

NOTICE
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2015 IL App (5th) 130333-U

NO. 5-13-0333

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
ROBERT E. TROSKE,)	Madison County.
)	
Petitioner-Appellant,)	
)	
and)	No. 08-D-1153
)	
KAREN M. TROSKE,)	Honorable
)	Ben L. Beyers II,
Respondent-Appellee.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Cates and Justice Moore¹ concurred in the judgment.

ORDER

¶ 1 *Held:* Order finding indirect civil contempt for failure to pay child support was a proper exercise of the court's discretion where (1) the record showed that the husband was paying for numerous personal expenses through his business account, including country club memberships and vacation homes; and (2) the husband's large tax debt was incurred due to his own failure to pay taxes for three years.

¹Justice Spomer was originally assigned to participate in this case. Justice Moore was substituted on the panel subsequent to Justice Spomer's retirement, and has read the briefs and listened to the tape of oral argument.

¶ 2 The petitioner, Robert E. Troske, appeals an order finding him in indirect civil contempt for failure to pay child support. He argues that (1) the trial court's finding of contempt was against the manifest weight of the evidence and constituted an abuse of the court's discretion; and (2) the court should have afforded him the opportunity to present evidence in support of a petition to modify child support which was filed prior to his former wife's petition for a finding of contempt. We affirm.

¶ 3 This case comes to us with a long and somewhat unusual procedural history. The parties, Robert and Karen Troske, were married in 1995. Their daughter, Emily, was born in 1998. Robert's daughter from a previous marriage, Andrea, was born in 1991. Although Robert testified at the contempt hearing that he and Karen did not separate until November 2008, they began filing separate income tax returns in 2007. Both parties owned their own businesses. Robert acknowledged at the contempt hearing that he did not pay the taxes for his business that were due in 2007, 2008, and 2009, which left him a tax debt of over \$167,000.

¶ 4 Robert filed a petition for dissolution in November 2008. After numerous continuances, the matter came for trial in January 2011. At that time, the parties agreed to a stipulation that the court would consider income information from 2009 as the basis for all decisions regarding maintenance, child support, property division, and the valuation of the businesses each party owned. The purpose of this agreement was to avoid the additional delay that would be needed to allow them to conduct discovery related to their 2010 income.

¶ 5 The final hearing in the matter took place on March 18, 2011. However, the court did not enter a final dissolution order resolving all issues until September 18, 2012. In that order, the court assigned Robert the \$167,000 tax debt. Although most of the remaining details of the court's property distribution are not relevant to this appeal, it is worth noting that the court expressly found that Robert's testimony regarding various disputed and unaccounted-for marital assets was not credible.

¶ 6 The court ordered Robert to pay \$2,000 per month in child support for the parties' minor daughter, Emily. The court also ordered him to pay maintenance-in-gross at a rate of \$500 per month. The court had previously ordered Robert to pay \$2,000 per month in temporary child support and \$750 per month in temporary maintenance. At the time the court entered the order in September 2012, he was in arrears on both of these obligations. The court ordered the parties to attempt to come to an agreement as to the amount of these arrearages, but stated that it would set a hearing to make that determination if the parties were unable to do so. The court ordered Robert to pay \$400 per month toward the arrearages.

¶ 7 On October 5, 2012, Robert filed a petition to modify his child support and maintenance obligations, alleging that his income had dropped substantially since 2009. Four days later, he filed a notice of appeal, arguing, among other things, that the court abused its discretion by accepting the parties' stipulation to the use of their 2009 income.

¶ 8 In January 2013, while Robert's appeal of the dissolution order was pending, the trial court held a hearing and entered an order finding Robert's arrearage to be \$73,000

pursuant to the parties' stipulation. Karen filed a motion for a finding of indirect civil contempt due to Robert's failure to pay child support.

¶ 9 The court held a hearing on Karen's contempt petition on June 27, 2013. At this time, Robert's petition to modify was still pending, as was his appeal of the underlying judgment. At the outset, attorneys for both parties noted that multiple motions were pending. They agreed that the hearing would be limited to resolving the contempt petition filed by Karen in January 2013. The petition to modify remained pending.

¶ 10 Both Robert and his fiancée, Shari Roth, testified at the hearing. Robert and Shari began living together in a home owned by Shari in 2009. They got engaged in 2011. In the September 2012 dissolution order, the court expressly found that Robert's testimony regarding his transactions with Shari was not credible. More specifically, the court disbelieved his claim that Shari was able to purchase the \$599,000 home they shared with no contributions from Robert. The court also pointed to large sums of money Robert paid to Shari, allegedly to repay loans she made to his business.

¶ 11 At the contempt hearing, Robert continued to assert that Shari paid for many of his expenses. Evidence regarding both Robert's and Shari's income was introduced. Robert's 2009 business tax return showed gross receipts of \$412,721 and ordinary business income of \$94,991. His 2009 individual tax return showed an adjusted gross income of \$148,460, including wages of \$36,000. Robert's 2012 business return showed gross receipts of \$243,733 and ordinary business income of \$93,407. His individual return showed an adjusted gross income of \$93,273, none of which was wages from his

company. Shari's W2 for 2011 showed an income of \$162,222, while her W2 for 2012 showed an income of \$84,471.

¶ 12 Robert acknowledged that he provided no documentation of his 2013 income to Karen's attorney in discovery. He did, however, file an affidavit of assets and liabilities. In it, he averred that his business income was \$9,600 per month. After deductions for current income taxes, health insurance premiums, maintenance, and installment payments on his tax debt, the statement indicated that Robert had a net income of \$2,754 per month. The affidavit listed additional monthly expenses exceeding \$3,000. At the hearing, however, Robert admitted that most of the expenses listed on the statement were paid through his business account in addition to the \$9,600 he withdrew as income for himself.

¶ 13 Robert testified that he acted as a broker between insurance companies and small businesses that purchased health insurance for their employees. He testified that the gross receipts for his business declined between 2009 and 2012 for two reasons. First, he asserted that small businesses were in a "holding pattern" on buying insurance for their employees due to uncertainty about changes mandated under the Affordable Care Act. Second, he testified that one of his major clients was bought by a company that used a different broker to purchase its insurance. Robert further testified that his financial circumstances also changed due to his tax debt. He explained that he entered into an installment payment agreement with the IRS in order to avoid tax levies being placed on his business accounts. The installment payment agreement required Robert to pay \$2,750 per month. He stated that the amount was determined by the IRS and was not negotiable.

¶ 14 Robert testified that he paid \$1,000 per month to Shari as rent, and he spent \$600 per month for gas. He explained that he drove a lot to meet with clients. He further testified that he owned no real estate and had no retirement assets, investments, or other bank accounts. Although he was awarded a condominium in Florida in the dissolution order, he lost it to foreclosure.

¶ 15 Robert testified that he paid Karen as much child support as he could afford to pay. He stated that the amount he could afford depended on how much he earned in commissions from insurance companies each month, which fluctuated. Between January and June 2013, he paid amounts ranging from \$755 to \$825. Robert acknowledged that he took vacations and had meals in restaurants during this period; however, he testified that Shari paid for these expenses.

¶ 16 Robert acknowledged that he was paying \$1,000 per month to the attorney representing him before the trial court and another \$1,000 per month to his appellate attorney. He testified that he paid \$175 per month for his country club membership in Illinois, \$200 per month for his country club membership in Florida, and \$2,200 per year in fees for the Lake of the Ozarks condo.

¶ 17 Robert was asked about his failure to pay taxes on his business income in 2007, 2008, and 2009. He acknowledged that Karen was also running her own business during this time period and managed to pay taxes on her business income. Asked what he was spending money on that precluded him from paying the taxes, Robert said, "Vacations, remodels." He testified that Karen was able to pay taxes on her business income while he was not because he was the one paying all of the bills incurred during this time period.

¶ 18 On cross-examination, Robert admitted that he paid for various personal expenses using his business account. These expenses included the utilities and association fees for a condominium in Lake of the Ozarks, a country club membership in Florida, another country club membership in Illinois, and the cell phone bills for himself and both of his daughters. At the time of the parties' divorce, Robert had an ownership interest in a partnership that owned the Lake of the Ozarks condo. The other owners were his parents. At the contempt hearing, he testified that he no longer had any interest in the partnership or the condo. He stated that he was allowed to stay in it in exchange for performing maintenance. However, he acknowledged that the utilities were in his name and that he was the only person who had a key to the condo.

¶ 19 Shari testified on behalf of Robert. She testified that she was a regional sales manager for an insurance company. In this role, she sold insurance policies to both brokers and consumers. Robert was one of the brokers she worked with. Shari was asked to explain the difference between her 2011 income and her 2012 income. In response, she explained that in 2012, she did not meet a target volume of sales that would have made her eligible for a "very large bonus" to be paid at the end of the year.

¶ 20 Shari, like Robert, testified that Robert owned no real estate and had no assets of which she was aware. In addition, she testified that Robert paid her \$1,000 per month as rent, which was his only contribution to their household expenses. She testified that the down payment on the home came entirely from her own earnings. Shari also corroborated Robert's testimony that she paid for the vacations they took together.

¶ 21 The court took the matter under advisement and entered a written order the following day. The court expressly found, "It is abundantly clear that Petitioner is sheltering himself in the cloak of 'business expenses' for non-business related items." The court further found that Robert's substantial debt to the IRS was a problem of his own making. In addition, the court observed that Robert was able to spend \$2,000 per month in attorney fees to fight to reduce his child support obligation. The court reasoned that if Robert could afford to spend \$2,000 per month to avoid his child support obligations, he could afford to pay that much in child support. The court thus found Robert's noncompliance with previous child support orders to be willful. The court entered a contempt finding and directed Robert to pay \$10,500 immediately in order to purge himself of the contempt. This amount was the total unpaid child support and child support arrearage payments that were due between January and June 2013. This appeal followed.

¶ 22 Robert raises two arguments in this appeal. First, he argues that the court abused its discretion by finding him in contempt and ordering him to make a lump-sum payment of \$10,500 in order to purge the contempt. Second, he argues that the court erred by not affording him an opportunity to be heard on his petition to modify child support and maintenance. We need only address the first of these contentions. The trial court has not yet ruled on Robert's petition to modify, and he does not point to any ruling in the record in which the court affirmatively refused to hold a hearing on the petition. As such, there is no ruling for us to review. Moreover, there is no indication in the record that Robert ever asked the court to hear the petition to modify prior to the contempt hearing, and the

parties' attorneys informed the court that they had agreed to limit that hearing to consideration of Karen's contempt petition. Therefore, Robert has forfeited this claim. We note, parenthetically, that the petition to modify is still pending. This court has affirmed the dissolution order, including the requirement that Robert pay \$2,000 per month as child support. In order to be entitled to relief, he will have to demonstrate a substantial change in circumstances. 750 ILCS 5/510(a)(1) (West 2012).

¶ 23 We turn now to Robert's contention that the court abused its discretion in finding him in contempt. A trial court has the authority to enforce its orders through civil contempt where a party has willfully violated the terms of the order. *In re Marriage of Logston*, 103 Ill. 2d 266, 285 (1984). Failure to comply with an order to pay child support constitutes *prima facie* evidence of contempt. Once that showing is made, the burden shifts to the noncompliant party to prove that he is unable to pay the support ordered. *In re Marriage of Logston*, 103 Ill. 2d at 285. To make this showing, the party must show that (1) he does not have the money to pay now and (2) he did not wrongfully dispose of assets he could have used to pay the judgment. *In re Marriage of Logston*, 103 Ill. 2d at 285.

¶ 24 Whether a party is guilty of contempt is a question of fact to be resolved by the trial court. *In re Marriage of Logston*, 103 Ill. 2d at 286-87. On appeal, we review the trial court's finding of contempt to determine whether the court abused its discretion. *In re Marriage of Baumgartner*, 384 Ill. App. 3d 39, 62 (2008). An abuse of discretion occurs only if the trial court's decision is arbitrary or "exceeds the bounds of reason and ignores recognized principles of law." *In re Marriage of Baumgartner*, 384 Ill. App. 3d

at 64. We will not reverse a contempt order unless the court abused its discretion or the factual findings underlying its decision are against the manifest weight of the evidence.

In re Marriage of Logston, 103 Ill. 2d at 286-87.

¶ 25 Robert argues that the court's order was against the manifest weight of the evidence because Karen provided no evidence to refute Robert's evidence that his income had declined to the point where he was unable to pay child support. We disagree. As stated previously, it was Robert who bore the burden of proving that his failure to comply with the child support orders was not willful. In other words, it was Robert's burden to prove that he could not afford to pay the child support he was ordered to pay. *In re Marriage of Logston*, 103 Ill. 2d at 285. Even setting aside questions of his credibility as a witness, the evidence Robert presented did not meet this burden. As discussed, Robert stated in his affidavit that he withdrew an average of \$9,600 per month from his business account as personal income. Although he averred and testified to substantial monthly expenses, he acknowledged that he paid most of these expenses directly from his business account in addition to the amount he withdrew for himself. This evidence does not support Robert's claim that he could not afford to pay child support. As such, there was nothing Karen needed to refute.

¶ 26 Robert points to the \$2,750-per-month installment payments on his tax debt. He argues that these payments significantly reduce his available income. He also asserts that the payments are for a tax debt incurred while the parties were married. Although it is true that the parties were legally married the entire time this debt was accrued, they were separated for at least part of that time. Moreover, as discussed previously, the debt was

the result of Robert's failure to pay taxes on his business income during a period of time when he and Karen were filing separate returns and Karen paid the tax on her own business income. As the trial court correctly observed, this debt was a problem he created for himself. We conclude that the court's contempt finding was supported by the evidence and did not constitute an abuse of discretion.

¶ 27 Robert also argues that the court abused its discretion in requiring him to pay the entire \$10,500 as a lump sum in order to purge himself of contempt. As he correctly points out, a civil contempt order must provide a means by which the contemnor can purge himself of the contempt and avoid punishment. The purging provision must be based on the party's realistic ability to pay. *In re Marriage of Betts*, 155 Ill. App. 3d 85, 103 (1987). An order to pay an arrearage of support in one lump sum does not necessarily run afoul of this requirement; however, if the party is not able to pay the lump sum, the requirement is not a realistic purging mechanism. See *In re Marriage of Betts*, 155 Ill. App. 3d at 103-04 (finding that the requirement of a \$12,950 lump-sum payment was probably unrealistic under the facts presented in that case). Robert argues that the court abused its discretion in ordering him to pay \$10,500 at once with no evidence that he could afford to make this payment. We need not consider this argument. The fact that Robert did make the payment renders this issue moot. See *In re Marriage of Betts*, 155 Ill. App. 3d at 104.

¶ 28 For the foregoing reasons, we affirm the trial court's finding of indirect civil contempt.

¶ 29 Affirmed.