



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

February 22, 2023

To:

Hon. Andrew J. Christenson
Circuit Court Judge
Electronic Notice

Joanna Fraczek
Electronic Notice

Ramona Geib
Clerk of Circuit Court
Fond du Lac County Courthouse
Electronic Notice

Jacob Daniel Wendt
Electronic Notice

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

2022AP724

Samantha Pearl Wendt v. Jacob Daniel Wendt (L.C. #2020FA11)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Samantha Pearl Wendt appeals from a circuit court order and an order denying reconsideration in a postdivorce proceeding. Samantha contends the circuit court erred when it denied her motion for contempt against her ex-husband, Jacob Daniel Wendt, because Jacob unilaterally took their child to three counseling sessions in violation of the parties' joint legal custody agreement. 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 (2019-20).¹ We reverse and remand for further proceedings consistent with this opinion.

Samantha and Jacob, each pro se, filed a joint petition for divorce in January 2020. The parties stipulated to a joint parenting plan and a marital settlement agreement (MSA), both of which were incorporated into the judgment of divorce. Pursuant to those documents, the parties agreed to joint legal custody and shared placement of their son, who was born in 2015. They agreed not to identify a final decision-maker for any major decision.

In a section of the parties' parenting plan that asks who will "provide" four categories of "medical services" for their son, including "COUNSELING/THERAPY," the parties indicated they would "split" each service. The parties also agreed in the parenting plan that they would settle disagreements regarding the plan through "open discussion." In the MSA, the parties agreed that Jacob would provide the child's medical insurance, which would cover "medical, dental, orthodontic, hospital, psychiatric, counseling, drug and other health expenses."

In August 2021, Samantha sought an order to show cause as to why Jacob should not be found in contempt for intentionally violating the parties' divorce judgment by making a nonemergency healthcare decision for their son without her knowledge or consent. She submitted an affidavit contending that, in August 2021, she learned that Jacob had enrolled the child in therapy without discussing it with her, and the child had attended three appointments. Samantha also filed copies of text messages between her and Jacob in which she stated that they had "shared decision making" under their parenting agreement and that she needed to be informed about their

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

child's therapy and did not consent to it. She further told Jacob that she cancelled all future appointments. In response, Jacob texted that he paid for the appointments "as I knew you wouldn't approve and nor did I want you involved."

After a court commissioner declined to find Jacob in contempt, Samantha sought de novo review before the circuit court. The court held a hearing at which no testimony was taken. The court denied the contempt motion on the grounds that counseling was not a healthcare decision that would qualify as a "major decision":

I do not find that counseling is a type of medical or ... healthcare decision that would ... qualify as a major decision or even if it is a type of major decision because it's a type of nonemergency healthcare, it's not necessarily apparent to ... a parent that that ... kind of counseling would qualify as healthcare.

The court also found that Jacob's conduct did not intentionally violate the divorce judgment's specification that the parties were to have joint legal custody over their son.

Samantha moved for reconsideration, and the circuit court held another hearing at which no testimony was taken. Samantha argued that the parties' parenting plan, which was incorporated into the divorce judgment, designated counseling as a "medical service" and that under WIS. STAT. ch. 767, counseling was a "Major decision[]" that had to be made jointly by her and Jacob. Jacob argued that the divorce judgment awarded the parties joint legal custody, meaning that both had the right to make major decisions but neither had to communicate or obtain the other's consent. The circuit court agreed with Jacob that "[j]oint legal custody" under WIS. STAT. § 767.001(1s) gave each parent "the opportunity to exercise decisions regarding legal custody" but that it "does not say both parties have to agree." The court held that Jacob could make an independent decision because the parents' rights are joint but also "several." Finally, the court pointed to the parenting

plan’s designation that Jacob and Samantha would “split” the provision of medical services, including counseling, as “imply[ing] that the decisions are divisible. They’re allocated. It does not say both. It says split.” Samantha appeals.

In actions affecting the family, the circuit court is vested with the authority to do “all acts and things necessary and proper in those actions and to carry ... orders and judgments into execution.” WIS. STAT. § 767.01(1). This broad grant of authority includes the authority to find a person in contempt for intentionally disobeying, resisting, or obstructing an order of the court, such as a divorce judgment. *See* WIS. STAT. § 785.01(1)(b); *Tensfeldt v. Haberman*, 2009 WI 77, ¶35, 319 Wis. 2d 329, 768 N.W.2d 641 (violating a divorce judgment “is unlawful and can subject the violator to sanctions for contempt of court”).

Here, Samantha sought remedial contempt for intentional violation of a court order under WIS. STAT. § 785.01(1)(b). Remedial sanctions may be imposed only for the purpose of terminating a continuing contempt. *Christensen v. Sullivan*, 2009 WI 87, ¶54, 320 Wis. 2d 76, 768 N.W.2d 798; § 785.01(3) (describing a “[r]emedial sanction” as one “imposed for the purpose of terminating a continuing contempt of court” (emphasis added)). As such, remedial sanctions require that the contemptuous conduct is continuing and needs to be terminated. *Christensen*, 320 Wis. 2d 76, ¶¶55, 75.

We review a circuit court’s use of its contempt power for a proper exercise of discretion. *Benn v. Benn*, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999). Findings of fact and conclusions of law may underlie discretionary decisions. *Monicken v. Monicken*, 226 Wis. 2d 119, 125, 593 N.W.2d 509 (Ct. App. 1999). We uphold findings of fact unless they are clearly erroneous; however, we review questions of law de novo. *See* WIS. STAT. § 805.17(2); *Monicken*,

226 Wis. 2d at 125. A “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, the circuit court determined that Jacob had the right to unilaterally provide counseling to the child. This was an error of law. All legal custodians have “the right and responsibility to make major decisions concerning the child,” including “nonemergency health care,” except as otherwise provided in the divorce judgment. WIS. STAT. § 767.001(2)(a), (2m). Under § 767.001(1s), a court that gives “[j]oint legal custody” of a child is ordering both parties to “share legal custody,” such that “neither party’s legal custody rights are superior,” except as otherwise provided in the divorce judgment.

On appeal, Jacob does not directly challenge Samantha’s contention that the counseling was “nonemergency health care” under WIS. STAT. § 767.001(2m). Indeed, he acknowledges that the parties’ parenting plan identifies counseling and therapy as “medical services.” The MSA also identified counseling as “medical and health care.”² Instead, Jacob argues that neither the statutory

² We agree that the term “nonemergency health care,” which is not defined in WIS. STAT. ch. 767, fairly encompasses the counseling sessions, which Jacob described as giving the child “a sounding board, someone that the child could speak with instead of the two parents to give him some tools in dealing with the troubles and the issues that he’s experiencing as a result of this divorce action,” *see Emergency*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011), <https://ahdictionary.com/word/search.html?q=emergency> (“A serious situation or occurrence that happens unexpectedly and demands immediate action”); *Health care*, *id.*, <https://ahdictionary.com/word/search.html?q=health+care> (“The prevention, treatment, and management of illness and the preservation of mental and physical well-being through the services offered by the medical and allied health professions”); *State v. A.L.*, 2019 WI 20, ¶16, 385 Wis. 2d 612, 923 N.W.2d 827 (stating that courts “rely on dictionary definitions when the legislature fails to provide a definition in the statute”).

definition of joint legal custody nor the parties' divorce judgment require cooperation, but rather, permit each parent to make medical decisions in the best interests of the child during their periods of placement.

Jacob is wrong. Joint legal custody clearly contemplates and requires cooperative decision-making on “major decisions”—joint and equal decision-making—and refusals to cooperate must be reasonable. This is evident from the role that cooperation plays in custody determinations. Wisconsin law states that “[t]he cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party” is a factor to be considered when determining custody and the best interest of the child. WIS. STAT. § 767.41(5)(am)3. One reason a court may award sole legal custody is if “[t]he parties will not be able to cooperate in the future decision making required under an award of joint legal custody.” Sec. 767.41(2)(b)2.c. But “the court may not give sole legal custody to a parent who refuses to cooperate with the other parent if the court finds that the refusal to cooperate is unreasonable.” Sec. 767.41(2)(c). Finally, if a court awards joint legal custody, it may award “one party sole power to make specified decisions, while both parties retain equal rights and responsibilities for other decisions.” Sec. 767.41(6)(b). These provisions clearly contemplate reasonable cooperation by persons with joint legal custody in exercising their “right[s] and responsibilit[ies] to make major decisions concerning the child.” WIS. STAT. § 767.001(2)(a).

In short, the parties agreed to joint legal custody, which gives them equal rights, and they may not unreasonably refuse to cooperate. It is clear that the parties must endeavor to reasonably cooperate on major decisions in the best interests of the child. The circuit court's contrary conclusion is an error of law.

Because the circuit court’s denial of Samantha’s motion was grounded on an incorrect interpretation of the applicable statutes, it constitutes an erroneous exercise of discretion. *See Kenyon v. Kenyon*, 2004 WI 147, ¶10, 277 Wis. 2d 47, 690 N.W.2d 251. We must, therefore, remand this case for a new hearing under WIS. STAT. § 785.03. The circuit court should make findings of fact concerning whether Jacob’s conduct meets the standard for contempt, *see* WIS. STAT. § 785.01(1)(b), and if it does, the court should consider, in its discretion, whether a remedial sanction is appropriate. *See* WIS. STAT. §§ 785.02, 785.03(1)(a), 785.04(1); *Benn*, 230 Wis. 2d at 308.

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are summarily reversed, and this cause is remanded pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals