

NOTICE

Decision filed 09/30/15. 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.

2015 IL App (5th) 140230-U

NO. 5-14-0230

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).

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
ROBERT E. FINKE, JR.,)	Madison County.
)	
Petitioner-Appellee,)	
)	
and)	No. 98-D-428
)	
MARTHA J. FINKE, n/k/a MARTHA J. STEWARD,)	Honorable
)	Clarence W. Harrison II,
Respondent-Appellant.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Stewart and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court abused its discretion when it imputed past income to a parent for purposes of determining nonminor child support. The trial court abused its discretion in ordering nonminor child support without an evidentiary basis.

¶ 2 Martha J. Finke, who is now known as Martha J. Steward (Martha), appeals from the trial court's order awarding her former spouse, Robert E. Finke (Robert), \$150 per month in nonminor support for their daughter, Samantha, and ordering Martha to pay one-half of Samantha's educational and medical expenses. Several months after Robert filed the petition, Martha resigned her job as a manager of a convenience store because of

the stressful work environment. She remained unemployed on the date of the hearing. She argues that because nonminor support is discretionary, and she had no income, the court improperly imputed income to her. She also argues that there was no evidence establishing the statutory factors required for an award of nonminor support. We reverse and remand.

¶ 3

FACTS

¶ 4 Robert and Martha were divorced in 1998. Their daughter, Samantha, was born in 1998. In August 2010, the court entered an order modifying child support, ordering Martha to pay Robert \$75 every two weeks for child support. The order provided that child support would terminate on Samantha's nineteenth birthday.

¶ 5 In August 2012, Robert filed a motion seeking nonminor support, educational expenses, and medical expenses for Samantha. He also sought reimbursement for a portion of medical bills he paid on Samantha's behalf. At that time, Robert worked for Vandalia Bus Lines and Martha worked as a manager for a Casey's convenience store. Samantha was 19 years old and lived with Robert. Samantha was attending Southwestern Illinois College (SWIC).

¶ 6 In June 2013, Martha resigned her managerial job at Casey's. According to Martha, she resigned because her work environment became too stressful due to a managerial change and increased duties. She applied for, and the State awarded her, unemployment benefits. Her employer appealed, citing Martha's resignation. The Department of Employment Security agreed with Casey's and terminated Martha's

benefits. At the time of the hearing, Martha was still unemployed and earned no income, but was supported financially by her current husband.

¶ 7 The trial court held a hearing on the motion in January 2014. Martha's attorney reminded the court that Samantha was no longer a minor, and that Robert, not Samantha, signed Samantha's affidavit of assets and liabilities. He argued that he believed Samantha was receiving a Pell grant to cover some of the tuition costs, which Robert did not list in Samantha's affidavit. Samantha's affidavit did not contain tuition costs. The trial court asked the parties, including Samantha, to supplement the record by submitting tax returns, or W-2s or 1099s for tax year 2013.

¶ 8 The trial court asked Robert if his health insurance covered Samantha. Robert informed the court that Samantha was not an insured under his policy, but that he had asked his benefits coordinator at work to find out what it would cost to add her to his plan. When Martha worked for Casey's, Samantha was Martha's dependent on her health insurance policy. However, when Martha resigned from that job, Samantha's health insurance coverage ended.

¶ 9 At the conclusion of the hearing, the trial court noted:

"The history of the case is one in which mother has been limited in the amount of moneys that were previously paid with regard to the daughter even when she was a minor; however, the amounts were regular, consistent and were to be payable on a monthly basis as opposed to in lump sums ***.

I could make life extremely painful for the parties by making them go through and identify things beyond the affidavits that they have already supplied,

but the concern that I have is twofold. One, I don't know what purpose I would accomplish with regard to that other than essentially making a bad situation worse. But more importantly, I suspect that I would have no more funds discovered at the end of the day than I have at the moment. So, I'm not going to have—it's not going to make the pie any bigger."

¶ 10 On February 11, 2014, the trial court entered a formal written order. The court noted that section 513(b) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/513(b) (West 2012)) required the court to consider all relevant factors before awarding nonminor support and educational expenses. Those factors included the financial resources of the parents, the child's standard of living if the parents had remained married, the financial resources of the child, and the child's academic performance. The court noted that Martha voluntarily left employment due to stress, but that she failed to exhaust other avenues of dealing with the stressful job before she resigned. Therefore, the court found that Martha was capable of working, and reaffirmed the original child support award of \$75 every two weeks. The court ordered Martha to pay nonminor child support until Samantha completed a four-year baccalaureate degree.

¶ 11 The court reviewed an exhibit Robert provided and noted that tuition costs for two semesters of SWIC classes, after application of the Pell grant Samantha received, was \$2,064.50. Robert also sought reimbursement for Samantha's out-of-pocket medical expenses and asked the court to order Martha to pay a portion of Samantha's outstanding medical bills. Based upon the affidavits of assets and liabilities, the court concluded that if Martha had continued her Casey's employment, her monthly income would be close to

Robert's monthly income. Therefore, the court ordered both parties to pay one-half of all SWIC tuition, books, and other educational expenses, and one-half of the outstanding medical bills. The court also ordered Martha to reimburse Robert for one-half of Samantha's out-of-pocket medical expenses.

¶ 12 Martha filed a motion to reconsider the court's order, arguing that the court cannot order her to pay more than she can afford, and that her ability to pay must be determined as of the date of the hearing. *In re Support of Pearson*, 111 Ill. 2d 545, 442, 490 N.E.2d 1274, 1277 (1986). Martha acknowledged that the court could construe her voluntary termination of employment against her in a minor child support case, but argued that the same is not true in a case for nonminor support. Martha also argued that there were outstanding questions about whether or not Samantha was a full-time student because her transcript listed numerous classes from which she had withdrawn. Martha argued that there was no evidence in the record establishing Samantha's tuition costs for the fall 2013 semester. Additionally, Martha noted that Samantha did not testify at the hearing, and so the court could not determine whether Samantha intended to obtain a four-year degree.

¶ 13 The trial court held a hearing on the motion to reconsider in April 2014. Again, no one testified at the hearing. Martha's attorney argued that the court should not consider Samantha a full-time student, because she had withdrawn from so many of her classes. In response, Robert's attorney asked the court to consider the legislative intent behind the nonminor support statute—that children of divorced parents should be encouraged to seek a college degree. He also argued that Martha did not ask for leave from her job or for a

transfer to a less stressful job category with the same employer. At the conclusion of the hearing, the trial court entered an order denying Martha's motion to reconsider.

¶ 14 Martha appeals and alleges that the trial court erred by awarding nonminor child support for education, and educational and medical expenses because she had no income. She also contends that we must reverse the trial court's order because the order lacked an evidentiary foundation.

¶ 15 **LAW AND ANALYSIS**

¶ 16 Generally, the Illinois Marriage and Dissolution of Marriage Act (Act) does not require parents to continue making child support payments after the child has reached majority. *In re Marriage of Raski*, 64 Ill. App. 3d 629, 632, 381 N.E.2d 744, 747 (1978). However, Illinois law allows courts to order one or both parents to pay nonminor child support for educational expenses. 750 ILCS 5/513(a)(2) (West 2012). Those educational expenses may include "room, board, dues, tuition, transportation, books, fees, registration and application costs, medical expenses including medical insurance, dental expenses, and living expenses during the school year and periods of recess." *Id.* The authority to order nonminor child support terminates upon the child's completion of a baccalaureate degree. *Id.* In making this type of award, the statute mandates that the court:

"consider all relevant factors that appear reasonable and necessary, including

- (1) The financial resources of both parents.
- (2) The standard of living the child would have enjoyed had the marriage not been dissolved.
- (3) The financial resources of the child.

(4) The child's academic performance." 750 ILCS 5/513(b) (West 2012).

Courts construe an expenses award pursuant to this statute as a form of child support. *In re Marriage of Chee*, 2011 IL App (1st) 102797, 952 N.E.2d 1252. If the child is living in the home of one parent, then educational expenses may include a reasonable living expense. *In re Marriage of Falat*, 201 Ill. App. 3d 320, 327, 559 N.E.2d 33, 37-38 (1990).

¶ 17 On appeal from an award of nonminor support for educational expenses, we review the court's order to determine if the court abused its discretion. *People ex rel. Sussen v. Keller*, 382 Ill. App. 3d 872, 892 N.E.2d 11, 37-38 (2008). A trial court abuses its discretion to award nonminor child support if the court bases its decision upon incomplete information or upon an incomplete record. *Street v. Street*, 325 Ill. App. 3d 108, 114, 756 N.E.2d 887, 892 (2001).

¶ 18 Lack of Income

¶ 19 Martha argues that the trial court abused its discretion in ordering her to pay living expenses, educational costs, and medical bills for her daughter. As Martha is unemployed with no income, she contends that the trial court ignored Illinois case law holding that a court should not order a parent to pay nonminor support if he or she cannot afford to do so.

¶ 20 As stated earlier in this order, nonminor support is not mandated and is completely within the trial court's discretion. *Sussen*, 382 Ill. App. 3d at 881-82, 892 N.E.2d at 19. Because this type of child support is discretionary, cases in Illinois have held that a court

should not order the parent to pay more than the parent can afford. See *In re Marriage of Cianchetti*, 351 Ill. App. 3d 832, 815 N.E.2d 17 (2004) (the father had a negative income balance after payment of bills, but despite that fact he was previously able to pay \$15,000 per year in child support and high school tuition, the trial court's assessment that the father could continue to pay \$15,000 annually for college education did not amount to an abuse of the trial court's discretion); *In re Support of Pearson*, 111 Ill. 2d 545, 490 N.E.2d 1274 (1986) (citing *Booth v. Booth*, 122 Ill. App. 2d 1, 7, 258 N.E.2d 834, 837 (1970)) (divorce decree contemplated nonminor support if child enrolls in college after high school; \$100 per month was consistent with the amount spent by the parents on two older children who attended college during the marriage; and the employed parent could afford the \$100 amount ordered by the court); *In re Marriage of Fahy*, 208 Ill. App. 3d 677, 567 N.E.2d 552 (1991) (ordering parent to pay 60% of educational costs for one child constituted an abuse of the trial court's discretion when that parent had no ability to pay that amount). The parent's "ability to pay must be evaluated with regard to the party's resources at the time of the hearing." *In re Support of Pearson*, 111 Ill. 2d at 552, 490 N.E.2d at 1277 (citing *Elizer v. Elizer*, 36 Ill. App. 3d 552, 555, 344 N.E.2d 493, 496 (1976)).

¶ 21 In this case, the trial court made findings that Martha voluntarily resigned her employment on the basis of stress. Although the court did not question the legitimacy of Martha's stated reason for resigning, the court stated that Martha should have pursued other alternatives within the Casey's organization or taken an allowed leave of absence in lieu of voluntary termination of employment. The trial court found that Martha's past

income was indicative of her current financial situation. We disagree with this analysis. The parties do not cite, and we have not found, any Illinois case allowing the imputation of income in a nonminor child support case. The statute contemplates an assessment of each parent's financial resources. 750 ILCS 5/513(b) (West 2012). Other than the imputation of past income to Martha, there was no exploration of her other available financial resources. While Illinois law contemplates an end to mandated child support on the child's nineteenth birthday, there are exceptions to this rule. Educational expenses are a potential exception. 750 ILCS 5/513 (West 2012). The language of the statute is discretionary. *Id.* Therefore, the trial court is not required to order nonminor child support simply because a child pursues higher education. With no law supporting the imputation of Martha's former monthly income, we find that the trial court abused its discretion.

¶ 22

Evidentiary Basis of Order

¶ 23 In this case, the trial court recognized that the parents had limited financial resources. The court reasoned that the parties would incur lower attorney fees if the scope of the hearing were limited. However, by not receiving testimony at the hearing, the result is that there is insufficient evidence to support the court's order.

¶ 24 No one testified at the initial hearing for nonminor support. There was no testimony from the parents that would provide the standard of living evidence—whether they pursued education after high school and their intentions, if any, while they were married about the education of their child. There was no evidence about whether or not Samantha had employment and income. There was no testimony to clarify expenses

referenced in Samantha's affidavit of assets and liabilities prepared by her father. Robert produced various documents to the court for examination during the hearing, but the documents do not appear to be certified and no one verified that these documents were SWIC business records. Robert introduced no evidence about the amount owed and/or paid to SWIC. There was no evidence offered about the Pell grant. There was no evidence of Samantha's academic performance. Samantha did not testify about the withdrawals from certain courses. Consequently, there was no testimony about whether Samantha was still in college, and about whether she planned to continue with college. There was no testimony about whether there was any tuition refund because she withdrew from so many classes.

¶ 25 The trial court's order states that the court considered all of the nonminor child support factors listed in section 513(a)(2) of the Act (750 ILCS 5/513(a)(2) (West 2012)). Despite this statement in the order, we find that the trial court's order based its decision on incomplete information because there was no evidence introduced at the hearing. *Street*, 325 Ill. App. 3d at 114, 756 N.E.2d at 892. Although we appreciate the trial court's motivation in preservation of monetary assets and judicial economy, the court cannot forego evidentiary proof. Therefore, we find that the trial court abused its discretion. *Id.*

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, the judgment of the circuit court of Madison County is reversed and the cause remanded.

¶ 28 Reversed and remanded.