2016 IL App (2d) 150343-U
No. 2-15-0343
Order filed March 14, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF JANE B. MARCUS, Petitioner-Appellant, and STUART L. MARCUS, Respondent-Appellee.	))))))))))	Appeal from the Circuit Court of Lake County. No. 05-D-1566 Honorable Patricia S. Fix, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in finding that Jane had not met her burden of showing that the parties' 2010 agreed order, which changed the terms of Stuart's maintenance, contained a scrivener's error. It also did not err in finding Jane in contempt of that order and requiring her to pay Stuart's attorney fees. Therefore, we affirmed.

¶ 2 On May 7, 2010, petitioner, Jane B. Marcus, and respondent, Stuart L. Marcus, entered an agreed order changing the terms of Stuart's maintenance. Several years later, Stuart filed a petition for rule to show cause because Jane had stopped paying maintenance before the April 30, 2014, termination date listed in the agreed order. Jane filed a motion for a declaratory

judgment, alleging that the "2014" in the agreed order was a scrivener's error and that the agreed order was supposed to state that maintenance terminated on April 30, 2013. The trial court denied Jane's motion and later found her in contempt of the agreed order. It ordered her to pay the outstanding maintenance and Stuart's attorney fees.

¶ 3 On appeal, Jane argues that the trial court failed to recognize that the 2010 agreed order contained an obvious scrivener's error. She additionally argues that the trial court abused its discretion by: holding Jane in contempt of an order that it had labeled ambiguous; failing to identify any method by which she could purge herself of contempt; and ordering her to pay Stuart's attorney fees incurred in connection with the contempt. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The parties married in 1985 and had two children. Their marriage was dissolved on August 23, 2006. The dissolution judgment incorporated the parties' marital settlement agreement (MSA), which provided for joint custody of the children, with Jane as the primary residential custodian. Jane was solely responsible for paying for: all of the children's major expenses, including clothing; their medical insurance and unreimbursed medical expenses; their extracurricular activities; and their college expenses.

¶ 6 Regarding maintenance, the MSA provided that Jane waived all claims of maintenance from Stuart and would pay him maintenance as follows:

> "**9. <u>STUART'S MAINTENANCE</u>**
>
> A. JANE shall pay STUART $110,000.00 per year in maintenance, payable in two equal monthly installments of $4583.33 on the first and fifteenth day of each month for a period of 84 months. **JANE'S OBLIGATION TO PAY STUART**

MAINTENANCE IS NON-REVIEWABLE AND NON-MODIFIABLE AS TO AMOUNT AND DURATION.

B. The parties agree that maintenance payments made by JANE to STUART pursuant to the Agreed Order entered April 13, 2006 **** are included within the 84-month period. Therefore, the 84-month period began to run at the time of Jane's first maintenance payment to Stuart under the Agreed Order on May 1, 2006, and ends on April 30, 2014.

C. For the first 36 months of the 84-month period, JANE's obligation to pay STUART maintenance, as set forth in Section 10.A., may terminate only in the event of JANE's death, subject to the life insurance provisions in Section 10.F., below, or in the event of STUART's death.

D. After the first 36 months of the 84-month period, JANE's obligation to pay STUART maintenance, as set forth in Section 10.A., shall terminate upon the first of the following events:

i) STUART's remarriage;

ii) STUART's residing with another individual on a continuing, conjugal basis;

iii) STUART's death;

iv) JANE's death, subject to the life insurance provision in Section 10.F., below; or

v) The end of the 84-month term." (Emphases in original.).

The MSA also required that Jane maintain life insurance of $710,000 to secure her maintenance obligation.

¶ 7 Thus, although the MSA referred to an 84-month period six times and also required that Jane maintain life insurance to secure her maintenance obligation in an amount equal to 84 times her monthly maintenance obligation ($710,000), it stated in section 9B that the maintenance would terminate on April 30, 2014, which would be 12 months beyond the 84-month period otherwise specified.

¶ 8 On May 7, 2010, Jane filed a petition to modify maintenance. She stated:

> "Paragraph 9 of the MSA provides Jane shall pay Stuart $110,000 per year in maintenance for a period of 84 months culminating on April 30, 2014, subject to the terminating events listed in paragraph 9(c)-(d) of the MSA."

Jane alleged that since the entry of the judgment, a substantial change in circumstances had occurred warranting a modification of her maintenance obligation, in that her income had decreased significantly. She further alleged:

> "The parties are in agreement that Jane's maintenance obligation should be modified such that she shall pay Stuart $7,500 per month ($90,000 per year) retroactive April 1, 2010 until April 30, 2014."

¶ 9 The same day that Jane filed her petition for modification, the parties entered an agreed order granting Jane's petition for modification. It stated:

> "Paragraph 9 of the parties' Marital Settlement Agreement which is incorporated in the parties' Judgment of Dissolution of Marriage entered August 23, 2006 is hereby modified to provide that from April 1, 2010 until April 30, 2014, JANE shall pay STUART maintenance in the amount of $7,500 per month ($90,000 per year) and that payment shall be made in two equal monthly installments of $3,750 on the first and

fifteenth day of each month, subject to the terminating events listed in paragraph 9(c)-(d) of the MSA."

¶ 10 On June 24, 2013, Stuart filed a petition for rule to show cause, asking that Jane be held in contempt for violating the May 7, 2010, agreed order. He alleged that although that order required Jane to pay maintenance until April 30, 2014, Jane had refused to pay him support beginning in May 2013, despite the financial ability to do so.

¶ 11 On July 24, 2013, Jane filed a motion for a declaratory judgment and other relief. She alleged that the MSA contained a scrivener's error, in that although the document repeatedly stated that she would pay Stuart 84 months' maintenance, the MSA identified the maintenance termination date as April 30, 2014, instead of April 30, 2013, as it should have been. Jane alleged that that scrivener's error was then "carried forward" to the subsequent May 7, 2010, agreed order. Jane noted that the agreed order specifically provided that her maintenance obligation was "subject to the terminating events listed in Paragraph 9(c)-(d) of the MSA", and that paragraph in the MSA listed "[t]he end of the 84-month term" as a terminating event. Jane alleged that Stuart was attempting to capitalize on what was clearly a scrivener's error for his own, undeserved gain. Jane sought a declaration that her obligation to pay maintenance terminated on April 30, 2013.

¶ 12 The trial court held a hearing on Jane's motion on September 10, 2014. During the hearing, Stuart admitted that in the MSA, the reference to the year 2014 instead of 2013 was a scrivener's error. However, he disputed that the subsequent agreed order contained a scrivener's error. Stuart argued that he had agreed to a reduction in monthly maintenance and a modification of the unmodifiable MSA in exchange for an additional year of payments, such that he would gain $30,000 overall. Jane took the position that the agreed order contained a

scrivener's error and that the parties had agreed to decrease monthly maintenance payments without increasing the term of maintenance, such that she would end up paying Stuart $60,000 less than provided for in the MSA.

¶ 13 The trial court stated that although the agreed order clearly listed April 30, 2014, as the termination date, the agreed order also stated that it was subject to the terminating events listed in the MSA, which included the end of an 84-month term. The trial court stated:

> "If that [latter] language was not in the 2010 order, I would probably be finding this to be clear and unambiguous language as it sits without hearing parol evidence in this case but Paragraph – when we loop back to the marital settlement agreement, and the only reason I'm looping back to the marital settlement agreement is because we are told that it is subject to the terminating events listed in Paragraphs 9c and d of the MSA. Paragraph d, Subsection 5 says the end of the 84 month-term.
>
> So I cannot find at this time without hearing parol evidence that this document on its face is unambiguous."

In sum, the trial court ruled that the agreed order was ambiguous on its face, requiring the consideration of parol evidence.

¶ 14 On October 7, 2014, the trial court issued a rule to show cause as to why Jane was not in indirect civil contempt. The parties also presented parol evidence of their negotiations leading up to the 2010 agreed order. Jane testified as follows, in relevant part. She worked in the financial services industry, and due to the financial crisis, her income was reduced by over one-half in 2008. Therefore, Jane sold her vacation home and put her primary residence up for sale. Still, she no longer believed that she could afford to pay Stuart $110,000 yearly maintenance.

¶ 15 In 2010, the parties' older child was going to graduate high school and begin college, for which Jane was solely responsible for paying. On March 21, 2010, she e-mailed Stuart asking if he would agree to reduce maintenance to $71,000 per year.[1] He responded on March 23, 2010, saying that his attorney's advice was to stick to the agreement, but he was willing to defer $20,000 per year until the end of the settlement. Jane replied on March 23, 2010, saying that she was not willing to defer $20,000 because doing so would mean that she would have to continue to pay maintenance beyond the seven-year requirement. She asked Stuart to share in some of the financial pain, not defer it. He replied saying that he would speak to his attorney. On March 25, 2010, Jane asked that Stuart voluntarily reduce the monthly maintenance amount to $7,500 beginning April 1, 2010 ($90,000 per year). Stuart responded on March 26, 2010, stating:

> "kathy [Stuart's attorney] is opposed to your proposal…but don't get your shorts in a bunch…i'm not!! i appreciate your bending. i'll go along with it, just don't write anything up before we get back. we really need to iron out the rhetoric. it's funny, as my life winds down quickly, i've come to the 'f—it' attitude. i know i'm the wuss by speaking this way, but i just don't have the strength, emotionally, to argue. i think kathy feels that by modifying a non-modifiable document, i open up a pandora's box of problems which you could spring on me. are you going to do that…i don't have a clue. are you capable of doing that…i just remember something you once told me…'i can do anything I want'!!!! so, that's the dilemma i'm faced with. at this point in my life, i guess it doesn't really matter. we'll just see how this drama plays itself out. i guess my hubris (tragic flaw) is that i give in too easily. no, i'm not falling on my sword; just bemoaning an untenable situation."

[1] The parties' e-mails were admitted into evidence.

Based on the above series of e-mails, Jane's understanding of the agreement was that maintenance would be reduced to $90,000 a year for the remaining three years, and that Stuart was helping her out because her financial situation had changed dramatically beyond what they had contemplated. The "2014" instead of "2013" in the agreed order was a mistake that Jane did not catch at the time the agreed order was entered.

¶ 16 On cross-examination, Jane testified that she and Stuart did not have further discussions about the agreement after his March 26, 2010, e-mail. She agreed that her March 25, 2010, e-mail asking to reduce the maintenance to $7,500 per month also stated that if her earnings returned to their previous $550,000 level, she would resume paying him $110,000 annually, but that language was not in the agreed order. Jane testified that she did not review the terminating events in the MSA when she signed the agreed order, but she also testified that she did not remember whether she looked at the terminating events in 2010.

¶ 17 Kathy Farmer, Stuart's previous attorney, testified as follows. Stuart contacted her on about March 21, 2010, stating that Jane wanted to modify the maintenance provision. Around March 23, 2010, Farmer told Stuart that the maintenance was non-modifiable regardless of whether Jane's income had increased or decreased. Farmer said that if Stuart was inclined to modify the judgment, he should receive something back as a result, such as interest on the deferred amount. A day or two later, Stuart said that Jane had agreed to the deferral of $20,000 per year "to be tacked on the back end." Farmer did not speak to Jane or her attorney about the modification.

¶ 18 The trial court admitted into evidence Farmer's time records attached to her bill for Stuart. Entries from March 25, 2010, stated: (1) "Review of two e-mails from client re: $20,000.00 per year deferral is all that he will do"; (2) "E-mail to client re: calling Drew [Jane's

attorney] is a waste of time"; (3) "Another e-mail from and to client re: don't do anything"; (4) "Final e-mail from and to client." Time entries from March 26, 2010, stated: (1) "E-mail from and to client re: ex-wife has come up to his figure"; (2) "2nd e-mail from and to client re: I do not like his deal and reasons why"; and (3) "E-mail from client and to client with what needs to be done if he insists on making the deal with his wife."

¶ 19 Farmer did not have copies of the e-mails. Farmer did not like the deal because Stuart was getting a deferral without anything in return, such as interest on the deferred amount. In her last correspondence she told Stuart that if he was going to go through with the deal, it needed to be written as a $20,000 deferral of maintenance.

¶ 20 Stuart provided the following testimony. Farmer had advised him not to agree to modify maintenance because she thought it could result in the modification of other provisions. In Stuart's March 26 e-mail, when he stated that he appreciated Jane bending, he meant that they "could both come to some kind of agreement." When he said "i'll [*sic*] go along with it," he meant that if she drew up a document that was agreeable to him, he would sign it. That is why he said not to write anything before he and the kids came back from vacation. Jane later gave him a copy of the proposed agreed order. Stuart did not show it to an attorney and did not look at the termination events referenced from the MSA. Stuart thought that the agreement reduced monthly maintenance "and there was a specific date on there where it terminated."

¶ 21 The trial court found as follows. The parol evidence had "not pointed towards a meeting of the minds of both parties that would clarify the agreed order entered on May 7th of 2010." The evidence indicated that the parties had inconsistent ideas of what the agreement would ultimately be. On the one hand there was evidence that Jane was struggling financially and believed that she needed Stuart's consent to change the 2006 MSA. Her attorney argued that the

MSA had a contradiction in listing 84 months and the year 2014, but the focus here was on the construction of the 2010 contract. The evidence showed that although Stuart was communicating about amending the MSA, he knew that he did not have to do it. Stuart spoke about deferring $20,000 a year, which indicated to the court that his:

> "intention was not to aggregate the totality of the maintenance obligation or really even a portion of it, but just merely to stretch it out for a longer period of time so as to give [Jane] a little more time to breath financially, understanding he was under no obligation to do this."

It was relevant that both parties appeared to be articulate and intelligent. The agreed order was a one-page document, and nowhere on the document was a 2013 termination mentioned, or 84 months. Instead, the termination date of April 30, 2014, was clearly written. It was hard to believe that a sophisticated and successful business woman like Jane would not have caught that date as a scrivener's error and mentioned something. It was also relevant that the petition for modification requested the same relief that was granted in the order. The trial court continued:

> "I also applied a little commonsense, I thought, at least as sensical as the Court can apply rudimentary math. And to the Court, it appeared that [Stuart] was in, what I will colloquial call, the driver's seat. He may have known for a variety of reasons that he had a pretty ironclad non-modifiable contract for maintenance there. And in order for him to agree, from his position in the driver's seat to modify it, there would have to be some form of quid pro quo logically for him to accept a modification that he was likely not to have imposed by a court of law. And so that modification, that quid pro quo, for the reduction of $20,000 a year logically could be construed as adding or extending the maintenance to 2014, which would then reduce his annual net amount of maintenance,

> but keep his general total amount of maintenance similar by adding and deferring the payments to add yet another year."

The trial court stated that Jane had not proved by clear and convincing evidence that there was a mutual mistake of fact or a unilateral mistake coupled with fraud. It could not find based on the parol evidence that it was more likely than not that the parties' intent was that the maintenance terminate in 2013. Instead, it had to find that the agreed order signed by the parties, which reduced maintenance from $110,000 to $90,000 a year "and for a term that did not expire until April 30th of 2013" [*sic*] was the contract that the parties intended to enter into.

¶ 22 Based on questions seeking clarification from Jane's attorney, the trial court stated that it was resolving the ambiguity "based on what [it had] heard, even the parole [*sic*] evidence at this time" by determining that Jane agreed to extend the $90,000 payments to April 2014. The court stated that the parties did not have a meeting of the minds in March 2010 as to the modification of maintenance. "They may have had a meeting of the minds that maintenance needed to be modified, but *** they each had a different idea of how that would occur." Because the parol evidence did not show a meeting of the minds, the May 2010 written order controlled. Therefore, it was denying Jane's motion for a declaratory judgment.

¶ 23 On October 27, 2014, Jane filed a motion to reconsider, claiming that the trial court misapplied the law to the facts. She attached to the motion an affidavit of her attorney, Andrew Eichner, who discussed the circumstances under which he prepared the May 2010 agreed order. On November 6, 2014, Jane filed a motion to strike the issuance of the rule to show cause.

¶ 24 The trial court denied the motion to reconsider on December 22, 2014. In doing so, it stated that it would not consider Eichner's affidavit because he could have testified during the parol evidence hearing but did not.

¶ 25 The trial court then proceeded to hear Stuart's petition for rule to show cause. Eichner, testified as follows, in relevant part. He represented Jane in her marriage dissolution proceedings and in the post-decree proceedings. In 2010, Jane was concerned about maintenance, and Eichner told her that the court would likely require Stuart to contribute to the children's college expenses if she filed a petition. Jane said that she would negotiate directly with Stuart to avoid attorney fees. Jane showed Eichner the series of e-mails, and he believed that Jane and Stuart had reached an agreement that maintenance would be reduced to $90,000 per year for the balance of the 84 months. His firm prepared an order reflecting the agreement. At no time did anyone suggest that Jane had agreed to pay additional maintenance. In June 2013, Jane e-mailed him saying that Stuart had filed a petition for rule to show cause for not paying maintenance from May 2013 on. In June or July 2013, Eichner told her that in his opinion, she did not have an obligation to continue paying maintenance. He said that he would file a motion for a declaratory judgment to correct the scrivener's error in the agreed order, which listed the wrong termination year. He advised that if the court did not find it to be a scrivener's error, the court would still find the order to be ambiguous because it had two termination dates, and the trial court did in fact find it to be ambiguous. Eichner then told Jane that if the order was ambiguous, the trial court could still find that she owed money, but she could not be found in contempt of court because she was not on notice of what she was violating.

¶ 26 The trial court found as follows. In June 2013 Eichner advised Jane that she did not have an obligation to pay Stuart $7,500 monthly maintenance under the 2010 agreed order. The trial court agreed with Eichner that if an order was ambiguous, an individual should not be held in contempt for failing to comply with the order, but on October 7, 2014, the order was "fully vetted," and the trial court found that it "was, in fact, not ambiguous and was the order of the

case to be followed." From that time on, Jane had made no effort to make any maintenance payments, nor was there any evidence that she was unable to make payments. Therefore, the trial court was finding that she was in contempt for failing to pay maintenance from October 7, 2014, on, and that she owed Stuart $90,000.

¶ 27 After the ruling, Eichner stated that he had filed a motion to reconsider the October 7, 2014, order, and that motion had not been denied until that day. The trial court said that it had made its ruling and that it was finding Jane in "friendly contempt" in that it did not bear Jane any ill will and was not going to incarcerate her. The trial court stated that it appreciated that she may have received some advice from her lawyer which had "shepard[ed] [her] through this case for a very long time," but after its October 2014 ruling, she should have made some attempt to pay maintenance, and if it did not find her in contempt, there would be no redress for failing to comply with a court order.

¶ 28 On January 16, 2015, Stuart filed a petition for attorney fees and costs pursuant to section 508(b) of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/508(b) (West 2014)). He requested $14,033.40. On March 20, 2015, the trial court ordered that Jane pay $12,500 in fees under section 508(b).

¶ 29 II. ANALYSIS

¶ 30 We first address Jane's argument that the trial court erred in not finding that the 2010 order contained a scrivener's error in listing the maintenance's termination date as April 30, 2014, as opposed to April 30, 2013. A scrivener's error is "a clerical error resulting from a minor mistake or inadvertence when writing or when copying something on the record, including typing an incorrect number." *In re Marriage of Crecos*, 2015 IL App (1st) 132756, ¶ 17. An error that is decisional or judgmental, as opposed to mechanical or technical, is not a scrivener's

error. *Handelsman v. Handelsman*, 366 Ill. App. 3d 1122, 1135 (2006). Similarly, "[a]n error that is the deliberate or conscious result of the exercise of professional judgment, or a misapprehension of the law or the facts, will not qualify as a scrivener's error." *Id.*

¶ 31 A *nunc pro tunc* order is used to correct a scrivener's error to allow the record to express, in writing, what the court actually intended to occur. *U.S. Bank National Ass'n v. Luckett*, 2013 IL App (1st) 113678, ¶ 27. A *nunc pro tunc* order may not be used to have the court construe a judgment, but rather only to enter of record a judgment that was formerly rendered but not entered of record. *In re Marriage of Breslow*, 306 Ill. App. 3d 41, 54 (1999). Here, Jane did not seek to correct the purported order *nunc pro tunc*, and such a motion would not have been appropriate, as the error is allegedly one made by the parties, rather than the trial court, and would require construction of the judgment and other pleadings. The vehicle Jane chose to use was a motion for a declaratory judgment and other relief. A declaratory judgment was arguably also not appropriate because such a judgment allows a trial court to address a controversy after a dispute has arisen but before steps have been taken that give rise to a claim for damages. *Karimi v. 401 North Wabash Venture, LLC*, 2011 IL App (1st) 102670, ¶ 10. Here, Stuart filed a petition for rule to show cause for failure to pay maintenance, so he already had a claim for damages.

¶ 32 Even if a declaratory judgment motion was proper, Jane was, in substance, essentially seeking a reformation of the agreed order based on an alleged scrivener's error. See *Biskupski v. Jaroszewski*, 398 Ill. 287, 288 (1947) (the plaintiff sought reformation of the contract, alleging that the scrivener had made an error in reducing the agreement between the parties to writing); *Bank of America, N.A. v. Carpenter*, 401 Ill. App. 3d 788, 799 (2010) (equating claim of scrivener's error to seeking reformation of the contract based on provision being mistakenly

included); see also *Wheeler-Dealer, Ltd. v. Christ*, 379 Ill. App. 3d 864, 872 (2008) ("Reformation of a written instrument is based upon proof of an underlying agreement between the parties which has been thwarted by a mutual mistake in transcription."). A written instrument presumably expresses the parties' intent, and courts will not reform it without evidence of mutual mistake (*U.S. Bank Trust, N.A. v. Colston*, 2015 IL App (5th) 140100, ¶ 26) or a unilateral mistake by one party caused by the fraud of the other party (*Marengo Federal Savings & Loan Ass'n v. First National Bank of Woodstock*, 172 Ill. App. 3d 859, 863 (1988)). See also *Continental Illinois National Bank & Trust Co. of Chicago v. Sax*, 199 Ill. App. 3d 685, 695 (1990) (agreed orders are not a judicial determination of the parties' rights and can be amended or set aside only on a showing of fraudulent misrepresentation, coercion, incompetence of one of the parties, gross disparity in the parties' position or capacity, or newly discovered evidence). The party seeking reformation based on mutual mistake must show by clear and convincing evidence that the document contains a mutual mistake, and the trial court's ruling on the matter will not be disturbed unless it is against the manifest weight of the evidence. *Schivarelli v. Chicago Transit Authority*, 355 Ill. App. 3d 93, 100 (2005). [2]

¶ 33 Typically, if an instrument appears complete, certain, and unambiguous, then parol evidence of a prior or contemporaneous agreement is not admissible to vary the terms of the instrument. *Danhauer v. Danhauer*, 2013 IL App (1st) 123537, ¶ 29. However, even where the instrument to be reformed is clear and unambiguous, the parol evidence rule does not prevent the

[2] The trial court's finding that Jane had not proved by clear and convincing evidence that there was a mutual mistake of fact or unilateral mistake coupled with fraud (see *supra* ¶ 21) shows that the trial court also construed Jane's motion as seeking reformation of the agreed order.

admission of extrinsic evidence on the question of mutual mistake. *Id.* In such a situation, the parol evidence is used to show the parties' real agreement when a mistake has been made in drafting the contract. *In re Marriage of Johnson*, 237 Ill. App. 3d 381, 391 (1992). A mutual mistake of fact which can be shown by parol evidence is one where both contracting parties have the same misconception, such that the parties are in actual agreement but the agreement as written does not express the parties' real intent. *In re Marriage of Johnson*, 237 Ill. App. 3d at 391.

¶ 34 Jane argues that it was obvious that the 2010 agreed order contained a scrivener's error because: (1) Stuart admitted that the use of April 30, 2014, instead of April 30, 2013, in the parties' MSA was in error; (2) the same erroneous date of April 30, 2014, was carried forward to the agreed order; and (3) the agreed order stated that it was subject to the termination events listed in paragraphs 9(c)-(d) of the MSA, which included "[t]he end of the 84-month term," which would have been April 30, 2013. Jane argues that both the MSA and the agreed order contained the same incongruity of listing an 84-month term and the date of April 30, 2014, and since Stuart admitted that the use of the date in the MSA was a scrivener's error, the trial court should have recognized the same scrivener's error in the agreed order. According to Jane, the issue should have been resolved without resorting to parol evidence.

¶ 35 Jane argues that even if the parol evidence is considered, it unequivocally supported her position. Jane maintains that it is undisputed that she was in financial straits, facing eight years of total college expenses for the parties' children, liquidating assets, and seeking to reduce her maintenance obligation to Stuart. She argues that the evidence showed that: (1) she asked Stuart to accept a reduction in maintenance; (2) Stuart asked Jane to defer $20,000 per year until the end, and Jane explicitly refused; (3) Stuart's then-counsel had time records showing that she "did

not like his deal"; and (4) Stuart's e-mail also said that his attorney was opposed to it but said that he would "go along with it" and that his "tragic flaw" was that he "give[s] in too easily." Jane argues when this evidence is combined with the evidence from the MSA identifying her maintenance obligation as 84 months, the only reasonable conclusion is that the parties intended to reduce Jane's maintenance obligation such that she would save approximately $60,000, not increase and extend it such that she would end up paying an additional $30,000, and that the "2014" in the agreed order was a scrivener's error. Jane argues that although Stuart contended in his response to her motion for a declaratory judgment that the parties negotiated for Jane to modify the amount that she was paying and extend it for one year, there was no evidence supporting this claim. Jane argues that, moreover, the tone of Stuart's March 26, 2010, e-mail is not that of someone receiving tens of thousands of dollars of additional maintenance; Jane argues that his characterization of himself as a "wuss" who "give[s] in too easily" is sharply at odds with the trial court's portrayal of him as "in the driver's seat." Jane argues that the best evidence of what the parties were agreeing to is their contemporaneous e-mails, guided by common sense notions, and that the only logical version of events is the one that she has set forth.

¶ 36 Stuart argues that the trial court's ruling was not against the manifest weight of the evidence because: (1) no attorney who prepared any of the documents for Jane in 2010 testified; (2) Jane testified that she read the agreed order before signing it but had not looked at the terminating events in the MSA; (3) the chain of e-mails on which Jane relied show that they did not present a complete agreement by the parties, as Jane's statement that she would increase maintenance if her income increased was not in the agreed order, and Stuart's e-mail said that they still needed to "iron out the rhetoric" and that she should not proffer a written agreement until he returned from vacation; and (4) Jane originally could not have succeeded in modifying

maintenance in contested litigation. Stuart argues that, therefore, the trial court did not come to an unreasonable or arbitrary decision in determining that: Stuart did not agree in his March 2010 e-mail to give up something for nothing; Stuart never agreed to forfeit $20,000 per year in maintenance; and both parties signed an agreement knowing that payments would not end until April 30, 2014.

¶ 37 Stuart argues that his characterization of himself in his e-mail as a "wuss" did not mean that he accepted Jane's proposal, which was not what was reflected in the agreed order, as it did not include an increase in maintenance if Jane's income increased. Stuart argues that "wuss" could easily mean that he was willing to agree to any changes when he knew that he did not have to and when Farmer had told him that he risked other modifications by doing so. Stuart argues that, most significantly, the last e-mail informed Jane that he would have to agree to a written instrument to finalize matters. Stuart argues that the trial court correctly found that the written agreed order controlled.

¶ 38 Regarding the trial court's references to ambiguity, Stuart argues that the principle that a specific contract clause will control over a general one when they address the same subject matter (*Barba v. Village of Bensenville*, 2015 IL App (2d) 140337, ¶ 25) eliminates any possible ambiguity in the agreed order, as the reference to paragraphs 9(c)-(d) of the MSA was a general reference to termination events as a whole, while the end date of April 30, 2014, was specific and an exception to the general provision. Stuart argues that even if an ambiguity existed, it was the trial court's responsibility to resolve it through parol evidence (see *Shields Pork Plus, Inc. v. Swiss Valley Ag Service*, 329 Ill. App. 3d 305, 313 (2002)), and the trial court's resolution of this issue was not against the manifest weight of the evidence. He also argues that a claim of mutual mistake was not shown, as there was no evidence that Stuart believed that the order drafted by

Jane's attorney, which Jane signed, represented anything other than an agreement to pay maintenance through April 30, 2014.

¶ 39 We disagree with Jane that the use of the year "2014" on the 2010 agreed order was an "obvious" scrivener's error, as the agreed order was entered into years after the MSA, and it changed the terms of Stuart's maintenance. Jane's petition to modify maintenance stated that the parties agreed that "Jane's maintenance obligation should be modified such that she shall pay Stuart $7,500 per month ($90,000 per year) retroactive April 1, 2010 until April 30, 2014," and the agreed order reflected this request. In other words, the parties could have agreed to reduce the amount of monthly maintenance Stuart received but also extend maintenance for an additional year, and any references to 84 months in the petition to modify and the agreed order could be taken as the scrivener's error, instead of the error being the April 30, 2014, termination date. Accordingly, the trial court did not err in seeking parol evidence on the parties' agreement.

¶ 40 We further conclude that the trial court's ruling, that Jane did not prove by clear and convincing evidence that the parties had a meeting of the minds that was not accurately reflected in the agreed order, was not against the manifest weight of the evidence. Looking at the parol evidence, the e-mails revealed that: Jane asked that Stuart agree to reduction of maintenance to $71,000 per year; Stuart replied that he spoke to Farmer and she advised him to stick to the agreement, but he was willing to defer $20,000 per year until the end of the settlement; Jane said that she was not willing to defer $20,000 per year; and a few e-mails later, Jane asked that Stuart accept a reduction to $7,500 per month, and she would resume paying him the previous amount if her earnings returned to the $550,000 level. Stuart then responded with the e-mail saying that he would "go along with it," but not to write up anything before he returned because they needed

to "iron out the rhetoric." He stated that Farmer felt that by agreeing to modify a non-modifiable document, he was opening himself up to "a pandora's box of problems."

¶ 41 Thus, we agree with Stuart that his references to "bending" and "wuss" could be interpreted as reflecting that he was agreeing to any changes of the MSA at all, and not that he was agreeing to waive the deferral of the total maintenance due. This interpretation corresponds to Farmer's testimony and time records that she did not think that Stuart should agree to any modification of the MSA, and that if he did, he should receive interest on the deferred amount. In other words, the evidence indicates that Farmer did not contemplate that Stuart would receive less maintenance overall. It is true that the parol evidence also did not show that Stuart thought that he would receive $30,000 more maintenance overall, but it was Jane's burden to show that the evidence indicated a meeting of the minds that was not reflected in the agreed order due to a mutual mistake of fact, which she failed to do. Rather, Stuart explicitly wanted to read the proposed order before formally agreeing to the change. Where "[t]here has been no meeting of the minds, there can be no reformation." *Wheeler-Dealer, Ltd.*, 379 Ill. App. 3d at 872. Moreover, although there was evidence that at the time of the e-mail exchanges, Jane intended that there be no deferral of maintenance, a unilateral mistake by her would not be grounds for reforming the contract absent fraud by the other party (see *Marengo Federal Savings & Loan Ass'n*, 172 Ill. App. 3d at 863), and there was no allegation or evidence of fraud here. In sum, the trial court did not err in ruling that Jane did not meet her burden of showing that the agreed order should be reformed due to mutual mistake of fact that resulted in an alleged scrivener's error.

¶ 42 Jane next argues that the trial court abused its discretion by holding her in contempt of an order that it had labeled ambiguous.

¶ 43 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. *Cetera*, 404 Ill. App. 3d at 41. To support a contempt finding, the underlying order must be so specific and clear that as to be susceptible to only one interpretation; it must be unambiguous. *In re Marriage of Baumgartner*, 2014 IL App (1st) 120552, ¶ 64. 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); *In re Marriage of Weddigen*, 2015 IL App (4th) 150044, ¶ 20.

¶ 44 Stuart argues that Jane has forfeited the issue of ambiguity because she argued in the trial court, and continues to argue, that the agreed order was not ambiguous but rather contained only a scrivener's error. Stuart further argues that the trial court stated at the end of the October 7, 2014, proceedings that the agreed order was not ambiguous but rather clearly stated the parties' intent to reduce the annual maintenance while adding an additional year of payments. Stuart maintains that the trial court was correct because the April 30, 2014, termination date was not susceptible to more than one meaning and cannot be deemed ambiguous, and the reference to the termination events in the MSA was superseded as a matter of law by the specific date.

¶ 45 Stuart argues that because Jane failed to make payments under the agreed order, a *prima facie* case of contempt existed against her, and she had the burden of establishing that her conduct was not willful and contumacious and that there existed a valid reason for her not to pay. Stuart contends that even though Jane believed that the agreed order was erroneous because it

contained the wrong termination date, it would not justify deliberately violating the order. See *In re Marriage of Barile*, 385 Ill. App. 3d 752, 758 (2008) (party could be held in contempt for violating voidable order). Stuart further argues that although Jane had a motion to reconsider pending, and such motions normally stay enforcement of a judgment (see 735 ILCS 5/2-1203 (West 2014)), section 413(a) of the Marriage Act provides: "An order requiring maintenance or support of a spouse of a minor child or children entered under this Act or any other law of this State shall not be suspended or the enforcement thereof stayed pending the filing and resolution of post-judgment motions or an appeal." 750 ILCS 5/413(a) (West 2014). Stuart argues that, therefore, the trial court "was correct in finding fault with Jane's continued intransigence even after any possible excuse regarding interpretation of the agreed order had evaporated."

¶ 46 Beginning with the question of ambiguity, we disagree that Jane has forfeited this issue, as it was the trial court that initially labeled the order as ambiguous, and Jane is merely arguing that its contempt finding is inconsistent with its own finding of ambiguity.

¶ 47 We note that the trial court did not find Jane in contempt for failing to pay maintenance beginning in May 2013. Instead, the trial court stated that on October 7, 2014, it had determined that the agreed order was not ambiguous and was the order of the case to be followed, and Jane should have begun paying maintenance at that time. Accordingly, we next examine the trial court's construction of the agreed order, recognizing that we have already determined that the trial court did not err in denying Jane's request to essentially reform the contract to replace the year "2014" with the year "2013."

¶ 48 Agreed orders are considered to be contracts between the parties, so their construction is governed by contract law principles. *Draper & Kramer, Inc. v. King*, 2014 IL App (1st) 132073, ¶ 27. The primary goal is to effectuate the parties' intent (*Elliott v. LRSL Enterprises, Inc.*, 226

Ill. App. 3d 724, 729 (1992)), which is best indicated by the plain meaning of the words of the contract (*Paluch v. United Parcel Service, Inc.*, 2014 IL App (1st) 130621, ¶ 13). Contract language is ambiguous if it is susceptible to more than one meaning. *Id.* "Issues of contract interpretation, including whether a contract is ambiguous, are reviewed *de novo*." *Bozek v. Erie Insurance Group*, 2015 IL App (2d) 150155, ¶ 20. However, where extrinsic evidence is needed to establish the parties' intent, the intent is a question of fact, and the trial court's finding will not be disturbed unless it is against the manifest weight of the evidence. *K's Merchandise Mart, Inc. v. Northgate Limited Partnership*, 359 Ill. App. 3d 1137, 1142 (2005).

¶ 49 Here, the trial court initially found that the agreed order was ambiguous because the order listed the termination date of April 30, 2014, but it also referenced the termination events in the MSA, which included the end of the 84-month period (April 30, 2013). At the October 7, 2014, hearing, the trial court ruled that Jane had not proven by clear and convincing parole evidence that there was a mutual mistake of fact in writing the maintenance termination date as April 30, 2014, instead of April 30, 2013. The court stated that it was resolving the ambiguity "based on what [it had] heard, even the parole [*sic*] evidence at this time" by determining that the agreed order that the parties signed was the contract that they intended to enter in to, and that Jane agreed to extend the $90,000 payments to April 2014.

¶ 50 Even looking at just the face of the agreed order, we do not find any error in the trial court's conclusion, because, as Stuart points out, if contractual provisions conflict or create an ambiguity, the more specific provision controls. *Coe v. BDO Seidman, L.L.P.*, 2015 IL App (1st) 142215, ¶ 27. Here, the maintenance termination date of April 30, 2014, was more specific than the reference to the MSA's general termination events. *Cf. Countryman v. Industrial Comm'n*, 292 Ill. App. 3d 738, 742-43 (1997) (specific provisions of a release overrided general release

provisions). Moreover, any ambiguity must be resolved against the drafter of the contract (*International Supply Co. v. Campbell*, 391 Ill. App. 3d 439, 452 (2009), which in this case was Jane. Even considering the parol evidence, the trial court's ruling was not against the manifest weight of the evidence because, as discussed, the evidence did not show that in March 2010 the parties had a meeting of the minds as to what the exact terms of the agreed order would be. Thus, we agree with the trial court insofar as it had resolved the ambiguity in the agreed order on October 7, 2014, by ruling that the written order controlled and that the parties had agreed to extend maintenance payments until April 30, 2014.

¶ 51 Correspondingly, the trial court stated at the contempt hearing that Jane should have begun paying maintenance following the October 7, 2014, hearing. We do not find any error in the trial court's position because, as stated, on October 7, 2014, it construed the agreed order as requiring maintenance payments until April 30, 2014. Further, as Stuart points out, although Jane filed a motion to reconsider the October 7, 2014, ruling, her motion did not stay enforcement of the agreed maintenance order under section 413(a) of the Marriage Act. See also *In re Marriage of Weddigen*, 2015 IL App (4th) 150044, ¶ 41 (where the respondent unilaterally decided not to make child support payments based on the mistaken belief that the appeal of the issue would stay his obligation, his nonpayment was without cause or justification). At the contempt hearing, Eichner testified that in June or July 2013, he told Jane that she could not be held in contempt of court because she was not on notice of what she was violating, in that, at a minimum, the agreed order was ambiguous. However, as stated, the trial court resolved the ambiguity on October 7, 2014. Eichner did not testify as to what he advised Jane after that date regarding maintenance payments, and Jane did not testify as to why she had not begun paying maintenance after that ruling or as to any financial inability to pay; in fact, Jane did not testify at

the contempt hearing at all. Accordingly, we cannot say that the trial court's finding of contempt was an abuse of discretion or was against the manifest weight of the evidence.

¶ 52 Jane argues that the trial court purportedly held her in "friendly contempt," but no such thing exists. However, it is clear that the trial court held Jane in indirect civil contempt, as even the written order is labeled as such. "Friendly contempt" is a phrase found in caselaw, and it usually refers to a situation in which the trial court holds a party in contempt to facilitate the party's appeal of its ruling through an interlocutory appeal. See *Klaine v. Southern Illinois Hospital Services*, 2016 IL 118217, ¶ 6; *Doe v. Weinzweig*, 2015 IL App (1st) 133424, ¶ 10. Here, the trial court's comments make it clear that it was using the phrase to indicate that it did not have any ill will towards Jane and did not feel that it needed to incarcerate her for compliance.

¶ 53 Jane argues that the trial court's contempt order was void because it awarded Stuart a $90,000 judgment, which he had not even sought in his petition, but did not identify any purge. She further argues that Stuart's petition should have been stricken because it did not even identify the nature of contempt sought.

¶ 54 In a civil contempt proceeding, the contemnor must have the opportunity to purge himself or herself of contempt by complying with the pertinent court order. *In re M.S.*, 2015 IL App (4th) 140857, ¶ 36. Here, the trial court found Jane in violation of the 2010 agreed order and ordered that she pay Stuart $90,000 pursuant to that order, so it identified the purge requirement.

¶ 55 As far as Stuart's petition for rule to show cause, Jane does not cite any authority for the proposition that such a petition must explicitly state what type of contempt it is seeking, thus forfeiting this question for review. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (argument in brief shall contain citation to authorities relied upon); *Adler v. Greenfield*, 2013 IL App (1st)

121066, ¶ 59 (failure to support argument with citation to legal authority results in forfeiture of the argument on appeal). Even otherwise, it is clear that Stuart was seeking compliance with the 2010 agreed order such that he received the maintenance that he was allegedly due under the order, which shows he was seeking a civil contempt finding. See *Felzak v. Hruby*, 226 Ill. 2d 382, 391 (2007) (civil contempt is a sanction or penalty that seeks to coerce future compliance with a court order). Moreover, Stuart's petition alleged that Jane had violated the agreed order by not paying maintenance beginning in May 2013 and sought "appropriate sanctions," so the trial court's judgment in his favor for $90,000, representing the amount due to him under the order, was appropriate.

¶ 56 Last, Jane argues that the trial court abused its discretion in ordering her to pay Stuart's attorney fees incurred in connection with the contempt order. She argues that the agreed order did not support a finding of contempt and that the contempt finding was also void because it did not identify a purge amount. She therefore argues that the trial court's March 20, 2015, order requiring her to pay $12,500 for Stuart's attorney fees should be reversed.

¶ 57 Section 508(b) of the Marriage Act states, 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." 750 ILCS 5/508(b) (West 2014).

The imposition of such fees upon a finding of contempt are mandatory. *In re Marriage of Putzler*, 2013 IL App (2d) 120551, ¶ 38. As we have determined that the trial court's finding of

contempt was not an abuse of discretion or against the manifest weight of the evidence, and that it did identify a purge amount, the trial court properly awarded Stuart attorney fees.

¶ 58 III. CONCLUSION

¶ 59 For the reasons stated, we affirm the judgment of the Lake County circuit court.

¶ 60 Affirmed.