

No. 1-17-1583

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

ELISA SCOTT,)	
)	
Petitioner-Appellee,)	Appeal from the
)	Circuit Court of
)	Cook County
v.)	
)	No. 11 D 50895
KENNETH WRIGHT,)	
)	
Respondent)	Honorable
)	Ellen L. Flannigan,
)	Judge Presiding.
(Parres Wright, Contemnor-Appellant).)	

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Mikva and Justice Griffin concurred in the judgment.

ORDER

- ¶ 1 *Held:* Finding of indirect criminal contempt is reversed.
- ¶ 2 This contempt proceeding was commenced in the circuit court of Cook County, domestic relations division, on November 1, 2016, when plaintiff, Elisa Scott, filed a petition for rule to show cause against the alleged contemnor, Dr. Parres M. Wright (Parres), a non-party witness in the underlying proceeding involving a custody dispute. Scott moved the court “to issue a rule to show cause against Dr. Parres Mone Wright to show cause if she can, why she should not be held

in contempt of the orders entered on May 19, 2016 and June 27, 2016 . . . for failing to appear at trial and to compel her appearance.” Following a hearing on the petition, on February 8, 2017, Parres was found to be in indirect civil contempt and was committed to the Cook County department of corrections “there to remain until she shall have purged herself of contempt by paying Scott Rule 508(B) fees. Commitment is stayed until hearing on the 508 petit[ion] for fees after which she shall post a bond in the amount ordered by the court.” After another hearing, circuit court ordered Parres to pay \$12,265.90 to Scott’s attorneys and “that payment *** shall purge Ms. Wright of this Court’s contempt finding against her.” On May 30, 2017, the circuit court entered a judgment order against Parres in favor of the Barclay Law Group, P.C. in the amount of \$12,266.90 with the judgment order concluding with the statement “[T]he finding of Indirect Civil Contempt is discharged.”

¶ 3 On appeal, Parres argues: (1) the trial court mischaracterized the contempt as indirect civil contempt; (2) she was deprived of her constitutional right to due process because Scott failed to show that there was a clear order that Parres appear at a specified trial date and that such an order was received by Parres; (3) the trial court erred when it refused to allow Parres to subpoena witnesses to appear and testify in her defense; and (4) the trial court erred in awarding fees under section 508(b) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/508(b) (West 2016)) for two attorneys. For the following reasons, we reverse.

¶ 4 **BACKGROUND**

¶ 5 Parres Mone Wright is the wife of Kenneth Wright, and a non-party witness in the underlying domestic relations custody action between Elisa Scott and Kenneth Wright. On May 19, 2016, the court entered an order indicating that Parres had appeared in court at 3:35 p.m. and

that she was ordered to appear on June 27, 2016, at 9:30 a.m. All trial subpoenas were entered and continued until then. The order indicates that Parres was given a copy of the order. On June 27, 2016, the court continued all trial subpoenas to November 1, 2016. The record does not reflect if Parres was present in court on June 27, 2016.

¶ 6 On November 1, 2016, plaintiff, Elisa Scott, filed a petition for rule to show cause against Parres to show cause why she should not be held in contempt for violating the court's orders for failing to appear at trial on May 19, 2016, and June 27, 2016. Thereafter, on November 1, 2016, court entered an order that "a rule shall issue against Dr. Parres Mone Wright for failing to follow the court's orders of May 19, 2016 and June 27, 2016 to show cause as to why she should not be held in contempt of court[.]" The court indicated in the written order that Parres' name had been called at 10:15 a.m. and 3:58 p.m. and that there was no response from her. The custody trial was continued to November 2, 2016.

¶ 7 On November 2, 2016, the case was continued for trial to November 3, 2016, and all subpoenas were entered and continued, as was the rule to show cause against Parres. The record does not include an order from November 3, 2016, but on November 4, 2016, the trial was continued to November 22, 2016, with all trial subpoenas continued to that date. The rule to show cause was also continued to November 22, 2016.

¶ 8 On November 16, 2016, petitioner filed a certificate of service with the court indicating that Parres had been served at her place of employment with a copy of the rule to show cause, and the November 1, 2, and 4 orders. Her husband, Kenneth Wright, subsequently filed a motion to quash service.

¶ 9 On November 22, 2016, the court denied Kenneth's motion to quash service because he

did not represent Parres and because he had no standing to challenge service. The custody matter was continued to December 7, 2016, for closing argument, with all trial subpoenas and the rule to show cause were also continued to the same date.

¶ 10 A contempt hearing was held on February 8, 2017. Parres testified that “I was not told to be here. On the days that I've been told to be here, I've been here. So I didn't receive anything saying be here.” On direct examination, Parres testified that the first time she was asked to come to court was in May. She received a subpoena to appear in court on May 17. Parres testified that she did come to court on May 17 and another day that week, but could not remember what day. When she was there on May 17, there was no court. She waited a while for someone to call her name but no one did. She waited for a couple of hours outside the courtroom. She did not speak to her husband while she was waiting.

¶ 11 Sometime later that week, Parres was in court again. She drove down with her husband and arrived about 9 a.m. She spoke with someone in uniform who told her to wait. Someone in a uniform finally called her name about 3:45 that afternoon. That was the first time she met Judge Flanagan. It was too late to take her testimony that day so she was instructed to come back on another day in late June. She was given a form with the date which indicated June 27 at 9 a.m. in room CL11.

¶ 12 Parres testified that she appeared in court on June 27 at 9 a.m. She waited as she had done before until 3 p.m. She did not remember if she spoke with her husband that day. Her name was never called. She never received any information about additional court dates until she received a subpoena in December. She did not learn from her husband that there were subsequent court dates after June 27 because he never talked to her about the case. Parres never asked her husband

what happened to the case or why she was not able to testify. She was not told about the trial dates of November 1, 2, or 3. She was not aware of any court dates between June 27 and December.

¶ 13 Parres denied that she provided anyone, including her attorney Ms. Hollis, dates that she was available to give testimony in November. Parres could not remember the exact date she hired Ms. Hollis to represent her regarding her giving testimony in the underlying case. She believed it was between June and September.

¶ 14 On cross-examination by her husband, Kenneth Wright, Parres testified that she did not receive notice from opposing counsel, the Sheriff's office or anyone else to appear in court on November 1, 2016.

¶ 15 On redirect, Parres admitted that the order she received in May telling her to return to court on June 27 also stated "all trial subpoenas entered and continued."

¶ 16 The court heard closing arguments. After finding Parres' claim of lack of notice to be incredible, the trial court entered an order stating that Parres

"[i]s hereby found and declared to be in indirect civil contempt of court for willful failure to obey the court's order as herein stated"; and that she "[i]s ordered committed to the Cook County Jail, there to remain until she shall have purged herself of contempt by paying Scott Rule 508(B) fees. Commitment is stayed until hearing on the 508 petit[ion] for fees after which she shall post a bond in the amount ordered by the court, with the clerk of the circuit court."

The court continued the matter to allow plaintiff's attorneys, the Barclay Law Group (BLG) to file a petition for attorney fees and costs pursuant to section 508(b) of the Act.

¶ 17 On April 19, 2017, the court denied Parres’ motion to reconsider and granted BLG’s petition for attorney fees and costs. BLG’s billing for attorney fees reflected fees charged for two attorneys, Lester Barclay at an hourly rate of \$450 and Melba Castillo at an hourly rate of \$300, or a combined rate of \$750.00/hr. In rejecting Parres’ argument that the court appearances by Melba Castillo, as “second chair”, were *per se* unreasonable, the trial court stated that it “does not find that a second chair is unreasonable as Castillo assisted Barclay throughout the hearing and made argument as to certain objections made by both Mrs. Wright and Mr. Wright.” The court ordered Parres to pay BLG \$11,087.50 in attorney fees and \$1169.40 in costs. The trial court further ordered “[t]hat payment of the aforementioned amount shall purge Mrs. Wright of this Court’s contempt finding against her.” Judgment was entered on May 30, 2017, which directed Parres to pay BLG fees and costs in the amount of \$12,256.90. The judgment order concluded by stating: “The finding of Indirect Civil Contempt is discharged.” Ms. Wright thereafter filed a timely notice of appeal.

¶ 18

II. ANALYSIS

¶ 19 Parres argues that the court actually found her in indirect criminal contempt rather than indirect civil contempt as the court’s order indicates. Parres argues that the punishment for her contumacious conduct, commitment to the Cook County department of corrections and the payment of Scott’s attorney fees and costs pursuant to section 508(b) of the Act, shows that the court intended to punish her for violating a court order, not to coerce her to comply with a court order. Parres further argues that the criminal contempt must be vacated because she was not afforded certain rights which must accompany a criminal contempt proceeding. We agree.

¶ 20 Contempt can be either criminal or civil and either direct or indirect. The distinction

between civil and criminal contempt depends on the nature of the sanction being imposed, rather than the trial court's characterization. *In re Marriage of Betts*, 200 Ill. App. 3d 26, 47 (1990).

The test for determining whether contempt proceedings are criminal or civil in nature is identifying the dominant purpose for which sanctions are imposed. *Id.* A civil contempt sanction is coercive and seeks to compel future compliance with a court order, whereas a criminal contempt sanction punishes a party for past conduct. *People v. Warren*, 173 Ill. 2d 348, 368 (1996). Civil contempt relies on coercion of the contemnor: she is being coerced to do something and thus can be relieved from the coercion by compliance. *In re Marriage of Ruchala*, 208 Ill. App. 3d 971, 977 (1991). Criminal contempt is conduct which is directed against the dignity and authority of the court. *Id.* Where the contemnor is being punished without the possibility of relief from punishment, the finding is one of criminal contempt. *Betts*, 200 Ill. App. 3d at 43 (1990). In other words, the test is whether, considering the totality of the circumstances, the contempt proceeding is coercive or punitive in nature. *In re Marriage of Miller*, 88 Ill. App. 3d 370, 373 (1980).

¶ 21 There is also a distinct difference between indirect and direct contumacious conduct. Indirect contempt arises from conduct that occurred outside of the judge's presence. *Ruchala*, 208 Ill. App. 3d at 977. In indirect contempt cases, the judge does not have full personal knowledge of all elements of the contempt. *Betts*, 200 Ill. App. 3d at 48. Direct contempt arises from conduct that occurred in the judge's presence, making all elements of the offense within the judge's personal knowledge. *People v. Simac*, 161 Ill. 2d 297, 306 (1994). While a trial court can punish direct contempt summarily, indirect contempt requires the due process rights of notice, opportunity to answer, and a hearing. *People v. Kaeding*, 239 Ill. App. 3d 851 (1993). The power

to punish for contempt rests within the sound discretion of the trial court and its determination will not be disturbed on review absent an abuse of that discretion. *In re Estate of Maslowe*, 133 Ill. App. 3d 1043, 1046, (1985).

¶ 22 Scott has failed to file a brief with this court. However, the alleged errors are the type that can be decided without the aid of an appellee's brief. In such a case, we may reverse "if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record." *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). We find that the appellant's brief establishes a *prima facie* case of reversible error and we reverse.

¶ 23 The trial court found Parres "to be in indirect civil contempt of court for willful failure to obey the courts order as herein stated" and ordered her "committed to the Cook County Jail, there to remain until she shall have purged herself of contempt by paying Scott[']s Rule 508(B) fees."¹ Despite the language of the court's order, it is clear from the record before us that Parres was found in indirect criminal contempt. Although Parres never surrendered to Cook County jail, both the threat of imprisonment and the payment of the section 508(b) fees were imposed as punishment for her past conduct, namely Parres's failure to appear in court as a witness at the custody hearing in violation of a court order. Nothing about the contempt order was coercive or sought to compel Parres's future compliance that she should appear as a witness, which would support a finding of indirect civil contempt. The custody hearing had concluded and Parres did not have the ability to purge the contempt by compliance with the relevant court orders. *Felzak v. Hruby*, 226 Ill. 2d 382, 391 (2007) (the contemnor in a civil contempt proceeding must have the

¹There is no dispute in this case that the contempt alleged is indirect contempt, in that it involved Parres' failure to appear in court, a matter outside of the court's presence.

opportunity to purge him or herself from contempt by complying with the relevant court order). By the time this contempt proceeding was adjudicated, the custody proceeding had been completed and there was no action that Parres could take to purge herself into compliance with the orders to attend the custody hearing as a witness. After considering the totality of the circumstances, the contempt proceeding was clearly punitive in nature given the monetary sanction imposed long after the custody hearing where Parres was to be a witness had concluded. Therefore, we find that the contempt finding was actually a finding of indirect criminal contempt. See *Miller*, 88 Ill. App. 3d at 373.

¶ 24 There are certain rights afforded to a person charged with indirect criminal contempt, namely all of the constitutional protections and procedural rights afforded to other criminal defendants that Parres was not afforded in this case. *Betts*, 200 Ill. App. 3d at 58. The rights afforded to criminal defendants include the right to be charged by a written complaint, petition or information; the right to know the nature of those charges; the right to personal service; the right to file an answer; the right to be heard; the right to present evidence; the right to confront and cross-examine witnesses; the right to be personally present at trial; the right to subpoena witnesses; the right to a public hearing; the right to the privilege against self-incrimination; the right to counsel; the right to the presumption of innocence; and the right to be proven guilty beyond a reasonable doubt. *People v. Budzynski*, 333 Ill. App. 3d 433, 439 (2002); *Betts*, 200 Ill. App. 3d at 58. In addition to these rights, “[a] defendant in an indirect criminal contempt proceeding is entitled to a jury trial *** if the potential penalty may exceed six months’ incarceration or a fine greater than \$500.” *City of Rockford v. Suski*, 307 Ill. App. 3d 233, 247 (1999).

¶ 25 A defendant in an indirect criminal proceeding may also move for a substitution of judge under section 114-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-5 (West 2010)). *Hoga v. Clark*, 113 Ill. App. 3d 1050, 1059 (1983). If the motion is made within 10 days after the cause has been placed on the judge's call, the named judge cannot proceed further and must transfer the case. 725 ILCS 5/114-5(a) (West 2010). The motion for substitution of judge may be made at any other time provided that the movant can prove prejudice on the part of the judge. *In re Marriage of Madary*, 166 Ill. App.3d 103, 106 (1988); 725 ILCS 5/114-5 (West 2010).

¶ 26 Parres was not afforded most of the constitutional and procedural rights set forth above. To begin with, she was not given notice that she could be held in indirect criminal contempt. Rather, the motion filed by Scott asked the court to find Parres in "contempt" for failure to attend two court hearings. This motion did not put Parres on notice that she was facing criminal sanctions including confinement in the Cook County jail.

"The alleged contemnor cannot assert these [constitutional and procedural] rights unless he receives proper notice of the nature of the charges against him. Accordingly, any party wishing to initiate indirect criminal contempt proceedings must not only notify the alleged contemnor that sanctions are being sought, but that the proceedings will be criminal in nature. [Citation.] Thus, indirect criminal contempt proceedings cannot be initiated by a pleading captioned so as to imply that the proceedings will not be criminal. Instead, a party seeking a finding of indirect criminal contempt must say so explicitly by filing a pleading captioned 'petition for adjudication of criminal contempt.' [Citation.]" *People v. Goleash*, 311 Ill. App. 3d 949, 957 (2000).

Furthermore, Scott's motion was referred to as a motion for a rule to show cause as to why she should not be held in contempt, likely implying to a layperson that the requested proceedings did not implicate a penal sanction of incarceration. The court also issued a rule to show cause against Parres in its November 1, 2016, order. See *In re Marriage of Carpel*, 232 Ill. App. 3d 806, 823 (1992) (holding that pleading captioned " 'petition for rule to show cause' " implies that the proceeding will be civil because a criminal defendant can never be compelled to " 'show cause' "); *Betts*, 200 Ill. App. 3d at 58-59. Parres was not informed that she could be found in criminal contempt and therefore it cannot be said that she was ever served with a proper complaint or was ever properly notified of the charges against her and this failure results in a violation of her due process rights.

¶ 27 The contempt proceedings in this case also suffer from a plethora of additional violations of Parres's due process rights. Parres could have moved for a substitution of judge, asked for a jury trial, and exercised her right to remain silent under the fifth amendment of the United States Constitution, as well as the right to present evidence and to confront and cross-examine any witnesses against her. She was precluded from exercising these rights because she was never informed that she was facing criminal contempt charges. Furthermore, the nature of the proceedings in the circuit court also improperly shifted the burden of proof to Parres to establish why she should not be held in contempt. In a criminal contempt proceeding, the contemnor has the right to be proven guilty beyond a reasonable doubt and cannot be compelled to "show cause." *Betts*, 200 Ill. App. 3d at 58-59. The denial of Parres's constitutional due process rights requires reversal.

¶ 28 We are fully aware that the award of attorney's fees provision under section 508(b) is

authorized in a contempt proceeding. *In re Marriage of Davis*, 292 Ill.App.3d 802, 811 (1997).

Section 508(b) of the Act provides that:

“b) In every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against whom the proceeding is brought to pay promptly the costs and reasonable attorney's fees of the prevailing party. If non-compliance is with respect to a discovery order, the non-compliance is presumptively without compelling cause or justification, and the presumption may only be rebutted by clear and convincing evidence. If at any time a court finds that a hearing under this Act was precipitated or conducted for any improper purpose, the court shall allocate fees and costs of all parties for the hearing to the party or counsel found to have acted improperly. Improper purposes include, but are not limited to, harassment, unnecessary delay, or other acts needlessly increasing the cost of litigation.” 750 ILCS 5/508(b) (West 2016).

¶ 29 Although “[s]ection 508(b) of the Act is mandatory, not discretionary, and does not allow for the court to exercise its discretion as to payment if the defaulting party's conduct was without cause or justification” (*In re Marriage of Walters*, 238 Ill. App. 3d 1086, 1098 (1992); see also *In re Marriage of Clay*, 210 Ill. App. 3d 778, 782 (1991)), we are unaware of any Illinois case where section 508(b) fees were assessed as a contempt sanction against a non-party witness based on a contempt finding. Nevertheless, the record support's our finding that the trial court's intention was to punish Parres for her prior violations of the court's orders to appear as a witness on certain dates and therefore the circuit court should have conducted an indirect criminal contempt proceeding. No part of the court's imposed sanctions served to coerce Parres's

compliance with the court's order or to compel her to appear for trial. As stated, the trial was long over at the time the court entered judgment in this case.

¶ 30

III. CONCLUSION

¶ 31 For the reasons stated above, we reverse the orders of the circuit court of Cook County finding the Parres in indirect civil contempt, and awarding attorney fees to BLG in the amount of \$12,256.90. Remand to the circuit court is not required because the petition for a finding of civil contempt for failure to appear as a witness in a civil proceeding that has concluded renders the petition moot.

¶ 32 Reversed.