SIXTH DIVISION
March 23, 2012

No. 1-10-2706

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SARAH E. CORWIN, n/k/a SARAH HASTINGS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 02 D 331147
	)	
SCOTT L. CORWIN,	)	The Honorable
	)	Nancy J. Katz,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Justices Lampkin and Palmer concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's decision is reversed and its child support order vacated because the court improperly imputed income of the noncustodial parent's spouse. The court abused its discretion in setting a support order that created an incentive to frustrate visitation. Appellant ordered to pay temporary child support until a new child support hearing is held on remand.

¶ 2 The trial court granted the father's petition for child support from the mother, the noncustodial parent, since remarried and a stay-at-home mother. The court found that a substantial change in circumstances had occurred when the father's financial resources had decreased, and the mother spent less money on visitation travel. The court ordered the mother to pay no less than $1,000 and up to $3,000 per month in child support, analogizing the financial support provided by the mother's new husband to gifts, which effectively imputed a substantial portion of the husband's income to the mother. The child support order provided that $3,000 in child support was due when the mother failed to visit the child in a calendar-month period. The court denied the mother's motion to reconsider, which contended that Illinois case law does not permit imputing the husband's income to the mother. We agree with the mother and reverse and remand for a new child support hearing.

¶ 3 BACKGROUND

¶ 4 Sarah Hastings (formerly Sarah Corwin) and Scott Corwin married in 1999 and divorced in 2004. Sarah received residential custody of their daughter, Trinity. At the time of the divorce, both parties claimed to be unemployed. Scott supported himself through periodic self-employment. He has a master's degree and in the past has had jobs that provided a substantial income. Sarah has a short employment history, consisting of mostly minimum wage jobs. She does not have a college degree.

¶ 5 In 2006, Sarah married John Hastings, a Utah resident. She petitioned the court to remove Trinity to Utah, but she later withdrew the petition. The parties then entered into an agreed order modifying their custody arrangement. The circuit court adopted the agreed order as its own,

which it entered on July 27, 2006. The order provided that Scott would have residential custody of Trinity, while Sarah moved to Utah. The order further provided that residential custody of Trinity would switch to Sarah when Trinity reached the age of 12. Trinity was six years old at the time. Pursuant to the agreed order, neither party would pay the other child support. At the time they signed the agreement, Scott was self-employed and Sarah was not employed.

¶ 6 Following her move to Utah, Sarah made monthly trips to visit Trinity in Illinois. Since marrying John, Sarah has not worked. John earns a significant income. He pays Sarah's living expenses and an unspecified allowance each month for additional expenses. Sarah and John keep the rest of their finances separate, using separate bank accounts and credit cards. Sarah maintains a checking account and does not have any other bank accounts. She drives a car that John owns. John is the sole owner of their house in Utah.

¶ 7 In 2009, Sarah became pregnant, which her doctors considered to be "high-risk." The doctors recommended substantial bed rest and that she not travel by air. Sarah's visits to Illinois decreased significantly. Sarah visited Trinity approximately 24 times in 2007 and 23 times in 2008, but less than 10 times in 2009. When asked how frequently she would visit Trinity in 2010, Sarah answered, "I would say closer to five [times], maybe somewhere in the middle [of five and 24 times]. *** I can only speculate." Sarah stated that her son had health problems, and the amount of her travel would depend upon the child's health.

¶ 8 Scott filed his first petition to set child support in 2008. He argued that costs of Trinity's care had increased, which constituted a change of circumstances. At the time, Scott was employed, earning an annual income of $150,000 plus approximately $100,000 in bonuses. The

court declined to find a change in circumstances to justify a support modification. Sometime after the court denied the petition, Scott lost his job. He began receiving $2,236 per month in unemployment benefits. To supplement that income, he withdrew $5,000 per month from his savings account and $50,000 from a retirement fund. He continued operating his self-run business, but it was not generating any profit. Citing these changes in his financial situation, Scott filed another petition on January 8, 2009, to set child support. This is the petition at issue in this appeal.

¶ 9 In his petition, Scott alleged that Sarah had drastically reduced the times she traveled to Illinois to see Trinity, which reduced her travel expenses. Scott argued that the reason child support was set at zero in the agreed order was the anticipated travel expenses Sarah would incur. Because Sarah was no longer spending as much money for travel, Scott argued that those funds should go to child support. Scott claimed that even after the birth of her child in Utah, which ended her travel restrictions because of her "high risk" pregnancy, Sarah visited Trinity much less often. Scott testified that he spends more money on babysitters and activities for Trinity because Trinity has been spending less time with her mother.

¶ 10 Following a hearing, the trial court found that circumstances had changed to warrant a new child support order. The court determined that Scott's income had decreased substantially from his loss of employment, and Sarah's travel expenses decreased because she was visiting less often. The court noted that the 2006 agreed order setting child support at zero did not contemplate a situation in which Scott earned no money from employment. In terms of the amount of child support Sarah should pay, the court noted that "under [*In re Marriage of*] *Rogers*, [213 Ill. 2d 129,

131 (2004),] a substantial income is available to Ms. Hastings. Her living expenses [and] personal expenses are all paid for by someone else."

¶ 11 The court set child support at $3,000 per month. A flat amount of $1,000 was to be paid to Scott on the first of each month; the balance of $2,000 would be paid only if no visitation occurred between Sarah and Trinity in a calendar month. Otherwise, the travel expenses would be deducted from the balance of $2,000 and the unused portion would be owed by Sarah as child support. Sarah was ordered to pay this difference to Scott by the tenth day of the following month. Under no circumstances would Sarah be obligated to pay more than $3,000 or less than $1,000 as child support.

¶ 12 Sarah filed a motion for reconsideration arguing that the trial court had improperly imputed her spouse's income to her. The trial court denied the motion. Sarah appeals.

¶ 13 ANALYSIS

¶ 14 Sarah argues that the trial court erred in (1) finding that circumstances had changed, which warranted a modification to the amount of child support, and (2) setting the amount of child support Sarah must pay by imputing a substantial portion of her husband's income to her.

¶ 15 We review a trial court's decision to modify a child support order under an abuse of discretion standard. *In re Marriage of Garrett*, 336 Ill. App. 3d 1018, 1020 (2003). An abuse of discretion occurs when the court misapplies the law. " 'The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.' " *Najas Cortes v. Orion Securities, Inc.*, 362 Ill. App. 3d 1043, 1047 (2005) (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)).

¶ 16 Change in Circumstances.

¶ 17 Courts have the power to modify child support orders "upon a showing of a substantial change in circumstances." 750 ILCS 5/510(a)(1) (West 2006). The party seeking a modification has the burden to show that a substantial change has occurred. *In re Marriage of Eberhardt*, 387 Ill. App. 3d 226, 231 (2008). A "change in circumstances *of any nature* that would justify equitable action by the court in the best interests of the child" can provide the basis for a modification. (Emphasis in original.) *In re Marriage of Singleteary*, 293 Ill. App. 3d 25, 34 (1997). A change of income is a new circumstance that can warrant a modification in child support. *Eberhardt*, 387 Ill. App. 3d at 231. A court may also increase child support if the moving party proves the payor parent has an increased ability to pay. *Garrett*, 336 Ill. App. 3d at 1021.

¶ 18 Scott argues three major changes in the parties' circumstances support the trial court's order: (1) his financial resources have declined significantly; (2) Sarah's travel costs have decreased; and (3) the costs of Trinity's care have increased.

¶ 19 According to Scott, his loss of employment has made it more difficult for him to support Trinity without a contribution from Sarah. Sarah argues that Scott's loss of employment does not constitute a change of circumstances because Scott was self-employed at the time the agreed order was entered and remains self-employed today. We note, however, that Scott's focus is not the change in his employment status, but rather the change in his income. It is undisputed that Scott is struggling financially and has had to dip into his savings to support Trinity. This was not the case in 2006 when the court adopted the parties' agreement that no child support would be paid.

While no evidence appears in the record showing the precise amount of Scott's income in 2006, the agreed order, as the trial court noted, "[did] not contemplate zero income virtually from self-employment and no W-2 wages at all." Because Scott now has no income, circumstances have changed.

¶ 20 In addition, Trinity's living expenses have increased. As with all children, as Trinity gets older, her food, clothing, and activities cost more. "[A]n increase in children's needs can be presumed on the basis that they have grown older and the cost of living has risen," and this can constitute a change in circumstances. *In re Marriage of Sweet*, 316 Ill. App. 3d 101, 105 (2000).

¶ 21 For both these reasons, the trial court did not abuse its discretion in holding that a substantial change in circumstances occurred, which warranted a modification of the 2006 child support order. For reasons we make clear below, we reject the assertion that fewer visits by Sarah can constitute a change of circumstances alone to support a modification in the child support order.

¶ 22 Child Support Award

¶ 23 Sarah also argues that the trial court erred in setting child support at $3,000 per month because it impermissibly imputed her husband's income to her. Sarah points to her occupation as a stay-at-home mom with no outside employment. Nor, as she contends, would she be able to earn a substantial salary in the job market given her educational level. Consequently, even if income potential were the measuring stick, her potential earning ability is low. In any event, she points to her lack of "income" and asserts the order requiring substantial child support lacks an evidentiary basis. Scott argues that based on the amount of money her husband has spent on

Sarah's attorneys and the amount she spent on her trips to visit Trinity in 2007 and 2008, the support provided by Sarah's husband should be treated as "gifts," which can be considered in calculating child support.

¶ 24 The trial court determines the appropriate amount of child support. *Singleteary*, 293 Ill. App. 3d at 35. Section 505 of the Illinois Marriage and Dissolution of Marriage Act provides the guidelines to set the amount of child support. 750 ILCS 5/505(a)(1) (West 2006). The guidelines provide that a noncustodial parent's "net income" should be used to set the amount based on the applicable percentage for the number of children involved. *Id.* A court may impose an obligation on a party commensurate with the party's earning potential, even if that party has no actual income. *Sweet*, 316 Ill. App. 3d at 107. In such a case, the court may deviate from the guidelines; in so exercising its discretion, the court examines several factors. *Singleteary*, 293 Ill. App. 3d at 35-36. The factors include (1) the financial resources of the child; (2) the financial resources of the custodial parent; (3) the standard of living the child would have enjoyed had the marriage not been dissolved; (4) the physical and emotional condition of the child and her educational needs; and (5) the financial resources of the noncustodial parent. *Id.* at 35.

¶ 25 We note at the outset that the rule for determining the financial resources of a noncustodial parent who has remarried is in flux. The traditional rule has been that "[t]he financial status of a current spouse may not be considered to ascertain the ability of a party to fulfill a child support obligation." *In re Marriage of Keown*, 225 Ill. App. 3d 808, 813 (1992); see also *Street v. Street*, 325 Ill. App. 3d 108, 113 (2001) (noting the "long line of cases" that have held that a new spouse's income is not relevant in proceedings seeking to modify child support orders). In a similar vein,

the legislature has provided by statute that "[n]either husband nor wife shall be liable for *** the separate debts of each other." 750 ILCS 65/5 (West 2006). However, as the court in the *Street* case noted, "there is clearly a current trend in the case law moving away from the traditional rule of law on this issue." *Street,* 325 Ill. App. 3d at 114.

¶ 26 Several courts have held that it is proper to examine the finances of a current spouse of the noncustodial parent when their incomes are commingled. *In re Marriage of Baptist,* 232 Ill. App. 3d 906, 920 (1992). It is also equitably to consider the current spouse's income "to determine whether the child support obligation would imperil the supporting parent and his or he spouce's ability to meet their needs." *Id.* (citing *Keown,* 225 Ill. App. 3d at 813). Similarly, another court has approved consideration of whether the remarriage of the payor parent provided her with greater financial support to enable her to contribute more of her own income to her children. *In re Marriage of Riegel,* 242 Ill. App. 3d 496, 499 (1993). In other words, "courts have *** determined 'income' includes the availability of additional spendable funds due to a spouse's income." *In re Marriage of McGowan,* 265 Ill. App. 3d 976, 978 (1994) (citing *Keown,* 225 Ill. App. 3d at 808).

¶ 27 We have found no case, however, that has ruled upon the particular issue presented by the instant case; that is, where the noncustodial parent earns no income, may the income of the new spouse be treated as if a portion is "income" of the noncustodial parent for purposes of setting child support. Nor is the record before us fully developed as to the funds truly available to Sarah from her husband. The limited record reveals that Sarah and John do not pool their finances. John was never a party to the proceedings below; thus, he was never required to submit financial

information. Nevertheless, it is clear that John earns a substantial income and that the circuit court in this case considered John's substantial income in setting the child support due from Sarah. The court read the *Rogers* case to permit it to "impute [John's] income" to Sarah. "[T]hey've obviously used [John's] assets to pay for their joint expenses and her individual expenses, another [basis in *Rogers*] for the court to impute income."

¶ 28 In *Rogers*, a mother sought to have a father's child support obligation increased. *Rogers*, 213 Ill. 2d at 131. The father earned a net income of $15,000 from a teaching job, and he received approximately $46,000 in gifts and "loans" from his parents each year. *Id.* at 133. He did not have to repay the "loans." *Id.* at 134. The trial court held that the $46,000 the father received constituted gifts that qualified as income and set support at 20% of $61,000 in accordance with the guidelines for a single child. *Id.* at 133. The supreme court affirmed that the "loans" were in effect gifts, all of which constituted income. *Id.* at 137. The supreme court looked to the plain meaning of the word "income" in the statute. *Id.* at 136-37. The supreme court held that the continuous stream of gifts and loans were a viable source of funds to provide a standard of living to the father that he could not sustain on a net salary of $15,000, and therefore the gifts and the loans from the parents qualified as income. *Id.* at 140.

¶ 29 Based on the ruling in *Rogers*, the trial court reasoned that the money Sarah received from John for her litigation expenses and visitation travel costs were equivalent to the gifts the *Rogers* father received. That is an extension of *Rogers* we cannot subscribe to, and one that the record before us does not support.

¶ 30 That John, as Sarah's husband and the provider for his family, pays for the things that

Sarah needs is hardly the equivalent of parents loaning or giving money to a grown son. A husband paying the living expenses for his wife, who in turn has an obligation to support a child from a different marriage, cannot fairly be called a gift, at least under our current state of the law. As we stated above, we are aware of no Illinois case that permits a substantial portion of the spouse's income to be factored into the noncustodial parent's child support obligation when the noncustodial parent is not employed. A ruling that allows John's support for Sarah to qualify as a gift under *Rogers*, without clear limitations, expands the definition of "income" far beyond what our supreme court stated in *Rogers*.[1]

¶ 31 Sarah claims that John gives her no money beyond a "limited allowance." Sarah contends that the "income" imputed to her far exceeded her earning potential given her level of education and her employment history. See *Sweet*, 316 Ill. App. 3d at 107. Even considering John's support, which might enable Sarah to contribute a higher percentage of her own income based on availability of greater resources *(McGowan*, 265 Ill. App. 3d at 978), $3,000 per month is excessive. Sarah claims that she is willing to pay child support, which we find no reason to doubt. In fact, at oral argument, Sarah admitted that child support of $1,000 per month may not be

[1] Taking the $3,000 Scott would receive as child support if Sarah were unable to visit during any one month, we calculate Sarah's net monthly income to be imputed at $15,000, based on the 20% in the guidelines for the support of a single child. The annual gross salary for a net income of $15,000 per month would approach $300,000. Even accepting the evidence in the record that John earns $1 million a year, which Sarah contests, we are unpersuaded that a $300,000 income can reasonably be imputed to Sarah.

excessive.

¶ 32 The method by which the trial court used to fluctuate the amount Sarah would have to pay as child support is equally troubling. The trial court based the majority of the payment on whether Sarah visited Trinity each month or paid for Trinity's travel to visit her. While we are confident the trial judge intended to encourage more visitation between Sarah and Trinity, the order could have the opposite effect. The fewer visitation trips between Sarah and Trinity, the more cash Scott receives. We see no reason Scott should receive greater child support should Sarah be unable to visit with Trinity in any particular month. While we likewise do not believe Scott would seek to dissuade visitation, a court should not sanction a child support payment scheme that ties the amount of child support to the amount of visitation by the noncustodial parent. The very possibility that a custodial parent would benefit by receiving greater child support should visitation be frustrated is enough to compel reversal in this case.

¶ 33 The trial court abused its discretion in setting child support in the amount of $3,000. In the exercise of our inherent authority, we modify the child support order *nunc pro tunc* to the date of its entry of March 16, 2010. We remand to the circuit court for a new hearing to set child support. We reduce the child support to $1,000 per month, as the amount Sarah must pay until a new child support hearing is held. Sarah is entitled to a monthly credit for any monthly amount paid in excess of $1,000 in child support to Scott since March 16, 2010.

¶ 34 CONCLUSION

¶ 35 Changed circumstances exist to permit a modification of a child support order that provided, through the agreement of the parties, that no support be paid. However, the trial court

abused its discretion by imputing a substantial portion of the income of the spouse of the noncustodial parent under *Rogers*, and in adopting a method of calculating child support based on whether monthly visitations occurred. We vacate the child support order and enter a temporary child support amount of $1,000 per month until a new child support hearing is held in the circuit court of Cook County.

¶ 36 Reversed and remanded with directions.