

2013 IL App (2d) 121221-U
No. 2-12-1221
Order filed June 6, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
RENEE M. LEFEVRE-ROWLEY,)	of Kane County.
)	
Petitioner-Appellee,)	
)	
and)	No. 06-DK-175
)	
STEVEN M. ROWLEY,)	Honorable
)	Robert P. Pilmer,
Respondent-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* Respondent's motion to reconsider the court's earlier order dismissing the appeal from the contempt order was denied; petitioner's motion to dismiss for alleged violations of Rule 341 and Rule 342 was denied; where the trial court made no written or oral findings in ruling on respondent's petition to modify child support and educational expenses, this court vacated the order of July 11, 2012, in part and remanded for the trial court to make specific findings.

¶ 2 Respondent, Steven M. Rowley, appeals from three orders entered by the circuit court of Kane County on July 11, 2012, September 5, 2012, and October 17, 2012. The July 11, 2012, order denied respondent's petition to modify child support and college expenses and held respondent in

indirect civil contempt for his failure to pay support. The September 5, 2012, order granted petitioner's, Renee M. Lefevre-Rowley's, posttrial motion directed at the contempt finding and made the contempt finding immediately appealable. The October 17, 2012, order granted petitioner's petition for attorney fees arising out of the contempt. For the reasons that follow, we vacate in part the July 11, 2012, order and remand.

¶ 3

BACKGROUND

¶ 4 The parties were married on December 29, 1984, and have two children born to the marriage, Hannah Rose, born May 14, 1992, and Sarah Catherine, born January 25, 1999. A judgment of divorce was entered by the circuit court of Waukesha County, Wisconsin, on March 26, 2004, which incorporated the parties' marital settlement agreement. The marital settlement agreement provided for, *inter alia*, college expenses. On March 13, 2006, the judgment was enrolled in the circuit court of Kane County, Illinois, upon petitioner's petition.¹ Petitioner and the children were then residing in Kane County. Respondent at all times has resided in Waukesha, Wisconsin. On January 23, 2007, the Wisconsin court relinquished jurisdiction.

¶ 5 On February 9, 2007, the trial court (Kane County) ordered respondent to pay \$282.21 per week as child support for the two children. On June 3, 2009, that amount was reduced to \$102 per week because respondent had been laid off from his job as an architect in February 2009. The sum of \$102 per week was based on the amount of unemployment benefits respondent was receiving. In addition to \$102 in child support, respondent was ordered to pay \$90 per week toward the

¹Because Renee petitioned for enrollment of the judgment, we will refer to her as petitioner and to Steven as respondent, although the parties' designations were reversed in the original Wisconsin divorce proceeding.

children's uncovered medical expenses and insurance premiums. On July 13, 2010, respondent moved to modify child support on the basis that Hannah had turned 18. On October 28, 2010, the parties entered into an agreed order in which respondent agreed to pay \$5,246 toward Hannah's 2010-2011 college expenses and to pay \$102 per week in child support for Sarah. The contributions toward uncovered medical expenses and insurance premiums remained the same.

¶ 6 In December 2010, respondent's unemployment benefits terminated. Respondent had been unsuccessful in his efforts to locate work, even outside his field. When a series of odd jobs ended, respondent petitioned on July 27, 2011, to modify child support and college expenses on the basis that he had no source of income. Petitioner filed a petition for a rule to show cause, alleging that respondent had wilfully refused to pay court ordered child support. Trial on the petition to modify and the petition for a rule commenced on May 22, 2012.

¶ 7 Respondent, age 51, testified that he was currently married to Marianne, and they had no children together. Respondent testified that, after his unemployment benefits ceased and he had no income, he paid support from a home equity line of credit and then from a loan he obtained from his father. According to respondent, he had no further ability to borrow from his father. In January 2010, respondent renovated two properties his father owned. Respondent testified that his father paid him \$25 per hour and agreed to pay respondent when the houses sold. When the houses did not sell, respondent's father paid respondent approximately \$3,500 in the same increments as the unemployment benefits respondent had received, approximately \$300 per week. According to respondent, Marianne's salary of approximately \$25,000 per year was insufficient to pay the bills, so they lived off of the home equity line of credit. During this period, respondent continued to pay support.

¶ 8 In July, August, and September of 2011, respondent was hospitalized a total of 30 days for an “emotional or a mental breakdown.” Respondent testified that when he was out of the hospital, he functioned very poorly. He described struggling getting around the house and feeding himself. He was prescribed medication that made him shaky and unable to sleep. Respondent testified that he currently was on lithium. In addition to medication, respondent attended therapy sessions. At the time of trial, respondent was still under psychiatric care.

¶ 9 Respondent testified that his health insurance did not pay for about \$15,000 of his mental health care treatment. In order to pay for the treatment, respondent took money from the 401(k) plan he had established with his former employer. In July 2011, when respondent went into the hospital, he had no source of income and stopped making support payments in August 2011.

¶ 10 Respondent testified that he resumed looking for work in early September 2011. He testified that he was looking for “pretty much anything [he] could find” all over the United States. Since being laid off, respondent had between 5 and 10 job interviews, but no job offers had materialized. At Christmastime 2011, respondent worked for free as part of his therapy in his brother-in-law’s grocery store for four days. Respondent also applied for social security disability benefits but was denied. Respondent testified that he worked for a friend in 2012 doing carpentry and home remodeling for which he was paid \$25 an hour. According to respondent, every time he received a check, he sent petitioner a support payment.

¶ 11 Respondent testified that in September 2010 his 401(k) plan had a balance of approximately \$74,000. On January 25, 2012, respondent took the balance, which was then \$81,913, and opened an IRA at Harris Bank. Respondent testified that he withdrew \$25,000 from the IRA on February 6, 2012, and used the money to pay his medical bills and his attorney, leaving about \$55,000 in the

account. According to respondent, both his doctors and his attorney had to be paid or they would quit treating and representing him. Respondent testified that he had no other investment accounts or assets. When asked why he did not use the remaining money to pay support, respondent testified that he did not feel that he should have to deplete “every dime” to pay for Hannah’s college expenses. Respondent testified that he did not go further into debt to pay for Hannah’s college, because “[e]verything is going to run out very soon.”

¶ 12 Respondent testified that his house in Waukesha was worth between \$210,000 and \$230,000, and that it was encumbered with a \$128,000 first mortgage and an \$80,000 second mortgage. Respondent had a rental house in Oconomowoc, Wisconsin, on which he owed more than the house was worth and was unable to sell it.

¶ 13 Respondent testified that his contribution to the children’s health insurance was \$274 month. In addition, petitioner was asking him to pay \$3,000 toward Sarah’s braces. Uncovered medical expenses for the children ran approximately \$2,000 per year. Respondent testified that all told, with Hannah’s college, the average he was required to pay per year was \$15,000. He testified that he had no way to pay that. On cross-examination, respondent admitted that he had the ability to comply with the support orders, but that the money would have to come from his retirement fund, “the last money I have on earth.” Respondent agreed with petitioner’s counsel that, as a matter of priority, respondent decided not to pay for Hannah’s college expenses and have nothing left.

¶ 14 Exhibits in evidence showed that respondent’s income in 2008 was \$65,861.81. In 2009, respondent received \$13,125.91 as a severance package from his former employer and \$15,848 in unemployment benefits for a total income of \$28,973.91. In 2010, respondent’s income from unemployment benefits was \$20,126. In 2011, respondent’s income from odd jobs was \$3,506.

According to a financial disclosure statement dated May 22, 2012, respondent's monthly expenses were \$3,855 and his total monthly net income from all sources was \$750.

¶ 15 Petitioner testified that she was a teacher in the Geneva school district and made \$50,000 annually. She and the children lived in a mortgage-free home owned by her parents. She paid no rent, but she paid the utilities, maintenance, and association fees. Petitioner testified that her parents paid her legal fees. She said she did not know the amount of fees paid on her behalf, because she gave the bills to her parents without opening them. Petitioner admitted to owning three retirement plans worth approximately \$120,000. Petitioner testified that she had not withdrawn any money from her retirement accounts to pay Hannah's college expenses, but she said that she had drained her savings account to do so. Without Hannah's grants and scholarships, the cost per semester was \$16,000. With the grants, scholarships, and loans, the cost was \$5,000 per semester. According to petitioner, there was no less expensive school than the private St. Ambrose University in Iowa, where Hannah was attending, to which Hannah could transfer. Petitioner agreed with respondent's counsel that at some point a parent should not have to face financial peril to pay for a child's college education. She added that she did not believe that was the case here. Petitioner testified that she could not take out loans to help pay for Hannah's education, because she had no assets. Petitioner testified that her monthly expenses were \$3100 and her monthly net income was \$2,600. Petitioner agreed that, without the expense of Hannah's college, she would have a surplus every month. Petitioner did not agree that she and respondent could not afford to pay for Hannah's college.

¶ 16 On cross-examination, petitioner testified that Hannah's school advised that respondent should take out a "parent plus" loan, which respondent did not do. According to petitioner, the last time she received any support from respondent was in March 2012.

¶ 17 Without making any findings, the trial court denied respondent's petition to modify child support; denied respondent's request for modification of his contribution toward uncovered medical expenses; and granted respondent's request to modify his contribution toward the cost of the children's health insurance premiums. The trial court found that respondent had the ability to pay and found respondent in indirect civil contempt. The trial court then "expressly" did not find that respondent's failure to comply with the support orders was without compelling cause or justification. On July 11, 2012, the trial court entered a written order reflecting its judgment.

¶ 18 On July 19, 2012, petitioner filed a motion to reconsider, pointing out that the finding that respondent was in indirect civil contempt was inconsistent with the express failure to find that respondent's actions were without compelling cause or justification. On September 5, 2012, the trial court granted the motion to reconsider and modified the July 11, 2012, order to reflect that respondent's failure to comply was without compelling cause or justification. On September 14, 2012, petitioner filed a petition for attorney fees relating to the preparation and prosecution of her petition for a rule to show cause, which was granted on October 17, 2012. Respondent filed a notice of appeal on November 2, 2012.

¶ 19 ANALYSIS

¶ 20 Before we address the merits of this appeal, we need to dispose of two pending motions. The first is respondent's motion to reconsider our earlier dismissal of his appeal from the contempt order. Some additional procedural background is required. On March 14, 2013, petitioner filed a motion to dismiss the entire appeal for lack of jurisdiction. On April 10, 2012, a motion panel of this court granted the motion to dismiss in part and denied it in part. We granted the motion with respect to the appeal from that part of the July 11, 2012, order holding respondent in indirect civil contempt,

because the appeal was not taken within 30 days of the order of contempt. On May 2, 2013, respondent filed a motion to reconsider.

¶ 21 Illinois Supreme Court Rule 304(b)(5) (eff. Feb. 26, 2010) makes immediately appealable, despite the pendency of other matters, “[a]n order finding a person *** in contempt of court which imposes a monetary or other penalty.” Here, the trial court sentenced respondent to six months in the Kane County jail with a purge provision, although the sentence was stayed, giving respondent a chance to purge the contempt prior to being taken into custody. Therefore, the contempt order was immediately appealable. Rule 304(b) also provides that the time for filing the notice of appeal shall be as provided in Supreme Court Rule 303. Ill. S. Ct. R. 304(b) (eff. Feb. 26, 2010). Illinois Supreme Court Rule 303(a)(1) (eff. June 4, 2008) provides that the notice of appeal must be filed within 30 days after the entry of the final judgment appealed from, or, if a timely posttrial motion directed against the judgment is filed, then the notice of appeal must be filed within 30 days after the entry of the order disposing of the last pending postjudgment motion. Contempt citations along with all other orders falling within the scope of Rule 304(b) must be appealed within 30 days of their entry or be barred. *Revolution Portfolio, LLC v. Beale*, 341 Ill. App. 3d 1021, 1025 (2003). Here, respondent failed to appeal the contempt order within 30 days of September 5, 2012, which was the day the trial court disposed of the postjudgment motion directed at the judgment of contempt. Respondent’s motion to reconsider never mentions the time provision of Rule 304(b) but argues that respondent had the option to wait until all issues were rendered appealable. He did not have that option. Accordingly, the motion to reconsider is denied.

¶ 22 On September 5, 2012, the trial court granted petitioner’s motion to reconsider and modified paragraph 9 of the July 11, 2012, order to provide that respondent’s failure to pay support was

without compelling cause or justification. Petitioner then filed, on September 14, 2012, a petition for attorney fees pursuant to section 508(b) of the Act (750 ILCS 5/508(b) (West 2010)) relating to the preparation and prosecution of her petition for a rule to show cause that led to the contempt order. Under section 508(b), the court must enter an order requiring the party against whom the proceeding was brought to pay reasonable attorney fees when the court finds that the failure to comply with the support order was without cause or justification. *In re Marriage of Lavelle*, 206 Ill. App. 3d 607, 614 (1990). On October 17, 2012, the trial court in our case awarded fees in the sum of \$4,500 to petitioner. Respondent timely appealed from this order. However, respondent makes no argument related to the merits of the order granting attorney fees. His entire argument is as follows: “In the present case, if this court reverses the trial court’s finding of contempt, then this court should likewise reverse the trial court’s award of attorney fees because the fees were based upon the contempt finding.” In *Lavelle*, the appellate court reversed an award of section 508(b) attorney fees because it reversed the contempt order upon which the fee award was based (“Because we have found that respondent was justified in not making child support payments, we likewise find that the trial court erred in awarding attorney fees to petitioner.”) *Lavelle*, 206 Ill. App. 3d at 614. Here, we are not able to review the contempt order, and respondent makes no argument other than that he should not have been found in contempt as a reason to reverse the order granting fees. As respondent does not advance any other argument for reversing the order of October 17, 2012, we will not address the issue. See *In re Marriage of Petraitis*, 263 Ill. App. 3d 1022, 1037 (1993) (appellate court would not address issue included in notice of appeal but not briefed or argued.)

¶ 23 In her brief, petitioner questions why we have jurisdiction over the remainder of the appeal where a separate order of September 5, 2012, continued the case to November 9, 2012, for a status

hearing on respondent's job search. Petitioner posits that, if the pendency of petitioner's fee petition rendered the remaining issues not appealable until the ruling on the fee petition², then the pendency of the status date relating to respondent's job search, ought to have the same effect. We denied the motion to dismiss the appeal for lack of jurisdiction as to all issues except contempt, because the notice of appeal was timely filed as to those remaining issues—within 30 days of the order granting the petition for attorney fees. See *In re Marriage of Putzler*, 2013 IL App (2d) 120551, ¶ 25 (the respondent's notice of appeal was timely where it was filed within 30 days of when all pending claims were resolved.)

¶ 24 Our jurisdiction is limited to reviewing appeals from final judgments. *In re Marriage of Verdung*, 126 Ill. 2d 542, 553 (1989). A judgment is final for purposes of appeal if it determines the litigation on the merits or some definite part thereof so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment. *Verdung*, 126 Ill. 2d at 553. Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) provides that if multiple *claims* are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all *claims* only if the trial court makes an express written finding that there is no just reason to delay enforcement or appeal, or both. A *claim* is any right, liability, or matter raised in an action. *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 464 (1990). Without a Rule 304(a) finding, a final order disposing of fewer than all *claims* is not an appealable order and does not become appealable until all of the

²In petitioner's motion to dismiss the appeal for lack of jurisdiction, she cited cases from the first and third districts of the appellate court, which diverge from this district, on the question of whether postdissolution proceedings are separate claims and subject to Rule 304(a) findings. See our discussion in the body of the order.

claims are resolved. *Marsh*, 138 Ill. 2d at 464. This district, contrary to the first and third districts, holds that a postdissolution petition is a new *claim* within the original dissolution proceedings and is appealable, without a Rule 304(a) finding, only when all pending postjudgment motions or separate *claims* are resolved. *In re Marriage of Duggan*, 376 Ill. App. 3d 725, 734-45 (2007). Respondent's notice of appeal as to the remainder of the July 11, 2012, order would also have been due by October 5, 2012, but the pendency of the fee petition (a separate claim) rendered those issues nonappealable without a Rule 304(a) finding, which respondent did not obtain. For that reason, everything except the contempt was not appealable until the fee petition was resolved on October 17, 2012. Continuing the matter for status as to respondent's job search was not a *claim* within the meaning of Rule 304(a). Respondent was simply required to show to the court his good-faith efforts to find employment. Neither parties' rights or liabilities were to be adjudicated at the status hearing.

¶ 25 The second motion we must consider is petitioner's motion to dismiss the appeal for violations of Illinois Supreme Court Rules 341 and 342. Illinois Supreme Court Rule 341 (eff. Jul. 1, 2008) governs appellate briefs and represents our supreme court's considered opinion of the format that best facilitates the clear and orderly presentation of arguments. *Kerger v. Board of Trustees of Community College District No. 502*, 295 Ill. App. 3d 272, 275 (1997). Illinois Supreme Court Rule 342 (eff. Jan. 1, 2005) governs appendices to briefs. The motion is five pages in length and contains 18 alleged violations. We need not discuss in any detail the motion's allegations, as they are trivial. As an example, petitioner complains that the margins of respondent's brief are off by 1/4" and that the staples were not secure on the copy delivered to petitioner's attorney. Overall, the appendix is compliant with the rule. Striking an appellate brief, in whole or in part, is a harsh sanction and is appropriate only when the violations of procedural rules hinder our review. *Hall v.*

Naper Gold Hospitality LLC, 2012 IL App (2d) 111151, ¶ 15 (appellant's brief was stricken and appeal was dismissed where the jurisdictional statement and statement of facts were copied and pasted from an unrelated case; where the brief contained no standards of review; and where all arguments were forfeited due to violations of rules.) Here, the alleged infractions are picayune. Accordingly, the motion to dismiss is denied.

¶ 26 We turn now to the merits. Respondent argues that the trial court erred in denying his petition to modify child support and his contribution toward Hannah's college expenses. Section 510(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/510(a) (West 2010)) provides that a child support judgment can be modified only upon a showing of a substantial change in circumstances. *In re Marriage of Breitenfeldt*, 362 Ill. App. 3d 668, 673 (2005). College expenses are considered child support. *In re Marriage of Petersen*, 2011 IL 110984, ¶ 13. Generally, a parent's obligation to support his or her minor child begins at birth and continues only until the child attains majority. *In re Marriage of Holderrieth*, 181 Ill. App. 3d 199, 206 (1989). However, in cases of dissolution, section 513 of the Act authorizes a trial court to provide for the education of the child even after he or she reaches majority. *Holderrieth*, 181 Ill. App. 3d at 206.

¶ 27 Here, respondent assumes a change in circumstances and argues, first, that the trial court abused its discretion when it failed to adhere to the guidelines in section 505 of the Act (750 ILCS 5/505 (West 2010)) in setting child support, and, second, that the trial court's denial of his petition was against the manifest weight of the evidence. On the other hand, petitioner states that it is not clear whether the trial court found a change in circumstances and argues that respondent's withdrawal of \$25,000 from his IRA constituted income such that there was no substantial change in his circumstances, as child support had previously been calculated on his income of approximately \$20,000 a year in unemployment benefits.

¶ 28 The trial court made no oral or written findings, without which, we are unable to review the order of July 11, 2012. Thus, we vacate the order of July 11, 2012, except for that part of the order holding respondent in contempt (we have no jurisdiction over that part of the order), and we remand so that the trial court can make specific, explicit findings on the record. Upon remand, the trial court shall first find whether or not there was a substantial change in circumstances. If the trial court finds that there was no substantial change in circumstances, it shall deny the petition to modify. If the trial court finds that there was a substantial change in circumstances, it shall follow the procedure set forth in section 505(a) of the Act to calculate the amount of child support for Sarah. See *In re Marriage of McGrath*, 2012 IL 112792, ¶ 11. The trial court shall calculate respondent's net income and then set support at 20% of that net income, if appropriate. 750 ILCS 5/505(a)(1) (West 2010). If the trial court finds that a deviation from the guidelines is appropriate, the court shall consider the best interests of the child in light of evidence including but not limited to one or more of the relevant factors set forth in section 505(a)(2). 750 ILCS 5/505(a)(2) (West 2010); *McGrath*, 2012 IL 112792, ¶ 12. If the court deviates from the guidelines, the court's finding shall state the amount of support that would have been required under the guidelines, if determinable. 750 ILCS 5/505(a)(2)(a) to (e) (West 2010); *McGrath*, 2012 IL 112792, ¶ 12. The court shall then state the reason or reasons for the variance from the guidelines. 750 ILCS 5/505(a)(2)(a) to (e) (West 2010); *McGrath*, 2012 IL 112792, ¶ 12. In calculating respondent's net income, if the court finds that the amount respondent withdrew from his IRA was income, the court shall avoid double counting by determining what percentage of the IRA money was previously considered as income. See *In re Marriage of Lindman*, 356 Ill. App. 3d 462, 470 (2005).

¶ 29 Section 513 of the Act governs Hannah's college expenses. See 750 ILCS 5/513 (West 2010). The court may award sums of money out of the property and income of either or both parties,

as equity may require. 750 ILCS 5/513(a) (West 2010). In making an award, if any, the court shall consider those factors enumerated in section 513(b):

- (1) the financial resources of both parents;
- (2) the standard of living the child would have enjoyed had the marriage not been dissolved;
- (3) the financial resources of the child; and
- (4) the child's academic performance. 750 ILCS 5/513(b) (West 2010).

Upon remand, the trial court shall make findings with respect to the above factors or any other factors it considers.

¶ 30 That part of the order of July 11, 2012, denying respondent's petition to modify is vacated; cause remanded.