2016 IL App (5th) 150454-U

NO. 5-15-0454

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

KEITH JOSEPH JACKSON,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellee,	)	Monroe County.
	)	
v.	)	No. 10-D-01
	)	
WENDY MARIE McALISTER,	)	Honorable
	)	Christopher T. Kolker,
Respondent-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Schwarm and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in ordering each party to pay child support to the other or in failing to award either party retroactive child support.

¶ 2 Respondent, Wendy Marie McAlister, formerly Wendy Jackson, appeals from an order of the circuit court of Monroe County modifying a previous order filed in dissolution proceedings between her and her former husband, petitioner, Keith Joseph Jackson. On appeal respondent contends: (1) the trial court abused its discretion in ordering her to pay child support to petitioner because petitioner failed to show a substantial change in circumstances; (2) the trial court abused its discretion in ordering

each party to pay child support to the other party; and (3) the trial court abused its discretion in denying her retroactive child support. We affirm.

¶ 3 FACTS

¶ 4 The parties were married on May 9, 1998. Three children were born during the marriage, Connor in 1999, Serena in 2000, and Cohen in 2005. Petitioner filed for dissolution on January 5, 2010. Respondent filed a counter petition on January 25, 2010.

¶ 5 A dissolution order was entered on April 4, 2011, at which time the parties entered into a marital settlement agreement and a joint parenting agreement (JPA). The parties were awarded joint physical and legal custody of the children, with respondent designated as the children's primary residential parent. Petitioner was granted visitation every Thursday night and every other week from Wednesday through Friday morning, to alternate every other week from Thursday until Monday morning. The parties agreed neither party should pay child support to the other. Respondent agreed to provide health insurance for the children, with the parties splitting uncovered medical deductibles, prescriptions, dental, ocular, and psychological counseling expenses.

¶ 6 On January 9, 2012, respondent filed a postjudgment motion to modify child support in which she requested petitioner pay child support to her pursuant to Illinois statutory guidelines. On January 23, 2014, petitioner filed a postjudgment petition for change of custody or, in the alternative, change of designation of primary residential parent. The petition alleged, *inter alia*, that respondent and Connor had a poor relationship, and it was in Connor's best interests to modify the parties' JPA and change

the designation of the primary residential parent from respondent to petitioner. Petitioner also sought child support for Connor from respondent.

¶ 7 Evidence adduced at a hearing shows that since 2009, petitioner has been renting a 3,000 square foot home, with five bedrooms and a pool. At the time of the hearing he was paying $2,000 per month rent for the home. Petitioner is self-employed and owns 24/7 Onsite Camera, which provides cameras to construction sites for contractors to be able to view and manage job sites. Petitioner started the business in 2010 after his management position at Fabick CAT was eliminated. Petitioner used a personal loan of $165,000 from his retirement funds to start the business. Petitioner testified that loan has been paid back.

¶ 8 Petitioner only takes a salary when there is enough money in the business to allow him to pay all his bills and still have something left for him. As of August 19, 2015, the hearing date, petitioner's gross income for the year was $16,653.03. His tax returns for 2014 showed he had a total business income of $307,806, with ordinary income of $87,008, which included a deduction for depreciation of $32,732. In addition to using his retirement savings, petitioner uses credit cards to meet his daily expenses.

¶ 9 Respondent is a nurse and earns over $70,000 per year. She is remarried and her new husband earns approximately $100,000 per year. Respondent and her new husband each own a home.

¶ 10 Both parties testified about increased expenses the children are incurring. For example, respondent testified Serena is a competitive gymnast and her fees for that

extracurricular activity are over $7,000 per year. Respondent maintained that she was forced to take four large withdrawals from her retirement accounts since 2012 in order to keep up with her expenses. Petitioner testified that their son Cohen is in a specialized school for children with learning disabilities. Petitioner has also been forced to use retirement funds to keep up with the costs of raising the children.

¶ 11 Connor moved in with petitioner in October 2013. Since that time, Connor has had limited visitation with respondent. He spent only one night at respondent's house since he moved in with petitioner. Connor plays club soccer. Despite the parties' agreement to split the children's expenses, respondent has refused to help pay for Connor's soccer expenses since August 2014. Petitioner travels to out-of-town tournaments with Connor and pays for all hotels and food.

¶ 12 The guardian *ad litem* (GAL) recommended the physical custody schedule be amended only if respondent could still exercise visitation with Connor and if Connor and both parents attend counseling. Ultimately, the parties stipulated both would maintain joint custody of Connor, but petitioner would now be designated as the primary residential parent and Connor could visit with respondent as he wished. The stipulation was approved by the trial court. Respondent remains the primary residential parent of the parties' other two children.

¶ 13 With regard to child support, the trial court ordered respondent to pay petitioner $700.24 per month, and petitioner to pay respondent $645.12 per month, with both payments beginning on October 1, 2015. The trial court denied each party's request for

retroactive child support. Respondent filed a timely notice of appeal. Her appeal is limited to the award of child support and the trial court's denial of retroactive child support to her.

¶ 14 ANALYSIS

¶ 15 I. Substantial Change in Circumstances

¶ 16 Respondent first contends the trial court abused its discretion in ordering her to pay petitioner child support because petitioner failed to show a substantial change in circumstances. We disagree.

¶ 17 The modification of child support payments lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Rogers*, 213 Ill. 2d 129, 135, 820 N.E.2d 386, 389 (2004). The abuse of discretion standard is the most deferential standard of review available. *People v. Coleman*, 183 Ill. 2d 366, 387, 701 N.E.2d 1063, 1074 (1998). A trial court abuses its discretion only where no reasonable person would take the view adopted by the trial court or when its decision is arbitrary, fanciful, or unreasonable. *People v. Anderson*, 367 Ill. App. 3d 653, 664, 856 N.E.2d 29, 38 (2006).

¶ 18 Petitions to modify child support are determined in accordance with section 510(a) of the Illinois Marriage and Dissolution of Marriage Act (Act), which provides that an order for child support may be modified upon a showing of a substantial change in circumstances. 750 ILCS 5/510(a)(1) (West 2010). Once a determination is made that modification is warranted the court should consider the factors set forth in section 505(a)

of the Act. *In re Marriage of Lyons*, 155 Ill. App. 3d 300, 305, 508 N.E.2d 458, 461-62 (1987). Percentage guidelines set forth in section 505(a) of the Act do not apply in split custody cases, such as we have here, but the following factors set forth in section 505 do apply and should be considered:

> "(a) the financial resources and needs of the child;
>
> (b) the financial resources and needs of the custodial parent;
>
> (c) the standard of living the child would have enjoyed had the marriage not been dissolved;
>
> (d) the physical and emotional condition of the child, and his educational needs; and
>
> (e) the financial resources and needs of the non-custodial parent." 750 ILCS 5/505(a)(2) (West 2010).

Here, the trial court found there had been a substantial change in circumstances, specifically stating the substantial change was that "Connor has been living with [petitioner] since January of 2014."

¶ 19 However, the trial court goes on to note other changes, including the fact that respondent is remarried and she and her new husband now own two homes. The trial court also noted petitioner started a new business and that in order to keep that business running petitioner "used personal retirement savings and took out loans." The trial court further noted that the parties had already stipulated that the JPA should be modified so that petitioner should be the primary residential custodian of Connor. Finally, the trial court found "[b]oth parties live beyond their means." Ultimately, the trial court ordered

respondent to pay petitioner child support in the amount of $700.24 per month and petitioner to pay respondent child support in the amount of $645.12 per month.

¶ 20 We agree with the trial court that a substantial change in circumstances has occurred for at least three reasons: (1) Connor is now living with petitioner rather than respondent; (2) respondent is remarried; and (3) petitioner has a different job. Respondent insists that petitioner's change in employment is voluntary and his diminished financial capacity is of his own making and, therefore, he has not shown a substantial change in circumstances necessary to modify the parties' agreement not to pay child support. In support of her argument, respondent cites *In re Marriage of Deike*, 381 Ill. App. 3d 620, 887 N.E.2d 628 (2008). However, that case is distinguishable.

¶ 21 In *Deike*, the father lost $46,500 on a bar and grill business venture while earning only $31,174 over the same period of time. Our colleagues in the Fourth District held that the business loss did not "amount to a substantial change in circumstances" to warrant reduction of his child support obligations, noting that his voluntary decision to expend his limited resources on a voluntary business investment was made at the expense of support he should have provided to his children. *Deike*, 381 Ill. App. 3d at 632, 887 N.E.2d at 638. That court also noted that the father still owned vacation property and a boat and was able to support his new wife and child while operating his bar and grill at a loss. *Deike*, 381 Ill. App. 3d at 634, 887 N.E.2d at 640.

¶ 22 In the instant case, petitioner lost his job through no fault of his own and opened his business in a field in which he was familiar. In *Deike*, however, the father maintained

his good paying job for 10 years after the parties' divorce, but failed to save for his children's college, and, after the loss of his job, opened a bar and grill despite having never worked in that type of industry. Here, contrary to *Deike*, the petitioner's business is not operating at a loss.

¶ 23 Petitioner's business experienced gross sales in excess of $300,000 in 2014, which allowed petitioner to take a salary from the business. Moreover, unlike the father in *Deike*, petitioner is not remarried and has had no additional children. Finally, Connor has moved in with petitioner, whereas in *Deike* none of the children were living with their father, as all were enrolled in college, with two living on campus and one commuting and living with her mother. *Deike*, 381 Ill. App. 3d at 623, 887 N.E.2d at 632. Under these circumstances, we find respondent's reliance on *Deike* misplaced.

¶ 24 The record before us shows that Connor is living with petitioner and rarely visits respondent. Connor has only spent the night with her on one occasion since moving in with petitioner. Respondent stipulated that petitioner should now be the primary custodian of Connor. Respondent is remarried and her new husband makes a substantial salary. Under these circumstances, we cannot say the trial court erred in finding a substantial change in circumstances occurred.

¶ 25 II. Ordering Each Party to Pay Child Support to the Other

¶ 26 Respondent next contends that even if petitioner proved a substantial change in circumstances, the trial court abused its discretion in ordering each party to pay child

support to the other because the trial court failed to properly calculate the parties' incomes. Again, we disagree.

¶ 27 The trial court specifically found petitioner "[h]as a monthly net income of $2304.00 per month." The trial court went on to explain that petitioner's "income was figured by calculating his 2014 reported earnings, allocating an amount of expenses from the credit cards and business, but also deducting expenses spent on medical and dental as stated on his 2014 taxes." The trial court found respondent "[h]as a monthly net income of $3501.22" based upon respondent's testimony or production of evidence. Thus, contrary to respondent's assertions, the trial court expressly stated its findings and gave sufficient explanation as to how it calculated the parties' incomes. While respondent insists the trial court's findings and calculations are incorrect, we are unconvinced.

¶ 28 The trial court found that petitioner's income "was difficult to determine." Our review of the record confirms that finding. Respondent argues the trial court should have considered petitioner's past income and earning potential in its calculation, but we cannot say the trial court's declination of that approach was an abuse of discretion. Considering the record as a whole, the trial court's calculations appear reasonable.

¶ 29 Both parents have an obligation to financially support their children. *In re Marriage of Duerr*, 250 Ill. App. 3d 232, 238, 621 N.E.2d 120, 125 (1993). In split custody cases, a strict mathematical application of support guidelines found in section 505(a)(1) of the Act is not contemplated. *In re Marriage of Keown*, 225 Ill. App. 3d 808, 812, 587 N.E.2d 644, 647 (1992). However, the trial court should consider the factors set

forth in section 505(a)(2) of the Act, including the financial resources and needs of the children and the custodial parent and noncustodial parent. *In re Marriage of White*, 204 Ill. App. 3d 579, 582, 561 N.E.2d 1387, 1388-89 (1990).

¶ 30 Here, the trial court did an admirable job of trying to sort out the financial condition of the parties. Respondent contends petitioner was not forthright or credible with regard to his income. Respondent specifically asserts that because petitioner testified his monthly expenses are approximately $7,000, and he is current with his bills, his net income must be $7,000. However, it is important to note that the trial court specifically found respondent, not petitioner, "not credible at the hearing." It is well settled that the trial court is in a superior position than we are as a reviewing court to judge the credibility of the witnesses and determine the needs of the children. *In re Custody of Sussenbach*, 108 Ill. 2d 489, 499, 485 N.E.2d 367, 371 (1985).

¶ 31 The trial court acknowledged petitioner lives above his means and raided his retirement funds and paid for monthly expenses through credit cards. The trial court also acknowledged that respondent lives above her means. However, the record shows both parties want what is best for their children. The parties not only allow their children to participate in high-level sports, but also have spent considerable sums to ensure their special needs son gets a proper education.

¶ 32 We point out that while petitioner testified his net income was $1,858 per month, the trial court disagreed and found petitioner has a monthly net income of $2,304 per month based upon his 2014 tax returns. As for respondent's income, the trial court

accepted respondent's own lowest calculation of her net income as shown on her updated financial statement. For respondent to now argue that the trial court improperly calculated her net income is disingenuous.

¶ 33 Ultimately, the trial court ordered respondent to pay petitioner child support in the amount of $700.24 per month and petitioner to pay respondent child support in the amount of $645.12 per month. Thus, by ordering both parties to pay each other child support, the trial court's modification amounts to respondent paying petitioner $55.12 per month in child support. Under these circumstances, respondent has failed to convince us that the trial court failed to properly calculate the parties' incomes. Based upon the record before us, we cannot say the trial court's order is arbitrary, fanciful, or unreasonable or that no reasonable person would adopt this view.

¶ 34 III. Failing to Order Retroactive Child Support

¶ 35 Respondent also contends the trial court abused its discretion in denying her request for retroactive child support. We disagree.

¶ 36 A trial court may award retroactive child support if such award is fit, reasonable, and just. *In re Marriage of Rogliano*, 198 Ill. App. 3d 404, 410, 555 N.E.2d 1114, 1118 (1990). Whether or not to award retroactive child support is a question left to the sound discretion of the trial court. *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1119, 806 N.E.2d 701, 711 (2004).

¶ 37 We have previously set forth that the trial court did not err in its modification with regard to child support, which essentially boils down to respondent's paying petitioner

$55.12 per month. Thus, we are not sure why respondent would want this award to be retroactive. Nevertheless, respondent argues petitioner delayed the proceedings by failing to provide discovery on a timely basis. As petitioner points out, however, respondent presented no testimony or exhibits regarding this issue and relies solely on selected pleadings in the record.

¶ 38 The record shows that as of April 4, 2011, the parties were operating under a stipulated agreement wherein neither party would pay child support to the other. On January 9, 2012, respondent filed a motion to modify seeking child support. In October 2013, Connor moved in with petitioner. On January 23, 2014, petitioner filed a petition for a change of custody with regard to Connor and also sought child support. It is uncontroverted that Connor and respondent do not get along. Connor's relationship with respondent got progressively worse after the parties' divorce. Respondent is remarried, and her new husband has children from a previous marriage.

¶ 39 To say this is a complicated family matter is an understatement. Respondent has failed to convince us that petitioner caused undue delay. Here, the trial court denied both parties' requests for retroactive child support. We cannot say the trial court abused its discretion in failing to award respondent retroactive child support.

¶ 40 CONCLUSION

¶ 41 While it is difficult to discern petitioner's income, the trial court's approach was reasonable. The trial court's order is extensive and detailed, and shows the trial court simply did not believe respondent. The trial court was in a better position than we are to

judge the credibility of the parties. Accordingly, we affirm the judgment of the circuit court of Monroe County.

¶ 42 Affirmed.