

NOTICE
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2014 IL App (5th) 130446-U

NO. 5-13-0446

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).

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
LISA A. BASLER, n/k/a Lisa Gallatin,)	Williamson County.
)	
Petitioner-Appellee,)	
)	
and)	No. 05-D-72
)	
MARK D. BASLER,)	Honorable
)	Brad K. Bleyer,
Respondent-Appellant.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Welch and Justice Spomer concurred in the judgment.

ORDER

¶ 1 *Held:* Where the trial court's increase in child support was not an abuse of discretion, we affirm that order. Where the arrearage calculation was incorrect, we modify the judgment to reflect the correct amount and the correct monthly repayment. Where there was no abuse of discretion in the trial court's order awarding income tax deductions, we affirm the judgment.

¶ 2 Mark D. Basler appeals from the trial court's June 14, 2013, ruling in favor of Lisa A. Gallatin that increased child support, made the new amount retroactive, and awarded Lisa both income tax exemptions.

¶ 3

FACTS

¶ 4 Mark and Lisa Basler were married, and granted a divorce in 2006. Two children were born during the marriage—Dustin who is presently 17 years of age, and Jennifer who is 15 years of age. The court designated Lisa as the primary residential custodian and granted visitation to Mark. The court ordered Mark to pay child support. The court entered the most recent child support order on December 2, 2010. The court ordered Mark to pay Lisa \$125 every two weeks starting January 1, 2011. The court also ordered Mark to pay one-half of the health insurance premiums for the children.

¶ 5 In September 2011, Lisa filed a petition seeking to increase child support. She alleged that Mark's income had increased.

¶ 6 The court held its trial on the child support issue in June 2013. Evidence at trial focused on Mark's new career path and the income earned. Mark was the only witness.

¶ 7 Mark is self-employed as a truck driver for his own company, Mark Basler Excavating and Trucking, LLC. He started the company in 2010. By 2012, Mark owned two trucks and used a second driver when needed. The business is seasonal, and thus Mark claims that he has very little business from January through March. As a result, he testified that his income fluctuates.

¶ 8 At the hearing, he submitted income tax returns for the three years since he started the business. A certified public accountant prepared his returns based upon his bank deposits and his receipts. In 2010, Mark's federal income tax return reflected \$12,059 in business income. His profit or loss schedule reflected gross receipts of \$46,677, with

expenses totaling \$34,618. In 2011, Mark claimed business income of \$17,972. From his profit or loss schedule, he reported gross income of \$53,700, with expenses of \$35,728. In 2012, Mark claimed business income of \$14,927, derived from \$111,891 in gross receipts, with expenses of \$96,964. Mark provided a chart to the court outlining income through June 2013 that listed an average annual income of \$7,644. Mark based this average on 2011 and 2012 income tax returns and receipts and expenses for the first five months of 2013.

¶ 9 Following the trial, the court made a docket entry order on June 14, 2013. That docket entry stated:

"Based on evidence presented the court finds that Mark Basler has had an increase in income which requires a modification to child support. The child support obligation is increased to \$375/every two weeks starting July 1, 2013. The court further finds that Mark Basler is obligated to pay back child support retroactive to Sept. 2011 in the amount of \$10,500. The court discharges the [rule to show cause] on the issue of the 2008 child exemption for tax purposes. Due to the disparity in child support being provided by the parties, the Judgment of Dissolution is further modified to allow Lisa Gallatin to claim both children as exemptions for tax purposes. Both parties are to continue to reimburse Charles Gallatin ½ of the costs of the children's health insurance being provided through his employer. The retroactive child support of \$10,500 is to be paid in 7 monthly installments of \$1500 beginning 8-1-13."

¶ 10 Mark filed a motion requesting that the court reconsider its order. By docket entry, the court denied this motion on August 13, 2013. Mark appeals.

¶ 11

LAW AND ANALYSIS

¶ 12 On appeal, Mark claims that the trial court abused its discretion in concluding that there was a substantial change in circumstances warranting an increase in his child support obligation from \$125 every two weeks to \$375 every two weeks. He also contends that the trial court's award of retroactive support—to the date that Lisa filed the petition for modification—was an abuse of the trial court's discretion. Finally, Mark claims that the trial court committed error in modifying a term of the original dissolution judgment to award Lisa both income tax deductions for the children.

¶ 13

Modification of Child Support Order

¶ 14 A trial court's ruling on a request for modification of a child support order will not be reversed unless the court's ruling amounts to an abuse of discretion. *In re Marriage of Rogers*, 213 Ill. 2d 129, 135, 820 N.E.2d 386, 389 (2004) (citing *In re Marriage of Bussey*, 108 Ill. 2d 286, 296, 483 N.E.2d 1229, 1233 (1985)); *In re Marriage of Davis*, 287 Ill. App. 3d 846, 852, 679 N.E.2d 110, 115 (1997). An abuse of discretion occurs only in a case where no reasonable person could agree with the trial court's decision. *In re Marriage of Partney*, 212 Ill. App. 3d 586, 590, 571 N.E.2d 266, 268 (1991).

¶ 15 Section 505 of the Illinois Marriage and Dissolution of Marriage Act requires that, at a minimum, the court shall order 28% of a party's net income as support for two children. 750 ILCS 5/505(a)(1) (West 2010).

¶ 16 Pursuant to section 510(a)(1) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/510(a)(1) (West 2006)), a child support order can be modified upon a showing of a substantial change of circumstances. The party seeking the modification bears the burden to establish that there has been a change in the noncustodial parent's ability to pay the increased amount. *In re Marriage of Sweet*, 316 Ill. App. 3d 101, 105, 735 N.E.2d 1037, 1041 (2000). Courts do not calculate the amount of increased support based upon net income until after the custodial parent adequately proves a substantial change in circumstances including the noncustodial parent's increased ability to pay. *In re Marriage of Pylawka*, 277 Ill. App. 3d 728, 731, 661 N.E.2d 505, 508 (1996).

¶ 17 Section 505(a)(3) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/505(a)(3) (West 2010)) defines net income as the total of all income from all sources minus certain deductions for federal and state income tax, social security payments, mandatory retirement contributions, union dues, dependent and individual health care insurance premiums, prior support or maintenance obligations, debt repayments reasonable and necessary to produce income, medical expense necessary to preserve life or health, and other reasonable expenditures for the benefit of the child and other parent, exclusive of gifts. The term "income" is not defined further than that, but was intended to have expansive application. *Marriage of Rogers*, 213 Ill. 2d at 136, 820 N.E.2d at 390.

¶ 18 On appeal, Mark argues that the evidence at trial established that his annual income was far less than the approximately \$35,000 the trial court calculated based upon

the revised child support order of \$375 biweekly. He claims that because he testified that he had an accountant prepare his income tax returns, and that he provided all expenses and income to his accountant, we should accept the net profit figures contained within those returns as proof of his income.

¶ 19 In this case both the issue of whether or not there was an increase and the amount of any such increase are entangled. One of the income issues is connected to tax return deduction entries. On schedule C in his federal income tax returns, Mark took deductions in 2010 and in 2012 for "Depreciation and sect. 179 expense." In 2010, the amount of this deduction was \$14,500. In 2012, the amount of this deduction was \$20,150. Mark took no depreciation deduction in 2011. Those deductions represent an expense that legally qualifies as a deduction and affects the amount of income taxes Mark has to pay. If the depreciation is a scheduled percentage of asset depreciation allowable pursuant to Internal Revenue Service regulations, and not actual funds spent during the tax year, Mark may have had more money available to him during the year. Alternatively, the deductions could represent a purchase of a piece of equipment and therefore Mark would not have the extra income at his disposal.

¶ 20 At trial, Mark testified that his accountant prepared all of his income tax returns, and he did not know the purpose of the deductions at issue. He testified that he believed that those expenses related to his purchase of two pieces of equipment. At trial, he produced no documentation to establish that the deductions represented expenses connected to equipment purchases.

¶ 21 Other exhibits available to the court included months of Mark's business bank statements. In reviewing these 2012 bank statements, we find no check or disbursement from the business account that matches up with the \$20,150 in depreciation deductions Mark claimed in 2012. The lack of evidence supporting an equipment purchase in these records, or in any other part of the record, supports a conclusion that the depreciation Mark took in 2012 was not related to funds he spent to obtain a piece of equipment. Furthermore, we note that in all of the bank statements in 2012, and into 2013, Mark wrote out several checks and made some transfers from the business account to another account bearing his name. Those transfers and withdrawals to himself certainly give the appearance of "draws" or income to Mark.

¶ 22 Mark assumes that the trial court included the depreciation amounts from 2010 and 2012 as income when calculating child support. He cites to two cases where the courts would not count depreciation towards income earned for child support calculations. See *Posey v. Tate*, 275 Ill. App. 3d 822, 656 N.E.2d 222 (1995); *In re Marriage of Davis*, 287 Ill. App. 3d 846, 679 N.E.2d 110 (1997). In the calculation of income for child support, the courts in both cases considered depreciation as fitting within the "deduction from income" category of "[e]xpenditures for repayment of debts that represent reasonable and necessary expenses for the production of income." 750 ILCS 5/505(a)(3)(h) (West 2010). The *Posey* court noted that "it is well settled that 'tax-reported income does not provide conclusive evidence of either [the supporting parent's] gross or net income under the Act, which provides its own guidelines on deductions from

*** income that reflect different policies and purposes than the Federal tax code.' " *Posey*, 275 Ill. App. 3d at 826, 656 N.E.2d at 225 (quoting *In re Marriage of Carpel*, 232 Ill. App. 3d 806, 818, 597 N.E.2d 847, 856 (1992)). When courts have allowed the deduction of depreciation expense from gross income in the calculation of child support, there has been proof of a specified repayment schedule tied to the asset being depreciated. See *Marriage of Partney*, 212 Ill. App. 3d at 592-93, 571 N.E.2d at 270; *Marriage of Davis*, 287 Ill. App. 3d at 854, 679 N.E.2d at 116.

¶ 23 While it is a possibility that the two large depreciation deductions were related to equipment purchased by Mark that is "for the production of income" (750 ILCS 5/505(a)(3)(h) (West 2010)), the fact remains that Mark did not specifically know the source of the deductions. He testified that he believed that the amounts represented the full price of two trucks that he purchased. He provided no verification of the purchase of vehicles, their sales receipts, loan documents (if loans were required to obtain these trucks), or any other type of verification that the deductions were tied to the purchase of equipment.

¶ 24 At trial, Lisa's attorney also argued that the gross receipts and expenses claimed in income tax returns did not match up with deposits and withdrawals in his business bank account. In 2010, Mark's expenses, not including depreciation, were \$20,118. In 2011, the reported expenses were \$35,728, and in 2012, the reported expenses totaled \$76,814. The average monthly expense for those years was \$3,685. Mark's average tax liability was \$168.97 per month. Mark's average monthly deposits amounted to \$11,814 per

month. Lisa contends that after deducting expenses and taxes, Mark's average monthly income was \$7,966.66. Even if we added in the depreciation expenses Mark claimed, the average monthly expenses would be \$4,647.60, which would reduce his average monthly income to \$6,007.53. Accepting Lisa's argument but allowing the addition of depreciation claimed, biweekly support at the statutory 28% would exceed the trial court's order of \$375. Regardless of the calculation, we find that the documentary evidence along with Mark's testimony support a finding that his business income exceeded the amount claimed in his income tax returns.

¶ 25 While Lisa bore the burden of proof to establish that Mark's income increased, she put forth ample evidence that his receipts and expenses did not match what he reported on his income tax returns. That evidence provided a strong inference that Mark had far more income available to him. At that point, Mark needed to establish that the figures in his income tax returns reflected his actual income. He did not call his certified public accountant as a witness at trial. Prior to trial, he produced his bank statements and his income tax returns. He knew what would be at issue at trial—that Lisa claimed he made more money, and that therefore, Lisa was asking the court to increase child support. Mark claims that his testimony refuted Lisa's claims. Having reviewed the record, we find that his testimony did not do so. As we previously stated, the income and expenses discrepancies in the bank statements establish that Mark's income was not merely the net profit he reported on the income tax returns. Given those discrepancies, coupled with the fact that Mark put on no other evidence supporting his income argument, we do not find

that the court's order of \$375 payable every two weeks was an abuse of the trial court's discretion.

¶ 26 Mark also argues that Lisa never argued nor proved that there was a substantial change in circumstances with respect to the children's expenses, which the custodial parent must establish in addition to an increase in the noncustodial parent's income. Mark is correct that Illinois courts do follow this two-prong test. *In re Marriage of Turrell*, 335 Ill. App. 3d 297, 307, 781 N.E.2d 430, 440 (2002). Mark is also correct that Lisa put on no evidence at trial that the financial needs of the children had increased. However, Mark did not raise this issue at trial or in his posttrial motion, and therefore we consider the issue waived. *Morgan v. Richardson*, 343 Ill. App. 3d 733, 742, 798 N.E.2d 1233, 1241 (2003).

¶ 27 Retroactive Support With Arrearage Payable at \$1,500 Per Month

¶ 28 In addition to increasing the child support to \$375 every two weeks, the trial court made the award retroactive to the date that Lisa filed her petition seeking the modification—September 2011. The court calculated retroactive support in the amount of \$10,500. Mark argues that the trial court's retroactive support order was an abuse of discretion in two respects. First, he claims that the trial court miscalculated his arrearage. Second, he claims that the order to pay \$1,500 monthly was punitive.

¶ 29 The trial court has the discretion to award child support retroactively if doing so is reasonable and just. *In re Marriage of Rogliano*, 198 Ill. App. 3d 404, 410, 555 N.E.2d 1114, 1118 (1990). If a noncustodial parent pays more than he was ordered by the court

to pay, then that extra amount can be considered by the trial court in determining the amount of retroactive support to be ordered. See, e.g., *Department of Healthcare & Family Services ex rel. Jorgenson v. Jorgenson*, 403 Ill. App. 3d 1009, 1011, 934 N.E.2d 1064, 1064 (2010).

¶ 30 In arguing this issue, Mark combines a health insurance reimbursement of \$103.50 per month that he was required to reimburse Lisa's husband with his biweekly \$125 child support. As the trial court did not combine the health insurance premium contribution to the biweekly child support, and there is no mention of the health insurance amount in the trial court's order, we find this argument and Mark's related calculations confusing. Lisa's attorney provided the court with a printout from the Williamson County circuit clerk's Office showing all payments (with the health insurance added in) made from January 1, 2011, through June 13, 2013. After review of this circuit clerk printout and the trial court's order, we conclude that the arrearage order was slightly miscalculated. Mark's calculations are also wrong. Between January 1, 2011, through the court's hearing in June 2013, Mark calculates and argues that he overpaid \$1,162 in support.

¶ 31 The petition to modify child support was filed in mid-September 2011. Mark argues that the court did not subtract his overpayments from the retroactive support. From the filing until the end of 2011, there were 3.5 months of retroactive support to be calculated. In 2012, there were 12 months. The court's order was entered in mid-June 2013, and therefore, there were 5.5 months of retroactive support to be calculated for

2013. Adding the months together, there were 21 months of retroactive child support ordered by the trial court.

¶ 32 At the rate of \$125 every two weeks, Mark was supposed to pay \$3,250 annually, or \$270.83 monthly. The increased rate of \$375 every two weeks meant that Mark was supposed to pay \$9,750 per year, or \$812.50 per month. The monthly difference to be paid was \$541.67, in retroactive support. Multiplied by the 21 months, Mark owed \$11,375.07 in retroactive child support.

¶ 33 From mid-September through December 31, 2011, Mark paid \$1,062.80 in child support. In 2012, Mark paid \$5,470 in child support. From January 1, 2013, through the court's order in mid-June 2013, Mark paid \$1,489.57.¹ Subtracting the \$270.83 per month child support from the totals Mark paid in child support, Mark overpaid \$114.89 in 2011, \$2,220.04 in 2012, and underpaid \$610.57 in 2013. For the 21 months of retroactive support ordered, Mark overpaid a total of \$1,724.36.

¶ 34 Subtracting the \$1,724.36 overpayments from the \$11,375.07 of retroactive support, Mark's actual arrearage for those 21 months was \$9,650.71, which is \$849.29 less than what the trial court calculated. Accordingly, pursuant to our authority under Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we amend that portion of the court's order of retroactive support by substituting \$9,650.71 for the original \$10,500.

¹These calculations represent child support *after* subtracting the \$103.50 per month for health insurance that he included in his payments to the county clerk.

¶ 35 Mark also complains that the repayment order that required him to pay the retroactive support at a rate of \$1,500 per month was not reasonable given his income. We disagree. Given the discrepancies noted in the analysis of the previous issue, we are not able to conclude that the trial court's order was erroneous as to the seven-month payment plan. However, we amend that portion of the court's order to reflect the new retroactive amount of \$9,650.71 that Mark must pay in seven monthly installments of \$1,378.67.

¶ 36 Tax Exemption Modification

¶ 37 Mark finally argues that the trial court's order modifying the original judgment and awarding Lisa both income tax exemptions was erroneous. Although Lisa did not raise the issue of income tax exemptions in her petition, Mark filed a rule to show cause about not receiving the exemption in one particular tax year. In the original order, the court awarded each parent one exemption. He testified that since entry of the dissolution judgment, he had never received an exemption—that Lisa always took both exemptions. In its June 14, 2013, order, the trial court stated:

"Due to the disparity in child support being provided by the parties, the Judgment of Dissolution is further modified to allow Lisa Gallatin to claim both children as exemptions."

¶ 38 The trial court can award an income tax dependency exemption to the parent who contributes the majority of the child's support. *In re Marriage of DiFatta*, 306 Ill. App. 3d 656, 663, 714 N.E.2d 1092, 1096 (1999). Obviously, the custodial parent's

contribution to the care of a child does not necessarily translate to a specific monetary amount because of time and energy expended in raising the children, in addition to the money required to feed, clothe, house, and educate the child. *Id.* In addition, paying the statutory amount of child support does not necessarily entitle the noncustodial parent to receive the income tax exemption. *Id.* We review a trial court's award of an income tax exemption under an abuse of discretion standard. *Id.* We review the facts considered by the court that resulted in the award under the manifest weight of the evidence standard. *Stockton v. Oldenburg*, 305 Ill. App. 3d 897, 901, 713 N.E.2d 259, 262 (1999).

¶ 39 In this case, we do not find that the trial court abused its discretion in awarding Lisa both exemptions. She maintained physical custody of both children, and thus was involved on a daily basis with the children. As stated in *Marriage of DiFatta*, the time and energy expended is not necessarily quantifiable in a monetary sense. *Marriage of DiFatta*, 306 Ill. App. 3d at 663, 714 N.E.2d at 1096. The trial court retains the discretion to make this type of award. From the record, the trial court reached the decision that there was a disparity in child support warranting the award. We also note that although the original judgment split the exemptions, Lisa always received both. We see no basis in the record to reverse this order.

¶ 40 CONCLUSION

¶ 41 For the foregoing reasons, the judgment of the circuit court of Williamson County is hereby affirmed, and the judgment modified.

¶ 42 Affirmed; judgment modified.