COURT OF APPEALS
DECISION
DATED AND RELEASED

APRIL 24, 1996

NOTICE

No. 95-2354

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

In re the Marriage of:

SHARON MOWERY,

Petitioner-Respondent,

v.

JAMES E. MOWERY,

Respondent-Appellant.

APPEAL from an order of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed*.

ANDERSON, P.J. James E. Mowery appeals from an order of the trial court finding him in contempt of court for failure to pay child support and modifying child support from a fixed amount to a percentage or a fixed amount, whichever was greater. We conclude that the trial court did not erroneously exercise its discretion in holding James in contempt or for requiring him to pay unpaid child support. Accordingly, we affirm the trial court.

We take the facts of this case from the trial court's decision as follows. James and Sharon Mowery were divorced in July 1982. At that time, they had three minor children together: Cory, Tony and Jaime. The judgment of divorce provided that James was to pay child support of $50 per week for each of the minor children who were placed with Sharon. The judgment also provided that Sharon was to claim Tony as a tax exemption and James was to claim Cory and Jaime as exemptions as long as he was ninety percent current in his child support obligation. In 1982, at the time of the divorce, Sharon was earning approximately $15,600 net per year, and James was self-employed, earning approximately $30,000 gross per year.

In May 1983, James was found in contempt of court for failing to pay child support. The court ordered James to continue to pay child support of $150 per week, plus $10 per week on the arrearage.

James subsequently moved to Pennsylvania. In January 1985, an order from the Court of Common Pleas of Pennsylvania set support for two of the children, Cory and Jaime, in the amount of $100 per week. The order was filed in Racine County. In December of that same year, an order was issued from the Pennsylvania court changing support to $100 per month, plus $15 per month for arrearages. This order was not filed in Racine County.

According to the trial court, the Mowerys' court file also contained an "agreed order" dated December 1986 by Todd County District Court in Kentucky, where James resided at that time. The order required James to pay $200 per month as child support for Cory and Jaime and established child

support arrearages at $22,075. According to the trial court, there is no record that this order was filed in Racine County, although a copy of it in the file was stamped by the district attorney's office. The Kentucky court issued an order dated October 1991 suspending all child support payments based upon Jaime residing with James. Racine County received a copy of this order. In August 1992, an order reinstated child support for Jaime because James no longer had custody of Jaime. An order of dismissal was also issued in January 1994 dismissing the matter in Todd County. These two orders are not on file in Racine County.

The judgment of divorce in Wisconsin has never been modified. Since the divorce, James and Sharon have placed the children between them or, in the case of Jaime, with a third party. In the present action, Sharon asked the court to find James in contempt for failing to pay child support and sought to modify child support from a flat rate of $50 per week per child to seventeen percent of James's gross income. At the time of the trial court's order, there was only one minor child in Sharon's placement.

The trial court held that neither the Pennsylvania nor the Kentucky order modified the Wisconsin judgment. It stated:

> The respondent was clearly entitled to pay child support as established by either Pennsylvania or Kentucky; however, such payment did not meet his duty under the Wisconsin judgment and arrearages could accrue under the Wisconsin judgment if the child support ordered by the other state was less than the level set in Wisconsin.

….

> … [T]he respondent is found in contempt of this Court for failing to pay child support as previously ordered by the Wisconsin judgment; he had the ability to make such payments and he willfully refused to make child support payments, for such acts he shall be incarcerated in the Racine County Jail for a period of six months.

James appeals.

The decision whether to modify child support payments is within the sound discretion of the trial court. ***Burger v. Burger***, 144 Wis.2d 514, 523, 424 N.W.2d 691, 695 (1988). Proper exercise of this broad discretion exists where the record reflects that the court considered the needs of the custodial parent and children and the ability of the noncustodial parent to pay. *See* ***id.*** at 524, 424 N.W.2d at 695.

James argues that the trial court erred in ordering him to pay child support arrearages.[1] He contends that Sharon should be equitably estopped from collecting any arrearages because she induced him not to pay child support: "Sharon Mowery sent not only one, but two letters waiving her right to child support arrearages." In a letter dated April 25, 1985, Sharon wrote:

> I, Sharon K. Mowery release the back support in which James E. Mowery is behind from the time of my divorce until January of 1985. I do expect to receive my $100.00 per week regularly as soon as possible. However, I will not let his financial problem affect my support payments for the remaining years that my children

[1] A custodial parent cannot only seek to recover arrearages in the family court, but also has an independent action and can assign that action to the child. *See* ***Kroeger v. Kroeger***, 120 Wis.2d 48, 52, 353 N.W.2d 60, 62 (Ct. App. 1984).

> are minors. Whatever is behind in the future I do expect to receive in full. As of right now I do expect some money every week and in the future I will not except [sic] any excuses.

In return I want the right to claim both daughters, Cory and Jaime on my taxes until they are 18 years of age. I also would like to see some kind of proof of an insurance policy on Jim (Life Insurance) with my children as beneficiary.

In a second letter dated September 26, 1991, Sharon wrote:

> I, Sharon Mowery give custody of Jaime K. Mowery to James E. Mowery as of 9-26-91.
>
> I also drop all arrearages obtained by James E. Mowery.
>
> Also the order of 200.00 per month for support is canceled per court date.
>
> I also can claim Jaime K. Mowery on my taxes until she is 18 years of age.

James claims that he relied on these letters to his detriment.

Regarding the April 1985 letter, we conclude that James was not induced to stop paying child support. In ***Ondrasek v. Tenneson***, 158 Wis.2d 690, 694, 462 N.W.2d 915, 917 (Ct. App. 1990), the court stated:

> To invoke estoppel, a party must show that both parties entered into the stipulation freely and knowingly, that the overall settlement is fair and equitable and not illegal or against public policy, and that one party subsequently seeks to be released from its terms on the grounds that the court could not have entered the order it did without the parties' agreement.

James did not follow the terms of the letter; therefore, he cannot claim that he relied on it to his detriment. There is no evidence that he bought life insurance,

naming the children as his beneficiaries, or that James continued to pay the future child support that Sharon asked.

We further conclude that any agreement to waive the significant amount of arrearages or future support in this case is void as against public policy. The paramount goal of the child support statute is to promote the best interests of the children of divorced parents. ***Id.*** at 695, 462 N.W.2d at 917. "[B]ecause of the public interest in the welfare of children, the child's best interests transcend an agreement or stipulation of the parties." ***Id.*** There was no justification for James and Sharon to cancel significant amounts of arrearages.[2] To do so was totally against the best interests of the children and is against the public policy of the child support statute.

James also claims that the trial court erred in ordering him to pay child support arrearages at a rate that was beyond his ability to pay. We reject James's argument and conclude, as the supreme court did in ***Burger***, that considering James's gross income, his inability to pay was not demonstrated on the record. Although James's income may have fluctuated over the years, he has been consistently behind on child support since shortly after the divorce. At the hearing, it was revealed that in 1992 James's gross profit on his income tax return was $76,000. In 1991 and 1990, he claimed gross profits in excess of $90,000.

[2] Sharon claims that at the time of the second letter, James owed $36,990 in child support arrearages.

James also argues that the trial court erred in finding him in contempt of court. He asserts that he did not have the ability to pay. "[A] person can be held in contempt of court for failure to pay money where the refusal is willful and contemptuous and not a result of his [or her] inability to pay." ***Burger***, 144 Wis.2d at 528, 424 N.W.2d at 697 (quoted source omitted). We review the trial court's use of its contempt power for an erroneous exercise of discretion. *See* ***State ex rel. N.A. v. G.S.***, 156 Wis.2d 338, 341, 456 N.W.2d 867, 868 (Ct. App. 1990). In a contempt proceeding, the burden of proof is on the person against whom the contempt is charged to show that his or her conduct is not contemptuous. ***Kaminsky v. Milwaukee Acceptance Corp.***, 39 Wis.2d 741, 747, 159 N.W.2d 643, 647 (1968). James's unwillingness to meet his legal as well as moral obligation to care for his children is evidence of willful disobedience justifying contempt. "If the circuit 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." ***Burger***, 144 Wis.2d at 528, 424 N.W.2d at 697 (quoted source omitted). The record reflects that James had the ability to make child support payments and he refused. We therefore conclude that the trial court did not erroneously exercise its discretion.

Last, James claims that the trial court erred in not considering the letter signed by Sharon on September 26, 1991, and whether it was signed under duress. We need not reach this issue because we conclude that Sharon's two letters to James were violative of public policy.

By the Court.—Order affirmed.

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