

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 29, 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. 03-0654
STATE OF WISCONSIN**

Cir. Ct. No. 00FA000748

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

ALEC T. ELLSWORTH,

PETITIONER-APPELLANT,

V.

LAURIE R. ELLSWORTH,

RESPONDENT-RESPONDENT.

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

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Alec T. Ellsworth appeals from an order finding him in contempt and imposing a sanction of 180 days in jail in the absence of purging his contempt by the payment of \$442,010 to his former wife, Laurie R.

Ellsworth. He argues that he did not violate a clear mandate of the parties' settlement agreement, that because his contempt was completed the sanction imposed was punitive and imposed without adequate due process, and that the purge condition was an erroneous exercise of discretion because he does not have the ability to pay the required sum. We reject Alec's claims and affirm the order.

¶2 The parties were divorced in 2001. The marital settlement agreement incorporated in the judgment of divorce required the payment of joint debts by the sale of Time Warner Telecommunications stock to be distributed to Alec in 2001 and 2002. The agreement provided that remaining shares would be split equally between the parties and "the parties will consult and agree to the timing for selling shares at an agreeable price in 2001 and 2002."

¶3 Alec received the 2001 Time Warner stock distribution on May 10, 2001. Laurie received her shares from Alec on September 25, 2001. By then, and in part due to the unanticipated and shocking events of September 11, 2001, the value of the stock was significantly less. On Laurie's motion for a finding of contempt and de novo review by the circuit court, Alec was found in contempt for not timely disclosing to Laurie that he had received the 2001 stock distribution. The court found that Alec used the stock as collateral on a margin account. It also found that his failure to timely notify Laurie prevented her from protecting her interest in the stock at a time when the value of the stock was sufficient to pay the joint debts. The court ordered Alec to serve 180 days in jail as a sanction. To purge his contempt Alec was ordered to pay Laurie \$442,010, representing the difference in the value of the stock fourteen days after receipt by Alec and the value when distributed to Laurie. In anticipation that certain real estate would sell, Alec was given nine months, until June 11, 2003, to purge his contempt.

¶4 We review the circuit court’s use of contempt powers to determine whether the court properly exercised its discretion. *Benn v. Benn*, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999). We examine the record to determine if the court applied the proper legal standard to the facts of record and used a demonstrated rational process to reach a result that a reasonable judge could reach. *Id.* The court’s findings of fact are not set aside unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2001-02).¹ To the extent the determination of contempt involves an interpretation of the court’s order or the parties’ marital property settlement agreement, a question of law is presented which we review de novo. *City of Wis. Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995).

¶5 We first address Alec’s claim that the circuit court erred in finding him in contempt because he did not violate any unequivocal or clearly articulated command set forth in a court order. A party cannot willfully violate a provision in a judgment subject to misunderstanding. *See Balaam v. Balaam*, 52 Wis. 2d 20, 30, 187 N.W.2d 867 (1971) (failure to pay not willful when based on a misunderstanding). The court found that Alec had a “clear fiduciary responsibility” to notify Laurie that the stock had been received. While it is true that the settlement agreement did not specifically impose the duty, every contract has an implied covenant of good faith conduct intended as a guarantee against “arbitrary or unreasonable conduct.” *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 796, 541 N.W.2d 203 (Ct. App. 1995) (citation omitted). The settlement agreement required a number of things to be done once the stock was

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

distributed; it was to be a triggering event for the parties to agree on a sale of stock so that debts could be paid. There is no room for reasonable argument that this provision does not require notice. Without notification, the remainder of the parties' obligations under the settlement agreement would forever be in limbo and performance left to Alec's discretion. The settlement agreement incorporated into the judgment of divorce was sufficiently definite to permit the finding of contempt for failure to timely give notification.

¶6 Alec contends that because his contemptuous conduct ceased when Laurie actually received notice, the circuit court was without authority to impose a remedial sanction which can be imposed only to terminate a continuing contempt of court. *See* WIS. STAT. § 785.01(3). He believes that the sanction is punitive and is void because imposed without affording him the due process required by WIS. STAT. § 785.03(1)(b). *See Diane K. J. v. James L. J.*, 196 Wis. 2d 964, 970, 539 N.W.2d 703 (Ct. App. 1995).

¶7 This court has recognized the subtle distinction between remedial (civil) and punitive (criminal) contempt. *Id.* at 968. However, we are not persuaded by Alec's assertion that his contempt is complete merely because he later in fact gave Laurie notice that the stock had been received. Alec can never fully comply with the requirement that he *timely* notify Laurie that the stock was distributed. That moment has passed and can never be recaptured. Thus, the contempt is forever continuing and the failure to give timely notice is a continuing disobedience of the judgment. Further, the settlement agreement required ongoing conduct by the parties by interrelated obligations. Continuing compliance with its provisions is required until all provisions of the settlement agreement have been fulfilled. The failed notice frustrated the completion of the settlement agreement. *See Griffin v. Reeve*, 141 Wis. 2d 699, 708, 416 N.W.2d 612 (1987) (force of

order does not expire until compliance). To hold otherwise in this case would strip the circuit court of the power to provide a remedy for Alec's contemptuous conduct. "A dominant purpose of the contempt proceeding is to aid the private litigant." *Id.*

¶8 The remedial sanction is appropriate. The circuit court exercised its discretion in imposing a purge condition outside of compliance with the order which led to the contempt. *See Larsen v. Larsen*, 165 Wis. 2d 679, 685, 478 N.W.2d 18 (1992). The court noted that when the stock was distributed, the value was sufficient to permit the parties to meet their joint obligations. Alec's conduct with respect to the stock prevented that from happening. The payment of the \$442,010 serves the remedial aims and is reasonably related to the nature of the contempt. *See id.*

¶9 Alec argues that the purge condition was unreasonable because he has no ability to pay the \$442,010, and the "keys to the jailhouse door" are not within his reach. In addition to being reasonably related to the cause or nature of contempt, purge conditions must be "feasible" and within the power of the person. *State ex rel. V.J.H. v. C.A.B.*, 163 Wis. 2d 833, 845, 472 N.W.2d 839 (Ct. App. 1991); *State ex rel. N.A. v. G.S.*, 156 Wis. 2d 338, 342, 456 N.W.2d 867 (Ct. App. 1990). "Whether an act is within the contemnor's power is a finding of fact that will not be disturbed unless it is clearly erroneous." *N.A.*, 156 Wis. 2d at 343.

¶10 The circuit court found that after the divorce and despite continuing unemployment and steady decline of the stock market, Alec continued to spend money in a fashion commensurate with his pre-divorce income. Significantly, the court found payments of almost \$189,000 in a four-month period for items other than necessities. The record reflects that Alec lost significant sums in the stock

market downturn and after just a few months of employment was laid off from his \$40,000 a year job. However, the record also demonstrates that Alec owns real estate with a potential for development. Alec testified at the de novo hearing that the property was a significant asset from which “things can be recouped out of developing the land.” At the September 11, 2002 hearing,² Alec’s potential sale of the property to a development group was reported. Alec’s counsel estimated that Alec’s net proceeds would be approximately \$500,000 if the development contract were executed. Alec asked for a reasonable period of time with a reasonable interest rate so he could develop the property and use the proceeds to pay Laurie. Additionally, Alec had the burden of establishing that the purge condition was not feasible. *Benn*, 230 Wis. 2d at 312; *V.J.H.*, 163 Wis. 2d at 845-46. While Alec claimed that he had liquidated available personal property in order to meet family support obligations, he offered no accounting to the court of the items sold and monies received. The court’s implicit finding that Alec has the ability to satisfy the purge condition is not clearly erroneous. Giving Alec nine months to make the payment was also a proper exercise of discretion in setting the purge condition.

By the Court.—Order affirmed.

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

² The circuit court earlier found Alec in contempt with respect to timely notification but reserved for later determination the appropriate sanction. At the September 11, 2002 hearing, the circuit court ruled on Alec’s motion for reconsideration and determined the sanction and purge condition.

