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2017 IL App (3d) 160762-U

Order filed December 21, 2017

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2017

<i>In re</i> MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
MICHAEL PEFFER,	)	Tazewell County, Illinois,
	)	
Petitioner-Appellant,	)	
	)	Appeal No. 3-16-0762
and	)	Circuit No. 02-D-111
	)	
GINA PEFFER, n/k/a Gina Feehan,	)	Honorable
	)	Thomas A. Keith,
Respondent-Appellee.	)	Judge, Presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Presiding Justice Holdridge and Justice McDade concurred in the judgment.

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**ORDER**

¶ 1           *Held:* (1) The circuit court did not abuse its discretion when it modified Michael’s child support obligation. (2) Michael failed to prove that the judge was biased. (3) We decline to impose sanctions.

¶ 2           Petitioner, Michael Pepper, appeals from the circuit court’s November 2016 order that recalculated his child support obligation and ordered Michael to pay an arrearage. Michael argues that: (1) the court abused its discretion in recalculating Michael’s income; (2) the court erred when it denied Michael’s petition for downward modification of child support; and (3) the

judge failed to recuse himself because he had a personal and working relationship with respondent, Gina Pepper. In her brief, Gina asks this court to impose sanctions. We decline this request, but affirm the circuit court's ruling.

¶ 3

### FACTS

¶ 4

On February 20, 2002, Michael filed a petition for dissolution of marriage. The petition alleged that the parties were married in 1989, had three marital children, and Gina was then pregnant with the parties' fourth child. Gina gave birth to the parties' fourth child before the court entered the judgment for dissolution of marriage.

¶ 5

On May 5, 2003, the circuit court entered a judgment for the dissolution of the marriage of Michael and Gina. The judgment awarded custody of the parties' two eldest children to Michael and custody of the parties' two younger children to Gina. The judgment did not provide for child support.

¶ 6

On June 22, 2005, Gina filed a petition to modify the judgment. In her petition, Gina asked the court to enter an order for child support. On May 25, 2006, the court ordered Michael to pay \$1000 per month as child support.

¶ 7

On February 22, 2010, Gina filed a petition to modify child support. On August 24, 2010, Michael filed a competing petition to modify child support and custody. Michael's petition argued that the court should award to him custody of the parties' two younger children and that his child support obligation should be modified accordingly. The parties entered an agreed order in which Michael's petition was voluntarily dismissed. The court ruled that a change in circumstances of the children and Michael justified a change in support. The court used a three-year income average to calculate Michael's support obligation because Michael was self-

employed as a chiropractor and his annual net income fluctuated. The court increased Michael's child support obligation to \$5127 per month.

¶ 8 On November 22, 2011, the court awarded temporary custody of the parties' third-born child to Michael. The custody award lasted for seven months, until the child reached the age of majority. The court ordered that the parties' fourth-born child remain in Gina's custody.

¶ 9 On February 27, 2012, Michael filed a petition to modify child support. Michael argued that since the court imposed the \$5127 per month child support obligation, he had earned substantially less income, and on June 5, 2012, the parties' third child will attain the age of majority. The parties entered an agreed order that reduced Michael's child support obligation to \$3000 per month.

¶ 10 On March 12, 2013, Michael filed a second petition to modify child support. The petition alleged that Michael had experienced a substantial change in circumstances and his 2012 income was lower than his 2009 income. As a result, Michael asked the court to reduce his child support obligation by \$500 per month. On July 31, 2013, the parties entered an agreed order that reset Michael's child support obligation to \$2500 per month. The order found that Michael's income was \$197,088 in 2010, \$90,000 in 2011, and \$163,000 in 2012, and Michael had a three-year average net income average of \$150,000 per year.

¶ 11 On October 22, 2014, Michael filed a third petition to modify child support. The petition alleged that Michael had incurred a substantial decrease in income since the entry of the July 31, 2013, order. The petition also argued that the three-year net income average used since 2010 should no longer be employed and the recalculation should be based solely on Michael's 2014 and current income.

¶ 12 On February 13, 2015, Gina filed a petition for upward modification of child support. The petition alleged that a substantial change in circumstances had occurred and Michael's three-year average net income had increased. Each party filed a financial affidavit after they filed their petition for child support modification.

¶ 13 On April 20, 2016, Gina filed a petition to vacate the agreed order of July 31, 2013. Gina alleged that the 2012 tax return that the court relied on to calculate Michael's child support obligation excluded \$32,408 of voluntary pretax pension contributions. The exclusion gave Michael the appearance of a higher tax burden and lower net income. Gina alleged that between March 14 and April 15, 2013, Michael filed an amended tax return with the Internal Revenue Service that included the \$32,408 pretax pension contribution.

¶ 14 On May 26, 2016, Gina served on Michael a request for admission of facts and genuineness of documents. The request asked Michael to admit that he: (1) deposited \$32,408 into a retirement savings account on or before April 15, 2013, (2) prepared an amended 2012 federal income tax return prior to July 31, 2013, (3) did not disclose the retirement contribution to Gina before the July 31, 2013, agreed order was entered, and (4) the contribution reduced Michael's tax liability. On September 8, 2016, Judge Thomas A. Keith<sup>1</sup> entered an order that deemed the facts admitted. Judge Keith then set the cause for a November 16, 2016, hearing on Gina's petition to vacate the July 31, 2013, agreed order, and the parties' competing petitions to modify child support.

¶ 15 On November 14, 2016, Michael filed a petition to continue the hearing. On November 16, 2016, the court called the case for a hearing. Counsel for Michael appeared at the hearing without her client. The docket entries do not indicate if the court ruled on Michael's

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<sup>1</sup>The docket sheet indicates that Judge Keith began presiding over the case in January 2016. Between 2010 and 2015, Judge Kim L. Kelley presided over the case.

motion, and the report of proceeding states that the first part of the hearing was not recorded. The existent portion of the report of proceedings indicates that the court denied Michael's motion to continue the case as the court considered the arguments of Michael's counsel and ruled on the petitions. During the hearing, the parties agreed to vacate the July 31, 2013, agreed order. The parties then argued the amount of Michael's recalculated 2013 child support obligation.

¶ 16 Counsel for Gina recalculated Michael's income for 2012 as follows: Michael had \$468,777 of gross income as stated in schedule C of his 2012 tax return.<sup>2</sup> Counsel then added back \$10,400 of cash income, and \$14,405 of interest and rental income. Counsel deducted from the income \$246,674 for insurance, repairs, maintenance, supplies, taxes, license, utilities, and wages. For purposes of her child support calculation counsel did not deduct the following expenses from Michael's net income: \$11,003 for vehicle expenses, \$21,831 for legal and professional services, \$17,341 for advertising, \$10,629 for depreciation, and \$6159 for travel and meals. Counsel's calculation indicated that Michael had a net income of \$246,908 in 2012 and a child support obligation of \$2966 per month.

¶ 17 Counsel for Michael argued that the vehicle expenses, legal and professional services, advertising expenses, depreciation, and travel and meal expenses should be deducted from his net income, but did not present evidence in support. Instead, counsel argued that Michael would have difficulty documenting these expenses as they were incurred more than four years before the hearing.

¶ 18 The court found that Michael's income for 2012 was \$246,908. The court then used Michael's 2010 and 2011 incomes from the July 31, 2013, order, to recalculate Michael's child

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<sup>2</sup>Michael's 2012, 2013, and 2014 tax returns, the returns discussed in open court during the November 16, 2016, hearing, were filed as an exhibit to the record on appeal.

support. The court ordered Michael to pay \$2966 per month in child support for the period of March 12, 2013, to February 13, 2015.

¶ 19 Next, the parties argued their respective petitions to modify Michael’s child support for the period between the filing of the parties’ petitions and May 17, 2016, the date that the parties’ youngest child was emancipated. Counsel for Michael argued that Michael’s child support obligation should be reduced because two of the parties’ adult children lived with him. Counsel for Gina argued that Michael should pay \$4287 per month in child support based on her calculation of Michael’s 2012, 2013, and 2014 incomes. Counsel for Gina calculated that Michael had a net income of \$246,908 for 2012, \$284,487 for 2013, and \$240,487 for 2014. Counsel for Gina’s calculation of Michael’s 2014 income included \$76,000 income from the sale of real property. Counsel for Michael argued that the \$76,000 should be excluded from Michael’s income because the property sold for less than the purchase price.

¶ 20 The court noted that Michael had not been forthcoming with discovery and that it did not have all of Michael’s financial information for 2014 and 2015. Due to Michael’s omissions, the court had to infer or decide the proper amounts of the reasonable expenses. The court excluded the \$76,000 in real estate sale proceeds from Michael’s net income

“because rather than go back and nit-pick every little deduction that we did for every year because I do think some of those deductions should be applied, not all, I think some of them that you took out need to come out. But I also think some of them, there needs to be some compensation for—there’s got to be some travel, there has to be some advertisement, you know. I agree the depreciation should be added back in. The legal fees is a problem, okay. But this is kind of my way historically of going back and adding that back.”

The court then denied Michael's petition to modify child support, and ordered Michael to pay child support of \$3862 per month for the period of February 13, 2015, to May 17, 2016. In its written order, the court found that Michael had a total child support arrearage of \$31,148 (\$10,718 for the period between March 12, 2013, and February 13, 2015, and \$20,430 for the period between February 13, 2015, and May 17, 2016). Thereafter, Gina moved for an award of attorney fees. In granting Gina's motion, the court stated:

"I'm going to make that finding for the record that this is based on [Michael] and his lack of response to the Court and prolonging it, and he did misrepresent the facts back when, and he did file a tax return and then turned around and filed another tax return after the determination was made and never brought it to the attention of the Court."

¶ 21 On December 12, 2016, Michael filed a *pro se* notice of appeal. The notice of appeal said that Michael "appeals from the circuit court of Tazewell County's Order of November 16, 2016, which Order dismissed Plaintiff's Verified Second Amended Complaint in its entirety with prejudice."

¶ 22 ANALYSIS

¶ 23 I. Child Support Modification

¶ 24 Michael argues that the court abused its discretion when it denied his petition for downward modification of child support and granted Gina's petition for an upward modification. Michael specifically contends that the evidence of his income, as provided by Gina and relied on by the court, was fraudulent or false. Upon review, we find that the court did not abuse its discretion when it denied Michael's petition as Michael's evidence failed to refute Gina's calculation of his net income.

¶ 25 We review the court’s modification of Michael’s child support obligation for an abuse of discretion. *In re Marriage of Garrett*, 336 Ill. App. 3d 1018, 1020 (2003). “An abuse of discretion occurs only where no reasonable person could agree with the position taken by [the] trial court.” *In re Marriage of Ackerley*, 333 Ill. App. 3d 382, 395 (2002).

¶ 26 Section 510(a)(1) of the Illinois Marriage and Dissolution of Marriage Act permits the modification of child support where a party has experienced a change in circumstances. 750 ILCS 5/510(a)(1) (West 2014). The moving party has the burden to show that a substantial change in circumstances has occurred. *Garrett*, 336 Ill. App. 3d at 1021. The circuit court may increase the payor parent’s child support where the payor experienced an increased ability to pay. *Id.* Where a party’s income fluctuates from year to year, the circuit court may use an income average to determine the payor’s current net income for the purpose of the child support calculation. *Id.* at 1025.

¶ 27 We first address the recalculation of Michael’s 2012 net income and increase in Michael’s 2013 to 2015 child support obligation. During the November 16, 2016, hearing, the parties agreed to vacate the July 31, 2013, order which ordered Michael to pay \$2500 per month in child support. The court then addressed the issue of Michael’s recalculated 2012 income. Counsel for Gina argued that Michael had a 2012 income of \$246,908. This amount excluded deductions for legal fees, advertising, depreciation, travel, and meals. Counsel for Michael opposed the exclusion of these deductions from Michael’s net income, but counsel did not cite to evidence that directly refuted Gina’s claim. Instead, counsel for Michael argued that she likely could not supply documentary evidence of the disputed expenses because the expenditures occurred four years before the hearing. The court rejected counsel’s argument, and reset



Michael's 2013 to 2015 child support obligation to \$2966 per month using the net income figure provided by Gina.

¶ 28           There is no indication in the record that the figures provided by counsel for Gina were fraudulent. Counsel for Gina began his calculation with the gross income figure stated in schedule C of Michael's 2012 return. Moreover, Michael presented no evidence to refute Gina's exclusion of the specified deductions from the net income calculation. Therefore, we find that the court did not abuse its discretion when it recalculated Michael's 2012 net income and reset his March 12, 2013, through February 13, 2015, child support obligation.

¶ 29           We next address the court's ruling on the parties competing petitions for modification of child support. The parties first argued Michael's 2014 income. Gina argued that \$76,000 from the sale of real property should be included in Michael's net income. Counsel for Michael argued that the proceeds were not net income because the property sold for less than its purchase price. Again, Michael presented no evidence or testimony to establish this loss or a decrease in his net income. In exercise of its discretion, the court declined to "nit-pick" the deductions that were included in Gina's calculation, and instead, excluded the \$76,000 from the real property sale from Michael's net income. The court averaged Michael's net income for the years 2012, 2013, and 2014, and found that Michael's child support obligation for the period of February 13, 2015, to May 17, 2016, was \$3862 per month. From this record, we find that no reasonable person would disagree with the court's denial of Michael's petition to decrease child support and grant of Gina's petition to increase child support. The court did not abuse its discretion when it granted Gina's petition.

¶ 30

## II. Judicial Bias

¶ 31 Michael argues Judge Keith should have recused himself because he had a personal and working relationship with Gina and her new spouse. In his brief, Michael alleged that Gina had worked as a court reporter in Judge Keith’s courtroom, and Gina’s husband was a police detective who had worked with Judge Keith when Judge Keith was employed as a federal prosecutor. We find that Michael has forfeited review of this issue, and even setting aside the forfeiture, the record does not support his claim.

¶ 32 A trial judge is presumed to be impartial, and the party alleging a bias bears the burden to overcome this presumption. *In re Marriage of Petersen*, 319 Ill. App. 3d 325, 339 (2001). “[T]he party making the charge of prejudice must present evidence of prejudicial trial conduct and evidence of the judge’s personal bias.” *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002). The moving party may provide evidence from an extrajudicial source. *Id.* However, a judge’s rulings, by themselves, are almost never sufficient to establish judicial bias. *Liteky v. United States*, 510 U.S. 540, 555 (1994). Further, “judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.” *Id.*

¶ 33 Michael raises this issue for the first time in his direct appeal. As a result, he has forfeited review of the issue. *In re Marriage of Brackett*, 309 Ill. App. 3d 329, 338 (1999) (issues not objected to at trial or raised in a posttrial motion are considered waived and cannot be argued for the first time on appeal). Even setting aside Michael’s forfeiture (see *In re Marriage of Bennett*, 131 Ill. App. 3d 1050, 1055 (1985) (ruling court may overlook the waiver rule to achieve a just result), we find that Michael did not satisfy his burden to present evidence of prejudicial trial conduct or personal bias.

¶ 34 In his brief, Michael argues that he “believe[d] that the Honorable Judge Thomas Keith’s professional and personal relationship with [Gina] directly affected the Order of November 16, 2016.” Michael argues that he learned, after Judge Keith made his ruling, that Judge Keith had worked with Gina and Gina’s current husband. Michael did not file any evidence that documented this alleged relationship or the resultant bias. Moreover, Judge Keith’s November 16, 2016, ruling and comments during the hearing do not support Michael’s claim. See *Liteky*, 510 U.S. at 555. As we noted above, Judge Keith ruled after considering the evidence, parties’ calculations and arguments. In contrast to the tax returns and financial affidavits relied upon by Gina, counsel for Michael presented no evidence, and Michael did not testify in opposition to Gina’s case. Thus, the record does not establish that the court’s rulings were biased, and Michael has failed to present any additional evidence to establish bias.

¶ 35 III. Sanctions

¶ 36 Gina asks this court to impose sanctions on Michael because Michael: (1) committed fraud upon the court in July 2013, (2) failed to comply with discovery orders in October and December 2014, (3) failed to appear at the November 16, 2016, hearing, and (4) the instant appeal is frivolous. Ill. S. Ct. R. 375 (eff. Feb 1, 1994). We decline to impose sanctions. The first three grounds for sanctions alleged by Gina involve Michael’s conduct in the circuit court and not his actions in this appeal. As a result, these issues were best addressed by the circuit court. We further reject Gina’s fourth ground for sanctions and find that although Michael’s appeal was unsuccessful it was not frivolous.

¶ 37 CONCLUSION

¶ 38 The judgment of the circuit court of Tazewell County is affirmed.

¶ 39 Affirmed.