STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2021AP001436

In re the finding of contempt in:
In re the marriage of:
JULIE C. VALADEZ,
Appellant,
v.

THE HONORABLE MICHAEL J. APRAHAMIAN,
Respondent.

On Notice of Appeal from an Order of Contempt Made on August 13, 2021 and Entered on August 17, 2021, in the Waukesha County Circuit Court, the Honorable Michael J. Aprahamian, Presiding

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REPLY BRIEF OF APPELLANT

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ARGUMENT

Judge Aprahamian acted without authority when he initiated his own contempt proceedings against Ms. Valadez. He also erroneously exercised his discretion in concluding that Ms. Valadez committed contempt of court. Consequently, the finding of contempt and sanctions imposed must be vacated.

I. The circuit court acted without authority when it found Ms. Valadez in contempt.

The circuit court, on its own, filed an order to show cause and held a contempt hearing based on its belief that Ms. Valadez had violated two of its orders. Judge Aprahamian, through counsel, argues that this action was proper on three alternative grounds: 1) the contempt action was a continuation of previous summary contempt proceedings; 2) the GAL's letter was properly construed as a motion for contempt; or, 3) his action was authorized under his inherent contempt authority.[1] Each of these defenses of

[1] In advancing these arguments, Judge Aprahamian repeatedly makes references to facts which are either unsupported by the citations made to the record, lack citation to the record altogether, or are not in the record, contrary to Wis. Stat. § 809.19(1)(d)-(e) (for example, he states that Ms. Valadez made "multiple, unsubstantiated reports" of abuse and neglect to the children and cites to R562:23, which contains no information about who called human services or the outcomes of any investigations; he also asserts that Ms. Valadez has not

Judge Aprahamian's improper finding of contempt, however, is easily refuted.

A. This was not a valid continuation of an earlier summary contempt proceeding.

The record is clear that the contempt action at issue in this case was not a "continuation of the earlier summary contempt sanction," even if such a procedure would be proper – which for the reasons set forth in the initial brief, it would not. (Initial Br. 19; Response Br. 11).

The order to show cause drafted and filed by Judge Aprahamian states that Ms. Valadez was to show cause as to why she should not be held in contempt for "her noncompliance with the Court's order entered on July 30, 2021, that she facilitate the release of CPS information by August 4, 2021." (674). Further, at the contempt hearing, Judge Aprahamian asked whether Ms. Valadez had signed a release or otherwise allowed the release of records after July 30 and by August 4, 2021. (708:6-8). It is clear that Judge Aprahamian determined that Ms. Valadez violated what he believed to be an order entered on July 30th to "facilitate the release" of CPS records. This hearing was not to determine whether Ms. Valadez violated the June 2nd order to sign a release.[2]

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yet "complete[d] the straightforward tasks required of her.")(Response Br. 6, 18).

[2] The finding of contempt related to the June 2, 2021, order is the subject of the appeal in Case No. 2021AP001186.

Further, although Judge Aprahamian asserts that he "could have again placed [Ms. Valadez] in summary contempt at the July 30 hearing" due to her revoking the release after the June 2nd hearing, he provides no citation to statute or case law to support that position and it is simply not accurate. (Response Br. 11). As set forth in the initial brief, summary contempt may only be used if, among other things, the contumacious act occurs in the actual presence of the court and the sanction is imposed immediately after the contempt. *Matter of Finding of Contempt in State v. Kruse*, 194 Wis. 2d 418, 429-30, 533 N.W.2d 819 (1995) (citing *Gower v. Marinette County Circ. Court*, 154 Wis. 2d 1, 10-11, 452 N.W.2d 355 (1990)). Neither Ms. Valadez's revocation of the release she signed on June 2nd, or her failure to sign a new release or otherwise facilitate the release of records by August 4th, occurred in the actual presence of the court. Nor could a sanction imposed on August 13, 2021, qualify as occurring immediately after the alleged June 2nd contempt.

Finally, Judge Aprahamian's assertion that Ms. Valadez "should not be able to escape summary contempt sanctions through sham compliance" with purge conditions, shows his misunderstanding of the summary contempt procedure. (Response Br. 12). Sanctions imposed for summary contempt are punitive and must be imposed immediately for the purpose of protecting the authority and dignity of the court. Wis. Stat. § 785.03(2); *Kruse*, 194 Wis. 2d 418, 429-30. The sanctions which may be imposed are a fine of not more than $500, up to 30 days in jail, or both.

Wis. Stat. § 785.04(2)(b). No alternative sanctions, or purge conditions, are authorized. Nor would a purge condition make sense in this context, as, unlike remedial contempt proceedings in which a purge condition must be ordered, the purpose of summary contempt is not to ensure compliance with the court order; it is punitive and meant to preserve the authority of the court. *In re Paternity of Cy C. J.*, 196 Wis. 2d 964, 968-969, 539 N.W.2d 703 (Ct. App. 1995). Thus, if the court had imposed a proper punitive sanction there would be no method by which Ms. Valadez could have escaped it. Moreover, if any party were aggrieved by Ms. Valadez's failure to sign a release for the CPS records, that party could have certainly filed a motion for remedial contempt, putting an end to what Judge Aprahamian views as Ms. Valadez's "charade."

For these reasons, as well as those in the initial brief, the contempt action in this case cannot be justified as a "continued" summary contempt proceeding.

B. The GAL's August 9th letter was not a motion for contempt.

If not justified as summary contempt proceedings, Judge Aprahamian asserts that the contempt action in this case was authorized by statute because the GAL's letter was properly construed as a motion for contempt. This argument again ignores the reality of what the record demonstrates occurred below.

First, the letter filed by the GAL on August 9, 2021, contained absolutely no language that could be construed as requesting relief or any action by the circuit court. A properly pled motion must "set forth the relief or order sought." Wis. Stat. § 802.01(2)(a). The GAL's letter did not do that, it was simply informative – providing Judge Aprahamian with an "update on the status of the court ordered psychological evaluation." (672:1). There was no request that Judge Aprahamian enter an order or grant any relief based on the information provided. Notably, the GAL had filed motions in this case previously, including a motion for contempt of court, so certainly knew what needed to be filed to obtain a finding of contempt, or other relief, if that was her intent. (445; 510; 468, 469).

Second, at the contempt hearing, Judge Aprahamian acknowledged that he filed the order to show cause himself due to his concerns about the information provided by the GAL and the lack of response from Attorney Green regarding the release of records. (708:5-8). He never once stated that he had scheduled the hearing on the GAL's motion, nor did he require the GAL to present any evidence or offer of proof in support of "her motion."

Neither the GAL, nor any other party, filed a motion seeking contempt for Ms. Valadez's failure to comply with the order for psychological evaluation or order for release of records. As there was no motion for contempt filed by an aggrieved party, the circuit court acted without authority when it scheduled an order to

show cause hearing and held Ms. Valadez in contempt. *See* Wis. Stat. § 785.03(1)(a).

C. The circuit court had no inherent authority to initiate contempt proceedings outside of the procedures allowed by statute.

Judge Aprahamian acted without authority when he initiated contempt proceedings on his own, failing to follow the procedures set forth in ch. 785, Wis. Stats. Such action cannot be justified as one falling within the inherent authority of circuit courts.

In *Frisch v. Henrichs*, 2007 WI 102, ¶32, 304 Wis. 2d 1, 736 N.W.2d 85, the Wisconsin Supreme Court addressed the relationship between the court's inherent contempt power and the statutes, explaining:

> "A court's power to use contempt stems from the inherent authority of the court. The power may, however, within limitations, be regulated by the legislature." *"Despite the fact that power exists independently of statute, this court ruled [in 1880], that when the procedures and penalties of contempt are prescribed by statute, the statute controls."* This formulation necessarily presents questions of whether the legislature has fully prescribed the procedures and penalties of contempt and, if it has, whether the limitations imposed impair the inherent authority of the court. *The legislature may regulate and limit the contempt power "so long as the contempt power is not rendered ineffectual.*"

(internal citations omitted)(emphasis added).

Wisconsin courts have long recognized that a circuit court may not exercise its inherent contempt power without following the statutory procedures set forth in ch. 785. *See Id.*, ¶¶32-33*; See also Evans v. Luebke*, 2003 WI App 207, ¶17, 267 Wis. 2d 596, 671 N.W.2d 304 ("For over one hundred twenty years…the Wisconsin Supreme Court has recognized legislative regulation of the contempt power, and the court has proscribed the exercise of this power outside of the statutory scheme."); *State ex rel. Lanning v. Lonsdale,* 48 Wis. 348, 367, 4 N.W. 390 (1880)*; B.L.P. v. Circuit Court for Racine County*, 118 Wis. 2d 33, 41, 345 N.W.2d 510 (Ct. App. 1984). The legislature's regulation of the contempt power set forth therein has never been found to impair the inherent authority of the court and Judge Aprahamian makes no argument that his contempt power has been rendered ineffectual under the circumstances of this case. He simply asserts, without explanation, that "this is an instance where [the contempt sanctions] should be upheld based on the court's inherent authority." (Response Br. 14).

Judge Aprahamian, however, provided no argument or reasons why the statutory procedures were insufficient to address Ms. Valadez's behavior. He made no argument about why, if her failure to comply with the orders caused such a hardship in the case, neither Mr. Valadez nor the GAL filed a motion for contempt seeking enforcement of those orders. *See* Wis. Stat. § 785.03(1)(a). Nor did he explain why he could not have referred Ms. Valadez's contempt to a prosecutor. *See* Wis. Stat. § 785.03(1)(b). Just as the

court in *B.L.P.*, Judge Aprahamian failed to exhaust the statutory procedure and has pointed to no reasons for this court to find that the procedure required by statute is unreasonable. *See B.L.P.*, 118 Wis. 2d at 39-41.

Judge Aprahamian failed to follow the procedures set forth in ch. 785 and, consequently, acted without authority when he filed his own order to show cause, held a contempt hearing on it, and found Ms. Valadez in contempt. The order for contempt and sanctions must be vacated.

II. The circuit court's finding of contempt was clearly erroneous.

While the finding of contempt in this matter must be vacated due to Judge Aprahamian's failure to comply with statutory procedure, it is also improper as Judge Aprahamian erroneously exercised his discretion in finding that Ms. Valadez violated an order that was never actually made and an order for which contempt cannot be imposed.

There is nothing in the record to support Judge Aprahamian's claim that, on July 30, 2021, he ordered Ms. Valadez to sign a release of information for CPS records or that he ordered Attorney Green to "prepare a stipulation and order for the release of the information." (Response Br. 7). Rather, as laid out in the initial brief, the transcript from the July 30th hearing is clear – Judge Aprahamian ordered Attorney Green to prepare an order that said CPS needed to provide the records. (699:185-186). Although

Attorney Green may have agreed that Ms. Valadez would sign a new release, the circuit court never ordered her to do so. (699:191-192). Again, Judge Aprahamian admitted as much at the contempt hearing, noting that he ordered "[Attorney] Green to either prepare an order relative to [Ms. Valadez's withdrawal of the release] or make sure that that information was released and there be some documentation supporting that by August 4th." (708:6). Judge Aprahamian did not order Ms. Valadez, personally, to do anything related to the release of records on that date and, consequently, erroneously exercised his discretion in finding her in contempt for failing to comply with an order that was never actually made.

Further, Judge Aprahamian erroneously exercised his discretion when he found Ms. Valadez in contempt for failing to comply with the order for psychological evaluation, as violation of such an order cannot be sanctioned through contempt. *See* Wis. Stat. § 804.12(2)(a)4.. Judge Aprahamian argues that the statutory prohibition on enforcement of psychological orders through contempt does not apply here because the order at issue in this case was not entered under § 804.10. (Response Br. 16-17). In doing so, he ignores the GAL's motion for psychological evaluation and cites case law that is inapposite.

The GAL's motion for change of placement and psychological evaluation specifically states:

> *Pursuant to Wis. Stat. § 804.10* and based upon Ms. Julie Valadez's continued violation of court

> orders, continued manipulation of the children and treatment providers and her inability to understand the harm she is causing her children, I am requesting that the Court order Ms. Julie Valadez to compete a psychological evaluation.

(445:6)(emphasis added). It is that motion that Judge Aprahamian granted, and when he did so, he did not make reference to any other authority for the order. (696:39-40).

Moreover, *In re Visitation of Z.E.R.*, 222 Wis. 2d 628, 593 N.W.2d 840 (Ct. App. 1999), on which Judge Aprahamian relies, did not discuss whether the circuit court had authority, upon motion of a party, to order a psychological examination and then enforce it through contempt proceedings. Rather, this court was asked to determine whether the circuit court erroneously exercised its discretion when it ordered a psychological evaluation in a grandparent visitation case. *Z.E.R.*, 222 Wis. 2d at 643-44. In a single paragraph, this court noted that "when a trial court is determining the best interests of the child, it should consider the mental and physical health of the parties and the child," and because the circuit court's evaluations were intended to help it decide whether visitation was in the child's best interests, it did not erroneously exercise its discretion in doing so. *Id.* at 644.

Ms. Valadez does not argue that the circuit court did not have authority to order the psychological evaluation, only that he could not find her in contempt for failing to comply with that order. Section 767.201

specifically provides that "[e]xcept as otherwise provided in the statutes, chs. 801-847 govern procedure and practice in an action affecting the family." Section 767.41(5)(am), in turn, states that when determining legal custody and physical placement of children, the circuit court shall consider "[w]hether the mental or physical health of a party…negatively affects the child's intellectual, physical, or emotional well-being." Thus, section 804.10(1), which states that, upon motion and notice, when "the mental or physical condition, …, of a party is in issue, the court in which the action is pending may order the party to submit to a physical, mental, or vocational examination," provided the circuit court with authority to order the psychological evaluation upon the GAL's motion in this case. Because that authority derived from § 804.10, however, § 804.12(2)(a)4.'s prohibition on the use of contempt to enforce such an order also applied. The case cited by Judge Aprahamian does not state otherwise.

Finally, as set forth in the initial brief, the purge conditions ordered by Judge Aprahamian were improper as they were not feasible. (Initial Br. 23-24). At the contempt hearing, Judge Aprahamian made clear that Ms. Valadez's scheduling of a psychological evaluation would not be sufficient to purge her contempt; she was required to actually complete that evaluation before petitioning the court for release from jail. (708:11, 18-20). Further, the emails attached to the GAL's letter demonstrate that the psychologist Ms. Valadez was ordered to see had a full schedule and would likely not be able to do an evaluation prior to

August 20, 2021, as was ordered. (672:3). The timing of completion of the psychological evaluation was out of Ms. Valadez's control, she could not demand to be seen at any time prior to the expiration of her 30-day jail sanction to secure her release, and thus, the purge conditions imposed were not reasonable.

Judge Aprahamian erroneously exercised his discretion by relying on inaccurate facts and a misunderstanding of law, as well as imposing unreasonable purge conditions. As a result, the finding of contempt must be vacated.

CONCLUSION

For the reasons stated above, as well as those in the initial brief, Ms. Valadez respectfully requests that this court vacate the circuit court's contempt order and sanctions.

Dated and filed this 20th day of December, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,786 words.

Dated and filed this 20th day of December, 2021.

Signed:
Electronically signed by
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