2011 IL App (1st) 102575-U

THIRD DIVISION
December 7, 2011

Nos. 1-10-2575, 1-10-2915 (Consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF MICHELLE MONTICELLO, Petitioner-Appellee and Cross-Appellant, and MICHAEL MONTICELLO, Respondent-Appellant and Cross-Appellee.	))))))))))	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY No. 01 D 11195 HONORABLE JORDAN KAPLAN, JUDGE PRESIDING.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Salone concurred in the judgment.

O R D E R

¶ 1 *HELD*: The circuit court of Cook County did not abuse its discretion in increasing the ex-husband's monthly child support payments. However, the child support award should have been retroactive to the time when the husband had notice of the ex-wife's petition to increase support. The circuit court did not err in denying the ex-wife's petition for attorney fees. The judgment of the circuit court is affirmed in part, reversed in part and remanded.

¶ 2 Michael Monticello appeals from a post-dissolution order of the circuit court of Cook County increasing his monthly child support payments. Michelle Monticello, now known as

Michelle Roberts, cross-appeals from the circuit court's decision that the increased child support was not retroactive to her filing of the petition for modification and the circuit court's denial of her request for attorney fees. For the following reasons, we affirm the increase in child support, reverse the denial of retroactive child support, affirm the denial of attorney fees, and remand the case for further proceedings.

¶ 3 BACKGROUND

¶ 4 The record on appeal discloses the following facts. Michelle and Michael were married in 1995. They have two daughters: Claire, born in 1997; and Madeline, born in 1998.

¶ 5 In 2001, Michelle filed a petition for dissolution of marriage. She filed an asset disclosure statement claiming no income, monthly living expenses of $2,460, and monthly debt service of $1,200. Michael filed an asset disclosure statement claiming an adjusted gross income of $180,000, monthly net income of $7,539, monthly living expenses of $6,497, and monthly debt service of $218.

¶ 6 The case was resolved by agreement. The circuit court entered a judgment for dissolution of marriage incorporating a marital settlement agreement and a joint custody and parenting agreement. The parties agreed their daughters' primary residence would be with Michelle. Michael would pay monthly unallocated maintenance and support of $3,600 from July 2002, through August 2004. Thereafter, Michael would pay child support in accordance with the minimum statutory guideline set forth in section 505 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/505 (West 2002)). Michael agreed to pay for life and medical insurance, with both splitting the cost of unreimbursed medical expenses. Michael also agreed to

pay the daughters' Catholic school tuition through academic year 2003-04, reserving the issue of future academic years. Michelle received approximately 54% of the total net marital estate.

¶ 7 In 2004, Michelle filed petitions to increase child support and for contribution to the daughters' private education costs. Michelle alleged Michael's gross income had increased significantly since the original judgment was entered. In response, Michael alleged that Michelle had remarried and her household income had increased significantly. On March 24, 2005, the circuit court entered an agreed order directing Michael to pay $2,574 in monthly child support, which represented 28% of his net monthly salary. The order also directed Michael to pay as additional child support 28% of performance bonuses he received under his employer's corporate incentive plan, up to a gross bonus amount of $125,000. The parties further agreed to equally divide their daughters' tuition and fees for the 2004-05 academic year.

¶ 8 On October 30, 2007, Michelle filed her current petition to increase child support. Michelle sent a copy of the petition to Michael's counsel on January 17, 2008. Michael's counsel filed a response to the petition on February 25, 2008. The petition was initially set for hearing on June 12, 2008, but was continued numerous times for various reasons. On June 3, 2008, the hearing was continued on Michael's motion. Subsequently, the hearing was reset on the trial court's motion on at least two occasions. On December 8, 2008, the trial court held a settlement/pretrial conference and continued the matter to December 22, 2008. The petition was then set for hearing on March 3, 2009, but was reset for May 14, 2009, on Michael's motion.

¶ 9 The hearing was held on May 14 and completed on August 17, 2009. At the hearing, Michelle testified she worked part-time as a teacher, earning approximately $25,000 annually.

She worked for the Catholic Archdiocese, as she did prior to the birth of the parties' children. Michelle listed total monthly living expenses of $7,200 in her 2005 disclosure statement, and $12,280 in her 2009 disclosure statement. The latter figure from Michelle's current disclosure does not include expenses for her current husband. Michelle's credit card debt increased from approximately $4,500 in 2005 to a balance of $15,000 in 2009.

¶ 10 Michelle also testified her child support payments are deposited into her checking account, not a joint account with her husband. She received $2,574 monthly, along with payments from Michael's bonuses averaging $22,000 annually (averaging $1,833 monthly). According to Michelle, she paid $4,625 in monthly expenses, including food, telephone, laundry, drycleaning, and housekeeping expenses.

¶ 11 Michelle further testified that Claire is involved in a volleyball club, while Madeline is in a soccer club. Michelle initially testified her daughters started Irish dancing lessons in 2005, but later stated they began in the fall of 2002. The cost of the Irish dancing lessons in 2005 was $600 monthly. According to Michelle, Claire is one of the top 20 Irish dancers in America, while Madeline is one of the top 120 Irish dancers in the world. Both girls have won numerous dancing competitions; they have been to Ireland twice. The girls take lessons two or three times weekly, but have lessons five times weekly to prepare for major competitions, which occur three times annually. Michelle's disclosure statement claims Irish dancing expenses of $17,321 annually, of which approximately $5,000 is spent on lessons, with the remainder paid for competitions, costumes and associated costs.

¶ 12 Moreover, Michelle testified Michael was aware of their daughters' dancing since 2002 and did not object to it, although he had declined to contribute towards the dancing expenses. According to Michelle, Michael has attended the children's dancing activities, including traveling to Ohio and Tennessee to see them dance.

¶ 13 Michael testified he recently remarried and lives in a single-family home in Glenview, Illinois, worth $800,000, on which $430,000 is still owed. Michael and Michelle lived in a home valued at $557,000 during their marriage. Michael previously worked for LaSalle Bank and began working as executive director for the Private Bank in 2007. He received a signing bonus of $117,000 and receives other bonuses pursuant to his contract. From 2006 to 2008, Michael received the maximum bonus and paid 28% of the maximum $125,000 specified in the prior agreed order. Michael's adjusted gross income was $624,369 in 2007, and $531,550 in 2008. However, Michael's W-2 gross pay was $309,452 in 2008. In 2009, Michael's annual salary was $193,000, and he was paid $160,000 in bonuses to date. Michael stated his bonuses were not guaranteed and his stock options were then "under water." Michael paid an average $53,000 in annual child support.

¶ 14 Michael also testified Michelle made the decisions about the children's activities. Michael does not object to his daughters having extracurricular activities, but he does object to the amount and cost, particularly for the Irish dancing. Michael stated he did not learn the children were involved in Irish dancing until after the divorce. According to Michael, Michelle never asked him to contribute to the dancing expenses or sent him a bill. Michael also testified he knew his daughters were competing in Ireland, but he did not travel there and was unaware of

the traveling cost for his daughters to compete there. Michael added that the Irish dancing has occasionally forced a rescheduling of his parenting time.

¶ 15 The parties submitted written closing arguments in October 2009. That same month, Michelle filed a petition for $15,520.78 in attorney fees, amending prior requests filed in 2008. At a hearing the circuit court held on the fee petition later that month, the parties stipulated that Michelle's attorney spent a reasonable and necessary amount of time on her case and $250 per hour was a reasonable rate for the legal services provided. However, the parties did not agree that the time expended resulted in Michelle incurring actual fees.

¶ 16 The circuit court ruled on Michelle's petitions on July 30, 2010. The trial court found a substantial change in circumstances had occurred because Michael's income and the children's expenses had increased since entry of the March 24, 2005, order. The circuit court found it did not have adequate evidence to determine the exact amount of Michael's net income, because his current income structure included salary, bonuses, stocks, options, employer retirement contributions, and miscellaneous compensation, which varied from year to year. Accordingly, after considering the financial resources and needs of the children; the financial resources and needs of the custodial parent; the standard of living the children would have enjoyed had the marriage not been dissolved; the physical and emotional condition of the children and their educational needs; and the financial resources and needs of the noncustodial parent, the trial court ordered Michael to pay $6,600 in monthly child support, inclusive of any expenses for extracurricular activities. The circuit court ordered that the support payments would not be retroactive because Michael was current in his child support payments.

¶ 17 The circuit court also denied Michelle's attorney fee petition. The circuit court found both parties had the ability to pay their own fees. The circuit court also found Michael had significant income and assets from which he could pay his attorney fees. The circuit court ruled Michael should not be responsible for Michelle's fees because he was current in his support payments. The court further ruled that Michelle should be responsible for her own fees because she was represented at the hearing by her current husband.

¶ 18 On August 26, 2010, Michael filed a timely notice of appeal with this court. On September 3, 2010, Michelle filed a timely notice of cross-appeal. The same day, the circuit court entered a uniform order for support. On October 1, 2010, Michael filed a timely second notice of appeal to this court. The appeals were consolidated on December 6, 2010.

¶ 19 DISCUSSION

¶ 20 I. Michael's Appeal

¶ 21 On appeal, Michael argues the trial court erred by ordering him to pay $6,600 in monthly child support. A child support judgment can be modified only upon a showing of a substantial change in circumstances. *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 1076 (2009); *In re Marriage of Sweet*, 316 Ill. App. 3d 101, 105 (2000). The party seeking the modification must show both a change in the children's needs and in the noncustodial parent's ability to pay. *Sweet*, 316 Ill. App. 3d at 105.

¶ 22 If a change in circumstances has been established, the court must set child support payments based on relevant statutory factors. Section 505 of the Act provides in relevant part:

"(a) In a proceeding for *** modification of a previous order for child support under Section 510 of this Act ***, the court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable and necessary for his support, without regard to marital misconduct. ***

(1) The Court shall determine the minimum amount of support by using the following guidelines:

Number of Children	Percent of Supporting Party's Net Income
1	20%
2	28%
3	32%
4	40%
5	45%
6 or more	50%

(2) The above guidelines shall be applied in each case unless the court makes a finding that application of the guidelines would be inappropriate, after considering the best interests of the child in light of evidence including but not limited to one or more of the following relevant factors:

(a) the financial resources and needs of the child;

(b) the financial resources and needs of the custodial parent;

(c) the standard of living the child would have enjoyed had the marriage not been dissolved;

> (d) the physical and emotional condition of the child, and his educational needs; and
>
> (e) the financial resources and needs of the non-custodial parent.
>
> If the court deviates from the guidelines, the court's finding shall state the amount of support that would have been required under the guidelines, if determinable. The court shall include the reason or reasons for the variance from the guidelines.
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> * * *
>
> (5) If the net income cannot be determined because of default or any other reason, the court shall order support in an amount considered reasonable in the particular case. The final order in all cases shall state the support level in dollar amounts. However, if the court finds that the child support amount cannot be expressed exclusively as a dollar amount because all or a portion of the payor's net income is uncertain as to source, time of payment, or amount, the court may order a percentage amount of support in addition to a specific dollar amount and enter such other orders as may be necessary to determine and enforce, on a timely basis, the applicable support ordered." 750 ILCS 5/505 (West 2010).

The setting or modification of child support is within the trial court's discretion and will not be reversed absent an abuse of that discretion. *Sweet*, 316 Ill. App. 3d at 105.

¶ 23 Michael first argues that the trial court erroneously failed to determine his net income. Generally, in reaching the proper amount of child support, the court must first determine the noncustodial parent's net income. *Gosney*, 394 Ill. App. 3d at 1077. Although net income may

be difficult to ascertain in some cases and an impediment to determining an award of support, it is well established that courts have the authority to compel parties to pay child support at a level commensurate with their earning potential. *Id.*; *Sweet*, 316 Ill. App. 3d at 107. If present income is uncertain, a court may impute income to the payor. *Gosney*, 394 Ill. App. 3d at 1077; *Sweet*, 316 Ill. App. 3d at 107. It is also proper for the court to use an income-averaging approach to determine the noncustodial parent's child support obligation where that parent's income varies significantly from year to year. *E.g.*, *In re Marriage of Tegeler*, 365 Ill. App. 3d 448, 459 (2006); *In re Marriage of DiFatta*, 306 Ill. App. 3d 656, 662 (1999); *In re Marriage of Freesen*, 275 Ill. App. 3d 97, 104 (1995).

¶ 24 The trial court's order specifically relied on section 505(a)(5) of the Act, which expressly provides for situations where net income cannot be determined. 750 ILCS 5/505(a)(5) (West 2010). Michael argues he is a W-2 employee and his income was easily ascertainable. However, the record shows Michael's compensation included not only salary, but also bonus payments, stock options, contributions to retirement accounts, and miscellaneous income, creating significant annual fluctuations in his income. Thus, the trial judge did not abuse his discretion in concluding that he could not determine the exact amount of Michael's net income.[1]

[1] Following oral argument, Michael moved to cite *In re Marriage of Douglas*, 195 Ill. App. 3d 1053 (1990), and *In re Marriage of Steel*, 2011 IL App (2d) 080974 ¶ 89, as authority ruling the trial court was required to make an express finding of his net income. Neither case involved an express finding that section 505(a)(5) of the Act applied, as is the case here.

¶ 25 Michael also argues the $6,600 figure "came out of nowhere." Michelle responds that the trial court used an income-averaging approach, arguing that $6,600 represents approximately 28% of Michael's average adjusted gross income for 2006-08 after statutory deductions, as summarized in her closing argument to the trial court. The record shows that Michelle's closing argument sought $6,260 in monthly support based on a calculated net income of $410,000, which Michelle argued was less than Michael's average income for the prior three years. This court will reject the argument that the trial court made no findings and affirm where it is clear the court implicitly made findings consistent with one of the party's closing argument. See *In re Marriage of Marx,* 281 Ill. App. 3d 897, 900-01 (1996).

¶ 26 In this case, although the record tends to support Michelle's claim that the trial court used an income-averaging approach and ordered an increase consistent with the statutory guidelines, the trial court's order cites section 505(a)(5) of the Act and states that the judge relied on the factors listed in section 505(a)(2) of the Act. Accordingly, we turn to consider whether the trial court abused its discretion in increasing the monthly child support payment to $6,600, based on the five factors listed in section 505(a)(2) of the Act.

¶ 27 First, we consider the financial resources and needs of the parties' two children. In this case, there was no evidence that the children have independent financial resources. An increase in children's needs can be presumed on the basis that they have grown older and the cost of living has risen. *Sweet*, 316 Ill. App. 3d at 105. The evidence adduced at the hearing also points to an increase in the children's expenses.

¶ 28 Second, we consider the financial resources and needs of the noncustodial parent. Michael states his annual salary is $193,000 and that his bonus is not guaranteed.[2] However, the trial court was entitled to consider bonus payments in determining Michael's financial resources. See *Einstein v. Nijim*, 358 Ill. App. 3d 263, 270-71 (2005). Michael notes he is also obliged to contribute to the children's school, health insurance and uncovered medical expenses. However, Michael's brief does not refer to amounts for these expenses, although his brief does note that Michael was initially fully responsible for the children's tuition and this obligation was reduced starting in the 2004-05 school year. Michelle, comparing Michael's disclosure statements for 2004 and 2009, notes that the value of Michael's home, rental properties and retirement accounts have increased in value by hundreds of thousands of dollars.

¶ 29 Third, we consider the financial resources and needs of the custodial parent. Michael asserts Michelle has the time and ability to work full-time, but chooses not to do so. Michael notes that a court may impute additional income to a noncustodial parent who is voluntarily underemployed. *In re Marriage of Adams*, 348 Ill. App. 3d 340, 344 (2004). However, the trial court is not required to do so. *Adams* relied on *Sweet*, which ruled "if a court finds that a party is not making a good-faith effort to earn sufficient income, the court may set or continue that

[2] Michael notes he filed a new petition after the order on appeal was entered. Michael's petition alleged he did not receive a discretionary bonus in 2009 payable in 2010. Michael's subsequent petition is not the subject of this appeal.

party's support obligation at a higher level appropriate to the party's skills and experience." *Sweet*, 316 Ill. App. 3d at 107.

¶ 30 In this case, Michelle earns approximately $25,000 annually working part-time as a teacher for a Catholic school, as she did prior to having children, at a level appropriate for her experience. Michael does not identify any evidence in the record regarding Michelle's prospects for full-time employment, suitable employment opportunities, or expenses that might be incurred regarding the children if Michelle worked full-time.

¶ 31 Additionally, Michael asserts that the court may impute Michelle's current husband's income to her. See *In re Marriage of Drysch*, 314 Ill. App. 3d 640, 644-46 (2000). Again, Michael points to no evidence in support of the argument. Michael alleged that Michelle's husband has a yearly income over $200,000, but identifies no testimony or documentary evidence of this. The record shows that Michelle's husband billed $250 hourly representing Michelle in this case, but there is no direct evidence of her current husband's true income or expenses.

¶ 32 Michael further notes that Michelle has saved some of the child support payments and has more money in the bank than she had in 2005. Michelle responds that in 2005, she had $18,700 in joint savings and checking accounts with her husband and personal debt of $4,500. At trial, she had $50,000 in the joint accounts and $15,500 in personal debt. Michelle testified at trial that approximately $30,000 of the joint accounts were funds provided by her current husband.

¶ 33 Michael implies that Michelle is attempting to obtain maintenance in the guise of child support. See *In re Marriage of Scafuri*, 203 Ill. App. 3d 385, 392 (1990). However, there is no evidence in the record to support the speculation that Michelle has misappropriated child support money for her own use. This court has found a custodial parent saving to provide for future uncertainties to be commendable. *In re Marriage of Garrett*, 336 Ill. App. 3d 1018, 1022 (2003). "This court does not want to instruct that unless a custodial parent spends the allotted child support money within the month it is received, the court will deem the excess unnecessary." *Id.*

¶ 34 Fourth, we consider the standard of living the children would have enjoyed had the marriage not been dissolved. Michael relies heavily on *In re Marriage of Singleteary*, 293 Ill. App. 3d 25, 36 (1997), and *In re Marriage of Bush*, 191 Ill. App. 3d 249, 261 (1989), in support of his argument that a child support award is not intended as a windfall to the custodial parent. In each case, however, the facts involved a situation where both parents' individual incomes were more than sufficient to meet the child's needs and allow the child the lifestyle he would have enjoyed if the parties had not divorced. *Singleteary*, 293 Ill. App. 3d at 38; *Bush*, 191 Ill. App. 3d at 260. Such is not the case here. Michelle's annual income of approximately $25,000 is nominal compared to Michael's income -- however measured – and clearly could not be considered sufficient to provide the reasonable needs of their two daughters, taking into account their lifestyle before the dissolution. Although child support is the joint obligation of both parents, when one parent earns a disproportionately greater income than the other, that parent should bear a larger share of the support. See *Singleteary*, 293 Ill. App. 3d at 38.

¶ 35 Ultimately, Michael's argument is that providing for the reasonable needs of his daughters should not extend to financing their Irish dance lessons, competitions and associated expenses. Michael's argument conflates the already considered financial needs of the children with the standard of living the children would have enjoyed had the marriage not been dissolved. This level of support may extend beyond the children's "shown needs." *In re Marriage of Bussey*, 108 Ill. 2d 286, 297 (1985).

¶ 36 Based on the record before us, Michael has known about his daughters' Irish dancing activities for years and did not object, although he has declined to contribute towards the dancing expenses specifically. The record shows that Michael knew these activities extended to interstate and international competition. A trial court could reasonably infer that Michael understood not only that such activities were likely costly, but also that they were likely being financed in part from his monthly child support payments.

¶ 37 Fifth, we consider the physical and emotional condition of the children, and their educational needs. This was not an issue at trial.

¶ 38 The ultimate issue is whether, having considered these factors, the trial court abused its discretion in ordering an increase in child support. An abuse of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view. *People v. Ortega*, 209 Ill. 2d 354, 359 (2004); *People v. Illgen*, 145 Ill. 2d 353, 364 (1991). An application of impermissible legal criteria will also justify a reversal in this context. *Ortega*, 209 Ill. 2d at 360; *Boatmen's National Bank of Belleville v. Martin*, 155 Ill. 2d 305, 314 (1993). Based on the record before us, we cannot say that no reasonable person would have

ordered the child support increase at issue. Michael has not shown any error of law in the entry of the order. Accordingly, we conclude the trial court did not abuse its discretion in ordering Michael to pay $6,600 monthly for child support.

¶ 39 II. Michelle's Cross-Appeal

¶ 40 In her cross-appeal, Michelle argues the trial court erred in denying her retroactive child support and contribution to her attorney fees. We address each contention in turn.

¶ 41 A. Retroactive Child Support

¶ 42 First, Michelle argues the trial court erred in not making the increased child support retroactive to the filing of her petition. Section 510 of the Act provides that provisions of any judgment respecting maintenance or support may be modified "only as to installments accruing subsequent to due notice" by the party seeking the change. 750 ILCS 5/510(a) (West 2006). This insures that the respondent is put on notice prior to any change being made with respect to the original child support and expense obligations. *In re Marriage of Petersen*, 2011 IL 110984, ¶ 18. The question of whether modification of child support should be retroactive to the date of the filing of the petition for modification is in the sound discretion of the trial court. *E.g., Fedun v. Kuczek*, 155 Ill. App. 3d 798, 805 (1987).

¶ 43 In this case, Michelle filed her petition to modify child support on October 30, 2007. However, Michelle did not send a copy of the petition to Michael's attorney until January 17, 2008. Moreover, the record does not show when Michael was actually served with notice of the petition. Michael certainly received due notice by February 25, 2008, when Michael's attorney filed a response to the petition.

¶ 44 After Michael received due notice, the petition was initially set for hearing on June 12, 2008, but was continued numerous times for various reasons. On June 3, 2008, the hearing was continued on Michael's motion. Thereafter, the hearing was reset on at least two occasions by the trial court. On December 8, 2008, the trial court held a settlement/pretrial conference and continued the matter to December 22, 2008. The petition was then set for hearing on March 3, 2009. The hearing was reset for May 14, 2009, on Michael's motion. The hearing was held on May 14 and August 17, 2009. The parties submitted written closing arguments in October 2009. The trial court ruled on Michelle's petition on July 30, 2010.

¶ 45 "We recognize that there is some delay in disposing of post-decree petitions inherent in the judicial process due to securing service on the parties, to competing discovery, and to the court's calendar." *In re Marriage of Leva*, 125 Ill. App. 3d 55, 57 (1983). However, a modification of child support should be retroactive where the entry of the order was unduly delayed by the spouse and the trial court. See, *e.g.*, *In re Marriage of Carpel*, 232 Ill. App. 3d 806, 820 (1992) (denial of retroactive support where husband caused no delay, court timely heard the petition and wife failed to pursue prior petitions); *Fedun*, 155 Ill. App. 3d at 805 (court's 14 month delay after hearing in entering order prejudiced the plaintiff). Indeed, retroactivity may be warranted even in cases where the delay is attributable to routine judicial process, where the delay is for an extended period of time. See *In re Marriage of Geis*, 159 Ill. App. 3d 975, 988 (1987) (two years).

¶ 46 In this case, the delay in ruling on the petition was extended two and one-half years, much longer than the delay in either *Fedun* or *Geis*. After Michael received notice, there is no

showing in the record that Michelle was responsible for the various delays in hearing her petition. The record shows the delays are attributable to Michael and the trial court. The changes in circumstances justifying the increase in child support existed at the time Michael had due notice of Michelle's petition. *In re Marriage of Ingrassia*, 140 Ill. App. 3d 826, 832 (1986) (trial court justified in awarding support increase retroactive to petitioner's bankruptcy, rather than filing of petition).

¶ 47 Michael argues the trial court was justified in denying retroactive support because Michael had always paid substantial and reasonable amounts of support. Michael cites no legal authority supporting the assertion, which fails to address the reality of the change in circumstances after the prior level of support was set. Michael also argues the trial court could have found that it would be unfair to make the award retroactive, given the amount of the increase in support. Again, Michael cites no authority in support of this assertion. Moreover, we conclude it would be unfair and unreasonable for Michael to benefit from delays he caused and delays attributable to the trial court, and that it is arguably more unfair and more unreasonable when a substantial increase in support is at issue. Conversely, accepting Michael's argument would only encourage respondents to seek delays in the hope that a lengthy delay might cause a trial court to decline making an award retroactive. Our case law recognizes that some delay in adjudicating may be inevitable; it does not recognize such delay as desirable or encourage delay.

¶ 48 In short, as the amount of child support was properly increased, Michelle would be unfairly prejudiced by the extreme delay caused by Michael and the trial court if the order is not

made retroactive. Accordingly, the provision of the circuit court's order denying retroactive child support is reversed, and the cause remanded for the entry of an award retroactive to the date when Michael received due notice of Michelle's petition.

¶ 49 B. Attorney Fees

¶ 50 Second, Michelle argues the trial court erred in denying her $15,520.78 in attorney fees. Generally, it is the responsibility of the party who incurred attorney fees to pay those fees. *In re Marriage of Nesbitt*, 377 Ill. App. 3d 649, 656 (2007). However, section 508(a) of the Act allows for an award of attorney fees where one party lacks the financial resources and the other party has the ability to pay. 750 ILCS 5/508(a) (West 2006). When determining an award of attorney fees, the allocation of assets and liabilities, maintenance and the relative earning abilities of the parties should be considered. *In re Marriage of Suriano*, 324 Ill. App. 3d 839, 852 (2001). The party seeking an award of attorney fees must establish an inability to pay and the other spouse's ability to do so. *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005). Financial inability exists where requiring payment of fees would strip that party of his or her means of support or undermine his or her financial stability. *Schneider*, 214 Ill. 2d at 174. The allowance of attorney fees and the amount awarded are matters within the sound discretion of the circuit court and will not be reversed on appeal absent an abuse of discretion. *Schneider*, 214 Ill. 2d at 173.

¶ 51 In this case, the trial court refused to award attorney fees to Michelle on the grounds that both parties had the ability to pay their own attorney fees and Michelle was represented by her current husband. Although Michelle primarily argues the trial court erred in considering she was

represented by her spouse, we conclude the trial court did not err in denying fees based on Michelle's ability to pay. Financial inability to pay does not demand a showing of destitution, and the fee-seeking spouse is not required to divest himself or herself of capital assets before requesting fees. *In re Marriage of Minear*, 287 Ill. App. 3d 1073, 1085 (1997). It is sufficient to show payment would exhaust the petitioner's estate or strip the petitioner of his or her means of support or undermine his or her economic stability. *Id.*; *In re Marriage of Haas*, 215 Ill. App. 3d 959, 965 (1991). In this case, while there is a great disparity in the parties' incomes, Michelle did not show that paying $15,520.78 would exhaust her estate, strip her of support, or undermine her economic stability. Accordingly, we conclude the circuit court did not abuse its discretion in denying Michelle's attorney fee petition.

¶ 52 CONCLUSION

¶ 53 In sum, the trial court did not abuse its discretion in increasing Michael's monthly child support payment. However, the trial court unreasonably refused to order that the child support award be retroactive to when Michael had due notice of Michelle's petition for modification of child support. Lastly, the trial court did not erred in denying Michelle's attorney fee petition, as Michelle failed to show an inability to pay her own fees. Accordingly, the judgment of the circuit court of Cook County is affirmed in part, reversed in part, and remanded for further proceedings, including the entry of a retroactive child support award, consistent with this order.

¶ 54 Affirmed in part and reversed in part; cause remanded with directions.