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DISTRICT I

July 31, 2018

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

2017AP313 In re the marriage of:
Kimberly C. Niemi v. Martin B. Hying (L.C. # 2006FA6891)

Before Kessler, P.J., Brennan and Dugan, 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).

Martin B. Hying, *pro se*, appeals an order entered on February 6, 2017, in which the circuit court: (1) lifted the stay of a commitment previously imposed in a contempt proceeding against Hying; (2) established conditions by which Hying could purge the sanction of commitment; and (3) denied Hying's oral motion to "vacate or waive all monies owed" to the guardian *ad litem* for Hying's daughter and to the attorney representing Hying's former wife, Kimberly C. Niemi, f/k/a Hying. Based on our review of the briefs and record, we conclude at

conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We summarily affirm. We also conclude that this appeal is frivolous because Hying knew or should have known that his arguments are without a reasonable basis in law or equity and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law. *See* WIS. STAT. RULE 809.25(3)(c)2. We remand the matter to the circuit court for a determination of reasonable costs and attorney's fees, and we impose limitations on Hying's future access to the court of appeals. *See* ***id.***; *see also* ***Puchner v. Hepperla***, 2001 WI App 50, ¶7, 241 Wis. 2d 545, 625 N.W.2d 609.

Hying and Niemi divorced in November 2007. Substantial post-divorce litigation followed in circuit court, and Hying has pursued multiple appeals and petitions for supervisory writs challenging the circuit court's actions and orders. *See* ***Hying v. Hying*** (***Hying I***), No. 2010AP914, unpublished slip op. (WI App Apr. 6, 2011), ***State ex rel. Hying v. Circuit Court*** (***Hying II***), No. 2011AP1899-W, unpublished op. and order (WI App Sept. 28, 2011), ***Hying v. Hying*** (***Hying III***), No. 2011AP1430, unpublished slip op. (WI App May 30, 2012), ***Hying v. Hying*** (***Hying IV***), No. 2012AP2019, unpublished op. and order (WI App Feb. 7, 2013), ***Hying v. Hying*** (***Hying V***), No. 2014AP1780, unpublished slip op. (WI App Jan. 26, 2016), ***State ex rel. Hying v. Circuit Court*** (***Hying VI***), No. 2016AP317-W, unpublished op. and order (WI App May 23, 2016), ***State ex rel. Hying v. Circuit Court*** (***Hying VII***), No. 2016AP1896-W, unpublished op. and order (WI App Oct. 13, 2016), and ***Hying v. Hying*** (***Hying VIII-IX***), Nos. 2016AP137 and 2016AP1446, unpublished op. and order (WI App Aug. 16, 2017). The following facts bear directly on the instant appeal.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

By order of June 26, 2014, the circuit court found Hying in contempt for failing to comply with prior court orders, including orders that he pay attorney's fees to the guardian *ad litem* and to Niemi's attorney. The circuit court ordered Hying to pay seventy-five percent of the fees of both the guardian *ad litem* and opposing counsel no later than October 31, 2014. Hying appealed the order. This court affirmed. *See* ***Hying V***, No. 2014AP1780, ¶1.

By order of December 23, 2014, the circuit court found Hying in contempt for failing to make the payments required by the order of June 26, 2014. The circuit court imposed six months in the House of Correction as a sanction but stayed the commitment pending determination of purge conditions. Shortly thereafter, however, the assigned circuit court recused itself. A few weeks later, the successor circuit court also recused itself, advising that an out-of-county judge should be assigned to the case. By order entered March 13, 2015, the Chief Justice of the Wisconsin Supreme Court assigned a reserve judge, the Honorable Dennis Flynn, to preside in this matter. That order remains in place.

On August 6, 2015, the circuit court, Judge Flynn presiding, held a hearing and determined that Hying had not made the payments of attorney's fees and guardian *ad litem* fees required of him, that his failure to pay was intentional, and that he had the ability to pay. The circuit court imposed six months in the House of Correction as a penalty but ordered that Hying could purge the commitment by fulfilling a series of conditions. These required that, no later than August 20, 2015, he make certain lump-sum payments to opposing counsel and to the guardian *ad litem* and that he file a wage garnishment, also described in the order as an income assignment, requiring his employer to withhold $700 per month from his pay, with the money allocated to Hying's remaining obligations to the guardian *ad litem* and opposing counsel. The circuit court further ordered that Hying would be recommitted if he did not continue to pay $700

each month towards the remaining debt to the guardian *ad litem* and to Niemi's attorney. The circuit court memorialized its findings and conclusions in a written order entered on August 26, 2015.

Hying made the lump-sum payments required by the circuit court's August 2015 order. Hying's employer, however, believed that $700 per month exceeded the amount that could be withheld from Hying's pay. Therefore, by orders entered January 7, 2016, and June 21, 2016, the circuit court continued the stay of the commitment and modified the provisions of the August 2015 order by requiring, as relevant here, that Hying himself pay $700 per month directly to Niemi's attorney, who would disperse a portion to the guardian *ad litem*. Hying challenged the 2016 orders in consolidated appeals, and we affirmed. *See* ***Hying VIII-IX***, Nos. 2016AP137 and 2016AP1446 at 1. We also concluded that Hying knew or should have known that the proceedings underlying those orders were not, as he contended, controlled by provisions of the garnishment statutes and that his appeals were frivolous. *See* ***id.*** at 2.

In November 2016, Niemi moved to lift the stay of Hying's six-month commitment on the ground that Hying was failing to make the monthly $700 payments that the circuit court's orders required. On January 19, 2017, the circuit court conducted a hearing and found that Hying had willfully failed to make payments. The circuit court lifted the stay of the commitment previously imposed but allowed Hying to avoid incarceration by paying: (1) the arrearage on the monthly payments that accrued between September 2016 and January 2017; (2) the totality of the $3543 he owed to the guardian *ad litem*; and (3) $3300 in attorney's fees that Niemi incurred to pursue the motion. The circuit court further ordered that Hying continue paying $700 per month towards the balance of the fees owed to Niemi's attorney pursuant to prior orders, and the circuit

court denied Hying's oral request to vacate all of the fees owed to the lawyers. Hying made the lump-sum payments required to avoid incarceration and now appeals.

Hying first asserts that the circuit court "forfeited jurisdiction and [erroneously exercised] its discretion when it conducted a hearing to lift a stay on contempt when no stay was in effect."[2] Hying's contention that a stay was not in effect turns on an obvious fallacy, namely, his assertion that "contempt orders were vacated on August 19, 2015" by order of the chief judge of the Milwaukee County circuit court. Hying relies on an entry, made by the chief judge's clerk, in the Consolidated Court Access Program (CCAP). The CCAP entry states: "The joint-petitioner Husband appeared in this office and provided this clerk with proof of the purge requirement ordered by the Honorable (Reserve Judge) Dennis J. Flynn on 08-06-2015. Therefore, the finding of contempt stayed until 08-20-2015 is vacated." This text reflects only the observations and actions of a clerk. "It is well recognized in Wisconsin that a clerk of court may not exercise any judicial powers." ***State v. Dickson***, 53 Wis. 2d 532, 540, 193 N.W.2d 17 (1972). Hying knew or should have known that a clerk could not vacate contempt orders.[3]

Hying next states that the circuit court erred by not accepting as an exhibit a copy of the August 19, 2015 CCAP entry. Hying asserts that he would have prevailed had the circuit court

[2] Hying contends in his briefs that the circuit court's actions constituted an "abuse of discretion." The supreme court replaced that and similar language more than twenty-five years ago with the phrase "erroneous exercise of discretion." *See* ***Hefty v. Hefty***, 172 Wis. 2d 124, 128 n.1, 493 N.W.2d 33 (1992). We have substituted the correct language in our restatements of his arguments.

[3] Hying also suggests that the Milwaukee County chief judge reassigned the case to herself on August 19, 2015. We reject the contention because he states it for the first time in his reply brief, *see* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661, and because he does not point to a reassignment order or other factual support for the claim, *see* ***Dieck v. Unified School Dist.***, 157 Wis 2d 134, 148 n.9, 458 N.W.2d 565 (Ct. App. 1990).

considered the "decision of [the] chief judge" vacating the contempt finding. His claim is meritless. Pursuant to WIS. STAT. § 901.03(1), error may not be predicated upon an evidentiary ruling unless a substantial right of the party is affected. Because the CCAP entry was not an order vacating the contempt finding, exclusion of the entry as an exhibit did not affect his substantial rights.

Next, Hying contends that the circuit court erroneously exercised its discretion by ordering him to pay the fees he owed to the guardian *ad litem* in order to purge the sanction imposed for contempt. 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). If the circuit court logically interpreted the facts, applied a proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach, we will affirm a discretionary decision. *See* ***id.***

At the hearing, the circuit court correctly observed that to avoid jail, Hying had the burden to prove that the purge conditions were unreasonable or that his failure to pay the amounts required by the circuit court's orders was unintentional and beyond his power to control. *See* ***State ex rel. V.J.H. v. C.A.B.***, 163 Wis. 2d 833, 843-44, 472 N.W.2d 839 (Ct. App. 1991). The circuit court went on to find that Hying failed to carry his burden. The circuit court noted that it found in August 2015 that Hying was able to pay $700 a month "and that hasn't been revisited." Moreover, the evidence showed that Hying had $35,000 immediately available, but he paid only a fraction of the amount required for the period from September 2016 through the date of the January 19, 2017 hearing. The circuit court concluded that Hying could make the required payments but instead looked for reasons to avoid the obligation. We may not set aside a

circuit court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). The findings here are fully supported by the record, and we will not disturb them.

Hying nonetheless contends that the circuit court erred by ordering him to pay the fees owed to the guardian *ad litem* because the circuit court's orders of January 2016 and June 2016 required him to tender his $700 payments to Niemi's attorney, who had agreed to distribute a portion of the amount to the guardian *ad litem*. Hying states that "[i]ssues of non-payment of balance due are between the [guardian *ad litem*] and [Niemi's attorney]," and further, that requiring Hying to pay fees directly to the guardian *ad litem* constituted an "[erroneous exercise] of discretion due to the transfer of liability." The arguments are meritless. They ignore both the circuit court's conclusion that Hying was not making the entirety of the payments for Niemi's attorney to distribute and the circuit court's statutory authority to impose "[a]n order designed to ensure compliance with a prior order of the court" as a remedial sanction for contempt. *See* WIS. STAT. § 785.04(1)(d); *see also* ***State ex rel. Larsen v. Larsen***, 165 Wis. 2d 679, 685, 478 N.W.2d 18 (1992) (circuit court has "inherent authority to grant purge conditions which allow contemnors to purge their contempt outside of complying with the court order which led to the contempt").

Hying also challenges the portion of the order requiring him to pay $3300 in attorney's fees that Niemi incurred to pursue the contempt proceedings. "[A] circuit court is permitted to impose the payment of money sufficient to compensate a party for the loss suffered as a result of the contempt of court, as a sanction." ***Benn***, 230 Wis. 2d at 315. Hying contends that Niemi did not present "reasonable evidence or relevant facts" to prove the attorney's fees incurred. In fact, Niemi's counsel testified about counsel's hourly rate and the number of hours spent working on the matter. The circuit court, as the trier of fact, was the ultimate arbiter of the witness's

credibility and the weight of the testimony. *See* ***Lessor v. Wangelin***, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998). Hying's challenge to the circuit court's assessment lacks merit. *See* ***id.*** at 669 (party knew or should have known that an appeal asking this court to reweigh the testimony of witnesses and reach a conclusion regarding credibility contrary to that reached by the circuit court could not be successful and was frivolous).

Hying asserts next that the circuit court should have vacated the orders requiring him to pay the fees of the guardian *ad litem* and Niemi's counsel because Niemi's counsel acted "maliciously" by moving "to lift a vacated stay and misguiding the court regarding official court records." His argument is laced with attacks on the circuit court and opposing counsel, but in substance he appears to contend that, because the circuit court's orders in August 2015 subjected him to a garnishment of more than twenty-five percent of his disposable income, the order violated provisions of the garnishment statutes, WIS. STAT. ch. 812, and all subsequent orders requiring him to make payments on his financial obligations are an "attempt to circumvent clear statutory garnishment law." Based on these contentions, he maintains that opposing counsel's efforts to enforce the requirement that he pay $700 a month are unlawful "misconduct" that warrants relieving him of any obligation to pay his debts. His contentions are meritless.[4]

Although Hying states that "this case turn on Wisconsin garnishment statutes," we categorically concluded in ***Hying VIII-IX*** that any arguments based on a claim that a

[4] Hying also asserts that his debts should be vacated because Niemi's counsel misled the court and "misrepresent[ed] the law" by arguing that CCAP entries are not the official court record. Hying should have known that the claim is meritless. Our supreme court has determined that a CCAP report is not the official record of a circuit court case. *See* ***State v. Bonds***, 2006 WI 83, ¶46, 292 Wis. 2d 344, 717 N.W.2d 133 (discussing CCAP reports in the context of a criminal proceeding).

garnishment action underlies these proceedings "flow from [a] faulty premise." ***Id.***, Nos. 2016AP137 and 2016AP1446 at 3. We explained that the garnishment statutes:

> relate[] to actions creditors take to try to collect a debt.... There is no civil judgment against Hying upon which to execute an earnings garnishment. While his purge condition to avoid incarceration was to enter a voluntary wage assignment with his employer, the matter remains a family law case and contempt proceeding under WIS. STAT. chs. 767 and 785.

Hying VIII-IX, Nos. 2016AP137 and 2016AP1446 at 3. Further, we determined that, in light of the valid contempt findings in this case, Judge Flynn was within his authority to impose a remedial sanction to terminate the continuing contempt and obtain compliance with the prior court orders. *See* ***id.***

Hying VIII-IX constitutes the law of this case and therefore must be followed here. *See* ***Laatsch v. Derzon***, 2018 WI App 10, ¶40, 380 Wis. 2d 108, 908 N.W.2d 471. Accordingly, we reject Hying's arguments stating or implying that opposing counsel and the circuit court acted improperly by enforcing his financial obligations without regard to laws applicable to garnishment. We also conclude, as we did in ***Hying VIII-IX***, that as an experienced *pro se* litigator, Hying knew or should have known that no reasonable basis existed to rely on garnishment law. *See* ***id.***, Nos. 2016AP137 and 2016AP1446 at 4.

Last, Hying asserts that the circuit court and opposing counsel "engaged in prosecutorial vindictiveness."[5] Hying tells us that he presented this claim to the circuit court "when [he] stated

[5] To the extent that Hying makes additional arguments in his briefs, we conclude that they lack merit and decline to address them. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

on the record that [he] would not engage in conjecture as to why th[e] court repeatedly sidesteps the law." Hying's brief reflects his awareness that an appellant may not present an issue to this court that was not first raised in the circuit court. *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838. We reject Hying's effort to persuade us that portions of the record that do not include a reference to prosecutorial vindictiveness somehow alerted the circuit court that he relied on a theory of prosecutorial vindictiveness. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344-45, 516 N.W.2d 463 (Ct. App. 1994) (matter must be raised in a way sufficient to alert the circuit court to the issue the litigant intends to present). Moreover, even assuming the issue was raised, "prosecutorial vindictiveness" is a criminal law doctrine. *Cf.* ***State v. Johnson***, 2000 WI 12, ¶¶20-23, 32, 232 Wis. 2d 679, 605 N.W.2d 846 (describing application of the doctrine). Nothing in Hying's submission demonstrates that the doctrine has any applicability here. In the absence of supporting authority for his claim, it lacks merit. *See* ***Apple Hill Farms Dev., LLP v. Price***, 2012 WI App 69, ¶19, 342 Wis. 2d 162, 816 N.W.2d 914.

Niemi asserts that this appeal is frivolous and moves for sanctions. We may declare the appeal frivolous if we conclude that Hying "knew, or should have known, that the appeal ... was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." *See* WIS. STAT. RULE 809.25(3)(c)2. An appeal is frivolous if we determine that it is frivolous in its entirety. *See* ***Howell v. Denomie***, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621.

We conclude that Hying's appeal is entirely frivolous. We determined in ***Hying VIII-IX*** that Hying knew or should have known that his arguments based on WIS. STAT. ch. 812 were inapplicable to the circumstances of his case. *See* ***Hying VIII-IX***, Nos. 2016AP137 and 2016AP1446 at 4. We have explained in this opinion why Hying knew or should have known

that the remaining claims he presents here are similarly meritless. We will not excuse the decision to pursue a frivolous appeal merely because Hying is a *pro se* party. The purpose of sanctions is to deter litigants and attorneys alike from commencing or continuing frivolous actions. *See* ***Holz v. Busy Bees Contracting, Inc.***, 223 Wis. 2d 598, 609, 589 N.W.2d 633 (Ct. App. 1998). It makes no difference to a respondent whether an appellant commences a frivolous appeal on his or her own behalf or with the assistance of a lawyer because the harm to the respondent is "the same—unnecessary and burdensome" litigation. *See* ***id.*** Accordingly, we conclude that the monetary sanctions Niemi seeks are appropriate here. We remand this matter to the circuit court for a determination of Niemi's reasonable costs, fees, and attorney's fees incurred in the instant appeal.

We will also grant Niemi's request to impose limits on Hying's future activity in this court until the outstanding fees owed to the guardian *ad litem* and to Niemi's counsel are paid in full. "A court faced with a litigant who brings frivolous litigation has the authority to limit that litigant's access to the court." ***Puchner***, 241 Wis. 2d 545, ¶7. Hying has pursued three frivolous appeals arising from contempt findings based on failure to pay required fees. His litigation history signals his willingness to consume limited judicial resources in pursuit of meritless claims, harming not only Niemi but also other litigants who seek the court's timely assistance in matters that are not frivolous. *See* ***id.*** Absent a restriction on his activities, Hying "may be undeterred from bringing frivolous litigation." *See* ***id***. Accordingly, to aid the effective and efficient administration of justice, we will exercise our inherent authority to impose limitations on Hying's litigation.

IT IS ORDERED that the circuit court's order of February 6, 2017, is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this matter is remanded to the circuit court for assessment against Hying of Niemi's reasonable costs and fees, including reasonable appellate attorney's fees, pursuant to WIS. STAT. RULE 809.25(3).

IT IS FURTHER ORDERED that Hying may not, without first obtaining leave of this court, pursue any motion in this court or any appeal in which Kimberly Niemi, f/k/a/ Hying, is a respondent and the issue in dispute involves guardian *ad litem* fees or the attorney's fees owed to Niemi's counsel. At the time of filing any such motion or appeal, Hying must submit a copy of this decision and an affidavit stating either that: (1) his proposed motion or appeal does not directly or tangentially challenge the attorney's fees or the guardian *ad litem* fees that the circuit court required him to pay in its orders of June 26, 2014, December 23, 2014, August 26, 2015, January 7, 2016, June 21, 2016, and February 6, 2017; or (2) that he has paid the entirety of the attorney's fees and the guardian *ad litem* fees that he was required to pay pursuant to those orders. No identified or potential respondent to Hying's litigation regarding such fees will be required to respond to any motion in this court or any appeal that Hying files unless and until this court has either requested a response or granted Hying permission to proceed.

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

Sheila T. Reiff
Clerk of Court of Appeals