

No. 1-14-3595

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHN "JAY" BARRIGER,)	Appeal from the
)	Circuit Court of
Petitioner-Appellant,)	Cook County.
)	
v.)	No. 13 D 79267
)	
LAURA FITZPATRICK,)	Honorable
)	Sharon Johnson,
Respondent-Appellee.)	Judge Presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Pierce and Justice Simon concurred in the judgment.

O R D E R

¶ 1 *Held:* Where petitioner had the means to pay child support, order of indirect civil contempt affirmed over petitioner's contention that the circuit court abused its discretion.

¶ 2 Petitioner, John "Jay" Barriger, failed to pay the court-ordered amount of child support to respondent, the mother of their minor daughter. Barriger contends that the trial court abused its discretion in finding him in indirect civil contempt, claiming his failure to pay was neither willful

nor intentional. We affirm. Based on totality of the evidence, the trial court's finding was not contrary to the manifest weight of the evidence or an abuse of discretion.

¶ 3 Background

¶ 4 Barriger filed a petition to establish, *inter alia*, paternity, custody, and child support of and for E.B., his and respondent Laura Fitzpatrick's child. Barriger alleged that he had been a contractor, but now stayed home to care for his two minor sons from a previous marriage, and that Fitzpatrick was physically violent toward him, his children, and Fitzpatrick's older daughter from a former relationship. His financial support came from a trust set up by his grandmother.

¶ 5 Fitzpatrick alleged the trust and Barriger's parents supported Barriger who was unable to keep a job, and that Barriger had never been the primary caretaker of E.B. due to his abuse of alcohol and drugs. She claimed: (i) Barriger acted extremely violent towards her and the children; (ii) she had brought a domestic battery case against him which was pending; (iii) she had obtained an order of protection against him for her and her older daughter; and (iv) Barriger had been "indicated" by the Department of Child and Family Services for child abuse against her older daughter.

¶ 6 On June 7, 2013, Fitzpatrick filed a motion for temporary and permanent child support and other relief, alleging that since April 2008, Barriger had never been employed, resided in Kenilworth, IL, and maintained an high standard of living, including memberships in the Union League Club, the Sheridan Shores Yacht Club, the King Spa, and LifeTime Fitness. According to Fitzpatrick, Barriger afforded this lifestyle through a trust fund from which he received \$2,500 a month and generous gifts from his parents, which paid his membership expenses, phone bills, food, car, gas, and boat expenses, including storage, and the majority of expenses relating to Barriger's two minor children from a previous marriage. Fitzpatrick also claimed that, for

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purposes of calculating child support, Barriger's rent-free residence at his parents' Kenilworth, home and his parents' gifts to him should be deemed income. She asserted that Barriger had no legitimate reason for refusing to obtain a full-time job.

¶ 7 Barriger responded to Fitzgerald's motion for child support by alleging that he had been the primary caregiver for E.B. from her birth through February 2013. He denied receiving generous gifts from his parents; all expenses paid on his behalf were paid by his trust which was solely administered by his father as trustee. Barriger also denied the allegations regarding the domestic battery case.

¶ 8 On August 16, 2013, the trial court ordered Barriger pay temporary child support of \$500 monthly. On April 17, 2014, following a hearing, the trial court awarded Fitzgerald monthly child support of \$1,373.25, and \$11,105.75 in retroactive child support.

¶ 9 On May 13, 2014, Fitzgerald filed a motion for a rule to show cause as to why Barriger should not be held in indirect civil contempt after he paid only \$500 on May 1, an amount \$873 less than what the court ordered, and none of the retroactive child support. She alleged Barriger's refusal to pay was willful and contumacious.

¶ 10 At a hearing on the motion for a rule to show cause, the parties stipulated that Barriger was the sole beneficiary of the Elizabeth T. Barriger Trust, his father was one of two trustees, and on April 30, 2014, the account contained \$112,306.91. The parties further stipulated that on May 30, 2014, the trust account balance was zero.

¶ 11 Barriger testified that he was a stay-at-home father. He believed he was the only beneficiary of the Elizabeth T. Barriger Trust, and recently learned of another trust, the John W. Barriger IV Family Trust, of which he may be a beneficiary, and which he believed was set up for the educational expenses of his children. For the past month or two, he did not receive any

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money from the Elizabeth T. Barriger Trust. Since the temporary order for child support, his father paid the \$500 per month. And, since the entry of the April 17, 2014 order, he received \$300-\$800 per month from his father. Barriger testified that his father paid for his supervised visits with E.B.

¶ 12 Barriger acknowledged that he and his father were aware of the child support order requiring him to pay \$1,373.25 monthly, but his father refused to pay the child support, and he had no access to the trust money. Barriger testified that he was at the "mercy" of his father, who wrote him checks and he had no control over what his father paid him. Barriger said he never had the ability to access or directly remove money from the trust account, and that his father removed the money from the trust account without his knowledge. The trust account was supposed to pay to him \$2,500 a month for five years.

¶ 13 Barriger supported his two sons from his previous marriage with money he received from the trust. His father also paid for many of their expenses. Barriger acknowledged that he had a million dollar loan with his father for a home he rehabbed. Ownership of the home was in his father's name. A contract for the sale of the home "fell through," and Barriger paid back his father over \$100,000. Barriger acknowledged that his father paid off the loan on a truck he used and admitted to belonging to Lifetime Fitness health club. Barriger denied having a boat, stating that he used his father's boat.

¶ 14 Barriger's father, John W. Barriger, IV (JWB, IV), testified that he lived in Kenilworth, and was one of two trustees of the Elizabeth T. Barriger Trust, of which his son was the sole beneficiary. He testified that his son owed him one million dollars, and, therefore, he removed the money from the trust and placed it in his own personal bank account. He told the other trustee that he was going to do this, but did not tell his son until after the fact. From his personal

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account, he paid for the supervised visits of his son, his son's attorney's fees, and \$500 in child support for E.B., as well as extracurricular activities for her. He also provided his son somewhere between \$300 to \$800 a month for groceries and "other things." JWB, IV stated that his son told him the amount of child support, which the son could not pay because he could not afford it. JWB, IV testified that he would not pay the money even if his son was placed in contempt of court.

¶ 15 JWB, IV acknowledged that he set up another trust for his son, the John Barriger IV Family Trust, which had a balance of \$288,074.13, but he was not a trustee and had no direct access to the funds. He paid the expenses for his two grandsons from his son's prior marriage, including their camps, clothing, sailing lessons, and food, and "other things." He noted that his son and grandsons lived with him.

¶ 16 At the close of evidence, the trial court found Barriger in indirect civil contempt. The court noted the testimony that Barriger received between \$300 to \$800 a month from his father, but found that it was most likely closer to \$800, in addition to the money paid for all of the children's expenses. The court wondered what Barriger used the \$800 for, noting there was no evidence as to what other bills Barriger had, and therefore, it would follow that the \$800 could go towards the balance of child support. In its written order, the court stated that Barriger had not given any legally sufficient reasons for his failure to comply with the child support order, even though he had the means to comply, and that his failure to comply was willful and contumacious.

¶ 17 On July 21, 2014, the court entered a corrected order finding that Barriger was \$2,119.75 in arrears of child support payments, and had not given any legally sufficient reasons for failing to comply with the order, having the means to comply with it, and his failure to comply was willful and contumacious. The court further found Barriger in contempt for failing to pay

retroactive child support, and the failure to pay the full amount of child support due and owing may result in his commitment to Cook County Jail.

¶ 18 The trial court denied a motion to reconsider the order of indirect civil contempt.

¶ 19 Analysis

¶ 20 Barriger asserts that the circuit court abused its discretion in holding him in indirect civil contempt because there was no evidence of willfulness or intentional contempt on his part where he lacked an income or direct access to funds (the trust money) and the \$800 his father provided him monthly paid for groceries, support, and entertainment expenses for his three minor children.

¶ 21 Indirect civil contempt consists of contemptuous acts that occur outside the trial court's presence. *In re Marriage of Tatham*, 293 Ill. App. 3d 471, 480 (1997). Essential to a finding of indirect civil contempt is proof of willful disobedience of a court order, resulting in the loss of a benefit or advantage to an opposing party. *In re Marriage of Charous*, 368 Ill. App. 3d 99, 107 (2006). A finding of indirect civil contempt raises a question of fact which will be upheld on review unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion. *In re Marriage of Stephenson*, 2014 IL App (2d) 140344, ¶25, citing *In re Marriage of Logston*, 103 Ill. 2d 266, 286-87 (1984).

¶ 22 Once the petitioner establishes a violation by a preponderance of the evidence, the alleged contemnor must show that the violation was not willful and contumacious and that a valid excuse existed for failing to follow the court's order. *In re Marriage of Charous*, 368 Ill. App. 3d at 107. Conduct that demonstrates contumacious behavior is “calculated to embarrass, hinder, or obstruct a court in its administration of justice or [lessen] the authority and dignity of the court.” (Internal quotation marks omitted.) *Id.* at 108. The trial court found Barriger in indirect civil contempt for not paying the amount ordered to be paid in its order of April 17,

2014. Accordingly, the burden shifted to Barriger to show that he did not willfully or contumaciously violate the court order.

¶ 23 To sufficiently establish an inability to pay, Barriger must show by definite and explicit evidence that he neither has money now with which he can pay nor has disposed wrongfully of money or assets with which he might have paid. See *In re Marriage of Logston*, 103 Ill. 2d at 285. Income, for purposes of child support, includes any payment to an individual, regardless of its source, and whether it is nonrecurring, and includes trust account distributions. *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 280-81 (2006).

¶ 24 JWB, IV paid respondent \$500 a month in child support, and also gave Barriger \$800 a month. We observe that JWB, IV testified at the hearing that the \$800 was used for groceries and "other things," but then admitted that he paid for the expenses of Barriger's two sons, including their food, clothing, shelter, camps, and sailing lessons. Furthermore, although Barriger testified that he paid Fitzgerald \$500 a month for child support, JWB, IV clarified that he directly paid Fitzgerald for some of the costs associated with her home, and that he paid for E.B.'s extracurricular activities. This testimony showed JWB, IV was providing the essential living expenses for his son's children, which supports the finding of the court that the additional \$800 a month given directly to Barriger could be used to cover the child support payments and that Barriger provided no contrary evidence otherwise. Accordingly, we find that the circuit court's indirect civil contempt finding was not against the manifest weight of the evidence, or an abuse of discretion. *In re Marriage of Stephenson*, 2014 IL App (2d) 140344, ¶30.

¶ 25 In reaching this conclusion, we disagree with Barriger's reliance on *People v. Harris*, 41 Ill. App. 3d 690, 693 (1976), and *Sullivan v. Sullivan*, 16 Ill. App. 3d 549, 552 (1973). In *Harris*, 41 Ill. App. 3d at 691, defendant entered a guilty plea agreement to pay \$50 a month in

restitution. The record showed that he received only \$30 a month as a marine, eventually undesirably discharged, and then attempted to hold a couple of jobs but was unsuccessful. *Harris*, 41 Ill. App. 3d at 692. The circuit court found that defendant, by his own negligence and indifference, lost his only jobs after the service, and did not make a good faith effort to comply with the sentence imposed. *Harris*, 41 Ill. App. 3d at 692. The reviewing court concluded that failure to secure and maintain employment did not amount to willfully placing one's self in a position of inability to comply with a court order, and reversed the court's order. *Harris*, 41 Ill. App. 3d at 694.

¶ 26 Unlike *Harris*, Barriger received \$800 a month from his father, which the court found could be used to pay child support for E.B. because, under the testimony presented, this was not being used to cover the necessary expenses for his two sons, which the evidence showed were also provided by JWB, IV. Thus, the order of contempt did not rest on Barriger's employment status, but on the evidence showing Barriger had a source of available money from which the monthly child support costs ordered could have been paid.

¶ 27 In *Sullivan*, 16 Ill. App. 3d at 551, defendant was ordered to pay child support, but was unable to do so because he was dismissed from his job as an insurance adjuster, and could not obtain employment due to poor recommendations from his prior employer. The circuit court held him in contempt, but on appeal, this court noted that contempt could not be imposed where the failure of a person to obey an order was due to poverty, insolvency, or other misfortune, and in that case, there was no showing of willful contempt. *Sullivan*, 16 Ill. App. 3d at 552.

¶ 28 Our review of the record satisfies us that no poverty, insolvency, or other misfortune prevented Barriger from paying the court ordered child support, and thus, his failure to pay the

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full amount was properly found to be willful and contumacious. *Cf. Sullivan*, 16 Ill. App. 3d at 552.

¶ 29 We affirm the order of the circuit court of Cook County.

¶ 30 Affirmed.