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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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<i>In re</i> THE MARRIAGE OF	)	Appeal from the Circuit Court
TERRY M. TROBIANI,	)	of McHenry County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 07-DV-624
	)	
TRUDY A. TROBIANI,	)	Honorable
	)	Maureen McIntyre,
Respondent-Appellant.	)	Judge, Presiding.

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JUSTICE ZENOFF delivered the judgment of the court.  
Justices Hutchinson and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court abused its discretion by denying respondent's petition for a rule to show cause, as petitioner's general testimony about his financial status was insufficient to establish his inability to satisfy his support obligations; we vacated the court's judgment and remanded for petitioner to have an opportunity to provide definite and explicit evidence.

¶ 2 Respondent, Trudy A. Trobiani, appeals the trial court's order declining to find petitioner, Terry M. Trobiani, in contempt for failure to comply with the parties' marital settlement agreement (MSA). We vacate and remand.

¶ 3 I. BACKGROUND

¶ 4 The parties' marriage was dissolved in 2010. Under the MSA, petitioner was to pay as maintenance the mortgage on a residence and the payment on a home equity line of credit. A section of the agreement stated that an additional property (the Colby Point property) would become petitioner's sole and exclusive property free of any rights or claims by respondent and that he would be entitled to 100% of the proceeds of any transfer or sale. However, in another section of the agreement, respondent was granted a lien on any proceeds of the Colby Point property up to the amount of \$400,000. Respondent could demand a sale if petitioner was more than 60 days late on any maintenance payment, with the net proceeds being applied to the liens and any surplus paid to petitioner. Respondent would then be entitled to a lien on the proceeds of any remaining property owned by petitioner. Petitioner was also required to carry life insurance.

¶ 5 On November 3, 2014, petitioner was found in contempt for failure to make payments. He purged himself of the contempt on December 2, 2014. On April 10, 2015, respondent filed a petition for a rule to show cause, alleging that petitioner failed to pay maintenance and failed to carry life insurance. She also alleged that he transferred the Colby Point property to a third party without maintaining respondent's lien. A rule to show cause was entered and, on July 25, 2016, a hearing was held.

¶ 6 Petitioner appeared *pro se*. He admitted that he was required to pay maintenance and that he failed to do so. He testified that he had done everything he could to make the payments but was financially unable to pay. Petitioner was previously involved in real estate development and stated that he was "down to nothing," he had lost his cars and boat, his utilities were disconnected, and he had to move out of his home because he had no electricity. He had no bank accounts and had to use a currency exchange to make payments. Petitioner stated that he

essentially worked for room and board at a restaurant. He earned \$7,000 per year in cash, yet was being asked to pay \$2,500 per month in maintenance. He had not purchased new jeans or shoes in over two years. He drove a 16-year-old truck with 200,000 miles on it. He did not have health insurance, but qualified for Medicaid. Petitioner stated that he currently had life insurance for over the amount required but was previously unable to get it for over a year because of his indebtedness and zero net worth. He borrowed the money to purge the previous contempt in December 2014 and did not know if he would be able to pay it back.

¶ 7 Petitioner testified that he used property, such as the Colby Point property, as collateral for his previous real estate development business. He said that using it as collateral to create new business would enable him to pay what he owed to respondent. Thus, he assigned his interest in the Colby Point property to an LLC that he was a member of at the time of the assignment, which he argued was allowed under the MSA. At the time of the hearing, he was not a member, but the LLC had agreed that it would either purchase the property from him for \$515,000 or give him interest for the time the property was held. The LLC had made a similar agreement as to his house. Under the agreements, the LLC was to return the properties upon demand or it would have to pay under the agreements. Petitioner testified that legal action was in progress concerning the properties because the LLC had not paid him as agreed and that he could recover \$200,000 to \$300,000 for the portion of the lawsuit concerning Colby Point. Petitioner stressed that respondent would get the net proceeds of any recovery.

¶ 8 Petitioner did not provide documentation to support his testimony. He stated that he sent documentation about the life insurance policy to respondent's attorney and that he previously provided documents about the Colby Point transaction at an earlier court date. He did not bring the documents to the hearing, because he did not think that he had to do so.

¶ 9 Respondent did not call any witnesses. The court declined to find petitioner in contempt. The court noted that petitioner's uncontroverted testimony was that he had life insurance. The court found that his failure to pay was not willful, because he lacked the ability to pay. In regard to the Colby Point property, the court found that there were no net proceeds that respondent could have a lien on at that time. Respondent appeals.

¶ 10 II. ANALYSIS

¶ 11 Respondent contends that the trial court erred when it failed to find petitioner in contempt. She argues that he failed to show with reasonable certainty his inability to pay and that he did not provide justifiable reasons for divesting himself of assets such as the Colby Point property when he did not provide documentation of his assets and liabilities.

¶ 12 Petitioner has not filed a brief. Without an appellee's brief, "if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal." *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). In this case, because the record and issues are simple, we choose to decide the case on its merits.

¶ 13 "The power to enforce an order to pay money through contempt is limited to cases of wilful refusal to obey the court's order." *In re Marriage of Logston*, 103 Ill. 2d 266, 285 (1984). "The noncompliance with an order to pay maintenance constitutes *prima facie* evidence of contempt." *Id.* 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 pay was not willful or contumacious and that there exists a valid excuse for his failure to pay. *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 279 (2006). Contumacious behavior consists of "conduct calculated to embarrass, hinder, or obstruct a court in its administration of justice or [conduct] lessening the

authority and dignity of the court. (Internal quotation marks omitted.) [Citation.]” *In re Marriage of McCormick*, 2013 IL App (2d) 120100, ¶ 17).

¶ 14 A defendant may meet his burden by showing that he is unable to pay. *Logston*, 103 Ill. 2d at 285. “To prove this defense, a defendant must show that he neither has money now with which he can pay, nor has disposed wrongfully of money or assets with which he might have paid.” *Id.* To do so, the defendant must show with reasonable certainty the amount of money he has received and has disbursed in paying obligations that he should pay before paying maintenance. *Id.* at 286. It is proper that the defendant first pay for bare living expenses. *Id.* “[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.” *Id.* at 286-87.<sup>1</sup>

¶ 15 Here, it is undisputed that respondent made a *prima facie* case, and petitioner admitted that he failed to pay. Petitioner then argued that he was unable to pay. He testified that he had lost nearly everything and earned \$7,000 per year in cash. He also testified that he had no money left after paying his living expenses. That testimony was uncontroverted. However, petitioner did not provide documentation as to his income and expenses. Thus, respondent argues that he should have been found in contempt.

¶ 16 “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

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<sup>1</sup> In *In re Marriage of Barile*, 385 Ill. App. 3d 752, 759 n.3 (2008), we noted that the supreme court has cautioned against using an abuse-of-discretion standard for factual findings. However, we stated that we would adhere to the standard set forth in *Logston* because the supreme court has not specifically altered its standard of review for contempt petitions.

and no way of getting money to meet support obligations.” *Sharp*, 369 Ill. App. 3d at 282. Estimates and guess-work will not suffice to show with reasonable certainty the amount of money received and disbursed. *In re Marriage of Ramos*, 126 Ill. App. 3d 391, 399 (1984). “[F]inancial inability to comply with an order must be shown by definite and explicit evidence [citation], and that burden is not met by general testimony with regard to financial status.” *Id.* at 398. “It is insufficient to merely say that all of the contemnor’s money was spent to pay living expenses.” *Sharp*, 369 Ill. App. 3d at 282-83.

¶ 17 To be sure, in contempt cases based on a lack of documentation, the contemnor’s testimony indicated that he was paying for more than bare living expenses. For example, in *Sharp*, the contemnor testified that he spent trust money on monthly payments and repairs for a Porsche, attorney fees, rent, and other unidentified expenses totaling \$31,000 while neglecting to pay child support and maintenance of a lesser amount. He also borrowed money that was not applied to support obligations. *Id.* at 283. Because he did not account for a large portion of the money he admitted receiving or show that his disbursements had to be made before paying support obligations, his testimony was inadequate, and the court did not abuse its discretion in holding him in contempt. *Id.*; see also *Logston*, 103 Ill. 2d at 286-87 (trial court did not abuse its discretion in finding contempt when it was unknown whether money was diverted for nonessential items such as a recreational vehicle, kitchen improvements, and a trip to California, and \$160 per month was spent on recreation, gifts, hobbies, and the cost of volunteer work); *Ramos*, 126 Ill. App. 3d at 399 (trial court did not abuse its discretion in finding contempt when contemnor had assets valued at as much as \$20 million and merely stated that, after paying expenses, there was very little left).

¶ 18 Here, petitioner's case presents a far different scenario. There was no evidence that he spent money on any items beyond his bare needs. Petitioner testified that he had lost his assets, worked for room and board, had no bank accounts, and was paid in cash. He ate at the restaurant in which he worked, drove an old truck, and had not purchased new jeans or shoes in two years. The trial court, by ruling as it did, clearly found his testimony credible.

¶ 19 Nevertheless, petitioner was required to present definite and specific evidence to meet his burden and he failed to do so. General testimony as to financial status will not suffice. *Sharp*, 369 Ill. App. 3d at 282. Thus, the trial court abused its discretion in finding a lack of contempt absent additional evidence. However, reversing with directions to find petitioner in contempt would be inappropriate given that, despite the lack of specific documents, petitioner's testimony was that he lacked the means to pay his obligations.

¶ 20 "Civil contempt proceedings have two fundamental attributes: (1) The contemnor must be capable of taking the action sought to be coerced, and (2) no further contempt sanctions are imposed upon the contemnor's compliance with the pertinent court order." *In re Marriage of Betts*, 200 Ill. App. 3d 26, 44 (1990). "In other words, the contemnor must have an opportunity to purge himself of contempt by complying with the pertinent court order." *Id.* "If the contempt sanction is incarceration, the respondent's circumstances should be such that he may correctly be viewed as possessing the 'keys to his cell.'" *Id.* (quoting *Logston*, 103 Ill. 2d at 289).

¶ 21 Holding a party in contempt when he is incapable of purging directly contravenes the purpose of contempt proceedings. Accordingly, we remand for further proceedings to allow petitioner to provide the court with specific evidence of any inability to pay. While it could be argued this gives petitioner a "second day in court," this should not inhibit a remand. "[T]he concept of 'a day in court' is not intended to shut the parties off, but on the contrary to permit the

parties to offer all relevant evidence which the court requires to reach an accurate decision and to do justice.” *Inter-Insurance Exchange of the Chicago Motor Club v. Employers Mutual Casualty Co.*, 31 Ill. App. 3d 906, 909-10 (1975). Justice would not be served to any party by finding petitioner in contempt if he is actually unable to pay, as doing so would even further erode the likelihood of his ability to pay in the future. Thus, under the unique circumstances of this case, we vacate and remand for further proceedings on petitioner’s ability to pay maintenance and carry life insurance.

¶ 22 As to the Colby Point property, one section of the MSA stated that petitioner would hold the property free and clear of any claims and would be entitled to 100% of the proceeds of any sale or transfer of ownership. Another provision allowed respondent to demand a sale and a lien on the proceeds of the property. Thus, respondent argued that the transfer of the property denied her the ability to recover under that provision. The record fails to show whether a demand for sale was ever made, and petitioner testified that he transferred the property as part of an agreement that contemplated generating revenue. While nothing shows that he transferred the property to hide assets or proceeds, the transfer did arguably violate respondent’s right to demand a sale and recover the proceeds. Therefore, this issue should be revisited on remand, and petitioner should provide specific evidence about the transaction to allow the trial court to fully determine whether he should be held in contempt.

¶ 23

### III. CONCLUSION

¶ 24 The trial court abused its discretion when it declined to find petitioner in contempt without requiring petitioner to provide specific evidence of his inability to pay. Accordingly, the judgment of the circuit court of McHenry County is vacated and the cause is remanded for further proceedings.



¶ 25 Vacated and remanded.