

NOTICE

Decision filed 01/20/12. 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.

2012 IL App (5th) 110352-U  
NO. 5-11-0352  
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).

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<i>In re</i> MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
KEMBERLY GARVER,	)	Madison County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 09-D-1216
	)	
RONALD GARVER,	)	Honorable
	)	David Grounds,
Respondent-Appellee.	)	Judge, presiding.

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JUSTICE SPOMER delivered the judgment of the court.  
Justices Welch and Wexstten concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Circuit court did not err in its custody determination or by awarding attorney fees to the respondent. Reversed and remanded with directions to reflect proper thrift savings plan amount, to incorporate deductions for health insurance premiums in calculating the petitioner's net monthly income, and to clarify that child support payments are to be made semimonthly.
- ¶ 2 The petitioner, Kemberly Garver, appeals the judgment of the circuit court of Madison County that dissolved her marriage to the respondent, Ronald Garver. Kemberly argues (1) that the circuit court erred in awarding primary physical custody of the parties' two minor children to Ronald, (2) that the circuit court abused its discretion in determining the value of one of Ronald's retirement accounts, (3) that the circuit court miscalculated Kemberly's child support obligation, and (4) that the circuit court abused its discretion in ordering Kemberly to pay part of Ronald's attorney fees. For the reasons that follow, we affirm in part, reverse in part, and remand with directions.

¶ 3

## FACTS

¶ 4 The facts necessary to our disposition of this appeal are as follows. Ronald and Kemberly Garver were married on June 25, 1999. Two children were born during the marriage, L.G. in 2001 and R.G. in 2003. During the course of the marriage, Kemberly obtained a bachelor's degree in nursing and became a critical care nurse. Kemberly filed a petition for a dissolution of the marriage on December 7, 2009. Ronald filed a counterpetition for a dissolution of the marriage on January 19, 2010. Trial was held on May 3-5, 2011.

¶ 5 At the trial, Kemberly testified that she is a registered nurse and works at Memorial Hospital in Belleville. She had previously worked the night shift, working three nights per week, but had recently switched to working days. Although she made substantially more money working nights, Kemberly switched to the day shift thinking she would have more time with the kids, but has actually had less. When she worked the night shift, she got home around 8:30 a.m. Ronald took the kids to school when Kemberly was working, and Kemberly took them on the days she did not work. Since switching to days, Kemberly leaves around 5:45 a.m. and gets home around 9 p.m. She has continued to work three days per week and spends four days with the kids. She has no control over the specific days of the week that she works. When she was working nights, Ronald took the children to latchkey every morning before school. Now they go to latchkey both before and after school.

¶ 6 Kemberly testified that both she and Ronald take the children to church and various extracurricular activities, and they both help the children with their homework. She also testified that L.G. has a peanut allergy and R.G. has asthma. Kemberly felt that as a nurse, she is better able than Ronald is to deal with these conditions.

¶ 7 Kemberly acknowledged that she had worked a lot of overtime. In her position statement filed pursuant to Local Rule 8.03, Kemberly listed her gross monthly income as

\$5,400. At trial, she testified that her gross income for 2009 was over \$100,000 and that her gross income for 2010 was over \$90,000. She further testified that as of April 1, 2011, she had earned over \$29,000. Kemberly liquidated an individual retirement account held in her name.

¶ 8 Ronald testified that he has worked for the Federal Bureau of Prisons for 17 years. He is now employed as a manufacturing supervisor and works from 7:20 a.m. to 3:50 p.m., Monday through Friday. He never works overtime, nights, weekends, or holidays. He always gets the kids ready for school in the morning and takes them to latchkey. Kemberly used to get the kids after school, but since she began working days the children have gone to latchkey after school and Ronald has picked them up after he gets off work. Kemberly switched to working days approximately one week before trial. Since starting day shifts Kemberly leaves for work around 5:45 a.m. and gets home around 10 p.m. When she was working the night shift she left around 6 p.m. and got home around 10 a.m. When the children were not in school, a babysitter watched them during the day while Kemberly slept.

¶ 9 Ronald testified that the children are involved in a number of activities and that he takes L.G. to dance lessons, was the assistant baseball coach for R.G.'s baseball team and was present for all practices and games, is in regular contact with the children's teachers, helps R.G. with his reading issues, helps the children with their homework, takes the children to church every Sunday, and takes them to their music lessons. Ronald never missed a parent-teacher conference at school, although Kemberly sometimes did because of work. Ronald testified that he knows how to respond and has responded to the children's allergic reactions or asthma attacks.

¶ 10 Ronald testified that Kemberly recently had R.G. baptized but that he did not learn of her plans until the day it happened. The parties had discussed having L.G. baptized, but Ronald was unaware that Kemberly intended to have R.G. baptized also. The baptism did

not occur in the church that the family had attended since the children were born, but in a church that Kemberly had recently started attending. Ronald also testified that Kemberly had only recently begun to provide him with her work schedules and that they are always approximately one week late.

¶ 11 Attorney Kathleen Buckley testified that she had been appointed guardian *ad litem* in the present case. Buckley interviewed the children and both parents on multiple occasions. Buckley recommended that the parties share joint legal custody of the children and that Ronald be named as primary physical custodian. In forming her opinion, Buckley considered all of the relevant factors in sections 602(a) and 602.1 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/602(a), 602.1 (West 2010)), but the two most important factors were who the children were accustomed to as caregiver on a daily basis and the willingness of each party to facilitate a relationship between the children and the other party.

¶ 12 With respect to the first factor, Buckley testified that because of Kemberly's work schedule, Ronald was the principal caregiver. It was usually Ronald who attended church and other activities with the children, got them up in the morning and took them to school, and was available during the evening to help them with their homework. Kemberly was required to work three 12-hour shifts per week, but it was not uncommon for her to work as many as six shifts per week. Although Kemberly worked nights so that she could be available for the children during the day when Ronald was working, this meant that it was Ronald who got them up in the morning, fed them breakfast, and got them to school. Buckley emphasized that it was critically important for the children to be on a regular schedule.

¶ 13 With respect to the second factor, Buckley testified that she was concerned about Kemberly's willingness to facilitate a relationship between the children and Ronald.

Buckley noted that Kemberly had made several important decisions regarding the children without consulting with Ronald. Specifically, Kemberly had considered counseling for L.G. and had R.G. baptized without consulting Ronald. Buckley also noted that Ronald had indicated that joint legal custody was acceptable, provided that he had primary physical custody, whereas Kemberly desired sole custody and wanted Ronald to have visitation every other weekend.

¶ 14 On July 25, 2011, the circuit court entered an order dissolving the parties' marriage. Adopting the findings and opinion of the guardian *ad litem*, the circuit court awarded the parties joint legal custody of the children and made Ronald the primary physical custodian. Kemberly was awarded two overnight periods per week coinciding with the days/evenings when she was not at work, two nonconsecutive weeks during the summer months, and alternate holidays.

¶ 15 The circuit court found that Kemberly's gross monthly income was \$5,744.80 and that her net monthly income was \$4,480.94. The court ordered Kemberly to pay child support at the statutory rate of 28% in the amount of \$627 biweekly.

¶ 16 Ronald was ordered to continue covering the children as beneficiaries under his health insurance, and Kemberly was ordered to reimburse Ronald for 50% of the cost of the health insurance premium incurred for the benefit of the children.

¶ 17 The circuit court ordered the marital residence to be sold and the proceeds used to pay the mortgage and certain other debt incurred for the benefit of the marital residence. Any net proceeds were to be split evenly between the parties. The court also apportioned the marital debt and personal property. In allocating the parties' retirement and pension assets, the circuit court awarded Kemberly \$35,000 from Ronald's thrift savings plan, the value of which the circuit court determined to be \$119,927.23 as of March 31, 2011. The circuit court also ordered Kemberly to pay \$4,000 of Ronald's attorney fees.

¶ 18 Kemberly filed a timely notice of appeal.

¶ 19 ANALYSIS

¶ 20 On appeal, Kemberly argues that the circuit court abused its discretion in awarding primary physical custody of the children to Ronald. She also argues that the circuit court erred in determining the value of the thrift savings plan, miscalculated the amount of her child support obligation, and abused its discretion in ordering her to pay a portion of Ronald's attorney fees.

¶ 21 Custody

¶ 22 Kemberly argues that the circuit court abused its discretion in awarding primary physical custody of the children to Ronald because the court's judgment fails to maximize the time that the children are in the care of one of their parents, as opposed to a babysitter. Specifically, Kemberly argues that she only works three days per week whereas Ronald works five days per week, but she has the children only two overnight periods per week. Thus, she contends, the children are without her at least two days per week when she is off work and they are with Ronald at least three days per week while he is working. Kemberly maintains that it is in the best interests of the children that they be with her the four days per week that she is off work. Kemberly further argues that as an alternative to making her primary physical custodian, visitation should be modified to give her more than two overnight periods per week.

¶ 23 "A trial court has broad discretion in making custody determinations, and a reviewing court should only reverse if the determination is against the manifest weight of the evidence or it appears a manifest injustice has occurred." *In re A.S.*, 394 Ill. App. 3d 204, 212-13 (2009) (citing *In re Marriage of Feig*, 296 Ill. App. 3d 405, 408 (1998)). A circuit court's custody determination must be given great deference because the trial judge has had the opportunity to observe the witnesses as they testify and is therefore in a superior position to

determine the best interests of the child (*In re Marriage of Quindry*, 223 Ill. App. 3d 735, 737 (1992)), and there is a strong and compelling presumption that the circuit court's custody determinations are correct (*In re Marriage of Willis*, 234 Ill. App. 3d 156, 161 (1992)).

¶ 24 Section 602(a) of the Act (750 ILCS 5/602(a) (West 2010)) requires the circuit court to determine custody according to the best interests of the children after considering all of the relevant factors, including those enumerated therein. Section 602.1(c) of the Act provides that the court may enter an award of joint custody if it determines that joint custody would be in the children's best interest, taking into account (1) the ability of the parents to cooperate effectively and consistently in matters that directly affect the joint parenting of the child, (2) the residential circumstances of each parent, and (3) other factors which may be relevant to the child's best interest. 750 ILCS 5/602.1(c) (West 2010).

¶ 25 Here, after considering the relevant factors set forth in section 602(a) and section 602.1(c), the circuit court found that it was in the children's best interests that the parties have joint legal custody of the children, with Ronald having primary physical custody. The circuit court did not find any of the factors in either section 602(a) or 602.1(c) to favor Kemberly. The court found that the following factors favored Ronald: "the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest" (750 ILCS 5/602(a)(3) (West 2010)); "the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child" (750 ILCS 5/602(a)(8) (West 2010)); and "the ability of the parents to cooperate effectively and consistently in matters that directly affect the joint parenting of the child" (750 ILCS 5/602.1(c)(1) (West 2010)).

¶ 26 The circuit court found that Ronald's work schedule significantly favored making him the primary physical custodian, noting that he worked daytimes, Monday through Friday, with virtually no overtime, whereas Kemberly had a less traditional schedule and had worked

various shifts in order to maximize her income for the benefit of the family. The court further noted that Ronald had been actively involved in the children's activities and had been primarily responsible for following through with those activities, as well as arranging daycare. The court also found that Ronald was better able to foster a constructive relationship between the children and the noncustodial parent than Kemberly. The court noted that while Ronald had made numerous accommodations to maximize Kemberly's time with the children in light of her continuously changing work schedule, Kemberly had continually failed to provide Ronald with her work schedule, despite repeated requests, thereby complicating the physical custody schedule. The court also noted that Kemberly had a history of making unilateral decisions affecting the children.

¶ 27 We note that in its judgment, the circuit court referenced the time awarded Kemberly with the children as "periods of physical custody." Although we find that such time is properly characterized as visitation, we do not find the circuit court's custody decision or the visitation time awarded to be against the manifest weight of the evidence. Accordingly, we affirm the circuit court's decision to award physical custody to Ronald and visitation to Kemberly.

¶ 28 **Thrift Savings Plan**

¶ 29 Kemberly next argues that the circuit court erred in determining the value of Ronald's thrift savings plan to be \$119,927.23 as of March 31, 2011. She maintains that Respondent's Exhibit 31 demonstrates that the value of the thrift savings plan as of March 31, 2011, was \$144,679.75, and that Ronald's testimony reveals that the \$119,927.23 figure was the value of the plan as of March 31, 2010. Ronald acknowledges that the circuit court used the incorrect figure when determining Kemberly's share of the thrift savings plan. Accordingly, we remand with instructions to the circuit court to allocate Kemberly's share, using the correct figure.



¶ 30

### Child Support

¶ 31 Kemberly next argues that the circuit court made several errors in calculating her child support obligation. She contends that the circuit court failed to subtract the amount she was to reimburse Ronald for the children's health insurance premium when determining her net income and that the court confused semimonthly and biweekly payments when determining the frequency with which she was to pay child support.

¶ 32

### *Health Insurance Premium*

¶ 33 Kemberly argues that the circuit court erred by failing to consider her court-ordered health insurance obligation in calculating her child support. The circuit court ordered Kemberly to reimburse Ronald for 50% of the cost of the health insurance premium incurred for the benefit of the children, which was \$124.47 biweekly. Kemberly contends that the circuit court was required to subtract the amount of the premiums for which she was responsible, \$62.24, from her net income before determining her child support obligation. Ronald agrees that the payment of health insurance premiums is an allowable deduction in determining net income, but argues that it is not possible to determine whether the circuit court deducted the health insurance premium because the circuit court did not specify which statutory deductions it applied in determining Kemberly's net income.

¶ 34 Section 505(a)(1) of the Act provides that the statutory minimum amount of child support for two children is 28% of the supporting party's net income. 750 ILCS 5/505(a)(1) (West 2010). Section 505(a)(3) of the Act defines "net income" as income from all sources, minus certain deductions including, *inter alia*, dependent health insurance premiums (750 ILCS 5/505(a)(3)(f) (West 2010)). 750 ILCS 5/505(a)(3) (West 2010). A circuit court's findings with respect to net income and the appropriate amount of child support will not be disturbed on review absent an abuse of discretion. *In re Marriage of Breitenfeldt*, 362 Ill. App. 3d 668 (2005).

¶ 35 In the present case, the circuit court determined Kemberly's monthly gross income to be \$5,744.80 and her net monthly income to be \$4,480.94. The court did not specify which, if any, deductions it used in calculating her net income. Accordingly, we reverse and remand with instructions for the circuit court to incorporate and specify the deductions for health insurance premiums in determining Kemberly's net monthly income.

¶ 36 *Payments*

¶ 37 Kemberly next argues that the circuit court erred by confusing "semi-monthly" with "bi-weekly." Specifically, she contends that the court calculated the amount of her child support semimonthly but ordered her to pay child support biweekly, and in doing so failed to consider that a person who is paid semimonthly is paid 24 times a year while a person who is paid biweekly is paid 26 times a year. Kemberly argues that as a result of the court's error, she will be required to pay in excess of the 28% statutory guideline amount. We agree. Accordingly, we reverse and remand with instructions for the circuit court to clarify this issue in its order.

¶ 38 *Attorney Fees*

¶ 39 Finally, Kemberly argues that the circuit court erred by ordering her to pay \$4,000 of Ronald's attorney fees where there was no showing that Ronald was unable to pay his own attorney fees. A circuit court's decision to award or deny attorney fees will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Snow*, 277 Ill. App. 3d 642, 653 (1996).

¶ 40 Although attorney fees are generally the responsibility of the parties that incurred them (*In re Marriage of Samardzija*, 365 Ill. App. 3d 702, 709 (2006)), section 508(a) of the Act provides that the circuit court may order one party to pay a reasonable amount towards the other party's attorney fees if the party seeking fees demonstrates that he or she lacks the financial resources to pay and the other party has the ability to pay (750 ILCS 5/508(a) (West

2010)). Financial inability does not require a showing of destitution, and the party seeking an award of attorney fees is not required to divest himself of capital assets before seeking a fee award. *In re Marriage of Minear*, 287 Ill. App. 3d 1073, 1085 (1997), *aff'd*, 181 Ill. 2d 552 (1998). Financial inability exists where the payment of fees would strip that party of his means of support or undermine his financial stability. *In re Marriage of Puls*, 268 Ill. App. 3d 882, 889 (1994). The party seeking an award of attorney fees bears the burden of demonstrating both his inability to pay and his spouse's ability to pay. *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005). "Merely showing that the other spouse has a greater ability to pay attorney fees is not sufficient." *In re Marriage of Sparagowski*, 232 Ill. App. 3d 257, 258-59 (1992). In determining whether to award attorney fees and the amount of any such award, the court should consider the allocation of assets and liabilities, maintenance, and the relative earning ability of the parties. *In re Marriage of Suriano*, 324 Ill. App. 3d 839, 852 (2001).

¶ 41 In awarding Ronald \$4,000 in attorney fees, the circuit court found that Kemberly had paid \$12,000 in attorney fees prior to trial with money she had withdrawn from the marital estate, that Ronald had paid \$6,000 in attorney fees prior to trial using money that he had borrowed from his parents and had incurred \$1,000 in attorney fees for the enforcement of discovery orders, and that there was a significant disparity in income between the parties. We find that this was not an abuse of discretion. Accordingly, we affirm the award of attorney fees to Ronald.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, we affirm the circuit court's determinations regarding custody and visitation, we affirm the circuit court's award of attorney fees to Ronald, and we reverse and remand with instructions for the circuit court to modify its order to reflect the correct amount with regard to the thrift savings plan, to incorporate and specify deductions

for health insurance premiums in calculating Kemberly's net income for purposes of determining her child support obligation, and to amend its order to clarify that Kemberly's child support payments are to be made semimonthly.

¶ 44 Affirmed in part and reversed in part; cause remanded with directions.