

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).

2015 IL App (3d) 140892-U

Order filed August 4, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
)	of the 21st Judicial Circuit,
TERESA LOUISE ILLUM,)	Kankakee County, Illinois,
)	
Petitioner-Appellee,)	
)	Appeal No. 3-14-0892
and)	Circuit No. 12-D-34
)	
BRIAN DARRELL ILLUM,)	Honorable
)	Adrienne W. Albrecht,
Respondent-Appellant.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court abused its discretion in determining husband's net income. Trial court did not err in setting child support in amount that deviated from statutory guidelines.

¶ 2 Teresa Louise Illum, filed a petition for dissolution of her marriage from Brian Darrell Illum in January of 2012. On appeal, Teresa argues that the trial court's method for determining Brian's net income constituted an abuse of discretion. Further, Teresa argues that the trial court

abused its discretion by setting child support in an amount that deviated from the statutory guidelines. We vacate the order for child support and remand with instructions.

¶ 3

FACTS

¶ 4

Teresa and Brian married in March 2004. At the time of the marriage, Teresa was the custodial parent of a daughter from a prior relationship, and Brian was the custodial parent of a daughter and son from a prior marriage. During the parties' marriage, Brian adopted Teresa's daughter.

¶ 5

In January 2012, Teresa filed a petition for dissolution of marriage. Teresa and Brian agreed to custody and visitation of their daughter and the division of personal property, but they did not agree about the classification of certain property, the division of marital property and debts, or the amount of child support Brian should pay. A trial was held on the contested issues.

¶ 6

The evidence adduced at trial showed that Brian had custody of his two children from a prior marriage. His 16-year-old daughter has been diagnosed with autism, bipolar disorder, mild retardation and attention deficit hyperactivity disorder (ADHD). She requires constant supervision. His 10-year-old son also suffers from ADHD. Brian receives supplemental security income (SSI) payments for his daughter of \$551 per month and monthly child support of \$318 for both children.

¶ 7

Brian owned a lawn maintenance and snow removal company, Affordable Lawncare. He testified that the primary bank account for the business was at First Trust and Savings Bank (First Trust). The majority of the business's deposits went into that account. Brian testified that he had a second business account at People's Bank. Any business deposits that did not go to the First Trust account were deposited at People's Bank.

¶ 8 The parties provided their tax returns from 2008 to 2011. According to those returns, Affordable Lawncare had gross income of \$43,790, and business expenses¹ of \$31,265, in 2008. In 2009, Affordable Lawncare had gross income totaling \$61,950 and business expenses of \$52,624. In 2010, the business had gross income of \$82,003, with business expenses of \$73,705. Finally, in 2011, Affordable Lawncare had gross income of \$87,754, and business expenses of \$85,236. Brian agreed that his gross income steadily increased from 2008 to 2011.

¶ 9 Brian provided bank statements for his Affordable Lawncare accounts. The deposits in those accounts totaled \$190,870.62 in 2010, and \$203,245 in 2011. However, the tax returns for those years show that Affordable Lawncare's gross receipts were \$87,323 in 2010, and \$92,721 in 2011.

¶ 10 Brian also provided profit and loss statements for Affordable Lawncare from January to May 2012. Those statements showed that the company had gross receipts during those five months totaling \$61,347.50 and net income of \$28,923.41. Brian testified that he only plowed snow twice during the winter of 2012 due to a lack of snow.

¶ 11 In a memorandum of opinion issued following the trial, the court held that the statutory child support guidelines were inapplicable to the case. The court found that it could not "ascertain with any degree of confidence what [Brian's] actual income is." Noting discrepancies of more than \$100,000 between the total deposits in Brian's bank accounts and the gross income reported on his tax returns, the court stated that "the tax returns can't be used as the sole measure of [Brian's] income." The court imposed a child support obligation upon Brian in the sum \$50 per month, finding that total to be "equitable."

¹ Brian's business expenses were itemized in schedule C of form 1040.

¶ 12 Teresa filed a motion to reconsider the trial court's decisions, after which the trial court filed a memorandum of opinion stating that it should have determined Brian's net income. To do so, the court "added all of the deposits in Affordable Lawncare's main business account and considered the reduction in his deposits between 2011 and 2012 because of adverse weather conditions. It then subtracted the expenses itemized on the 2011 Schedule C." The court found that Brian's net income was \$2,633 per month, consisting of \$515 per month in SSI for his daughter,² \$318 per month in child support for both children, and \$1,800 per month in income from Affordable Lawncare. Considering this evidence, the court concluded that its original order of \$50 per week in child support was reasonable.

¶ 13 On appeal, this court found that the trial court's determination of Brian's net income as well as its child support award were abuses of its discretion. *Illum*, 2014 IL App (3d) 130069-U, ¶ 23. Specifically, we found that the court erred in considering only Brian's income from 2012. *Id.* ¶ 24. We remanded "for the trial court to consider the average of Brian's income from the three years prior to the date of trial to determine his net income for child support purposes." *Id.* Further, we rejected the trial court's position that the statutory child support guidelines did not apply. *Id.* ¶ 25.

¶ 14 On remand, the trial court "used the same analysis to determine Brian's statutory net income for 2010 and 2011 as it employed for 2012." The court explained that "[t]he reason for this is that Brian's business receipts are clearly much higher than he claims on his income tax return; but would likely be duplicated were the court to include deposits in the People's Banks account." Using this method, the court found Brian's statutory net income to be \$8,273 in 2011

² We note that the court's total of \$515 per month in SSI for Brian's daughter may have been a scrivener's error, as Brian testified that he receives \$551 per month in SSI.

and \$5,965 in 2010. Because bank statements were not available for years prior to 2010, the court stated that "it must rely on the income tax returns for 2008 and 2009." Based on the tax returns, the court found Brian's statutory net income to be \$1,158 in 2009 and \$1,243 in 2008.

¶ 15 The trial court averaged the above incomes, along with the original \$1,800 figure from 2012, to find an average statutory monthly net income of \$3,687. The court noted that Brian's child support obligation under the statutory guidelines would be \$737 per month. However, the court found that Brian's obligation to the two children that continued to reside with him presented a sufficient basis to deviate from the guidelines. The court awarded Teresa \$500 per month in child support.

¶ 16 ANALYSIS

¶ 17 On appeal, Teresa argues that the method employed by the trial court to determine Brian's statutory net income suffered from a number of flaws. Specifically, she argues that the trial court abused its discretion in: (1) relying on Brian's tax returns to determine his income in 2008 and 2009; (2) failing to incorporate deposits into Affordable Lawncare's secondary bank account; (3) deducting from Brian's net income the amount he received for support of his two other children; and (4) relying upon Brian's Schedule C itemizations for business expenses deducted from his net income. Teresa also argues that the trial court abused its discretion in deviating from the statutory child support guidelines.

¶ 18 Upon review, we find that the trial court abused its discretion in relying on Brian's tax returns to determine his income in 2008 and 2009 and failing to incorporate deposits into Affordable Lawncare's secondary bank account. The trial court's deduction of money Brian received for the care of his other children from his net income also constituted an abuse of

discretion. The trial court's reliance upon Brian's schedule C business expenses, however, was within its discretion.

¶ 19 We remand with instructions that the trial court recalculate Brian's net income, state the amount he would then owe under the statutory child support guidelines, and determine what—if any—deviation from those guidelines is appropriate, and issue a new order for support.

¶ 20 I. Method Used in Calculating Brian's Net Income

¶ 21 Section 505 of the Illinois Marriage and Dissolution of Marriage Act (Act) defines net income for purposes of child support as the total of all income from all sources minus several enumerated deductions. 750 ILCS 5/505(a)(3) (West 2012). The findings of a trial court as to net income and the award of child support are within its sound discretion and will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Nelson*, 297 Ill. App. 3d 651, 655 (1998). An abuse of discretion occurs only where no reasonable person would take the view of the trial court. *In re Marriage of Berberet*, 2012 IL App (4th) 110749, ¶ 41.

¶ 22 A. Law of the Case

¶ 23 At the outset of our analysis, we must address Brian's primary argument on appeal. Brian contends that under the law-of-the-case doctrine Teresa is barred from bringing claims of error as to the method utilized by the trial court in determining his net income. He maintains that because this court, in the previous appeal of this case, implicitly endorsed the method that the court used in calculating his 2012 net income—the same method then used on remand to calculate his net income in 2011 and 2010—Teresa may not relitigate the issue in this appeal. We disagree.

¶ 24 The law-of-the-case doctrine limits relitigation of a previously decided issue in the same case, whether that issue was decided by the trial court or the reviewing court. See *McDonald v.*

Lipov, 2014 IL App (2d) 130401, ¶ 40. "The doctrine applies to questions of law on remand to the trial court as well as on subsequent appeals." *Id.* The doctrine includes explicit decisions of the reviewing court as well as "those issues decided by necessary implication." *Id.* Importantly, the doctrine is prudential, rather than an actual limitation upon the power of the courts. *Combs v. Schmidt*, 2012 IL App (2d) 110517, ¶ 40. That is, the doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided[.]" *People v. Patterson*, 154 Ill. 2d 414, 468-69 (1992).

¶ 25 The issues presented here, relating to the trial court's method of determining Brian's net income, were not addressed—either explicitly or implicitly—in the previous appeal. There, we found that the trial court abused its discretion by only considering Brian's 2012 income, and remanded "for the trial court to consider the average of Brian's income from the three years prior to the date of trial to determine his net income for child support purposes." *Illum*, 2014 IL App (3d) 130069-U, ¶ 24. Our mandate cannot be read as an implicit endorsement of the method used by the trial court for calculating Brian's 2012 income. Because the issue has not been "previously decided," (*Lipov*, 2014 IL App (2d) 130401, ¶ 40), it remains open for litigation on this appeal.

¶ 26 B. Use of 2008 and 2009 Tax Returns

¶ 27 Where it is difficult to ascertain the net income of a noncustodial spouse, the court may consider past earnings in determining the noncustodial spouse's net income for purposes of a child support award. *In re Marriage of Hubbs*, 363 Ill. App. 3d 696, 706 (2006). When an obligor is self-employed and his income fluctuates from year to year, the trial court should consider the obligor's income over several years. *In re Marriage of Freesen*, 275 Ill. App. 3d 97, 103-04 (1995). "[I]ncome averaging is an approved method to apply in determining current net

income for the purpose of establishing child support." *In re Marriage of Garrett*, 336 Ill. App. 3d 1018, 1025 (2003). "At least the three prior years should be used to obtain an accurate income picture." (Emphasis added.) *Freesen*, 275 Ill. App. 3d at 103.

¶ 28 Averaging the obligor's income over a period beyond three years is within the trial court's sound discretion, as facts vary from case to case. *Freesen*, 275 Ill. App. 3d at 103. A court, however, should not rely upon outdated information which no longer reflects prospective income. *Id.*

¶ 29 In the case at hand, citing *Freesen*, we remanded the matter "for the trial court to consider the average of Brian's income from the three years prior to the date of trial." *Illum*, 2014 IL App (3d) 130069-U, ¶ 24. The trial court, in turn, averaged Brian's income over a five-year period from 2008 through 2012. The court included the years 2008 and 2009—years in which Brian's income was calculated solely through reference to his tax returns—despite its previously expressed belief that the incomes reported in Brian's tax returns could not be relied upon in calculating his net income. Indeed, the trial court's initial decision that Brian's 2010 and 2011 tax returns were unreliable—given that they reported at least \$100,000 less in income than his bank receipts indicated—was clearly sound. Meanwhile, Brian's tax returns in 2008 and 2009 indicated gross annual incomes of \$13,896 and \$14,916, respectively. These totals are miniscule in comparison to Brian's net income in 2010 and 2011,³ as calculated using his bank receipts, casting considerable doubt on the accuracy of his earlier tax returns.

¶ 30 While the inclusion of more than three years in an income-averaging period is within the trial court's discretion, it is apparent that the trial court only considered Brian's 2008 and 2009

³ The trial court calculated Brian's net annual income as \$71,580 in 2010 and \$99,276 in 2011.

income because it was under the impression that such consideration was required by our mandate. Our mandate required the trial court to consider the average of Brian's income from the three years prior to the date of trial in order to give a more accurate indication of Brian's income in light of the fact he is self-employed and business fluctuates. To the extent the trial court relied on information that it determined to be unreliable or inaccurate such reliance is an abuse of discretion.

¶ 31 C. People's Bank Account

¶ 32 In its memorandum of opinion issued following Teresa's motion for reconsideration, the trial court stated that it began the process of calculating Brian's income by adding "all of the deposits in Affordable Lawncare's main business account." On remand, the court used the same method to calculate Brian's 2011 and 2010 income. The trial court never considered any deposits made into Affordable Lawncare's second account at People's Bank.

¶ 33 Brian himself testified that any business deposits that do not go to the First Trust account were deposited at People's Bank. The trial court's explanation for why it did not consider those deposits was that "Brian's business receipts *** would likely be duplicated were the court to include deposits in the People's Bank account." It is unclear from the record what the trial court's assumption was based upon, and the court itself did not explain further. Given Brian's testimony, we find that the trial court's refusal to consider deposits in both of Affordable Lawncare's bank accounts was an abuse of discretion.

¶ 34 D. Deduction of SSI and Child Support from Brian's Net Income

¶ 35 Section 505 of the Act provides a formula for calculating the amount of child support a noncustodial parent must pay. 750 ILCS 5/505 (West 2012). When a party is the noncustodial parent of one child, he or she must pay 20% of his or her net income in child support. *Id.* §

505(a)(1). The statute defines "net income" as "the total of all income from all sources, minus the following deductions:" federal and state income tax; social security payments; mandatory retirement contributions; union dues; mandatory insurance premiums; prior obligations of support or maintenance actually paid pursuant to court order; "[e]xpenditures 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"; and foster care payments paid by the Department of Children and Family Services for providing licensed foster care to a foster child. *Id.* § 505(a)(3)(a-i). A trial court's deduction of income not authorized by the statute is an abuse of discretion. See *Gay v. Dunlap*, 279 Ill. App. 3d 140, 145 (1996).

¶ 36 In determining Brian's statutory net income, the trial court considered only Brian's income from Affordable Lawncare. It did not include the money Brian receives for the care of his two children from a previous marriage. No provision in the child support statute provides for the deduction of such income. Accordingly, the trial court abused its discretion by failing to include the money Brian receives for the care of his two children in calculating his statutory net income.⁴

¶ 37 E. Schedule C Business Expenses

¶ 38 When an obligor owns a business, it is appropriate for a trial court to subtract the day-to-day operating expenses of the business in determining the obligor's net income. *In re Marriage*

⁴ Though the trial court abused its discretion by directly deducting those payments from Brian's net income in determining the amount he would owe under the statutory guidelines, it remained free to consider the purpose of those payments when deciding whether to adhere to the guidelines. See 750 ILCS 5/505(a)(2)(e) (West 2012); see also Section II, *infra*.

of *Tegeler*, 365 Ill. App. 3d 448, 455 (2006). Otherwise, the result would be unjust because thousands of dollars of income that the obligor does not actually possess would be imputed to him. *Id.*

¶ 39 In *Tegeler*—an opinion that this court cited approvingly in the previous appeal in this case—the second district reasoned that such day-to-day operating expenses should be deducted pursuant to section 505(a)(3)(h) of the Act. *Tegeler*, 365 Ill. App. 3d at 453. That section provides that "[e]xpenditures for repayment of debts that represent reasonable and necessary expenses for the production of income" may be deducted from the calculation of net income. 750 ILCS 5/505(a)(3)(h) (West 2012). Thus, any day-to-day operating expenses of a business may be deducted from net income, so long as they are reasonable and necessary for the production of income. *Tegeler*, 365 Ill. App. 3d at 456. The respondent in *Tegeler* provided tax returns itemizing his business expenses, and testified that those expenses were reasonable and necessary. *Id.* The reviewing court held that the evidence was sufficient to make a *prima facie* case that the expenses should be deducted from his net income. *Id.*

¶ 40 In the case at hand, Teresa argues that Brian failed to present any evidence that the business expenses itemized on his tax returns were reasonable and necessary. Thus, Teresa concludes, those expenses should not have been deducted from his net income. We disagree.

¶ 41 Similar to the result in *Tegeler*, we find that the trial court could infer from the itemized business expenses on Brian's tax returns that those expenses were reasonable and necessary for the production of income, thus satisfying Brian's *prima facie* burden. While the trial court expressed skepticism in regard to the *gross income* reported on Brian's tax returns, it never expressed such skepticism in regard to the *expenses* listed on those returns. The trial court acted within its discretion in deducting Affordable Lawncare's business expenses from his net income.

¶ 42

II. Deviation from the Statutory Guidelines

¶ 43

Under the Act, when a party is the noncustodial parent of one child, he or she must pay 20% of his or her net income in child support. 750 ILCS 5/505(a)(1) (West 2012). The Act further provides that the guideline percentage should be applied unless the court finds that deviation is appropriate upon consideration of a number of factors, including the financial resources and needs of the noncustodial parent. *Id.* § 505(a)(2). A court that deviates from the guidelines must state reasons for the variance and must state the amount that would have been required under the guidelines. *Slagel v. Wessels*, 314 Ill. App. 3d 330, 333 (2000).

¶ 44

In the present case, the trial court found that Brian would owe \$737 per month in child support under the guidelines, but deviated from that amount, and ordered that Brian pay \$500 per month. The court heard testimony that Brian had custody of two children from a previous marriage, one of whom has been diagnosed with a number of disorders and requires constant supervision. The trial court found that Brian's obligation to those two children "presents sufficient basis to deviate downwards from the guidelines." A reasonable person might reach this same conclusion. Accordingly, the trial court did not abuse its discretion by deviating from the statutory guidelines.

¶ 45

Though the trial court did not ultimately impose a child support obligation in accordance with the statutory guidelines, the errors committed in calculating what that total would have been must still be corrected on remand. The reasons for this are twofold. First, a court deviating from the statutory guidelines must state what the guideline amount would have been. *Wessels*, 314 Ill. App. 3d at 333. It is implicit in that rule that the total stated be accurate. Second, while the trial court remains free on remand to deviate from the statutory guidelines, that decision to deviate—

and indeed, the decision as to how much to deviate—should be made based upon an accurate figure under the statutory guidelines.

¶ 46

CONCLUSION

¶ 47

The judgment of the circuit court of Kankakee County is vacated in part and remanded with instructions.

¶ 48

Vacated; remanded with instructions.