

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 19, 2010

A. John Voelker
Acting 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. 2009AP3129

Cir. Ct. No. 1989FA199

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

CINDI LYNNE OLSON N/K/A CINDI LYNNE BEMBENEK,

PETITIONER-APPELLANT,

v.

CLIFF O. OLSON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Portage County:
JOHN V. FINN, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Cindi Olson appeals an order of the circuit court denying her motion for contempt against her ex-husband for failure to pay her \$6000 plus interest under their 1990 divorce judgment. I affirm.

Background

¶2 Cindi and Cliff Olson were granted a divorce on May 15, 1990. Pursuant to the judgment of divorce, as part of the property division, Cliff was required to pay Cindi a \$6000 equalizing payment. The \$6000 began to accrue interest after sixty days and was to be paid in full no later than September 15, 1990. Cliff did not meet this deadline, and in October 1990 and February 1991 the court declined to find Cliff in contempt. Over eighteen years later, in March 2009, Cindi filed a “Motion For Remedial Contempt,” citing Cliff’s failure to pay the \$6000 and requesting as sanctions that Cliff be ordered to pay the amount plus interest or, alternatively, that other WIS. STAT. § 785.04 sanctions be imposed. She also requested attorney’s fees. Cliff did not dispute that he had failed to comply with the divorce judgment.² After a hearing, the circuit court declined to find Cliff in contempt and denied Cindi’s motion.

Discussion

¶3 Cindi essentially argues that the only reasonable conclusion from the facts is that Cliff’s failure to pay Cindi was willful and that, given this, the circuit

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.

² The parties do dispute whether Cliff made partial payments near the time of the divorce. However, whether Cliff made these partial payments does not affect the analysis because Cliff admits that he did not make all of the required payments.

court abused its discretion when it failed to sanction Cliff for his willful failure to comply with the divorce judgment. The argument fails for two reasons, as explained below.

¶4 I review a circuit court’s use of its contempt power to determine whether the court properly exercised its discretion. *Benn v. Benn*, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999). “Remedial contempt seeks to procure present and future compliance with court orders, but the sanction must be purgeable through compliance with the order from which the contempt arose.” *Id.* at 309. The mere failure to comply with a court order is an insufficient basis for a contempt finding. *See id.* The party must have been able to comply with the order, and his or her refusal must be willful and intentional. *See id.* at 309-10. It is within the circuit court’s discretion to decide what type of remedial sanctions to impose for contempt. *Id.* at 308 (citing WIS. STAT. §§ 785.02 and 785.04(1)).

¶5 The first flaw in Cindi’s argument is that her argument before the circuit court was directed at Cliff’s prior failure to pay and her speculation that, sometime during the past nineteen years, Cliff had the ability to pay and failed to do so. Remedial sanctions, however, seek “to procure present and future compliance with court orders.” *Benn*, 230 Wis. 2d at 309. Thus, the pertinent question was whether, at the time of the contempt hearing, Cliff had the ability to pay and was failing to do so. It follows, for example, that, when Cindi points to Cliff’s testimony that in the past he spent money on entertainment, alcohol, and cigarettes, her argument does not address Cliff’s current situation. *See Christensen v. Sullivan*, 2009 WI 87, ¶¶50-55, 320 Wis. 2d 76, 768 N.W.2d 798 (discussing the differences between remedial and punitive sanctions and noting that, among other differences, punitive sanctions punish past contempt of court whereas remedial sanctions address continuing contempt); *see also id.*, ¶53

(quoting WIS. STAT. § 785.03(1)(b) and stating that punitive sanctions must “be brought exclusively by ‘[t]he district attorney of a county, the attorney general or a special prosecutor appointed by the court’ in a nonsummary procedure”).

¶6 I note that, even assuming remedial contempt could be a remedy for a past failure to pay, the circuit court found that Cindi failed to show that Cliff intentionally failed to pay in the past. The court’s ruling was brief, but it is apparent that the court rejected Cindi’s contention that Cliff’s failure to comply was willful. The court stated: “I don’t think it’s a willful failure to pay.” This is a finding of fact that binds me unless clearly erroneous. *See Royster-Clark, Inc. v. Olsen’s Mill, Inc.*, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530. My review of the record shows that this is not a clearly erroneous finding in light of Cliff’s testimony.

¶7 The second reason Cindi’s argument fails is that, even if I focus on Cliff’s current failure to pay, and even if I assume that the circuit court implicitly addressed that topic, the record supports the circuit court’s implicit rejection of the proposition that Cliff currently had the ability to pay and was failing to do so.

¶8 I acknowledge that there was information in Cliff’s bankruptcy filing that he had been earning \$5000 per month, and testimony that Cliff would soon be employed again. But, at the time Cindi asked the court to hold Cliff in contempt, he was unemployed. This is not a technicality. A request for a remedial contempt sanction asks the court to impose an ongoing sanction to terminate a current ongoing contempt. I cannot conclude that at the time of the hearing there was evidence supporting a current willful failure to pay. It follows that, if the circuit court’s rejection of Cindi’s argument contains an implicit ruling that Cliff was not currently in contempt, I affirm that ruling.

¶9 Cindi broadly argues that the circuit court was obligated to use its “inherent power” of contempt to protect its jurisdiction for the good of the legal system. This policy consideration does not, however, relate to the remedial sanctions she seeks, which are for her benefit, not the public’s. *See Christensen*, 320 Wis. 2d 76, ¶55 (stating that “remedial sanctions are not designed to punish the contemnor, vindicate the court’s authority, or benefit the public”).

¶10 In sum, I affirm the circuit court’s denial of Cindi’s motion for contempt.

By the Court.—Order affirmed.

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

