

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).

2011 IL App (4th) 110020-U

Filed 12/2/11

NO. 4-11-0020

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Marriage of)	Appeal from
JOSHUA SHARP,)	Circuit Court of
Petitioner-Appellant,)	Macon County
and)	No. 06D603
CANDICE SHARP,)	
Respondent-Appellee.)	Honorable
)	Katherine M. McCarthy,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Cook and Knecht concurred in the judgment.

ORDER

- ¶ 1 *Held*: Trial court did not err in ordering appellant to pay \$319.92 in child support per week.
- ¶ 2 On May 18, 2010, the trial court entered an order titled "Order as to Modification of Judgment of Dissolution of Marriage." The court ordered petitioner, Joshua Sharp, to pay child support for one child in the amount of \$319.92 per week. On June 15, 2010, Joshua filed a petition for rehearing and a motion for reconsideration. On December 6, 2010, the trial court entered an order denying Joshua's petition for rehearing and motion for reconsideration. Joshua makes the following arguments on appeal: (1) the trial court erred in strictly applying section 505(a)(3) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/505(a)(3) (West 2008)) in disregard of the parties' agreement as to how child support would be calculated; (2) the trial court erred in its interpretation of the term "net income" as that term was used in the

parties' marital settlement agreement; and (3) the trial court erred in failing to deviate downward in its support order pursuant to section 505(a)(2) of the Act (750 ILCS 5/505(a)(2) (West 2008).

We affirm.

¶ 3

I. BACKGROUND

¶ 4

This appeal stems from the dissolution of the marriage of Joshua and Candice Sharp. As this case has been ongoing since December 2006, we address only the facts needed to understand the issue before this court. In February 2010, Joshua and Candice entered into a marital settlement agreement and joint parenting agreement. Joshua and Candice had one child together, Cameron, who was born on December 15, 2001. According to the agreement:

"The husband is self-employed. As a result, [Joshua] shall pay to [Candice], as and for the support of the minor child, Cameron, the sum of 20% of his annual net income on a monthly basis, commencing on the 5th day of the first month after entry of Judgment of Dissolution, and continuing on a monthly basis on the 5th day of the month thereafter. His annual net income shall be calculated by averaging his 2009, 2008[,] and 2007 tax returns."

At a hearing on February 26, 2010, Joshua testified he was employed at Sharp's Taekwondo, a business he owned. Joshua did not testify as to any special meaning to be applied to the term "net income" in the marital settlement agreement. Joshua testified he was not able to provide the court with a figure as to his "net income." Candice also did not testify as to any special meaning to be applied to the term "net income." The trial court found the marital settlement agreement resolved all property and debt issues between the parties except for the allocation of a boat,

which is not at issue in this appeal. At the hearing, the court stated Joshua was ordered to pay 20 percent of his net income to be determined within 14 days.

¶ 5 At a hearing on April 26, 2010, Joshua's attorney represented Joshua's monthly child support payments would be significantly less than the \$500 he was currently paying (pursuant to a temporary support order) when his net income for 2007, 2008, and 2009 was averaged. Candice's attorney told the court she did not have a complete set of tax returns from Joshua for 2007, 2008, and 2009. Joshua's attorney replied: "I've given her the page that shows adjusted gross income for the sake of brevity." The court ordered Joshua's attorney to provide Candice's attorney with the full tax returns within five days.

¶ 6 On May 10, 2010, the trial court held a status hearing. Joshua's attorney told the court the hearing was set for both status and to fix support. Candice's attorney stated if the hearing was to fix support she would need a continuance. Candice's attorney informed the court she had received a complete tax return for 2008. However, Joshua had not provided a complete return for 2009 as it was missing itemization sheets for business expenses and a few other items. The court then asked Joshua's counsel's position on Candice's motion and the following exchange occurred:

"[JOSHUA'S ATTORNEY]: We object to that, Judge, strenuously because we have furnished them the tax returns with respect to adjusted gross income. I have used that figure as his net income, and it actually would be less than that, and – but still – and I base it on a three-year average. The 2007 return, which they have a copy of, is a joint return. I based it on the last three years

adjusted gross income of Mr. Sharp, and the additional discovery will serve no purpose whatsoever. I mean, the figure is what it is. It's never been challenged by the Department of Revenue. It is what it is, and it's time that we fix support which is substantially less than what he's been ordered to pay of \$500 a month. If this goes another month, he's – he's having a hard time as it is –

* * *

THE COURT: I can't – the IRS and the child support purposes, the deductions, I mean, I don't care what the IRS thinks about his deductions. For child support purposes, it's totally different.

[CANDICE'S ATTORNEY]: Right.

¶ 7 On May 12, 2010, the trial court held a hearing to set child support. The trial court asked the parties if they wanted an evidentiary hearing or simply to present arguments. Joshua's attorney asked the court to take notice of the tax returns, and he would base his argument on those returns. He stated, "As far as I'm concerned, that's our evidence." Joshua's attorney argued the figure listed as his business income on his respective tax returns for 2007, 2008, and 2009 should be used to determine his child support obligation pursuant to the marital settlement agreement. Joshua's business income was listed on his tax returns as \$8,498 for 2007, \$20,817 for 2008, and \$19,092 for 2009. By averaging these figures, Joshua's attorney argued the weekly child support payment should be \$62.07.

¶ 8 According to Candice's attorney, Joshua's adjusted gross income for these three

years was \$8,498 for 2007, \$19,346 for 2008, and \$17,743 for 2009. However, Candice's attorney stated Joshua's gross income was \$75,522 for 2007, \$84,886 for 2008, and \$92,571 in 2009. She argued section 505 of the Act (750 ILCS 5/505(a)(3) (West 2008)) defines "net income" as the total income from all sources, minus specifically enumerated deductions. Candice's counsel argued Joshua did not meet his burden of establishing he was entitled to deductions from his gross receipts.

¶ 9 On May 18, 2010, the trial court ordered Joshua to pay \$319.92 per week to Candice for child support. The court ordered the child support retroactive to the entry of the dissolution judgment. In explaining its decision, the court wrote:

"Plaintiff argues that the combined taxable income for the years 2007, 2008, and 2009 total \$48,407.00. When you average the three years of taxable income, this results in an average taxable income to [Joshua] of \$16,135.65. However, a self-employed obligor's taxable income under federal income tax laws is not necessarily the same as the obligor's net income for the purpose of determining child support. We must turn to the statutory definition of 'net income,[]' under 750 ILCS 5/505(a)(3) in order to determine the allowable deductions from gross income to determine net income for child support purposes. The case of *In re the Marriage of Carpel* *** requires the trial court to first start with the obligor's reported gross income from all sources and then deduct from that figure what it deems appropriate under Section 505(a)(3)(h) as

reasonable and necessary expenses for reducing income in determining his net income under the Act. These reasonable and necessary expenses must be for the repayment of debts and are only allowed for the period that such payments are due and terminate when the payment period terminates as well.

It is agreed upon by the parties that [Joshua's] reported gross income from all sources for the year 2007 is \$75,522.00; for the year 2008 is \$84,886.00; and for the year 2009 is \$92,571.00. After applying deductions for self-employment taxes for each of those years, the average net income for purposes of child support calculations is \$83,179.33. Using the statutory guidelines of 20% for one child, this results in a child support obligation for the Plaintiff of \$319.92 per week. There has been no evidence presented by the Plaintiff that any of the other deductions fall within the statutory guidelines set forth in Section 505(a)(3)(h) of the Act."

¶ 10 On June 15, 2010, attorney John L. Davis filed a petition for rehearing on Joshua's behalf, arguing the amount of child support ordered was clearly outside the guidelines and unconscionable because it virtually disallowed any deductions from Joshua's gross income in setting child support. That same day, attorney Darrell Statzer, who was not affiliated with attorney Davis, filed a motion for reconsideration on Joshua's behalf, arguing the court failed to properly calculate Joshua's net income because it failed to deduct Joshua's expenditures for

repayment of debts reasonably necessary for the production of income. Attorney Statzer also argued, in the alternative, the court abused its discretion in failing to take other expenses into account and departing from the guidelines.

¶ 11 On October 14, 2010, the trial court held a hearing on these motions. Yet another attorney, Kent A. Rathbun, who was not affiliated with either of Joshua's prior attorneys, appeared for Joshua to argue these filings. Attorney Rathbun acknowledged he was not proud of either the petition for rehearing or the motion for reconsideration filed by Joshua's previous attorneys but adopted them because it was too late to change them.

¶ 12 On December 6, 2010, the trial court entered an order on Joshua's motion for reconsideration and petition for rehearing. The court found neither the petition for rehearing nor the motion for reconsideration were based on newly discovered evidence unavailable at the time of the original hearing, changes in existing law, or errors in the court's application of the law.

The court stated:

"In [his] oral argument, [Joshua] argues that an ambiguity is raised by the language in the Marital Settlement Agreement pertaining to the calculation of child support (Article 3, 3.1(a)). In the Marital Settlement Agreement, child support is to be calculated by averaging his 2009, 2008, and 2007 tax returns so as to calculate [Joshua's] annual net income. In that same Paragraph, [Joshua] agrees to pay to [Candice] as and for the support of the minor child, Cameron, 'the sum of 20% of his annual net income on a monthly basis ...[.]' Net income for purposes of child support

calculations is very different from a tax payor's net taxable income. Plaintiff now argues that such ambiguity should have been resolved by the court, even though it was not raised by either party at any time during any of the contested hearings on the issue of child support. The Court rejects that argument as a basis for reconsideration or rehearing. At oral argument, the parties agreed that the Plaintiff's reported gross income from all sources for the year 2007 was \$75,522.00; for the year 2008 was \$84,886.00; and for the year 2009 was \$92,571.00. After applying the statutory deductions for each of those years, the Court found that the average net income for purposes of child support calculations is \$83,179.33. The Court found there was not sufficient evidence presented by [Joshua] to support any further allowable deductions. The Court declines to consider [Joshua's] arguments now on that issue."

This appeal followed.

¶ 13

II. ANALYSIS

¶ 14

We first note Candice did not file a brief in this appeal. However, this does not require automatic reversal because appellant continues to bear the burden of establishing trial court error. *TSP-Hope v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1173, 890 N.E.2d 1220, 1223 (2008). While this court will not serve as an appellee's advocate or search the record to affirm the trial court, we may do so if justice requires. *First Capitol Mortgage Corp. v.*

Talandis Construction Corp., 63 Ill. 2d 128, 133, 345 N.E.2d 493, 495 (1976). "When the record is simple, and the claimed errors are such that this court can easily decide them on the merits without the aid of an appellee's brief, this court should decide the appeal on its merits." *TSP-Hope*, 382 Ill. App. 3d at 1173-74, 890 N.E.2d at 1223, quoting *Plooy v. Paryani*, 275 Ill. App. 3d 1074, 1088, 657 N.E.2d 12, 23 (1995). This case can be decided easily.

¶ 15 Joshua argues the use of the term "net income" in the marital settlement agreement is ambiguous. Contrary to Joshua's assertion, "net income" has a well-settled, unambiguous meaning when it comes to setting child support. Section 505(a)(3) of the Act (750 ILCS 5/505(a)(3) (West 2008)) defines "net income" as follows:

" 'Net income' is defined as the total of all income from all sources, minus the following deductions:

(a) Federal income tax (properly calculated withholding or estimated payments);

(b) State income tax (properly calculated withholding or estimated payments);

(c) Social Security (FICA payments);

(d) Mandatory retirement contributions required by law or as a condition of employment;

(e) Union dues;

(f) Dependent and individual health/hospitalization insurance premiums;

(g) Prior obligations of support or maintenance actually

paid pursuant to a court order;

(h) Expenditures for repayment of debts that represent reasonable and necessary expenses for the production of income, medical expenditures necessary to preserve life or health, reasonable expenditures for the benefit of the child and the other parent, exclusive of gifts. The court shall reduce net income in determining the minimum amount of support to be ordered only for the period that such payments are due and shall enter an order containing provisions for its self-executing modification upon termination of such payment period."

¶ 16 In *In re Marriage of Carpel*, 232 Ill. App. 3d 806, 818, 597 N.E.2d 847, 856 (1992), this court made clear tax-reported income does not provide conclusive evidence of either a child support obligor's gross or net income under the Act. The Act provides its own "guidelines on deductions from business income that reflect different policies and purposes than the Federal tax code." *Carpel*, 232 Ill. App. 3d at 818, 597 N.E.2d at 856. When an individual is self-employed, trial courts are directed to start with the obligor's gross income from all sources--not his claimed income after he has deducted all sums permitted by the federal tax code--and "deduct from that figure what it deems appropriate under section 505(a)(3)(h) as reasonable and necessary expenses for producing income in determining his net income under the Act." *Carpel*, 232 Ill. App. 3d at 819, 597 N.E.2d at 857.

¶ 17 In *Gay v. Dunlap*, 279 Ill. App. 3d 140, 145, 664 N.E.2d 88, 92 (1996), this court determined a child support obligor was unable to deduct from his income his automobile

expenses for gas, repairs, and insurance premiums or his entertainment expenses pursuant to section 505(a)(3)(h) of the Act (750 ILCS 5/505(a)(3)(h) (West 1992)) . This court stated "[a]llowing day-to-day business expenses to be deducted under subsection (a)(3)(h) would ignore the language 'for repayment of debts.' " *Gay*, 279 Ill. App. 3d at 147, 664 N.E.2d at 93.

¶ 18 The obligor in *Gay* also sought to deduct money he paid to lease a Mercedes. This court stated just "because an expense falls into the category of a debt repayment does not mean it is deductible" from the obligor's net income. *Gay*, 279 Ill. App. 3d at 148, 664 N.E.2d at 94. "[T]he proponent of the deduction must also show the debts being repaid 'represent reasonable and necessary expenses for the production of income.' (750 ILCS 5/505(a)(3)(h) (West 1992))." *Gay*, 279 Ill. App. 3d at 148, 664 N.E.2d at 94.

"The term 'reasonable' means 'Not immoderate or excessive' (Black's Law Dictionary 1265, 6th ed. 1990)); 'being or remaining within the bounds of reason: not extreme: not excessive' (Webster's Third New International Dictionary 1892 (1986)). Here, we find it applies to the relationship between the amount of the expense and the amount by which income is in good faith expected to increase as a result. This definition implies the same expense could be reasonable in one context and not in another." *Gay*, 279 Ill. App. 3d at 149, 664 N.E.2d at 95.

In *Gay*, the court found no evidence had been presented "regarding the extent to which [the obligor's] use of a Mercedes, as opposed to some other car, was believed to affect his income." *Gay*, 279 Ill. App. 3d at 149, 664 N.E.2d at 95.

¶ 19 The trial court followed *Carpel* in determining Joshua's average net income for the three years set out in the marital settlement agreement. Joshua's attorney failed to introduce any evidence to show Joshua's claimed business expenses were deductible from his gross income pursuant to section 505(a)(3)(h) of the Act (750 ILCS 5/505(a)(3)(h) (West 2008)).

¶ 20 Joshua's action in providing only the first page of his tax returns to Candice's counsel was disingenuous at best. Joshua preferred to use his adjusted gross income, determined after deducting a variety of expenses, including vehicle expenses, as the basis for calculating child support. Moreover, Joshua presented no evidence to the trial court to establish these expenses were properly deductible pursuant to section 505(a)(3)(h) of the Act (750 ILCS 5/505(a)(3)(h) (West 2008)). Further, Joshua's contention Candice bore the burden of showing his deductions were improper is also meritless.

¶ 21 Here, the trial court properly determined the meaning of "net income." Without any evidence from Joshua to support his deductions, the court's calculation of net income without consideration of defendant's "business expenses" was permissible.

¶ 22 While Joshua argues this case was appropriate for a downward deviation from the child support guidelines, he failed to (1) make this argument to the trial court and (2) provide any basis for the court to do so.

¶ 23 III. CONCLUSION

¶ 24 We find Joshua's arguments have no merit whatsoever. Accordingly, we affirm the trial court's judgment.

¶ 25 Affirmed.