowed supervised visits with the child.

Following a hearing on January 21, 2022, a court commissioner issued an order denying Jeffrey's contempt request. In the order, the commissioner wrote that she "lack[ed] authority to enforce the current placement order since the bond conditions prohibit contact between the parties and require supervised placement." Jeffrey sought de novo review of the commissioner's order in the circuit court, which held a hearing on February 21, 2022. At the hearing, Jeffrey acknowledged that on January 26, 2022—five days after the commissioner's order—his bond conditions had changed to prohibit him from having any contact with his child. The court denied

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

the contempt motion, stating that it was “a remedial contempt and there’s no way to remedy this at this point given the fact you can’t have contact with the child.”² Jeffrey appeals.

“We review a circuit court’s use of its contempt power for [an] erroneous exercise of discretion.” *Monicken v. Monicken*, 226 Wis. 2d 119, 125, 593 N.W.2d 509 (Ct. App. 1999).³ “A circuit court’s discretionary decision is upheld as long as the court ‘examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.’” *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789 (quoting *Long v. Long*, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995)).

Here, Jeffrey sought to enforce physical placement under WIS. STAT. § 767.471(3) and sought the remedy of contempt as permitted under § 767.471(3)(b) and (5)(b)2.b. The contempt remedy allowed under § 767.471 is treated as a remedial sanction under WIS. STAT. § 785.03(1)(a). See § 767.471(3)(e). Remedial sanctions may be imposed only to terminate a continuing contempt. Sec. 785.01(3) (“‘Remedial sanction’ means a sanction imposed for the purpose of terminating a continuing contempt of court.”); *Christensen v. Sullivan*, 2009 WI 87, ¶54, 320 Wis. 2d 76, 768 N.W.2d 798. As such, a remedial sanction may be imposed only if the contemptuous conduct is continuing and needs to be terminated. *Christensen*, 320 Wis. 2d 76, ¶¶55, 75.

² After denying the contempt motion, the circuit court transferred the case to the circuit court for Marathon County pursuant to the parties’ agreement.

³ On appeal, Jeffrey continues to argue that the court commissioner erred in denying his contempt motion. We may not review the commissioner’s order because it is not a final order under WIS. STAT. § 808.03(1). See *State v. Trongeau*, 135 Wis. 2d 188, 191-93, 400 N.W.2d 12 (Ct. App. 1986). Our review is limited to the circuit court’s order.

Here, the contemptuous conduct was Amber's refusal to allow Jeffrey to have physical placement of their child, as provided in the divorce judgment. But it is undisputed that, at the time of the circuit court hearing, Jeffrey's bond conditions had changed and he was not permitted to have any contact with the child. From the point at which the no-contact condition was imposed, it superseded Jeffrey's right to physical placement under the divorce judgment, and Amber's refusal to allow him to see the child no longer violated the divorce judgment. The circuit court did not erroneously exercise its discretion because it properly applied the law in determining that there was no continuing contempt and denying Jeffrey's request for a remedial contempt sanction.

Jeffrey's attempts to seek a contempt sanction for what he contends were violations of the divorce judgment that occurred before the no-contact condition was imposed are without merit. Again, the remedial sanction for contempt applicable to enforcement of child placement requires continuing contempt, and it is undisputed that Jeffrey was unable to have physical placement at the time of the circuit court's decision. Thus, Jeffrey was unable to show any continuing contempt.⁴

Finally, Amber requests that we award her attorneys fees under WIS. STAT. RULE 809.25(3)(c) because Jeffrey's appeal is frivolous. Jeffrey similarly suggests that we award him costs associated with this appeal in his reply brief. Amber's request is denied because she did not file a separate motion for an award of fees as required under WIS. STAT. RULE

⁴ Because our determination that there is no continuing contempt is dispositive of this appeal, we need not address the parties' additional arguments. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (we need not address other issues when one is dispositive of the appeal).

809.25(3)(a). *See Schapiro v. Pokos*, 2011 WI App 97, ¶19, 334 Wis. 2d 694, 802 N.W.2d 204. Jeffrey's request is denied because, as the losing party, he is not entitled to an award of costs. *See* WIS. STAT. RULE 809.25(1)(a)2.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals