

2015 IL App (2d) 140971-U
No. 2-14-0971
Order filed May 18, 2015

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
JANUARY SCARPINO,)	of Du Page County.
n/k/a January Stern,)	
)	
Petitioner-Appellant,)	
)	
and)	No. 06-D-1168
)	
FRANK SCARPINO,)	Honorable
)	Neal W. Cerne,
Respondent-Appellee.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not err in denying petitioner's contempt petition, as the court was entitled to find that respondent's violation was not willful; (2) the trial court did not err in denying petitioner's request for attorney fees under section 508(b), as the court had properly found, in denying petitioner's contempt petition, that respondent's violation was justified.

¶ 2 Petitioner, January Scarpino, n/k/a January Stern, appeals from an order of the circuit court of Du Page County, which denied her amended petition for a finding of indirect civil contempt against respondent, Frank Scarpino, and her request for attorney fees. For the reasons that follow, we affirm.

¶ 3

I. BACKGROUND

¶ 4 The parties' marriage was dissolved on November 2, 2007.

¶ 5 On January 10, 2014, the parties entered into an agreed order. Paragraph 1 of the agreed order required respondent to pay petitioner \$10,700 on or before March 11, 2014. Paragraph 2 of the agreed order required respondent to pay petitioner \$45,000 in 30 installments of \$1,500 per month, beginning on February 1, 2014, with the remaining payments due on the first day of each succeeding month. Paragraph 2 further provided: "The payments shall be made by automatic withdrawal from the Respondent's Charter One account to the Petitioner's account to be identified at a later date."

¶ 6 On June 11, 2014, petitioner filed a petition for a finding of indirect civil contempt against respondent, alleging that respondent failed to comply with the provisions of the agreed order. Petitioner alleged that respondent failed to pay her \$10,700 as required by paragraph 1. Petitioner further alleged that respondent failed to make the \$1,500 monthly payments due on February 1, 2014, March 1, 2014, April 1, 2014, May 1, 2014, and June 1, 2014.

¶ 7 A hearing took place on July 22 and July 23, 2014.¹ At the hearing, respondent testified that he went to Charter One bank to set up an automatic transfer from his account to petitioner's Chase Bank account and was told that "they don't do direct deposits from bank-to-bank unless you are an employer with an employee doing direct deposit." Respondent testified that he asked his attorney to ask "the other side" to set up an account at Charter One so that the direct deposits could be arranged. Respondent testified that, on February 27, 2014, he sent a check to petitioner to cover the \$10,700 payment and the payment due February 1, 2014. He testified that he mailed

¹ The hearing also addressed the parties' petitions for attorney fees and petitioner's petition for modification of the marital settlement agreement.

the check to petitioner's home address, return receipt requested, on February 27, 2014, but the mail was returned. Subsequently, he sent a check, dated June 12, 2014, for \$20,500 to petitioner. The check has been cashed.

¶ 8 Petitioner testified that her attorney provided respondent's attorney with her Chase Bank account number to set up the direct deposits from respondent. She identified an email, dated February 7, 2014, sent from respondent's counsel to her counsel, requesting that petitioner set up a Charter One account for the direct deposits and stating that respondent had \$10,000 to send her. When asked whether she set up a Charter One account, petitioner replied: "I don't have a Charter One account for that." Petitioner confirmed her address and agreed that there was no reason why she would not receive mail at that address. Petitioner did not recall receiving a notice concerning certified mail in February 2014. Petitioner agreed that respondent had paid her the \$10,700 due under paragraph 1 of the agreed order and that he had paid her the \$1,500 monthly payments through July.

¶ 9 On September 2, 2014, the trial court denied the petition. The court held that respondent complied with paragraph 1 of the agreed order, finding that respondent sent the sum by certified mail, that the mail was refused, and that respondent subsequently paid the sum on June 11, 2014. The court held that respondent complied with paragraph 2 of the agreed order to the best of his ability. The court noted that the agreed order specifically provided that respondent's payments be made by automatic transfer from his account to petitioner's account. The court stated: "[T]he intent of the order was obvious that there was going to be an automatic withdrawal from his account to her account, so it would make for easy accounting as to when payments were missed or not missed, and that was obviously the intent." The court found that respondent timely went to Charter One to establish the withdrawal but petitioner's failure to establish an account at

Charter One made it impossible for respondent to comply with the agreed order. The court noted that “to effectuate that order, [petitioner] has to open an account at Charter One.”

¶ 10 The court also denied each party’s request for attorney fees, stating that “[e]ach party has the ability to pay their own fees without destabilizing their financial condition.”

¶ 11 Petitioner timely appealed.

¶ 12 II. ANALYSIS

¶ 13 Petitioner argues that “[t]he trial court grossly abused its discretion in failing to find [respondent] in indirect civil contempt.” We disagree.

¶ 14 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. A finding of civil contempt seeks to coerce future compliance with a court order. *Felzak v. Hruby*, 226 Ill.2d 382, 391 (2007). Unlike criminal contempt, the purpose of a finding of civil contempt is not punishment for past contumacious conduct. *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 279 (2006). For civil contempt, the contemnor must be capable of taking the action sought to be coerced. *Id.*

¶ 15 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. *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, ¶ 20.²

² In *In re Marriage of Barile*, 385 Ill. App. 3d 752, 759 n.3 (2008), this court noted that

¶ 16 Here, with respect to compliance with paragraph 1 of the agreed order, respondent testified that he mailed a check to petitioner on February 27, 2014, but that the mail was returned. The trial court was entitled to find that testimony credible. Although petitioner claimed that she never received notice of certified mail in February 2014, the presence of conflicting testimony or inferences that could be drawn from that testimony does not establish that the trial court's judgment is against the manifest weight of the evidence. See *Watkins v. American Service Insurance Co.*, 260 Ill. App. 3d 1054, 1062 (1994) ("A judgment is not against the manifest weight of the evidence merely because there is sufficient evidence to support a contrary judgment."). With respect to compliance with paragraph 2, respondent explained why he was unable to set up the automatic transfers. He explained that, to effectuate the transfers, petitioner was required to set up an account at Charter One, but petitioner testified that she had not done so. The trial court reasonably found that petitioner's failure to set up an account made it impossible for respondent to comply. Furthermore, the evidence established that, at the time of the hearing, respondent had paid petitioner the sums due through July 2014. Because the trial court's determination was supported by the evidence, we cannot say that a contrary finding is clearly apparent.

¶ 17 Petitioner's reliance on *In re Marriage of Betts*, 172 Ill. App. 3d 742 (1988), does not warrant a different conclusion. In *Betts*, the respondent was found in contempt for failure to pay child support notwithstanding the fact that he made full payment one day prior to the hearing. *Id.* at 746. The contempt order found that " 'the respondent *** willfully violated the court order

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 set forth in *Logston* because the supreme court has not specifically altered its standard of review for contempt petitions. *Id.*

relative to support.’ ” *Id.* The appellate court affirmed the finding of contempt. In so doing, the court noted that the respondent failed to provide the court with transcripts from the hearing and that, without more, the court was “not compelled to look farther than the common law record.” *Id.* at 746-47. The court stated: “Although we are not fully aware of the details of the trial court’s motivation for its judgment, we find it was contemptuous of respondent to wait to pay the past-due support on the eve of the date set for hearing.” *Id.* at 746. *Betts* is distinguishable because here the trial court did not make a finding that respondent willfully violated a court order. To the contrary, as stated above, the court found that respondent complied with the order to the best of his ability. As noted, that finding was proper.

¶ 18 Petitioner also argues that the trial court erred in failing to award her attorney fees related to her petition. According to petitioner, even though the trial court declined to find respondent in contempt, she was entitled to attorney fees, because respondent’s failure to pay was without compelling cause or justification.

¶ 19 Petitioner argues that fees were warranted under section 508(b) of the Illinois Marriage and Dissolution of Marriage Act, which provides as follows:

“(b) In every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against whom the proceeding is brought to pay promptly the costs and reasonable attorney’s fees of the prevailing party.”
750 ILCS 5/508(b) (West 2012).

“We will not reverse a trial court’s decision to deny attorney fees unless the trial court abused its discretion.” *In re Marriage of Schurtz*, 382 Ill. App. 3d 1123, 1127 (2008).

¶ 20 We find no abuse of discretion in the trial court's refusal to award fees. The trial court specifically noted that respondent timely mailed the payment due under paragraph 1 of the agreed order. Further, with respect to compliance with paragraph 2, the trial court noted that the agreed order required that the payments be made by automatic transfer. Therefore, as the court noted, petitioner's failure to set up the necessary account to facilitate payment rendered respondent's compliance impossible. Having found that respondent's violation was justified, the court properly denied fees under section 508(b).

¶ 21 Petitioner again relies on *Betts*, to support her argument that fees should have been awarded. Petitioner contends that, in *Betts*, the court awarded fees to the petitioner despite the fact that the respondent had complied with his child-support obligations before the hearing began. However, as noted, in *Betts* there was a finding of contempt, whereas here we have no such finding.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 24 Affirmed.