

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

August 18, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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**No. 97-3308**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE MARRIAGE OF:**

**DEBORAH LEE GORMAN,**

**PETITIONER-RESPONDENT,**

**v.**

**RICHARD ALLEN GORMAN,**

**RESPONDENT-APPELLANT.**

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APPEAL from orders of the circuit court for Outagamie County:  
JAMES T. BAYORGEON, Judge. *Affirmed in part; reversed in part.*

Before Cane, C.J., Myse, P.J. and Hoover, J.

CANE, C.J. Richard Gorman appeals a contempt order requiring him to pay \$75,723.96<sup>1</sup> as a sanction under § 785.04(1)(a), STATS. He contends

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<sup>1</sup> This amount represents \$59,672.99 in child support arrearage calculated by 25% of \$150,000 per year, plus interest of \$16,050.97.

the trial court erroneously exercised its discretion by imposing a sanction based on an erroneous calculation of a child support arrearage. Because the trial court properly exercised its discretion by fashioning the contempt sanction, we affirm that part of the order. Gorman also appeals the trial court's establishment of future child support at \$3,125 per month, contending the trial court erred by using his earning capacity and not his actual earnings. We agree and reverse that part of the order.

### **BACKGROUND**

This appeal stems from a judgment in the original divorce action between Richard and Deborah Gorman. The parties were married June 10, 1988; they had twins born August 14, 1990; they were divorced October 19, 1993. The stipulation and judgment of divorce provided that Richard would pay \$3,800 per month in child support based on his expectation that he would be employed at a salary of \$250,000 per year as an orthopedic surgeon. If Richard's income exceeded \$250,000 per year, he would pay child support of 8% on any income over \$250,000. Also, Richard would pay \$6,330 in support arrearage and contribute \$3,000 toward Deborah's attorney fees. The parties would exchange yearly tax returns and all attachments upon filing of the returns. Medical and dental expenses of the children, whether insured or not, were Richard's responsibility. Additionally, Richard would provide a trust for the children of \$250,000 in life insurance, to be maintained until his support obligations were met.

On January 27, 1994, child support was amended by a stipulated order and reduced from the original order of \$3,800 per month to \$1,354 per month because Richard's \$250,000 yearly salary did not materialize. The order

also required that Richard provide Deborah's counsel with monthly accountings of his financial status, including copies of pay stubs or other evidence of salary and copies of statements from all cash and deposit accounts, such as savings, checking or money market accounts.

On March 30, pursuant to the stipulated order amending the divorce judgment, the parties appeared for a review before the family court commissioner. Based on the parties' testimony, the commissioner found that Richard had been earning \$1,250 per week, but anticipated beginning employment with a guaranteed salary of \$150,000 per year on May 1 or 15. The commissioner ordered:

Effective March 30, 1994, [Richard] shall make child support payments in the amount of 25% of his gross income, but not more than \$3,800.00 per month. In addition, [Richard] shall pay child support equal to 8% of any gross income in excess of \$250,000 per year.

The March order (filed April 13) also (1) required Richard to provide the previously ordered monthly financial disclosures to Deborah's attorney beginning April 1, and on the first day of each month thereafter; (2) set payment on the arrearage at \$300 per month; (3) ordered payment of child support to be made by wage assignment to the clerk of court; and (4) continued the remaining provisions of the judgment of divorce not otherwise inconsistent with its order.

On Deborah's motion, the trial court found Richard in contempt for failing to pay current child support, failing to pay arrearages and the attorney fee contribution, failing to provide life or health insurance as ordered, and failing to provide financial records and income tax returns. As a remedial contempt sanction, it ordered Richard to pay an amount representing an arrearage based on a

calculation of 25% of \$150,000 per year, plus interest. It also set future support at \$3,125 per month. Gorman now appeals those orders.

### CONTEMPT SANCTIONS

The question before us is whether the trial court, in fashioning a remedial contempt sanction properly exercised its discretion when determining a monetary sanction that would compensate the children for their loss due to Richard's failure to pay child support. The trial court's use of its contempt power is reviewed for a misuse of discretion. *State ex rel. N.A. v. G.S.*, 156 Wis.2d 338, 341, 456 N.W.2d 867, 868 (Ct. App. 1990). The trial court's discretionary determination will be sustained if it is the product of a rational mental process based on the reasoned application of the appropriate legal standard to the relevant facts in the case. *Hedtcke v. Sentry Ins. Co.*, 109 Wis.2d 461, 471, 326 N.W.2d 727, 732 (1982).

The enforcement of a support obligation is accomplished through the use of remedial contempt that looks to terminate a continuing contempt of court and ensure future compliance with the support order. Section 785.01(3), STATS.; *State ex rel. V.J.H. v. C.A.B.*, 163 Wis.2d 833, 844, 472 N.W.2d 839, 843 (Ct. App. 1991). Section 785.04(1)(a), STATS., provides:

A court may impose one or more of the following remedial sanctions:

- (a) Payment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court.

The sanction is a form of coercive action designed to compel the contemnor to take affirmative and corrective action to remain in compliance with an existing court order. *V.J.H.*, 163 Wis.2d at 845, 472 N.W.2d at 843.

Here, the trial court found Richard in contempt for failing to pay child support many times over, and failing to comply with the order to provide monthly financial accountings, as well as the other provisions of its order. It ordered a sanction of a "payment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court," as allowed in § 785.04(1)(a), STATS.

Richard does not dispute the trial court's finding of contempt.<sup>2</sup> Instead, he contends the trial court erroneously exercised its discretion when it set the sanction amount using 25% of \$150,000 per year to determine an amount representing his arrearage. He argues the trial court's discretion is limited by the standard set forth in § 785.04(1)(a), STATS.; that is, to an amount sufficient to compensate a party for loss suffered by the party as a result of a contempt of court. He submits the trial court is confined to the mathematical formula unambiguously set forth in the March 1994 order in calculating the amount of the sanction, and that the trial court should have determined the sanction amount based on 25% of his actual income because that figure accurately reflects what the children should have received as child support under the unambiguous terms of the March 1994 order.<sup>3</sup>

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<sup>2</sup> Richard argued in his brief that the contempt finding was flawed because the trial court did not find that his failure to pay was a result of inability to pay and the contempt finding was based on an erroneous view of the March 1994 order. At oral argument, Richard conceded that the trial court could find Richard in contempt on all grounds asserted in Deborah's motion. However, even in the absence of Richard's concession, the contempt finding was proper because the record shows the trial court did find Richard had an ability to pay support and failed to do so, and Richard failed to pay child support even at the rate of 25% of his actual earnings from 1994 to 1996 as set forth in the March 1994 order.

<sup>3</sup> Richard also argued in his brief that the trial court erroneously relied on a September 9, 1996, child support agency arrearage order showing the monthly amount owed as \$3,800. At oral argument, the parties stipulated that the trial court did not consider the 1996 order in determining the sanction.

Deborah contends the trial court is free in its discretion to determine a monetary sanction under § 785.04(1)(a), STATS., and may use any reasonable method available to calculate an arrearage amount. She argues it was not a misuse of discretion for the trial court to base the sanction on a fixed yearly salary because the trial court could reasonably interpret the 1994 order as requiring Richard to pay 25% of an amount certain based on the finding of fact that Richard's salary was \$150,000 per year.<sup>4</sup>

We conclude the trial court properly exercised its discretion by fashioning the monetary contempt sanction. The trial court imposed a sanction allowed for in § 785.04(1)(a), STATS., by imposing a sanction equivalent to the amount of the arrearage it believed would be sufficient to compensate the children for the loss they suffered because of Richard's failure to pay full child support. Because of Richard's failure to supply monthly financial accountings and because it doubted the tax returns accurately reflected Richard's gross income, the trial court was not persuaded that Richard's tax returns were accurate evidence of his actual earnings. The trial court is not required to accept either Richard's testimony or financial evidence as credible. *See Lellman v. Mott*, 204 Wis.2d 166, 173, 554 N.W.2d 525, 528 (Ct. App. 1996). Richard's frustration of an accurate calculation of his actual earnings by deliberately failing to submit the monthly financial accountings does not prevent the trial court from setting a sanction based upon the information it had. The trial court may choose a method for calculating a sanction

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<sup>4</sup> There is some dispute whether the trial court could have concluded that the March 1994 order required child support at the rate of 25% of \$150,000 per year based on its reasonable interpretation of the findings of fact and order as a whole, as well as the parties' intentions. However, because we decide the case based on the trial court's exercise of discretion in fashioning the sanction, we need not review the trial court's interpretation of the order.

based upon the available evidence when a party's intentional conduct precludes a precise determination of annual gross income. *See id.*

The record supports the trial court's proper exercise of discretion by ordering a sanction based on an amount sufficient to compensate Richard's children for his failure to pay support. Because Richard consistently failed to comply with the order requiring monthly financial accountings, the trial court could reasonably find that Richard had earned at least \$150,000 a year, as evidenced by his employment at that rate for seven to eight months, and then for two months at the \$180,000 per-year level. Based on our review, we cannot conclude the trial court's findings are clearly erroneous or that it misused its discretion. We therefore affirm the \$75,723.96 sanction.

### **FUTURE CHILD SUPPORT**

The trial court set Richard's future child support obligation at \$3,125 per month.<sup>5</sup> Richard contends the trial court erred by modifying the March 1994 child support obligation of 25% of his gross income to the \$3,125 amount. He argues the trial court could not undertake a modification of child support without a

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<sup>5</sup> The \$3,125 per month represents 25% of \$12,500 per month, based on a yearly salary of \$150,000.

request by either party as required by § 767.25(1m), STATS.<sup>6</sup> He also contends the trial court erred by deviating from the requirement in § 767.25(1j), STATS., which provides: "Except as provided in sub. (1m), the court shall determine child support payments by using the percentage standard established by the department under s. 49.22(9), Wis. Stats." Richard argues the trial court cannot consider his earning capacity in setting future child support unless it first finds that it was unreasonable for him to leave his employment to purchase his own medical practice.

Deborah contends the trial court did not modify child support. She argues the trial court merely enforced the March 1994 child support order as it was intended to be executed, and therefore \$3,125 per month is an appropriate amount of child support. She argues the trial court implicitly found Richard's decision to go into private practice was unreasonable in light of his support obligations.

It is unclear from the record whether the trial court intended to modify the March 1994 child support order or whether its purpose was to enforce the order according to its interpretation. It is not apparent from the record that a request for modification was presented to the court, although Deborah contends that her contempt motion asking child support to be set at 25% of gross income but not less than an amount certain to be established by the court is sufficient to meet the § 767.25(1m), STATS., request requirement.

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<sup>6</sup> Section 767.25(1m), STATS., provides:

*Upon request by a party, the court may modify the amount of child support payments determined under sub. (1j) if, after considering the following factors, the court finds by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to any of the parties. (Emphasis added.)*

We need not resolve these questions in order to reach our ultimate conclusion. In either case, the trial court considered Richard's earning capacity in arriving at the \$3,125 per month obligation for future support.

A payor's earning capacity may be considered when the payor's termination of employment resulting in lower earnings is voluntary and unreasonable. *Smith v. Smith*, 177 Wis.2d 128, 135-36, 501 N.W.2d 850, 854 (Ct. App. 1993). Divorced spouses should be allowed a fair choice of a means of livelihood and to pursue what they feel are the best opportunities even though they might for the present be working for a lesser financial return. *Balaam v. Balaam*, 52 Wis.2d 20, 28, 187 N.W.2d 867, 871 (1971). This rule, however, is subject to reasonableness commensurate with their support obligations to their children. *Id.*

The law recognizes the right of an obligor to make career decisions which, in some instances, will diminish the income available to meet the obligor's support ... duty. Indeed, in the appropriate case, such a decision may be the more prudent career decision over the long term, despite its immediate disadvantage to both the obligor and the obligee. However, since the reasonableness of the conduct is the standard, this right is qualified – not absolute.

*Kelly v. Hougham*, 178 Wis.2d 546, 557, 504 N.W.2d 440, 444 (Ct. App. 1993) (quoting *Van Offeren v. Van Offeren*, 173 Wis.2d 482, 498, 496 N.W.2d 660, 666 (Ct. App. 1992)).

Here, the trial court did not make an explicit finding that Richard's decision to go into private practice was unreasonable. We reject Deborah's suggestion that the trial court implicitly found that Richard's decision was unreasonable. The trial court commented:

Now, [Richard] chose to accept a lesser figure ... because he wanted to start his own practice. And I find nothing wrong with that. It's commendable. However, when people have obligations, and particularly obligations to his children, whatever their dreams are, their aspirations and hopes and ideals, they all have to be subordinate to their obligation to their children.

We cannot conclude that the trial court implicitly found Richard's decision to go into private practice unreasonable based on its remarks concerning Richard's professional employment choices.

In the absence of a finding of unreasonableness, either express or sufficiently implied, it was error for the trial court under these limited facts to consider Richard's earning capacity in setting future child support. We therefore reverse the May 29, 1997, order setting child support at a specific sum of \$3,125 per month. The March 1994 order setting child support at 25% of gross income remains in effect.

### SUMMARY

Because we conclude the record supports the trial court's proper exercise of discretion in setting the contempt sanction, we affirm the order for sanction. Because we conclude the trial court erroneously considered Richard's earning capacity in setting future child support payments, we reverse the order for \$3,125 monthly child support. The March 1994 child support order remains in effect.

*By the Court.*—Orders affirmed in part; reversed in part. No costs to either party.

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