2015 IL App (1st) 143168-U

FIRST DIVISION
June 22, 2015

No. 1-14-3168

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF MATTHEW J. THIBEAU, Petitioner-Appellant, and REGINA M. THIBEAU, Respondent-Appellee.	))))))))))	Appeal from the Circuit Court of Cook County. No. 10 D2 30489 Honorable Jeanne Reynolds, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** In this divorce case, the husband sought a modification of maintenance payments to his former wife. The circuit court dismissed the husband's motion to modify maintenance and found him in indirect civil contempt of court for failure to pay maintenance. When the husband failed to pay the entire purge amount, the court entered an order of commitment, finding him in willful contempt for failure to pay maintenance. The court also awarded attorney fees to the former wife. We affirm.

¶ 2 This divorce case illustrates the consequences of knowingly entering into a marital settlement agreement (MSA) with less than favorable terms and then attempting to modify those

terms by claiming a substantial change in circumstances. Petitioner Matthew Thibeau and respondent Regina Thibeau entered into an MSA, which was incorporated into a divorce judgment. The MSA required Matthew to pay Regina $3,000 in monthly maintenance for a period of 130 months. Matthew later filed a petition to modify maintenance to $750 per month, arguing a significant change in his employment circumstances prevented him from being able to pay $3,000 in monthly maintenance. Regina moved to dismiss Matthew's petition under section 2-619 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2012)).

¶ 3 The circuit court granted the motion to dismiss, finding that Matthew intentionally transferred $55,262.22 from a retirement account to his new wife in order to evade his court-ordered maintenance obligation. The court found Matthew in indirect civil contempt for his willful failure to pay maintenance to Regina and ordered a purge payment of $15,000. The court also granted Regina's petition for attorney fees pursuant to section 508(b) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/508(b) (West 2012)). When Matthew was unable to pay the full $15,000 purge amount, the court issued an order of commitment until he could post the remaining amount as bond for his release. On appeal, Matthew seeks reversal of: (1) the dismissal of his motion to modify maintenance; (2) the court's finding that article 2.2 of the MSA is not modifiable; (3) the order of contempt; and (4) the award of attorney fees to respondent. He also argues that retirement funds that he liquidated and transferred to his new wife cannot be considered as income or as a security for payment of future maintenance to Regina. We affirm the circuit court's judgment.

¶ 4 BACKGROUND

¶ 5 Matthew and Regina were married on October 6, 1990 and have two adult children. On September 9, 2010, Matthew filed for dissolution of marriage. The parties entered into an MSA

on May 23, 2012, which was incorporated into a judgment of dissolution of marriage, entered on the same date. The MSA stated that both parties were represented by counsel over the course of settlement negotiations. Each party acknowledged that they were fully informed and sufficiently understood: (1) "the legal rights and responsibilities of each party, respectively, arising from the relationship of the parties and the commencement and prosecution of [the] case;" (2) "the range of what the Court may order in the event that this case proceeded to trial, as a contested case, for resolution by judicial determination;" and (3) "the legal effect of all the terms and provisions of this Agreement as well as the legal rights and responsibilities of each party, respectively, arising hereunder." The parties declined to undertake formal discovery in favor of mediation sessions and acknowledged that each "disclosed all of the wealth, property, estate and income of the other by the financial representations made" in the MSA.

¶ 6 Article II of the MSA addresses maintenance to the parties. Matthew waived all rights to maintenance from Regina. Article II, section 2.2 of the MSA delineated Matthew's maintenance obligation to Regina, stating that "[t]he parties acknowledge that they have been in a long-term marriage whereby Matthew has been the primary provider of the family support for the term of their marriage. As a result, the parties agree that Matthew shall be obligated to pay, and Regina shall be entitled to receive, maintenance for a period of one hundred thirty (130) months through and including April 30, 3012 [*sic*]." The MSA set forth the terms of maintenance as follows:

> "A. Effective May 1, 2012, Matthew shall pay to Regina the sum of $3,000 per month in maintenance. The parties agree and acknowledge that the $3,000 maintenance payment is based upon an imputed/gross income for Matthew in the amount of $130,000 per year. Except for the month[s] of May and June, 2012 as set forth below, Matthew shall direct deposit this $3,000 payment into a

bank account designated by Regina, so that each monthly payment shall arrive on or before the 1st of each month, beginning July 1, 2012. For the month of May, 2012, Matthew shall tender a pro rata amount of maintenance to Regina based upon the number of days remaining in the month of May directly to Regina, and shall tender said payment on or before May 31, 2012. The parties agree that Matthew shall not have [to] make a maintenance payment to Regina for the month of June, 2012.

B. The parties agree that the amount of Matthew's maintenance payment to Regina shall be partially modifiable on a limited basis as specifically set forth more fully below. Specifically, the parties agree that, regardless of Matthew's income, Matthew's minimum maintenance payment to Regina shall be $3,000 each month during the period Regina is entitled to receive maintenance. Moreover, any income earned by Matthew that is in excess of $250,000 in a calendar year, shall not be considered as a basis to modify maintenance. The parties acknowledge and agree that, any income earned by Matthew in excess of $130,000, but less than $250,000 may be a basis for Regina to increase maintenance.

* * *

E. The parties agree that, except as specifically set forth in paragraph 2.2(B), Matthew's obligation to Regina may be modifiable based upon a substantial change of circumstances pursuant to 750 ILCS 5/510."

¶ 7 Before entering into the MSA, the parties testified at a hearing before the circuit court on the proposed agreement. Matthew testified that he was about to start new employment as a

consultant for a company. Regina's counsel asked Matthew, "you do understand that under this agreement even if that employment falls through in the future or even before you begin that job, you are still obligated to pay Regina a minimum of $3,000 per month in maintenance unless that is terminated under paragraph 2.2C of the judgment, correct?" Matthew responded, "yes." Following the testimony, the court stated that it had the opportunity to review the terms of the proposed MSA and found that the terms were "fair, reasonable and not unconscionable." The court ordered a judgment for dissolution of marriage.

¶ 8 On February 22, 2013, Regina filed a petition for rule to show cause, alleging Matthew violated his maintenance obligation by paying only $2,000 for the month of January 2013 and failing to pay $3,000 in maintenance on February 1, 2013. On March 6, 2013, the circuit court granted Matthew until March 31, 2013 to respond to Regina's petition and set a hearing date for April 12, 2013. Thereafter, Regina filed a notice to appear and produce at the hearing. An agreed order dated April 12, 2013 showed that Matthew filed a "Petition to Modify," which is not included in the record. The court set the matter for a hearing on May 8, 2013.

¶ 9 On May 2, 2013, Regina responded to Matthew's petition to modify judgment for dissolution of marriage. She pled that she had insufficient information to admit or deny whether Matthew had suffered a substantial change of circumstances and, therefore, denied that allegation.[1] Regina also had insufficient information to admit or deny whether Matthew's

[1] Regina's answer was verified, but it was problematic in two respects. First, when a party answers a complaint or petition and truly does not know whether to admit or deny the allegation, the party must submit a specific type of verification stating that she does not have knowledge of those particular allegations. 735 ILCS 5/2-610(b) (West 2012). Failure to do so results in admission of the allegation notwithstanding the "lack of knowledge" language in the answer. *Hoxha v. LaSalle National Bank*, 365 Ill. App. 3d 80, 85 (2006); see also 735 ILCS 5/1-109 (West 2012). Because the verified answer contains no "want of knowledge" affidavit as required by section 1-109 of the Code (735 ILCS 5/1-109 (West 2012)), Regina admitted those allegations. Second, a party can never answer an allegation by saying she lacks knowledge and "therefore denies" the allegation. A party can have no knowledge of the truth of the allegation,

consulting contract with his new employer was not renewed and, as such, she denied that allegation as well. She noted the maintenance obligation as set forth in the MSA and stated that the parties agreed, "regardless of Matthew's employment in the future, he would be obligated to pay Regina a *minimum* of $3,000 per month in maintenance." (Emphasis in original.) Regina argued that "[t]he only time a modification of Matthew's maintenance obligation would occur is if Matthew earned *in excess* of $130,000 per year, in which case Regina could petition for an increase in maintenance." (Emphasis in original.) She asserted that Matthew's present and future employment status were taken into account when the parties entered into the MSA. She prayed for the denial of Matthew's petition to modify and requested attorney fees. In his reply, Matthew stated that he "repeatedly notified Regina that due to his unemployment and inability to obtain employment, despite his many attempts to seek employment, he was only able to make a $2,000 payment in February, 2013."

¶ 10 Following a hearing on May 8, 2013, the circuit court found that Matthew had the ability to pay Regina maintenance as set forth in the MSA. In a written order, the court found "Matthew's relationship with his girlfriend is a sham and fraud upon this Court to evade his financial responsibilities ordered pursuant to the parties' Judgment for Dissolution of Marriage." In addition, the court held that the terms of the judgment for dissolution of marriage did not allow for a decrease in Matthew's maintenance payments to Regina. The court found Matthew in indirect civil contempt of court for his failure to pay maintenance. The court ordered Matthew to pay $13,000 to Regina in outstanding maintenance by May 22, 2013. Matthew's motion to modify the judgment for dissolution was denied. The court ordered that Matthew's failure to pay the purge could subject him to additional sanctions and that the purge required him to keep

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or the party can believe it to be actually false so as to truthfully deny it. A party cannot, however, give both responses -- they are mutually contradictory. See generally *Parkway Bank v. Korzen*, 2013 IL App (1st) 130380, ¶¶ 35-38.

current on his maintenance obligation. Finally, the court granted leave for Regina to file a petition for attorney fees.

¶ 11 Matthew satisfied the $13,000 purge on May 22, 2013 and paid attorney fees to Regina's counsel. By agreed order dated May 24, 2013, the circuit court found that Matthew satisfied the purge order and was current on his $3,000 monthly maintenance obligation through May 2013.

¶ 12 On July 17, 2014, Regina filed another petition for rule to show cause, alleging that Matthew failed to pay maintenance for the months of May, June, and July 2014. Regina prayed that Matthew be held in indirect civil contempt and that he be ordered to pay the outstanding maintenance amount, plus 9% interest and attorney fees.

¶ 13 Matthew filed a verified petition for rule to show cause on July 29, 2014. He argued that Regina was in violation of the MSA because she failed to provide him with any financial information as required by article II, paragraph 2.2F of the agreement. He asserted that Regina's refusal to comply was an attempt to frustrate and impair his efforts to seek modification of the maintenance requirement.

¶ 14 On the same date, Matthew also responded to Regina's petition for rule to show cause. He acknowledged the $3,000 monthly maintenance payment, but argued the payment "was expressly predicated upon [his] gross income of $130,000 per year" and that Regina failed to specify that he had the ability to pay, but failed to do so. Matthew asserted the maintenance payment was modifiable pursuant to section 510 of the Act (750 ILCS 5/510 (West 2012)). He alleged that the circuit court did not award maintenance in gross, "but determined that it was predicated upon current gross income at the time of entry of Judgment and subject to modification upon a showing of significant change in circumstances." He also asserted that the court's May 8, 2013 findings were not based on any evidence adduced at the hearing held on the

same date. He noted that he was not allowed to make a comment at that time and that he and his girlfriend, mentioned in the May 8, 2013 order, were engaged at the time and married on September 1, 2013. He then alleged, "[g]iven this Court's prior rulings, [h]e has had to liquidate his entire retirement fund, the sole remaining marital asset awarded to him in the Judgment for Dissolution of Marriage, to satisfy the maintenance provisions of the Judgment for Dissolution. This has caused a significant redistribution of the marital assets and impoverished [him], [while] enriching [Regina] beyond the financial benefit [she] was intended to receive under the provisions of the Judgment."

¶ 15 Matthew further alleged that his imputed gross income of $130,000 in May 2011 decreased to $95,911 by December 2011, and further decreased to $10,392 in 2012. Matthew's gross income for 2013 was $16,876. All other income reported came from the liquidation of retirement funds from which he had to pay tax penalties for early withdrawal. Matthew's originally imputed gross income was $10,833.33 per month, but at the time of filing his response to Regina's petition, his annualized gross income per month was $2,979.17. He alleged that he remarried and was supporting his new wife, who was attending graduate school. He argued that "[t]his is a significant change in circumstances and fundamental to demonstrating that [he] was and is unable to pay the amount required by the Judgment and a demonstrable indication that [his] failure *** to pay $3,000 per month was not willful or without just cause." He requested a modification of maintenance to $750 per month.

¶ 16 Matthew also filed a verified motion to modify "child support"[2] pursuant to section 510 of the Act. He pled allegations similar to what was contained in his response to Regina's petition for rule to show cause. He argued that the circuit court did not consider the provisions of article

[2] The circuit court later acknowledged the scrivener's error and that Matthew had intended to file a motion to modify maintenance.

II, paragraph 2.2E when it denied his previous motion to modify. Matthew also described the history of his employment, or lack thereof, following his execution of the MSA. He stated that his only employment in 2014 was with Loyola University, where he earned $8,000 for teaching from January to June and an additional $1,500 for teaching a summer course. In May 2014, he commenced work under a contract with Holy Family Catholic Community Church for $3,750 per month, which was set to expire in November 2014. He stated that he liquidated all of his retirement funds and used them to pay maintenance and his expenses. He asserted that he had no other available assets with which to pay maintenance and that his income was insufficient to support himself. He argued that the use of his retirement funds to pay maintenance and his substantial reduction of income since 2011 were *prima facie* evidence of a substantial change in circumstances that required a decrease of the monthly maintenance payment.

¶ 17 In a July 30, 2014 agreed order, Regina was required to respond to Matthew's petition for rule to show cause. The agreed order also specifically stated, "Regina intends to file a motion to dismiss in response to Matthew's Petition to Modify Maintenance. Regina shall file her motion to dismiss within twenty-one days, and Matthew shall have 14 days to respond to said motion to dismiss." The circuit court set the matter for hearing and required Matthew to tender a disclosure statement and copies of all monthly bank, retirement account, and credit card statements from April 1, 2013 to date.

¶ 18 On August 18, 2014, Regina responded to Matthew's petition for rule to show cause and moved to dismiss his verified motion to modify child support (which Regina acknowledged was actually a request to modify maintenance) under Code section 2-619. Noting the language in article II, paragraphs 2.2A and 2.2B of the MSA and Matthew's testimony that he understood he was required to continue paying maintenance regardless of his employment status, Regina

argued Matthew had no legal option to reduce his minimum maintenance obligation. Regina argued Matthew's motion to modify was barred by an affirmative matter pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)), namely, that the MSA and incorporating judgment for dissolution of marriage prevented a reduction of the $3,000 monthly maintenance obligation.

¶ 19 Matthew filed a pleading styled "reply re absence of a response to petitioner's verified motion to modify maintenance" on August 29, 2014, arguing Regina unlawfully responded to his motion to modify maintenance by filing a motion to dismiss instead of a direct response to his motion. He asserted that Regina's motion to dismiss violated the Code and Illinois Supreme Court rules. He contended that, as a result, none of his verified statements in support of his motion to modify had been refuted, contradicted, or denied and, therefore, his motion should be accepted as true. Matthew argued that nothing in the MSA prohibits a modification of maintenance pursuant to section 510(a-5) of the Act (750 ILCS 5/510(a-5) (West 2012)). On the same date, Matthew filed his response to the motion to dismiss and also moved for sanctions. The gist of his argument was that his motion to modify maintenance, as a postjudgment decree, was not a pleading and, therefore, could not be dismissed or stricken pursuant to section 2-619 of the Code. Matthew sought sanctions under Illinois Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. Feb. 1, 1994)), arguing Regina's motion to dismiss was not filed in good faith under Illinois law. He also asserted that Regina intentionally misrepresented the terms of the MSA because the agreement was silent on the issue of a reduction in the maintenance obligation.

¶ 20 On September 12, 2014, the circuit court heard argument on Matthew's motion to modify maintenance, Regina's motion to dismiss, and the parties' petitions for rule to show cause. The

court first considered the motion to dismiss. The court stated in response to Matthew's argument:

> "I understand you are asking for [modification] based upon his reduction in income. However, I don't agree with your reading of the marital settlement agreement with regards to his maintenance obligation. The maintenance obligation was there. It was specific and set forth that it was dependent on his imputed income at that time. That was by agreement of the parties.
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> * * *
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> There was a provision that was contained in the agreement that could be increased at a certain time, but I do not agree with your not reading of what the marital settlement agreement states."

The court granted Regina's motion to dismiss "because the terms of the marital settlement agreement preclude the Court from getting to a resolution on the motion in its current form. That is not to be said that if he cannot pay the maintenance obligation, the Court is still going to have to look to whether or not he would be held in contempt based upon the income available to him."

¶ 21 The circuit court then heard testimony from the parties on their petitions for rule to show cause. Regina testified that she did not receive maintenance payments from Matthew from May through September 2014. Matthew testified regarding income from his 2014 employment with Loyola University and Holy Family Community Church. Matthew's gross income to date was $29,500. He then described his monthly expenses. Next, he testified regarding a March 2014 statement from his UBS retirement account, which indicated a balance of zero. Matthew stated that he used the funds from the UBS account to pay his maintenance obligation. A portion of the $188,000 from the account was also used to support himself and his new wife, Loretta. Matthew

had $695.41 in his checking account as of July 25, 2014. He had no other bank accounts or financial assets and calculated that he had a monthly deficit of $588.23 between his gross income and expenses. Matthew's expenses included a monthly mortgage, a $6,281.27 credit card debt, and $300 monthly payments on a 2012 Buick Verano, which he purchased in July 2014. Matthew's 2013 tax return listed his gross cash income of $10,209 and other income totaling $105,000. He explained that the $105,000 constituted the early withdrawal of his retirement account to pay maintenance. Matthew paid a tax penalty on the $105,000 for the early withdrawal. Other than the two employment contracts and the residual money obtained from liquidating the UBS account, Matthew had no other assets or resources from which he could pay maintenance. Matthew was the sole source of support for himself and Loretta.

¶ 22 Matthew testified further regarding the UBS account during cross-examination. On March 14, 2014, he withdrew the remaining $65,014.38, paid withdrawal taxes on that amount, and transferred the remaining $55,262.22 to Loretta. Matthew stated that "he used" those funds to pay Regina maintenance through May 2014. The remainder paid for house repairs and for Loretta to cover the cost of taxes for filing a joint tax return. Matthew could not recall whether the entirety of the $55,262.22 was spent by May 1, 2014. Matthew then testified regarding additional monthly expenses, including a recurring cigar account and an account with ancestry.com. He also testified that he went on vacations with Loretta by using funds from her bank account.

¶ 23 Following the parties' testimony and additional argument, the circuit court ruled on Regina's petition for rule to show cause. The court stated:

"Mr. Thibeau, knowing he had a maintenance obligation, transferred $55,000 to his wife. The Court finds that that transfer was intentional to ensure that there were no funds available to him to pay his maintenance obligation.

Again, this is the same pattern that we have seen in the past. Mr. Thibeau testified that he is the sole provider for his family. Mr. Thibeau remarried knowing that he had an obligation to pay maintenance to his first wife. He has intentionally taken $55,000 in assets and transferred it to his wife. He then testified that he pays all of the household bills from his -- that that is his sole responsibility. His income does not justify him being able to pay all of those bills each month during this time in question.

Further, even his testimony from the last question that was asked -- that you asked him whether he goes on vacation and he says, no, he doesn't pay for vacations. Instead he goes on vacations that his wife pays for out of her funds. He gave her $55,000 in March knowing he had a maintenance obligation.

The Court finds Mr. Thibeau is in willful contempt of court. He has transferred assets solely for the purpose of negating his own maintenance obligation."

¶ 24 In a written order of the same date, the circuit court granted Regina's motion to dismiss Matthew's motion to modify maintenance. The court found Matthew in indirect civil contempt and that the $55,262.22 withdrawn from the UBS account and transferred to his wife was an intentional transfer of funds to evade his court-ordered maintenance obligation. The court set the purge amount at $15,000 and ordered it to be paid by September 15, 2014. The order stated that

if Matthew failed to pay the $15,000 purge, the court may impose additional sanctions. Finally, the court granted Regina leave to file a petition for attorney fees.

¶ 25 On September 15, 2014, the circuit court denied Matthew's motions to reconsider the finding of contempt and vacate the order for purge. The court denied Matthew's petition for rule to show cause. The court granted an extension for Matthew's purge to October 15, 2014. Matthew filed his initial notice of appeal on October 10, 2014, challenging the court's September 12 and 15 orders.

¶ 26 During the October 15, 2014 hearing on Regina's petition for attorney fees, Matthew argued that the circuit court could not consider the $55,262.22 from the retirement account as income because no Qualified Domestic Relations Order (QDRO) was in place for those funds. The court stated, "this was not a QDRO situation. This situation was specifically [Matthew] withdrew and cashed out funds available to pay his maintenance deliberately, deliberately. He placed those funds in his new wife's name to avoid his maintenance obligation." The court then asked if Matthew had the $15,000 purge amount ready for payment. Matthew responded that he had a check for $2,500 and that he did not have $15,000.

¶ 27 The circuit court found that Matthew deliberately secreted funds to avoid paying his maintenance obligation and he was provided with extra time to pay the $15,000 purge amount. The court entered an order of commitment, finding Matthew guilty of willful contempt for failure to pay maintenance pursuant to the judgment of dissolution of marriage. After Matthew submitted the $2,500 check, the court set the bond amount at $12,500. The court also entered judgment in favor of Regina and against Matthew in the amount of $4,582.50 for attorney fees to be payable within 30 days.

¶ 28 On October 24, 2014, the circuit court entered a written order finding that Matthew purged the finding of contempt. The court discharged Matthew and released his bond. Matthew amended his notice of appeal to also contest the court's October 15, 2014 order.

¶ 29 ANALYSIS

¶ 30 Before reaching the merits of this appeal, we note that Regina failed to file a brief within the time prescribed by Illinois Supreme Court Rule 343(a) (Ill. S. Ct. R. 343(a) (eff. July 1, 2008)). In cases when an appellee has not filed a response brief, "where the record is simple and issues may be disposed of easily, we may decide the merits of the appeal solely on appellant's brief." *People v. Wagner*, 152 Ill. App. 3d 34, 35 (1987) (citing *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33 (1976)). We choose to decide the merits here.

¶ 31 Matthew argues that Regina's section 2-619 motion to dismiss was not the appropriate procedural vehicle with which to respond to his motion to modify maintenance. He asserts his postjudgment motion constituted a new proceeding and, thus, was not a pleading, rendering Regina's motion to dismiss a nullity. He contends the circuit court abused its discretion when it granted Regina's motion to dismiss. Matthew also argues that article II, section 2.2 of the MSA is modifiable pursuant to the provisions of section 510 of the Act (750 ILCS 5/510 (West 2012)) upon a showing of a significant change in circumstances; in this case, his underemployment. He additionally asserts that his retirement funds cannot be considered as income for purposes of paying maintenance. He contends that the court's finding of contempt was against the manifest weight of the evidence and an abuse of discretion. Finally, he argues that attorney fees should not be awarded if the finding of contempt or the granting of Regina's motion to dismiss was an abuse of discretion. We address each of these arguments in turn.

¶ 32 The Procedural Propriety of Regina's Motion to Dismiss

¶ 33 Matthew first challenges whether Regina properly filed a section 2-619 motion to dismiss in response to his motion to modify maintenance. He argues that Regina disregarded the Code and Illinois Supreme Court rules because his postjudgment motion was not a pleading and, therefore, could not be dismissed or stricken under section 2-619, citing *In re Marriage of Kozloff*, 101 Ill. 2d 526, 530 (1984). According to Matthew, post-decree petitions are not "new proceedings" and, thus, do not constitute "pleadings." He asserts that Regina waived her opportunity to respond to his motion when she moved to dismiss. He contends the circuit court abused its discretion when it granted her motion to dismiss.

¶ 34 In this case, the circuit court entered an *agreed* order on July 30, 2014, in which the parties specifically agreed, "Regina intends to file a motion to dismiss in response to Matthew's Petition to Modify Maintenance." A party cannot complain of error that he induced the court to make or to which he consented. *McMath v. Katholi*, 191 Ill. 2d 251, 255 (2000); see also *In re Estate of Robinson*, 144 Ill. App. 3d 701, 710-11 (1986) (a party that entered into an agreed order precluded her from later complaining of errors which she invited). Because Matthew invited and consented to the error from which he now complains, we find he has forfeited this issue. *McMath*, 191 Ill. 2d at 255; *In re Ch. W.*, 408 Ill. App. 3d 541, 547 (2011).

¶ 35 Even if the issue had not been forfeited, the error is harmless. The court below granted the motion to dismiss and, therefore, declined to grant any relief regarding the petition. Our supreme court has determined that "the character of [a] pleading should be determined from its content, not its label." *In re Scarlett Z.-D.*, 2015 IL 117904, ¶ 64. The content of the motion to dismiss was indistinguishable from what one would expect to be in a standard response opposing

the petition. Accordingly, labeling it as a "motion to dismiss" did not render it a nullity or otherwise create reversible error.

¶ 36 Modification of Maintenance

¶ 37 Matthew argues that article II, paragraph 2.2E of the MSA specifically provides that maintenance shall be modifiable pursuant to the provisions of section 510 of the Act (750 ILCS 5/510 (West 2012)). Matthew asserts that maintenance payments are modifiable absent an express provision in the MSA that maintenance is not modifiable. He also contends the fact that his income had to be imputed to calculate the amount of maintenance should also be considered as a reason why section 510 of the Act should apply. However, Matthew simply concludes he is entitled to a modification based on section 510 of the Act without explaining why article II, paragraph 2.2E trumps the clear and unambiguous language of article II, paragraph 2.2B, which specifically states, "*regardless of Matthew's income*, Matthew's minimum maintenance payment to Regina shall be $3,000 each month during the period Regina is entitled to receive maintenance." (Emphasis added.) Contrary to Matthew's argument, the circuit court did not refuse to consider Matthew's application for modification of his maintenance without any consideration of the statutory requirements. Matthew seeks a modification based on his reduced income level, which article II, paragraph 2.2B specifically prohibited.

¶ 38 The terms of a marital settlement agreement are binding on the parties and the courts. *Blum v. Koster*, 235 Ill. 2d 21, 32 (2009). Marital settlement agreements are contracts and, therefore, the rules governing the interpretation of contracts apply. See *In re Marriage of Murphy*, 359 Ill. App. 3d 289, 300 (2005). "The primary goal of contract interpretation is to give effect to the parties' intent by interpreting the contract as a whole and applying the plain and ordinary meaning to unambiguous terms." *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill.

App. 3d 632, 636-37 (2008). "As a general rule, the parties' intentions are determined from their final agreement." *Kehoe v. Commonwealth Edison Co.*, 296 Ill. App. 3d 584, 590 (1998). Illinois follows the "four corners rule for contract interpretation in that, " '[a]n agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used.' " *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999) (quoting *Western Illinois Oil Co. v. Thompson*, 26 Ill. 2d 287, 291 (1962)). "If the language of the contract is facially unambiguous, then the contract is interpreted by the trial court as a matter of law without the use of parol evidence." *Air Safety, Inc.*, 185 Ill. 2d at 462. "The interpretation of a martial settlement agreement is reviewed *de novo* as a question of law." *Blum*, 235 Ill. 2d at 33.

¶ 39 Paragraph 5 of Matthew's motion to modify maintenance stated that he applied to the circuit court for a modification of his maintenance obligation "predicated upon a loss of employment." The remainder of the motion sets forth Matthew's employment history immediately before the execution of the MSA and thereafter. In other words, the thrust of his argument to obtain a lower maintenance payment stems from his reduced income. The problem with Matthew's argument is that the MSA is clear and unambiguous on the issue of maintenance vis-à-vis Matthew's income level. Matthew testified he understood that even if his employment fell through in the future, he would still be obligated to pay Regina a minimum of $3,000 per month in maintenance unless maintenance terminates under article II, paragraph 2.2C. As such, Matthew knew that his income level was not a determinative factor for purposes of modifying maintenance under article II of the MSA before he executed the agreement. He cannot now

complain about the clear and unambiguous language of the MSA, which both parties drafted together, negotiated, bargained for, and agreed to all the terms upon execution.

¶ 40 Under normal circumstances, a maintenance order by its very nature is to be reviewed and modified by the court that entered the order. We do not suggest that a maintenance order entered for a specific period of time cannot be reviewed or modified. However, the specific facts and circumstances of this case are unique in that the parties *contractually* agreed that the maintenance order would not be modifiable on the basis which Matthew presented in his modification petition.

¶ 41 We find that the circuit court properly dismissed Matthew's motion to modify maintenance. The language of article II, paragraph 2.2B of the MSA speaks for itself.

¶ 42 Matthew's Liquidated Retirement Funds

¶ 43 Matthew argues that his UBS retirement fund cannot be considered as income or as a security for payment of future maintenance to Regina. He points out that the circuit court ordered him to pay an arrearage owed in 2013 that was paid from his 401(k) account, which he claims was protected by the federal Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1001 *et seq*. (2000)). He argues the court abused its discretion when it found that he intentionally transferred money from his liquidated UBS retirement account to evade payment of his future maintenance obligation because: (1) no debt or arrears existed on his maintenance payments when he liquidated his UBS account; (2) Regina agreed under the MSA to "waive any claim of right, title or interest" in the UBS account minus the sum of $169,989, which was awarded to her as sole and separate property; (3) the court entered no QDRO for the UBS account; and (4) the MSA contained no provision that funds from the UBS account had to be

reserved or used to pay maintenance. Matthew cites *In re Marriage of McLauchlan*, 2012 IL App (1st) 102114, in support of his argument.

¶ 44 The distribution of marital property is within the discretion of the circuit court and will not be disturbed absent an abuse of discretion. *In re Marriage of Polsky*, 387 Ill. App. 3d 126, 135 (2008). An abuse of discretion occurs only when no reasonable person would take the view adopted by the circuit court. *Id*.

¶ 45 This court in *In re Marriage of Thomas*, 339 Ill. App. 3d 214, 225 (2003) reviewed ERISA as it related to the Act (750 ILCS 5/101 *et seq.* (West 2000)). "Pension trust benefits earned by an employee spouse while married are 'property' acquired during the marriage pursuant to section 503 of the Marriage Act (750 ILCS 5/503 (West 2000)) and are, thus, marital property subject to division between the spouses upon dissolution of their marriage." *Id*. The court explained:

> "Under ERISA, a method for dividing pension and retirement benefits between the employee spouse and the nonemployee spouse pursuant to a dissolution of marriage is through the mechanism of a [QDRO] approved by the court. *** Section 1056(d)(1) of ERISA states that each pension plan shall provide that benefits provided under the plan may not be assigned or alienated. *** After the enactment of ERISA, federal courts were divided on the question of whether spouses, former spouses, and children could claim an interest in pension benefits to satisfy family support obligations.
>
> Congress then passed the Retirement Equity Act of 1984 *** in part to ensure that ERISA's preemption and anti-alienation provisions could not be used to block enforcement of court orders providing for child support and maintenance

> payments by ERISA plan participants. Under ERISA, as amended by the Retirement Equity Act, a QDRO is exempt from both the pension plan 'anti-alienation' provision and ERISA's general preemption clause.
>
> Pursuant to section 1056(d) of ERISA, a court order relating to spousal property rights in an employee spouse's pension is a QDRO if it creates or recognizes an alternate payee's right to receive all or a portion of the benefits payable with respect to a participant under a plan. The QDRO mechanism provides that the alternate payee, or the spouse, former spouse, child, or other dependent of a participant is to be considered a plan beneficiary." (Internal quotations and citations omitted.) *In re Marriage of Thomas,* 339 Ill. App. 3d at 225-26.

The *Thomas* court held that "ERISA permits a trial court's entry of a QDRO to assign pension and other retirement benefits to a former spouse to satisfy a judgment for past-due maintenance and child support payments." *Id*. at 227.

¶ 46 In *McLauchlan,* the husband argued that the circuit court erred when it included withdrawals from his retirement accounts as income in calculating maintenance and arrearages. The MSA executed by the parties included a property settlement which specifically "waive[d] any and all interests, or partial interest(s) in and to the retirement plan(s) the other party is receiving pursuant to terms of the Agreement." When the lower court calculated the husband's total gross income, it included an amount that consisted entirely of retirement account withdrawals that the husband used to pay for both his own expenses and maintenance. The lower court also found the husband in contempt for failure to pay maintenance.

¶ 47 The *McLauchlan* court held that "absent fraud, coercion or misrepresentation, where the parties have entered into a property settlement agreement wherein each has waived any and all interests in and to the retirement plan(s) of the other party, the parties are bound to the terms of their agreement." *McLauchlan*, 2012 IL App (1st) 102114, ¶ 29. The lower court's inclusion of the husband's withdrawals from his retirement plans as income in determining maintenance was an improper modification of the parties' settlement agreement. *Id*. ¶ 25.

¶ 48 This case is distinguishable from *McLauchlan* because, here, Matthew intentionally transferred his retirement funds to his new wife to avoid paying maintenance to Regina. Indeed, Regina agreed to "waive any claim of right, title or interest" in the UBS account minus a designated amount, but unlike the husband in *McLauchlan*, Matthew purposefully liquidated his UBS retirement account and transferred $55,262.22 to his new wife to avoid his maintenance obligation. By doing so, he changed the character of the funds and made them available as a source to pay maintenance. Matthew cannot hide retirement funds to evade his court-ordered maintenance obligation and then claim the circuit court improperly considered the secreted funds as income after it ordered him to pay the arrears. The *McLauchlan* court specifically held that in cases of fraud, the waiver language in the MSA would not apply. *McLauchlan*, 2012 IL App (1st) 102114, ¶ 29.

¶ 49 Furthermore, contrary to Matthew's argument, the circuit court did not hold that funds from his UBS retirement account be held as security for future payment of maintenance. Matthew had already liquidated his retirement account and transferred $55,262.22 to his new wife before the court made its finding. Matthew's liquidation of the account also rendered a QDRO unnecessary. Had the court ordered an attachment on the UBS account before Matthew liquidated it, then his QDRO argument might have merit. Finally, Matthew has not explained

how the court abused its discretion based on the fact that no debt or arrears existed when Matthew liquidated his UBS account. Whether Matthew was in debt or arrears at the time he liquidated his UBS account is irrelevant considering his actions *thereafter*, namely, that he transferred the money from that account to his new wife to avoid his maintenance obligation. We find no abuse of discretion.

¶ 50 Finding of Contempt

¶ 51 Matthew next argues that the circuit court's finding of contempt was against the manifest weight of the evidence and an abuse of discretion. Again, he asserts that the funds he withdrew from his UBS retirement account could not be considered as "income" as it related to maintenance payments because Regina waived her interest or claim to those funds in the MSA. Matthew points to evidence in the record that Loretta had been paying Matthew's maintenance obligation from her personal account and that $24,000 of the retirement funds were used to reimburse her for those payments and the remainder of the fund were used to pay debts, medical expenses, and family expenses. Matthew asserts that the court inaccurately concluded that the transfer of funds to Loretta was done intentionally to evade his court-ordered maintenance obligation when no arrearage existed and when no QDRO had been entered. Additionally, Matthew argues that the finding of contempt was not based upon the existence of an ability to pay maintenance and a willful refusal to do so.

¶ 52 Contempt of court is defined as "conduct calculated to embarrass, hinder, or obstruct a court in its administration of justice or to derogate from its authority or dignity or bring the administration of law into disrepute." *In re Estate of Melody*, 42 Ill. 2d 451, 452 (1969) (citing *People v. Gholson*, 412 Ill. 294, 298 (1952)). A contempt of court order is used as a means to control conduct either by punishing an offender who obstructs or embarrasses the court in its

administration of justice or by coercing compliance with court orders. *People v. Budzynski*, 333 Ill. App. 3d 433, 438 (2002).

¶ 53 Contempt is characterized as either direct or indirect. Indirect contempt of court, which the circuit court found in this case, refers to contumacious actions that occur outside of the courtroom. *In re Marriage of Charous*, 368 Ill. App. 3d 99, 107 (2006). The existence of a court order and proof of willful disobedience of that order are essential to any finding of indirect contempt. *In re Marriage of Tatham*, 293 Ill. App. 3d 471, 480 (1997). "The burden initially falls on the petitioner to prove by a preponderance of the evidence that the alleged contemnor has violated a court order." *Charous*, 368 Ill. App. 3d at 107 (citing *In re Marriage of LaTour*, 241 Ill. App. 3d 500, 508 (1993)). If a preponderance of evidence is established, the burden then shifts to the alleged contemnor to show that noncompliance with the court's order was not willful or contumacious and that he had a valid excuse for failure to follow the court order. *Charous*, 368 Ill. App. 3d at 107-08. Whether a party is guilty of civil contempt is a question for the trial court and its decision will not be disturbed on appeal unless it is against the manifest weight of the evidence or the record demonstrates an abuse of discretion. *Id*. at 108 (citing *In re Marriage of Logston*, 103 Ill. 2d 266, 286-87 (1984)).

¶ 54 Civil contempt proceedings have two fundamental attributes – the contemnor must be capable of taking the action sought to be coerced and 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). "One of the chief characteristics of civil contempt is that the contemnor must 'hold the key to the cell,' *i.e.*, he must have it within his power to purge himself by complying with the court's order." *Pancotto v. Mayes*, 304 Ill. App. 3d 108, 111 (1999) (quoting *In re Marriage of Betts*, 200 Ill. App. 3d 26, 44 (1990)).

¶ 55 In this case, the circuit court based its finding of contempt on the fact that Matthew withdrew funds from his UBS retirement account and transferred the money to his wife when he owed maintenance payments to Regina. At the hearing on Regina's petition for rule to show cause, she testified that she did not receive maintenance payments from Matthew from May through September 2014. Thus, Regina established a *prima facie* case for contempt and the burden shifted to Matthew to demonstrate his inability to pay was not willful or contumacious, but based upon a valid excuse. See *In re Marriage of Barile*, 385 Ill. App. 3d 752, 758-59 (2008); *Charous*, 368 Ill. App. 3d at 107-08. Matthew was required to show that he neither had the money, nor had he disposed wrongfully of money or assets which he might have paid. *In re Marriage of Lyons*, 155 Ill. App. 3d 300, 307 (1987). 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).

¶ 56 Matthew testified that he withdrew a total of $188,000 from the UBS retirement account to support himself and Loretta. He used some of those funds to pay his maintenance obligation. He withdrew the remaining $65,014.38 on March 14, 2014, paid a tax penalty, and transferred the remaining $55,262.22 to Loretta. Matthew stated that "he used" those funds to pay maintenance through May 2014 and that the remainder paid for house repairs and for Loretta to cover the cost of taxes for filing a joint tax return.

¶ 57 Matthew remarried knowing that he had an obligation to pay maintenance to Regina. He executed the MSA knowing that he would owe Regina $3,000 per month in maintenance regardless of his income. Matthew transferred $55,262.22 to Loretta in March 2014 when he knew that he had a maintenance obligation to Regina. Matthew's testimony shows he purchased a 2012 Buick Verano in July 2014 for $18,000 while his maintenance obligation was in arrears.

In addition, he went on vacations with Loretta, using money from her account, even though he testified that he is the sole provider for his new wife and his income tax return lists Loretta as a student. Matthew also testified that he had other recurring monthly expenses, including a mortgage, a $6,281.27 credit card debt, a cigar account, and an account with ancestry.com, among others. Matthew's choice to cover his own expenses and many nonessential expenses that he himself incurred does not absolve him of his maintenance obligation. In short, Matthew did not show that his failure to pay maintenance was due to inability.

¶ 58 Moreover, Matthew failed to show that his transfer of $55,262.22 to Loretta was not willful or contumacious. Indeed, the transfer of those funds is evidence of an attempt to impoverish himself and avoid payment of maintenance to Regina. We find the manifest weight of the evidence supports the circuit court's finding of civil contempt against Matthew and that the court did not abuse its discretion.

¶ 59 Matthew argues that he was unfairly incarcerated because he had no ability to pay the $15,000 purge amount. The circuit court granted Matthew an additional month to pay the purge. During this month, Matthew never attempted to appear before the court to present evidence of his inability to pay or to propose a plan that would allow him pay his arrearage over a period of time. When Matthew appeared in court on October 15, 2014, he told the court that he did not have $15,000. He presented no evidence to support this claim. He presented a check for $2,500 and the court then entered an order of commitment, setting bond at $12,500 (the remainder of the purge). As discussed above, the manifest weight of the evidence supports the circuit court's findings and we find no abuse of discretion occurred.

¶ 60 Attorney Fees

¶ 61 Finally, Matthew argues that attorney fees should not be awarded if we found the circuit court abused its discretion by granting Regina's motion to dismiss and finding Matthew in indirect civil contempt of court. We have not found as such. Nevertheless, the court specifically awarded attorney fees under section 508(b) of the Act, which states that "[i]n every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against whom the proceeding is brought to pay promptly the costs and reasonable attorney's fees of the prevailing party." 750 ILCS 5/508(b) (West 2012). Section 508(b) also states that if a court at any time "finds that a hearing under this Act was precipitated or conducted for any improper purpose, the court shall allocate fees and costs of all parties for the hearing to the party or counsel found to have acted improperly. "Section 508(b) of the Act is mandatory, not discretionary, and does not allow for the court to exercise its discretion as to payment if the defaulting party's conduct was without cause or justification." *In re Marriage of Walters*, 238 Ill. App. 3d 1086, 1098 (1992). Under the above statutory guidelines, the court granted Regina a mandatory award for attorney fees. We reject Matthew's argument that attorney fees were improperly awarded.

¶ 62 CONCLUSION

¶ 63 The judgment of the circuit court is affirmed.

¶ 64 Affirmed.