COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP96 **Cir. Ct. No. 2009FA73**

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

IN RE THE FINDING OF CONTEMPT IN RE THE MARRIAGE OF SARA M. MARCOTT V. LONNIE L. MARCOTT:

SARA M. MARCOTT,

JOINT-PETITIONER-APPELLANT,

V.

LONNIE L. MARCOTT,

JOINT-PETITIONER-RESPONDENT.

APPEAL from an order of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Sara M. Marcott appeals a circuit court order finding her in contempt of court for violating that part of the judgment of divorce that awarded her and her ex-husband, Lonnie, joint legal custody of their two minor children. The court found Sara in contempt because she moved the children from a school in the Greenwood school district to a school in the Auburndale school district without Lonnie's consent.

¶2 On appeal, Sara contends that the circuit court erred in making its contempt finding because: (1) she was the "primary caretaker" of the children, pursuant to WIS. STAT. § 767.41(6)(c), and therefore she had "primary rights regarding the children's education" and Lonnie only had "residual parental rights;" (2) a party cannot "be held in contempt for a purported violation of a statutory provision not specifically incorporated into an order" of the court; and (3) the circuit court failed to properly apply the law to the facts of this case. For the reasons we explain below, we reject Sara's arguments and affirm.

BACKGROUND

¶3 The relevant facts are undisputed. Sara and Lonnie filed a joint petition for divorce. The parties stipulated that they would have joint legal custody of their two minor children, and that Sara would have primary physical placement. The court entered a judgment of divorce, which incorporated the parties' stipulations. At the time the court entered the divorce judgment, the parties lived in different cities in Clark County: Sara resided in Greenwood, and Lonnie resided in Abbotsford. The children attended school in the Greenwood

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

school district. However, a couple months before the 2012 school year began, Sara moved the children to Auburndale, a short distance away from Greenwood, and enrolled the children in a school in the Auburndale school district. Sara did not seek permission from Lonnie to do so, and Lonnie did not consent to sending the children to a new school.

¶4 Lonnie moved the circuit court to find Sara in contempt of court for failing to comply with the divorce judgment by enrolling the children in a school in the Auburndale school district without his consent.[2] Following a hearing, the circuit court granted the motion. The court found that Sara lacked the authority to change the children's school district without Lonnie's consent because, pursuant to WIS. STAT. § 767.001(2)(a), a person who is granted legal custody of a child, such as Lonnie, has the "right and responsibility to make major decisions concerning the child," which, pursuant to § 767.001(2m), includes "choice of school." The circuit court concluded that Sara violated the divorce judgment because she made a "major decision" concerning the children without Lonnie's consent, and thus denied him his rights as a joint legal custodian. Sara moved for reconsideration. The court denied the motion. Sara appeals.

DISCUSSION

¶5 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

[2] We note that the parties do not dispute that Sara did not need Lonnie's consent to relocate from Greenwood to Auburndale because a parent with legal custody and physical placement rights is not required to provide notice to the other parent when establishing a new legal residence with the child, as long as the new legal residence is within the state and is less than 150 miles from the other parent. WIS. STAT. § 767.481(1)(a).

carry … orders and judgments into execution." WIS. STAT. § 767.01(1). The broad authority of the circuit court includes the authority to find a person in contempt of court 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").

¶6 We review a circuit court's contempt finding for an erroneous exercise of discretion. ***Monicken v. Monicken***, 226 Wis. 2d 119, 125, 593 N.W.2d 509 (Ct. App. 1999). 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 reasoned 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.

¶7 Sara first argues that the circuit court erred in holding her in contempt of court for obstructing the divorce judgment because WIS. STAT. § 767.41(6)(c) "allows for the specification of one parent as the 'primary caregiver,'" and the "primary caregiver" has "primary rights regarding the children's education" and the other parent "retain[s] residual parental rights." We conclude that WIS. STAT. § 767.41(6)(c) does not apply to this case.

¶8 WISCONSIN STAT. § 767.41(6)(c) provides in full:

> In making an order of joint legal custody and periods of physical placement, the court may specify one parent as the primary caretaker of the child and one home as the primary home of the child, for the purpose of determining eligibility for aid under s. 49.19 or benefits under ss. 49.141 to 49.161 or for any other purpose the court considers appropriate.

By its plain terms, § 767.41(6)(c) applies only for the purpose of determining eligibility for aid or for benefits under the specific statutes cited therein, or for any other purpose the court in its discretion deems appropriate. Sara fails to explain why this statute applies in a case where neither party is seeking aid or benefits under any of the statutes cross-referenced in § 767.41(6)(c), and the court did not specify that Sara was the primary caretaker of the children for any other purpose, such as to make decisions regarding the children's education.

¶9 Sara relies on ***Westrate v. Westrate***, 124 Wis. 2d 244, 369 N.W.2d 165 (Ct. App. 1985), for the proposition that she has the right as the "primary caretaker" under WIS. STAT. § 767.41(6)(c) to make decisions regarding the children's education without Lonnie's consent. Sara's reliance on ***Westrate*** is misplaced for two reasons.

¶10 First, as we have already explained, the circuit court did not designate Sara as the "primary caretaker," pursuant to WIS. STAT. § 767.41(6)(c).

¶11 Second, Sara misreads ***Westrate***. In ***Westrate***, we determined that a circuit court erred when it granted sole legal custody to the mother and divided physical custody equally between the parents. ***Id.*** at 246. We concluded that, pursuant to WIS. STAT. § 767.24 (1985-86), "physical custody implicitly must be united in the legal custodian" when the parties do not agree to joint legal custody. ***Id.*** at 246-48. ***Westrate*** does not apply to this case because, here, the parties stipulated to joint legal custody. When the parties stipulate to joint legal custody, as they did here, the parties have equal rights to make decisions concerning "choice of school." *See* WIS. STAT. § 767.001(1s), (2)(a), (2m).

¶12 To the extent that Sara may be arguing that she has the right to unilaterally choose the children's school because she has primary physical

placement of the children, we disagree. Primary physical placement is defined by statute as the following:

> [T]he condition under which a party has the right to have a child physically placed with that party and has the right and responsibility to make, during that placement, routine daily decisions regarding the child's care, consistent with major decisions made by a person having legal custody.

WIS. STAT. § 767.001(5). This statute does not grant Sara the right, as the party with primary physical placement, to change the children's school because changing schools is not a "routine daily decision." As we have explained, the statutory definition of "major decisions" includes "choice of school." § 767.001(2m). Thus, reading § 767.001(2m) and (5) together, Sara did not have the right to unilaterally change the children's school by virtue of the fact that she has primary physical placement.

¶13 Sara next argues, relying on ***Hunter v. Hunter***, 44 Wis. 2d 618, 172 N.W.2d 167 (1969), and ***State v. Dickson***, 53 Wis. 2d 532, 193 N.W.2d 17 (1972), that the circuit court erred in making its contempt finding because a party cannot be held in contempt "for a purported violation of a statutory provision not specifically incorporated into [the court] order." We reject Sara's argument on two grounds.

¶14 First, neither ***Hunter*** nor ***Dickson*** supports Sara's argument. In ***Hunter***, the Wisconsin Supreme Court determined that a husband could not be found in contempt of court based on a portion of a divorce judgment explaining that WIS. STAT. § 245.10 (1969) prohibited an individual from remarrying without permission from a court if the individual was obligated to support minor children not in his or her legal custody. ***Hunter***, 44 Wis. 2d at 621-22. The court reasoned that the divorce judgment merely explained the terms of the statute and "did not

specifically order or adjudge" that the husband could not remarry without permission from a court. ***Id.*** at 622 (emphasis omitted).

¶15 In ***Dickson***, the supreme court concluded that a circuit court erred in finding an attorney in contempt of court for failing to comply with instructions provided in a document that was rubber stamped with the name of the clerk of court because a document "issued by the clerk is not an order of the court." ***Dickson***, 53 Wis. 2d at 534-35, 540.

¶16 There is a critical difference between ***Hunter*** and ***Dickson***, on the one hand, and this case on the other. In both ***Hunter*** and ***Dickson***, the individuals who were found in contempt of court did not actually violate a court order. *See* ***Hunter***, 44 Wis. 2d at 621-22; *see also* ***Dickson***, 53 Wis. 2d at 540-41. Here, in contrast, Sara did in fact violate a court order when she failed to comply with the portion of the divorce judgment that awarded joint legal custody to the parties.

¶17 The second ground for rejecting Sara's argument is that, even though the divorce judgment did not expressly include the statute defining "joint legal custody," *see* WIS. STAT. § 767.001(1s), the divorce judgment necessarily invoked the statute defining that term because "[t]he action for divorce is a statutory action." ***Hirchert v. Hirchert***, 243 Wis. 519, 525, 11 N.W.2d 157 (1943). That is, a circuit court's authority to act in actions affecting the family is governed by the statutory scheme set forth in WIS. STAT. ch. 767. Consequently, a judgment of divorce entered by the court incorporates the applicable statutes in ch. 767, even though the judgment does not specifically cite those statutes.

¶18 Specific to this case, a court's authority to grant joint legal custody is found in WIS. STAT. § 767.41(2)(a), which provides that a court may "give joint legal custody or sole legal custody of a minor child." Under WIS. STAT.

§ 767.001(1s), a court that gives joint 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, and, as we have discussed, all legal custodians have "the right and responsibility to make major decisions concerning the child," including "choice of school," except as otherwise provided in the divorce judgment. § 767.001(2)(a), (2m).

¶19 Thus, as we can see, even though the circuit court did not expressly incorporate the statute defining joint legal custody into the judgment of divorce, this divorce action is governed by WIS. STAT. ch. 767, which includes the statute defining joint legal custody, WIS. STAT. § 767.001. Consequently, the absence of any cite to the statute defining joint legal custody in the judgment of divorce does not render the judgment unenforceable in a contempt proceeding.

¶20 Finally, Sara argues that the contempt finding "was an erroneous application of law to the facts." However, applying the law to the undisputed facts of this case, we conclude that the circuit court properly exercised its discretion in finding Sara in contempt of court for violating the divorce judgment. As we have explained, the divorce judgment granted the parties joint legal custody regarding all major decisions enumerated in WIS. STAT. § 767.001(2m), including "choice of school." Stated differently, the judgment of divorce did not exclude Lonnie's right as a joint legal custodian to participate equally in the decisions regarding "choice of school" for the children. Accordingly, under the terms of the judgment of divorce, Sara and Lonnie had equal rights in deciding where to send the children to school. Thus, based on Sara's own admissions, she intentionally violated that part of the judgment of divorce granting joint legal custody by unilaterally sending the children to a school in the Auburndale school district, without seeking and obtaining Lonnie's consent.

CONCLUSION

¶21 For all of the above reasons, we affirm.

By the Court.—Order affirmed.

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