

NOTICE

Decision filed 05/24/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-10-0324

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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REBECCA JONES,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellant,	)	Madison County.
	)	
v.	)	No. 04-D-689
	)	
MARK L. ALLEN,	)	Honorable
	)	Ellar Duff,
Respondent-Appellee.	)	Judge, presiding.

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JUSTICE SPOMER delivered the judgment of the court.  
Presiding Justice Chapman and Justice Wexstten concurred in the judgment.

**R U L E 2 3 O R D E R**

*Held:* The trial court abused its discretion by reducing the respondent's child support obligation based on the statutory guidelines, where the evidence showed that the respondent's income is indeterminable. The circuit court's order is reversed and the cause is remanded with directions for the trial court to determine a reasonable amount of child support, pursuant to section 505(a)(5) of the Act (750 ILCS 5/505(a)(5) (West 2008)), and to determine the child support arrearage and statutory interest amounts.

The petitioner, Rebecca Jones, appeals the June 10, 2010, order of the circuit court of Madison County that, *inter alia*, reduced the child support obligation of the respondent, Mark L. Allen, and failed to set forth the amount of child support arrearage and statutory interest owed by Mark. For the following reasons, we reverse and remand with directions.

FACTS

The parties were married on May 29, 1993. During the marriage, four children were born to the parties. On July 9, 2004, Rebecca filed a petition for a dissolution of the marriage. A judgment for the dissolution of the marriage was entered on November 17, 2004, and a subsequent order was filed on January 19, 2005, which determined that Mark had

a monthly net income of \$5,670 and directed Mark to pay Rebecca \$2,265 per month in child support. The order further directed Mark to pay \$453 monthly toward any delinquency should it occur. A supplemental judgment was entered on July 25, 2005, that, *inter alia*, granted joint custody to the parties, with Rebecca designated as the primary physical custodian of the children, and incorporated by reference the January 19, 2005, child support order. On September 17, 2009, the trial court entered an order finding that Mark's gross and net income amounts were "disputed" and that Mark was \$46,580 in arrears on his child support obligation as of August 31, 2009, not including statutory interest. The order maintained the amount of the monthly child support obligation at \$2,265, as established in the January 19, 2005, order, as well as the directive regarding the payment of the arrearages in the amount of \$453 monthly.

On September 28, 2009, Mark filed a petition to modify custody, alleging a substantial change of circumstances in that the parties' two oldest children were now residing with him with Rebecca's consent. On April 29, 2010, Rebecca filed a first amended petition for an adjudication of indirect civil contempt, alleging that subsequent to the trial court's September 17, 2009, order, Mark had failed and refused to pay any amount toward the current support obligation or the arrearages. The trial court entered a custody judgment by stipulation of the parties on April 29, 2010, granting joint custody to the parties, designating Mark as the primary residential custodian of the two older children, and designating Rebecca as the primary residential custodian of the two younger children.

On April 29, 2010, and May 4, 2010, hearings were held on Rebecca's first amended petition for an adjudication of indirect civil contempt and on the issue of the child support obligations of each parent, in light of the modification of custody. Testimony and evidence adduced at the hearings was as follows. Dale Morlen testified that he is the president of Morlen Properties, which sold property to Mark and his live-in girlfriend, Chancy Lambert,

via a contract for deed dated March 20, 2009. Pursuant to the contract, the price of the property is \$130,000. Morlen averred that he receives regular payments on the property from Mark in the amount of \$820 monthly. Morlen testified that Mark makes the payments primarily in cash and sometimes in the form of a check, and he added that Mark is current on all the payments.

Rebecca testified that she is remarried and employed full-time as a teacher for Head Start in Cahokia, where she earns \$24,000 per year. Petitioner's Exhibit 4 was introduced, which is a copy of the 2009 tax return that Rebecca filed jointly with her current husband. Rebecca explained that she gets paid 12 months out of the year through her employment with Head Start, although she works 9 months and is off during the summer. Rebecca identified Respondent's Exhibits 3, 4, and 5 as pay statements from her employment with Head Start. Pursuant to the exhibits, Rebecca testified that her monthly net income is \$1,684. Rebecca testified that during the summer of 2009 she was employed at a daycare in Highland, where she earned gross wages in the amount of \$360 per week. Rebecca presented no paystubs with regard to her job at the daycare, nor W-2's from either the daycare or Head Start, but she testified that she would later produce them to corroborate her testimony. Rebecca testified that she had made no child support payments to Mark since the two older children moved in with him in late summer 2009, although she acknowledged the expenses of having children in the home.

Mark testified that although he was ordered to pay child support to Rebecca in 2005, he had not paid all that he owed. Mark conceded that since the September 17, 2009, order was entered, he had not paid any of the \$2,265 monthly child support obligation or any of the \$453 monthly payments toward the arrearages. He attributed his failure to pay to a lack of income. Mark testified that he resides with his girlfriend, Chancy Lambert, as well as with the parties' two oldest children. He reported that he is self-employed as a hair stylist and does

not receive a paycheck because he is paid by each client individually. Mark explained that because of this pay structure, he does not receive W-2's. Respondent's Exhibit 2 reflects Mark's 2009 tax return, pursuant to which Mark testified that his gross income for 2009 was \$26,543. Mark testified that he was due a refund of \$2,643 for 2009, which he never received because he owes money to the IRS. Pursuant to his cross-examination, Mark admitted that he did not file tax returns for 2004, 2005, or 2006 because he did not have the money to pay his taxes. Mark was uncertain regarding whether he filed a tax return for 2007, but he admitted that he did not pay his taxes for 2007.

Mark also testified on cross-examination that he receives payments from his clients by cash, checks, and credit cards. Mark was unsure of the percentage of payments he receives in cash, but he acknowledged using cash for his house payments and for groceries. Mark testified that in the previous year he cashed most of the checks he received rather than depositing them into his bank account, because he wanted to avoid having the State garnish the account due to child support arrearages.

Petitioner's Exhibit 2 is made up of bank statements dated July 22, 2008, through October 21, 2008, and July 22, 2009, through April 20, 2010. Pursuant to a previously sustained objection regarding the relevant period of time, Mark was questioned only regarding the statements dated September 19, 2009, and beyond. The statements reflect credit card payments made to Mark by his clients, which appear as deposits listed as "Global Pay." Mark attested that credit card payments are reflected in this manner a number of days after he swipes a client's credit card. Mark was uncertain regarding what percentage of payments are made by credit cards, but he testified that in 2007 he attempted to reduce the number of credit card payments to avoid the accompanying fees. Also pursuant to Petitioner's Exhibit 2, Mark acknowledged current deductions for a health club in the amount of \$43 per month and deductions for health insurance premiums totaling approximately \$130

per month.

Respondent's Exhibit 1 was introduced, which Mark identified as a copy of his affidavit of assets and liabilities. Pursuant to this exhibit, Mark testified that his gross monthly income is \$3,900, but after withholdings for expenses necessary for the production of income, such as the space he rents at the salon, as well as hair care supplies and other withholdings, his net income is \$1,871 per month. On cross-examination, Mark testified that his monthly household expenses total \$3,306. Pursuant to his affidavit of assets and liabilities, \$1,185 of these expenses are for housing alone, which includes the house payment, insurance, taxes, and home maintenance. Upon questioning regarding his monthly expenses exceeding his income, Mark denied failing to report as income substantial amounts of cash derived from his business. However, he also denied keeping business records of customer payments. Mark testified that his live-in girlfriend, Chancy Lambert, is currently unemployed, but she had contributed to paying the household expenses during prior periods of employment.

The hearing resumed on May 4, 2010, at which time Rebecca testified that Mark was employed as a hair stylist throughout their 12-year marriage, during which Mark brought home checks and cash every night. Rebecca testified that per Mark's instructions, she deposited some of the checks and cashed the remainder. She explained that cash was never used to make the mortgage payments during the marriage but that all the groceries were purchased with cash. Rebecca agreed that Mark's work schedule during the marriage was consistent with Mark's testimony regarding his current work schedule.

Rebecca testified that she sees Mark on a weekly basis, that he drives his own car, and that he appears to be well-dressed. She described Mark's house as a nice, stick-built, ranch-style home in good repair with a nice yard. Rebecca added that Mark purchased horseback riding lessons for one of the children and \$400 bicycles for two of the other

children, although Mark testified to his belief that his girlfriend might have been employed at the time and paid for the lessons. Rebecca testified that Mark's monthly child support obligation as set forth in the trial court's January 19, 2005, order was based on a stipulation of the parties regarding the amount of Mark's net income, which was calculated by using Mark's appointment book, in which he entered figures nightly as well as annually.

Rebecca testified that the January 19, 2005, order also required Mark to provide health insurance for all the children but that he ceased doing so in 2008. Rebecca reported that she began providing the health insurance for the children when her job commenced in March 2009. Rebecca testified that, pursuant to Petitioner's Exhibit 10, which consists of her most recent paystubs, the withholdings for health and dental insurance for herself and the children total \$108 for each bimonthly pay period. Rebecca stated that she was unsure of how much of the withholdings was for herself and how much was for the children but that she was capable of finding out if needed. She testified that her husband pays for his own health insurance. Rebecca requested the trial court to incorporate into its order the costs that Mark had failed to pay for insurance on the children. A representative from the State's Attorney's office was present in the courtroom and notified the trial court that she had been unable to calculate Mark's total arrearages and statutory interest, due to complications with the computer system. The trial court agreed, without objection from Mark's counsel, to hold the record open to allow for a determination of the amounts of arrearages and interest.

The trial court entered an order on June 10, 2010, in which it specified that the issues before it were the resolution of Rebecca's first amended petition for an adjudication of indirect civil contempt and the child support obligations of both parties, in light of the modification of custody. Throughout the order, the trial court mistakenly refers to the September 17, 2009, order as the "01 September 2009 order." On the issue of contempt, the trial court found, "Based on the evidence presented [Mark's] income had substantially

decreased and he was not able to pay the sums required in the [September 17, 2009,] order." Nonetheless, the trial court noted that Mark had chosen not to pay any amount. Accordingly, Mark was held in indirect civil contempt of court for the failure to comply with the terms of the September 17, 2009, order, and the contempt was found wilful. The trial court ordered Mark to pay Rebecca's attorney fees incurred in enforcing the September 17, 2009, order, totaling \$1,800.

On the issue of child support, the trial court found Rebecca's average net income to be \$1,710.94 per month, based on her three most recent paystubs, and found Mark's net income to be \$1,871 per month, based on his affidavit of assets and liabilities. The trial court terminated Mark's previous child support obligation of \$2,265 per month and decreased his child support obligation to \$44.82 per month for the two children in Rebecca's custody, effective September 28, 2009, the filing date of Mark's petition to modify custody. The exhibit folder in the record on appeal contains a "State of Illinois Child Support Program Support Calculation Worksheet," which reflects child support arrearages totaling \$64,300 and interest totaling \$4,749.84 as of May 14, 2010. In spite of the trial court agreeing at the hearing to hold the record open to allow for these calculations, there is no reference to these amounts in the June 10, 2010, order and no mention of the repayment of them. Rebecca filed a timely notice of appeal.

#### ANALYSIS

At the outset, we note that Mark did not file an appellee's brief in this case and that no oral argument was held. Rebecca's issues on appeal are whether the trial court abused its discretion by reducing Mark's child support obligation and failing to incorporate in its order the arrearage and statutory interest amounts owed by Mark and a payment schedule for those amounts. "[T]he trial court has discretion to \*\*\* modify child support as it deems appropriate." *In re Marriage of Carpel*, 232 Ill. App. 3d 806, 815 (1992). "We will not

disturb any child support \*\*\* modification unless the trial court has abused its discretion." *Id.* "An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court." *Id.*

Section 505(a)(1) of the Illinois Marriage and Dissolution of Marriage Act (Act) provides guidelines for a trial court to use when establishing child support obligations, based on, *inter alia*, certain percentages of a supporting party's net income. 750 ILCS 5/505(a)(1) (West 2008). However, section 505(a)(5) also states, "If the net income cannot be determined because of default or any other reason, the court shall order support in an amount considered reasonable in the particular case." 750 ILCS 5/505(a)(5) (West 2008).

In this case, the trial court reduced Mark's child support obligation to \$44.82 per month, using the section 505(a)(1) guidelines (750 ILCS 5/505(a)(1) (West 2008)) in determining Mark's monthly obligation. Although the order does not explicitly state the breakdown of the figures, it can be deduced that the trial court applied the statutory percentage (28% for two children) to Mark's net monthly income of \$1,871, pursuant to Mark's affidavit of assets and liabilities, totaling \$523.88. The trial court then reduced that amount by Rebecca's child support obligation for the children in Mark's care, which was calculated by applying the statutory percentage (28% for two children) to Rebecca's monthly net income of \$1,710.94, in accordance with her most recent paystubs and totaling \$479.06. This formula yields a \$44.82 monthly support obligation owed by Mark.

Rebecca contends that the trial court erred by substantially reducing Mark's child support obligation because the evidence is lacking to support Mark's claims of a substantial reduction of his income. We agree. Although Mark testified, as reflected in his affidavit, that his monthly net income is \$1,871, other evidence in the record prompts us to conclude that Mark's net income, in actuality, is indeterminable. Mark testified that he receives payments from his clients by cash, checks, and credit cards. However, he expressed

uncertainty regarding the percentage of each method of payment received. Moreover, Mark testified that he keeps no business records of the amounts received from clients. This scenario makes it impossible to determine an accurate net monthly income amount and calls into question any ability Mark had of setting forth a net income amount in his affidavit.

In addition, Mark testified to substantial cash transactions he makes on a regular basis. Along with Dale Morlen, Mark testified that he uses cash for his monthly \$820 house payments. Despite Mark's claim that his expenses exceed his income every month and the fact that his live-in girlfriend is unemployed, as Morlen testified, Mark has had no trouble making his house payments and is currently up-to-date. Moreover, Mark testified that he uses cash to purchase all the household groceries. Other evidence shows that Mark has been disingenuous regarding his financial affairs. Mark admitted that he owes taxes to the IRS for the years 2004, 2005, 2006, and 2007. Notably, Mark testified that he cashes most of the checks he receives, rather than depositing them, because he does not want the State to garnish his account due to the child support arrearages he owes.

Pursuant to Mark's affidavit of assets and liabilities, his monthly household expenses exceed his monthly net income by \$1,435. However, there is no additional evidence in the record to support this assertion. As discussed, Mark has not fallen behind on his house payments of \$820 per month. Moreover, testimony shows that Mark lives in a nice home that is in good repair, that Mark is well-dressed, and that he drives his own car. Petitioner's Exhibit 2 reflects deductions in Mark's bank account for payments to a health club in monthly amounts of \$43, the latest of which was deducted only nine days prior to the hearing. In addition, all of Mark's monthly bank statements in Petitioner's Exhibit 2 reflect positive ending balances.

In the case of *In re Marriage of Ford*, 377 Ill. App. 3d 181, 183 (2007), the husband admitted at the trial that when determining his income he did not include any cash payments

he received. Other testimony showed that he used cash to pay certain expenses. *Id.* at 184. Moreover, no questions were asked at the trial regarding the husband's business expenses. *Id.* at 185, 189. On appeal, the husband argued that the trial court erred by ordering child support based on his gross income, rather than deducting the expenses reflected in his statement of expenses and income, which was attached to his affidavit. *Id.* at 188. The appellate court noted that the husband failed to keep accurate or detailed business records and that he had been paid a significant amount of cash which he did not deposit into his bank account. *Id.* at 189. Accordingly, the court applied section 505(a)(5) of the Act because of an inability to determine the husband's net income and affirmed the child support award. *Id.* at 189.

Likewise in the case at bar, for the reasons already discussed, it is impossible to determine Mark's net income from this record. Accordingly, the trial court abused its discretion by applying the section 505(a)(1) guidelines of the Act in its determination of Mark's child support obligation. We reverse that portion of the June 10, 2010, order and remand with directions to apply section 505(a)(5) of the Act, which requires the trial court to order child support in an amount reasonable in this case (750 ILCS 5/505(a)(5) (West 2008)), applied retroactively to September 28, 2009, the date Mark filed his petition for a modification of custody (see *In re Marriage of McDavid*, 97 Ill. App. 3d 1044, 1050 (1981) (there is no vested right to child support accruing after the filing of a petition for a modification)), and to reduce this amount by Rebecca's child support obligation.

With regard to the issue of arrearages, Rebecca aptly notes that the trial court failed to set forth the amount of child support arrearages and statutory interest owed by Mark in its June 10, 2010, order. This was likely an oversight, given that the trial court agreed to hold the record open until an accurate determination could be made regarding current amounts owed and that a document reflecting those amounts is present in the record. Either way, "the

law is clear in Illinois that past-due installments of support are a vested right and a court has no authority to modify them." *Stark v. Stark*, 131 Ill. App. 2d 995, 998 (1971). Exceptions to this include an agreement of the parties and equitable estoppel (see *In re Marriage of McDavid*, 97 Ill. App. 3d at 1050), neither of which apply here. Accordingly, on remand, we direct the trial court to establish arrearage amounts and the statutory interest thereon and to establish an amount of monthly installments to repay those amounts.

#### CONCLUSION

For the foregoing reasons, we reverse the child support award in the June 10, 2010, order, and we remand with directions to determine a reasonable amount of child support, pursuant to section 505(a)(5) of the Act (750 ILCS 5/505(a)(5) (West 2008)), to be applied retroactively to September 28, 2009, and to establish the child support arrearage and statutory interest amounts and repayment installment amounts therefor.

Reversed; cause remanded with directions.