

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 14, 2016

Diane M. Fremgen
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. 2016AP47

Cir. Ct. No. 2007FA188

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

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

NICOLE A. GOMEZ F/K/A NICOLE ANITA LESZCZYNSKI,

JOINT-PETITIONER-RESPONDENT,

V.

DAVID LESZCZYNSKI,

JOINT-PETITIONER-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County:
PAUL V. MALLOY, Judge. *Affirmed and cause remanded for further
proceedings consistent with this opinion.*

¶1 NEUBAUER, C.J.¹ David Leszczynski appeals from an order dated December 21, 2015, finding him in contempt of court for failing to purge himself of certain conditions imposed by a prior order, sentencing him to ninety days in jail unless he paid \$81,576 in arrears for Section 71 payments and child support, and awarding his former wife, Nicole A. Gomez, attorney fees. After thirty days, the circuit court released Leszczynski from jail. We conclude that the circuit court properly found that Leszczynski was in contempt and awarded Gomez attorney fees, and that he was not denied the opportunity to present evidence. Thus, we affirm and remand to the circuit court for further proceedings consistent with this opinion.

¶2 On January 22, 2008, Leszczynski and Gomez were granted a judgment of divorce. The judgment of divorce incorporated their Marital Settlement Agreement, which provided that Leszczynski would pay Gomez Section 71 payments in the amount of \$4167 per month running from February 1, 2008 through January 31, 2011.²

¶3 In November 2008, Gomez moved to enforce the judgment and hold Leszczynski in contempt for failing to make monthly Section 71 payments.

¶4 In February 2009, a Family Court Commissioner (FCC) issued findings and recommendations that Leszczynski send out resumes and apply for employment with at least ten potential employers and provide copies to Gomez's

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

² Section 71 refers to a section of the Internal Revenue Code relating to alimony and separate maintenance payments. *See* 26 U.S.C. § 71.

attorney. The FCC did not make a finding of contempt. The circuit court adopted the FCC's findings and recommendations.

¶5 In April 2013, Gomez moved to hold Leszczynski in contempt for failing to pay child support and Section 71 payments. In a supporting affidavit, Gomez stated that in addition to arrears in child support, Leszczynski owed \$80,000 in Section 71 payments. Leszczynski had not made a single Section 71 payment in all of 2012.

¶6 On September 17, 2013, a FCC signed an order finding Leszczynski in contempt for failing to pay child support and Section 71 payments. As conditions to purge the contempt, the FCC required Leszczynski to pay \$2500 directly to the Wisconsin Support Collections Trust by July 16, 2013, to remain current on his payment of child support, to conduct a job search and make ten "contacts" with potential employers each week, to provide proof of those "contacts" to Gomez's attorney and to Ozaukee County Child Support each week, and to provide proof to Gomez's lawyer of any cash received or deposits into any account over which Leszczynski had control.

¶7 Leszczynski moved for reconsideration of the September 17, 2013 order, but his motion was denied.

¶8 On April 16, 2014, a FCC signed an order finding Leszczynski in contempt for failing to remain current on child support payments and to comply with the purge condition requiring him to contact employers and provide proof of same. Although a provision indicated that Leszczynski was found in contempt for both failure to pay child support and Section 71 payments, the latter was crossed out and initialed by the FCC. The purge conditions required Leszczynski, among other things, to remain current on his child support payments, to conduct a job

search and make fifteen contacts with potential employers each week with proof of same to be provided to Gomez's attorney, and to provide proof to Gomez's lawyer on a biweekly basis of any cash received or deposits into any account over which Leszczynski had control. A failure to comply with the purge conditions would result in Leszczynski's incarceration for ninety days.

¶9 On October 7, 2014, Gomez moved to hold Leszczynski in contempt for failing to pay child support and Section 71 payments and to comply with the purge conditions previously issued. In a supporting affidavit, Gomez claimed that Leszczynski had not provided one proof of a job search since the last hearing, had provided his bank statements only sporadically, had not paid child support for more than two months even though his July 2014 bank statement showed a significant balance, and still owed her \$78,291 in Section 71 payments.

¶10 On October 23, 2014, a hearing was held before a FCC. The FCC stated that before him was a motion to modify child support set for an evidentiary hearing and a motion to hold Leszczynski in contempt. The FCC noted that he had already held Leszczynski in contempt on two prior occasions and asked if there was any reason why the motion for contempt should not be certified to the circuit court for appropriate remedial sanctions that might include incarceration. Leszczynski's attorney stated that he thought that this was where things were headed if the FCC thought Leszczynski was in contempt. The FCC certified the contempt to the circuit court.

¶11 On May 5, 2015, the parties entered into a stipulation regarding child support based on imputed incomes to both parties: \$115,000 for Leszczynski and \$31,200 for Gomez. Even though both parties believed the other had more earning capacity, this was "a compromise to end ongoing litigation regarding child

support.” Leszczynski was to pay \$1200 per month in child support beginning June 1, 2015.

¶12 On June 12, 2015, Gomez moved to hold Leszczynski in contempt based on his failure to pay child support for May and June 2015. Gomez noted that Leszczynski had been found in contempt on three prior occasions based on his failure to pay child support, Section 71 payments, and to comply with purge conditions. In addition, she noted, the sanction and purge conditions for Leszczynski’s prior contempts were set for July. As relief, among other things, Gomez requested that Leszczynski be incarcerated for ninety days which could be purged if, among other things, he paid her actual attorney fees and \$30,000 in Section 71 payments.

¶13 At a hearing on July 16, 2015, before the circuit court, Leszczynski took the position that he had complied with all the prior contempt orders, that he had paid the \$2500 he was ordered to pay, and was current with child support (except for an issue with payments he made to Child Support being diverted to Section 71 arrears). In response to the court, Leszczynski’s counsel acknowledged that Leszczynski was not making Section 71 payments, but he was ordered to pay \$2500 and he had made that payment. The hearing on October 23, 2014, counsel said, was to determine if there was any additional amount he should pay. Thus, there was no contempt order before the court that Leszczynski had not complied with purge conditions. In response, Gomez’s attorney stated that at the beginning of the hearing on October 23, 2014, the FCC found Leszczynski in contempt and certified the issue to the circuit court. This was “separate from the child support issue.” Leszczynski, Gomez’s attorney said, had been found in contempt three times, and that was regarding the Section 71 payments he had not made since 2012. Leszczynski has been ordered to go on job searches, but he refuses to

comply. The original purpose for the parties' presence, Gomez's attorney said, was for the contempt that the FCC had certified. The circuit court rescheduled the matter for August 21. The court told Leszczynski that he had thirty days to make some payments or he was going to jail. If the court was convinced that Leszczynski was in contempt and willfully violating court orders, then he was going to jail. Leszczynski needed to look at the prior orders and ensure that he did what he had been ordered to do. Otherwise Leszczynski needed to ask for relief from those prior orders.

¶14 In the interim, Leszczynski moved to dismiss Gomez's motion to hold him in contempt because he was current on child support and had made the one-time \$2500 Section 71 payment when it was due on July 16, 2013.

¶15 On September 28, 2015, at a hearing before the circuit court, the parties disagreed about why they were in court. Gomez's attorney asserted that they were in court because Leszczynski had been found in contempt three times, with the last time the FCC certifying the matter to the circuit court to determine the sanction and purge conditions. Those contempts were for more than just child support, as Leszczynski's attorney maintained, they were for failure to make Section 71 payments. Leszczynski still owed more than \$70,000, and had not made a payment since 2012—although some payments had been applied to Section 71, those were inadvertent, misapplied by Child Support. Leszczynski, counsel asserted, "had more than ample ability" to pay the outstanding Section 71 payments. From October 23, 2014, through August 31, 2015, Leszczynski had deposited \$134,929 into his personal account. In June 2014, Leszczynski purchased a house in full for approximately \$200,000. Afterward, Leszczynski put a mortgage on the house "after he purchased it to his own LLC that is titled in his son's name for an amount way more than what he purchased." There was no

underlying note or exchange of money; Gomez claimed it was done with the intent to hinder collection.

¶16 Leszczynski's attorney responded that the only order about Section 71 payments was the one dated September 17, 2013, directing Leszczynski to make one payment of \$2500, which he did. Leszczynski had not made payments pursuant to the judgment of divorce, but there was "no contempt hearing pending before the [FCC] on that issue." "We're talking about child support," counsel said.

¶17 The parties then disputed over what had occurred at the hearing on October 23, 2014. Leszczynski's attorney asserted that the FCC had not found Leszczynski in contempt on October 23, 2014. Gomez's attorney stated that there was no written order, but that the order was oral. The court directed the parties to look at the transcript from October 23, 2014, and submit an order to the FCC in conformity with what he had ordered. If there was no specific finding of contempt, then Gomez should make a motion to hold him in contempt for not making Section 71 payments. The court told the parties that it could not send Leszczynski to jail when "it's as hazy as this."

¶18 On October 8, 2015, Gomez's counsel wrote the FCC, telling him that he had certified this matter for remedial sanctions at the October 23, 2014 hearing. This was based on an order of contempt issued on September 17, 2013, and "subsequent contempt." Counsel enclosed a copy of the September 17, 2013 contempt order and part of the transcript from the hearing on October 23, 2014.

¶19 In late October 2015, Gomez's attorney submitted a proposed order to the FCC certifying the matter to the circuit court for remedial sanctions

regarding Leszczynski's contempt "pursuant to the contempt order of September 17, 2013 and subsequent contempt."

¶20 Leszczynski's attorney objected to the proposed order. She argued that Leszczynski had complied with the purge conditions set by the April 16, 2014 order.

¶21 On October 30, 2015, the FCC signed the proposed order, and it was forwarded to the circuit court.

¶22 The FCC also signed an order, dated December 1, 2015, indicating that the May 2015 stipulation "resolved the contempt regarding child support."

¶23 On December 17, 2015, the parties appeared in the circuit court. Leszczynski appeared pro se, after counsel moved to withdraw. The court reviewed the history of the litigation. Gomez's attorney argued that Leszczynski had over two years to attempt to obtain a job, that there were two orders directing him to seek employment, and he had not complied, a fact which he had previously conceded. While he was supposed to be searching for a job, he purchased a home and traveled.

¶24 Leszczynski responded that in the order of April 16, 2014, the FCC took contempt for failure to pay Section 71 "off the table" because of a "hardship" in Leszczynski's "ability to pay the \$70,000." Leszczynski maintained that the contempt that was certified had to do with child support and the purging of conditions related to child support, and not contempt for failing to make Section 71 payments. However, the stipulation entered into on May 5, 2015, handled all of the child support issues, including employment and income, with \$115,000 being imputed to Leszczynski. The stipulation "was a global agreement that took

care of everything but [Section] 71.” Leszczyński said that in May 2014, during a deposition, he explained that he was going to pay Gomez the outstanding Section 71 payments by buying a house, renovating it, and then reselling it; from the proceeds of the sale, he planned to pay Gomez. However, it turned out that there was a \$600,000 lien on the house from a court case Leszczyński lost, and that the lien was greater than the value of the house; so, Leszczyński could not sell the house. This was why there was a “hardship” finding in the order of April 16, 2014, Leszczyński said. When asked, Leszczyński acknowledged that he did not file the job searches “because I found a job” on March 28, 2014. Apparently from that job, Leszczyński earned \$258,000, which he used to purchase the house he intended to renovate and resell.

¶25 The court decided not to take testimony because it would involve hearsay or “he said-she said.” The court found Leszczyński had bought a home while not making Section 71 payments and not complying with the job search. The court decided to commit Leszczyński to jail for ninety days with Huber privileges, and he could serve the ninety days or become current on his obligations.

¶26 Counsel for Gomez asked for attorney fees, and the court found that they were “appropriate.”

¶27 In the order appealed from, dated December 21, 2015, the court stated that Leszczyński was found to be in contempt on September 17, 2013, that he had failed to comply with the purge conditions “of the Order of the Court,” and that he was sentenced to ninety days in jail with Huber privileges. He would be released from custody and the purge lifted if he paid \$75,426 in Section 71

payments and \$6150 in child support. Attorney fees were granted to Gomez, and she was to submit a separate affidavit.

¶28 In January 2016, Leszczyński moved to vacate the December 21, 2015 order, arguing that he was not in contempt of either the September 17, 2013 order or the April 16, 2014 order. As to the September 17, 2013 order, he was not in contempt of it because he had made a one-time payment of \$2500 as required to purge the contempt. As to the April 16, 2014 order, he was not in contempt of it because the May 2015 stipulation had resolved that contempt, which concerned only child support. Indeed, the December 1, 2015 order stated that the contempt regarding child support had been resolved. Therefore, since Leszczyński had purged, there was no basis to incarcerate him. Even if he had not purged, the alternative purge condition requiring him to pay \$81,576 in order to be released from incarceration was not reasonable.

¶29 The circuit court lifted the commitment order and ordered Leszczyński released because the court had made its “point” and “all anyone” wanted was for him “to start making good on his Section 71 payments.” The court warned him, however, that “[i]t doesn’t go away,” and that he needed to start paying or he would be back in court. In other words, the court was “not vacating the contempt.” Leszczyński was ordered to pay \$1200 per month in Section 71 payments beginning February 1, 2016, in addition to his current child support obligation.

¶30 Leszczyński contends that the circuit court erred in sanctioning him for contempt of court because he had complied with the prior purge conditions. At the very least, given the confusing history of the case, which the circuit court

acknowledged at one point, Leszczynski thought he was in compliance and, thus, his contempt was not willful. Further, he was denied the opportunity to testify at the December 17, 2015 hearing and explain that he was not in contempt. Even if Leszczynski was in contempt, he contends that the remedial sanction requiring him to pay \$81,576 within ninety days while incarcerated was not purgeable and, therefore, the sanction was essentially punitive and not remedial. While Leszczynski acknowledges that he was released from jail, he argues that the sanction should be vacated in its entirety, particularly the award of attorney fees, because the court did not consider the reasonableness of the fees and the financial resources of the parties.

¶31 “‘Contempt of court’ means,” among other things, “intentional ... [d]isobedience, resistance or obstruction of the authority, process or order of a court.” WIS. STAT. § 785.01(1)(b). For a contempt of court, a court may impose a remedial sanction. WIS. STAT. § 785.02. A “[r]emedial sanction’ means a sanction imposed for the purpose of terminating a continuing contempt of court.” Sec. 785.01(3). A remedial sanction, which is civil, is designed to enforce a private right of a party in an action. *Frisch v. Henrichs*, 2007 WI 102, ¶35, 304 Wis. 2d 1, 736 N.W.2d 85. As a “remedial sanction,” a court may impose one or more of the following exclusive sanctions listed in WIS. STAT. § 785.04(1):

(a) Payment 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.

(b) Imprisonment if the contempt of court is of a type included in [WIS. STAT. §] 785.01(1)(b), (bm), (c) or (d). The imprisonment may extend only so long as the person is committing the contempt of court or 6 months, whichever is the shorter period.

(c) A forfeiture not to exceed \$2,000 for each day the contempt of court continues.

(d) An order designed to ensure compliance with a prior order of the court.

(e) A sanction other than the sanctions specified in pars. (a) to (d) if it expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

¶32 The remedial “sanction must be purgeable through compliance with the original court order.” *Diane K.J. v. James L.J.*, 196 Wis. 2d 964, 969, 539 N.W.2d 703 (Ct. App. 1995); see *State v. King*, 82 Wis. 2d 124, 130, 262 N.W.2d 80 (1978). Alternatively, a court may, but is not required to, grant a purge condition as a means for a contemnor to remove the sanction. See *Larsen v. Larsen*, 165 Wis. 2d 679, 685 n.1, 478 N.W.2d 18 (1992) (noting that at one time, the statutes required that civil contempt sentences be purgeable, but that the current statutes do not contain such a requirement other than that if imprisonment is imposed, then it continues for the shorter of either six months or the cessation of the contempt); *Diane K.J.*, 196 Wis. 2d at 969. If a purge condition is granted, it must clearly spell out what the contemnor must do to be purged, “the contemnor should be able to fulfill the proposed purge, and the condition should be reasonably related to the cause or nature of the contempt.” *Larsen*, 165 Wis. 2d at 685; see *State ex rel. N.A. v. G.S.*, 156 Wis. 2d 338, 342-43, 456 N.W.2d 867 (Ct. App. 1990). The requirement that the contemnor be able to fulfill the purge condition “applies regardless of whether the contemnor has been incarcerated or the sentence meted out has been stayed.” *State ex rel. N.A.*, 156 Wis. 2d at 343.

¶33 A party may be held in contempt if he or she has the ability to pay but the refusal to pay is willful and with intent to avoid payment. See *Benn v. Benn*, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999). A circuit court’s use of its contempt power is a discretionary act, which requires us “to determine if the circuit court logically interpreted the facts, applied the proper legal standard,

and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach.” *Id.* at 308.

¶34 Here, as indicated in the order of September 17, 2013, the FCC found Leszczynski in contempt for failing to make Section 71 payments as required by the judgment of divorce. In order to purge, Leszczynski was required both to pay \$2500 *and* to conduct job searches, proof of which he was supposed to file with Gomez’s attorney. While he complied with the former, he undisputedly did not comply with the latter. Since Leszczynski did not satisfy the alternative purge condition of conducting job searches and providing proof of same to Gomez’s attorney, his contempt for failure to make Section 71 payments continued. *See Frisch*, 304 Wis. 2d 1, ¶60.

¶35 Leszczynski’s primary argument is that the removal of the Section 71 payment contempt in the April 16, 2014 order somehow overrode the September 17, 2013 contempt finding and purge conditions. We disagree. On October 7, 2014, Gomez moved to hold Leszczynski in contempt for failing to pay child support and Section 71 payments and to comply with the purge conditions previously issued. The FCC found Leszczynski was in contempt and failed to meet the purge conditions. The purge condition requiring Leszczynski to verify that he was seeking employment was not satisfied. Moreover, Leszczynski’s interpretation of the orders of September 17, 2013, and April 16, 2014, is not reasonable. It is not reasonable to conclude that because Leszczynski made a one-time payment of \$2500 and had a hardship that he no longer had to look for employment, and verify that he was doing so, so that he could earn sufficient income to pay off the Section 71 debt that by then was more than three years delinquent. The whole point of remedial contempt is “to procure present and future compliance with court orders.” *Benn*, 230 Wis. 2d at 309. Leszczynski

could hardly be brought into compliance if he had no income and was not seeking employment. Required compliance with the original court order and the purge conditions continued; Leszczynski's contempt continued.

¶36 In addition, the circuit court did not erroneously exercise its discretion in finding that Leszczynski was clearly in willful contempt of the judgment of divorce for failing to make Section 71 payments, which had been due and owing since 2011. As a remedial sanction for that contempt, absent compliance with the purge conditions established here, the circuit court could imprison Leszczynski. While Leszczynski contends that requiring him to pay the full amount was not feasible, he wholly ignores his admitted past and continuous failure over many years to comply with the alternative purge condition. Moreover, by Leszczynski's own admission he owed more than \$70,000 in Section 71 payments, which he could have paid from the \$258,000 he had earned in 2014, but instead used to purchase a home in full without a mortgage in the hope of renovating and reselling it.³ Leszczynski also challenges the court's provision of the opportunity to avoid contempt and lift the jail sanction upon payment of the full amount owing, i.e., but this alternative purge condition was nothing more than a reaffirmation that he was required to comply with the original order. Ultimately, the court released Leszczynski after thirty days and, thus, his then-current ability to pay is, for purposes of the December 21, 2015 sanction of ninety days in jail, moot.

³ In addition, during the hearing on December 17, 2015, Gomez's attorney noted that Leszczynski had testified before the FCC on September 22, 2015, while seeking to vacate the stipulation of May 5, 2015, that in 2014 he had earned \$258,000.

¶37 Next Leszczynski argues that the circuit court denied him the opportunity to testify and explain that he was in compliance. While the need for an evidentiary hearing is ordinarily required, *see Evans v. Luebke*, 2003 WI App 207, ¶24, 267 Wis. 2d 596, 671 N.W.2d 304; *see also Kaminsky v. Milwaukee Acceptance Corp.*, 39 Wis. 2d 741, 751, 159 N.W.2d 643 (1968), the need for taking of evidence in this case was, as noted, obviated by Leszczynski's own admissions.

¶38 Finally, the circuit court appropriately awarded Gomez attorney fees. Contrary to Leszczynski's contention, the circuit court was not required to consider the financial resources of the parties before making an award. Generally, one spouse's need and the other spouse's ability to pay are necessary in order to make an award of attorney fees in a divorce proceeding. *See Benn*, 230 Wis. 2d at 315. In contempt proceedings, however, a different standard applies. *Id.* A circuit court may "impose the payment of money sufficient to compensate a party for the loss suffered as a result of the contempt of court, as a sanction," which includes an award of attorney fees. *Id.*; *Town of Seymour v. City of Eau Claire*, 112 Wis. 2d 313, 320, 332 N.W.2d 821 (Ct. App. 1983). Therefore, there is no requirement that the circuit court make findings of need and ability to pay before making such an award. *Benn*, 230 Wis. 2d at 315.

¶39 The type of sanctions, including the award of attorney fees, is within the discretion of the circuit court. *Id.* at 308. The circuit court properly awarded attorney fees to Gomez for having to repeatedly seek judicial assistance to enforce the judgment. *Id.* at 315. While Leszczynski also complains that the circuit court neglected to make a finding on the reasonableness of the fee, that issue is not before us. The order appealed from directed Gomez to submit a separate affidavit as to the amount, and we have nothing in the record indicating that the circuit

court decided the issue prior to appeal. *See generally Kilian v. Mercedes-Benz USA, LLC*, 2011 WI 65, ¶58, 335 Wis. 2d 566, 799 N.W.2d 815. The award of attorney fees was an appropriate sanction given Leszczynski's contempt and failure to purge, and the amount was not determined prior to appeal.

¶40 Therefore, we conclude that the circuit court properly found that Leszczynski was in contempt, he was not denied his right to submit evidence on his compliance, and the award of attorney fees was appropriate. We affirm and remand to the circuit court for proceedings consistent with this opinion.

By the Court.—Order affirmed and cause remanded for further proceedings consistent with this opinion.

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

