2013 IL App (1st) 120821-U

FOURTH DIVISION
December 19, 2013

Nos. 1-12-0821, 1-12-3813, 1-13-0129 (cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF	)	
	)	Appeal from the
THOMAS W. HOWELL,	)	Circuit Court of
	)	Cook County.
Petitioner-Appellant,	)	
	)	No. 06 D 230002
v.	)	
	)	The Honorable
NISANNE A. HOWELL,	)	Jeanne Marie Reynolds,
	)	Judge Presiding.
Respondent-Appellee.	)	

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court did not err in entering a body attachment order based on a former husband's failure to pay the purge amount on a contempt order representing certain unpaid attorney fees of his former wife's counsel relating to a petition for rule to show cause based on the former husband's failure to comply with court orders regarding the payment of his children's college expenses. The court also did not err in finding the former husband in contempt for failing to pay certain college expenses for his children and issuing a body attachment order. The court did not err in denying the former husband's second amended petition for modification of the parties' dissolution judgment. The court did not err in its award of attorney fees pursuant to Section 508(b) of the Illinois Marriage and Dissolution of Marriage Act.

¶ 2 Petitioner Thomas Howell filed the three instant appeals, consolidated by this Court pursuant to orders dated February 7, 2013, and December 10, 2013. In case number 1-12-0821, Thomas appeals from a body attachment order entered by the circuit court of Cook County on March 26, 2012, and all underlying orders. The $8,100 purge amount referenced in the orders represented unpaid fees owed to the attorneys for Thomas's former wife, respondent Nisanne Howell, pursuant to court order. The attorney fees were incurred in connection with Nisanne's fifth petition for rule to show cause[1] based on Thomas's failure to comply with court orders regarding the payment of their children's college education expenses. In case number 1-12-3813, Thomas appeals from an order entered on December 4, 2012, which, among other things, denied Thomas's second amended petition to modify the parties' dissolution judgment and found him in contempt for failing to pay certain college education expenses for his daughter. In case number 1-13-0129, Thomas appeals from an order entered January 8, 2013. On that date, the court entered a body attachment order based on Thomas's failure to timely pay $4,072.66, a portion of the college education expense amount Thomas was ordered to pay in the December 4, 2012 order; the court also entered an order awarding attorney fees to Nisanne's counsel in the amount of $5,400 in connection with Nisanne's seventh petition for rule to show cause.

¶ 3 Thomas's primary contention on appeal is that the circuit court erred in entering the foregoing orders because Thomas lacks the financial means to pay the amounts at issue. For the reasons stated below, we affirm each of the orders that are the subject of the instant appeals.

¶ 4 BACKGROUND

¶ 5 The legal proceedings that have stemmed from the former couple's divorce have been lengthy and contentious and have included a number of appeals—both concluded and pending—before this court. We have provided below a description of certain pleadings, orders, and

[1]Nisanne admits that she inadvertently captioned this petition as the "fifth" petition even though an earlier "fifth" petition had been filed. References herein to the Nisanne's "fifth" petition for rule to show cause are to the petition filed April 20, 2011.

hearings necessary to decide the instant appeals.

¶ 6 Thomas and Nisanne married in February, 1994. The former couple has four children: Anthony (born in 1988), Philip (born in 1989), Loretta (born in 1991), and Theodore (born in 1994). In his January 2006 petition for dissolution of marriage, Thomas stated that he was a musician. Thomas represents that he is now retired and unemployed. As of the date of her March 2006 counter-petition for dissolution of marriage—and as of the dates of the orders that are the subject of the instant appeal—Nisanne was employed as a musician by the Chicago Symphony Orchestra (CSO).

¶ 7 On August 12, 2008, the court entered a "Judgment for Dissolution of Marriage" (the dissolution order) and dismissed Nisanne's amended counter-petition. The dissolution order referenced the "oral settlement agreement which was testified to by both parties on July 11, 2008" and provided, in part, as follows: (a) the parties' marriage was dissolved; (b) Nisanne was granted sole custody of the two minor children, Loretta and Theodore; (c) each party waived all rights to maintenance from the other; (d) Thomas was ordered to pay Nisanne child support of $515 per month for Loretta and Theodore "based upon 28% of Thomas' current represented net pension income of $1,840.00 per month"; (e) Thomas would have the rights to 2306 Thayer Street in Evanston, Illinois (the Evanston house); (f) Nisanne would have the rights to the approximately $55,000 remaining in escrow from the sale of certain property in Glen Flora, Wisconsin and Thomas would have the rights to the farmhouse and remaining acreage in Glen Flora; and (g) lakefront acreage and a cabin in Hayward, Wisconsin would be listed for sale, with the net proceeds to be divided equally, except for reimbursement to Thomas out of Nisanne's share of one-half of the amount he advanced for Anthony's and Philip's college education expenses for the fall 2008 semester.[2]

[2]According to Thomas's disclosure statement dated December 15, 2011, the Hayward, Wisconsin lake cabin was sold in October 2008 "per Divorce Judgment for about $384,000."

¶ 8 In addition, the dissolution order detailed the parties' respective obligations regarding payment of their children's "college education expenses." If a child is considered a "full-time student," regardless of where such child attends college, the order provided that each party's obligations for college expenses for such child "is limited to and shall in no event exceed an amount equal to one-half of the college education expenses at the 'base rate' for in-state residents at the University of Illinois at Urbana-Champaign." The dissolution order further stated, in part, that payments for tuition, fees, and room and board "shall be made directly to the respective institutions."

¶ 9 In June, 2009, Thomas filed a "Motion for Modification," seeking a "substantial reduction" in his child support and college contribution obligations. He represented that he "experienced substantial reductions in the value of his IRA accounts and his income derived therefrom" and that he "has suffered from an extremely rare form of cancer which resulted in surgery and his incurring substantial bills and expenses relative thereto." On July 1, 2010, the court entered an order that, among other things, denied Thomas's modification motion, finding that there were "significant assets" in Thomas's "possession and control." The court also held Thomas in contempt for his failure pay certain college education expenses in accordance with the dissolution order. Thomas was ordered to make all payments for future college education expenses to Nisanne.

¶ 10 On April 20, 2011, Nisanne filed a second "Fifth Petition for Rule to Show Cause," claiming that $13,541 was due from Thomas for the spring 2011 semester for his share of the children's college education costs.

¶ 11 In July, 2011, Thomas filed an "Amended Motion to Modify Judgment for Dissolution of Marriage," seeking a modification of the dissolution order and the July 1, 2010 order based on a "material and substantial change of circumstances," including the exhaustion of certain of his funds, "serious health issues," and his lack of a "reasonable expectation of quality employment."

In August, 2011, Nisanne moved to dismiss Thomas's motion, claiming that the arguments were the same ones raised—and rejected by the court—in the earlier modification motion. Nisanne also asserted that, not only had his circumstances not changed adversely, but Thomas failed to disclose new pension income.

¶ 12 On October 4, 2011, the court entered an order issuing a rule against Thomas to show cause why he "should not be held in contempt of court for his failure to pay college education expenses for Philip & Loretta Howell for the spring & fall semesters of 2011 in the amount of $27,082. " The $27,082 amount was based on $13,541 each for Philip and Loretta, representing Thomas's share of their educational expenses as capped by the University of Illinois base rate. On October 12, 2011, the court entered an order providing, in part, that it was advised that "Thomas Howell will pay to [Nisanne's counsel] Engelman & Smith via credit card the amount of $10,000 as advance on his college obligations as identified in the 5th Petition for Rule & that Mr. Howell will be applying for a mortgage on his personal residence & that the application will be resolved within 45 days." On December 20, 2011, the court entered an order that provided, among other things, that Thomas still owed $17,082—$27,082 minus the $10,000 paid in October, 2011—and held him in indirect civil contempt. The order also required Thomas to pay $5,000 in attorney fees to Engelman & Smith pursuant to Section 508(b) of the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/101 *et seq.* (West 2008) (the IMDMA); the fees were incurred in connection with Thomas's appeals of certain orders entered by the circuit court in 2010.

¶ 13 On January 4, 2012, Nisanne filed a petition for attorney fees pursuant to Section 508(b) in the amount of $9,180, representing the fees and costs owed to Engelman & Smith in connection with the fifth petition for rule to show cause.

¶ 14 On January 6, 2012, the court entered an order providing, in part, "Thomas Howell shall have 14 days, or by January 20, 2012, to purge himself of the contempt citation in this court's

order of December 20, 2011. Mr. Howell may purge himself of the contempt by the payment of $22,082 on or before Jan. 20, 2012. The failure to purge himself of the contempt will subject Mr. Howell to sanctions, which may include body attachment." The $22,082 amount represented the outstanding balances on the previously-ordered spring and fall semester obligations totaling $17,082, plus the $5,000 in court-ordered attorney fees. The order also granted Nisanne's motion to dismiss Thomas's amended modification motion, noting that "Thomas may file a new motion alleging a substantial change in circumstances since the July 1, 2010 order."

¶ 15 On January 11, 2012, Nisanne filed a sixth petition for rule to show cause relating to Thomas's alleged failure and refusal to pay college education expenses for Philip and Loretta for the spring semester of 2012. On January 26, 2012, Thomas filed a response to the January 4 fee petition, in which he asserted, in part, that "Engelman & Smith's itemized fees also reflect non-contempt items." On the same date, Thomas filed a response to the sixth petition for rule to show cause, asserting, in part, that he had paid the amounts referenced in the sixth petition directly to the university "although $10,000 *** previously paid to [Nisanne]" allegedly was "never forwarded to the University of Colorado, contrary to Court Order ***." With respect to the loan secured by the Evanston house, Thomas stated that "he has applied for loans and has been waiting nearly four (4) months for the loan to be approved and said loan has been approved on January 20, 2012 and should be funded the week of January 23, 2012."

¶ 16 On January 27, 2012, the court entered an order providing, in part: (a) Thomas failed to pay $22,082 as required by the January 6, 2012 order and failed to appear to explain such failure and thus a "body attachment order shall issue concurrently herewith;" (b) Engelman & Smith was awarded fees from Thomas in the amount of $8,100 relating to the fifth petition for rule to show cause; and (c) "[a] Rule is entered against [Thomas] on [Nisanne's] 6th Petition for Rule for his failure to pay the Spring 2012 semester college contributions for Philip Howell & Loretta Howell, in the total amount of $13,541.00." Also on January 27, 2012, the court issued a body

attachment order, requiring $22,082.00 cash bond as escrow. On February 6, 2012, Thomas filed an emergency motion to quash the body attachment order, stating that he paid the $22,082.00; the court quashed the body attachment on February 7, 2012, and ordered the payment of the deposited funds to Nisanne's attorneys.

¶ 17 Thomas filed a "Second Amended Petition to Modify Judgment for Dissolution of Marriage" on February 17, 2012. In the motion, Thomas detailed the "substantial change" in his financial circumstances since the July 1, 2010 order was entered, including the reduction or depletion of the balances in various accounts, the $76,000 lien added to his previously unencumbered Evanston house, and the fact that he was no longer employed in any capacity with the Lake Forest Symphony, a "side job" which had been his only employment. Thomas contended that his original loan application was for $103,000, "but this was reduced to $76,000, the largest amount possible due to his present financial circumstances." Thomas requested entry of an order modifying the dissolution order and the July 1, 2010 order to reflect "Tom's current income and assets" and providing that payments would be made "directly to the college or university in accordance with the original Judgment."

¶ 18 During a court hearing on March 9, 2012, the following exchange occurred between Nisanne's counsel and Thomas:

> "[Thomas]: *** The spring of 2012 was wired directly to the children just as it had been done previously in August of 2010."
>
> [Mr. Smith]: So it's correct that you did not pay Nisanne that money, correct?
>
> [Thomas]: No, I didn't.
>
> [Mr. Smith]: It is also true that you didn't comply with Paragraph 2 of the order of January 27, 2012 which required the payment of $8,100 in attorney's fees to our office under the fifth Petition for Rule, is that correct?
>
> [Thomas]: I have no more money."

Following Thomas's testimony, the court stated, among other things: "The Court finds that he's in contempt of Court. I also find that he has not paid the $8,100 in attorney's fees that are owed to Mrs. Howell's attorney, yet he had no problem making the over $12,000 in payments to his own attorneys. Again, Mr. Howell is picking and choosing which expenses he deems are necessary and important to pay."

¶ 19 At the conclusion of the March 9 hearing, the court entered an order, finding, in part, that Thomas "willfully defied the Court orders of August 12, 2008 (Judgment) and the order that requires him to pay college education expenses directly to Nisanne; and that Thomas Howell has not paid $8,100 pursuant to ¶ 2 of the order of Jan. 27, 2012." The court held Thomas in contempt for his "willful and blatant defiance of this court's orders of August 12, 2008 & July 1, 2010." The order provided that Thomas "may purge the contempt by the payment of $8,100 made to [Nisanne's] attorneys within 14 days," and admonished Thomas "again that all future college education expenses shall be made directly to Nisanne."

¶ 20 After a hearing on March 26, 2012, where Thomas failed to personally appear, the court entered an order stating, among other things, that Thomas "failed to pay the sums required" and "failed to purge himself of the contempt." The order provided that a body attachment against Thomas "shall issue with a cash bond required of $8,100.00." On the same date, the body attachment order was entered against Thomas. Thomas filed an appeal, assigned case number 1-12-0821, challenging the court's March 26, 2012 body attachment order and all underlying related orders.

¶ 21 On October 11, 2012, Nisanne filed a seventh petition for rule to show cause, alleging that Thomas "failed and refused to pay his one-half share" – totaling $5,447.50 – of Loretta's fall 2012 semester of school. On December 3, 2012, the court held a hearing on (a) Thomas's second amended petition to modify the dissolution order and (b) Nisanne's seventh petition for rule to show cause.

¶ 22 Thomas testified that, as of the date of the December 3 hearing, he was not employed and he supported himself through Social Security and two pensions. He had a negative cash balance at the end of each month. "Basically nothing" remained in various accounts that had held between "75 and 85 thousand" as of July of 2010. The Evanston house, which Thomas owned free and clear of liens as of July of 2010, now had a mortgage; the lender would not lend Thomas more than $76,000. After fees and taxes, Thomas testified that he received $67,000 on the loan, which he spent as follows: (a) "[r]oughly $10,000" on home repairs that were a condition of the loan; (b) $5,500 in back real estate taxes; (c) $40,000 toward college expenses for his children; and (d) $4,500 to Thomas's counsel. He stated that Nisanne's counsel "as part of a purge got $5,000 in legal fees" and clarified that "of the $22 thousand, purge was 5,000, was [*sic*] legal fees for Mr. Smith and $17 thousand was college related." Thomas testified that his appellate counsel, Annette Fernholz, whom he retained on February 14, 2012, "may have gotten a thousand dollars on that but basically her money came out of closing out my last IRA."

¶ 23 Thomas further testified that he paid "about $155 thousand" in total for his children's college expenses. He stated that he had "around $23 thousand" in credit card debt and "over $13 thousand" in other debts, including $3,897 owed to Ms. Fernholz. When asked whether he owed Traveler's Insurance any money, Thomas answered "[p]otential lawsuit of $44 thousand."

¶ 24 Thomas testified that he owned thirteen acres of farmland in Wisconsin but was "[a]bsolutely not" able to sell this property because "[t]here's no market." When asked how he determined that "[t]here's no market," Thomas said, "I looked around my neighborhood and looked at the vacant houses that had been there for four or five years and the new houses that were on the market and I had also offered it to the guy who buys real estate around there who is not interested." Thomas also indicated that he did not have the ability to contribute toward his children's college expenses since filing his petition because "I've got barely enough money to stay in my house if I do."

¶ 25 On cross-examination, Thomas testified that on July 1, 2010, his pension and retirement benefit income was $2,046 per month. In his November 27, 2012 disclosure statement, Thomas's pension and retirement benefit income was $2,795 per month. In March of 2010, Thomas was paying $395 per month for child support; as of the hearing date he was not paying any child support. He stated that he started receiving Social Security income in November of 2011.

¶ 26 Thomas also testified that he paid $7,500 plus "probably a little over $2,000" to Ms. Fernholz, who was representing him "in the appeal of the orders entered in February and March of 2012." He stated that he still owed her $3,900. He estimated that he paid $4,500 to Mr. Delman, his trial counsel, out of the $67,000 loan proceeds; after that time, he paid $4,000 to Mr. Delman and still owed him more than $13,000 as of the hearing date. Out of the $67,000 he also paid approximately $2,000 or $3,000 for "various medical bills." He testified that he wired $6,700 "to each of my two children" on January 26, 2012. He later stated that "$13,500 was wired directly from the bank to University of Colorado." When asked whether he has "any moneys available to pay toward college expenses as listed in the seventh Rule to Show Cause," Thomas answered "[n]o." Thomas testified that he made no contributions toward Loretta's college for the fall of 2012 or for the spring of 2013.

¶ 27 Nisanne testified that she had previously been terminated by the CSO because Thomas had filed a claim on Nisanne's insurance; she later was reinstated in her position through union grievance procedures. She testified that she formerly owned a home that was the subject of a foreclosure action and that she had $90,000 in student loans for her children's education that had been in forbearance. She also testified that she owed approximately $70,000 to the Internal Revenue Service. She stated that her "credit was ruined in the labor dispute" and that "[w]e have been denied Parent Plus Loans twice."

¶ 28 Nisanne testified that Thomas's one-half share for Loretta's fall 2012 tuition was $5,447.50, which is less than one-half of the University of Illinois base rate. His share of

Loretta's spring 2013 tuition would be $6,770.50, as limited by the University of Illinois base rate. Nisanne testified that she made a demand on Thomas for those amounts but that he had not contributed anything. On cross-examination, Nisanne stated that her 2011 income was "over 200 thousand" because of back pay.

¶ 29 The circuit court concluded, in part, as follows:

> "The fact remains that the Judgment certainly required Mr. Howell to contribute to the children's expenses as did Mrs. Howell. That is the obligation as set forth in the Judgment. The fact that Mr. Howell was not employed at the date of the Judgment but had significant assets awarded to him at his disposal to make toward his obligations to provide for not only child support but also for the children's college expenses was well known to Mr. Howell both from the date of the Judgment through today's date. The fact that he has spent – and I calculated it – he's spent in excess of $80 thousand in assets from the July 2010 last court date was something that Mr. Howell has voluntarily done. He has depleted his assets full well knowing that he's got an obligation to pay for the children's college expenses.
>
> ***
>
> The Court is going – also the Court does find that Mr. Howell's income has increased. He has taken another mortgage out on the property. He continues to spend his funds as he chooses without regard to his obligations as well.
>
> The court finds that I cannot order an increase in his contribution to college expenses, that really is not properly before me, but the Court will deny his Motion to Modify. I do not find that there has been a relevant change in circumstances based on the fact that his income has increased and he has voluntarily depleted his assets while full well knowing that he has an obligation to provide for the children's expenses."

As to the rule to show cause, the court found that it was a "valid petition" and that Thomas was

obligated to make payments toward Loretta's college expenses for fall 2012 and spring 2013.

¶ 30 On December 4, 2012, the court entered a written order denying Thomas's second amended petition to modify judgment. The order further provided that Thomas was obligated to pay to Nisanne $5,447.50 for Loretta's fall 2012 semester and $6,775.50 for her spring 2013 semester college education expenses. The court found that Thomas "did not pay his share *** and his failure was willful and without compelling reason or justification." The court held Thomas in contempt and ordered him to pay to Nisanne "the total amount of $12,218.00 which may be paid in three equal installments of $4,072.66 each within 30, 60 and 90 days respectively" from the date of the order. The order provided that "[u]pon full payment due this contempt order will be purged." The court also granted Nisanne leave to file a Section 508(b) fee petition related to her seventh petition for rule to show cause, which she filed on December 20, 2012. Nisanne sought a fee award of $7,065, representing $6,165 in incurred fees and $900 in anticipated fees.

¶ 31 Thomas filed a notice of appeal from the December 4 order "and all underlying orders touching and concerning the order appealed from." He is seeking reversal of the "denial of Appellant's Second Amended Petition for Modify [*sic*] Judgment and reversal of finding of contempt." This appeal was assigned case number 1-12-3813.

¶ 32 At a hearing on January 8, 2013, Nisanne's counsel stated that "[t]he first purge in the amount of $4,072.66 is now past due and has not been paid and Mr. Howell is not in court." Thomas's counsel stated that he had advised Thomas of the court date and "told him that it was incumbent upon him to be here." The court granted Nisanne's counsel request for a body attachment with "the bond at least in the amount of the first payment" – $4,072.66. With respect to the pending Section 508(b) attorney fee petition, Thomas's counsel argued that certain of the fees were unrelated or "a bit excessive." Although the court found that the hourly rate and amount of time "expended both in reviewing the petitions, motions, responses, as well as the

preparation for the hearings to be necessary and reasonable," the court deducted 3.5 hours that related to appellate court proceedings or where the hearing addressed multiple matters. The court also reduced counsel's estimated compensable time for the January 8, 2013 hearing from three hours to one hour.

¶ 33 After the hearing, the circuit court entered a written order on January 8, 2013, awarding Nisanne's counsel $5,400 in attorney fees. It also issued a body attachment order providing that Thomas failed to "pay $4072.66 on or before Jan. 4, 2013 and failed to appear in court pursuant to the terms of the order entered December 4, 2012 thereby failing to purge himself of the contempt or to explain such failure." The body attachment order provided that if Thomas was taken into custody, he could be released upon his deposit of $4,072.66 cash bond as escrow.

¶ 34 Thomas filed an appeal from the January 8 order "and all underlying orders touching and concerning this order" seeking a "[r]eversal of the finding of contempt and sanction of incarceration." Thomas filed an amended notice of appeal; he added that he is seeking reversal of the "order for 508(B) attorney's fees." This appeal was assigned case number 1-13-0129.

¶ 35 ANALYSIS

¶ 36 As a preliminary matter, we deny Thomas's request – set forth in his reply briefs – to strike all or a portion of Nisanne's statements of facts in her briefs, which, according to Thomas, do "not comport with Supreme Court Rule 341(h)(6) which requires facts 'stated accurately and fairly and without argument' and 'with appropriate reference to the pages of the record on appeal.' " As stated by the Illinois Supreme Court in *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479 (2012), ¶ 10, fn. 4, "Our review of the record indicates that the violations of Supreme Court Rule 341 (Ill. S. Ct. R. 341(h)(6) (eff. July 1, 2008)) are minor and do not hinder our review of the case. Accordingly, we will not strike the entire statement of facts but will disregard any inappropriate argumentative statements." As to Thomas's other concerns regarding "highly prejudicial" and "speculative" theories allegedly

propounded in one of Nisanne's briefs, we simply state that we agree with Thomas's assertion that "[t]he facts of this case are contained in the appellate record, complete with exhibits and testimony." We thus turn to the merits.

¶ 37 March 9, 2012 Contempt Order and March 26, 2012 Body Attachment Order

¶ 38 Thomas was held in contempt on March 9, 2012, with an $8,100 purge amount, representing unpaid attorney fees owed to Nisanne's counsel; a body attachment was entered on March 26, 2012. Thomas contends on appeal that he cannot purge the contempt because he "has no liquid financial resources to pay the sanction." Thomas asserts that "it is contrary to law *** to be held in contempt of court for non-payment when he lacked the resources to make payment at the time of the contempt hearing." He contends that "[s]uch behavior" does not "rise to willful or contumacious conduct" and thus he should not have been held in contempt of court.

¶ 39 "A court has the authority to enforce its orders by way of contempt." *In re Marriage of Levinson*, 2013 IL App (1st) 121696, ¶ 52. Civil contempt proceedings "are coercive, that is, the civil contempt procedure is designed to compel the contemnor to perform a specific act." *Id.* Upon a showing by the petitioner that a violation of a court order has occurred, "the burden shifts to the alleged contemnor to show the violation was not wilful." *In re Marriage of LaTour*, 241 Ill. App. 3d 500, 508 (1993); see also *In re Marriage of Kneitz*, 341 Ill. App. 3d 299, 304 (2003) ("The burden is on the alleged contemnor to show that [his or her] non-compliance was not contumacious and that she had a valid excuse for not complying").

¶ 40 "Civil contempt proceedings have two fundamental attributes: (1) the contemnor must be capable of taking the action sought to be coerced, and (2) no further contempt sanctions are imposed upon the contemnor's compliance with the pertinent court order." *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 279 (2006). A court in any civil contempt proceeding "must allow the contemnor an opportunity to purge his contempt." *In re Marriage of Dunseth*, 260 Ill. App. 3d 816, 828 (1994). In other words, the contemnor must have the " 'keys to the cell in his own

hands.' " *In re Marriage of Morse,* 240 Ill. App. 3d 296, 302 (1993).

¶ 41 "[W]hether a party is guilty of contempt is a question of fact for the trial court, and *** a reviewing court will not disturb the finding 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); see also *Levinson*, 2013 IL App (1st) 121696, ¶ 52 (noting that "[w]hether a party is guilty of contempt is within the sound discretion of the trial court, and we will not reverse a trial court's determination absent an abuse of discretion."); *In re Marriage of Barile*, 385 Ill. App. 3d 752, 759, fn. 3 (2008) (noting that appellate court has invoked only the manifest weight standard or the abuse of discretion standard in certain cases, but concluding that the supreme court "has not specifically altered" the *Logston* standard).

¶ 42 In the instant case, we conclude that the circuit court did not abuse its discretion in holding Thomas in contempt of court and issuing a body attachment order when he failed to pay the $8,100 purge amount, nor were the circuit court's findings against the manifest weight of the evidence. We recognize that "[t]he purging provision in any civil contempt sanction for nonpayment must be based on the contemnor's ability to pay." *Dunseth*, 260 Ill. App. 3d at 828. During the March 9, 2012, hearing – the date that the court held him in contempt for failure to pay the $8,100 – the court heard certain testimony from Thomas that refutes his professed inability to comply with the order. As discussed further below, Thomas stated that he received approximately $67,000 in net loan proceeds based on a $76,000 mortgage on his Evanston house. He also testified that the Evanston house was appraised at approximately $410,000. As to his unencumbered "[s]mall farmhouse and 13 acres" in Wisconsin, Thomas opined that the property was not "marketable," but in response to a question by the court, he stated that he "would expect to get maybe nine, ten grand" for the property.[3]

[3]Although not necessary for our analysis herein, we observe that in his "Motion to Supplement Motion For Approval of Depositing Deeds In Lieu of Bond," filed with this court on April 27, 2012 – approximately seven weeks after his testimony during the March 9, 2012

¶ 43 The defense of "poverty and misfortune as a valid excuse for nonpayment has been found applicable only in the most extreme cases, notably where a defendant had no money and no way of getting money" to meet support obligations. *In re Marriage of Dall*, 212 Ill. App. 3d 85, 97-98 (1991). In his reply brief, Thomas "wonder[s] if he must be rendered homeless before a trier a fact would modify his college obligations and cease finding him in contempt of court." Far from homeless, Thomas owned two properties when he pled poverty in the circuit court. While Thomas's primary contention on appeal is that he has no "liquid resources" to pay the purge amount, he cites no authority for his apparent position that his alleged "illiquidity" is synonymous with "poverty" for contempt purposes. Thomas admitted that his Evanston house was appraised at approximately $410,000 and encumbered by a $76,000 mortgage, leaving equity of approximately $334,000 on that asset alone. As the circuit court noted during the March 9 hearing, Thomas did not sell his home; nothing in the record indicates that Thomas attempted to secure alternative housing.

¶ 44 A contemnor "bears the burden of proving that failure to comply with the court order was not wilful." *In re Estate of Hayden*, 361 Ill. App. 3d 1021, 1029 (2005). "To prove that a failure to pay was not wilful, a defendant must show that he does not have the money *and that he did not wrongfully dispose of money or assets by which could have made payment*." *Id.* (emphasis added); see also *Dunseth*, 260 Ill. App. 3d at 829 (stating that "[a] clear defense to contempt exists where a person's failure to obey an order is due to insolvency or other misfortune, unless that inability to pay is the result of a wrongful or illegal act."). "The party must show, with reasonable certainty, the amount of money he has received since the order was entered and that it has been disbursed in the payment of expenses that under the law he should pay before making any payment on the support decree." *Sharp*, 369 Ill. App. 3d at 282. A contemnor may not assert

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hearing – Thomas included a "Comparative Market Analysis" valuing the Wisconsin property at $43,700.

his inability to comply with a court order where he "has voluntarily created the incapacity." *Kneitz*, 341 Ill. App. 3d at 304.

¶ 45 Even assuming *arguendo* that Thomas's failure to pay was due to his inability to do so, such inability would appear to be a result of Thomas's own wrongful acts. Thomas's initial brief in case number 1-12-0821 indicates that the approximately $67,000 net proceeds from the loan secured by the Evanston house were received on January 23, 2012, whereas his reply brief states that the funds were received on January 26, 2012;[4] he explains his distribution of the funds as follows:

> " *** Thomas paid $22,082 for the purge for the 5th petition for rule [$5,000 of which include fees to his ex-wife's attorney], $13,541 for the spring 2012 college expenses, $5,600 in real estate taxes, $9,000-$10,000 in construction costs mandated by the mortgagor, $4,500 in legal fees to current counsel, $7,500 in additional legal fees, and $2,000-$3,000 in medical expenses."

Thomas asserts that "[i]t was not until March 9, 2012 that Thomas was ordered to pay $8,100 in attorney's fees within 14 days." Thomas contends that "[b]y that time the funds from the mortgage loan were spent for college costs and other creditors." However, we note that on January 27, 2012, the circuit court entered an order providing, among other things, that Nisanne's counsel was awarded fees from Thomas in the amount of $8,100. As the circuit court observed during the March 9, 2012 hearing, Thomas "has not paid the $8,100 in attorney's fees that are owed to Mrs. Howell's attorney, yet he had no problem making the over $12,000 in payments to his own attorneys. Again, Mr. Howell is picking and choosing which expenses he deems are

[4]Although it does not affect our analysis herein, we observe that Thomas states in a brief filed in cases 1-12-3813 and 1-13-0129 that "[i]t was not until February 2, 2013 that he actually received the mortgage loan proceeds." We assume Thomas meant "February 2, 2012," given his citation to his testimony during the hearing held December 3, 2012, in which he stated that he received the mortgage proceeds on January 26, 2012, "[b]ut apparently they weren't all freed up until February 2nd."

necessary and important to pay." Also, Thomas appears to have wired $13,542, representing his share of Loretta's and Philip's spring semester 2012 college education expenses, directly to the University of Colorado on January 25, 2012—in violation of the court's order to pay Nisanne directly—even though the court had not yet entered a rule to show cause with respect to that amount. Even assuming Thomas lacked the ability to pay the $8,100—which we do not believe was the case—such inability was the result, in part, of Thomas making payments as he wished rather than making payments as mandated by court order.

¶ 46 Furthermore, the cases cited by Thomas are inapposite. For example, in *In re Marriage of Sawyer*, 264 Ill. App. 3d 839 (1994), the appellate court affirmed the circuit court's finding of no contempt despite the ex-husband's failure to comply with the provision of a dissolution judgment regarding payment of college expenses. The circuit court found, among other things, that the ex-husband's failure to meet the obligations was neither willful nor contumacious; the ex-husband owed the government more than $45,000 in fines and $600,000 in income taxes after his release from prison but earned a weekly net income of approximately $250. *Id.* at 843-44. The appellate court expressed skepticism regarding the ex-husband's testimony in the trial court, *i.e.*, that prior to his incarceration for tax evasion, he sold the stock of his company to his future wife for $1,000 because she "had no independent means" of support but then three months after the sale, the woman purchased a $500,000 home where he moved after his incarceration. *Id.* at 843. However, the appellate court concluded, in part: "[W]e are not so convinced of his present financial inability but are bound by the trial court's determination in the absence of manifest error." *Id.* at 849. Rather than supporting Thomas's position, we read this case as a reaffirmation of a deferential standard of review applied to contempt orders.

¶ 47 Thomas also contends the Illinois Supreme Court's decision in *In re Marriage of McGrath*, 2012 IL 112792, is instructive. The *McGrath* court considered "whether money that an unemployed parent regularly draws from a savings account may be included in the calculation

of net income when setting child support under section 505" of the IMDMA. *Id.*, ¶ 1. After analyzing the meaning of "net income" and "income," the court concluded that the term "income" excluded the respondent's savings accounts withdrawals, and the court thus reversed the judgments of the circuit and appellate courts. *Id.*, ¶ 14, 15, 19, 20. Thomas asserts that, "[s]imilarly" he "should not be required to liquidate his only assets [*sic*] – his residence – to satisfy a college contribution obligation, particularly when he petitioned the court to modify his obligation given his current circumstances." We do not view the *McGrath* court's analysis of the statutory definition of "net income" as relevant to instant case. Furthermore, we note that our supreme court in *McGrath* stated that "trial and appellate courts were rightly concerned that the amount generated by respondent's actual net income was inadequate, particularly when the evidence showed that respondent had considerable assets and was withdrawing over $8,000 from his savings account every month." *Id.*, ¶ 16. The court then observed that the IMDMA "specifically provides what to do in such a situation": "If application of the guidelines generates an amount that the court considers inappropriate, then the court should make a specific finding to that effect and adjust the amount accordingly." *Id.* Contrary to Thomas's seeming suggestion, *McGrath* should not be read to limit or diminish a parent's support obligation, but rather to require the correct calculation of such obligation.

¶ 48 On a final note, as is evident from even the abbreviated background of the case provided above, Thomas's noncompliance with the orders challenged on appeal appears to have been part of a larger pattern of willful refusal to comply with the circuit court's orders regarding the payment of his children's college expenses. During a court hearing on December 15, 2011, an email communication from Thomas to his son Philip, sent on November 22, 2011 – with Thomas's counsel copied on the email – was introduced into evidence. In the email, Thomas stated in part:

"*** You are really screwing me by your refusal to show your records. Your college

> money was stolen by your mother. I've turned over a total of $41,000 to your mom for college and see no proof that any of the money was given to any of you kids.
>
> Now mom's lawyer wants $26,000 more for 'college' but you won't get the money and I will go to jail before I give away more of your college money to your mother for her to steal. This jail time will be partially caused by you.
>
> Give me the records please.
>
> Hope all is well.
>
> Love Dad"

The court stated during the hearing, "I find the e-mail to be perfectly clear of Mr. Howell's intentions with regard to this matter and his intentions to follow any Court orders." We agree.

¶ 49 In sum, the record supports the circuit court's orders finding Thomas in contempt and imposing a body attachment on March 26, 2012. We hold that there was no abuse of discretion nor was the circuit court's decision against the manifest weight of the evidence.

¶ 50 The Denial of the Second Amended Modification Petition

¶ 51 Thomas contends that the trial court erred in denying his second amended petition to modify judgment in its December 4, 2012 order. Section 513 of IMDMA provides, in part, that the court may "make provision for the educational expenses of the child or children of the parties, whether of minor or majority age, and an application for educational expenses may be made before or after the child has attained majority." 750 ILCS 5/513(a)(2) (West 2010). "Orders entered pursuant to section 513 are always modifiable." *In re Marriage of Koenig*, 2012 IL App (2d) 110503, ¶ 11; *In re Marriage of Deike*, 381 Ill. App. 3d 620, 627 (2008) (noting that a "trial court has the authority to modify provisions of a marital settlement agreement pertaining to payment of college expenses"); *In re Marriage of Loffredi*, 232 Ill. App. 3d 709, 712 (1992) (same). These orders "remain modifiable because a provision for the payment of college expenses is considered in the nature of child support rather than a property settlement." *Koenig*,

2012 IL App (2d) 110503, ¶ 11; *In re Marriage of Petersen*, 2011 IL 110984, ¶ 13 (noting that "Illinois courts have consistently held that section 513 expenses are a form of child support").

¶ 52 "The pertinent question in determining whether to grant a petition for modification of a provision for payment of college expenses is the same as that on a petition to modify any other support term. That is, whether the petitioner has shown a substantial change in circumstances. [citation]." *Deike*, 381 Ill. App. 3d at 627 (quoting *Loffredi*, 232 Ill. App. 3d at 712); see also *In re Marriage of Rash and King*, 406 Ill. App. 3d 381, 388 (2010); 750 ILCS 5/510(a) (West 2010) (providing that an order for child support may be modified "upon a showing of a substantial change in circumstances"). A trial court has "wide latitude" in considering whether a substantial change has occurred warranting modification. *In re Marriage of Breitenfeldt*, 362 Ill. App. 3d 668, 674 (2005). Courts "consider the circumstances of the parents and the circumstances of the child" when evaluating whether there is a sufficient basis to modify child support. *Deike*, 381 Ill. App. 3d at 631. The burden of proof is on the movant. *Rash*, 406 Ill. App. 3d at 388.

¶ 53 "Generally speaking, the modification of child support payments lies within the sound discretion of the trial court, and a trial court's modification order will not be disturbed on appeal, absent an abuse of discretion." *In re Marriage of Rogers*, 213 Ill. 2d. 129, 135 (2004); see also *Rash,* 406 Ill. App. 3d at 388 (same); *In re Singleteary*, 293 Ill. App. 3d 25, 35 (1997) (same). " 'It is well established that an abuse of discretion will be found only where no reasonable person would take the view adopted by the trial court.' [Citation]." *In re Marriage of Putzler*, 2013 IL App (2d) 120551, ¶ 28.

¶ 54 " 'The issue on a petition for modification of child support is whether there has been a material [, *i.e.*, substantial,] change in the circumstances of the parties since the previous order.' [Citation.]" *In re Marriage of Armstrong*, 346 Ill. App. 3d 818, 822 (2004) ("In many cases, the previous order will be the original judgment" but in this case, the "previous order" was the trial court's order denying a prior petition to modify the judgment). When considering Thomas's

second amended petition for modification of judgment, the circuit court correctly used July 1, 2010—the date of the court's denial of an earlier modification motion—as the "baseline" for purposes of determining whether there had been a substantial change in circumstances.

¶ 55 Thomas contends on appeal that the trial court erred in denying his second amended petition for modification. He lists various college expense-related payments—and fees to Nisanne's counsel—that the court ordered him to pay. He asserts that his debts increased and his assets decreased from 2010 to November of 2012. He explains the disposition of the $67,000 home loan proceeds, including $4,500 to his trial counsel; he states that "maybe another $1,000 went to appellate counsel, who was paid primarily with IRA funds." He contends that he has "little or no savings," and that "he cannot mortgage his house any further, has a farm that has no value, is retired and receives a small pension and social security."

¶ 56 Nisanne responds that, during the time period at issue, Thomas's gross income increased from $2,391 per month to $4,343 per month, while his expenses did not change significantly. While Thomas now had a mortgage of $408 per month, his monthly child support obligation of $395 had ended. Nisanne contends that Thomas's monthly debt service went from $550 per month in 2010 to $1,192 in 2012 "but that was self-imposed by the flawed choices he made in not supporting his children as it includes $660 per month in monthly payments to his trial and appellate lawyers."

¶ 57 We conclude that the trial court did not abuse its discretion in denying Thomas's second amended petition for modification. After reviewing numerous exhibits and hearing the testimony of Thomas and Nisanne, the court did "not find that there has been a relevant change in circumstances based on the fact that his income has increased and he has voluntarily depleted his assets while full well knowing that he has an obligation to provide for the children's expenses." The court's denial of Thomas's petition is supported by, among other things, the substantial increase in Thomas's gross monthly income and his continued ownership of the Evanston house and the Wisconsin property. The diminishment of the balances in his various accounts is, at best,

understandable in light of his commitment in the agreed-upon dissolution order from 2008 to partially pay for potentially four college educations. At worst, such diminishment reflects poor choices by Thomas, some in apparent violation of court orders. In sum, the trial court did not err in finding no such substantial change.

¶ 58 December 4, 2012 Contempt Order and January 8, 2013 Body Attachment Order

¶ 59 On December 4, 2012, the circuit court held Thomas in contempt of court for nonpayment of college expenses in the amount of $12,218, payable over three months. On January 8, 2013, the court issued a body attachment after Thomas failed to make the first payment. Thomas contends that "[i]t is contrary to law for Thomas to be held in contempt of court for non-payment when he lacked the resources to make payment at the time of the contempt hearing." Thomas asserts that such behavior does not "rise to willful or contumacious conduct" and thus the finding of contempt should be reversed.

¶ 60 As discussed above, we recognize that "[t]he purging provision in any civil contempt sanction for nonpayment must be based on the contemnor's ability to pay." *Dunseth*, 260 Ill. App. 3d at 828. Based on our review of the record, we conclude that the circuit court did not abuse its discretion in holding Thomas in contempt of court and issuing a body attachment order when he failed to pay the required purge amount, nor were the circuit court's findings against the manifest weight of the evidence. Thomas contends that he "should not have to deplete all of his property and assets to contribute to the college expenses of his children when he increases his debt every month." However, we note that Thomas continued to own two parcels of real estate—the Evanston house and the Wisconsin property—when he again pled poverty in the circuit court. Furthermore, as the court noted at the conclusion of the December 3, 2012 hearing, "Thomas is choosing how he wants to spend his funds without regard to the obligations he has." Even assuming *arguendo* that Thomas lacked the ability to pay the purge amount—which we do not believe was the case—such inability arguably was the result of Thomas making certain payments that he chose, such as payments to his own counsel, rather than making the payments mandated

by court order.

¶ 61 We conclude that the trial court's finding of contempt on December 4, 2012, and the imposition of a body attachment on January 8, 2013, was not against the manifest weight of the evidence and does not represent an abuse of discretion.

¶ 62 Section 508(b) Fees

¶ 63 The circuit court ordered Thomas to pay $5,400 in attorney fees to Nisanne's counsel pursuant to an order entered January 8, 2013; the fees were incurred in connection with Nisanne's seventh petition for rule to show cause. Section 508(b) of the IMDMA provides, in part, 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 2010) (Emphasis added). "Thus, the court has no discretion under section 508(b) except to determine if the failure to comply with an order was without compelling cause or justification; if it so finds, attorney fees must be imposed." *In re Marriage of Putzler*, 2013 IL App (2d) 120551, ¶ 37; see also *Deike*, 381 Ill. App. 3d at 634 ("Where an ex-spouse's failure to pay was without cause or justification, an award of attorneys fees is mandatory by statute."). A contempt finding is "sufficient to require an award of fees under section 508(b), but such a finding is not necessary." *In re Marriage of Berto*, 344 Ill. App. 3d 705, 717 (2003). "An award of attorneys' fees will not be overturned in the absence of a clear abuse of discretion by the trial court." *In re Marriage of Michaelson*, 359 Ill. App. 3d 706, 715 (2005).

¶ 64 Thomas contends on appeal that he "should not have been assessed attorney's fees pursuant to section 508(b) because he should not have been held in contempt of court." As discussed above, we disagree. Thomas also contends that the fees are "excessive," and he requests a reduction. For example, Thomas asserts that "it should not have taken 3.25 hours to review [certain documents] and to include four tax returns and four disclosure statements as

exhibits."

¶ 65 A trial court should consider only "the reasonableness of the fee award, based on factors such as time spent, the ability of the attorney, and the complexity of the work" when calculating Section 508(b) fees. *Putzler*, 2013 IL App (2d) 120551, ¶ 40. It is improper for the court to consider the party's ability to pay. See *In re Parentage of M.C.B.*, 324 Ill. App. 3d 1, 4 (2001); *In re Marriage of Irvine*, 215 Ill. App. 3d 629, 635 (1991) (noting that a "party who has been forced to resort to the judicial process to secure compliance with the terms of an order or judgment is entitled to her reasonable attorney fees even absent a showing of inability to pay"). After reviewing, among other things, the fee petition and the transcript of the January 8, 2013 hearing, we conclude that the circuit court did not abuse its discretion in its award of Section 508(b) fees. The amount originally sought by Engelman & Smith was $7,065. Thomas's counsel challenged certain time entries; the court agreed with certain of counsel's challenges and made deductions accordingly. The court awarded Section 508(b) fees in the amount of $5,400, representing 18 hours of work at $300 per hour. The record indicates that the circuit court considered the amount of time spent, the ability of the attorney, and the complexity of the work in awarding a reasonable fee amount. The circuit court did not abuse its discretion in making such award.

¶ 66 CONCLUSION

¶ 67 For the reasons stated above, we affirm each of the orders of the circuit court that are the subject of the instant appeals.

¶ 68 Affirmed.