2014 IL App (5th) 130101-U

NO. 5-13-0101

IN THE

APPELLATE COURT OF

ILLINOIS

FIFTH DISTRICT

KATHLEEN WESTRA, n/k/a Kathleen Steinbraker,	)	Appeal from the Circuit Court of Madison County.
Petitioner-Appellant,	)	No. 08-F-827
v.	)	
JOHN WESTRA,	)	Honorable Dean E. Sweet,
Respondent-Appellee.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Welch and Justice Spomer concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court erred in denying wife's petition for civil contempt where the dissolution order required husband to provide an accounting of his rental property income and husband provided only copies of a tax schedule. Trial court did not abuse its discretion in denying wife's motion to modify child support.

¶ 2 The petitioner, Kathleen Westra, now known as Kathleen Steinbraker (Kathy), appeals an order of the trial court (1) denying her motion to modify child support and (2) denying her petition for adjudication of contempt against the respondent, John Westra.

Kathy argues that the trial court erred and abused its discretion in making both of these rulings. We affirm in part, reverse in part, and remand for further proceedings.

¶ 3 The parties were married in New Jersey in 1973. They had three children during their marriage–John Jay Westra (Jay) (born May 4, 1978), Blake Westra (born May 31, 1981), and Chase Westra (born September 4, 1992). The circuit court in Kane County, Illinois, dissolved the parties' marriage in August 1997. After an appeal of the original dissolution order, the Kane County court entered a new judgment of dissolution on March 4, 1999. Only the 1999 judgment is at issue in this appeal.

¶ 4 The 1999 judgment incorporated the parties' marital settlement agreement. That agreement was drafted by John, an attorney whose areas of practice included divorce cases. Pursuant to the agreement, Kathy was to have sole legal custody of the two minor children, Blake and Chase. The parties' oldest son, Jay, was in college and was no longer a minor. Under the agreement, John was to pay $1,192 per month for child support until June 2000, when Blake was expected to graduate from high school. At that time, John's child support obligation would be reduced to $954 per month. The agreement further provided that John would be responsible for two-thirds of the cost of any of the children's medical or dental expenses that were not covered by insurance and that Kathy would be responsible for the remaining one-third of the cost.

¶ 5 The marital settlement agreement made the following provisions with respect to the children's college and professional school educational expenses. First, it provided that John was to use "the total net income from his rental property at 391 Schmale Road, Carol Stream, Illinois," to pay for the children's college expenses. In addition, the

agreement provided that if the net income from the rental property was not sufficient to cover these expenses, the parties would be responsible for the remaining expenses "commensurate with their ability to pay." The agreement defined educational expenses to include, but not be limited to, tuition, fees, books, boarding or lodging expenses, and transportation to and from school. The agreement further provided:

> "Husband shall also provide to wife an annual accounting of all gross income and expenses for his rental property. To the extent that husband has net income which exceeds payments to the college expenses of the children actually paid by the husband in accordance with this agreement, husband shall pay 25% of said excess as additional child support to wife until Blake is emancipated under this agreement and shall thereafter pay 20% of said excess as additional child support for Chase."

¶ 6 Subsequent to the divorce, Kathy moved from Kane County to Edwardsville with Blake and Chase. In December 2008, she filed a petition to enroll the March 1999 Kane County judgment in Madison County. Along with the petition to enroll the Kane County judgment, Kathy filed a motion to increase child support and a petition for the adjudication of indirect civil contempt. By this time, both Jay and Blake had graduated from college, while Chase was still a minor.

¶ 7 In her motion to increase child support, Kathy alleged that a material change in circumstances had occurred necessitating an increase in support for Chase in that (1) Chase was incurring more expenses than he did when he was younger because he was participating in additional extracurricular activities and because he was driving, (2) the

cost of living had increased, and (3) John was earning more income than he did when the judgment was entered.

¶ 8 In her contempt petition, Kathy alleged that John violated the terms of the agreement incorporated into the 1999 judgment by (1) failing to provide an annual accounting of his rental property income, (2) failing to pay the additional child support from the rental income, and (3) failing to pay his share of expenses for Blake's orthodontic care and Chase's chiropractic care. She further alleged that these violations were willful.

¶ 9 In April 2010, Kathy filed another petition for contempt. She renewed the allegations in her original petition. In addition, she alleged that John willfully violated the terms of the order by (1) selling the rental property in "a deliberate attempt to avoid" his obligation to contribute rental property income to college expenses and child support and (2) attempting to diminish his net income by paying himself a management fee from the gross rental income. John filed a petition seeking an adjudication of contempt against Kathy and a motion to reduce child support; however, he has not appealed the court's ruling on either petition.

¶ 10 The court held hearings in the matter in April and November 2011. John testified that he was one of five partners in a general practice law firm. John's areas of practice included personal injury, criminal defense, and divorce. Each partner had between a 22% and 17.5% ownership interest in the firm; however, each had an equal vote on setting salaries and determining whether to issue a distribution of profits from the firm as bonuses to the partners.

¶ 11 John testified at length about his management of the rental properties. During the parties' marriage, they jointly acquired an office building located at 391 Schmale Road in Carol Stream, Illinois. The building was in an office park that had been developed by a physician with the intent that it be used solely for medical offices. John testified that the deed to the property contained a restriction limiting use of the building to tenants with medical practices. As previously mentioned, the 1999 dissolution order required John to use the net rental income from this building for his sons' college expenses.

¶ 12 Pursuant to the marital settlement agreement incorporated into the 1999 order, the Schmale Road property was awarded to John, and he was required to refinance the mortgage within one year so that Kathy's name would be removed from the mortgage. John testified that he did so in June 1999. He acknowledged that when he refinanced the mortgage, he took out an additional $40,000 loan. He further acknowledged that this increased the amount of his monthly loan payment on the property, thus decreasing the amount of net rental income. John admitted that he used the proceeds from the loan to pay debts not related to his children's expenses. Specifically, he testified that he used the loan proceeds to pay his attorney fees and the portion of Kathy's attorney fees he was ordered to pay. John testified that he again refinanced the mortgage on the Schmale Road property in May 2004. This time, he took an additional $50,000 loan.

¶ 13 John testified about a management fee he began claiming as a deduction from his rental income in 1998. He acknowledged that he was the person who managed the building and did not actually pay a fee to anyone. He explained that deducting the fee was something he did for the purpose of maximizing the tax deductions available to him.

He admitted, however, that the deduction he claimed for the management fee might have been "a wash" because he had to claim the management fee as income to himself. He did not remember whether he actually did so. Moreover, John acknowledged that in a 2002 letter, he told Kathy that he was deducting the management fee because he needed the money to pay a loan he had incurred to pay attorney fees related to the parties' divorce.

¶ 14 John testified that the Schmale Road property was a 2,500-square-foot building consisting of two office suites. Both suites were rented at the time the 1999 dissolution order was entered. He testified, however, that by 2004, he had difficulty finding tenants to rent the two suites. He explained that this difficulty stemmed from a change in the local market conditions. Specifically, a new hospital had been built in the vicinity which rented office space to physicians. John sold the office building in September 2004. He testified that he did not realize a capital gain from the sale because he used the sale proceeds to pay off the mortgage and purchase a new investment property, a vacation rental worth less than the office building.

¶ 15 John testified that when he sold the Schmale Road office building, none of his children were in college. Jay graduated in 2000, Blake graduated earlier in 2004, and Chase was still a minor. (We note that Chase began college in 2011.) John further testified that the net income from the property was only sufficient to fully cover college expenses one year; in all other years, he had to use other funds to pay his share of the expenses. John acknowledged that once Blake graduated, he was still obligated to pay 20% of the net rental income as child support for Chase. However, John testified that by this time, the building was losing money.

¶ 16 John stated that he provided Kathy with nothing more than copies of the schedule E he filed with his tax returns while he owned the office building on Schmale Road because that was "the only accounting" he kept for that building. He testified that Kathy never complained that this was insufficient documentation. He stated that he did not provide her with any documentation related to the vacation property he bought after selling the office building because he did not believe the agreement required him to do so.

¶ 17 John testified that the rental property he purchased after selling the office building is a unit in a "condotel" located on the shore of Lake Geneva in Wisconsin. He explained that a "condotel" is simply a hotel that allows investors to purchase individual units within the hotel. The property is managed as if it were a regular hotel. John testified that because the property is managed as a hotel, the hotel management maintains it and rents it out. He further testified that he can also use the unit for personal use or allow family members or friends to use it. He testified that he in fact did use it and allow others to use it, but he did so for only approximately five days a year. As previously noted, John testified that he did not provide Kathy with any annual accountings related to the Lake Geneva property because he did not believe he was required to do so.

¶ 18 Kathy testified that she never received "any real accounting" from John related to his rental property income. She acknowledged receiving copies of John's schedule E through 2004 and receiving "some accounting" related to a repair on the Schmale Road office building; however, from 2005 to 2009, she did not even receive that much. Kathy testified that she asked for the accountings. We note that the record contains several

letters from Kathy to John requesting that he provide her with an accounting pursuant to the agreement. We further note, however, that only one of these letters indicates that Kathy had received John's schedule E and found it to be insufficient. Kathy further testified that during the marriage, both she and John worked at managing the Schmale Road property, but at no time took a management fee. According to Kathy, John told her that he was taking the management fee because he needed the money to pay a loan he took to pay attorney fees he was ordered to pay to her attorney in the dissolution proceedings.

¶ 19 Kathy also testified regarding the events leading up to the sale of the office building. According to Kathy, John attempted to rent the suites at a rate of $18 per square foot. She testified, however, that she saw advertisements for comparable office space being offered at a rental rate of between $10 and $14 per square foot.

¶ 20 The court took the matter under advisement. In October 2012, the court entered a written order denying both parties' petitions for adjudication of contempt and both parties' motions to modify child support. The court expressly found that neither party had demonstrated a substantial change in circumstances that would justify a change in the amount of child support. The court noted that Kathy's argument that John's income had increased was largely based on her assertion that he had "some degree of control" over the salary paid to him by his law firm. However, the court found that Kathy failed to prove that John had any additional income from the law firm or a "right to income which is hidden or accrued."

¶ 21 The court further found that John's actions related to the rental property did not violate the terms of the agreement incorporated into the 1999 judgment. In support of this finding, the court expressly found that the agreement did not require John to provide Kathy with anything more than copies of his schedule E to document the rental income from the Schmale Road office building. In addition, the court found that the agreement did not require John to continue to own and maintain that building indefinitely. The court, however, found that John *did* violate the terms of the order by failing to reimburse Kathy for his share of Blake's orthodontic expenses and Chase's chiropractic expenses. The court did not find this noncompliance to constitute contempt, but ordered John to reimburse Kathy for the expenses.

¶ 22 In January 2013, the court granted John's motion to modify its October 2012 order and reduced the amount he was ordered to reimburse Kathy. This appeal followed.

¶ 23 On appeal, Kathy argues that the court erred in denying her petition to modify child support and denying her petition to find John in civil contempt for his failure to provide an accounting and pay child support from his rental income. We note that Kathy does not argue on appeal that John has hidden income or income that should be imputed to him from his law firm. She does argue, however, that additional income from the rental properties should be considered. Because this question is closely intertwined with her contention that the court erred in its ruling on her petition for civil contempt, we will consider that question first.

¶ 24 Trial courts have the authority to enforce their orders through civil contempt where a party has willfully violated the terms of the order. *In re Marriage of Logston*,

103 Ill. 2d 266, 285, 469 N.E.2d 167, 175 (1984). On appeal, we review a trial court's contempt findings to determine whether the court abused its discretion. *In re Marriage of Baumgartner*, 384 Ill. App. 3d 39, 62, 890 N.E.2d 1256, 1276 (2008). A court abuses its discretion if its decision is arbitrary or "exceeds the bounds of reason and ignores recognized principles of law." *In re Marriage of Baumgartner*, 384 Ill. App. 3d at 64, 890 N.E.2d at 1278. We will not reverse a court's decision unless its factual findings are against the manifest weight of the evidence or the court abused its discretion. *In re Marriage of Logston*, 103 Ill. 2d at 286-87, 469 N.E.2d at 176.

¶ 25 Generally, whether a party is guilty of contempt is a question of fact to be resolved by the trial court. *In re Marriage of Logston*, 103 Ill. 2d at 286-87, 469 N.E.2d at 176. Here, however, the court's finding that John fully complied with the 1999 dissolution order turned on its interpretation of the terms of the marital settlement agreement that were incorporated into the order. The essential facts underpinning this determination were not in dispute. That is, there was no dispute that John failed to provide Kathy with anything more than copies of the schedule E that was filed with his federal income tax returns prior to the sale of the office building, and there was also no dispute that he did, in fact, provide the copies of his schedule E. The question was whether the agreement required him to provide more. Interpreting and determining the legal effect of contractual provisions is a question of law which we review *de novo*. *Lake County Grading Co., LLC v. Village of Antioch*, 2013 IL App (2d) 120474, ¶ 21, 985 N.E.2d 638. Applying this standard, we find that the court misconstrued the pertinent terms of the agreement.

¶ 26 The agreement unequivocally required John to provide "an annual accounting" of the gross income and expenses associated with his rental property. Although the agreement does not define the term "accounting," that term ordinarily means something more than a copy of a tax schedule. See, *e.g.*, Black's Law Dictionary 19 (6th ed. 1990) (defining an accounting as "An act or system of making up or setting accounts, consisting of a statement of account with debits and credits arising from [the] relationship of [the] parties"); YourDictionary.com, http://www.yourdictionary.com/accounting (last visited Mar. 5, 2014) (defining an accounting as "a system of establishing how the assets of a business, estate, trust, or other similar entity were managed and disposed of"). Thus, it is clear that the agreement required John to provide something more than a copy of his tax schedule.

¶ 27 This conclusion is bolstered by two additional factors. First, as Kathy correctly notes, net income for purposes of child support is broader than net income for tax purposes. *In re Marriage of Baumgartner*, 384 Ill. App. 3d at 53, 890 N.E.2d at 1269-70. Second, we emphasize that John, an attorney with experience handling divorce cases, drafted the agreement. If he intended to limit his accounting obligation to providing Kathy with nothing more than a copy of the schedule E filed with his tax returns, he could have drafted the agreement to reflect that. We thus conclude that the court erred in finding that John satisfied the requirements of the order by providing Kathy with nothing more than copies of his schedule E.

¶ 28 Kathy also alleged that John violated the terms of the agreement incorporated into the order by failing to provide her with any type of accounting related to the rental

property he purchased after selling the Schmale Road office building. The trial court rejected this argument, finding that it depended upon reading into the agreement a requirement that John own and maintain the property indefinitely, a requirement the court found was not imposed by the agreement. While we agree with the court that John was not required to continue to own the office building indefinitely, we do not believe this resolves the question of John's accounting or child support obligations.

¶ 29 In this regard, it is important to note that the agreement contained two separate provisions addressing John's obligations with respect to rental property income. The provision requiring him to provide an accounting referred to "his rental property" without specifying an address. The same provision required John to pay 20% of any net rental income beyond the amount needed to pay for college expenses as child support for Chase in addition to the child support he was ordered to pay based on his law firm income. A separate provision required John to use all of the net income from "his rental property at 391 Schmale Road" to pay for the boys' college expenses. By its express terms, then, the agreement required John to pay 20% of the net income from any rental property he owned as child support for Chase and to provide Kathy with an annual accounting relating to any such income. We note that what, if any, obligation John has to use rental income from any property other than the Schmale Road office building to pay for Chase's college expenses is less clear. However, that question is not before us in this appeal.

¶ 30 We emphasize that this interpretation is mandated by the Illinois Marriage and Dissolution of Marriage Act. That Act includes guidelines to establish the minimum amount of child support that should be ordered. For one child, the guideline amount is at

least 20% of the supporting parent's net income. 750 ILCS 5/505(a)(1) (West 2008). The relevant statute defines "net income" as "the total of all income from all sources" less certain specified deductions. 750 ILCS 5/505(a)(3) (West 2008). Illinois courts have held that this "inclusive language" is to be interpreted and applied broadly. *Department of Public Aid ex rel. Jennings v. White*, 286 Ill. App. 3d 213, 217, 675 N.E.2d 985, 988 (1997) (citing *In re Marriage of Dodds*, 222 Ill. App. 3d 99, 103, 583 N.E.2d 608, 611 (1991)). A supporting parent's income thus includes investment income such as rental income. See *Jennings*, 286 Ill. App. 3d at 217-18, 675 N.E.2d at 988.

¶ 31 A trial court entering a child support order is responsible for safeguarding the best interests of the children involved. As such, the court must determine the appropriate guideline amount and may only approve an amount below the guideline if it makes express findings as to why the deviation is appropriate. *In re Marriage of Hightower*, 358 Ill. App. 3d 165, 171, 830 N.E.2d 862, 868 (2005). Because the court has a role in protecting the best interests of children, a private agreement related to child support, such as the agreement involved here, is only enforceable if it has been approved by the court pursuant to these principles. *Blisset v. Blisset*, 123 Ill. 2d 161, 169-70, 526 N.E.2d 125, 129 (1988).

¶ 32 The record in this case includes the Kane County order, but does not include any other records from the dissolution proceedings. The order itself does not contain express findings justifying a deviation below the guideline amount. Presumably, the dollar amount for child support approved by the court when it incorporated the parties' agreement into the order represented 20% of what the court found John's income from the

law firm to be. As noted, however, John's total net income included his rental income as well. Thus, the Kane County court could not have ordered child support based on the parties' agreement unless it included a requirement that John pay 20% of *any* of his rental income as child support in addition to the specified dollar amount.

¶ 33 We conclude that John violated the order by failing to provide accountings annually both before and after he sold the Schmale Road property. For both of these reasons, the court's determination that John fully complied with the accounting requirement in the order was error.

¶ 34 This does not end our inquiry. As we noted previously, the power of a court to enforce its orders through civil contempt is limited to willful refusal to comply with the order. *In re Marriage of Logston*, 103 Ill. 2d at 285, 469 N.E.2d at 175. Whether noncompliance is willful is a question of fact for the trial court. Here, the trial court found John to be in compliance due to its interpretation of the order. Therefore, the court did not make that determination. We also note that Kathy's contempt petitions specifically alleged that John violated the order by failing to pay child support from his rental income and that he deliberately reduced his income by charging himself a management fee. The court did not resolve these questions in its order, finding only that John satisfied the accounting requirement by providing copies of his schedule E. Therefore, we must remand the matter for further proceedings to allow the court to make these necessary findings.

¶ 35 Kathy next argues that the court erred in denying her motion to increase child support. The party seeking a modification of child support has the burden of proving a

substantial change in circumstances that necessitates the change. *In re Marriage of Rash*, 406 Ill. App. 3d 381, 388, 941 N.E.2d 989, 995 (2010). However, a court may modify a child support order without the necessity of showing a substantial change in circumstances if there is an inconsistency of at least 20% between the amount of child support paid and the amount of child support that would result from applying the statutory guidelines. 750 ILCS 5/510(a)(2)(A) (West 2008). We will not reverse a trial court's ruling on a motion to modify child support unless its factual findings are against the manifest weight of the evidence or its decision constitutes an abuse of discretion. *In re Marriage of Popa*, 2013 IL App (1st) 130818, ¶ 21, 995 N.E.2d 521.

¶ 36 Here, the trial court expressly found that Kathy did not provide sufficient evidence to support her contention that John had additional income or the right to additional income from his law firm income. On appeal, Kathy does not contend that this finding was against the manifest weight of the evidence. She argues, however, that (1) John paid less than 20% of his net income from his employment as child support based on the figures provided in his tax returns and (2) he paid less than 20% of his net rental income in child support because he claimed deductions to which he was not entitled and failed to provide appropriate accountings. We will address these arguments in turn.

¶ 37 As stated previously, a party seeking a modification of child support need not demonstrate a material change in circumstances if the party can show that the child support actually paid deviates from the guideline amount by at least 20%. 750 ILCS 5/510(a)(2)(A) (West 2008). Here, the guideline amount is 20% of John's net income, as determined by section 505 of the Illinois Marriage and Dissolution of Marriage Act.

Kathy's brief contains a table showing John's income from employment and some of his deductions for 2008 through 2010. The figures in these tables accurately reflect the figures in John's tax returns appearing in the record, and her calculations do show that the child support actually paid over those three years was more than 20% lower than the guideline amount. However, Kathy's calculations do not take into consideration John's health insurance premiums, which are a deduction under the applicable statute. See 750 ILCS 5/505(a)(3)(f) (West 2008). We also note that Kathy only alleged a substantial change of circumstances in her motion to increase child support.

¶ 38 Kathy's allegations regarding John's rental income merit further discussion. The tax records submitted show that the management fee John deducted from his gross rental income from the Schmale Road office building represented a significant portion of the income available. In 2000, the management fee deducted was $3,181, leaving a net income of $3,952. In 2001, John deducted a management fee of $4,024 and reported a net loss of $2,366. In 2002, he deducted a $4,000 management fee and reported a net rental income of $10,130. As previously discussed, John admitted that the management fee was not being paid to anyone other than himself.

¶ 39 After John sold the office building, he purchased the "condotel" unit in Wisconsin. The documentation in the record shows that John had net losses from this property every year that he owned it. However, like the Schmale Road property, John never provided a full accounting of his income and expenses from the Wisconsin property, and it appears that some of the deductions he has claimed are questionable. John testified in the hearings that the management fee was 30% of the gross rental income. He stated that the

property was actually managed by the hotel management and the fee was in fact paid from his rental receipts. However, the amounts claimed each year exceed that amount. In 2008, for example, John's schedule E shows rent receipts of $20,202 and a management fee of $7,587, which is approximately 37.5% of the gross rental receipts. In 2005, he had rent receipts of $16,828 and claimed a management fee of $6,117, which is more than 36% of the gross rents. In addition, John claimed deductions for expenses related to keeping a boat at the property, but he admitted in his testimony that he did not allow the boat to be used by renters and kept it there for his personal use.

¶ 40 We note, however, that the original order simply required John to pay 20% of his net rental income as additional child support. We have already concluded that the court erred in finding that John fully complied with the order when it ruled on Kathy's contempt petitions. On remand, the court will need to determine John's true net income from his rental properties in order to determine whether he violated the order by failing to pay child support from this income.

¶ 41 In addition, we reiterate that Kathy alleged that John deliberately reduced his rental income to avoid paying child support. There was some evidence to support this allegation. The record contains conflicting testimony regarding the reason John was unable to rent the office suites before selling the Schmale Road property in 2004, and John admitted telling Kathy that he was taking a management fee from that property in order to pay debts unrelated to the children's educational expenses. Courts may impute income to a noncustodial parent under certain circumstances. Relevant for purposes of this appeal, income may be imputed if the court finds that the noncustodial parent is

deliberately avoiding a child support obligation by reducing his or her income. *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 1077, 916 N.E.2d 614, 619 (2009). On remand, the court should consider whether the circumstances warrant imputing rental income to John. Once the court determines John's net rental income–actual and/or imputed–for the relevant period, it can determine whether there is an arrearage under the terms of the order without modification. Thus, we affirm the court's denial of Kathy's motion to increase child support.

¶ 42 For the foregoing reasons, we reverse the portion of the court's order denying Kathy's petition for indirect civil contempt and remand for further proceedings on that question consistent with this order. We affirm the order in all other respects.

¶ 43 Affirmed in part and reversed in part; cause remanded with directions.