

NOTICE

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2011 IL App (5th) 100426-U

NO. 5-10-0426

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

In re MARRIAGE OF

DIANE M. LUPA,

Petitioner-Appellee,

and

LEONARD R. LUPA,

Respondent-Appellant.

) Appeal from the
) Circuit Court of
) St. Clair County.
)

) No. 05-D-519
)

) Honorable
) Heinz M. Rudolf,
) Judge, presiding.
)

JUSTICE SPOMER delivered the judgment of the court.
Justices Goldenhersh and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court lacked jurisdiction to determine the federal taxability of annuity payments made by one spouse to another, and thus that portion of the circuit court's order that found the husband in contempt of court for filing 1099-R forms with the Internal Revenue Service and ordered him to revoke said forms is vacated. However, the attorney fee award and the remainder of the circuit court's order is affirmed in its entirety, as the attorney fees incurred by wife in enforcing prior orders of the court and in defending contempt petitions filed by husband which the circuit court found to be meritless were within the circuit court's discretion to award to wife pursuant to section 508 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/508 (West 2010)).

¶ 2 The respondent, Leonard R. Lupa, appeals paragraph nine of the order of the circuit court of St. Clair County, entered April 12, 2010, which: (1) found him in contempt of court for filing form 1099-R with the Internal Revenue Service (IRS) for tax years 2008 and 2009; (2) ordered him, within 14 days, to amend his 2008 tax return to correct the effects of the form 1099-R; (3) ordered him, within 14 days, to revoke the form 1099-R for tax year 2009;

and (4) imposed a fine of \$20 per day if written confirmation of same was not provided within 21 days. In addition, Leonard requests that this court remand for the circuit court to reconsider, in light of this alleged error, paragraph 11 of said order, awarding the petitioner, Diane M. Lupa, \$16,000 in attorney fees pursuant to section 508 of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/508 (West 2010)). For the reasons that follow, we vacate paragraph nine of the order and affirm the remainder of the order in its entirety.

¶ 3

FACTS

¶ 4 The facts necessary to our disposition of this appeal are as follows. On October 13, 2008, the Honorable Laninya A. Cason entered an amended supplemental judgment for the dissolution of the parties' marriage. In paragraph 10 of said order, the circuit court found:

"That the parties agreed that Wife shall be entitled to 27.5 percent (27.5%) of the Husband's annuity pension through the Internal Revenue Service beginning September 6, 2007.

That until the Qualified Domestic Relations Order takes effect, Respondent shall pay 27.5 percent (27.5%) of said net OPM Federal annuity directly to the Petitioner. **Any amount due and owing at the time of the entry of this Amended Supplemental Judgment of Dissolution shall be paid in a lump sum to Petitioner within 30 days of the entry of this Amended Supplemental Judgment of Dissolution of Marriage.**" (Emphasis in original.)

¶ 5 In paragraph 11 of the order, the circuit court found:

"That for 26 months prior to the entry of the Judgment of Dissolution, Respondent did not pay Petitioner her 27.5% share of his monthly OPM Federal annuity income. Petitioner's interest in this 26 months of annuity payments is \$1,285.00 per month for 26 months, totaling \$33,410. The Court has considered

this in dividing the marital property and the Court has compensated Petitioner by awarding her a Judgment in the amount of \$20,000 and by awarding Petitioner other cash accounts." (Emphasis in original.)

¶ 6 Based on the foregoing, the circuit court ordered the following in the property division portion of the order:

"MARITAL INTEREST IN Husband's US Retirement Annuity accrued date of marriage April 20, 1985 to date of retirement now in pay status (55% of total) or \$4,501.81 per month TO HUSBAND=FIFTY PERCENT OF MARITAL INTEREST TO WIFE=FIFTY PERCENT OF MARITAL INTEREST VIA DOMESTIC RELATIONS ORDER AND/OR ORDER PREPARED BY COUNSEL FOR DIANE M. LUPA

K) In addition, Respondent to pay Petitioner \$20,000 cash to account for the withholding of her share of his OPM Federal annuity, the child support owed to Respondent and equitable division of property, **within 30 days of the entry of this Amended Supplemental Judgment of Dissolution of Marriage. Said amount is a judgment in favor of Petitioner and Against Respondent."** (Emphasis in original.)

¶ 7 On January 2, 2009, Diane filed a petition for contempt based on Leonard's failure to pay her the designated portion of the OPM annuity and the \$20,000 back payment. On January 9, 2009, Leonard filed a cross-petition for contempt based, *inter alia*, on Diane's alleged failure to pay 50% of uninsured medical expenses for the minor children. At a hearing held on January 9, 2009, before the Honorable Heinz M. Rudolf, Diane acknowledged receipt of the \$20,000 back payment and various checks which Leonard represented to be Diane's portion of the OPM annuity, calculated by Leonard at the rate of

\$1,285 a month, which did not include cost-of-living increases that Leonard received on his monthly OPM annuity payments, rather than the 27.5% ordered by the circuit court in the amended supplemental judgment of dissolution. Testimony and argument at the hearing focused on whether Diane was entitled to 27.5% of the monthly payment received by Leonard or whether she was only entitled to \$1,285 a month and which of these scenarios should be reflected in the qualified Illinois domestic relations order (QILDRO) that was being negotiated between the parties.

¶ 8 After hearing argument of counsel, the circuit court ordered that Diane accept the amounts tendered by Leonard, with the issue reserved on the sufficiency of these amounts. With regard to the pending QILDRO, the circuit court ordered that the QILDRO reflect that Diane is entitled to 27.5% of the gross amount of the annuity payments, and said QILDRO was entered on February 2, 2009. Leonard appealed the entry of the QILDRO to this court, arguing that by ordering 27.5% of the gross amount to be paid to Diane, rather than a fixed amount, the circuit court improperly deviated from the terms of the amended supplemental judgment of marriage. This court affirmed the entry of the QILDRO as written. *In re Marriage of Lupa*, No. 5-09-0222 (July 26, 2010) (unpublished order under Supreme Court Rule 23 (eff. May 30, 2008)).

¶ 9 On May 5, 2009, Diane filed a motion for sanctions and/or petition for contempt and other relief on the basis that Leonard had filed several IRS 1099-R forms declaring the payments he made to Diane to be taxable to her and a deduction for him. According to the petition, Leonard sent these forms to the IRS but did not send them to Diane. On January 27, 2010, Diane filed another petition for a rule to show cause and other relief on the basis that Leonard did not pay her 27.5% of the net amount of his OPM annuity in the period before the QILDRO went into effect, as the amended supplemental judgment had directed him. The petition for a rule to show cause also repeated the allegations related to the 1099-R forms.

On May 12, 2009, Diane filed a second motion for sanctions and/or petition for contempt and other relief based on her allegation that Leonard fraudulently altered a document entitled "Vanguard Transfer of Assets Between Nonretirement Brokerage Accounts" in order to facilitate a transfer of funds to him which were not awarded to him in the amended supplemental judgment of dissolution.

¶ 10 On March 18, 2010, the circuit court held an evidentiary hearing on both Leonard and Diane's contempt petitions. Leonard testified that he is a retired IRS agent currently serving as a contract IRS fraud investigator. He identified 1099-R forms he filed with the IRS for pension payments he made to Diane in 2008 and 2009. One of the 1099-R forms reflected that he paid \$33,410 to Diane for 2008, and another reflected a \$20,000 payment. Leonard acknowledged that based upon the amended supplemental judgment, he was not ordered to pay the \$33,410 and in fact did not make such a payment to Diane.

¶ 11 Leonard also testified as to how he calculated the payments he made to Diane in the period before the QILDRO took effect. The amended supplemental judgment required Leonard to pay 27.5% of his net annuity payment. Leonard testified that he paid Diane 27.5% of the payment after deductions for federal tax withheld, insurance for himself and two minor children, long-term care insurance for himself, deduction for a car payment for one of the minor children, and life insurance for himself. In addition, he did not count cost-of-living increases that he received in the payment.

¶ 12 Both parties presented expert testimony on the issue of whether the method Leonard used to calculate the payments was proper and whether it was proper for Leonard to issue the 1099-R forms and deduct the annuity payments made to Diane on his tax return. Daniel Wiedenbenner, a certified public accountant specializing in tax accounting, testified that until a QILDRO goes into effect, federal tax law requires that the person to whom the pension payments are directly distributed is responsible for the tax. According to Mr. Wiedenbenner,

this interpretation would be consistent with the terms of the amended supplemental judgment of dissolution, which provided that until the QILDRO went into effect, Leonard shall pay 27.5% of the net amount to Diane, which Mr. Wiedenbenner defined to include only federal withholding. Mr. Wiedenbenner testified that it was illegal under federal tax law for Leonard to issue the 1099-R forms for the payments he made to Diane and to deduct the payments from his income on his returns.

¶ 13 On the other hand, Charles Fahrner, an IRS agent and certified fraud examiner who is a friend of Leonard, testified that the term "net" in the amended supplemental judgment gave Leonard the right to pay Diane 27.5% of his annuity payment after any and all deductions were applied to his payment, including deductions for Leonard's insurance and car payment. In addition, Mr. Fahrner testified that because Leonard's pension was in the form of an annuity, which is categorized in federal tax law as income from property, that portion paid to Diane was taxable to her. Both parties presented federal tax case law to the circuit court on this issue.

¶ 14 The circuit court also heard evidence on Leonard's contempt petition for Diane's alleged failure to pay her part of the children's uninsured medical expenses. Evidence revealed that Leonard was billing Diane for items such as mileage and meal expenses incurred while traveling to appointments. Finally, the circuit court heard evidence on Diane's second petition for contempt regarding the allegations that Leonard fraudulently altered a Vanguard document, during which Leonard refused to answer questions, pleading privilege pursuant to the fifth amendment. At the conclusion of the hearing, the circuit court took the cross-petitions for contempt under advisement. Thereafter, both parties filed petitions for attorney fees pursuant to section 508 of the Act (750 ILCS 5/508 (West 2010)), accompanied by affidavits.

¶ 15 On April 12, 2010, the circuit court entered a detailed order disposing of all pending

motions. As to Leonard's petition for contempt, the circuit court found that Diane had abided by the amended supplemental judgment of dissolution in all respects and found that Leonard submitted bills to Diane for meal expenses, travel expenses, and/or mileage reimbursements to which he was not entitled. Accordingly, the circuit court denied Leonard's petition for contempt in its entirety and denied his petition for attorney fees.

¶ 16 As to Diane's petitions for contempt, the circuit court found that Leonard failed to pay all sums owed to Diane within 30 days of the amended supplemental judgment as ordered by the court and never executed the QILDRO as ordered by the court. In particular, the circuit court found that Leonard intentionally underpaid Diane from his OPM annuity each month until the QILDRO went into effect, and it entered a judgment in favor of Diane for the amount she was underpaid and prejudgment interest, for a total of \$8,400.86. The circuit court further found Leonard to be in indirect civil contempt for his failure to make these payments as ordered.

¶ 17 In paragraph nine of the order, the circuit court analyzed federal tax law and the expert opinions presented by the parties. The circuit court found that the payments Leonard made to Diane from his OPM annuity prior to the entry of the QILDRO were taxable to Leonard and not to Diane and found Leonard to be in indirect civil contempt of court for issuing the 1099s and deducting the payments on his tax return. The circuit court directed Leonard to pay the tax liability for all OPM annuity payments prior to the entry of the QILDRO, to take any and all steps to amend his 2008 tax return to correct the effects of the 1099-R form issued to Diane for 2008, and to revoke the 1099-R issued to Diane for 2009. The circuit court mandated that Leonard take these steps with the IRS or any other agency necessary to negate the effect of the 1099-R forms for 2008 and 2009 within 14 days of the entry of the order and provided that, in the event that Leonard failed to provide written proof to Diane within 21 days that he had complied with this provision, he pay a fine of \$20 per day until

such time that he had taken all remedial action necessary to correct the wrongful filing of the 1099-R forms.

¶ 18 Finally in paragraph 11, with regard to Diane's petition for attorney fees, the circuit court stated that it had considered all applicable case law and statutory provisions, including, but not limited, to sections 501(c-1), 503(j), and 508 of the Act (750 ILCS 5/501(c-1), 503(j), 508 (West 2010)). The circuit court found that neither party presented any evidence challenging the reasonableness or necessity of the fees. Based on its consideration of the relevant statutes, the circuit court again denied Leonard's petition for fees and awarded Diane \$16,000 in attorney fees, having found that of the \$19,329.30 in attorney fees that Diane had incurred, the majority of the fees were incurred by Diane to enforce the prior orders of the court and to defend against Leonard's various posttrial motions, all of which were denied. On May 11, 2010, Leonard filed a posttrial motion, which was denied on August 21, 2010. Leonard filed a timely notice of appeal.

¶ 19 ANALYSIS

¶ 20 Leonard appeals only from paragraph nine of the April 12, 2010, order, finding him in contempt for issuing the 1099-R forms and deducting his OPM annuity payments to Diane prior to the entry of the QILDRO on his 2008 tax return and ordering him to amend and/or revoke these forms with the IRS. In addition, Leonard requests that in light of this error we remand to the circuit court to reconsider the \$16,000 award of attorney fees pursuant to section 508 of the Act (750 ILCS 5/508 (West 2010)) to Diane. Leonard contends that the circuit court was without jurisdiction to enter this portion of the order. "[W]hether a party is guilty of contempt is a question of fact for the trial court, and *** a reviewing court will not disturb the finding unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion." *In re Marriage of Logston*, 103 Ill. 2d 266, 286-87 (1984). However, "[w]hether the circuit court properly exercised jurisdiction is reviewed *de novo*."

In re John C.M., 382 Ill. App. 3d 553, 558 (2008). After reviewing paragraph nine of the April 12, 2010, order in light of these standards of review, we agree with Leonard that the circuit court lacked jurisdiction to declare the income tax consequences of the OPM payments and to order Leonard to amend and/or revoke his tax return and the 1099-R forms.

¶ 21 In dividing marital property, the circuit court is required to consider, *inter alia*, the tax consequences of the property division upon the respective economic circumstances of the parties. 750 ILCS 5/503(d)(12) (West 2010). In so doing, the circuit court has the power to characterize a property division in order to effect the tax consequences. *In re Marriage of McCune*, 86 Ill. App. 3d 311, 316 (1980). However, the power to declare a transaction taxable or nontaxable under the Internal Revenue Code lies exclusively with the federal government. *In re Marriage of McCune*, 86 Ill. App. 3d at 316 (citing *Imel v. United States*, 523 F.2d 853, 857 (10th Cir. 1975)).

¶ 22 Here, the circuit court, in its amended supplemental judgment of dissolution, ordered Leonard to pay Diane a specific percentage of his net monthly OPM annuity payment until such time as a QILDRO could be entered and put into effect. In so doing, the circuit court was within its province to consider the tax consequences of its order. However, the federal government has the exclusive authority to determine whether the payments were taxable to Leonard or Diane. Accordingly, the dispute between Leonard and Diane regarding the filing of the 1099-R forms and Leonard's 2008 tax return must be resolved through the channels set forth in the Internal Revenue Code and accompanying administrative regulations. While wrongdoing on the part of Leonard in issuing the 1099-R forms is apparent, especially for the \$33,410 that he was not required to pay, the remedy for these indiscretions is properly under the jurisdiction of the IRS and the federal courts. For these reasons, paragraph nine of the April 12, 2010, order must be vacated.

¶ 23 It is also important to recognize that the circuit court did not declare the tax

consequences of the direct OPM payments from Leonard to Diane until the time of the April 12, 2010, order. Leonard was not directed to pay the tax liability and prohibited from filing 1099 forms in the October 13, 2008, amended supplemental judgment of dissolution. As such, the declaration in paragraph nine of the April 12, 2010, order must be construed as a modification of the amended supplemental judgment, and the circuit court is without jurisdiction to make such a modification after 30 days. See *Brickey v. Brickey*, 44 Ill. App. 3d 563, 565 (1976); see also *In re Marriage of Miller*, 108 Ill. App. 3d 63, 66 (1982).

¶ 24 In addition, a party may not be found in contempt of court unless the court has specifically ordered the party to do or refrain from doing that for which he is found in contempt. *O'Leary v. Allphin*, 64 Ill. 2d 500, 514 (1976). On this subject, our supreme court has explained:

" 'Punishment for contempt has been described as a drastic remedy and to the end that individual liberty be protected from possible abuse of the inherent power of the courts to so proceed, it is required that the mandate of the court must be clear before disobedience can subject a person to punishment.' " *O'Leary*, 64 Ill. 2d at 514 (quoting *People v. Wilcox*, 5 Ill. 2d 222, 228 (1955)).

See also *Illinois School Bus Co. v. South Suburban Safeway Lines, Inc.*, 132 Ill. App. 2d 833, 839-40 (1971); *Engelman v. Engelman*, 26 Ill. App. 3d 1073, 1077 (1975). Here, the amended supplemental judgment of dissolution made no pronouncements regarding Leonard's filing of 1099-R forms. These are two additional reasons to vacate paragraph nine of the April 12, 2010, order.

¶ 25 We note that in her brief, Diane did not present any authority contrary to that given by Leonard, and set forth above, as to why the circuit court erred in its pronouncements in paragraph nine of the April 12, 2010, order. Instead, Diane defends all the other aspects of the circuit court's order of that date. We reiterate that although we are vacating the contempt

finding and pronouncements made in paragraph nine, the finding of contempt in other paragraphs of the order for Leonard's failure to timely pay Diane all amounts due and owing under the amended supplemental judgment of dissolution, as well as all other aspects of the order, remains intact.

¶ 26 Leonard urges this court to remand this cause to the circuit court to reconsider its \$16,000 attorney fee award to Diane in light of our decision to vacate paragraph nine. We decline to do so. The circuit court stated in its order that in its award of attorney fees, it had considered all applicable case law and statutory provisions, including, but not limited to, sections 501(c-1), 503(j), and 508 of the Act (750 ILCS 5/501(c-1), 503(j), 508 (West 2010)). Section 501(c-1) provides for the circuit court to make an interim award of attorney fees based on the income, needs, and earning capacity of each party, as well as any other factor the court finds to be just and equitable. In addition, section 508(b) of the Act (750 ILCS 5/508(b) (West 2010)) provides:

"In every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against whom the proceeding is brought to pay promptly the costs and reasonable attorney's fees of the prevailing party. *** If at any time a court finds that a hearing under this Act was precipitated or conducted for any improper purpose, the court shall allocate fees and costs of all parties for the hearing to the party or counsel found to have acted improperly."

¶ 27 Here, the circuit court expressly found that of the \$19,329.30 in attorney fees Diane submitted with her petition, a majority of said fees were incurred to enforce the circuit court's prior orders or to defend from Leonard's posttrial motions, all of which the circuit court found to be meritless. The circuit court made an express finding that Leonard intentionally and without justification failed to tender the sums owed under the amended supplemental

judgment in a timely fashion and that Leonard, by his conduct in filing contempt petitions against Diane and by demanding payment of items that Diane was not required to pay, needlessly increased the cost of the litigation. Noting that Leonard presented no evidence challenging the reasonableness or necessity of the fees, the circuit court awarded Diane \$16,000. As reflected in the circuit court's findings, we find ample evidence supporting the award of fees to Diane independent of that portion of the order that we have vacated. Accordingly, we affirm the attorney fee award and all other aspects of the April 12, 2010, order.

¶ 28

CONCLUSION

¶ 29 For the foregoing reasons, paragraph nine of the April 12, 2010, order of the circuit court of St. Clair County is vacated, and the remainder of the order is affirmed in its entirety.

¶ 30 Vacated in part and affirmed in part.