

**Appeal No. 2006AP2128**

**Cir. Ct. No. 2004FA361**

**WISCONSIN COURT OF APPEALS  
DISTRICT II**

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**IN RE THE MARRIAGE OF:**

**NANCY H. ROUSH,**

**PETITIONER-RESPONDENT,**

**V.**

**WILLIAM S. ROUSH, JR.,**

**RESPONDENT-APPELLANT.**

**FILED**

**DEC 12, 2007**

David R. Schanker  
Clerk of Supreme Court

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**CERTIFICATION BY WISCONSIN COURT OF APPEALS**

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Before Anderson, PJ, Nettesheim and Snyder, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

**ISSUE**

Does WIS. STAT. § 767.30(3)(b) (2003-04)<sup>1</sup> wrongly encroach upon inherent judicial contempt powers to enforce support obligations by limiting the

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<sup>1</sup> WIS. STAT. § 767.30 was in effect on the date that this contempt order was issued, August 5, 2006. Section 767.30 was renumbered WIS. STAT. § 767.77 pursuant to 2005 Wis. Act 443, §§ 137, 239, with an effective date of January 1, 2007. All relevant subsections remained the same. All references to the Wisconsin Statutes herein are to the 2003-04 version.

use of WIS. STAT. ch. 785 remedial contempt to when a “party fails to pay a payment ordered under sub. (1) *or* to give security under sub. (2)”?<sup>2</sup> (Emphasis added.)

## BACKGROUND

William S. Roush, Jr., and Nancy H. Roush were married on June 23, 1984, and children were born of the marriage. On January 7, 2005, a divorce judgment was entered dissolving the marriage and requiring William to make monthly child support and maintenance payments. The judgment provided that the marital homestead be sold and that one-half of the proceeds that William received from the homestead sale “shall be deposited with the Clerk of Courts for Waukesha County in an interest bearing account as security for [William’s] financial obligations as set forth herein.”

The judgment’s security fund provision was premised upon the family court’s November 5, 2004 oral finding that “in light of the circumstances ... about the proven unreliability of [William’s] support of the family, I’m going to require that half of his share after the adjustment on the debt be deposited in a trust with the clerk of courts for purposes of acting as security for payment of child support and maintenance.” It is undisputed that William also deposited some 401K money into the security fund. The “trust” resulted in the creation of a WIS. STAT. § 767.30(2) security fund.

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<sup>2</sup> The appeal also presents issues addressing the award of attorney fees and statutory due process. Addressing the certified issue first is necessary to resolve those issues.

The divorce judgment provided for monthly child support and maintenance totaling \$4402.<sup>3</sup> At the August 3, 2006 contempt hearing, William conceded that he had not made the required monthly support payments for April, May, June and July of 2006 with money other than that held in the security trust fund. William was not, however, in arrears in child support and maintenance obligations on August 3, 2006, the date the family court found him in contempt.

### DISCUSSION

This certification questions whether the family court's WIS. STAT. ch. 785 contempt finding was legal considering the limiting language of WIS. STAT. § 767.30(3). Section 767.30(3) reads in relevant part as follows:

If the party fails to pay a payment ordered under sub. (1) *or* [emphasis added]<sup>4</sup> to give security under sub. (2), the court may by any appropriate remedy enforce the judgment ... including any past due payment and interest. Appropriate remedies include but are not limited to:

....

(b) Contempt of court under ch. 785.

On August 3, 2006, when William was found in contempt, he was current on his support payments; furthermore, he had provided a WIS. STAT. § 767.30(2) security fund sufficient to meet his past and his current support obligations. William contends in this appeal, and argued at the August 3, 2006,

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<sup>3</sup> The child support and maintenance payments adjusted periodically under the terms of the judgment. As of June 1, 2005, William was to pay \$1902 per month for child support and \$2500 per month for maintenance.

<sup>4</sup> A statute should be construed as to give meaning to every word. *Town of Grand Chute v. City of Appleton*, 91 Wis. 2d 293, 297, 282 N.W.2d 629 (Ct. App. 1979). The word “or” is disjunctive, not conjunctive like “and.” *Id.*

contempt hearing, that he was not in contempt but was in compliance with the family court's order.<sup>5</sup> The court acknowledged as much by stating, "[A]ll of the amounts [William] is supposed to pay for child support and maintenance have been paid, it is true."

However, the family court rejected William's attempt to escape a finding of contempt, noting that he had paid his support obligations from the security fund. The problem, as the family court described, was as follows:

[William] didn't pay [the child support and maintenance] by any other means except for his assets that I seized, put in trust with the Clerk of Courts as a security fund, it is clearly a security fund, not a primary source for payment, because ... [Nancy] can't take any money out of [the security fund] until [William] fails to pay on time ....

It is [William's] money, but it is security, it is a backup, it is a secondary payment source, not the primary source. It is only when he is already delinquent on a monthly payment that this security fund composed of his assets is touched.

....

So I reject [William's] argument that he is in compliance. He is not in compliance. He has failed to make a single one of those payments complained about here; April, May, June and July.

The family court then proceeded to find William in contempt and to impose sanctions, including incarceration:

[I]n light of the fact I found [William] in contempt before and that didn't produce the desired effect, namely payment, I'm going to sentence him to the full six months this

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<sup>5</sup> William poses the issue as "The Appellant Was Not in Contempt on August 3, 2006." While he did not specifically address the issue presented in this certification, he did question the propriety of the family court's finding of contempt where the legislature had limited the court's WIS. STAT. ch. 785 judicial contempt powers in WIS. STAT. § 767.30(3).

time.... I want him to pay what he is supposed to pay, and as required by law I'll set purge terms ... that he can accomplish. So the keys to the jail cell are in his own hand....

He is to pay the court ordered maintenance and child support from August 1 [2006] forward in a timely fashion, not from the [security fund] but from his income, or any other source, not from the [security fund.]

WISCONSIN STAT. § 767.30 directs the manner in which the family court can provide for the enforcement of child support and maintenance obligations. Subsections (1m) and (2) read:

[T]he court may provide that any payment be paid in the amounts and at the times that it considers expedient.

The court may ... require [the obligated] party to give sufficient security for payment.

The circuit court ordered that William comply with periodic payments as contemplated in WIS. STAT. § 767.30(1), as well as set up a sufficient security under § 767.30(2).<sup>6</sup> William's violation of the court order came when he used the security fund to pay his support obligations.

The family court possesses an inherent power to hold in contempt those who disobey a lawful order of the court. *State v. A.W.O.*, 117 Wis. 2d 120, 126, 344 N.W.2d 200 (Ct. App. 1983). The procedures for this power are found in WIS. STAT. ch. 785. WISCONSIN STAT. § 767.30(3)(b) provides the court specific legislative authority to use its contempt powers to enforce family court orders, which arguably limits the inherent judicial contempt power to either a violation of

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<sup>6</sup> Whether the family court is authorized to do both, however, is not the focus of this certification.

sub. (1), failing to make periodic support payments, or in the alternative, sub. (2), failing to set up a security sufficient to meet support obligations.

In *Frisch v. Henrichs*, 2007 WI 102, ¶32, \_\_\_ Wis. 2d \_\_\_, 736 N.W.2d 85, the supreme court acknowledged that the inherent contempt power of family courts is subject to regulation by the legislature:

“A court’s power to use contempt stems from the inherent authority of the court. The power may, however, within limitations, be regulated by the legislature.” *Griffin v. Reeve*, 141 Wis. 2d 699, 706 n.4, 416 N.W.2d 612 (1987). “Despite the fact that the power exists independently of statute, this court ruled [in 1880], that when the procedures and penalties of contempt are prescribed by statute, the statute controls. *Douglas County v. Edwards*, 137 Wis. 2d 65, 88, 403 N.W.2d 438 (1987) (citing *State ex rel. Lanning v. Lonsdale*, 48 Wis. 348, 367, 4 N.W. 390 (1880)). This formulation necessarily presents questions of whether the legislature has fully prescribed the procedures and penalties of contempt and, if it has, whether the limitations imposed impair the inherent authority of the court. The legislature may regulate and limit the contempt power “so long as the contempt power is not rendered ineffectual.” Note (WIS. STAT. § 785.02), § 11, ch. 257, Laws of 1979, at 1355.

The pivotal issue here is one of separation of powers. The separation of powers doctrine envisions a system of separate branches sharing many powers, while jealously guarding certain others, a system of “separateness but interdependence, autonomy but reciprocity.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952); *State v. Holmes*, 106 Wis. 2d 31, 43, 315 N.W.2d 703 (1982). A statute within the area of power shared by the two branches (judicial and legislative), yet outside of the judiciary’s exclusive authority, will be acceptable only if it does not unduly burden or substantially interfere with the judicial branch. *Holmes*, 106 Wis. 2d at 68.

Here, the contempt holding of the family court indicates that it either concluded the legislative language in WIS. STAT. § 767.30(3)(b) did not prohibit a finding of contempt when William failed to meet the requirements of both § 767.30(1) and (2), or, more importantly, that § 767.30(3) unduly burdened or substantially interfered with the authority of the judicial branch in using its contempt powers.

Contempt to enforce orders and judgments is a valuable and protected judicial resource. The ability of the legislature to regulate that inherent power, with limitation, has been recognized by the Wisconsin supreme court. Whether the Wisconsin legislature has exercised its power to regulate the inherent contempt power of the family court in this case,<sup>7</sup> within the limitations of concern indicated in *Griffin*, is a separation of powers issue that should be addressed by Wisconsin's highest judicial authority, the supreme court. We respectfully certify the question.

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<sup>7</sup> Cases dealing with the inherent powers of the court are necessarily fact-specific. Certain powers have been ceded to the courts because “without them [courts] could neither maintain their dignity, transact their business, nor accomplish the purposes of their existence.” *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 16-17 n.7, 531 N.W.2d 32 (1995) (citation omitted). Such powers include the power to impose penalties, to expunge records, and to dismiss criminal charges with prejudice. *Id. State ex. rel Friedrich* provides an extensive list of cases addressing the powers of the court. *See id.*

