

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 3, 2010

David R. Schanker
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. 2008AP2467

Cir. Ct. No. 2004FA361

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

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

NANCY HANNA ROUSH,

PETITIONER-RESPONDENT,

v.

WILLIAM S. ROUSH, JR.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Waukesha County:
ROBERT G. MAWDSLEY, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ William S. Roush, Jr., appeals from a trial court order finding him in contempt for willful nonpayment of maintenance to his former spouse, Nancy Hanna Roush. He additionally appeals a subsequent order finding that he had failed to purge the contempt order and sanctioning him to report to the Waukesha county huber facility for a weekend. Roush argues on appeal that the trial court failed to apply the correct legal standard in evaluating whether his actions constituted contempt. He additionally contends that the “purge terms” imposed by the trial court were a misuse of discretion and exceeded its lawful authority. We reject Roush’s arguments and affirm the orders.

¶2 The facts relevant to this appeal are as follows. The parties were divorced in 2004 following a twenty-year marriage. As part of the divorce judgment, William was ordered to pay Nancy indefinite maintenance in the amount of \$4000 per month upon the termination of child support. The judgment was not appealed; however, there have been numerous postjudgment proceedings related to enforcing support orders. Most recently of record is a July 15, 2008 hearing regarding Nancy’s June 26, 2008 motion for contempt regarding the nonpayment of maintenance. At that hearing, Nancy testified that she had not received any court-ordered maintenance during the months of November 2007 through the date of the hearing on July 15, 2008. William, a self-employed attorney, who was fifty-four years old at the time of the hearing, testified as to his current employment and financial status and argued that the contempt motion should be denied based on lack of evidence that his failure to pay maintenance was

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

willful and that he had the ability to pay maintenance but chooses not to. William's argument was based in part on the fact that he was incarcerated from January 1, 2008, until May 1, 2008, on another contempt order and, therefore, was not able to pay maintenance during that time.

¶3 The trial court found William in contempt, stating: “[Y]our inability to pay is a willful situation.” The trial court noted its finding that William's search for employment in the legal profession had been “highly restrictive” both in practice area and geographic location. The court found that William's efforts to earn income by finding salaried or partnership employment “had been woefully limited.” Further, he had not made any effort to make “some kind of payment” or to get a loan to fulfill his maintenance obligations.

¶4 On August 22, 2008, the trial court issued a written decision and order noting its contempt finding and its decision that “remedial measures are necessary with respect to his previously inadequate work search and his failure to make any sort of payment toward his maintenance since November of 2007.” The court then set forth four specific goals for William to meet prior to the next hearing date of September 19, 2008,² and notified William that the failure to meet

² The goals set forth in the August 22, 2008 decision and order are as follows:

1. William has demonstrated an ability to borrow sums of money and he has had time to earn sums of money. The Court orders he shall pay a sum of \$2,000 to Nancy by the next hearing date.
2. William shall expand the geographical area of his work search. Madison and other counties shall be included. William shall expand how he looks for jobs, including Internet websites, mail, sending resumes, job listing websites, *Bar Journal* advertisements, and Bar Association publications.

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those goals would result in an “unspecified jail sentence and monetary penalty.” Following the hearing on September 19, the court issued an order finding that William’s “work search attempts are not adequate” and that he had not purged the contempt order. The court ordered William to report to the Waukesha county huber facility to serve the weekend in jail. William appeals.

DISCUSSION

¶5 William contends that the trial court erroneously exercised its discretion in arriving at its contempt finding and order. While William acknowledges that contempt may be appropriate for failures to obey maintenance awards, *Schroeder v. Schroeder*, 100 Wis. 2d 625, 630, 302 N.W.2d 475 (1981), he argues that a finding of civil contempt requires in the first instance that it is within the person’s power to do the thing ordered, *Town of Seymour v. City of Eau Claire*, 112 Wis. 2d 313, 318, 332 N.W.2d 821 (Ct. App. 1983). According to William, it is not within his power to pay \$4000 per month in maintenance.

¶6 Contempt of court is intentional disobedience to the authority, process or order of a court. WIS. STAT. § 785.01(1)(b). A person may be held in contempt for failure to pay where that failure is willful and contemptuous and not the result of an inability to pay. *Van Offeren v. Van Offeren*, 173 Wis. 2d 482, 498, 496 N.W.2d 660 (Ct. App. 1992). We review a trial court’s use of its

3. William shall apply for publicly funded legal work, especially in the Milwaukee County area.

4. William shall document all efforts at legal employment for view by the Court and the petition at the September 19 hearing. William shall provide the information he intends to present to the petitioner’s counsel five days prior to the hearing.

contempt power for a proper exercise of discretion. *Benn v. Benn*, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999). Findings of fact and conclusions of law may underlie discretionary decisions. *Monicken v. Monicken*, 226 Wis. 2d 119, 125, 593 N.W.2d 509 (Ct. App. 1999). We uphold findings of fact unless they are clearly erroneous; however, we review questions of law de novo. See WIS. STAT. § 805.17(2); *Monicken*, 226 Wis. 2d at 125. Determining the type of remedial sanctions to impose for contempt also is a discretionary determination. *Benn*, 230 Wis. 2d at 308; see also WIS. STAT. §§ 785.02 and 785.04(1).

¶7 As we have observed previously, a finding of contempt rests on the trial court's factual findings regarding the person's ability to pay. *State v. Rose*, 171 Wis. 2d 617, 623, 492 N.W.2d 350 (Ct. App. 1992). The principal findings are that the person is able to pay and that the refusal to pay is willful and done with intent to avoid payment. *Id.* The burden of proof is on the person against whom the contempt is charged to show his conduct is not contemptuous. *Besaw v. Besaw*, 89 Wis. 2d 509, 517, 279 N.W.2d 192 (1979). William argues that the trial court's findings of fact as to his ability to pay and refusal to do so were not supported by the record and are clearly erroneous.

¶8 With respect to his ability to pay, William contends that the financial statement submitted at the motion hearing, namely his bank statements (personal and business), demonstrate that he does not have the ability to pay the court-ordered maintenance. However, William's view of "ability to pay" is too narrow. The trial court did consider William's financial statements but found that his inability to pay was a "willful situation." In other words, the trial court's determination that William's "efforts to earn income, to find either salaried or partnership employment ... had been woefully limited" weighed into its determination that William had the ability to pay but was not attempting to secure

employment which would permit him to do so. The trial court referenced William's failure to produce sufficient employment applications while also noting the amount of time William expends in litigation with Nancy and his obvious "churning" of that situation.

¶9 While William contends that the trial court's comments have "absolutely no foundation in the evidentiary record," our review of the record reveals only one employment application prior to the September 19 contempt hearing. The trial court's findings on ability to pay were intertwined with its discussion of willfulness, and as to both determinations, we are satisfied that there is supporting credible evidence in the record.³ See WIS. STAT. § 805.17. It is the

³ William takes issue with the trial court's acknowledgement that his period of incarceration would have affected his situation, but nevertheless finding "willful non-payment." However, William recently raised this argument on appeal. In *Roush v. Roush*, No. 2008AP1038, unpublished slip op. ¶6 (WI App March 4, 2009) (per curiam), William argued that "he hardly can be expected to earn an income and satisfy his obligations while in jail." *Id.* This court upheld the trial court's finding of contempt, explaining that "William may be less able to pay because he is in custody but he is in custody because he refused to pay." *Id.*, ¶7. This court explained:

William's argument is circular, or perhaps backwards. He himself testified that he grossed \$66,000 or \$67,000 in 2007. He also testified that he had not made any maintenance payment since March 2005 that was not a condition of a purge. The circuit court found that, even when in custody, William was working under Huber release until January 2008 and that, despite gross receipts of some \$9,000 between October and December of 2007, "not \$1 was ever paid on this obligation, not \$1." It also found that William had done nothing to broaden his practice or, in fact, "anything but contrive his circumstances so as not to pay this obligation." The court concluded that William's failure to pay was not due to inability, but to a purposeful exhaustion of moneys in "flagrant defiance of [a] court order." Thus, William may be less able to pay because he is in custody but he is in custody because he refused to pay.

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trial court, not this court, which is in the best position to determine whether or not an act is contemptuous. *Schroeder*, 100 Wis. 2d at 640.

¶10 Finally, we reject William's reliance on case law concerning postjudgment modification of support to bolster his contention that his efforts as a self-employed attorney have been reasonable. While these cases do address a divorced spouse's employment decisions, this appeal does not concern a motion for modification.⁴ The divorce judgment entered in 2004 ordering William to pay \$4000 per month in maintenance is still in force. Therefore, the issue on appeal is limited to whether William is in contempt for failing to fulfill his maintenance obligation under that judgment. The trial court determined that he was. Based on our review of the record, we have no basis for reversing the trial court's discretionary decision.

¶11 We next turn to William's challenge to the purge conditions imposed by the trial court. A court may impose remedial sanctions for contempt of court pursuant to WIS. STAT. § 785.02. *Frisch v. Henrichs*, 2007 WI 102, ¶33, 304 Wis. 2d 1, 736 N.W.2d 85. The sanction imposed must be purgeable through compliance with the original court order which was violated. *Benn*, 230 Wis. 2d at 311. The court also has the authority to establish alternate conditions, which if

Id. This reasoning applies here as well. At William's contempt hearing in this case, the trial court, Judge Mawdsley presiding, was aware both that William had been incarcerated and that the incarceration had negatively affected William's practice. However, the trial court nevertheless found William's conduct to be willful.

⁴ We note that this court recently affirmed the trial court's June 14, 2007 order denying William's motion to modify his maintenance obligation based on his failure to present evidence as to his 2006 earnings. See *Roush v. Roush*, Nos. 2007AP1444; 2007AP2427; 2007AP2945, unpublished slip op. ¶¶1, 4-10 (WI App June 17, 2009) (per curiam). While William may believe that grounds currently exist for a reduction in his maintenance obligation, the fact remains that such a motion is not part of this appellate record.

met, will purge the contempt. *Id.* If payment of money is a condition required for the purge, a court may impose the payment that is sufficient to compensate for the loss suffered by another due to failure to comply with the court's order. *Id.* (citing WIS. STAT. § 785.04(1)(a)). However, the purge conditions must be "feasible and must be reasonably related to the cause or nature of the contempt." *Benn*, 230 Wis. 2d at 311.

¶12 Here, the court ordered William to: (1) pay Nancy \$2000 either by borrowing or earning money; (2) expand the geographical area of his work search to include Madison and other counties and to expand his search vehicles to include Web sites, Bar Association publications, etcetera; (3) apply for publicly funded legal work, especially in the Milwaukee county area; and (4) document efforts to secure legal employment and present it at the September 19 hearing. William contends that ordering him to engage in a "work search" requiring him to abandon his law practice and relocate was an erroneous exercise of discretion and exceeded the court's authority. We disagree with William's characterization of the court's order.

¶13 William first challenges the court's authority to issue a "seek work" order to enforce maintenance payments. William contends that seek work orders are limited to child support cases and "situations in which the payor is unemployed or grossly underemployed and refuses to pay child support, forcing the custodial parent to depend on the [s]tate for subsistence." However, the statute authorizing the use of contempt under WIS. STAT. ch. 785 expressly addresses child support, family support and maintenance. WIS. STAT. § 767.57(1h). Further, WIS. STAT. § 785.04(1)(d) permits the court to impose "[a]n order designed to ensure compliance with a prior order of the court." William fails to point to any law which limits the tailoring of a remedial sanction to include an order to seek

alternate employment, especially in a case such as this where the payor attributes a complete failure to pay *any* amount of maintenance to a lack of earnings.

¶14 William also contends that the court’s order is particularly egregious because it compels him to apply for employment “hundreds of miles away” from his community and to apply for nonlegal work. William mischaracterizes the court’s order. The court simply ordered him to expand the geographical area of his search. The court specifically suggested seeking work in Madison, a community located approximately seventy-nine miles from Milwaukee. Clearly there are numerous other counties—Racine, Ozaukee, Waukesha—that would not require relocation. Further, there is nothing in the court’s purge conditions that requires William to seek nonlegal employment. While the court’s oral contempt ruling referenced the possibility that William may need to expand his work search to include nonlegal employment, this was not included as a purge condition.

¶15 In sum, William’s defense to the contempt orders has been his inability to pay based on his current income. The trial court has determined that the insufficiency of William’s current income is due to willful conduct on his part. Thus, the provisions of the court’s order addressing William’s current employment situation are designed to ensure compliance with court-ordered maintenance obligations. Such a sanction is permitted under WIS. STAT. § 785.04(1)(d).

¶16 As a final matter, we reject Nancy’s request that we remand for a determination of reasonable attorney fees and costs on the basis that William filed this appeal in bad faith. At the time William filed this appeal, he was not in possession of our June 17, 2009 decision in *Roush v. Roush*, Nos. 2007AP1444, 2007AP2427, 2007AP2945, unpublished slip op. (WI App June 17, 2009). Therefore, it is possible that William reasonably believed that there was some

merit to his contention that the trial court erred in its determination that his inability to pay was the result of willful conduct. *See* WIS. STAT. RULE 809.25(3)(c)2.

CONCLUSION

¶17 We conclude that the trial court appropriately exercised its discretion when it determined that William was in contempt and when it set its purge conditions. We therefore affirm the trial court's orders as to William's contempt and failure to meet purge conditions. Nancy's motion for frivolous costs under WIS. STAT. RULE 809.25(3) is denied.

By the Court.—Orders affirmed.

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

