

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 26, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2006AP2128

Cir. Ct. No. 2004FA361

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

NANCY H. ROUSH,

PETITIONER-RESPONDENT,

v.

WILLIAM S. ROUSH, JR.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Waukesha County:
J. MAC DAVIS, Judge. *Order affirmed; order reversed.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 SNYDER, J. William S. Roush, Jr. appeals from two orders stemming from post-divorce proceedings intended to carry out and enforce the

divorce judgment.¹ He appeals from an order directing him to make past-due support payments and to pay attorney fees associated with Nancy Roush's actions to enforce the judgment of divorce. This order imposed and stayed a six-month jail sentence for contempt, set purge conditions, and awarded attorney fees and other costs to Nancy. William argues that the order should be reversed because he was not provided adequate notice of the substance of the underlying hearing and because the court's rulings reflect an erroneous exercise of discretion. He also appeals from an order finding him in contempt for failure to pay child support and maintenance out of his income rather than out of a court-ordered security fund. William argues that this order should be reversed because he was not in contempt on the date of the hearing. We affirm the first order, which addressed past due support and awarded attorney's fees and costs to Nancy; however, we reverse the subsequent contempt order because it is based on an erroneous application of the law.

BACKGROUND

¶2 William and Nancy were married on June 23, 1984, and children were born of the marriage. On January 7, 2005, a divorce judgment was entered dissolving the marriage and requiring William to make monthly child support and maintenance payments. The divorce judgment provided for monthly child support and maintenance totaling \$4402.² The judgment provided that the marital

¹ The order dated August 22, 2006, contains the rulings made by Judge J. Mac Davis at a hearing on August 3, 2006; however, because of court rotation schedules, the order is signed by Judge Patrick C. Haughney.

² The child support and maintenance payments adjusted periodically under the terms of the judgment. As of June 1, 2005, William was to pay \$1902 per month for child support and \$2500 per month for maintenance.

homestead be sold and that the one-half of the proceeds that William received from the homestead sale “shall be deposited with the Clerk of Courts for Waukesha County in an interest bearing account as security for [William’s] financial obligations as set forth herein.”

¶3 The judgment’s security fund provision was premised upon the family court’s November 5, 2004, oral finding that “in light of the circumstances ... about the proven unreliability of [William’s] support of the family, I’m going to require that half of his share after the adjustment on the debt be deposited in a trust with the clerk of courts for purposes of acting as security for payment of child support and maintenance.” It is undisputed that William also deposited some 401K money into the security fund. The “trust” resulted in the creation of a WIS. STAT. § 767.30(2) (2003-04)³ security fund.

¶4 Numerous post-judgment motions and hearings ensued. William was found in contempt at a hearing on March 31, 2006, because he had failed to pay support for the months of January, February and March. The court sentenced William to sixty days in jail, set purge conditions, and scheduled the matter for further review on May 31, 2006. On May 31, the court determined that William had not met the purge conditions and ordered that William be taken into custody until he did. The court continued the matter for another review hearing on July 6, 2006.

³ WISCONSIN STAT. § 767.30 was in effect on the date that this contempt order was signed. Section 767.30 was renumbered § 767.77 pursuant to 2005 Wis. Act 443 with an effective date of January 1, 2007. All relevant subsections remained the same. All references to § 767.30 are to the 2003-04 version; all references to other sections are to the 2005-06 version.

¶5 Prior to the July 6 hearing, William filed and later withdrew a motion to modify maintenance and support. Because he withdrew his motion, William requested that the matter be removed from the court's calendar. The court refused. William appeared at the hearing and argued to the court that nothing was legitimately pending before the court and that the hearing should be adjourned. The court disagreed, holding that whether William had complied with the purge terms of the court's contempt order and whether Nancy should be awarded attorney's fees were both before the court. The hearing went forward.

¶6 At the July 6 hearing, the circuit court heard testimony that William was again behind on his support obligations. The court determined that William could purge his contempt by making payments into the security fund. The court also awarded costs and attorney fees to Nancy.

¶7 Nancy filed a new motion for contempt and the court set a hearing date of August 3, 2006. At the hearing William was no longer in arrears on his child support and maintenance obligations. The court observed, "[A]ll of the amounts he is supposed to pay for child support and maintenance have been paid, it is true." However, William conceded that he had not made the required monthly support payments for April, May, June and July of 2006 with money other than that held in the security trust fund. The court held him in contempt, sentenced him to six months in jail with Huber privileges, and set purge terms. William appeals from the orders resulting from the July and August proceedings.

DISCUSSION

The July 21 Order: Due Process and Attorney Fees

¶8 William contends that he was denied due process when, at the July 6 hearing, the circuit court proceeded on matters about which William had no prior notice. Due process requires notice that reasonably conveys the information required for parties to prepare their arguments and make their objections. *See Bachowski v. Salamone*, 139 Wis. 2d 397, 412, 407 N.W.2d 533 (1987). However, due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). William asserts that, when he appeared at the July 6 hearing, nothing was properly pending before the court.

¶9 William offers *Carly A.T. v. Jon T.*, 2004 WI App 73, 272 Wis. 2d 662, 679 N.W.2d 903, and *Guelig v. Guelig*, 2005 WI App 212, 287 Wis. 2d 472, 704 N.W.2d 916, for support of his contentions. We remanded *Carly A.T.* because the hearing notice indicated that the amount of child support that would be pursued was zero, yet a claim for child support was made in the final moments of the hearing. *Carly A.T.*, 272 Wis. 2d 662, ¶¶21-22. We held that neither the petition nor the proceedings put Jon T. on notice that the petitioner would be asserting a claim for support and therefore we reversed. *Id.*, ¶22. In *Guelig*, we held that Timothy Guelig did not receive notice that the merits of placement and custody of his daughter would be addressed at a scheduling conference; moreover, all of the notices provided to Timothy indicated that he must file a parenting plan before a pretrial conference where the merits of placement and custody would be addressed. *Guelig*, 287 Wis. 2d 472, ¶¶39-40. In *Guelig*, there was no pretrial conference and therefore no event to trigger the filing of parenting plans. *See id.*,

¶41. We held that Timothy “had no notice whatsoever” that the court might consider placement and custody at the scheduling conference. *Id.*, ¶52. Neither case lends support for William’s arguments here.

¶10 The circuit court held that William had received reasonable notice that his compliance with the purge terms would be reviewed at the July 6 hearing. The court stated in relevant part: “I reviewed the purge that was previously scheduled for May 31 and now it has been adjourned to today. So it is before the Court, notice to all.... So, we’ll have a hearing as to whether [William] has complied with the purge terms momentarily.” The court continued:

The issues of nonpayment are still before me. The purge terms by their nature need to be reviewed and revised to make sure they properly relate to the contemptuous conduct, and they properly relate to the ability of the person found in contempt to comply with them, since in these civil contempts the keys to the jail have to be in the hands of the person in the jail; that is, has to be a purge term they can actually comply with and get themselves released from the jail.

So, it is self evident by the nature of the proceeding that when we set a review it is to see if the purge term[s] need to be modified, whether they need to be lifted, or whether they need to be stayed to make sure the person is not unfairly held.

¶11 William makes much of the fact that the circuit court removed an existing purge term (that he produce certain business records) and added a “new” purge term (that he replenish the security fund for monthly support payments made in April, May, and June and pay his July payment out of his income rather than the fund). This is not as troublesome as William suggests. WISCONSIN STAT. ch. 785 allows the circuit court to establish an alternate purge condition to purge a party’s contempt. *See Benn v. Benn*, 230 Wis. 2d 301, 311, 602 N.W.2d 65 (Ct. App. 1999); *State ex rel. Larsen v. Larsen*, 159 Wis. 2d 672, 676, 465

N.W.2d 225 (Ct. App. 1990), *aff'd*, 165 Wis. 2d 679, 478 N.W.2d 18 (1992). A purge term may be imposed if there is a continuing contempt that requires a remedy. The key is that the purge term must be feasible and reasonably related to the cause or nature of the contempt. *Benn*, 230 Wis. 2d at 311. The court's purge term directed William to make payment on past support obligations by replenishing the fund from which he improperly took the money. William was obligated to make these payments regardless of the order.

¶12 William also argues that Nancy cannot summon up her February 7 motion to support her claim for attorney's fees at the July 6 hearing. He contends that Nancy's original motion was resolved and the attorney's fees were awarded at the March 31 hearing and thus no motion for attorney's fees was pending. He directs us to WIS. STAT. § 785.03(1)(a), which states in relevant part: "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." Thus, he argues, Nancy had no motion for attorney's fees pending on July 6 because she had not filed a new motion.

¶13 We begin by tracing the path of the motion for fees and costs. Nancy's motion for contempt, which was filed February 7, 2006, sought sanctions including attorney's fees and costs associated with William's failure to pay support. In response to that motion, the court awarded \$1250 towards Nancy's fees. On the record at the May 31 hearing, Nancy requested further consideration of the court's attorney's fees award due to William's continuing contempt. The court indicated that it would take up the issue at the July 6 hearing. On July 6, Nancy's attorney provided records documenting time spent on matters related to William's continuing contempt.

¶14 Although William argued that the amount of fees requested constituted an unfair surprise, the court admonished William for failing to seek discovery, formally or informally, with regard to the attorney's fees claim. The court denied William's request for an adjournment, noting that William had notice that Nancy's motion for attorney's fees would be covered at the hearing and stating that William "can't be heard to complain that he didn't get the information when he never bothered to ask for it." Our review confirms that Nancy's motion for attorney's fees incorporated a pattern of contempt that continued through July 2006 and that the "proceeding to which the contempt [was] related," *see* WIS. STAT. § 785.03(1)(a), was ongoing.

¶15 The record demonstrates that William was on notice of the issues to be covered at the July 6 hearing and that the circuit court properly reviewed the purge terms and awarded attorney's fees. William's arguments to the contrary are unpersuasive and we conclude no violation of his due process right to notice occurred.

¶16 William next contends that the amount of attorney's fees awarded by the circuit court demonstrates an erroneous exercise of discretion. WISCONSIN STAT. ch. 785 authorizes remedial sanctions, 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." Sec. 785.04(1)(a). It is within the circuit court's discretion to determine if an award of attorney's fees is appropriate. *See Van Offeren v. Van Offeren*, 173 Wis. 2d 482, 499, 496 N.W.2d 660 (Ct. App 1992). When attorney's fees are contested, we give deference to the trial court's exercise of discretion. *See Village of Shorewood v. Steinberg*, 174 Wis. 2d 191, 204, 496 N.W.2d 57 (1993).

¶17 William presents three allegations of error. First, he asserts that the claim for attorney’s fees is deceptive because Nancy had not been billed for those fees and therefore has not incurred a loss. At the hearing, Nancy testified that, although she could not remember the hourly rate, she had a “fee agreement” with her attorney that required her to pay him “regardless of whether or not the Court awards attorney’s fees” to her. She further stated that she had made some prior payments on her legal bill and that those payments had come out of the trust fund on file with the clerk of courts. Nancy’s legal bills constitute a debt that encumbers her financial situation; therefore, she has incurred a loss that is compensable by the remedial sanction of attorney’s fees. William offers no legal argument to the contrary, but instead relies on character assaults and innuendo to make his point.⁴ Therefore, we need not address this issue further. *See State v. Lindell*, 2000 WI App 180, ¶23 n.8, 238 Wis. 2d 422, 617 N.W.2d 500 (arguments unsupported by legal authority will not be considered), *aff’d*, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223.

¶18 William’s second challenge to the award of attorney’s fees is that the circuit court’s reasoning demonstrates an erroneous exercise of discretion. The precise wording William uses is that the circuit court’s reasoning for the award “borders on the bizarre.” The characterization hardly fits the treatment the court gave the matter. The court referenced WIS. STAT. ch. 767, which leads us to believe that the court awarded attorney’s fees under the family law chapter. However, because the matter pending was contempt, attorney’s fees were also an

⁴ William includes spiteful allegations regarding Nancy and her personal relationships. These asides waste this court’s time and belittle this court’s role. We caution William to refrain from inappropriate and irrelevant assertions.

appropriate remedial sanction under WIS. STAT. § 785.04(1). See *Benn*, 230 Wis. 2d at 315.⁵ The circuit court acknowledged several factors it considers when awarding attorney’s fees, including ability to pay, need for payment, and equity and fairness. It identified the overwhelming consideration in this case to be fairness. The court then went on to acknowledge that extensive effort was expended, “trying to get [William] to comply with previously entered court orders.” The court stated, “It would be grossly unfair to let [William] not meet his court-ordered obligations, litigate, and litigate them as he has, obstruct as he has at times, not comply to the point where he ends up in the jail, and then stick [Nancy] with the attorney’s fees for the whole ball of wax” The record supports the circuit court’s characterizations and its discretionary decision to award attorney’s fees.

¶19 Third, William alleges that the award included fees for work done on previously resolved and non-compensable claims. Nancy concedes a prior award of \$1250 for attorney’s fees and the court acknowledged addressing the issue before. In calculating the appropriate award, the court reviewed Nancy’s legal bill, compared it to the court proceedings, applied the hourly rate and deducted the amount awarded previously. The court’s reasoning was as follows:

I’ll find Exhibit 3 to be a reasonable and necessary representation of the lawyer’s time applicable to the case this year. I’ll notice ... very much of it closely cross references with what is in the court file.

⁵ Attorney’s fees may be awarded as a remedial sanction pursuant to WIS. STAT. § 785.04(1)(a), or under WIS. STAT. § 767.241(1)(a), which allows courts to award attorney’s fees in actions affecting the family. The family law statute requires the court to consider the financial resources of both parties before crafting an award. The contempt statute does not require a review of financial resources or a party’s ability to pay. The difference is not critical because the circuit court’s rationale is sufficient under either analysis.

....

And right down the list here it comports closely with the hearings we have had, preparations for the hearings we have had, preparations for filings and pleadings and the like.

So the record in the file fully support[s] and cross reference[s] with Exhibit No.3, and support[s] the Court's findings that those are reasonable and necessary attorney's fees.

....

So I'll round it to a total of 48 hours at [\$]175, that [is] \$8,400. I'll deduct the [\$]1250 I ordered previously on a different record but for the same set of proceedings, under the same time line. So I'll order that [William] is responsible for \$7150 in attorney's fees to [Nancy] through today on the matters requested.

We are satisfied that the circuit court properly exercised its discretion, avoided any redundant fees, and produced an award that is supported by the record.

The August 22 Order: The Circuit Court's Statutory Contempt Power

¶20 William challenges the circuit court's August 22, 2006 order finding him in contempt of court. He argues that he was in compliance with the support orders at the time of the hearing and that the court's contempt holding was erroneous under the plain language of WIS. STAT. § 767.30(3).⁶ The relevant portion of §767.30(3) is as follows:

⁶ William poses the issue as "The Appellant Was Not in Contempt on August 3, 2006." While he did not specifically address the issue as framed here, he did question the propriety of the family court's finding of contempt where the legislature had limited the court's WIS. STAT. ch. 785 judicial contempt powers in WIS. STAT. § 767.30(3). We certified the following question to the Wisconsin supreme court: Does Wis. Stat. § 767.30(3)(b) (2003-04)⁶ wrongly encroach upon inherent judicial contempt powers to enforce support obligations by limiting the use of Wis. Stat. ch. 785 remedial contempt to when "a party fails to pay a payment under sub. (1) or to give security under sub (2)"? (Emphasis added.) The supreme court denied certification.

(3) If the party fails to pay a payment ordered under sub. (1) or to give security under sub. (2), the court may by any appropriate remedy enforce the judgment, or the order as if it were a final judgment, including any past due payment and interest. Appropriate remedies include but are not limited to:

....

(b) Contempt of Court under ch. 785.

Application of a statute to undisputed facts presents a question of law, which we review de novo. *State v. Setagord*, 211 Wis. 2d 397, 405-06, 565 N.W.2d 506 (1997).

¶21 A court’s power to use contempt stems from the inherent authority of the court; however, the power may, within limits, be regulated by the legislature. *Frisch v. Henrichs*, 2007 WI 102, ¶32, 304 Wis. 2d 1, 736 N.W.2d 85. When the procedures and penalties of contempt are set forth by statute, the statute controls. *Id.* This formulation necessarily presents questions of whether the legislature has fully prescribed the procedures and penalties of contempt and, if it has, whether the limitations imposed impair the inherent authority of the court. The legislature may regulate and limit the contempt power “so long as the contempt power is not rendered ineffectual.” *Id.* (Citation omitted)

¶22 On August 3, 2006, when William was found in contempt, he was current on his support payments; furthermore, he had provided a security fund sufficient to meet his past and his current support obligations as acknowledged by the circuit court, which stated “[A]ll of the amounts [William] is supposed to pay for child support and maintenance have been paid, it is true.” William therefore contends, and argued at the August 3 hearing, that he was not in contempt but was in compliance with the family court’s order.

¶23 However, the family court rejected William's attempt to escape a finding of contempt, noting that he had paid his support obligations from the security fund. The problem, as the family court described, was as follows:

[William] didn't pay [the child support and maintenance] by any other means except for his assets that I seized, put in trust with the Clerk of Courts as a security fund, it is clearly a security fund, not a primary source for payment, because ... [Nancy] can't take any money out of [the security fund] until [William] fails to pay on time.

It is [William's] money, but it is security, it is a backup, it is a secondary payment source, not the primary source. It is only when he is already delinquent on a monthly payment that this security fund composed of his assets is touched.

....

So I reject [William's] argument that he is in compliance. He is not in compliance. He has failed to make a single one of those payments complained about here; April, May, June and July.

He is to pay the court ordered maintenance and child support from August 1[, 2006] forward in a timely fashion, not from the [security fund] but from his income, or any other source, not from the [security fund].

¶24 The family court possesses an inherent power to hold in contempt those who disobey a lawful order of the court. *See State v. A.W.O.*, 117 Wis. 2d 120, 126, 344 N.W.2d 200 (Ct. App. 1983). The procedures for this power are found in WIS. STAT. ch. 785. However, WIS. STAT. § 767.30(3)(b) provides specific legislative authority for the court to use its contempt powers to enforce family court orders. As indicated in *Frisch*, this statute limits the inherent judicial contempt power to either a violation of subsection (1), failing to make periodic support payments, or in the alternative, subsection (2), failing to give sufficient security for payment. *See Frisch*, 2007 WI 102, ¶32 (the legislature may, within limits, regulate the inherent contempt power of the court). The court's contempt

power under WIS. STAT. § 767.30(3)(b) is available only if William fails to do one or the other. Here he did both. William was current in his support payments. Section 767.30(3)(b) does not render the circuit court's contempt power ineffectual if William fails to stay current in his support payments under both alternatives. Under the specific facts of this case, we conclude that under the plain language of § 767.30(3)(b), the court exceeded its authority when it held William in contempt.

¶25 The circuit court intended that William pay periodic support from his income and created a security fund to avoid future problems with support, and was justified in so ordering. See *Foregger v. Foregger*, 48 Wis. 2d 512, 521, 180 N.W.2d 578 (1970). Because William used the security fund rather than his income to make his monthly support payments, he was not in compliance with the court's order. However, the legislature has expressly directed that the contempt sanction is available only if the payment is not made or the obligated party did not give sufficient security for payment. We conclude that the order holding William in contempt must be reversed.

CONCLUSION

¶26 We conclude that William's due process right to notice of the issues pending at the July 6 hearing was not violated. Further, the circuit court properly exercised its discretion when it awarded attorney's fees to Nancy. We also conclude that, because the circuit court's inherent contempt power may be limited by the legislature, the court here was obligated to abide by express terms of WIS. STAT. § 767.30(3)(b), which authorizes contempt when a party fails to make periodic support payments or fails to establish a security fund. Because both periodic support payments and a security fund had been ordered, and because

William was current in his child support at the time of the contempt finding, the enforcement statute precludes a ch. 785 contempt sanction. Accordingly, we affirm the order filed July 21, 2006, and reverse the order filed August 22, 2006.

By the Court.—Order affirmed; order reversed.

Not recommended for publication in the official reports.

