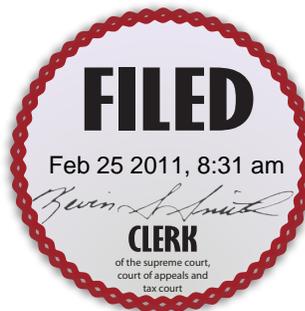


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN RE THE MATTER OF: TOWNE )  
DISSOLUTION )

THOMAS J. TOWNE, )  
Appellant, )

vs. )

CINDY TOWNE and STATE OF INDIANA, )  
Appellees. )

No. 68A05-1009-DR-585

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APPEAL FROM THE RANDOLPH CIRCUIT COURT  
The Honorable Jay L. Toney, Judge  
Cause No. 68C01-8503-DR-95

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February 25, 2011

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellant Thomas J. Towne (“Father”) appeals the trial court’s order finding him in contempt for failure to pay child support to Cindy Towne (“Mother”). Concluding that the evidence is sufficient to support the trial court’s contempt finding, but noting that the trial court’s contempt order fails to specify that Father will be released from his community service obligation upon complying with the child support order, we affirm and remand to the trial court with instructions to amend its order.

### **FACTS AND PROCEDURAL HISTORY**

On November 21, 1985, the trial court dissolved the marriage of Father and Mother and ordered Father to pay \$35.00 per week as child support for their child. Since that date, Father has repeatedly failed to comply with his child support obligation and, as a result, has been found in contempt numerous times. On January 11, 2001, the State filed a petition to intervene and to be added as a party to the instant action.

On July 19, 2010, the State filed an Information for Rule to Show Cause. In the Information, the State alleged that Father should be found to be in contempt of court because, as of that date, Father was in arrears of his child support obligation in the total sum of \$28,615.85 as of July 15, 2010. On August 20, 2010, the trial court conducted a hearing on the State’s motion at the conclusion of which the trial court took the matter under advisement. On August 24, 2010, the trial court issued an order finding that Father was in arrears in the amount of \$28,615.85. The trial court determined that Father was in contempt and ordered him to serve 200 hours of community service and to pay off his arrearage at a rate of \$35.00 per week. This appeal follows.

## DISCUSSION AND DECISION

### I. Contempt Finding

Father contends that the trial court abused its discretion in determining that he was in contempt for what it found to be his willful failure to satisfy his child support obligation. The Indiana Supreme Court has held that contempt is available to assist in the enforcement of a child support order so long as the delinquency was the result of a willful failure by the parent to comply with the support order and the parent has the financial ability to comply. *Pettit v. Pettit*, 626 N.E.2d 444, 447 (Ind. 1993). The decision as to whether a party is in contempt is left to the discretion of the trial court. *Emery v. Sautter*, 788 N.E.2d 856, 859-60 (Ind. Ct. App. 2003), *trans. denied*.

“Because the decision as to whether a party is in contempt is left to the discretion of the trial court, we will reverse a trial court’s findings only if ‘it is against the logic and effect of the evidence before it or is contrary to law.’” *Id.* (quoting *Mosser v. Mosser*, 729 N.E.2d 197, 199 (Ind. Ct. App. 2000)). When reviewing a contempt order, we do not re-weigh the evidence or judge the witnesses’ credibility and will uphold the order unless the record provides us with a firm and definite belief that a mistake has been made by the trial court. *Id.* at 860. The party in contempt bears the burden of demonstrating that his acts were not “willful.” *Id.* at 859.

Father acknowledges that he was aware of his child support obligation and concedes that he is \$28,615.85 in arrears of his support obligation, but claims that he is unable to pay child support because he is ill and unemployed. In support of this claim, Father provided the

trial court with certain medical documents outlining his ailments. Father, however, has failed to provide any documentation supporting his claim that he is unable to obtain and maintain employment. Thus, Father has failed to demonstrate that he is unable to earn sufficient funds to satisfy his weekly child support obligation because of his current ailments. In addition, the record clearly demonstrates that Father's unwillingness to meet his child support obligation dates to long before Father began suffering from his current ailments. Accordingly, we conclude that the trial court did not abuse its discretion in finding Father to be in contempt of his court-ordered child support obligation. To the extent that Father's challenge amounts to an invitation to reweigh the evidence on appeal, we decline to do so. *See Staresnick v. Staresnick*, 830 N.E.2d 127, 131 (Ind. Ct. App. 2005).

## **II. Sentence**

Upon finding Father in contempt for his willful failure to pay child support, the trial court ordered Father to complete 200 hours of community service and to pay off his arrearage at a rate of \$35 per week. The trial court, however, did not specify that the requirement that Father complete 200 hours of community service contains a coercive element, *i.e.*, that Father will be released from his community service obligation upon complying with the child support order, or whether it was merely punitive in nature.

Our supreme court has held that:

The primary objective of a civil contempt proceeding is not to punish the defendant, but rather to coerce action for the benefit of the aggrieved party. Punishment in the form of imprisonment or a fine levied against the defendant, which goes to the State and not to the injured party, is characteristic of a criminal proceeding. In a civil contempt action the fine is to be paid to the aggrieved party, and imprisonment is for the purpose of

coercing compliance with the order.

*Duemling v. Fort Wayne Cmty. Concerts, Inc.*, 243 Ind. 521, 188 N.E.2d 274, 276 (1963). Even when an order of imprisonment appears to be punitive, it may still be lawful. *Emery v. Sautter*, 788 N.E.2d 856, 860 (Ind. Ct. App. 2003). The sentence “must be viewed as remedial if the court conditions release upon the contemnor’s willingness to [comply with the order].” *Moore v. Ferguson*, 680 N.E.2d 862, 865 (Ind. Ct. App. 1997) (quoting *Shillitani v. United States*, 384 U.S. 364, 370, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966) (alteration in original)).

*Branum v. State*, 822 N.E.2d 1102, 1105 (Ind. Ct. App. 2005), *clarified on reh’g*, 829 N.E.2d 622 (Ind. Ct. App. 2005).

Here, it is unclear from the trial court’s order whether the requirement that Father complete 200 hours of community service was intended to be punitive or coercive in nature. The trial court did not include an express provision whereby Father’s community service obligation was conditioned upon his compliance with the child support order. Because we are unable to determine whether the trial court’s order was intended to be punitive or coercive in nature, we instruct the trial court to amend its order to specify that Father will be released from his community service obligation by complying with the child support order. *See id.*; *Emery*, 788 N.E.2d at 860-61.

The judgment of the trial court is affirmed and remanded to the trial court with instructions.

KIRSCH, J., and CRONE, J., concur.