2013 IL App (2d) 121061-U
No. 2-12-1061
Order filed June 27, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF ANNE-MARIE CLARK, n/k/a Anne-Marie Holm,	)	Appeal from the Circuit Court of Winnebago County.
Petitioner-Appellant,	)	
and	)	No. 02-D-1410
DAVID CLARK,	)	Honorable Joseph J. Bruce,
Respondent-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in denying petitioner an award of interest on respondent's child-support arrearage, as such an award was mandatory.

¶ 2 Petitioner, Anne-Marie Clark, appeals from the trial court's order modifying child support paid by respondent, David Clark, and calculating an arrearage, but denying an award of interest on it. She contends that changes in the law make an interest award mandatory. We agree. Accordingly, we reverse and remand for a determination of the amount of interest due.

¶ 3 I. BACKGROUND

¶ 4 The marriage of the parties was dissolved in 2003, and respondent was ordered to pay child support. In 2004, child support was modified. In 2009, both parties filed petitions for modification of child support, alleging a change in circumstances. In March 2012, the court provided a memorandum of decision, stating its findings of fact and requesting the attorneys to make retroactive arrearage calculations. On April 4, 2012, the trial court entered an order modifying support retroactively. The court ordered that any arrearage would be paid back at a rate of $35 per week and ordered that interest would not be applied to the retroactive arrearage. On April 26, 2012, the total amount of the arrearage was determined to be $8,898.

¶ 5 Petitioner moved to reconsider, contending that the court erred when it failed to award interest on the arrearage. On July 30, 2012, the court denied the motion under *In re Marriage of Tegeler*, 365 Ill. App. 3d 448, 461-63 (2006), because the arrearage was not based on a failure to pay under a previous support order. The court also held that changes to the law applied only to "child support judgments arising by operation of law" and that its order was not such a judgment. Petitioner appeals.

¶ 6 II. ANALYSIS

¶ 7 Petitioner contends that, under section 12-109 of the Code of Civil Procedure (Code) (735 ILCS 5/12-109 (West 2010)), which was amended in 2006, interest on the arrearage is mandatory.

¶ 8 Respondent has not filed a brief on appeal. Courts of review generally will not serve as an advocate for the appellee. *Hess v. Hess*, 87 Ill. App. 3d 947, 949 (1980). "In such a situation, our supreme court's decision in *First Capitol Mortgage Corp. v. Talandis Construction Corp*., 63 Ill. 2d 128 (1976), normally dictates that a court consider the merits of an appeal if the issues and the record are susceptible to easy decision, but that a court otherwise decide the case in favor of the

appellant if the appellant establishes a *prima facie* case for reversal." *Mahoney v. Gummerson*, 2012 IL App (2d) 120391, ¶ 10. Because this case presents a question of law, we apply a *de novo* review. *In re Parentage of R.B.P.*, 393 Ill. App. 3d 967, 970 (2009).

¶ 9 We note that petitioner's counsel devotes a portion of his argument to a discussion of his personal involvement with changes in the law on when interest is awarded. That activity is outside of the record. Thus, counsel's personal testimonial about the matter is inappropriate for our consideration and we do not take it into account in our decision.

¶ 10 Although petitioner discusses only section 12-109, several statutes are applicable. First, in 1987, the General Assembly amended the Illinois Marriage and Dissolution of Marriage Act (Act) by adding the following:

> "Any new or existing support order entered by the court under this Section shall be deemed to be a series of judgments against the person obligated to pay support thereunder, each such judgment to be in the amount of each payment or installment of support and each such judgment to be deemed entered as of the date the corresponding payment or installment becomes due under the terms of the support order. Each such judgment shall have the full force, effect and attributes of any other judgment of this State, including the ability to be enforced." Ill. Rev. Stat. 1987, ch. 40, ¶ 505(c) (now 750 ILCS 5/505(d) (West 2010)).

¶ 11 "This change was made in response to federal legislation which required states seeking certain federal funds to treat unpaid support payments as judgments as a condition of receiving those funds." *Illinois Department of Healthcare & Family Services ex rel. Wiszowaty v. Wiszowaty*, 239 Ill. 2d 483, 487 (2011) (citing 42 U.S.C. § 666(a)(9)(A) (2006). In 1987, section 12-109 of the Code was amended to provide in part:

> "Interest on judgments. Every judgment except those arising by operation of law from child support orders shall bear interest thereon as provided in Section 2-1303. *Every judgment arising by operation of law from a child support order shall bear interest* as provided in Section 2-1303 commencing 30 days from the effective date of each such judgment." (Emphasis added.) Ill. Rev. Stat. 1987, ch. 110, ¶ 12-109 (now 735 ILCS 5/12-109 (West 2010).

¶ 12 "Under section 2-1303 of the Code in 1987, and still today, '[j]udgments recovered in any court *shall draw interest* at the rate of 9% per annum from the date of the judgment until satisfied.' " (Emphasis in original.) *Wiszowaty*, 239 Ill. 2d at 487 (quoting Ill. Rev. Stat. 1987, ch. 110, ¶ 2-1303 (now 735 ILCS 5/2-1303 (West 2010).

¶ 13 Thus, "the legislature stated that unpaid child support payments 'shall' be deemed judgments and that these judgments 'shall bear interest' at the same rate as all other judgments. The use of the word 'shall' generally indicates a mandatory requirement." *Id*. Accordingly, in *Wiszowaty*, our supreme court held that, under the plain and ordinary language of the statutory amendments, past-due child support payments began to bear mandatory interest in 1987. *Id*. at 487-88.

¶ 14 In addressing the issue in *Wiszowaty*, the supreme court addressed previous case law holding that the imposition of interest on child support judgments was a matter within the trial court's discretion. For example, in *Finley v. Finley*, 81 Ill. 2d 317, 332 (1980), the court noted that the previous version of the Act said nothing about mandatory interest and therefore was not relevant. "At that time, in 1980, unpaid child support payments were not characterized as judgments." *Wiszowaty*, 239 Ill. 2d at 488. Thus, because there were no controlling statutes defining unpaid child support payments as judgments or providing for interest, interest could be awarded on those

payments as a discretionary matter because the divorce proceeding could be likened to a chancery proceeding, which allowed the court to apply equitable considerations to deny an interest award. See *Wiszowaty*, 239 Ill. 2d at 489 (discussing *Finley*). But when the law changed in 1987, each unpaid child support installment became an actual " 'judgment' that arises by operation of law," which " 'shall bear interest.' " *Id*. at 490. Thus, the court held that the plain language of the statutory amendments applied and that its decision in *Finley* did not compel a different result. *Id*.

¶ 15 In 2006, section 12-109 was amended further to provide instructions for the calculation of interest on child support judgments, and now states that interest shall be calculated by applying one-twelfth of the current statutory interest rate to the unpaid child support balance at the end of each calendar month. "[t]he unpaid child support balance at the end of the month is the total amount of child support ordered, excluding the child support that was due for that month to the extent that it was not paid in that month *and including judgments for retroactive child support*, less all payments received." (Emphasis added.) 735 ILCS 5/12-109 (West 2010).

¶ 16 Here, the trial court denied interest, relying in part on *In re Marriage of Tegeler*. But that case did not discuss the 2006 revision to section 12-109, which explicitly includes retroactive child support judgments. See *In re Marriage of Tegeler*, 365 Ill. App. 3d at 461-63. The trial court then acknowledged the statutory changes but found that its modification order was not a child support judgment arising by operation of law. However, as previously noted, the supreme court in *Wiszowaty* specifically held that, since 1987, each unpaid child support installment is an actual judgment that arises by operation of law. *Wiszowaty,* 239 Ill. 2d at 490. At that time, interest on such judgments became mandatory and equitable principles could not be applied to deny an award of interest. Accordingly, the trial court erred when it denied an award of interest on the arrearage.

¶ 17 III. CONCLUSION

¶ 18 The trial court erred when it did not award interest on the arrearage. Accordingly, the judgment of the circuit court of Winnebago County is reversed and the cause is remanded for a determination of the amount of interest due.

¶ 19 Reversed and remanded.