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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

02-18-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

In re the Finding of Contempt in
re the Paternity of M.J.F.-S.:

Michelle L. Steele and State of Wisconsin,
Petitioners-Respondents,

V.

Appeal No. 2014AP001947

Circuit Court
Case No. 2006PA000163PJ

Jason G. Foster,
Respondent-Appellant.

APPEAL FROM AN ORDER
OF THE CIRCUIT COURT FOR EAU CLAIRE COUNTY
Circuit Court Case No. 2006PA000119
The Honorable Jon M. Theisen, Presiding

**PETITIONER-RESPONDENT EAU CLAIRE COUNTY CHILD SUPPORT
AGENCY'S BRIEF**

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TABLE OF CONTENTS

Table of Authorities.....	ii
Statement as to Oral Argument and Publication.....	iii
Statement of the Issue.....	iv
Statement of the Case.....	1
Statement of Facts.....	2
Discussion and Argument.....	7
Conclusion.....	19
Certification.....	21
Certification Electronic Filing.....	22

TABLE OF AUTHORITIES

Cases

Dennis v. State , 117 Wis.2d 249, 344 N.W.2d 128 (Wis. 1984)	8
O'Connor v. O'Conner , 48 Wis.2d 535, 180 N.W.2d 735, 740..	7
Schrameck v. Bohren , 145 Wis.2d 695, 704, 429 N.W.2d 501 (Ct. App 1988)	8
Zimbrich v. Labor & Indust. Review Comm'n , 235 Wis.2d 132, 138, 613 N.W.2d198, 201 2000 WI App 106 (WI Ct App 2000)	8

Statutes

Wis. Stat. §49.855	16
Wis. Stat. §49.855(1)	15
Wis. Stat. §49.855(3)	15
Wis. Stat. §49.855(4) (a)	15
Wis. Stat. §49.855(4) (b)	15
Wis. Stat. §767.78	11
Wis. Stat. §767.78(2)	7

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Appellant does not request oral argument, and believes that written briefs will resolve all issues.

The issues set forth in this appeal do not meet the statutory requirements for publication pursuant to Wisconsin Statutes §809.23(1)(a)2.

STATEMENT OF THE ISSUE

1. Did the Trial Court commit error when it denied Jason Foster's motion to dismiss based upon his argument that the affidavit to the underlying Order to Show Cause was vague?
2. Did the Trial Court commit error when it found Jason Foster in Contempt of Court?

STATEMENT OF THE CASE

This case is an appeal of the decision of the Honorable Jon M. Theisen, Circuit Court Branch IV from a hearing held before the court on July 25, 2014. The hearing on July 25, 2014, was scheduled by the court after Jason Foster filed a post-conviction motion from the hearing held before the court on September 16, 2013. In addition to the issues raised by Mr. Foster in his motion and set forth in his brief, was the issue of whether or not the court would lift the stay on the 60 day sanction imposed by the court on September 16, 2013.

STATEMENT OF FACTS

Due to the large number of motions and hearings that have been held on the issue of contempt of court and child support this statement of facts has been abbreviated to address the issues before the court.

Jason Foster, Appellant, was adjudicated the father of M.J.F.S by court order on January 11, 2007. (R.1) On March 16, 2007 Jason Foster's child support obligation was established at the rate of \$470 per month. (R.4,1) On June 15, 2009 his child support obligation was adjusted by agreement of the parties to \$574 per month. (R.28) On October 29, 2009 it was temporarily adjusted downward to \$128 per month, reflecting the fact that Jason Foster was receiving unemployment compensation. At that time Jason Foster represented to the court that he would be returning to college for up to two years to pursue his MBA. As such the order contained a provision that it would revert back to \$571 per month effective January 1, 2010, based on his earning capacity of \$4,160 per month. (R.32, 1) On April 28, 2010 at a hearing before Circuit Court Judge Benjamin Proctor, an order was entered that found Jason Foster had the earning capacity of \$4,160 per month, affirmed the

support obligation of \$571 per month but ordered Jason Foster to pay a minimum of \$200 every month. (R.38)

A the hearing before Judge Jon Theisen on December 4, 2012, the custodial parent in this case, Michelle Steele, through her attorney Stella Pagonis filed an order to show cause that among other things addresses the issue of contempt of court for the failure to pay child support. This hearing is cited by Jason Foster as a reason why he felt he only needed to pay \$200 per month in order to avoid a finding of contempt. (Appellants' brief, Page 21-22)

On December 4, 2012, the court reviewed the prior order of Judge Proctor dated April 28, 2010.

"Court: What it appears that Judge Proctor did in April, 2010 was indicate that you could pay \$200 per month as of May 1, 2010. That did not change your order. Your current order remains the \$574." (R. 283, 11:14-17)

The court found Jason Foster in contempt of court:

"Court: Okay I'll find him in contempt. As and for conditions of his purge, he will start in December of 2012, remain current on his child support order and his child support order is 574 plus \$25." (R.283, 13:12-15)

The court found the arrears of record were \$16,121.38 as of December 4, 2012. (R.283,15:12-13)

Pursuant to an order to show cause filed by the Eau Claire County Child Support Agency on August 13, 2013, a hearing was scheduled before Judge Theisen on September 16, 2013. As of that date Jason Foster's child support arrears had grown \$1,531.76 to \$17,653.14. (R.151, 4:22) The evidence which was limited to the time period after the December 4, 2012 hearing, showed that during the eight and one half months since December 2012, there were only two months where the child support obligation was paid in full, in February and May 2013. During both of those months the payments were derived from the interception of Jason Foster' income tax refund. In February payment of \$574 was made toward the current child support obligation and \$588.69 was paid towards the outstanding accounts. In May, 2013 Jason Foster paid \$50 towards his current child support obligation and the \$2,717.09 tax intercept was paid toward his arrears. The history of payments show a partial payment of \$263.45 in January, no payments were made in the months of March and April, and \$50 per month was paid in each of the months of June, July and August. (R.151, 5-6)

On September 16, 2013 Jason Foster testified that he had been employed with Farmers Insurance Company continuously since June, 2012. He worked first as a producer and then in October 2012 he signed a contract to become an agent. (R.151, 11-12) When he was questioned about the lack of his child support payments he stated:

Because I'm not making the kind of money that I did when I was a manager back in 2009." (R.151, 11:11-13)

Despite the order to show cause requiring him to provide current financial information to the child support agency, no information was provided by Mr. Foster concerning his income, expenses and assets for the year 2013. (R,151,13-14)

Subsequent to the hearing on September 16, 2013, and pursuant to an appeal filed under Court File No. 2013AP2133, which was ultimately dismissed, Jason Foster was authorized to file a motion for reconsideration with the circuit court. As a result a hearing was held before Judge Theisen on June 24, 2014. During that hearing the court upheld the prior finding of contempt, granted Jason Foster's motion for the right to present evidence on the

issue of contempt and denied the motion of Jason Foster to dismiss the order to show cause dated August 13, 2013 on the basis that the affidavit attached to the order to show cause did not provide sufficient information to Jason Foster or adequate notice or opportunity to prepare for the hearing. Jason Foster is appealing that order.

DISCUSSION AND ARGUMENT

I. THE COURT'S RULING ON THE SUFFICIENCY OF THE AFFIDAVIT WAS CORRECT.

Wisconsin Statutes section 767.78(2) *If a person has incurred a financial obligation and has failed within reasonable time or as ordered by the court to satisfy the obligation, and the wage assignment proceeding under s.767.75, and account transfer under s.767.76 are inapplicable, impractical or unreasonable the court may on its own initiative, and shall upon the application of the receiving party, issue an order requiring the payer to show cause at reasonable time specified in the order why he or she should not be subject to contempt of court under ch.785.*

Respondent cites several cases as the basis for his argument that the affidavit that was the basis for the order to show cause was deficient:

O'Connor v. O'Connor, 48 Wis. 2d 535,543, 180 N.W.2d 735,740 *"Due process demands at least a notice and a hearing in the contempt process, whether the proceeding is under statutory authority or is an exercise of the inherent power of the court to enforce its order by an in personam remedy.*

Schrameck v. Bohren, 145 Wis.2d 695,704,429 N.W.2d 501 (Ct. App. 1988). *There must be timely notice to the respondent that reasonably conveys information about the hearing so he can prepare defense and make objections.*

Zimbrick v. Labor & Indus. Review Comm'n, 235 Wis.2d 132,138, 613 N.W.2d 198,201, 2000 WI App 106 (Wi Ct. App 2000.) *"As for the adequacy of the notice, the notice must be reasonably calculated to inform the person of the pending proceeding and to afford the person the opportunity to object and defend his or her rights." And, "In addition to the notice being inadequate, Mr. Foster must also show prejudice from the inadequate notice." 235 Wis.2d at 139.*

Dennis v. State, 117 Wis. 2d 249,261, 344, N.W.2d 128,134 (Wis.1984). *The statutory requirements and due process . . . require that the defendant be aware of what he must answer to so that he can be prepared to offer proof and explanation showing his good faith efforts to comply with the court's orders."*

Jason Foster argues that "the order to show cause and affidavit do not state the months or amounts that Mr. Foster should be found in contempt of court for, and is

therefore ambiguous." (Appellant's Brief, Page 18).

Appellant further argues "it was especially clear that Mr. Foster could not have known which months after the December 12, 2012 order that he would have been in contempt for given that the circuit court and attorneys were not clear about which months would apply to determine whether Mr. Foster was in contempt. Jason Foster's attorney, in her oral argument to the circuit court on this issue stated:

"All I'm saying is when I have to file a contempt, I include more information about exactly why the person is in contempt, and if it would have been a child support problem, I would have said for the months of whatever he was in contempt for not paying these amounts. (R.285, 15:1-6).

While counsel points out what she perceives as deficiencies she fails to show how the notice provided fails to comply with the law, or how the perceived ambiguity in any way caused prejudice to Jason Foster.

The affidavit complained about by Jason Foster is part of an order to show cause signed by court commissioner Nathan Novak on August 13, 2013. The affidavit is signed by Assistant Corporation Counsel Timothy Sullivan. (R.128)

A review of these documents shows the following: The order to show cause orders Jason Foster to appear for pretrial conference at the Eau Claire County Child Support Agency at 4:00 p.m. on Tuesday August 27, 2013, and for a hearing before the court on Thursday September 5, 2013 at 9:30 a.m. (adjourned to September 16, 2013 before Circuit Court Judge Theisen), and indicates that: Jason Foster must appear in person to show cause why you should not be found in contempt for failure to obey the orders of the court.

Further it advises him that he has right to be represented by an attorney; and the potential sanctions that may be imposed pursuant to Chapter 785 if he is found in contempt. Finally, it ordered Jason Foster to provide a number of financial documents to the child support agency prior to August 20, 2013.

The attached affidavit states: "that Jason Foster has failed to comply with the court order for support and owes arrearages in this case." It goes on to state that the current child support obligation is \$574 per month with an additional \$25 per month towards outstanding accounts. As of the date of the affidavit Jason Foster had accumulated \$13,992.88 in total arrears.

Consistent with the language of the cases cited by the Appellant the purpose of the Order to Show Cause and affidavit is to give the respondent notice of the time, date and location of the hearing, and the purpose of the hearing. Jason Foster received notice of all of these items. The order to show cause clearly states the date and time that Mr. Foster is to appear for both the pretrial conference and the hearing before the court. It is at those times that he would have an opportunity to object to the request of the child support agency to find him in contempt of court. The order to show cause clearly states that the issue before the court will be contempt of court, and the affidavit indicates that the basis for the issue of contempt is the "failure to comply with the court order for support and that he owes arrearages in this case."

The order to show cause and affidavit complies with the requirements of Wisconsin Statutes §767.78 and the requirements of the case law cited by Jason Foster. The assumption on the part of Jason Foster's attorney believes that more is required in order to provide adequate notice is not consistent with the law. The circuit court appropriately denied the motion of Jason Foster when it found that Jason Foster had received notice of the hearing.

II. The Court Did Not Commit Error When It Found Jason Foster In Contempt of Court

Jason Foster in his brief argues:

"On December 4, 2012 a previous order to show cause was heard by the court. The court took the average of Mr. Foster's 12 months of payments in determining whether he met the \$200 per month required obligation... Mr. Foster relied on the court's method of determining whether he was in compliance with the child support order that arose out of the December 4, 2012 hearing when he paid support in 2013. At the post-conviction hearing, Mr. Foster testified that he believed that he had made adequate payment by taking the average of his support payment over the months. He also testified that it was his understanding that his payments went to his current monthly obligation, and that any overpayments he made in one month would be applied to the next month. (Appellant's brief, page 22)

On April 28, 2010 a hearing was held before then Circuit Court Branch 4 Judge Benjamin Proctor. At that hearing the court found that Jason Foster had an earning capacity of \$4,160 per month, reaffirmed the child support obligation of \$574 per month, and further ordered that Jason Foster pay a minimum of \$200 per month towards his child support obligation. (R.38)

On December 4, 2012 Jason Foster raised the issue of the \$200 order with Judge Theisen. In reviewing the issue the court stated:

Court: Well have you been believing that you need to pay the \$200? From my reading of this, that's an incorrect interpretation. The \$200 may have been a, I don't know what you call it, relief, but it never changed your order, Okay. So, therefore, with regard to child support I want to make it clear that the current order of the court is \$574 per month, \$25 per month toward arrears. (R.283, 11:20-25)

Initially, the court did not find Jason Foster in contempt after making this statement. (R.238, 12:2-4) Thereafter the court had a discussion about the amount of payments made. (R.238, 13:12-13) Then the court reversed itself and found Jason Foster in contempt:

Okay, I will find him in contempt. As and for conditions of his purge, he will start in December of 2012, remain current on his child support order, and his child support order is \$574 plus \$25. Okay. (R.283, 13:12-13).

This order makes it clear what amount of child support Jason Foster was required to pay after the December 2012

hearing. There is no reason for Jason Foster to believe that he was only required to pay \$200 per month. Any confusion that Jason Foster may have had prior to the hearing on December 4, 2012 was eliminated by this order.

The testimony provided at both of the hearings on September 16, 2013 and July 25, 2014 are clear that during most of the months of the year 2013 Jason Foster did not comply with his court order to pay his child support obligation. Jason Foster argues that if you consider the two tax refund intercepts that were received in February and May 2013, and then average his payments for the year, that he is not in contempt of court. The record clearly shows that other than the two intercepts received in February and May of 2013, the payments made in the other months of 2013 were either minimal partial payments or not made at all. Jason Foster did not make any child support payments in the months of March and April 2013, and paid only \$50.00 during each of the months of June, July and August 2013. Between December 2012 and September 2013, and despite the two tax refund intercept payments, Jason Foster's total arrears still increased \$1,531.76 from \$16,121.28 to \$17,653.14. (R. 151, 4-6)

Wisconsin Statutes §49.855(1). *If a person obligated to pay child support, family support, maintenance, or the receiving and disbursing fee under s. 767.57(1e) (a) is delinquent in making any of these payments, or owes an outstanding amount that has been ordered by the court for past support, medical expenses or birth expenses, upon application under 59.53(5) the department of children and families shall certify the delinquent payment or outstanding amount to the department of revenue and, at least annually, shall provide the department of revenue any certifications of delinquencies or outstanding amounts. . . .*

Wisconsin Statutes §49.855(3). *Receipt of a certification by the department of revenue shall constitute a lien, equal to the amount certified, on any state tax refund.*

Wisconsin Statutes §49.855(4) (a). *The department of revenue shall send the portion of any state tax refund or credits withheld for delinquent support . . .*

Wisconsin Statutes §49.855(4) (b). *The department of administration shall send the portion of any federal tax refunds or credit received from the internal revenue service that was withheld . . .*

The refund intercepts received in February and May 2013 were not payments towards Jason Foster's current child

support obligation. These payments only occurred because Jason Foster had accumulated a large delinquency in his child support obligation, and the debt was certified by the State of Wisconsin to the Department of Revenue and the Internal Revenue Service pursuant to Wisconsin Statute §49.855. These were not payments made by Jason Foster. Instead these were the enforcement of a lien placed on his tax refunds. Wisconsin Statute §49.855 exists as a means to obtain payments towards delinquent support payments. It is not meant as a means to satisfy the monthly child support obligation.

With the removal of the payments received from the tax refund intercepts from payments made toward the monthly child support obligation, Jason Foster's argument of averaging the payments fails. The only month between December 2013 and September 2013 that Jason Foster made his child support payment in full was during the month February 2013. During the time of December 2012 through September 2013 Jason Foster was self-employed and controlled the payments made toward his child support obligation. He did not provide any financial records showing his income or expenses for the year 2013, so the court was unable to determine if it was or was not reasonable for Jason Foster

to pay. When asked why he did not make his payments, Jason Foster stated: *"because I'm not making the money that I did when I was a manager back in 2009."* (R.151,11:12-13) Yet he never did indicate how much he was in fact earning from his insurance business. As such, the court had no way of determining the truthfulness of his statement without supporting documentation. No evidence suggests that Jason Foster had an inability to work or produce an income, as the result of a physical, mental or emotional disability during the year 2013. Jason Foster offered no reason why he only made \$50 payments during the months of June, July or August 2013.

The County proved a prima facie case that that Jason Foster had the ability to make payments as result of his employment. Any confusion about whether Jason Foster should have been paying \$200 per month or \$574 per month was eliminated as a result of the court's order in December 2012. Despite that, Jason Foster failed to comply with the court's order to pay his child support obligation of \$574 per month for the seven of the eight months between the December 2012 hearing and the September 2013 hearing. One can reasonably infer, based on his arguments, that Jason Foster choose not to make his child support payments after

February 2013 because he thought he could count the tax refund intercepts as a payment towards current support and average the payment throughout the year. This is contrary to the law and also the December 2012 order of the court that requires Jason Foster to pay \$574 per month for current support and \$25 per moth towards his arrears. Either way you get to the same conclusion that Jason Foster willfully choose not to make his child support payments. The fact that he did so is contempt of a prior court order for the period of time of December 2012 through September 2013.

Apart from the year 2013 there also was pending before the court on July 24, 2014 a motion to lift the stay on the sentence imposed at the September 2013 hearing. As such the court also needed to consider Jason Foster's testimony on July 25, 2014. Jason Foster despite being employed in September, 2013, testified on July 25, 2014 that he was unemployed. He testified that he left his position with Farmers Insurance Company in November 2013 without notifying the child support agency. Subsequent to that, he moved from the Milwaukee area to the northern part of the state, also without notifying the child support agency. He then obtained new employment in Medford, Wisconsin at a

different insurance agency, again, without reporting the information to the child support agency. Then after he was terminated from the employment in Medford he failed to complete and submit the court ordered work searches as he was required to do upon becoming unemployed. (R. 285, 27-29) All of this is contrary to the orders entered by the court at the hearing on September 2013 that requires Jason Foster to report any changes in income address or employment to the child support agency with 72 hours. (R,132) It was reasonable and appropriate for the court to find that Jason Foster knew the requirements of his court order and that he willfully failed to comply with the reporting requirements of those orders, and as such is in contempt of court.

CONCLUSION

The circuit court did not commit error when it denied Appellant's motion to dismiss. Appellant has failed to show how the language of the affidavit does not comply with the requirements of the law or how Jason Foster was prejudiced by the court's order.

The court appropriately found Jason Foster in contempt of court. The court clearly set forth the expectation that Jason Foster make his full child support payment of \$574 each and every month following the hearing in December, 2012. Jason Foster failed to make the payments, and provided no evidence that indicated that he was unable to make his child support payments despite the fact that he was working. It was reasonable and not an erroneous exercise of discretion for the court to conclude that Jason Foster's failure to pay was willful and contrary to the court's order.

It is respectfully requested that this court affirm the decision of the Circuit Court.

Dated this __ day of February, 2015

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8) (b) and (c) for a brief and appendix produced with monospaced font. The length of the brief is 20 pages and 3764 words.

Dated this _____ day of February, 2015.

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CERTIFICATION - § 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of February, 2015.

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