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April 15, 2015

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

2014AP2608-FT

In re the marriage of: Cheryl Marie Brown-Doney v. Quinn Ryan
Oldenhoff (L.C. #2007FA960)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Cheryl Marie Brown-Doney appeals from a circuit court order denying Brown-Doney's Petition for Waiver of Fees and Costs-Affidavit of Indigency without an evidentiary hearing. Pursuant to a presubmission conference and this court's order of December 16, 2014, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2013-14).¹ Upon review of those memoranda and the record, we reverse and remand with directions.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

On September 4, 2014, Brown-Doney, through her attorney, filed a Petition for Waiver of Fees and Costs-Affidavit of Indigency and Order, pursuant to WIS. STAT. § 814.29(1).² Brown-Doney checked the boxes in Section 1 of the form indicating that she currently receives “Food stamps/FoodShare” and “Medical assistance.”³ On September 23, 2014, the circuit court denied the petition, finding Brown-Doney to be “not indigent” and “the allegation of poverty to be untrue.” Brown-Doney appeals.

WISCONSIN STAT. § 814.29(1)(a) provides that a person “may commence, prosecute or defend any [court] action” without being required to pay fees “upon order of the court based on a finding that because of poverty the person is unable to pay the costs of the action ... or to give security for those costs.” Pursuant to § 814.29(1)(d), “[t]he court shall make a finding of poverty and issue an order [waiving fees] if the affidavit demonstrates any of the following:”

1. That the person is a recipient of means-tested public assistance, including aid to families with dependent children, relief funded by a relief block grant under [WIS. STAT.] ch. 49, relief provided by counties under [WIS. STAT. §] 59.53(21), medical assistance, supplemental security income, food stamps or benefits received by veterans under [WIS. STAT. §] 45.40(1m) or under 38 USC 501 to 562.
2. That the person is represented by an attorney through a legal services program for indigent persons, including, without limitation, those funded by the federal legal services corporation,

² WISCONSIN STAT. § 814.29(1)(b) states that a person seeking a fee waiver must file an affidavit “setting forth briefly the nature of the cause, defense or appeal and facts demonstrating his or her poverty.” Paragraphs (1)(b) and (1)(c) specify that the petitioner’s affidavit and the court’s findings and order must be “in the form prescribed by the judicial conference.” In this case, the judicially prescribed form is Circuit Court Form CV-410.

³ Along with the petition, Brown-Doney submitted documentation demonstrating that she received food stamps/FoodShare and medical assistance. Though not required, Brown-Doney also completed section 2 of the form by providing information concerning her income, assets and liabilities.

the state public defender or volunteer attorney programs based on indigency.

3. That the person is otherwise unable, because of poverty, to pay the costs of the action, proceeding or appeal or to give security for those costs. In determining the persons ability under this subdivision to pay or give security for fees and costs, the court shall consider the person's household size, income, expenses, assets and debts and the federal poverty guidelines under 42 USC 9902(2).

WIS. STAT. § 814.29(1)(d)1.-3.

We conclude that the circuit court erred by finding that Brown-Doney was not indigent and that her allegation of poverty was untrue.⁴ Pursuant to WIS. STAT. § 814.29(1)(d)1., because she receives means-tested public assistance, Brown-Doney is necessarily “indigent” and automatically qualifies for a fee waiver for purposes of § 814.29. In order to deny the petition on grounds that Brown-Doney is not indigent or her allegation of poverty is untrue, the court must find that, despite her assertions, Brown-Doney is not receiving either food stamps/FoodShare or medical assistance.⁵ An evidentiary hearing is required before the circuit court can properly find

⁴ Pursuant to WIS. STAT. § 814.29(2):

The court may dismiss any action or proceeding or may require the payment of, or the giving of security for, costs, fees and service if the court determines that the allegation of poverty is untrue. The court may later require the payment of, or the giving of security for, costs, fees and service if the court determines that the person no longer meets any of the requirements under sub. (1).

⁵ The respondent contends that this interpretation of WIS. STAT. § 814.29 “is illogical” because “[i]f the trial court is to have no discretion, then why does the form provided by the State allow the trial court to find ‘the allegation of poverty to be untrue?’” We disagree. The court may find untrue a petitioner’s allegation that he or she is receiving public assistance or is represented by an attorney through a legal services program for indigent persons. Similarly, where a person is not receiving public assistance but instead relies on Section 2 of CV-140 to establish his or her poverty under § 814.29(1)(d)3., a circuit court may find that the financial circumstances alleged in Section 2 are untrue.

that Brown-Doney is not actually receiving the public assistance stated in her petition and affidavit.

On remand, if, after an evidentiary hearing, the circuit court determines that Brown-Doney in fact receives “Food stamps/FoodShare” or “Medical assistance,” then the court “shall make a finding of poverty and issue an order under [WIS. STAT. § 814.29(1)(a)].” Sec. 814.29(1)(d). If the court finds that Brown-Doney actually does not receive either asserted form of public assistance, then the court shall determine whether Brown-Doney is indigent based on WIS. STAT. § 814.29(1)(d)3.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily reversed and the cause is remanded with directions pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals