2016 IL App (5th) 150481-U

NO. 5-15-0481

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT



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| JOHN LISTELLO, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellant, | ) | Clinton County. |
| | ) | |
| v. | ) | No. 09-F-19 |
| | ) | |
| BRIDGET WUEBBLES, | ) | Honorable |
| | ) | William J. Becker, |
| Defendant-Appellee. | ) | Judge, presiding. |

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice Schwarm and Justice Goldenhersh concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court did not abuse its discretion in ordering the divorced father to pay one-third of his nonminor child's college expenses and one-half of her medical, dental, and vision expenses not covered by insurance.

¶ 2 The defendant mother, Bridget Wuebbles, filed a petition for nonminor support and educational expenses, requesting that the plaintiff father, John Listello, be ordered to pay one-third of the college expenses of the parties' nonminor child, Caitlynn Listello. After a hearing, the trial court ordered John to pay one-third of Caitlynn's college expenses and one-half of her medical, dental, and vision expenses not covered by insurance. John filed a motion to reconsider, which was denied. John appeals, arguing

that the court abused its discretion in imputing income to him based upon his prior income and, as a result, requiring him to pay beyond his ability at the time of the hearing. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 When the parties divorced on November 24, 1998, they entered into a joint parenting agreement and a marital settlement agreement, in which John agreed to pay Bridget $350 per month in child support for Caitlynn (born March 19, 1997). The marital settlement agreement made no provision for nonminor support or educational expenses.

¶ 5 John's child support obligation was increased several times over the next 15 years. On December 16, 1999, it was increased to $491.95 per month; on September 17, 2009, it was increased to $1,260.99 per month, retroactive to September 1, 2009; and on February 1, 2013, it was increased to $1,750 per month, retroactive to May 17, 2012.

¶ 6 On July 18, 2014, the court entered an order decreasing John's child support obligation to $1,620 per month, effective August 1, 2014. The court also found that John had a child support arrearage of $13,497, which he was ordered to pay within one year, at the rate of at least $1,124.75 per month, beginning on August 1, 2014.

¶ 7 On September 25, 2014, John filed a petition to modify/abate child support. In the petition, John alleged that he had been involuntarily terminated from his employment.

¶ 8 On May 27, 2015, Bridget filed a petition for rule to show cause. In the petition, Bridget alleged that John had failed to comply with the court's July 18, 2014, order and asked that he be held in contempt of court.

¶ 9 At the June 4, 2015, hearing on John's petition to modify/abate child support and Bridget's petition for rule to show cause, John testified that he was hired by Sigma-Aldrich in May 2014 and earned $47,807 during the four-month period from May through August 2014 but was involuntarily terminated on September 5, 2014. After his termination, he drew unemployment benefits and tried to find other employment.

¶ 10 John testified that, at the time of the hearing, he was self-employed. He stated that he was operating two start-up companies, LifeSci Strategic Consulting and LifeSci Diagnostics Group. He stated that LifeSci Strategic Consulting "ha[d] been contracted by MedTekCorp, *** serving both as marketing consultant and MedTek's diagnostic service offerings." He testified that LifeSci Diagnostics Group "ha[d] been contracted by GeneID *** to serve as both marketer and consulting for GeneID's cancer risk assessment testing/prevent test offering." He stated that LifeSci Diagnostics Group had also "been contracted by Solona Healthcare, LLC to serve as both marketer and consulting for AIBiotech's genetics testing services." Copies of these contracts were admitted into evidence.

¶ 11 John testified that his start-up companies had not yet generated any income. He stated that his pay would be straight commission and that his goal was to be earning approximately $60,000 per year by the end of 2015.

¶ 12 On cross-examination, John acknowledged that, rather than paying his child support, he had loaned his start-up companies $22,500 in October 2014 and testified that the $22,500 "went to payroll." He also acknowledged that he had received income tax

refunds totaling $13,298 in April 2015 and that he had not used any of the $13,298 to pay on his child support arrearage or Caitlynn's medical expenses, which he owed to Bridget.

¶ 13 Bridget testified that she worked as a speech therapist for Kaskaskia Special Education District. In order to help pay the bills, she was also working two additional jobs, one as a waitress and one as a *per diem* speech therapist at a nursing home.

¶ 14 After the testimony, the court noted that, even though Caitlynn had turned 18 and had graduated, which terminated her child support, John would still be faced with nonminor support and educational expenses. The court indicated that it generally required the father, mother, and child to each pay one-third of the child's college expenses, which the court noted was usually more than the child support had been.

¶ 15 On June 19, 2015, the court entered an order ruling on Bridget's petition for rule to show cause and John's petition to modify/abate child support. As to Bridget's petition for rule to show cause, the court found John in contempt for failing to comply with the July 18, 2014, order, noting that the order had established a child support arrearage of $13,497; that, since that time, John had received income tax refunds of approximately $13,000 and had loaned approximately $22,000 to his start-up companies; and that he clearly had the ability to pay money on the child support arrearage but had not done so.

¶ 16 As to John's petition to modify/abate child support, the court ruled as follows:

> "[John] requests that support be modified or abated from September 25, 2014. [He] contends that he lost his employment through no fault of his own from Sigma Aldrich. [Bridget] contends that [John] voluntarily terminated his employment. The evidence shows that Sigma Aldrich did not contest the receipt

of unemployment compensation benefits as a result of the termination. The evidence shows [John] actively sought employment since the termination. The evidence also suggests that [John] would move from employer to employer at various times in the past. The court believes that modification of support is in order; however, because [John's] income varied and because [he] had a history of changing jobs consideration of past earnings would be appropriate.

The evidence shows that [John's] income for the year 2014 was approximately $48,000. In the year 2013 he made approximately $90,000. In the year 2012 he made slightly more than $100,000. The new businesses that [he] is trying to involve himself in ha[ve] yet to show a profit; however, it is reasonable to conclude based upon [his] earnings history that [he] could reasonably be expected to make $60,000 per year gross which would net $40,000 approximately per year. [His] current spending habits and lifestyle suggest this. The court is of the opinion, based on the evidence, that it is equitable to take past earnings into account and to set support from September 25, 2014[,] to May 25, 2015[,] at *** $666.66 per month for a total of $6,000. ***

No provision is made for college expense[s] since no request is made for that at this time. ***

This is a final and appealable order disposing of all pending claims of the parties against each other."

¶ 17 On July 20, 2015, Bridget filed a petition for nonminor support and educational expenses. In the petition, Bridget stated that Caitlynn would be attending college in the fall of 2015, that she was willing and able to pay one-third of Caitlynn's college expenses, that Caitlynn was willing and able to pay one-third of her college expenses, and that John was financially able to contribute toward Caitlynn's college expenses. Bridget asked that John be ordered to pay one-third of Caitlynn's college expenses and one-half of her medical, dental, and vision expenses not covered by insurance.

¶ 18 At the September 1, 2015, hearing on her petition for nonminor support and educational expenses, Bridget testified that Caitlynn had begun attending Southern Illinois University Edwardsville in August 2015. She detailed Caitlynn's college expenses, which she estimated totaled between $27,000 and $28,000 per year. Caitlynn had a $3,000 scholarship, leaving a balance of between $24,000 and $25,000 per year. Bridget stated that, not only was she willing to pay her one-third share of Caitlynn's college expenses, but she was also willing to pay as much of Caitlynn's share as she could. She testified that she earned approximately $44,000 per year but, after insurance payments, took home approximately $2,100 per month. She asked that she and John be ordered to split Caitlynn's medical, dental, and vision expenses not paid by insurance.

¶ 19 Caitlynn testified that she had been saving for college for as long as she could remember and that she had managed to save approximately $7,000 even after paying for most of her car. She was working two jobs as a waitress while attending college.

¶ 20 Bridget's attorney then asked the court to take judicial notice of its June 19, 2015, order with regard to John's financial situation. The court did so without objection.

¶ 21 John testified that his start-up companies had still not yet generated any income and that he had filed for Chapter 7 bankruptcy 11 days earlier. He stated that he had $30,000 in unsecured debt and $270,000 in secured debt, which was for his house and vehicle, which were both "under water." He testified that there were no assets currently available to him and that he had no credit to get a loan.

¶ 22 On cross-examination, John acknowledged that he was not unemployed but, instead, was self-employed. He testified that he had an equal partner, who was covering some of the expenses, and that he "sit[s] at home" and "work[s] on the computer." As to his income, he testified, in pertinent part, as follows:

> "I do not have income yet. We're still trying to build the organization. Structurally it's great. The number of people that are moving their stuff is great. The turnaround time on insurance companies is really horrendous. As to when I'll have income, I've given up on that answer. We thought we'd have income in May. We thought we'd have it in June. I turned over to the true understanding that when God decides that machine is going to get turned on, that's when it comes out. I've never been right anytime I state income will come. The mechanism, the structure, the corporation is building fantastically in ways we never thought it would. But how you turn it on, *** I don't know. We're working on it."

¶ 23 On September 4, 2015, the court entered an order granting Bridget's petition for nonminor support and educational expenses. The court ordered John to pay one-third of Caitlynn's college expenses and one-half of her medical, dental, and vision expenses not covered by insurance. The court noted that John was self-employed; that, even though

his start-up companies were not yet generating a profit, they were expected to do so; and that, based on its rationale in its prior order, he would have income.

¶ 24 On October 5, 2015, John filed a motion to reconsider, arguing that the court failed to consider his financial resources at the time of the hearing. At the hearing on the motion, John's attorney argued that he had no income at the time of the hearing; that Bridget had more resources available to her; and that he should, therefore, be apportioned a lesser percentage of Caitlynn's college expenses. At the hearing, the court stated: "[John] is responsible for college expenses based upon an income that I determined to be about $60,000 in the June 19th order[,] which was not appealed." On October 16, 2015, the court entered its order denying John's motion to reconsider. John appeals.

¶ 25 ANALYSIS

¶ 26 Section 513 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/513 (West 2014)) allows a court, in certain circumstances, to "award sums of money out of the property and income of either or both parties ***, as equity may require, for the support of the child or children of the parties who have attained majority." 750 ILCS 5/513(a) (West 2014). One such circumstance is to provide for the child's college expenses, which "may include, but shall not be limited to, room, board, dues, tuition, transportation, books, fees, registration and application costs, medical expenses including medical insurance, dental expenses, and living expenses during the school year and periods of recess." 750 ILCS 5/513(a)(2) (West 2014).

¶ 27 When deciding whether to award college expenses and the amount thereof, the court must consider all relevant factors that are reasonable and necessary, including: the

financial resources of both parents, the standard of living the child would have enjoyed had the marriage not been dissolved, the child's financial resources, and the child's academic performance. 750 ILCS 5/513(b)(1)-(4) (West 2014).

¶ 28 The decision whether to award educational expenses is reviewed for an abuse of discretion. *People ex rel. Sussen v. Keller*, 382 Ill. App. 3d 872, 877-78 (2008). An abuse of discretion occurs when the court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the court. *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009).

¶ 29 John argues that the trial court abused its discretion in imputing income to him based upon his prior income. However, a careful review of the record demonstrates that the court did not actually impute income to John. The imputation of income arose in response to support-paying parents who experienced a reduction in income and sought a corresponding decrease in child support. *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 1077 (2009). When the other parent questioned the motives of the support-paying parent, courts imputed income when appropriate. *Id.* However, in order to impute income to a support-paying parent, the court must find that he is voluntarily unemployed, is trying to evade a support obligation, or has unreasonably failed to take advantage of an employment opportunity. *Id.* Here, the court made none of these findings; nor did it indicate that it was imputing income to John. Moreover, Bridget did not ask the court to impute income to John; nor did she question John's motives.

¶ 30 Instead, the court, at Bridget's attorney's request and without objection by John, took judicial notice of its June 19, 2015, order, in which it had concluded that, based

upon John's earnings history, he could reasonably be expected to gross $60,000 per year and to net approximately $40,000 per year. That order, which was entered less than three months before the September 1, 2015, hearing on Bridget's petition for nonminor support and educational expenses, was not appealed. In its September 4, 2015, order granting Bridget's petition for nonminor support and educational expenses, the court noted that John was self-employed and that, even though his start-up companies were "not yet generating a profit," they were "expected to do so." The court concluded that, based on its rationale in its prior order, John would have income.

¶ 31 John also argues that the court abused its discretion by considering its previous findings made at the June 4, 2015, hearing rather than his undisputed testimony regarding his inability to pay at the time of the September 1, 2015, hearing. He argues that the June 19, 2015, order related to his child support obligations, not nonminor support, and that nonminor support is a separate and independent consideration unrelated to child support. He argues that the court ignored his present lack of income and, instead, calculated his income based upon an unrelated order and his income prior to his 2014 unemployment. He argues that the court abused its discretion in considering his 2012, 2013, and 2014 income in determining his 2015 income because he was not self-employed during those years, and there is no evidence that he worked on a commission during those years. He argues that his prior income is unrelated to his potential income from his new start-up businesses. He argues that his ability to pay should have been evaluated based upon the resources available to him at the time of the hearing, and he should not have been ordered to pay an amount greater than he could afford.

¶ 32 Initially, we note that the court did not abuse its discretion in taking judicial notice of its prior order. See *In re Brown*, 71 Ill. 2d 151, 155 (1978) ("Clearly, a court may and should take judicial notice of other proceedings in the same case which is before it and the facts established therein.").

¶ 33 In its June 19, 2015, order, the court concluded that, based upon John's earnings history, he could reasonably be expected to gross $60,000 per year and to net approximately $40,000 per year. Where it is difficult to ascertain the net income of a support-paying parent, the court may consider past earnings in determining the parent's net income for purposes of a child support award. *In re Marriage of Hubbs*, 363 Ill. App. 3d 696, 706 (2006). Accordingly, the court did not abuse its discretion in considering John's past earnings in determining his net income for purposes of a child support award.

¶ 34 At the September 1, 2015, hearing, which was less than 90 days after the June 4, 2015, hearing, there was nothing to suggest that John's financial resources had changed since the June 19, 2015, order except for the fact that he had filed a bankruptcy petition with approximately $30,000 in unsecured debt. In its order granting Bridget's petition for nonminor support and educational expenses, the court noted that John was self-employed and that, even though his start-up companies were "not yet generating a profit," they were "expected to do so." The court concluded that, based on its rationale in its prior order, John would have income. The court did not abuse its discretion in concluding that John would have income even though his start-up companies had not yet generated a profit where they were expected to do so. Based upon the court's determination that John would have income, we cannot say that the court abused its discretion in ordering him to

pay one-third of Caitlynn's college expenses and one-half of her medical, dental, and vision expenses not covered by insurance.

¶ 35 We note that Caitlynn's estimated college expenses, after deducting her $3,000 scholarship, are between $24,000 and $25,000 per year. John's one-third share of those expenses is, therefore, between $8,000 and $8,333.33 per year, or between $666.67 and $694.44 per month. In its June 19, 2015, order, the court ordered John to pay $666.66 per month in child support for the period from September 25, 2014, until May 25, 2015, when Caitlynn graduated from high school. His obligation to pay one-third of her college expenses will, therefore, be no more burdensome than his child support obligation, from which he did not appeal.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, the judgment of the circuit court of Clinton County is affirmed.

¶ 38 Affirmed.