

No. 1-13-0658

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 Rule23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF KEN THOMPSON,) Appeal from the
Petitioner-Appellant, and Paula Thompson,) Circuit Court of
Respondent-Appellee.) Cook County.
)
) 08 D 6836
)
) The Honorable
) Andrea M. Schleifer,
) Judge Presiding

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in denying petitioner's motion to modify child support and maintenance or in holding petitioner in contempt for failure to make the payments because petitioner acted in bad faith when he voluntarily changed jobs without accounting for his support obligations. This court affirmed the judgment of the circuit court.

¶ 2 This appeal arises from a trial court judgment holding petitioner Ken Thompson in indirect civil contempt for failing to pay child support and maintenance to his former wife, respondent Paula Thompson, following their dissolution of marriage. Ken challenges that contempt judgment, as well as the denial of his underlying petition to modify child support and

maintenance, contending the rulings represent an abuse its discretion because he did not act in bad faith when he voluntarily changed jobs. We affirm.

¶ 3 BACKGROUND

¶ 4 The parties' dissolution judgment incorporating a marital settlement agreement (MSA) was entered on March 15, 2011. Article 4 of the MSA provided that Ken, who then worked for DLC financial consulting company, was to pay Paula \$1,507.45 twice a month (or 28 percent of his biweekly net pay of \$5,383.75) in support of their two children, starting from the entry of the dissolution judgment. Article 4 also provided that Ken pay Paula \$2,600 in maintenance every month for 24 months commencing April 1, 2011, until March 1, 2013.

¶ 5 Some eight months later, on October 3, 2012, Ken filed a petition to modify child support and maintenance payments. Ken stated that he began working for LX Consulting in August 2012 and, because LX was essentially a start-up company, Ken was "not receiving any income." He stated this was a substantial change in his financial situation justifying modification of child support and maintenance and, in support, pointed to an "attached 13.3.1 statement" that does not appear in the record on appeal. Paula opposed Ken's petition, and also filed a petition for rule to show cause in which she alleged that Ken had refused to make the child support and maintenance payments identified in Article 4 of the MSA for August through December 2012. Paula alleged that since Ken had the "financial capacity" to make the payments, his refusal to do so was "willful and contemptuous," warranting a contempt finding and order for the forgone payments.

¶ 6 On February 14, 2013 (Valentine's Day), the trial court held a hearing with the parties and their counsel present. Ken testified in support of his petition to modify that his former company DLC was a staffing firm for professionals and he worked as a director of client

services. His salary was about \$200,000, including a bonus. He contemplated forming LX Consulting around 2006 and had regular conversations about the potential move with Paula. In August 2012, with the market at an "inflection point," Ken formed LX Consulting, advising companies and serving as the sole shareholder, because he believed he "could actually earn much better income" for his family. He initially projected business earnings of \$1 million for year one, giving him a \$100,000 salary, and about \$1 million increases for the five years to follow. Nonetheless, from August to December 2012, he made only \$16,600 or about \$4,000 per month. He explained that start-up costs included office space, finance, accounting, infrastructure, four employees (paid at a rate of \$55-\$100 per hour), etc., and he did not borrow any funds to jump-start his business. As of the hearing date, Ken projected some \$750,000 in business earnings, yet he requested to hold off paying his child support and maintenance in order to develop his business. He added that although he was not paying child support and even though he shared custody of the children, he was paying \$450 a month for his children. He testified he did not launch the business as a means of avoiding his responsibilities under the dissolution judgment even though he coincidentally ceased his payments the same month he launched his business.

¶ 7 On cross-examination, Ken stated he had a mortgage and rental property income that went towards the mortgage. His monthly living expenses amounted to about \$6,840 and of those he paid what he could. Ken previously had about \$26,000 in his 401K, but he had used this money to fund his business. He acknowledged he had no documentation to demonstrate projections of his salary at his new business. He also acknowledged that for the year of 2012, prior to opening his own business, his salary grossed at \$196,000. He stated he had paintings of value (between \$12,000 and \$25,000), which he could sell, but he had not investigated liquidation further.

¶ 8 A separate hearing was also held on the petition for rule to show cause, wherein Ken testified in a similar manner as before that he was unable to make the support payments because of his changed employment circumstances. He added that even while at DLC, he was "operating at deficits," but did not provide an explanation as to why and also stated that he was unable to save at that time.

¶ 9 The trial court found Ken's claim that he was unable to pay child support and maintenance lacked credulity and concluded he was acting in bad faith. The court stated it was notable that Ken did not start his business while still married or during his divorce, but waited until he was bound by an agreement for payments before he voluntarily terminated his employment to start his own business. The court stated, "[i]f he can pay his rent and his mortgage and he can pay between 50 and 55 and \$100 [sic] per hour for four employees, I believe he has the ability to pay his children the modest amount of child support" based on his prior income. The court also noted that Ken had a source of money in the paintings but had done nothing to convert the objects to cash. The court stated that Ken's voluntary termination of his employment, done without taking appropriate steps to account for child support and maintenance on a judgment he had only recently entered into, made him in indirect civil contempt of court. Noting that Ken had joint custody of the children, the court concluded, "[i]f he wanted to take this leap of faith, he should have banked some money," and "secured his children's needs."

¶ 10 Following evidence and argument, the court entered a contempt order for \$38,550.58, representing the amount of money Ken was in arrears for child support and maintenance, but stayed the order until February 28, 2013, for Ken to purge the contempt finding by paying \$19,275.22. The same day, the court denied Ken's petition to modify child support and maintenance.

¶ 11 This appeal followed. Ken now challenges the trial court's denial of Ken's petition to modify support and the order holding him in contempt. We address each in turn.

¶ 12 ANALYSIS

¶ 13 A child support and a maintenance judgment can be modified only upon a showing of a substantial change in circumstances. 750 ILCS 5/510(a)(1), (a-5) (West 2012). The party seeking modification bears the burden of proving he's entitled to the relief. *In re Marriage of Anderson*, 409 Ill. App. 3d 191, 199 (2011); *In re Marriage of Lyons*, 155 Ill. App. 3d 300, 304-05 (1987). With regard to both judgments, a party seeking to decrease his obligations based on a voluntary change in employment must demonstrate that the action was taken in good faith and not to evade financial responsibility. *In re Marriage of Sweet*, 316 Ill. App. 3d 101, 106 (2000); *see also* 750 ILCS 5/510(a-5) (West 2012) (listing factors to consider for maintenance). Absent a good faith showing, the voluntary termination of employment does not warrant an abatement of these obligations. *Sweet*, 316 Ill. App. 3d at 106.

¶ 14 Here, the trial court determined that Ken failed to present a credible motive for terminating his employment shortly after agreeing through the MSA to provide for maintenance to his wife for two years and child support payments based on his rather sizeable income from DLC. We cannot say the trial court abused its discretion in denying Ken's petition or that its factual findings were against the manifest weight of the evidence. *See In re Marriage of Ross*, 355 Ill. App. 3d 1162, 1166-67 (2005); *Lyons*, 155 Ill. App. 3d at 305.

¶ 15 We agree with the trial court that Ken failed to ensure he had adequate funds set aside so he could comply with the dissolution judgment before launching his own business. Although Ken testified he projected his company earnings of \$1 million for year one, sound planning would seem to suggest that most companies actually run a deficit in the first years of

operation. Ken, moreover, was already "operating at deficits" while at DLC, calling into question the wisdom of his decision to launch a business. Ken also did not present any evidence other than his self-serving testimony, which the trial court apparently discredited, that his start-up would result in increased earnings over time. *Cf. In re Marriage of Webber*, 191 Ill. App. 3d 327, 329 (1989) (motion to reduce child support affirmed where trial court credited testimony of petitioner that additional education would increase his earning potential). Regardless, Ken could have sought a small business loan or liquidated his assets like the paintings so he could honor his child support and maintenance obligations, but he chose not to do so. His maintenance payments, after all, were only for two years, and one of his children is autistic. See 750 ILCS 5/510(a-5) (West 2012) (a factor to consider is the duration of the maintenance payments in relation to the marriage). It is well established that courts have the authority to compel parties to support at a level commensurate with their earning potential. See *In re Marriage of Deike*, 381 Ill. App. 3d 620, 631 (2008). As succinctly stated in *Sweet*: "While a party's desire to remain self-employed is not insignificant, *** the interests of the other spouse and the children may sometimes take precedence." 316 Ill. App. 3d at 107. Although Ken claims he acted in good faith, based on the evidence the trial court found otherwise, and we will not disturb that determination. See *Anderson*, 409 Ill. App. 3d at 199 (credibility determinations and the weight of the evidence are within the province of the trial court).

¶ 16 We reach a similar conclusion regarding the trial court's contempt order. Here, Ken's admitted failure to comply with the support judgment served as *prima facie* evidence of contempt, and so he bore the burden to demonstrate his inability to pay was not willful or contumacious but based on a valid excuse. See *In re Marriage of Barile*, 385 Ill. App. 3d 752, 758-59 (2008); see also 750 ILCS 5/505(b) (West Supp. 2013). He was required to show that he

neither had the money, nor had he disposed wrongfully of money or assets with which he might have paid. *Lyons*, 155 Ill. App. 3d at 307. In addition, he had to establish financial inability to comply with the order by some definite and explicit evidence. *In re Marriage of Chenoweth*, 134 Ill. App. 3d 1015, 1018 (1985). Based on our analysis above, Ken was unable to carry this burden.

¶ 17 Lastly, we reject Ken's late-coming assertion in his brief that he has paid Paula "in full regarding the remaining maintenance payments" owed under the MSA, even though the evidence "is not part of the record on appeal." In support, Ken points to his brief's appendix, which includes copies of several checks he subsequently issued to Paula in 2013. However, this court will not consider evidence that is not part of the trial record or presented to the trial judge. See *Ruiz v. Walker*, 386 Ill. App. 3d 1080, 1081 (2008). If Ken has in fact purged part of the contempt order, he may present that evidence to the trial court below.

¶ 18 CONCLUSION

¶ 19 Based on the foregoing, we affirm the judgment of the circuit court.

¶ 20 Affirmed.