Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-448

DECEMBER TERM, 2001

Melissa Clemmons (Hancock)	}	
v.	}	APPEALED FROM:
Joshua Clemmons	}	Chittenden Family Court
	}	DOCKET NO. 793-9-94 Cndm
	}	Trial Judge: Linda Levitt

In the above-entitled cause, the Clerk will enter:

Father appeals the family court's September 25, 2001 decision ordering him incarcerated for ninety days or until he pays a specified amount of child support arrears. We affirm and lift our October 12, 2001 stay of the family court's order.

The following facts reveal a lengthy and largely unsuccessful struggle by mother, the office of child support (OCS), and the court system to compel father to support his three children. The parties were married in 1987 and have three children born in April 1988, July 1989, and October 1990. Mother filed for divorce in 1994 after father moved to West Africa. A default judgment was entered against father in June 1995. Father failed to make any child support payments under the order. In 1998, father returned to the United States and filed a motion to vacate the divorce order. In March 1999, the parties entered into a stipulation under which father consented to a judgment in favor of mother for $35,000 in child support arrears, a substantially smaller amount than what he owed under the provisions of the original divorce order. Father agreed to pay (1) $100 per month initially toward the arrears, with the payments increasing by $50 per month until they reached $350 on September 1, 1999; (2) $4000 to reimburse OCS for past ANFC (aid to needy families with children) payments made to mother; and (3) $250 per month in child support payments for two months, increasing to $400 per month beginning in April 1999. Father also agreed to make all payments to OCS while mother was receiving ANFC benefits. The agreement was adopted by the family court on April 9, 1999.

In December 1999, OCS filed a petition to enforce the order. In March 2000, father stipulated to a judgment in favor of mother for $39,200 and a judgment in favor of OCS for $8150. Father agreed to pay $4600 by May 15, 2000 while remaining current on his monthly $400 support obligation. He also agreed to pay $350 per month in arrears beginning in June 2000.

In August 2000, OCS filed another petition to enforce. The magistrate entered judgment for mother and OCS and referred the matter to the family court for a contempt hearing, which was held on December 5, 2000. Father failed to appear despite being properly served. In a December 13, 2000 decision, the court found that father had paid only $2000 in child support between March and December 2000, and thus was in violation of the March 2000 order, which required payments of nearly $11,000 during that period. The court further found that defendant had paid only $900 in child support from April 1995 until the March 2000 order. The court imputed income to father in the amount of $50,000 per year plus commissions, and found that his living expenses were minimal because he was residing with his parents. The court ordered defendant to pay $8950 within sixty days and $750 per month thereafter, or the matter would be set for a

mittimus hearing.

Father failed to comply with the order, and a mittimus hearing was eventually held on June 19, 2001. At the beginning of the hearing, the parties announced that they had reached a settlement agreement, under which (1) OCS's mittimus motion would be dismissed pending receipt of $7500 from a Texas company that owed father money for services rendered; and (2) the monthly child support payment, including payment on arrears, would increase from $750 to $1000. The court accepted the agreement, but when OCS contacted the company father claimed owed him money, the president of the company stated that neither he nor his company was holding any money for father. On August 15, 2001, having received only one $400 payment from father, OCS filed a motion to reopen the mittimus hearing. At a September 18, 2001 hearing, the family court took testimony from father and by telephone from the president of the Texas company. The company president testified that the money owed to father was not available because the company's client that had commissioned the work done by father was in financial difficulty. Father testified that he had assumed the money would be available. He also testified that (1) he could command $150 an hour for his computer-based work; (2) he had been working between thirty-five and fifty hours per week for the Texas company and another corporation; and (3) within the next two to three weeks, he expected to receive a commission in the amount of $10,000 to $12,000 based on services rendered for the other corporation.

After hearing the evidence, the family court concluded that father's failure to pay child support was willful, considering the income he was capable of making and the small amount of money that he had paid in child support since the December 13 order and over the years. In its September 25, 2001 decision, the court ordered father incarcerated for ninety days or until he purged himself of contempt by paying $12,700. The court determined that because father had failed to purge himself of contempt as set forth in the June 19 stipulation, his compliance with the December 13, 2000 contempt order was once again at issue. The court found that (1) the June 19 stipulation contemplated that the $7500 owed to father had already been set aside and needed only to be transferred to OCS; (2) being self-employed, father had a duty to ensure that the Texas company was authorized to pay the $7500; (3) father was promptly notified that the company had refused to transfer the funds, but did nothing to effectuate the transfer; (4) father is a skilled and well-regarded consultant in the field of computer programming and website design, such that he commands compensation at a rate of $1000 per day; and (5) with little or no expenses and the ability to earn $1000 per day, father had at all relevant times the ability to comply with his support obligation and the court's purge requirements contained in the December 13 contempt order.

Father was incarcerated following the September 18 hearing and remained in jail until October 12, 2001, when this Court granted his request for a stay pending appeal. On appeal, father argues that (1) the family court erred by finding him in civil contempt when the undisputed evidence established that he was unable to comply with the court's support order; and (2) the court's mittimus order amounted to a finding of criminal contempt because the undisputed evidence established that he was unable to pay the purge amount. OCS responds that the family court properly exercised its discretion by enforcing the unconditional June 19 stipulation and issuing the mittimus.

Father first argues that the court erred by finding him in contempt, given the undisputed evidence demonstrating that he was unable to fulfill his support obligation. In father's view, he was victimized by the financial misfortunes of his client and thus should not be made responsible for the breakdown of the settlement agreement. According to father, any "mistaken judgment" on his part cannot be the basis of a finding of contempt. See Mayo v. Mayo, 12 Vt. L.W. 288, 290 (2001).

Before directly addressing these arguments, we consider the posture of the case below and on appeal. At the June 19, 2001 mittimus hearing, father had already been found in contempt pursuant to the family court's unappealed December 13, 2000 order; thus, the only issue at that hearing was whether he should be incarcerated for his contempt. Father avoided incarceration when the parties reached a stipulated settlement based on father's proffer that the Texas company had "withheld all the money that he is owed" and was merely "waiting to get the paperwork together so that they [could] distribute it to the Office of Child Support." As the result of the proffer, the matter was closed, but the court indicated that the case would be reopened in the event that the expected transaction fell through. After the transfer of funds failed, the court granted OCS's motion to reopen the mittimus hearing, which was held on September 18, 2001. Although the focus of OCS's motion was on father's alleged breach of the June 19 settlement agreement, at the hearing father offered to share with the court his efforts to earn money to fulfill his child support obligation. Hence, as the family court stated

in its September 25, 2001 order, the issue of father's compliance with the December 13 contempt order was again before the court.

With this in mind, we consider father's argument that he could not be held in contempt because he had no ability to satisfy his support obligation. Even if we ignore the fact that father failed to appeal from the December 13 contempt order, his argument has no merit. At the September 18 hearing, father conceded his failure to comply with the support order, and thus he "had the burden of establishing inability to comply." Russell v. Armitage, 166 Vt. 392, 401 (1997). Just as in Russell, the family court here held father in contempt "not because he had the present ability to pay the child support, but because he failed to establish an inability to comply with the court's order." Id. On several occasions, father signed stipulations agreeing to pay a specified amount of child support. The magistrate found in a November 2000 order that father had been making $50,000 per year plus commissions seven years earlier and continued to possess the skills that earned him that kind of income. Father himself testified at the June 19 hearing that he could command $150 an hour for his work, and that he had been working thirty-five to fifty hours per week for two companies, one of which was expected to give him a commission of $10,000 or more within the next two weeks. Yet, despite his ability to earn income, father had paid mother approximately $5000 in child support over a seven-year period. Plainly, father failed to meet his burden of demonstrating that he was unable to meet his child support obligation.

Defendant argues, however, that he could not be incarcerated based on a civil contempt order because the evidence indicated that he did not have the money to purge himself of the contempt. See Sheehan v. Ryea, __ Vt. __, __, 757 A.2d 467, 468-69 (2000) (imposing purge conditions that contemnor cannot meet amounts to punishment akin to criminal contempt). Once again, we conclude that father failed to meet his burden of proof. "[I]f the contemnor alleges that his compliance either with the original [contempt] order or the purgative conditions is impossible, it is his burden to establish the facts necessary to justify his failure to comply." Spabile v. Hunt, 134 Vt. 332, 335 (1976) (emphasis added). At the September 19 hearing, father answered in the negative when his attorney asked him whether he had assets that he could apply toward child support payments. But this testimony was insufficient to discharge his burden to demonstrate that he had no means of obtaining money to satisfy his support obligations or to meet the purge conditions. See In re Marriage of Betts, 507 N.E.2d 912, 922-23 (Ill. App. Ct. 1987) (defense of poverty and misfortune as valid excuse for nonpayment of child support is applicable only in most extreme circumstances, where spouse has no money and no means of getting money to meet support obligation; father did not meet his burden of demonstrating poverty, given his failure to submit proof of income or financial records of any kind); Jones v. Hargrove, 516 So.2d 1354, 1357 (Miss. 1987) (defendant may avoid contempt judgment by showing inability to pay child support, but "such a showing must be made with particularity and not in general terms").

Affirmed; mandate to issue forthwith.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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James L. Morse, Associate Justice

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Marilyn S. Skoglund, Associate Justice