2018 IL App (2d) 170106-U
No. 2-17-0106
Order filed March 12, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF DEBORAH HIRSCHFELD, Petitioner-Appellant, and THEODORE M. HIRSCHFELD, Respondent-Appellee.	))))))))))	Appeal from the Circuit Court of Lake County. No. 98-D-2387 Honorable Nancy Schuster-Waites, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The former wife was not justified in violating the discovery order. However, the trial court's Rule 219(c) discovery sanction of default judgment was too harsh. We vacate the default judgment and remand.

¶ 2 Respondent, Theodore M. Hirschfeld, petitioned pursuant to section 510 of the Illinois Marriage and Dissolution of Marriage Act (the Act) to modify the parties' 1998 dissolution judgment and marital settlement agreement, alleging that he could not afford to pay for 50% of his daughter Francesca's medical school. 750 ILCS 5/510 (West 2014). Petitioner, Deborah Hirschfeld, moved to dismiss the petition, arguing that the educational provisions were not

subject to modification. The trial court denied the motion and continued the matter for hearing. Deborah refused to comply with discovery orders, stating that she would rather be held in contempt than voluntarily disclose her financial information. Theodore moved for sanctions under Illinois Supreme Court Rule 219(c) (eff. July 1, 2002). Specifically, he asked that the court enter default judgment in his favor, releasing him from any obligation to contribute to the cost of medical school. The court granted the motion for sanctions and issued a default judgment. (Theodore contemporaneously withdrew as moot a pending petition against Deborah for rule to show cause.) We vacate the default judgment, because the default judgment was too severe of a sanction, not issued as a last resort after other enforcement methods failed, not in proportion or relation to the discovery violation, and not in furtherance of the goals of Rule 219(c) to effectuate discovery and a trial on the merits. Having vacated the default judgment, we remand for further proceedings on Theodore's petition to modify.

¶ 3 I. BACKGROUND

¶ 4 Deborah and Theodore married in 1990. They had two children, Francesca and Danika. They divorced in 1998. A post-decree appeal concerned visitation. See *In re Marriage of Hirschfeld*, No. 2-07-0335 (2007) (unpublished order pursuant to Supreme Court Rule 23). The instant appeal concerns the payment of costs associated with Francesca's admission and attendance at Tufts University School of Medicine. After scholarships and financial aid, the remaining cost of the program is approximately $46,000 per year.

¶ 5 The 1998 dissolution judgment incorporated a marital settlement agreement, which addressed educational expenses as follows:

> "8.1 The parties agree to contribute toward educational expenses of private school for elementary school, secondary school, post high school education including college,

university, or trade or vocational school, *graduate school, medical school, and/or law school* for the minor children. The term 'expenses for education' means and includes, but is not limited to, tuition, books, supplies, registration, application fees, give/get, and other required fees, board, lodging, utilities, including telephone, sorority dues and charges, and round-trip transportation expenses between school and the home of the children (if the child attends an out of state school, then such round trips [are] not to exceed eight (8) in any calendar year.)

8.2 The parties agree that their obligation to contribute to any child's educational expenses is conditioned upon the following:

* * *

(b) *** that graduate school, medical school, or law school is limited to four consecutive years after college, university, or trade school, except the time shall be extended in the case of a child's serious illness;

* * *

8.4 The parties further [agree] that the children as well as both parties, shall make every effort and good faith attempt to obtain the maximum amount of student aid available, be it scholarships, loans, or otherwise, the remaining costs and expenses shall be paid by the parties with the HUSBAND and WIFE each being responsible for fifty (50) percent thereof.

* * *

8.6 The parties' responsibility to contribute to the post high school education of the children shall terminate in all respects, in the event that the children have not completed their education as prescribed hereinabove, if said child marries prior to

completion of said education within the prescribed period, or said children have attained the age of twenty-six (26) years of age, whichever event occurs first in point of time.

* * *

8.8 WIFE reserves the right to seek leave of Court to modify the amount of educational expenses to be paid based upon the amount of educational expenses in a given school year. *The matter may be brought before the court for review one time each school year until educational expenses cease* and are terminated in accordance with the agreement." (Emphases added.)

¶ 6 A. The July 26, 2013, and April 3, 2014, Orders

¶ 7 It is clear from the record that, after the 1998 judgment, the parties filed numerous pleadings concerning child support. However, many pleadings and orders appear to be missing from the record. We piece together the background based on an incomplete record, and we note key gaps. Two orders contained in the record, issued prior to Theodore's petition to modify, are relevant to Deborah's argument that she was justified in violating the discovery order: the July 26, 2013, and April 3, 2014, orders.

¶ 8 On July 26, 2013, the trial court entered a five-page order addressing child-support issues, drafted by Deborah. Deborah highlights the following language in that order:

"[Concerning] costs and expenses to date for [the medical and graduate school entrance exams] along with the judgment in [a different trial court case number] and finding that the only issue regarding modification, if any[,] is regarding the continuing payment of child support which shall be determined at hearing at a later date *as all issues regarding college and graduate school were taken outside of 750 ILCS 5/513 per the judgment*." (Emphasis added.)

The petitions prompting the July 2013 order are not part of the record. Similarly, there are no transcripts or bystander's reports relating to the July 2013 order.

¶ 9 On April 3, 2014, the court entered an agreed order, requiring Theodore to contribute $210,000 for past due child support, educational expenses, and college expenses. It also required Theodore to contribute $5,000 per year for graduate expenses for Danika. It further required that Theodore contribute up to $2,000 toward the cost of Francesca's applications to medical school. It specifically granted Theodore leave to file a petition "regarding" the educational expenses, should Francesca be admitted to medical school.

¶ 10 The order acknowledged that Theodore was unemployed. It required him to seek full-time employment comparable to his prior employment and to keep a job log, to be tendered to Deborah every 30 days. Theodore was to liquidate his 401(k) plan holdings, and be responsible for all taxes and penalties associated with said liquidation, in order to pay for the aforementioned child support and education expenses.

¶ 11 B. Theodore's Petition to Modify

¶ 12 On September 15, 2014, Theodore petitioned to modify the 1998 judgment, particularly the provisions outlining his obligation to pay for Francesca's medical school. Theodore represented that, after scholarships and aid, 50% of remaining costs associated with Francesca's attendance exceeded $23,000 per year. Theodore noted that he had undergone substantial periods of reduced income and unemployment, and he believed that Deborah's income had increased. Theodore's assets had been depleted by litigation initiated by Deborah (an attorney who had been able to represent herself *pro se*). Theodore had previously paid child support and educational expenses from existing assets (rather than new income). However, "the last substantial asset he had was ordered liquidated on April 3, 2014." Theodore asked the court to

modify the 1998 judgment so as to release him from his obligation to contribute to the cost of Francesca's medical school. Theodore did not attach a financial affidavit. (Other documents in the record indicate that, later in 2014, Theodore obtained employment at Duke University.)

¶ 13 On November 20, 2014, Deborah moved to dismiss Theodore's petition to modify pursuant to section 2-619 of the Code of Civil procedure (Code). 735 ILCS 5/2-619 (West 2014). She argued, *inter alia*, that: (1) the doctrine of *res judicata* barred Theodore from seeking modification, because the trial court already determined, in its July 26, 2013, and April 3, 2014, orders that the graduate expenses were not subject to modification; and (2) the 1998 judgment precluded modification of graduate expenses. She complained that Theodore had not attached a financial affidavit.

¶ 14 On January 28, 2015, the court denied Deborah's motion to dismiss. It did not address the *res judicata* argument, or the fact that Theodore failed to attach a financial affidavit. It found that the graduate expenses were an "extension of" child support, and, as child support is always subject to modification, the graduate expenses would be subject to modification. The record contains no transcripts or bystander's reports relating to the January 2015 order. Deborah moved to reconsider.

¶ 15 On March 10, 2015, before the court ruled on Deborah's motion to reconsider, Theodore moved to compel Deborah to produce documents and answer interrogatories. He pleaded that Deborah had earlier stated in open court that she would rather be held in contempt than voluntarily produce the documents.

¶ 16 On April 27, 2015, Deborah responded to the motion to compel. She asked that discovery be addressed, if necessary, after her motion to reconsider was heard and decided.

¶ 17 On October 13, 2015, the court denied Deborah's motion to reconsider. It also gave Deborah 28 days to respond to the petition to modify and to produce documents. The record contains no transcripts or bystander's reports relating to the October 2015 order.

¶ 18 On November 9, 2015, the court granted Deborah an additional 28 days to respond and produce. She did not produce discovery.

¶ 19 On March 10, 2016, Theodore moved for discovery sanctions pursuant to Rule 219(c). Specifically, Theodore asked that a default judgment be entered in his favor, releasing him from *any* obligation to contribute to the costs associated with Francesca's medical school. He noted that Deborah had earlier stated in open court that she would not produce the documents concerning her financial information, and she would rather be held in contempt than voluntarily produce the documents. He also referenced a pending petition against Deborah for rule to show cause as to why she had not complied with the discovery order.

¶ 20 Meanwhile, Deborah had her own complaints against Theodore. In 2014, she petitioned for a rule to show cause for his failure to comply with the April 3, 2014, order, which had required Theodore to pay for past child support and educational expenses, among other matters. On January 28, 2015, the court determined that Theodore was not in contempt, *but* it ordered him to complete certain tasks to come into compliance with the order, such as securing life insurance and liquidating his 401(k) holdings. On August 24, 2015, Deborah petitioned a second time for a rule to show cause for failure to comply with the April 2014 order. She stated that Theodore had not paid $5,000 for Danika's graduate school or shown proof of life insurance. On November 9, 2015, the court stated that the rule would issue. On April 27, 2016, Deborah petitioned a third time for a rule to show cause for failure to comply with the April 2014 order. She alleged, among other issues, that Theodore *still* had not paid $5,000 for Danika's graduate school. On

June 28, 2016, the court found Theodore to be in contempt.[1] On August 2, 2016, it entered an order noting that Theodore purged himself of contempt by paying $7,000. The court continued pending matters to October 17, 2016.

¶ 21 On January 9, 2017, the court entered a default judgment against Deborah, granting Theodore's petition to modify judgment, releasing him from any obligation to contribute to the costs associated with Francesca's medical school (aside from the $2,000 already ordered April 2014). In the judgment, the court noted that Deborah had stated in open court that she would rather be held in contempt than voluntarily produce the documents, and the court believed that she did not intend to produce the documents. The court also noted that Theodore withdrew as moot the pending petition against Deborah for rule to show cause. The record contains no transcripts or bystander's report related to the January 2017 order. This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, Deborah challenges the Rule 219 discovery sanction of default judgment. She essentially argues that: (1) she was justified in violating the discovery order, because the court erred in denying her motion to dismiss; and (2) even if she was not justified in violating the discovery order, the default judgment was too severe of a discovery sanction. The court's decisions concerning discovery sanctions are reviewed for an abuse of discretion. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120 (1998).

¶ 24 Before addressing Deborah's arguments, we set the boundaries of our analysis. We first address the gaps in the record. There were no transcripts or bystanders' reports of the hearings preceding the discovery orders or the default judgment. And, we resolve any doubts that arise

[1] A copy of the June 28, 2016, order is not in the record. The court refers to it, however, in the August 2, 2016, order.

from the incompleteness of the record against Deborah. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). Therefore, we agree with Theodore that we must presume that Deborah acted contumaciously when she stated in open court that she would rather be held in contempt than voluntarily disclose the evidence and that she did not intend to disclose the evidence. However, the gaps in the record are not necessarily dispositive. By the nature of the sanction at issue here, we know that the court did not consider any evidence when totally relieving Theodore of his obligation to contribute to graduate expenses. We also know that the court did not employ intermediate sanctions, because, in the written order of default judgment, the court recounted prior orders and occurrences. It did not list any intermediate sanctions, and, to the contrary, it specifically stated that the contempt petition was withdrawn. Therefore, despite gaps in the record, certain occurrences are clear and do not require inference.

¶ 25 We next address, and reject, Theodore's argument that we can *only* vacate the default judgment and remand for further proceedings if Deborah acted reasonably and was justified in violating the discovery order. Theodore quotes boilerplate language: "Before a default judgment will be set aside, the sanctioned party has the burden of establishing that his failure to comply with discovery orders was justified by extenuating circumstances and must show a willingness to comply with discovery orders in the future." *Koppel v. Michael*, 374 Ill. App. 3d 998, 1004 (2007). This quote cannot be read in isolation. Rather, a court abuses its discretion when the sanctioned party's conduct was not unreasonable *or* the sanction itself was not just. *Id.* As we will explain further, to adopt Theodore's position would be to render unassailable every dismissal or default judgment based on contumacious behavior alone, regardless of the lack of warning, progressive sanctioning, prejudice, effort to effectuate a trial on the merits, or the

importance of the evidence and issues. Thus, we consider both whether Deborah was justified in violating the discovery order and whether the sanction was just.

¶ 26 A. Deborah was not Justified in Violating the Discovery Order

¶ 27 Deborah argues that she was justified in violating the discovery order, because the court erred in denying her section 2-619 motion to dismiss Theodore's petition to modify. She explains that she sought a contempt finding as a good-faith test of the court's decision that the graduate expenses were subject to modification, so that she could obtain appellate review of the issue. *Bauter v. Reding*, 68 Ill. App. 3d 171, 174 (1979). In this way, Deborah's argument that she was justified in violating the discovery order is duplicative of her argument, in section B of this order, that the trial court should have employed a lesser sanction- contempt- prior to entering a default judgment. Although we ultimately agree with Deborah that the default judgment was too harsh, we will not direct the trial court on *which* lesser sanction to employ. Indeed, we infer that it was, at least in part, the trial court's frustration with Deborah's gamesmanship over what it believed to be a meritless issue that led it to forgo a contempt finding and jump to the harshest possible sanction, a default judgment.

¶ 28 Deborah's argument that the graduate expenses were not subject to modification is meritless and does not justify her violation of the discovery order. Deborah claims that: (1) the doctrine of *res judicata* precluded Theodore from seeking modification, where the July 26, 2013, and April 3, 2014, orders constituted final adjudications against modification; and (b) the 1998 judgment precluded modification of graduate expenses.

¶ 29 Deborah's *res judicata* argument is forfeited for failure to cite basic case law regarding the doctrine of *res judicata*. See *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 208 (2007); Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2017). In any event, the

July 26, 2013, and April 3, 2014, orders cannot be read as final adjudications against modification. The July 2013 order's statement that "all issues regarding college and graduate expenses have been taken outside [the statute]" was a single phrase in a five-page order. The pleadings and transcripts leading up to the order are missing from the record. The context is unclear. Even if we were to make the inference urged by Deborah, that the 1998 judgment, and not the statute, controlled the issue of modification, this only begs the question of how to interpret the 1998 judgment. Also, the April 2014 order cannot be read as a final adjudication against modification, because it specifically granted Theodore leave to petition "regarding the expenses" upon notification of Francesca's acceptance to medical school.

¶ 30 Deborah's contract-interpretation argument also is without merit. Marital settlement agreements are essentially contracts between parties, and rules pertaining to construction of contracts apply to interpretations of such agreements. *In re Marriage of Corkey*, 269 Ill. App. 3d 392, 397 (1995). A court is to construe the terms of the agreement so as to give effect to the intent of the parties. *In re Marriage of Druss*, 226 Ill. App. 3d 470, 475 (1992). Where the terms are unambiguous, the intent is determined solely from the language of the agreement. *Id*. The court's interpretation of a marital settlement agreement is reviewed *de novo*. *In re Marriage of Culp*, 399 Ill. App. 3d 542, 547 (2010).

¶ 31 The 1998 agreement shows no intent to contract around the court's continuing authority to modify educational expenses. An intention to preclude modification of terms that are typically subject to modification must be expressly stated. *Corkey*, 269 Ill. App. 3d at 397. Nowhere does the 1998 agreement state that its graduate provisions are not subject to modification. To the contrary, although in reference to Deborah's right to seek modification, paragraph 8.8 provides that the issue of educational expenses may be brought to the court for

review and, hence, modification once per year. And, Deborah had a history of acting according to the assumption that the expenses could be modified. In the April 3, 2014, *agreed* order, Theodore was granted leave to file a petition regarding educational expenses related to Francesca's attendance at medical school.

¶ 32 Because the 1998 agreement shows *no intent* to contract around the court's continuing authority to modify educational expenses, we need not address yet another significant hurdle for Deborah. That is, generally, the parties *cannot* contract around the court's continuing authority to modify educational expenses. See, *e.g.*, *In re Marriage of Loffredi*, 232 Ill. App. 3d 709, 714-715 (1992) (educational provisions are in the nature of child support and, thus, are *always* subject to modification, even if the marital settlement agreement precludes modification). Deborah argues that graduate expenses, as opposed to undergraduate expenses, should be an exception to the general rule. She notes that, in 2000, the legislature amended section 513 of the Act to preclude the *court* from ordering educational expenses beyond the baccalaureate degree. Pub. Act 91-204 (eff. January 1, 2000) (amending 750 ILCS 5/513). She fails to explain why, once the *parties* contract for an obligation to contribute beyond the baccalaureate degree, the obligation would not be subject to modification. Indeed, our instinct is that, if the parties may contract for such an obligation, and the court has authority to enforce it, [2] the court also would have the authority to modify it. When a parent contracts for a financial obligation to trigger 20

[2] In *In re Marriage of Koenig*, 2012 IL App (2d) 110503, ¶ 17, this court accepted without discussion that the court had the authority to enforce the parties' open-ended agreement to contribute to graduate expenses as they were "reasonably able" to pay. The court's subsequent setting of the amounts owed, once the obligation triggered, was considered enforcement, not modification.

years in the future, he will likely be able to demonstrate a substantial change in circumstance. He has not continually paid $X per month or year before seeking a modification based on a substantial change in circumstance. Rather, he has never before paid the expense at issue, here, medical school. (Deborah also fails to explain why the 2000 amendment should affect our interpretation of the parties' 1998 intent regarding modification.) Deborah's argument against modification is largely undeveloped, devoid of policy considerations, and, as we have stated, would not change the outcome here. Therefore, we do not further consider it in the context of whether Deborah failed to justify her violation of the discovery order. Deborah *has* failed to justify her violation of the discovery order. Nevertheless, we will briefly return to the implications of the legislature's 2000 amendment when we provide directions for the trial court on remand.

¶ 33 B. The Sanction Was Not Just

¶ 34 Deborah next argues that the sanction was not just. She contends that the default judgment did not serve the purpose of Rule 219 to effect discovery and a trial on the merits, but, rather, unduly punished her and relieved Theodore of an obligation. We agree that the sanction was too severe, not issued as a last resort after other enforcement methods failed, not in proportion or relation to the discovery violation, and not in furtherance of the goals of the rule to effectuate discovery and a trial on the merits.

¶ 35 1. Black Letter Law

¶ 36 Rule 219(c) states:

> "(c) Failure to Comply with Order or Rules. If a party, or any person at the instance of or in collusion with a party, unreasonably fails to comply with any provision of part E of article II of the rules of this court (Discovery, Requests for Admission, and

Pretrial Procedure) or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:

(i) That further proceedings be stayed until the order or rule is complied with;

(ii) That the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;

(iii) That the offending party be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;

(iv) That a witness be barred from testifying concerning that issue;

(v) That, as to claims or defenses asserted in any pleading to which that issue is material, *a judgment by default be entered against the offending party* or that the offending party's action be dismissed with or without prejudice;

(vi) That any portion of the offending party's pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue; or

(vii) That in cases where a money judgment is entered against a party subject to sanctions under this subparagraph, order the offending party to pay interest at the rate provided by law for judgments for any period of pretrial delay attributable to the offending party's conduct.

In lieu of or in addition to the foregoing, the court, upon motion or upon its own initiative, may impose upon the offending party or his or her attorney, or both, an appropriate sanction, which may include an order to pay to the other party or parties the

> amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee, and when the misconduct is willful, a monetary penalty. When appropriate, the court *may, by contempt proceedings, compel obedience* by any party or person to any subpoena issued or order entered under these rules. Notwithstanding the entry of a judgment or an order of dismissal, whether voluntary or involuntary, the trial court shall retain jurisdiction to enforce, on its own motion or on the motion of any party, any order imposing monetary sanctions, including such orders as may be entered on motions which were pending hereunder prior to the filing of a notice or motion seeking a judgment or order of dismissal.
>
> Where a sanction is imposed under this paragraph (c), the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order." (Emphases added.) Ill. S. Ct. Rule 219 (eff. July 1, 2002).

¶ 37 Rule 219(c) authorizes the trial court to impose sanctions on a party who unreasonably fails to comply with its discovery rules or orders. *Shimanovsky*, 181 Ill. 2d at 120. The goal of the sanction should be to effectuate discovery and a trial on the merits, not to punish. *Id*. at 123. Factors a court may consider in determining what sanction to apply are: (1) the surprise to the adverse party if the evidence were to be presented for the first time just before, or at, trial; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence. *Id*. at 124. Courts may consider the importance of the information the non-compliant party was ordered to produce. *Hartnett v. Stack*, 241 Ill. App. 3d

157, 173 (1993). No one factor is determinative. *Shimanovsky*, 181 Ill. 2d at 124. Rather, the court must consider the unique factual situation that each case presents to determine which sanction, if any, should be imposed. *Id*. at 127. "To the maximum extent that is practicable, sanctions should be customized to address the nature and extent of the harm while prescribing a cure to the specific offense." *Locasto v. City of Chicago*, 2014 IL App (1st) 113576, ¶ 27. A sanction is not just if it bears no relation to the conduct that gave rise to the sanction and to the effect of that conduct on the parties. *Koppel*, 374 Ill. App. 3d at 1004. Additionally, the sanction must be in proportion to the gravity of the violation. *Id*. (discovery procedures are "meaningless" if they are not in proportion to the violation). For the factor of prejudice to warrant a dismissal or default judgment, the court must find that the prejudice caused by the discovery violation is so great that it can *only* be remedied by dismissing the case or entering default judgment. *Shimanovsky*, 181 Ill. 2d at 127.

¶ 38 Dismissal or entry of a default judgment is a "drastic sanction" to be employed *only* in response to "deliberate, contumacious, or unwarranted disregard of the court's authority" *and* as a "last resort *** after all the court's other enforcement powers have failed to advance the litigation." *Id*. at 123. A court should not enter a default judgment without first employing intermediate sanctions and an advance warning that continued dilatory responses could result in a default. *Locasto*, 2014 IL App (1st) 113576, ¶ 46.

¶ 39 B. *Booher*, *Daebel*, and *Bradley*

¶ 40 Courts have applied these principles in divorce contexts. For example, in *In re Marriage of Booher*, 313 Ill. App. 3d 356, 361 (2000), the court reversed as too severe a Rule 219(c) sanction barring the husband from presenting *any* evidence in a dissolution action. The husband had failed to file a discovery affidavit relating to income, expenses, and property. However, the

wife was not unduly surprised by the violation, because the husband had already provided some financial information in earlier discovery. *Id*. at 360. Also, the prejudice to the husband resulting from the sanction was too great, because he was unable to present evidence about custody. *Id*. Custody and visitation were too important for the court to preclude evidence on the topic due to a discovery violation. *Id*. Additionally, the violation concerned finances, and it was not reasonably related to the issue of custody. *Id*. A reasonable sanction, in proportion and in relation to the violation, would have been to bar the husband from contradicting or going beyond the previously disclosed financial information. *Id*. at 361.

¶ 41 In *In re Marriage of Daebel*, 404 Ill. App. 3d 473, 489 (2010), the court reversed as too *lenient* Rule 219(c) sanctions for attorney fees. The court explained that the sanction did not redress the disadvantage to the husband when the wife refused to appear in deposition in an admitted effort to avoid answering questions but was still allowed to testify at trial. *Id*. at 488. As one of the purposes of Rule 219(c) sanctions is to ensure a fair trial on the merits, the only rational cure for the wife's misconduct was to bar her testimony and to bar undisclosed defenses. *Id*. The court did *not* go so far as to say that a default judgment was proper, as had been initially requested by the husband. *Id*. at 476, 488. Thus, in *Daebel*, the sanction was crafted to cure the violation, not to punish the offending party.

¶ 42 In *In re Marriage of Bradley*, 2011 IL App (4th) 110392, ¶ 2, the court upheld Rule 219(c) sanctions imposing $6,000 in attorney fees *and* barring the husband from claiming a $227,000 farm as non-marital property. The trial court explained that the husband failed to disclose, until the eve of trial, that he owned, and used marital resources to maintain, substantial acreage in Missouri. The wife did not know it existed. If classified as marital property, it would be the parties' most valuable asset. The court characterized the husband's argument as: " 'O.K.,

she caught me. Make me pay [$6,000 in attorney] fees.' " *Id*. at ¶ 13. The court rejected that argument, stating: "If the stakes far exceed the potential fees [here, $227,000 compared to $6,000], then telling the truth [to the court] simply becomes a cost-benefit analysis." *Id*.

¶ 43 The appellate court upheld the sanction, noting the: (1) gravity of the husband's violation ("the Missouri farm was the most significant asset before the court" and "[the husband] initially refused to identify" and later "repeatedly lied to the court concerning his acquisition of the property"); and (2) prejudice to the wife (the wife did not have an opportunity to investigate the circumstances under which the husband acquired the farm or its appraisal and "an enormous potential for prejudice lies if financial information is missing"). *Id*. at ¶¶ 22-25. Thus, in *Bradley*, the sanction was in proportion and relation to the violation. The husband was issued a severe sanction only after repeatedly lying to the court about an important asset. At the same time, the sanction related only to the asset about which the husband had lied to the court and refused to produce reliable evidence.

¶ 44 C. The Instant Case

¶ 45 Here, the default judgment was too severe of a sanction, not issued as a last resort after other enforcement methods failed, not in proportion or relation to the discovery violation, and not in furtherance of the goals of Rule 219(c) to effectuate discovery and a trial on the merits. The record, limited as it is, demonstrates the absence of warning and progressive sanctioning. On April 27, 2015, Deborah responded to Theodore's motion to compel by asking that discovery be addressed after the ruling on her motion to reconsider. On October 13, 2015, the court denied the motion to reconsider and gave Deborah 28 days to produce documents. On November 9, 2015, it gave her another 28 days. Neither of these orders contained warnings or intermediate sanctions. On March 10, 2016, Theodore moved for default judgment. From April 27, 2016, to

August 2, 2016, the court heard matters pertaining to *Theodore's* contempt. The court continued the case to October 17, 2016. It entered default judgment on January 9, 2017. The default order recounted prior rulings without mention of intermediate sanctions. Rather, it noted that the less extreme enforcement method of contempt proceedings was withdrawn as moot. Rule 219 specifically authorizes the court to "by contempt proceedings, compel obedience" with its discovery orders. With this court's rejection of Deborah's modification argument, the lesser enforcement methods should be more attractive to the trial court.

¶ 46 Also, the default judgment was not in relation or in proportion to the violation. Effectively, the default judgment did not sanction the wrongdoer, Deborah. Her obligation to contribute to Francesca's graduate expenses remains as it was, at 50%. Whether she will choose to pay a greater share is a family matter outside the scope of the courts. Rather than sanction Deborah, the default judgment rewarded Theodore, who was relieved of a significant, contracted-for obligation. The absence or late disclosure of Deborah's financial information did not so prejudice Theodore's case that the only cure would be to enter default judgment in his favor. Rather, Theodore still had to prove that he had an inability to fulfill his obligation in order to be released from it.

¶ 47 Moreover, the default judgment undermined Rule 219(c)'s purpose to effectuate a trial on the merits. Rather than issue an intermediate sanction, the court skipped to a default judgment. It did not consider Theodore's alleged inability to pay before relieving him of his obligation. As in *Booher* and *Daebel*, a reasonable sanction would have been to fine Deborah, to bar Deborah from testifying or, specific to this case, to bar her from presenting evidence of her own financial status.

¶ 48 The cases cited by Theodore, *Koppel*, 374 Ill. App. 3d at 1004, and *Hartnett*, 241 Ill. App. 3d at 173, do not convince us otherwise. *Koppel* illustrates the proper application of progressive sanctioning, with the court making every attempt to effectuate discovery and a trial on the merits before resorting to a default judgment. There, the court issued more than five intermediate sanctions, progressing from attorney fees, to fines, to barring witnesses, to a conditional default that could be vacated upon compliance. Here, in contrast, the default judgment was not a last resort, but, rather, was entered before attempting less extreme measures such as a fine or barring testimony.

¶ 49 *Hartnett* illustrates the importance of considering the nature of the withheld evidence when crafting a sanction that relates to, and attempts to cure, the violation. There, the defendant answered with an affirmative defense that he was terminally ill and had sold his business to persons who had agreed to assume responsibility for his liabilities. After making his health the "linchpin" of his defense, he refused to comply with discovery orders by the court to confirm his health status. *Hartnett*, 241 Ill. App. 3d at 176. A cure for a defendant who refuses to support his own affirmative defense is to enter judgment in favor of the plaintiff: "In view of such recalcitrance, the court had no other effective powers to advance the litigation than to enter a default judgment." *Id.* Here, in contrast, there is no unsupported affirmative defense. The instant case was not dead in the water based on Deborah's violation. The court still should have held Theodore to his burden to prove his inability to fulfill his obligation before releasing him from it. This is true regardless of Deborah's financial status.

¶ 50 Thus, we vacate as too severe the default judgment. We remand for further proceedings on Theodore's petition to modify his obligation to contribute to the cost of medical school.

¶ 51 For the sake of efficiency on remand, we address certain points concerning Deborah's financials and Theodore's petition to modify. "When appropriate, a reviewing court may address issues that are likely to recur on remand in order to provide guidance to the lower court and thereby expedite the ultimate termination of the litigation. With limited exception, however, courts should refrain from deciding an issue when resolution of the issue will have no effect on the disposition of the appeal presently before the court." *Pielet v. Pielet*, 2012 IL 112064, ¶ 56. Here, we believe it is appropriate to address certain issues, because, if we do not, we may have affirmatively misguided the trial court.

¶ 52 The only appealable issue here is whether the Rule 219 sanction was warranted. We determined that Deborah failed to justify her violation of the discovery order, but the sanction of default judgment was too severe. We do *not* mean to imply, however, that the court's priority and focus on remand should be to pursue the disclosure of *Deborah's* financials. We are mindful of gaps in the record, but we find it curious that the court did not pursue the disclosure of *Theodore's* financials, as Deborah requested in her motion to dismiss. It is Theodore who seeks to be relieved of a contracted-for obligation. Deborah does not seek relief from her 50% obligation.

¶ 53 As Deborah noted in her brief, in 2000, the legislature amended section 513 of the Act to preclude the court from ordering educational expenses beyond the baccalaureate degree. We rejected as undeveloped and improbable Deborah's extrapolation that the 2000 amendment meant that the 1998 educational provisions were not subject to modification at all. The more interesting question implicated by the legislature's prohibition of court-ordered graduate expenses, only hinted at here, is whether a court hearing a petition to modify graduate expenses is, or should be, precluded from *increasing* the non-movant's obligation to pay graduate

expenses, even where the non-movant has abundant financial resources. We find no authority permitting a court-ordered increase of the non-movant's obligation to pay graduate expenses even if the movant's obligation is reduced.

¶ 54 III. CONCLUSION

¶ 55 For the reasons stated, we vacate the default judgment and remand for proceedings consistent with this order.

¶ 56 Vacated and remanded.