

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 24, 2009

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. 2009AP1328

Cir. Ct. No. 2004FA155

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

WANDA M. BARTSCH,

PETITIONER-APPELLANT,

v.

RONALD F. BARTSCH,

RESPONDENT-RESPONDENT,

BARRON COUNTY CHILD SUPPORT AGENCY,

RESPONDENT.

APPEAL from an order of the circuit court for Barron County:
TIMOTHY M. DOYLE, Judge. *Affirmed in part; reversed in part, and cause
remanded for further proceedings.*

¶1 PETERSON, J.¹ Wanda Bartsch appeals an order finding her in contempt of court for failing to pay child support. Bartsch argues the order was not supported by the requisite findings of facts. We affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

¶2 Bartsch and her husband divorced in December 2004. Bartsch's ex-husband received primary placement of their three minor children and Bartsch was ordered to pay child support. The support order set Bartsch's payment at \$769 per month, based on her gross monthly income of \$2,958. The order also required Bartsch to pay past support at the rate of \$31 per month. In December 2007, Bartsch was fired from her job. She did not find a new job and stopped making her support payments. In September 2008, the circuit court ordered Bartsch to show cause why she should not be found in contempt for failing to comply with the support order.

¶3 At the hearing on the order to show cause, Bartsch argued she should not be found in contempt because her failure to pay child support was not intentional, but a result of her unemployment. She also requested the court modify her child support obligation and set her payment at an amount based on the federal minimum wage.

¶4 The court found Bartsch in contempt, noting she paid a total of only \$170 in child support over eleven months. However, it granted Bartsch's request to base her support obligation on the minimum wage and modified her payments

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

to \$191.62 per month. It also concluded that she should pay \$50 per month toward arrears. The court then entered a remedial contempt order imposing and staying a twenty-day jail sentence and specifying Bartsch could purge her contempt by making her monthly payments in full, beginning January 2009.

DISCUSSION

¶5 This appeal presents two issues. The first is whether the circuit court properly found Bartsch in contempt. The second concerns the modification of Bartsch's support order. We review both issues for the erroneous exercise of discretion. *Krieman v. Goldberg*, 214 Wis. 2d 163, 169, 571 N.W.2d 425 (Ct. App. 1997) (a finding of contempt is a finding of fact that will not be overturned unless clearly erroneous); *Burger v. Burger*, 144 Wis. 2d 514, 523-24, 424 N.W.2d 691 (1988) (modification of a child support order rests within the sound discretion of the circuit court).

1. Contempt

¶6 A person who fails to meet a child support obligation may be found in contempt of court. WIS. STAT. § 767.77(3)(b). To find a person in contempt, a circuit court must make "factual findings regarding the person's ability to pay." *Rose v. Rose*, 171 Wis. 2d 617, 623, 492 N.W.2d 350 (Ct. App. 1992). Specifically, the court must find: (a) the person is able to pay; and (b) "the refusal to pay is willful and with intent to avoid payment." *Krieman*, 214 Wis. 2d at 169 (citation omitted).

a. Whether Bartsch could pay

¶7 Bartsch argues the court failed to make the requisite finding regarding her ability to pay because it did not find she was able to pay the full \$769 per month. A court, however, need not find a person could have paid the full amount to find contempt. *See Haeuser v. Haeuser*, 200 Wis. 2d 750, 767, 548 N.W.2d 535 (Ct. App. 1996) (defendant’s inability to pay the full \$500 monthly obligation did not excuse his failure to pay “even one dime” of maintenance). Likewise, here, the court noted it was finding Bartsch in contempt “for basically paying nothing on child support since January of this year.”

¶8 We conclude the court’s finding that Bartsch could have paid more than \$170 over eleven months—or an average of less than \$16 per month—is not clearly erroneous. Bartsch’s own request that the court base her child support obligation on the federal minimum wage concedes this: when the court asked Bartsch what income amount it should base her payments on she replied, “minimum wage” and confirmed she understood minimum wage was approximately \$6.50 per hour. By accepting Bartsch’s concession her child support obligation should be based on the minimum wage, the court implicitly found she could pay that amount.

¶9 Even had Bartsch not conceded she had the ability to pay at least an amount based on the minimum wage, she ignores the rule that the burden was on her to show her failure to pay was not contemptuous. *See Besaw v. Besaw*, 89 Wis. 2d 509, 517, 279 N.W.2d 192 (1979). Bartsch mistakenly focuses exclusively on whether she was able to pay the full \$769—an amount the circuit court acknowledged she could not pay—and nowhere offers evidence she was unable to pay more than the \$170 she did pay.

b. Whether Bartsch's failure to pay was willful

¶10 Bartsch argues her failure to pay was not willful because she did not leave her previous job of her own volition and she attempted to find employment after being fired. That Bartsch did not find a job, however, does not prove she could not get a job or pay more if she did. Again, her request that the court modify her child support obligation concedes she could at least pay an amount based on the minimum wage.

¶11 Further, Bartsch's protestations that the court ignored her "uncontradicted testimony regarding her efforts to find employment" are incorrect. The court explicitly found Bartsch employable and was skeptical of her efforts to find employment, observing: "She's a competent woman. I don't know how hard she's really looking for work at the present time, but she's clearly employable." This skepticism is supported by the record. The support order required Bartsch to seek work at five employers per week if unemployed and present a written list of employment contacts to the child support agency. Bartsch testified she had applied to approximately sixteen jobs per month—or an average of four per week—since she was fired, but this was less than the order required. Further, Bartsch has an associate's degree in accounting and held steady employment for at least eight years prior to being fired in a position that paid \$37,000 per year. Because Bartsch had job training and a history of steady employment yet failed to make the necessary number of employment contacts, the court could reasonably conclude her efforts to find a new job were inadequate.

¶12 Finally, Bartsch's difficulty finding employment did not permit her to simply disregard the support order. A person may request that an order be modified when there is a substantial change in the circumstances of the parties or

the children. WIS. STAT. § 767.59(1f). But to receive a modification, a party must actually seek it and show it is justified. *See Thibadeau v. Thibadeau*, 150 Wis. 2d 109, 114-15, 441 N.W.2d 281 (Ct. App. 1989). Bartsch apparently requested a reduction in her child support in June 2008 when her son turned eighteen, but the record contains no evidence she ever asked for a reduction because of her inability to find employment.

¶13 We therefore conclude there is ample evidence Bartsch could pay and her failure to pay was willful. Accordingly, we affirm that part of the circuit court's order finding Bartsch in contempt.

2. Modification of the Support Order

¶14 Bartsch argues the court erroneously exercised its discretion because it ordered her to pay \$50 each month toward arrears without finding she could make these payments. We agree.

¶15 While modification of a child support order “rests within the sound discretion of the circuit court,” proper exercise of this discretion requires the court to consider “the ability of the non-custodial parent to pay.” *Burger*, 144 Wis. 2d at 523-24. Here, the court ordered Bartsch to pay her arrearage, but did not find she could. It simply stated, “I’m also going to order that effective [June 2, 2008] she will pay \$50 a month on arrears. As of June ... she had already built up about [\$]5,000 of arrears and ... more arrears will have to be calculated from that date forward. She’s going to have to pay 50 bucks a month on the arrears.” It may be that Bartsch is able to pay her arrearage, but the circuit court was required to find this before ordering her to do so. Therefore, we reverse that part of the order requiring Bartsch to pay \$50 per month on arrears and remand for the court to determine how much Bartsch is able to pay each month toward arrears.

By the Court.—Order affirmed in part; reversed in part, and cause remanded for further proceedings.

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

