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SIXTH DIVISION
April 15, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
PATRICK RUSSELL,)	Cook County.
)	
Petitioner-Appellant,)	
)	
and)	No. 02 D 530348
)	
MARY GIBLIN,)	The Honorable
)	Pamela E. Loza,
Respondent-Appellee.)	Judge Presiding.

PRESIDING JUSTICE GARCIA delivered the judgment of the court.
Justices Cahill and R. E. Gordon concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion in finding former husband in indirect civil contempt of court for his failure to comply with the terms of the judgment regarding child support, medical insurance and life insurance and for his failure to reimburse the custodial parent for medical expenses incurred on behalf of the children where the former husband did not establish with "reasonable certainty" his financial inability to comply; the trial court was within its discretion ordering the former husband to pay former wife's attorney fees and recalculating the former husband's child support obligations based on his income of the most recent year based on income tax filings.

Following an evidentiary hearing, the trial court granted respondent Mary Giblin's

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petition for a finding of indirect civil contempt against her former husband, Patrick Russell, for his alleged failure to pay child support, reimburse Giblin for medical and educational expenses, provide medical coverage for his children and obtain a life insurance policy in the amount set forth in the judgment of dissolution of marriage. We find the trial court did not abuse its discretion where it was clear Russell's failure to fulfill these obligations was willful. He could afford \$700 monthly in child support payments where he earned \$59,020 in 2008 and his current wife earns over \$92,000 annually. The court was also within its discretion in using Russell's 2008 tax return to calculate his modified child support obligation. It was not unreasonable for the court to decline to average Russell's income over three-years to determine his new child support obligation where there was little reliable income data for other years and averaging is not statutorily required. We affirm.

BACKGROUND

Russell and Giblin were married in 1991, and their marriage produced two children: Patrick Russell, Jr., born May 27, 1994, and Amanda Russell, born January 19, 1990. Pursuant to a judgment of dissolution of marriage entered January 23, 2003, Giblin retained sole custody of the children and Russell was ordered to pay monthly child support of \$700, equaling 25% of his net income, until the children's emancipation. Russell was also ordered to pay one half of the children's educational costs, to secure a life insurance policy worth at least \$150,000 benefitting the children, to maintain medical insurance for the children during any period in which Giblin was unable to do so through employment, and to pay extraordinary medical and dental expenses of the children not covered by insurance.

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On January 4, 2008, Giblin moved to enforce the judgment provisions regarding child support, medical insurance and life insurance. During the course of the proceedings, both parties moved to modify the amount of Russell's child support obligation. On April 14, 2009, Giblin filed a petition for a finding of indirect civil contempt based on his failure to abide by the terms of the judgment. An evidentiary hearing was held on August 10, 2009.

At the hearing, Giblin testified that she did not keep a separate record of Russell's child support payments, but she used her bank's records to track the deposits of checks he gave her. She informed Russell of medical bills the children incurred but received no reimbursement from him. She testified that Russell was never current on his obligation to remit his monthly child support obligation of \$700. Russell's counsel showed her various copies of checks and money orders endorsed by Russell. She admitted receiving some, could not recall receiving others and denied receiving at least one. Evidence demonstrated she received five payments in 2003, nine in 2004, 12 in 2005, nine in 2006, nine in 2007, and seven in 2008.

Russell testified that he was employed by Vanguard trucking when the judgment for dissolution was entered. When that company went out of business, Russell purchased an 18-wheel truck that he operated independently. He testified his business earned \$18,729.53 in 2005, lost \$3,585.23 in 2006, earned \$36,000 in 2007, and earned \$11,689 in 2008. His current wife makes over \$92,000 annually. Russell contended he would occasionally make child support payments in cash, which apparently Giblin did not record. Russell purchased a \$50,000 life insurance policy naming Amanda and Patrick a beneficiaries rather than one for \$150,000 as required by the judgment. He had paid his attorney \$3,000 as of the date of the evidentiary

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hearing, and still owed her about \$15,000.

On cross examination, Russell testified that subsequent to the divorce he has taken trips to Hawaii, Florida, Las Vegas, and Australia, where he and his current wife honeymooned for three to four weeks. He and his wife pay for a private nanny that takes care of their children five days per week. Russell testified that when Giblin became sick with heart problems, he remained current on his child support obligations. Giblin testified to the contrary.

The trial court entered a written decision on September 30, 2009. It found that "both parties were at times not credible." The court reduced Russell's child support obligation from 25% to 20% of net income pursuant to 750 ILCS 5/505(a)(1) (West 2008), as Amanda was emancipated. The court found Russell had a gross child support obligation beginning January 23, 2003 through September 30, 2009 of \$56,163; he had actually paid only \$40,000, leaving a child support arrearage of \$16,163.

In its written decision, the court held Russell in "willful and wanton indirect civil contempt of this Court for his failure to pay child support" in the amount of the arrearage. "The fact that [Russell] has paid no child support since October of 2008 speaks volumes to this Court. [Russell] testified that he thought it was more important to pay his attorney than to pay child support because there was a contempt issue pending." Russell was also held in contempt for failure to pay a \$72.23 bill for Patrick's medical care pursuant to the judgment. He also owed Giblin \$2,728 for medical insurance costs, but his delinquency in paying those costs did not independently warrant a contempt order. Russell was, however, held in contempt for failing to maintain a life insurance policy worth \$150,000 for his children. The court ordered both parents

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to contribute one third of the cost of Amanda's community college expenses.

Regarding the opposing motions for modification of child support, the court reviewed the parties' financial disclosure affidavits and Russell's personal and corporate federal income tax returns for 2007 and 2008. It noted Russell had not provided the court with a profit and loss statement for 2009, which reflected poorly on his credibility. "This Court does not find [Russell's] testimony very credible, when [he] states that he earns no income from his job at the trucking company." The court determined that the 2008 corporate tax return submitted by Russell indicated gross income of \$173,308. The court added \$50 of interest income and granted Russell deductions totaling \$114,288 for accounting expenses, bank charges, dues and subscriptions, fuel, insurance, outside services, parking and tolls, postage and tools to arrive at Russell's net income. Based on these calculations, the court "awarded [Russell] an annual salary of \$59,070. The proper child support to be paid by [Russell], representing 20% of his net income is \$848 per month."¹

The court concluded Russell was liable to Giblin in the amount of \$16,163 for past due child support, \$818.93 for past due child support based on the new support amount,² \$2,728 for medical insurance reimbursement, \$72.23 for unreimbursed medical expenses, and \$293.33 for Amanda's educational expenses, for a total of \$20,075.49. Russell was given 14 days to pay the

¹ \$59,070 multiplied by 20% and divided by 12 months is \$984.50 per month. Giblin did not file a brief; the trial court's figure of \$848 stands as unchallenged.

² Representing the \$148 increase in child support obligation (from \$700 to \$848) between the date of Giblin's petition for a finding of indirect civil contempt and the date of the decision.

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amounts for which he was held in indirect civil contempt before he was committed to the Cook County Department of Corrections. The court granted Giblin leave to file a petition for attorney fees, which she subsequently did. In an order dated February 8, 2010, the court ordered Russell to pay Giblin's attorney fees, totaling \$28,128.75.

On February 8, 2010, the court found Russell had paid nearly all of the \$20,075 he owed Giblin. Russell was not committed to the Department of Corrections, but his request for reconsideration of the court's earlier findings was denied. Russell timely appeals; Giblin did not file a brief.

ANALYSIS

Russell contends the trial court erred in finding him in indirect civil contempt because there was no *prima facie* evidence that he failed to fulfill his child support obligations. He further argues that even if such a showing had been made there was no evidence that the failure to pay was willful and contumacious, as he had valid reasons not to pay. Russell further argues the court erroneously failed to average his income for the three preceding years to determine his new child support obligation. He claims it was error to base his child support obligation on only his 2008 income. We address the merits of Russell's appeal on his brief only. See *Thomas v. Koe*, 395 Ill. App. 3d 570, 577, 924 N.E.2d 1093 (2009) (under *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133, 345 N.E.2d 493 (1976), there are "three distinct, discretionary options a reviewing court may exercise in the absence of an appellee's brief," one of which is ruling on the merits).³ We find the trial court acted within its discretion in

³ Russell's brief violates Supreme Court Rule 342(a)(eff. January 2, 2005) because it

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finding Russell in indirect civil contempt of court, ordering that he pay Giblin's attorney fees, and calculating Russell's new child support obligation on his 2008 income.

Indirect Contempt of Court

Section 505(b) of the Illinois Marriage and Dissolution of Marriage Act "authorizes a court to find a payor parent in contempt for violating a support order." *In re Marriage of Deike*, 381 Ill. App. 3d 620, 632, 887 N.E.2d 628 (2008), citing 750 ILCS 5/505(b) (West 2008) ("Failure of either parent to comply with an order to pay support shall be punishable as in other cases of contempt."). "Whether a party is guilty of contempt is a question of fact that a reviewing court will not disturb unless the trial court's finding was against the manifest weight of the evidence." *J.S.A. v. M.H.*, 384 Ill. App. 3d 998, 1009, 893 N.E.2d 682 (2008). "A trial court will be said to have abused its discretion only if it acts arbitrarily without the employment of conscientious judgment, exceeds the bounds of reason and ignores recognized principles of law, or if no reasonable person would take the position adopted by the court." *In re Marriage of Baumgartner*, 384 Ill. App. 3d 39, 64, 890 N.E.2d 1256 (2008).

A finding of indirect civil contempt for failure to pay child support is warranted when there is " 'willful and contumacious refusal to obey the court's order.' " *Id.*, quoting *In re Marriage of Steinberg*, 302 Ill. App. 3d 845, 853, 706 N.E.2d 895 (1998), quoting *In re Marriage of Logston*, 103 Ill. 2d 266, 285, 469 N.E.2d 167 (1984). " 'The failure to pay child support under a court order or judgment is *prima facie* evidence of indirect, civil contempt.' " *Baumgartner*, 384 Ill. App. 3d at 62, quoting *Steinberg*, 302 Ill. App. 3d at 853 (*prima facie*

contains no table of contents to its appendix or to the record on appeal.

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evidence of contempt was established despite former husband's regular payment of child support, as he failed to correctly calculate the amount owed).

Here, Russell does not deny that he failed to make all monthly child support payments in every year of the six-year period except 2005. The trial court found that Russell owed child support totaling \$56,163 through 2008. Russell, however, paid only \$40,000 over that period and he paid nothing in 2009, through September. According to Russell, he thought it more important to pay his lawyer than pay his child support because he had contempt proceedings pending against him. Russell admits in his brief that he failed to pay child support in full: "Appellant's failure to pay all of the child support (it is important to note that he paid a substantial amount of money in child support) was due entirely to his inability to pay and were [sic] not willful and contumacious." Russell also admits he failed to maintain the \$150,000 life insurance policy mandated by the judgment of dissolution of marriage.

In the proceedings below, the trial court heard two record volumes of testimony; Russell cannot dispute that the trial court was "in the best position to determine the credibility of the witnesses, and to either accept or reject their testimony." *In re Marriage of Elies*, 248 Ill. App. 3d 1052, 1058, 618 N.E.2d 934 (1993) (contempt finding affirmed where trial court found former husband manipulated his income to shelter assets from child support obligations). Given Russell's admission that he did not fully comply with his child support obligations, there can be no dispute that *prima facie* evidence exists to support a finding of indirect civil contempt. See *Deike*, 381 Ill. App. 3d at 634 (*prima facie* evidence of contempt found where former husband was in arrears on child support by the time of hearing).

When faced with *prima facie* evidence of contempt, "the alleged contemner is obligated to show his failure to comply was not willful." *Deike*, 381 Ill. App. 3d at 633. "Because of this presumption of willfulness, the burden of proof is on [the alleged contemner] to show his actions were not willful." *Id.* To meet this burden, the alleged contemner must present "definite and explicit evidence" of his financial inability to pay. *Id.* "General testimony does not meet that burden. A payor must, by testimony, present evidence establishing with reasonable certainty money disbursed for expenses other than payments on the support order was disbursed for expenses permitted by law." *Id.* "It is proper that [the payor] first pay his bare living expenses; but whenever he has any money in his possession that belongs to him and which is not absolutely needed by him for the purpose of obtaining the mere necessities of life, it is his duty to make a payment on this decree." *Logston*, 103 Ill. 2d at 286, quoting *Shaffner v. Shaffner*, 212 Ill. 492, 496 72 N.E. 447 (1904). As in *Deike*, we find Russell did not meet his burden.

In *Deike*, the respondent lost \$46,500 on a business venture while earning only \$31,174 over the same time period. We held that the business loss did not "amount to a substantial change in circumstances" to warrant a modification of his child support obligations. We noted that his voluntary decision to expend his limited resources on a business investment was made at the expense of the support he should have provided to his children. *Deike*, 381 Ill. App. 3d at 632. We saw no reason to question the circuit court's decision to reject the respondent's claim of a substantial change in circumstances when the respondent continued "to operate the business at a loss." *Deike*, 381 Ill. App. 3d at 632. He also still owned vacation property and a boat and was able to support his new wife and her child while operating a business at a loss. *Deike*, 381

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Ill. App. 3d at 634. We rejected his contention that he presented "definite and explicit evidence" to rebut the *prima facie* evidence of contempt for his failure to remain current with his child support.

Here, a contempt finding is all the more justified, as the court found Russell earned over \$59,000 in 2008, which he does not dispute. Russell and his wife can afford a nanny five days per week and vacations to Australia, Florida, Las Vegas and Hawaii. Russell owns two 18-wheel trucks, and his current wife earns over \$92,000 annually. See *Id.* at 627 (the court may consider "the financial status of a current spouse *** to determine whether payment of support would endanger the ability of the support-paying party and that party's current spouse to meet their needs")). Russell found it more important to pay his attorney than his children's child support. That Russell was evidently able to pay Giblin nearly \$20,000 within 14 days to avoid incarceration discredits his "financial inability" to pay claim. Finally, we note the trial court rejected as incredible Russell's testimony "that he earns no income from his job at the trucking company."

The trial court did not abuse its discretion in finding Russell failed to establish with "reasonable certainty" that his failure to pay was not willful.

Giblin's Attorney Fees

Next, Russell contends it was error for the trial court to require that he pay Giblin's attorney fees. He contends the court's imposition of attorney fees is "analogous to punitive damages," but provides no authority for the assertion. "Where an ex-spouse's failure to pay was without cause or justification, an award of attorney fees is mandatory by statute." *Deike*, 381 Ill.

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App. 3d at 640, citing 750 ILCS 5/508(b) (West 2006) ("when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against whom the proceeding is brought to pay promptly the *** reasonable attorney's fees of the prevailing party."). "Because finding a party in contempt for failing to comply with a court order implies a finding the failure to comply was without cause or justification, the imposition of attorney fees is allowed." *Deike*, 381 Ill. App. 3d at 640.

Because the trial court did not err in finding Russell in indirect contempt of court for failing to meet his child support obligations and fully comply with the terms of the judgment of dissolution of marriage, it necessarily follows that the trial court did not err in requiring Russell to pay Giblin's attorney fees.

The Child Support Calculation

Russell contends that the trial court should not have relied on only one year of his income to calculate his new child support obligation because his income "fluctuated significantly." He would have the circuit court base Russell's obligation on an average of his income over the past three years.

"Modification of child-support orders lies within the sound discretion of the trial court, and its decision will not be disturbed on appeal unless an abuse of discretion is found." *Deike*, 381 Ill. App. 3d at 630, citing *In re Marriage of Rogers*, 213 Ill. 2d 129, 135, 820 N.E.2d 386 (2004). An abuse of discretion occurs in a decision on child-support modification "only when no reasonable person would agree with the court's decision." *Deike*, 381 Ill. App. 3d at 630. We find no basis to conclude that an abuse of discretion occurred in this case.

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It is true that case law suggests that trial courts "should" consider an average of prior years' net income to calculate child support obligations when that income fluctuates significantly. See *In re Marriage of Carpel*, 232 Ill. App. 3d 806, 819, 597 N.E.2d 847 (1992) (income fluctuated between \$3,434 and \$328,496) and *In re Marriage of Freesen*, 275 Ill. App. 3d 97, 103, 655 N.E.2d 1144 (1995) (income fluctuated between \$175,002 and \$341,926). We note, however, that the comprehensive scheme for calculating a child support obligation based on net income in section 505(a) of the Illinois Marriage and Dissolution of Marriage Act makes no mention of averaging a payor's previous incomes. 750 ILCS 5/505(a) (West 2008).

In any event, the fluctuation Russell's claims is not a dramatic as in *Carpel* or *Freesen*. Moreover, Russell provided the trial court with little reliable information regarding his income in the prior years he claims the trial court should have considered.. Nor did he provide the court with his 2009 net income figures. Where Russell did not present "definite and explicit evidence" to explain his failure to pay the required child support, the value of Russell's testimony as to his income, in the absence of documentary proof, is questionable. In any event, the trial court found Russell was "not very credible."

This case is more akin to *In re Marriage of Schroeder*, 215 Ill. App. 3d 156, 162, 574 N.E.2d 834 (1991), where the court rejected income averaging because much of the payor's data was unreliable. The *Schroeder* court focused on the payor's prior year income data, finding statutory requirements "necessitate[] the use of a base figure extracted from the most recent accurate income data [citations], and militate[] against a methodology of averaging." *Schroeder*, 215 Ill. App. 3d at 160. Under the holding in *Schroeder*, it was not unreasonable for the trial

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court to decide that Russell's income tax return for 2008 was the most reliable income data.

Consistent with *Carpel* and *Freesen* that averaging "should" be considered, more recent cases have explained averaging is "reasonable," but not mandatory. See *In re Marriage of Nelson*, 297 Ill. App. 3d 651, 655, 698 N.E.2d 1084 (1998); *Elies*, 248 Ill. App. 3d at 1061. We find no support in our case law for Russell's claim that the trial court was *required* to average income from prior years to calculate his child support obligation.

We also Russell's challenge to the use of his 2008 income to calculate his support obligation to be curious in light of his claim that 2008 was "clearly the best financial year for [his] company." This admission calls into question Russell's claim at page 17 of his brief that he earned only \$11,689 in 2008, which is less than he claims to have earned in prior years. We find no merit to Russell's contention that he was treated unfairly because his future child support obligations are based on his reported income for 2008.

CONCLUSION

The trial court did not abuse its discretion in finding Russell in indirect civil contempt of court for failing to fulfill his child support obligation when he failed to rebut the *prima facie* evidence of contempt with definite and explicit evidence of a financial inability to pay. Based on the finding that his failure to pay the child support and fully comply with the terms of the agreement was without cause or justification, we find no merit to Russell's claim that he should not be made to pay a portion of Giblin's attorney fees. Finally, the court was fully justified in calculating Russell's future child support obligations on his 2008 income.

Affirmed.