

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

SEPTEMBER 3, 1997

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, 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. 97-1070-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

ROBIN K. TRAPP,

PETITIONER-RESPONDENT,

V.

MARK A. TRAPP,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Vilas County:
JAMES B. MOHR, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Mark A. Trapp appeals an order finding him in contempt of court for intentionally disobeying a divorce judgment that required he

pay Robin K. Trapp \$450 monthly maintenance.¹ He argues that he did not willfully disregard the maintenance order, but merely lacked the ability to pay. The evidence supports the trial court's finding of willful disobedience. We therefore affirm the contempt order.

Much of Mark's argument is premised on the false assertion that Robin had the burden of proving his ability to pay. Robin's burden consisted of proving that Mark disobeyed the divorce judgment entered less than five months earlier. She fulfilled her burden by showing that he had not made any maintenance payments during that time. Inability to pay is an affirmative defense, and the burden was on Mark to establish that defense regardless whether the contempt proceeding was initiated by an order to show cause or a motion.² *See Van Offeren v. Van Offeren*, 173 Wis.2d 482, 498-99, 496 N.W.2d 660, 666 (Ct. App. 1992); *State v. Duprey*, 149 Wis.2d 655, 659, 439 N.W.2d 837, 839 (Ct. App. 1989).

The record supports the trial court's finding that Mark failed to establish inability to pay. Whether a person is capable of doing what he is ordered to do is a question of fact for the trial court to decide. *See Seymour v. Eau Claire*, 112 Wis.2d 313, 318, 332 N.W.2d 821, 823 (Ct. App. 1983). The trial court's findings of fact are to be sustained unless they are clearly erroneous. *See* § 805.17(2), STATS. The trial court found that Mark's financial situation did not substantially change after the divorce judgment. He failed to pay maintenance starting with the first payment due. He received net sales of \$6,000 during this

¹ This is an expedited appeal under RULE 809.17, STATS.

² We also note that Mark and his attorney conceded at the contempt hearing that he bore the burden of proving inability to pay.

time and secured a \$25,000 loan, but allocated none of these funds to satisfy his maintenance obligation. Instead he applied these funds toward his personal living expenses, mortgage and truck payments. He continued to employ a secretary at his business, a business he contends has no value and operates at a loss. Although Mark claimed that he did odd jobs such as shoveling roofs to make ends meet, he also admitted that he flew to Arizona for an eight-day vacation after the divorce, demonstrating less than full commitment to his quest for greater income. The record supports the finding that Mark had the ability to make these payments and merely chose to allocate his resources on other expenditures to which he attached a higher priority.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

