No. 2-12-0956

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

IN RE THE MARRIAGE OF:	)	
	)	Appeal from the Circuit Court,
LISA M. KNAUF,	)	18th Judicial Circuit, DuPage County, IL
Petitioner-Appellee,	)	
	)	Circuit Court No. 08 D 2361
vs.	)	
	)	
DANIEL J. LOBNER,	)	Honorable Judge Brian McKilip,
Respondent-Appellant.	)	Judge Presiding

PETITIONER-APPELLEE LISA M. KNAUF'S RESPONSE TO RESPONDENT-APPELLANT'S BRIEF

Lisa M. Knauf, Pro Se
123 Main Street
Anytown, IL 12345
630-456-7890

ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

Appellee Lisa M. Knauf seeks to have the Appellate Court uphold the August 8, 2012 order of the Trial Court, entered by the Honorable Judge Brian McKilip, which was a post-decree increase in the Appellant's child support obligation based on a substantial increase in his net income.

ISSUES PRESENTED FOR REVIEW

(A) Did the Trial Court abuse its discretion when it increased Appellant's monthly child support obligation based on additional income disbursed from retirement accounts, when the parties' Judgment for Dissolution said those withdrawals would not be counted as income when needed to meet Appellant's initial child support obligation?

(B) Did the Trial Court err in raising Appellant's imputed income?

STATEMENT OF FACTS

PLEADINGS

The parties were divorced on November 19, 2009. At that time a signed Marital Settlement Agreement was entered setting an initial child support payment amount of $595.00 per month (CLR-69) for the two minor children that reside with Lisa pursuant to an Agreed Joint Parenting Agreement. The amount of child support was based on Daniel's imputed annual income of $35,000 at the time of the divorce. On March 15, 2011, Daniel filed a Petition to Decrease Child Support and Expenses (CLR-171) and Lisa filed a Response to Respondent's Petition to Reduce Child Support and Expenses on April 11, 2011.

While the Petition to Decrease was pending, Lisa received Daniel's 2010 tax return and filed a Petition to Increase Child Support (CLR-226) on June 20, 2011. Trial was held on May 23, 2012. The Court issued its ruling on July 3, 2012 (CLR-268), granting the Petition to Increase Child Support. The Court set the new amount based on evidence that the lifestyle Daniel has established over the last three years is supported by an approximate net income of $50,000 per year after payment of State and Federal taxes and insurance premiums (CLR-271). An order was entered August 8, 2012 (CLR-273), increasing Daniel's monthly support to $1,166.00 per month effective August 1, 2012 (CLR-275) and his support arrearage for the period June 20, 2011 to July 31, 2012 at $7,632.33 (CLR-275).

Daniel appeals both the child support increase and the increase in his imputed income on which it is based.

TESTIMONY

At the time of the divorce in November 2009, Daniel was a self-employed insurance salesman (ROP-55) and has been so employed since 2005 (ROP-55). Daniel's monthly income in May 2012, based on his Comprehensive Financial Statement and testified to at trial, was $10,586 per month (ROP-18). His income is derived from commissions from his insurance business and supplemented by withdrawals from annuities (ROP-55, SCLR).

Lisa was employed full time at the time of the divorce (ROP-35). She continued full-time employment with a subsequent employer until April 2011, when her position was eliminated during a restructuring (ROP-35). In Fall 2010, Lisa enrolled in school part-time while continuing to work. Lisa testified she is now a full-time student and holds a part-time job on campus (ROP-35). She testified she has residential custody of the parties' two children, ages 13 and 15 (ROP-36).

At trial, Daniel testified as to his financial obligations. From his monthly $10,586 income, he pays his personal health insurance premium of $347.00 (ROP-22) and child support of $595.00 (CLR-69). He is also obligated to pay annual federal and state income taxes and self-employment taxes. Daniel makes no mandatory payments for union dues, pension or 401(k) plans (ROP-22) and makes no debt payments on loans exclusively to support his business (ROP-90, 95).

All of Daniel's remaining monthly income is spent on discretionary personal and business expenditures. At trial, Daniel testified that his personal expenses include items such as his personal cell phone, treats and activities for the children (ROP-67), vacations (ROP-68, 70), expenses for his summer vacation home (ROP-69), and his boats (ROP-

70). Daniel has monthly discretionary business expenses of approximately $1,170.00 (ROP-20), which include a large mileage deduction, restaurant meals and entertainment, all of which he deducts on his annual income tax return (ROP-22, 23).

STANDARD OF REVIEW

This appeal pertains to trial court proceedings related to determining Daniel's net income for the purposes of calculating child support and increasing Daniel's child support obligation. The standard of review of these rulings is whether the decision is an abuse of discretion.

The Trial Court has broad discretion in determining issues of child support and a trial court's modification order will not be disturbed on appeal, absent an abuse of discretion. In re Marriage of Rogers, 213 Ill.2d 129 (2004). The determination of net income is reviewed under an abuse of discretion standard. Id. When a party appeals an order modifying an award of child support, we ask whether the trial court abused its discretion. In re Marriage of Mulry, 314 Ill.App.3d 756, 760 (4th Dist.2000).

ARGUMENT

1. The Trial Court Order Increasing the Child Support Obligation is Not an Abuse of Discretion.

A. Parties' Judgment of Dissolution Does Not Prohibit Including Distributions From Retirement Accounts in Calculation of Income.

The marital settlement agreement is like any other contract and the court must ascertain the parties' intent from the language of the agreement. In re Marriage of

Dundas, 355 Ill.App.3d 423, 425-426 (2d Dist.2005). In this case, the Trial Court correctly determined that the parties' Judgment of Dissolution (hereafter referred to as Judgment) did not intend to allow Daniel to live a lifestyle based on a net $50,000 income while paying child support as if he was living on net income of $25,000. (CLR-270). By lifting one sentence from the parties' Judgment, Daniel constructs the primary basis for the argument that his withdrawals from retirement accounts should not be included as income for child support calculations (Respondent's brief p. 5). That sentence reads: *It is acknowledged that these withdrawals are not considered income for child support purposes* (emphasis added; CLR-69).

The intention of the parties is not to be gathered from detached portions of a contract or from any clause or provision standing by itself, but each part of the instrument should be viewed in the light of the other parts. Martindell v. Lake Shore Nat. Bank, 15 Ill.2d 272, 283 (1958). This sentence in Section IX of the Judgment must be read together with the two sentences immediately prior, which read in part that Daniel's child support would be "**initially** set" at $595.00 per month and "**until he obtains sufficient employment to pay child support** and meet his monthly living expenses, he may from time to time withdraw from his various retirement accounts" (CLR-69, emphasis added). By inserting the word "initially" before the amount, it can be understood that the parties intended that Daniel's child support amount could change over time or it would have been written as a flat amount for all time.

Daniel argues that "living expenses" were not defined or limited in the Judgment (Respondent's brief p. 6, 8) and therefore any income used to pay for these expenses should not be considered for child support purposes (Respondent's brief p. 6). Daniel

further argues that because the word 'reasonable' was not explicitly included in the Judgment (Respondent's brief p. 6), he now has sole discretion and wide latitude to determine what should constitute 'living expenses.'

The Illinois Marriage and Dissolution of Marriage Act (hereafter the Act) defines what is income for child support purposes and the Act explicitly sets out what expenditures can be deducted to arrive at net income. 750 ILCS 5/505. General living expenses are not on this list. Further, the Internal Revenue Code includes examples of what it defines as 'living expenses' to include the cost of maintaining a household, including rent, water, utilities, and cost to insure a dwelling. I.R.C. §1.262.1. It does not expand the definition to include expenses such as those Daniel testified were for trips to Great America (ROP-67), video games (ROP-67), treats (ROP-67), vacations (ROP-68, 70), expenses for a summer vacation home (ROP-69), boats (ROP-69, 70) and the purchase of three kayaks (ROP-73).

Daniel states he has not obtained sufficient employment with pay or commission of at least $35,000 and therefore his income is not sufficient to pay child support or his living expenses (Respondent's Brief p. 6). However, Daniel's 2010 tax return shows gross income from insurance sales commissions of $41,459. (SCLR) and his 2011 tax return shows gross income from insurance sales commissions of $41,851 (SCLR). In both of these years these amounts are in excess of the $35,000 gross imputed income in the Judgment on which the initial child support obligation was calculated (CLR-69).

Over and above his commission income, Daniel's 2010 tax return showed an additional income amount from retirement distributions of $83,518 (SCLR), for a total gross income in 2010 of $124,977. Likewise, his 2011 tax return showed additional

income from retirement distribution totaling $70,221 (SCLR) for a total gross income of $112,072. For the first four months of 2012 (January 1 – May 4), Daniel's 2012 Comprehensive Financial Statement showed a year-to-date total income of $42,244, equal to a monthly gross income of $10,586. (SCLR), again including both his commission and retirement incomes.

The recent Supreme Court holding in In re Marriage of McGrath, 2012 IL 112792, is cited by Daniel as further support that his retirement income should not be used in the child support calculation, because like McGrath the money in the accounts already belonged to Daniel (Appellant's brief p. 9). However, the instant case is different from McGrath because it concerns retirement accounts and not savings accounts.

Retirement assets are different than savings accounts because they are intended to be used as future income and are given preferential tax treatment because of the nature of that type of account. I.R.C. §408 (e). While the Internal Revenue Code and the Act treat certain expenses and business deductions from income differently, they both treat retirement income the same: as '*income*'. Additionally, Daniel's accounts are annuities, which are a type of investment vehicle, often acquired under a life-insurance contract, designed to guarantee certain periodic payments. *See* Black's Law Dictionary 38 (3d. pocket ed. 2006). This case is not unlike a person who is living on a retirement pension and who still has an obligation to pay child support. Should not Daniel's children share in the benefit when Daniel is using retirement assets to live?

The holding in McGrath is noteworthy in the consideration of the case at bar. In this case, the Court said that although the calculation of net income in McGrath needed to be reviewed, it acknowledged the lower courts' concern that because he was unemployed,

Mr. McGrath's actual [employment] income was inadequate [for calculations of child support], when the evidence showed he had considerable assets to support his lifestyle. The Court noted that the statute specifically provides a remedy in that situation and can adjust the support obligation accordingly. In re Marriage of McGrath, 2012 IL 112792 at 16. "Therefore, calculating respondent's net income correctly does not have to mean that respondent is "absolved of his child support obligation", as the appellate court feared". Id at 16.

In the case at bar, the Trial Court used this remedy, stating in its ruling that "Daniel's income was difficult to determine" and found that Daniel's "lifestyle established … over the last three years approximates a net income of $50,000" on which child support should be based. (CLR-271). In further support of this stance, Daniel's testimony at trial was that the retirement account withdrawals were necessary to 'substantiate a lifestyle that is based on $10,000 per month' (ROP-23) and the Trial Court's child support obligation based on a net $50,000 income per year (CLR-271), a downward deviation from Daniel's own testimony, which equates to a $120,000 annual lifestyle.

B. Trial Court Determination of Net Income was correct.

The Trial Court correctly applied the Marriage Act statute when it calculated Daniel's net income by adding income from all sources and subtracting amounts for allowed deductions, including tax liability and health insurance, to arrive at an amount on which to then calculate child support. (CLR-270). No evidence was presented to the Trial Court to show that Daniel made payments for mandatory retirement contributions, mandatory union dues, expenditures for the repayment of debts related to the production

of income, or foster care payments, all of which are allowed deductions from gross income under the Act. 750 ILCS 5/505(a)(3)(d), (e), (g), (h), (i). (ROP-16,17, 95, 96).

The Act sets statutory guidelines for the calculation of child support obligations based on net income. 750 ILCS 5/505(a)(3). The legislature defined "net income," for purposes of the statute, as "the total of all income from all sources," minus specifically enumerated allowable deductions, which it then proceeded to list. Gay on Behalf of Gay v. Dunlap, 279 Ill.App.3d 140, 146 (1996). The fundamental rule of statutory interpretation is to give effect to the intention of the legislature and the best indicator of the legislature's intent is the plain language of the statute. In re Marriage of Rogers, 213 Ill.2d 129 (Rogers II, 2004). Statutes should be construed in a manner that avoids absurd, unreasonable, unjust or inconvenient results. In re Mary Ann P., 202 Ill.2d 393 (2002).

Daniel argues that all of his Schedule C business expenses should be deducted from his gross income before calculation of child support (Appellant's Brief p. 8; see also C-266). However, the Appellate Court has recognized that the Internal Revenue Code is designed to achieve different purposes than the state's child support provisions and Section 505 of the Act, not the tax code, defines income for child support purposes. In re Marriage of Rogers, 345 Ill.App.3d 77, 80 (Rogers I, 1st Dist.2003). Therefore, income that is not taxable under the Internal Revenue Code is included for child support purposes under Section 505.

As support for his position, Daniel cites Rimkus v. Rimkus, 199 Ill.App.3d 903 (1st Dist.1990), as a basis for excluding these business expenses from the child support calculation because they are used to generate income. However in a later case,

Gay on Behalf of Gay v. Dunlap, 279 Ill.App.3d 142 (1996), the Court declined to follow Rimkus with respect to this point. The Court reasoned in Gay that Rimkus was decided based on the 1979 Illinois child support statute, which bears little resemblance to the current statute. Gay at 146. "Allowing day-to-day business expenses to be deducted under subsection (a)(3)(h) would ignore the language 'for repayment of debts.' The legislature could have enacted the statute without such language, but it chose to include it. We will not read this language out of the statute when the statute makes perfect sense with it included". Id. at 147.

2. The Trial Court was correct to change Appellant's imputed income.

A. Judgment correctly calculated initial imputed income.

Daniel argues that his initial $595.00 child support amount is incorrect because the Judgment states it is based on 28% of his gross income, instead of the net as required by the Marriage Act, 750 ILCS 5/505 (Respondent-Appellant's Brief, p. 5-6). However a simple calculation shows this is not correct. If Daniel's child support had been set on 28% of his gross income, it would have been $816.67 per month not $595.00. As the Trial Court indicated in its ruling, $595.00 per month for two children is 28% of a net income of $25,500 (CLR-270) and is therefore in line with the amount stated in the Judgment, based on Daniel's 2009 tax return, the year of the dissolution. (SCLR).

Daniel's 2012 Financial Disclosure Statement (SCLR) shows his monthly living expenses total $1,950 per month from January 1 – May 4, 2012 and those expenses include rent, electricity, food, and clothing. Not including any retirement account distributions, Daniel stated his income was $14,594 or an average of $2,918.80 per month, more than enough to pay his stated expenses and his $595.00 monthly child

support obligation, with money left over. Daniel also testified that he has additional monthly miscellaneous expenses of $4,561.00 per month and that total does not include living expenses such as rent, utilities, food, nor does it include any expenses for the children. (ROP-32-33).

The Judgment states that "until Husband obtains sufficient employment to pay child support and meet his monthly lining expenses, he may from time to time withdraw funds from his various retirement accounts. It is acknowledged that these withdrawals are not considered income for child support purposes." (CLR-69). Doesn't this also mean that once Daniel can meet his monthly obligations through his employment, these withdrawals will be considered income for child support purposes? The evidence clearly shows his business income is sufficient and therefore any additional income from any source should be included in calculating his child support obligation.

B. Increase in Appellant's income is a change in circumstances warranting a change in child support obligation.

The Trial Court determined that Daniel's increase in his lifestyle (CLR-271) and increase in his income (CLR-270) warranted a change in his child support obligation (CLR-271). The Trial Court heard testimony and reviewed numerous financial documents in reaching this determination (SCLR). Illinois case law supports this position. For example, the Supreme Court held in a 1985 case "that a child is not only entitled to support for his basic needs, but that the statute requires the court to consider the 'standard of living the child would have enjoyed had the marriage not been dissolved.' 725 ILCS 5/505. A child is not expected to have to live at a minimal level of

comfort while the noncustodial parent is living a life of luxury". In re Marriage of Bussey, 108 Ill.2d 286, 297 (1985). In another case, the Third District held that child support obligations may be increased pursuant to the Act based upon the supporting parent's increased ability to pay, regardless of whether the child's needs have also increased. Wilson v. Wilson,166 Ill.App.3d 1035, 1038 (1988).

Daniel is correct in contending that the trial court did not pursue an in-depth investigation into the expenses relevant to support of the two minor children, but his own attorney objected to this line of questioning (ROP-34, 37). However, case law supports the Trial Court's decision even without this testimony. The relevant factors to be used by the trial court **include, but are not limited to**: (1) the financial resources of the child; (2) the financial resources and needs of the custodial parent; (3) the standard of living the child would have enjoyed had the marriage not been dissolved; (4) the physical and emotional condition of the child, and his educational needs; and **(5) the financial resources and the needs of the noncustodial parent**. In re Marriage of Stockton, 169 Ill.App.3d 318, 325-26 (1988) (emphasis added).

Conclusion

The Trial Court's ruling should be upheld because it is correct and fair. The Trial Court heard the testimony and reviewed the evidence and its ruling is not an abuse of discretion. Daniel's net income was calculated correctly based on the applicable statute and the language of the parties' Judgment was interpreted correctly as to their intent at the time of the divorce. Further, Daniel's lifestyle, as established over the last three years is evidence of his ability to support his children in a manner commensurate with his own.

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	)	
DANIEL J. LOBNER,	)	Honorable Judge Brian McKilip,
Respondent-Appellant.	)	Judge Presiding

CERTIFICATE OF COMPLIANCE

To: Steven A. Miner
Attorney for Appellant
28 Rolling Hills Drive
Barrington, Illinois 60010

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) Statement of Points and Authorities, the Rule 341(c) Certificate of Compliance, and the Certificate of Service, and those matters appended to the brief under rule 342(a) is 13 pages.

Respectfully Submitted,

_____
Lisa M. Knauf, Pro Se

Lisa M. Knauf
207 Haddon Place
Addison, IL 60101
630-560-9749

APPENDIX A:

TRIAL COURT RULING