COURT OF APPEALS
DECISION
DATED AND FILED

March 19, 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. 97-2484

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN RE THE MARRIAGE OF: JAMES A. OLSON,

PETITIONER,

V.

LORI OLSON N/K/A LORI SCYKES,

RESPONDENT.

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LORI OLSON N/K/A LORI SCYKES,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed.*

Before Vergeront, Deininger, and Jones,[1] JJ.

DEININGER, J. Lori Scykes (formerly Lori Olson) appeals a November 1996 order which held her in contempt for failing to seek work as required under a modified divorce judgment. She also appeals a subsequent order denying her motion to modify the November order. The November order committed Scykes to six months in jail but stayed the commitment provided Scykes met two conditions, one of which was that she continue to seek work. Scykes argues that because she is disabled and receives Supplemental Security Income (SSI), the trial court lacks authority to countermand the federal determination of disability by ordering her to seek work. Additionally, Scykes claims the trial court's imposition of "criminal sanctions" upon her for failing to fulfill the seek-work order is unconstitutional and that she cannot be ordered to pay child support out of the SSI she receives.

We conclude that the trial court's order requiring Scykes to seek work was well within its discretion, that the order is not preempted by federal law, and that the trial court made the requisite findings of fact to hold Scykes in contempt. We also reject Scykes' argument regarding the constitutionality of the contempt sanctions and conclude that any issues regarding the payment of child support out of SSI benefits are not ripe for determination. Accordingly, we affirm the trial court's orders.

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[1] Circuit Judge P. Charles Jones is sitting by special assignment pursuant to the Judicial Exchange Program.

BACKGROUND

Scykes and James Olson were divorced in 1990 after eleven years of marriage. The 1990 divorce judgment awarded Olson primary physical placement of the couple's only child and ordered Scykes, who was unemployed at the time, to contribute seventeen percent of her gross income to support her child "at such time as she obtains wage income." On January 4, 1994, the trial court modified the judgment, ordering Scykes to pay a support arrearage of $174.13 at the rate of $20 a month and also ordering her "to seek work for the purpose of providing support for the minor child of the parties." The trial court acknowledged at the time that Scykes has dyslexia and was then receiving SSI, but found that "[i]rrespective of this disability, [Scykes] is capable of working although the types of jobs available to [Scykes] are limited due to the disability." To ensure compliance with the order, the court specifically required Scykes to apply for at least four different jobs each month "within a 60 mile radius of her residence until she obtains employment."

On August 27, 1996, the Child Support Agency for Grant County obtained an order requiring Scykes to show cause why she should not be found in contempt of court because she was "currently unemployed and has failed and refused to make adequate efforts to find suitable and gainful employment." Following a hearing, the trial court entered an order on November 19, 1996, finding Scykes in contempt of court due to her failure to comply with the court's previous seek-work order. The trial court's order provided, in pertinent part:

> IT IS HEREBY ORDERED:
>
> 1. That the Respondent, Lori Scykes, is hereby held in contempt of court for failure to comply with the Court's seek work order.

> 2. That the Respondent, Lori Scykes, is hereby committed to the Grant Count[y] Jail for a period of six months as and for her contempt.
>
> 3. That the above jail sentence is hereby stayed as long as the Respondent, Lori Scykes, complies with the following conditions:
>
> A. That the Respondent register and cooperate with all steps of the Children First Program.
>
> B. That the Respondent apply for at least 50 jobs within the next six months, 25 of which shall be in Madison or east of Madison.

The court further ordered that if Scykes failed to comply with the two conditions, she would be arrested and jailed, but that she could then "purge her contempt by paying her child support arrearage in full." Finally, the court ordered Scykes to "pay current child support at the rate of 17 percent of her gross income but not less than $140.00 per month commencing January 7, 1997."

Scykes filed a timely notice of intent to pursue postconviction relief,[2] and thereafter she filed motions in the trial court for postconviction relief and for a stay of the November 19th order pending appeal. At the hearing on her motions, Scykes argued that the federal Supremacy Clause[3] precluded the trial court from ordering Scykes to seek work since she was deemed disabled and was receiving SSI. The court denied Scykes' motion but modified its prior order "only

[2] Section 785.03(3), STATS., provides that appeals of contempt orders are to proceed "in accordance with s. 809.30 if the proceeding was prosecuted by the state." Section 809.30, STATS., generally governs appeals in criminal matters.

[3] The Supremacy Clause, Article VI, Clause 2 of the U. S. Constitution provides:

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

to the effect that it will no longer require [Scykes] to look for jobs in Madison or east of Madison." The court also stayed the November order pending the outcome of this appeal.

ANALYSIS

a. The Seek-Work Order

The crux of Scykes' argument on appeal is that the seek-work order is unconstitutional due to her status as an SSI recipient and that she cannot be found in contempt of an unconstitutional order. We disagree with her assertion that the seek-work order in this case is unconstitutional. Ordering a party to seek work as part of a child support order is within the discretion of the trial court. ***Dennis v. State,*** 117 Wis.2d 249, 259, 344 N.W.2d 128, 132 (1984). We will not set aside a trial court's discretionary action unless the court has erroneously exercised its discretion.

Domestic relations are preeminently matters of state law, and therefore, when Congress passes general legislation it rarely intends to displace state authority in this area. ***Mansell v. Mansell,*** 490 U.S. 581, 587 (1989). A state domestic order must give way, however, to clearly conflicting federal enactments. ***Ridgway v. Ridgway,*** 454 U.S. 46, 55 (1981). On the rare occasion when state family law comes into conflict with a federal statute, review under the Supremacy Clause is limited to a determination of whether Congress has "'positively required by direct enactment' that state law be preempted." ***Rose v. Rose,*** 481 U.S. 619, 625 (1987) (quoted source omitted). "Before a state law governing domestic relations will be overridden, it 'must do 'major damage' to 'clear and substantial' federal interests.'" ***Id.*** at 625 (quoted source omitted).

This court has previously addressed the question presented in this case: whether the Supremacy Clause precludes a state court from requiring an SSI recipient to seek work. ***Langlois v. Langlois,*** 150 Wis.2d 101, 106-07, 441 N.W.2d 286, 288-89 (Ct. App. 1989). In ***Langlois,*** the husband, an SSI recipient, moved to modify a state child support order and to vacate a seek-work order. ***Id***. at 103, 441 N.W.2d at 287. The husband argued that the trial court was precluded from requiring him to seek work because he had been declared disabled under the Social Security Act and was receiving SSI due to the disability. We concluded that the seek-work order "does not clearly conflict with the SSI program nor does it do major damage to the federal interest involved." ***Id***. at 106, 441 N.W.2d at 288. We specifically determined that although a federal assistance grant was based on a finding that the husband was disabled, a state court was not forbidden by the federal determination from ordering him to attempt finding work. ***Id***. at 107, 441 N.W.2d at 289.

Scykes contends, however, that our decision in ***Langlois*** is wrong, and that we should conclude that the present seek-work order is preempted under the federal Supremacy Clause. Scykes cites nothing in the record that would differentiate the circumstances presented here from those we addressed in ***Langlois.*** As we discuss below, the record clearly indicates an ability by Scykes to obtain and maintain employment. Because this court has previously determined that an SSI recipient can be ordered to seek work, we conclude that the trial court's seek-work order is not unconstitutional *See* Section 752.41(2), STATS. ("Officially published opinions of the court of appeals shall have statewide precedential effect."); *and* ***Cook v. Cook,*** 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997) (only the supreme court has the power to overrule, modify or withdraw language from a published decision of the court of appeals).

b. Civil Contempt Sanctions

We first note that the sanctions imposed and stayed by the trial court are not criminal penalties, but civil "remedial contempt sanctions" under §§ 785.03(1)(a) and 785.04(1), STATS. Because this is a remedial, or civil, contempt, Scykes has the burden of showing that she is not in contempt. ***Balaam v. Balaam,*** 52 Wis.2d 20, 30, 187 N.W.2d 867, 872 (1971). A person may be held in contempt if he or she refuses to abide by an order made by a court having personal and subject matter jurisdiction. ***State v. Rose,*** 171 Wis.2d 617, 622, 492 N.W.2d 350, 353 (Ct. App. 1992). This court will not set aside the trial court's factual findings that a person has committed a contempt of court unless they are clearly erroneous. ***Id***. at 623, 492 N.W.2d at 353; § 805.17(2), STATS. We review a trial court's use of its contempt power to determine whether the court properly exercised its discretion. ***Haeuser v. Haeuser,*** 200 Wis.2d 750, 767, 548 N.W.2d 535, 543 (Ct. App. 1996).

We conclude the trial court made the required findings to support a contempt order. A finding of contempt, when the order disobeyed is for the payment of child support, is based on a trial court's factual findings regarding a person's ability to pay. ***Rose,*** 171 Wis.2d at 623, 492 N.W.2d at 353. The principal findings are that "the person is able to pay and the refusal to pay is willful and with intent to avoid payment." ***Haeuser,*** 200 Wis.2d at 767, 548 N.W.2d at 543. The corresponding findings in this case would be that Scykes is able to work and that her refusal to seek work is willful. The trial court specifically found that Scykes had "a work history," noting further that "[s]he had a job in Clinton, Iowa for a year and quit it without any good reason." The court went on to find:

> I'm going to find that she's in Contempt of Court … [s]he's not made a reasonable effort …. She does not have a substantial learning disability to the extent that it would disable her from getting a job. She has a work history. She can work and get a job if she is applying for jobs.

Because the record includes appropriate findings to support remedial contempt sanctions, the November 19, 1996 order does not represent an erroneous exercise of discretion.

c. Payment of Child Support out of SSI Benefits

Scykes also argues that the "child support requirement [in the November order] amounts to subjecting her SSI to legal process" which is forbidden by 42 U.S.C. § 1383(d) (1993). 42 U.S.C. § 407(a) (1988) provides that "none of the moneys paid or payable ... under [subchapter II] shall be subject to execution, levy, attachment, garnishment, or other *legal process*." (Emphasis added.) 42 U.S.C. § 1383(d)(1) extends § 407(a)'s protections to SSI benefits awarded pursuant to subchapter XVI, including SSI benefits. The "legal process" language of § 407(a) has been interpreted broadly. *See* ***Becker County Human Serv. v. Peppel,*** 493 N.W.2d 573, 575 (Minn. Ct. App. 1992) (trial court's threat to hold a mother, whose only source of income was SSI benefits, in contempt for failure to pay child support found to be "legal process" barred by federal law). The court in ***Becker*** reviewed an order establishing child support of $69 per month for a parent whose only source of income was SSI benefits in the amount of $407 per month. The order threatened contempt sanctions if the SSI recipient failed to comply with the support order.

In contrast, the trial court here found Scykes in contempt "for failure to comply with the Court's seek work order," not for a failure to pay support or arrearages. The jail commitment imposed as a contempt sanction was specifically

stayed so long as Scykes complied with the revised seek-work order, and thus her avoidance of the sanction was not conditioned, in the first instance, on payments of any amount of past or present support.[4] The court's November 19th order further did not mandate that Scykes immediately pay her arrearage, or even that she immediately start paying a minimum dollar amount of child support each month. Rather, at the November 1996 hearing, the trial court specifically stated "I'm going to make it a minimum of $140 a month, 60 days from today. So she'll have 60 days to find a job and to start making payments."

Scykes contends, however, that "the effective result of the order [is that because] she doesn't have other employment to provide money for child support [the child support would necessarily] come out of her SSI." We disagree. The trial court explicitly noted during the May 28, 1997 hearing "that nobody in this courtroom has ever ordered her to pay a nickel out of her SSI or social security payments." An order to pay child support where the obligor's only source of income is his or her SSI benefits would violate the protection from legal process provided to Social Security benefits under Section 49.96, STATS.[5] ***Langlois,*** 150

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[4] The November 19, 1996 order contains both a "stay" provision and a "purge" provision. (If Scykes did not comply with the Children First and seek-work requirements, she could be arrested and jailed, but she could then "purge her contempt by paying her child support arrearage in full.") This two-step mechanism for avoiding the contempt sanction is somewhat confusing. "The law of nonsummary remedial contempt does not require a stay of a sanction." ***State v. Rose,*** 171 Wis.2d 617, 624, 492 N.W.2d 350, 353 (1992). Rather, the law requires that the contemnor have an opportunity to purge the contempt. ***Id***. "[T]o some degree, the 'stay' is of no legal effect. Under the law of contempt, a purge condition, not a stay, is what keeps a contemnor out of jail." ***Id***. at 619, 492 N.W.2d at 351.

[5] Section 49.96, STATS., (prior to July 1, 1996, § 49.41, STATS.) provides as follows:

> All grants of aid to families with dependent children, payments made under ss. 48.57 (3m) or 49.148 (1) (b) to 49.159, payments made for social services, cash benefits paid by counties under s. 59.53 (21), and benefits under s. 49.77 or federal Title XVI [which includes SSI benefits], are exempt from every tax, and

(continued)

Wis.2d at 104-06, 441 N.W.2d at 287-88. But that has not yet occurred on this record. Scykes may well find employment before the first minimum child support payment is due sixty days following the entry of the order.[6]

We read the November 19th order as allowing Scykes to avoid contempt sanctions simply by registering and cooperating with "all steps of the Children First Program," and applying "for at least 50 jobs within the next six months." No sanction is imposed for failure to commence minimum monthly support payments after sixty days. Before the issue of Scykes' payment of child support out of SSI benefits is squarely presented under the present order, therefore, the following would need to occur: (1) at least sixty days must elapse; (2) Scykes must continue to have no other source of income; (3) she must fail to pay the minimum monthly child support ordered; and (4) the County must commence a new contempt proceeding alleging as a basis that Scykes has not paid the minimum monthly support amount as ordered.[7] Only the first of these is fairly certain to occur. As a result, we do not consider the issue yet ripe for determination. *See, e.g.,* ***Loy v. Bunderson***, 107 Wis.2d 400, 412-14, 320 N.W.2d

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> from execution, garnishment, attachment and every other process and shall be inalienable.

[6] The November 19, 1996 order, which was granted orally on November 7, 1996, provided for payment of current support in the amount of "17% of [Scykes'] gross income but not less than $140 per month commencing January 7, 1997." That order has been stayed during this appeal. We suggest that, following remittitur, an order be entered reflecting new calendar dates that would implement the court's intent that Scykes have sixty days to find work before the minimum child support amount is imposed.

[7] The issue could also ripen if (1), (2) and (3) occur and Scykes also fails to comply with the "stay conditions" of the November 19th order. If she is then arrested and jailed, the only "purge condition" available to her would be to pay the accrued support arrearage out of her SSI benefits. She could then raise the issue by requesting a hearing. *See* ***V.J.H. v. C.A.B.***, 163 Wis.2d 833, 842-44, 472 N.W.2d 839, 843 (Ct. App. 1991) (prior to being jailed, contemnor may request and is entitled to a hearing, following which court may modify purge conditions).

175, 183-84 (1982) (ripeness requires that facts be sufficiently developed so court may avoid addressing "abstract disagreements").

CONCLUSION

We conclude that the seek-work provisions of the November 19th order are within the trial court's discretion and are not preempted by federal law. We also conclude that the trial court made the necessary findings of fact to impose remedial contempt sanctions on Scykes. Finally, we conclude that the order for a minimum amount of monthly child support, since it is first effective following sixty days of job search activities, does not yet present an issue regarding the payment of child support out of SSI benefits that is ripe for determination by this court. Accordingly, we affirm the trial court's orders.

By the Court.—Orders affirmed.

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