

THIRD DIVISION
September 12, 2012

No. 12-0859

NOTICE: This order was filed under Supreme Court Rule 23(c)(2) and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARION IVEY,)	Appeal from the
)	Circuit Court of
Petitioner-Appellee,)	Cook County
)	
v.)	
)	No. 10 D4 30251
ROGER IVEY,)	
)	
Respondent-Appellant.)	Honorable
)	Lisa Ruble Murphy,
)	Judge Presiding.

ORDER

PRESIDING JUSTICE SALONE delivered the judgment of the court.
Justice Steele and Justice Neville concurred in the judgment.

HELD: Denial of the motion for substitution of judge as of right was proper; the continuance of the motion for permanent child support did not violate respondent's constitutional rights; finding that respondent waived his rights to petitioner's retirement account was not against the manifest weight of the evidence; custody agreement granting residential custody of the children to petitioner was valid; petitioner did not meet his burden of proof in showing the application of the child support guidelines was inappropriate. The trial court erred in determining the amount of child support respondent was required to pay; cause remanded for factual determination of respondent's income.

¶ 1 Respondent Roger Ivey (Roger), appeals from several rulings and findings of the lower court related to his divorce from petitioner Marion Ivey (Marion). For the following reasons, we affirm in part and reverse in part.

¶ 2 Roger and Marion were married on April 6, 1996, in Cook County, Illinois. They lived as husband and wife until June 2010. Marion filed for divorce on June 14, 2010. The couple has three children, A.D., A.V. and A.E., who are all minors.

¶ 3 In all matters related to the divorce, Marion was represented by counsel. Roger did not obtain counsel and proceeded *pro se*. On April 8, 2011, the court entered a temporary child support order against Roger in the amount of \$1225 per month. On April 20, 2011, the parties entered into a Custody Judgment Agreement (Custody Agreement) whereby both Roger and Marion were given joint legal and physical custody; Marion was given residential custody. On November 15, 2011, the court entered the Judgment for Dissolution of Marriage (Divorce Decree), which incorporated the Custody Agreement into its order. The Divorce Decree, among other things, made permanent the child support obligation of \$1225 per month to Marion. Shortly thereafter, the court modified the child support order, lowering Roger's obligation to \$1158 per month. Roger then filed a Motion to Vacate Judgment for Dissolution of Marriage, which was denied. This timely appeal followed. Roger has raised a number of issues relating to the Divorce Decree and the related proceedings. We will address each in turn.

¶ 4 *1. Denial of Motion for Substitution of Judge*

¶ 5 Roger filed a motion for a temporary restraining order against Marion on September 30, 2010. He sought to prevent Marion from intimidating and willfully depriving the children under the

Illinois Domestic Violence Act. He did not allege any specific violations, but merely cited the definitions contained therein. Nor did he plead any specific facts alleging in what ways Marion intimidated or deprived the children. The motion for the restraining order was stricken when Roger failed to appear in open court.

¶ 6 One week later, on October 7, 2010, Roger simultaneously filed motions for substitution of judge with cause and substitution of judge as of right. In his for cause motion, Roger alleged that the trial judge had ruled against Roger's motion for a restraining order that he claims he did not file. In fact, the complete court record containing all documents and orders filed in the proceedings include a motion for a restraining order signed by Roger and stamped by the clerk of the court. After a hearing, Roger's for cause motion was denied.

¶ 7 Roger now appeals to this court claiming the trial court erred in denying his substitution as of right motion. Our review of a trial court's ruling on a motion for substitution of judge as of right is *de novo*. *In re D.M.*, 395 Ill.App.3d 972, 977 (2009).

¶ 8 We first note that Roger did not cite the correct statute in his substitution as of right motion. Even assuming he had cited the proper statute, his argument is without merit. A party is entitled to substitution of judge as of right if the motion is presented before trial or hearing begins and before the judge to whom it is presented has ruled on a substantial issue in the case, or if the motion is presented by consent of the parties. 735 ILCS 5/2-1001(2)(ii) (West 2010). However, if a movant has had an opportunity to form an opinion as to how the judge may rule on future motions, a motion for substitution of judge as of right may be properly denied. *In re D.M.*, 395 Ill.App.3d at 976-977. The purpose of this exception is to prevent litigants from "judge shopping" after developing an

opinion that a judge is unfavorably disposed to his or her case. *Id.* at 978. In Roger's simultaneous for cause motion, he alleged that the judge held a bias against *pro se* litigants. He also asserted his belief that the judge would rule against any emergency motions he were to file. In fact, the court made an adverse ruling to Roger's motion. He then developed an opinion as to how the judge would have ruled on his cause going forward. This is precisely the type of behavior that is intended to be discouraged. Therefore, the trial court did not err in denying Roger's motion for substitution of judge as of right.

¶ 9 2. *Continuance of Roger's Motion for Child Support*

¶ 10 Roger's next claim is that the court violated his rights under the Fifth and Fourteenth Amendments of the United States Constitution by continuing his motions for child support until trial while ruling on Marion's pre-trial motion for child support. We review *de novo* whether a person's constitutional rights have been violated. *In re A.W.*, 231 Ill.2d 92, 106 (2008). However, the evidence does not support Roger's claim. On September 9, 2010, Marion filed a motion seeking, among other things, temporary child support from Roger. On September 16, 2010, Roger filed a similar motion seeking temporary child support from Marion. The court awarded Marion temporary child support on April 8, 2011. Roger then filed a motion seeking permanent child support on May 26, 2011. On July 8, 2011, the court continued all then-outstanding motions until the full trial. Although Roger's May 26 motion was titled "Supplemental Arguments for Order of Child Support", in the motion it is clear that he was seeking permanent, not temporary, child support. The record shows it was Roger's motion for permanent support that was continued until trial, not his motion for temporary support. While Marion prevailed on the matter of temporary support, there is nothing in

1-12-0859

the record to support Roger's bald assertion that his motion for temporary support was never considered by the trial court. We find no evidence that Roger's constitutional rights were violated by the continuation of his permanent child support motion.

¶ 11 3. *Marion's Retirement Account*

¶ 12 Under the Divorce Decree, the court found that Roger waived his rights to Marion's TRS retirement account. Marion was granted full and sole rights to this account. Roger was not granted any interest in the account, including any future survivor or spousal benefits in such account. Roger now claims that the trial court failed to make a ruling on whether this account was marital property, and argues that it should have been deemed marital property on principles of equity.

¶ 13 In the Divorce Decree, the trial court found that Roger had waived any rights to the retirement account. The trial court's findings of fact will not be disturbed unless those findings go against the manifest weight of the evidence. *Corral v. Mervis Industries, Inc.*, 217 Ill.2d 144, 154 (2005). Under this standard, the trial court's decision will only be reversed if the opposite conclusion is apparent, or when the findings appear to be unreasonable, arbitrary or not based on the evidence. *Id.* at 155. Here, the evidence clearly supports the trial court's finding that Roger waived any rights he may have had to the TRS account. In his Counter-Petition to Dissolution of Marriage (Divorce Counter-Petition), Roger expressly waived his rights to any of Marion's retirement accounts. Roger concedes that he waived those rights, but claims that he later revoked this waiver and reasserted his rights via an amendment to his Divorce Counter-Petition. The amendment is not in the complete record of the proceedings, a fact that Roger also acknowledges. On the face of the evidence before us, we cannot say that the trial court erred in awarding Marion sole rights to the TRS

retirement account. The opposite conclusion was not clearly evident, the court's findings were not unreasonable or arbitrary and were clearly based on the evidence presented.

¶ 14 4. *Grant of Residential Custody to Marion*

¶ 15 Roger next contends the court erred in granting Marion residential custody of the children. The issue of residential custody was decided in the Custody Agreement, which was not an order imposed by the court but rather a consent decree reflecting the private, contractual agreement of the parties. *See In re Marriage of Rolseth*, 389 Ill.App.3d 969, 971 (2009). The Custody Agreement was signed by Roger and each page was initialed by him. The validity of the terms of the Custody Agreement must be reviewed according to the principles governing consent decrees.

¶ 16 Consent decrees are generally binding on the parties, and cannot be modified without the consent of each party. *Id.* A court must uphold a consent decree unless one of the limited exceptions to this rule is present. *Id.* at 972. Our common law has established the legitimate reasons why a court may invalidate a consent decree. These reasons commonly include: fraud, coercion, incompetence of one of the parties, gross disparity in the bargaining positions of the parties or newly discovered evidence; a court may also invalidate it if it determines the agreement is void as a matter of public policy, or finds errors of law apparent on the face of the record. *See generally Rolseth*, 389 Ill.App.3d at 971-972 (giving an overview of recent case law on challenges to consent decrees). Roger has not alleged any established reason for challenging the Custody Agreement; rather he argues that the award of residential custody to Marion was unfair. Because he has not given any cognizable reason why this court should disturb an arrangement that he expressly consented to, we may not invalidate the Custody Agreement with respect to the matter of residential custody.

¶ 17 5. *Child Support Determination*

¶ 18 Roger also claims the trial court erred in determining the amount of child support granted to Marion. The determination of child support is governed by the Illinois Marriage and Dissolution of Marriage Act (the Act). 750 ILCS 5/101—*et seq.* (West 2010). The Act provides guidelines indicating the minimum amount of support to be paid by the supporting party. *In re Keon C.*, 344 Ill.App.3d 1137, 1141 (2003). Under the guidelines, Roger, in supporting three children, is required to pay at least 32% of his net income. 750 ILCS 5/505(a)(1) (West 2010). The guidelines must be followed, unless the court finds application of the guidelines would be inappropriate, based on several enumerated factors. *Anderson v. Heckman*, 343 Ill.App.3d 449, 452-453 (2003); 750 ILCS 5/505(a)(2) (West 2010).

¶ 19 In the Divorce Decree (as later modified by the court on November 23, 2011), Roger was required to pay to Marion the greater of \$1158 monthly or 32% of his net monthly income. Roger challenges the applicability of the guidelines. Section 505(a) of the Act creates a rebuttable presumption that a specific percentage of a non-custodial parent's income represents an appropriate award of child support. *In re Marriage of Adams*, 348 Ill.App.3d 340, 343 (2004); *Stockton v. Oldenburg*, 305 Ill.App.3d 897, 902 (1999). The guidelines apply even where the parties have joint legal custody and one party has residential custody. *In re Marriage of Demattia*, 302 Ill.App.3d 390, 393 (1999). The party wishing to deviate from the guidelines carries the burden of proof that the guidelines would have been inappropriate. *Roper v. Johns*, 345 Ill.App.3d 1127, 1130 (2004).

¶ 20 Roger argues that the guidelines should not have been applied based on consideration of the factors enumerated in Section 505(a)(2) of the Act: the financial needs of the child; the financial

1-12-0859

needs of the custodial parent; the financial needs of the non-custodial parent; what the children's standard of living would have been had the marriage not been dissolved; and the physical, emotional and educational needs of the children. 750 ILCS 5/505(a)(2) (West 2010).

¶ 21 Roger makes several arguments in support of his claim that the trial court should have deviated from the guidelines. First he argues that Marion does not need support from him, as she was fully able to provide for the children without the court ordered temporary support. However, during that time, Roger was voluntarily paying to Marion \$1000 per month, slightly less than he was eventually ordered by the court to pay. Roger also argues that his children's standard of living will be reduced because of his support obligation. For example, Roger notes that his children will now have to share a bedroom because he cannot afford to rent an apartment in which they each have their own room. He will also no longer be able to afford to take them on their yearly trip to visit their only living grandparent in Atlanta, Georgia.

¶ 22 While we take careful consideration of the impact of the divorce upon the lives of the children, Roger has not shown that their standard of living will be significantly affected to the extent needed to justify deviation from the guidelines. Nor has Roger provided persuasive proof that Marion's financial circumstances warranted the court to deviate downward from the guidelines. Roger has made no other arguments that the other factors provided in Section 505(a)(2) were not properly considered by the trial court. Thus, we cannot say that Roger has carried his burden of proof in showing that the application of the guidelines was inappropriate in his case.

¶ 23 Roger's last argument is that the trial court erred in its finding of his net income. Pursuant to the Rule 13.3.1 Disclosure Statement Roger filed with the court, his net monthly income is

1-12-0859

\$3,590.32. Pay stubs entered into the record indicate that his average net monthly income is \$3,436.16. The trial court determined that his net monthly income was \$4,000. The court did not state the reasons for this finding in the child support order. The court's finding goes against the evidence presented in the court record of proceedings. We therefore remand to the trial court for a modification of the child support order to include a detailed finding of Roger's net income and, if necessary, an adjustment to the child support obligation.

¶ 24 Affirmed in part, reversed in part; cause remanded.