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2012 IL App (3d) 120221-U

Order filed December 20, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT  
A.D., 2012

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<i>In re</i> MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 10 <sup>th</sup> Judicial Circuit,
JAMES T. FLYNN,	)	Peoria County, Illinois,
	)	
Petitioner-Appellee,	)	
	)	Appeal No. 03-12-0221
v.	)	Circuit No. 08-D-229
	)	
	)	
MICHELLE E. FLYNN,	)	
	)	Honorable Michael Risinger,
Respondent-Appellant.	)	Judge Presiding.

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JUSTICE WRIGHT delivered the judgment of the court.  
Justices Holdridge and McDade concurred in the judgment.

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**ORDER**

¶ 1 *Held:* After remand, the trial court did not abuse its discretion by denying mother's request to modify a joint parenting agreement to require the primary physical custodial parent, father, to pay mother retroactive child support, based on the parties sharing nearly equal amounts of time housing the children, from the date of mother's motion for child support until the trial court's ruling two years later.

¶ 2 The parties divorced in 2008 and agreed to a joint parenting agreement that designated father as primary residential custodian but awarded nearly equal “custodial time” with the children for each parent and reserved the issue of child support. On September 28, 2009, mother requested the court to consider requiring father to pay child support to mother based on his income, which exceeded mother's income, in 2009. However, while mother’s motion remained pending, father's income level as a union plumber steadily declined. When the contested hearing took place in October and November of 2011, to determine the merits of mother’s 2009 motion to modify the joint parenting agreement, father’s income had dropped to an amount that was comparable to mother's income.

¶ 3 Following the contested hearing, the court modified the joint parenting agreement to decrease the number of children father could claim as an annual tax exemption and ordered father to pay 100% of certain expenses previously ordered to be shared by the parents pursuant to the terms of the joint parenting agreement. However, the court denied mother's request for both retroactive and current child support.

¶ 4 On appeal, mother abandons the request for current support, but appeals the trial court’s 2012 decision denying her request for retroactive child support beginning in 2009. We affirm.

¶ 5 BACKGROUND

¶ 6 On May 19, 2008, the court approved and entered the parties’ judgment for dissolution of marriage, settlement agreement, and joint parenting agreement. The joint parenting agreement awarded joint custody to both parties, but named father the “primary physical custodian” of the children and granted mother extensive “custodial time” with the five minor children, born between 1995 and 2005, by providing mother with a nearly equal amount of time with the

children.<sup>1</sup> The 2008 joint parenting agreement also required father to provide health insurance coverage through his employment, and required mother to split uncovered medical, school, and extracurricular expenses with father, who was awarded the dependency exceptions for tax purposes. The joint parenting agreement also stated:

“It is the intentions of the parties to contribute to the financial support [of] the children and neither party shall be order [*sic*] at this time to pay a set amount of child support.”

¶ 7 On September 28, 2009, mother filed a “Petition to Modify” the joint parenting agreement by requesting the trial court to award her current and retroactive child support for all five children, calculated at half of the statutory amount of 45% of father's net income.<sup>2</sup> 750 ILCS 5/505 (West 2008). Mother’s petition also requested the trial court to name both parents as physical custodians of the children; designate mother as physical custodian of all five children for income tax purposes; and order father to pay her attorney’s fees and court costs in addition to child support. Additionally, mother’s petition requested the court to grant other just and equitable relief.

¶ 8 On February 16, 2010, the court denied mother’s 2009 petition to modify the joint parenting agreement after finding mother did not prove that a substantial change of circumstances occurred since the entry of the joint parenting agreement in 2008. Mother's first appeal successfully challenged the 2010 court order. On May 31, 2011, this court reversed the

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<sup>1</sup> Father had custody of the children one to three nights more than mother each month.

<sup>2</sup> Mother requested half because father and mother shared nearly equal custodial time with the children.

trial court's decision holding mother was not required to show a substantial change of circumstances because the initial joint parenting agreement reserved the award of child support for a later date. This court then remanded the case to the trial court to consider the merits of mother's 2009 motion.

¶ 9 After remand, the parties supplemented the exhibits and financial affidavits, previously presented to the trial court during the 2009 hearing. The additional exhibits presented to the court, during a hearing held on October 13 and November 21, 2011, included: current 2011 financial affidavits; 2009 and 2010 tax returns; current pay stubs from mother's and father's employment; records of father's work at job sites and layoffs as a union plumber; a copy of father's payments for health insurance for the children when the union did not cover insurance costs; copies of checks for payments made by father on behalf of the children for health care expenses, parochial school tuition expenses, and extracurricular expenses; and the amount of each party's attorney's fees.

¶ 10 At the close of the hearing on November 21, 2011, the court recited its oral ruling and later entered a written order, dated February 15, 2012, denying mother's request for child support, finding father was the primary physical custodian and the parties' net incomes were substantially the same in 2011, but granting other equitable relief, consistent with the facts, by ordering father to now pay 100% of the five minor children's uncovered dental and medical expenses, including insurance coverage if not provided through employment, in addition to paying 100% all school-related expenses including tuition, school fees, and the costs of extracurricular activities. All of these expenses were previously agreed to be equally shared by the parents, pursuant to the joint parenting agreement, although mother had not reimbursed

father for half of all uncovered dental and medical, school, day care and extracurricular expenses already paid by father. The court's order also modified the original joint parenting agreement to allow each parent to annually claim some, but not all, of the children for tax exemption purposes, rather than father claiming all five children, beginning with mother claiming three children and father claiming two children in 2011; father claiming three and mother claiming two children the following year; and alternating each year thereafter. Finally, the court ordered father to pay a majority of mother's attorney's fees, specifically \$9,500, payable to mother's attorney at a monthly rate of \$100.

¶ 11 Mother filed her notice of appeal leading to this second appeal on March 16, 2012, challenging the court's denial of her request for current and retroactive child support. Father has not filed a cross appeal of the court's order modifying the joint parenting agreement to increase his financial obligations.

¶ 12 ANALYSIS

¶ 13 On appeal, mother now challenges the trial court's decision denying her request for retroactive child support from 2009 until 2011, but withdraws her appeal from the court's ruling pertaining to current support. Mother contends that she is entitled to retroactive child support because, at the time she initially filed her petition to modify on September 28, 2009, father earned substantially more income than she earned while they shared nearly equal time with the five children. Father argues the trial court did not abuse its discretion by denying retroactive child support to mother in the 2012 ruling because he was named the primary physical custodian during that time period and actually paid for the majority of the children's daily living, healthcare, and school expenses rather than only half of those expenses as agreed in the joint

parenting agreement.

¶ 14 It is well established that the trial court’s decision to award retroactive child support rests within the sound discretion of the trial court and will not be overturned on review absent an abuse of discretion. *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1119 (2004); *In re Marriage of Boland*, 308 Ill. App. 3d 1063, 1066 (1999). Mother argues that the trial court abused its discretion in denying her retroactive child support because, although the court found the parties’ net incomes were substantially similar at the time of the hearing, father earned substantially more income than mother in 2009 and 2010 during the pendency of the hearings and the first appeal on her petition to modify.

¶ 15 Mother cites only two cases in her appellate brief to support her argument that she is entitled to retroactive child support as a noncustodial parent sharing nearly equal custodian time with the other primary residential custodial parent of their children: *In re Marriage of Leva*, 125 Ill. App. 3d 55 (1983); and *In re Marriage of Geis*, 159 Ill. App. 3d 975 (1987). In his *pro se* brief, father argues *Leva* is distinguishable because the party seeking retroactive support in those cases was the “custodial parent,” and, here, father was named the “primary physical custodian” in the original joint parenting agreement.

¶ 16 We note that section 505 of the Act does not use the terms custodial or noncustodial parent but provides:

“[T]he court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable and necessary for his support, without regard to marital misconduct. The duty of support owed to a child includes the obligation to provide for the reasonable and necessary physical, mental and emotional

health needs of the child. For purposes of this Section, the term ‘child’ shall include any child under age 18 and any child under age 19 who is still attending high school.”

750 ILCS 5/505 (West 2010).

¶ 17 The parties have not tendered a case for our consideration where a trial court awarded retroactive or current child support to a parent who was *not* named the primary or physical custodian of the parties' minor children but shared nearly equal time with the children. Our research discovered the decision of *In re Marriage of Demattia*, where the court acknowledged a rebuttable presumption existed that the specified statutory percentage of a *noncustodial* parent's income represented an appropriate child support award for the *custodial* parent. *In re Marriage of Demattia*, 302 Ill. App. 3d 390, 393 (1998). However, the *Demattia* court noted section 505 did not address joint custody cases, such as the case at bar, where the noncustodial parent receives extended visitation rights with the children. The *Demattia* court recognized a court had discretion to deviate *downward* from the statutory amount for the *noncustodial* to pay in the child support if the *noncustodial* parent had extended visitation time. *Demattia*, 302 Ill. App. 3d at 393-94. In that case, the *Demattia* court held the trial court did not abuse its discretion in ordering the noncustodial parent to make the statutory amount of child support payments and denying an abatement of court-ordered child support paid by the noncustodial parent during extended visitation or custodial time between the noncustodial parent and the child. *Id.* See also *Sawicki*, 346 Ill. App. 3d at 1119 (the trial court did not abuse its discretion where wife was awarded retroactive child support from the date the court named her the temporary physical custodian of the child where, although the parties continued to live together pending the divorce judgment, wife primarily provided for the child); *Boland*, 308 Ill. App. 3d at 1065 (trial court

must set the minimum statutory amount of child support to be paid to the *custodial* parent of two children at 25% of the *noncustodial* parent's net income, unless the trial court finds reason to deviate from this percentage).

¶ 18 Here, it is undisputed that the amount of time each joint parent spent housing the children was nearly equal from 2009 until 2011. The court also found that both father's and mother's net incomes were nearly equal at the time of the 2011 hearing after remand. Yet, in spite of the joint parents' comparable income levels in 2011, the court granted additional equitable relief in favor of mother by requiring father to pay 100% of tuition and school, extracurricular, and unpaid medical and dental expenses, thereby relieving mother of the obligation to pay half of these expenses pursuant to the terms of the original joint parenting agreement. In addition, as requested by mother, the court modified the original joint parenting agreement to take away father's ability to claim all five children as dependents for tax purposes on an annual basis. Finally, in spite of father's reduced income, the court ordered father to pay the majority of mother's attorney's fees, approximating \$10,000, as well as his own attorney's fees, rather than splitting these fees with mother.

¶ 19 Although the court did not order the payment of any retroactive child support to mother, a noncustodial joint parent who shared nearly equal time with the children, based on our careful review of the record and the unusual circumstances of this case, we conclude the court carefully balanced the financial demands of parenthood for each joint parent during the time period from 2009 until 2011. The trial court also admitted and reviewed the exhibits included in the record which reflect the amounts each parent actually paid toward the care and needs of the five minor children during the same time frame and show father paid far more than his one-half share of the

children's expenses, before modifying the joint parenting agreement to impose the additional ongoing financial obligations on father alone while denying retroactive support in favor of mother. Therefore, we conclude that the trial court did not abuse its discretion in this case by denying retroactive support pursuant to mother's motion to modify the joint parenting agreement.

¶ 20

#### CONCLUSION

¶ 21 For the foregoing reasons, we affirm the decision of the circuit court denying mother's request for retroactive child support.

¶ 22 Affirmed.