

NOTICE

Decision filed 06/01/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-10-0130

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

<p><i>In re</i> MARRIAGE OF</p> <p>BRENDA L. NUTTY,</p> <p style="padding-left: 40px;">Petitioner-Appellee,</p> <p>and</p> <p>DAVID ALAN NUTTY,</p> <p style="padding-left: 40px;">Respondent-Appellant.</p>	<p>)</p>	<p>Appeal from the</p> <p>Circuit Court of</p> <p>Johnson County.</p> <p>No. 05-D-11</p> <p>Honorable</p> <p>James R. Williamson,</p> <p>Judge, presiding.</p>
--	---	--

JUSTICE WEXSTTEN delivered the judgment of the court.  
 Justices Welch and Goldenhersh concurred in the judgment.

**RULE 23 ORDER**

*Held:* On remand, the circuit court did not abuse its discretion by ordering the respondent to pay monthly child support and an arrearage of past child support, nor did it abuse its discretion in refusing to grant joint custody to the parties over their minor child, because custody was not an issue for the circuit court to determine on remand.

The respondent, David Alan Nutty, appeals the amended judgment entered by the circuit court of Johnson County after a remand. The respondent initially appealed the original judgment for the dissolution of the marriage, whereupon we reversed the judgment with regard to the division of the marital assets and debts, as well as the circuit court's determination on the issues of child support, maintenance, and attorney fees, and remanded the cause. *In re Marriage of Nutty*, No. 5-08-0042 (2008) (unpublished order under Supreme Court Rule 23 (eff. May 30, 2008)). On remand, the circuit court divided the marital assets and debts in accordance with section 503 of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/503 (West 2008)). The circuit court further ordered the

respondent to pay child support on a monthly basis for the parties' minor child, a daughter, and also ordered the payment of an arrearage of past child support. In addition, it declined to award either party maintenance or attorney fees. The determination that the petitioner, Brenda Louise Nutty, retain sole custody of the parties' daughter with the respondent having visitation rights remained unchanged from the original judgment. The respondent now appeals, *pro se*, regarding the portion of the circuit court's amended judgment after the remand that orders him to pay monthly child support and an arrearage of past child support. Additionally, the respondent appeals the circuit court's failure to grant joint custody over the parties' daughter. We affirm the amended judgment of the circuit court.

#### BACKGROUND

The petitioner, Brenda L. Nutty (Brenda), and the respondent, David Alan Nutty (Alan), were married on September 3, 1982. On March 29, 2005, the couple legally separated, and on November 21, 2005, Brenda filed a petition for a dissolution of the marriage, with Alan filing his counterpetition on December 27, 2005. At the time of the hearings leading up to the judgment of the dissolution of the marriage, Brenda was employed as a nurse for the Veterans Medical Center in Marion, Illinois, where she had been employed since 1982. Brenda earned \$61,218 in gross wages. Alan was employed as a cashier at the Wal-Mart in Du Quoin, Illinois, working approximately 26 to 28 hours per week at a pay rate of \$7.55 per hour. Upon their separation, Alan moved to a small, three-room cabin in De Soto, Illinois, which had electricity but not central air or heating. Brenda remained at the parties' marital residence, located in Carterville, Illinois, where the parties' daughter also continued to reside. Pursuant to their separation agreement, Brenda had sole custody over their daughter.

While he did study engineering for a time at Southern Illinois University in Carbondale, Illinois, Alan never earned a baccalaureate degree. Brenda, however, did

eventually earn her baccalaureate degree of science in nursing. Therefore, throughout the duration of their marriage, Brenda provided the majority of the family's income, while Alan stayed at home to take care of their daughter. Although Alan held various jobs throughout the marriage, testimony revealed that he was unable to earn a substantial income from his employment. Along with his other various jobs, Alan ran a fishing guide service since 1992. He also managed to publish two books on fishing, for which he received limited royalties. Yet, Alan stated that because he was seriously injured in a conveyer belt accident back in 1978, he was limited in pursuing certain employment opportunities due to his physical disabilities.

Sometime before the final hearing on the parties' dissolution petitions, Alan moved into a trailer in Murphysboro, Illinois, which cost him \$200 a month in rent (plus \$200 per month in "sweat equity"). Alan had also been transferred to the new Wal-Mart Supercenter in Murphysboro, Illinois, and also worked part-time as an administrative assistant for Kennedy Real Estate. Although Alan maintained certain daytime visitation hours with his minor daughter, the understanding was that he could not have overnight visitation until he repaired his trailer to make the living conditions more suitable for her.

A judgment for the dissolution of the marriage was entered by the circuit court on December 26, 2007. Brenda was awarded sole custody over the parties' daughter, while Alan was awarded visitation on alternating Saturdays and Sundays and on alternating holidays from the hours of 9 a.m. until 5 p.m. The judgment also provided that once Alan's residence was deemed "suitable," he would be allowed overnight visitation and four separate weeks of summer visitation with his daughter. Brenda was ordered to be solely responsible for the costs and expenses to support their daughter, including costs for medical care and those associated with any extracurricular activities, excluding any incurred during the daughter's visitation with Alan. Thus, in lieu of ordering Alan to pay any child support to Brenda, the

judgment of the circuit court awarded her "equity in the marital residence, subject to her obligation to assume, pay and indemnify [Alan] from the mortgage indebtedness and taxes thereon." Neither party was awarded maintenance, although Alan had petitioned for it.

The judgment also provided for the division of the parties' marital assets and debts based on the following rationale: "Considering the debt assigned to [Brenda], the lack of any child support award, [and] the lack of any contribution from [Alan] for the minor child's medical insurance, medical expenses, extracurricular activity costs[,] or educational costs[,] and considering [that Alan is] freed of debt, and various other evidentiary factors, an equitable division of marital property warrants a substantial disparity in property awarded to [Brenda] \*\*\*." Brenda was therefore awarded the marital residence but was assigned the first and second mortgage secured by the property, for a net equity value of \$79,815. Brenda was further awarded the net value of her retirement savings account, valued at \$65,059.33, her savings plan valued at \$3,200, the furniture in the residence, and her personal vehicle, which was a 2003 PT Cruiser. She was further assigned the outstanding debt on the PT Cruiser and the parties' credit card accounts of \$30,038. In sum, the initial judgment of dissolution awarded Brenda \$134,746.33 in net equity from the parties' marital estate.

Alan was awarded his vehicle, which was a 1996 Chevrolet Monte Carlo, with an estimated value of \$2,000. He was also awarded his three fishing boats, estimated to be worth \$8,400 total, the two life insurance policies, valued at \$8,199, his John A. Logan College retirement account, valued at \$70, his fishing guide business, and any royalties paid from his two fishing books. In sum, the initial judgment of dissolution awarded Alan \$21,561.50 in net equity from the parties' marital estate. Lastly, each party was ordered to pay their own attorney fees.

Alan appealed the initial judgment of dissolution, arguing that the circuit court abused its discretion in its division of marital property and debts. In an order issued on October 20,

2008, we agreed that the circuit court's division of the parties' marital assets created a "substantial disparity" in favor of Brenda. Specifically, we recognized that while section 503(d)(10) of the Act allowed a court to apportion marital assets and debts "in lieu of" maintenance, nothing in the Act authorizes the apportionment of marital property and debts in lieu of child support. 750 ILCS 5/503(d)(10) (West 2006). Rather, we noted that a court's determination of the amount of child support to be paid by the noncustodial parent is an issue "separate and distinct" from the division of the marital estate. Therefore, we held, "[T]he plain language of the Act does not authorize the circuit court to sign away the rights of the child to financial support from the noncustodial parent through a marital property apportionment in favor of the custodial parent." *In re Marriage of Nutty*, No. 5-08-0042, order at 9. Further, since the circuit court did not determine the amount of child support based on Alan's net income pursuant to section 505 of the Act (750 ILCS 5/505 (West 2006)), we reversed the circuit court's child support order and its division of marital assets and debts, remanding for a reconsideration of these issues. In short, we found, "The [circuit] court abused its discretion in awarding Brenda a greater share of the marital assets in lieu of child support." *In re Marriage of Nutty*, No. 5-08-0042, order at 7.

On remand, the circuit court conducted a rehearing on June 16, 2009, and November 9, 2009, in which it considered the factors set forth in section 505 in order to determine an amount of child support to award. Brenda presented evidence detailing Alan's income and deductions for the years 2007, 2008, and 2009. On January 7, 2010, the circuit court used the statutory percentage of 20%, and in its amended judgment after remand, it ordered Alan to pay past child support for the years 2007 through 2009, in an amount totaling \$11,040. In addition, based on his then-current monthly net take-home pay of \$1,968, Alan was ordered to pay child support to Brenda for their daughter in the amount of \$400 per month, commencing on January 1, 2010. Brenda was ordered to maintain health insurance for their

daughter, with Alan responsible for paying one-half of her health care costs not covered by insurance. Alan's request for maintenance was denied, as was his request that Brenda pay all or part of his attorney fees.

The amended judgment on remand further allocated the marital estate, awarding Brenda with the following marital property: (1) the PT Cruiser automobile, (2) her thrift savings plan, (3) her civil service retirement plan, (4) the Ethan Allen furniture already in her possession, and (5) the marital residence. Brenda was also held responsible for the following marital debts: (1) the first and second mortgage to CitiMortgage secured by the marital residence, (2) the outstanding loan balance on the PT Cruiser automobile, (3) the outstanding balance on the Harris Mastercard, (4) the outstanding balance on two separate Discover cards, and (5) the outstanding balance on the Personal Finance credit card. Brenda was further awarded her trial court costs in the amount of \$261.

Alan received the following property from the marital estate: (1) the Chevrolet Monte Carlo and the proceeds from the sale of the Chevrolet Blazer, (2) the fishing boats, motors, trailers, and related fishing equipment, (3) two State Farm life insurance policies for himself and Brenda, (4) his fishing guide business, (5) his two published books and all the proceeds/royalties therefrom, (6) his John A. Logan College retirement account, and (7) his Wal-Mart stock. Alan was not held responsible for any of the recognized marital debts (except any incurred by him since the original judgment of dissolution). Alan was further awarded the amount of his appellate court costs (regarding his first appeal) in the amount of \$737.93. He also was awarded some equity in the marital residence in the amount of \$24,057.75. From this amount of equity, the circuit court ordered that Alan's arrearage of past child support in the amount of \$11,040 be subtracted, along with the \$261 in court costs owed to Brenda. The court further ordered that the \$737.93 in appellate court costs Alan was owed be added to this amount of equity. Thus, \$13,494.09 was the final amount of equity

in the marital residence awarded to Alan, to be paid upon the first to occur of the following events: (1) the parties' daughter receives her baccalaureate degree, or (2) she reaches age 23 without having first either achieved a baccalaureate degree or being emancipated, or (3) she becomes emancipated, or (4) Brenda sells the marital residence or refinances its debt.

Alan subsequently moved for a modification of the circuit court's amended judgment on remand, seeking, among other things, a modification of the circuit court's determination that he should not receive maintenance or attorney fees and the allocation of the marital estate, which he argued was divided inequitably in favor of Brenda, as well as the amount of monthly child support he was ordered to pay, including the arrearage of past child support from 2007 through 2009. Brenda opposed Alan's motion for a modification. In an order dated February 17, 2010, the circuit court denied Alan's motion for a modification of the amended judgment on remand. This appeal followed.

#### ANALYSIS

On appeal, the respondent raises two issues. The first is whether the circuit court abused its discretion by ordering him to pay monthly child support and also an arrearage of past child support. The second issue the respondent raises is whether the circuit court abused its discretion by refusing to grant joint custody over the parties' daughter and refusing to grant him liberal and customary visitation rights with her.

Alan argues that the circuit court abused its discretion in its determination that he should pay child support to Brenda for their daughter at the statutory percentage. Instead, Alan asserts that due to his low income and health conditions, paired with Brenda's substantial income, equity requires that he be excused from his statutory obligation to pay child support as the noncustodial parent of the parties' daughter.

Sections 505(a)(1) and (a)(2) of the Act require that the circuit court set the minimum amount of child support for one child at 20% of the noncustodial parent's net income unless

the court finds a reason to deviate from that amount. 750 ILCS 5/505(a)(1), (a)(2) (West 2008). In seeking a deviation from the statutory percentage, the movant bears the burden of proof to submit evidence substantiating that "compelling reasons" exist to justify a deviation. *Roper v. Johns*, 345 Ill. App. 3d 1127, 1130 (2004) (citing *Department of Public Aid ex rel. Nale v. Nale*, 294 Ill. App. 3d 747, 752 (1998)). Further, a deviation is only proper if the circuit court finds that an application of the statutory guidelines would be inappropriate. *Einstein v. Nijim*, 358 Ill. App. 3d 263, 273 (2005) (citing 750 ILCS 5/505(a)(2) (West 2000) and *In re Keon C.*, 344 Ill. App. 3d 1137, 1141-42 (2003)). The determination of whether compelling reasons exist to deviate from the statutory percentage is made by considering one or more of the following factors:

- "(a) the financial resources and needs of the child;
- (b) the financial resources and needs of the custodial parent;
- (c) the standard of living the child would have enjoyed had the marriage not been dissolved;
- (d) the physical and emotional condition of the child, and his educational needs; and
- (e) the financial needs and resources of the non-custodial parent." 750 ILCS 5/505(a)(2) (West 2008).

See also *Einstein*, 358 Ill. App. 3d at 273.

First, we note that Alan does not challenge the circuit court's amended judgment on remand with respect to either the division of marital property or the determination of his net income. Instead, he solely challenges the portion of the circuit court's order requiring him to pay child support at the statutory percentage of 20% of his net income from the date of the original judgment of dissolution in 2007. Alan believes that the statutory percentage is too high, considering his low net income and increasing future medical needs, especially in light

of the fact that Brenda makes approximately three times as much as he does, she was not ordered to pay him maintenance or his attorney fees, and she was awarded a greater share of net equity in the marital estate.

The amended judgment on remand indicates that the circuit court based the amount of Alan's child support obligation at the statutory percentage, starting from 2007 up to the date of the amended judgment, for a total sum of \$11,040.59. Alan disputes the notion that he should be obligated to pay any past child support from the date of the original judgment of dissolution in 2007 through the date of the amended judgment on remand, due to his relative inability to pay, and he asserts that it was an abuse of discretion for the circuit court to order him to do so. However, we find that the circuit court took into account Alan's difficult financial situation, given that it allowed the past child support owed to be subtracted from the amount of equity Alan was to receive in the marital residence, rather than ordering Alan to pay this amount out of his earnings or other resources. Regarding the circuit court's application of the statutory percentage to determine his current monthly child support obligation of \$400 per month, Alan suggests that the circuit court should have deviated below the statutory percentage to the point of excusing him altogether from any child support obligation.

As stated previously, for a court to deviate below the statutory percentage, it needs to explicitly base its finding on one or more of the five factors set forth in section 505(a)(2) of the Act. It is clear from the language of the amended judgment on remand that the circuit court did not consider deviating below the statutory percentage. However, a review of the record indicates that Alan did not expressly seek a deviation below the statutory percentage, so the issue was not before the circuit court. Although he did make mention of the law allowing a court to deviate from the guidelines and quoted the factors in section 505 of the Act to consider, he failed to argue that a deviation was warranted or why any of the five

factors were applicable. Instead, Alan only opposed being obligated to pay past child support; he did not specifically argue that his current child support obligation should be set below the statutory percentage. To illustrate, in his prayer for relief contained in his written closing argument, submitted after the rehearing on remand, Alan requests that the circuit court not order him to pay back child support but prays that the circuit court "will order him to forthwith pay child support."

Even in his motion for a modification of amended judgment on remand, Alan failed to specifically seek a deviation from the statutory percentage for his child support payments, arguing only that he should not be obligated to pay past child support. Thus, we find that the circuit court did not abuse its discretion by using the statutory percentage of 20% to calculate Alan's currently monthly child support obligation as the noncustodial parent over the parties' daughter, given that a deviation was never expressly sought. Similarly, we also find no abuse of discretion in the circuit court's award of past child support, because it managed to fashion Alan's obligation in such a way that he will not have to make payments out of his current earnings, but instead, it will ultimately be deducted from his share of equity in the marital residence. In sum, because we find that the circuit court did not abuse its discretion in its determination of the amount of child support Alan owes, past and current, we must affirm this portion of the amended judgment on remand.<sup>1</sup>

The next issue raised on appeal is whether the circuit court abused its discretion by refusing to grant the parties joint custody over their daughter, and instead granting sole

---

<sup>1</sup>We note that an award of child support can subsequently be modified, should a party move for a modification thereof, and that the circuit court considers the same statutory factors that it would for a deviation from the statutory percentage when determining the initial award of child support. 750 ILCS 5/505(a)(2) (West 2008); see also *In re Marriage of Rash*, 406 Ill. App. 3d 381 (2010).

custody to Brenda, and also refusing to grant Alan liberal and customary visitation rights in violation of the Act. However, as we note from our prior decision in Alan's first appeal from the judgment of dissolution, the issue of custody over the parties' daughter was not within the scope of the remand. The only issues to be considered by the circuit court on remand were the issues regarding the division of the marital estate, child support, maintenance, and attorney fees. Regarding Alan's initial appeal on the issue of custody over the parties' daughter, we found that the circuit court did not abuse its discretion in awarding sole custody of the parties' daughter to Brenda, nor did we find an abuse of discretion in the circuit court's award of visitation to Alan. Instead, we found that the circuit court awarded Alan sufficient visitation rights based on the facts of the case, stating as follows: "Since Alan admitted that his current living situation was inappropriate for overnight visits with [the parties' daughter], we cannot find that the [circuit] court was manifestly unjust in withholding overnight visits with [her] until the time Alan finds a residence suitable for overnight visits." *In re Marriage of Nutty*, No. 5-08-0042, order at 13-14.

Thus, we affirmed the circuit court's order granting sole custody to Brenda and also affirmed the visitation awarded to Alan. Alan did not seek leave to appeal with the supreme court. The record does not reveal that on remand Alan moved to modify his visitation rights. In fact, the amended judgment on remand found that Alan "failed to prove that he has established a suitable residence for overnight visitation with" the parties' daughter. In his motion for a modification of amended judgment on remand, Alan did not specifically seek a modification of either custody or his visitation with the parties' daughter. Although he did testify that he spent money improving his current residence in order to improve the living conditions for the parties' daughter, the circuit court need not have considered the issue because this was not an issue to be determined on remand. Therefore, because Alan failed to raise the issue during the postappeal proceedings in circuit court, the issues of custody and

visitation are not now properly before us for our consideration. Rather, our order affirming the portion of the judgment of dissolution regarding custody and visitation has become the law of the case. See, e.g., *Zabinsky v. Gelber Group, Inc.*, 347 Ill. App. 3d 243, 248 (2004) ("Under the law of the case doctrine, issues presented and disposed of in a prior appeal are binding and will control in the circuit court upon remand as well as in the appellate court in a subsequent appeal."). Alan is therefore barred from raising this issue on appeal. Instead, he must first specifically pursue a modification of either custody or visitation from the circuit court. See 750 ILCS 5/607, 610 (West 2008).

#### CONCLUSION

For the reasons discussed herein, we affirm the circuit court's amended judgment on remand, dated January 7, 2010, pertaining to the award of child support and further find that the law-of-the-case doctrine bars the respondent from raising the issues of child custody and visitation rights for our consideration on appeal at this time.

Affirmed.