

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 2009

David R. Schanker
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 Nos. 2007AP1444
2007AP2427
2007AP2945**

Cir. Ct. No. 2004FA361

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

NANCY H. ROUSH,

PETITIONER-RESPONDENT,

V.

WILLIAM S. ROUSH, JR.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Waukesha County:
DONALD J. HASSIN JR., Judge. *Affirmed in part; reversed in part.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. In these consolidated appeals, William S. Roush, Jr., appeals from three orders entered in post-divorce proceedings. In a June 14, 2007 circuit court order (appeal no. 2007AP1444), the circuit court denied William's motion to modify maintenance and child support and his request to withdraw funds from the security fund to pay his tax obligations. We affirm these rulings. However, we reverse the circuit court's contempt finding because, as we have previously ruled, the circuit court could not find William in contempt if Nancy H. Roush obtained payment of child support and maintenance from the security fund. Because the circuit court did not have contempt authority under these circumstances, we also reverse the November 14, 2007 circuit court order (appeal no. 2007AP2945) because it sanctioned William and imposed jail time for failing to satisfy the purge conditions set out in the June 14 contempt order. Finally, we affirm the September 4, 2007 circuit court order (appeal no. 2007AP2427) requiring William to pay attorney's fees to Nancy because William did not appear at the hearing on Nancy's fee request, and he therefore waived his objection to the attorney's fees awarded by the circuit court.

Contempt Rulings

¶2 William protests the contempt findings in the June 14 order and the sanctions imposed in the November 14 order. The June 14 contempt finding arose from William's failure to pay child support and maintenance directly to Nancy from February to May, 2007.¹ During that period, Nancy obtained support payments from the security fund established earlier in the divorce. A balance of

¹ Child support terminated on May 31, 2007 after the last of the parties' children reached eighteen years of age.

approximately \$24,000 remained in the fund as of the June 14 order.² The November 14 order found that William did not meet the purge conditions set out in the June 14 order.

¶3 William argues that the purge conditions were impossible to meet. We need not address this argument because we conclude that the contempt finding in the June 14 order was error. In *Roush v. Roush*, No. 2006AP2128, unpublished slip op. at ¶¶24-25 (Wis. Ct. App. Mar. 26, 2008), we held that the circuit court could not use its WIS. STAT. § 767.30(3)(b) (2003-04)³ contempt powers upon William when he was current in his support obligations, even though the support obligations were paid from a security fund rather than directly to Nancy as required by the circuit court.⁴ Nancy concedes that the circumstances of the June 14 and November 14 orders are the same as the circumstances in *Roush* where we concluded that the circuit court did not have contempt power. Therefore, we reverse that portion of the June 14 order addressing William's contempt and setting purge conditions. We also reverse the November 14 order which imposed sanctions under an erroneous exercise of the circuit court's contempt power.

Modification of William's Support Obligation

² See *Roush v. Roush*, No. 2006AP2128, unpublished slip op. (Wis. Ct. App. Mar. 26, 2008), for a discussion of the security fund's creation.

³ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

⁴ We decline Nancy's invitation to reconsider our decision in *Roush v. Roush*, No. 2006AP2128, unpublished slip op. (Wis. Ct. App. Mar. 26, 2008).

¶4 William argues that the circuit court misused its discretion in the June 14 order when it declined to modify his support obligation. The circuit court may modify a support obligation only upon a positive showing of a substantial change in the financial circumstances of the parties. *Gerrits v. Gerrits*, 167 Wis. 2d. 429, 437, 482 N.W.2d 134 (Ct. App. 1992). We review a refusal to modify support for an erroneous exercise of discretion. See *Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶17, 269 Wis. 2d 598, 676 N.W.2d 452. We will affirm a discretionary decision when it results from the application of the correct legal standards to the facts of record. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. The court must compare the facts when the support order was entered with the present facts. *Licary v. Licary*, 168 Wis. 2d 686, 692, 484 N.W.2d 371 (Ct. App. 1992).

¶5 At the May 2007 hearings on William’s motion to reduce his support obligation, William argued that he could not pay \$4000 per month in support. He presented tax returns for 2004 and 2005, but no tax return for 2006 despite the circuit court’s request for that return. He also presented bank records from one account.

¶6 The circuit court found that although William claimed a change in his financial circumstances, the record was “wholly silent” about his 2006 earnings. The court observed that its inquiry had to focus on “exactly what you do earn or you’re capable of earning and how that has changed since the imputation of [\$145,000 in the judgment of divorce]...” The court noted that William’s 2005 income was \$177,000, which was in excess of the \$145,000 annual income attributed to him at the time of the divorce. William did not present a financial statement, billing or accounts receivable records for his law practice. The court

deemed the bank account records insufficient to establish William's income for purposes of the motion; the court could only infer from the records that banking transactions had occurred. The court observed that William was able to locate \$6900 to avoid further incarceration for failing to make support payments.

¶7 The court also faulted William's efforts to expand his law practice and generate more income. William offered no proof to substantiate his claim that he sought law-related employment in Milwaukee, and he declined to relocate to pursue other legal opportunities. The court found:

[William has made a] wholly enfeebled effort to practice law other than under the exact circumstances that you require: It must be an environmental case, it must be in Milwaukee, I'm not going to move, I'm not going to find another job someplace out of here that pays me, arguably, that amount of money even though I, apparently, am a marketable attorney....

The court found that William made no effort to do anything to generate more income and that he spent an inordinate amount of time litigating his post-divorce matters at the expense of generating income from the practice of law.

¶8 The circuit court summed up the record as follows:

And so I've got a situation where I don't know what you make other than I don't make as much as Judge Davis says I should make, an unwillingness to expand your practice, an unwillingness to relocate even minimally geographically, a record totally silent respecting any effort to hire or be employed other than your anecdotal testimony from the record about people you've talked to, all of whom remain nameless.

There is no record today, Mr. Roush, for this Court to disturb the award, none whatsoever.... At this point in time, Mr. Roush, there's been no showing, even a prima facie showing, that there's been a change in circumstances. You continue to not aggressively pursue your profession,

and continue to come back to court and ask this Court, in essence, to forgive your enfeebled effort.

....

You should have come armed with the information that you wanted to provide the Court, and I've incessantly asked you for just that.

¶9 The circuit court's findings of fact are not clearly erroneous. *See Rosplock v. Rosplock*, 217 Wis. 2d 22, 33, 577 N.W.2d 32 (Ct. App. 1998). The court applied the proper legal standard to William's inadequate proof at the May hearings and determined that there had been no substantial change in William's financial circumstances. *See Gerrits*, 167 Wis. 2d at 437. The circuit court properly exercised its discretion when it denied William's motion to modify his support obligation.

¶10 On appeal, William argues that he provided additional proof of his financial circumstances at the November 6, 2007 hearing held to address whether to incarcerate him for failing to meet the purge conditions set out in the June 14 order. However, William did not renew his motion to reduce his support obligation at the November 6 hearing. William's appellant's brief attempts to compile all of his financial information from the May 23, 2007 and November 6, 2007 hearings. However, we do not consider such proof *de novo*.

Contribution to Nancy's Attorney's Fees

¶11 William appeals the circuit court's September 4 order that he contribute \$5000 toward Nancy's attorney's fees for appeal No. 2007AP1444. William did not appear at the hearing on Nancy's motion due to illness. He had an attorney appear for him solely to explain his absence to the court and not to represent him on Nancy's motion. The court, noting William's history of failure

to appear and an outstanding warrant, determined that it would proceed with the hearing in William's absence. The court determined that Nancy required a \$5000 contribution toward her attorney's fees, William had the ability to pay, and William was unlikely to succeed on appeal.

¶12 Circuit courts are vested with inherent discretionary power to control their dockets "with economy of time and effort." *Rupert v. Home Mut. Ins. Co.*, 138 Wis. 2d 1, 7, 405 N.W.2d 661 (Ct. App. 1987). We see no misuse of discretion in holding the hearing in William's absence. We do not address William's objections to the order requiring him to pay attorney's fees because William waived his right to object by failing to appear for the hearing. William cannot raise his objections to the order requiring him to pay attorney's fees for the first time on appeal. See *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

Request to Withdraw Funds from Security Fund

¶13 Finally, William argues that the circuit court erred in the June 14 order when it denied his request to withdraw funds from the security fund to meet his 2005 tax obligations. The circuit court found that William did not offer sufficient proof of his 2005 tax obligations. The court characterized William's request as follows:

So, you're asking that you take money that was set aside because you couldn't pay the other—you didn't pay the other responsibilities you had and should be used to pay your taxes where you had—in 2005 gross income was in excess of \$177,000. That's the state of the record.

¶14 William conceded that the court had accurately described his request. The court declined to invade the security fund, which was already

depleted because William was not paying support directly to Nancy as contemplated in previous orders of the court.

¶15 William complains that Judge Hassin did not follow an April 24, 2006 order of Judge Davis that suggested William could seek permission to withdraw funds from the security fund to pay his taxes. We disagree. Judge Hassin entertained William's request to withdraw security account funds, and we review Judge Hassin's discretionary decision to deny that request. Judge Hassin viewed William's request as consistent with William's prior failures to meet his obligations under court orders. This was not a misuse of discretion.

¶16 We reverse that portion of the June 14 order finding William in contempt and setting purge conditions, and we reverse the November 14 order. We affirm the June 14 order's refusal to modify maintenance and child support or withdraw funds from the security fund. We affirm the September 4 order requiring William to pay attorney's fees to Nancy.

¶17 No WIS. STAT. RULE 809.25(1)(b) costs awarded to either party.⁵

⁵ The denial of costs on appeal to either party does not undermine the September 4, 2007 order requiring William to contribute to Nancy's attorney's fees for appeal No. 2007AP1444. We have affirmed that order. Because neither party prevailed entirely on appeal, neither party is awarded costs under WIS. STAT. RULE 809.25(1)(b).

By the Court.—Orders affirmed in part and reversed in part.

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

