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2015 IL App (5th) 140469-U

NOTICE
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NO. 5-14-0469

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ANNE LUTOSTANSKI-THOMAE,)	Appeal from the
)	Circuit Court of
Petitioner-Appellee,)	Madison County.
)	
v.)	No. 09-D-1031
)	
KEITH THOMAE,)	Honorable
)	Janet Heflin,
Respondent-Appellant.)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Justices Goldenhersh and Moore concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court's findings that the respondent terminated his employment in bad faith and that it could not determine respondent's income are affirmed as they were not against the manifest weight of the evidence.
- ¶ 2 Dr. Keith Thomae, the respondent, appeals from the circuit court's July 22, 2014, decision denying his petition for modification of child support and motion for judgment modifications and granting petitions for contempt filed by the petitioner, Anne Lutostanski-Thomae. The respondent challenges the court's findings that he terminated his employment in bad faith and that his income could not be determined from the

evidence produced at trial. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4 On August 12, 2011, the respondent and petitioner were granted a judgment of dissolution of marriage. The court found the petitioner to be the primary caregiver and custodian for their six children, while the respondent was the primary wage earner. The parties were to continue in these respective roles. At the time, the respondent was self-employed, operating Metro East Surgical Specialty, Highland Ambulatory Surgical, and Xerex. He also had a partnership in Down Town Medical Properties, LLC, with yearly gross income of approximately \$139,226 in 2010. The court found the respondent's net monthly income to be \$8,157. The court also found that, because the statutory rate for the six children was 50%, the respondent's monthly child support obligation would be \$4,078.

¶ 5 On July 2, 2012, the court entered an order modifying child support. The court found that the respondent was now employed at Scotland County Hospital, Memphis, Missouri, with a net income of \$16,155 per month. Thus, under the statutory rate, the respondent's monthly child support amount would be \$8,077. However, part of the respondent's income arose from quarterly productivity compensation, which could vary from quarter to quarter and could not be determined prospectively. The court ordered prospective child support to be paid at \$5,057 per month, with additional child support in an amount equal to 50% of any net quarterly productivity compensation. On March 26, 2013, the court again entered an order modifying child support. Based upon the

respondent's paystubs and W-2s, the court found the respondent's income to be \$12,763.57 monthly, resulting in a statutory child support payment of \$6,381.78 monthly.

¶ 6 On October 21, 2013, the respondent filed a *pro se* petition for modification of child support. In it, he claimed that he was relocating in order to be closer to the children and that his income had changed from \$11,500 monthly to \$0 monthly. On October 28, 2013, the respondent filed a *pro se* petition of modification for child support "Part II." In it, he claimed his income from his "previous 2011 business" had changed from \$7,100 per month to \$0 per month because "[p]revious business has no value[,] *** no income[, and] Chapter 7 bankruptcy filed." On December 11, 2013, the respondent filed a *pro se* motion for judgment modifications. In it, he claimed several significant changes, such as "[a] change of employment practice to the Highland, IL area to be closer to the children at both their request [and] need, and [r]espondents [*sic*] custodial rights," "[a] change in the financial stability of the [r]espondents [*sic*] previous employer," and "[a] change in the quality of the professional employer (Scotland County Hospital) off-call coverage leading to a future earnings demise by potential medical law suits (filed & nonfiled) if the same employment condition existed."

¶ 7 On February 20, 2014, the circuit court held a hearing to consider the respondent's petitions for modification and other matters in the case. The respondent testified that both he and his children desired for him to be "around them more." The respondent testified that his employer, Scotland County Hospital, "was not doing well" and was likely going to cut his pay. He also testified that "being at that hospital was causing [his] medical license to be at jeopardy" due to the failures of another surgeon causing

malpractice claims to be filed against the respondent. Thus, the respondent testified, he decided to leave Scotland County Hospital and start his own practice again. On cross-examination, the respondent stated that he had no documented communication with any potential or current employers. He testified that he left Scotland County Hospital of his own free will. He also testified that he did not remember any correspondence with Scotland County Hospital regarding the continuation or termination of his employment. The respondent therefore did not provide any documentation from Scotland County Hospital. He later testified that he had emailed the CEO regarding his decision to leave, but he did not produce this email.

¶ 8 The respondent also testified about both his and his company's financial records in order to prove his income. According to the respondent, his surgical practice, Thomae Surgical, was a subsidiary of Xerex, another company he owned. At the hearing, the respondent provided a December 31, 2013, summary of accounts for Xerex showing a previous balance of \$189.34 and an ending balance of \$1,750.18. The respondent also provided a February 7, 2014, personal bank account statement with a beginning balance of \$14,837.50 and an ending balance of \$930.49. Prior to the hearing, the respondent had also provided a November 29, 2013, summary of accounts for Xerex showing a previous balance of \$2,097.32 and an ending balance of \$189.34. The respondent had also provided a January 31, 2014, bank account activity statement for Xerex showing \$11,090.40 in deposits. The respondent lastly provided a January 8, 2014, personal bank account statement with a beginning balance of \$82.84 and an ending balance of \$14,837.50. On cross-examination, the respondent stated that he did not know "exactly"

what the source of the \$3,900 deposited into the Xerex account listed on the December 31, 2013, summary was, but it was "most likely from patient payments." The respondent testified that the \$11,090.40 deposited into the Xerex account listed on the January 31, 2014, bank account activity statement was "[f]rom patients." The respondent testified that he "[couldn't] remember right now" the source of several deposits listed on his January 8, 2014, personal bank account statement. The respondent testified that a \$2,000 deposit listed on his February 7, 2014, personal bank account statement was his payroll from his practice, but he "[didn't] know" the source of several other deposits. The respondent further testified that he had recently bought "a very inexpensive Chevy Sonic for a great price" and had traded in his Honda Pilot for a newer Honda Pilot with "cheaper monthly payments." During a July 22, 2014, hearing regarding other issues, the respondent stated that his business "paid cash" for the Chevy Sonic, meaning it was "owned free and clear."

¶ 9 On July 22, 2014, the court held further proceedings in which it denied the respondent's motions to modify child support. The court found that the respondent "voluntarily quit [his] employment" in part as "a bad faith attempt to avoid paying child support." The court further stated that it did "not believe [the respondent made] \$1,200 a month" and that it did "not find [the respondent] credible." Later in the proceedings before ruling on how the respondent would purge his contempt for failing to pay child support, the court stated that the respondent "cannot think it is reasonable to quit a \$250,000 a year job and stop supporting [his] children *** because [he wants] to be closer than five hours away." The court further noted that most people "can't go out and

pay cash for a new car." Therefore, the court found that "[it was] unreasonable for [the respondent] to think that [the court was] going to believe that [he] only make[s] \$1,200 a month." On July 22, 2014, the court also issued a written order that, among other things, denied the respondent's motions to modify child support. On August 21, 2014, the respondent filed a motion for rehearing and/or to reconsider the court's denial of the respondent's motions to modify child support. On September 17, 2014, the court held a hearing on the respondent's motion for rehearing and/or to reconsider. In denying the motion, the court stated that the respondent "is his own worst enemy" and that "[t]he Court did not find any of his testimony credible, period." The court further stated that it did not believe "there's some difference between the business entity and [the respondent] when he controls the business entity." Thus, the court did not find the respondent credible. Therefore, the court "couldn't determine what his income was." The court thus denied the respondent's motion. On September 17, 2014, the respondent filed his notice of appeal.

¶ 10

ANALYSIS

¶ 11 A circuit court's order for child support may be modified upon a showing of a substantial change in circumstances. 750 ILCS 5/510(a) (West 2012). Petitions to modify payment orders require the circuit court "to engage in a two-step process: (1) a judicial determination on a question of fact, *e.g.*, whether there has been a material change in the financial circumstances of the parties, or whether a party acted in good faith in voluntarily changing employment; and (2), if so, whether and by how much to modify the support ordered." *In re Marriage of Barnard*, 283 Ill. App. 3d 366, 370 (1996).

"Each of these steps calls for a different standard of review: the first, whether the trial court's factual determination was against the manifest weight of the evidence; and second, whether its decision at step two above *** constituted an abuse of discretion." *Id.* "A judgment is against the manifest weight of the evidence only when the opposite conclusion is clearly apparent." *In re Parentage of J.W.*, 2013 IL 114817, ¶ 55. " 'An abuse of discretion occurs only where no reasonable person would take the view adopted by the trial court.' " *In re Marriage of Berberet*, 2012 IL App (4th) 110749, ¶ 41 (quoting *In re Marriage of Moore*, 307 Ill. App. 3d 1041, 1043 (1999)).

¶ 12 "A good-faith voluntary change in employment which results in diminished financial ability may constitute a substantial change in circumstances justifying a reduction in child support payments." *In re Marriage of Horn*, 272 Ill. App. 3d 472, 476 (1995). "Whether a party has acted in good faith is generally a question of fact." *In re Marriage of Barnard*, 283 Ill. App. 3d at 370. "The party seeking the modification must present evidence of a motive, other than evasion of financial responsibilities for support of the children, in support of the petition for modification." *In re Marriage of Horn*, 272 Ill. App. 3d at 476-77. "The crucial consideration, to determine if a decision was made in good faith, is whether the change was prompted by a desire to evade financial responsibilities for supporting the children or to otherwise jeopardize their interests." *In re Marriage of Ross*, 355 Ill. App. 3d 1162, 1166 (2005). " 'Unless good faith is shown, a voluntary termination of employment by a supporting spouse is not considered a material change in circumstances sufficient to warrant abatement or modification of support

obligations.' [Citation.]" *Id.* (quoting *In re Marriage of Dall*, 212 Ill. App. 3d 85, 95-96 (1991)).

¶ 13 The respondent first argues that the circuit court's determination that he terminated his employment at Scotland County Hospital in bad faith was against the manifest weight of the evidence. The respondent, by his own admission, voluntarily terminated his employment. He offered three reasons to show why this voluntary termination should be considered in good faith. First, both the respondent and his children wished for him to increase his visitation with the children. Second, Scotland County Hospital was undergoing financial stress that the respondent feared would lead to a reduction of his salary. Third, the inferior work of another surgeon at Scotland County Hospital had caused the respondent to face malpractice claims and could imperil the respondent's license.

¶ 14 With regards to the second and third reasons, the respondent's only evidence was his testimony. He produced no other evidence despite admitting that he had corresponded with the CEO of Scotland County Hospital via email regarding his employment. Thus, the respondent's case on whether or not he terminated his employment in bad faith rested solely on his credibility as a witness. "It is the function of the trier of fact to determine the credibility of witnesses and the weight to be given their testimony." *In re Marriage of Mitteer*, 241 Ill. App. 3d 217, 226-27 (1993). In making its determination, the circuit court determined that it did not find the respondent credible. Given that the trier of fact did not believe the respondent's testimony, the respondent cannot rely on his testimony alone as evidence to show that his termination of

employment was in good faith. Therefore, the respondent did not show that his license was in danger or that Scotland County Hospital was in financial distress. Thus, the circuit court's determination that the respondent terminated his employment in bad faith was not against the manifest weight of the evidence.

¶ 15 The respondent also argues that the circuit court erred in finding that it could not determine his income because the finding was against the manifest weight of the evidence. Much of the respondent's evidence showing his current income came from his own testimony. Given that the circuit court found the respondent's testimony not credible, it was free to disregard this evidence. The respondent presented several bank statements for himself and for his business, Xerex, which wholly owned his surgical practice. However, the petitioner raised several doubts regarding these statements during cross-examination. The respondent was unable to explain with certainty the deposits to the Xerex account listed on its December 31, 2013, statement. The respondent also could not explain numerous deposits to his personal bank account listed on his January 8, 2014, and February 7, 2014, bank statements. The respondent testified that he recently had financed a newer Honda Pilot and purchased a Chevy Sonic. The respondent did not explain the financing of either vehicle in full detail prior to the circuit court's findings. During part of the July 22, 2014, hearing, the respondent admitted that his business had bought the Chevy Sonic outright. The circuit court had already made its findings before the respondent made this admission at the hearing. Nonetheless, this revelation lends credence to the circuit court's findings that the respondent had misrepresented his actual income and that there was no appreciable difference between the respondent's finances

and those of his business. Given that the respondent failed to explain these discrepancies in his financial records and spending habits, the circuit court's finding that it could not determine the respondent's income was not against the manifest weight of the evidence. Because neither of the circuit court's findings was against the manifest weight of the evidence, we must affirm.

¶ 16

CONCLUSION

¶ 17 For the reasons stated, we affirm the judgment of the circuit court of Madison County.

¶ 18 Affirmed.