No. 2—10—1036
Order filed June 24, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF	)	Appeal from the Circuit Court
JUDY NAGEL, n/k/a JUDY ZEMAN,	)	of Winnebago County.
	)	
Petitioner-Appellee,	)	
	)	
	)	No. 04—D—986
	)	
DREW NAGEL,	)	Honorable
	)	Steven L. Nordquist,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Jorgensen and Justices Bowman concurred in the judgment.

ORDER

Held: The trial court properly denied (in relevant part) respondent's petitions to recover child-support payments; although respondent might have been able to have his child-support obligation reduced prospectively, he did not petition for such relief, instead voluntarily paying merely what was due under the orders then in effect, which he could not seek to modify retroactively.

In a postdissolution-of-marriage case, respondent, Drew Nagel, appeals a judgment that awarded him credit for some, but not all, of the child support payments that he made to petitioner, Judy Nagel, n/k/a Judy Zeman. We affirm.

The parties were married on August 24, 1985. They have three children: David, born March 6, 1988; Brett, born May 17, 1989; and Matthew, born April 7, 1992. On August 26, 2004,

petitioner petitioned to dissolve the parties' marriage. On June 14, 2006, the trial court entered a dissolution judgment that incorporated a "Joint Parenting Agreement" under which the parties would share custody and a "Marital Settlement Agreement" under which the children would reside with petitioner. Paragraph 4 of the Marital Settlement Agreement required respondent to pay $284 weekly child support, beginning June 16, 2006. Paragraph 4 continued:

> "Child support shall be paid through the State Disbursement Unit pursuant to a Notice to Withhold Income for Support, effective immediately. Child Support shall be paid directly to the Wife until the withholding notice takes effect. Child support shall be paid until the youngest child attains the age of majority. However, if the youngest child will not graduate from high school until after attaining the age of 18, then the termination date of child support for that child shall be no earlier than the earlier of the date on which the child's high school graduation will occur or the date on which the child will attain the age of 19."

On June 27, 2006, the first notice of withholding was issued.

On October 11, 2007, respondent petitioned to terminate support on behalf of Brett (David was already emancipated) and to modify his overall support obligation. Respondent's petition noted that, as of May 17, 2007, Brett had turned 18 and graduated from high school. On November 6, 2007, by an agreed order, the trial court reduced respondent's obligation to $197.70 per month and stated that his obligation "shall terminate upon the youngest child turning 18, or upon his high school graduation, whichever occurs later[.]" The withholding notices were adjusted accordingly.

On October 4, 2009, petitioner filed a petition to increase child support, based on changed circumstances since the dissolution. (The petition ignored the November 6, 2007, modification.)

On October 15, 2009, respondent filed two petitions. The first stated as follows. Brett had turned 18 on May 17, 2007, and had graduated from high school on June 1, 2007. Therefore, from June 1, 2007, on, respondent should not have had to pay any support on his behalf. However, respondent had continued to do so, through income withheld from his paycheck, until November 6, 2007. Respondent alleged that he had overpaid "approximately $1,984.90 with regard to Brett, and he requested an award in this amount.

Respondent's second petition stated as follows. The dissolution judgment had given petitioner custody of the children. However, since June 2, 2009, per the parties' oral agreement, Matthew had been living with respondent. Respondent requested that the court modify custody to reflect the new arrangement and also award him child support retroactive to June 2, 2009.

On February 9, 2010, the trial court entered an agreed order that addressed issues not in dispute but did not decide any of the petitions. The pertinent parts read:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

A. That ~~as of June 2, 2009~~, the physical residential custody of the minor child, MATTHEW NAGEL, shall be placed with the [respondent], DREW NAGEL."

B. That child support for MATTHEW NAGEL payable by the [respondent] shall be terminated ~~as of June 2, 2009~~[.]"

On February 12, 2010, a withholding notice was issued, stating that respondent's child support obligation had been paid in full and was terminated.

The parties filed briefs on the pending petitions. Respondent's brief raised two contentions: (1) he was entitled to a refund of $1,984.90 in child support that he had paid in the 23 weeks between June 1, 2007, when Brett graduated from high school, and November 6, 2007, when the trial court

first modified his child support obligation; and (2) he was entitled to a refund of $7,117.20 in child support that he had paid in the 36 weeks between June 2, 2009, when Matthew started residing with him, and February 9, 2010, when the court changed custody and terminated his child support obligation. On the first contention, respondent reasoned that, because both parties had known that respondent's obligation to support Brett had ended on June 1, 2007, he should be refunded what had been withheld from his paycheck between then and November 6, 2007. On the second contention, respondent argued that, because the parties informally changed custody of Matthew on June 2, 2009, petitioner should be equitably estopped from retaining the child support payments that she had received after that date. Respondent also argued that, under the marital settlement agreement, petitioner had to pay child support on Matthew's behalf once Matthew moved in with respondent.

In her response brief, petitioner argued as follows. First, respondent's contention that he had overpaid child support on Brett's behalf was based on a misreading of the dissolution judgment, which did not allocate support among the children but provided simply that respondent would pay $284 weekly until Matthew reached 18 and graduated from high school. Thus, until the trial court modified support in November 2007, respondent had paid exactly what the judgment had required. Respondent was, in effect, seeking a retroactive reduction in his support obligation despite not having petitioned for it, and the trial court could not grant such relief.

Second, petitioner argued, respondent's request for child support that he had "overpaid" on Matthew's behalf was, in essence, an attempt to modify his child support obligation retroactively. Petitioner observed that, although the parties had informally changed Matthew's custody in June 2009, respondent did not follow up by petitioning the trial court to eliminate his child support

obligation—at least not until October 15, 2009. Thus, his "overpayments" had been voluntary, and the trial court could not refund him anything that he had paid before October 15, 2009.

On September 3, 2009, the parties appeared in court for a hearing on all three petitions. Respondent testified as follows. Brett graduated high school in June 2007, but respondent continued to pay $284 weekly child support until November 2007, when the court reduced his weekly obligation to $197.70. In June 2009, on the day that he graduated high school, Matthew came to live with respondent. In October 2009, respondent petitioned to modify child support. Between October 2009, when he filed his petitions, and February 12, 2010, when the court modified child support, respondent continued to pay child support and did not receive any child support from petitioner.

The parties and the judge clarified that Matthew had graduated high school in June 2010, not June 2009. Petitioner withdrew her petition and moved for a directed finding on respondent's petitions. The judge granted the motion, holding that respondent was entitled to a credit only for the period between October 15, 2009, and February 12, 2010, when he stopped paying further child support. The total credit was $3,558.76 (18 weeks x $197.70 per week). Petitioner conceded that this credit was proper. On September 3, 2010, the court entered a written order awarding respondent the credit. Respondent timely appealed.

On appeal, respondent argues first that the trial court erred in denying him any reimbursement for child support that he "overpaid" after Brett was emancipated on June 1, 2007, but before the trial court reduced his child support obligation on November 6, 2007. Respondent contends that, during this period, he was obligated to pay support on behalf of only Matthew, yet he actually paid the amount that the dissolution judgment provided for the support of both Brett and Matthew. Respondent contends that, during this period, he should have been obligated to pay only $197.70 per

week, the amount that the trial court found was proper for the support of Matthew alone. Respondent recognizes the general rule that a parent may not recover child support payments that he has made voluntarily (see *In re Marriage of Olsen*, 229 Ill. App. 3d 107, 110 (1992)). However, citing *In re Marriage of Tollison*, 208 Ill. App. 3d 17 (1991), respondent contends that an exception applies here, because the "voluntary" payments were being withheld from his paycheck. We disagree.

The crucial sequence of events is as follows. On June 14, 2006, the trial court ordered respondent to pay $284 weekly child support until Matthew either turned 18 or finished high school, whichever came later. The order did not allocate support among the minors. Respondent thereafter paid this weekly amount. Although Brett allegedly was emancipated as of June 1, 2007 (or May 17, 2007), respondent took no action toward reducing his child support obligation until October 11, 2007. On November 6, 2007, the trial court, by agreement, reduced child support to $197.70 per week, in view of Brett's emancipation.

As petitioner notes, respondent knew that Brett would be emancipated by June 1, 2007 (or earlier), but only on October 11, 2007, did he petition to reduce his child support obligation to reflect the changed circumstances. Between June 1, 2007, and November 6, 2007, he paid child support in the precise amount required. Thus, he did not "overpay" support in this period—although he paid more than he might have needed to had he promptly invoked the court's power to modify his obligation. We agree with petitioner that these facts entitle respondent to no relief.

The general rule is that no credit is given for voluntary overpayments of child support, even if made in the mistaken belief that they are required. *Olsen*, 229 Ill. App. 3d at 110; *In re Marriage of Smak*, 267 Ill. App. 3d 231, 233 (1994). The reason is that such a credit would be tantamount to allowing one party unilaterally to modify the dissolution decree and could cause future deprivation

to the children and the payee. *Id.* at 234. Such a unilateral action would impermissibly infringe on the trial court's exclusive authority to decide whether to modify child support. *In re Marriage of Rosenbaum*, 85 Ill. App. 3d 931, 933-34 (1980).

If no credit may be given for voluntary overpayments of child support, even if made in the mistaken belief that they are required, then, *a fortiori*, no credit may be given for voluntary contributions that were not actually overpayments, but merely exceeded what the payor's obligations could have been had he acted more promptly to reduce his burden. Therefore, the trial court did not err in refusing to modify respondent's support retroactively for a period during which he forwent the opportunity to have the trial court modify his obligation prospectively.

Tollison, on which respondent relies, is distinguishable. There, during the period for which he sought a refund, the former husband actually *did* pay more child support than the trial court's orders had required. *Tollison*, 208 Ill. App. 3d at 19. The appellate court noted that, because the excess payments resulted from an erroneous wage deduction order and were thus "not voluntarily made," and the former husband had diligently sought to clarify his actual obligation, fundamental fairness required that he receive the credit. *Id.* at 20.

In *Smak*, the former husband sought a refund of child support that had been withheld by a wage deduction order, contending that it was unfair to require him to pay child support after it was revealed that he was not the child's biological father. We affirmed the trial court's denial of any relief. We refused to extend *Tollison* to a wage deduction order that merely withheld the court-ordered amount. The crucial consideration was that the amount withheld was exactly what the court had required—and thus, "there was no overpayment within the meaning of *Tollison*." *Smak*, 267 Ill. App. 3d at 234. *Smak*'s reasoning applies here and requires us to reject respondent's first claim of error.

We turn to respondent's second claim of error: that the trial court should have credited him for child support that he paid on behalf of Matthew between June 2, 2009, when Matthew started to reside with him, and February 12, 2010, when the trial court actually changed legal custody and terminated respondent's support obligation prospectively. Respondent asserts that petitioner was equitably estopped from receiving child support while Matthew was actually living with him.

Respondent's argument founders on the same rock as does his first claim of error: generally, a party has no right to a credit for voluntary payments of child support, and ordering such a credit would be tantamount to allowing a unilateral reduction in support. See *id.*; *Rosenbaum*, 85 Ill. App. 3d at 933-34. As with the alleged overpayment on Brett's behalf, respondent could have acted to avoid or minimize the alleged windfall to petitioner—he could have petitioned the court promptly to change custody and terminate child support as of June 2, 2009, or as soon afterward as practicable. He did not do so, and he is entitled to no relief.

Respondent's invocation of equitable estoppel based on *In re Marriage of Jungkans*, 364 Ill. App. 3d 582 (2006), is not persuasive. In *Jungkans*, in a 1992 dissolution judgment, the mother received custody of the parties' two children and the father paid child support of $250 per month. In 1994, one child went to live with the father, and, starting in 1995, and for nearly nine years, the father reduced his monthly payments to $125. The mother then filed an action for the alleged arrearages.

This court reversed a judgment in her favor and remanded for the trial court to consider the father's affirmative defense of equitable estoppel. We noted several cases in which equitable estoppel had been recognized as a defense to an action for past-due support. We then explained that, although *Blisset v. Blisset*, 123 Ill. 2d 161 (1988), had held that "private agreements modifying child support are not enforceable as such, [*Blisset*] never stated that equitable estoppel could never apply

where a [former] spouse seeks past-due [child] support." (Emphasis added.) *Jungkans*, 364 Ill. App. 3d at 586; see *Blisset*, 123 Ill. 2d at 167-69. As petitioner observes, *Jungkans* allows the application of equitable estoppel only as an affirmative defense against an action to collect past-due child support, not as a basis for an action to modify retroactively a support obligation. Respondent cites no authority that expands the use of equitable estoppel to undo payments that have already been made in accordance with a court order. Thus, respondent cannot escape the general rule that a party may not recover voluntary overpayments—or alleged overpayments—of child support and the underlying principle that the modification of child support is a judicial prerogative.

As respondent has no legal basis on which to recover the alleged overpayments of child support, the trial court did not err in denying him any relief. Therefore, the judgment of the circuit court of Winnebago County is affirmed.

Affirmed.