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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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<i>In re</i> MARRIAGE OF	)	Appeal from the Circuit Court
ROBERT M. BEEVERS,	)	of Lake County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 04-D-967
	)	
NANCY L. BEEVERS,	)	Honorable
	)	David P. Brodsky,
Respondent-Appellee.	)	Judge, Presiding.

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

**ORDER**

¶ 1 *Held:* (1) Robert forfeited any objections to alleged defects in notice of Nancy’s petition for rule to show cause; (2) the trial court made sufficient factual findings in its contempt order; (3) the trial court’s ruling that Robert was in contempt of a June 10, 2009, support order was not against the manifest weight of the evidence, nor did the record reflect an abuse of discretion; (4) there was sufficient evidence that Robert had the financial ability to pay the purge amount; and (5) the contempt order should have included a provision allowing Robert to immediately be released from jail upon paying the purge amount. We therefore affirmed as modified.

¶ 2 I. BACKGROUND

¶ 3 Petitioner, Robert M. Beevers, appeals from the trial court's order finding him in contempt for failing to pay all current and past-due support owed to respondent, Nancy L. Beevers, for the period of June 10, 2009, through August 7, 2012. The court found that Robert owed Nancy \$61,138.43; that Robert wilfully violated the June 10, 2009, support order, and that the violation was without cause or justification. The trial court sentenced Robert to 120 days in the Lake County jail, though it stayed the sentence for 60 days to allow Robert to pay Nancy the purge amount of \$45,168.75.

¶ 4 On appeal, Robert argues that: (1) he failed to receive proper notice of Nancy's petition for rule to show cause; (2) the trial court's order lacks sufficient factual findings; (3) the finding of contempt was against the manifest weight of the evidence; (4) the trial court erred in finding that he had the present ability to pay the purge amount; and (5) the purge provision is improper in that it does not state that he will be released from jail upon payment of the purge. We agree with just the last contention, and we therefore affirm as modified.

¶ 5 A. Prior Court Orders

¶ 6 The parties were married on March 16, 1986, and their marriage was dissolved on June 24, 2005. The dissolution judgment incorporated the parties' marital settlement agreement, which required that Robert pay Nancy unallocated maintenance and child support of \$15,000 per month.

¶ 7 On December 4, 2006, Nancy filed a petition for rule to show cause, alleging that Robert was in arrears on his support obligation. On June 6, 2007, the parties agreed to the entry of a judgment against Robert for unpaid support in the amount of \$275,000. The judgment further decreased Robert's support obligation to \$3,000 per month beginning on June 15, 2007.

¶ 8 On July 22, 2008, in connection with Nancy's petition for rule to show cause, the trial court entered an agreed order reducing Robert's maintenance obligation to \$1,500 per month and further ordering him to pay \$1,250 per month towards the support arrearage, which it found now totaled \$283,335.75.

¶ 9 On March 9, 2009, Robert filed a petition to modify maintenance. The trial court granted the motion on June 10, 2009. It reduced Robert's maintenance obligation to \$1,200 per month and set his monthly arrearage payments at \$1,250 per month.

¶ 10 On August 3, 2010, Robert filed a petition to terminate or abate maintenance payments due to incarceration and unemployment. He stated that he had been sentenced to four months' incarceration in a federal case, and he was therefore terminated from his employment effective that month. On August 10, 2010, the trial court entered an agreed order abating Robert's support obligations until January 13, 2011.

¶ 11 On August 17, 2011, Nancy filed a five-count petition for rule to show cause. In count I, the only count at issue in this appeal, Nancy sought a finding of indirect civil contempt against Robert. Nancy referenced the June 2007, July 2008, and August 2010 orders. She alleged that since January 13, 2011, Robert had failed to pay anything towards the support arrearage. She alleged, on information and belief, that Robert was a beneficiary of the Beevers Family Trust (Trust) and had the authority to satisfy all or a portion of the child support and maintenance arrears.

¶ 12 B. Hearing on Petition for Rule to Show Cause

¶ 13 A hearing on count I of the petition took place on August 7, 2012; we summarize the proceedings, as reflected in the parties' agreed bystander's report.<sup>1</sup> The parties stipulated that in

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<sup>1</sup>The bystander's report states that the hearing took place on August 8, 2012, but the trial

answering Nancy's petition for rule to show cause, Robert filed an answer to a petition that was noticed to him but not filed with the court; Robert did not answer the petition actually filed with the court.

¶ 14 The trial court stated that in Robert's response, he admitted that he had not paid support as ordered since June 2009 and had not paid anything since January 13, 2011. The trial court took judicial notice of the clerk's records regarding support. The trial court stated that based on the records and per statute, the burden shifted to Robert to prove that he had not willfully violated the court's orders.

¶ 15 Robert then testified as follows. He lived in Highland Park with his son, Charlie. Robert's girlfriend, Keely Knack, also lived with them. During the last year, Robert was employed for four or five months doing clerical work at a law firm. He earned a total of \$1,300 during this time. He had attempted to find a job when he was released from jail in January 2011, but it was difficult because he had a criminal record. In a couple of weeks Robert was going to begin working at a job he obtained through connections from his prior employment; he would be doing "business development" work. Robert would earn \$35,000 to \$36,000 per year.

¶ 16 Robert was not able to pay the past and current support due to Nancy because he was not employed and did not have any money. As soon as he began working again, he would immediately begin paying her.

¶ 17 Robert's 2010 tax return reflected a total income of \$59,578. His August 14, 2011, financial affidavit listed his gross income for the year, up to the date of the affidavit, as \$9,394. Robert

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court's order states that it took place on August 7, 2012, which also corresponds to the trial court's findings.

testified that this amount represented the reimbursement of business expenses. The affidavit listed his net monthly income as \$1,322. Robert's January 27, 2012, financial affidavit listed his net monthly income as \$215.12. It listed his gross income "from all sources last year" as \$1,279.25.

¶ 18 Robert was a beneficiary of the Trust. Robert did not know if he was able to direct the Trust to make certain payments on his behalf or make payments to Nancy. The trustees were Robert's sister and an attorney. He never inquired if he was able to receive disbursements under the Trust. Robert explained that he had no authority over the Trust and that since his release from prison, he had been trying to get a job and take care of Charlie.

¶ 19 The parties stipulated that an exhibit showed pages from the checking account register for the Trust's checking account. The balance on the checkbook was \$77,142.37 as of January 13, 2011. There were thereafter monthly entries of \$1,800 for payments to Robert's landlord. The Trust had also been paying thousands of dollars of Robert's attorney fees related to postdissolution proceedings, including fees paid in connection with the contempt proceeding. Robert agreed that there were many thousands of dollars of checks paid to Keely, which he said were reimbursement for when she paid expenses for Robert and Charlie. There was an entry for \$500 for a birthday gift for "Rachel." A deposit was made in August 2011 for \$15,000, which was described as a disbursement from the Trust. In October 2011, the Trust purchased a car for Robert costing \$22,705.57. The balance in the account at the end of 2011 was \$80,896. Robert agreed that in 2011 and 2012, the Trust paid his rent and personal living expenses. It also paid Charlie's living expenses; Nancy had moved out-of-state and no one else was supporting Charlie.

¶ 20 The parties stipulated that Robert had been convicted of embezzlement from an employee benefit plan and was incarcerated from August 16, 2010, to December 14, 2010.

¶ 21 Robert's counsel argued that the trial court could not consider the Trust's existence when considering Robert's ability to pay support because Robert had no control of the Trust or trustees. He further argued that under Illinois law, trust assets could not be applied to pay unallocated support and maintenance.

¶ 22 Nancy's counsel argued that the court could consider payments made from the Trust for Robert's benefit as income to him.

¶ 23 C. Trial Court's Findings

¶ 24 The court stated as follows:

“Since July, 2010, [Robert] paid nothing toward the court ordered maintenance. [Robert] cannot stick his head in the sand regarding the trust. During the period that he was making no payments, through the trust he was living a comfortable lifestyle in Highland Park. All of his living expenses were covered. The trust purchased a car for him. The trust paid attorney fees in conjunction with this action. All the while he paid nothing toward his Court ordered obligation which had been reduced significantly. He is intentionally not inquiring into his ability to utilize the trust to pay maintenance which is part of reasonable living expenses. On June 10, 2009, this court entered an order requiring Robert to pay to Nancy the sum of \$1,200 per month in current support and \$1,250 per month in arrears support. Payment of \$1,250 and \$1,200 is consistent with the current lifestyle he is living. Since the date of June 10, 2009, Robert should have paid Nancy the sum of \$93,100. For the period of June 10, 2009 through August 7, 2012, Robert paid the sum of \$31,961.57, leaving an arrearage owed by Robert to Nancy in the sum of \$61,138.43. Of that \$61,138.43, this Court finds that the portion of the sum designated to be “support arrears” owed by Robert

to Nancy from June 10, 2009 through August 7, 2012 is \$38,338.43. For the period of January 13, 2011 through August 7, 2012, Robert owes current support to Nancy in the sum of \$22,800. Robert willfully violated this Court's order in failing to pay current and arrearage support as ordered by this Court on June 10, 2009, and his violation is without cause or justification. Robert [is] in indirect civil contempt of court *instanter* for his failure to pay current and arrearage support as ordered by this Court on June 10, 2009. Robert is sentenced to the Lake County Jail for a period of 120 days. His sentence is stayed for a period of 60 days pending purge. Robert may purge his contempt by paying within 60 days of the entry of this order, the sum of \$45,16.75 to Nancy Beevers through her counsel. The purge is comprised of the following: support in the amount of \$28,000; section 508(b) attorney's fees in connection with these proceedings in the amount of \$12,268.75; and court ordered support for the months of September and October, 2012 in the amount of \$4,900. The Court did not take into account [Robert's] conviction in making this ruling."

The trial court's written order corresponded to these findings, though it did not mention the Trust in the order.

¶25 On September 7, 2012, Robert filed a motion to clarify and/or reconsider the contempt order. Robert requested that the trial court make factual findings to support its conclusion that he willfully violated the June 2009 order and set forth the case law it relied on. Robert further argued that the trial court should reconsider its order because to the extent that it concluded that Robert could authorize payments to Nancy from the Trust, its ruling was contrary to Illinois law, under which a Trust is a necessary party to the proceedings.

¶ 26 The trial court denied Robert’s motion on November 14, 2012. It stated as follows. The trial court order required no additional clarification. The trial court entered a coercive remedy, rather than a punitive remedy, which it found Robert had the ability to meet. It did not mention the Trust, and Robert was free to pay the purge “out of whatever sums he so desires.” The fact that Robert received income from a Trust did not insulate him from his duty to abide by court orders.

¶ 27 Robert timely appealed. This court granted Robert’s motion to stay enforcement of the trial court’s order, though we conditioned the stay on Robert posting an appeal bond of \$50,000 cash, which he did.

¶ 28 II. ANALYSIS

¶ 29 We briefly look at the nature of indirect civil contempt before turning to Robert’s specific allegations of error. Contempt occurring outside of the trial court’s presence is labeled as indirect contempt. *Bank of America, N.A. v. Freed*, 2012 IL App (1st) 113178, ¶ 20. Civil contempt is a sanction or penalty that seeks to coerce future compliance with a court order. *Felzak v. Hruby*, 226 Ill. 2d 382, 391 (2007). Unlike criminal contempt, the purpose of civil contempt is not punishment for past contumacious conduct. *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 279 (2006). In civil contempt, the contemnor must be capable of taking the action sought to be coerced. *Id.* An indirect civil contempt order must contain a valid purge condition so that the contemnor has the proverbial “keys to his cell.” *Felzak*, 226 Ill. 2d at 391.

¶ 30 To obtain a finding of indirect civil contempt, the petitioner initially has the burden of proving, by a preponderance of the evidence, that the other party has violated a court order. *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 41 (2010). The burden next shifts to the alleged contemnor to prove that he did not willfully or contumaciously fail to comply with the court order, and that he has

a valid excuse. *Id.* A trial court's determination that a party has engaged in indirect civil contempt will not be disturbed on appeal 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); *Freed*, 2012 IL App (1st) 113178, ¶ 20.<sup>2</sup>

¶ 31

A. Notice

¶ 32 Robert first argues that the contempt order should be vacated because he did not receive proper notice of Nancy's petition for rule to show cause. Robert notes that he filed an answer to a petition that Nancy served on him but did not file with the court, whereas the petition Nancy filed with the court in August 2011 does not include a certificate of service. The trial court proceeded to hear count I of the August 2011 petition for rule to show cause.

¶ 33 A defendant in an indirect civil contempt proceeding must be afforded due process of law. *City of Quincy v. Weinberg*, 363 Ill. App. 3d 654, 664 (2006). However, only minimal due process is required for such proceedings, consisting of notice and an opportunity to be heard. *Id.*

¶ 34 Nancy argues that Robert's failure to object to lack of notice of the filed petition forfeited any objection to the petition. We agree. A court order may be void *ab initio* for lack of due process, but a defect in notice can be forfeited. *Williamsburg Village Owners Ass'n, Inc. v. Lauder Associates*, 200 Ill. App. 3d 474, 479 (1990). To preserve a question for review, a party must make an appropriate objection in the trial court. *Id.* Robert points out that his counsel asked the trial court

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<sup>2</sup>In *In re Marriage of Barile*, 385 Ill. App. 3d 752, 759 n.3 (2008), this court noted that the supreme court has cautioned against using an abuse-of-discretion standard for factual findings. However, we stated that we would adhere to the standard sent forth in *Longston* because the supreme court had not specifically altered its standard of review for contempt petitions. *Id.*

to strike the petition. However, Robert's counsel made the request on the basis that it was not clear which orders were allegedly violated for each count of the petition and that the petition was not specific regarding willful behavior. In other words, Robert's counsel did not object to the petition on the grounds of improper notice, and he continued to participate in the hearing. Therefore, Robert forfeited any objection to any defects in the notice. *Cf. id.* (the plaintiff forfeited the issue of sufficiency of the notice of a petition for contempt because he did not clearly object to not receiving notice).

¶ 35 Even if, *arguendo*, this argument was properly preserved, we would still not vacate the trial court's order. The failure to provide notice of a motion makes the trial court's resulting order voidable rather than void. *GMB Financial Group, Inc. v. Marzano*, 385 Ill. App. 3d 978, 983 (2008). Whether such an order should be vacated is not determined by the lack of notice but rather by whether the nonmoving party suffered any resulting harm or prejudice. *Id.* The prejudice must be actual, not just possible. *Id.* at 984. The prejudice must result from not timely receiving notice of the motion, rather than the result of the ruling on the motion itself. *Id.*

¶ 36 Here, Robert did not suffer any prejudice from not receiving timely notice of Nancy's August 2011 petition. Robert did receive notice and answered a prior version of the petition which contained very similar if not identical allegations as those in count I of the August 2011 petition. The hearing then proceeded on just count I, for which Robert was prepared. Therefore, Robert has not shown any prejudice from the lack of notice of the August 2011 petition.

¶ 37 Robert also argues that he was deprived of minimal due process because Nancy's petition for rule to show cause was based on his failure to pay the arrearage in the June 2007 and July 2008 orders, but he was ultimately found to be in willful contempt of the June 2009 order, which was not

referenced in the petition. Robert maintains that he therefore did not have proper notice of the charge against him.

¶ 38 The notice must adequately describe the facts on which the contempt charge is based and inform the alleged contemnor of the time and place of the evidentiary hearing, within a reasonable time before the hearing. *Weinberg*, 363 Ill. App. 3d at 664. Here, Nancy's petition referred to the August 2010 order in addition to the orders specified by Robert. More importantly, Nancy clearly sought payment of child support and maintenance arrears. Therefore, Robert had adequate notice that Nancy sought past-due support from June 2007 on, which included the June 2009 order.

¶ 39 B. Factual Findings

¶ 40 We next address Robert's argument that the trial court abused its discretion by failing to make necessary factual findings in its order and denying Robert's motion for clarification of the same. Robert argues that the order failed to state that he had the means to make all court-ordered maintenance pursuant to the June 2009 order for the period of June 10, 2009, through August 7, 2012. Robert further argues that the sole basis upon which the trial court could have found that he had the means to make those maintenance payments was from the Trust, so such a finding should have been included in the order.

¶ 41 A contempt order must be written and set forth the ground supporting the finding of contempt. *Central Production Credit Ass'n v. Kruse*, 156 Ill. App. 3d 526, 534 (1987). The order must contain facts, not just the trial court's opinions or conclusions. *Id.*

¶ 42 We conclude that the trial court's order contains sufficient facts. It states that Robert was in indirect civil contempt for failure to pay current and arrearage support as ordered on June 10, 2009, thereby clearly indicating the order on which the contempt was based. The trial court also listed in

detail the amount owed and what portion of that amount was support arrears. The trial court further stated that Robert's failure was without cause or justification, which is the equivalent of stating that Robert had the financial means of making the support payments, but did not do so. There is no requirement that the trial court list which funds the payments should have been made from, so the trial court was not required to specifically mention the Trust in its written order.

¶ 43 C. Finding of Contempt

¶ 44 We next address Robert's argument that the trial court's finding that he was in contempt of the June 2009 order is against the manifest weight of the evidence.

¶ 45 As mentioned, a petitioner has the initial burden of proving, by a preponderance of the evidence, that the other party has violated a court order. *DiFilippo*, 404 Ill. App. 3d at 41. A failure to make court-ordered support payments is *prima facie* evidence of contempt. *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 279 (2006). The burden then shifts to the alleged contemnor to show that the noncompliance was not willful or contumacious and that he has a valid excuse for failing to pay. *Id.* To show that he is unable to pay, the party must show that he has no money now with which to pay and did not wrongfully dispose of money or assets with which he might have paid. *In re Marriage of Logston*, 103 Ill. 2d at 285. The alleged contemnor may not meet his burden of showing the financial inability to comply with an order by general testimony regarding financial status, but rather must provide definite and explicit evidence. *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 282 (2006). Also, although it is proper for an obligor to first pay his bare living expenses, any money that is not absolutely required for the mere necessities of life should be used for maintenance. *In re Marriage of Logston*, 103 Ill. 2d 266, 286 (1984).

¶ 46 Here, the clerk's records of support payments showed that Robert had not made all of the court-ordered support payments. Therefore, the burden shifted to Robert to show that he did not willfully or contumaciously violate the court order, and that he had a valid excuse.

¶ 47 1. 2009 and 2010

¶ 48 Robert maintains that any implicit finding that he willfully violated the June 2009 order by failing to pay all court-ordered maintenance in calendar years 2009 and 2010 is against the manifest weight of the evidence. Robert states that his total income "for 2009, as reported on his 2010 Tax Return" was \$56,092. We fail to locate this figure in the return though we recognize that there is some information regarding 2009 state and local income tax refunds. Robert's tax return reflected a total 2010 income of \$56,578. Robert points out that according to the clerk's records, he made payments totaling \$30,230.78 in 2009 and \$16,961.55 for January through August 2010.<sup>3</sup> Robert argues that there was no evidence that he received any income from the Trust or that the Trust paid any of his expenses in 2009 and 2010.

¶ 49 Robert's argument is not persuasive. The burden had shifted to Robert to show that he was unable to pay and did not wrongfully dispose of any assets with which he could have paid. *In re Marriage of Logston*, 103 Ill. 2d at 285. Robert did not provide any clear evidence of his income in 2009. He paid \$16,961.55 in 2010, which is less than one-third of his income that year. More significantly, Robert did not present any evidence of his assets in 2009 and 2010. Therefore, we cannot say that a finding that Robert willfully failed to pay all court-ordered support in 2009 and 2010 is against the manifest weight of the evidence or an abuse of discretion.

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<sup>3</sup>As stated, in August 2010 the trial court entered an agreed order abating Robert's support obligations until January 2011 due to Robert's incarceration.

¶ 50

2. 2011 and 2012

¶ 51 Robert further argues that the evidence does not support a finding that he had the means but refused to pay the maintenance obligations mandated by the June 2009 order in calendar years 2011 and 2012.

¶ 52 Robert notes that he testified that he looked for work when he was released from jail in January 2011 but had difficulty due to his criminal record. He further testified that the Trust paid his living expenses in 2011 and 2012. Robert maintains that the record lacks any evidence that he had the means to pay any past-due or current support in 2011 or 2012 unless, as the circuit court must have found, the Trust was determined to be the source of Robert's ability to make the maintenance payments.

¶ 53 We agree with Robert that the evidence showed that the only source of revenue from which he could have made maintenance payments in 2011 and 2012 was the Trust. Robert's 2011 and 2012 financial affidavits, although somewhat inconsistent with each other and with his testimony, clearly showed little income. Nancy's petition for rule to show cause specifically mentioned the Trust as a source of funds, and the trial court's oral findings at the August 2012 contempt hearing referenced Robert's living off of the Trust and Robert's failing to inquire into the possibility of using Trust funds to make support payments.

¶ 54 Robert argues that a finding that he should have paid maintenance from the Trust is against the manifest weight of the evidence given the Trust's terms and established Illinois law. Robert points out that a trustee is obligated to carry out the trust according to its terms. *Faville v. Burns*, 2011 IL App (1st) 110335, ¶ 40. Robert argues that here the Trust provides that the trustees can make distributions of principal to Robert only for his support, care, and maintenance, so any

distribution to Robert to pay for Nancy's maintenance would be an improper breach of fiduciary duty. Robert further argues that because the trustees are authorized to make distributions solely in their discretion, he had no ability to compel them to make distributions for any reason, including his payment of maintenance obligations under the June 2009 order. Robert maintains that the Trust's spendthrift provision precludes alienating trust assets to pay creditors, so the trustees are further limited from making trust distributions to pay his maintenance obligations. Robert also cites section 2-1403 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1403 (West 2010)) for the proposition that a spouse has the ability to attach or otherwise withhold income or principal of a spendthrift trust to satisfy past due child support but not current or past due maintenance obligations.

¶ 55 Nancy argues that Robert's documents and testimony established that \$46,988.37 was paid to Robert from the Trust for things other than mere necessities, consisting of: \$22,705.57 for a car; \$18,400 to his girlfriend; \$5,382.80 to his lawyers; and \$500 for a birthday gift. Nancy argues that these sums prove the requisite disposition of money by Robert with which he could have paid his court-ordered obligations to her. Nancy argues that this is all-the-more true when Robert's \$1,800 monthly rent payments are factored in, as this amount is beyond a bare living expense.

¶ 56 Robert's arguments about his inability to direct the Trust money are quite compelling at first blush, but under the unique facts of these case, we ultimately cannot say it is against the manifest weight of the evidence to find that Robert failed to show that he lacked the means to pay his support obligations in 2011 and 2012.

¶ 57 The Trust states in relevant part:

"The share allocated to [Robert] shall be retained by the Trustees in trust, to be held, administered and distributed on the following terms: The Trustee shall pay to or apply for

the benefit of [Robert] the entire net income of his trust, quarterly or at more frequent intervals in the Trustee's discretion. If, in the Trustee's discretion, additional payment is prudent, principal may also be paid out if necessary for his proper support, care and maintenance, after taking into consideration, to the extent the Trustee deems advisable, any income or other resources of [Robert], outside of his trust, known to the Trustee. The trust may not be assigned, encumbered, or pledged.”

¶ 58 Spendthrift trust provisions, such as the one above, restrict the beneficiary's ability to alienate the trust corpus and the beneficiary's creditors' ability to attach it. *In re Marriage of Sharp*, 369 Ill. App. 3d at 281. However, once the beneficiary receives trust income, the income is no longer subject to the spendthrift provision's protections and can be used for any purpose, including the payment of child support and maintenance obligations. *Id.* It is also considered income to the recipient for child support and maintenance determinations. *Id.* We recognize that unlike in *Sharp*, where the trust dispersed money directly to the respondent, here the Trust wrote checks directly to the ultimate recipients, such as Robert's landlord and attorneys. Still, the Trust purchased a car costing over \$22,000 for Robert in October 2011, so this was an asset he could have used to satisfy at least a portion of his support obligations. Under such a scenario, Robert would not be rendered vehicle-less, as he could purchase a much less expensive used car or even request that the Trust buy another car for him.

¶ 59 Moreover, contrary to Robert's argument that the Trust would use its funds only for Robert's support, care, and maintenance, Robert himself testified that the Trust paid thousands of dollars to his girlfriend to reimburse her for living expenses that she paid for Robert *and* Charles, his son. The checkbook for the Trust's checking account lists “Robert + Charlies's liv exp” in parenthesis above

a payment for Knack, so the trustees knew they were distributing funds for the benefit of not just Robert. Robert testified that he never even asked the Trust if it could or was willing to make maintenance payments to Nancy or disbursements directly to himself. As the trial court put it, Robert “st[u]ck his head in the sand regarding the trust.”

¶ 60 Furthermore, while Robert seeks to use section 2-1403 of the Code as a shield, that section allows income or principal of a trust to be subject to withholding for the payment of unpaid child support obligations. 735 ILCS 5/2-1403 (West 2010). Although the ability to garnish from a spendthrift trust does not extend to maintenance (*Miller v. Miller*, 268 Ill. App. 3d 132, 143 (1994)), Robert was under court order to make monthly payments towards arrearage of unallocated support, which consists of both child support and maintenance. See *In re Marriage of Kincaid*, 2012 IL App (3d) 110511, ¶ 28. Robert argues that the only amount at issue in connection with the petition for rule to show cause accrued after the entry of the June 10, 2009, order, and that Nancy states in her brief that as of that date, Robert’s payments became maintenance-only payments. However, even accepting this proposition as true, that same order set Robert’s monthly arrearage payments at \$1,250 per month (in addition to maintenance payments), so those arrearage payments would therefore be for unallocated support. The trial court found that for the period of June 10, 2009, to August 7, 2012, Robert owed Nancy \$61,138.43, of which \$38,338.43 was “‘support arrears.’” Accordingly, Robert could have, at a minimum, requested that the Trust pay the portion of the arrearage constituting child support. See *id.* (“unallocated support is always comprised of some child support”).<sup>4</sup> Finally, although the Trust paid all of Robert’s living expenses in 2011 and 2012, he did

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<sup>4</sup>*Miller* states that the language in section 2-1403 is limited to child support “rather than to ‘maintenance and child support,’ or simply ‘support.’” *Miller*, 268 Ill. App. 3d at 143. We interpret

not apply any of the income he managed to earn those years towards support. As such, the trial court's finding that Robert willfully failed to pay support in 2011 and 2012 is not against the manifest weight of the evidence, nor does the record reflect an abuse of discretion.

¶ 61

D. Purge

¶ 62

1. Amount of Purge

¶ 63 Robert additionally argues that the contempt order must be reversed because there is no evidence that he had the ability to pay the purge amount, \$45,168.75, in August 2012. Robert argues that he testified that he was not employed at the time of the hearing and had not been employed since his incarceration in 2010. Robert argues that other than the payments made by the Trust on his behalf, he had no other means available to pay his expenses. Robert maintains that, therefore, the trial court would have had to deem the Trust to be the source of his ability to pay the purge. Robert argues that, however, since he cannot compel the trustees to pay the purge amount, any finding that he had the present ability to pay the purge amount is undermined. Robert further contends that the trial court's order was intended to circumvent established trust law and compel the Trust to pay the purge amount.

¶ 64 “The purging provision in any civil contempt sanction for nonpayment must be based on the contemnor's ability to pay.” *In re Marriage of Dunseth*, 260 Ill. App. 3d 816, 828 (1994). As stated, the contemnor must have the proverbial keys to his cell. *Felzak*, 226 Ill. 2d at 391.

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this analysis as meaning that garnishment of a spendthrift trust does not extend to both maintenance and child support; *Miller* does not imply that the statute prohibits the garnishment of the portion of unallocated support attributable to child support.

¶ 65 Nancy argues that Robert’s payment of \$50,000 cash to the clerk of the circuit court in January 2013 for the appeal bond is proof of his current ability to pay the purge. See *In re Marriage of Wisniewski*, 107 Ill. App. 3d 711, 720 (1982) (husband’s payment of purge amount defeated argument that he was unable to pay the purge).

¶ 66 We determine that it was not against the manifest weight of the evidence for the trial court to conclude that Robert had the ability to pay the \$45,168.75 purge amount. While Robert asserts that he had no means to pay this amount, we again point out that, at a minimum, he had a car, which he also failed to acknowledge in his January 2012 financial statement. We recognize that selling the car alone would not satisfy the purge amount, and that the evidence showed that any additional monies would largely have to come from the Trust. Although Robert may not be able to directly compel the trustees to pay the purge amount, that does not equate to an inability to satisfy the purge. In *Sharp*, the contemnor similarly argue that he had no ability to purge his sentences. The appellate court disagreed, stating:

“[A]t the hearing, the evidence established that it was within the trustees’ discretion to pay the sum necessary to secure respondent’s release from jail if he were to be incarcerated. Thus, the purging provision was based on respondent’s ability to pay.” *In re Marriage of Sharp*, 369 Ill. App. 3d at 283.

Thus, under *Sharp*, a respondent is considered to be able to pay a purge amount if it is within the trustees’ discretion to pay. While there is no trustee testimony in this case, under the Trust’s language, “principal may \*\*\* be paid out if necessary for [Robert’s] proper support, care and maintenance \*\*\*.” Keeping Robert out of jail would fall within the category of proper support, care, and maintenance, so it would be within the trustees’ discretion to pay the purge amount. Although



of purging contempt. *Id.* Instead, the order should provide for release from jail if the contemnor pays the purge amount after he is incarcerated. See *In re Marriage of Logston*, 103 Ill. 2d at 289.

¶ 71 Here, in derogation of the aforementioned law, the contempt order does not state that Robert may be immediately released from jail upon paying the purge amount. However, contrary to Robert's argument, this defect alone does not require that the order be vacated. In *Logston*, our supreme court ordered the trial court to revise the language of the order on remand. *Id.* In *Mentzer*, the appellate court affirmed the order with the improper purge provision, stating that it was sure that the trial court would "give defendant the opportunity to purge his contempt by discontinuing his contemptuous conduct if he is eventually jailed." *Mentzer*, 282 Ill. App. 3d at 638. The cases cited by Robert are distinguishable, as they were not vacated or even reversed solely based on the lack of a proper purge provision. See *Pancotto v. Mayes*, 304 Ill. App. 3d 108, 112 (1999) (contempt order was so defective as to be void where it did not state the nature of the contempt, did not indicate whether the imprisonment sanction was coercive or punitive, and did not set forth the terms upon which the contempt order could be dissolved); *Todd v. Arbuckle*, 1 Ill. App. 3d 32, 33 (1971) (order did not state on what terms the contempt could be purged and the contemnor released from jail); *White v. Adolph*, 305 Ill. App. 76, 80 (1940) (trial court failed to find that party's lack of compliance with order was willful and contumacious, and its order did not state the amount to be paid and the terms upon which the balance due should be paid).

¶ 72 Therefore, pursuant to our authority under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we modify the contempt order by adding the following provision: If Robert is placed in jail for failing to pay the purge, he shall immediately be released from custody upon payment of the purge amount of \$45,168.75 to Nancy through the clerk of the circuit court of Lake County.

¶ 73

III. CONCLUSION

¶ 74 For the reasons stated, we affirm the judgment of the Lake County circuit court in all respects, with the exception that we modify the August 2012 contempt order to reflect that Robert shall be released from jail if he pays the purge amount after he is incarcerated.

¶ 75 Affirmed as modified.