

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 1999

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.

Nos. 98-3524, 98-3525

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 98-3524

**IN RE THE PATERNITY OF DAVID V.S.:
STATE OF WISCONSIN,**

PETITIONER-RESPONDENT,

V.

**ASA V.D.,
RESPONDENT-APPELLANT.**

No. 98-3525

**IN RE THE PATERNITY OF DEVON L.C.:
STATE OF WISCONSIN,**

PETITIONER-RESPONDENT,

V.

**ASA V.D.,
RESPONDENT-APPELLANT.**

APPEALS from orders of the circuit court for Shawano County:
THOMAS G. GROVER, Judge. *Reversed.*

CANE, C.J. Asa V.D. appeals two remedial contempt orders for failing to pay child support.¹ Asa argues that the failure under §§ 767.305 and 785.03(1)(a), STATS.,² to give him notice of the contempt allegations deprived the circuit court of authority to exercise its remedial contempt powers. Additionally, he asserts that the record does not support a finding of contempt. This court concludes that because the record fails to show that Asa's refusal to pay child support was willful and with intent to avoid payment, the orders must be reversed.

I. FACTS

In December 1995, a default judgment was entered declaring Asa to be Devon L.C.'s father. In June 1996, Asa was ordered to pay child support for Devon. In a February 1997 order, Asa was declared to be David V.S.'s father and ordered to pay child support. The State filed an affidavit for remedial contempt in January 1998 alleging that Asa had failed to pay child support, was currently

¹ In a January 8, 1999, order, this court granted Asa's motion to consolidate these appeals.

² Section 785.03(1)(a), STATS., provides:

NONSUMMARY PROCEDURE. (a) *Remedial sanction.* A person aggrieved by a contempt of court may seek imposition of a remedial sanction for the contempt by filing a motion for that purpose in the proceeding to which the contempt is related. The court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

Under § 767.305, STATS., if a party fails to pay child support as ordered, the court may, or must if the receiving party files an application, issue an order requiring the payer to show cause why he or she should not be punished as provided in ch. 785, STATS.

unemployed, and had "failed and refused to make adequate efforts to find suitable and gainful employment."

At a March 16 contempt hearing, Asa testified that he was unemployed, but had been working forty hours per week as a laborer at the Pine Hills Golf Course. While he was working, his child support payments were deducted directly from his paycheck. Because he was a seasonal laborer, Pine Hills laid him off in October 1997. Asa further testified that his attempts to find work were unsuccessful; he stated that because he does not have a vehicle, he was forced to cancel his interviews because he had "no way there." He believed however, that beginning in the two months following the hearing he would resume his position at Pine Hills on a full-time basis. When Pine Hills closed for the season, he hoped to receive unemployment. In addition, Asa provided a three-page list of businesses where he attempted to find employment.

In requesting that the contempt issue be held open and reviewed again on June 29, the State expressed its opinion that given the number of places Asa had applied for employment, he showed a good faith effort to find employment during his off-work period. The State also noted that Asa planned to return to employment and that his employer "was good" at deducting child support directly from his paycheck. Finally, the State indicated that if Asa was making payments by the June 29 hearing, it would dismiss the contempt action. Asa requested that the circuit court dismiss the contempt motion, but the circuit court granted the State's motion and held the matter open under the conditions requested.

Because Asa failed to appear at the June 29 hearing, the circuit court issued a warrant for his arrest. Asa turned himself in. At a July 2 bond hearing,

Asa's counsel moved to dismiss the contempt action, contending that the circuit court had no jurisdiction because no new pleadings were filed setting forth new contempt allegations. After setting a cash bond, the court scheduled the contempt matter for a July 20 hearing.

At the July 20 contempt hearing, Asa's counsel reiterated that because the current contempt allegations were predicated on Asa's conduct since the March 16 contempt hearing, new written pleadings were required. He requested an adjournment so that the corporation counsel could indicate the basis for the contempt charge. The circuit court disagreed and stated, "Sounds to me like [we are] reviewing the same old contempt. And that's what we are going to do. And, apparently, that is based on everything that has happened." The hearing then continued with testimony from Asa.

Asa testified that he was once again unemployed; he lost his job at Pine Hills after one week because he had a vehicular accident. He then worked for Spirit Construction for "a month or two" until he was arrested; he obtained the position through a staffing service. While he worked for Spirit, child support payments were deducted from his paycheck. Asa testified that he had not made his child support payments because he was unemployed. He presented a list of three employment prospects and stated that he was living with his mother.

The State requested thirty days contempt on each case, to be served consecutively, and purgeable by paying the current orders and participating in the Children First program. Asa's counsel requested dismissal, indicating that the arrearages exceeded Asa's earnings for the same period, that he was obviously seeking employment diligently, and that Asa's failure to make his child support payments was not done knowingly and willingly. At the hearing, the circuit court

granted the State's request without explanation. Subsequently, the court issued a remedial contempt order finding that Asa had willfully violated the court's child support order.

II. ANALYSIS

Asa argues that the circuit court erroneously exercised its discretion when it found him in remedial contempt because: (1) it neither addressed whether he had the ability to pay child support between March and June of 1998 nor discussed the factors a court should consider when issuing a remedial contempt order; and (2) the record presented at the July 20 hearing fails to support a contempt finding.

The State asserts that it was unnecessary for the circuit court to give its reasons for the contempt finding because "the record speaks for itself." To support this contention, the State points to the following facts it insists supports the court's contempt order: Asa's "history" of contempt from 1996, which is part of this appellate record; his unemployment and inability to hold a job; his child support arrears; and his "half-hearted attempt at best" to obtain employment, which the State characterizes as a matter of credibility particularly within the circuit's province.

A person may be held in contempt if he or she refuses to comply with a circuit court order. *See Haeuser v. Haeuser*, 200 Wis.2d 750, 767, 548 N.W.2d 535, 542 (Ct. App. 1996). Remedial contempt seeks to procure present and future compliance with court orders, and the sanction must be purgeable through compliance. *State ex rel. N.A. v. G.S.*, 156 Wis.2d 338, 342, 456 N.W.2d 867, 869 (Ct. App. 1990); *see also* § 785.01(3), STATS. (definition of "remedial sanction"). Mere inability to pay child support cannot support a contempt finding.

Burger v. Burger, 144 Wis.2d 514, 528, 424 N.W.2d 691, 697 (1988). A person may be held in contempt, however, for failure to pay if that failure is willful and contemptuous and not the result of an inability to pay. *Id.* The purpose behind a remedial contempt hearing is to determine the person's ability to pay and the reason for the failure to pay the court's child support order. **Balaam v. Balaam**, 52 Wis.2d 20, 30, 187 N.W.2d 867, 872 (1971).

Thus, the principal factual findings that a court must make are that "the person is able to pay and the refusal to pay is willful and with intent to avoid payment." **Krieman v. Goldberg**, 214 Wis.2d 163, 169, 571 N.W.2d 425, 428 (Ct. App. 1997). The circuit court's findings of fact underlying its conclusion that a person has committed contempt will not be set aside unless they are clearly erroneous. Section 805.17(2), STATS.; *see also* **Haeuser**, 200 Wis.2d at 767, 548 N.W.2d at 542-43. The standard of review for remedial contempt is erroneous exercise of discretion. **Krieman**, 214 Wis.2d at 169, 571 N.W.2d at 428. This court will sustain discretionary determinations if the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. **Loy v. Bunderson**, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). This court concludes that the circuit court erroneously exercised its discretion because: (1) it failed to make the required factual finding that Asa has the ability to pay; and (2) based on the uncontested facts of record, the court's factual finding that Asa willfully refused to pay is clearly erroneous.

The issues before the circuit court were whether Asa had the ability to pay child support and whether his conduct was a willful and intentional refusal to obey the child support orders. *See* **Krieman**, 214 Wis.2d at 169, 571 N.W.2d at 428. First, while the record indeed shows Asa's failure to pay, the court did not

make the required finding that Asa had the ability to pay. *See id.* A court may order contempt if it concludes from past performance that a payor cannot be relied on to maintain support obligations until some legal force is exerted, *see Burger*, 144 Wis.2d at 528, 424 N.W.2d at 697, but here the court made no express factual finding regarding Asa's ability to pay support, whether past, present, or future.

Second, the uncontested facts of record do not support the court's factual finding that Asa's refusal to pay was willful. A determination that a refusal to pay is willful involves an assessment of the payer's intent, motives and credibility, all matters for the circuit court sitting as a finder of fact. *See Gehr v. City of Sheboygan*, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977). Asa was the only witness to testify at the contempt hearing. In its remedial contempt order, the court concluded that Asa's refusal to pay was "willful," but it made no factual findings, either at the hearing or in its order, regarding Asa's credibility, motives, or intent. Asa's testimony was the only evidence before the circuit court, and because the circuit court made no credibility finding, his testimony is uncontested.

According to Asa, he had not paid his child support obligations because he was unemployed. While he was working, however, the record shows that payments were deducted directly from his paycheck. Asa further testified that he was seeking employment and provided the court with the names of businesses at which he had applied. These uncontested facts of record do not support a finding that Asa's refusal to comply with the order was a willful and intentional refusal. A mere inability to pay is insufficient to support a contempt finding. *See Burger*, 144 Wis.2d at 528, 424 N.W.2d at 697.

Therefore, because the circuit court did not conclude that Asa had the ability to pay and because the uncontested facts of record do not support the

court's determination that Asa's refusal to pay was willful, the contempt orders are reversed.

Because this court concludes that the circuit court erroneously exercised its discretion by finding Asa in contempt for his inability to pay, it is unnecessary to address whether Asa received proper notice of the contempt hearing. *See Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

By the Court.—Orders reversed.

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

