2016 IL App (5th) 150138-U

NO. 5-15-0138

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
KATHERINE WALKER, n/k/a Katherine Schwent,	)	Madison County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 05-D-26
	)	
JOHN WALKER,	)	Honorable
	)	Philip B. Alfeld,
Respondent-Appellee.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: In ruling on a petition to modify child support, the trial court erred in finding an amended joint parenting agreement enforceable where the agreement was presented to the court and file-stamped, but there was no court order expressly identifying and approving the agreement. The trial court erred in interpreting the agreement to include a provision limiting the mother's right to request a modification of child support where the only reference to child support was a statement that all provisions of a previous order not explicitly modified by the agreement remained in force. The trial court thus erred in limiting its consideration of changed circumstances to the time period after the parties entered into the agreement.

¶ 2 The petitioner, Katherine Walker, now known as Katherine Schwent, appeals an order of the trial court denying her petition for a modification of child support. She

requested an increase in the amount of support and an order directing the respondent, John Walker, to pay for half of the expenses incurred for their daughter's participation in extracurricular activities. In determining that a modification was not warranted, the court considered the interplay between the original child support order and three subsequent agreements between the parties. The parties twice entered into agreements under which John agreed to allow Katherine to move to two different locations in Missouri in exchange for which Katherine agreed not to request increases in child support. The parties subsequently entered into an amended joint parenting agreement which did not explicitly address child support, but did provide that all provisions of the court's previous order that were not modified by the agreement "remained in full force and effect."

¶ 3 In ruling on Katherine's petition to modify child support, the court treated the amended joint parenting agreement as an order addressing child support. The court therefore found it appropriate to consider whether Katherine had demonstrated that a substantial change in circumstances had occurred since the date of the agreement and excluded any testimony concerning the circumstances that existed between the date the court entered the original judgment and that time. On appeal, Katherine argues that the court erred by (1) ruling that an agreement barring her from requesting an increase in child support was valid and enforceable absent court approval of the agreement; (2) interpreting the amended joint parenting agreement to include a provision related to the amount of child support; (3) excluding testimony related to changes in circumstances prior to the amended joint parenting agreement; and (4) finding that no substantial change

in circumstances had occurred and denying the petition to modify on this basis. We reverse and remand for further proceedings consistent with this decision.

¶ 4 The parties were married in August 2003. Their daughter, Jada, was born in April 2004. On August 9, 2005, the court entered an order dissolving the parties' marriage and reserving ancillary issues. On September 26, 2005, the court entered an agreed order resolving all remaining issues. Pursuant to this agreed order, the parties were to have joint legal custody of Jada, with Katherine as the primary residential custodian. John was to pay Katherine $80 per week in child support, which amounts to $346.67 per month. The order further provided that the parties were to enter into a joint parenting agreement. A typewritten joint parenting agreement appears in the record immediately following the September 26 judgment; however, it is not dated, file-stamped, signed by either party, or signed by the judge.

¶ 5 In March 2011, Katherine became engaged to John Schwent, Jr. At that time, Schwent lived and worked in Farmington, Missouri, a drive of approximately an hour and a half to an hour and 45 minutes from John's residence in Madison County, Illinois. Schwent also owned a home in Kingsville, Missouri, a four-hour drive from Madison County. In July 2011, Katherine married Schwent and moved with Jada to Farmington to live with her new husband. She did not petition the court for leave to remove Jada from the State of Illinois. However, the parties reached an agreement prior to the move. Pursuant to their agreement, John agreed not to oppose the move, and Katherine agreed not to request an increase in child support. In addition, the parties agreed to a new

visitation schedule. The parties reduced their agreement to writing, but did not submit the agreement to the court for approval.

¶ 6 In July 2012, Katherine moved with her husband and Jada to Kingsville, Missouri, due to job opportunities for both Katherine and her husband. According to Katherine, both her job as a teacher in Farmington and her husband's job as a hospital administrator in Farmington ended in May 2012. At the time, she still owned a home in Highland, Illinois, and her husband still owned a home in Kingsville, Missouri, although both homes had been on the market for several months. Katherine asserts that she applied for new teaching jobs in both locations, and was hired for a position in Kingsville. She also asserts that she discussed the move with John and reached an oral agreement regarding the move in June 2012.

¶ 7 On July 26, 2012, John filed a petition for a temporary restraining order prohibiting Katherine from moving to Kingsville. He alleged that she announced her intent to move to Kingsville without seeking leave of the court to remove Jada from Illinois. He further alleged that Katherine's decision to enroll Jada in Kingsville schools without first consulting him or participating in mediation violated the terms of the joint parenting agreement then in effect. The court granted the motion and entered an *ex parte* order that day. On August 2, the court entered an order extending the temporary restraining order. Katherine was served with notice on August 10.

¶ 8 On August 13, 2012, Katherine filed a motion to dismiss the temporary restraining order. She alleged that on July 8, 2011, the parties entered into an agreement which permitted her to move to Farmington, Missouri, with Jada. She stated that pursuant to

that agreement, the parties agreed that John would have additional visitation with Jada, the parties would share the cost of transportation for visitation, and Katherine would not seek an increase in child support. The agreement further provided that if Katherine moved out of St. Francis County (where Farmington is located), the parties would "revisit" the agreement. A copy of the agreement was attached to the motion as an exhibit.

¶ 9 Katherine further alleged in her motion that in June 2012, the parties reached a similar agreement with respect to her subsequent move to Kingsville. This agreement was not reduced to writing. Katherine asserted that John again agreed not to oppose her move, in exchange for which she agreed not to request an increase in child support. In addition, she alleged, the parties agreed that exchanges for visitation would take place in Columbia, Missouri, and they agreed to continue to share transportation costs. Katherine requested that the court dismiss the restraining orders it entered on July 26 and August 2. She further requested that the court enter "a new written order confirming the agreement of the parties *** allowing Petitioner to remove the child to Kingsville, Missouri, and restating the increased visitation schedule and other terms of the parties' agreement." Alternatively, she requested that the court maintain the status quo and allow the parties to proceed with a removal hearing.

¶ 10 On September 13, 2012, Katherine filed a petition for leave to remove Jada to Kingsville, Missouri. She again alleged that she and John entered into an oral agreement prior to the move, pursuant to which John agreed not to oppose the move and she agreed not to request an increase in child support. She alleged that, although this agreement

called for the parties to meet in Columbia, Missouri, to exchange Jada for visits, John refused to do so. As a result, Katherine alleged, she drove Jada all the way from Kingsville to Madison County and back for each visit.

¶ 11 Katherine further alleged that she did not make the move to frustrate John's ability to visit with Jada. She explained that her teaching job in Farmington and her husband's job as a hospital administrator in Farmington both ended in May 2012. At that time, Katherine still owned a home in Highland, Illinois, and her husband still owned a home in Kingsville, Missouri. She alleged that she applied for teaching jobs in both locations and that she was hired for a position in or near Kingsville.

¶ 12 In addition, Katherine alleged that the move would be in Jada's best interests. This was so, she alleged, because schools in the Kingsville school district were smaller and there were opportunities for Jada to pursue her interest in competitive swimming. Katherine further alleged that moving to Kingsville did not constitute a major change from living in Farmington.

¶ 13 The parties submitted the matter to mediation. In April 2013, they signed an amended joint parenting agreement. That agreement provided that Katherine would be granted leave to remove Jada to Kingsville, Missouri. It provided that she could subsequently move with Jada either within a 30-mile radius from Kingsville or "anywhere between Kingsville, Missouri, and Madison County, Illinois," but she could otherwise not move from the Kingsville area with Jada. The agreement set up a visitation schedule and provided that the parties would meet at a location in Columbia for exchanges. The agreement did not address the amount of child support to be paid, nor

did it address the costs of Jada's extracurricular activities. It did, however, provide that John was to continue to maintain Jada on his health insurance plan and that each party was to continue to pay one-half of Jada's medical, dental, and other similar expenses not covered by insurance.

¶ 14 Of particular significance to this appeal, the amended joint parenting agreement included a typed provision, stating that "All other provisions of the September 26, 2005, Order pertaining to child custody and visitation not expressly modified herein shall remain in full force and effect and stand as entered." However, the parties modified this provision in two ways. The phrase "pertaining to child custody and visitation" was crossed out. In addition, a handwritten phrase was added to the end of the sentence, indicating that the provisions of the prior judgment would remain in effect "including the allocation of the tax exemption." Both of these changes were initialed by both parties. In addition, the agreement provided that "in the event that either parent wishes to subsequently modify this Agreement, said modification shall be submitted to the other parent in writing and the parties shall consult before any mediation or Court action is undertaken in regard to custody or visitation."

¶ 15 The amended joint parenting agreement was submitted to the court and file-stamped on April 8, 2013. However, it is not clear from the record when or if the agreement was reviewed by the court. On April 25, the court entered an order indicating that the parties failed to appear for a scheduled case management hearing the previous day and resetting the hearing for June 19. On May 9, Katherine filed a motion to strike the June 19 setting because the matter had settled. Attached to her motion was a copy of

the amended joint parenting agreement. Another copy of the agreement was submitted to the court and file-stamped on May 30, 2013. The court did not enter any order incorporating the amended joint parenting agreement, and no judge signed any of the copies of the agreement that were filed with the court.

¶ 16 On February 19, 2014, Katherine filed the petition to modify child support that forms the basis of this appeal. In it, she alleged that the April 2013 amended joint parenting agreement did not address child support. She further alleged that (1) there had been a substantial increase in John's income since child support was set at $346.67 per month in the 2005 dissolution order; (2) the cost of living had increased over the same period of time; (3) Jada did not have expenses for school and extracurricular activities when the original order was entered, but now she did have such expenses; (4) John was not sharing equally in those expenses; and (5) John was not paying the statutory guideline amount of 20% of his current income as child support (see 750 ILCS 5/505(a)(1) (West 2012)). Katherine requested that support be increased to 20% of John's current net monthly income and that John be ordered to pay for half of the expenses incurred for Jada's extracurricular activities.

¶ 17 The matter came for a hearing on March 5, 2015. John was called to testify as an adverse witness by Katherine's attorney. When counsel attempted to question John regarding increases in Jada's expenses, John's attorney objected, arguing that questions regarding increases in the needs of the child since the dissolution were improper because "[t]here was a motion to enforce their agreement not to increase child support actually filed by Katherine Schwent." John's attorney further argued that the April 2013 joint

parenting agreement "approved the amount of child support" then being paid, and that agreement was "ratified and approved by the court." The trial court sustained the objection, telling Katherine's attorney, "Confine your question then to the last two years roughly." John testified that he did not believe Jada's expenses had increased in the last two years.

¶ 18 John testified that his gross income in 2014 was $56,951 per year, and his net income was approximately $4,450 per month. He acknowledged that the $346 per month in child support he was currently paying was based on his income in 2005. He also acknowledged that 20% of his 2014 income would be $890 per month. John further testified that Jada was not involved in any extracurricular activities and that he could not afford to pay for expenses related to such activities even if she were involved in them.

¶ 19 Katherine testified that she did not believe she was bound by the July 2011 agreement not to request a modification of child support because that agreement provided that it would become null and void if she moved away from Farmington, Missouri, or if John took her to court, both of which occurred. She further testified that during the mediation process leading to the 2013 amended joint parenting agreement, the parties did not discuss or reach an agreement concerning child support. Katherine's attorney then attempted to ask whether Jada's expenses had increased since the dissolution, but the court sustained John's objection to this questioning. Katherine then testified that Jada's expenses had increased since April 2013. She explained that Jada participated in competitive swimming and gymnastics, sang in a choir, and played the oboe. She testified at length regarding the expenses she incurred as a result of these activities,

including, swim suits, goggles, swim caps, fees to participate in the swim team, reeds for Jada's oboe, private oboe lessons, a music stand, and music books. Katherine testified that she sent John copies of these bills, but he has refused to reimburse her for any portion of the expenses. Her attorney attempted to ask if Jada ever sent John invitations to any of her swim meets or other activities, but the court sustained an objection, finding the testimony to be irrelevant.

¶ 20 Katherine was asked to clarify what relief she was seeking. She replied that she wanted the court to increase the amount of child support John was required to pay to an amount based on his current income and she wanted John to be ordered to pay for half of the expenses related to Jada's extracurricular activities. She explained that she was seeking an increase in child support retroactive to the date on which she filed her petition to modify, but was only requesting that John be ordered to pay for any future expenses incurred related to extracurricular activities.

¶ 21 Katherine acknowledged that John had complied with the court's previous child support order. She further acknowledged that her income had increased subsequent to her move to Kingsville. Finally, she acknowledged that she moved to Kingsville with Jada even though she did not have either a written agreement or a court order authorizing her to do so.

¶ 22 The court entered a detailed written order on March 23, 2015. The court stated that the question before it was whether a substantial change in circumstances had occurred that would warrant a modification of child support. See 750 ILCS 5/510(a)(1) (West 2012). The court then stated that in order to make this determination, it must first

address the question of "whether it must consider any changes that occurred after the original Judgment [was] entered in September 2005 or some other date."

¶ 23 In answering this question, the court considered the effects of the July 2011 agreement between the parties and the April 2013 joint parenting agreement. The court acknowledged that the July 2011 agreement between the parties–which included Katherine's agreement not to seek an increase in child support–"was never approved by the court and may not be enforceable absent that approval." The court found, however, that the April 2013 amended joint parenting agreement was approved by the court and, therefore, enforceable. The court further found that this agreement addressed child support. The significance of this finding is that child support may be modified if the court finds that a substantial change in circumstances has occurred after the court's previous child support order. See *In re Marriage of Adams*, 348 Ill. App. 3d 340, 343 (2004).

¶ 24 The court rejected Katherine's contention that the April 2013 amended joint parenting agreement did not address child support. It highlighted the provision which read, "All other provisions of the September 26, 2005, Order not expressly modified herein shall remain in full force and effect and stand as entered." The court emphasized that the printed phrase "pertaining to child custody and visitation" was crossed out, a change initialed by both parties. The court reasoned that the fact that the parties "specifically removed [this] limiting language" was evidence that they addressed the issue of child support in reaching their agreement. The court further emphasized that "the parties reaffirmed the amount of child support payments as it existed in April 2013, going

so far as to acknowledge that the terms of the amended agreement 'are fair, just, adequate and reasonable.' "

¶ 25 In addition, the court found that John's "agreement to ratify the removal to Kingsville was based upon continuing the status quo, including the amount of child support, which the Court approved, presumably after an independent review of the facts." On the basis of these findings, the court concluded that "a substantial change of circumstances must have occurred subsequent to April 2013 to allow a modification of the child support."

¶ 26 The court next considered whether Katherine met her burden of demonstrating such a change in circumstances. The court noted that John's income rose from $52,877 in 2013 to $56,951 in 2014. The court found that this change was not substantial enough to warrant an increase in the amount of child support paid. The court next addressed the question of expenses for Jada's extracurricular activities. The court found that these expenses were "not substantially different from those that existed in April 2013." The court also noted that there were "perhaps alternative grounds" for denying Katherine's request for John to contribute to these expenses. The court stated that Katherine did not consult with John before incurring the expenses and noted that the original order did not require him to pay for Jada's extracurricular activities.

¶ 27 The court denied the petition to modify. This appeal followed.

¶ 28 The crux of Katherine's argument on appeal is that the court erred in limiting evidence of changed circumstances to the period after April 2013. We agree.

¶ 29 As stated previously, an order for child support may only be modified upon a showing that there has been a substantial change in circumstances. 750 ILCS 5/510(a)(1) (West 2012). To establish that a substantial change has occurred, the party requesting modification must show substantial changes to both the noncustodial parent's ability to pay support and the needs of the child. *In re Marriage of Adams*, 348 Ill. App. 3d at 343. In addition, the party seeking a modification must demonstrate that a substantial change in circumstances has occurred since the court's previous child support order. *Id.*; see also *Gaines v. Gaines*, 106 Ill. App. 2d 9, 13 (1969). We will not reverse a trial court's determinations concerning the modification of child support absent an abuse of discretion. *In re Marriage of Adams*, 348 Ill. App. 3d at 343. However, the court's interpretation of the parties' agreements is a question of law which we will review *de novo*. *In re Marriage of Coulter*, 2012 IL 113474, ¶ 19.

¶ 30 In order to promote amicable resolutions to disputes arising between divorced spouses, the Illinois Marriage and Dissolution of Marriage Act provides that parties may enter into agreements regarding maintenance, property distribution, child support, or the allocation of parental responsibility (*i.e.*, custody and visitation). 750 ILCS 5/502(a) (West 2012). If such an agreement does *not* involve custody, visitation, or child support, its terms are binding on the court unless the court finds the agreement to be unconscionable. 750 ILCS 5/502(b) (West 2012). However, the court is *not* bound by the terms of an agreement involving custody, visitation, and child support. This is because the court has an obligation to protect the best interests of children involved in dissolution proceedings. *Blisset v. Blisset*, 123 Ill. 2d 161, 167 (1988). Allowing parents

to modify an existing child support obligation "by creating a new agreement between themselves without judicial approval would circumvent judicial protection of the children's interests" and allow parents to "bargain away their children's interests." *Id.* at 167-68. Thus, before an agreement concerning child support, custody, or visitation may be enforced, the court must find that the agreement comports with the children's best interests. *Id.* at 168. In addition, provisions concerning child support, custody, or visitation may subsequently be modified upon a showing of a substantial change in circumstances; such provisions may not be made nonmodifiable. 750 ILCS 5/502(f) (West 2012); *In re Marriage of Wittland*, 361 Ill. App. 3d 785, 788 (2005) (citing *In re Marriage of Steadman*, 283 Ill. App. 3d 703, 707-08 (1996)).

¶ 31 A joint parenting agreement that is either set forth in a court order or incorporated into an order by reference may be enforced as an order of the court or as a contract between the parties. *In re Marriage of Coulter*, 2012 IL 113474, ¶ 17. The agreement may instead be identified and approved by the court without being "expressly incorporated in the judgment." *Id.* This allows parties to agree to terms that a court does not have the authority to order, such as an agreement to share in the costs of a child's postgraduate education. *Id.* If an agreement is approved by the court but not incorporated into a judgment, it may only be enforced as a contract. *Id.* With these principles in mind, we turn to the agreements at issue in the case at hand.

¶ 32 Katherine first argues that the court erred in enforcing the July 2011 agreement to allow her to move with Jada to Farmington, Missouri, in exchange for her promise not to seek a modification of child support. As discussed previously, this agreement was never

approved by a judge and, as such, was not enforceable under the principles we have just discussed. However, the court acknowledged that the agreement was not enforceable. Thus, we need not consider this argument further. We will turn our attention instead to the court's interpretation and enforcement of the April 2013 amended joint parenting agreement.

¶ 33 Katherine argues that the court erred in treating the parties' 2013 agreement as a child support order and enforcing it as such. She points out that the agreement did not address any pending pleadings concerning child support. She argues that trial courts have no authority to render decisions modifying child support absent a pleading requesting such relief. See *Ligon v. Williams*, 264 Ill. App. 3d 701, 707-08 (1994). In response, John argues that an exception to this rule exists in cases where an agreed order is presented to the court. He contends that the pleading requirement is intended to define the issues before the court and ensure that both parties have adequate opportunity to prepare for trial. See *In re Marriage of Nau*, 355 Ill. App. 3d 1081, 1084 (2005). John contends that these purposes are satisfied where parties present the court with an agreed order even though it is not styled as a petition or pleading. See *id*. We find that the court erred in treating the agreement as if it were an order addressing child support for different reasons.

¶ 34 First and foremost, as we stated earlier, there is no indication in the record that the amended joint parenting agreement was signed by a judge, and there is no court order referencing the agreement, much less explicitly incorporating or approving its terms. The pertinent statute provides that if an agreement is to be incorporated into a judgment, "its

terms *shall* be set forth in the judgment." (Emphasis added.) 750 ILCS 5/502(d) (West 2012). If the agreement provides that it is *not* to be incorporated into the judgment, the judgment must "identify the agreement and state that the court has approved its terms." *Id*. Here, the case was assigned to the judge who ruled on the petition to modify support some time after the parties submitted their agreement to the court. He found a previous judge approved the agreement, "presumably after an independent review of the facts," explaining that, "The court could have rejected the agreement." This finding is likely based on the fact that the agreement was file-stamped after being submitted to the court. However, this procedure falls far short of the explicit statutory requirements we have just set forth. As such, the court erred in enforcing the agreement.

¶ 35 In addition, even assuming the amended joint parenting agreement can be considered an approved order, it did not address child support. As Katherine correctly notes, ordinarily a court may not modify child support absent a request to do so by one of the parties. See *Ligon*, 264 Ill. App. 3d at 707-08. As John points out, the court can modify support if it approves an agreement of the parties modifying support. See *In re Marriage of Nau*, 355 Ill. App. 3d at 1084. Here, however, the agreement did not modify support. A trial judge reviewing the agreement would have exceeded his authority by determining that the existing child support order is no longer appropriate because neither party requested a ruling on that matter. We also reiterate the fact that Katherine requested that the court cancel the hearing set in this matter because the parties had settled the removal issue. There is no indication in the record that any evidence was ever presented to the court concerning either John's financial circumstances or Jada's needs at

any time between September 2005 and April 2013. Thus, even assuming a court approved the agreement, the language in the agreement stating that previous provisions "remain in effect" means only that the unaddressed provisions of the original joint parenting agreement and dissolution order remained in effect without change. It cannot be read as a judicial finding that $346.67 was an appropriate amount of child support as of April 2013.

¶ 36 Moreover, we believe there is a stark contrast between the effect of an order modifying child support and an order that merely states that previous child support provisions remain in effect. Many of the changes in circumstances that warrant modification of child support normally occur gradually over time–for example, increases in the noncustodial parent's income and increases in the child's need for support. To hold that a court may not consider changes in circumstances from the time the current child support was ordered onward would frustrate the court's ability to make sure the child has adequate support. See *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 280 (2006) (explaining that ensuring the support of children is one of the primary purposes of the Marriage and Dissolution of Marriage Act); *In re Marriage of Klomps*, 286 Ill. App. 3d 710, 714 (1997) (same).

¶ 37 Finally, we note that the court found that John agreed to the move because Katherine agreed not to request a modification of child support. It is not clear how much significance the court placed on this finding in rendering its decision. Katherine testified that the parties made an oral agreement to that effect the month before she moved with Jada from Farmington to Kingsville. She further testified, however, that John did not

abide by that agreement and that the parties did not discuss child support during the mediation that ultimately led to the 2013 amended joint parenting agreement. In any case, assuming there was such an agreement, it was not included in the written agreement that was ultimately filed with the court and should not have been enforced. Moreover, as previously stated, an agreement between parties related to child support cannot be made nonmodifiable. See 750 ILCS 5/502(f) (West 2012); *In re Marriage of Wittland*, 361 Ill. App. 3d at 788; *In re Marriage of Steadman*, 283 Ill. App. 3d at 707-08. For all these reasons, we conclude that the court erred by limiting its consideration of changed circumstances to evidence of circumstances that occurred after April 2013.

¶ 38 Katherine also argues that the court erred and abused its discretion by denying both her request for an increase in child support and her request for an order directing John to pay for half of the costs of Jada's extracurricular activities. Because the court limited the evidence to circumstances arising after the parties entered into the joint parenting agreement, we must remand the matter to the trial court to allow the court to consider all relevant evidence and determine whether substantial changes in circumstances have occurred that would justify both of the modifications she is seeking. We therefore need not address these arguments.

¶ 39 For the foregoing reasons, we reverse this matter and remand to the trial court for further proceedings consistent with this decision.

¶ 40 Reversed and remanded.