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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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<i>In re</i> MARRIAGE OF DARREN BRADY,	)	Appeal from the Circuit Court
	)	of Du Page County.
Petitioner-Appellant,	)	
	)	
and	)	No. 00-D-590
	)	
JULIE BRADY, n/k/a Julie Zelinka,	)	
	)	
Respondent-Appellee	)	Honorable
	)	Neal W. Cerne,
(Thomas Kenny, Guardian <i>Ad Litem</i> ).	)	Judge, Presiding.

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JUSTICE ZENOFF delivered the judgment of the court.  
Justices McLaren and Spence concurred in the judgment.

**ORDER**

¶ 1 *Held:* Trial court erred in modifying and, ultimately, terminating child support *sua sponte* in the context of ruling on a petition to modify and enforce visitation; court's two-month downward deviation from the child support guidelines was not an abuse of discretion.

¶ 2 In May 2002, the trial court dissolved the marriage of petitioner, Darren Brady (Brady), and respondent, Julie Brady, n/k/a Julie Zelinka (Zelinka). In September 2012, Zelinka filed postdissolution petitions to modify her child support obligation and to modify and enforce visitation. The trial court granted the petition to modify child support, setting support at \$1,169

per month. Over the course of the next year, the trial court conducted a number of hearings on the pending visitation petition. During these hearings, frustrated with the parties' apparent inability to facilitate visitation between Zelinka and the children, the trial court *sua sponte* modified child support. One order directed Zelinka's support obligation to Thomas Kenny, the guardian *ad litem* (GAL) for the children. In its last order, the trial court terminated child support entirely. Because we agree with Brady that it was error for the trial court to modify and, ultimately, to terminate child support *sua sponte* in the context of ruling on a pending visitation petition, we reverse all of the child support orders entered after October 1, 2012, the date the court granted Zelinka's petition to modify child support and set support at \$1,169 per month. We also consider whether the court abused its discretion as to the October 1, 2012, order, which reduced child support below guideline levels for two months only. We conclude that the court stated a sufficient basis for that temporary deviation.

¶ 3

### I. BACKGROUND

¶ 4 On May 23, 2002, the court entered a judgment dissolving the marriage of Brady and Zelinka. The couple had two sons, one born January 2, 1997, and the other born April 20, 1999. The parties originally had joint custody of the children.

¶ 5 A series of postdissolution modifications of the judgment relating to the children followed. In 2006, the court made Brady the residential parent. On July 27, 2011, Zelinka filed a petition to modify visitation in anticipation of her moving to California, a move she in fact made. Brady then petitioned for sole custody, and, on November 3, 2011, the court granted the petition. Zelinka's child support obligation was set at \$1,285.04 per month.

¶ 6 On September 10, 2012, Zelinka filed a *pro se* petition to "terminate" child support. Although labeled a petition to "terminate" child support, in substance the one-page motion

alleged only that Zelinka's income had decreased, while Brady's income had increased. On the same date, Zelinka filed a petition for "enforcement" of visitation. The petition alleged that she had not had visitation with her children for 13 months. Although labeled a petition for "enforcement" of visitation, the only relief the petition requested was modification of visitation to "specifically outline periods of visitation."

¶ 7 On September 17, 2012, the court conducted a hearing on Zelinka's child support and visitation petitions. With respect to her child support petition, Zelinka indicated that she had moved back to Illinois in August 2012 and was unemployed. She clarified that she was seeking only a temporary cessation of child support until she became employed. The court granted her petition, temporarily reducing her child support obligation to zero. It ordered Zelinka to keep a job-search diary, and it set a status date of October 1, 2012, for her to produce the diary "to demonstrate her efforts to become employed." The court warned Zelinka that it could not leave her support obligation at zero for long.

¶ 8 With respect to Zelinka's visitation petition, the parties disputed who was at fault for Zelinka's long period without visitation. The court ordered Brady to return on the October 1, 2012, status date with a visitation schedule indicating when Zelinka could visit with the children.

¶ 9 At the October 1, 2012, status hearing, Zelinka told the court that she was about to start a new job such that her guideline support obligation would be \$1,169 a month. The court set child support at \$1,169 per month, but reduced Zelinka's support obligation to \$550 per month for October and November. The court said that its purpose in ordering below-guideline support for two months was to allow Zelinka to buy gifts for the boys to improve her relationship with them. The court stated, "I think it's obscene that she has no visitation and she's got to pay child support. I think that's obscene. That's my belief." The court set two visitation days and said

that it would address holiday and further visitation on December 4, 2012. It ordered each party to provide suggested visitation.

¶ 10 On October 24, 2012, Zelinka filed a petition seeking enforcement of visitation and mandated counseling for the two children. On October 31, 2012, the court appointed Kenny, who had served as GAL before, to serve in that role again.

¶ 11 On December 4, 2012, the court conducted a hearing on Zelinka's pending visitation petition. At the hearing, Kenny informed the court that the two visitation days the court scheduled in October had not gone well. He indicated that the children seemed to want to have no relationship with their mother. He said that Brady seemed "content with the situation as it is," while Zelinka "would like to see the boys, but they don't want to see her."

¶ 12 At the conclusion of the hearing, the court stated that it felt its hands were "a little tied." It said it would set a status date six months away, and asked Zelinka to "report on how it's going." The court stated that the situation was "a disaster" and that its entire focus was on reestablishing visitation. It further stated that "in my mind, support is not a big deal here. What's a big deal is getting mom back involved in the kids' lives." It then ordered that paying Kenny was Zelinka's responsibility, and it reduced child support to zero retroactive to September 1, 2012, to compensate. Brady objected to the change, arguing that visitation and support were legally separate issues. The court's December 4, 2012, written order simply stated, "Respondent's obligation to pay child support to petitioner is abated as of 9/1/12."

¶ 13 On December 10, 2012, Brady filed a motion to reconsider the December 4, 2012, order. The court denied it, stating that, based on what Kenny had said, it believed that Brady was not encouraging his children to maintain a relationship with their mother. The court clarified that the abatement of child support was "a temporary modification of support" that was effective

“until further order of court.” Brady indicated that he had outstanding bills related to the children’s participation in sports, that the children needed glasses and braces, and that he needed child support to afford those things. The court stated that “the best usage of this money is that they have a relationship with their mother.”

¶ 14 On February 11, 2013, Brady, who had retained counsel, filed a petition for reinstatement of child support. He argued that the trial court’s December 4, 2012, *sua sponte* abatement of child support in the absence of any pending petition relating to child support was error.

¶ 15 On April 17, 2013, the court denied Brady’s petition for reinstatement of child support, but “clarified/modified” the December 4, 2012, order. The court explained that it expected Zelinka to contribute the guideline 28% of her income, or \$1,169 per month, but that the support would go *first* to Kenny with the *remainder* to Brady. The visitation issues remained pending, and the court set a status date of May 1, 2013, to address visitation and to determine “child support based on Mr. Kenny’s billed hours.”

¶ 16 On May 1, 2013, Kenny’s billing was before the court. Kenny had billed only \$1,507, which Zelinka had paid. Zelinka’s unpaid, outstanding child support obligation for the months of October 2012 to May 2013 was \$6,675.50. Because Kenny’s bill had been paid in full, the court ordered that all future support go to Brady. The court declined to classify the unpaid support of \$6,675.50 as a child support arrearage. The court reserved ruling on how to dispose of the outstanding balance.

¶ 17 On September 13, 2013, Brady filed a motion seeking a repayment plan for the \$6,675.50, which he asserted was a delinquency in support payments by Zelinka.

¶ 18 On October 22, 2013, the court conducted a hearing on all pending matters, including Zelinka’s petition to modify and enforce visitation. During the hearing, Kenny again laid on

Brady most of the responsibility for the poor relationship between Zelinka and the children. At the conclusion of the hearing, the court again expressed its frustration with the parties' inability to coordinate visitation:

“I don't know how she can have visitation. It's impossible. It's a terrible, terrible situation. \*\*\* And then to be insistent upon receiving child support, she doesn't even get to see the kids, and in fact the child support if you really think about it is probably counter productive in this cause because what it's doing is it's going to a person who doesn't want to encourage a relationship with the mother. So how is child support being used for the benefit of the kids?”

The court concluded that it would not order any visitation. It then said, “The only thing I can do is I'm terminating child support, and I'm vacating any prior child support.” In its written order, the court terminated Zelinka's child-support obligation retroactive to October 1, 2012, and ordered Brady to reimburse Zelinka for any funds received.

¶ 19 On October 29, 2013, Brady filed a notice of appeal.

¶ 20 II. ANALYSIS

¶ 21 On appeal, Brady asks that we order guideline support of \$1,169 per month retroactive to October 1, 2012. He first asserts that all the orders relating to child support from December 4, 2012, on were void because the court lacked subject matter jurisdiction to enter the orders. Alternatively, he contends that, even if the trial court had subject matter jurisdiction to enter the orders, it was error for the court to modify and, ultimately, to terminate child support *sua sponte* when no party had requested any relief with respect to child support. As a second alternative, Brady argues that the court abused its discretion when it linked child support to visitation compliance, and that the court failed to comply with section 505(a)(2) of the Illinois Marriage

and Dissolution of Marriage Act (Act) (750 ILCS 5/505(a)(2) (West 2012)), which requires that “[i]f the court deviates from the [child support] guidelines” then the court’s finding “shall include the reason or reasons for the variance from the guidelines.”

¶ 22 Zelinka responds that the court had subject matter jurisdiction to enter the orders, which, in her view, were a series of temporary orders all based upon her September 10, 2012, petition for “termination” of support. As to whether the court acted within its discretion in entering the several below-guideline support orders, Zelinka argues that it is proper for a court to end child support where the custodial parent has engaged in extreme visitation interference.

¶ 23 We agree with Brady that it was error for the trial court to modify and, ultimately, to terminate child support *sua sponte* in the context of ruling on Zelinka’s visitation petition when neither party requested that relief.

¶ 24 Section 511 of the Act, which governs the procedure for petitioning to modify a judgment of dissolution, provides that such judgments “may be modified or enforced by order of court *pursuant to petition.*” (Emphasis added.) 750 ILCS 5/511 (West 2012). It requires that notice of the filing of the petition be given to the respondent. 750 ILCS 5/511(a) (West 2012). In the context of modifying child support, the requirements of a petition and notice serve important purposes, because section 510 of the Act states that any order of child support “may be modified only as to installments accruing subsequent to due notice by the moving party of the filing of the motion for modification.” 750 ILCS 5/510(a) (West 2012). Generally, child support may be modified only upon a substantial change in circumstances; however, limited exceptions apply. 750 ILCS 5/510(a) (West 2012).

¶ 25 The only pleading with respect to child support was Zelinka’s petition to modify support, filed on September 10, 2012. On September 17, 2012, the trial court ruled on Zelinka’s petition

by temporarily reducing child support to zero, while also ordering her to maintain a job-search diary and report back on October 1, 2012. At the October 1, 2012, hearing, Zelinka reported that she had obtained employment, and the trial court set child support at the guideline amount of \$1,169. Thus, the trial court finally resolved Zelinka's child support petition on October 1, 2012. Neither party filed a motion to reconsider the October 1, 2012, order.

¶ 26 On December 4, 2012, when the trial court *sua sponte* abated child support, and on October 22, 2013, when the trial court *sua sponte* terminated child support retroactive to October 1, 2012, no petition with respect to child support was pending, and Brady had not received any notice that child support might be modified or terminated, or on what basis. Although Zelinka had petitioned for modification of support in September 2012 based on her loss of employment, the trial court fully resolved her petition by temporarily ceasing support, and then by reinstating support on October 1, 2012, at the guideline level once she obtained new employment. Whereas Zelinka's child support petition sought modification on the standard basis of a substantial change in financial circumstances, the court made the *sua sponte* modifications on the altogether different basis that Brady was engaging in visitation interference. Nothing in Zelinka's petition to modify and enforce visitation put Brady on notice that child support might be modified or terminated.

¶ 27 In ruling on Zelinka's visitation petition at the December 4, 2012, and October 22, 2013, hearings, the trial court expressed frustration with the parties' apparent inability to facilitate visitation between Zelinka and the children. On December 4, 2012, it explained that it was setting child support at zero so that Zelinka could direct all of her child support to paying Kenny, the GAL. On October 22, 2013, the court terminated child support following a hearing at which Kenny laid on Brady most of the responsibility for the poor relationship between Zelinka

and the children. The court explained that, if it could not award Zelinka visitation, it would not order her to pay child support. However, neither Brady nor Zelinka requested the trial court to modify or terminate child support in order to facilitate visitation, and nothing in the Act contemplates a trial court *sua sponte* modifying or terminating child support in the context of ruling on a visitation petition.

¶ 28 Given that no pleading with respect to child support remained pending, and that neither party had requested any modification of child support due to Brady's purported visitation interference, we conclude that the trial court's *sua sponte* orders modifying and, ultimately, terminating child support were error. See *In re Custody of Ayala*, 344 Ill. App. 3d 574, 584-85 (2003) (trial court erred when it awarded custody of a child to the child's stepmother and grandparents where no pleading requested that relief); *In re Marriage of Cantrell*, 314 Ill. App. 3d 623, 628 (2000) (trial court erred in awarding permanent maintenance where no party had requested that relief); *In re Marriage of Sawyer*, 264 Ill. App. 3d 839, 848 (1994) ("a trial court cannot modify a spouse's child support obligations without a petition for modification first being filed"); see also *In re Marriage of Petrik*, 2012 IL App (2d) 110495, ¶ 21 ("The Act does not permit a trial court to modify a judgment of dissolution *sua sponte* when no postdissolution petitions have been filed."). Therefore, we vacate all of the child support orders entered after the initial October 1, 2012, order, which finally resolved Zelinka's child support petition.

¶ 29 Zelinka argues that, because the October 1, 2012, order did not become appealable until October 22, 2013, when the court finally resolved all pending postdissolution petitions, the court retained jurisdiction to modify it. However, even assuming that the court could have modified its ruling on Zelinka's child support petition, the court did not do so; instead, it modified and terminated child support in the context of ruling on Zelinka's visitation petition and on a basis

that had not been raised by any party. As we have discussed, this was error.

¶ 30 We note that the substantive ruling of the trial court was that Darren was impeding both visitation and the relationship between Zelinka and the children. We are sympathetic to the trial court's desire to promote the children's best interests and to fairly address what it believed to be serious visitation interference by Brady. However, the court was required to address the situation before it within the bounds of the Act and the issues as framed by the pleadings.

¶ 31 We now turn to Brady's claim that the two-month downward deviation of child support contained in the October 1, 2012, order was an abuse of discretion. We review a ruling on a petition to modify child support for an abuse of discretion. *In re Marriage of Popa*, 2013 IL App (1st) 130818, ¶ 21. Brady argues that the court did not make the explicit findings necessary to support the deviation from guideline support. We do not agree. A trial court must make express findings if it deviates from guideline support, but it may make those findings orally. *In re Marriage of Sweet*, 316 Ill. App. 3d 101, 108 (2000). Here, the court's remarks adequately explain the temporary deviation. The court stated that it wanted Zelinka to be able to restore her relationship with the children by buying them "gifts." Although this ruling was somewhat idiosyncratic, Brady did not specifically argue that the rationale was insufficient to justify the temporary deviation. Therefore, we cannot say that it was an abuse of discretion.

¶ 32

### III. CONCLUSION

¶ 33 For the reasons stated, we vacate the child support orders entered after October 1, 2012, but we affirm the October 1, 2012 order, thus returning Zelinka's support obligation to the level set on October 1, 2012.

¶ 34 Affirmed in part, vacated in part.