

NOTICE  
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2012 IL App (4th) 111143-U

Filed 7/13/12

NO. 4-11-1143

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Marriage of	)	Appeal from
THERESA O'HARE,	)	Circuit Court of
Petitioner-Appellee,	)	Sangamon County
and	)	No. 09D386
RONALD G. STRADT,	)	
Respondent-Appellant.	)	Honorable
	)	Steven H. Nardulli,
	)	Judge Presiding.

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JUSTICE McCULLOUGH delivered the judgment of the court.  
Justices Steigmann and Cook concurred in the judgment.

### ORDER

¶ 1 *Held:* (1) Ex-husband violated parties' agreed order by failing to pay child support that accrued prior to the implementation of an income withholding order and (2) former wife was entitled to attorney fees incident to enforcement of trial court's orders.

¶ 2 Respondent, Ronald G. Stradt, appeals the June 10, 2011, order of the Sangamon County circuit court awarding petitioner, Theresa O'Hare, a \$1,399.98 judgment for child-support arrearages and a \$5,000 judgment for attorney fees. We affirm.

¶ 3 The parties were married on May 10, 2008, and have one child together, Sophia (born in August 2006).

¶ 4 On June 26, 2009, Theresa filed a petition for dissolution of marriage. On August 19, 2009, the trial court entered an agreed order setting Ronald's temporary child support obligation at \$1,516 per month (\$699.69 every two weeks) beginning August 23, 2009, with an

"order of withholding to enter." The record shows an income withholding notice filed on August 27, 2009.

¶ 5 On September 4, 2009, Ronald filed a petition for protective custody alleging improper conduct by Theresa interfered with his parenting time with their three-year-old daughter. On September 29, 2009, Theresa filed a petition for rule to show cause alleging Ronald violated the parties' agreed order by failing to pay child support beginning August 23, 2009. On November 25, 2009, Theresa filed a petition for a temporary and permanent restraining order alleging Ronald engaged in "numerous harassing, intimidating and abusive conduct" towards her and towards caregivers of the minor child. Also on November 25, 2009, Theresa filed a motion to compel Ronald to complete discovery.

¶ 6 At a hearing on November 31, 2009, the parties placed on the record the terms of a settlement agreement. The trial court entered a judgment of dissolution on grounds only and directed the parties to prepare "a proposed judgment and settlement documents."

¶ 7 On December 22, 2009, the trial court entered an order clarifying Ronald's visitation and ordering the immediate return of three-year-old Sophie to Theresa. On December 31, 2009, Theresa filed a motion for entry of judgment for dissolution of marriage and restraining order. On January 6, 2010, the trial court entered the restraining order and on February 8, 2010, with the assistance of his third retained counsel, Ronald filed an objection to the proposed dissolution judgment.

¶ 8 On March 17, 2010, the court entered a dissolution judgment and ordered Ronald to pay \$7,500 of Theresa's attorney fees. On April 13, 2010, the trial court entered an order setting Ronald's child support obligation at \$1,325 per month, beginning April 1, 2010.

¶ 9 On April 15, 2010, Ronald filed a motion for reconsideration and rehearing stating his objections to the dissolution judgment. On July 20, 2010, Ronald filed a motion to clarify various terms of visitation detailed in multiple orders of the trial court. On September 9, 2010, Ronald filed a motion seeking Theresa's 2009 federal and state income tax returns.

¶ 10 On October 4, 2010, Theresa filed a rule to show cause referencing the temporary order entered on August 19, 2009, requiring Ronald to pay child support of \$1516 per month (\$699.69 every two weeks) beginning August 23, 2009, and alleging multiple violations of the restraining order entered on January 6, 2010. Theresa sought, in part, a judgment for "all sums due." Also on October 4, 2010, Theresa filed a petition to modify the dissolution judgment. On October 5, 2010, Theresa filed a motion to reconsider the trial court's order that she provide Ronald a copy of her 2009 federal and state income tax returns.

¶ 11 On November 16, 2010, Ronald filed a motion to strike a mediator's report, and on January 3, 2011, Ronald filed a motion to reconsider the trial court's denial of his motion to strike. Also on January 3, 2011, Ronald filed a response to Theresa's petition for rule to show cause filed on October 4, 2010. Ronald stated as an affirmative defense that the temporary order entered on August 19, 2009, requiring Ronald to pay child support of \$1516 per month (\$699.69 every two weeks) beginning August 23, 2009, was superseded by the dissolution judgment entered on March 17, 2010. On February 4, 2011, the trial court found Ronald "in willful contempt of court for his willful failure to abide by the orders of this court, specifically with regard to the exercise of visitation \*\*\*."

¶ 12 On April 29, 2011, Theresa filed a second petition for rule to show cause alleging Ronald (1) attended a kindergarten orientation with Sophie at a public school not associated with

Theresa's address, (2) had Sophie's hair cut, (3) speaks badly about Theresa's boyfriend, and (4) enrolled Sophie in drum lessons.

¶ 13 In a pretrial memorandum filed on June 3, 2011, Theresa identified the following as outstanding issues: (1) payment of Theresa's attorney fees by Ronald, (2) noncompliance with the August 19, 2009, temporary child support order as evidence of indirect civil contempt, and (3) acts alleged in Theresa's second petition for rule to show cause as further evidence of indirect civil contempt. Following a hearing on June 3, 2011, the trial court entered an order finding "two child support payments of \$699.69 accrued and were not paid between the effective date of child support and the implementation of the Notice of Withholding. As a consequence, Mr. Stradt is \$1,399.38 in arrears in his child support obligation." Further, the court discharged "all pending Rules to Show Cause," finding (1) compliance or (2) "situations in which the conduct was either mutual or *de minimus* or both." The court further ordered Ronald to pay \$5,000 of Theresa's attorney fees, finding the fees "relative to the efforts that were reasonably necessary to enforce the prior orders of the court."

¶ 14 On July 8, 2011, Ronald filed a motion to vacate, modify, or reconsider the June 10, 2011, order for arrearages and attorney fees, which the trial court denied.

¶ 15 This appeal followed.

¶ 16 Ronald first argues that the trial court erred in finding that he owed Theresa a child support arrearage in the amount of \$1,399.98. Ronald presents multiple arguments in support of this assertion. Initially, Ronald contends that the August 19, 2009, order, setting his temporary child support obligation by agreement, is void and unenforceable where it failed to state that all payments of support are to be made through the clerk of the court or by alternative

arrangement. We find nothing in the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/101 to 802 (2008)), to support Ronald's theory that an agreed temporary child support order must state that all payments of support are to be made through the clerk of the court or by alternative arrangement. Further, the parties agreed that Ronald would begin paying child support on August 23, 2009, with an "order of withholding to enter."

¶ 17 With no citation to authority, Ronald suggests the effective date of support was not August 19, 2009, but the date of the withholding notice, August 27, 2009. We agree the effective date of support was not August 19, 2009. The parties agreed that Ronald would begin paying child support on August 23, 2009, with an "order of withholding to enter." Theresa did not seek support from August 19, 2009, and the trial court did not calculate the arrearage from August 19, 2009.

¶ 18 Ronald next argues he was denied his right to due process because the judgment order for arrearages was void for lack of jurisdiction. Citing this court's decision in *In re Marriage of Azotea*, 200 Ill. App. 3d 182, 558 N.E.2d 550 (1990), Ronald argues the arrearage issue was not before the court pursuant to any proper pleading. We first note that in *Azotea*, this court held it was error for the trial court to decide the arrearage issue, not that the court's order was void or that it lacked jurisdiction to enter the order. Contrary to Ronald's argument, the record indicates that on October 4, 2010, Theresa filed a rule to show cause referencing the August 19, 2009, order requiring Ronald to pay child support beginning August 23, 2009, and seeking in part, a judgment for "all sums due." On January 3, 2011, Ronald filed a response to Theresa's petition for rule to show cause filed on October 4, 2010. Ronald stated as an affirmative defense that the August 19, 2009, order was superseded by the dissolution judgment entered

on March 17, 2010. Based on our review of the record, the arrearage issue was properly before the court. Further, we would reject Ronald's argument even if further pleading was required, as the filing of a petition itself may be waived if the issue is actually tried and no objection is made. See *In re Marriage of Daniels*, 243 Ill. App. 3d 43, 46-47, 612 N.E.2d 93, 95 (1993). We have reviewed the June 3, 2011, proceedings wherein no objection was made. Ronald fully utilized cross-examination and developed his own position through abundant testimony and exhibits.

¶ 19 Ronald next argues that the trial court erred when it found arrearages based on "unreliable records from the State Disbursement Unit (SDU)." The record does not support Ronald's argument. At the June 3, 2011, hearing, the court advised Theresa's counsel that he could not rely *solely* on the SDU records to prove "missing child support payments," as the SDU records were not "at this moment" reliable. In finding that "two child support payments of \$699.69 accrued and were not paid between the effective date of child support and the implementation of the Notice of Withholding," the trial court considered the August 19, 2009, agreed order setting Ronald's temporary child support obligation at \$1,516 per month (\$699.69 every two weeks) beginning August 23, 2009, with an "order of withholding to enter." The record shows an income withholding notice filed on August 27, 2009. Theresa testified that she did not receive a child support payment on August 23, 2009, and did not receive payment two weeks later, on September 6, 2009. Theresa first received payment on September 24, 2009, in the amount of \$699.69. Ronald admitted that he did not make the required payments on August 23, 2009, and September 6, 2009, but waited until the monies were withheld from his paycheck. Accordingly, the court did not err in finding that "two child support payments of \$699.69 accrued and were not paid between the effective date of child support and the implementation of the Notice of

Withholding."

¶ 20 Ronald next argues that Theresa's request for arrearages is barred by the doctrine of equitable estoppel. Ronald contends that Theresa's counsel, "in the absence of payment directives in the August 19, 2009 order," advised Ronald not to make the child support payments because Theresa's counsel would submit a notice of withholding. We note the August 19, 2009, agreed order very clearly directed Ronald to begin paying temporary child support of \$1,516 per month (\$699.69 every two weeks) beginning August 23, 2009. Further, the right to past-due installments of child support is a vested right which may not be reduced or eliminated by a court absent a valid defense. *Lewis v. Staub*, 95 Ill. App. 3d 243, 248, 419 N.E.2d 1223, 1227 (1981). As an exception to this otherwise rigid rule, courts will, in a proper case, give effect to an agreement between the parties to reduce child support payments or will apply the doctrine of equitable estoppel. *In re Marriage of Strand*, 86 Ill. App. 3d 827, 830, 408 N.E.2d 415, 417 (1980). Such an agreement must be proved by clear and convincing evidence. *Elliott v. Elliott*, 137 Ill. App. 3d 277, 279, 484 N.E.2d 482, 484 (1985). In the instant case, Ronald failed to prove the existence of any such agreement. We therefore affirm the trial court's \$1,399.98 judgment for arrears.

¶ 21 The remaining issues raised by Ronald all relate to the award of attorney fees by the trial court. Ronald argues Theresa is not entitled to an award of attorney fees because (1) she failed to file a petition for attorney fees, and therefore, the trial court was without jurisdiction to award fees; (2) the court's reasoning failed to meet the legal standard for an award of fees; and (3) Theresa's April 29, 2011, petition was precipitated for an improper purpose. Ronald argues the trial court erred in awarding attorney fees, citing both sections 508(a) and 508(b) of the

Dissolution Act (750 ILCS 5/508(a), (b) (West 2010)). We need not determine whether section 508(a) is applicable because the trial court awarded fees under section 508(b). Section 508(b) 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 noncompliance is with respect to a discovery order, the noncompliance is presumptively without compelling cause or justification, and the presumption may only be rebutted by clear and convincing evidence. *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.*

Improper purposes include, but are not limited to, harassment, unnecessary delay, or other acts needlessly increasing the cost of litigation." (Emphasis added.) 750 ILCS 5/508(b) (West 2010).

Section 508(b) is mandatory, not discretionary, and does not allow for the court to exercise its discretion as to payment if the defaulting party's conduct was without cause or justification. 750 ILCS 5/508(b) (West 2010); *In re Marriage of Walters*, 238 Ill. App. 3d 1086, 1098, 604 N.E.2d 432, 442 (1992). An award under section 508(b) does not depend on a party's inability to pay the

fee or the other party's ability to pay. *Walters*, 238 Ill. App. 3d at 1098, 604 N.E.2d at 442.

However, the fee awarded is subject to a determination of reasonableness based on factors such as time spent, the ability of the attorney, and the complexity of the work. See *Richardson v. Haddon*, 375 Ill. App. 3d 312, 314-15, 873 N.E.2d 570, 573 (2007).

¶ 22 At the June 3, 2011, hearing, Theresa's counsel offered into evidence affidavits detailing attorney fees and costs totaling \$11,048.14. Ronald advised the trial court that he did not want to question Theresa's counsel but had argument. The trial court admonished Ronald of the two issues: (1) hourly rate and (2) "whether or not items \*\*\* set out in his affidavit are reasonably related to the petitions to enforce various portions of the judgment." Ronald did not challenge the reasonableness of the fees. The court advised Ronald and Theresa that both had behaved badly and stated its intention to "look at these attorney fees and \*\*\* figure out a way to make the pain of these trips to the court come equally out of the two of you \*\*\*."

¶ 23 Following the hearing, the trial court entered an order discharging "all pending Rules to Show Cause," finding (1) compliance or (2) "situations in which the conduct was either mutual or *de minimus* or both." The court noted that Ronald "stipulated to the hourly rate and time spent by [Theresa's counsel] relating to the issues before the court." Further, the court referenced its contempt findings on February 4, 2011, as "a further basis for an award of attorney fees." The court ordered Ronald to pay \$5,000 of Theresa's attorney fees, finding the fees "relative to the efforts that were reasonably necessary to enforce the prior orders of the court."

¶ 24 While it is true that the trial court admonished Ronald that it felt it "unfair that you get to represent yourself while [Theresa] has to pay for an attorney," the record is clear this was not the basis for the award. Further, we note a finding of contempt is sufficient to require an

award of fees under section 508(b), but such a finding is not necessary. *In re Marriage of Berto*, 344 Ill. App. 3d 705, 717, 800 N.E.2d 550, 560 (2003). "The party that fails to comply with an order bears the burden of proving that compelling cause or justification for the noncompliance exists." *Berto*, 344 Ill. App. 3d at 717, 800 N.E.2d at 560. We therefore affirm the court's award of attorney fees.

¶ 25 For the reasons stated, we affirm the trial court's judgment.

¶ 26 Affirmed.