

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 27, 2018

Sheila T. Reiff
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. 2017AP263

Cir. Ct. No. 2015FA1437

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

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

ROBERT IAN HENSON,

PETITIONER-APPELLANT,

v.

PATRICIA ANN HENSON,

RESPONDENT-RESPONDENT,

BROWN COUNTY CHILD SUPPORT AGENCY,

RESPONDENT.

APPEAL from an order of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

¶1 STARK, P.J.¹ Robert Henson was found in contempt of court due to his failure to pay child support. The circuit court denied his postdisposition motion to vacate the contempt finding, and Robert now appeals. We conclude the court properly exercised its discretion in finding Robert in contempt and affirm.

BACKGROUND

¶2 The Waushara County Child Support Agency petitioned the circuit court in June of 2012 to order Robert to pay child support to his then-estranged wife, Patricia Henson. Pursuant to the parties' stipulation, the circuit court² entered an order that Robert pay Patricia \$116 per week in child support.

¶3 At a July 2015 hearing, the child support agency moved to modify the support obligation. Counsel for the child support agency explained the basis for the modification as follows:

We are here because there was a required TANF review. There are two minor children in this case. The parties are still married but have not filed for divorce. [Robert] was an insurance agent and is no longer employed. We are receiving ... payments from unemployment, so what we did, for our review, was we looked at his 2014 earnings along with a minimum wage earning, since he is currently unemployed, average[d] the two of them, and came up with a recommendation at 25 percent [of total income] of \$144 per week.

¶4 Robert opposed modification and advised the circuit court that he had been diagnosed as an insulin-dependent diabetic during the previous year. He

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² The Honorable Guy D. Dutcher presided over the child support and contempt actions in Waushara County.

claimed he was found unconscious at work and, as a result, demoted. According to Robert, when he questioned the demotion, he was fired. Robert also lost his health insurance and had exhausted his unemployment benefits. Robert represented he was a self-employed insurance salesperson, and he claimed to have earned a net income of \$1476.07 over the prior six months. Finally, Robert also informed the court that he had given over \$2000 to his family outside of the sums required by the support order.

¶5 Adopting the child support agency's recommendation, the circuit court ordered the obligation increased to \$144 per week and also ordered Robert to pay an additional \$50 per month toward arrears that existed for over thirty days. The modified order commenced on September 1, 2015.

¶6 Robert later moved the circuit court to modify the child support order. At a November 2015 hearing, Robert claimed that he experienced further reduction in income because of his illness and because he had incurred significant business expenses. The court observed that Robert presented no evidence of the impact his illness had on his ability to work, and it declined to modify the order.

¶7 An order to show cause for contempt of court was issued in December 2015 due to Robert's failure to comply with the child support order and his accrual of over \$2,000 in arrears. At a January 2016 hearing, the child support agency argued that Robert had not made a payment since August 2015, except for a \$195.76 payment made soon after the contempt affidavit was filed. However, rather than address the contempt issue, the circuit court adjourned the hearing in

light of the parties' newly filed divorce in Brown County. It was expected the Brown County Circuit Court would address the issue of child support in that case.³

¶8 Robert again requested that the Waushara County Circuit Court modify the child support order at a February 2016 hearing. Robert continued to argue that the court erroneously calculated his income in modifying the order, and he told the court that he declined job offers from other companies because he wanted to continue with his self-employment. The court did not modify the order at that time, but it instructed Robert to provide his tax returns from the previous three years so the court could calculate his income. In an April 2016 order, the court imputed to Robert a yearly income at \$24,889 by averaging his 2015 income of \$19,773 with his previous imputed earnings of \$30,000. Accordingly, it amended the child support obligation downward to \$519 per month.

¶9 The circuit court revisited the contempt issue at a June 2016 hearing. The child support agency advised the court that Robert had failed to make any payment pursuant to the child support order since it was last modified. In response, Robert cited a stipulated tax intercept of \$3284 and a nominal \$50 payment Robert made toward arrears before the hearing. Robert argued that the tax intercept had reduced his arrears, that he had made that \$50 payment in March, and that one of his children would turn seventeen years old in July. Robert also highlighted a January 2016 letter from a doctor regarding treatment of his illness, and he expressed his desire to continue to work. In all, Robert suggested that the

³ Robert petitioned for divorce in Brown County in December 2015. In the Brown County divorce case, Robert was ordered to continue to pay child support pursuant to the Waushara County case.

remaining accrued arrears of \$1960 were “something that ... can be controlled and dealt with in due course” without a contempt finding.

¶10 The circuit court found Robert in contempt of court, determining that he had not made a payment “for well over a half year” other than a \$50 payment in March. The court imposed and stayed a forty-five-day jail sentence with a purge condition requiring Robert to make monthly payments of \$569 (consisting of the combined support and arrears obligations) without interruption for thirteen months until his youngest child was emancipated.

¶11 After Robert was found in contempt, the venue of the child support and contempt proceedings was changed to Brown County, where Robert and Patricia were granted a judgment of divorce in October 2016. Robert filed a postdisposition motion in Brown County circuit court to vacate the original contempt of court finding. After a hearing, the circuit court entered an order denying his motion.⁴ Robert now appeals from the postdisposition order.

DISCUSSION

¶12 A circuit court may hold a person in contempt as a remedial sanction if he or she refuses to comply with an order of a competent court. WIS. STAT. §§ 785.01(3), 785.03(1)(a); *State v. Rose*, 171 Wis. 2d 617, 622, 492 N.W.2d 350 (Ct. App. 1992). Before a circuit court may impose a contempt sanction for a

⁴ At the postdisposition hearing, the circuit court declined to rule on the merits of Robert’s motion, determining that it lacked authority to “overrid[e] a certain other circuit court judge,” as his motion asked it to do. Robert additionally argues on appeal that the court had inherent authority to address the motion. Because we dispose of this matter on the merits, we need not address this issue. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

failure to pay support obligations, however, the court must find that the person is able to pay and any refusal to pay is willful and with intent to avoid payment. *Benn v. Benn*, 230 Wis. 2d 301, 310, 602 N.W.2d 65 (Ct. App. 1999). After a complainant has made a prima facie showing that an order has been violated, the alleged contemnor bears the burden of demonstrating that his or her conduct was not contemptuous. *Noack v. Noack*, 149 Wis. 2d 567, 575, 439 N.W.2d 600 (Ct. App. 1989); *see also Rose*, 171 Wis. 2d at 623. In addition, when remedial contempt is imposed, a court also must allow for the contempt sanction to be “purgeable” through either compliance with the contempt order or completion of alternate conditions. *Dianne K.J. v. James L.J.*, 196 Wis. 2d 964, 969, 539 N.W.2d 703 (Ct. App. 1995).

¶13 We review a circuit court’s use of its contempt power for an erroneous exercise of discretion. *Krieman v. Goldberg*, 214 Wis. 2d 163, 169, 571 N.W.2d 425 (Ct. App. 1997). Whether a person has committed contempt of court, including the person’s ability to pay and the existence of any willfulness or intent to avoid payment, is a question of fact. *Rose*, 171 Wis. 2d at 623. A court has properly exercised its discretion when it has logically interpreted the facts, applied a proper legal standard, and reached a reasonable conclusion using a demonstrated rational process. *Benn*, 230 Wis. 2d at 308. If a court fails to explain its reasoning in exercising its discretion, we independently review the record to determine whether it supports the court’s decision. *See Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

¶14 In challenging the Waushara County circuit court’s decision to find him in contempt, Robert argues that the court arbitrarily established the amount of his monthly payment and that it failed to consider his ability to pay when it earlier modified the child support order. He also asserts his job loss and illness reduced

his income and left him unable to pay the obligation. He further contends that nothing in the record supports a finding that his refusal to pay was willful and with the intent to avoid compliance with the child support order.

¶15 Robert's arguments fail for two reasons. First, Robert appears to assume that the circuit court's modifications of the child support order—in July 2015 and again in March 2016—are subject to our review. He is mistaken. Robert did not timely appeal from the underlying orders setting or modifying his child support payments. The monthly amount of the child support order may be relevant to Robert's ability to pay, but the circuit court's method in arriving at that amount is not. The only issue before this court is whether the court properly exercised its discretion in finding Robert in contempt for failing to pay child support under the previously established order.

¶16 Second, while Robert acknowledges the child support agency proved he had not made his court-ordered payments, he insists that the circuit court did not find either that he had the ability to pay the ordered support or that his failure to pay was willful and intentional. However, Robert ignores it was his burden to show that his violation of the child support order was not contemptuous. *See Rose*, 171 Wis. 2d at 623; *Noack*, 149 Wis. 2d at 575. In finding Robert in contempt, the court impliedly determined Robert failed in his burden of proof. *See Randall*, 235 Wis. 2d 1, ¶7. Although the circuit court did not explicitly make findings of fact on Robert's ability to pay and whether he willfully and intentionally avoided payment, we may assume the court made findings that ultimately support its decision, and we independently review the record to determine whether the record supports the court's decision. *See State v. Martwick*, 2000 WI 5, ¶31, 231 Wis. 2d 801, 604 N.W.2d 552; *see also Randall*, 235 Wis. 2d 1, ¶7.

¶17 As to the issue of Robert’s ability to pay, at the February 2016 hearing, Robert claimed that he had “countless people phoning me up, requesting me to go work for their companies” but that he declined the offers on the basis that he would become a “captured” insurance agent rather than run his own business. Robert criticizes the circuit court for admonishing him at the June 2016 contempt hearing “to secure some type of employment.” The court, however, could reasonably consider Robert’s decision to forgo sufficient income, despite his existing obligations, in determining he had the ability to pay the ordered support and was willfully avoiding payment. *See Van Offeren v. Van Offeren*, 173 Wis. 2d 482, 499, 496 N.W.2d 660 (Ct. App. 1992) (contemnor choosing to leave a well-paying job “to pursue a business with no immediate prospect of earning an income” constituted “willful disobedience” of court order).

¶18 Robert asserts the letter from a doctor offered at the contempt hearing evidenced his inability to work. Robert is incorrect. The January 2016 letter explained Robert was “[c]urrently being treated for uncontrolled diabetes and has neuropathy of his feet, legs and arms[,]... caus[ing] him to feel fatigued and have a difficult time working long hours.” The circuit court could reasonably conclude the letter failed to evidence Robert’s inability to work, as it failed to identify in meaningful detail either the current status of his health problems or the nature and extent of any limitations placed upon his work hours or functional capacity.

¶19 As to the issue of Robert’s willful and intentional failure to make the court-ordered payments, Robert noted at the June 2016 contempt hearing that one of his children was seventeen and near emancipation. However, that fact is not relevant to whether Robert failed to make court-ordered payments in the past.

¶20 Robert further argued he should not be found in contempt because his child support arrears had been reduced due to a tax intercept and because he had made a recent \$50 payment. However, in the three months prior to the contempt hearing, Robert’s only child support payment came after the child support agency moved to find him in contempt, and that payment was applied to Robert’s arrears. Under these circumstances, where no payment was made until Robert was at risk of a contempt finding, and then only in a nominal amount, the circuit court could reasonably find Robert’s failure to pay the ordered child support was willful and intentional. The court did not need to find Robert could have paid the full amount to find him in contempt. *See Haeuser v. Haeuser*, 200 Wis. 2d 750, 767, 548 N.W.2d 535 (Ct. App. 1996) (contemnor’s inability to pay the full \$500 monthly obligation did not excuse his failure “to pay even ‘one dime’ of maintenance”).

¶21 Finally, Robert asserts the circuit court set an unreasonable purge condition that it knew he could not meet. In support, however, Robert makes the same arguments we rejected above on the amount of child support ordered and his supposed lack of ability and intent regarding payment. Therefore, given the record in this case, we conclude the circuit court’s decision to find Robert in contempt of court was not an erroneous exercise of discretion.

By the Court.—Order affirmed.

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

