DIVISION ONE
FILED: 02/04/2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SCOTT WAGNER, Petitioner/Appellant, v. ILLINOIS DEPARTMENT OF HEALTH-CARE AND FAMILY SERVICES, Respondent/Appellee,	)	1 CA-CV 09-0190 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. FC2008-091483

The Honorable Emmet Ronan, Judge

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED

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K E S S L E R, Judge

¶1 Scott Wagner appeals from the superior court's judgment awarding interest on his unpaid child support obligation. For the reasons stated below, we hold that the superior court based its judgment in part on an erroneous interpretation of the governing statute and remand to the superior court for further proceedings consistent with this decision.

FACTUAL AND PROCEDURAL HISTORY

¶2 Pursuant to Arizona Revised Statutes ("A.R.S.") section 25-1286(A) (2007), Wagner filed a contest to an income withholding order for past due support challenging the withholding of his income to pay past due child support obligations imposed by an Illinois court. The past due support obligations included amounts found in arrears by an Illinois court in a 1998 order ("arrearage order") and additional payments due between then and 2001. The Illinois Department of Health and Family Services ("Illinois") was the support enforcement agency collecting the funds. At the evidentiary hearing, Wagner and Illinois stipulated that the past due principal amount was $5,984.04, and the parties subsequently briefed the superior court on the purely legal question of whether interest on that amount was due. The superior court ruled that as a matter of Illinois law interest was mandatory on all past due child support judgments and ordered Wagner to pay

interest on his past due principal amount. In a signed minute entry, the superior court determined that the total amount of principal and interest Wagner owed Illinois was $13,011.47. Wagner filed a timely notice of appeal. This Court has jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. § 12-2101(B) (2003).

ANALYSIS

¶3 Wagner argues that we should reverse the superior court because the superior court based its decision on the erroneous view that under Illinois law interest on past due child support payments is mandatory. He also argues that any statutory act which divests the superior court of discretion to determine whether interest is appropriate in a particular case violates the Illinois Constitution. Illinois argues that interest on child support obligations in arrears has been mandatory since 1987 in Illinois and we should affirm the superior court.

¶4 The superior court held that interest on arrearages was mandatory under Illinois' statutes. We review the judgment *de novo*. *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, 233, ¶ 8, 119 P.3d 1034, 1036 (App. 2005) (citation omitted) (holding that we review statutory interpretation *de novo*). We hold that interest on payments becoming due between the entry of the arrearage order and 2000 was discretionary with

the superior court. Interest on payments coming due after January 1, 2000 is mandatory. Because the superior court's award of interest applied to all past due payments, we reverse and remand that portion of the judgment finding interest accrued as a matter of law on payments prior to January 1, 2000. We affirm that portion of the judgment adding interest to payments due on or after January 1, 2000. On remand, the superior court may exercise its discretion whether interest should accrue to payments due after the 1998 Illinois arrearage order, but before January 1, 2000. Additionally, we note that the parties failed to brief whether an Arizona court can modify the Illinois court's 1998 arrearage order by awarding discretionary interest on that order. Because the parties failed to brief this issue in this Court and in the superior court, we decline to decide it and permit the parties to brief that issue to the superior court.

¶5 Because an Illinois court issued the support order, Illinois law governs the "accrual of interest on the arrearages under the order." A.R.S. § 25-1304(A)(2) (2007). Historically, Illinois had no statute addressing interest on unpaid child support obligations. *Ill. Dep't of Healthcare & Family Servs. ex. rel. Wiszowaty v. Wiszowaty*, 913 N.E.2d 680, 683 (Ill. App. 2009). However, Illinois did have two general statutes making interest on unpaid judgments mandatory. *Id.* at 683 (citing

Ill.Rev.Stat.1977, ch. 74, par. 3 ("Judgments recovered before any court shall draw interest at the rate of 8% per annum from the date of the judgment until satisfied."); Ill.Rev.Stat.1979, ch. 77, par. 7 ("Every execution issued upon a judgment shall bear interest thereon, from the date of the recovery of the judgment until the same is paid, at the rate of 8% per annum.")).

¶6 Illinois appellate courts held that, as of 1980, these statutes did not apply to past due orders for child support, leaving the accrual of interest on child support orders to the sound discretion of the trial court. *Finley v. Finley*, 410 N.E.2d 12, 19 (Ill. 1980); *Wiszowaty*, 913 N.E.2d at 682-88 (reciting a detailed history of Illinois's treatment of interest on child support judgments from *Finley* until the present). *Finley* reasoned that the equitable nature of a divorce proceeding justified the judicial decision not to make interest mandatory pursuant to the two general interest statutes. 410 N.E.2d at 19; *Wiszowaty*, 913 N.E.2d at 683.

¶7 In 1987, Illinois amended its general interest statutes. One relevant amendment created a thirty day grace period before interest could be assessed on child support payments. *Wiszowaty*, 913 N.E.2d at 686 (quoting 735 Ill. Comp. Stat. Ann 5/12-109 (West 1998) ("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 thereon as provided in Section 2-1303 commencing 30 days from the effective date of each such judgment."). The other amendment provided that once a court-ordered support payment becomes thirty days past due, it becomes a judgment by operation of law and has the effect of any other judgment. *Id.* at 687 (quoting 750 Ill. Comp. Stat. Ann. 5/505(d) (West 2006)).

> 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. A lien arises by operation of law against the real and personal property of the noncustodial parent for each installment of overdue support owed by the noncustodial parent.

Id.

¶8 One Illinois court has held that this statutory change reflects a legislative decision to make statutory interest mandatory. *See Burwell v. Burwell*, 753 N.E.2d 1259, 1261 (Ill.App. 2001). However, the weight of Illinois appellate authority has found that the 1987 amendments did not result in statutory interest being mandatory on past due child support payments, reasoning that the changes were simply intended to

prevent child support arrearages from being retroactively modified by courts of other states. *See e.g.*, *In re Marriage of Kaufman*, 701 N.E.2d 186, 189 (Ill.App. 1998); *In re Marriage of Steinberg*, 706 N.E.2d 895, 903 (Ill.App. 1998) (holding that trial court erred by basing its grant of interest on past due child support payment on belief that such interest was mandatory and finding that remand was appropriate); *Wiszowaty*, 913 N.E.2d at 687-88.

¶9 We follow the majority of Illinois appellate courts and hold that interest on unpaid support obligations remained discretionary after the 1987 amendments. *Burwell* was written subject to a well reasoned dissent. 753 N.E.2d at 1262 (Cook, J. dissenting). It has been subsequently criticized by an Illinois appellate court. *Wiszowaty*, 913 N.E.2d at 688-89. It is contrary to the majority of Illinois decisions addressing the impact of the 1987 amendments on interest on unpaid support obligations. *See e.g.*, *Kaufman*, 701 N.E.2d at 189; *Steinberg*, 706 N.E.2d at 903; *Wiszowaty*, 913 N.E.2d at 687-88.

¶10 A 2000 amendment to Illinois's Marriage and Dissolution of Marriage Act makes interest on child support obligations more than thirty days past due mandatory. 750 Ill. Comp. Stat. Ann. 5/505(b) (West 2000) ("A support obligation, or any portion of a support obligation, which becomes due and remains unpaid for 30 days or more shall accrue interest at the

rate of 9% per annum."). "It is undisputed that interest on late child support was mandatory as of January 1, 2000. . . ." *Wiszowaty*, 913 N.E.2d at 682. With respect to child support payments due on or after January 1, 2000, we affirm the superior court's holding that interest is mandatory and the order requiring that Wagner pay it.

¶11 Because the superior court in part erroneously interpreted the Illinois statutes, we reverse that part of the judgment. Because the award of interest on those payments which became past due prior to January 1, 2000 is discretionary, we remand to the superior court for an exercise of its discretion.[1] While exercising that discretion, the superior court should consider whether the Illinois judgment's failure to mention interest precludes it from exercising discretion with respect to the portion of the arrearage memorialized in that judgment due before January 1, 2000.

¶12 Wagner also argues that any statutory provision making interest mandatory on past due child support obligations

[1] We note that the record on appeal does not contain transcripts of the evidentiary hearing or the oral argument on the legal issue. Ordinarily, we would assume that the content of those transcripts would support the superior court's judgment and affirm. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). However, because the briefs agree on the relevant facts and the appeal concerns a purely legal question, the absence of a transcript does not require us to assume that the superior court's decision was proper. *See State v. Carrasco*, 201 Ariz. 220, 222 & n.1, ¶ 2, 33 P.3d 791, 793 & n.1 (App. 2001).

violates the Illinois constitution's reservation of certain inherent powers to the Illinois courts. Wagner bases his argument on language in *Smithberg v. Ill. Mun. Ret. Fund* indicating that the Illinois legislature may not infringe certain "traditional equitable powers" held by Illinois courts. 735 N.E.2d 560, 565 (2000). In *Smithberg* the "traditional equitable power" at stake was the power to enforce a judgment with a traditional equitable remedy by "consider[ing] done that which ought to have been done." *Id.* at 563, 569. Wagner argues that *Finley's* comparison of a divorce to a chancery proceeding makes the determination of interest on a past due child support obligation a traditional equitable power. However, "[d]etermination of child support involves no inherent judicial powers." *Boris v. Blaisdell*, 492 N.E.2d 622, 628 (Ill.App. 1986). "A legislative amendment that circumscribes judicial discretion in this area is no more an incursion into judicial authority than . . . mandatory sentencing guidelines." *Id.* Additionally, two Illinois courts, which do not hesitate to guard their inherent powers, *Smithberg*, 735 N.E.2d at 565, have applied statutory provisions depriving trial courts of discretion in the accrual of interest on unpaid child support payments without considering any possible constitutional violation. *Wiszowaty*, 913 N.E.2d at 682; *Burwell*, 753 N.E.2d at 1261. We reject Wagner's contention that a mandatory accrual of

interest on unpaid child support violates the Illinois constitution.

CONCLUSION

¶13 For the foregoing reasons we affirm that portion of the judgment determining the amount of principal due and awarding interest on payments due after January 1, 2000. We reverse the remaining portion of the judgment of the superior court and remand for further proceedings consistent with this decision.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
PATRICK IRVINE, Presiding Judge

/S/
MICHAEL J. BROWN, Judge