

No. 1-13-0248

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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IN RE THE MARRIAGE OF:	)	Appeal from the
	)	Circuit Court of
DAVE MADAN n/k/a DAVE REILLY-	)	Cook County, Illinois.
MADAN,	)	
	)	
Petitioner-Appellee,	)	No. 97 D 331702
v.	)	
	)	
SUMITA DAS,	)	Honorable
	)	Alfred Levinson,
Respondent-Appellant.	)	Judge Presiding.

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JUSTICE TAYLOR delivered the judgment of the court.  
Presiding Justice Gordon and Justice Palmer concurred in the judgment.

ORDER

*HELD:* Trial court denied former wife’s petition for attorney fees under section 508 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/508 (West 2010)), and former wife appealed. We found that the trial court’s decision was not an abuse of discretion where (1) the trial court made findings that she was voluntarily unemployed but capable of employment, her new husband paid all of her expenses, and requiring her to pay her own attorney fees would not impair her economic stability, and (2) former wife failed to provide a complete record on appeal.

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¶ 1 Respondent Sumita Das (Sumita) appeals the denial of her petition for attorney fees under section 508 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/508 (West 2010)) (Act).

¶ 2 Sumita and petitioner Dave Madan (Dave) were divorced on January 26, 2001. After the judgment of dissolution was entered, the parties “continuously engaged in post-decree litigation” (to use the trial court’s wording). On March 2, 2011, Sumita filed a petition for attorney fees, alleging that she had incurred \$21,412.50 in postjudgment attorney fees and costs and requesting that the court order Dave to pay them in their entirety. The trial court denied Sumita’s petition except for a “portion of the litigation between the parties [that] was fomented by Dave,” for which it awarded Sumita \$675. Sumita now appeals. For the reasons that follow, we affirm the judgment of the trial court.

### ¶ 3 I. BACKGROUND

¶ 4 Because the history of litigation between the parties is somewhat lengthy, we summarize only those portions that are relevant to the instant appeal.

¶ 5 A judgment of dissolution of marriage was entered between the parties on January 26, 2001. Subsequently, on July 15, 2009, the parties entered into an agreed order. The order provided, in relevant part, that Dave would create a life insurance trust at his expense with Sumita as the trustee. The corpus of the trust was to be a life insurance policy in the amount of \$250,000 for the benefit of Shyan, their daughter.

¶ 6 On February 1, 2011, Sumita filed a petition requesting that Dave be held in indirect civil contempt for failing to prepare a life insurance trust that satisfied the requirements set forth in the

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July 15, 2009, order. She also requested that Dave be ordered to pay the attorney fees and costs she incurred in the preparation and presentation of the contempt petition, pursuant to section 508(b) of the Act. 750 ILCS 5/508(b) (West 2010) (if a court finds that a party's failure to comply with an order "was without compelling cause of justification," the court shall order that party to pay the other party's attorney fees and costs).

¶ 7 On March 2, 2011, before the court had ruled upon her earlier petition, Sumita filed a second petition in which she sought attorney fees and costs under sections 508(a) and (b) for various postjudgment litigation. See 750 ILCS 5/508(a) (West 2010) (providing for discretionary fee awards by the court). (We shall refer to the February 1, 2011, petition as "the contempt petition" and the March 2, 2011, petition as "the fee petition.") In the fee petition, Sumita alleged that she had incurred \$21,412.50 in postjudgment attorney fees and costs, including fees incurred in enforcing Dave's compliance with the life insurance trust order.

¶ 8 The trial court held a hearing on the contempt petition on April 7, 2011; however, no transcript of that hearing is contained in the record. At the conclusion of that hearing, the trial court, per Judge Samuel Betar, issued an order stating: "The court finds that Dave Reilly Madan Living Trust does not comply with the spirit of 7/15/09 order but that such non compliance is NOT a willful violation of the order." The court gave Dave 45 days to redraft the trust. It did not rule on Sumita's request for fees at that time.

¶ 9 On October 3 and 4, 2012, the trial court conducted a hearing on Sumita's fee petition. Only the October 4 proceedings are transcribed in the record. There is no transcript, bystander's report, or agreed statement of facts for the October 3 proceedings.

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¶ 10 On December 10, 2012, the trial court, per Judge Alfred Levinson, denied Sumita's fee petition. In a memorandum opinion, the court made the following findings regarding the financial resources of the parties. Dave's gross income was approximately \$30,000 per month, with after-tax expenses totaling approximately \$14,000 per month. The court stated that "Dave's lifestyle is commensurate with someone who earns a substantial income."

¶ 11 As for Sumita, the court found that she had approximately \$133,000 in liquid assets, plus approximately \$250,000 equity in her home. She also received \$2,331 in monthly child support payments from Dave. She had remarried and was a "stay-at-home mother by choice." Both she and her husband testified that her husband paid all of her expenses and that they did not want her to work. Nevertheless, the court found that Sumita was capable of employment. The court further found that Sumita spent her time trading on the options exchange from home, earning \$8,000 a year. The court characterized this day trading as a "hobby" and stated:

"[Sumita] argues that she cannot pay her own attorney fees, but nevertheless she has chosen voluntary unemployment. If she can 'gamble' in options day trading, she can pay her own attorney fees! \*\*\* Sumita would not have to deplete any part of her principal accounts to pay her own attorney's fees. She could pay them with her options trading money."

¶ 12 Based upon the foregoing, the court reached the following conclusions:

"[T]he Court finds that Sumita failed to establish that she was financially unable to pay her attorney's fees. \*\*\* [I]t does not appear that requiring Sumita to pay her own attorney's fees will impair her economic stability. She would not be compelled to invade

her financial assets or exhaust her estate.”

Accordingly, the court denied Sumita’s petition for fees under section 508(a), except for \$675 in attorney fees for the litigation involving the life insurance trust, which the court found was “fomented by Dave.”

¶ 13 The court additionally denied Sumita’s request for attorney fees pursuant to section 508(b), stating: “Judge Betar had ruled on April 7, 2011, that although the original draft of the insurance trust did not comply with the spirit of the July 15, 2009 Order, such non-compliance was not a willful violation of the Order to create the life insurance trust.”

¶ 14 It is from this order that Sumita now appeals.

#### ¶ 15 II. ANALYSIS

¶ 16 On appeal, Sumita raises two contentions of error. First, she contends that the court erred in denying her petition for fees under section 508(a) of the Act based upon its finding that she had not shown an inability to pay her own attorney fees. Second, she contends that the court erred in denying her petition for fees under section 508(b) based upon its finding that Dave’s failure to comply with the July 15, 2009, order was not a willful violation.

¶ 17 A trial court’s decision to grant or deny fees under section 508 is generally reviewed for an abuse of discretion. *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005). However, where the question presented on appeal is one of law, we review it *de novo*. *Woods v. Cole*, 181 Ill. 2d 512, 516 (1998) (citing *Lucas v. Lakin*, 175 Ill. 2d 166, 171 (1997) (construction of a statute is a question of law that is reviewed *de novo*)).

¶ 18 A. Sufficiency of the Record on Appeal

¶ 19 At the outset, Dave argues, and we agree, that Sumita has failed to provide this court with a complete record on appeal. As noted above, the trial court held a two-day hearing on Sumita's fee petition, but the first day of that hearing is not transcribed in the record, nor is there any bystander's report or agreed statement of facts.

¶ 20 It is well established that the appellant has a duty to present the court with a proper record on appeal, so that the court has an adequate basis for reviewing the decision below. *Cooper v. United Development Co.*, 122 Ill. App. 3d 850, 860 (1984). If there is a gap in the record that could have a material impact on the case, the reviewing court will presume that the missing evidence supported the judgment of the trial court and resolve any doubts against the appellant. *In re Marriage of Rogers*, 213 Ill. 2d 129, 140 n.2 (2004); *Cooper*, 122 Ill. App. 3d at 860; *Tekansky v. Pearson*, 263 Ill. App. 3d 759, 764 (1994). Only if the record contains all the evidence that the reviewing court needs to make a proper decision may the court undertake substantive analysis of the case even where the record is not fully complete. *Gonella Baking Co. v. Clara's Pasta Di Casa, Ltd.*, 337 Ill. App. 3d 385, 388 (2003); *In re Marriage of Ward*, 282 Ill. App. 3d 423, 430 (1996); see *Landau*, 262 Ill. App. 3d at 92 (declining to dismiss an appeal merely on the basis of an inadequate record, but nevertheless finding that the inadequacy made meaningful review of the appellant's arguments impossible and therefore affirming the judgment of the trial court). The relevant issue is whether "this court is in the same position as the trial court" with respect to the legally operative facts of the case. *Gonella Baking Co.*, 337 Ill. App. 3d at 388.

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¶ 21 Sumita argues that we may still review this case on its merits, because her contentions involve solely questions of law rather than evidentiary issues. We proceed now to consider those questions of law. However, to the extent that the evidence presented at the hearing may be relevant to our decision, we will assume that the evidence supported the judgment of the trial court. *Rogers*, 213 Ill. 2d at 140 n.2.

¶ 22 B. Fees Under Section 508(a)

¶ 23 Sumita first contends that the trial court applied the wrong legal standard when it denied her petition for fees under section 508(a) of the Act based upon its finding that Sumita had not shown an inability to pay her own attorney fees. She argues that inability to pay is not a prerequisite to an award of fees under section 508(a).

¶ 24 We begin by examining the relevant portions of the Act. Section 508(a) of the Act provides:

“The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order any party to pay a reasonable amount for his own or the other party’s costs and attorney’s fees. \*\*\* [C]ontribution to attorney’s fees and costs may be awarded from the opposing party in accordance with subsection (j) of Section 503 \*\*\*.” 750 ILCS 5/508 (a) (West 2010).

Subsection (j) of section 503 provides, in relevant part:

“[A] party’s petition for contribution to fees and costs incurred in the proceeding shall be heard and decided, in accordance with the following provisions:

\*\*\*

(2) Any award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under Section 504.” 750 ILCS 5/503(j) (West 2010).

With regard to division of marital property, section 503 provides that the court “shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors.” 750 ILCS 5/503(d) (West 2010). The section then lists some relevant factors, including, but not limited to, the relevant economic circumstances of each spouse, the income, vocational skills, and employability of each spouse, and the reasonable opportunity of each spouse for future acquisition of capital assets and income. 750 ILCS 5/503(d)(5), (8), (11) (West 2010).

¶ 25 As Sumita points out, the Act does not explicitly require that a party seeking contribution under section 508(a) prove that she is unable to pay her own attorney fees. Rather, the Act merely states that the court shall “consider[] all relevant factors.” 750 ILCS 5/503(d) (West 2010). However, some courts, most notably our supreme court in *Schneider*, 214 Ill. 2d 152, have read an “inability to pay” requirement into the statute. In *Schneider*, the court stated:

“Section 508 of the Dissolution Act allows for an award of attorney fees where one party lacks the financial resources and the other party has the ability to pay.

[Citation.] The party seeking an award of attorney fees must establish her inability to pay and the other spouse’s ability to do so. [Citation.] Financial inability exists where requiring payment of fees would strip that party of her means of support or undermine her

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financial stability.” *Id.* at 174.

See also *In re Marriage of Patel and Sines-Patel*, 2013 IL App (1st) 112571, ¶ 113; *In re Marriage of Streur*, 2011 IL App (1st) 082326, ¶ 36; *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 667 (2008); *In re Marriage of Nesbitt*, 377 Ill. App. 3d 649, 657 (2007). Because our supreme court has stated that a party seeking an award of fees under section 508(a) must show an inability to pay, we are bound by that decision. “It is fundamental that the appellate court does not have the authority to abandon supreme court precedent.” *Orr v. Edgar*, 298 Ill. App. 3d 432, 442 (1998). Thus, under *Schneider*, it is apparent that the trial court did not err in denying Sumita an award of fees based upon its finding that she had not shown an inability to pay.

¶ 26 Sumita nevertheless urges us to abandon *Schneider* and its progeny as contrary to the plain language of the Act and instead follow the appellate court decision of *In re Marriage of Haken*, 394 Ill. App. 3d 155 (2009). In *Haken*, the trial court ordered the husband to contribute toward his wife’s attorney fees under section 508(a), and he appealed, arguing that the award of fees was improper because his wife had not shown an inability to pay. *Id.* at 161. The *Haken* court disagreed, stating, “Such a reading of this section eviscerates the statutory directive in section 503(j)(2) to consider the criteria for the division of marital property under section 503(d) in making contribution awards.” *Id.* The court further stated:

“Some courts have repeated language from older cases to the effect that a party seeking fees must establish his or her inability to pay and the other spouse’s ability to do so. [Citations.] They fail to note the language added to section 508(a) in 1996 (effective as to cases pending after June 1, 1997), as follows: ‘At the conclusion of the case,

contribution to attorney's fees and costs may be awarded from the opposing party in accordance with subsection (j) of [s]ection 503.' [Citation.]

The statute directs the court to consider many factors when deciding the amount of contribution a party may be ordered to make. The requirement that a person seeking contribution show an *inability* to pay appears nowhere in the statute. The relative financial standing of the parties should be considered, and that is what the section 503(d) factors are all about." *Id.* at 162 (quoting 750 ILCS 5/508(a) (West 1998)).

Sumita argues that we should follow the *Haken* decision in holding that a party seeking contribution under section 508(a) does not need to show an inability to pay. However, as noted, we lack the authority to abandon our supreme court's precedent in *Schneider. Orr*, 298 Ill. App. 2d at 442. For that reason alone we must reject Sumita's argument.

¶ 27 Moreover, we note that *Haken* merely holds that inability to pay is not a *prerequisite* for an award of fees under section 508(a). It does not purport to state that the court may not take a party's ability to pay, or lack thereof, into account. Nor could it reasonably do so, because the Act directs the court to consider "all relevant factors" (750 ILCS 5/503(d) (West 2010)), and a party's ability to pay is certainly a relevant factor. In this regard, we note that the court's decision to deny Sumita's petition was not premised solely upon its finding that she was able to pay her attorney fees. Rather, the court explicitly considered a variety of relevant factors, including the fact that Sumita is employable but has voluntarily chosen not to seek employment, and all of her expenses are paid by her husband. The court also found that requiring her to pay her own fees would not impair her economic stability or compel her to invade her financial

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assets. Because we do not have a complete transcript of the hearing on Sumita's fee petition, we must assume that the missing evidence supported the judgment of the trial court in this regard.

*Rogers*, 213 Ill. 2d at 140 n.2.

¶ 28 Accordingly, we find that the trial court did not err in denying Sumita an award of attorney fees under section 508(a).

¶ 29 C. Fees Under Section 508(b)

¶ 30 Sumita next contends that the trial court erred in denying her petition for fees under section 508(b) based upon its finding that Dave's failure to comply with the July 15, 2009, order was not a "willful violation" of that order.

¶ 31 Section 508(b) provides, in relevant 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." (Emphasis added.) 750 ILCS 5/508(b) (West 2010).

See *In re Marriage of Berto*, 344 Ill. App. 3d 705, 717 (2003) (in a fee proceeding under section 508(b), "[t]he party that fails to comply with an order bears the burden of proving that compelling cause or justification for the noncompliance exists").

¶ 32 In this case, when the trial court denied Sumita's petition for fees under section 508(b), it stated: "Judge Betar had ruled on April 7, 2011, that although the original draft of the insurance trust did not comply with the spirit of the July 15, 2009 Order, such non-compliance was *not a*

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*willful violation* of the Order to create the life insurance trust.” (Emphasis added.) Sumita argues that this wording shows that the trial court misapprehended the proper legal standard to be applied to fee petitions under section 508(b), in that it mistakenly thought that a willful violation was a prerequisite for a fee award.

¶ 33 Dave, on the other hand, argues that, in the absence of willful conduct, an award of fees under section 508(b) is within the court’s discretion. There is some support in the case law for Dave’s position. For instance, in *In re Marriage of Garelick*, 168 Ill. App. 3d 321, 328 (1988), the court stated that a petition for fees under section 508(b) may be denied “if the trial court finds that the failure to pay was justified, or that the failure was not willful and wanton.” Similarly, in *In re Marriage of Goldberg*, 282 Ill. App. 3d 997, 1004 (1996), the court held that the circuit court did not err in denying a section 508(b) petition based upon its finding that “ ‘there was no finding of wilful failure to comply with any prior Order or Judgments of this Court.’ ”

¶ 34 More importantly, though, we cannot assume that the trial court’s brief statement in its written order encapsulates its entire understanding of the facts or the law in this case, where we are missing a transcript of the entire first day of the hearing. It is entirely possible that, on the first day, the trial court heard pertinent testimony and issued oral findings of fact and statements of law that go beyond what is available to us in the incomplete record on appeal. We must presume that this gap in the record supported the judgment of the trial court and resolve all doubts against the appellant. *Rogers*, 213 Ill. 2d at 140 n.2; *Cooper*, 122 Ill. App. 3d at 860; *Tekansky*, 263 Ill. App. 3d at 764. Accordingly, we cannot find that the trial court erred in denying Sumita an award of fees under section 508(b).

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¶ 35 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 36 Affirmed.