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2013 IL App (3d) 120453-UB

Order filed October 31, 2013
Modified Upon Denial of Rehearing February 7, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D. 2014

In Re MARRIAGE OF KIMBERLY ANN SHADDON, n/k/a KIMBERLY ANN VOLPP,	)	Appeal from the Circuit Court of the 12th Judicial Circuit Will County, Illinois
Petitioner-Appellee,	)	
v.	)	Appeal No. 3-12-0453
	)	Circuit No. 02-D-1772
JOHN MICHAEL SHADDON,	)	
Respondent-Appellant.	)	Honorable Robert J. Baron, Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Lytton and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: Determinations regarding child support lie within the sound discretion of the trial court and will not be set aside absent an abuse of discretion. A trial court's finding regarding civil contempt will not be disturbed unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion.

¶ 2 Respondent, John Michael Shaddon, appeals a judgment increasing his child support obligation. Respondent alleges the circuit court abused its discretion in calculating respondent's income, and holding him in indirect civil contempt of court. Petitioner, Kimberly Ann Shaddon, has not filed a brief before this court. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 FACTS

¶ 4 The parties were married in 1993. Three children were born as a result of the marriage. The parties divorced in 2003. Under the terms of the judgment for dissolution of marriage, respondent was to pay child support of $1,600 per month during the school year and $1,200 per month during the summer months.

¶ 5 In 2008, petitioner filed a petition to increase support and a rule to show cause, alleging that respondent's income had increased since the entry of the judgment of dissolution. Respondent filed a petition to reduce support, alleging that his income had decreased due to the economy. The following evidence was adduced at the hearing on the parties' petitions.

¶ 6 Respondent is 43 years old and resides with his current wife, Ediene Shaddon and stepdaughter. He is the sole owner of Midwest Dynamic Automation (Midwest), which is a company engaged in the business of industrial controls. Ediene is employed by Midwest as an administrative assistant. Respondent takes several business trips annually that include providing entertainment for clients in order to establish and build up Midwest’s business relationships. In addition to business trips, respondent has given gifts to clients. For example, respondent purchased season tickets to the Chicago Blackhawks for over $12,000 and gave them to clients.

¶ 7 Rosemary Collins is a tax accountant who testified as petitioner's expert. Collins reviewed tax returns and bank statements from respondent and Midwest. Respondent had an

adjusted gross income of $55,533 in 2008. Collins opined that respondent's real income was more than that because he also received distributions of $133,422 as listed on schedule M2 line 5 of his federal tax return. These were considered "retained earnings." Collins confirmed that the total amount of the $133,422 in distributions was reported as income in prior years and appropriately taxed. The circuit court asked for clarification from Collins regarding the distribution and whether respondent would have to pay taxes on the $133,422. Collins clarified that respondent would not have to pay taxes on the distribution because it was from "previously taxed earnings."

¶ 8 Collins opined that respondent's 2008 income should also include $10,000, which was the amount that respondent deposited into a 401k. Collins noted that, like the "retained earnings," the $10,000 would not be part of respondent's adjusted gross income on his tax return. Collins also testified it was appropriate to increase respondent's income by the sum of $50,000, which was the amount of wages Midwest paid to Ediene Shaddon in 2008. Collins opined a $50,000 salary was unsupportable after considering Ediene's duties. In addition, Collins included $25,000 in respondent's 2008 income, which was drawn from a line of credit and used to purchase a piece of real property.

¶ 9 Respondent's reported 2009 adjusted gross income was $1,424. Collins opined this was not an accurate representation of respondent's actual income, but rather should also include $17,000 representing wages paid to Ediene and $2,722 from the sale of two parcels of real estate. Collins further testified that she included in respondent's 2009 income, $41,000 in payments and or/checks written to subcontractors and others for which no 1099's were issued, $10,000 paid to Ediene on December 25, 2009, and $6,000 paid to respondent for work on one of the properties.

Finally, Collins included $6,186 of "retained earnings," which were distributed to respondent in 2009.

¶ 10 The circuit court also made certain findings as to respondent's income for the years of 2005 through 2009. The court specifically determined that respondent's income for 2005 was $173,999; 2006 was $115,324; 2007 was $219,507; 2008 was $197,284; and 2009 was $74,758. The amount identified as income for 2008 included: the sum of $133,422, which represented the previously-taxed retained earnings; $50,000, which sum was the salary paid to Ediene; and $6,048, representing 20% of the value of a vehicle purchased for the business. The amount identified as income for 2009 included: the sum of $6,186, which represented previously taxed retained earnings; $17,000, which sum was the salary paid to Ediene; and $33,000 as "reclassified deposits." The court further determined that the average income for the years 2005 through 2009 was $156,174.

¶ 11 On September 11, 2011, the court entered an order setting respondent's child support obligation at $4,164 per month retroactive to May 22, 2008. This amount was reached by averaging the income for the years 2005 through 2009 and thereafter multiplying that sum by 32%.[1] The order further set the amount of arrearage at $106,420 ($162,420 due less $56,000 paid).

¶ 12 Respondent filed a motion for reconsideration arguing, among other things, that the court's decision was flawed given that the court utilized income averaging for purposes of setting the child support obligation. Upon hearing argument, the court granted, in part, respondent's

[1] The statutory percentage of income for child support for three minor children. (750 ILCS 505 ... (West 2010))

motion and acknowledged that the previous order was inappropriate in that it included income information for years 2005 through 2007 to arrive at the average net income for years 2008 and 2009. The court did not grant respondent's request to reconsider the inclusion of the retained earnings or the inclusion of Ediene's salary as income to him. The court subsequently averaged the income for years 2008 and 2009 and entered an order holding that respondent's child support obligation was $3,627 per month. The court further found that it was appropriate to average the income for 2008 and 2009 and reaffirmed its prior treatment of retained earnings and salary paid to Ediene as net income attributable to respondent.

¶ 13 Petitioner filed several motions for rule to show cause against respondent. Upon hearing argument, the circuit court entered a written order holding respondent in indirect civil contempt of court. The order stated:

> "CONTEMPT RE COUNSELING
>
> On June 25, 2008, the Court ordered the parties to 'cooperate in enrolling their daughter Nicole in counseling.' Three further Orders were entered attempting to get Nicole into counseling and the parents to also attend.
>
> [Respondent] continued to refuse and advance non-sense excuses for his failure to cooperate. At one point he attempted to terminate Nicole's counselor or pay his share, causing many interruptions in the child's scheduled therapy. He admitted at the hearing he never did attend. He is found to be in Indirect Civil Contempt for his failures to follow these orders.

On October 9, 2009, [respondent] filed an Emergency Motion to terminate his obligation to provide Health and Dental insurance for the children, alleging a downturn in his business and his income. The motion was withdrawn, but not until [petitioner] and her attorney had to appear. The evidence at the hearing showed that the allegations of 'lack of funds' was specious and only design[ed] to further harass, and [respondent] is ordered to reimburse [petitioner] for all costs, and attorney fees in defending said motion.

Multiple contempts and Discovery Delays

Consistently throughout this process, [respondent] caused unnecessary delays in production of discovery adding untold costs to the litigation, and mental anguish. There were multiple times where he would pay less than required, causing motions for contempt. [Petitioner] is invited to file a petition for costs and attorney fee reimbursement for these multiple violations.

Counsel for [petitioner] requested to submit final orders and proof of fees and costs and the Court will set a proper purge of these multiple contempt findings."

¶ 14 ANALYSIS

¶ 15 Initially, respondent argues the circuit court erred in calculating his income when increasing his child support obligation. Specifically, respondent claims error with regard to: (1) the averaging of his 2008 and 2009 income, (2) the inclusion of Ediene's salary as part of his income, and (3) the inclusion of "retained earnings" as part of his income. Respondent also

argues the trial court erred in: (4) holding him in indirect civil contempt of court. Determinations regarding child support lie within the sound discretion of the trial court and will not be set aside absent an abuse of discretion. *In re Marriage of Adams*, 92 Ill. App. 3d 797, 803 (1981). A trial court's finding regarding civil contempt will not be disturbed unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion. *In re Marriage of Logston*, 103 Ill. 2d 266, 286-87 (1984). Upon review, we find the court did not abuse its discretion when increasing respondent's support obligation. Moreover, the record supports the court's indirect civil contempt finding.

¶ 16 I. Averaging Income.

¶ 17 Respondent argues the averaging of his 2008 and 2009 income constitutes an abuse of discretion because his "tax returns and bank records were readily available for analysis." Where a child support calculation is involved and the relevant income on which it is based ~~on~~ varies, an appropriate dollar amount can be calculated by using the income averaging method. *In re Marriage of Duggan*, 376 Ill. App. 3d 725, 746 (2007).

¶ 18 Here, the income differential between 2008 and 2009 was vast. Specifically, the court determined that respondent’s income for 2008 was $197,284 and 2009 was $74,758. It would be inequitable to respondent if the court were to simply compute his support obligation using the $197,284 amount. Alternatively, it would be unfair to petitioner if the court were to simply compute respondent's obligation using the $74,758 amount. The income averaging method was the most equitable option in light of the specific facts of this case, including the fact that respondent, as sole owner of Midwest, is largely in control of what he actually receives each year. Moreover, if respondent's future income is closer to the $74,758 amount, as opposed to the $197,284 amount, he can *request* modification. See 750 ILCS 5/510(a)(1) (West 2008).

¶ 19 In coming to this conclusion, we reject respondent's reliance on *In re Marriage of Schroeder*, 215 Ill. App. 3d 156 (1991). The circuit court in that case averaged 6 years of income and the appellate court determined that some of the data was too old and unreliable. *Schroeder*, 215 Ill. App. 3d at 161. It concluded that income averaging should only be used if a "definitive pattern of economic reversals" over several years is shown. *Schroeder*, 215 Ill. App. 3d at 161. The appellate court in *In re Marriage of Elies*, 248 Ill. App. 3d 1052, 1060-61(1993), however, found that using the income average from the past three years was an appropriate method for determining available income for support. Furthermore, it disagreed with the *Schroeder* court's conclusion that income averaging should only be used if a definitive pattern of economic reversals over several years is shown. *Elies*, 248 Ill. App. 3d at 1060-61. For the reasons stated above, we, too, reject the *Schroeder* court's conclusion.

¶ 20 II. Ediene's Salary

¶ 21 Next, respondent argues that the inclusion of Ediene's salary as part of his income constitutes an abuse of discretion. Specifically, respondent contends "[t]here is no basis in fact or law, nor was there sufficient evidence presented to substantiate that the Court should attribute the salary paid to Ediene in 2008 and 2009 to his income." Respondent, however, fails to offer *any legal* argument or authority to this contention, and we find the issue has been waived. [1]

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[1] In his motion for rehearing, respondent accuses us of failing to address "the issue related to including reclassified deposits as part of his income." Respondent's briefs, however, never directly addressed this issue. Specifically, respondent failed to cite any relevant facts or case law with respect to this alleged issue. Instead, respondent merely offered a conclusory statement, buried in his retained earnings issue, that "there is no basis to attempt to portray reclassified

Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013), see also *Novakovic v. Samutin*, 354 Ill. App. 3d 660, 667 (2004) ("[A] party who fails to argue or cite authority in support of a point waives the issue for purposes of appeal").

¶ 22 In coming to this conclusion, we emphasize that we previously found respondent's briefs to be in violation of Illinois Supreme Court Rule 341(h)(6) (eff. Feb. 6 2013). However, instead of simply striking the briefs and dismissing his appeal, we afforded respondent an opportunity to submit new briefs. Specifically, we entered an order stating:

> "On the Court's own motion, appellant's brief is STRICKEN. Appellant is allowed to submit a new brief that complies with Supreme Court Rule 341(h)(6). Appellant is ordered to include in his brief (statement of facts) available facts regarding: (1) the actual income amounts found, (2) the circuit court's factual basis for those amounts, (3) the reconsideration motion and hearing, (4) the current obligation owed and (5) all other relevant facts necessary to an understanding of the case. If the additional information requires the modification of appellant's analysis, those changes may also be made to appellant's brief."

¶ 23 III. Retained Earnings.

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deposits as income when Shaddon clearly showed that the funds in question came from his personal account as he put his personal money back into the business." We deem respondent also waived this issue.

¶ 24 Next, respondent argues that the inclusion of "retained earnings" as part of his income constitutes an abuse of discretion. Specifically, respondent contends that because the retained earnings were "earned and taxed in earlier years" they cannot be considered income in 2008 and 2009.[2] "Retained earnings" refer to the undistributed profits of a corporation. *In re Marriage of Werries*, 247 Ill. App. 3d 639, 649 (1993).

¶ 25 While accepting respondent's limited and general claim that the retained earnings in the instant case were earned and taxed in previous years, we note that the earnings were not distributed to respondent until 2008 and 2009. We find the retained earnings increased respondent's wealth upon distribution and therefore constitute income. We note that "net income" for purposes of child support is a term defined by section 505(a)(3) of Illinois Marriage and Dissolution of Marriage Act (the Act). It defines "net income" broadly as "the total of *all income* from all sources," minus certain expressly defined deductions. (Emphasis added.) 750 ILCS 5/505(a)(3) (West 2008). "Retained earnings" is not one of these stated deductions. See 750 ILCS 5/505(a)(3) (West 2008). The Act does not define "income," but cases have defined it as "something that comes in as an increment or addition, a gain or profit that is usually measured in money, and increases the recipient's wealth." *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 280 (2006). Income includes "any form of payment to an individual, regardless of its source, and regardless of whether it is nonrecurring." *Sharp*, 369 Ill. App. 3d at 280. With these facts in

[2]Respondent appears to be arguing that the retained earnings have been counted twice as income but, despite having been directed to file a more factually-detailed brief, respondent has failed to provide us with information regarding the capacity (personal or corporate) in which the income was claimed or even what tax year or years the income was claimed.

mind, we find the circuit court's inclusion of the "retained earnings" as part of respondent's income when distributed did not constitute an abuse of discretion.

¶ 26 IV. Contempt

¶ 27 Finally, respondent argues that the circuit court erred in finding him in indirect civil contempt of court. Respondent argues that because the court's contempt finding was punitive, and not coercive in nature, "the only proper Order [that] could have been [entered was] for indirect criminal contempt." Stated another way, respondent believes any possible contempt in the present case would have to be criminal rather than civil. Respondent also generically asserts that the court's contempt findings were against the manifest weight of the evidence. In making this conclusory statement, defendant does not cite to the record or offer any argument rebutting the court's factual findings.

¶ 28 We acknowledge that criminal sanctions are normally retrospective in nature, whereas civil sanctions are usually prospective in nature. See *Doty v. Doty*, 255 Ill. App. 3d 1087, 1095 (1994). The supreme court, however, has noted the difficulty in applying such an arbitrary distinction. Specifically, it stated:

> "Contempt proceedings, while usually called civil or criminal, are, strictly speaking, neither. They may best be characterized as sui generis, and may partake of the characteristics of both. [Citations.] Proceedings in the nature of criminal contempt have been defined as those directed to preservation of the dignity and authority of the court, while it has been said that civil contempts are those prosecuted to enforce the rights of private parties and to compel obedience to orders or decrees for the benefit of opposing parties.

> [Citations.] These principles, while seemingly plain and adequate, are most difficult to apply. The line of demarcation in many instances is indistinct and even imperceptible. [Citation.]" *People ex rel. Chicago Bar Association v. Barasch*, 21 Ill. 2d 407, 409-10 (1976).

¶ 29 The record supports the conclusion that respondent did not comply with the circuit court's orders concerning counseling and discovery. The record also supports the conclusion that the emergency motion regarding health and dental care was filed with the intent to harass. While respondent may believe the civil contempt finding was entirely punitive in nature, we do not share such a belief. We believe the civil contempt finding could reasonably be seen as an attempt to coerce respondent to continue counseling with his daughter, Nicole, or at the very least engaging in a functional relationship with petitioner as it relates to Nicole. Moreover, the civil contempt finding could be seen as an effort to coerce respondent to refrain from filing harassing emergency motions and delaying discovery in any future litigation regarding this case. More importantly, however, the record supports the court's factual contempt findings. We will not reverse these findings as we believe the particular facts of this case present us with an instance where the difference between criminal and civil contempt "is indistinct and even imperceptible." *Barash*, 21 Ill. 2d at 409.

¶ 20 For the foregoing reasons, we affirm the circuit court's judgment.

¶ 31 Affirmed.