

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 9, 2003

Cornelia G. Clark
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. 02-3059
STATE OF WISCONSIN

Cir. Ct. No. 00-FA-110

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

FRANK C. KESSELRING, III,

PETITIONER-APPELLANT,

v.

ELLEN K. KESSELRING,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
LEE S. DREYFUS, JR., Judge. *Affirmed.*

¶1 SNYDER, J.¹ Frank C. Kesselring, III appeals from an order of the circuit court finding him in contempt for failure to pay child support. Kesselring

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2001-02). All references to Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

argues that the contempt finding was not proper under Wisconsin law. We disagree and affirm.

FACTS

¶2 Frank and Ellen K. Kesselring were married on December 30, 1989, and have two children. Frank filed for divorce on January 25, 2000, and on March 1, 2000, Frank's child support payments were set at \$1000 per month. The \$1000 figure was based upon a 1998 loan application in which Frank asserted he earned \$6000 per month.

¶3 The circuit court learned that Frank was not paying the full amount of his previously ordered child support payments when, on May 1, 2001, Ellen filed a contempt motion. Frank paid varying amounts and had accumulated \$11,876 in arrearages as of August 1, 2002.

¶4 On September 5, 2002, the circuit court imputed an income of \$50,000 to Frank and set child support in the amount of \$12,500 per year (starting August 1, 2002), payable in monthly installments of \$1041.66.

¶5 Ellen filed a second contempt motion for failure to pay child support arrearages, plus the court-ordered interest on the arrearages; this motion was granted by the circuit court on October 15, 2002. The court denied a motion by Frank to reconsider the \$50,000 income imputation pursuant to WIS. STAT. § 805.17(3). The court informed Frank that he could purge the contempt order if he paid \$12,935.91 in arrearages and interest by October 31, 2002.²

² The court added another \$1330 for unpaid medical/dental insurance, bringing the amount owed to \$14,265.91.

¶6 The circuit court sent Frank to jail on November 7, 2002, in accordance with the September 5, 2002 order, for failure to pay arrearages and interest on arrearages by the October 31, 2002 deadline. The court sentenced Frank to seventy-five days for the failure to pay arrearages and interest plus an additional thirty days for failure to pay the health insurance premiums. The court ordered the sentences to be served consecutive to one another.

¶7 Frank appealed the contempt order on December 16, 2002, filing a motion to stay the contempt order pending appeal, pursuant to WIS. STAT. § 809.12. On December 18, 2002, we denied this motion and clarified the scope of Frank's appeal. We indicated that the divorce was not yet final and therefore the \$50,000 income imputation was not a final judgment and not proper for this appeal. We denied the motion for stay because Frank only claimed error in the child support order and imputation of income and did not suggest there was a likelihood of success in having the contempt order overturned. Frank appeals the circuit court's contempt order.

DISCUSSION

¶8 Frank argues that it was not proper under Wisconsin law for the circuit court to find him in contempt and impose a jail sentence for failure to pay child support and other amounts. We disagree.

¶9 A circuit court's use of its contempt power and its decision as to the type of remedial sanctions to impose are discretionary decisions. *See State ex rel. N.A. v. G.S.*, 156 Wis. 2d 338, 341, 456 N.W.2d 867 (Ct. App. 1990); *see also* WIS. STAT. §§ 785.02, 785.04(1). The term discretion contemplates a reasoning process that considers the applicable law and the facts of record, leading to a conclusion a reasonable judge could reach. *Schneller v. St. Mary's Hosp. Med.*

Ctr., 155 Wis. 2d 365, 374, 455 N.W.2d 250 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 296, 470 N.W.2d 873 (1991). We will not reverse a discretionary determination by the trial court if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision. *Prahl v. Brosamle*, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987). "Where the trial court fails to adequately explain the reasons for its [discretionary] decision, we will independently review the record to determine whether it provides a reasonable basis for the trial court's ... ruling." *State v. Clark*, 179 Wis. 2d 484, 490, 507 N.W.2d 172 (Ct. App. 1993).

¶10 The following are essential to a contempt order: (1) the alleged contemnor is able to pay or should be able to pay if he or she can work but will not; (2) a willful refusal to pay with intent to avoid payment; and (3) clearly delineated purge conditions. *O'Connor v. O'Connor*, 48 Wis. 2d 535, 542-43, 180 N.W.2d 735 (1970); *see also Schroeder v. Schroeder*, 100 Wis. 2d 625, 639, 302 N.W.2d 475 (1981). 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). A person may be held in contempt of court for failure to pay money only where the failure to pay is willful and not the result of an inability to pay. *Balaam v. Balaam*, 52 Wis. 2d 20, 29, 187 N.W.2d 867 (1971).

¶11 Here, the circuit court determined that Frank had the ability to pay because he has sufficient assets available to him, i.e., his \$50,000 annual income. The circuit court concluded that Frank's refusal to pay was willful and with the intent to avoid payment. Upon establishing the first two elements of contempt, the circuit court imposed its sanction and clearly indicated to Frank what was needed to purge the contempt order: payment of \$12,935.91 in arrearages and interest.

¶12 We are satisfied upon review of the record that the court's decision to find Frank in contempt for failure to pay child support is not erroneous and is adequately supported by the evidence. The evidence supporting the finding includes a case account statement documenting Frank's child support payments from March 3, 2000 to August 1, 2002, Frank's financial information filed on August 10, 2002, indicating he had sufficient assets to cover child support payments, a loan application where Frank claimed to earn \$6000 per month, a struggling repair business with the exact same address as the new successful business Frank shares with his brother, and that Frank regularly writes himself checks from this business.

¶13 We conclude that the circuit court's findings that Frank was able to pay child support and his refusal to pay was willful are not clearly erroneous. In addition, the court provided Frank with delineated purge conditions. Consequently, the court's decision to find Frank in contempt was a proper exercise of discretion.

By the Court. —Order affirmed.

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

