2018 IL App (3d) 180043-U

Order filed October 25, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

In re MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
TRACI LEIMBACH, n/k/a TRACI AIMONE,	)	La Salle County, Illinois.
	)	
Petitioner-Appellee,	)	
	)	Appeal No. 3-18-0043
and	)	Circuit No. 95-D-144
	)	
DAVID D. LEIMBACH,	)	The Honorable
	)	Michelle A. Vescogni
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: Appellate court had jurisdiction to review propriety of contempt order entered against father for failing to pay educational and medical expenses for children but lacked jurisdiction to consider underlying final orders because father did not timely appeal them. Trial court's order of contempt was not against the manifest weight of the evidence or an abuse of discretion where father failed to comply with court orders for six years.

¶ 2 Fourteen years after petitioner Traci Leimbach n/k/a Traci Aimone and respondent David Leimbach were divorced, Aimone filed a petition for educational expenses on behalf of one of

their daughters. The trial court granted the petition and ordered Leimbach to reimburse Aimone for college expenses and to pay for the child's current and future tuition, books and related expenses. Six years later, Aimone filed a petition for rule to show cause alleging that Leimbach failed to make the educational payments ordered by the court, as well as medical expenses of the parties' children. The trial court found Leimbach in indirect civil contempt and sentenced him to an indefinite period of incarceration with a purge amount of $5,000 to Aimone. Leimbach appeals, arguing that the trial court erred in (1) granting Aimone's petition for educational expenses, (2) ordering him to pay his children's medical expenses, and (3) finding him in contempt.

¶ 3 FACTS

¶ 4 Petitioner Traci Aimone and respondent David Leimbach were married in 1990. In 1991, they had their first child, Heather. In 1993, they had their second child, Jessica. In 1995, Aimone filed a petition for dissolution of marriage. The trial court issued a judgment of dissolution, which incorporated a marital settlement agreement. The marital settlement agreement required Leimbach to maintain medical insurance for his children and held him responsible "for any and all medical, dental, optical, orthodontic and like expenses incurred on behalf of the minor children not otherwise covered by said policy of insurance." The agreement did not address educational expenses of the children.

¶ 5 In August 2009, Aimone filed a petition for educational expenses on Heather's behalf. The petition alleged that Heather would soon be attending Southern Illinois University (SIU) and did not have adequate financial resources to pay for her education and associated expenses. Aimone sought an order requiring Leimbach to pay for Heather's tuition, books, room and board and other expenses until she completed her schooling at SIU. In September 2009, an attorney

entered an appearance as Leimbach's counsel. In December 2009, Leimbach's counsel was granted leave to withdraw. That same month, Leimbach filed a financial affidavit.

¶ 6 On June 7, 2010, the trial court held a hearing on Aimone's petition. Leimbach did not appear at the hearing despite being given notice of it. The trial court entered an order requiring Leimbach to reimburse Aimone for $5,500 in educational expenses she paid to SIU on Heather's behalf for the 2009-2010 school year. For the 2010-2011 school year, Heather was enrolled at Illinois Valley Community College (IVCC). The court ordered Leimbach to pay 100% of Heather's tuition, books and supplies at IVCC and ordered Aimone to pay for Heather's room and board at IVCC. The court further ordered Leimbach to pay all of Heather's uncovered medical, dental, and vision expenses.

¶ 7 Also in June 2010, Aimone filed a petition for rule to show cause against Leimbach, alleging that he owed her $944.52 in uncovered medical expenses for Heather and Jessica. In August 2010, Leimbach filed a motion to vacate the judgment entered against him in June, requiring him to pay Heather's educational expenses. On September 15, 2010, the trial court denied Leimbach's motion to vacate. The trial court also discharged the rule to show cause Aimone filed against Leimbach but ordered him to pay $100 per month to Aimone until he paid the entire amount due.

¶ 8 In November 2016, Aimone filed a two-count petition for rule to show cause against Leimbach. Count I alleged that Leimbach failed to pay her any of the $944.52 he owed for uncovered medical expenses on behalf of the children. Count II alleged that Leimbach failed to pay the $5,500 he was ordered to pay for Heather's SIU expenses, or Heather's tuition, books and expenses at IVCC, which totaled $10,538.83. Proceedings on the petition were held before the Honorable Michelle Vescogni.

¶ 9 Leimbach filed a motion to dismiss Aimone's rule to show cause. The trial court dismissed Leimbach's motion. On September 25, 2017, the trial court entered an order holding Leimbach in indirect civil contempt for failing to obey the orders entered by the court on June 7, 2010, and September 15, 2000. The court entered judgment against Leimbach and in favor of Aimone for $10,473.95, and against Leimbach and in favor of IVCC for $10,538.83. The trial court continued the matter to December 6, 2017, for sentencing. On December 6, 2017, the trial court entered an order sentencing Leimbach immediately to an indefinite period of incarceration but allowing him to purge himself of indirect civil contempt by paying Aimone $5,000.

¶ 10 ANALYSIS

¶ 11 I. Appellate Jurisdiction

¶ 12 A. Contempt Order

¶ 13 Aimone argues that we lack jurisdiction to consider Leimbach's appeal from his contempt order because he did not appeal within 30 days of its entry.

¶ 14 Illinois Supreme Court Rule 304(b)(5) states, "[a]n order finding a person or entity in contempt of court which imposes a monetary or other penalty" is immediately appealable. Ill. S. Ct. R. 304(b)(5) (eff. March 8, 2016). Contempt citations must be appealed within 30 days of their entry or be barred. *Longo v. Globe Auto Recycling, Inc.*, 318 Ill. App. 3d 1028, 1036 (2001).

¶ 15 When a trial court grants a contempt petition but does not immediately enforce it, the defendant has 30 days from enforcement to appeal the contempt judgment. See *In re L.W.*, 2016 IL App (3d) 160092, ¶ 21. The trial court's order becomes final and appealable when the defendant's sentence begins. See *id.*

¶ 16 Here, the trial court entered its contempt order against Leimbach on September 25, 2017. However, the court retained jurisdiction and continued the matter for sentencing. On December 6, 2017, the trial court entered a sentencing order. At that time, the trial court's contempt order became final and appealable. See *id*. Leimbach filed his appeal more than 30 days later but received leave from this court to do so. See Ill. S. Ct. R. 303(d) (eff. July 1, 2017). As a result, we have jurisdiction to consider Leimbach's appeal of his contempt order.

¶ 17 B. Prior Orders

¶ 18 In his notice of appeal and brief, Leimbach attempts to appeal not only the contempt order but also prior orders entered by the trial court, including the June 7, 2010 order for educational expenses and the September 15, 2010 orders denying his motion to vacate default judgment and requiring him to pay past-due medical expenses.

¶ 19 1. Propriety

¶ 20 A contempt proceeding is collateral to and independent of the case in which the contempt arises. *Busey Bank v. Salyards*, 304 Ill. App. 3d 214, 218 (1999). When a contempt order results from the violation of an order that was final for purposes of appeal but was not appealed, the validity of the underlying judgment may not be considered in an appeal from the contempt order. *Id*.; *People v. Keys*, 324 Ill. App. 3d 630, 634 (2001). An appellate court does not have jurisdiction to review an earlier final order as a procedural step leading to an appealable contempt order. *Anderson Dundee 53 L.L.C. v. Terzakis*, 363 Ill. App. 3d 145, 153-54 (2005).

¶ 21 The trial court's June 7, 2010 order directing Leimbach to pay his daughter's educational expenses and its September 15, 2010 orders denying his motion to vacate the June 7 order and ordering him to pay his children's medical expenses were final orders. Leimbach was required to appeal those orders within 30 days. See Ill. S. Ct. R. 606(b) (eff. July 1, 2017). Because

Leimbach failed to timely appeal those orders, we are without jurisdiction to consider the propriety of them. See *Salyards*, 304 Ill. App. 3d at 218.

¶ 22 2. Voidness

¶ 23 Leimbach also argues that the trial court's June 7, 2010 order was entered in violation of the Servicemembers Civil Relief Act (Act) (50 U.S.C. § 3931 (2012)), thereby depriving the trial court of jurisdiction.

¶ 24 While we may not consider the propriety of the June 7, 2010 order, we may consider whether that order was void. See *Keys*, 324 Ill. App. 3d at 634. A void order is one entered by a court without jurisdiction. *In re Estate of Steinfeld*, 158 Ill. 2d 1, 12 (1994). A void order may be attacked, either directly or collaterally, at any time. *Id*.

¶ 25 If the requirements of the Act were jurisdictional, a judgment entered without following all of the Act's requirements would be void. *Schroeder v. Levy*, 222 Ill. App. 252, 254 (1921) (discussing identical provisions of predecessor statute, Soldiers' and Sailors' Civil Relief Act). However, that is not the case. *Id*. A judgment entered in violation of the Act will be permitted to stand unless the servicemember takes affirmative steps to have the judgment set aside. *Id*.; see 50 U.S.C. § 3931(g) (2012). Thus, the Act's requirements are not jurisdictional. *Schroeder*, 222 Ill. App. at 254; see also *Newman v. Board of Review, Department of Labor*, 84 A. 3d 1042, 1045 (N.J. Super. App. Div. 2014) (judgment entered in violation of Act is voidable, not void); *Klaeser v. Milton*, 47 So. 3d 817, 822 (Ala. Civ. App. 2010) (same); *In re K.B.*, 298 S.W. 3d 691, 693 (Tex. Ct. App. 2009) (same).

¶ 26 Because the Act's requirements are not jurisdictional, even if we accepted Leimbach's contention that the June 7, 2010 order was entered in violation of the Act, that order is not void.

See *Schroeder*, 222 Ill. App. at 254. Leimbach fails to assert any other basis for holding the trial court's June 7, 2010 or September 15, 2010 orders void. Therefore, we find those orders valid.

¶ 27 II. Contempt Order

¶ 28 Civil contempt occurs when a party fails to do something ordered by the trial court, resulting in the loss of a benefit or advantage to the opposing party. *In re Marriage of Charous*, 368 Ill. App. 3d 99, 107 (2006). If the contempt occurs outside the presence of the court, it is indirect. *Id*. A finding of indirect civil contempt is a question of fact for the trial court, which will not be disturbed on review unless it is against the manifest weight of the evidence or an abuse of discretion. *In re Marriage of Logston*, 103 Ill. 2d 266, 286-87 (1984).

¶ 29 A finding of indirect civil contempt requires both the existence of a court order and proof of willful disobedience of that order. *Charous*, 368 Ill. App. 3d at 107. The petitioner must show by a preponderance of the evidence that a court order has been violated, and the burden then shifts to the alleged contemnor to show that noncompliance with the order was not willful and that he had a valid excuse for failing to comply. *Id*.

¶ 30 Civil contempt is designed to coerce an individual to comply with a court order by giving him the opportunity to purge himself of contempt through compliance. *In re Marriage of O'Malley*, 2016 IL App (1st) 151118, ¶ 29. A finding of civil contempt is proper only if the contemnor has the ability to purge the contempt. *Id*. ¶¶ 26, 29.

¶ 31 A. Inability to Pay

¶ 32 Leimbach first argues that the trial court erred in finding him in contempt because he lacks funds to purge himself of contempt.

¶ 33 In order for the contemnor to prove that he is unable to pay, he must show that he neither has money now with which he can pay, nor has he disposed wrongfully of money or assets with

which he might have paid. *Charous*, 368 Ill. App. 3d at 107. Poverty is a valid defense to nonpayment only in the most extreme cases where the alleged contemnor has no money and no way of obtaining money to meet his obligations. *In re Marriage of Betts*, 155 Ill. App. 3d 85, 100 (1987). Financial inability to comply with a court order must be shown by definite and explicit evidence. *In re Marriage of Dall*, 212 Ill. App. 3d 85, 98 (1991). Testimony of a general nature with regard to financial status is insufficient to meet this burden. *Id.*

¶ 34 Here, Leimbach provided no evidence to the court of his inability to pay the amounts ordered by the court. He last completed a financial affidavit in 2009, more than seven years before the court's contempt finding. Since then, Leimbach has provided no evidence to the court of his inability to pay, other than his self-serving statements. Those statements are insufficient to satisfy Leimbach's burden of proving that he is financially unable to comply with the court's order. *See id*. The trial court did not err in holding Leimbach in contempt.

¶ 35 B. *Laches*

¶ 36 Leimbach next argues that the trial court erred in finding him in contempt because Aimone's claims were barred by *laches*.

¶ 37 *Laches* is an affirmative defense that must be pled and proved by the party asserting it. *In re Estate of Comiskey*, 146 Ill. App. 3d 804, 808 (1986). A defense not raised in the trial court is forfeited on appeal. *Campbell v. White*, 187 Ill. App. 3d 492, 505 (1989).

¶ 38 Mere passage of time, standing alone, will not warrant the application of *laches*. *Comiskey*, 146 Ill. App. 3d at 810. The defendant must also show that he has been prejudiced by the plaintiff's delay in enforcement. *Id*. Where the situation of the parties has not changed by reason of delay to the detriment of the party against whom recovery is sought, *laches* is inapplicable. *Heinze v. Heinze*, 79 Ill. App. 3d 1121, 1123 (1979). Demanding payment several

years after the payment becomes due does not constitute the kind of injury recognized in a *laches* defense. *In re Marriage of Coufal*, 156 Ill. App. 3d 814, 819 (1987). In the absence of any evidence demonstrating injury to the defendant, Illinois courts have held that *laches* does not apply when the plaintiff delayed more than 10 years in enforcing a monetary judgment. See *Finley v. Finley*, 81 Ill. 2d 317 (1980) (11 years); *Heinze*, 79 Ill. App. 3d 1121 (14 years); *Ellingwood v. Ellingwood*, 25 Ill. App. 3d 587 (1975) (22 years).

¶ 39 Here, Leimbach forfeited his argument that *laches* applies by failing to raise it in the trial court. Leimbach filed a motion to dismiss arguing that Aimone's rule to show cause should not be granted, but he never raised the defense of *laches*. Thus, he is barred from doing so now. See *Campbell*, 187 Ill. App. 3d at 505.

¶ 40 Forfeiture aside, Leimbach's argument lacks merit. Leimbach has failed to demonstrate how Aimone's six-year delay in seeking to enforce the judgments against him caused him harm. Absent a showing of injury, Leimbach's *laches* defense fails. See *Finley*, 81 Ill. 2d 317; *Heinze*, 79 Ill. App. 3d 1121; *Ellingwood*, 25 Ill. App. 3d 587.

¶ 41 C. Recusal

¶ 42 Finally, Leimbach argues that Judge Vescogni's contempt order should be reversed because Judge Vescogni had a personal relationship with Aimone's counsel and should have recused herself from the case.

¶ 43 A trial judge is presumed to be impartial. *In re Marriage of Petersen*, 319 Ill. App. 3d 325, 339 (2001). The party alleging bias bears the burden of presenting evidence to overcome this presumption. *Id*. "It is the responsibility of the party alleging grounds for disqualification of a judge to make a sufficient record in the trial court to establish reversible error on appeal." *Ford Motor Credit Co. v. Manzo*, 196 Ill. App. 3d 874, 884 (1990).

¶ 44 Pursuant to Illinois Supreme Court Rule 63(C)(1), "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned," including instances where "the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding." Ill. S. Ct. R. 63(C)(1)(a) (eff. Feb. 2, 2017). "Rule 63(C)(1)'s direction to judges to voluntarily recuse themselves where their 'impartiality might reasonably be questioned' [citation] includes 'situations involving the appearance of impropriety.' " *In re Marriage of O'Brien,* 2011 IL 109039, ¶ 43.

¶ 45 An appearance of impropriety exists when there is a current relationship between the judge and one of the attorneys in a case before the judge. *Gluth Brothers Construction, Inc. v. Union National Bank*, 192 Ill. App. 3d 649, 655 (1989). There is no appearance of impropriety where the trial judge and one of the attorneys on a case before the judge had a past relationship. *Id*. A trial judge is not obligated to inform a party that she had a relationship with the opposing party's attorney years earlier. See *id*. at 654. This is especially true where the relationship could be discovered through documents available to the public. *Id*.

¶ 46 Whether a judge should recuse herself is a decision that rests "*exclusively within the determination of the individual judge*." (Emphasis in original.) *O'Brien,* 2011 IL 109039, ¶ 45. We review a judge's recusal decision for an abuse of discretion. *Hassebrock v. Deep Rock Energy Corp.*, 2015 IL App (5th) 140105, ¶ 52.

¶ 47 Here, the only evidence Leimbach provided showing a relationship between Judge Vescogni and Aimone's counsel is a citation to a divorce action in which Vescogni allegedly represented Aimone's counsel. The citation to that case shows that the divorce proceeding began in 2002, 14 years before Judge Vescogni ruled on Aimone's rule to show cause. Leimbach failed

to present any evidence of a more recent relationship between Aimone's attorney and Judge Vescogni. That Vescogni represented Aimone's counsel many years before she ruled on Aimone's rule to show cause does not create an appearance of impropriety, requiring Judge Vescogni to disclose the relationship or recuse herself. See *Gluth Brothers Construction*, 192 Ill. App. 3d at 654, 655. This is especially true because the divorce action was a matter of public record that could have been discovered earlier by Leimbach. See *id*. Based on the evidence presented, Leimbach failed to prove that Judge Vescogni abused her discretion by not recusing herself.

¶ 48 CONCLUSION

¶ 49 The judgment of the circuit court of La Salle County is affirmed.

¶ 50 Affirmed.