

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 30, 2012

Diane M. Fremgen
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. 2012AP885-FT

Cir. Ct. No. 2001FA119

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE FINDING OF CONTEMPT IN RE THE MARRIAGE OF JAMES A. BAUER
AND CYNTHIA A. BAUER:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

JAMES A. BAUER,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waupaca County:
RAYMOND S. HUBER, Judge. *Affirmed.*

¶1 KLOPPENBURG, J.¹ James A. Bauer appeals a remedial contempt order entered based upon his failure to pay child support as required by a prior stipulated child support order. Bauer asserts that the evidence presented at the contempt hearing was insufficient to support the circuit court's finding of contempt, and therefore, the circuit court abused its discretion. For the reasons set forth in this opinion, this court affirms.

BACKGROUND

¶2 Bauer and his former spouse divorced in 2002. Under the divorce decree's terms, Bauer was obligated to pay \$430.00 per month in child support. In 2008, the amount was reduced to \$309.83 per month.

¶3 In 2010, the court placed Bauer on probation with conditional jail time, following an alcohol-related felony offense. At that time, NEW Curative, an organization that provides work for older adults, placed Bauer in a position at the Wisconsin Veterans' Home, where he worked 20 hours per week as a cook. Because this position did not provide enough hours to qualify Bauer for Huber privileges, the court amended its sentence to permit Bauer to serve his jail time on weekends, thereby enabling Bauer to work during the week. This arrangement continued from August 27, 2010, to April 12, 2011.² During most of this time period, Bauer paid child support.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) and (3) (2009-10). Pursuant to this court's order of May 11, 2012, the parties have submitted memo briefs. *See* WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² In March 2011, Bauer also worked part-time at Bob and Ed's Lawn Care for about three weeks. He earned approximately \$7.25 per hour and received payments in cash.

¶4 On or around April 12, 2011, Bauer was terminated from his job at the Veterans' Home after failing a preliminary breath test. As a result, Bauer lost his work privileges and ability to serve jail time on weekends. He applied for jobs while in jail, but was unable to secure a job. Bauer remained jailed from April 12, 2011, to October 23, 2011. He did not pay child support during that time.

¶5 Upon the State's affidavit of contempt filed June 6, 2011, the circuit court entered an order to show cause for Bauer's failure to comply with the child support order. The court eventually set the contempt hearing for October 26, 2011.

¶6 At the time of the contempt hearing, Bauer owed approximately \$6,000 in child support arrearages. Approximately one-half of the arrearages accrued between April 12, 2011, and October 23, 2011, the period in which Bauer was serving full jail time. Bauer had last made a child support payment on February 10, 2011.

¶7 The evidence at the contempt hearing consisted of Bauer's testimony and a short statement offered by Bauer's former spouse. At the close of the contempt hearing, the circuit court made the following findings:

This is a contempt action for Mr. Bauer failing to pay support. There is no question, as [Bauer's attorney] acknowledged, he has an alcohol problem. Quite frankly, I did get a whiff of alcohol on his breath today, which he – which he ought to be careful about. With that being said, the Court certainly knows about his alcohol problem because I believe the time he is serving on probation was time I gave him for – occurring back in September of '09 and December of '09.

He was sentenced in, I believe it was maybe June of 2010 – yeah, June 28th, 2010, on probation; given appropriate jail time as a condition and we tried to structure the jail time so he would be able to work. He was – he had

limited work at the time so we didn't – we structured it to allow him to serve the time so – because he could not qualify, as he indicated for huber [sic], we tried to accommodate him on those criminal cases. Apparently he found a job with the – someone who is supplying services for meal preparation at the Veteran's [sic] home.

And unfortunately, he apparently came to work with alcohol on his breath and that led to a termination. I understand that people with alcohol problems are going to fail at – recovery is a difficult process.

On the other hand, children continue to need support continuously, and when you have a job and you lose it because of your actions, I'm satisfied that that is contemptuous behavior so I am going to find him in contempt, sentence him to the county jail for a period of six months, and I will stay it and allow him to purge his contempt by, over the next three years, maintain – remain current in his current child support order. Or, if he's not working, that he provide at least 20 job contacts a month.

¶8 Based on these findings, the circuit court entered a remedial contempt order dated November 1, 2011, in which it found that Bauer “willfully and intentionally failed to comply with the orders of the court.” Bauer now appeals.

DISCUSSION

¶9 Bauer contends that the circuit court erroneously exercised its discretion by finding him in contempt. Specifically, Bauer argues that the evidence at the contempt hearing did not establish that Bauer's failure to work and pay support was willful and with intent to avoid payment.

¶10 The appellate court reviews the circuit court's use of its contempt power to determine whether the court properly exercised its discretion. *Haeuser v. Haeuser*, 200 Wis. 2d 750, 767, 548 N.W.2d 535 (Ct. App. 1996), *abrogated on other grounds by Kruckenberg v. Harvey*, 2005 WI 43, ¶62, 279 Wis. 2d 520, 694

N.W.2d 879. 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). A circuit court's finding that a person is in contempt of court will not be reversed unless the finding is clearly erroneous. *State v. Rose*, 171 Wis. 2d 617, 623, 492 N.W.2d 350 (Ct. App. 1992).

¶11 A person may be found in contempt if he or she has the ability, but refuses, to comply with a court order. *Benn v. Benn*, 230 Wis. 2d 301, 309, 602 N.W.2d 65 (Ct. App. 1999). In remedial contempt actions, the burden of proof is on the person against whom the contempt is charged to show that his or her conduct was not contemptuous. *Balaam v. Balaam*, 52 Wis. 2d 20, 30, 187 N.W.2d 867 (1971). The mere inability to pay cannot support a finding of contempt. *Van Offeren v. Van Offeren*, 173 Wis. 2d 482, 498, 496 N.W.2d 660 (Ct. App. 1992). Rather, the circuit court must find that “the person is able to pay and the refusal to pay is willful and with intent to avoid payment.” *Haeuser*, 200 Wis. 2d at 767.

¶12 In *Van Offeren*, Van Offeren accrued \$3,660 in child support arrearages after voluntarily leaving a well-paying job to pursue a new business venture. 173 Wis. 2d at 497-98. His new business did not generate the same level of income as his previous job. *Id.* at 490. Because he was unable to secure comparable income, he did not meet his support obligations. *Id.* at 499. This court affirmed the circuit court's finding of contempt, concluding the arrearage was the result of Van Offeren's willful disobedience and not of an inability to pay. *Id.* Specifically, the court reasoned that Van Offeren “was thus directly responsible for his inability to meet his obligations and for allowing the arrearages to accrue. If the court concludes from past performance that a paying parent

cannot be relied upon to keep up on support obligations until some legal force is exerted, use of contempt is perfectly justified.” *Id.*

¶13 In *Krieman v. Goldberg*, the court distinguished the facts from those in *Van Offeren* and reversed the circuit court’s finding of contempt, concluding that Goldberg’s failure to pay support was not intentional. See *Krieman v. Goldberg*, 214 Wis. 2d 163, 172, 571 N.W.2d 425 (Ct. App. 1997). In *Krieman*, Goldberg’s income was suddenly cut off when the government entity for which he worked was closed. *Id.* at 171. Distinguishing from *Van Offeren*, the appellate court noted that the circumstances of Goldberg’s loss of income were completely out of his control. *Krieman*, 214 Wis. 2d at 172.

¶14 Bauer argues that his circumstances fall somewhere in between those in *Van Offeren* and *Krieman*. However, unlike the payor’s position in *Krieman*, Bauer’s loss of income was not out of his control. See *Krieman*, 214 Wis. 2d at 172. This court determines that Bauer’s circumstances were more akin to those in *Van Offeren*, in which the payor’s own conduct caused his inability to meet his obligations, thereby demonstrating willful disobedience of the support order. Bauer had the ability to pay while working at the Wisconsin Veterans’ Home. Yet, Bauer chose to attend work while under the influence of alcohol so as to jeopardize his ability to earn income and pay support. He was directly responsible for the loss of his work-release privileges in April 2011, and the resulting inability to meet his support obligations.

¶15 Bauer argues that the evidence at the contempt hearing was insufficient to establish that his failure to pay was willful and with intent to avoid payment, and thus the court abused its discretion by finding him in contempt. The record reflects otherwise. Bauer’s misconduct resulted in unemployment and loss

of Huber privileges while serving jail time. Approximately \$3,000 in arrearages accrued during the time period in which Bauer was jailed full-time. Moreover, the other \$3,000 in arrearages accrued before Bauer was in jail. Bauer had a history of periods in which he did not pay support. In fact, Bauer did not make a payment after February 10, 2011, despite working at the Veterans' Home through April 12, 2011. Bauer was directly responsible for his inability to meet his child support obligation and for allowing the arrearages to accrue. These facts – his decision to attend work while under the influence, his history of nonpayment, and the missed payments between February and April 2011 – demonstrate disregard for his support obligations, thereby supporting a reasonable inference that Bauer's conduct was willful and with intent to avoid payment.

¶16 The circuit court outlined its familiarity with Bauer's history, his work at the Veterans' Home, and his termination due to alcohol use. Applying those facts to the standard for contempt, the court explicitly noted that “when you have a job and you lose it because of your actions, I'm satisfied that that is contemptuous behavior” As the *Van Offeren* court explained, contempt is “perfectly justified” when a payor's past performance demonstrates that he or she cannot be relied upon to keep up on support obligations until some legal force is exerted. 173 Wis. 2d at 499. The circuit court's ruling adhered to this notion. The circuit court is far better positioned than the appellate court to determine whether or not the act is contemptuous. *Schroeder v. Schroeder*, 100 Wis. 2d 625, 640, 302 N.W.2d 475 (1981). This court concludes that the circuit court properly exercised its discretion by finding Bauer in contempt.

By the Court.—Order affirmed.

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

