

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

AUGUST 20, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0238

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE THE MARRIAGE OF PAMELA
COUNTER AND ROBERT COUNTER:**

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

ROBERT COUNTER,

Respondent-Appellant.

APPEAL from an order of the circuit court for Florence County:
ROBERT A. KENNEDY, Judge. *Affirmed.*

LaROCQUE, J. Robert Counter appeals an order that among other things requires that he pay a child support arrearage of \$9,782.82 or serve 120 days in jail. Robert argues that the order constitutes a punitive sanction rather than a remedial sanction, and that the court abused its discretion when it ordered him to either borrow the money or go to jail. He also contends that he was denied the right to call witnesses in his behalf at the hearing on the petition for contempt sanctions. This court rejects Robert's contentions and affirms the order.

Robert first contends that an order that he pay the arrearage based upon a finding that he has the ability to borrow the money was an abuse of discretion because the ability to do so is contingent on the approval of the lender. He cites *State ex rel. N.A. v. G.S.*, 156 Wis.2d 338, 456 N.W.2d 867 (Ct. App. 1990), as authority for his contention. *G.S.* points out that a contempt sanction is remedial if the defendant is committed unless and until he performs the affirmative act required by the court order. *Id.* at 341, 456 N.W.2d at 869. The purge condition must spell out what the contemnor must do "and that action must be within the power of the person." *Id.* at 342, 456 N.W.2d at 869. In *G.S.*, the subject was placed in jail and ordered to look for work; he could not comply. *Id.* Further, even if out of jail, this court noted that hiring is an affirmative act by another individual and, therefore, not solely within the contemnor's control. *Id.* at 343, 456 N.W.2d at 869.

G.S. is readily distinguished. The requirement that a contemnor obtain a loan is not the equivalent of an order that he obtain employment. It is true that like a request for a job, a loan requires the assent of another. It is different, however, in that loans are routinely approved on the basis of one's ability to repay it. Robert takes the mandate of *G.S.* far too literally. In this case, the court made an express finding that Robert had the ability to take out a loan. Robert points to no basis for this court to conclude that the court's finding was clearly erroneous. See § 805.17(2), STATS. The record includes evidence that Robert has a legal interest in real estate. He has shown no basis why, if he cannot obtain the consent of the other owner, he cannot obtain partition and a mortgage. The trial court properly exercised its discretion by ordering Robert to serve a jail sentence in lieu of obtaining the money to pay the arrearage.

Robert was not denied the right to call witnesses. Robert did not ask to call witnesses. He offers no explanation why he did not inform the court that he wanted to do so. Absent such an explanation and a basis to support it in the record, Robert waived his right.

By the Court. – Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.