2012 IL App (2d) 101106-U
No. 2-10-1106
Order filed February 3, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROSANNA PISCOPO	)	Appeal from the Circuit Court of
	)	Du Page County.
Petitioner-Appellant,	)	
	)	
	)	No. 08-F-647
	)	
GARY VESELSKY,	)	Honorable
	)	Timothy J. McJoynt,
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

Held: The trial court's determination of the amount of child support was neither against the manifest weight of the evidence nor an abuse of discretion.

¶ 1 On May 19, 2010, the trial court granted child support from respondent, Gary Veselsky, to petitioner, Rosanna Piscopo.[1] Rosanna filed a motion for reconsideration on June 25, 2010, which the trial court denied. Rosanna appeals from the denial, arguing that "the [trial] court failed to

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[1]The parties were never married.

accurately calculate [Gary's] net income to award child support pursuant to statutory guidelines, and, therefore, the trial court abused its discretion." We affirm.

¶ 2 I. BACKGROUND

¶ 3 The minor child was born on April 23, 2006. An agreed order of paternity was entered on February 11, 2009, and on that date a temporary child support amount was set at $600 semi-monthly. On April 21, 2009, Gary filed a "Motion to Deviate from Statutory Guidelines for Child Support," to which Rosanna filed a response on May 4, 2009. After several continuances, a trial was held on May 6, 2010, addressing three main economic issues: permanent child support, retroactive child support, and medical expenses.[2]

¶ 4 On May 19, 2010, the trial court pronounced its findings.[3] Gary owned Shamrock Flooring and Tile Company located in Riverside, Illinois. Gary's income tax returns for 2007, 2008, and 2009 were introduced into evidence. Shamrock's 2009 federal income tax return; Shamrock's undated payment breakdown for a flooring project at Rich East High School, Rich South High School and Rich Central High School[4]; and Shamrock's amended order for materials at Rich East High School and Rich South High School were also in evidence. The trial court stated "[w]e got into dad's

[2]We have not been provided with a transcript of the trial on May 6. The record on appeal includes only the common law record and a transcript of the September 21, 2010, hearing on Rosanna's motion to reconsider the trial court's prior ruling.

[3]The May 19 report of proceedings is appended to Rosanna's motion for reconsideration contained in the common law record.

[4]We take judicial notice that these high schools comprise Rich Township High School District 277.

deposits from both his real estate holdings and his Sub S business [which in 2009 were] $670,000, '08, $517,000, ['07] 424,000, '06, 236,000." The court remarked that "the issue is Sub S account deposits don't equal income on taxes" and that "[s]imply presenting deposits, simply presenting tax returns in and of itself wasn't enough." The court went on: "[Gary] has also presented some reasonable explanations as to why his gross deposits don't come anywhere near his income because, obviously, it's before all his expenses or his business, as well as payment of expenses on his real estate holdings." Finally, the trial court remarked: "[Rosanna] did argue correctly that [Gary] has deducted depreciation on his nine investment buildings. So I did add this back into my calculations of what [Gary's] net income is."

¶ 5 The trial court denied Gary's petition to deviate from the child support guidelines set forth in section 5/505(a)(1) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/505(a)(1) (West 2008)), and ordered child support in the amount equal to 20% of $155,000, Gary's average net income for the three year period of 2007-2009. On May 27, 2010, the trial court's judgment was entered, awarding child support from Gary to Rosanna in the amount of $2,583.00 per month.

¶ 6 At the hearing on Rosanna's motion to reconsider, the trial court stated that it did not include the extra deposits from the high school flooring project because Gary's explanation that some of the money was a "one-time receipt" was "adequate." The trial court also stated:

> "I will, as I said before, average income over his last three years. If I added five years it would be a much different number. And the Court is also mindful of dad's large one-time contract. The Court has also taken into consider[ation] dad's sale of stock in '07. The Court is also aware of the current economy, and I'm taking that into consideration, and the Court

> is adding back depreciation. Based on that, I have a finding of dad's net income, $155,000 per year."

The trial court further remarked that it had set the child support "based on provable income that was proved" and denied the motion to reconsider.

¶ 7 Rosanna timely appealed the denial of her motion.

¶ 8 On June 17, 2010, Gary moved this court for leave to supplement the record on appeal with three trial exhibits, as well as Rosanna's pre-trial memorandum; exhibit 1 is the 2009 federal income tax return for Shamrock Flooring & Tile Company, an "S" corporation; exhibit 15 is an amendment to the Rich Township High School District order from Shamrock Flooring; and exhibit 18 is Shamrock Flooring's work description and payment breakdown for the school district flooring project. This court allowed the three exhibits, but denied Gary's motion as to the pre-trial memorandum, which was never entered into evidence during the trial.

¶ 9 II. ANALYSIS

¶ 10 The sole issue presented to this court is whether the trial court's determination of Gary's *average* annual net income was correct such that its award of support was not against the manifest weight of the evidence. The trial court's finding of net income is within the discretion of the trial court and we will not disturb its finding absent an abuse of that discretion. *In re Marriage of Garrett*, 336 Ill. App. 3d 1018, 1024-25 (2003). The abuse of discretion standard "is the most deferential standard of review-next to no review at all." *In re D.T.*, 212 Ill.2d 347, 356 (2004). The trial court has not abused its discretion if reasonable persons could differ as to its decision. *In re Marriage of Sanfratello*, 393 Ill. App.3d 641, 646 (2009).

¶ 11 Section 505(a)(3) of the Act defines "net income" as the "total of all income from all sources" minus the following deductions: (1) federal income tax, (2) state income tax, (3) social security withholdings, (4) mandatory retirement contributions, (5) union dues, (6) dependent and individual health insurance premiums, (7) prior obligations of support or maintenance, and (8) expenditures for repayment of debts that represent reasonable and necessary expenses for the production of income. 750 ILCS 5/505(a)(3) (West 2008). Additionally, section 505(a)(4) of the Act provides that, in cases where the court order provides for health and/or hospitalization insurance coverage, "the premiums for that insurance, or that portion of the premiums for which the supporting party is responsible in the case of insurance provided through an employer's health insurance plan where the employer pays a portion of the premiums, shall be subtracted from net income in determining the minimum amount of support to be ordered." 750 ILCS 5/505(a)(4) (West 2008). This court has stated that "income represents a 'gain or profit' and is 'ordinarily understood to be a return on the investment of labor or capital, thereby increasing the wealth of the recipient.' " *In re Marriage of Worrall*, 334 Ill. App. 3d 550, 554 (2002).

¶ 12 Citing *In re Marriage of Nelson*, 297 Ill. App. 3d 97 (1995), Rosanna correctly points out that, where a child support obligor has income fluctuations, it is appropriate to average the obligor's net income over three consecutive years. She then argues that, although the trial court correctly decided to average Gary's income for the three years prior to trial, it reached an incorrect figure that, in effect, resulted in a downward deviation from the guidelines in the statute, which, in the case of one child, provides for 20% of the supporting party's net income to allocated for child support. See 750 ILCS 5/505(a)(1) (West 2008). Rosanna calculated the average net income for the prior three years of 2007, 2008 and 2009 at $240,495.96, using Gary's net income as shown on his income tax

returns for these years. She arrived at this figure by subtracting Gary's federal income tax, state income tax, social security and medicare payments from his gross income (line 22) on his income tax returns and then averaging the remainder. Using her figures, the $2,583.00 per month amount represents 13% of Gary's net income, not the 20% provided for in the statutory guidelines. She asserts that "the Trial Court never articulated at trial nor during the hearing on Petitioner's Motion to Reconsider how or why it came up with the figure of $155,000 as Respondent's average net income for the prior three years." She then characterizes the trial court's "reasoning and articulation of why it denied Petitioner's Motion to Reconsider" as "arbitrary, fanciful or unreasonable."

¶ 13 While we have no report of proceedings for the trial itself, we do have the trial court's judgment order and the report of proceedings from hearing on the motion for reconsideration. Where an appellant fails to provide a report of proceedings, or a proper substitute such as a bystander's report, we must presume that the trial court followed the law and had a sufficient factual basis for its ruling. *In re Marriage of Thomsen*, 371 Ill. App. 3d 236, 241 (2007).

¶ 14 We find the trial court's decision to be well-reasoned. Rosanna uses a simple arithmetic formula to reach her figures, but the trial court explained that it was averaging Gary's net income for three years as reflected on his income tax returns; additionally, the trial court indicated that it was "taking into consideration" Gary's sale of stock and the one-time project that Shamrock Flooring completed in 2009 for the Rich Township high schools. The court also indicated that it adjusted Gary's income upward by adding in the depreciation that Gary had included on his income tax returns.

¶ 15 We also note that Gary was required to maintain medical insurance for the child until he reaches age 18 or graduates from high school. Section 505(a)(4) of the statute specifically states that

health and/or hospitalization insurance premiums, or that portion of the premiums for which the supporting party is responsible, should be deducted from the supporting party's net income for purposes of child support. Rosanna's argument ignores that portion of the trial court's ruling. The Illinois Supreme Court has held:

> "For purposes of determining statutory child support obligations, the General Assembly has adopted an expansive definition of what constitutes 'net income.' 'Net income' is defined broadly to encompass 'the total of all income from all sources,' *minus deductions for* state and federal income tax, social security (FICA payments), mandatory retirement contributions, union dues, dependent and individual health/hospitalization insurance premiums, prior obligations of support or maintenance actually paid pursuant to court order, and expenditures for repayment of debts incurred for certain purposes. 750 ILCS 5/505(a)(3) (West 2002)." (Emphasis added.) *In re Marriage of Rogers*, 213 Ill.2d 129, 136 (2004).

¶ 16 At the hearing on the motion to reconsider, the trial court stated that there was insufficient evidence to show Gary had a higher income, remarking that "[t]here is passive income here, but I was unable to discern the amount of that passive income." The trial court further stated that it had set the child support "based on provable income that was proved." The court calculated Gary's income at $155,000 per year by averaging his figures for the years 2007, 2008, and 2009. The judgment order dated May 27, 2010, awarded child support at 20% of Gary's average net income, in the amount of $2,583.00 per month. After reviewing the record presented to us, we do not believe that the trial court's ruling was "arbitrary, fanciful or unreasonable." The manifest weight of the evidence supports the trial court's ruling.

¶ 17 As a final matter, we note the following. Rosanna's reply brief states: "[Gary] fails to cite to the record to account for what particular quotes he is referring to which might shed light to the origins of the $155,000 figure that is in dispute." We deduce there was a trial on May 6, 2010, and closing arguments were heard on May 12, 2010; however, we have not been provided with a transcript of the proceedings on either of those dates. The common law record includes the transcript of the proceedings on May 19, 2010, wherein the trial court pronounced its findings. The judgment order was filed May 27, 2010, but, again, we have no transcript of the proceedings for that date.

¶ 18 The law in Illinois is well-settled regarding the burden of producing a complete record for review by this court. *In re Marriage of Baniak*, 2011 IL App (1st) 092017. Citing *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984), the court in *Baniak* stated:

> "it is the appellant's burden, not the appellee's burden, to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. [Citation]. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant. [Citation]. Therefore, under *Foutch*, we must presume that the trial court's order here is in conformity with the law and had a sufficient factual basis." *Baniak*, 2011 IL App (1st) 092017, ¶30.

Since Rosanna provided no record of proceedings, other than the May 19 and September 21, 2010, transcripts, she cannot fault Gary for failing to cite to the record.

¶ 19 On the other hand, Rosanna's pre-trial memorandum is appended to Gary's brief, which was filed June 10, 2011. This is one of the items that Gary attempted to make part of the record on appeal in his motion to supplement the record filed June 17. We denied his motion as to the

memorandum. This court will not rely on material in the appendix or the references to those materials within defendant's brief. See *Zimmer v. Melendez*, 222 Ill. App.3d 390, 394 (1991). "[A]ttachments to briefs not included in the record are not properly before the reviewing court and cannot be used to supplement the record." *Carroll v. Faust*, 311 Ill. App.3d 679, 683 (2000), citing *Melendez*, 222 Ill. App.3d at 394. Therefore, we will not speculate on the figures presented in the memorandum.

¶ 20 The trial court's computation of the average annual income was not against the manifest weight of the evidence, and the resulting exercise of discretion in formulating the amount of support was not an abuse of discretion. Therefore, we affirm the trial court's ruling as to the amount of child support.

¶ 21 III. CONCLUSION

¶ 22 For the aforementioned reasons, we affirm the trial court's judgment.

¶ 23 Affirmed.