

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 13, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2267

Cir. Ct. No. 2005FA83

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

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

DENISE K. CALO,

PETITIONER-RESPONDENT,

v.

RODNEY L. CALO,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Green Lake County:
MARK T. SLATE, Judge. *Affirmed in part; reversed in part and cause remanded
with directions.*

¶1 REILLY, J.¹ Rodney and Denise Calo, parents of two minor children, were divorced in 2007. Rodney, per the judgment of divorce, was ordered to make child support payments to Denise. The judgment also required Rodney to annually submit a copy of his income tax returns by April 15 of each year. Rodney did not submit his tax returns by April 15 for the years 2008, 2009, and 2010.

¶2 The court found Rodney in contempt for his failure to comply with the court order for the years 2008 through 2010. The court determined that \$4183.75 in child support had not been paid as a result of his violation. The court ordered Rodney to pay, within sixty days, \$4183.75 plus an additional fifty percent of the owed child support “to make sure Mr. Calo timely discloses his income tax returns per court order.” The court also awarded Denise \$1400 in attorney fees for her expenses in bringing the contempt action.

¶3 Rodney objects to the court’s contempt finding, arguing his failure was not “intentional” disobedience because Denise neither requested the information nor made an attempt at a mutual exchange. He also contends that the court erred when it imposed the fifty-percent portion of his sanction and when it did not extend Rodney’s payment deadline so that he could pay the additional amount. We affirm the court’s contempt finding, but we reverse the imposition of an additional fifty-percent sanction.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

STANDARD OF REVIEW

¶4 We review the court’s use of its contempt powers and its choice of remedial sanctions to ensure the court properly exercised its discretion. *Benn v. Benn*, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999). We review the record “to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process” to draw a reasonable conclusion. *Id.* The court’s findings of fact are upheld unless they are clearly erroneous. *City of Wis. Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995).

DISCUSSION

¶5 A remedial sanction is “imposed for the purpose of terminating a continuing contempt of court.” WIS. STAT. § 785.01(3). The court may impose an authorized sanction, including “[p]ayment 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.” WIS. STAT. § 785.04(1)(a). The court has discretion to determine the type of remedial sanctions to impose for contempt. *Benn*, 230 Wis. 2d at 308.

¶6 We affirm the court’s contempt finding as a proper exercise of the court’s discretion. We rely on our supreme court’s decision in *Frisch v. Henrichs*, 2007 WI 102, 304 Wis. 2d 1, 736 N.W.2d 85. In *Frisch*, the father was found in contempt for his failure to provide his tax documents in a timely manner. *Id.*, ¶81. Although he provided the necessary information at the time of his contempt hearing, the court found that “[t]he timely provision of information was an essential element of the court’s order,” and therefore, it was a continuing contempt that was not remedied when he provided the tax documents. *Id.* The

Frisch court affirmed the imposition of a remedial sanction to compensate the mother for the loss she suffered in past child support, finding that the sanction was the equivalent of a purge condition to terminate the father's contempt. *Id.*, ¶¶63, 81. Like the father in *Frisch*, Rodney was engaged in a continuing act of contempt that was not remedied with his untimely submission of his tax information because the court order required him to provide that information by April 15 on an annual basis. The court therefore properly exercised its discretion when it found Rodney in continuing contempt and ordered him to pay \$4183.75 to compensate Denise for the loss in child support that she suffered due to Rodney's failure to timely provide his tax returns and to terminate his continuing contempt.

¶7 Rodney argues that the court erred as it did not make a specific finding that he intentionally disobeyed the court order. This argument fails. Once Denise made a prima facie showing that he violated the court's order, Rodney had the burden to demonstrate lack of intent. *See Noack v. Noack*, 149 Wis. 2d 567, 575, 439 N.W.2d 600 (Ct. App. 1989). The record indicates that Rodney's attorney conceded that Rodney did not comply with the order. Rodney offered no testimony to dispute intentional noncompliance.

¶8 Rodney further argues that his conduct was not contemptuous because Denise neither requested the information nor made an attempt at a mutual exchange. We disagree. As the court found, the judgment of divorce did not require Denise to provide her information or request that Rodney provide his.²

² Rodney appears to express the belief that he was not bound by the original order as it did not require Denise to also submit her tax returns as required by WIS. STAT. § 767.54. We do not consider collateral attacks on the propriety of court orders as a defense for violating those orders. *Kriesel v. Kriesel*, 35 Wis. 2d 134, 139, 150 N.W.2d 416 (1967). Rodney was bound to obey the order until relieved from it in some legally prescribed way. *See State v. Rose*, 171 Wis. 2d 617, 622-23, 492 N.W.2d 350 (Ct. App. 1992).

There likewise is no evidence in the record to suggest Rodney was unaware of his obligations under the court order. He is responsible for compliance and he assumed the risk of being found in contempt for violating the order. *See Frisch*, 304 Wis. 2d 1, ¶80.

¶9 We reverse the portion of the court’s contempt order that requires Rodney to pay an additional fifty percent of the owed child support “to make sure Mr. Calo timely discloses his income tax returns per court order.” We can find no authority for this sanction. The sanction is not authorized by WIS. STAT. § 785.04(1)(a) as the court already ordered Rodney to pay Denise \$4183.75 in past child support and \$1400 in attorney fees to compensate for her loss. We also do not see how the sanction comports with § 785.04(1)(d), and neither the court nor Denise provides an explanation for how such a payment will ensure Rodney’s future compliance any more than the prospect of paying Denise’s attorney fees. The fifty-percent sanction instead resembles a punitive measure, which is not a permissible use of the court’s remedial sanction authority, *see Christensen v. Sullivan*, 2009 WI 87, ¶55, 320 Wis. 2d 76, 768 N.W.2d 798, and therefore represents an erroneous exercise of discretion, *see Benn*, 230 Wis. 2d at 308.

¶10 As we reverse the court’s order that Rodney pay an additional fifty-percent sanction, we need not consider his argument that the court should have given him more time to pay the additional amount. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (when one ground is dispositive of an issue, we need not discuss others).

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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

