2011 IL App (2d) 091225-U
No. 2—09—1225
Order filed September 2, 2011



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| In re MARRIAGE OF<br>SHEILA McCLURE,<br><br>Petitioner-Appellant,<br><br>and<br><br>MICHAEL J. McCLURE,<br><br>Respondent-Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court<br>of Du Page County.<br><br><br><br>No. 04—D—1455<br><br>Honorable<br>Linda E. Davenport,<br>Judge, Presiding. |

JUSTICE BOWMAN delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

**ORDER**

*Held*: The trial court erred in deviating from statutory child support guidelines based on the husband's voluntary decision to pay for private high school tuition for two of the children. Contrary to the wife's second argument, the trial court's order affirmatively required the husband to report certain bonus income to her, but on remand she could request that he also be required to show lack of bonus income. The trial court did not err in denying the wife's petition for contribution to her attorney fees.

¶ 1 Petitioner, Sheila McClure, appeals from the trial court's postdissolution judgments that, *inter alia*, set child support from respondent, Michael J. McClure, and denied her petition for contribution to attorney fees. Petitioner argues that the trial court erred: (1) in deviating downward

from child support guidelines based on Michael's voluntary decision to send two of their children to a private high school; (2) by not requiring Michael to provide her with proof of his income every month, so as to enforce the requirement that he pay as child support an additional percentage of any gross income exceeding $25,000 per month; and (3) by denying her petition for contribution to attorney fees. We affirm in part, reverse in part, and remand.

¶ 2 I. BACKGROUND

¶ 3 The parties were married on June 24, 1989, and had four children: John, born December 24, 1992; Martin, born January 29, 1994; Mary, born June 18, 1996, and Colin, born October 13, 1997. The parties' marriage was dissolved on October 12, 2005, and the judgment incorporated their marital settlement agreement. The agreement provided for joint legal custody of the children, with Sheila being the residential custodian. Based on Michael's estimated annual income of $462,000 and Sheila's imputed income of $40,000, Michael agreed to pay $13,000 per month in unallocated support for 36 months, beginning September 1, 2005. Sheila retained the right to file a petition asking that the court review and extend maintenance.

¶ 4 The marital settlement agreement included a provision about the children's private school tuition in a section discussing child custody and parenting, which was separate from provisions regarding family support and child support. The agreement stated:

> "The parties mutually agree that the minor children shall continue to attend grammar school at St. John of the Cross, where they are currently enrolled. The parties shall divide the costs of all private school tuition for each child at St. John of the Cross 75% by HUSBAND and 25% by WIFE. The parties shall divide equally all external fees that accompany the tuition bills. *The children's High School shall be the sole decision of the*

*HUSBAND, and he shall be solely responsible for any and all costs thereof. The parties acknowledge that the high school may be public or private* and they may have to designate HUSBAND's residence as primary for educational purposes." (Emphasis added.)

¶ 5 The section of the agreement regarding child support stated: "The HUSBAND shall pay child support for each child for the period commencing the date Family Support ends ***. The amount of child support shall be determined as per 750 ILCS 5/505 or its successor statute."

¶ 6 On August 28, 2008, Sheila filed a petition to extend the family support, including maintenance. On September 12, 2008, she petitioned for temporary support. On October 14, 2008, the trial court ordered Michael to pay $8,765 per month in temporary child support and $1,000 per month in temporary maintenance. On November 19, 2008, Michael filed a petition to terminate maintenance, arguing that his maintenance payments should be retroactively terminated to the date Sheila allegedly began residing with someone on a resident, continuing conjugal basis. Michael also argued that Sheila's income had increased, so she was not entitled to future maintenance. On July 27, 2009, Sheila filed a petition for contribution to attorney fees and costs, and Michael filed such a petition two days later.

¶ 7 A trial proceeded on various dates from July through October 2009. Regarding the children's high school, Sheila testified as follows. John and Martin attended St. Ignatius, and Michael paid the tuition. John had previously gone to Fenwick, but he wanted to transfer to St. Ignatius. John told her that Michael was aware of his desire and approved the transfer. Sheila assisted John by submitting the transfer form. She did not discuss the issue with Michael.

¶ 8 Michael testified as follows on the issue. John was initially enrolled at Fenwick, but he wanted to transfer to St. Ignatius, which cost $1,500 more per year than Fenwick. When Michael

told John that they needed to talk about the transfer, John said that the application had already been submitted. Michael agreed that he knew that John wanted to transfer prior to the form being sent. When asked whether it was solely his decision whether his children attended St. Ignatius, Michael responded in the affirmative.

¶ 9 The parties offered extensive testimony regarding their respective finances and the issue of Sheila's alleged conjugal cohabitation. At the close of Michael's case-in-chief, the trial court granted Sheila's motion for a directed finding on the cohabitation issue. Regarding the remaining issues, the trial court issued a letter opinion and corresponding order on October 19, 2009. The trial court found as follows regarding their finances, in relevant part. Sheila was employed and working 30 hours per week as a finance director. Her 2008 Medicare wages were $91,647.46. She received a $13,000 bonus in 2008 and had not yet received a 2009 bonus. Michael's salary was $300,000 per year, he received a $1,000 monthly car allowance, and he had the potential to earn a $150,000 bonus per year. In spring 2009, he received a $138,000 bonus.

¶ 10 Regarding maintenance, the trial court found that there had been a substantial change of circumstances based on Sheila earning over $91,000 for part-time employment and taking a number of trips, including a $9,000 trip to Ireland with the children. The court found that maintenance was no longer appropriate, and it terminated Sheila's right to maintenance effective January 1, 2009. The trial court stated that the termination resulted in an overpayment by Michael of $10,000 through October 31, 2009.

¶ 11 On the issue of the children's high school, the trial court found that the two eldest children were enrolled at St. Ignatius. John had started at Fenwick but changed to St. Ignatius, which was more expensive. "The testimony was contradictory as to whether this was done with or without

Michael's consent." Michael paid the cost for the children to attend the school, which was $2,400 per month.

¶ 12 For child support, the trial court stated that Michael's annual salary was $300,000, and guideline support for his income was $6,657 per month. However, the trial court found that "Michael's assumption of the costs for two (2) children to attend St. Ignatius [was] a legitimate basis to deviate downward from guideline support." It stated:

> "Based upon Michael paying for two (2) children to attend private high school, $5,500.00 per month in tax-free child support to Sheila is reasonable based upon all of the factors set forth in Section 505 of the Illinois Marriage and Dissolution of Marriage Act. If there are four minor children, and none of them are attending private high school, child support shall increase to $6,657.00 per month effective on the 1st of the month following the last month any of the children attended private high school."

The trial court further ordered that if Michael earned any Medicare wages exceeding $25,000 per month or received certain 1099 income, he was required "within seven days of the receipt of any such income, [to] provide Sheila with a copy of the gross amount of the payment." For four minor children, Michael was required to pay Sheila 20% of the gross amount of the check.

¶ 13 On November 12, 2009, the parties filed respective amended petitions for contribution to attorney fees and costs. Following a hearing, on November 19, 2009, the trial court denied both parties' petitions for contribution. Sheila timely appealed.

¶ 14 II. ANALYSIS

¶ 15 A. Deviation from Statutory Child Support Guidelines

¶ 16 Sheila first argues that the trial court erred in using Michael's voluntary assumption of private high school tuition as a basis for deviating downward from the statutory child support amount. Sheila argues that the parties voluntarily entered into the marital settlement agreement, which does not indicate that payment of private school tuition would affect child support in any way. Sheila argues that the trial court's decision was therefore a direct violation of the dissolution judgment and an agreement reached by the parties. Sheila argues that by taking money Michael is statutorily obligated to pay her and allowing him to instead pay that sum as tuition, the trial court effectively ruled that she must pay for the high school tuition, despite the parties' agreement to the contrary.

¶ 17 Michael first argues that the record on appeal is so deficient as to require affirming the trial court. Michael correctly points out that various reports of proceedings from the trial are absent from the record, including much of Michael's direct testimony and the questioning of Sheila by her own attorney. Sheila responds that the record contains the majority of the parties' testimony, as well as all pleadings and exhibits. She notes that the trial court issued a detailed opinion letter which sets forth its reason for deviating from the child support guidelines, as required by statute. Sheila argues that the omissions in the record are minor and at most, amount to testimony that would have been more favorable to her position. She argues that the record is sufficiently complete to allow for review of the trial court's child support determination and denial of her petition for contribution.

¶ 18 As the appellant, Sheila has the burden to provide the reviewing court with a sufficiently complete record to support a claim of error. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). We agree with Sheila that the record is sufficiently complete to allow us to review the issues she has raised, but we will resolve any doubts arising from the missing transcripts against her. See *id.*

¶ 19 The parties further disagree on the applicable standard of review. Sheila argues that we should apply an abuse of discretion standard, whereas Michael argues that the manifest weight of the evidence standard additionally applies. We agree with Michael to the extent that "[t]he standard of review for a current child support award is whether the award is an abuse of discretion or the factual predicate for the decision is against the manifest weight of the evidence." *Slagel v. Wessels*, 314 Ill. App. 3d 330, 332 (2000). However, we also agree with Sheila that she is not contesting the trial court's predicate factual findings but is rather contesting its decision to allow a downward deviation based on those findings, meaning that we will apply an abuse of discretion standard to her argument.

¶ 20 Michael points out that the trial court found that the evidence was contradictory as to whether he originally consented to John attending St. Ignatius. He argues that "once Sheila engineered the transfer, [he] was put in the untenable position of revoking what the child desired." Michael argues that he is obligated to pay $7,900 per month in children's expenses, in addition to 75% of the tuition costs of the two younger children and 20% of his bonus income. Michael argues that, therefore, the trial court did not abuse its discretion in ordering direct child support at 17% below the guidelines, especially considering that with the St. Ignatius costs alone, his children's expenses are 16% above guidelines. Michael further argues that we may affirm on any basis supported by the record, or if there is an incomplete record. Michael contends that there was no testimony included in the record as to the children's needs or what might reasonably exceed them, and at the same time there was testimony that Sheila was making a significant amount of money, could be making more, and had exercised discretionary, luxury spending.

¶ 21 The Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/501 *et seq.* (West 2008)) provides percentage guidelines for determining appropriate levels of child support. The guidelines apply to initial orders of child support as well as child support modifications. *In re Marriage of Sweet*, 316 Ill. App. 3d 101, 108 (2000). For four children, 40% of the noncustodial parent's net income is presumed to be an appropriate level of child support. 750 ILCS 5/505(a)(4) (West 2008). " 'Compelling reasons must exist in order to overcome that presumption and permit the court to deviate from the guidelines.' " *In re Keon C.*, 344 Ill. App. 3d 1137, 1141-42 (2003), quoting *In re Marriage of Stanley*, 279 Ill. App. 3d 1083, 1085 (1996). Compelling reasons include if the noncustodial parent has very limited resources, or if application of the guidelines would create a windfall for the custodial parent. *Stanley*, 279 Ill. App. 3d at 1086. The party seeking the deviation from the child support guidelines has the burden of producing evidence justifying the deviation. *Department of Public Aid ex rel. Nale v. Nale*, 294 Ill. App. 3d 747, 752 (1998).

¶ 22 In determining whether to deviate from the statutory guidelines, the trial court must consider the child's best interests in light of the factors set forth in section 505 of the Act, which consist of: (1) the child's financial resources and needs; (2) the custodial parent's financial resources and needs; (3) the standard of living the child would have enjoyed absent a dissolution of marriage; (4) the child's physical and emotional condition, and educational needs; and (5) the noncustodial parent's financial resources and needs. 750 ILCS 5/505(a)(2) (West 2008). When determining the child support obligation of a high-income parent, the court must balance the consideration that child support is not intended to be a windfall with the consideration of the standard of living the child would have enjoyed absent a marital dissolution. *In re Marriage of Singleteary*, 293 Ill. App. 3d 25, 36 (1997).

¶ 23 Regardless of the missing trial transcripts here, it is clear from the trial court's ruling that it was ordering a downward deviation from the child support guidelines based exclusively on Michael's payment of tuition for St. Ignatius, and we conclude that the trial court abused its discretion in doing so. The parties' marital settlement agreement clearly gave Michael the sole authority to determine whether the children attended a public or private high school, and it obligated him to pay for the latter if that is what he chose, without mentioning any effect on child support. Although Sheila may have mailed John's transfer application for St. Ignatius, Michael ratified the transfer by proceeding to pay the tuition. The parties' second eldest son apparently also began attending St. Ignatius when he entered high school, without dispute. Michael even agreed at trial that it was solely his decision whether his children attended St. Ignatius. Michael's voluntary decision to send the children to a private high school was not a "compelling reason" to justify deviating from the guidelines.

¶ 24 We find no merit in Michael's argument that there are alternative bases for affirming the trial court's ruling. The trial court ruled that without the high school tuition, Michael was required to pay statutory child support of $6,657 per month for four children, meaning that it did not find any other reason to deviate from the guidelines. Such a determination was not an abuse of discretion. Even otherwise, the alternative reasons cited by Michael in his pleadings to justify a downward deviation, such as him paying for the majority of the children's expenses, his financial support of his new wife and their two young children, and Sheila's increased earnings, are, under the circumstances of this case, not compelling reasons requiring deviation from the child support guidelines. *Cf. Stanley*, 279 Ill. App. 3d at 1987 (prior child support order alone does not justify deviating from the guidelines).

Accordingly, on remand, the trial court shall apply the $6,657 amount for child support and determine the arrearage due to Sheila.

¶ 25 B. Proof of Income

¶ 26 Sheila notes that the trial court's order requires Michael to pay as child support an additional percentage of gross income over $25,000. Sheila states that "[s]aid sums are payable within seven days of the receipt of the additional income." Sheila argues that the trial court erred in failing to require Michael to provide her with proof his monthly income. She maintains that without such proof, the additional child support provision will be unenforceable.

¶ 27 Michael argues that Sheila has forfeited this argument by failing to cite authority. He further argues that the order requires him to produce records of income within seven days of being paid more than $25,000 in a month. Michael argues that there is no reason why Sheila could not file a petition seeking a modification of support if she suspects a basis for it and then avail herself of common discovery practices as any other party would do.

¶ 28 As stated, the trial court's order states that if Michael earned any Medicare wages exceeding $25,000 per month or received certain 1099 income, he was required "within seven days of the receipt of any such income, [to] provide Sheila with a copy of the gross amount of the payment." For four minor children, Michael was required to pay Sheila 20% of the gross amount of the check. Thus, we agree with Michael that the order affirmatively requires him to provide Sheila with proof of his income within seven days of receiving the additional income. However, as we are remanding the case for the trial court to determine the child support arrearage, at that time Sheila may also raise the issue of having Michael provide, at some regular interval, proof of income or a statement of lack

of bonus income. We express no opinion as to whether Michael should be required to produce such additional proof, or what form it should take.

¶ 29 C. Attorney Fees

¶ 30 Last, Sheila argues that the trial court erred in denying her petition for contribution to attorney fees and costs. Sheila's amended petition for attorney fees stated that she had incurred $178,482.75 since the retention of her counsel, and $79,276.98 of that remained unpaid.

¶ 31 The decision to award or deny attorney fees is within the trial court's discretion and will not be reversed absent an abuse of that discretion. *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005). In denying both parties' petitions for attorney fees, the trial court stated as follows. It could not say that Michael made three times what Sheila did because it also had to consider what he was paying her. It did not have pity for either party saying that they were financially strapped. Sheila was making over $90,000 for part-time work and was getting tax free income of $5,500 per month in child support, while Michael was making $300,000 plus a bonus of up to $150,000. It was possible that they did not have the ability to spend over $30,000 per year to send their children to private school, but that was their decision. It did not find that either party had the inability to pay their own fees. The fees and hourly rates were reasonable, but it did not believe that either party had the obligation to pay anything to the other party.

¶ 32 Sheila argues that Michael has a far greater ability to pay her attorney fees than she does. Sheila argues that Michael's gross income was nearly five times her income. She notes that section 503(j)(2) of the Act (750 ILCS 5/503(j)(2) (West 2008)) states that "[a]ny award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under

Section 504." The criteria for division of marital property include the contribution of each party to the acquisition of marital property, including the contribution of a spouse as a homemaker; the value of the property assigned to each spouse; the marriage's duration; each spouse's economic circumstances; the age, heath, occupation, sources of income, and employability of each party; the custodial provisions for the children; and the reasonable opportunity of each spouse for future acquisition of capital assets and income. 750 ILCS 5/503(d) (West 2008). Sheila argues that she contributed a great deal to the value of the marital property and Michael's career by working while he was earning his MBA[1] and then staying home with their children for about 12 years. She maintains that she was not given a very disproportionate split of the marital assets but instead was given 36 months of family support, the maintenance portion of which has since terminated. She argues that her assets have decreased while Michael's assets have increased. Sheila argues that as the residential custodian of four children, she was unable to work a full-time schedule, yet she incurs half of the children's extensive extracurricular fees and costs of providing food and shelter. She maintains that the cost of being a residential custodian significantly exceeds her income and the child support she receives pursuant to the October 2009 order.

¶ 33 Sheila further argues that the trial court did not take into account the above-mentioned section 503(d) factors, failed to make any findings on the parties' respective ability to pay, and instead denied her petition on the basis that she could pay the fees. Sheila cites *In re Marriage of Hacken*, 394 Ill. App. 3d 155 (2009), for the proposition that there is no requirement that the person

[1]We note that Sheila testified that Michael also held a full-time job when he was studying for his MBA, and that she did not work the entire time he was studying for the degree.

seeking contribution to attorney's fees show an inability to pay the fees, and only the parties' relative financial standing should be considered.

¶ 34 We initially consider Sheila's argument about whether a party must first show an inability to pay before obtaining contribution to attorney fees. Section 508 of the Act states:

> "The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order any party to pay a reasonable amount for his own or the other party's costs and attorney's fees. *** At the conclusion of the case, contribution to attorney's fees and costs may be awarded from the opposing party in accordance with subsection (j) of Section 503." 750 ILCS 5/508(a) (West 2008).

As stated, section 503(j)(2) directs the court to consider contribution based on the criteria for dividing marital property.

¶ 35 *Hacken* reasoned that the requirement that a person seeking contribution show an inability to pay does not appear in section 508(a) as amended in 1997, but rather it requires consideration of section 503(d) factors, which all relate to the parties' relative financial standing. *Hacken*, 394 Ill. App. 3d at 162. *Hacken* stated that cases requiring a showing of an inability to pay were repeating language from older cases appling the pre-1997 version of section 508(a). *Id.* Indeed, the prior version of section 508(a) differs, stating:

> "The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order any party to pay a reasonable amount for his own costs and attorney's fees and for the costs and attorney's fees necessarily incurred, or for the *purpose of enabling a party lacking sufficient financial resources to obtain or retain legal*

> *representation*, expected to be incurred by any party." (Emphasis added.) 750 ILCS 5/508(a) (West 1996).

However, our supreme court has stated, relying on the current version of the statue, that section 508 allows for an award of attorney fees where one party lacks the financial resources and the other party has the ability to pay. *Schneider*, 214 Ill. 2d at 174. Such a statement is not contrary to the statute, as it still references consideration of the parties' financial resources. See 750 ILCS 5/508(a) (West 2008). The statute governing interim attorney fees still directly requires a showing that "the party from whom attorney's fees and costs are sought has the financial ability to pay reasonable amounts and that the party seeking attorney's fees and costs lacks sufficient access to assets or income to pay reasonable amounts." 750 ILCS 5/501(c—1)(3) (West 2008). Further, courts continue to cite and rely on the proposition that the Act allows for an award of attorney fees where one party lacks the financial resources and the other party is able to pay. See *e.g.*, *In re Marriage of Streur*, Nos. 1—08—2326, 1—09—0692, 1—09—0782, 1—09—0877, slip op. at 11 (Ill. App. May 11, 2011); *In re Marriage of Schinelli*, 406 Ill. App. 3d 991, 995 (2011). Accordingly, we disagree with *Hacken* that a party's ability to pay his own attorney fees is irrelevant when considering a petition for contribution.

¶ 36 A party is financially unable to pay her fees if it would strip her of her means of support or undermine her financial stability. *Schneider*, 214 Ill. 2d at 174. Here, Sheila earned over $100,000 in 2008 while working part-time. That same year, Sheila contributed over $12,000 to her 401(k) account. Sheila's decision to work part-time could be categorized as a lifestyle choice, as Michael testified that he was willing to have additional parenting time with the children, and the parties' eldest child was of driving age and had a car. In other words, Sheila had a reasonable opportunity

and ability to earn more money. She also exercised significant discretionary spending, including a $9,000 trip to Ireland, among other vacations, and tens of thousands of dollars for home renovations that included remodeling her basement and office. Accordingly, the trial court's determination that Sheila could pay her own fees was not against the manifest weight of the evidence, so its denial of her petition for contribution was not an abuse of discretion.

¶ 37 Even if, *arguendo*, Sheila was not required to show an inability to pay her own fees, we would still arrive at the same result. While Michael's gross income was several times that of Sheila's, Sheila still had the aforementioned ability to earn additional money, and the parties had similar levels of savings. Michael also had the child support obligation for the parties' children, which he was paying to Sheila, private school tuition payments, and two children with his new wife to support, as well as significant attorney fees and other debts of his own. Further, much of Michael's testimony regarding his expenses is not included in the record, requiring us to resolve any doubts from the missing testimony in his favor. Accordingly, even under the standard espoused by Sheila, the trial court acted within its discretion by denying her petition for contribution to attorney fees.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we reverse the trial court's decision to allow a downward deviation from child support guidelines based on Michael's voluntary assumption of private high school tuition. We remand the cause for the trial court to determine the amount of arrearage due. At that time, Sheila may also raise the issue of whether the trial court's judgment should be amended to require some sort of disclosure at regular intervals to show that Michael did not receive bonus income. We affirm the trial court's ruling denying Sheila's motion for contribution to attorney fees.

¶ 40 Affirmed in part and reversed in part; caused remanded.