

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 4, 2009

David R. Schanker
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. 2008AP1038

Cir. Ct. No. 2004FA361

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

NANCY HANNA ROUSH,

PETITIONER-RESPONDENT,

v.

WILLIAM SAMUEL ROUSH, JR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
DONALD J. HASSIN, JR., Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. This is another in a series of William S. Roush, Jr.'s appeals of post-divorce judgment proceedings. He appeals an order finding him in contempt for willful nonpayment of maintenance to his former wife, Nancy Hanna Roush. We affirm the order and deny frivolous appeal costs to Nancy.

¶2 Given the case's familiarity to all involved, we state only the facts essential to this appeal. William and Nancy divorced in 2004 after a twenty-year marriage. The judgment was not appealed but there ensued numerous post-judgment motions and hearings related to enforcing the child support and maintenance orders.

¶3 In May 2007, William was found in contempt for willfully failing to pay maintenance.¹ The circuit court sentenced him to six months in jail, but stayed the sentence and set up two purge conditions: (1) regular, timely payments on his maintenance obligation and (2) reimbursement of the security fund set up by the divorce judgment. William failed to meet the conditions, a *capias* issued and he was arrested on October 26, 2007. At the November 6 hearing, the court ordered William jailed if he did not satisfy the purge conditions by November 9. He made no payments and was incarcerated with work-release privileges. He still paid nothing. His work-release privileges were revoked on January 1, 2008, when he reported back to the Huber facility on New Year's Eve smelling of alcohol and testing positive for it.

¶4 Nancy filed a *pro se* motion for contempt for William's failure to pay his \$4000 monthly obligation from November 2007 through January 2008.

¹ No issues remain as to child support.

William testified that he had had some business receivables but acknowledged making no payment since March 2005 that was not a condition of a contempt purge. The court found William in contempt, ordered him to pay the \$12,000 arrearage in addition to his other outstanding obligations and sentenced him to ninety days without work-release privileges consecutive to the current sentence.

¶5 On appeal, William first argues that he should not have been found in contempt of court for failure to pay because a person may be held in contempt only if the failure to pay is willful. See *Roellig v. Roellig*, 146 Wis. 2d 652, 660, 431 N.W.2d 759 (Ct. App. 1988). We review a circuit court's use of its contempt power for a proper exercise of discretion. *Benn v. Benn*, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999). Findings of fact and conclusions of law may underlie discretionary determinations. *Monicken v. Monicken*, 226 Wis. 2d 119, 125, 593 N.W.2d 509 (Ct. App. 1999). We uphold findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). Questions of law we review de novo. *Monicken*, 226 Wis. 2d at 125.

¶6 William contends that he hardly can be expected to earn an income and satisfy his obligations while in jail. Indeed, for a finding of civil contempt, the person must have the power to do the thing ordered. *Schroeder v. Schroeder*, 100 Wis. 2d 625, 638, 302 N.W.2d 475 (1981).² A finding of contempt rests on the circuit court's factual findings regarding the person's ability to pay. *State v. Rose*, 171 Wis. 2d 617, 623, 492 N.W.2d 350 (Ct. App. 1992). The principal findings

² William explains at length his difficulties in securing new employment and/or establishing a solo practice, either of which would generate earnings significantly less than the \$145,000 income originally imputed to him. He also indicates he has health issues for which he has been hospitalized. These matters might be better suited to a motion to modify maintenance based on a substantial change of circumstances.

are that the person is able to pay and that the refusal to pay is willful and done with intent to avoid payment. *Id.* The burden of proof is on the person against whom the contempt is charged to show his conduct is not contemptuous. *Besaw v. Besaw*, 89 Wis. 2d 509, 517, 279 N.W.2d 192 (1979).

¶7 William's argument is circular, or perhaps backwards. He himself testified that he grossed \$66,000 or \$67,000 in 2007. He also testified that he had not made any maintenance payment since March 2005 that was not a condition of a purge. The circuit court found that, even when in custody, William was working under Huber release until January 2008 and that, despite gross receipts of some \$9,000 between October and December of 2007, "not \$1 was ever paid on this obligation, not \$1." It also found that William had done nothing to broaden his practice or, in fact, "anything but contrive his circumstances so as not to pay this obligation." The court concluded that William's failure to pay was not due to inability, but to a purposeful exhaustion of moneys in "flagrant defiance of [a] court order." Thus, William may be less able to pay because he is in custody but he is in custody because he refused to pay.

¶8 The circuit court is far better positioned than are we to determine whether or not the act is contemptuous. *Schroeder*, 100 Wis. 2d at 640. Even if we allowed that the original amount of maintenance of \$4000 per month is beyond William's current ability, we do not see how it explains, let alone excuses, his failure to pay anything at all for the months at issue. Furthermore, he alone is responsible for the loss of his work-release privileges in January 2008. When the inability to pay is willfully brought upon oneself with intent to avoid payment, the refusal to pay becomes contumacious, and the resulting inability will not purge the contempt. *Id.*

¶9 The circuit court made the requisite findings for contempt. Its findings that William is able to pay and that his refusal is willful and done with intent to avoid payment are not clearly erroneous. *See Rose*, 171 Wis. 2d at 623. In addition, the court observed that it had yet to hear or see any evidence that William accepts his responsibility to fulfill the obligations the court ordered in 2004. William has not borne the burden of showing that his conduct was not contemptuous. *Besaw*, 89 Wis. 2d at 517.

¶10 Finally, William argues that the circuit court itself called the sanction punitive and punitive sanctions are impermissible in a remedial contempt proceeding. *See State ex rel. N.A. v. G.S.*, 156 Wis. 2d 338, 341, 456 N.W.2d 867 (Ct. App. 1990). Whether the court misused its discretion by issuing a punitive sanction in a remedial contempt proceeding involves a question of law which we review de novo. *Diane K. J. v. James L. J.*, 196 Wis. 2d 964, 968, 539 N.W.2d 703 (Ct. App. 1995). We disagree with William that the sanction was punitive in nature. First, the order the court signed contains purge conditions. Purge conditions are an aspect of remedial, not punitive, contempt. *See id.* at 968-69.

¶11 Second, we agree with Nancy that the court's use of the word "punitive" in its remarks must be taken in context. The transcript suggests that Nancy, who appeared pro se, was unclear as to how the newly imposed ninety-day sentence related to the current sentence and the \$12,000 judgment. She needed clarification when learned that it was her responsibility as the movant to prepare the order. The court explained that it would "convert that \$12,000 to a judgment, but it doesn't absolve the punitive component of the contempt finding today." We read the court's comment as a lay explanation, not a legal definition.

¶12 Determining the type of remedial sanctions to impose for contempt is a discretionary determination. *Benn*, 230 Wis. 2d at 308; *see also* WIS. STAT. §§ 785.02 and 785.04(1) (2007-08).³ William did not honor his payment obligations even when he had work-release privileges. The specter of straight jail time appeared to compel payment in the past, and the court well may have hoped that it once again would motivate him. That does not make it a punitive sanction in the legal sense. We see no erroneous exercise of discretion.

¶13 As a final matter, Nancy asks that we remand for a determination of reasonable attorney fees and costs on the basis that William filed this appeal in bad faith solely to maliciously injure her. *See* WIS. STAT. § 809.25(3)(c)1. We may not award fees under § 809.25(3) unless the entire appeal is frivolous. *See Manor Enters., Inc. v. Vivid, Inc.*, 228 Wis. 2d 382, 403, 596 N.W.2d 828 (Ct. App. 1999). The record is insufficient to conclude that William undertook the appeal in bad faith solely to maliciously injure Nancy. Though his argument did not prevail, William reasonably could have believed there was some merit to his claim that being jailed recategorized his failure to pay from “willful nonpayment” to “inability to pay.” Because we do not conclude that William’s entire appeal is frivolous, Nancy’s motion for frivolous costs on appeal is denied.

By the Court.—Order affirmed.

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

³ All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

