ILLINOIS TRIAL COURT
DIVORCE DIGEST™

Hon. Pamela Loza ***Cook County***

Poverty Claim a Sham *08 D 30056*

(M) – Alan Toback, Sarah Czuprenski (F) – Karen Aldrich, Anne O'Connell

Hon. Mark J. Lopez ***Cook County***

Deficient Discovery Defeats Claim *07 D 7096*
(W) – Karen L. Levine, Melissa B. Pryor (H) – Steven Lake, Michael DiDomenico

Appellate Review:

#10 Hon. Raul Vega ***Cook County***

Removal Denied Despite Major Employment Opportunity *Affirmed* 1/27/2012 No. *1-12-111916*

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Poverty Claim a Sham

The parties were divorced in January of 2009. The father brought a motion to modify or abate his child support 6 months later claiming that his income had been reduced. He brought an amended motion one year later. Conversely, the mother brought two petitions for indirect civil contempt against him for failure to pay support, failure to contribute to the children's costs and failure to pay the mortgage on the marital residence. Judge Pamela E. Loza denied the father's motions. She further found that the father had engaged in a "veiled attempt to create a sham of poverty" and was in willful contempt owing $58,913 towards various court ordered obligations.

The mother was represented by Alan Toback and Sarah Czuprenski of Lake Toback. The father was represented by Karen Aldrich and Anne O'Connell.

The parties were divorced in January 2009. They had twins, age 7. A joint parenting agreement (JPA) and marital settlement agreement (MSA) were incorporated into the Judgment for Dissolution of Marriage. The JPA provided that the mother was to be the primary residential parent of the children. The father agreed to pay $2,600 per month in child support, which was in excess of the statutory guidelines, based on the needs of the children and the mother's waiver of maintenance.

The parties agreed that the father would pay 100% of the children's pre-school costs through the 2009-10 school year, after which the parties would split the children's educational costs equally. They also agreed to split the cost of Polish school 50%/50%. The father agreed to maintain medical insurance for the children and life insurance coverage for himself naming the mother as beneficiary/trustee. The parties also agreed to sell the marital residence and the father was to be responsible for the payment of the mortgage for February and March. Thereafter the wife was to pay the mortgage until it was sold.

The husband filed a Petition to Modify/Abate Support on July 1, 2009 and an amended Motion to Modify/Abate Support on July 21, 2010. The wife filed a Petition for Indirect Civil Contempt on July 31, 2009 and an Amended Petition for Indirect Civil Contempt on March 2, 2010.

The husband contended in his original motion that a substantial change in circumstances arose permitting a reduction or abatement in child support. He incorporated an entity entitled De Villa Painting Corp. which he operated. His customers had consisted of new home builders/general contractors and the building of new homes in the Chicago area. However, new home building had dropped to record lows in 2009. Judge Loza found that this argument was completely without merit. She stated that his income expense affidavits were "completely unreliable and [were] not worth the paper on which they [were] written."

The father stated that he had an adjusted gross monthly income of $4,487 in 2009, yet he failed to include the $42,500 he deposited toward the purchase of various properties. He also failed to include $10,000 that he received from a painting company and $23,185 that he used to pay back an alleged debt.

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The father's amended motion alleged that his obligation to pay support in the original MSA was based on his annual net income of approximately $111,500. He claimed that his adjusted gross receipts were only $33,000 in 2010, yet he admitted that $103,000 was deposited into his business bank account in 2010. Judge Loza found that the testimony of his accountant was completely without merit.

A business associate was called to testify about their business dealings. Judge Loza found that the father was using this man and his wife as straw people to try and defeat the mother's interest in some property and it was only a "veiled attempt to create a sham of poverty." There were other instances of the father funneling monies through various sources and then back to himself. Judge Loza determined that there was no substantial change in his income and therefore, no substantial change in circumstances.

In order to sustain his burden, the father had to make a prima facie showing that he failed to make the child support payments as provided and that his failure to not make the child support payments was not willful. In re Marriage of Chenoweth, 481 N.E.2d 765 (June 20, 1985). Judge Loza found that the father not only had the ability to support but he chose to use the money he had to make other investments rather than invest in the support of his children.

The Judge found that the father had failed to pay child support in the amount of $29,120 plus statutory interest. The mother contended that he had failed to pay tuition, book and fees in the amount of $16,336.65 for the 2009-10 school year. He also failed to pay for his half of the children's summer camp expenses, which was $1,148.30. The mother claimed that he failed to pay the mortgage from February to March, which he was ordered to do, in the amount of $12,309.53. The total owed by the father was $58,913.

Judge Loza denied the father's motion and amended motion to modify/abate child support. She granted the mother's Petition for Rule to Show Cause relative to lack of support payments, failure to pay for the children's camp costs.

Deficient Discovery Defeats Claim

The parties were divorced in 2009. Shortly thereafter, the ex-husband received 1.7 million dollars in funds from his company. The ex-wife brought a Petition to Modify the Judgment for his having failed to disclose this. Judge Mark Lopez dismissed the wife's Petition, found that both parties were aware that there would be an additional distribution and their negotiations were based on a disclosure and receipt of such. Both parties had instructed their attorneys to avoid further discovery and updates during the divorce proceedings.

The ex-wife was represented by Karen L. Levine and Melissa B. Pryor of Miller, Shakman and Beem. The ex-husband was represented by Steven Lake and Michael DiDomenico of Lake Toback.

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The parties entered into a marital settlement agreement (MSA) and a Judgment for Dissolution of Marriage was entered in September 2009. The ex-wife brought a Petition to Modify the Judgment alleging that the ex-husband failed to disclose his receipt of a distribution of approximately $1.7 million from his company (the company), that he failed to disclose that there was approximately $4 million in cash in the company's bank account, that he failed to disclose that he was to receive a multi-million dollar payment for work done during the parties' marriage and that he misrepresented in his Affidavit of Assets that he had no income from the company from July 18, 2009 to September 2, 2009. She also alleged that he failed to disclose that he held an ownership interest in two companies.

The ex-wife argued that these material misrepresentations of fact were false, misleading, and relied on by her when she agreed to the terms of the MSA. Paragraph F of the MSA executed by both parties reflected that they both had the benefit of legal counsel and that "each party ha[d] specifically waived the exercise of: 1. Any rights to take additional discovery to the extent not pursued; 2. Any rights to take further steps in connection or with obtaining any updates or further appraisals or valuations of any property held by either of the parties; and 3. Any rights to pursue claims for dissipation or otherwise. Further, the parties have instructed their respective attorneys to take no further measures themselves or through otherwise with respect to the foregoing." The ex-husband filed a motion to dismiss the ex-wife's Petition to Modify.

The ex-husband paid to the ex-wife $2,000,000 upon signing the MSA and $475,000 on January 15, 2010. In return for those payments, the ex-husband was awarded 100% of the company. At hearing, both parties agreed and they both had and took the opportunity to value the company. The parties agreed that the ex-husband did not have to disclose an updated value of the company bank account or the value of his interest.

Approximately three weeks after the entry of the Judgment, the ex-husband received a distribution of approximately $1.7 million. This distribution came from the completion of a contract that the ex-wife was fully appraised of. The parties had agreed that the ex-wife would receive an additional cash payment of $475,000 from the ex-husband on or before January 15, 2010. The ex-husband claimed that these monies were negotiated due to his anticipated receipt of funds.

Judge Lopez found that the ex-husband's motion to dismiss was well pled. "Section 2-1401 does not afford a litigant a remedy whereby he may be relieved of the consequence of his own mistakes or negligence." *Brockmeyer v. Duncan*, 18 Ill. 2nd 502 (1960). Additionally, "to set aside a judgment based on newly discovered evidence, it is quite settled that the evidence must be such as could not reasonably have been discovered at the time of or prior to the entry of judgment." *In re the Marriage of Travlos*, 218 Ill. App. 3d 1030 (1991). Judge Lopez found that both parties were aware that there would be an additional distribution. After the required taxes, the final amount received by the ex-husband was $1,084,914.24. The ex-wife received $475,000.00 of that sum.

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Judge Lopez found that the value of the company was fully litigated by the parties and valued in 2008. Both parties were free to obtain updated information if they had chosen to do so, and both parties elected not to. The parties had the option of waiting until receipt of the funds, and the exact dollar amount of the distribution was known with specificity, to prove up the dissolution and chose not to.

Judge Lopez found that, regarding the husband's failure to disclose an ownership interest in two companies, there was a question of fact that had to be determined. He denied the motion to dismiss on that count and allowed him time to respond to her motion. This matter is currently in litigation and will be reported on in a future issue of the Digest.

APPELLATE REVIEW:
Removal Denied Despite Major Employment Opportunity

In its August 2011, issue the Digest reported on a case in which the mother became an executive at Marsh, Inc. in New York. She filed a Petition for Removal and a Petition to Increase Child Support. Judge Raul Vega found that the mother failed to meet her burden of proof that removal would be in the best interest of the children, and denied removal. The Judge also found that the mother failed to show that the father's income had increased in order to warrant a finding of an ability to pay more child support.

The father was represented by Michael DiDomenico of Lake Toback, Ltd. The mother was represented by Vincent Stark and Jami Buzinski of Kamerlink, Stark, McCormack and Powers, LLC.

On January 27, 2012, the Appellate Court found that Judge Vega's decision denying the removal was not against the manifest weight of evidence and that it was not against the best interest of the children. The Judgment was affirmed. *Demaret*, 2012 IL App (1st) 111916.

To read the Appellate Opinion, please sign on to www.illinoisdivorcedigest.com.