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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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In re MARRIAGE OF LOREE HENDRY,	)	Appeal from the Circuit Court of McHenry County.
Petitioner-Appellee,	)	
and	)	No. 07-DV-637
MICHAEL HENDRY,	)	Honorable Michael J. Chmiel,
Respondent-Appellant.	)	Judge, Presiding.

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JUSTICE McLAREN delivered the judgment of the court.  
Justices Zenoff and Hudson concurred in the judgment.

**ORDER**

¶ 1 *Held:* Finding of indirect civil contempt was proper where respondent failed to comply with marital agreement and court's maintenance orders, and to prove his failure to pay support was not willful; maintenance arrearage award was properly calculated based on parties' original agreement where respondent provided no viable alternative and evidence showed his ability to pay.

¶ 2 Respondent, Michael Hendry, appeals from an order and finding of indirect civil contempt. When Michael failed to comply with the terms of the parties' marital settlement agreement, that is, to pay the maintenance due petitioner, Loree Hendry, and to provide proof of life insurance naming Loree as sole beneficiary, the trial court ordered Michael to comply or

serve six months in jail. On appeal, Michael argues that Loree failed to make out a *prima facie* case for contempt and that the trial court erred in imputing income to Michael. We affirm.

¶ 3

#### I. BACKGROUND

¶ 4 Loree and Michael Hendry were divorced on October 27, 2008. The marital settlement agreement provided, *inter alia*, that Michael was to make maintenance payments to Loree each month amounting to 25% of his net pay and any bonuses. The maintenance was to commence October 1, 2008, and to continue for 72 months, provided certain contingencies did not occur, which they did not. Thereafter, Michael was to tender quarterly to Loree all paystubs and other pertinent employee compensation information from the last three months in order to make a new maintenance calculation, if necessary, for the next three months. Additionally, Michael was to tender his federal and state income tax returns to Loree every year that he was obligated to pay maintenance.

¶ 5 At the time of the divorce, Michael was employed by Pacific Life and earning \$722,010 annually; his monthly net pay was \$41,332. Accordingly, based on his August paystub, the monthly maintenance payment amount was determined in the marital agreement to be \$10,333. In September 2010, Michael terminated his employment with Pacific Life, having lost, for unexplained reasons, the license necessary to continue working in the investment industry. After making one more maintenance payment in October 2010, Michael ceased making payments until May, 2012.

¶ 6 On May 7, 2012, Loree filed a petition for adjudication of indirect civil contempt. A hearing on the contempt petition was held on June 24, 2014. Loree testified that, from November 2010 until May 2012, Michael had not made a maintenance payment, and she received no paystubs or other income information during that period of time. From May 2012 to

the date of the hearing, Michael paid maintenance of \$125 per week. Loree began receiving paystubs in compliance with the marital agreement in June 2014 for May 2014. She had been provided copies of Michael's income tax returns for 2010, 2011, 2012 and 2013 through discovery requests.

¶ 7 Michael testified that, after leaving Pacific Life on September 28, 2010, he had no paystubs because he had no income from November 2010 through November 2011. He began receiving paycheck stubs in October 2012 and, since then, paid Loree \$125 in maintenance per week. In 2011 Michael purchased the assets of Bella Landscapes, LLC, for \$375,000 by putting \$100,000 down and financing \$275,000, which he paid in 60 monthly payments of \$3,467.80 and a balloon payment of approximately \$15,217.80. In September 2011, he also purchased a salon called Dolce Vita Salon, which his new wife operated, with a down payment of \$55,000.

¶ 8 Additional evidence of Michael's assets, transactions and non-payroll income, including tax returns for 2010 through 2013, was entered and showed that, after leaving his job with Pacific Life, Michael moved to Florida, where he purchased a home for \$178,000 cash in May of 2011. He later sold this home for \$258,000 and purchased another for \$235,000 with no mortgage. For the year 2013, Michael paid \$104,622 for charges on his American Express Card, some for personal expenses, some for business expenses. Sometime after the divorce, Michael also invested in a private equity fund called Invision Capital, into which he paid \$70,081. To qualify as an accredited investor in this fund, a person must have income in excess of \$200,000 a year, or joint income with his spouse in excess of \$300,000 per year, and have a reasonable expectation of making the same amount of income in the current year, or have individual net worth, excluding the value of his primary residence, of at least \$1,000,000. Michael's tax returns

for 2010 and 2011 show that he made stock trades totaling in excess of \$1,000,000 each year. Line seven of his 2011 tax return showed “wages, salaries, tips” of \$578,821.

¶ 9 The trial court found Michael in contempt for failing to comply with court orders and made a maintenance arrearage judgment of \$431,097.36 plus statutory interest. The figure was determined by adding up the amounts due based on the original finding of \$10,333 per month and subtracting the weeks Michael paid \$125 per week. Michael was also ordered to serve a six-month term in county jail, with the mittimus and sentence stayed until February 28, 2015. If Michael purged his contempt by paying the judgment by that date, and within seven days provided proof of a life insurance policy with a death benefit of \$500,000 naming Loree as sole beneficiary, the sentence would be lifted and quashed. On January 27, 2015, the mittimus and sentence were stayed until July 14, 2015, and the purge payment amount was limited to the maintenance arrearage, minus interest.

¶ 10 Michael filed a motion for reconsideration on February 26, 2015, and Loree responded. The court denied the motion on September 9, 2015. In its order, the court adopted Loree’s reply to the motion for reconsideration, in which she reasoned that using the \$10,333 monthly figure to calculate the maintenance arrearage was appropriate where (1) Michael failed to establish any level of income, and the agreement as written should apply, including, the court noted separately, its provisions for achieving modification of Michael’s obligation; and (2) it was apparent, in the absence of believable evidence to the contrary, that Michael had the ability to pay the maintenance in the amount he agreed. The September 9, 2015, order also required Michael to file a financial affidavit by October 21, 2015, and to appear at a hearing on October 28, 2015, for enforcement of the order and finding of contempt and possible modification thereto. Michael filed a notice of appeal on October 23, 2015.

¶ 11 Michael failed to file the financial affidavit or to appear at the hearing and, on October 28, 2015, the court lifted the stay of sentence and the mittimus, stating “[b]ody attachment will issue separately.” Michael filed an amended notice of appeal on October 30, 2015. Loree filed a Petition for Attorneys’ Fees Pursuant to Finding of Contempt on November 18, 2015, which remains pending in the trial court.

¶ 12 II. ANALYSIS

¶ 13 A. Jurisdiction

¶ 14 A reviewing court has an independent duty to consider issues of jurisdiction, regardless of whether either party has raised them. *People v. Smith*, 228 Ill. 2d 95, 104 (2008); *Village of Mundelein v. Thompson*, 341 Ill. App. 3d 842, 846 (2003) (reviewing court has an independent duty to insure that jurisdiction is proper in both civil and criminal cases). Michael maintains that we have jurisdiction under Rule 301, which governs appeals from final judgments. See Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994). Subject to certain exceptions, however, an appeal may be taken only after the trial court has resolved all claims against all parties. See *State Farm Fire & Casualty Co. v. John J. Rickhoff Sheet Metal Co.*, 394 Ill. App. 3d 548, 556 (2009). The contempt order in this case does not resolve all claims and, therefore, is not a final, appealable judgment, because Loree’s petition for attorney’s fees pursuant to findings of contempt remains pending.

¶ 15 However, this court has jurisdiction pursuant to Rule 304(b)(5) (II S. Ct. R 304(b)(5) (eff. March 8, 2016)), which governs appeals from final judgments that do not dispose of entire proceedings and provides:

**“(b) Judgments and Orders Appealable Without Special Finding.** The following judgments and orders are appealable without the finding required for appeals under paragraph (a) of this rule:

\* \* \*

(5) An order finding a person or entity in contempt of court which imposes a monetary or other penalty.”

¶ 16 By exercising our jurisdiction to review the contempt order under Rule 304(b)(5), we then review the maintenance order upon which it was based, notwithstanding that the maintenance order was non-final and otherwise not appealable. See *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 277 (2006) (“The review of a contempt finding necessarily requires review of the order upon which it is based. [Citation.] Thus, we have jurisdiction to review the \* \* \* order compelling respondent to pay temporary maintenance and child support to petitioner.”); *In re Marriage of Newton*, 2011 IL App (1st) 090683, ¶ 8 (“Where an unappealable interlocutory order results in a judgment of contempt including a fine or imprisonment, such a judgment is a final and appealable judgment and presents to the court for review the propriety of the order of the court claimed to have been violated.”). We need not consider the requirement of the order that Michael provide proof of life insurance naming Loree as sole beneficiary, as Michael does not challenge this ruling on appeal.

¶ 17 **B. Standards of Review**

¶ 18 Michael contends on appeal that: (1) Loree failed to make out a *prima facie* case for contempt and, therefore, it was not his burden to provide a valid excuse for non-payment; (2) Loree failed to establish that he breached the terms of the marital agreement in bad faith; and (3) the finding of contempt was erroneous because the trial court’s determination of the maintenance

arrears was either due to a misinterpretation of the marital agreement and judgment of dissolution or against the manifest weight of the evidence. We review the marital agreement and dissolution judgment agreement like we would any other contract, that is, *de novo*. See *Blum v. Koster*, 235 Ill. 2d 21, 33 (2009). Whether a party has committed breach of contract is a question of fact, which will not be disturbed on review unless the finding is against the manifest weight of the evidence. *Israel v. Nat'l Canada Corp.*, 276 Ill. App. 3d 454, 461 (1995). The amount of a maintenance award lies within the sound discretion of the trial court, and its decision will not be disturbed absent an abuse of that discretion. *In re Marriage of Selinger*, 351 Ill. App. 3d 611, 619 (2004). We will not disturb the trial court's factual finding of contempt 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).

¶ 19

C. *Prima Facie* Case

¶ 20 Michael first contends that Loree failed to make out a *prima facie* case for contempt because she failed to present evidence regarding Michael's income during the years subsequent to the judgment for dissolution of marriage entered on October 27, 2008. "The power to enforce an order to pay money through contempt is limited to cases of wilful refusal to obey the court's order." *Logston*, 103 Ill. 2d 266 at 285; *In re Marriage of Barile*, 385 Ill. App. 3d 752, 758 (2008) (citing *Logston*). The failure to make support payments as ordered is *prima facie* evidence of contempt. *Barile*, 385 Ill. App. 3d at 758-59; *Sharp*, 369 Ill.App.3d at 279. Once the party bringing the contempt petition establishes a *prima facie* case, the burden shifts to the alleged contemnor to prove that the failure to make support payments was not willful or contumacious and that there exists a valid excuse for his failure to pay. *Id.*

¶ 21 The trial court’s finding that Michael was in contempt was not against the manifest weight of the evidence. At the hearing on the contempt petition, the evidence revealed that, in October 2008, Michael was ordered to pay Loree 25% of his net income each month as maintenance, as well as 25% of his net bonus within 7 days of receipt, and to provide paystubs on a quarterly basis in order to calculate the maintenance to be paid Loree for the next three months. In presenting her case, Loree testified that Michael paid her no maintenance for a period of time (“I believe it [was from] November of 2010 up until May of 2012”), and she received no paystubs reflecting his earnings during this period. This unrefuted evidence of failure to comply with the court’s order was sufficient to meet Loree’s burden of establishing a *prima facie* case of contempt. The burden then properly shifted to Michael to prove that the failure to make support payments and to provide paystubs was not willful or contumacious and that there exists a valid excuse for his failure to pay. *Barile*, 385 Ill. App. 3d at 758–59; *Sharp*, 369 Ill.App.3d at 279.

¶ 22 Michael argues that Loree failed to make out a *prima facie* case because, under the specific terms of the dissolution judgment, he could have had no income at all during the period of time to which the contempt petition applied due to a change or disruption in his employment. This argument is unavailing. Under Illinois law, it was not Loree’s burden to present evidence that Michael had income or what his income was during the pertinent time in order to make out a *prima facie* case of contempt; her burden was met by merely presenting evidence that she did not receive maintenance, which she did in her testimony. If Michael had a valid reason for his failure to pay maintenance pursuant to the court’s order, it was up to him to share this information with the court. As will be discussed below, Michael failed to meet this burden.

¶ 23 C. Excuse for Nonpayment.

¶ 24 Michael contends that the trial court improperly imputed income to him where the marital settlement agreement fixed the terms for calculating maintenance and did not provide for “changes in employment, reductions in income, or terminations of employment.” This contention is without merit. The marital agreement sets out the procedure for a quarterly recalculation of maintenance, which Michael chose not to follow. He did not tender to Loree the information necessary to effectuate the agreed-upon procedure, nor did he communicate with Loree or the court regarding any inability to comply with the terms of the marital agreement or the court’s maintenance orders. As Michael offered no alternative basis for determining his income and for calculating the maintenance to be paid, the court relied on the agreement that was in effect when Michael stopped making payments. We do not find this decision to be an abuse of the court’s discretion. See *In re Marriage of Awan*, 388 Ill. App. 3d 204, 213 (2009) (an abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court).

¶ 25 Michael further contends that, even if he breached the terms of the agreement, he did not do so in bad faith, citing *Dayan v. McDonald’s Corp.*, 125 Ill. App. 3d 972 (1984) for the proposition that he had an obligation to comply with the terms of the marital agreement in good faith. According to Michael, he did not leave his job with Pacific Life in bad faith but resigned only because he lost his license to work in the securities industry. He analogizes his situation to that of an attorney who loses his license and is barred from the practice of law. He offers, however, no explanation for why he lost his license, and, given the circumstances under which most attorneys are barred from practice, his attorney analogy is unhelpful to any assertion of good faith conduct.

¶ 26 In denying Michael’s motion to reconsider its order and finding of contempt, the trial court noted that Michael had not explained how he lost his license “and what *exhaustive* steps he took to get back his license or pursue other, similar earnings.” [Emphasis in original.] The only other excuse Michael offered for not meeting his maintenance obligations was a claim of insufficient funds. The evidence, however, did not support this claim, as will be discussed below. Thus, the trial court’s contempt finding was also not against the manifest weight of the evidence. See *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 44 (a decision is against the manifest weight of the evidence only when an opposite conclusion is clearly apparent).

¶ 27 D. The Maintenance Arrearage

¶ 28 The Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/505 (West 2014)) “creates a rebuttable presumption that all income, unless specifically excluded by the statute, is income for support purposes.” *Sharp*, 369 Ill. App. 3d at 280.

“The defense of poverty and misfortune for failure to make support payments has been found applicable only in the most extreme cases, notably those in which a party has no money and no way of getting money to meet support obligations. \* \* \* The party must show, with reasonable certainty, the amount of money he has received since the order was entered and that it has been disbursed in the payment of expenses that under the law he should pay before making any payment on the support decree.” *Id.* at 282.

To show that he is unable to pay, the party must show not only that he has no money with which to pay, but also that he did not wrongfully dispose of money or assets with which he might have paid. *Logston*, 103 Ill.2d at 285. Any money that is not absolutely required for the mere necessities of life should be used for maintenance. *Id.* at 286.

¶ 29 The evidence supports the trial court's finding that Michael had, or disposed of, income and/or assets that would have permitted him to make his court-ordered maintenance payments. Although he claims to have been making only \$500 per week after leaving his job, subsequent to the divorce, Michael purchased a landscaping business for himself and a salon for his new wife; invested in a private equity fund where he had to show that he had \$200,000 annual income or a net worth of \$1,000,000; paid more than \$100,000 in American Express bills in a single year; purchased two houses in Florida for cash; and made stock trades in excess of \$1,000,000 in two consecutive years. In the absence of believable evidence to the contrary, the court's conclusion that Michael could afford to pay his maintenance obligation was not against the weight of the evidence. Similarly, in the absence of a viable alternative, the court's conclusion that Michael owed Loree the maintenance he originally agreed to pay for 72 months was not an abuse of the court's discretion.

¶ 30

### III. CONCLUSION

¶ 31 Michael's unilateral decision to stop making maintenance payments, together with his unwillingness or inability to explain that decision, placed him in contempt of court. The court's determination that Michael had the ability to pay what he originally agreed to pay was neither an abuse of discretion nor against the manifest weight of the evidence. Accordingly, we affirm.

¶ 32 The judgment of the Circuit Court of McHenry County is affirmed.

¶ 33 Affirmed.