

**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).

2014 IL App (3d) 130924-U

Order filed August 1, 2014

---

IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

RHONDA MARRS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Petitioner-Appellee,	)	Kankakee County, Illinois,
	)	
v.	)	Appeal No. 3-13-0924
	)	Circuit No. 05-F-54
	)	
DAVID ZAWISTOWSKI,	)	Honorable
	)	Michael D. Kramer,
Respondent-Appellant.	)	Judge, Presiding.

---

JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Schmidt and Wright concurred in the judgment.

---

**ORDER**

¶ 1 *Held:* Trial court abused its discretion by barring from evidence respondent's 2005 and 2006 tax returns where such evidence was necessary to establish a foundational baseline for a finding of a substantial change in circumstances.

¶ 2 Petitioner, Rhonda Marrs, sought modification of a 2006 child support order, pursuant to which respondent, David Zawistowski, was paying \$300 biweekly in child support. That number was a deviation from the statutorily prescribed 28%, though the 2006 order did not indicate what 28% of respondent's income would have been. At a hearing, respondent attempted to introduce

tax returns from 2005 and 2006, but the court denied their admission. The court granted petitioner's petition, modifying child support payments to \$345 per week, 28% of respondent's 2013 weekly income, with arrearages dating back to the filing of the petition. We reverse.

¶ 3

### FACTS

¶ 4

On February 8, 2006, petitioner and respondent entered into a joint parenting agreement which resolved, among other things, the amount that respondent would pay in support and maintenance of the parties' two children. A 2006 court order was subsequently entered reflecting that agreement. In pertinent part, the order dictated that

"DAVID JAMES ZAWISTOWSKI,[ ] will pay as and for the support and maintenance of the parties' minor children the sum of Three Hundred Dollars (\$300.00) bi weekly, which is slightly less than Twenty Eight Percent (28%) of his net bi-weekly pay due to the fact that he provides substantial day care for the children[.]"

The order did not indicate the actual amount of respondent's biweekly income, nor did it indicate his total income in general.

¶ 5

On March 19, 2010, petitioner filed a petition to modify child support. In her petition, petitioner asserted that the circumstances of the parties had substantially changed since the entry of the 2006 agreement. Such changed circumstances, petitioner alleged, included the fact that respondent's income had increased. On August 11, 2010, respondent filed a "Petition to decrease child support and/or to suspend, and abate child support."

¶ 6

On April 5 and August 20, 2013, the court held hearings on petitioner's and respondent's petitions, respectively. At the April 5 hearing, petitioner put into evidence respondent's tax return from 2010, W-2s from 2011 and 2012, and a pay stub from 2013. Respondent averred

that he had not filed his taxes in 2011 or 2012. The 2010 tax return indicated that respondent had filed as head of household.

¶ 7 Respondent, proceeding *pro se*, then sought to introduce into evidence his tax returns from 2005, 2006, and 2008. Petitioner objected on the grounds of relevance, and the court sustained the objection, stating:

"So they need to show that somehow your income has gone up or changed since then. And the information from '05, '06, and '08 prior to the entry of that order really has no relevance to the Court. I'm gonna sustain the objection to those exhibits."

At argument, respondent pointed out that petitioner could not establish an increase in respondent's income after the entry of the 2006 order without first establishing what his income was at that time. In response, petitioner's counsel urged the court to interpret the word "slightly" in the 2006 order to be a deviation of "5 percent or even 10 percent."

¶ 8 At the later hearing on respondent's petition, respondent again attempted to introduce evidence of his income as of 2006, but was again denied by the court. Said the court: "[L]et's start from the position that 28 percent of your net pay at the time this Joint Parenting Order was entered February of 2006 is right, slightly around close to \$300 bi-weekly." When respondent insisted this was not the case, the court told him:

"[Y]ou want to know what the baseline is, and in my mind I know what the baseline is. Baseline was right around 28 percent is \$300 bi-weekly. So you can start from there or let's move on."

Later in the hearing, respondent testified that his income had neither substantially increased nor decreased since the time of the 2006 agreement. He estimated that "it's within 5 percent either way." When respondent offered to check his 2005 tax return to confirm this, another objection

was sustained on the grounds of relevancy.

¶ 9 After hearing arguments on both petitions, the court granted petitioner's petition to modify. In determining proper arrearages for 2011 and 2012, the court did not accept the net incomes reflected on respondent's W-2s, instead calculating those net incomes by applying his federal and state tax rates from his 2010 tax return, and deducting those amounts from his gross income. The total tax, as determined by these rates, fell well below respondent's actual withholdings from those years. As a result, the court's findings of respondent's net income in 2011 and 2012 were more than those reflected on respondent's W-2s by \$10,038 and \$10,976, respectively.

¶ 10 Respondent appeals, arguing that the trial court abused its discretion in excluding 2005 and 2006 tax returns from evidence.

¶ 11 ANALYSIS

¶ 12 The modification of child support payments is a matter of the trial court's discretion and will not be disturbed on appeal absent an abuse of that discretion. *In re Marriage of Bussey*, 108 Ill. 2d 286 (1985). Likewise, the decision to admit or exclude evidence is also a matter of discretion. *People v. Hope*, 168 Ill. 2d 1 (1995). An abuse of discretion is found only where the trial court's decision is arbitrary, fanciful or unreasonable or where no reasonable person would agree with the position adopted by the trial court. *People v. Becker*, 239 Ill. 2d 215 (2010).

¶ 13 Generally, an order for modification of child support may only be granted "upon a showing of a substantial change in circumstances."<sup>1</sup> 750 ILCS 5/510(a)(1) (West 2012). "To establish a substantial change in circumstances, the petitioner must show an increase in the

---

<sup>1</sup> Though there are two narrow exceptions to this requirement, neither is applicable in the case at bar. See 750 ILCS 5/510(a)(2)(A), (B) (West 2010).

noncustodial parent's ability to pay and an increase in the needs of the child since the court's previous order." *In re Marriage of Adams*, 348 Ill. App. 3d 340, 343 (2004). Because courts will assume that the needs of children increase as they grow up and the cost of living rises, (*id.*), demonstration of a substantial change in circumstances hinges on an increase in the noncustodial parent's ability to pay.

¶ 14 It is well-settled that only relevant evidence may be admitted at trial. *E.g.*, *People v. Hoerer*, 375 Ill. App. 3d 148 (2007); see also Ill. R. Evid. 402 (eff. Jan. 1, 2011) ("Evidence which is not relevant is not admissible."). Evidence is relevant if it tends to make the existence of a fact that is important to the determination of an action either more or less probable than it would be without the evidence. *People v. Decaluwe*, 405 Ill. App. 3d 256 (2010). "A trial court may reject evidence on the grounds of relevancy if it is remote, uncertain, or speculative." *People v. Cloutier*, 156 Ill. 2d 483, 501 (1993).

¶ 15 In the case at hand, respondent's 2005 and 2006 tax returns were not only relevant, but necessary to determining whether there had been an increase in respondent's income since the previous order. Logic dictates that to determine the difference in income from 2006 to 2010, one must know what those incomes actually were. Despite being required by statute,<sup>2</sup> the 2006 order made no mention of what respondent's actual net income was at that time. Thus, the court chose to assume, despite respondent's protests, that the difference in respondent's actual income in 2006 and the amount reflected in the 2006 order was negligible. While such interpretation may be necessary where evidence is lacking in a case, here respondent made repeated efforts to actually

---

<sup>2</sup> 750 ILCS 5/505(a) (West 2012) ("If the court deviates from the guidelines, the court's finding shall state the amount of support that would have been required under the guidelines, if determinable.")

