

2024 IL App (1st) 241866-U

No. 1-24-1866

Filed December 20, 2024

Third Division

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

IN RE MARRIAGE OF:)	Appeal from the
)	Circuit Court of
ROSEANNE TELLEZ,)	Cook County.
)	
Petitioner-Appellee,)	
)	No. 10 D 7549
And)	
)	
DAVID A. CERDA,)	Honorable
)	Regina A. Scannicchio
Respondent-Appellant.)	Judge, Presiding.

JUSTICE MARTIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Lyle concurred in the judgment.

ORDER

¶ 1 *Held:* Civil contempt order vacated when the record fails to support that the contemnor has the ability to satisfy the purge condition set by the circuit court.

¶ 2 The circuit court found David Cerda in indirect civil contempt for failing to pay child support and ordered him to be detained in the Cook County jail on condition that he pay \$248,648.73. For the reasons that follow, we vacate the contempt order and order David’s release from custody.

¶ 3

I. BACKGROUND

¶ 4

Subsequent to the dissolution of their marriage, Roseanne Tellez filed numerous petitions related to David's failure to pay his support obligations for their three children.¹ On August 12, 2024, a hearing was held on three pending petitions. Two petitions requested findings of indirect civil contempt for failure to pay child support. Taken together, those petitions related to periods from July 2021 through September 2023. The third petition sought enforcement of an order entered in May 2020 ordering David to pay previous arrearages. In total, Roseanne alleged that David owed \$248,648.73.

¶ 5

Roseanne testified that David failed to fulfill child support obligations he had been ordered to pay by prior court orders in the amounts stated in her petitions. She further testified to the hardship of supporting their three children by herself and described the needs of their eldest child, who is a severely disabled adult. On cross examination, Roseanne confirmed that since 2020, she received a total of \$20,000 from David's father. She clarified, on redirect, that the \$20,000 related to David's prior outstanding child support obligations.

¶ 6

The court found that Roseanne made a *prima facie* showing of contempt and issued a rule for David to show cause why he should not be held in contempt. The record indicates that, upon taking the witness stand, David reported he was feeling ill and requested medical attention. He was transported to a hospital by EMTs.

¶ 7

The hearing resumed on September 17, 2024. David, who is a lawyer,² testified that he has no income or assets to pay toward his outstanding arrearage. According to him, he last received

¹As in their memoranda filed in this court, we use the parties' first names.

²The Attorney Registration & Disciplinary Commission's website indicates that David is not currently authorized to practice law in Illinois for failure to demonstrate compliance with mandatory Continuing Legal Education requirements. The website does not indicate the date on which David became unauthorized to practice law.

income in 2015—attorney fees from a successful case. At present, David was working on three cases. In one, he represents his son in a lawsuit against the Chicago Cubs related to disability accommodations. David expected that he might receive some attorney fees from a settlement. In another case, he represents a plaintiff alleging legal malpractice, which was scheduled to go to trial in April of 2025 in Kane County. David was retained recently on an hourly basis in a third case, but he had not yet been paid.

¶ 8 Apart from that, David stated that he exhausted his assets in 2021, moved in with his father, and is fully dependent on him for support. He reported that he has no personal bank accounts, no credit cards, and no other sources of income. David testified that he owes the IRS \$355,000 and the State of Illinois \$55,000. In addition, former attorneys, a former landlord, and Visa have each obtained judgments against him for tens of thousands of dollars.

¶ 9 David acknowledged that he had previously been found in contempt in this case but purged the contempt with payments of \$5000 each time. Those payments, however, were not made by him, but by his father.

¶ 10 On cross examination, David admitted that he had not obtained or applied for any other employment since 2021, apart from asking other lawyers for work. He admitted that on four prior occasions, he was facing incarceration for civil contempt. On each occasion, he made a \$5000 payment.

¶ 11 David testified, on redirect, that two malpractice cases have been filed against him. Since information about those cases is publicly accessible, he believes they impair his ability to get new clients. David reiterated that the \$5000 payments to purge his prior findings of contempt were made by his father directly to the “Illinois Department of Child Support [*sic*].”

¶ 12 In ruling, the court explained that the burden to show why he should not be held in contempt for failure to pay child support had shifted to him. The court acknowledged that David had asserted the defense of inability to comply due to lack of funds. However, the court noted that he presented no documentary or other evidence to support his testimony. The court went on:

“the defense of poverty and misfortune, if valid as an [excuse] for nonpayment, to which the Court did not hear any valid excuse for nonpayment, other than the choices, the personal choices you have made in the use of your law license, a licensed practicing attorney in the State of Illinois who gave the Court a litany of cases that had been successful, made the choice and continues to make the choice, seeking no other means of legal work to comply with the Court’s orders and simply states, ‘no, I haven’t looked for other work; no, it has been a phone call here and there,’ that the child support obligation was so unimportant that you [sought] no other means by which to comply with the Court’s orders.

* * *

It is unfortunate that you make certain choices and continue to make certain choices, Mr. Cerda, that have pretty dire consequences.

Not only consequences for yourself, but for your children, who are entitled to support. And it is unfortunate that we find ourselves in the situation where you have not met your burden with respect to the willful and contumacious finding by this Court for a violation of the Child Support Order to the amount of *** \$248,648.73.

* * *

And the reason I am making a point of that is to establish for this record that this Court—it is now September of 2024—multiple court appearances, multiple civil contempt proceedings, multiple years of opportunity to comply and noting that the only time there

has been a dollar paid to child support in the past four years is when this Court has made the finding of contempt and when this Court has ordered payment.”

Upon finding David in civil contempt, the court ordered him taken into custody and set a purge amount of \$248,648.73. David filed a notice of appeal the next day.

¶ 13

II. ANALYSIS

¶ 14

David argues that the trial court erred by failing to consider his testimony regarding his financial status in both the finding of contempt and setting the amount he must pay to purge the contempt. He further argues that the court abused its discretion by ordering him jailed without making a finding that he had the ability to pay the purge amount. We agree that the trial court abused its discretion by setting a purge amount without making a finding—or the record otherwise supporting—that David was able to comply.

¶ 15

Courts have the inherent power to compel compliance with their orders. *Sanders v. Shephard*, 163 Ill. 2d 534, 540 (1994). This includes the power to enforce an order to pay money through civil contempt proceedings where there has been a willful refusal to obey the court’s order. *In re Marriage of Harnack*, 2022 IL App (1st) 210143, ¶ 52. “Civil contempt is remedial in nature, intended to benefit the complainant by coercing obedience with a court order.” *Door Properties, LLC v. Nahlawi*, 2023 IL App (1st) 230012, ¶ 30. Thus, a fundamental attribute of civil contempt proceedings is that the contemnor must be capable of taking the action sought to be coerced. *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 279 (2006).

¶ 16

Noncompliance with an order to pay is *prima facie* evidence of contempt. *In re Marriage of Logston*, 103 Ill. 2d 266, 285 (1984). Once a *prima facie* showing is made, the burden shifts to the alleged contemnor to show that he is unable to pay. *Id.*

¶ 17 A defense exists “where the failure of a person to obey an order to pay is due to poverty, insolvency, or other misfortune, unless that inability to pay is the result of a wrongful or illegal act.” *In re Marriage of Betts*, 155 Ill. App. 3d 85, 100 (1987). Further, the defense is unavailable when the contemnor has voluntarily created the inability to comply. *Harnack*, 2022 IL App (1st) 210143, ¶ 52. To prove the 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.* Financial inability to comply with an 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 regarding financial status is insufficient. *Id.* (citing *In re Marriage of Chenoweth*, 134 Ill App. 3d 1015, 1019 (1985)).

¶ 18 Whether a party is guilty of contempt is a question of fact to be resolved by the circuit court. *Harnack*, 2022 IL App (1st) 210143, ¶ 47. We will not disturb the court’s judgment on appeal unless it is against the manifest weight of the evidence, or the record reflects an abuse of discretion. *Id.* “A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented.” *Best v. Best*, 223 Ill. 2d 342, 350 (2006). “An abuse of discretion occurs when no reasonable person would take the view of the circuit court or when the court commits an error of law.” *Door Properties, LLC v. Nahlawi*, 2023 IL App (1st) 230012, ¶ 25.

¶ 19 Here, the court found that David’s failure to pay was due to his choices. Specifically, the court explained that David failed to use his law license or otherwise obtain employment to earn income with which he could meet his child support obligations. Thus, the court concluded that David failed to establish a defense and his noncompliance with child support orders was willful.

In other words, David voluntarily created his inability to comply. A court's decision as to the sanction that should follow, however, is a separate determination.

¶ 20 As noted, the ability to comply with what is ordered is fundamental to civil contempt. Although a respondent bears the burden of proving their inability to comply, civil contempt is inappropriate unless the court is convinced that the respondent has the ability to do what the court has ordered. See *Sharp*, 369 Ill. App. 3d at 283 (affirming civil contempt order when the evidence established that the contemnor had the ability to pay the purge amount). Without the ability to comply, the sanction is punitive instead of coercive. *Nahlawi*, 2023 IL App (1st) 230012, ¶¶ 38-40 (observing that an improper purge provision morphs a civil contempt order into a punitive order of criminal contempt).

¶ 21 In cases where courts have affirmed civil contempt orders when the respondent claimed an inability to pay, the record otherwise indicated that the respondent did have such an ability. See *Logston*, 103 Ill. 2d at 286 (“[t]he record shows Eugene’s monthly income with reasonable certainty.”); *In re Marriage of Harnack*, 2022 IL App (1st) 210143, ¶ 53 (observing that the contemnor “is not impoverished” and transferred assets to an offshore account); *Dall*, 212 Ill App. 3d at 94 (contemnor had retirement income and proceeds from other sources). No such evidence appears in the record here. Moreover, the court’s remarks implicitly and necessarily accepted David’s testimony and recognized that he has had no income for several years and, thus, was presently unable to pay.

¶ 22 Nonetheless, the court appeared to rely on the fact that payments were made when David had been threatened with contempt on prior occasions. Yet, the record indicates that those payments were made by David’s father. Roseanne acknowledged so in her testimony. Payments made in the past by David’s father are an inappropriate basis to believe that David can pay. A

person held in civil contempt must personally hold the keys to their cell. *In re Marriage of Knoll*, 2016 IL App (1st) 152494, ¶ 58. “A contempt order may not use the contemnor as a ‘hostage’ to put pressure on third parties interested in his or her release from contempt.” 17 Am. Jur. 2d Contempt § 200 (October 2024).

¶ 23 In sum, the record fails to support that David can purge himself of the contempt. “A civil contempt order that fails to provide the contemnor with the ‘keys to his cell’ is void.” *Knoll*, 2016 IL App (1st) 152494, ¶ 58. Accordingly, we must vacate the contempt order.

¶ 24 III. CONCLUSION

¶ 25 Based on the foregoing, we vacate the order of indirect civil contempt. We order that David be released immediately. Nothing in this order should be taken as a bar to any future contempt proceedings related to nonpayment of child support. The mandate shall issue *instanter*.

¶ 26 Vacated.