2013 IL App (2d) 120791-U
No. 2-12-0791
Order filed September 27, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF GILBERT T. TSO,	)	Appeal from the Circuit Court of Lake County.
and	)	No. 11-D-1102
REBECCA MURRAY TSO,	)	
Respondent-Appellee,	)	Honorable David P. Brodsky,
(Grund & Leavitt, P.C., Contemnor-Appellant).	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Because section 501(c-1)(3) of the Illinois Marriage and Dissolution of Marriage Act expressly provided that a court may use retainers and interim fees that have been "previously paid," the legislature clearly contemplated that fees that had already been paid to an attorney in satisfaction of an obligation could be subject to disgorgement. Further, section 501(c-1)(3) did not constitute an impermissible taking under the United States or Illinois constitutions, did not violate the separation of powers clause in the Illinois constitution, and did not violate contemnor's right to substantive or procedural due process. Thus, we affirmed.

¶ 2 Following nine years of marriage, petitioner, Gilbert T. Tso, filed a petition for dissolution of marriage to dissolve his marriage with respondent, Rebecca Murray Tso. During the proceedings,

the trial court entered an order requiring contemnor, Grund & Leavitt, P.C., who represented petitioner, to disgorge fees and pay $20,000 in fees to respondent's counsel. Thereafter, the trial court found contemnor in indirect civil contempt for violating that order. Contemnor appeals from the trial court's contempt finding, contending that (1) the trial court incorrectly interpreted the statutory term "available funds" provided in section 501(c-1)(3) of the Illinois Marriage and Dissolution of Marriage Act (the Marriage Act) (750 ILCS 5/501(c-1)(3) (West 2010)); (2) section 501(c-1)(3) of the Act violates the United States and Illinois constitutions prohibitions against taking private property for public use without just compensation; (3) section 501(c-1)(3) of the Marriage Act violates the separation of powers clause contained in article 2, section 1 of the Illinois constitution; and (4) section 501(c-1(3) of the Marriage Act violates the guarantee of substantive due process of law contained in the United States and Illinois constitutions. We affirm.

¶ 3 I. Background

¶ 4 The record reflects that petitioner and respondent were married on June 9, 2001, and that one child was born during the marriage. On May 27, 2011, petitioner filed a petition for dissolution of marriage, claiming irreconcilable differences.

¶ 5 On April 23, 2012, respondent filed a petition for temporary relief seeking interim attorney fees from petitioner. Respondent argued that she had already incurred $56,429.40 in attorney fees, in addition to guardian *ad litem* and other associated fees, including paying $19,415.50 to petitioner. On May 29, 2012, following a hearing, the trial court granted respondent's petition and ordered petitioner to pay respondent's attorneys $20,000 for interim fees.

¶ 6 On June 11, 2012, petitioner filed a motion to reconsider the trial court's May 29, 2012, order. Petitioner argued that the trial court failed to make a finding that he had sufficient funds or

income to pay respondent interim fees; respondent had the financial ability to pay her own attorney fees; and the trial court's order effectively required him to liquidate his investment retirement account. On June 22, 2012, the trial court entered an order granting petitioner's motion to reconsider and vacated its prior order requiring petitioner to pay respondent $20,000 in interim fees. However, the trial court granted respondent's request to have contemnor disgorge fees and pay respondent's counsel $20,000 in interim fees by July 6, 2012.

¶ 7 On July 12, 2012, respondent filed a petition for adjudication of indirect civil contempt against contemnor, alleging that contemnor failed to comply with the trial court's June 22, 2012, order. On July 16, 2012, contemnor filed its response to respondent's contempt petition and incorporated by reference a "Memorandum of Law in Opposition to 'Petition for Adjudication [o]f Indirect Civil Contempt.' " Contemnor's response denied the allegations in respondent's contempt petition. The response requested that the trial court enter an order finding part 3 of section 501(c-1) "unconstitutional under the Constitution of the United States and the *** Illinois Constitution for the reasons stated hereinabove and denying [respondent's] [c]ontempt petition." Contemnor's response requested in the alternative that the trial court enter an order vacating its June 22, 2012, order because that order was void "for want of subject-matter jurisdiction." In its memorandum of law incorporated into its response, contemnor argued that part 3 of section 501(c-1) of the Marriage Act violated the prohibitions on taking private property for public use without just compensation contained in the United States and Illinois constitutions; violated the separation of powers clause contained in section 1, article 2 of the Illinois constitution; violated the guarantee of substantive and procedural due process of law contained in the United States and Illinois constitutions; and that the trial court exceeded its statutory authority in ordering fees be disgorged because the trial court did

not first find that the fees were available. In support of its last argument, contemnor argued that the statutory language contained in section 501(c-1) required the trial court to make a predicate finding that funds were available before ordering fees be disgorged. Further, contemnor argued that it was not holding any "available" or unused fees; rather, petitioner owed contemnor $47,000 in outstanding fees.

¶ 8 On July 18, 2012, the trial court held oral arguments on respondent's contempt petition. The trial court struck contemnor's memorandum of law incorporated into its response to respondent's contempt petition after concluding that it violated Lake County local rule 2.01, which required a party to seek leave before filing a brief in excess of 15 pages. The trial court permitted contemnor to argue only the points expressly raised in its response. Following arguments, the trial court found contemnor in indirect civil contempt. The trial court advised contemnor that it understood contemnor's argument that section 501(c-1) was "terribly unfair," but that the statutory provision was enacted to level the playing field and to prevent "an unfairness." The trial court entered an order fining contemnor $100 per day until it purged itself by paying the disgorgement fees to respondent's counsel. Contemnor timely appealed the trial court's July 18, 2012, contempt order.

¶ 9 II. Discussion

¶ 10 Before addressing the merits of contemnor's appeal, we note that respondent did not file a response brief. However, the absence of an appellee brief does not prevent us from addressing the issues raised because the record is simple and we can review the claimed errors without the assistance of an appellee brief. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 11 A. Statutory Construction

¶ 12 Contemnor's first contention on appeal is that the trial court erred in construing sections 501(c-1)(1) and (3) of the Marriage Act. Contemnor argues that those statutory provisions provide that a court can enter an order allocating "available funds," and as a result, "a court must make a predicate finding that funds are available before ordering disgorgement." Contemnor argues that the trial court failed to make such a finding here. Therefore, contemnor maintains, the trial court exceeded its statutory authority and its order is void.

¶ 13 Our resolution of this issue depends on the construction of a statute and is therefore subject to *de novo* review. See *In re Marriage of Best*, 228 Ill. 2d 107, 116 (2008) (citing *Fisher v. Waldrop*, 221 Ill. 2d 102, 112 (2006)). The primary objective of statutory interpretation is to give effect to the intent of the legislature, and the most reliable indicator of intent is the language of the statute given its plain, ordinary, and popularly understood meaning. *In re Marriage of Rogers*, 213 Ill. 2d 129, 136 (2004). When determining the meaning of a statute, it " 'should be read as a whole with all relevant parts considered.' " *Gardner v. Mullins*, 234 Ill. 2d 503, 511 (2009) (quoting *Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189 (1990)). If the statutory language is clear, a reviewing court does not need to resort to extrinsic aids of construction, such as legislative history (*Northern Kane Educational Corp. v. Cambridge Lakes Education Ass'n*, 394 Ill. App. 3d 755, 758 (2009)), and in such situations, a court may not depart from the plain language of the statute and read into it exceptions, limitations, or conditions that are inconsistent with the express legislative intent. *Landheer v. Landheer*, 383 Ill. App. 3d 317, 321 (2008).

¶ 14 Section 501(c-1)(3) of the Marriage Act provides:

> "(c-1) As used in this subsection (c-1), 'interim attorney fees and costs' means attorney's fees and costs assessed from time to time while a case is pending,

> in favor of a petitioning party's current counsel, for reasonable fees and costs either already incurred or to be incurred, and 'interim award' means an award of interim attorney's fees and costs. Interim awards shall be governed by the following:
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> * * *
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> (3) In any proceeding under this subsection (c-1), the court (or hearing officer) shall assess an interim award against an opposing party in an amount necessary to enable the petitioning party to participate adequately in the litigation, upon findings that the party from whom attorney's fees and costs are sought has the financial ability to pay reasonable amounts and that the party seeking attorney's fees and costs lacks sufficient access to assets or income to pay reasonable amounts. *** If the court finds that both parties lack financial ability or access to assets or income for reasonable attorney's fees and costs, the court (or hearing officer) shall enter an order that allocates available funds for each party's counsel, *including retainers or interim payments, or both*, *previously paid*, in a manner that achieves substantial parity between the parties. (Emphasis added.) *Id.*

The purpose of allowing interim fees is to prevent the party in control of the assets to force the other party into ceding valid claims because the latter cannot pay attorney fees and expert witnesses to adequately prosecute his or her claim. *In re Marriage of Levinson*, 2013 IL App (1st) 121696, ¶ 28.

¶ 15 Guided by the above principles, we reject contemnor's interpretation of section 501(c-1)(3). The language in section 501(c-1)(3) provides that, to obtain substantial parity between the parties in a dissolution-of-marriage proceeding, the court may enter an order allocating funds for each

party's counsel, including retainers and interim fees, "*previously paid*." This court has noted that the word "payment" is commonly defined as "the delivery of money or its equivalent to the person to whom it is due *in satisfaction of an obligation*." (Emphasis in original.) *American Standard Insurance Co. v. Basbagill*, 333 Ill. App. 3d 11, 18 (2002) (citing Black's Law Dictionary 1150 (7th ed. 1997)). By expressly specifying that a court may use retainers and interim fees that have been "previously paid," the legislature clearly contemplated that fees that had already been paid to an attorney in satisfaction of an obligation could be subject to disgorgement. Moreover, in arguing that only fees that are being held by counsel as a prepayment for future services can be deemed "available" and subject to disgorgement, contemnor is asking us to read a limitation into section 501(c-1)(3) that would conflict with the legislature's express intent in enacting that statutory provision, which as noted above, is to achieve substantial parity between the parties. We are not permitted to depart from the statute's plain language to create a limitation that conflicts with the express intent of section 501(c-1)(3). See *Gaffney v. Board of Trustees of the Orland Fire Protection District*, 2012 IL 110012, ¶ 56 (noting that a court will not depart from plain statutory language by reading into it exceptions, limitations, or conditions that conflict with the legislature's express intent).

¶ 16 We find this court's recent decision in *In re Marriage of Earlywine*, 2012 IL App (2d) 110730, instructive. In *Earlywine*, the trial court entered an order requiring the petitioner's attorney to turn over $4,000 the petitioner had paid him as an advance payment retainer to the respondent's attorney. *Id.* ¶ 1. On appeal, we considered whether an attorney who was paid for his services via an advance retainer may be ordered, pursuant to section 501(c-1)(3) of the Marriage Act, to turn over to opposing counsel monies for interim attorney fees. *Id.* ¶ 11.

¶ 17 The court in *Earlywine* began its analysis by distinguishing different types of retainers. Citing *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277 (2007), the reviewing court noted that our supreme court acknowledged that advanced payment retainers were viable. *Earlywine*, 2012 IL App (2d) 110730, ¶ 12. An advance payment retainer represents a legal payment to the attorney for his commitment to provide future legal services and monies in such retainers become property of the attorney immediately upon payment and are deposited into the attorney's general account. *Id.*

¶ 18 The court in *Earlywine* then addressed the argument made by the petitioner's attorney, that is, because the monies in the advance payment retainer paid by his client immediately belonged to him, the trial court could not order him to turn over any money in the retainer to the respondent's attorney. *Id.* ¶ 14. This court rejected that argument. *Id.* In doing so, we first opined that section 501(c-1)(3) did not specify which type of retainer was subject to disgorgement. Instead, that statutory provision generally listed "retainer," and therefore, the court was required to give that word "its fullest possible meaning," which included advance payment retainers. *Id.* ¶¶ 19-21. We also concluded that "strong policy considerations" supported our decision. Specifically, because the purpose of section 501(c-1)(3) is to level the playing field between spouses, construing the statute to exclude advance payments retainers "would be defeating the very purpose of the statute." *Id.* ¶ 22. Thus, we affirmed the trial court's order requiring the petitioner's attorney to turn over $4,000 to the respondent's attorney even though the money in the advance payment retainer already belonged to the petitioner's attorney. See *id.* at ¶ 24.

¶ 19 In this case, contemnor's argument, when distilled to its essence, mirrors the argument that we rejected in *Earlywine.* Like the petitioner's attorney in *Earlywine*, contemnor here is arguing that

because the fees petitioner has already paid were now its property, it cannot be subject to disgorgement. However, such a construction would defeat "the very purpose of the statute," which is to level the playing field between the parties. *Id.* ¶ 22; see also *Lewis v. Giordano's Enterprises, Inc.*, 397 Ill. App. 3d 581, 585 (2009) (noting that a court should consider the reason for the law and the purpose it obtains, in addition to the language chosen by the legislature).

¶ 20 Accordingly, section 501(c-1)(3) expressly provides that a court can use retainers and interim fees "previously paid" to allocate funds to achieve substantial parity between the parties, and consistent with the court's prior opinion in *Earlywine*, we conclude that the trial court did not err in ordering contemnor to pay $20,000 to respondent's counsel..

¶ 21 B. Eminent Domain

¶ 22 Contemnor next contends that section 501(c-1)(3) of the Marriage Act "necessarily violates" the prohibitions against the taking of private property for public use without just compensation contained in both the United States and Illinois constitutions. In support of this contention, contemnor argues that, if our legislature wants to ensure that all litigants in dissolution proceedings have equal access to representation, the State must pay for those services and not confiscate earned fees from matrimonial lawyers. "Put simply," contemnor maintains, "the State has to pick up the bill."

¶ 23 The taking clause of the fifth amendment to the United States Constitution, made applicable to the State of Illinois through the fourteenth amendment, and the Illinois Constitution, require just compensation for private property taken by the exercise of eminent domain. U.S. Const., amend. V; Ill. Const. 1970, art. I, § 15. "In addition to taking by direct physical invasion of private property by the government, takings may also result from the impact of government regulation." *City of*

Chicago v. ProLogis, 383 Ill. App. 3d 160, 165 (2008). However, only the "most severe" government regulation amounts to a taking requiring just compensation. *Stahelin v. Forest Preserve District*, 376 Ill. App. 3d 765, 772 (2007). Determining whether there has been an actionable taking is a question of law that we review *de novo*. *City of Chicago v. ProLogis*, 236 Ill. 2d 69,77 (2010).

¶ 24 In *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), the United States Supreme Court considered whether the Multiemployer Pension Plan Amendment Act of 1980 (the Act) (28 U.S.C. §§ 1381-1461), which required an employer withdrawing from a multiemployer pension plan to pay a withdrawal fee to the pension plan, violated the fifth amendment's taking clause. *Connolly*, 475 U.S. at 217, 220-21. The trustees of a multiemployer pension plan and an employer participating in that plan argued that the imposition of a noncontractual withdrawal liability violated the taking clause because it required withdrawing employers to transfer their assets for the private use of pension trusts. *Id.* at 221. The *Connolly* Court agreed that an employer subject to withdrawal liability was permanently deprived of the assets that it paid to the pension trust. *Id.* at 222. Further, the Court concluded that liability "[was] not an obligation that can be considered insubstantial," noting that the withdrawal liability for an employer in the case before it amounted to nearly 25% of that firm's net worth. *Id.*

¶ 25 Nonetheless, the *Connolly* Court concluded:

> "[A]ppellants' submission—that such a statutory liability to a private party always constitutes an uncompensated taking prohibited by the [f]ifth [a]mendment—if accepted, would prove too much. In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not

previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." *Id.*

¶ 26 The *Connolly* Court further "eschewed the development of any set formula" for identifying a prohibited taking, instead noting that it has relied on factual inquiries into the circumstances of a specific case. *Id.* at 224. The Court opined that three factors "have particular significance" in such an inquiry: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with investment-backed expectations; and (3) the character of the governmental action. *Id.* at 225. Regarding the first factor, the Court noted that there was "no doubt" that the Act deprived an employer of the money owed pursuant to its statutory obligation, but concluded that "the mere fact that the employer must pay money to comply with the Act is but a necessary consequence of [the Act's] regulatory scheme." *Id.* at 226. Regarding the second factor, the Court addressed the appellants' argument that, because the employer's obligations arose from the specific terms of the pension plan's trust agreement, imposing withdrawal liability upset "those reasonable expectations." In assessing this factor, the Court noted that pension plans were the object of legislative concern for some period of time and that "[p]rudent employers then had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations." *Id.* at 227. Finally, with respect to the third factor, the *Connolly* Court noted that the government did not physically invade or permanently appropriate any employer's property for its own use. Rather, the Act safeguarded participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan's obligation during the course of the employer's association with the plan. *Id.* at 225. Thus, the Court opined:

> "[t]his interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good, and under our cases, does not constitute a taking requiring [g]overnment compensation." *Id.*

¶ 27 In this case, as in *Connolly*, contemnor's argument that section 501(c-1)(3) constitutes a taking in violation of the United States and Illinois constitutions proves too much. As the *Connolly* Court directs, section 501(c-1)(3) does not necessarily constitute an impermissible taking merely because it requires contemnor to use its assets for the benefit of another. *Id.* at 222.

¶ 28 Further, applying the *Connolly* factors reinforces our belief that section 501(c-1)(3) does not constitute a compensable taking. Regarding the first factor, we are cognizant that contemnor will be deprived of $20,000 that the trial court ordered it to pay respondent's attorney. However, this is a necessary consequence of the regulatory scheme underlying section 501(c-1)(3). See *id.* at 226. With respect to the second factor, like the employer in *Connolly*, contemnor here had ample notice that, in the process of representing petitioner, it could be ordered to disgorge fees to pay to respondent's attorney. See *id.* at 226-27. Petitioner filed his petition for dissolution on May 27, 2011, after section 501(c-1) was last amended. 750 ILCS 5/501(c-1) (West 2010). Finally, regarding the character of the government's action, as in *Connolly*, the government does not physically invade or permanently appropriate contemnor's assets for its own use. See *Connolly*, 475 U.S. at 225. Rather, section 501(c-1)(3) of the Marriage Act seeks to ensure that both parties in a dissolution proceeding are in substantial parity in terms of financial resources to prevent the party in control of the assets from forcing the other party into ceding valid claims because the latter cannot pay attorney fees and experts to adequately prosecute his or her claim. *Levinson*, 2013 IL App (1st) 121696, ¶ 28.

¶ 29 Based on the foregoing, we reject contemnor's argument that section 501(c-1)(3) constitutes an impermissible taking under either the United States or Illinois constitutions.

¶ 30 C. Separation of Powers Clause

¶ 31 Contemnor next contends that section 501(c-1)(3) violates section 1, article 2 of the Illinois Constitution of 1970, which provides "[t]he legislature, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill. Const. 1970, art. I, § 2.

¶ 32 Contemnor's argument is unavailing. In *Kaufman, Litwin, & Feinstein v. Edgar*, 301 Ill. App. 3d 826 (1999), the reviewing court rejected the plaintiff's argument that section 508(c)(3) of the Marriage Act—which provided, in part, that a determination of reasonable fees and costs was within the trial court's discretion and that a trial court could reduce fees that it deemed "unconsciously excessive" (750 ILCS 5/508(c)(3) (West 1996))—violated the separation of powers clause. *Edgar*, 301 Ill. App. 3d at 833. The court began its analysis by noting that a strong presumption of constitutionality attached to legislative enactments and that the party challenging a statute's constitutionality faced a heavy burden of establishing the alleged constitutional deficiency. *Id.* at 830. The court further noted that "[t]he separation of powers clause is not designed to produce a complete divorce among the branches of our single government," and that "the separate spheres" of our government may overlap. *Id.* at 831. The court in *Edgar* concluded that section 508(c)(3) did not tell a court how to rule in a particular case, but instead left the issue of how attorney-client fee contracts in individual cases should be enforced to the discretion of the court. *Id.*

¶ 33 We find the reasoning in *Edgar* persuasive to this matter. As with section 508(c)(3), section 501(c-1)(3) of the Marriage Act does not dictate to a court how to rule in a particular case. Rather,

section 501(c-1)(3), when read together with subsections (c-1)(1) and (2), affords courts discretion in awarding an interim fees. See *id.*

¶ 34 D. Due Process

¶ 35 Contemnor next contends that section 501(c-1)(3) violates its right to both substantive and procedural due process of law. Regarding substantive due process, contemnor argues that the statutory provision deprives it of a protected liberty interest without the legislature having a rational basis for doing so; and section 501(c-1)(3) also "shocks the conscious." With respect to procedural due process, contemnor argues that "under the statutory scheme here, there was no judicial inquiry into whether [it] already earned those fees through past services rendered."

¶ 36 We are not persuaded. The court in *Edgar* rejected the plaintiff's argument that section 501(c-1)(3) violated its right to substantive due process. *Id.* at 836. Contrary to contemnor's argument here, and as the court in *Edgar* found, we determine that the legislature had a rational basis for enacting section 501(c-1)(3); that is, to level the playing field by equalizing the parties' litigation resources. *Id.* at 836. Further, the interim-fee provisions have a rational relationship to that purpose. *Id.*

¶ 37 We also reject contemnor's argument that section 501(c-1)(3) "shocks the conscious" in determining whether a substantive due process violation has occurred. Contemnor argues that the statutory provision violates that test "for all these foregoing reasons," while providing one citation to authority without explaining how that authority supports its position. Accordingly, we find this argument waived pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008). See *Wolfe v. Menard, Inc.*, 364 Ill. App. 3d 338, 348 (2006) (noting that the appellate court is not a depository in which the appealing party may dump the burden of argument).

¶ 38 Finally, we reject contemnor's argument that section 501(c-1)(3) violates its right to procedural due process. The court in *Edgar* rejected a similar argument, noting that a full evidentiary hearing was not always necessary to determine attorney fees, and in any event, section 501(c-1)(3) allows for an evidentiary hearing if such a hearing was found to be necessary. *Edgar*, 301 Ill. App. 3d at 836-37. In this case, a 2010 amendment to section 501(c-1) provides that a proceeding for interim attorney fees shall be nonevidentiary and summary in nature "[e]xcept for good cause shown." 750 ILCS 501(c-1)(1) (West 2010). The record reflects that the trial court considered contemnor's argument and that contemnor had the option to petition for an evidentiary hearing if it believed that good cause could be shown.

¶ 39 III. Conclusion

¶ 40 For the foregoing reasons, we affirm the judgment of the circuit court of Lake County.

¶ 41 Affirmed.