COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1306 **Cir. Ct. No. 2008FA800**

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

IN RE THE FINDING OF CONTEMPT IN
IN RE THE MARRIAGE OF:

CHERI F. BECKER,

PETITIONER-RESPONDENT,

V.

JONATHAN D. BECKER,

RESPONDENT-APPELLANT.

APPEAL from order of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed*.

¶1 BROWN, C.J. [1] Jonathan Becker appeals from a contempt order issued against him for his failure to pay for half of the work-related child care expenses for his children with Cheri Becker, as stipulated in the Beckers' divorce and as previously ordered by the court. Because the record establishes Jonathan's contempt of court, we affirm.

¶2 The Beckers' divorce became final on May 28, 2010. The court's final findings of fact, conclusions of law, and judgment for divorce incorporated by reference the terms of the parties' final divorce stipulation, which resolved the question of child support and child care expenses by stating that "[p]ursuant to Sec. 767.511, Wis. Stats." Jonathan would pay Cheri a little more than $550 every two weeks, based upon "factors" including the parties' incomes, their shared placement (36% overnights with Jonathan and 64% with Cheri), and their agreement to share the children's variable cost expenses "and the work-related daycare expenses" fifty-fifty. Jonathan's failure to pay his one-half of child care expenses led to the contempt order from which he appeals.

¶3 At the time of the divorce, Jonathan was employed as the president of a business that was owned by his parents, earning $80,000 a year. Soon after the divorce,[2] the family business failed, and Jonathan was unemployed after October 23, 2010. The parties' divorce judgment obligated Jonathan to look for work if unemployed, and while the record suggests his job search was not as

[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.

[2] There is some dispute as to exactly when the business closed, with some testimony indicating it was nine days after the divorce was final, and other testimony suggesting it was in October 2010. This dispute is immaterial for this appeal.

active as it should have been,[3] Jonathan, in April 2011, found a new job, earning $16 per hour. Upon Jonathan's motion, the court reduced his child support obligation, in August 2011, to $597 per month,[4] based on an imputed income of $21 per hour, suggesting that if need be Jonathan might get a second job, to "add some time on" and make up for the difference between his wage and the earning capacity the court believed he had.[5]

¶4 Shortly after the August 2011 order was issued, Jonathan wrote a letter to the court articulating numerous complaints about the proceedings, the most relevant of which in this appeal is his identification of errors in the calculation of the new support amount of $597 per month, as well as an error in the interim child support amount that was in place from February through August of 2011. In September, the court held a hearing regarding the issues raised in Jonathan's letter and determined that the child support amount should be reduced

[3] In a hearing concerning modification of his child support obligations, Jonathan testified that he "kind of procrastinated and put [] off" filing the affidavits concerning his job search and admitted that he was not consistently seeking employment as actively as required.

[4] In describing these procedural facts, we skip over various irrelevant proceedings, such as, for instance, the proceeding before the court commissioner that preceded the court's August 2011 order.

[5] We reject Jonathan's contention that the circuit court judge "improperly took judicial notice" of his own experience by mentioning that his own father took a job as a security guard to make ends meet, while explaining to Jonathan that he knew his ruling on Jonathan's earning capacity might require Jonathan to work extra hours. The case Jonathan cites, ***State v. Sarnowski***, 2005 WI App 48, 280 Wis. 2d 243, 694 N.W.2d 498, does not support him. ***Sarnowski*** is a criminal case in which the circuit court held a father guilty of failure to support his children without evidence concerning the job market, despite the father's testimony that he dutifully sought work three or four times a week and could not find it, relying only upon the judge's own experience in having difficulty finding a carpenter to do work on the judge's house. ***Id.***, ¶¶9-10. In Jonathan's case, the court heard evidence concerning Jonathan's past salary history and his rather unimpressive job search efforts, evidence that supported the court's conclusion that Jonathan is working at a job below his earning capacity and should be charged with responsibility for the difference.

to $460 a month. At that September hearing, the attorney for the child support agency raised the issue of Jonathan's failure to pay for his share of the child care expenses, which were treated separately from child support, as variable expenses, per the parties' final divorce stipulation. Jonathan stated that he wanted "documentation" of Cheri's payments to her mother, and the court agreed that some sort of documentation was required, telling Cheri, "when you pay [your mother] you need to provide him with what was paid and what his half is." The court then stated "get that to [Jonathan] and he needs to pay it within three days." When asked if he understood, Jonathan responded: "Within three days."

¶5 The parties then aired their dispute concerning what, exactly, the documentation of the child care expenses must consist of. After some discussion concerning the fact that Cheri's mother did not provide a written bill to her daughter for the care, the following exchange occurred:

> Mr. Becker: So does her mother then provide a receipt to Cheri for the amount she paid that I receive a copy of?
>
> Ms. Becker: No, she doesn't. He knows that.
>
> [Agency attorney]: She should now.
>
> Ms. Becker: I'll do it and she won't daycare for us.
>
> The Court: That is the problem with paying cash.

The proceedings came to a close without further resolution of this documentation question. The order issued after the hearing directed Jonathan to pay child support of $460 per month, "based on respondent's earning capacity as determined by the Court of $44,000 annually and the parties' shared placement as previously ordered." Concerning child care expenses, the order stated,

> As previously ordered the variable expenses of the children and the work-related daycare expenses of the children shall be divided 50/50 between the parties.

> Cheri shall provide Jonathan monthly with a written statement of the daycare costs for the children. Payment is to be made from Jonathan to Cheri for his half of the costs within three (3) days of receipt of the statement.
>
> ….
>
> If reimbursements/payments for child care/daycare expenses … are not made within the three days as ordered by the Court, Cheri may request the Court to include the childcare expenses as a deviation added to the child support.

¶6 About a month later, Jonathan emailed Cheri and her mother, stating, "I'm not in any kind of financial position right now where I would be able to pay for child/day care services for the girls." He stated that he minimized his own need for child care services through "an adjusted work schedule" permitted by his employer, and suggested that "[p]erhaps [the need for child care] could be kept to a minimum if Cheri worked an adjusted schedule similar to mine where she could work extended hours during the times the girls are under my care." He added, "I don't expect this suggestion will go over very well. I know Cheri likes to have her Mondays off. But there has been a price associated with this luxury that I can no longer afford."

¶7 In short, just a month after the hearing in which, after reviewing his financial disclosure, the court ordered Jonathan to pay his half of the $300 per month child care expenses, Jonathan wrote to Cheri and her mother stating that he was "not in any kind of financial position right now" to pay as ordered. In April 2012, Cheri filed an order to show cause and affidavit for finding of contempt against Jonathan, attaching Jonathan's email about his being "not in any kind of financial position" to pay along with a copy of the order directing him to pay.

¶8 The hearing on the issue of Jonathan's contempt for the court's order that he pay one-half of child care expenses took place on May 2, 2012. Cheri

explained that Jonathan had only paid for the child care once since the order that was issued in September 2011. When asked why he failed to pay, Jonathan responded as follows:

> I can provide a financial disclosure to you, your Honor. I have no ability to pay those expenses at all. Additionally, I don't receive a lot of detail on them at all. I just receive—I can provide a copy of what I received. It just indicates from Cheri she paid her mother $150 but there is no indication how many hours where she watched the children or anything along those lines. Just a straight $150 per month so I would prefer some better documentation but there is no real refusal to pay or anything. It is just simply I just don't have the ability. I don't have the means to be able to pay. My income was raised slightly if you might recall. I still have an imputed income amount of $44,000 attributed to me, and I am at … $17.50 an hour and already I am paying upwards to 25 percent of my income with the additional expenses that I have to pay excluding tuition which is another 200 some dollars a month and daycare services which are $150 a month.

The court reviewed Jonathan's financial disclosure, and listened to Jonathan's complaints concerning the costs of completing the bankruptcy for the family business and money owed to the State of Wisconsin and for back child support. When Jonathan explained, "I have had a lot of difficulty just being able to make ends meet," the court observed, "I am sure your ex-wife has too," and Jonathan said, "I don't know."[6]

¶9 After hearing more about Jonathan's preference that the child care costs be reduced or eliminated by changes to Cheri's schedule, the court turned to Cheri. Cheri stated, "I understand Mr. Becker … wanted me to change my

[6] Jonathan identifies this as an unfair "assumption" on the part of the circuit court, but as Jonathan is well aware, the court had reviewed financial disclosures from both parties and thus was familiar with both parties' financial circumstances.

schedule at work. I don't have an option on that at this point." She also asserted, "he spends his time still closing down their family business and helping his parents and stuff." She also detailed the extent of care provided by her mother: Tuesday through Friday each week, before and after school care and transportation. Regarding documentation, Cheri asserted, "he knows these hours, your Honor…. [B]ecause we have been doing this forever."

¶10 The court expressed the belief that $150 a month was "a pretty good deal" for child care before and after school, four days a week, and calculated "at least $900 due and owing for the six months" that Jonathan had failed to pay for since the September 2011 order was issued. The court stated, "I am going to find you in contempt for not [paying the $150 a month]. And from my review here I think that, you know, that's a pretty reasonable amount of money and it needs to be paid. Based upon your monthly income I think that can be done."

¶11 At Cheri's request, the court further ordered that the arrearage would be paid off by adding $50 on to the monthly charge of $150 for the child care, until the $900 was paid off. When Jonathan expressed confusion as to whether $50 or $150 was to be added to the $460 child support deduction from his paycheck, the court clarified its order quite directly:

> The court: However you pay that 150, it is now 200 until the 900 is done.
>
> Mr. Becker: But I haven't been paying the 150.
>
> The Court: Well, if you don't now, you are going to jail.
>
> Mr. Becker: But it has to be 200 now?
>
> The Court: Correct, until that 900 is taken care of. Anything else today?

In response to Jonathan's continued objections that he could not pay the ordered amount, the court explained that the hearing was concerning his wife's request for a finding of contempt of the prior order in which the court had determined that he was obligated to reimburse her half of the child care. In response to Jonathan's complaint that "there is no record of her actually paying her mother," Cheri interjected, "The last time we were here [the court] had instructed me what to write him and that's what I did."

¶12 The court then stated, apparently to Jonathan, "If you don't think $150 is worth the child care for your kid, then," only to be interrupted by Jonathan saying, "I do. I do. I know it is very reasonable and, I mean, I am very gracious," and then offered other facts, such as his high gas expenses and the poor economy. The following exchange ended the hearing:

> The Court: I know all of that. We have been down that road.
>
> Mr. Becker: We have, yes.
>
> The Court: Well, Ms. Becker, you need to provide me with an order that states what I just said here today.
>
> Ms. Becker: Okay.
>
> The Court: Make sure Mr. Becker gets a copy of it. That is it for today.

After the hearing, the court issued the order from which Jonathan appeals, finding that Jonathan "intentionally and without legal justification failed to comply with a court order and IS found in **Contempt** for "failure to pay child care expenses. Rather than imposing an immediate sanction, the court ordered that Jonathan could purge the contempt by paying $200 per month beginning May 2, 2012, until all arrears balances are paid in full. The court further ordered,

> As previously ordered the variable expenses of the work-related daycare expenses of the children shall be divided 50/50 between the parties.
>
> Cheri Becker is to provide a detailed billing regarding the child care hours to Jonathan Becker. Payment is to be made within three (3) days of receipt of the bill.
>
> $900.00 outstanding in past child care expenses in which the court finds Mr. Becker in contempt.
>
> Jonathan Becker is to pay Cheri Becker $200.00 ($150.00 normal child care expense and $50.00 towards arrears) per month until arrears ($900.00) are paid, then normal amount of $150.00 per month will resume.
>
> Failure to pay shall result in Jail being imposed.

Instead of paying as ordered, Jonathan appealed.

¶13 A court's exercise of its contempt power to enforce its own orders is discretionary. ***Benn v. Benn***, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999). We review such decisions with deference. So long as the circuit court logically interpreted the facts, applied the proper legal standard, and reached a conclusion that a reasonable judge could reach, in a demonstrated rational process, we will affirm. ***Id.***

¶14 Having reviewed the entire record in this divorce, as well as the parties' lengthy briefs, we discern no error of fact or law. Most of the arguments Jonathan makes in his brief, such as his argument that the court should change the parties' stipulation that child care expenses be handled separately from child support, he failed to raise below, and issues not presented to the court below will not be considered by the appellate court. ***Brandt v. Brandt***, 145 Wis.2d 394, 420-21, 427 N.W.2d 126 (Ct. App. 1988). Other arguments, such as his continued insistence that the circuit court erred in attributing to him an earning capacity higher than his current wage, Jonathan made and lost at the hearings in August and

September 2011. The time to appeal is within forty-five days of the entry of a final judgment or order, so he cannot appeal those orders now. WIS. STAT. § 808.04. Furthermore, even manifest errors (such as errors in mathematical calculations) are deemed waived if not raised below:

> Common sense and practical economic considerations of time, effort and money dictate that such "mechanical" adjustments, if warranted, to the findings and judgment should first be allowed to occur at the trial court level. In most cases, this should eliminate the expense and delay of an appeal as to such issues. It also will eliminate trial court proceedings after remand to correct rudimentary error which the trial court should have earlier addressed. Failure to bring a motion to correct such manifest errors properly constitutes a waiver of the right to have such an issue considered on appeal.

Schinner v. Schinner, 143 Wis. 2d 81, 93, 420 N.W.2d 381 (Ct. App. 1988).

¶15 The only arguments Jonathan made at the contempt hearing concerned his proffered justifications for failure to pay for the shared child care expenses. He gave two somewhat contradictory explanations: one, that he was unable, financially, to pay, because of his reduced income and various expenses; and two, that he should not have to pay until presented with a more detailed billing statement. As for the first argument, the court already had considered and rejected it, at the August 2011 hearing, when it carefully explained its reasoning for imputing to Jonathan an earning capacity of $21 per hour. The court's reasoning was perfectly rational and could not be reversed by us, even if Jonathan had preserved his objection to it, which he did not. Continuing to defy a court's reasonable factual finding because one disagrees with it is the very definition of contempt.

¶16 As for the second argument, it is true that the court in the contempt hearing declined to resolve the parties' dispute concerning how detailed the

statement of the child care expenses must be. But we fail to see how it was error for the court to leave it to the parties' good judgment to figure that out for themselves.

¶17 The court's contempt order allows Jonathan to purge the contempt by making the monthly payments after being presented with a detailed statement of the child care charges his former wife has been, and is, paying. If he believes that the statements his former wife has presented, or presents in the future, are insufficiently detailed to trigger his obligation under the circuit court's order, then he should bring a motion in the circuit court, under WIS. STAT. § 767.59, attaching the statement or statements in question, and ask the court to clarify whether he will continue to be obligated to pay. As the record stands now, we do not know what the statement or statements say. The trial court obviously was not interested in entertaining this eleventh hour argument and no finding was made. This was well within the trial court's discretion. So, we have no idea whether the statement complied with the court's expectations or not.

By the Court.—Order affirmed.

This opinion will not be published pursuant to WIS. STAT. RULE 809.23(1)(b)4.