2011 IL App (1st) 100824-U

SECOND DIVISION
NOVEMBER 8, 2011

1-10-0824

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE THE MARRIAGE OF:	)	Appeal from the
	)	Circuit Court of
MEG REYNOLDS,	)	Cook County.
	)	
Petitioner-Appellant,	)	
	)	No. 98 D 3295
and	)	
	)	
WILLIAM M. EJZAK,	)	Honorable
	)	Mark Lopez,
Respondent-Appellee.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Quinn and Justice Harris concurred in the judgment.

ORDER

¶1 *Held*: The circuit court acted within its discretion in reducing former husband's child support obligation, denying former wife's petition for college contribution and petition for indirect civil contempt against former husband for nonpayment of child support. Further, the circuit court did not convert a temporary order into a final order without affording the parties an evidentiary hearing.

¶2 On July 20, 2009, the circuit court of Cook County entered an order which reduced the child

support obligation owed by the respondent-appellee, William Ejzak (Bill).[1] The court found that Bill had "no present ability" to contribute to his son's first-year college expenses, and denied a "petition for indirect civil contempt" for Bill's failure to pay child support. On November 9, 2009, the circuit court denied a motion for reconsideration filed by the petitioner-appellant, Meg Reynolds (Meg). On February 25, 2010, the circuit court denied Meg's motion to clarify the court's November 9, 2009 ruling. On appeal, Meg argues that: (1) the circuit court erred in ruling that Bill had "no present ability" to contribute to his son's first-year college expenses; (2) the circuit court erred in reducing Bill's child support obligation and in denying her "petition for indirect civil contempt" for nonpayment of child support; and (3) the circuit court abused its discretion when it converted a temporary child support order into a final order without holding an evidentiary hearing. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶3 BACKGROUND

¶4 This case has a long and complex procedural history, and only facts relevant to our disposition of the issues on appeal are outlined in this order. On May 27, 1989, Meg and Bill, both attorneys, married in Illinois, and had two sons, Tom and Will.[2] In December 1999, the couple divorced. At the time of the divorce, Tom was nine years old and Will was seven years old. On April 12, 2000, the circuit court[3] entered an amended judgment for dissolution of marriage (2000

[1]William Ejzak is referenced in various documents in the record on appeal as "Bill." For clarity, we likewise address him as Bill in this order.

[2]Tom's date of birth is May 27, 1990; Will was born on September 22, 1992.

[3]Judge Mosche Jacobius entered the April 12, 2000 amended judgment for dissolution of marriage; however, the original judgment was not included in the record on appeal.

amended judgment), which granted sole custody of Tom and Will to Meg and awarded Bill visitation rights. Paragraphs 8 and 9 of the 2000 amended judgment specified that Bill was obligated to contribute $1,600 monthly for child support "until the children attain the age of 18 or graduate from high school, whichever occur[s] last," and was obligated to pay $500 per month "to defray the children's private school and summer camp expenses." Paragraph 11 also stated that the couple was obligated to divide all medical and dental costs of their children on a "50%-50% basis." Paragraph 13 provided that the parties "shall be obligated to pay for the college education of the children in accordance with Section 513 of the Illinois Marriage and Dissolution of Marriage Act."

¶5 On April 29, 2000, Bill remarried. He and his second wife, Carol Bauer Ejzak (Carol), had a son, Benjamin (Ben), during the course of their marriage. In May 2008, Carol passed away suddenly and unexpectedly, and Bill became the sole caretaker of Ben, who was eight years old at the time of Carol's death.

¶6 During Tom's senior year in high school (academic year 2007-2008), Meg and Bill engaged in private discussions, but were not able to come to an agreement, on the amount of contribution for Tom's college expenses. By June 2008, Tom had turned 18 years old and had graduated from high school. In August 2008, Tom commenced his freshman year of college at Indiana University. The cost of attending Indiana University in 2008, after offsets by financial aid, amounted to over $30,000. These costs included tuition, room and board, books, car insurance and tutor fees for Tom, who has learning disabilities. It is undisputed that Bill paid $3,000 toward Tom's first-year college expenses.

¶7 On August 18, 2008, Bill, through legal counsel, filed a petition to modify child support

(petition to modify), seeking a reduction in his obligation to pay his monthly child support because Tom had reached the age of majority and the children were no longer attending private school or summer camps. The petition to modify also stated that Bill was contributing $12,000 toward Tom's college expenses. On November 21, 2008, Bill filed an amended petition to modify child support (amended petition to modify), which eliminated the statement regarding an alleged $12,000 contribution for Tom's college costs, and urged the court to consider Bill's status as a sole provider to his minor son, Ben, in adjusting his child support obligations to Tom and Will.

¶8 In November 2008, Meg filed a petition for contribution to college education expenses (petition for college contribution), pursuant to section 513 of the Illinois Marriage and Dissolution of Marriage Act (Act), requesting that the court order Bill to contribute at least 65% to Tom's college education. Meg noted in the petition for college contribution that she had, by that time, contributed more than $16,000 to Tom's college expenses. In November 2008, Meg also filed a "petition for indirect civil contempt" for medical expenses (petition for medical expenses), alleging that Bill should be held in contempt of court for failing to pay his 50% share of their children's medical expenses over a five-year period, in the amount of $3,956.05, as required by paragraph 11 of the 2000 amended judgment.

¶9 In January 2009, Bill lost his job, without cause, as an attorney at the law firm of Brown, Udell & Pomerantz (BUP). BUP paid Bill a full salary until January 30, 2009, in the gross amount of $9,807. However, Bill continued to receive $1,200 per month in rental income from his two-flat property in Chicago, $1,590 per month in Social Security survivor benefits for Ben as a result of Carol's death, and also received, as Carol's named beneficiary, her 401(k) account in the amount of

$59,800. In February 2009, Bill stopped paying his child support obligation for Tom and Will. Also in February 2009, Bill started working at the law firm of Katten & Temple as an independent contractor. Bill's pay at Katten & Temple was dependent upon commissions made from the law firm's clients–receiving 60% of the amount collected from clients he originated and 50% of the amount collected from clients he did not originate.

¶10 On February 26, 2009, Bill filed a second amended petition to modify child support (second amended petition to modify), which informed the circuit court of the circumstances surrounding his January 2009 job loss and asked the circuit court to suspend his child support obligations until his income could be established with some reasonable certainty. A financial disclosure statement was attached to the second amended petition to modify.

¶11 On March 31, 2009, Meg filed a "petition for indirect civil contempt" for Bill's nonpayment of child support (petition for nonpayment of child support), in the amount of $4,200 in arrearage.

¶12 On April 7, 2009, a two-day hearing commenced on the four pending petitions: Bill's second amended petition to modify; Meg's petition for college contribution; Meg's petition for medical expenses; and Meg's petition for nonpayment of child support. At the hearing, the circuit court heard testimony from Bill and Meg. During Bill's testimony, the circuit court rejected two questions posed by his attorney regarding what Bill expected to earn on average in monthly income as an independent contractor with Katten & Temple. The circuit court noted that Bill could only testify as to what he was actually earning, but was not allowed to speculate about future earnings at the law firm. Thereafter, Bill testified that, as of the date of the hearing, he had earned a total of $1,650 at

Katten & Temple, which averaged $800 per month of income for February and March 2009. Bill further testified that he earned $1,200 per month in rental income from his two-flat property in Chicago, $1,590 per month in Social Security survivor benefits which could only be used for the benefit of Ben, and that he received Carol's 401(k) account, which was worth approximately $59,000.[4] He testified that a 10% penalty and 20% in taxes would be imposed for withdrawing from Carol's 401(k) account. However, Bill testified that he received approximately $7,000 in disbursement from an IRA account that he inherited from Carol after her death. Bill stated that he used that $7,000 to pay $3,000 of Tom's college expenses, Cook County tax and other expenses relating to Carol's death. Bill noted that, excluding transportation costs, his total monthly household expenses was $4,160, that he did not have any other 401(k) accounts, deferred compensations or savings, and that he had under $800 in his checking account at the time of the hearing. At the hearing, Meg testified that she was an attorney at Blue Cross Blue Shield, and presented detailed records of Tom's college costs.

¶13 At the end of the two-day hearing, the circuit court made an oral ruling, finding that Bill had demonstrated a substantial change in circumstances, that he had no present ability to contribute to Tom's college education, and that he had no current obligation to make any contributions to Tom's first-year college expenses. The circuit court then denied Meg's petition for nonpayment of child support, stating that Bill had "demonstrated good cause and justification for his noncompliance." However, the circuit court granted Meg's petition for medical expenses and held Bill in contempt

[4]The record shows that Carol's investment account is referred to as both an IRA account and a 401(k) account. For clarity, we refer to it as a 401(k) account.

of court for failing to pay his 50% share of the medical expenses for the children. The circuit court further noted that, based on the record and testimony of Bill's earnings, Bill had a monthly *net* income of $1,155, which, according to a statutory guideline for child support, required him to pay $231–or 20%–of monthly child support. However, in light of the $59,800 in Carol's 401(k) account which Bill inherited after her death, the circuit court made an "upward deviation" from the guideline, and found that he was obligated to pay $1,000 per month in child support. The circuit court then held that Bill's obligation to pay child support, pursuant to the 2000 amended judgment, was temporarily reduced to $1,000 per month and that the temporary reduction was retroactive to February 1, 2009. The circuit court then stated the following:

> "I will probably have [Bill] back here as well on the status on either his job search or alternatively his earnings for his practice.
>
> Obviously as soon as you get back to work, back on your feet, we can enter a more appropriate order that would benefit all parties concerned here."
>
> * * *
>
> [T]he issue of contribution for [Tom's] first year at [college] is now res judicata. So any subsequent issues would be for any subsequent years or for [Will] when he becomes of age."

¶14 Although no transcript of the proceedings were provided to this court, there is some evidence in the record to show that, on May 29, 2009, the parties returned to court for an update regarding

Bill's earnings at Katten & Temple.[5]

¶15 In June 2009, Meg, through her attorneys, commenced further discovery against Bill by issuing subpoenas seeking information relating to other assets that Bill may have owned, including a pension plan from MCI Communications, Inc. (MCI), where Carol was formerly employed. A notice of deposition for Bill and a subpoena for records at Katten & Temple were also issued. In response, Bill sent a June 16, 2009 e-mail to Meg's legal counsel, asking that Meg withdraw all such "post-hearing discovery." On June 23, 2009, after receiving no response from Meg's counsel, Bill, acting *pro se*, filed a motion to quash the notice of deposition and subpoenas.

¶16 On July 9, 2009, the circuit court granted Bill's motion to quash in part, by prohibiting discovery for the period prior to January 30, 2009.

¶17 On July 20, 2009, the circuit court entered a written order memorializing the oral rulings at the April 2009 hearing,[6] which noted that the circuit court continued to exercise jurisdiction over Meg's petition for medical expenses, Bill's second amended petition to modify, and Meg's petition for college contribution, "but only with respect to expenses arising after Tom's 2008-2009 academic year which concluded in May 2009."

¶18 On August 19, 2009, Meg filed a motion for reconsideration of the July 20, 2009 order. On September 23, 2009, Meg, acting *pro se*, filed an amended motion for reconsideration contending

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[5]There is also some indication in the record that on July 7, 2009, Bill further reported his updated income and earnings before the circuit court. Further, following the April 2009 hearing, Bill's attorney withdrew from representation and Bill proceeded *pro se* on the case.

[6]After the April 2009 hearing, the parties disagreed on the content of the draft order memorializing the circuit court's findings. Thus, it appears from the record that this disagreement contributed to the delay of the circuit court's written order.

that the circuit court committed various errors in its July 20, 2009 ruling. The amended motion for reconsideration further urged the circuit court to consider newly discovered evidence regarding additional undisclosed income and assets available to Bill at the time of the April 2009 hearing. A letter from BUP dated April 14, 2009 was attached as an exhibit to the amended motion for reconsideration, which stated that Bill "may possibly have deferred compensation on future payments made by clients procured by him. *** The estimated amount for January through March 2009 is $6,894.98. This amount may change as charge backs may apply."

¶19 On October 28, 2009, Meg filed a motion for temporary relief under Section 501 of the Act (motion for temporary relief), requesting that the circuit court order Bill "to provide, on a temporary basis, year-end and monthly income information for himself, his minor child (Social Security only) and any business he maintains, including copies of commission and other law firm checks and other payments, 1099s, W-2s and other documsents *** to Meg for so long as Bill's child support obligation remains temporarily reduced by this [c]ourt." The motion for temporary relief alleged that Meg needed this information in order to determine whether the circuit court's temporary reduction of Bill's child support obligation should be lifted.

¶20 Following a hearing on November 9, 2009, the circuit court granted in part Meg's amended motion for reconsideration, finding that the April 14, 2009 letter from BUP was newly discovered evidence and that Bill had admitted to receiving a net sum of $3,100 in deferred compensations from BUP after April 2009. Bill also represented to the circuit court that he then contributed the $3,100 toward Tom's college expenses, which Meg verified as true. The circuit court then denied Meg's amended motion for reconsideration in all other respects, finding that the July 20, 2009 order "shall

stand as a final order," that it did not warrant any modification, and that Meg had not filed a motion to modify child support after the April 2009 hearing.

¶21 On November 20, 2009, Meg filed a motion for enforcement of a subpoena for records (motion for enforcement of subpoena) issued to MCI, where Carol was formerly employed. The motion for enforcement alleged that Bill could be eligible for an MCI pension plan as her surviving spouse, but that MCI had failed to comply with the subpoena.

¶22 On December 3, 2009, the circuit court denied Meg's motion for enforcement of subpoena, noting that the matter was moot as a result of paragraph 3 of the circuit court's November 9, 2009 order, which stated that the July 20, 2009 order "shall stand as a final order."[7]

¶23 On December 9, 2009, Meg filed a motion to clarify, correct or reconsider (motion to clarify) paragraph 3 of the November 9, 2009 order and the December 3, 2009 order denying the motion for enforcement of subpoena as moot.

¶24 On December 23, 2009, the circuit court entered an order stating that a hearing shall be held on February 25, 2010 regarding the following pending motions: Meg's October 28, 2009 motion for temporary relief; Meg's December 9, 2009 motion to clarify; and "[a]ny petition related to support/college expenses that Meg may file subsequent to this date, provided there is sufficient time for Bill to respond." Meg did not file any petitions for child support or college contribution after

[7]Although transcripts of the December 3, 2009 proceedings were not included in the record on appeal, the parties do not dispute that the circuit court denied the motion for enforcement of subpoena as moot on this basis.

December 23, 2009.[8]

¶25 On February 25, 2010, the circuit court denied Meg's December 9, 2009 motion to clarify:

> "I believe my original order goes back to July [20], 2009. [Meg's] former attorney filed a motion to reconsider that motion, and I called a hearing and ruled on it on November [9], 2009. Thereafter, on December [9], [Meg] filed a *pro se* motion to reconsider my order of November [9], 2009 reconsidering my order of July [20], 2009.
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> * * *
>
> [W]hen I first entered the temporary order, I entered it in order to enter a continuance to see what [Bill's] income would be because it was in flux. He had lost his job. He was starting as an independent contractor, *** and I did not know, nor did anybody know, what his cash flow was going to be. I continued it for *at least two or three times* to find out what he earned from one day to the next so I could modify that order any way that I felt appropriate.
>
> * * *
>
> After I get to so many status dates and I felt that there is nothing more to be gained from this, *** I deemed that order final

[8]The record on appeals shows that on July 10, 2009, Meg had filed a petition for contribution against Bill for Tom's college expenses, "including, but not limited to, his 2009 summer-school attendance and for the 2009-2010 academic year." We note, however, that Meg voluntarily withdrew the petition and the circuit court thereby dismissed it without prejudice.

> and the dollar amount I set is a final order. I also advised you at that time, because I even put it in my ruling, that the [c]ourt has represented to the parties, Meg specifically, that information she obtained regarding [Bill's] financial situation post hearing are matters for a future hearing.
>
> * * *
>
> I advised then, I will repeat myself so the record is clear, that if you want to address what he's done since my order was entered, I'll be happy to do so on a *motion to modify child support*. That [will] give you the opportunity to find out all those questions you're asking about, what has he made since the last order was entered, if there's been a change, if his income is up, whatever it is, I will be happy to accommodate those requests. But the way we do it, it isn't to continually continue a temporary order *ad infinitum*. There has to be closure to it, but you're still always allowed to repetition and we have a new time period, new subject matter. If you convince me that his income is up, I will modify my order accordingly. But in terms of the standard for a motion for reconsideration, the [c]ourt finds no basis for any clarification, [correction], or reconsideration and that motion is denied." (Emphases added.)

As a result of the circuit court's denial of the December 9, 2009 motion to clarify, Meg voluntarily

withdrew her October 28, 2009 motion for temporary relief.

¶26 On March 24, 2010, Meg filed a notice of appeal before this court.

¶27 ANALYSIS

¶28 We determine the following issues: (1) whether the circuit court erred in reducing Bill's child support obligation and in denying Meg's petition for nonpayment of child support; (2) whether the circuit court erred in ruling that Bill had "no present ability" to contribute to Tom's first-year college expenses; and (3) whether the circuit court erroneously converted a temporary child support order into a final order without holding an evidentiary hearing.

¶29 As an initial matter, we address the threshold issue of jurisdiction. Bill concedes that Meg's March 24, 2010 notice of appeal before this court was timely regarding the circuit court's February 25, 2010 order denying Meg's December 9, 2009 motion to clarify. However, he argues that because the December 9, 2009 motion to clarify only concerned matters relating to his second amended petition to modify, the March 24, 2010 notice of appeal was untimely as to the circuit court's ruling regarding Meg's petition for college expenses and petition for nonpayment of child support. We disagree.

¶30 Supreme Court Rule 303(a)(1) provides that a notice of appeal "must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from, or, if a timely posttrial motion directed against the judgment is filed, *** within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order." Ill. S. Ct. Rule 303(a)(1) (eff. Sept. 1, 2006). A final judgment is "one that disposes of the rights of the

parties with regard to the entire controversy or a definite and separate part thereof." *Gibson v. Belvidere National Bank and Trust,* 326 Ill. App. 3d 45, 48, 759 N.E.2d 991, 994 (2001). Supreme Court Rule 303(a)(2) further provides that "[n]o request for reconsideration of a ruling on a postjudgment motion will toll the running of the time within which a notice of appeal must be filed under this rule." Ill. S. Ct. Rule 303(a)(2) (eff. Sept. 1, 2006).

¶31 In the instant case, in April 2009, the circuit court held a two-day hearing on Bill's second amended petition to modify, Meg's petition for college contribution, petition for medical expenses, and petition for nonpayment of child support. At the end of the April 2009 hearing, the circuit court made an oral ruling finding that Bill had no present ability to contribute to Tom's first-year college education; denying Meg's petition for nonpayment of child support; reducing Bill's child support obligation to $1,000 per month; and granting Meg's petition for medical expenses, which is not an issue on appeal before us. On July 20, 2009, the circuit court entered a written order memorializing the April 2009 oral rulings, but retained jurisdiction over the issues of medical expenses, college contribution for expenses arising after Tom's first year of college, and Bill's second amended petition to modify. On November 9, 2009, the circuit court denied Meg's amended motion for reconsideration of the July 20, 2009 order, finding that the July 20, 2009 "shall stand as a final order." On February 25, 2010, the circuit court denied Meg's December 9, 2009 motion to clarify the November 9, 2009 order.

¶32 We find that the circuit court's July 20, 2009 order, in which it retained jurisdiction over certain matters, was not a final order disposing of the rights of the parties with regard to the entire

controversy. Rather, the circuit court's November 9, 2009 order declaring the July 20, 2009 ruling to "stand as a final order" was the final judgment from which an appeal may be made. Accordingly, Meg's December 9, 2009 motion to clarify the circuit court's November 9, 2009 order was a timely postjudgment motion that effectively tolled the running of the time within which a notice of appeal must be filed. Thus, the March 24, 2010 notice of appeal was timely filed within 30 days after the entry of the circuit court's February 25, 2010 order disposing of the last pending postjudgment motion directed against the circuit court's final order. Further, we may review all interlocutory orders that constitute a "procedural step in the progression leading to the entry of the final judgment from which an appeal has been taken." See generally *Knapp v. Bulun*, 392 Ill. App. 3d 1018, 1023, 911 N.E.2d 541, 547 (2009) (an appeal from a final judgment draws into issue all previous interlocutory orders that produced the final judgment). Therefore, we have jurisdiction over this appeal.

¶33 Turning to the merits of the appeal, we first determine whether the circuit court erred in reducing Bill's child support obligation and in denying Meg's petition for nonpayment of child support.

¶34 Meg argues that the circuit court erred in reducing Bill's child support obligation, retroactive to February 1, 2009. Specifically, she contends that the circuit court, in reducing Bill's child support obligation, failed to take into account his substantial earning history and earning potential. Meg further argues that the circuit court erred in denying her petition for nonpayment of child support.

¶35 Bill counters that the circuit court's factual findings were not against the manifest weight of

the evidence and that its decision to reduce his child support obligation was not an abuse of discretion. He contends that the circuit court did not err in taking into account his earnings at the time of the April 2009 hearing, and that the circuit court properly reduced his child support obligation retroactive to February 1, 2009.

¶36 We review the circuit court's factual findings under a manifest weight of the evidence standard and its decision to reduce Bill's child support obligation under an abuse of discretion standard. See *In re Marriage of Eberhardt*, 387 Ill. App. 3d 226, 233, 900 N.E.2d 319, 326 (2008). A finding is against the manifest weight of the evidence " 'only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence.' " *Id.*, quoting *Bazydlo v. Volant*, 164 Ill. 2d 207, 215, 647 N.E.2d 273, 277 (1995). An abuse of discretion occurs when no reasonable person would take the circuit court's view. *In re Marriage of Eberhardt*, 387 Ill. App. at 233, 900 N.E.2d at 326.

¶37 Section 510 of the Act governs the modification of child support obligation. 750 ILCS 5/510 (West 2008). An order of child support obligation may be modified upon a showing that there is a substantial change in circumstances. 750 ILCS 5/510(a)(1) (West 2008). The party seeking relief carries the burden of showing a change in circumstances substantial enough to warrant a modification of child support. *In re Marriage of Eberhardt*, 387 Ill. App. at 231, 900 N.E.2d at 324. A change in income constitutes a basis for modification of child support. *Id.* "Net income" is defined as the total of all income from all sources, minus certain enumerated statutory deductions such as federal and state taxes, social security payments, union dues, health insurance premiums,

prior child support obligations paid, and expenditures for repayment of debts. See 750 ILCS 5/505(a)(3) (West 2008). Child support obligation is determined by the parent's economic situation at the time the court makes the child support calculations. *In re Marriage of Rogers*, 213 Ill. 2d 129, 138, 820 N.E.2d 386, 391 (2004).

¶38 In the case at bar, following the two-day hearing in April 2009, the circuit court found that Bill had demonstrated a substantial change in circumstances. We find that the circuit court's findings of fact were supported by the weight of the evidence presented at the hearing. The circuit court noted that the evidence showed that Bill was terminated, without fault, from his employment with BUP on January 30, 2009, and that the unforseen loss of his employment was not a result of bad faith or conduct by Bill. Based on the record and Bill's testimony at the hearing, the circuit court found that the majority of Bill's February 2009 *gross* income in the amount of $9,807 resulted from his last paycheck from his employment with BUP. Bill's unimpeached testimony showed that he received a monthly *gross* income from Katten & Temple in the amount of $1,650--the *net* income of which amounted to $1,155 at the time of the hearing. The record also showed that Bill's monthly expenses, excluding transportation costs, were $4,160. The circuit court also considered other streams of income which Bill received, noting that the $1,590 per month in Social Security benefits was used to support Bill's minor son, Ben, that the mortgage debt related to Bill's two-flat property in Chicago exceeded the $1,200 per month that he received in rental income, and that Bill inherited a 401(k) account from Carol in the amount of $59,800. Moreover, we reject Meg's contention that the circuit court erred in failing to consider Bill's earning history and earning potential, and in rejecting any speculations in Bill's testimony at the April 2009 hearing regarding his future earnings

at Katten & Temple, because, absent bad faith, child support obligation is determined by Bill's economic situation at the time of the hearing. See *In re Marriage of Rogers*, 213 Ill. 2d at 138, 820 N.E.2d at 391; *In re Support of Pearson*, 111 Ill. 2d 545, 490 N.E.2d 1274 (1986); see also *In re Marriage of Anderson and Murphy*, 405 Ill. App. 3d 1129, 1137, 938 N.E.2d 207, 213 (2010); *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 1077, 916 N.E.2d 614, 618-19 (2009) (Illinois courts may impute income only when the payor parent is voluntarily unemployed, when the payor parent is attempting to evade a support obligation, or when the payor parent has unreasonably failed to take advantage of an employment opportunity); *In re Marriage of Lindman*, 356 Ill. App. 3d 462, 468, 824 N.E.2d 1219, 1224 (2005) (the Act does not allow "the possibility of more or less income in the future to determine whether the parent will pay more or less child support today").

¶39 We further find that the circuit court's decision to reduce Bill's child support obligation was not an abuse of discretion. In determining the amount of child support reduction, the circuit court, in accordance with statutory guidelines, calculated that 20% of Bill's $1,155 net income amounted to $231 per month in child support for Will, who was still a minor at the time of the hearing. See 750 ILCS 5/505(a)(1) (West 2008). However, in light of Bill's inheritance of Carol's 401(k) account in the amount of $59,800, the circuit court made an "upward deviation" from the statutory guidelines to $1,000. We cannot say that the circuit court's decision to reduce Bill's child support obligation from $2,100 per month, as set forth in the 2000 amended judgment, to $1,000 in April 2009, was such that no reasonable person would take the circuit court's view. Thus, we find that the circuit court did not abuse its discretion in reducing Bill's child support obligation.

¶40 Meg further contends that the circuit court erred in reducing Bill's child support obligation retroactive to February 1, 2009. She argues that Bill's second amended petition to modify, based on his job loss, was not filed until February 26, 2009. Thus, she argues, any reduction in child support should be applied no earlier than March 1, 2009.

¶41 Section 510(a) of the Act provides that "the provisions of any judgment respecting maintenance or support may be modified only as to installments accruing subsequent to due notice by the moving party of the filing of the motion for modification." 750 ILCS 5/510(a) (West 2008). Retroactive modification of child support may be applied to the date of the filing of the petition for modification. See *In re Marriage of Pettifer and Mathias*, 304 Ill. App. 3d 326, 328, 709 N.E.2d 994, 996 (1999).

¶42 We find that the circuit court acted within its discretion in retroactively reducing Bill's child support obligation to February 1, 2009. In the instant case, on August 18, 2008, Bill filed the original petition to modify child support, as a result of Tom's attainment of majority age. On November 21, 2008, he filed an amended petition to modify child support. On February 26, 2009, Bill filed a second amended petition to modify child support, which sought relief from the court based on Tom's emancipation and Bill's January 2009 job loss. We find that Bill's filing of the second amended petition to modify related back to his original August 18, 2008 petition. See *In re Marriage of Duerr*, 250 Ill. App. 3d 232, 239, 621 N.E.2d 120, 125 (1993). Accordingly, the date of due notice to Meg with respect to Bill's petition to modify child support is the date of his original filing–August 18, 2008–and the circuit court could have modified child support for any installments

accruing from the date of due notice. In this case, however, the circuit court chose to reduce Bill's child support obligation retroactive to February 1, 2009, rather than to August 18, 2008, thereby requiring Bill to pay the original amount of $2,100 in monthly child support through January 2009. We find no abuse of discretion in the circuit court's decision, in light of the fact that Bill was paid a full salary by his former employer, BUP, until January 30, 2009.

¶43 The circuit court further denied Meg's petition for nonpayment of child support, finding that Bill should not be held in contempt of court because he had demonstrated "good cause and justification" for failing to pay child support in February 2009 and March 2009. On appeal, however, Meg maintains that the circuit court erred in denying her petition for nonpayment of child support because it overlooked certain resources that Bill had that could have been used to make child support payments–namely, the $59,800 in Carol's 401(k) account, the January 2009 salary income, $1,200 per month of rental income and $1,590 per month in Social Security survivor payments.

¶44 Whether a party is guilty of contempt is a question of fact and a reviewing court will not disturb such a finding by a lower court unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion. *In re Marriage of Deike*, 381 Ill. App. 3d 620, 633, 887 N.E.2d 628, 639 (2008). "The failure to make support payments as required by court order is *prima facie* evidence of contempt." *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 279, 860 N.E.2d 539, 548 (2006). "The burden then rests on the alleged contemnor to show that his noncompliance was not willful or contumacious and that he has a valid excuse for his failure to pay." *Id.*

¶45 Based on our review of the record, we find that the circuit court acted within its discretion

in denying Meg's petition for nonpayment of child support, and thus, declining to hold Bill in contempt of court for his failure to pay child support in February 2009 and March 2009. The circuit court's finding that Bill showed good cause and justification for his noncompliance was supported by the evidence. Bill's loss of employment at the end of January 2009 and his significant decrease in income as an independent contractor at Katten & Temple were demonstrably sufficient to support the circuit court's ruling. But *cf. id*. at 280, 860 N.E.2d at 548 (payor's failure to make support payments was willful and contumacious where "he did not show that he was unable to pay the support or that he was unaware of his obligation to do so"). As discussed, it is clear that the circuit court properly considered Bill's other streams of income, by noting that the $1,590 per month in Social Security benefits was used to support Bill's minor son, Ben, and that the mortgage debt related to Bill's two-flat property in Chicago exceeded the $1,200 per month that he received in rental income. Although the record shows that Bill had inherited a 401(k) account from Carol in the amount of $59,800, *undisbursed* funds from an IRA, deferred employment earnings, pensions and the like are not considered "income" under section 505(a)(3) of the Act. See generally 750 ILCS 5/505(a)(3) (West 2008); *In re Marriage of Eberhardt*, 387 Ill. App. 3d at 226, 900 N.E.2d at 319 (former husband's *withdrawals* from IRA accounts were considered income for purposes of child support calculation); In *re Marriage of Lindman*, 356 Ill. App. 3d 462, 824 N.E.2d 1219 (2005) (IRA *disbursements* constituted "income" under section 505 of the Act). Thus, we conclude that the circuit court did not abuse its discretion in denying Meg's petition for nonpayment of child support.

¶46 We next determine whether the circuit court erred in ruling that Bill had "no present ability" to contribute to Tom's first-year college expenses.

¶47 Paragraph 13 of the 2000 amended judgment, entered by the circuit court following the parties' dissolution of marriage, provided that the parties "shall be obligated to pay for the college education of the children in accordance with [s]ection 513 of the [Act]." Section 513 of the Act provides that a court, in making awards for educational expenses, shall consider "all relevant factors that appear reasonable and necessary, including: (1) [t]he financial resources of both parents; (2) [t]he standard of living the child would have enjoyed had the marriage not been dissolved; (3) [t]he financial resources of the child; [and] (4) the child's academic performance." 750 ILCS 5/513 (West 2008). On appeal, Meg only disputes the first factor, namely, that Bill's financial resources enabled him to contribute to Tom's college expenses.

¶48 We review the circuit court's factual findings under a manifest weight of the evidence standard and its ultimate decision regarding whether to award education expenses under an abuse of discretion standard. See *People ex rel. Sussen v. Keller*, 382 Ill. App. 3d 872, 877, 892 N.E.2d 11, 16 (2008).

¶49 Meg makes similar arguments regarding the issue of college contribution as those relating to the issue of child support. Meg argues that the circuit court, in ruling that Bill had no present ability to contribute to Tom's first-year college expenses, erroneously disregarded "substantial money and property" to which Bill had access–including the $59,800 in Carol's 401(k) account; the $1,200 per month in rental income from his two-flat property in Chicago; Bill's January 2009 gross salary from BUP in the amount of $9,807; $1,590 per month in Social Security survivor benefits; Bill's $1,650 income from Katten & Temple as of the date of the April 2009 hearing; and various

income received by Bill in 2008.

¶50 Bill counters that the circuit court's factual findings were not against the manifest weight of the evidence and that its decision not to award Tom's first-year college expenses was not an abuse of discretion.

¶51 As discussed, the circuit court's factual findings, at the April 2009 hearing, were supported by the evidence presented. Based on our review of the record, the circuit court acted within its discretion in determining that Bill had no "present ability" to contribute to Tom's first year of college expenses. Specifically, the circuit court noted that Bill's loss of employment was unforseen, and that "any way [the court] look[s] at this record," Bill had no current ability to pay for Tom's educational expenses. Although the record shows that the circuit court's specific discussion of Bill's various streams of income occurred mostly during its ruling to reduce child support, we find no abuse of discretion in the circuit court's determination not to impose educational expenses against Bill for Tom's first year of college based on the same facts, where educational expenses under section 513 of the Act are considered a form of child support. See *In re Marriage of Chee*, 2011 IL App. (1st) 102797, ¶9; *Petersen v. Petersen*, 403 Ill. App. 3d 839, 844, 932 N.E.2d 1184, 1188 (2010) (payment of college expenses is a form of child support for nonminor children of a dissolved marriage). Moreover, we reject Meg's contention that the circuit court erred in failing to consider Bill's earning history and earning potential, and in not ordering Bill to contribute to Tom's first-year college expenses for the months prior to his job loss, as Meg contends, because, absent bad faith, college contribution is determined by Bill's economic situation at the time of the hearing. See *In re*

Support of Pearson, 111 Ill. 2d at 552, 490 N.E.2d at 1277; *In re Marriage of Gosney*, 394 Ill. App. 3d at 1077, 916 N.E.2d at 618-19. Thus, we find that the circuit court acted within its discretion in ruling that Bill had "no present ability" to contribute to Tom's first year of college expenses.

¶52 We next determine whether the circuit court erroneously converted a temporary child support order into a final order without holding an evidentiary hearing.

¶53 Meg contends that the July 20, 2009 order memorializing the circuit court's oral rulings from the April 2009 hearing was only a temporary, rather than a final order, and that its November 9, 2009 order denying in part her motion for reconsideration erroneously converted the July 20, 2009 temporary order into a final order without an evidentiary hearing or sworn testimony from Bill regarding his updated earnings.

¶54 As discussed at the outset of this order, the circuit court's November 9, 2009 order declaring the July 20, 2009 ruling to "stand as a final order" was the final judgment from which an appeal may be made. There is some indication in the record that, following the April 2009 hearing, the parties returned to court on May 29, 2009 and July 7, 2009, for an update regarding Bill's earnings at Katten & Temple. At the November 9, 2009 hearing, the circuit court remarked that Meg had not filed a new motion to modify child support after the April 2009 hearing. Moreover, on February 25, 2010, in denying Meg's motion to clarify, the circuit court noted that it had continued the matter for "at least two or three times to find out what [Bill] earned from one day to the next," but that it deemed the July 20, 2009 order final because the court "felt that there [was] nothing more to be gained from this." Thus, we find that the circuit court had multiple opportunities to evaluate Bill's economic

situation and properly deemed the July 20, 2009 order to become final.

¶55 Nor do we accept Meg's contention that the circuit court inappropriately "dismissed" her petition for college contribution against Bill for Tom's second, third and fourth years of college. The circuit court's July 20, 2009 order specifically noted that Bill had "no present ability" to contribute to Tom's first-year college expenses, and that the issue of college contribution was *res judicata* only to the extent of Tom's freshman year of college. Our review of the record revealed that on July 10, 2009, Meg had filed a petition for contribution against Bill for Tom's 2009 summer school attendance and the 2009-2010 academic year, but then voluntarily withdrew the petition for unknown reasons. Further, the record shows that the circuit court, as late as December 23, 2009, allowed Meg to file any new petitions relating to the modification of child support or college contribution. However, Meg never filed a new petition for college contribution or modification of child support. Thus, we find Meg's contentions to be without merit.

¶56 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶57 Affirmed.