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2013 IL App (3d) 121050-U

Order filed September 9, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
TYLER P. CLARK,)	of the 10th Judicial Circuit,
)	Tazewell County, Illinois,
Petitioner-Appellant,)	
)	Appeal No. 3-12-1050
and)	Circuit No. 09-D-14
)	
DEANNA CLARK,)	Honorable
)	Jerelyn D. Maher,
Respondent-Appellee.)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justice McDade concurred in the judgment.
Justice O'Brien specially concurred.

ORDER

¶ 1 *Held:* In a postdissolution proceeding, the trial court did not err in finding that petitioner had failed to establish a substantial change in circumstances and in denying petitioner's petition to establish child support on that basis. The appellate court, therefore, affirmed the trial court's judgment.

¶ 2 Petitioner, Tyler P. Clark, filed a post-judgment petition, seeking to have his ex-wife, respondent, Deanna Clark, start paying child support for the parties' two children. After an evidentiary hearing, the trial court found that there had not been a substantial change in

circumstances that would warrant a modification of child support and denied the petition. Tyler appeals. We affirm the trial court's judgment.

¶ 3

FACTS

¶ 4 The parties were married in 2001 and had two children: Jacob, born in 1996, and Taylor, born in 2002. In May 2009, a judgment for dissolution was entered dissolving the parties' marriage. The judgment incorporated the terms of the parties' marital settlement agreement and joint parenting agreement (all three documents are collectively referred to herein as the judgment). The judgment provided that the parties would have joint custody of their two children, with Tyler having physical custody and Deanna having reasonable visitation rights, which included two overnight visits with the children per week on Monday and Friday nights. The judgment provided further that no child support would be paid by either party because of the parties' comparable incomes and the amount of time each party would have the children in his or her custody.

¶ 5 In August 2010, Tyler filed his first petition to establish child support. In the petition, Tyler alleged that Deanna should be required to pay child support because the children were in his custody the majority of the time and he was "essentially" paying for all of their expenses. A hearing was held on the petition in June 2011. By that time, Deanna's visits with Jacob had decreased each week to about one overnight visit on Fridays and going out to dinner together on Mondays. The trial court denied the petition, finding that there was a lack of competent evidence to show a substantial change in circumstances.

¶ 6 In September 2012, Tyler filed a second petition to establish child support, which was later followed by a supplemental petition (collectively referred to as the petition). Tyler alleged

in the petition that a substantial change in circumstances had occurred in that: (1) he had custody of the children the majority of the time (5 days a week); (2) Deanna had not exercised visitation with Jacob in over a year and a half; (3) his income had decreased; (4) Deanna's income had substantially increased; and (5) the expenses to care for the minor children, who were now 16 and 10 years old, had greatly increased. Tyler asked the court to require Deanna to pay child support of 28% of her net income, pursuant to the statutory guidelines.

¶ 7 An evidentiary hearing was held on the petition in November 2012, at which Deanna and Tyler both testified. The evidence presented established that Tyler's income had remained about the same, but Deanna's income had decreased somewhat because of a job change, the good faith of which is not in dispute in this appeal. Deanna's visits with Jacob had decreased further and were limited to going out to dinner once a week. Jacob had stopped having overnight visits with Deanna near the end of 2011 because Deanna had moved in with her boyfriend, who was now her fiancé, and Jacob did not feel comfortable with the situation. Deanna's visits with Taylor, however, had remained the same. The children had become involved in several activities, which were primarily paid for by Tyler. Taylor was taking horse riding lessons (\$120 per month) and clarinet lessons (\$170 initially and \$47 per month thereafter) and was being tutored for school (\$40 per month). Jacob was involved in football (various costs) and had obtained his driver's license (\$90 per month for insurance on Tyler's policy plus another \$60 that Tyler paid every six months to Deanna's father for coverage on his policy because Deanna's father had provided the vehicle and had maintained insurance on it). Deanna helped pay for some of the expenses of football but did not help pay for any of the other activities. Deanna did, however, pay for the expenses of the children when they were with her.

¶ 8 At the conclusion of the evidence, the trial court ruled that there had not been a substantial change in circumstances that would warrant a modification of the previous child support order. In reaching that conclusion, the trial court found that the decrease in Deanna's overnight visitation with Jacob was not significant and commented that the framework of the parties' initial agreement (as incorporated into the judgment) was one in which there was "very limited amount of time to the mother with a tradeoff that there be no child support." The trial court repeatedly noted that those were the terms to which the parties had agreed.

¶ 9 After the trial court announced its ruling, Tyler's attorney asked a question in clarification. The following conversation ensued:

"[TYLER'S ATTORNEY]: It was my understanding that the Courts [*sic*] made it a factual determination that the change has been that mother is exercising one less overnight per week.

THE COURT: At the best.

[TYLER'S ATTORNEY]: In fact, it was my understanding from the testimony that it was clear that she had not exercised any overnights with the child since the last—[w]ell, since November of 2011. I am just trying to get clear for the record the Court's finding on this particular issue.

THE COURT: She said that she spent other times with him. I mean, I am not taking this in terms of I spent an hour with this child versus 2 hours.

Now an overnight, you know, I don't know what overnight means by their Joint Parenting. So basically what you are asking me to do, and counsel knows that this is not how I value these thing[s].

Time spent with your children is precious. I can't put a money figure on that. But even if she weren't spending overnights, her testimony was that she was spending time with him.

The bottom line is, this was their agreement and it was a very limited amount of time for the mother, very limited, and the overnights are what, 3 hours, 4 hours? She testified she spent times with him, just not overnight, make him comfortable.

Not significant."

Tyler subsequently appealed the trial court's ruling.

¶ 10

ANALYSIS

¶ 11 Tyler argues on appeal that the trial court erred in finding that there had not been a substantial change in circumstances and in denying his petition to establish child support on that basis. Tyler asserts that the decrease in Deanna's overnight visits with Jacob from two times per week, as it was at the time of judgment, to zero times per week, as it had been for the past year, was sufficient to constitute a substantial change that would warrant a modification of the existing child support order. In making that assertion, Tyler notes that it is not in the best interest of a child to allow a parent to forgo time spent with the child in exchange for not having to pay child support. Tyler asserts further that the trial court placed too much emphasis on the fact that the initial custody and visitation arrangement was agreed to by the parties and points out that the terms of a marital settlement agreement do not limit the trial court's ability to modify child support under the statute. Tyler asks, therefore, that we reverse the trial court's ruling and that we remand this case for the trial court to determine the appropriate amount of child support to be

awarded.

¶ 12 Deanna argues that the trial court's ruling was proper and should be affirmed. Deanna asserts that the appropriate time frame in determining whether a substantial change has occurred in this case is from the denial of Tyler's previous modification petition in June 2011 and not from the judgment date, as Tyler claims. Using the June 2011 date as the starting point, Deanna asserts that the reduction of one day less of overnight visitation with Jacob, from one day a week to zero days a week, was not substantial. Deanna also contends that a modification of child support was not warranted in this case because her income had decreased from the date of the previous order. Deanna notes that whether the trial court should have approved the terms of the parties' initial agreement, which limited the amount of time she spent with the children and provided that no child support would be paid, is not an issue that is before this court.

¶ 13 In response, Tyler maintains that the appropriate starting point for determining whether a substantial change of circumstances has occurred is the judgment date and not the date of the previous order, which denied Tyler's request for modification and made no change to the child support provision. Tyler responds further that the decrease in Deanna's income does not prevent a modification in this case, because under the law as applied in this District, he is only required to show either an increase in Deanna's ability to pay or an increase in the children's needs, but not both.

¶ 14 A trial court's ruling on the modification of child support will not be reversed on appeal absent an abuse of discretion. *In re Marriage of Bussey*, 108 Ill. 2d 286, 296 (1985). The threshold for finding an abuse of discretion is a high one and will not be overcome unless it can be said that the trial court's ruling was arbitrary, fanciful, or unreasonable, or that no reasonable

person would have taken the view adopted by the trial court. See *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009); *In re Leona W.*, 228 Ill. 2d 439, 460 (2008).

¶ 15 An order of child support may be modified upon a showing of a substantial change in circumstances. 750 ILCS 5/510(a) (West 2010); *In re Marriage of Adams*, 348 Ill. App. 3d 340, 343 (2004). In determining whether a substantial change in circumstances has occurred, the trial court has broad latitude and will consider both the circumstances of the parents and the circumstances of the children. See *In re Marriage of Johnson*, 209 Ill. App. 3d 1025, 1029 (1991); *In re Marriage of Lambdin*, 245 Ill. App. 3d 797, 806 (1993). Under the traditional approach, to establish a substantial change in circumstances, the petitioner had to show that there was an increase in the payor spouse's income and also an increase in the needs of the children. See, e.g., *Kelleher v. Kelleher*, 67 Ill. App. 2d 410, 414 (1966); see also 2 H. Joseph Gitlin, *Gitlin on Divorce: A Guide to Illinois Matrimonial Law* §17-1(c) (3d ed. 2013). This court, however, has taken a more flexible approach and has allowed for modifications of child support, even when the noncustodial parent's income has not increased. See, e.g., *Johnson*, 209 Ill. App. 3d at 1029-30; see also Gitlin, *supra*. If a court finds that a substantial change in circumstances has occurred, it will then consider the same factors that it considered in formulating the original amount to determine the appropriate amount of the modification to the child support order. *Lambdin*, 245 Ill. App. 3d at 806.

¶ 16 Having reviewed the record in the present case, we find that no abuse of discretion occurred. In making its determination, the trial court considered the testimony of the parties and the arguments of their attorneys. The underlying facts before the court were not in dispute—Deanna's time with Jacob had decreased, the children's expenses had increased, and

Deanna's income had decreased. Based upon those facts and keeping in mind the initial custody and visitation arrangement, the trial court, in its discretion, determined that the replacement of Jacob's overnight visitation with visitation over dinner was insignificant, and we find no basis upon which to conclude that the trial court's ruling was erroneous. It is unclear from the record in this case whether the trial court was considering the change in visitation from the date of the previous order (a reduction from one overnight visit to zero), which denied Tyler's first petition to establish child support, or from the date of the judgment (a reduction from two overnight visits to zero), and we do not believe that a determination one way or the other is dispositive here. Under either situation, the trial court was well within its discretion to find that the change was insignificant. We are also not persuaded by Tyler's policy assertion, which seems to challenge the validity of the initial custody and support arrangement, a matter that is not currently before this court. We find nothing improper about the trial court's reference to the parties' agreement and do not believe that it indicates that the trial court put too much emphasis on that particular fact. Rather, the reference merely indicates the trial court's familiarity with the underlying facts and the inescapable factual context in which the child custody and support provisions arose.

¶ 17

CONCLUSION

¶ 18 For the foregoing reasons, we affirm the judgment of the circuit court of Tazewell County.

¶ 19 Affirmed.

¶ 20 JUSTICE O'BRIEN, specially concurring.

¶ 21 I concur in the disposition of the majority, but write separately because I do not feel the majority has adequately addressed the issue of the proper period of time to review in order to

determine whether there has been a substantial change in circumstances such that would warrant the modification of the judgment to establish payment of child support. The petitioner has argued we must look back to the time of the entry of the original judgment for dissolution of marriage to determine whether a change in circumstances has occurred since the previous petition to modify the judgment was denied. The respondent argues that the correct period of time is from the entry of the denial of the first petition to modify judgment. I believe it is important to clarify that the court is not constrained by a period of time, but rather by the *res judicata* effect of the facts presented by the petitioner in his previous petition to modify judgment. The petitioner alleged in his first petition to modify judgment that the respondent was only exercising one overnight per week with the minor child, Jacob. In the second petition to modify judgment, the petitioner alleged that the respondent was no longer having any overnight visitation with the minor child Jacob. Since the changed circumstances alleged in the first petition to modify were already considered and dealt with, they cannot be the basis for the substantial change in circumstances alleged in any subsequent petition to modify the judgment. *In Re Marriage of Pedersen*, 237 Ill. App.3d 952 (1992); citing *In Re Marriage of Zeman*, 198 Ill. App.3d 722 (1990); and *Sullivan v. Sullivan*, 98 Ill. App.3d 928 (1981). In this case, the fact that Jacob had gone from two weekly overnight visits to one weekly overnight visit with the respondent already existed and was addressed by the trial court during the hearing on the first petition to modify and did not constitute a change in circumstances for the purposes of the second petition to modify. *Nordstrom v. Nordstrom*, 36 Ill. App. 3d 181, 185 (1976). The petitioner argues that this leads to the absurd result of being unable to address the cumulative effect of the changes in circumstances from the date of the entry of the original decree. However,

as noted by the court in *Pedersen*, it is improper for a petitioner to file a petition to modify every time some slight change occurs in his financial situation or that of a former spouse. Rather, a petition should not be filed until the accumulating changes amount to a "substantial change" in circumstances. *In re Marriage of Pedersen*, 237 Ill. App. 3d at 957. The trial court in the instant case demonstrated her knowledge of the case and the case law and made her findings in an appropriate manner.