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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|--------------------------|---|-------------------------------|
| <i>In re</i> MARRIAGE OF |) | Appeal from the Circuit Court |
| BARBARA ROLL, |) | of Lake County. |
| |) | |
| Petitioner-Appellant, |) | |
| |) | |
| and |) | No. 92—D—2161 |
| |) | |
| EDWARD F. ROLL, |) | Honorable |
| |) | David P. Brodsky, |
| Respondent-Appellee. |) | Judge, Presiding. |

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

Held: The trial court erred in ruling that petitioner had not made a *prima facie* case to support her petition for a rule to show cause why respondent should not be held in contempt for his failure to pay child support; petitioner provided uncontroverted testimony that respondent paid less than the full support owed, and this was sufficient to shift the burden to respondent to show why he should not be held in contempt; cause remanded for further proceedings.

Petitioner, Barbara Roll, appeals from an order of the circuit court of Lake County that, *inter alia*, denied count I of her six-count amended petition for a rule to show cause against respondent, Edward F. Roll. In count I, Barbara alleged that Edward owed unpaid child support. Following an

evidentiary hearing, the trial court entered judgment in Barbara's favor on several counts of the petition, but denied count I. We affirm in part, reverse in part, and remand.

In 1994, the trial court entered a judgment dissolving the parties' marriage. The judgment incorporated the parties' marital settlement agreement, which provided for the sale of the marital residence and the equal division of the proceeds of the sale. The parties had two children: Lesley, born in July 1982, and Anthony, born in August 1985. The marital settlement agreement provided that, "[u]pon the sale of the [marital residence] and the parties living in separate households EDWARD shall pay \$250 every other week as and for child support for the minor children of the parties Lesley and Anthony." The agreement further provided that "[c]hild support shall abate on a child's emancipation."

On August 26, 2008, Barbara filed a petition for a rule to show cause alleging, *inter alia*, that Edward owed at least \$60,250 in unpaid child support for Lesley and Anthony who, at that point, were both emancipated. On March 18, 2009, Barbara filed an amended petition for a rule to show cause, which consisted of six separate counts. Count I alleged that Edward owed \$39,929 in past-due child support for the period from September 1994 through June 2003. At the hearing on the petition a written stipulation between the parties was admitted into evidence. The stipulation indicates that: (1) the marital residence was sold on August 31; (2) \$250 every two weeks from September 1, 1994, through July 15, 2000, totals \$38,187.50; and (3) \$250 every two weeks from July 15, 2000, through August 15, 2003,¹ totals \$20,041.66. The parties further stipulated that "[f]rom September 1, 1994 through June, 2003, [Edward] paid [Barbara] *at least* \$17,571.00 in child

¹Although Lesley and Anthony became emancipated in July 2000 and August 2003, respectively, the precise significance of the fifteenth days of those months is not entirely clear.

support.” (Emphasis added.) However, according to a bystander’s report of the hearing on the petition, Barbara testified that Edward paid “*only* \$17,571.00” (emphasis added) in child support from September 1994 through August 2003. As noted, the trial court denied count I of the petition. The trial court concluded that Barbara failed to make a *prima facie* case. Barbara argues on appeal that the conclusion was error.

Although Edward has not filed an appellee's brief, the record and the issues raised on appeal are such that review of the merits is appropriate under *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

The function of a petition for a rule to show cause has been summarized as follows:

“A petition for a rule to show cause is the method for notifying the court that a court order may have been violated, and the petitioner requests a hearing on the issue. The petition for a rule to show cause and the rule to show cause operate together to inform the alleged contemnor of the allegations against her. The rule to show cause is the method by which the court brings the parties before it for a hearing. It also notifies the alleged contemnor of the time and place of the hearing. Thus, the petition for a rule to show cause initiates the contempt proceedings, but it does not establish that a violation of a court order has in fact occurred. The rule to show cause, issued by the court, is not a finding [that] a violation of a court order has occurred, but part of the process of notifying the alleged contemnor of the charges, and time and place of the hearing. At the hearing, the burden is on the petitioner to show a violation of a court order has occurred. Once this showing has been made, the burden shifts to the alleged contemnor to show the violation was not wilful.” *In re Marriage of LaTour*, 241 Ill. App. 3d 500, 508 (1993).

As noted, the trial court denied count I of Barbara's petition on the ground that Barbara failed to establish a *prima facie* case. This ruling was erroneous. We note that the marital settlement agreement provides that "[c]hild support shall abate on a child's emancipation," but does not specify the extent to which child support should have been reduced upon the emancipation of the parties' older child. It is clear, however, that Edward was obligated to pay Barbara \$250 every two weeks at least until the older child became emancipated. The parties stipulated that the total child support due for that period was \$38,187.50. Barbara provided uncontroverted testimony that Edward paid only \$17,571 in child support. Thus, the record establishes that Edward owes over \$20,000 in past-due child support. Although "[t]he power to enforce an order to pay money through contempt is limited to cases of wilful refusal to obey the court's order" (*In re Marriage of Logston*, 103 Ill. 2d 266, 285 (1984)), a parent's failure to pay support ordered by the court is *prima facie* evidence of indirect, civil contempt, and the parent bears the burden of showing that the failure to pay was not willful. *In re Marriage of Baumgartner*, 384 Ill. App. 3d 39, 62 (2008).

The record here shows that Edward did not pay all child support due under the judgment dissolving the parties' marriage. Thus, the record establishes a *prima facie* case of contempt, and the trial court should have ordered Edward to show cause why he should not be held in contempt. Because the trial court erroneously ruled that Barbara failed to establish a *prima facie* case, Edward was not called upon to rebut the *prima facie* showing with evidence that his failure to pay was not willful. Accordingly, we remand the case to the trial court so that Edward may have the opportunity to do so.

Barbara also argues that Edward should be ordered to pay the attorney fees she incurred in enforcing his child support obligation. See 750 ILCS 5/508(a)(2) (West 2008). Until such time as

Edward is found to be in contempt, an award of attorney fees would be premature. The matter should be determined by the trial court on remand.

For the foregoing reasons, we reverse the order of the circuit court of Lake County denying count I of Barbara's petition for a rule to show cause and remand for further proceedings in accordance with this order. We affirm the trial court's disposition of the remaining counts of the petition for a rule to show cause.

Affirmed in part and reversed in part; cause remanded.