COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 96-3207

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

JOHN MCCLELLAN,

PETITIONER-APPELLANT,

V.

MARY L. SANTICH,
A/K/A MARY L. MCCLELLAN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: RAYMOND E. GIERINGER, Reserve Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

FINE, J. John McClellan appeals *pro se* from the trial court's order finding him in contempt of court and sentencing him to six months of

incarceration.[1] We affirm in part, reverse in part, and remand for further proceedings.

The dispute presented by this appeal is the latest in an ongoing battle between McClellan and Mary L. Santich, whose relationship was described by us in a 1996 unpublished opinion:

> McClellan and Santich are the biological parents of John Marcus McClellan III, born on July 19, 1987. According to McClellan, the parties were married three months later on October 12, 1987. Santich states that they were never married. During the next few years, their relationship deteriorated and the parties separated. Santich was awarded sole legal custody of their son. Santich moved to Wisconsin while McClellan remained in Nevada, where they had been living. On May 17, 1990, McClellan petitioned the district court in Nevada for visitation rights with his son. Soon after, McClellan relocated to Wisconsin. On January 3, 1991, the district court in Nevada entered an order fixing McClellan's visitation schedule. On February 1, 1991, McClellan filed the Nevada order with the Milwaukee circuit court. On July 13, 1992, McClellan petitioned for divorce. On October 21, 1992, Santich counterclaimed, seeking an annulment.

McClellan v. Santich, Nos. 94-1505, 94-2544, & 94-2882, unpublished slip op. at 2 (Wis. Ct. App. June 25, 1996) (*per curiam*). The marriage was later annulled. ***Id.***, slip op. at 3.

McClellan seeks reversal of the trial court's contempt order, and asserts the following grounds: 1) that he timely filed a substitution-of-judge request against the judge finding him in contempt, and, therefore, that judge

[1] McClellan's brief discusses the trial court's refusal to modify custody and placement of the parties' minor child even though the order from which McClellan has appealed does not mention the trial court's oral decision on that issue. We nevertheless have jurisdiction over that aspect of McClellan's appeal. *See* ***Jacquart v. Jacquart***, 183 Wis.2d 372, 379–381, 515 N.W.2d 539, 541–542 (Ct. App. 1994).

lacked jurisdiction, *see* § 801.58, STATS.; 2) that he did not submit to the trial court's jurisdiction; 3) that the judge who found him in contempt was biased; 4) that the trial court erroneously refused to appoint counsel for him; 5) that there was insufficient evidence to support the trial court's finding that McClellan was in contempt; and 6) that the trial court erroneously exercised its discretion by refusing to change custody and placement of the parties' minor child. We discuss these assertions in sequence.

1. *Substitution*. McClellan claims he timely filed his request for substitution of judge. This issue was already decided by us on appeal, *see* ***McClellan***, slip op. at 7–8, and that decision is the law of the case and is final. *See* ***State ex rel. Blackdeer v. Township of Levis***, 176 Wis.2d 252, 261, 500 N.W.2d 339, 342 (Ct. App. 1993) ("It is axiomatic that 'a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal.'") (quoted source omitted).

2. *Submission to the trial court's jurisdiction*. McClellan devotes four sentences in his main brief to this contention, arguing that the trial court lacked jurisdiction over him because he refused to "give his name in court when asked for appearances." This argument is undeveloped and, therefore, we do not address it. *See* ***Barakat v. Department of Health & Social Services***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (court will not consider arguments that are undeveloped).

3. *Alleged trial-court bias*. It is true without a doubt that it is a denial of a litigant's rights to subject that litigant to a biased tribunal. Although McClellan cites legal authority for this unremarkable proposition, he does not give

record citations to anything that demonstrates that the trial judge before whom he appeared was biased against him. As noted, we will not consider undeveloped arguments, and it is the obligation of the party who claims error by the trial court to cite support in the record. RULE 809.19(1)(e), STATS. (argument in appellant's brief must "contain the contention of the appellant, the reasons therefor, with citations to the authorities, statutes *and parts of the record relied on*") (emphasis added).

4. *Appointment of counsel*. McClellan asserts correctly that a person facing incarceration for civil contempt is generally entitled to counsel. *See* ***State v. Pultz***, 206 Wis.2d 112, 129–133, 556 N.W.2d 708, 715–717 (1996).[2] An indigent person is entitled to appointment of counsel. ***Id.***, 206 Wis.2d at 133, 556 N.W.2d at 717. The record of the September 17, 1996, hearing at which the trial court sentenced McClellan to incarceration for contempt reveals that McClellan told the trial court that he had been evaluated by the office of the State Public Defender but that, for a reason that is not apparent on the record, that office "requested more information." *See* § 967.06 & ch. 977, STATS. Significantly, the

[2] Although ***Pultz*** discussed contempt proceedings initiated by government, 206 Wis.2d at 119–131, 556 N.W.2d at 711–716, the loss of liberty is no less significant where incarceration as a civil-contempt sanction is sought by a private litigant. *Compare* § 967.06, STATS. (re: indigent person's entitlement to counsel under the constitution or laws of the United States or this state) *with* § 977.05(6)(b)1 (public defender may not appoint counsel for indigent person "subject to contempt of court proceedings under s. 767.30 or 767.305 for failure to pay child or family support" if "action is not brought by the state, its delegate under s. 59.53 (6) (a) or an attorney appointed under s. 767.045(1)(c)").

Santich does not address any alleged distinction between government versus private-litigant initiated contempt proceedings, and the record in this case is not ripe for an analysis of whether that distinction is sufficient to deny counsel to some indigent persons facing incarceration for contempt of court. As noted later in the main body of this opinion, McClellan was represented by a public-defender appointed lawyer at an earlier stage of the proceedings, and the circuit court has the inherent power to appoint counsel for indigent persons subject to incarceration.

office of the State Public defender had apparently previously found that McClellan was indigent because that office appointed a lawyer to represent him at an earlier contempt hearing. Although McClellan asked the trial court to either appoint counsel for him, *see* ***Pultz***, 206 Wis.2d at 126 n.10, 556 N.W.2d at 714 n.10 (circuit court has inherent power to appoint counsel for indigent defendant), or call the office of the State Public Defender, the trial court glissaded to another issue because, as the trial court recognized, it could not sentence McClellan to jail "without a public defender present." Nevertheless, later on in the hearing, the trial court found McClellan in contempt of an order that he seek work, and sentenced him to six months at the Milwaukee County House of Correction, commenting that "you can get the Public Defender to try to get you out because you have the ability to have a job." This has it all backwards. *See* ***id.***, 206 Wis.2d at 126–127, 556 N.W.2d at 714 ("Affording counsel after a defendant is found in contempt is too late.").

> Before the court proceeds on the contempt motion, it should advise the *pro se* defendant that if he or she is found to be in contempt, the court could impose sanctions which may include the defendant having to spend time in jail. The court must also instruct that the defendant is entitled to be represented by an attorney. If the defendant wants an attorney but is financially unable to pay for a lawyer, the court must advise the defendant that an attorney will be appointed at public expense. The circuit court must be satisfied that the defendant understands those rights and must make the necessary findings based upon the defendant's answers and any other evidence the court receives. If the defendant wants to obtain counsel, the court should give the defendant a reasonable time either to retain counsel or, if indigent, to receive appointed counsel before proceeding on the contempt motion.

Id., 206 Wis.2d at 132–133, 556 N.W.2d at 717 (footnote omitted). The order of contempt is reversed and the matter is remanded to the trial court with directions that it follow the procedure mandated by ***Pultz*** in determining whether McClellan

is entitled to appointed counsel; if so, the contempt finding and sentence must be vacated and McClellan given a new hearing.

5. *Evidence in support of contempt finding*. In light of our disposition of item number 4, we do not address this issue; McClellan is entitled to counsel at any hearing at which he is found in contempt and at any hearing at which the trial court imposes a period of incarceration as a sanction for that contempt.[3]

6. *Custody and placement of the parties' minor child*. A trial court may not modify a custody and placement order so as to "substantially alter the time a parent may spend with his or her child" after the expiration of two years from entry of that order unless a modification is both in the child's "best interest," § 767.325(1)(b)1.a., STATS., and there has been a "substantial change of circumstances," § 767.325(1)(b)1.b., STATS. These are matters vested within the trial court's discretion. *See* ***Gould v. Gould***, 116 Wis.2d 493, 497–498, 342 N.W.2d 426, 429 (1984). Here, the trial court considered that the minor child was doing "reasonably well" despite the acrimonious nature of his parents' ongoing disputes, noting that it had "been on this case three-and-a-half years and nothing has changed." Although McClellan complains that the trial court placed undue reliance on the guardian *ad litem*, and that it prevented McClellan from adducing evidence "to dispute what the [guardian *ad litem*] stated," the hearing record does not bear this out. Moreover, McClellan did not make an offer of proof—either

[3] We do not have to make a sufficiency-of-the-evidence analysis mandated by ***State v. Ivy***, 119 Wis.2d 591, 607–610, 350 N.W.2d 622, 631–632 (1984) (retrial prohibited by double-jeopardy clause unless evidence is sufficient to support conviction) because double jeopardy is not implicated by civil contempt. *See* ***United States v. Ryan***, 810 F.2d 650, 653 n.1 (7th Cir. 1987).

orally or in writing—and has thus not preserved the point he wished to, but did not, make. *See* RULE 901.03(1)(b), STATS. (offer of proof necessary to preserve alleged error in excluding evidence). We have examined the transcript of the hearing and conclude that the trial court acted well within its discretion in refusing to modify custody and placement.

By the Court.—Order affirmed in part; reversed in part and cause remanded for further proceedings.[4]

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

[4] Santich seeks an award of frivolous-appeal costs in connection with McClellan's argument on the substitution-of-judge issue. We agree that McClellan's appeal on that issue was frivolous, given our earlier decision in ***McClellan***, Nos. 94-1505, 94-2544, & 94-2882. *See* RULE 809.25(3), STATS. We decline to award costs, however, for the following reasons: 1) In light of our earlier decision, the effort expended by Santich in briefing this aspect of the appeal was *de minimis*; 2) More importantly, Santich's brief, although prepared by an attorney, has completely ignored the requirement that the statement of facts and argument portions of a brief be supported by record references. *See* RULE 809.19(3)(a), STATS., incorporating the requirements of RULE 809.19(1), STATS. Accordingly, we decline to order frivolous-appeal costs. *See* RULE 809.83(2), STATS. (sanctions for failure to comply with rules).