

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 2, 1996

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(1), STATS.

NOTICE

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

No. 96-0173

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

DONNA L. FORTIN,

Petitioner-Respondent,

v.

EUGENE E. ZEGAROWICZ,

Respondent-Appellant.

APPEAL from an order of the circuit court for Dunn County:
JAMES A. WENDLAND, Judge. *Affirmed.*

MYSE, J. Eugene Zegarowicz appeals an order finding him in contempt for failure to pay child support arrears as ordered by the trial court. The contempt order imposed a sixty-day jail term with purge provisions requiring Zegarowicz to file a full financial disclosure statement with signed authorizations to verify the financial information disclosed, and to pay \$400 per month for the next twelve months as partial payment on the arrears. Zegarowicz contends that the trial court erroneously exercised its discretion by: (1) finding him in contempt for failure to pay child support arrears without evidence or findings as to his ability to pay; (2) imposing a sixty-day jail sentence without evidence that he had the ability to comply with the purge

provisions; and (3) awarding Fortin attorney fees without a finding of Zegarowicz's ability to pay and Fortin's need for contribution to fees. This court rejects Zegarowicz's arguments and affirms the order.

Zegarowicz and Fortin were divorced in 1966. Pursuant to the divorce judgment, Zegarowicz was ordered to pay \$260 per month child support for the three minor children born of their marriage. In 1972, the judgment was modified to require the payment of \$300 per month, \$260 for current child support and \$40 for arrears. All three children were emancipated as of July 1975. While Zegarowicz has practiced law in New York for years, he suffered a stroke in September 1994 and has not practiced since.

In March 1995, Fortin filed a motion to enforce the child support provisions of the divorce judgment. Zegarowicz did not appear personally, but filed an affidavit in response to Fortin's motion and was represented by counsel at the hearing. The trial court found that the principle amount of child support unpaid pursuant to the terms of the divorce judgment totaled \$16,320. A subsequent calculation, including interest, determined the full amount of the arrearage to be \$51,816. The trial court ordered Zegarowicz to contribute \$500 toward Fortin's attorney fees and to pay the total amounts for arrearages and attorney fees within sixty days of the hearing.

At the expiration of sixty days, Fortin filed a motion for remedial contempt because Zegarowicz had not paid the arrearage or attorney fees. Zegarowicz did not appear at the contempt hearing but was represented by counsel. At the hearing, the trial court ruled that Zegarowicz's affidavit offered by his attorney was hearsay and would not be considered by the court. Zegarowicz offered no other evidence at the hearing. Fortin testified that Zegarowicz had only made a \$100 payment since the previous court hearing. The trial court found that the \$100 payment was contemptuous in and of itself. The trial court also found that Zegarowicz had the opportunity to come into court on two occasions and failed to either appear personally or by telephone and therefore had not made himself available for cross-examination as to his true net worth and income. Therefore, the trial court found Zegarowicz in contempt and sentenced him to sixty days in jail with purge provisions requiring him to file a full financial disclosure statement with signed authorizations to verify the financial information disclosed and to pay \$400 per month for the next twelve months as partial payment on the arrears. The trial

court further ordered Zegarowicz to pay \$250 in attorney fees to Fortin's attorney as costs for bringing the contempt action. Zegarowicz appeals this order.

Zegarowicz first contends that the trial court erred by finding him in contempt without evidence or findings as to his ability to pay.¹ The trial court's use of its contempt power is reviewed for an erroneous exercise of discretion. *State ex rel. N.A. v. G.S.*, 156 Wis.2d 338, 341, 456 N.W.2d 867, 868 (Ct. App. 1990). This court will sustain the discretionary determination as long as it is the product of a rational mental process based on the reasoned application of the appropriate legal standard to the relevant facts. *Hedtcke v. Sentry Ins. Co.*, 109 Wis.2d 461, 471, 326 N.W.2d 727, 732 (1982). Where the trial court fails to set forth its reasoning, this court independently reviews the record to determine whether there is a basis for the trial court's decision. *WPS Corp. v. Krist*, 104 Wis.2d 381, 395, 311 N.W.2d 624, 631 (1981).

"[A] person may be held in contempt of court for failure to pay money only where the failure to pay is willful and not the result of an inability to pay." *Balaam v. Balaam*, 52 Wis.2d 20, 29, 187 N.W.2d 867, 872 (1971). Because this was a civil contempt proceeding, the burden of proof was on Zegarowicz to show that his conduct was not contemptuous. *Id.* at 30, 187 N.W.2d at 872. Accordingly, Zegarowicz had the burden to show either that his failure to pay was not willful or that it was the result of an inability to pay.

Zegarowicz contends that there was no evidence or finding of his ability to pay. Zegarowicz, however, ignores the rule that the burden was on him to prove that his failure to comply was not contemptuous. Zegarowicz did not produce any evidence in support of a defense of an inability to pay more than the \$100 payment toward the arrears. While Zegarowicz's attorney offered an affidavit into evidence showing Zegarowicz's income and expenses, the trial court struck the affidavit from the record as hearsay. The trial court in its order found that Zegarowicz had opportunities to appear either personally or by telephone and failed to do so and therefore had not made himself available to be cross-examined regarding his true net worth and income. Based on the trial

¹ Because Zegarowicz appeals the order finding him in contempt, this court will limit its inquiry to that order and will not address the initial finding of the total arrears due.

court's finding and the fact that the record reflects that Zegarowicz failed to produce any evidence of his inability to pay, this court concludes that the trial court did not erroneously exercise its discretion by finding Zegarowicz in contempt.

In addition, Zegarowicz's affidavit supports the trial court's finding that the \$100 payment was contemptuous in and of itself. While the affidavit was hearsay for the purposes Zegarowicz wished to use it, the trial court could consider the affidavit an admission for the purpose of determining that Zegarowicz had income and the ability to make more than the \$100 payment. *See* § 908.01(4)(b), STATS. A finding that Zegarowicz had the ability to make payments greater than the \$100 payment is a finding of fact this court reviews under the clearly erroneous standard. *See* § 805.17(2), STATS.

The affidavit discloses that Zegarowicz receives pension and social security income in excess of \$2,000 per month. The affidavit further indicates that Zegarowicz makes a \$315 per month mortgage payment from which the court may infer that he is the owner of a home. According to the affidavit, Zegarowicz had in excess of \$200 per month after his monthly expenses. Further, his monthly expenses included rent, telephone and yellow pages advertisement for his law office that he has not used since his stroke totalling \$465 per month. From these facts, the trial court may reasonably assume that the payment of \$100 over a sixty-day period was an unreasonable effort toward discharging over \$50,000 of child support arrears. Therefore, this court concludes that the trial court's finding of fact is supported by the evidence in the record and not clearly erroneous.

Next, Zegarowicz contends that the trial court erroneously exercised its discretion by imposing a sixty-day jail term without evidence that he had the ability to comply with the purge provisions. Zegarowicz contends that there is no evidence that he can pay \$400 per month toward the arrears.

It is true that the general statement of law is that the purge conditions must be within the power of the contemnor. *G.S.*, 156 Wis.2d at 342, 456 N.W.2d at 869. Zegarowicz, however, misunderstands the requirements of the purge provisions. The requirement that the provisions be reasonable does not require a finding that the person found in contempt can meet the terms of

the purge order from his current income. Purge provisions that require the person in contempt to borrow money, liquidate assets or take other steps to meet conditions required to purge are not unreasonable merely because they cannot be paid from current cash flow.

The touchstone of the purge provision is its reasonableness, not the ability to meet the conditions from any specific asset or source of income. Here the court required a \$400-per-month payment as well as financial disclosures. Based upon a substantial period of time practicing law, pension and social security income in excess of \$2,000 per month and the evidence that he is the owner of a home, this court concludes that the \$400-per-month cash requirement is reasonable. Therefore, this court concludes that there is no merit to Zegarowicz's contention that the trial court erroneously exercised its discretion by formulating the conditions necessary for Zegarowicz to purge himself of the contempt finding.

Finally, Zegarowicz contends that the trial court erred by ordering him to pay \$250 toward Fortin's attorney fees as costs for bringing the contempt action. Zegarowicz argues that the court must make a finding of his ability to pay and Fortin's need for contribution to fees before such an order can be entered. Zegarowicz, however, confuses the award of attorney fees at the time of divorce with the trial court's powers in a remedial contempt hearing. Section 785.04(1)(a), STATS., permits the trial court to impose a sanction of payment of a sum of money sufficient to compensate a party for a loss suffered as a result of the contempt of court. A person may be awarded attorney fees incurred while prosecuting a contempt action as losses. *Seymour v. Eau Claire*, 112 Wis.2d 313, 320, 332 N.W.2d 821, 824 (Ct. App. 1983). Because there is no requirement that there be a finding of need and an ability to pay before the trial court may exercise its remedial contempt powers in regard to attorney fees, we reject Zegarowicz's argument.

Because this court concludes that the trial court did not erroneously exercise its discretion by finding Zegarowicz in contempt, by formulating the conditions necessary to purge his contempt or by awarding attorney fees, the order is affirmed.

By the Court. – Order affirmed.

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