Nos. 2—10—0682 & 2—10—0989 cons.
Order filed June 16, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF WENDY JABLOW,	)	Appeal from the Circuit Court
	)	of Du Page County.
Petitioner-Appellant,	)	
	)	
and	)	No. 03—D—1739
	)	
STEVEN JABLOW,	)	Honorable
	)	James J. Konetski,
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Bowman concurred in the judgment.

ORDER

Held: Trial court abused its discretion in denying petitioner's petition to modify child support pursuant to section 510(a)(1) of the Marriage and Dissolution of Marriage Act because it did not consider whether a substantial change in circumstances had occurred. Trial court did not abuse its discretion in awarding respondent attorney fees pursuant to section 508(a) of the Marriage and Dissolution of Marriage Act. We affirmed in part and reversed in part and remanded with directions.

In December 2004, the trial court entered a judgment dissolving the marriage between petitioner, Wendy Jablow, and respondent, Steven Jablow. The trial court awarded joint custody of their two minor children with petitioner the primary residential parent, and awarded maintenance to respondent for five years. Petitioner subsequently filed a petition to set child support pursuant to sections 505 and 510 of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/505, 510 (West 2008)), which the trial court denied. Respondent then filed a petition for

contribution to attorney fees pursuant to section 508(a)(3) of the Act (750 ILCS 5/508(a)(3) (West 2008)) and the trial court awarded him $10,000. This consolidated appeal follows. Petitioner contends that (1) the trial court erred in denying her petition to set child support, and (2) the trial court abused its discretion in granting respondent's petition for contribution to attorney fees. We affirm in part and reverse in part.

BACKGROUND

The record reflects that the parties were married in 1982 and had two children. On December 17, 2004, the trial court entered a judgment dissolving the parties' marriage. At the time of the judgment of dissolution, respondent was earning approximately $9,000 annually as a swim teacher and personal trainer. The trial court's judgment granted the parties joint custody of the children and granted petitioner primary residential custody. Incorporated into the judgment was a written letter opinion dated November 17, 2004. The judgment provided that the trial court reserved the issue of child support payments, but the letter opinion expressly provided:

> "The [trial court] has carefully considered the provisions of [section 505 of the Act]. Accordingly, the [trial court] declines to impose the statutory guideline for child support upon [r]espondent's net income."

The letter opinion further specified that the trial court deviated from the statutory guidelines due to the disparity in income between the parties and provided that "[a]ny modification of this provision shall be pursuant to [section 510 of the Act]." The trial court also awarded respondent maintenance for five years, specifying its rationale in the letter opinion.

On January 21, 2010, petitioner filed a petition to set child support. Petitioner alleged that a substantial change in circumstances occurred since the judgment was entered; specifically, the

needs of the children increased and respondent's income increased. Petitioner requested that the trial court order respondent to pay 28% of his net income toward child support in accordance with section 505 of the Act. During a hearing on the petition, the trial court asked petitioner's counsel:

> "As a matter of law since the issue of child support was reserved, is it your opinion that you have to demonstrate a substantial change in circumstances?"

The trial court further stated:

> "I guess any modification to which [section 510] would ordinarily apply in that sense.
>
> But I don't know that—and I'm asking you opinions. When you have a reservation of child support, I don't know that [showing a substantial change in circumstances] be determined. I think it's essentially a *de novo* determination. I don't know."

The parties informed the trial court that its opinion letter expressly provided that any modification to the original child support determination would be pursuant to section 510 of the Act. The trial court then responded:

> "Well that could have—should have been more explicit. That could refer to the dependency exemptions and so forth.
>
> But I really—I think as a matter of law, whether I was clear, unclear, right or wrong, I think—I think the law is that you do not have to demonstrate a substantial change of circumstances, and I'm not going to require it."

On May 21, 2010, the trial court denied petitioner's petition. The trial court's order noted that, pursuant to the submitted exhibits, petitioner's monthly income was $35,970 and the monthly expenses for the minor children were $3,406, while respondent's total income for 2009 was $28,505. The order further provided that petitioner testified that she was seeking child support because both

parents needed to support the children and it was important for the children's self-esteem. The trial court concluded "[n]o foundation was provided for [p]etitioner's opinions or conclusions." The order further noted that petitioner filed her petition almost immediately upon the expiration of respondent's maintenance award.

In addition, on May 18, 2010, respondent filed a petition for contribution to attorney fees and costs. Respondent represented that he incurred $9,579.94 in attorney fees and costs resulting from petitioner's petition. Respondent argued that awarding him fees and costs was appropriate pursuant to section 508 of the Act (750 ILCS 5/508 (West 2008)) because petitioner's income was significantly greater than his. Respondent claimed he was self-employed and his income in 2009 was $24,000 plus worker's compensation benefits for a work-related injury. Conversely, according to respondent, petitioner's income in 2009 exceeded $500,000. On June 28, 2010, the trial court ordered petitioner to pay respondent $5,455 for fees and costs. On June 30, 2010, petitioner filed a notice of appeal with respect to the trial court's May 21, 2010, and June 28, 2010, orders.

On September 3, 2010, respondent filed a petition for fees to defend petitioner's appeal. Respondent again argued that he was entitled to fees due to the disparity in income between him and petitioner. After entertaining argument's on the petition, the trial court stated:

> "[T]he reason [petitioner] is asking for child support from [respondent] was because *** it was the principle of the thing. She wanted her daughters to know that their father contribute to their support.
>
> To me I respect that, but that also sounds a little like sport litigation to me. She has an awful lot of money, and the first day that she could she came after him for child support. She admitted she didn't need the money. That's not controlling, I understand ***.

> But in the meantime, this is in my opinion something that not only did your client start but continues to pursue against someone who makes not ten times less but 20—almost 25 times less. And you have to wonder what the motive is to that, a little bit. Although I guess if you take her at her word she is doing it for her daughters."

On September 28, 2010, the trial court ordered petitioner to pay $10,000 to respondent for past and prospective attorney fees. On September 29, 2010, petitioner filed her notice of appeal with respect to the trial court's September 28, 2010, order. We subsequently consolidated the two appeals.

DISCUSSION

I. Petition to Set Child Support

The first issue raised on appeal is whether the trial court erred in holding that respondent did not have to pay child support. Petitioner raises several arguments in support of this contention, including that the trial court erred by failing to properly adhere to the statutory provisions of section 510 of the Act. We agree.

Section 510(a) of the Act enables a trial court to modify an existing order for child support (1) upon the showing of a substantial change in circumstances or (2) without the necessity of such a change, upon a showing of (a) an inconsistency of at least 20% between the amount of the existing order and the amount of child support that results from application of the guidelines specified in section 505 of the Act, or (b) a need to provide for health care needs or health insurance for the child. 750 ILCS 5/510(a) (West 2010). Upon satisfaction of either requirement for modification, section 510 mandates that the trial court then follow statutory guidelines provided in section 505 of the Act. *Anderson v. Heckman*, 343 Ill. App. 3d 449, 454 (2003). Section 505(a) of the Act provides a rebuttable presumption that a specified percentage of a noncustodial parent's income is an

appropriate award of child support, and this presumption also applies to modification proceedings. *Department of Public Aid ex rel. Nale v. Nale*, 294 Ill. App. 3d 747, 751-52 (1998). The party seeking deviation from the statutory guidelines bears the burden of producing evidence justifying the deviation, and overcoming the presumption requires compelling reasons. *Id.* at 752. Section 505(a) of the Act further requires that when a trial court deviates from the statutory guidelines, "it shall state the amount of support that would have been required under the guidelines" and "shall include the reason or reasons for the variance from the guidelines." 750 ILCS 5/505(a)(2) (West 2010). The modification of child support payments lies within the sound discretion of the trial court, and its decision will not be disturbed absent an abuse of discretion. *In re Marriage of Tegeier*, 365 Ill. App. 3d 448, 453 (2006).

In the current matter, the trial court abused its discretion by misapplying the law and failing to adhere to the statutory requirements of sections 510 of the Act. As noted above, the trial court concluded that it did not need to determine whether a change in circumstances occurred pursuant to section 510(a)(1) of the Act because the judgment of dissolution of marriage reserved the issue of child support. This conclusion, however, ignores the plain language of the trial court's opinion letter incorporated into its judgment of dissolution. The opinion letter expressly provided that the trial court carefully considered the factors outlined in section 505 of the Act and declined to impose the statutory guidelines due to the disparity in income between the parties. This constituted a sufficient finding pursuant to section 505(a)(2). *In re Marriage of Minear*, 287 Ill. App. 3d 1073, 1080 (1997) (noting that a trial court's comments regarding the disparity in income between the parties satisfied the requirements of section 505(a)(2)).

In addition, the trial court's conclusion that it did not have to consider whether a change in circumstances occurred ignored the nature of the petition. Although petitioner titled her petition "petition to set child support," it expressly referenced section 510 of the Act and alleged a substantial change in circumstances. Illinois law is well settled that a motion's substance, not title, dictates its character. *Vanderplow v. Krych*, 332 Ill. App. 3d 51, 54 (2002).

Respondent acknowledges that the trial court erred in concluding that it did not need to determine whether a change in circumstances occurred, but maintains the error was harmless because petitioner was not required to meet her threshold burden of establishing a change in circumstances. We disagree. The trial court's statement that it was not required to determine whether a change in circumstances occurred clearly reflects it "was laboring under a misconception of the law applicable to a petition of this nature," and the "misconception deprived [petitioner] of a fair hearing on her petition." *Powers v. Powers*, 69 Ill. App. 3d 485, 490 (1979). Accordingly, the trial court abused its discretion by erroneously concluding it did not have to determine whether a change in circumstances occurred.

On remand, the trial court should consider whether a change in circumstances occurred warranting a modification of its previous child support order. If it makes such a determination, the trial court must then comply with section 505(a) of the Act. If the trial court deviates from the statutory guidelines, it "shall state the amount of the support that would have been required under the guidelines" and include the reasons for the deviation. See 750 ILCS 505(a)(2)(West 2010). The trial court shall also bear in mind that section 505(a) of the Act creates a rebuttable presumption that a specified percentage of a noncustodial parent's income represents an appropriate child support award, and compelling reasons must be presented to overcome the presumption that the statutory guidelines will be applied. See *Anderson*, 343 Ill. App. 3d at 444-45.

II. Respondent's Petition for Attorney Fees

The second issue on appeal is whether the trial court erred ordering petitioner to contribute $10,000 toward respondent's attorney fees. Section 508(a) of the Act provides that a trial court may order any party to "pay a reasonable amount for his own or the other party's costs and attorney's fees." 750 ILCS 508(a) (West 2008). The primary obligation for payment of attorney fees rests with the party receiving the services, and the moving party must demonstrate both the financial inability to pay and the ability of the other spouse to do so. *In re Marriage of Adams*, 348 Ill. App. 3d 340, 344 (2004). Financial inability exists where requiring payment of fees would strip that party of his or her means of support or undermine that person's financial stability (*In re Schneider*, 214 Ill. 2d 152, 174 (2005)), but does not require a party to show destitution (*In re Marriage of Carpel*, 232 Ill. App. 3d 806, 832 (1992)). A trial court's decision to award or deny fees will be reversed only if the trial court abused its discretion. *In re Schneider*, 214 Ill. 2d at 174.

Although we are concerned with the trial court's comments characterizing petitioner's petition seeking a modification of child support as "sport litigation," its decision to order petitioner to pay $10,000 toward respondent's attorney fees was not an abuse of discretion. Respondent's financial statement listed seven certificates of deposit totaling $24,500 and two individual retirement accounts, one valued at $73,000 and the other valued at $63,000. These assets indicate that respondent is capable of paying his attorney fees. Nonetheless, as noted above, the record also reflects a clear gross disparity in income between the parties. Petitioner's financial statement reflects that she earned a gross income in excess of $549,000 in 2009, and her net monthly income was $26,431 while her monthly living expenses were $19,163.73. Conversely, respondent's 2009 tax return indicated that he earned $28,505 in 2008 and his financial statement reflected that he earned $24,000 in 2009 plus workers' compensation benefits. This disparity in income is sufficient to

warrant an award of attorney fees pursuant to section 508(a) of the Act. See *In re Marriage of Carpel*, 232 Ill. App. 3d at 832 ("Although the trial court found that both parties have sufficient assets or income to pay their own attorney's fees, the evidence establishes a gross disparity [in the parties'] actual incomes and income potential, which would warrant the trial court to award such fees.").

Despite affirming the trial court's order granting respondent's petition for attorney fees, we take this opportunity to express our concern with the trial court's characterization of petitioner's petition to set child support as "sport litigation" and subsequent comments questioning her motives in bringing her petition. The record indicates petitioner brought her petition in good faith on the reasonable belief that respondent's increase in income constituted a substantial change in circumstances justifying a modification of the previous child support order. We respectfully urge the trial court use more caution with respect to a litigant's motive in the future.

CONCLUSION

For the reasons set for above, we affirm in part and reverse in part the judgment of the circuit court of Du Page County and remand with instructions.

Affirmed in part and reversed in part; cause remanded with directions.