COURT OF APPEALS
DECISION
DATED AND RELEASED

September 17, 1997

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2558

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN RE THE MARRIAGE OF:

ELIZABETH H.,

PETITIONER-RESPONDENT,

V.

MALCOLM H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: RICHARD J. KREUL, Judge. *Modified and, as modified, affirmed.*

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

PER CURIAM. Malcolm H. appeals from a circuit court order finding him in contempt of court, ordering his commitment and staying his commitment as long as certain purge conditions are met. On appeal, he challenges the trial court's order that he not make any derogatory, cursing or intimidating

written or verbal statements and that if he violates any conditions of the order he will be incarcerated immediately with the right to request a hearing within twenty-four hours of being detained. As to the restriction on Malcolm's communications, we conclude that this provision of the order is overly broad and that modification is required so that the provision reflects the context in which the order was entered. With that modification, we affirm the trial court's exercise of discretion.

The parties divorced in October 1995. In the judgment of divorce, the trial court granted sole legal custody and primary physical placement of the parties' minor child to Elizabeth and granted Malcolm limited and supervised periods of visitation. The judgment was not appealed.

In May 1996, the child's guardian ad litem moved the court to find Malcolm in contempt for deliberately and intentionally failing to abide by the judgment of divorce. As grounds, the guardian stated that Malcolm had made disparaging comments about Elizabeth to the child and further violated conditions of the supervised visits. Elizabeth also moved the court to find Malcolm in contempt for harassing, intimidating and threatening persons involved with the case and for making disparaging remarks about her. After a hearing, the trial court found Malcolm in contempt based upon a recorded telephone conversation in the spring of 1986 between Malcolm and the child in which he told her she could ignore court orders regarding supervised visitation. Malcolm does not appeal the contempt finding.

As a contempt sanction, the circuit court ordered Malcolm committed to the Racine County Jail for thirty days without Huber privileges. However, the court stayed that commitment for one year on the condition that Malcolm "not write any letter or put into print or verbalize anything with

derogatory, cursing or intimidating remarks to or about anyone" and that if Malcolm violated any of the conditions of the stay he would be incarcerated on an ex parte affidavit but could demand a hearing within twenty-four hours of his detention. It is these conditions that Malcolm challenges on appeal.

As a preliminary matter, we note that Malcolm's appellate brief argues the standard of review for child custody determinations and is largely devoted to an exposition of the constitutional implications of the contempt order on his parent-child relationship. Malcolm errs in both respects. This is an appeal from a contempt order, not a child custody decision. Additionally, a trial court's contempt powers are well defined and a trial court may exercise those powers independent of their impact upon a parent-child relationship.

A person may be held in contempt of court 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). "We review a trial court's use of its contempt power to determine if the trial court properly exercised its discretion." ***Id***. at 767, 548 N.W.2d at 543. The imposition of a remedial sanction is discretionary with the trial court. *See* ***State ex rel. N.A. v. G.S.***, 156 Wis.2d 338, 341-42, 456 N.W.2d 867, 868-69 (Ct. App. 1990). Remedial contempt seeks to procure present and future compliance with court orders and the sanction must be purgable through compliance. *See* ***id***. at 342, 456 N.W.2d at 869. We will uphold the trial court's discretionary decision if the record shows that discretion was exercised and a reasonable basis exists for the trial court's ruling. *See* ***J.F. Ahern Co. v. Building Comm'n***, 114 Wis.2d 69, 85, 336 N.W.2d 679, 687 (Ct. App. 1983). As stated earlier, Malcolm does not challenge the finding of contempt. Malcolm's appeal addresses whether the trial court properly exercised its discretion in fashioning its contempt sanctions.

It is apparent from the contempt record that the trial court sought to circumscribe Malcolm's communications with and to individuals involved in the case and to redress his recurring pattern of verbal and written abuse of them. However, worded as it is, this portion of the contempt order is too broad and does not sufficiently adhere to the context in which the court made the order. As written, this provision would prohibit any communication to or with anyone not involved with this case. From the record, this was not the trial court's intent. Accordingly, we modify this provision of the contempt order to reflect the trial court's intention that Malcolm cease putting into print or verbalizing derogatory, cursing or intimidating remarks to or about anyone involved in the postdivorce proceedings. On this record, such a restriction does not violate any right of Malcolm to free expression. *Cf.* ***Lange v. Lange***, 175 Wis.2d 373, 382, 502 N.W.2d 143, 147 (Ct. App. 1993), *cert. denied*, 511 U.S. 1025 (1994) (prohibition of father's imposition of religious views on children upheld).

Malcolm also argues that the order is impermissibly vague because it does not precisely define "derogatory," "cursing" and "intimidating." We disagree. To avoid invalidation on vagueness grounds, the order must be sufficiently definite so that Malcolm is able to discern the region of proscribed conduct and the standards under which he may be found in contempt. *See* ***City of Milwaukee v. Wilson***, 96 Wis.2d 11, 16, 291 N.W.2d 452, 456 (1980). We conclude that the order's prohibition on making derogatory, cursing or intimidating remarks is sufficiently definite and not vague. In ***Chaplinsky v. New Hampshire***, 315 U.S. 568, 573-74 (1942), the Supreme Court held that a statute which prohibited addressing offensive, derisive or annoying words was not vague and did not impermissibly infringe upon First Amendment rights. In the context

of this case, we conclude that Malcolm is sufficiently capable of understanding the prohibitions set forth in the trial court's contempt order.

In a footnote in his appellate brief, Malcolm complains that the order's stay of the thirty-day jail sentence is also vague. He questions whether this means that once the order has been in effect for a period of one year he will have to serve a thirty-day jail sentence, or whether he is only subject to a jail sentence for a period of one year. We note that Malcolm did not move the trial court for the clarification he believes is necessary. We will not address this issue because it is raised for the first time in this court. *See* ***Allen v. Allen***, 78 Wis.2d 263, 270, 254 N.W.2d 244, 248 (1977).

Malcolm relies upon ***State v. Mitchell***, 169 Wis.2d 153, 485 N.W.2d 807 (1992), to support his argument that the order violates his First Amendment rights. Malcolm fails to acknowledge that that Wisconsin Supreme Court decision was reversed by the United States Supreme Court in ***Wisconsin v. Mitchell***, 508 U.S. 476 (1993).

Malcolm argues that the order violates his Fourteenth Amendment right to due process because it arbitrarily and capriciously subjects him to incarceration without proper procedural guarantees. We disagree. We have already held that the order, which issued after a full hearing, gives Malcolm proper notice of the conduct he needs to avoid. The ability to send a contemnor to jail to secure compliance with a trial court order is sanctioned by our law. *See* ***N.A.,*** 156 Wis.2d at 341, 456 N.W.2d at 869. We note that the order provides that Malcolm may only be incarcerated on days when he may exercise his right to a hearing

within twenty-four hours. This adequately protects Malcolm's desire for review by the trial court.[1]

Malcolm also argues that the court's order infringes upon his child's constitutional right to have a relationship with him. We reject this claim. The child has a guardian ad litem who functions in the same manner as an attorney and advocates for the child's best interests. *See* ***Joshua K. v. Nancy K.***, 201 Wis.2d 655, 660, 549 N.W.2d 494, 496 (Ct. App. 1996). The guardian supported the issuance of the contempt order as being in the child's best interests. The child's best interests have been vindicated by her guardian.

We also reject Malcolm's argument that because parental rights are involved in this postdivorce proceeding, the trial court could not impose a jail sentence as a sanction for Malcolm's contempt. We disagree. Jail as a sanction is expressly recognized by the contempt statute, and the trial court properly exercised its discretion in imposing this sanction. Malcolm's framing of the issues in the context of child custody and the rights of parents vis-à-vis their children is erroneous given that this appeal was taken from an order finding Malcolm in contempt. Moreover, we note that even if Malcolm is detained, he may pay the $10,000 purge amount to Elizabeth and be released immediately. This purge condition is also an appropriate use of the trial court's contempt power. *See* ***State v. Rose***, 171 Wis.2d 617, 626, 492 N.W.2d 350, 354 (Ct. App. 1992).

By the Court.—Order modified and, as modified, affirmed.

[1] Because the trial court has granted Malcolm the right to a hearing within twenty-four hours of his detention, we need not decide whether the law requires such a hearing.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.