2013 IL App (2d) 120989-U
No. 2-12-0989
Order filed September 27, 2013

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF	)	Appeal from the Circuit Court
CHARLES F.G. KUYK, III,	)	of Kane County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 08-D-1179
	)	
KIMBERLY L. KUYK n/k/a	)	Honorable
Kimberly L. Larson,	)	Robert B. Spence,
	)	Kevin T. Busch,
Respondent-Appellee.	)	Judges, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Burke and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly interpreted and applied Article 2.2 of the Marital Settlement Agreement, and it properly determined the amount of maintenance respondent was entitled to receive. The trial court's determination of petitioner's maintenance arrearage was not against the manifest weight of the evidence, and the trial court's imposition of attorney fees pursuant to section 508(b) of the Illinois Marriage and Dissolution of Marriage Act was not an abuse of discretion. We affirmed the judgment of the trial court.

¶ 2 In this post-decree matter, petitioner, Charles F.G. Kuyk, III, appeals from the trial court's order finding him in arrears of his maintenance obligation to respondent, Kimberly L. Kuyk, n/k/a

Kimberly L. Larson, and awarding attorney fees to respondent's counsel. Respondent had filed a petition for rule to show cause based on petitioner's purported failure to comply with the terms of their Marital Settlement Agreement (the Agreement). After a hearing, the trial court declined to issue a rule to show cause, but in interpreting the Agreement found respondent $61,476 in arrears of his maintenance obligation to respondent; the trial court also granted respondent's petition for attorney fees pursuant to section 508(b) of the Illinois Marriage and Dissolution of Marriage Act (the Act) 750 ILCS 5/508(b) (West 2010)). Petitioner contends that the trial court erred in its interpretation of the Agreement and abused its discretion in awarding attorney fees to respondent. We affirm.

¶ 3 On April 22, 2009, the petitioner and his counsel appeared before the trial court, and the trial court granted respondent's counsel's motion to withdraw from representation. The trial court immediately proceeded to a prove-up hearing, wherein it questioned petitioner's counsel regarding the terms of the Agreement. The record reflects that the trial court thereafter issued a judgment for dissolution of marriage to the parties. In the judgment, the trial court incorporated the Agreement, which contained a provision relating to maintenance for respondent. Article 2.2 of the Agreement provided:

> "[Petitioner] shall pay [respondent] maintenance in the sum of $6,200.00 per month for a period of 60 months at which time the maintenance shall be reviewable upon the filing of a petition prior to the termination of the maintenance. In addition, [petitioner] shall pay [respondent] 25% of his annual balance of profits received from Crowe Horwath as and for additional maintenance. These amounts, coupled with the income from income producing

assets/pension described in § 4.6, below, will provide income to [respondent] in the approximate amount of $152,700 per year."

¶ 4 In April 2010, the trial court entered an agreed order, which clarified the terms and conditions of the Agreement pertaining to the parties' retirement accounts and pension plans. With respect to these provisions, the trial court expressed:

> "The amounts being paid by [petitioner] to [respondent] pursuant to the terms and conditions of this Order do not constitute maintenance but are, in fact, property settlement previously assigned to [respondent] pursuant to the terms and conditions of the parties' written Marital Settlement Agreement incorporated into the Judgment of Dissolution of Marriage in this cause entered on April 22, 2009. This Court retains continuing jurisdiction over the parties and the subject matter of this Order for purposes of entering such orders as this Court deems just and appropriate so as to facilitate a 50/50 division between [petitioner] and [respondent] of the financial benefits/payments paid to [petitioner] as a result of his interests in both the PricewaterhouseCoopers Partner Retirement Pension Plan and the Capital Account Plan for purposes of insuring that each party receives their 50% property interest therein."

¶ 5 Thereafter, in May 2012, respondent filed a petition for order to show cause against petitioner, alleging that he had failed to comply with Article 2.2 of the Agreement. In support of her petition, respondent alleged that, as reflected in Article 2.2, the parties "made a deal *** to ensure that [respondent] would receive $152,700.00 per year." Respondent further alleged that petitioner obligated himself for at least 60 months "to ensure that he would pay maintenance to [respondent]

representing the difference between $152,700.00 per year and the gross amount that [respondent] received as a result of the income producing assets described in paragraph 4.6" of the Agreement.

¶ 6 Petitioner filed an answer to respondent's petition and an objection to an issuance of an order to show cause, denying the material allegations and stating that the Agreement speaks for itself. Petitioner further affirmatively stated that Article 2.2 was not a "guarantee" that respondent would received $152,700 of income per year and that he made no "deal" with respondent to ensure that respondent would receive $152,700 per year. The trial court entered a family court order to show cause, and the matter proceeded to a hearing in July 2012.

¶ 7 Respondent also filed a petition for attorney fees and costs pursuant to section 508(a) of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/508(a) (West 2010)). Respondent alleged that the Agreement provided that petitioner "guaranteed" maintenance to her of $152,700 per year. Respondent alleged that petitioner has "bombarded" her and her counsel with pleadings and discovery requests. Respondent alleged that petitioner has the ability to pay attorney fees and that she could not continue to utilize her marital estate to pay her attorney fees and costs. Petitioner filed a response, denying the material allegations.

¶ 8 On July 24, 2012, the trial court conducted a hearing. Petitioner testified as an adverse witness. Petitioner admitted that his total taxable income for 2009 was $566,819; for 2010 was $590,220; and for 2011 was in excess of $300,000. Petitioner admitted that he paid respondent $129,647 in both years 2010 and 2011. Petitioner agreed that he had the ability to pay respondent $152,700 on an annual basis since the April 2009 judgment of dissolution was entered.

¶ 9 On direct, petitioner testified that he did not pay her any profit distributions in 2010 and 2011 because he did not receive any from his employment at Crowe Horwath. The trial court inquired

further regarding the profit distributions, and petitioner explained that the firm closes its books every March 31 and then settles up with its partners and makes a final distribution in June. Petitioner testified that only partners are entitled to receive profit distributions, and he was demoted from full equity partner to employee during the second or third week of March in 2009. Petitioner agreed that he learned of the demotion before April 22, 2009, when the trial court issued the judgment of dissolution, which had incorporated the Agreement into it. Petitioner testified that he did not know about the demotion in February 2009 when he initially entered into the Agreement. Petitioner testified that he notified respondent by email on approximately March 26, 2009, that he would not be receiving the profit distributions.

¶ 10 As an adverse witness again, petitioner agreed that the Agreement reflected that respondent would receive $152,700 from him. Petitioner acknowledged he was present at the prove-up hearing but could not recall whether he informed the trial court of his demotion. Petitioner could not recall whether the transcript from the prove-up hearing reflected that he would suffer the loss of any benefits.

¶ 11 Respondent testified that she had not received $152,700 annually from petitioner since 2009 and calculated his arrearage at $76,018.52. Respondent testified that, beginning in May 2009, she began receiving $6,200 per month from petitioner, but could not recall whether she received any funds from April 22 to May 1, 2009.

¶ 12 On cross-examination, respondent agreed that she believed Article 2.2 of the Agreement guaranteed her income of $152,700 per year. Respondent agreed that one component of the Agreement called for maintenance of $6,200 per month, or $74,400 annually. Respondent agreed that the second component called for 25% of petitioner's annual profit distribution. Respondent

agreed that the third component referenced Article 4.6 in the Agreement and called for a portion of petitioner's pension and capital account payments.

¶ 13 Respondent further agreed that petitioner was a partner at Crowe Horwath at the time the Agreement was entered into on February 23, 2009. Respondent denied that she set the profit distribution component and explained that she did not draft the document. Respondent testified that she was not aware of petitioner's demotion prior to the April 2009 prove-up hearing. Respondent acknowledged that she was not formally represented by counsel when she signed the February 23, 2009, Agreement. Respondent believed that beginning in April 2009, she was to receive approximately $152,000 per year, but she acknowledged that she did not file a petition for contempt until May 11, 2012. Respondent acknowledged that the word "ensure" was not contained in Article 2.2 of the Agreement.

¶ 14 At the close of respondent's case, respondent orally moved for a finding of contempt. Following argument by the parties, the trial court presented its impressions. The trial court indicated that the withdrawal of representation by respondent's counsel was not relevant to understanding the intent of the parties prior to signing the Agreement. The trial court reasoned that, if the agreement could be subject to more than one meaning, it would construe it against the drafter. The trial court further stated, in relevant part:

> "[Respondent's] understanding all along was she was to receive the 152,700, had she or her lawyer been present [at the prove-up hearing], at least the revelation on the record that [petitioner] was no longer a partner and was now a director would have raised some questions as to the viability of that provision.

That may not be critical, because I believe, based on what I've heard so far, that [petitioner] did inform [respondent] prior to the prove-up that he had been demoted. His testimony on that issue seems much more clear and credible. But that doesn't alter what their intent was, nor did he make or take any steps to modify that provision as it was written.

The Court has to give intent or meaning to the language utilized. That is, language is there for a purpose. And although [petitioner] has seized on the word approximate, if it wasn't the intent of the parties that [respondent] were to receive 152,700 a year, there would be no purpose served in even including that language.

I believe the parties negotiated a settlement where [petitioner] intended to pay and [respondent] intended to receive approximately 152,700 a year, give or take a few dollars. And while they may have agreed that these payments would be tied to the receipt and to a certain degree the calculation of his profit sharing distribution, which instead of coming monthly, came annually, it was still their intent that he pay it.

***

While I do not believe that [petitioner] thought that merely losing his capital distributions annually relieved him of his duty to come up with the balance, it is clear the parties at least operated that way for a period of years.

And I do not believe under the equities in this case it would be appropriate to find [petitioner] in contempt of court, but that doesn't alter the Court's opinion that [respondent] is entitled to enforce the provision. I think she is. And I believe the provision provides for the payment.

So insomuch as the motion for directed finding seeks to strike that part of the petition that seeks to either incarcerate or set a purge or other punishment under the powers of contempt, the motion is granted.

Insomuch as the petition for rule is seeking to enforce a court order that otherwise maybe was unclear or maybe the parties allowed to lie is denied, because I believe that you can only read the agreement to suggest that it was the intent that she receive those amounts. Otherwise, the parties would have put the language somewhere else, and you have to give meaning to language that is used."

¶ 15 Petitioner requested the trial court to reserve its final ruling so he could present evidence on his own behalf. The trial court thus took the matter under advisement and continued the hearing.

¶ 16 On August 10, 2012, the hearing resumed. Petitioner testified on his own behalf. Petitioner identified the Agreement and testified that he executed the Agreement on February 23, 2009. At that time he was a full equity partner at Crowe Horwath, and his compensation included monthly draws and an annual profit distribution. Petitioner was demoted in mid-March to a director position and no longer received a profit distribution. The dissolution was finalized on April 22, 2009.

¶ 17 Petitioner testified that he telephoned respondent and notified her of his demotion on or about March 26, 2009. Petitioner testified that he did not believe the Agreement needed to be modified. Petitioner testified that he derived the $152,700 figure from his own calculation, but that he did not expect respondent to "actually receive exactly $152,000 in any year" or construe it as a "guarantee to pay" respondent $152,700.

¶ 18 On cross-examination, petitioner acknowledged that he never explicitly stated to respondent that he was demoted and that, as a result of the demotion, she was not going to receive $152,700 per

year. Petitioner acknowledged that respondent's former attorney was physically present in the courtroom during the prove-up hearing, but did not believe the former attorney participated in the prove-up. Petitioner admitted that he never informed the judge at the prove-up hearing that he had been demoted and would receive less income.

¶ 19 The trial court examined petitioner and asked why he did not inform the judge at the prove-up hearing that he would no longer be making payments to respondent from his annual profit distribution. Petitioner responded that he "just didn't know it was necessary to do that." The trial court asked petitioner why he put the $152,700 maintenance figure in the Agreement, and petitioner responded that the amount was a hypothetical demonstration. Petitioner testified that its purpose was to give respondent "an idea for her benefit of what she could [expect], *** if all things were to remain the same." Petitioner acknowledged that he did not use estimates in other locations of the Agreement as to what her share of his pension distributions were going to be.

¶ 20 At the conclusion of the hearing, the parties presented their arguments, and the trial court ruled as follows:

> "One thing is clear. Regardless of the potential different interpretations that could be applied to Article 2 of the *** agreement, the parties' intent at the time of executing the agreement was that [respondent] receive approximately $152,000 in maintenance.
>
> *** [C]learly that's what they contracted for. That's what they believed was going to happen, and they provided a mechanism under which it was purported to happen.
>
> While [respondent] was represented during the negotiation, she was not represented at the time the document was executed, *** her lawyer did not participate in the prove-up

and specifically sought leave orally to withdraw and was granted leave to withdraw literally moments before the prove-up began.

While [respondent] was notified of the change in employment status prior to the prove-up, the evidence is clear she had little opportunity to do anything about it ***. For whatever reason, her lawyer abandoned her at the prove-up hearing.

The testimony that was presented at the prove-up hearing on the relevant issues as it relates to maintenance on page 6 of the prove-up transcript *** discussing maintenance, and the only time the word maintenance was used was in this colloquy.

* * *

No other place in the prove-up transcript *** relat[ed] specifically to maintenance. Although the agreement *** clearly indicated that maintenance had several components, *** there would be no reason to put those paragraphs in Article 2 if there wasn't an intent that they be treated as maintenance. ***

***

And when [petitioner] was demoted, he understood something that [respondent] did not understand, and that [the judge presiding at the prove-up hearing] was never given the opportunity to understand. And that is, at least from the standpoint of Paragraph 2.2, there was not going to be a flow of annual balance of profits received.

[Petitioner's] testimony today repeatedly stating his position that hey, no need to modify the agreement because 25 percent of nothing is nothing undermines his position and bolsters [respondent's] position that he desperately did not want to see this agreement fall apart, and he is now grasping at straws to try to figure out how this agreement makes sense.

> *** [T]he parties put the language in their agreement, and I have to give intent to the language of their agreement. And yes, it may be that his true obligation fluctuates, but yes, I do believe that the court can read a minimum into the agreement or at least an intended minimum."

¶ 21 The trial court declined to find petitioner committed a willful violation and declined to hold him in contempt. The trial court, however, did find that petitioner's failure to account for the additional amount of maintenance was without compelling cause or justification. The trial court noted that petitioner stipulated that he had the ability to pay. The trial court determined the maintenance arrearage for 2010 was $27,353 for 2011 was $27,353; and for 2012 was $18,235; however, the trial court awarded only the amount requested by respondent in her closing argument, which was $61,476. The trial court concluded:

> "And I think for those reasons, the court can find that the judgment requiring payment of that amount is enforceable against [petitioner], that the arrearage pointed out for the years 2010, 2011, and a portion of 2012 in the amount of $61,476 is appropriate, and [respondent's counsel] is entitled to 508(b) fees as a result of having to bring these proceedings."

¶ 22 On August 13, 2012, the trial court issued a written order and incorporated its prior findings into the order. The trial court ordered petitioner to pay respondent the $61,476 arrearage on or before December 31, 2012; found that petitioner's failure to pay did not constitute a willful violation and declined to hold him in contempt of court; but found petitioner's failure to pay was without just cause and granted respondent's counsel leave to file a petition for attorney fees pursuant to section 508(b) of the Act. On September 6, 2012, the trial court entered an order setting the attorney fees to be paid. Petitioner filed a timely notice of appeal.

¶ 23 Petitioner first contends that the trial court's interpretation of the Agreement was erroneous and contrary to the plain language of Article 2.2. Petitioner argues that the trial court, without any legal authority, rewrote the terms and improperly entered a retroactive maintenance award for respondent. Petitioner argues that the language in Article 2.2 "specifically and clearly dictated the specific dollar amounts he was required to pay [respondent], along with a percentage of profit distribution and with an estimate of what [respondent] could have expected as her annual income based upon historical information that the parties had at the time the [Agreement] was executed." Petitioner asserts that the word "approximate" supports his interpretation that the $152,700 was not a "guarantee, but [was] merely an estimation of what [respondent] might receive on a yearly basis income from all three sources (*i.e.*, fixed monthly maintenance, variable profit distributions, and fixed retirement benefits) based upon [his] former position as an equity partner with Crowe Horwath."

¶ 24 Petitioner's first issue challenges the trial court's interpretation and effect of the parties' Agreement, which was incorporated into the dissolution judgment, as it relates to whether the parties intended that petitioner pay, and respondent receive, approximately $152,700 of maintenance per year. As noted by our supreme court in *In re Marriage of Coulter*, 2012 IL 113474, ¶ 19, "[a] [joint parenting agreement], like a marital settlement agreement ***, is a contract between the parties and, as such, a court's primary objective is to give effect to the intent of the parties, which must be determined only by the language of the agreement, absent an ambiguity." This issue presents a question of law that we review *de novo*. *Id.*

¶ 25 In this case, the trial court properly interpreted Article 2.2 of the Agreement. "We consider the instrument as a whole and presume that the parties included each provision deliberately and for

a purpose." *In re Marriage of Turrell*, 335 Ill. App. 3d 297, 305 (2002). Petitioner's maintenance obligation totaled an "approximate" amount of $152,700 per year. Using "approximate" reflects an acknowledgment and understanding that the amount of maintenance would be reasonably close to $152,700 per year. See *In re Marriage of Bohnsack*, 2012 IL App (2d) 110250, ¶ 9 (giving an agreement's terms their plain and ordinary meaning); *People v. Harper*, 135 Ill. App. 3d 846, 849 (1985) (citing *Webster's Dictionary* to define "approximately" as "reasonably close to; nearly, almost, about"). Further, the trial court properly interpreted Article 2.2 in its entirety when it determined that petitioner's demotion as a partner did not absolve him of the duty to fulfill his annual maintenance obligation of approximately $152,700. See *Turrell*, 335 Ill. App. 3d at 305.

¶ 26 In determining that the trial court properly interpreted Article 2.2 of the Agreement, we note that neither party claims that the provision was ambiguous. See *In re Marriage of Culp*, 399 Ill. App. 3d 542, 547 (2010) (stating that "[a]n agreement is unambiguous when it contains language susceptible to only one reasonable interpretation"). However, "[l]anguage is not ambiguous merely because the parties do not agree on its meaning." *Id.* at 547. As it pertained to the petitioner's version of the maintenance provision, the trial court reflected on petitioner's lack of candor to respondent following his demotion and to the judge presiding at the prove-up hearing and even commented that petitioner was "grasping at straws to try to figure out how this agreement makes sense." Contrary to petitioner's assertion, the trial court did not rewrite the terms of the agreement; it simply rejected petitioner's interpretation of the Article's meaning. See *In re Marriage of Sweders*, 296 Ill. App. 3d 919, 923 (1998) (declining to read the marital settlement agreement as proposed by the wife because it would produce "an unusual, unreasonable, absurd, and inequitable result"). Accordingly, we conclude that the trial court properly determined that Article 2.2 of the

Agreement provided for petitioner to pay, and for respondent to receive, approximately $152,700 per year for maintenance.

¶ 27 As part of this issue, petitioner challenges the trial court's determination of the maintenance arrearage. Petitioner contends that the trial court's finding that he was $61,476 in maintenance arrears was against the manifest weight of the evidence. In support of his contention, petitioner presents an argument to this court that the "trial court's findings relative to the parties' understanding of the [Agreement] was somewhat confusing ***." Petitioner repeats his argument that the trial court inserted language into the Agreement and then paraphrases, without citation to the record, "that the trial court generally agreed that [petitioner] would never have to pay more than $152,700.00 per year to [respondent]." Petitioner maintains that, "based upon the payments [respondent] has received, and the clear and plain language of the parties' [Agreement], there is no maintenance arrearage." Respondent counters first, that petitioner has failed to cite authority for his contention and, as a result, has forfeited review of the issue; second, that the trial court's determination of the arrearage was not against the manifest weight of the evidence.

¶ 28 Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) provides that arguments "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." An appellant's failure to do so warrants forfeiture of that issue for appellate review. See *In re Marriage of Vondra*, 2013 IL App (1st) 123025, ¶ 13. That being said, waiver is a limitation on the parties and not the courts. *In re Marriage of Sutton*, 136 Ill. 2d 441, 446 (1990). We have reviewed petitioner's brief and reply brief, and although petitioner did not cite to supporting legal authority in this particular section of his appellate brief and cited only three times to the record, he did include authority as part of his standard of review. We decline to

find that petitioner has forfeited review of the arrearage issue; however, we will affirm it in summary fashion.

¶ 29 We have already determined that the trial court properly interpreted Article 2.2 of the Agreement when it provided for petitioner to pay, and for respondent to receive, approximately $152,700 per year for maintenance. We have reviewed the trial court's rulings with respect to the maintenance issue, and we found nothing confusing or inconsistent. The trial court heard evidence reflecting the amount of maintenance petitioner had paid to respondent for the years 2009, 2010, 2011, and a portion of 2012. With that evidence, the trial court determined that petitioner was $61,476 in maintenance arrears. Petitioner does not challenge the trial court's mathematical calculation. See *In re Marriage of Ackerley*, 333 Ill. App. 3d 382, 392-94 (2002) (reviewing the trial court's mathematical calculation of an arrearage). Accordingly, we conclude the trial court's determination of arrearage was not against the manifest weight of the evidence. See *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 44.

¶ 30 Petitioner's second contention is that the trial court erred when it ordered him to pay respondent's attorney fees pursuant to section 508(b) of the Act. In support of this contention, petitioner again resorts to the trial court's interpretation of Article 2.2 of the Agreement. Respondent counters that petitioner has forfeited this issue for review for his failure to comply with Rule 341(h)(7). We have reviewed the briefs, and again, decline to impose forfeiture; but we will again affirm the award of attorney fees in summary fashion.

¶ 31 Section 508(b) of the Act provides, in pertinent part:

> "In every proceeding for the enforcement of an order or judgment 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 costs and reasonable attorney's fees of the prevailing party." 750 ILCS 5/508(b) (West 2010).

¶ 32 In considering whether to grant a motion for attorney fees pursuant to section 508(b), the trial court has discretion in determining whether the nonmovant's alleged noncompliance was justified or unjustified. *In re Marriage of Berto*, 344 Ill. App. 3d 705, 716 (2003). Accordingly, we review a trial court's findings regarding justification for abuse of discretion. However, if the trial court finds that the nonmovant did not comply with a court order and that the noncompliance was without compelling cause or justification, the language of the Act mandates that the court award attorney fees to the movant. *Id.* A finding of contempt, such as that produced by a rule to show cause proceeding, "is sufficient to require an award of fees under section 508(b), but such a finding is not necessary." *Id.* at 717. Once the movant demonstrates that the nonmovant has not complied with a court order, the burden of showing that the noncompliance was justified is on the nonmovant. *Id.*

¶ 33 In the present case, we conclude no abuse of the trial court's discretion occurred. The trial court found that petitioner had stipulated to his ability to pay and that petitioner's failure to account for the additional amount of maintenance was without compelling cause or justification. This was sufficient for the trial court to require an award of fees. See *Id.* Accordingly, we hold no abuse of the trial court's discretion occurred.

¶ 34 For the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

¶ 35 Affirmed.