2012 IL App (2d) 120233-U
No. 2-12-0233
Order filed September 21, 2012

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF JOHN FAIVRE, Petitioner-Appellee, and JODI FAIVRE, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 05-D-1523 Honorable Kevin T. Busch, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

Held: The trial court abused its discretion by finding that there was no support arrearage without conducting an evidentiary hearing to resolve this factual dispute.

¶ 1 Pursuant to the judgment for dissolution of marriage entered on September 12, 2006, petitioner, John Faivre, was ordered to pay a percentage of his income as unallocated support. Respondent, Jodi Faivre, filed a petition for rule to show cause, alleging that John failed to comply with the terms of the judgment. Specifically, she alleged that John did not pay a percentage of his income as unallocated support. Without hearing evidence, the trial court found that there was no

support arrearage owing from John to Jodi, and it dismissed the petition for rule to show cause. Jodi appeals this finding in the absence of an evidentiary hearing. For the reasons that follow, we affirm the trial court's order dismissing the rule to show cause, but we reverse that portion of the trial court's order finding that there was no support arrearage, and remand the cause for an evidentiary hearing on that issue.

¶ 2 I. BACKGROUND

¶ 3 Jodi and John were married on January 8, 1993, and four children were born during the marriage. On October 27, 2005, John filed a petition for dissolution of marriage. The trial court entered a judgment for dissolution of marriage on September 12, 2006. According to the parenting agreement, which was incorporated into the judgment, Jodi and John were awarded joint custody of the four minor children and Jodi was awarded residential custody.

¶ 4 Pursuant to article II of the agreement, John was ordered to pay unallocated family support to Jodi in the amount of $3,584 per month. This amount represented "50% of Husband's net income based upon a seventy (70) hour work schedule at the rate of $131 per hour." John also agreed to pay Jodi "50% of any and all sums he receives over and above [his] base income, stipulated by the parties to be 70 hours at a rate of $131 per hour, or $9,170 per month gross."

¶ 5 The settlement agreement obligated John to provide Jodi with his State and Federal income tax returns by the first of April each year. The settlement agreement further ordered that the unallocated support would be terminated on April 1, 2011, and, at the time of termination, John was ordered only to pay child support.

¶ 6 On April 7, 2011, John filed a petition to establish child support. He alleged that the judgment required the payment of unallocated family support until April 1, 2011. He further alleged

that his child support obligation should be established pursuant to section 505 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/505 (West 2010)). Pursuant to the petition, the trial court entered an order requiring John and Jodi to exchange comprehensive financial statements, and the court set the case for a status hearing on April 29, 2011.

¶ 7 On the same date, the trial court entered a temporary order in which the parties agreed, in essence, that John was to pay $3,100 per month for temporary child support and that he would pay 40% of his net income above his base salary of $134,844. Several status hearings followed the entry of the agreed temporary order.

¶ 8 On August 15, 2011, Jodi filed a petition for "order to show cause," seeking to hold John in indirect civil contempt for failing to tender Jodi complete copies of his 2006 through 2010 State and Federal income tax returns with supporting documents pursuant to the terms of the judgment of dissolution. Jodi alleged that she needed the documents to verify that John had paid the appropriate amount she was to receive for unallocated support. Jodi further alleged that, based on her current review of tax returns, John was in arrears on his support obligation, but she needed the complete returns to determine and verify the amount owed. John filed a response and a motion to dismiss the petition.

¶ 9 On August 26, 2011, John's attorney represented that complete copies of John's 2006 through 2010 State and Federal tax returns would be tendered to Jodi's attorney.

¶ 10 On December 16, 2011, Jodi filed a "petition for rule to show cause." Jodi alleged that John had not paid the unallocated support and was in arrears in the amount of $46,791. Jodi attached to the petition a document entitled "Support Calculations," in which she listed the annual income figures for the years 2006 through 2010, to support her conclusion regarding the amount of John's

unallocated support arrearage for those years. Jodi requested, *inter alia,* that the court enter a rule to show cause against John requiring him to show why he should not be held in contempt for his refusal and failure to pay support obligation. John filed a response and a motion to dismiss the petition.

¶ 11 On January 4, 2012, the trial court heard argument on whether the rule to show cause should issue. No evidence was presented on that date, as the case was set only for argument regarding the formula the parties intended to use to compute the amount of support in excess of John's base support obligation. Jodi expressly stated in her brief that she was "not going to argue and/or present facts about the specific arrearage for each year. Those are factual issues for an evidentiary hearing."

¶ 12 During the argument, the court indicated that it could not issue the rule to show cause because the order was not crystal clear. The court noted that there was not any allegation that John had not paid, and "there is a legitimate difference of opinion between the parties as to what and how that would have been calculated." Jodi's lawyer responded: "Then we would ask leave to amend to just ask for the child support arrearage. There doesn't have to be a contempt finding for that. But the Court clearly has jurisdiction to determine if the support is owing."

¶ 13 Following argument over what formula was to be used to determine John's obligation to pay unallocated support in excess of his base support obligation, the trial court stated: "[T]he court is going to find that there is no arrearage, there is no contemptible conduct, that the parties clearly had a misunderstanding. But from this point forward, the order will be clear that the intent of the parties was that [John] pay [Jodi] 50% of any gross received, and that should be really easy."

¶ 14 The trial court thereafter entered an order dismissing Jodi's petition for rule to show cause and finding "there is no support arrearage owing from the Plaintiff to the Defendant." The case was then continued to January 25, 2012, for status on John's petition to set child support.

¶ 15 On January 23, 2012, an agreed order was entered resolving John's petition to set child support. The order expressly states that the judgment was entered without prejudice to Jodi's right to appeal or otherwise attack the terms of the January 4, 2012, order which found that John has no unallocated support due and owing. Jodi timely appeals.

¶ 16 II. ANALYSIS

¶ 17 Jodi challenges the trial court's finding that there was no support arrearage in the absence of an evidentiary hearing. In response, John contends: (1) the only issue before the trial court on January 4, 2012, was a hearing to determine the legal meaning of the settlement agreement and therefore, an evidentiary hearing would not have assisted the court in interpreting the marital settlement agreement; (2) the trial court did not err in determining that John had no arrearage because he, in fact, had paid all amounts due; and (3) Jodi waived her right to claim she was denied an evidentiary hearing because she failed to present an offer of proof to the trial court.

¶ 18 Jodi agrees with John's position that it was not necessary for the trial court to have an evidentiary hearing to determine the terms of the settlement agreement, as this was the only issue before the court on January 4. Jodi also does not dispute the trial court's ruling regarding the terms of the settlement agreement that, if John receives gross income in excess of $9,170 per month, "the intent of the parties was that [John would] pay [Jodi] 50% of any gross received." However, Jodi takes issue with John's argument that it was not necessary to hold an evidentiary hearing and with the trial court's conclusion that John had no arrearage because he paid all amounts due. Jodi

maintains that, without hearing any argument or examining any relevant documents, it was impossible for the court to determine if John had "paid all amounts due." Jodi asserts that this is a disputed factual issue that the trial court could not possibly have ascertained without an evidentiary hearing.

¶ 19 In *Gentile v. Gentile*, 87 Ill. App. 3d 311, 313 (1980), the court held that the failure to issue a rule was not final and appealable, as the petitioner was not precluded from filing a petition specifically requesting arrearage. Here, after it became clear that the trial court would not issue the rule to show cause, Jodi's counsel specifically asked for leave to amend the petition just to request arrearage relief. The trial court then simply found that there was no arrearage. Jodi was entitled to request the amendment of her petition to seek an arrearage.

¶ 20 Moreover, an evidentiary hearing is required if a disputed factual issue exists material to whether relief is justified. See *S.C. Vaughan Oil Co. v. Caldwell, Troutt, and Alexander*, 299 Ill. App. 3d 892, 898 (1998). Clearly, a factual dispute existed over whether John was in arrears. Jodi's petition for rule to show cause alleged that John had support arrearage for the years 2006 though 2010. Jodi also argued during the hearing on the rule to show cause that John was in arrears. John refuted an arrearage, and he continues to argue on appeal that he paid all amounts due. Whether or not there is an arrearage raises a factual issue requiring an evidentiary hearing. See *In re Marriage of Lorenzi*, 84 Ill. App. 3d 427, 432 (1980) (where facts are controverted, the proof should be presented at an orderly hearing); *Dendrinos v. Dendrinos*, 58 Ill. App. 3d 639, 642 (1978) (trial court abused its discretion in denying ex-wife's petition to set aside property settlement agreement incorporated in divorce decree without benefit of evidentiary hearing, in view of fact that various allegations were disputed and, therefore, the matter was not amenable to resolution through a

disjointed proceeding). Additionally, based on our review of the alleged figures set forth in the support calculations attached to Jodi's petition for rule to show cause, it appears that Jodi was entitled to an evidentiary hearing on that issue.

¶ 21 John cites *K4 Enterprises v. Grater, Inc.*, 394 Ill. App. 3d 307, 318 (2009), and *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill. App. 3d 18, 32 (2008), in support of his contention that Jodi waived her right to claim she was denied an evidentiary hearing by failing to present an offer of proof. A proper offer of proof is the key to preserving a trial court's alleged error in excluding evidence. *K4 Enterprises*, 394 Ill. App. 3d at 318. Here, however, the alleged error is not the trial court's denial of the admission of evidence, but the court's ruling on a factual issue without conducting a required evidentiary hearing.

¶ 22 Accordingly, the trial court abused its discretion by finding that there was no support arrearage rather than resolving the factual dispute between Jodi and John through an evidentiary hearing. Therefore, we reverse that portion of the trial court's order finding that there was no support arrearage owing from John to Jodi, and we remand for a hearing on that issue.

¶ 23 III. CONCLUSION

¶ 24 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed in part, reversed in part, and remanded.

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