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2016 IL App (5th) 140417-U

NO. 5-14-0417

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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SUSAN GASKILL,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellee,	)	Madison County.
	)	
v.	)	No. 02-D-580
	)	
JAMES MIKULAIT,	)	
	)	
Respondent-Appellant	)	
	)	Honorable
(The Department of Healthcare and	)	Duane L. Bailey,
Family Services, Intervening Petitioner).	)	Judge, presiding.

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JUSTICE STEWART delivered the judgment of the court.  
Justices Goldenhersh and Moore concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court's judgment modifying the father's permanent child support obligations retroactive to January 1, 2011, and assessing an arrearage and interest thereon was affirmed in part and reversed in part and the cause was remanded for the court to set retroactive child support to February 10, 2014, and to determine the amount of the arrearage and interest thereon, holding that (1) the court had subject matter jurisdiction to consider the issue of child support arrearage and to enter a judgment for said arrearage; (2) the court abused its discretion in retroactively modifying the father's child support obligations to January 1, 2011; (3) the judgment order of arrearage and interest was against the manifest weight of the evidence; and (4) the court did not abuse its discretion in denying the father's petition to temporarily reduce his child support payments based on his layoff from his employment.

¶ 2 The respondent, James Mikulait, appeals the circuit court's August 18, 2014, order modifying his permanent child support obligations and assessing an arrearage based upon calculations provided by the intervening petitioner, the Illinois Department of Healthcare and Family Services (the Department), which was providing child support enforcement services for the petitioner, Susan Gaskill. On appeal, Mikulait argues that (1) the court lacked subject matter jurisdiction to consider the issue of child support arrearage and to enter a judgment for said arrearage; (2) the court abused its discretion in retroactively modifying his child support obligations to January 1, 2011; (3) the judgment order of arrearage and interest was against the manifest weight of the evidence; and (4) the court abused its discretion in denying his seventh petition to temporarily reduce his child support payments based on his layoff from his employment. For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings.

¶ 3 **BACKGROUND**

¶ 4 Gaskill and Mikulait married on September 1, 1996. Two children were born during the marriage, Connor (born August 21, 1998) and Cole (born October 12, 1999).

¶ 5 On June 4, 2002, Gaskill filed a petition to dissolve the marriage. On June 6, 2002, the court entered a judgment of dissolution of marriage. The judgment incorporated by reference the support order, which required Mikulait to pay child support of \$250 per week plus \$60 per week toward any delinquency that accrued after entry of the order. He was also to pay one-half of the children's daycare expenses and one-half of their medical expenses not covered by his health insurance.

¶ 6 On June 11, 2007, Gaskill filed a petition for adjudication of indirect civil contempt, seeking to hold Mikulait in contempt for failing to comply with the support order. She alleged that he had (1) "made only partial payments of child support resulting in an arrearage of approximately \$93,043.56, including statutory interest"; (2) failed to pay one-half of the children's healthcare deductibles for the years from 2002 through 2007, which totaled \$1,499.76; and (3) failed to pay one-half of the children's daycare expenses for the years from 2004 through 2007, which totaled \$3,850.

¶ 7 On December 4, 2007, Mikulait filed a petition to temporarily suspend his child support payments. In the petition, he stated that he was laid off from his employment on November 14, 2007, and that he was unable to make his child support payments.

¶ 8 On February 28, 2008, the court entered an order, ruling that Mikulait owed Gaskill \$1,150 for his half of the children's medical expenses through February 27, 2008. The court reserved other issues raised in Gaskill's petition.

¶ 9 In April 2008, the Department advised Mikulait that it was providing child support enforcement services to Gaskill and directed him to send his payments to the State disbursement unit. In May 2008, the Department filed a petition to intervene and a motion asking that Mikulait be ordered to send his payments to the State disbursement unit.

¶ 10 On February 6, 2009, the court entered an order, finding Mikulait "in willful contempt for failure to pay child support as ordered." Finding that his unpaid child support amounted to \$40,616.19, the court entered judgment against him and in favor of Gaskill in that amount. Given the substantial arrearage, the court ordered him to pay an

additional \$50 per week "towards the back support with interest accruing in accord with the statute," along with his regular weekly support of \$250. The court also found him in willful contempt for failing to pay daycare expenses from January 2004 onward and entered judgment against him and in favor of Gaskill for \$3,533.24 in daycare expenses, with statutory interest to run from the date of the order. The court also found that the judgment entered against him on February 28, 2008, for past medical bills remained unpaid and ordered that the amount due for past medical bills be paid to Gaskill from funds held in his attorney's trust account. The court found that he had no "justifiable excuse" for not complying with his obligations to pay child support, daycare expenses, and uninsured medical expenses and, therefore, ordered him to pay Gaskill's attorney fees in the amount of \$5,372.50 within 30 days.

¶ 11 On May 12, 2010, Gaskill filed another petition to hold Mikulait in indirect civil contempt. She argued that, despite the court's February 6, 2009, order finding him in willful contempt and ordering him to pay her attorney fees in the amount of \$5,372.50 within 30 days, he had made only four partial payments toward those fees.

¶ 12 On June 3, 2010, Mikulait filed his second petition to temporarily suspend his child support payments, stating that he was laid off from his employment five days earlier. The court suspended his payments for the week of June 3, 2010.

¶ 13 On August 30, 2010, Mikulait filed an answer to Gaskill's contempt petition. He acknowledged that he had failed to pay the full \$5,372.50 in attorney fees within 30 days as ordered but asserted that his failure to do so was not willful or contemptuous. He stated that he had paid a minimum of \$3,450 of the \$5,372.50.

¶ 14 On October 29, 2010, by agreement of the parties, the court entered an order finding Mikulait \$17,335.06 in arrears, not including statutory interest. The court also admonished him that he was responsible for paying any child support not withheld from his pay.

¶ 15 On February 21, 2012, Mikulait filed his third petition to temporarily suspend his child support payments, stating that he was laid off from his employment six days earlier. The court suspended his support obligations from February 21 to March 4, 2012.

¶ 16 On May 7, 2012, Mikulait filed his fourth petition to temporarily suspend his child support payments, stating that he was laid off from his employment two days earlier. On June 19, 2012, the court found that he was receiving unemployment insurance benefits and modified his support obligation beginning on May 11, 2012, requiring him to pay \$138 per week in child support and \$27.60 toward the delinquency. The amount of arrearage was reserved.

¶ 17 At an August 21, 2012, hearing, Mikulait advised the court that he was back to work. Based on a pay stub he submitted at the hearing, the court entered a permanent order requiring him to pay \$257 per week in current support plus \$51.40 per week toward the delinquency. The amount of arrearage was reserved. After Mikulait stipulated that he owed \$1,958.20 in past due medical expenses for the children, the court ordered him to pay \$100 per month toward that obligation.

¶ 18 On November 20, 2012, the court entered an order, noting that Mikulait had paid only \$100 of the \$1,958.20 he owed for past due medical expenses. The court also noted that he had agreed to pay an additional \$400 by November 28, 2012.

¶ 19 On June 24, 2013, Mikulait filed his fifth petition to temporarily suspend his child support payments, stating that he was laid off from his employment 12 days earlier. On July 29, 2013, the court entered a temporary support order based on his estimate of his unemployment benefits. The court ordered him to pay \$138 per week in child support and \$27 per week toward the delinquency. The court also ordered him to provide recent pay stubs at the next hearing. The amount of arrearage was reserved.

¶ 20 At an October 1, 2013, hearing, Mikulait reported that he had returned to work in August 2013 but that he was laid off on September 26, 2013. The parties agreed to keep the temporary support order in effect, and the court ordered Mikulait to provide either pay stubs or documentation of unemployment insurance benefits at the next hearing.

¶ 21 On November 25, 2013, Gaskill filed a motion asking that the court modify the child support order to require Mikulait to pay 28% of his income whether employed or unemployed. In the motion, she stated that the support she received was insufficient to meet the children's expenses.

¶ 22 At a hearing that same day, Mikulait failed to appear. Because he had not provided the court with pay stubs or proof that he was receiving unemployment benefits, the court entered a support order based on pay stubs he had provided in August 2012. The court ordered him to pay \$257 per week in child support and \$51.40 per week toward the delinquency. The court noted that the Department was to calculate the arrearage before the next hearing. The court ordered Mikulait to personally appear at the next hearing and to bring pay stubs, job logs, employer information, and unemployment insurance benefits documentation.

¶ 23 After a December 30, 2013, hearing, the court ordered Mikulait to provide his three most recent pay stubs at the next hearing. The court also ordered him to provide his 2012 and 2013 tax returns, if available. If the returns were unavailable, the court ordered him to provide a signed document from his wife or accountant explaining why the returns were unavailable. The court also ordered him to provide all W2s he had available and a detailed work report from January 1 through December 31, 2013.

¶ 24 That same day, Mikulait filed his sixth petition to temporarily suspend his child support payments. In the motion, he stated that he was laid off from his employment.

¶ 25 At a February 10, 2014, hearing, Mikulait submitted documentation of unemployment benefits, his 2012 tax returns, a work report for 2013, and a letter signed by Cindy Mikulait as to why he had not provided his 2013 tax documents. The court entered a temporary support order based on his unemployment insurance benefits, ordering him to make biweekly payments of \$314 for child support and \$62.80 towards the delinquency. The amount of arrearage was reserved. In a separate order entered that same day, the court entered judgment in favor of Gaskill and against Mikulait in the amount of \$1,839.70 for past due medical expenses.

¶ 26 Also on February 10, 2014, Gaskill filed a motion, asking the court to review Mikulait's tax records for the years 2009 through 2013 and to modify the child support award and arrearage based on those records. Three days later, the Department filed a request to produce, asking Mikulait to produce "W-2, 1099 and any other tax forms for 2013" as well as other documents that established his income.

¶ 27 At the next hearing, on March 10, 2014, Mikulait "brought 1099s and W2s from 2013 \*\*\* but failed to produce any supporting documentation reflecting any and all expenses necessary to producing income." The court held that he was "required to produce the missing documents as well as [his] 2011 and 2013 full tax return, including all attachments, at the next court date." The case was reset for April 21, 2014.

¶ 28 At the April 21, 2014, hearing, Mikulait provided his 2013 tax returns but failed to provide "supporting documentation reflecting any and all expenses necessary to producing income." The court calculated his average income based on the 2012 and 2013 records. Based on his 2012 and 2013 income tax returns, the court concluded that his net income was significantly more than previously reported. The court revised his support obligation retroactive to January 1, 2012, in light of the higher income he had earned, ordering him to pay \$387 per week in child support plus \$77.40 per week toward the delinquency. The court scheduled a hearing for May 20, 2014, to determine retroactive support for 2011 and to set a permanent support amount. The court again ordered him to provide his 2011 tax returns at the next hearing.

¶ 29 At the May 20, 2014, hearing, Mikulait again failed to provide his 2011 tax returns. The court granted a 10-day continuance for him to submit the returns and reserved whether to hold him in contempt for not providing them as previously ordered. He finally submitted his 2011 returns on June 5, 2014.

¶ 30 On June 10, 2014, having reviewed Mikulait's 2011 tax returns, the court calculated his average weekly income for 2011 and modified his payment amount for 2011 to \$460 from \$250, finding that "this is the amount of support that should have been



paid during 2011." The court granted retroactive relief "due to [his] continuous non-compliance since 2010 with court orders to update employment/income information and requests to disclose income information." The amount of arrearage was reserved.

¶ 31 On June 11, 2014, Mikulait filed his seventh petition to temporarily reduce his child support payments, stating that he was laid off from his employment five days earlier. He asked the court to reduce his child support payments based on his estimate of his unemployment benefits.

¶ 32 On June 20, 2014, the Department filed a response in opposition to Mikulait's petition to temporarily reduce his child support payments. The Department noted that he did "not have a traditional employment situation in that he routinely works short durations with sporadic periods of unemployment spaced in between." The Department further noted that the "frequency with which [he] changes employment status makes it difficult and burdensome to determine his net income." The Department argued that the court's use of income averaging in its support order was reasonable and helped "eliminate the inefficiency that has plagued this case in the past."

¶ 33 After a July 21, 2014, hearing, the court denied Mikulait's petition to temporarily reduce his child support payments, finding that he had not shown a material change in circumstances. The court noted that it would settle the issue of the amount of arrearage and past due bills at the next hearing.

¶ 34 After an August 18, 2014, hearing, the court entered a permanent order, finding that, based on the Department's calculations, as of June 30, 2014, Mikulait owed \$25,415.06 in overdue child support and \$6,881.38 in statutory interest. The court

ordered him to pay \$387 per week for current support beginning on the date of the order plus \$77.40 per week toward the arrearage. Mikulait filed a timely appeal.

¶ 35

#### ANALYSIS

¶ 36 Mikulait first argues that the circuit court lacked subject matter jurisdiction to consider child support arrearage and to enter a judgment for said arrearage because no party sought an assessment of arrearage or a judgment for such arrearage since the entry of the permanent judgment order on August 21, 2012. We disagree.

¶ 37 In her February 10, 2014, motion, Gaskill asked the court to review Mikulait's tax records from 2009 through 2013 and to modify child support and the arrearage based on those records. The court, therefore, had subject matter jurisdiction to consider child support arrearage and to enter a judgment for said arrearage.

¶ 38 Mikulait next argues that the circuit court abused its discretion in retroactively modifying his child support obligations to January 1, 2011. We agree.

¶ 39 Section 510(a) of the Illinois Marriage and Dissolution of Marriage Act (the Act), which provides the statutory framework for modifications of child support obligations, provides, in pertinent part, as follows: "Except as otherwise provided \*\*\*, the provisions of any judgment respecting \*\*\* support may be modified only as to installments accruing subsequent to due notice by the moving party of the filing of the motion for modification." 750 ILCS 5/510(a) (West 2014).

¶ 40 Although the decision to award retroactive child support rests within the sound discretion of the trial court (*In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1119 (2004)), "[u]nder the plain language of the statute, a retroactive modification is limited to

only those installments that date back to the filing date of the petition for modification" (*In re Marriage of Petersen*, 2011 IL 110984, ¶ 18). The purpose of this requirement is to ensure that the respondent is put on notice before any change is made with respect to the original child support obligations. *Id.*

¶ 41 The Department's reliance upon *In re Marriage of Rocha*, 2015 IL App (3d) 140470, in support of its argument that the circuit court's retroactive modification of support to January 1, 2011, was proper is misplaced. In *Rocha*, the court was considering a petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)) to vacate prior court orders based on the court's finding that the husband fraudulently concealed his income and employment from the court. *Rocha*, 2015 IL App (3d) 140470, ¶ 1. Here, unlike in *Rocha*, neither the Department nor Gaskill filed a section 2-1401 petition seeking to set aside the August 21, 2012, permanent order on the grounds that Mikulait fraudulently concealed his income or employment.

¶ 42 Instead, in her February 10, 2014, motion, Gaskill asked the court to review Mikulait's tax records from 2009 through 2013 and to modify child support and the arrearage based on those records. Therefore, under section 510(a) of the Act, any modification of Mikulait's child support obligations could only be retroactive to February 10, 2014, the date Gaskill filed her petition. The retroactive modification of Mikulait's child support obligations to January 1, 2011, was, therefore, an abuse of discretion.

¶ 43 Mikulait next argues that the judgment order of arrearage and interest was against the manifest weight of the evidence. We agree.

¶ 44 The determination of the amount of a child support arrearage is an issue of fact, which will be reversed only if it is against the manifest weight of the evidence. *In re Marriage of Smith*, 347 Ill. App. 3d 395, 399 (2004).

¶ 45 Here, on August 18, 2014, the circuit court entered its final order, permanently modifying child support and entering a judgment for \$25,415.06 in overdue child support plus \$6,881.38 in statutory interest, but the record is devoid of the evidence upon which the court relied in entering that judgment. No exhibit was offered, or received into evidence, to justify the court's order. Absent evidence of the Department's calculations, it is impossible for this court to determine if there was a factual basis for the arrearage. The fact that the court's April 21 and June 10, 2014, orders reflect that child support was retroactively modified for the years 2011 and 2012 suggests that the arrearage calculations were based on improper evidence. Consequently, the judgment for arrearage and interest thereon must be set aside and the cause remanded for a determination of the amount of the arrearage and interest thereon.

¶ 46 Finally, Mikulait argues that the circuit court abused its discretion in denying his seventh request to temporarily reduce his child support payments based on his layoff from his employment. We disagree.

¶ 47 In cases where a noncustodial parent's income fluctuates or is otherwise difficult to determine, we have directed the circuit court to "consider an average of at least the last three years of gross income as reflected in [the parent's] wage statements and his income tax returns and subtract deductions allowed under section 505(a)(3) of the Act to arrive at net income for each year." *In re Marriage of Freesen*, 275 Ill. App. 3d 97, 104 (1995).

¶ 48 Here, Mikulait's income fluctuates because he is frequently temporarily laid off from his employment. When he is laid off, he sometimes receives unemployment compensation benefits. Therefore, at the April 21, 2014, hearing, the circuit court calculated his average income based on his 2012 and 2013 income tax returns and revised his support obligations based on his average income.

¶ 49 Given the irregular nature of his employment, Mikulait failed to show that another temporary layoff less than two months after entry of the support order based on his average income constituted a material change in circumstances. Therefore, the circuit court did not abuse its discretion in denying his seventh petition to temporarily reduce his child support payments based on his layoff from his employment.

¶ 50 **CONCLUSION**

¶ 51 For the foregoing reasons, those portions of the judgment of the circuit court of Madison County modifying child support retroactive to January 1, 2011, and assessing a child support arrearage and interest thereon are reversed and the cause is remanded for the circuit court to set retroactive child support to February 10, 2014, and to determine the amount of the arrearage and interest thereon. The remainder of the circuit court's judgment is affirmed.

¶ 52 Affirmed in part; reversed in part; and remanded.