COURT OF APPEALS
DECISION
DATED AND RELEASED

September 14, 1995

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. 94-1327

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE MARRIAGE OF:

MYRA LEVINE (HEILPRIN),

Petitioner-Respondent,

v.

RICHARD HEILPRIN,

Respondent-Appellant.

APPEAL from an order of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Eich, C.J., Dykman and Sundby, JJ.

PER CURIAM. Richard Heilprin appeals from a postjudgment order in this divorce action. The issues relate to maintenance, arrearages, and contempt. We reverse the contempt portion of the order, but otherwise affirm.

In the order appealed from, the trial court terminated Heilprin's obligation to pay maintenance until further order, held him in contempt and sentenced him to six months in jail for his failure to pay maintenance arrearages of $61,578.40. The contempt was to be purgeable by payment of $1,000 per month. We stayed the contempt portion of the trial court's order pending appeal.

Contempt proceedings may be either punitive or remedial. *See* ch. 785, STATS. This proceeding was commenced on the motion of Myra Levine, Heilprin's former spouse. Heilprin argues that the proceeding was "unquestionably" punitive because she sought his incarceration. Because the proceeding was punitive, Heilprin argues, it was not properly commenced by motion and he was not afforded the process due in such proceedings. We reject the argument. Imprisonment is available as a sanction in a remedial contempt action. Section 785.04(1)(b), STATS.

Heilprin argues that the trial court erred in making its maintenance decision because it did not consider Levine's need for maintenance and did not allow Heilprin discovery on this issue, and because Levine was not available for cross-examination at the hearing. However, Heilprin prevailed on future payment of maintenance. Any error was harmless.

Heilprin argues that the trial court erred by terminating his maintenance obligation as of March 1, 1994, rather than as of January 1992, when he filed a motion to terminate maintenance. That motion was never ruled upon. The trial court found that Heilprin had taken no action to pursue the earlier motion, and the court was advised that the parties had mutually agreed not to pursue the issue. Heilprin concedes that the parties agreed to adjourn the hearing that had been scheduled. He argues, however, that it would be inequitable not to terminate maintenance as of the earlier date, because the purpose of the adjournment was to allow Heilprin's financial and personal situation to stabilize, thus sparing the court the need to relitigate those issues within a short time. We reject the argument. It is not inequitable to hold Heilprin to his decision not to pursue the earlier motion.

Heilprin argues that the trial court erred by not expunging his maintenance arrearage. Maintenance arrearages cannot be revised prior to the

date the person receiving maintenance has been notified of the petition to alter maintenance. Section 767.32(1m), STATS. Heilprin argues that it is contrary to the legislature's intent to include maintenance in this statute, since the intent was to "curb the outflow of public assistance for child support." He argues that it interferes with the trial court's discretion in setting maintenance. The legislature, however, unambiguously included maintenance in the statute, and therefore we reject this argument.

Heilprin argues that the statute prohibiting revision of arrearages, § 767.32(1m), STATS., should be applied only to divorce judgments entered after its effective date, August 1, 1987. This divorce judgment was entered in 1985. However, the supreme court has already decided that the statute applies to "arrearages which accrue, or have accrued, pursuant to *an order or* judgment for support entered [after] August 1, 1987." ***Schulz v. Ystad***, 155 Wis.2d 574, 582, 456 N.W.2d 312, 314 (1990) (emphasis added). Heilprin's arrearages accrued pursuant to a 1990 maintenance order. His argument is meritless.

Heilprin argues that he is unable to meet the purge provision of the contempt order. He argues that the trial court's order is inconsistent in that the court finds that he is no longer able to pay maintenance, yet it orders him to pay $1,000 per month to purge the contempt. We agree. A purge condition must be one which the contemnor is capable of fulfilling. ***State ex rel. Larsen v. Larsen***, 165 Wis.2d 679, 685, 478 N.W.2d 18, 20-21 (1992). Levine argues that Heilprin can purge the contempt because "[a]ll he has to do is get a job!" However, this argument is not supported by the court's findings. First, the trial court has not made any finding that Heilprin is employable. To the extent the court addressed this issue, it rejected such a finding: "His ability to earn significant income is speculative based upon his age and qualifications." Second, it is not at all clear that, should Heilprin become employed, any of his earnings would be available to purge the contempt. The parties do not dispute that he owes many thousands of dollars in federal taxes. Therefore, we conclude that the contempt order must be reversed because it sets a purge condition which, on the facts before the court, Heilprin is not able to meet.

Finally, Heilprin argues in one paragraph that the trial court erred in giving Levine a lien on his pension plan because the plan is "an I.R.S., ERISA qualified, non-assignable plan," which presents "a federal question" under ***Patterson v. Shumate***, 504 U.S. 753 (1992). The relevance of this case is not

immediately apparent. We do not further address this issue because it has been inadequately briefed. ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

In summary, we reverse the contempt portion of the order appealed from because it sets a purge condition that the contemnor is, on the evidence adduced, unable to meet. We affirm the order in all other respects.

Both parties have prevailed in this appeal. No costs to either party.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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