2019 IL App (1st) 180828-U

No. 1-18-0828

Third Division
September 30, 2019

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

In re MARRIAGE OF JOHN D'AMBROGIO,	)	Appeal from the Circuit Court of Cook County.
Petitioner-Appellant,	)	No. 09 D8 317
and	)	Honorable John Thomas Carr, Judge, presiding.
EILEEN D'AMBROGIO,	)	
Respondent-Appellee.	)	

JUSTICE COBBS delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court's dismissal of a petition to review child support obligation is affirmed where petitioner did not establish a substantial change in circumstances. Request for trial judge reassignment declined.

¶ 2 Petitioner, John D'Ambrogio, appeals the trial court's March 23, 2018 order dismissing his "Petition to Review Child Support Obligation." He contends that the trial court erred in dismissing his petition without an evidentiary hearing and was biased against him. John requests that this court reverse the trial court's dismissal and remand this case to a different

trial judge for an evidentiary hearing on his petition. For the following reasons, we affirm the trial court's order.

¶ 3 I. BACKGROUND

¶ 4 John, and respondent, Eileen D'Ambrogio, were married in 1999 and have two minor children together. On June 27, 2011, the trial court entered a judgment dissolving the John and Eileen's marriage. That judgment incorporated a marital settlement agreement ("MSA") which contained the following provisions for child support:

> "4.1 [John] shall pay to [Eileen] *** the sum of Two Thousand One Hundred Dollars ($2,100.00) per month ***. Said support represents Twenty-Eight Percent (28%) of [John's] 'net' monthly base income based upon his current annual gross base salary of $130,000.
>
> That in the event [John] receives bonuses for 2011, payable in 2012, and so on and so forth while the children are minors and eligible for child support, [John] shall continue to pay Twenty-Eight Percent (28%) of the net of each bonus and/or additional income up to a gross amount of Three Hundred Fifty Thousand Dollars ($350,000.00) per year. In the event [John] earns any gross compensation in excess of Three Hundred Fifty Thousand Dollars ($350,000.00) per year any such amount shall not be subject to child support.
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> 4.2 Upon [John] receiving any bonus, with the exception of the 2010 bonus payable in February of 2011, he shall make a photocopy of the check and immediately forward a copy along with a personal check in the amount of Twenty Eight Percent (28%) of the 'net' income of [John's] gross earnings which represents the child support due to [Eileen] pursuant to the terms of this agreement. Net shall be

calculated be [*sic*] applying the effective tax rate from [John's] last filed tax returns. To the extent that the parties dispute the calculation or the determination of the amount of the additional income, the parties shall submit the issue to a court for determination.

4.3 That the payment of child support shall be based upon [John's] gross income from his employment and any other interest income, dividend income, investment income and the like, except that any income derived by [John], notwithstanding Section 505 of the IMDMA, from the sale of any current real estate or a liquidation of any asset awarded to [John] as a result of the Judgment for Dissolution of Marriage shall not be included in the calculations for child support purposes. This paragraph is modifiable if [John] ceases employment or is employed at a substantially lower income and [John] is using assets for his living expenses while earning a substantially lower income."

¶ 5 An "Agreed Order Regarding Child Support and Other Matters" was entered on June 3, 2016, modifying the MSA. The agreed order stated the following regarding child support:

"A. [John] shall tender $3300 per month to [Eileen] for his child support obligation for the two (2) minor children in accordance with statutory guidelines and the Judgment for Dissolution beginning June of 2016.

B. [Eileen] agrees not to request a 'true-up' from [John] or directly/indirectly petition the court to revisit child support unless [John's] income is in excess of $215,000 gross annually[.]

C. [John] shall tender an amount equal to 28% of the larger of his 2015 income tax refunds to [Eileen] within 10 days after receipt."

¶ 6 On January 2, 2018, Eileen filed a motion for contribution, alleging an increase in cell phone expenses for the children and requesting a 50% contribution from John. On January 18, 2018, John filed the petition at issue, alleging that there had been a substantial change in circumstances since the 2016 agreed order was entered. Specifically, he claimed that his income had increased, as had the children's expenses. Eileen then filed a "Combined Motion to Strike and Dismiss Petitioner's Petition to Review Child Support Obligation" pursuant to sections 2-615 and 2-619 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-615, 2-619 (West 2016). She alleged that John's petition should be dismissed because it did not state any legal basis upon which relief could be granted as the MSA and the agreed order specifically covered this issue. On March 15, 2018, John responded to Eileen's combined motion to strike and dismiss.

¶ 7 A hearing was held before the trial court on March 23, 2018. John argued that the increase in his income, from $171,000 in 2016 to $340,000 in 2017, constituted a substantial change in circumstances requiring an evidentiary hearing on his petition. Eileen argued that the petition was legally insufficient on its face. During the hearing, the court stated that John's pleading alleged an income increase and requested review under the new statute for child support. The court found that that was insufficient to require a hearing. Defense counsel then asked if the court was ruling that "no matter what my client—whatever increase there is *** that would never be enough to have a hearing on a motion to modify child support." The court responded in the affirmative and explained:

> "I'll tell you why. I'll be even more specific on it. If he wants to pay her more in support, just have him write a check. I'm not telling him he can't pay more support. All I'm doing is saying I'm not going to enter another order that modifies it that

> gets it under the new statute one way or another. And my guess would be—my guess would be that this isn't a situation where, hey, I earn more money. I should pay more support. My guess would be is that if you factor in the new statute, even though he says, I earn more money, you're going to have—gee, the result is, he's going to pay less support under the new statute, okay, and so that's why I'm doing it. So I'm doing it on my own. I have no problem with this guy paying more money. All he has to do is—if he wants to pay her more money and he has this burning desire to tell everybody, gee, I earn a lot more money now, because you don't say—all you say is a modification. It doesn't say, gee, I want to pay her more money now. It just says, I want a modification under the new statute."

¶ 8 Thus, the court "on [its] own motion" denied Eileen's motion for contribution because "it's a waste of the Court's time" and dismissed John's petition. John filed his notice of appeal from that order on April 18, 2018. On July 11, 2018, Eileen filed a petition for rule to show cause in the trial court, alleging that John failed to comply with the agreed order and the court should require him to "true-up" his child support obligations. The trial court stayed litigation on that petition pending the outcome of this appeal.

¶ 9 II. ANALYSIS

¶ 10 John argues on appeal that the trial court erred in dismissing his petition without an evidentiary hearing. He further contends that the trial judge was biased against him, and therefore, we should reassign this case to a different trial judge on remand.

¶ 11 A. Jurisdiction

¶ 12 As a preliminary matter, we must address Eileen's contentions that this court lacks jurisdiction over this appeal. See *Lebron v. Gottlieb Memorial Hosp.*, 237 Ill. 2d 217, 251-52

(2010) (A reviewing court has a duty to examine its jurisdiction before addressing the merits of an appeal). Eileen contends that John has not provided the correct statement of jurisdiction nor is this case ripe for review.

¶ 13 An appellant is required to provide a statement of jurisdiction, under Illinois Supreme Court Rule 341(h)(4) (eff. Nov. 1, 2017), that explains "the basis of the appeal including the supreme court rule or other law which confers jurisdiction upon the reviewing court." However, a statement of jurisdiction is not a necessary component of the court's jurisdiction and an appeal can be reviewed as long as jurisdiction is proper. See *Luttrell v. Panozzo*, 252 Ill. App. 3d 597, 600 (1993).

¶ 14 We agree with Eileen's contention that John's statement of jurisdiction is inaccurate as it lists Illinois Supreme Court Rule 304(b)(3) for its jurisdictional basis. That rule is inapplicable here as it allows for appeals from "[a] judgment or order granting or denying any of the relief prayed in a petition under section 2-1401 of the Code of Civil Procedure." and the record does not reveal any such petition. See Ill. S. Ct. R. 304(b)(3) (eff. Mar. 8, 2016). Nevertheless, this error is not fatal. We note that John amended his statement of jurisdiction in his reply brief, citing Illinois Supreme Court Rule 303, as his jurisdictional basis. This rule applies to final and appealable judgments in a civil case. Ill. S. Ct. R. 303(a)(1) (eff. July 1, 2017).Thus, we consider whether the trial court's dismissal was a final and appealable judgment.

¶ 15 "To be final, a judgment must dispose of the litigation or some definite part of it." *In re Rogan M.*, 2014 IL App (1st) 132765, ¶ 9. A final order that disposes of fewer than all the parties' claims is not appealable unless there is a finding that there is no just reason to delay. *In re Marriage of Gutman*, 232 Ill. 2d 151, 145 (2008); Ill. S. Ct. R. 304(a) (eff. Feb. 26,

2010). "[P]ostdissolution petitions or motions that are separate actions are independently appealable upon their resolution, whereas filings that are part of a larger action are only appealable when the larger action is resolved[.]" *In re Marriage of A'Hearn*, 408 Ill. App. 3d 1091, 1094 (2011).

¶ 16 John's petition and Eileen's motion for contribution were postdissolution actions that may be independently appealable upon their resolution. The trial court's order dismissed both actions, and there were no other issues pending at the time of the court's order. The order also stated that it was "final and appealable." Accordingly, we have jurisdiction under Rule 303.

¶ 17 Eileen alternatively argues that this matter is not ripe for review because her petition for rule to show cause is pending in the trial court. As stated above, that petition alleges that John failed to comply with the agreed order and the court should require him to "true-up" his child support obligations. Eileen's argument fails because John's earlier filed notice of appeal divested the trial court of jurisdiction to hear her petition.

¶ 18 "A notice of appeal is a procedural device filed with the trial court that, when timely filed, vests jurisdiction in the appellate court in order to permit review of the judgment such that it may be affirmed, reversed, or modified." *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 173 (2011). After the notice of appeal has been filed, the trial court no longer has jurisdiction over the matter; however, the trial court retains jurisdiction for matters collateral or incidental to the judgment. *Id.* at 173-74.

¶ 19 Here, Eileen filed her petition on July 11, 2018. John's notice of appeal was timely filed earlier, on April 18, 2018. John's notice of appeal divested the trial court of jurisdiction, unless such matters subsequently raised were collateral or incidental to the trial court's order

dismissing his petition. Eileen's petition for rule to show cause cannot be construed as collateral or incidental. It is directly related to John's child support obligation, which is relevant to this appeal. Thus, the trial court does not currently have jurisdiction over Eileen's petition. Moreover, the trial court properly stayed any action on her motion until this appeal is resolved.

¶ 20 B. Child Support Petition

¶ 21 John asserts that the trial court improperly dismissed his petition without affording him an evidentiary hearing or leave to amend his petition. He also maintains that the trial court could not dismiss his petition because it was a motion rather than a pleading.

¶ 22 We briefly note that we construe John's petition as a pleading rather than a motion. This court has previously defined a pleading as a party's formal allegations of his claims or defenses whereas a motion is an application to the court for a ruling or an order in a pending case. *In re Marriage of Wolff*, 355 Ill. App. 3d 403, 407 (2005). In this case, John captioned his filing as a "petition to review child support obligation." Although John did not set out formal allegations of his claims, his petition sought to modify the child support order. "[A] petition for modification of child support is to be considered a pleading." *In re Marriage of Sutherland*, 251 Ill. App. 3d 41, 414 (1993).

¶ 23 Prior to reaching our analysis of John's petition, we find it necessary to provide some context for the implicated statutory provisions. At the time the judgment of dissolution and agreed order were entered, section 505(a)(1) of the Illinois Marriage and Dissolution of Marriage Act (the Act) established child support guidelines for two minor children (as in this case) to be 28% of the supporting party's net income. 750 ILCS 5/505(a)(1) (West 2016). However, the Act was amended by Public Act 99-764 (eff. July 1, 2017) and Public Act 100-

15 (eff. July 1, 2017). This changed the prior child support guidelines to an "income shares" approach. Now, courts must "compute the basic child support obligation" by determining the parents' combined monthly net income and calculating each parent's percentage share of the basic child support obligation. 750 ILCS 5/505(a)(1.5) (West 2018).

¶ 24 Under the Act, a child support order may be modified "upon a showing of a substantial change in circumstances." 750 ILCS 5/510(a)(1) (West 2018). Once a party demonstrates this prerequisite change in circumstances, the court proceeds to consider a modification of child support in accordance with the factors set forth in section 505(a)(2) of the Act. 750 ILCS 5/505(a)(2) (West 2018). The legislature specified that the change to the income shares model would not "constitute a substantial change in circumstances warranting a modification." See 750 ILCS 5/510(a) (West 2018). However, an increase in the supporting parent's income does constitute a substantial change in circumstances. *In re Marriage of Putzler*, 2013 IL App (2d) 120551, ¶ 29; see also *In re Marriage of Singleteary*, 293 Ill. App. 3d 25, 34-35 (1997) (finding an increase in income could be a substantial change in circumstances and stating "[t]he law is clear that only some change in circumstances *of any nature* that would justify equitable action by the court in the best interests of the child is required." (Emphasis original)).

¶ 25 John's petition does allege a substantial change in circumstances, *i.e.* his increase in income as the supporting, or obligor, parent, and does not seek a modification solely to apply the income shares model over the 28% guideline. Thus, he has apparently met the prerequisite for a consideration of the modification of child support. However, our analysis cannot end here because case law provides that if the alleged substantial change in circumstances was contemplated by the parties in their MSA, then no modification is

warranted. *In re Marriage of Salvatore*, 2019 IL App (2d) 180425, ¶ 24; see also *In re Marriage of Hughes*, 322 Ill. App. 3d 815, 819 (finding that an increase in income was not a substantial change in circumstances because it was "contemplated and expected by the court when the judgment for dissolution of marriage was entered").

¶ 26 Thus, our review turns on whether the provisions regarding John's child support obligation in the MSA and the agreed order contemplated an increase in John's income. The MSA and the agreed order will be construed as a single agreement. See *In re Marriage of Farrell and Howe*, 2017 IL App (1st) 170611, ¶ 12. The interpretation of a marital settlement agreement involves question of law that we review *de novo*. *Blum v. Koster*, 235Ill. 2d 21, 33 (2009).

¶ 27 In interpreting the provisions contained therein, we construe the agreement "in the manner of any other contract, and the court must ascertain the parties' intent from the language of the agreement." *Blum*, 235 Ill. 2d at 33. The intent is "determined from the instrument as a whole and not from any one clause standing alone; meaning and intent must be given every part." (Internal quotation marks omitted). *In re Marriage of Donnelly*, 2015 IL App (1st) 142619, ¶ 12. Further, "[w]hen the terms of the agreement are unambiguous, intent must be determined solely from the agreement's language[,]" (*Frank*, 2015 IL App (3d) 140292, ¶ 12) which is to be "given its plain and ordinary meaning. *Owens v. McDermott, Will, & Emery*, 316 Ill. App. 3d 340, 344 (2000). However, if the language is ambiguous, the trial court may hear parol evidence in order to ascertain the parties' intent. *Frank*, 2015 IL App (3d) 140292, ¶ 12.

¶ 28

¶ 29 Under the terms of the MSA, John's child support obligation would be 28% of his annual salary, which at the time was $130,000 resulting in a $2,100 monthly payment, and he was also required to pay 28% "of the net of each bonus and/or additional income" up to $350,000. Thus, bonuses and other additional income were contemplated by the parties. Though "additional income" is not defined in the judgment, John's gross income is determined from "his employment and any other interest income, dividend income, investment income and the like[.]" There is nothing ambiguous about the terms of John's child support obligation, and it is clear that the parties anticipated John's income to vary or increase from year to year.

¶ 30 Under the terms of the agreed order, which modified the MSA, John's child support obligation increased to $3,300 per month "in accordance with the statutory guidelines and the Judgment of Dissolution." As stated above, the MSA provided that John's child support obligation would be 28% of his annual income, which mirrored the statutory guidelines for child support for two minor children at the time. See 750 ILCS 5/505(a)(1) (West 2016). It follows then that John's child support obligation increased because his income increased. The agreed order also provides that Eileen cannot request a "true-up" until John's income surpasses $215,000. We do not find the language of the agreed order to be ambiguous either. It clearly provides for John's new child support obligation based on the same procedure contained in the MSA and it limits Eileen's ability to request another "true-up" from John.

¶ 31 Taken together, the agreements create a procedure for addressing changes in John's income. Following the agreed order, his child support obligation increased from $2,100 to $3,300 per month. The MSA also included a "true-up" provision in the event that John received a bonus or additional income in a given year. If John received a bonus, then he was to pay Eileen 28% of the net income of those gross earnings. The agreed order limited

Eileen's request for a "true-up" to the point at which John's annual income exceeded $215,000. Finally, the MSA stated that any gross compensation in excess of $350,000 would not be subject to child support. Thus, it is clear that the parties contemplated increases in John's annual income, whether it be through bonuses or a salary increase, and they provided for a method, namely a "true-up", to deal with those increases.

¶ 32 Additionally, we note that the MSA allows for the parties to petition the court for a resolution only when they "dispute the calculation or the determination of the amount of the additional income." From this, we can infer that an increase in John's income does not automatically require a petition to modify child support but only when the parties cannot agree to that amount.

¶ 33 We find, then, that when the parties entered into both agreements, they contemplated a potential increase in John's income in the future. See *In re Marriage of Mulry*, 314 Ill. App. 3d 756, 760-61 (2000) (finding that the marital settlement agreement provided for the appellant's payment of college expenses and, thus, the trial court correctly found that it was not a substantial change to warrant modification of child support). Such increases are provided for in the agreements, and the provisions in the agreements control this issue. As John alleged before the court, his annual income has increased from $171,000 to $340,000, and in accordance with the agreed order, Eileen is permitted to request a "true-up" from John because his income now exceeds $215,000. However, there is no need to petition the court at this juncture because there is not a current dispute as to the amount owed, in accordance with the MSA.

¶ 34 In sum, John's increase in income does not establish a substantial change in circumstances. It does not warrant an evidentiary hearing and it does not trigger the

application of the new statutory guidelines for child support. We therefore conclude that the trial court was correct in refusing to hold an evidentiary hearing and dismissing John's petition. See *Pekin Insurance Company v. AAA-1 Masonry & Tuckpointing, Inc.*, 2017 IL App (1st) 160200, ¶ 21 ("[A] reviewing court may affirm the trial court's ruling for any reason supported by the record regardless of the basis relied upon by the trial court.").

¶ 35 Accordingly, we affirm the court's order dismissing John's petition to review child support obligation.

¶ 36 C. Trial Judge Reassignment

¶ 37 John also argues that the trial judge in this case was not impartial and was predisposed to a specific ruling, as demonstrated during the hearing on his petition. Thus, he requests reassignment to a different trial judge on remand. As we have not found a basis for reversing the trial court's order, we will not remand this matter. Accordingly, there is no need for reassignment. Moreover, it is presumed that a trial judge is impartial and the burden of overcoming that presumption is on John. *Suriano v. Lafeber*, 386 Ill. App. 3d 490, 494 (2008). Although the trial court judge made remarks that appeared to disapprove of John's petition, the record does not demonstrate "such deep-seated favoritism or antagonism that would make fair judgment impossible." *Eychaner v. Gross*, 202 Ill. 2d 228, 281 (2002).

¶ 38 III. CONCLUSION

¶ 39 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 40 Affirmed.