NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA07-1217

	Opinion Delivered MARCH 11, 2009
EDMUNDO G. ROGERS APPELLANT	APPEAL FROM THE BENTON COUNTY CIRCUIT COURT, [NO. E00-1602-4]
V.	HONORABLE JOHN R. SCOTT, JUDGE
CYNTHIA ANN ROGERS APPELLEE	AFFIRMED

M. MICHAEL KINARD, Judge

This is the sixth opinion issued by the Arkansas Court of Appeals since 2002 in the protracted divorce case of Edmundo and Cynthia Rogers. The current appeal arises from a Petition for Contempt filed by Ms. Rogers against Mr. Rogers based on his failure to pay child support, alimony, and attorney fees. The circuit court held Mr. Rogers in contempt, sentenced him to fifty days' incarceration, and ruled that he could purge his contempt by paying $50,000 toward the arrearages. Mr. Rogers appeals and asserts numerous arguments for reversal. We find no merit in any of the arguments and affirm the contempt order.

The Benton County Circuit Court entered the original divorce decree on February 26, 2001. The decree ordered Mr. Rogers to pay $1000 per month child support and a total of $9200 in alimony. Mr. Rogers appealed, and this court reversed and remanded on the ground that the circuit court lacked the authority to dissolve the marriage due to the parties' failure to corroborate residency. *Rogers v. Rogers*, CA01-790 (June 19, 2002) (not designated for

publication) (*Rogers I*). During the pendency of that appeal, the circuit court held Mr. Rogers in contempt for failing to pay the decree's child-support and alimony awards. Mr. Rogers appealed those orders, and this court affirmed, ruling that the reversal in *Rogers I* did not affect the circuit court's jurisdiction to enforce the alimony and support awards. *Rogers v. Rogers*, 80 Ark. App. 430, 97 S.W.3d 429 (2003) (*Rogers II*). The next appeal also affirmed a contempt petition against Mr. Rogers and affirmed the circuit court's grant of permission to Ms. Rogers to relocate with the couple's children to Tulsa, Oklahoma. *Rogers v. Rogers*, CA02-699 (Aug. 27, 2003) (not designated for publication) (*Rogers III*).

While the appeals in *Rogers II* and *III* were pending, the parties returned to circuit court and produced corroborating evidence of residency. The circuit court then retried several aspects of the case and ordered Mr. Rogers to pay $300 per month in child support (as opposed to the original $1000) and no alimony (as opposed to the original $9200). Ms. Rogers appealed, and this court reversed for reinstatement of the original awards. *Rogers v. Rogers*, 90 Ark. App. 321, 205 S.W.3d 856 (2005) (*Rogers IV*). On February 27, 2006, the circuit court entered an order re-establishing the original child-support and alimony awards; calculating the arrearages owed by Mr. Rogers for child support ($32,455) and alimony ($9200); and awarding Ms. Rogers judgment for those amounts. Mr. Rogers appealed from that order, and this court affirmed in *Rogers v. Rogers*, CA06-848 (Sept. 19, 2007) (not designated for publication) (*Rogers V*).

The present proceedings occurred while Mr. Rogers's appeal was pending in *Rogers V*. On October 4, 2006, Ms. Rogers filed a Petition for Contempt asserting Mr. Rogers's failure

to pay the support and alimony arrearages set forth in the February 27, 2006 order and his failure to pay attorney fees awarded to her throughout the case. Mr. Rogers moved to dismiss the petition, arguing that the circuit court lacked jurisdiction and that Ms. Rogers improperly served him with the petition. The circuit court denied the motion to dismiss, and the contempt hearing went forward on May 30, 2007, despite the parties' interim efforts to settle their dispute.

Edmundo Rogers did not appear at the contempt hearing. However, his attorney appeared and told the court that the contempt issue had been settled. Ms. Rogers and her attorney stated that no final settlement had been reached. Ms. Rogers also testified that Mr. Rogers owed her $18,037 in attorney fees and that he had paid very little on the child-support arrearage. Lois Barrett of the Benton County Child Support Office presented a computer print-out that reflected the amounts Mr. Rogers had paid toward the attorney-fee, alimony, and child-support arrearages. The court relied on that exhibit to determine that Mr. Rogers had paid $1950 in attorney fees; possibly $375 in past-due alimony (the record was not clear); and $2000 on past-due child support, which left him owing Ms. Rogers approximately $55,000 on all arrearages. The court found that Mr. Rogers had made no serious attempt to reduce the amounts he owed and that his contempt was willful. The court ordered Mr. Rogers incarcerated for fifty days with the option of purging his contempt by paying $50,000 toward the arrearages.

Mr. Rogers moved for a new trial or reconsideration, arguing, *inter alia*, that the court miscalculated the amounts he had paid on the arrearages. The circuit court denied the motion, and this appeal followed.

Circuit Court Jurisdiction

We first address Mr. Rogers's contention that the circuit court lacked jurisdiction to hold him in contempt. Mr. Rogers argues that the circuit court's failure to reserve jurisdiction in the February 27, 2006 arrearage order prohibited further action by the court with regard to the order. We disagree. The line of cases relied on by Mr. Rogers, as exemplified by *Linn v. Miller*, 99 Ark. App. 407, 261 S.W.3d 471 (2007), and *Jones v. Jones*, 26 Ark. App. 1, 759 S.W.2d 42 (1988), hold that a circuit court's reservation of jurisdiction in a domestic-relations case generally preserves the court's power to modify an order. However, the circuit court in this case *enforced* rather than modified a prior order. A circuit court has jurisdiction to enforce a previous order, *Stilley v. Fort Smith Sch. Dist.*, 367 Ark. 193, 238 S.W.3d 902 (2006), and contempt is the court's primary weapon for doing so. *See* David Newbern & John Watkins, *Civil Practice & Procedure* § 38:7 (4th ed. 2006). Arkansas Code Annotated sections 9-12-314(d) and 9-12-234(j) (Repl. 2008) also recognize the circuit court's power to enforce a decree or a support order through contempt proceedings when an arrearage is reduced to judgment. Moreover, Arkansas courts have repeatedly held that a circuit court retains jurisdiction over child support as a matter of public policy. *See Maxwell v. State*, 343 Ark. 154, 33 S.W.3d 108 (2000); *Frigon v. Frigon*, 66 Ark. App. 343, 989 S.W.2d 931 (1999). In light of these authorities, we see no jurisdictional barrier to the circuit court's entry of the contempt order.

Mr. Rogers also argues that the circuit court lacked jurisdiction to enter a contempt order while his appeal from a prior order was pending. As a general rule, the circuit court loses jurisdiction over the parties and subject matter of a case once the record is lodged on appeal. *See Gore v. Heartland Comm. Bank*, 356 Ark. 665, 158 S.W.3d 123 (2004). However, that rule is not invariably applied in support cases. In *Goodin v. Goodin*, 240 Ark. 541, 542, 400 S.W.2d 665, 666-67 (1966), the Arkansas Supreme Court stated that it would sustain the trial court's "continuing power to enforce its decrees for support or child custody despite the pendency of an appeal." Mr. Rogers attempts to distinguish *Goodin* by arguing that it does not apply to an appeal from a final judgment, but this is simply incorrect. The trial court in *Goodin* entered a final divorce decree and a writ of supersedeas; the issue on appeal was whether a payor could obtain a stay of the monthly support payments contained in a divorce decree.

Similarly, Arkansas courts have recognized that a support payor is not absolutely entitled to a stay pending appeal. In *Conlee v. Conlee*, 370 Ark. 89, 257 S.W.3d 543 (2007), the supreme court held that a party is bound to obey a divorce decree that is on appeal and that the appeal does not stay proceedings under the decree. In *Rogers II*, *supra*, this court held that a party cannot avoid making court-ordered support payments simply by taking an appeal, lest the family of the payor suffer while an appeal is pending. We therefore conclude that the circuit court retained jurisdiction to issue a contempt citation against Mr. Rogers.

Mr. Rogers also suggests that the circuit court lacked jurisdiction *ab initio*, given the parties' initial failure to corroborate residency. This omission was subsequently remedied and,

in any event, *Rogers II* declared that the circuit court retained the authority to enforce its original support orders.

Service of the Contempt Petition

Mr. Rogers argues that he was not properly served with the contempt petition. We conclude that the record demonstrates otherwise.

This was a case in which a final judgment had been entered and the circuit court had continuing jurisdiction, so Ms. Rogers was required to serve the petition on Mr. Rogers rather than his attorney. *See* Ark. R. Civ. P. 5(b)(1). Ms. Rogers employed a process server to serve the petition on Mr. Rogers while he visited the children in Tulsa. The server's affidavit states that he is a certified process server in good standing; that he received papers to be served on Edmundo Rogers; and that he "individually served the within named person" with a true copy of the summons and contempt petition. The summons's return of service states that the server delivered a copy to "the person named therein as defendant," who was identified as Edmundo Rogers. The server's representations comply with Ark. R. Civ. P. 5(b)(2), which requires personal delivery to the defendant.[1] Mr. Rogers's affidavit states that he was not personally served and that an individual he did not know left the papers on the windshield of his rented vehicle. But, his affidavit is not conclusive, given his status as an interested party. *See Dyson v.*

[1] Oklahoma law, which the parties also cite, similarly provides that post-judgment motions in a divorce proceeding shall be served, among other methods, by personal delivery on the party. 12 Okla. Stat. Ann. §§ 2005.1 and 2004(C).

Ferncliff Props., Inc., 16 Ark. App. 64, 696 S.W.2d 767 (1985). We therefore decline to reverse on the ground of improper service.[2]

Mr. Rogers also asserts that Ms. Rogers lured him to Tulsa on the pretext of visiting the children and obtained service on him through fraud. But, again, Mr. Rogers's statements are not determinative of this issue. *Id.* His claim of fraud is not based on evidence but on his own conclusions. It was Mr. Rogers's burden to demonstrate fraud, *e.g., Bridges v. Bush*, 93 Ark. App. 461, 220 S.W.3d 259 (2005), and his conclusory affidavit is insufficient to do so. *See generally Bushong v. Garman Co.*, 311 Ark. 228, 843 S.W.2d 807 (1992).

Mr. Rogers's remaining arguments on this point are procedurally barred. He contends that the Oklahoma process server was not "specially appointed," *see* Ark. R. Civ. P. 4(c), and that the summons did not contain a clerk's seal (although the summons did contain the clerk's signature and the statement, "Witness My Hand And Seal Of The Court"). Mr. Rogers did not raise these arguments below, and we will not address them for the first time on appeal. *McKnight v. Bank of Am.*, 372 Ark. 456, ___ S.W.3d ___ (2008). Mr. Rogers also points to a statement in Ms. Rogers's brief that she contacted the process server to deliver the summons and petition. He contends that this violated Oklahoma law, which requires an attorney to deliver a summons to the process server. This argument also was not raised below, and we decline to engage in fact-finding based on the wording in Ms. Rogers's appellate brief.

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[2] The circuit court employed a different line of reasoning in upholding the validity of service, but this court may affirm the circuit court's ruling if it was correct for any reason. *Fritzinger v. Beene*, 80 Ark. App. 416, 97 S.W.3d 440 (2003).

The Contempt Order

Mr. Rogers argues that the contempt order was invalid for a number of reasons. He claims that the February 2006 arrearage order, of which he was held in contempt, "did not command him to do anything" and, therefore, he could not be held in contempt of the order. We rejected a similar argument in *Johns v. Johns*, 103 Ark. App. 55, ___ S.W.3d ___ (2008). Unquestionably, a court may enforce a judgment for support or fee arrearages through its contempt powers. Ark. Code Ann. §§ 9-12-314(d) and -234(j) (Repl. 2008); *Gould v. Gould*, 308 Ark. 213, 823 S.W.2d 890 (1992).

Mr. Rogers additionally asserts that the contempt was invalid because the parties had settled the matter and because his prior contempt citations carried a *res judicata* effect. The evidence on settlement was in conflict, and such conflicts are to be resolved by the trier of fact. *Bristow v. Mourot*, 99 Ark. App. 386, 260 S.W.3d 733 (2007). As for Mr. Rogers's *res judicata* argument, regardless of his prior contempt history, he was again in contempt when he failed to pay the arrearages imposed by the February 2006 order. The court had the authority to enforce the arrearage order. Ark. Code Ann. §§ 9-12-314(d) and -234(j) (Repl. 2008); *Gould*, *supra*.

Mr. Rogers's remaining arguments challenge the circuit court's finding that he was in willful contempt and that he should receive credit for only $4325 paid toward the child-support, alimony, and fee arrearages. In order to establish civil contempt, there must be willful disobedience of a valid court order. *Applegate v. Applegate*, 101 Ark. App. 289, ___ S.W.3d ___

(2008). Our standard of review is whether the circuit court's finding of contempt is clearly against the preponderance of the evidence. *Id*.

According to Mr. Rogers, his contempt was not willful because confusion existed over the amount he was required to pay and, once the confusion was resolved, it "defie[d] credulity that he could pay such a large sum" on short notice. However, the circuit court noted Mr. Rogers's meager payment history throughout the case, which reflected no serious attempts to reduce the substantial arrearages until February 2007. By that point, a year had passed since entry of the arrearage order and Ms. Rogers had filed another of several contempt petitions against Mr. Rogers. We also observe that Mr. Rogers did not appear at the hearing to contest his ability to pay, even though it was his burden to do so. *See Rogers II*, *supra*. Given Mr. Rogers's payment history and his lack of participation at the contempt hearing, we cannot say that the circuit court's finding of willful non-payment was clearly against the preponderance of the evidence.[3]

We likewise decline to reassess the circuit court's calculation of Mr. Rogers's credits for payments on the arrearages. The court recited the credit amounts from the bench during the contempt hearing, but Mr. Rogers did not assert any error in calculation until his motion for a new trial. A party cannot wait until the outcome of a case to bring an error to the circuit

[3] Mr. Rogers takes issue with the circuit court's statement that he did not request modification of child support. He contends that the court denied a prior motion for modification and that another motion would have been futile. We read the court's remark as simply an additional comment on Mr. Rogers's failure to appear at the contempt hearing and present his arguments to the court.

court's attention in a motion for a new trial. *See Cochran v. Bentley*, 369 Ark. 159, 251 S.W.3d 253 (2007).

Recusal

Mr. Rogers argues that the circuit judge should have recused. A trial judge has a duty to sit on a case unless there is a valid reason to disqualify. *Turner v. N.W. Ark. Neurosurgery Clinic*, 91 Ark. App. 290, 210 S.W.3d 126 (2005). A judge's decision not to recuse will not be disturbed absent an abuse of discretion, and the party seeking recusal must demonstrate bias. *Id*. There is a presumption of impartiality on the part of judges. *See id*. Whether a judge has become biased to the point that he should disqualify himself is a matter confined to his conscience. *Searcy v. Davenport*, 352 Ark. 307, 100 S.W.3d 711 (2003). Unless there is an objective showing of bias, there must be a communication of bias in order to require recusal for implied bias. *Turner*, *supra*.

The record in this case reveals no exhibition of prejudice or bias. The judge ruled against Mr. Rogers in several instances, but that does not mandate recusal. *Turner*, *supra*. Neither does, as Mr. Rogers claims, his filing a petition against the circuit judge with the Judicial Discipline and Disability Commission and the judge reporting him to the Supreme Court Committee on Professional Conduct. *See, e.g., Stilley v. Perry*, 372 Ark. 259, ___ S.W.3d ___ (2008); *Searcy v. Davenport*, 352 Ark. 307, 100 S.W.3d 711 (2003). Our review convinces us that the judge did not abuse his discretion in declining to recuse.

Findings of Fact and Conclusions of Law

Mr. Rogers argues that the circuit court erred when it failed to make findings of fact and conclusions of law upon denying his motion for a new trial. Rule 52(a) of the Arkansas Rules of Civil Procedure provides that, if requested by a party at any time prior to entry of judgment, in all contested actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon. However, Rule 52(a) also provides that "findings of fact and conclusions of law are unnecessary on decisions of motions under these rules." In light of this language in Rule 52(a), we find no error on this point.

For the reasons stated, we affirm the circuit court's order of contempt against Edmundo Rogers.

Affirmed.

VAUGHT, C.J., and GLADWIN, J., agree.