Illinois Official Reports

Appellate Court

***In re Marriage of Weddigen*, 2015 IL App (4th) 150044**

Appellate Court Caption	In re: MARRIAGE OF BRENDA WEDDIGEN, Petitioner-Appellee, and JAMES WEDDIGEN, Respondent-Appellant.
District & No.	Fourth District Docket No. 4-15-0044
Filed	October 28, 2015
Decision Under Review	Appeal from the Circuit Court of Sangamon County, No. 06-D-501; the Hon. Steven H. Nardulli, Judge, presiding.
Judgment	Affirmed in part and reversed in part; cause remanded.
Counsel on Appeal	Sara M. Mayo (argued), of Law Offices of Sara M. Mayo, of Springfield, for appellant. Gregory A. Scott (argued), of Scott & Scott, P.C., of Springfield, for appellee.
Panel	JUSTICE APPLETON delivered the judgment of the court, with opinion. Justice Knecht concurred in the judgment and opinion. Justice Steigmann specially concurred, with opinion.

OPINION

¶ 1 Respondent, James Weddigen, was found in indirect civil contempt of court for comments he posted on the online social networking site, Facebook. The trial court's purge order required respondent to post further comments on Facebook apologizing, recanting, and correcting his previous comments. Respondent appeals the order of contempt, the purge order, and the order requiring respondent to pay petitioner's attorney fees associated with the contempt proceedings. We affirm in part, reverse in part, and remand.

¶ 2 I. BACKGROUND

¶ 3 On August 15, 2014, during the pendency of various issues arising in the parties' postdissolution of marriage proceedings, petitioner, Brenda Weddigen, filed a petition for the trial court to hold respondent in direct civil contempt and issue a restraining order. Petitioner alleged respondent, while using his cellular telephone, intentionally and secretly recorded a hearing conducted three days earlier in violation of Illinois Supreme Court Rule 63(A)(8) (eff. July 1, 2013). Petitioner discovered this information after respondent posted a comment on the Facebook page of the Illinois Fathers Non-Profit Organization, admitting he recorded the hearing without permission and encouraging others to do the same. The comment at issue stated:

> "On March 20, 2014, the Illinois Supreme Court declared the Illinois Eavesdropping Act of 1961 to be UNCONSTITUTIONAL. (*State of Illinois v. Melongo*, 2014 IL 114852). I recorded my hearing today and I encourage all of you to do so as well…..This is going to raise a lot of issues with the court, but they should have thought of that before they turned the court system into a revenue center for the county."

Petitioner alleged respondent's conduct also violated the Federal Interception and Disclosure of Wire or Electronic Communications Act (18 U.S.C § 2511 (2006)). He also posted instructions on how to effectively get a cellular telephone through court security in order to record the hearing. He posted the following:

> "I'd recommend you dress like an attorney and say it's your calendar. I've been denied before. A guard in Champaign asked if I was an attorney. I said no. He told me to take my phone back to my vehicle. The next time I said yes. And I walked right through."

¶ 4 In his written response, entitled "Notice to the Court to Take Judicial Notice" and "Motion to Dismiss," respondent, proceeding *pro se*, said he "made a false claim on Facebook." Although respondent had "boasted" he had made a recording of a court hearing, in his response he insisted, in fact, he had not done so. He wrote: "there is nothing illegal about making a false claim whether in public or private as long as that claim is not made while testifying under oath." He reportedly posted the comment "to encourage others to invoke their [first] and [fourteenth] amendment rights pursuant to recent constitutional decisions by the Illinois Supreme Court." See U.S. Const., amends. I, XIV. Soon after respondent's filed response, Sara M. Mayo entered her appearance as respondent's counsel.

¶ 5 On October 16, 2014, petitioner filed a petition for indirect civil contempt, alleging respondent failed to make the court-ordered payments toward his child-support arrearage. In her prayer for relief, petitioner requested respondent pay her attorney fees and costs associated with filing the petition.

¶ 6 On October 20, 2014, the trial court conducted a hearing and first allowed the parties to argue whether respondent had violated any rule by secretly recording the hearing as alleged. After considering the arguments, the court stated it was "going to reduce the scope of" the argument and accept respondent's statement "that he did not actually record these proceedings." However, the court found respondent in indirect civil contempt of court for posting the comments on the Facebook page, encouraging others to record proceedings and giving instructions on how to accomplish it. The court asked respondent to explain, on the witness stand, "why it is that he got on a website and told people that it was okay to conduct recordings in [the] courtroom ***. That's the contempt as far as I'm concerned."

¶ 7 Mayo explained to the court she was not prepared to put respondent on the witness stand to address that particular concern, because it was, in her opinion, "beyond what [they were] arguing." According to Mayo, the scope of petitioner's contempt petition was the act of recording, not the act of posting a comment on Facebook. The court responded:

> "Barring–well, even with a, almost regardless of what his explanation is, I don't see, and I'm willing to listen to him, but I don't see how his comments on Facebook were anything other than intended to bring disorder and disruption to my and every courtroom in the state. It was my intention, unless he has a spectacular explanation, Ms. Mayo, to find him in contempt of court and to permit him to purge himself of his contempt of court by placing on Facebook and every other social media to which he has access an apology to everyone, an explanation that he was wrong and encouraging people that they should not record those kinds, any court proceedings because there are supreme court rules that prohibit it. Is that something your client is willing to accept?"

Mayo answered in the affirmative.

¶ 8 The trial court proceeded to consider issues relating to child support and visitation. After the presentation of evidence and arguments of counsel, the court ruled in open court on these issues, stating as follows:

> "By [October 31, 2014,] I also want a copy filed with the clerk and directed to me with regards to the apology and public statement that [respondent] has put on the Facebook page. I said his Facebook page before. In looking at the pleadings, it looks as though it's on a Facebook page that relates to another organization, I'm not exactly sure what it is.
>
> ***
>
> By October 31st he is to post his apology, his correction with regard to family court cases and Supreme Court rules relating to recording in court proceedings. And I'll take a look at that after that point in time. All right. I'll get you all a written order to that effect."

¶ 9 On October 24, 2014, the trial court entered a written order. The portion of the order relevant to this appeal provided, as follows:

> "[Respondent] has filed a response [to petitioner's contempt petition] which admits that he posted the statement in question and states that he is not in contempt as he did not actually record any court proceedings.
>
> The court accepts [respondent]'s representation that he did not actually record court proceedings. Nonetheless, the court finds that his statements on Facebook stating that he had recorded in-court family proceedings and encouraging others to record family court proceedings constitute contempt of court as the statements tend to encourage disruption in this court and other courts. [Respondent] has shown himself to be a sophisticated person with regard to family court proceedings.
>
> [Respondent] has been given an opportunity in open court to explain his posting and to address the court's belief that it was the posting of the admonition to electronically record family court proceedings that constitutes a contempt, regardless of whether he actually recorded family court proceedings.
>
> The court finds [respondent] in indirect civil contempt of court for his Facebook posting admonishing others to electronically record family court proceedings. [Respondent] may purge himself of his contempt by making a public statement on the Facebook page on which he made his statement to the effect that he was in error as to the law regarding the electronic recording of family court proceedings, apologizing to anyone who may have read his posting, and advising others to refrain from electronically recording family court proceedings."

¶ 10 The trial court did not find respondent in contempt of court for nonpayment of the child-support arrearage, but it found "it was reasonably necessary for [petitioner] to file enforcement proceedings in order to obtain compliance with the prior orders of the court with regard to child support." Accordingly, the court ordered respondent to pay petitioner's attorney fees incurred due to the filing of her contempt proceedings related to both the Facebook posting and child support.

¶ 11 On November 21, 2014, respondent filed a motion to reconsider, alleging he was given no notice he would be subject to contempt proceedings for *posting* the comment on Facebook. Instead, he believed petitioner was seeking a finding of contempt related to his alleged secret *recording* of the hearing. As a result, he alleged a violation of his due-process rights for a lack of notice of his potential contemptuous conduct. He further argued the trial court had violated his first amendment right to freedom of speech by holding him in contempt for his Facebook posting and by ordering him to post a response as a purge condition. He also claimed the court erred in awarding petitioner attorney fees when the court had not found him to be in contempt on the grounds alleged in either of her petitions for contempt–for the Facebook posting and the nonpayment of child support.

¶ 12 On December 3, 2014, the trial court entered a written order vacating the order which had found respondent in contempt related to the Facebook posting. The court found respondent *had* received proper notice of his potential contemptuous conduct "related to his act of placing a statement on a Facebook page[–]a statement that he had audio-recorded his own court proceedings and which encouraged others to do the same," but the court gave respondent "an opportunity to explain why his social media encouragement of others to audio-record court proceedings should not support a finding of contempt." The court set the matter for a hearing on January 6, 2015.

¶ 13 On January 6, 2015, the trial court conducted a rule-to-show-cause hearing. Respondent testified his intent in posting the comment was to follow *People v. Clark*, 2014 IL 115776, which, according to respondent, made it unconstitutional to punish people for recording public hearings. He said he did not intend to "incite lawlessness" and he does not believe lawlessness ensued. He posted his comment, believing the law had been changed regarding the legality of recording public hearings. He adamantly denied recording the earlier hearing.

¶ 14 After considering the arguments of counsel, the court stated as follows:

> "He was held in contempt, and I'm now holding him, again, in contempt of court for posting the advocacy for surreptitiously recording and putting every judge in this state in the potential of a violation of the Canons by surreptitiously recording family court proceedings.
>
> There is nothing in that criminal case that he has cited to me that says it's all right to record courtroom proceedings. It says that the state's attorney can't criminally prosecute a person, but that doesn't mean it's all right, and that's a pretty easy distinction. You don't need to be a lawyer to read that case and realize that nothing in that case says that it is permissible to record family court proceedings. Nothing in that case says that.
>
> [Respondent] is held in contempt of court. I'm not imposing a sanction yet, but I imposed, when I held him in contempt of court for this, I imposed an obligation, telling him he can purge himself of this contempt by simply going back on this website and telling people that it is wrong. They cannot record family court proceedings. It is proportionate. It is directed to his conduct, and I don't see any problem in him going out and correcting the misapprehension that he has created with every person who goes on this website, and it's not hard to find this website. It's an advocacy website."

The court ordered respondent to purge contempt within 14 days. The court indicated the order was not final until they addressed respondent's purge conditions in 14 days.

¶ 15 On January 20, 2015, at the follow-up hearing, respondent informed the trial court he would not purge himself of his contempt. The court imposed a sanction of $100 per day until respondent "completes his purge as ordered." On January 21, 2015, the court entered a written order to this effect:

> "On January 6, 2015, the rehearing was conducted and [respondent] was given the opportunity to explain why he posted his encouragement to others to electronically record family court proceedings. This court once again found [respondent] in contempt of court for posting on a social media website statements encouraging others to record family court proceedings. The court specifically noted that the issue of recording proceedings had been addressed by the court in prior hearings in this case, with an admonishment at that time which directed [respondent] to refrain from using his computer to record family court proceedings.
>
> Although the Illinois Supreme Court has ruled the Illinois eavesdropping statute unconstitutional in the context of criminal proceedings for violations of the eavesdropping statute, nothing in the opinion can reasonably be read to permit individuals to electronically record family court proceedings. By encouraging others to electronically record family court proceedings, [respondent] placed this court and

other courts in the position of potentially violating Canon 3(A)(8) of the Code of Judicial Conduct. Further, he encouraged others to engage in potentially disruptive conduct in family court proceedings.

* * *

While the court does not find [respondent] in contempt of court for his failure to pay child support as ordered, the court finds that it was reasonably necessary for [petitioner] to file enforcement proceedings in order to obtain compliance with the prior orders of the court with regard to child support.

***

The court finds that [petitioner] is entitled to her attorney fees that were incurred relative to the petition for indirect civil contempt relating to the Facebook posting and her attorney fees to obtain compliance with the child support orders of the court."

The court noted the order was final and appealable.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Respondent challenges the propriety of the trial court's order entered upon its *sua sponte* motion to hold respondent in contempt of court for his comments on Facebook. Respondent characterizes this motion as the court's "*sua sponte* motion" because petitioner sought to hold respondent in contempt of court for his alleged conduct of secretly recording a prior hearing, not for posting comments on Facebook. Petitioner discovered respondent allegedly recorded the hearing when she saw respondent's comments online, admitting he had recorded the hearing and encouraging others to do the same. Although the court proceeded with contempt charges, it presumed respondent had not, in fact, recorded the hearing as alleged. The court stated: "I'm going to accept [respondent]'s statement that he did not actually record these proceedings." Instead, the court imposed indirect civil contempt charges against respondent for encouraging others to record family court proceedings and instructing them on how to do so.

¶ 19 "[A]ll courts have the inherent power to punish contempt; such power is essential to the maintenance of their authority and the administration of judicial powers." *People v. Simac*, 161 Ill. 2d 297, 305 (1994). The procedures that must be followed in contempt proceedings vary according to the type of contempt at issue. Before addressing respondent's arguments in this appeal, we must determine what type of contempt was imposed in this case. The trial court found respondent in indirect civil contempt, but this court is not bound by the court's designation. *SKS & Associates, Inc. v. Dart*, 2012 IL App (1st) 103504, ¶ 14. Instead, we must examine the purpose of the proceedings and the nature of the sanctions imposed and then determine whether the proper constitutional and procedural requirements were met. *In re Marriage of Betts*, 200 Ill. App. 3d 26, 43 (1990).

¶ 20 Civil contempt is coercive in nature. *Betts*, 200 Ill. App. 3d at 43. The court seeks to compel the contemnor to perform a particular act. *Betts*, 200 Ill. App. 3d at 43. "Civil contempt consists of failing to do an act ordered by the court for the benefit of another party." *In re Marriage of Miller*, 88 Ill. App. 3d 370, 373 (1980). "Civil contempt proceedings have two fundamental attributes: (1) [t]he contemnor must be capable of taking

the action sought to be coerced, and (2) no further contempt sanctions are imposed upon the contemnor's compliance with the pertinent court order." *Betts*, 200 Ill. App. 3d at 44.

¶ 21 On the other hand, criminal contempt is " ' "conduct which is calculated to embarrass, hinder or obstruct a court in its administration of justice or derogate from its authority or dignity, thereby bringing the administration of law into disrepute." ' " *Simac*, 161 Ill. 2d at 305 (quoting *People v. L.A.S.*, 111 Ill. 2d 539, 543 (1986), quoting *People v. Javaras*, 51 Ill. 2d 296, 299 (1972)). "[C]riminal contempt includes acts showing disrespect for the court, or its orders, or processes, or tending to obstruct the administration of justice." *Miller*, 88 Ill. App. 3d at 373. A finding of criminal contempt is intended to punish the wrongdoer and vindicate the dignity and authority of the court. *Simac*, 161 Ill. 2d at 305-06. "[T]he reasons for imposing punishment for criminal contempt are much the same as the rationale for punishing other types of misdemeanor criminal conduct–retribution, deterrence, and vindication of the norms of socially acceptable conduct." *Betts*, 200 Ill. App. 3d at 44. Criminal contempt is imposed to punish *past conduct* that offends the dignity of the court. *People v. Goleash*, 311 Ill. App. 3d 949, 956 (2000). "The conduct which may be punished by means of criminal contempt proceedings covers the entire gamut of disrespectful, disruptive, deceitful, and disobedient acts (or failures to act) which affect judicial proceedings." *Betts*, 200 Ill. App. 3d at 45.

¶ 22 "[T]he test for determining whether contempt proceedings are criminal or civil in nature is the dominant purpose for which sanctions are imposed." *Betts*, 200 Ill. App. 3d at 47. Whether a party is guilty of contempt is a question of fact for the trial court, and a reviewing court should not disturb the trial court's determination unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion. *In re Marriage of Logston*, 103 Ill. 2d 266, 286-87 (1984).

¶ 23 A. Indirect Criminal Contempt

¶ 24 We find the conduct at issue in this case forms the basis for both criminal and civil contempt sanctions. See *Betts*, 200 Ill. App. 3d at 46. It is apparent the trial court concluded the same. However, the procedures used blurred the distinctions between the types of contempt intended.

> "In instances where both civil and criminal sanctions are imposed, analysis of the purpose of these multiple sanctions may be aided if they are viewed in the following fashion. Criminal sanctions are *retrospective* in nature; they seek to punish a contemnor for past acts which he cannot now undo. Civil sanctions are *prospective* in nature; they seek to coerce compliance at some point in the future. That point might be immediate compliance in open court or whenever the contemnor chooses to use his 'key'–namely, compliance–to open the jailhouse door." (Emphases in original.) *Betts*, 200 Ill. App. 3d at 46.

¶ 25 Petitioner initially sought a finding of civil contempt for respondent's conduct of secretly recording the prior hearing. According to the language in the petition, petitioner sought to (1) impose unspecified sanctions for respondent's indirect-civil-contempt conduct of recording the hearing and (2) coerce him to comply with court rules by not recording any future hearings. In her prayer for relief, petitioner asked the court to "issue a rule to respondent *** to show cause, if any he can, as to why he is not in direct [*sic*] civil contempt of this court"

and to find respondent "in direct [*sic*] civil contempt of this court for his actions of secretly recording the hearing on August 12, 2014."

¶ 26 The trial court, on its own motion, while disregarding the alleged recording of the hearing as contemptuous conduct, pursued respondent's conduct of posting comments on Facebook as contemptuous. Rather than coercing respondent into complying with the court's directives of refraining from recording any hearing, the court sought to punish and sanction respondent for his past conduct of posting comments. The court found respondent's comments offended the dignity and repute of the court (see *Goleash*, 311 Ill. App. 3d at 956) and said respondent's postings "tend to encourage disruption in this court and other courts." Given the circumstances presented, we conclude the dominant purpose of the contempt proceedings related to Facebook was to punish respondent's past conduct of posting the disparaging comments. In other words, indirect criminal contempt was the proper designation of respondent's conduct. (Indirect because it was done outside the presence of the court. *People v. Gholson*, 412 Ill. 294, 298 (1952).)

¶ 27 A person charged with indirect criminal contempt is entitled to all of the constitutional protections and procedural rights afforded to other criminal defendants. *Betts*, 200 Ill. App. 3d at 58. These include the rights to (1) be charged by a written complaint, petition or information; (2) know the nature of those charges; (3) personal service; (4) file an answer; (5) be heard; (6) present evidence; (7) confront and cross-examine witnesses; (8) be personally present at trial; (9) subpoena witnesses; (10) a public hearing; (11) the privilege against self-incrimination; (12) counsel; (13) the presumption of innocence; and (14) be proved guilty beyond a reasonable doubt. *People v. Budzynski*, 333 Ill. App. 3d 433, 439 (2002); *Betts*, 200 Ill. App. 3d at 58; *Goleash*, 311 Ill. App. 3d at 956-57.

¶ 28 Because these indirect-civil-contempt proceedings morphed into indirect-criminal-contempt proceedings, respondent was not afforded many of the constitutional and procedural rights set forth above. First and foremost, respondent was not given written notice of the charge or notice he could be held in indirect *criminal* contempt. The petition filed on August 22, 2014, explicitly asked the trial court to find respondent in "indirect civil contempt." Specifically, the petition alleged (1) respondent "secretly recorded the hearing on his telephone," (2) his actions were in violation of Illinois Supreme Court Rule 63(A)(8) (eff. July 1, 2013), (3) he did not seek prior approval before recording the proceedings, (4) he admitted in a Facebook post he recorded the hearing and encouraged others "to disregard the Supreme Court Rule," (5) the court should impose sanctions to "obtain his compliance with Supreme Court Rule 63," and (6) a permanent restraining order should issue to prevent future recordings.

¶ 29 The explicit language and the implicit intent of this petition indicated petitioner intended to "coerce" respondent to refrain from recording future proceedings. The prayer for relief referred to a motion for a rule to show cause as to why respondent should not be held in contempt, "further implying that the contempt proceedings were civil in nature." See *SKS & Associates, Inc. v. Dart*, 2012 IL App (1st) 103504, ¶ 22; *In re Marriage of Carpel*, 232 Ill. App. 3d 806, 823 (1992) (finding the pleading requesting a rule to show cause implies the proceeding will be civil because a criminal defendant can never be compelled to "show cause"); *Betts*, 200 Ill. App. 3d at 58-59 ("if a respondent has a right not to testify, he cannot be required to 'show cause' why he should not be held in indirect criminal contempt"). That

is, in criminal contempt proceedings, the burden should not be placed on the contemnor to explain his position or to "show cause" as to why he should not be held in contempt.

¶ 30 As this court has previously stated:

> "The alleged contemnor cannot assert these [constitutional and procedural] rights unless he receives proper notice of the nature of the charges against him. Accordingly, any party wishing to initiate indirect criminal contempt proceedings must not only notify the alleged contemnor that sanctions are being sought, but that the proceedings will be criminal in nature. [Citation.] Thus, indirect criminal contempt proceedings cannot be initiated by a pleading captioned so as to imply that the proceedings will not be criminal. Instead, a party seeking a finding of indirect criminal contempt must say so explicitly by filing a pleading captioned 'petition for adjudication of criminal contempt.' [Citation.]" *Goleash*, 311 Ill. App. 3d at 957.

¶ 31 Because the proceedings were brought with the intent of pursuing civil contempt, respondent was not afforded the safeguards necessary for finding him in criminal contempt. Based upon the nature and purpose of the contempt proceedings brought against him, it is clear respondent was actually found in indirect criminal contempt of court without the proper and necessary constitutional and procedural safeguards in place. Accordingly, we reverse the court's finding of contempt.

¶ 32 B. Indirect Civil Contempt

¶ 33 At the same time, the trial court also imposed civil-contempt sanctions, though the court referred to those sanctions as purge conditions associated with the previously discussed finding of contempt. The court ordered respondent to post additional comments on the same Facebook page apologizing, correcting, or recanting his previous comments. The court sought to coerce respondent's compliance with the court's directive. Thus, respondent's refusal to post subsequent comments per the court's instructions should support separate indirect civil contempt proceedings. The civil sanctions are prospective in nature, as they seek future compliance. *Betts*, 200 Ill. App. 3d at 46. In other words, respondent holds the key to his own jailhouse door.

¶ 34 Because a separate, yet related, indirect-civil-contempt proceeding was intended against respondent, the parties must comply with the appropriate procedural steps for that proceeding as well. With indirect civil contempt, respondent is entitled to minimal due process, consisting of the basic components of notice and opportunity to be heard. *Betts*, 200 Ill. App. 3d at 53. Therefore, should the parties proceed with the imposition of indirect-civil-contempt charges against respondent, the required procedural and constitutional safeguards must be met in this context as well.

¶ 35 We see no need to address the implication of the contempt proceedings on respondent's first amendment rights to freedom of speech when we have reversed the trial court's order finding respondent in indirect civil contempt of court. Any analysis regarding the first amendment would be premature and advisory at this point in the proceedings when the finding of contempt has been abrogated. See *Cushing v. Greyhound Lines, Inc.*, 2013 IL App (1st) 103197, ¶ 378 (any discussion of the issue of an award of fees would be premature in light of the court's decision to vacate the final order and remand for further proceedings).

¶ 36 C. Attorney Fees

¶ 37 Finally, respondent challenges the trial court's award of attorney fees in two instances. First, the court awarded petitioner her reasonable attorney fees associated with the contempt proceedings related to the Facebook comments. Respondent argues petitioner is not entitled to her fees because the court did not find him in contempt based upon the allegations in her petition. Our reversal of the contempt convictions and remand for the possibility of further contempt proceedings also requires the reversal of the award of attorney fees entered against respondent on January 21, 2015. *Betts*, 200 Ill. App. 3d at 67.

¶ 38 Second, the trial court awarded petitioner her reasonable attorney fees associated with the contempt proceedings related to the child-support issues. The court specifically found respondent was not in contempt of court for his failure to pay child support as ordered. However, the court found, because it was "reasonably necessary" for petitioner to file enforcement proceedings, she was entitled to an award of her reasonable attorney fees.

¶ 39 Petitioner claims the trial court awarded fees pursuant to section 508(b) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/508(b) (West 2014)), which allows for the award of fees if the party's failure to comply with the court's order "was without compelling cause or justification." The court specifically found respondent was not in contempt of court for his nonpayment. However, the court also specifically found "it was reasonably necessary for [petitioner] to file enforcement proceedings in order to obtain compliance with the prior orders of the court with regard to child support."

¶ 40 "A party who has been forced to resort to the judicial process to secure compliance with the terms of an order or judgment is entitled to her reasonable attorney fees even absent a showing of inability to pay." *In re Marriage of Irvine*, 215 Ill. App. 3d 629, 635 (1991). Regardless of the finding of contempt, the court found respondent had failed to comply with the child-support order, necessitating petitioner's action.

¶ 41 Respondent unilaterally decided not to make the child-support payments as ordered under a mistaken belief that an appeal of the issue would stay his obligation. Given those circumstances, respondent argues his nonpayment was not "without cause or justification." This court has rejected a similar argument. For the purposes of section 508(b) of the Dissolution Act, we have found the unilateral reduction in support payments without court order, by itself, is adequate to establish the "without cause or justification." *In re Marriage of Clay*, 210 Ill. App. 3d 778, 781 (1991) (the respondent's failure to pay child support based upon his mistaken belief that he could unilaterally reduce his payments was sufficient to satisfy the policy of the award of attorney fees under section 508(b)). We find no error in the trial court's award of fees for respondent's nonpayment of his child-support arrearage.

¶ 42 III. CONCLUSION

¶ 43 For the reasons stated, we reverse the trial court's order which found respondent in indirect civil contempt of court and assessed attorney fees against him. We affirm the trial court's order assessing attorney fees against respondent related to the nonpayment of the established child support arrearage.

¶ 44 Affirmed in part and reversed in part; cause remanded.

¶ 45 STEIGMANN, J., specially concurring.

¶ 46 Although fully agreeing with the majority, I write separately to express my dismay regarding the contempt proceedings that occurred in this case. Respondent's postings on social media were clearly entitled to first amendment protection, and the contempt proceedings in this case violated his first amendment rights. That the attorney who brought those contempt proceedings is one of the most respected members of the Sangamon County divorce bar and the judge who entered the contempt findings is one of the most experienced and well-regarded trial judges in central Illinois compels me to write this special concurrence. If a lawyer and judge of their deserved repute do not realize the first amendment implications of their actions in this case, then further guidance is obviously needed.

¶ 47 During the contempt hearing, the trial court accepted respondent's statement that he did not actually record the hearing the court conducted in May 2014. Nonetheless, the court found respondent in indirect civil contempt of court for posting comments on Facebook that encouraged others to record court proceedings. The court then directed respondent to purge himself of his contempt by "placing on Facebook and every other social media to which he has access an apology to everyone, an explanation that he was wrong and encouraging people that they should not record *** any court proceedings because there are supreme court rules that prohibit doing so." The court explicitly found that respondent's statements on Facebook "constitute contempt of court as the statements tend to encourage disruption in this court and other courts." That finding and the trial court's "purge order" are the subject of this special concurrence.

¶ 48 I. UNITED STATES SUPREME COURT DECISIONS ON POINT

¶ 49 The modern, seminal decision from the United States Supreme Court on the first amendment is *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), where the Court wrote the following: "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." More recently, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002), the Court reiterated and expanded upon these themes, as follows:

> "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. *** First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.
>
> To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. See [*Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684, 689 (1959)]; see also *Bartnicki* v. *Vopper*, 532 U.S. 514, 529 (2001) ('The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it'). The government may not prohibit speech because it increases the chance an unlawful

act will be committed 'at some indefinite future time.' *Hess* v. *Indiana*, 414 U.S. 105, 108 (1973) (*per curiam*)."

¶ 50 The Court also had occasion to apply the *Brandenburg* standard in *National Ass'n for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), in which, during a civil rights boycott, Charles Evers, an NAACP official, allegedly threatened violence against boycott breakers. The Supreme Court unanimously concluded that Evers' speech was protected by the first amendment, explaining that "[t]his court has made clear *** that mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." (Emphasis in original.) *Id*. at 927. The Court added the following:

> "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the 'profound national commitment' that 'debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co.* v. *Sullivan*, 376 U.S. [254, 270 (1964)]." *Id*. at 928.

¶ 51 In *Bridges v. State of California*, 314 U.S. 252 (1941), the Court addressed a case in which the petitioners had been adjudged guilty of contempt of court and fined by a California state court. Their convictions rested upon comments pertaining to pending litigation that were published in newspapers. The petitioners argued the State's action was prohibited by the United States Constitution because it abridged their freedom of speech. *Id*. at 258-59. The Supreme Court reversed and, in doing so, provided some guidance for the present case.

¶ 52 The Court applied the then-standard for use in first amendment cases of whether the words in question "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about *** substantive evils." (Internal quotation marks omitted.) *Id*. at 261. The Court added that the likelihood, however great, that a substantive evil will result "cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial', [citation]; it must be 'serious', [citation]." *Id*. at 262. The Court added the following: "What finally emerges from the '[clear] and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Id*. at 263. The Court concluded as follows:

> "Those cases [applying the 'clear and present danger' test] do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Id*.

¶ 53 Significantly for this case, the Court also wrote the following: "History affords no support for the contention that the criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case." *Id*. at 268.

¶ 54 Regarding what may be the sensitive feelings of judges to criticism, whether fair or unfair, the Court also added the following:

> "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the digni[t]y of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." *Id*. at 270-71.

¶ 55 To emphasize this point, the Court provided an interesting excerpt from a letter written by Thomas Jefferson: " 'I deplore *** the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. *** These ordures are rapidly depraving the public taste. It is however an evil for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be limited without being lost.' " *Id*. at 270 n.16. Apparently, dissatisfaction with the press is not a modern phenomenon.

¶ 56 *Bridges* precedes *Brandenburg* by 28 years, and legal scholars agree that the *Brandenburg* standard provides greater protection for controversial speech than the "clear and present danger" standard mentioned in *Bridges*. Yet, even under *Bridges*, the contempt proceedings in this case would clearly violate respondent's first amendment rights.

¶ 57 II. ILLINOIS CASES ON POINT

¶ 58 Almost 60 years ago, the Supreme Court of Illinois addressed the propriety of a contempt finding and jail sentence when the defendant claimed his speech was protected by the first amendment. In *People v. Goss*, 10 Ill. 2d 533 (1957), the supreme court reversed that finding, albeit based upon the trial court's error in refusing to grant the defendant's motion for change of venue. The supreme court discussed *Bridges* at length and wrote the following:

> "Comment on pending cases, even if it is unfair and inaccurate, is not to be adjudged contemptuous unless it constitutes an 'imminent peril' to the administration of justice. [Citation.] The social interest in the integrity and competence of the judicial process requires that courts and judges should not be shielded from wholesome exposure to public view, and if this interest is to be well served, then some latitude must be allowed for inaccurate and intemperate comment." *Id*. at 544.

¶ 59 In a more recent decision involving a case in which the defendant was found in contempt and asserted his first amendment protections, the First District Appellate Court in *D'Agostino v. Lynch*, 382 Ill. App. 3d 960, 971 (2008), wrote the following:

> "The public interest in the integrity and competence of the judicial process requires that courts and judges not be shielded from 'wholesome exposure.' *People v. Goss*, 10 Ill. 2d 533, 544, 141 N.E.2d 385, 390 (1957). To that end, the United States Supreme Court has declared that freedom of speech and freedom of the press should not be impaired through the exercise of a court's contempt power unless there is ' "no doubt that the utterances in question are a serious and imminent threat to the administration of justice." ' *People v. Hathaway*, 27 Ill. 2d 615, 618, 190 N.E.2d 332, 334 (1963), quoting *Craig v. Harney*, 331 U.S. 367, 373 *** (1947). Thus, 'the first amendment forbids the punishment by contempt for comment on pending cases in the

absence of a showing that the utterances created a "clear and present danger" to the administration of justice.' *Hathaway*, 27 Ill. 2d at 618, 190 N.E.2d at 334."

¶ 60 III. THE CONTEMPT PROCEEDINGS IN THIS CASE VIOLATED RESPONDENT'S FIRST AMENDENT RIGHTS

¶ 61 Judged in accordance with the aforementioned cases, the contempt proceedings in this case violated respondent's first amendment rights. The *worst* that can be said of respondent's conduct is that he urged persons attending trial court proceedings to record them despite an Illinois Supreme Court rule forbidding that conduct. See Ill. S. Ct. R. 63(A)(8) (eff. July 1, 2013). However unwise or unwarranted recording trial court proceedings may be, what respondent urged here is a violation of trial court protocol that I have serious doubts would even constitute criminal behavior. And exactly how pressing an issue in the first place was respondent's advocacy of violating this rule? Thus, as Justice Brandeis wrote in *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), "even imminent danger cannot justify" restrictions on speech "unless the evil apprehended is relatively serious." Recording trial court proceedings in violation of an Illinois Supreme Court rule falls far short of that standard.

¶ 62 Trial courts have alternative means of ensuring that the supreme court rule prohibiting recording in the courtroom is enforced. For instance, many courthouses (1) bar the entry of persons with cell phones or other devices which can record courtroom proceedings and (2) require people who wish to enter to go through scanning devices to detect any metal objects they may be carrying. And, of course, persons who are caught actually violating that proscription are subject to punishment, which in itself (especially if publicized) should serve as a deterrent to others considering such conduct.

¶ 63 It must be remembered that at issue in this case is the first amendment to the United States Constitution–the crown jewel of our constitution that provides protections for the fundamental rights of Americans that no other persons on this planet enjoy–at least, not to the extent that we do. Thus, as the Supreme Court wrote just five months ago in *Reed v. Town of Gilbert, Arizona*, 576 U.S. ___, ___, 135 S. Ct. 2218, 2231 (2015), a case concerning whether a municipality's sign code unduly restricted freedom of speech, the provisions at issue "can stand only if they survive strict scrutiny, which requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." (Internal quotation marks omitted.) The restriction the trial court imposed in this case utterly fails to meet the "*narrowly tailored*" test.

¶ 64 As bad as the original contempt finding may have been, the so-called "purge order" was manifestly worse. It constitutes an example of "compelled speech" reminiscent of Stalinist show trials or Vietnam "Re-education Camps," circa 1976. The trial court was completely without any legal justification to impose such an order.

¶ 65 IV. CONCLUSION

¶ 66 We in the judiciary are part of the government and just as subject to fair–and unfair–criticism as those in the executive and legislative branches. We can no more be "delicate snowflakes" in the face of such criticism than can any other government official.

The orders entered in this case finding respondent in contempt and directing him to purge his contempt were unnecessary, unwarranted, unwise, and violative of the first amendment.