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2012 IL App (3d) 090206-U

Order filed July 17, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
MARIANNE MILLER,)	of the 12th Judicial Circuit
)	Will County, Illinois,
Petitioner-Appellee,)	
)	Appeal Nos. 3-09-0206, 3-09-0555
and)	Circuit No. 05-D-1460
)	
DERRICK MILLER,)	Honorable
)	Joseph C. Polito
Respondent-Appellant.)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice Holdridge specially concurred.
Justice Lytton dissented.

ORDER

- ¶ 1 *Held:* The trial court's finding that respondent husband was in indirect civil contempt for failing to comply with terms of a marital settlement agreement incorporated into the parties' judgment of dissolution of marriage is upheld. The purge order requiring respondent to pay petitioner wife 55.5% of the parties' estimated tax payments plus 9% interest and attorney fees to "make Petitioner whole" is reversed as an invalid compensatory award. The cause is remanded to the trial court for entry of a proper purge order and a determination of whether attorney fees should be separately awarded.
- ¶ 2 The trial court entered an order finding respondent, Derrick Miller, in willful indirect

civil contempt for his failure to comply with a provision of the parties' marital settlement agreement, incorporated by reference into the judgment of dissolution of marriage. Thereafter, the trial court ordered respondent to pay petitioner, Marianne Miller, \$31,912.50 plus 9% interest and attorney fees as part of the purge provisions. Derrick appeals both the contempt finding and the purge order directing Derrick to pay monies, attorney fees and interest to Marianne. We affirm in part, reverse in part, and remand for further proceedings.

¶ 3 FACTS

¶ 4 Derrick and Marianne were married for 25 years. When they divorced in 2007, the parties entered into a marital settlement agreement. This agreement was incorporated into their judgment of dissolution of marriage.

¶ 5 Pursuant to the terms of the settlement agreement, Derrick received 44.5% of the marital estate and Marianne received 55.5% of the marital estate. The settlement agreement also contained a provision that addressed the parties' estimated tax prepayments for the 2007 tax year. This provision provided as follows:

“For 2007 \$50,000 had been paid for estimated taxes to the federal government and \$7,500 for the state government. The Wife shall be entitled to declare 55.5% of these payments and the Husband shall be precluded from claiming such portion. The Husband shall be entitled to declare 44.5% of these payments and the Wife shall be precluded from claiming such portion.”

¶ 6 After she filed her 2007 income tax returns which included her claim to 55.5% of the pre-paid taxes, Marianne learned Derrick claimed 100% of the pre-paid taxes after she received a notice of intent from the Internal Revenue Service (IRS) to levy against her assets in the amount

of \$16,190.57 including tax penalties and interest. Consequently, Marianne filed a petition for rule to show cause and other relief alleging that Derrick refused to execute documents requested by the IRS to confirm Derrick was court ordered not to claim more than 45.5% of the pre-paid tax payments. The petition sought a finding of contempt and an order of the court requiring Derrick to comply with the prior court's order. Marianne also sought an order requiring Derrick to pay her attorney fees and costs associated with the contempt proceedings. Subsequently, Marianne alternatively suggested purge conditions requiring Derrick to pay \$31,912.50 directly to Marianne, which represented 55.5% of the \$57,500 in tax prepayments made to the State of Illinois and the IRS for the 2007 tax year. According to Marianne, such an award would make her "whole."

¶ 7 The trial court issued a rule to show cause. At the hearing on the rule to show cause, Derrick testified and admitted he claimed 100% of the 2007 tax prepayments. He claimed he did so because he could not reach Marianne's accountants to apportion the parties' income for 2007 and he did not agree with the distribution of monies pursuant to the parties' marital settlement agreement.

¶ 8 During this hearing, the trial court was advised that Marianne owed approximately \$16,000 to the IRS for 2007 taxes due on her nonmarital assets. Pending the resolution of the issue regarding the taxes which were pre-paid during the marriage, Marianne voluntarily paid approximately \$16,000 to the IRS and several thousand dollars to the Illinois Department of Revenue to avoid further interest and penalties.

¶ 9 The trial court found Derrick to be in willful, indirect civil contempt for failing to comply with the marital settlement agreement and judgment for dissolution of marriage, as a result of

claiming more than 44.5% of the estimated tax prepayments for 2007. The trial court sentenced Derrick to an indeterminate term in the county jail, but stayed the sentence for 33 days in order to allow him to purge the indirect civil contempt by paying Marianne \$31,912.50, which represented 55.5% of the estimated tax payments made by the parties to the IRS and the Illinois Department of Revenue for the tax year 2007. In addition, the court ordered Derrick to pay 9% interest accrued on that amount since July 28, 2008, to Marianne. Derrick paid the purge amount directly to Marianne.

¶ 10 Thereafter, Marianne filed a petition for attorney fees pursuant to section 508(b) of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/508(b) (West 2008)), seeking \$29,628.31 for fees and costs associated with the initiation of the contempt proceedings, plus an additional \$3,000 for the fees hearing. The trial court awarded attorney fees and costs in the amount of \$26,702.50, and then ordered Derrick to pay these additional fees and costs in order to avoid incarceration following the finding of contempt.

¶ 11 Derrick appealed the original finding of contempt, the terms of the purge order, and the subsequent award of attorney fees as additional purge conditions. This court affirmed the trial court's finding of contempt but reversed the purge order and remanded for further proceedings. Following our order, we allowed the appellee's petition for rehearing and now issue a new order, affirming the trial court's finding of contempt but reversing the purge order, and we remand for further proceedings.

¶ 12 ANALYSIS

¶ 13 First, Derrick contends he did not engage in willful and contumacious conduct. Alternatively, Derrick contends the trial court erred by entering a compensatory damage award in

favor of Marianne as a sanction for his indirect civil contempt. Derrick also alleges the attorney fees were unreasonable and constituted an improper compensatory damage award.

¶ 14 Marianne responds by arguing that Derrick has waived his challenge to the compensatory nature of the purge provisions by not raising this challenge in the trial court. Even if the issue has not been waived, Marianne argues that the purge order was not a compensatory damage award because it simply awarded her property which was wrongfully appropriated by Derrick. She also argues the trial court's award of attorney fees was reasonable.

¶ 15 First, we consider whether waiver applies to the issue of the purge provisions fashioned by the trial court in this case. As a general rule, a party waives an issue for appeal when he fails to raise it in the trial court. *Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1, 11 (1996). Nevertheless, the waiver doctrine is an administrative limitation on the parties, not a jurisdictional constraint on this court. *Id.* A reviewing court may consider an issue not raised in the trial court if the issue is one of law and is fully briefed by the parties. *Id.* Since the issue of whether the purge order was a compensatory damage award is one of law, we choose to reach the merits of Derrick's argument.

¶ 16 Generally, a party is in civil contempt when he or she fails to comply with a court order, resulting in some loss to the opposing party. *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 41 (2010). A finding of indirect civil contempt requires proof of a valid court order and a willful violation of that order. *Cetera*, 404 Ill. App. 3d at 41. The burden initially falls on the opposing party to show a violation of a court order by a preponderance of the evidence. *Id.* The burden then shifts to the alleged contemnor to show that the violation was not willful or contumacious and that he had a valid reason for noncompliance. *Id.* Whether a party is guilty of indirect civil contempt

becomes a question of fact for the trial court, and a reviewing court will not disturb that finding unless it is against the manifest weight of the evidence, or the record reflects an abuse of discretion. *In re Marriage of Logston*, 103 Ill. 2d 266, 286-87 (1984).

¶ 17 In this case, the marital settlement agreement, which was incorporated into the judgment of dissolution of marriage, limited the parties to declaring certain percentages of their 2007 pre-paid taxes. Derrick admitted he claimed 100% of the prepayments toward his income tax obligation, rather than the 44.5% specified in the marital settlement agreement. As justification for claiming more than his share of prepaid taxes, Derrick testified he applied 100% of the tax prepayments to reduce his own tax liability because he disagreed with the trial court's decision and felt the trial court should have allocated more of the 2007 joint marital income to Marianne.

¶ 18 Obviously, the court did not accept Derrick's explanation as a valid reason justifying his admitted noncompliance. In this case, the record supports the court's determination that Derrick violated provisions of the parties' marital settlement agreement without a valid reason for his noncompliance. Thus, the trial court's finding of indirect civil contempt was not against the manifest weight of the evidence.

¶ 19 Next, we consider the scope of the purge conditions imposed by the court. The record shows that, after finding Derrick in contempt of court, the court sentenced him to an indeterminate term in the Will County jail for contempt. However, the court stayed execution of the sentence for 33 days to allow Derrick the opportunity to purge the sentence by paying \$31,912.50 plus 9% interest directly to Marianne. After Derrick paid \$31,912.50 plus 9% interest directly to Marianne, thereby satisfying those terms of the purge order, the court later ordered Derrick to also pay \$26,702.50 to Marianne for her attorney fees, as an additional

condition to purge his contemptuous behavior and avoid the indefinite jail sentence imposed by the court.

¶ 20 The sanctions for civil contempt should be designed to be prospective in nature and seek to coerce compliance with a valid court order. *In re Marriage of Doty*, 255 Ill. App. 3d 1087, 1095 (1994). Thus, a person found in indirect civil contempt must be given the "keys to his cell" and the ability to purge his contempt. *In re Marriage of Logston*, 103 Ill. 2d at 289. Civil contempt is not a private remedy. *Keuper v. Beechen, Dill and Sperling Builders, Inc.*, 301 Ill. App. 3d 667, 669-70 (1998). "Because a sanction in a civil contempt proceeding is strictly coercive, the court is without the authority to compensate an aggrieved party for its damages." *Id.* at 670 (citing *Harper v. Missouri Pacific Railroad Co.*, 282 Ill. App. 3d 19, 30 (1996)).

¶ 21 We begin by focusing on the original order at the heart of the contempt proceeding. Here, the original judgment of dissolution of marriage, which incorporated the marital settlement agreement designed by the parties, did not order Derrick to reimburse Marianne for any part of the pre-paid tax payments. Yet, the purge order required Derrick to both reimburse Marianne for 55.5% of the pre-paid tax payments *and* to pay additional interest and attorney fees to avoid incarceration.

¶ 22 In her Reply to Derrick's Response to the Petition for Rehearing filed with this court, Marianne concedes, at the time of the finding of civil contempt, the trial court could have required Derrick to "execute the required IRS form and file an amended tax return" in order to purge the contempt. However, Marianne now argues that, since our original decision was not issued until September 2, 2011, it is now impossible for *Marianne* to amend her own 2007 tax returns. In addition, Marianne submits that an order requiring Derrick to amend his tax return or

provided accurate information to the IRS would not provide an effective remedy for Marianne at this point in time.

¶ 23 We agree that the passage of time is a relevant consideration for the court to consider on remand, with respect to the consequences for Derrick rather than Marianne. Once a purge provision becomes impossible for the contemnor, due process may prohibit the trial court from imposing any sanction which is no longer possible for Derrick to carry out. See *Sanders v. Shephard*, 163 Ill. 2d 534 (1994). Nonetheless, Marianne's inability to file her own amended tax return has no bearing on the sanction the trial court can impose for civil contempt due to Derrick's previous conduct in this case. The contempt sanction must mirror the requirements of the original court order to be enforced. In this case, the original order did not require Derrick to directly compensate Marianne for the 2007 pre-paid taxes but dictated the information Derrick could provide to the IRS without violating the court order at issue.

¶ 24 The direct payment of \$31,912.50 to Marianne to keep Derrick out of jail, does not correlate with the court order sought to be enforced by civil contempt pertaining to the information Derrick provided to the IRS. Here, the marital settlement agreement required Derrick to claim no more than 45.5% of pre-paid taxes on his own 2007 IRS tax forms, for purposes of paying his individual tax obligations, but *did not* anticipate Derrick would directly pay Marianne for 55.5% of the pre-paid taxes under any circumstances.

¶ 25 Thus, the purge order altered the distribution of property established by the judgment for dissolution of the marriage by requiring Derrick to pay Marianne a sum equal to 55.5% of the 2007 pre-paid taxes. In addition, the court compensated Marianne for the tertiary damages she suffered because of Derrick's contemptuous behavior by adding 9% interest, attorney fees, and

costs in the amount of \$26,702.50 to the terms of the original purge order.

¶ 26 A trial court simply lacks the authority to order damages which are not the direct remedial loss of a contemnor's violation or to order compensation for tertiary damages. See *Keuper*, 301 Ill. App. 3d 667; *Harper v. Missouri Pacific R.R. Co.*, 282 Ill. App. 3d 19 (1996). By imposing additional financial obligations upon Derrick to directly pay Marianne 55.5% of the 2007 pre-paid taxes *plus* interest and attorney fees, the purge order became compensatory and invalid.

¶ 27 Derrick was not originally ordered to pay Marianne 55.5% of the estimated tax payments for 2007, but was simply restricted to report a certain amount of pre-paid taxes on his personal return. Compliance with this court order required Derrick to correct the information he provided to the IRS, not compensate Marianne for the inconvenience he caused by failing to comply with the court order. Consequently, the cases relied upon by the dissent are distinguishable, because those cases involved orders requiring one party to personally pay certain amounts of money to a spouse or deliver property of certain value directly to the other spouse. In this case, the court order required of Derrick to deliver certain information to the IRS, not to deliver property to the other spouse.

¶ 28 In each of the decisions cited by the dissent, unlike the case at bar, the court strictly enforced a prior order that required the payment or delivery of property, not information, to a third party such as the IRS. Although the dissent correctly points out that a party may collect interest on post-dissolution judgments, the *Carrier* court did not address whether a court had the authority to order the payment of interest as an appropriate condition of a civil contempt purge order. See *In re Marriage of Carrier*, 332 Ill. App. 3d 654 (2002).

¶ 29 Consequently, we remand the cause to the trial court to impose an effective sanction, if

any, to compel compliance with the specific provisions of paragraph 11.2 of the parties' marital settlement agreement, rather than provide compensatory relief to Marianne equal to 55.5% of the value of pre-paid taxes plus interest and attorney fees.

¶ 30 Next, we turn to Derrick's argument regarding the court's imposition of attorney fees.

Attorney fees may be separately awarded by the court pursuant to section 508(b) of the Act.

This provision provides that, even absent a showing of inability to pay, a party who has been forced to resort to the judicial process to secure compliance with the terms of an order or

judgment is entitled to reasonable attorney fees. 750 ILCS 5/508(b) (West 2008); *In re*

Marriage of Letsinger, 321 Ill. App. 3d 961, 970 (2001). Regardless of whether the fees were reasonable or statutorily authorized, the trial court imposed the requirement that Derrick pay his former wife's attorney fees as part of Derrick's purge order, which we have found to be invalid.

Therefore, the order for attorney fees is reversed, and the cause is remanded to the trial court for the court to determine, pursuant to statute, the reasonableness of the requested attorney fees, independent of the purge provisions for the finding of indirect civil contempt.

¶ 31 CONCLUSION

¶ 32 The judgment of the circuit court of Will County finding Derrick to be in indirect, willful civil contempt of court is affirmed. The purge order of the circuit court is reversed. This cause is remanded to the circuit court for further proceedings consistent with this order.

¶ 33 Affirmed in part; reversed in part; and remanded with directions.

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¶ 34 JUSTICE HOLDRIDGE, specially concurring:

¶ 35 I agree that the purge conditions contained in the trial court's contempt order were

improperly compensatory. As the dissent correctly notes, in an order of indirect civil contempt, a trial court may direct a party to perform an action required by the court's prior judgment even if that action involves the payment of money. Thus, if the initial judgment in this case had required Derrick to pay alimony, the civil contempt order could have directed him to pay the alimony required by that judgment as a purge condition. However, the initial judgment at issue in this case did not require Derrick to pay any money to Marianne. Instead, it required Derrick not to claim a certain portion of the prepaid taxes. As Marianne recognized and argued before the trial court, the court could have compelled compliance with that judgment by directing Derrick to execute and notarize certain forms that would have notified the IRS of the judgment's allocation of the estimated taxes between the parties. Instead, the court ordered Derrick to pay a portion of the prepaid taxes to Marianne. It also ordered Derrick to pay additional interest and attorney's fees to avoid incarceration. Thus, the court's purge order in this case was improper and should be reversed.

¶ 36 Contrary to the dissent's suggestion, nothing in our decision today diminishes or calls into question a trial court's authority to award injunctive relief in indirect civil contempt orders by requiring a contemnor to pay money or to perform other obligations imposed by a prior judgment. Accordingly, the dissent's fears that our decision "places the whole concept of indirect civil contempt in domestic relations cases in jeopardy" (*infra* ¶ 45) is, in my opinion, unfounded.

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¶ 37 JUSTICE LYTTON, dissenting:

¶ 38 In this case, the majority finds that Derrick violated the provisions of the marital settlement agreement by applying 100% of the estimated tax prepayments to reduce his own tax

liability. Nevertheless, it concludes that the contempt order fashioned by the trial court is invalid as a "compensatory award" payable to Marianne. The relief granted in this case is remedial, not compensatory; I therefore dissent.

¶ 39 There is a difference between remedial relief of injunctive orders and compensatory damages. A civil contempt proceeding seeks to coerce the contemnor into compliance with a court order. *In re Marriage of Morreale*, 351 Ill. App. 3d 238 (2004). It is remedial and is intended to "compel the performance of the thing required by the decree of the court for the benefit of the party complainant." *Rothschild & Co. v. Steger & Sons Piano Manufacturing Co.*, 256 Ill. 196, 201 (1912). An order for compensatory damages, on the other hand, requires payment for damages caused by a violation of the order, not the direct remedial loss of the contemnor's refusal to obey the order. *Keuper v. Beechen, Dill & Sperling Builders, Inc.*, 301 Ill. App. 3d 667 (1998). Although a court may enter an order seeking to compel compliance with a previous order, it is without authority to compensate an aggrieved party for secondary or tertiary damages caused by non-compliance. *Harper v. Missouri Pacific R.R. Co.*, 282 Ill. App. 3d 19 (1996).

¶ 40 In dissolution cases, courts frequently enter orders of indirect civil contempt as an injunctive remedy. For example, in *In re Marriage of Havens*, 213 Ill. App. 3d 151 (1991), the wife disobeyed a court order requiring her to return her former husband's nonmarital property to him. When she failed to return the items, the court held her in contempt and provided that she could purge the contempt by paying her husband \$11,497, as the replacement value of the items. In *In re Marriage of Admire*, 193 Ill. App. 3d 324 (1989), the husband missed mortgage payments resulting in foreclosure of the marital home. The court found the husband in contempt.

Since the home had been sold, the court allowed the husband to purge the contempt by paying the wife \$25,000, the sale price of the property. See also, *In re Marriage of Cierny*, 187 Ill. App. 3d 334 (1989) (husband's refused to sign deed as required in settlement agreement, resulting in contempt order allowing him to purge himself by executing the deed); *Taapken v. Taapken*, 39 Ill. App. 3d 785 (1976) (husband found in contempt for failing to pay wife her portion of certificates of deposit under divorce decree and sentenced to periodic imprisonment until he paid the wife \$1,500 and presented a plan for repaying the remainder); *In re Marriage of Michaelson*, 359 Ill. App. 3d 706 (2005) (child support arrearage); and *In re Marriage of Ramos*, 126 Ill. App. 3d 391 (1984) (lump sum maintenance).

¶ 41 The majority states that compensatory damages may not be awarded in indirect civil contempt proceedings. It is well settled that a petitioning party may not recover compensatory damages in a civil contempt proceeding in Illinois. *Harper*, 282 Ill. App. 3d at 30. As a result, contempt orders awarding the plaintiff the cost of replacement windows due to the defendant's failure to comply with a settlement agreement to repair faulty windows (*Keuper*, 301 Ill. App. 3d 667), directing fines to be paid to the plaintiff for the defendant's willful violation of a preliminary injunction (*Harper*, 282 Ill. App. 3d 19), or ordering the payment of clean-up costs resulting from the defendant's violation of an environmental injunction (*Round Lake Sanitary District v. Basic Electronics Manufacturing Corp.*, 60 Ill. App. 3d 40 (1978)), have been found to be impermissible awards of compensatory damages.

¶ 42 The civil contempt order here does not award compensatory damages based on an underlying suit; it orders Derrick to comply with the marital settlement agreement. The settlement agreement states:

"For 2007 \$50,000 has been paid for estimated taxes to the federal government and \$7,500 for the state government. The Wife shall be entitled to declare 55.5% of these payments and the Husband shall be precluded from claiming such portion. The Husband shall be entitled to declare 44.5% of these payments and the Wife shall be precluded from claiming such portion."

In light of Derrick's conduct, the trial court found him in contempt and gave him the opportunity to purge himself and avoid the jail sentence by paying Marianne 55.5% of the prepaid estimated taxes, or \$31,912.50, plus interest.¹ It did not award secondary or tertiary damages to compensate Marianne; it sought to compel Derrick to comply with the direct terms of the settlement agreement.

¶ 43 I find no legal support for the suggestion that the award of additional interest and attorney fees converts the trial court's contempt order into an invalid compensatory award. It is well settled that interest in a divorce proceeding may be awarded. See *In re Marriage of Carrier*, 332 Ill. App. 3d 654 (2002). Under section 2-1303 of the Code of Civil Procedure, "judgments recovered in any court shall draw interest at the rate of 9% per annum from the date of the

¹ As the special concurrence states, the initial judgment ordered Derrick "not to claim a certain portion of the prepaid taxes" and the court's purge order instructed Derrick to "pay a portion of the prepaid taxes to Marianne." *Supra* ¶ 35. These statements clearly demonstrate that the purge order was remedial. The court's order did not compensate Marianne for damages or losses, such as IRS penalties; it simply converted the percent award of the prior judgment into a dollar amount equivalent.

judgment until satisfied." 735 ILCS 5/2-1303 (West 2008). In this case, the trial court acted within its discretion and applied interest, pursuant to section 2-1303, to the prepaid tax payment that Derrick wrongfully claimed. See *Carrier*, 332 Ill. App. 3d at 660 (decision to award interest is discretionary).

¶ 44 Moreover, the trial court's award of attorney fees was authorized under section 5/508(b) of the Illinois Marriage and Dissolution of Marriage Act. See 750 ILCS 5/508(b) (West 2008); *In re Marriage of Ackerley*, 333 Ill. App. 3d 382 (2002) (when a court determines that a party's failure to comply with a court order is without compelling cause or justification, an award of attorney fees and costs under section 508(b) is mandatory). Both the award of interest and the subsequent order granting attorney fees are common components of a contempt proceeding. They are ancillary to the court's prior judgment; they are not compensatory. See *In re Marriage of Berto*, 344 Ill. App. 3d 705 (2003).

¶ 45 The majority ignores the distinction between injunctive relief and a compensatory award. That distinction is critical, particularly in domestic relations cases where, as here, a spouse has not received the direct benefit of a prior court order. The ruling today places the whole concept of indirect civil contempt in domestic relations cases in jeopardy. Relief from unpaid orders for payment of child support arrearage, lump sum maintenance, property settlements or joint income tax refunds is at risk. The order cannot and should not stand. The trial court acted within its authority in providing injunctive relief.