

SECOND DIVISION
January 26, 2016

No. 1-14-1091

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 DISTRICT

IN RE THE MARRIAGE OF SMITH,)	Appeal from the Circuit Court
)	of Cook County.
HOLLY E. SMITH,)	
)	
Petitioner-Appellee,)	
)	No. 09 D 2564
v.)	
)	
TIMOTHY SMITH,)	
)	Honorable Fe Fernandez
Respondent-Appellant.)	Judge Presiding

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

O R D E R

- ¶ 1 *Held:* The trial court did not abuse its discretion in refusing to adjust the marital property distribution upon reconsideration and in awarding petitioner-wife rehabilitative maintenance. The trial court erred when it refused to award respondent attorney fees following its finding of indirect civil contempt against petitioner.
- ¶ 2 This appeal has three issues that arise from the dissolution of marriage proceedings. The first issue is whether the trial court erred when it did not make a commensurate adjustment to the marital property distribution when, on reconsideration, it adjusted the amount that petitioner-wife was required to return to the marital property. The second issue is whether the trial court erred

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when it awarded petitioner \$4,000 per month in rehabilitative maintenance. The third issue is whether the trial court erred in refusing to award respondent-husband attorney fees and interest following the trial court's finding of indirect contempt against petitioner. For the following reasons, we affirm the trial court's distribution of the marital property and the award of rehabilitative maintenance. However, we reverse and remand the trial court's decision refusing to award respondent attorney fees and interest associated with a finding of indirect civil contempt against petitioner.

¶ 3

BACKGROUND

¶ 4 Petitioner Holly Smith ("petitioner") and Respondent Tim Smith ("respondent") married on December 14, 1991. The parties had two children PS, born on January 28, 1995, and AS born on October 12, 1998. On October 26, 2011, petitioner filed for dissolution of the marriage. The issues raised at trial were: 1) custody; 2) valuation of the marital business and the real estate where the business was located; 3) determination of child support for the minor AS; 4) division of marital assets; and 5) petitioner's maintenance. In addition, respondent filed a petition for rule to show cause based on petitioner having removed \$651,000 in tax refund money from an account that had been frozen by court order.

¶ 5 The trial took place on multiple dates from May 1 through June 28, 2013. On December 23, 2013, the trial court entered its order containing its Findings of Fact, Conclusions of Law and the Judgment for Dissolution of Marriage. At the time of the dissolution of marriage, petitioner was 45 years old and respondent was 46 years old.

¶ 6 Respondent is the owner of a business, Port Lee Corporation ("PLC") that provides laboratory and evidence information systems for police departments, forensic crime labs, and

medical examiners. Petitioner holds a degree in accounting and a minor in computer science. She worked part-time for PLS for a period of 13 years doing payroll, accounts receivable, and accounts payable. She was paid \$30 per hour, and in 2012 her gross income was \$23,897.54 with a net pay of \$662.45 per pay period for 26 pay periods. Petitioner testified at trial that she would not work for PLC after the divorce.

¶ 7 The trial court valued the marital assets at \$5,393,290.80. The marital assets included the marital business, PLC, valued at \$1,670,000. The court noted in its order that petitioner owed PLC \$651,000. Petitioner was awarded \$2,898,369.85 less \$651,000 that she withdrew from the parties' account for a total of \$2,247,369.85 representing 47.4% of the marital property that included cash, all retirement accounts, real estate and a car. Respondent was awarded a total of \$2,494,921 which represented 52.6% of the marital assets including PLC, PLC property (valued at \$337,500), 2 cars, a boat and cash (\$300,000 of which was advanced by agreement of the parties and by a court order for transfer to the corporation for operating advances).

¶ 8 Next, the trial court found that petitioner removed \$651,000 from PLC's Chase bank account into her personal account in violation of a court order, entered on September 8, 2011 that stated in relevant part:

"If either party desires to withdraw or transfer money from a PLC account to be used for a personal expense, not for the expense of the business, he or she shall advise the other party, in writing, as soon as practicable in advance of the transaction the amount to be transferred and the purpose for the transfer."

The court found that petitioner's actions removing and placing the money in her personal account were knowing and without lawful justification and found her in indirect civil contempt. In order

to purge the contempt, the trial court ordered petitioner to return the \$651,000 to PLC in 14 days.

¶ 9 The court determined that respondent's net earnings based on his history of salary and distributions to be \$112,018 and awarded 20% of his net income totaling \$1,867 per month for child support for their minor son, AS.

¶ 10 The court noted that, based on the history of dividends and income on the accounts distributed to petitioner, petitioner could earn an average of \$30,000 per year or \$2,500 per month. In addition, the court calculated that petitioner could earn \$48,000 per year if she would work full time. The court added this amount to petitioner's investment income totaling \$78,000 in annual income. The court found that adding this amount to the child support would make petitioner short of the \$144,000 per year standard of living that she enjoyed during the marriage and noted that, until petitioner finds full time employment, she would have additional expenses to her COBRA health care benefits. The court recognized petitioner's ability to earn a higher salary should she pursue more sophisticated work in accounting and computers but stated that petitioner would need additional education and training. Ultimately, the court awarded petitioner \$4,000 in rehabilitative maintenance.

¶ 11 Both parties filed motions for reconsideration. The trial court denied their motions but modified the amount that petitioner was required to return to PLC to purge the order of indirect civil contempt from \$651,000 to \$509,000. The court denied respondent's request that the amount of money that petitioner was required to return include the 9% statutory interest on judgment. Similarly, the court denied respondent's request for attorney fees in conjunction with petitioner's indirect civil contempt proceedings and held each party responsible for the payment of their own attorney fees. This appeal followed.

¶ 12

ANALYSIS

¶ 13

I. The Purge Amount

¶ 14 Respondent claims that the trial court erred when upon reconsideration, it adjusted downward the amount of money petitioner was ordered to return from \$651,000 to \$509,000 and failed to make any corresponding adjustments to the distribution of the marital property. Respondent contends that when the trial court adjusted the purge amount from \$651,000 to \$509,000, the difference of \$142,000 had a reverberating effect on both the valuation and the distribution of the marital property that substantially prejudiced respondent while favoring petitioner. Respondent maintains that the trial court erred in not following the percentages of distribution as set forth in the trial court's initial order.

¶ 15 Pursuant to section 503(d) of the Illinois Marriage and Dissolution of Marriage Act (Act), marital property must be divided in "just proportions." 750 ILCS 5/503(d) (West 2012); *In re Marriage of Callahan*, 2013 IL App (1st) 113751, ¶ 21. The touchstone of apportionment of marital property is whether the distribution is equitable and each case rests on its own facts. *In re Marriage of Jones*, 187 Ill. App. 3d 206, 222 (1989). We will not disturb a trial court's division of marital property unless an abuse of discretion is shown. *Id.* A trial court does not abuse its discretion unless, in view of all of the circumstances, its decision so exceeded the bounds of reason that no reasonable person would take the view adopted by the trial court. *Id.*

¶ 16 In the instant case, the trial court did not abuse its discretion when, upon reconsideration, it did not apportion \$142,000 difference according to the percentages stated in its order distributing the marital property. The court noted during the hearing on the motion to reconsider that it attempted to reach a roughly 50/50 division, and, following the court's decision on

reconsideration, the distribution of the marital property between parties came closer to the result of an equitable distribution. The trial court initially awarded respondent \$2,494,921 which represented 52.6% of the marital property while it awarded petitioner a total of \$2,247,369.85 representing 47.4% of the marital property. Upon reconsideration, respondent's corresponding marital distribution property constituted 51.08% of the marital property while petitioner's distribution constituted 48.91%. Contrary to respondent's argument, the trial court attempted to equalize the marital distribution in order to reach a result as close to the "just proportions" as possible.

¶ 17 Moreover, although the percentages differ slightly from the trial court's initial distribution, the difference is minimal. See *In re Marriage of Walker*, 386 Ill. App. 3d 1034, 1044 (2008) (the trial court did not abuse its discretion when the percentages reached by the court were slightly different from the proposed distribution of property); *In re Marriage of Alexander*, 368 Ill. App. 3d 192, 205 (2006) (error in valuation of property was *de minimus*). Therefore, the trial court did not abuse its discretion when it modified the amount of money that petitioner was ordered to return to PLC and, subsequently, it did not adjust the distribution of the marital property to coincide with the initial marital distribution.

¶ 18 II. Rehabilitative Maintenance

¶ 19 Respondent contends next that the trial court abused its discretion when it awarded petitioner \$4,000 per month in rehabilitative maintenance for a period of 4 years. Respondent claims that the court's decision was contrary to the evidence presented at trial. Respondent points to the fact that petitioner worked part-time throughout their marriage for PLC doing payroll, accounts receivable and accounts payable while earning \$30.00 per hour. Respondent

contends that the trial court erred when assessing petitioner's potential income as being decreased from \$60,000 per year to \$48,000 due to additional education and training she might be required to undertake since petitioner made no showing that additional education and training would assist her in obtaining employment. Respondent also argues that the court's apportionment of petitioner's standard of living unjustly favored petitioner to respondent's detriment.

¶ 20 When determining the amount and duration of a maintenance award, the trial court must consider the following 12 factors listed in section 504(a) of the Act (750 ILCS 5/504(a) (West 2012)):

- “(1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance;
- (2) the needs of each party;
- (3) the present and future earning capacity of each party;
- (4) any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having foregone or delayed education, training, employment, or career opportunities due to the marriage;
- (5) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment or is the custodian of a child making it appropriate that the custodian not seek employment;
- (6) the standard of living established during the marriage;
- (7) the duration of the marriage;

- (8) the age and the physical and emotional condition of both parties;
- (9) the tax consequences of the property division upon the respective economic circumstances of the parties;
- (10) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;
- (11) any valid agreement of the parties; and
- (12) any other factor that the court expressly finds to be just and equitable.”

¶ 21 The purpose of rehabilitative maintenance is to “provide incentive for the spouse receiving support to use diligence in procuring training or skills necessary to attain self-sufficiency.” *In re Marriage of Toole*, 273 Ill. App. 3d 607, 611 (1995). This objective must be balanced against a realistic appraisal of the likelihood that the spouse will be able to support herself in some reasonable approximation of the standard of living established during the marriage, especially where the marriage was of long duration. *Brown v. Brown*, 241 Ill. App. 3d 305, 310 (1993); *In re Marriage of Pearson*, 236 Ill. App. 3d 337, 347 (1992). The policy underlying rehabilitative maintenance is to sever all financial ties between the former couple in an expeditious, and just manner and make each spouse independent of the other as soon as practicable. *In re Marriage of Ward*, 267 Ill. App. 3d 35, 42 (1994). The propriety, amount, and duration of a maintenance award are matters which lie within the sound discretion of the trial court, and its judgment will not be disturbed on review absent an abuse of that discretion. *In re Marriage of Hart*, 194 Ill. App. 3d 839, 851 (1990). An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court. *Id.*

¶ 22 When a party challenges a trial court's factual findings regarding a maintenance determination, this court will not dispute a trial court's findings unless the findings are against the manifest weight of the evidence. *In re Marriage of Walker*, 386 Ill. App. 3d 1034, 1041 (2008). Findings are “against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the court's findings are unreasonable, arbitrary, and not based on any of the evidence.” *In re Marriage of Bhati*, 397 Ill. App. 3d 53, 61 (2009).

¶ 23 In the instant matter, the trial court's determination that petitioner was entitled to \$4,000 per month in rehabilitative maintenance was not an abuse of discretion. After considering all the factors listed in section 504, the trial court noted that although petitioner was young, educated and capable of working full time, petitioner was not able to maintain the life style that the parties enjoyed during the marriage. The parties had been married for 22 years. The trial court held that petitioner's potential income was \$48,000 based on her employment record. The court noted that petitioner could earn a higher salary with additional education and training, but it also observed that petitioner was paid \$30 per hour while working for PLC; earned under \$24,000 in 2012; and had never worked full-time. Accordingly, based on the evidence presented in the trial court, the trial court's assessment of petitioner's potential income was not against the manifest weight of the evidence. See *In re Marriage of Hart*, 181 Ill. App. 3d 1066, 1068 (1989) (maintenance awards should not be based on speculation as to the future conditions of the parties, but rather on the circumstances disclosed by the evidence).

¶ 24 In addition, when awarding maintenance for petitioner, the trial court balanced the goal that petitioner obtain employment against the likelihood that petitioner will be able to support herself in some reasonable approximation of the standard of living established during the

marriage. See *In re Marriage of Nord*, 402 Ill. App. 3d 288, 306 (2010). Based on the evidence presented at trial, the court held that petitioner was not able to maintain the standard of living during the marriage. Specifically, petitioner's expense affidavit established that the total monthly expenses for herself, the children and the household were \$12,022.99 per month or \$144,275.88 per year. Petitioner's investment income was \$30,000 per year or \$2,500 per month. The court added this amount to petitioner's potential income of \$48,000 for a total annual income of \$78,000. The court found that adding this amount to the child support would make petitioner short of the \$144,000 per year standard of living she enjoyed during the marriage noting that, until petitioner finds full time employment, she would also have additional expenses to her COBRA health care benefits.

¶ 25 Meanwhile, the court found that respondent's gross income for 2012 was \$167,000 with net earnings of \$112,018. While respondent testified that from his salary he took his children out for dinner, vacationed with them out of the country and bought them technological items, he did not provide any specific evidence of family or personal expenses. Therefore, respondent did not establish that he does not have the financial resources to meet his needs as well as those of petitioner, including child support of \$1,867 per month, maintenance, and life insurance for the children. See *In re Marriage of Cheger*, 213 Ill. App. 3d 371, 379 (1991). Further, respondent will continue to have greater earning potential than petitioner because he is the owner of PLC and he solely controls the amount of his salary and distributions. In addition, the record reflects that he has the potential of earning additional income from other investments. Accordingly, respondent has not established that the trial court's findings of fact were against the manifest weight of the evidence or that its maintenance award was an abuse of discretion.

¶ 26

III. Attorney's Fees and Interest

¶ 27 Respondent claims that the trial court erred in refusing to award attorney fees and interest after the trial court found petitioner in indirect civil contempt for transferring money in her personal account in violation of the court's order. Section 508(b) of the Act, states that “[i]n 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). Section 508(b) of the Act is mandatory, not discretionary, and does not allow for the court to exercise its discretion as to payment if the defaulting party's conduct was without cause or justification. *In re Marriage of Putzler*, 2013 IL App (2d) 120551, ¶ 37; *In re Marriage of Walters*, 238 Ill. App. 3d 1086, 1098 (1992). If it so finds, attorney fees must be imposed. *In re Marriage of Putzler*, 2013 IL App (2d) 120551, ¶ 37.

¶ 28 The original burden of showing that the alleged contemnor violated a court order is on the one making the allegation. *In re Marriage of Charous*, 368 Ill. App. 3d 99, 107 (2006). Here, respondent put forth uncontradicted proof that petitioner violated the court's order by transferring money from an account when the court's order specifically forbade that action. After respondent met its burden, the burden shifted to petitioner, the alleged contemnor, to show that the noncompliance was not willful and that she had a valid excuse for failing to follow the court's order. *Id.* at 107-08. Petitioner did not meet her burden on either requirement. Petitioner failed to put forth proof that could in any way establish that her noncompliance was anything but willful or that she had any compelling cause or justification whatsoever for not complying with

the trial court's order. Certainly she failed to put forth evidence to show that her knowing disregard for the court order was justified. See 750 ILCS 5/508(b). Accordingly, the trial court properly found that petitioner acted in contravention of the court order and the Act, and properly entered a finding of indirect civil contempt.

¶ 29 Finding a party in contempt for failing to comply with a court order implies a finding that the failure to comply was without cause or justification rendering mandatory the imposition of attorney fees per section 508(b). *In re Marriage of Deike*, 381 Ill. App. 3d 620, 634 (2008). Specifically, “[b]ecause the primary prerequisite to *any* contempt finding is willful, contumacious conduct, it follows that a finding that a party is in contempt of court for failing to comply with a court's orders carries with it an *implicit* finding that the failure to comply was without cause or justification.” (Emphases in original). *In re Marriage of Putzler*, 2013 IL App (2d) 120551, ¶ 38 quoting *In re Marriage of Cierny*, 187 Ill. App. 3d 334, 348 (1989). To be perfectly clear, our reading of the statute and the holding of *Putzler* is that a contempt finding in a section 508(b) proceeding comes with an implied finding that the failure to comply with the relevant order or judgment was without compelling cause or justification.

¶ 30 But even more than that, the trial court expressly held that petitioner's conduct was willful and without compelling justification. The trial court found that petitioner's violation of its order was done “knowing[ly] and without lawful justification.” A knowing violation is a willful violation. Although specifically applying to the intent requirement in criminal cases, Illinois law prescribes that “conduct performed knowingly *** is performed willfully *** unless the statute clearly requires another meaning.” See 720 ILCS 5/4–5 (West 2012); *People ex rel. City of Chicago v. Le Mirage, Inc.*, 2013 IL App (1st) 093547, ¶ 96 (analyzing the meaning of the terms

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"knowingly" and "willfully" in the context of an indirect criminal contempt case). The trial court's holding makes clear that it found that petitioner knew of the court's order, violated it, and had no justification for doing so. Where there is "no lawful justification" whatsoever, there cannot be "compelling justification." The trial court correctly found petitioner to be in contempt and in violation of its order under the Act, thereby, requiring the mandatory directive that the trial court award attorney fees to the party bringing the allegation of contemptuous conduct.

¶ 31 Accordingly, the trial court's judgment refusing to award respondent attorney fees and costs associated with respondent's petition for rule to show cause is reversed. The case is remanded on this issue alone for respondent to prove up his attorney fees. On remand, the trial court is instructed to reconsider its findings as to an award of interest for the amount of money that petitioner transferred and kept in her bank account in violation of its order.

¶ 32

CONCLUSION

¶ 33 For all the foregoing, we affirm the trial court's judgment regarding the distribution of the marital property and the award of petitioner's rehabilitative maintenance. We reverse the trial court's judgment denying respondent's request for attorney fees in pursuing his petition for rule to show cause. We remand the case to the trial court for a hearing to prove up the attorney fees and for the court to reconsider whether interest should be awarded.

¶ 34 Affirmed in part, reversed and remanded in part.