2011 IL App (2d) 101293-U
No. 2-10-1293
Order filed December 2l, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF MARY M. LIVORSI,	)	Appeal from the Circuit Court
	)	of Lake County.
Petitioner-Appellant,	)	
	)	
and	)	No. 01-D-963
	)	
MICHAEL C. LIVORSI,	)	Honorable
	)	David P. Brodsky,
Respondent-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Bowman and Hutchinson concurred in the judgment.

ORDER

Held: The trial court erred in awarding retroactive child support to the former husband, where he petitioned for such support after the period during which he had residential custody of the parties' daughter and for which he sought support had passed.

The trial court did not err in awarding child support to the former wife at the level set at dissolution, where the former wife's post-dissolution filing seeking guideline support was, in essence, a petition for modification of support requiring a showing of a substantial change in circumstances. The former wife failed to make such showing. Affirmed in part and reversed in part.

¶ 1 In post-dissolution proceedings, petitioner, Mary M. Livorsi, and respondent, Michael C. Livorsi, filed cross-petitions for child support. The trial court granted the petitions. Mary appeals, arguing that the trial court erred in: (1) awarding Michael retroactive child support; and (2) setting

her support award at a level that deviated below statutory guidelines. For the following reasons, we agree with Mary's first argument and reject her second argument. Accordingly, we affirm in part and reverse in part.

¶ 2 I. BACKGROUND

¶ 3 The parties were married in 1989 and had one child, Gina (born November 27, 1990). They divorced on January 17, 2003. The dissolution judgment incorporated a marital settlement agreement that, in turn, contained a joint child custody and parenting agreement, wherein Mary was awarded primary residential custody of Gina. Pursuant to the marital settlement agreement, the court ordered Michael to pay $3,000 per month in child support (based on his 2001 income, which was unspecified in the order and is not specified anywhere in the record on appeal). Also, the parties agreed to pay for Gina's higher education expenses, the extent of which was to be determined by section 513 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/513 (West 2002)).

¶ 4 Five years after the dissolution judgment, on March 17, 2008, Michael petitioned to modify custody, requesting that he be awarded residential custody of Gina and that his support obligations be abated retroactive to the date of the filing of his petition. Michael alleged that there had been a substantial change in circumstances warranting the modification of the custodial arrangement, including that Gina had been abandoned by Mary, who allegedly abused alcohol and did not follow the parties' visitation schedule, and that she was now living, per her preference, with Michael.

¶ 5 On March 18, 2008, the trial court entered an agreed order: (1) noting that Michael thereby withdrew his March 17, 2008, petition; (2) granting Michael "possession" of Gina (but providing that the parties continued to have joint custody of their child); (3) reserving the issue of child support ("Child support is reserved for Mary"); and (4) abating Michael's child support obligation with the

exception that he continue to contribute to Gina's health insurance premium. The order also noted that it was "entered without prejudice to either part[y's] right[ ] to a full hearing on any issue listed herein." Once Gina began residing with Michael, Mary no longer received the $3,000 monthly child support payments from Michael. Gina resided with Michael from March 6, to October 14, 2008 (about seven months).

¶ 6 On November 12, 2008, Mary moved to transfer residential custody and for child support and college expenses. In count I of her motion, Mary argued that, since the entry of the March 18, 2008, agreed order, there had been a substantial change in circumstances warranting the transfer of residential custody of Gina to Mary. Specifically, Mary alleged that Gina had moved out of Michael's home and lived in Mary's secondary condominium with limited supervision and had refused to return to Michael's home. In count II of her motion, Mary requested that, pursuant to sections 505 and 510 of the Act (750 ILCS 5/505, 510 (West 2006) (child support; support for non-minor children and educational expenses)), Michael pay child support for Gina until she graduated from high school. Mary alleged that Michael is gainfully employed, earns a substantial income, and is well able to pay child support, whereas she does not have sufficient funds or income to support Gina without Michael's support. Finally, in count III, Mary petitioned for contribution to college expenses, alleging that Michael's income exceeds $500,000 and that he is well able to contribute to such expenses, whereas Mary's income is $56,000 and that she does not have sufficient resources to contribute to Gina's college expenses without Michael's contribution.

¶ 7 On the same day, the trial court transferred temporary residential custody of Gina back to Mary. On February 4, 2009, the court denied Michael's motion to vacate its November 12, 2008, order and ordered the parties to participate in mediation, which ultimately proved unfruitful. Gina

resided with Mary from November 12, 2008, until she began college in the fall of 2009. Gina attained age 18 on November 27, 2008, and graduated high school in May 2009.

¶ 8 On January 7, 2009, Michael petitioned, pursuant to sections 501 and 505 of the Act (750 ILCS 5/501, 505 (West 2008) (temporary relief; child support)), for child support and reimbursements for the seven-month period during which Gina resided with him (March 6, to October 14, 2008). He alleged that the March 18, 2008, agreed order had awarded him custody of Gina and had reserved the issue of child support. Michael further alleged that Mary was employed full time and well able to provide $21,000 in child support (calculated at the $3,000 monthly rate Michael had paid), plus reimbursement for the personal items Gina needed (that Mary allegedly would not return or provide to Michael) after she began residing with Michael and for medical and psychological expenses Gina incurred while in Michael's care and custody.

¶ 9 In response, Mary argued that Michael was not entitled to child support because he did not file his petition, which she characterized as seeking modification under section 510(a) of the Act, until *after* residential custody of Gina was transferred back to Mary. Michael replied that, because the dissolution judgment made Mary the support recipient, his petition for support (pursuant to the March 18, 2008, agreed order) was not a modification, but a petition under the agreed order preserving his initial right to seek support when he was granted residential custody of Gina.

¶ 10 On August 10, 2010, a hearing was held on the parties' cross-petitions for child support. The testimony, which primarily focused on the issue of college expense allocation, reflected that Mary's 2008 gross income was about $66,000 (from her work as a licensing representative for the Department of Children and Family Services). She also earned over $18,000 in interest and dividends and received $35,000 from Michael pursuant to the parties' property settlement. Mary had over $470,000 in investments, $38,000 in retirement savings, and a Vernon Hills residence that

she valued at $475,000 (with a $207,500 mortgage). Michael's 2008 gross income was $179,000 (from his work in the boat accessory business) and he earned over $187,000 in dividends and interest. He owned real estate valued at over $2 million (with a $347,000 mortgage on one property), had over $3.4 million in investments and securities, $271,000 in retirement savings, and owned $120,000 worth of vehicles (with a $23,000 indebtedness). Michael had remarried and adopted his second wife's daughter (age 16); he supported both of them.

¶ 11 The trial court, on November 23, 2010, awarded Mary $24,000 in retroactive child support at a rate of $3,000 per month for the period November 2008 to May 2009.[1] It noted that the amount represented a downward deviation from the statutory guidelines (750 ILCS 5/505(a)(1) (West 2008) (setting support for one child at 20% of the supporting party's net income) in consideration of the parties' incomes. The court also awarded Michael $8,000 in child support for the period during which Gina resided with him (March to October 2008). The court granted in part and denied in part Michael's motion to reconsider (addressing college expenses). Mary appeals.

¶ 12 II. ANALYSIS

¶ 13 A. Child Support Award to Michael

¶ 14 Mary argues first that the trial court erred in awarding $8,000 in child support to Michael for the period (March to October 2008) during which Gina resided with him. She asserts that retroactive child support awards are limited to those accruing *subsequent* to the filing of a support petition. She points out that Michael filed his support petition on January 7, 2009, which was *after* the period Gina had resided with him. For the following reasons, we agree with Mary that the trial court erred in awarding child support to Michael.

[1]The parties agree that Gina was emancipated upon her high school graduation in May 2009.

¶ 15 The modification of a support order is ordinarily reviewed for an abuse of discretion. *In re Marriage of Boyden*, 164 Ill. App. 3d 385, 387 (1987). However, the issue whether the trial court's order was statutorily authorized presents a statutory interpretation question of law that we review *de novo*. *In re Andrew B.*, 237 Ill. 2d 340, 348 (2010).

¶ 16 Section 510 of the Act contains the framework for modifications, depending on the basis for the modification, and provides that modifications are not retroactive:

> "Except as otherwise provided ***, the provisions of any judgment respecting maintenance or support may be *modified* only as to installments accruing *subsequent* to *due notice* by the moving party of the *filing of the motion for modification* ***." (Emphases added.) 750 ILCS 5/510(a) (West 2010).

The provision codifies the notion that a court that issues "a final divorce decree retains jurisdiction of the proceeding at all times to enforce, adjust, or modify the original decree in regard to the custody and care of children, as the changing circumstances may warrant." *In re Marriage of Petersen*, 2011 IL 110984 at ¶19. Section 510's prohibition on retroactive support "insures that the respondent is put on notice prior to any change being made with respect to the original child support and expense obligations." *Id.* at ¶18.

¶ 17 In *Petersen*, the supreme court recently held that "the legislature intended the verb 'modify' as it is used in section 510 to connote any action taken to adjust, change or alter the obligations of one or more of the parties subsequent to entry of the final divorce decree." *Id.* at ¶16. The court concluded that, where the parties' divorce decree reserved the issue of each party's obligation to contribute to their children's college expenses, the former wife's subsequent petition to allocate college expenses, which sought, in part, reimbursement for expenses that predated the filing of the petition, implicated section 510, which prohibits retroactive support awards. *Id.* at ¶¶13, 17-18

(further holding that "support" includes education payments under section 513 of the Act (750 ILCS 5/513 (West 2006) (Act provision that authorizes the trial court to allocate educational expenses for unemancipated children who have attained the age of majority)). Accordingly, the court held that the trial court erred in allocating to the former husband a portion of college expenses that predated the filing of the former wife's petition. *Id.* at ¶25.

¶ 18 In addition to its broad reading of the verb "modify," the *Petersen* court based its decision on a long history of consistent case law that holds that "actions taken pursuant to reservations clauses" are "modifications under section 510 subject to the prohibition of retroactive support." *Id.* at ¶22; see, *e.g.*, *Nerini v. Nerini*, 140 Ill. App. 3d 848, 854 (1986) (by reserving child support issue in divorce decree, trial court exercised its discretion to not make an award at that time and section 510, which prohibits retroactive support, applied); see also *Connor v. Watkins*, 158 Ill. App. 3d 759, 762 (1987).

¶ 19 Relying on some of the foregoing authority, Mary argues that the reservation of child support in the agreed March 18, 2008, order, like a reservation in an original divorce decree, renders Michael's petition a request for a modification that implicated section 510(a) of the Act (even though he stated in his petition that it was brought pursuant to sections 501 and 505 of the statute). Section 510(a) in turn, prohibits any award because Michael sought support for a period *prior* to the filing date of his petition. As the petition's untimeliness precludes any child support award for the period Michael had residential custody of Gina in 2008, Mary argues that the trial court's $8,000 award should be reversed. We agree. The agreed order that transferred custody of Gina to Michael reserved the issue of support to Michael. The foregoing case law mandates a reversal. *Petersen*, 2011 IL 110984 at ¶22; *Nerini*, 140 Ill. App. 3d at 854; *Connor*, 158 Ill. App. 3d at 762.

¶ 20 Michael responds that the express reservation of the child support issue in the trial court's March 18, 2008, agreed order, along with the provision stating that all rights were preserved subject to a full hearing, left child support as a continuing issue in a non-final order. Alternatively, he argues that, because this court may affirm for any reason stated of record, the trial court properly could have imposed an $8,000 obligation on Mary toward the $21,000 in expenses for replacing Gina's personal possessions while she resided with him and for her psychological counseling. Michael notes that the parties' marital settlement agreement stated that Mary would pay all of Gina's expenses and an equal share of her uncovered medical expenses. Michael reasons that the trial court "could have imposed an $8,000 obligation on Mary simply through enforcement of the [dissolution] judgment."

¶ 21 We reject Michael's argument that the March 18, 2008, order provided *notice* to Mary that Michael might be entitled to child support commencing with Gina's change in residence. He points to the order's language that reserved child support and its provision stating that it was entered without prejudice to either party's right to a full hearing on any issue listed therein. As Mary notes, this argument is forfeited because Michael did not raise it below (*In re Marriage of Pond & Pomrenke*, 379 Ill. App. 3d 982, 983 (2008) (failure to raise issue in trial court results in forfeiture of issue on appeal)) and does not cite to any relevant authority (Ill. S. Ct. R. 341 (h)(7) (eff. Sept. 1, 2006)). Forfeiture aside, the "notice" referenced in section 510(a) of the Act is of the moving party's "filing" of his or her "petition" (750 ILCS 5/510(a) (West 2010)). The statute does not reference a court order. Indeed, had Michael believed the agreed order (March 18, 2008) provided adequate notice, he would have had no need to file his subsequent (January 7, 2009) petition for child support.

¶ 22 Finally, we decline to address Michael's alternative argument that, because this court may affirm for any reasons of record, the trial court should be affirmed because the court could have imposed an $8,000 obligation on Mary through enforcement of the marital settlement agreement's provisions that Mary would pay for all of Gina's expenses (a reference to the replacement of personal property Michael allegedly he paid for after he was awarded custody of Gina) and one half of her uncovered medical expenses (*i.e.*, psychological counseling). Michael did not document any such expenses (a point he conceded during his testimony) and did not raise this argument below. Accordingly, it is forfeited.

¶ 23 In summary, the trial court erred in awarding Michael retroactive child support.

¶ 24 B. Child Support Award to Mary

¶ 25 Next, Mary addresses the trial court's order awarding her $3,000 per month in child support from Michael for the period November 2008 to May 2009 (when she regained residential custody of Gina to the date of Gina's high school graduation). Mary argues that the court erred by deviating below the statutory guidelines, where: (1) Michael never requested a deviation; (2) he did not present evidence supporting any deviation; and (3) the trial court failed to make necessary findings supporting its ruling. For the following reasons, we reject Mary's argument.

¶ 26 Child support awards lie within the sound discretion of the trial court, and its decision will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Anderson & Murphy*, 405 Ill. App. 3d 1129, 1134 (2010). A trial court abuses its discretion where no reasonable person would take the court's view. *In re Marriage of Eberhardt*, 387 Ill. App. 3d 226, 234 (2008).

¶ 27 In her November 12, 2008, filing, Mary, citing sections 505 and 510 of the Act, requested a transfer of residential custody of Gina back to her and child support from Michael. She alleged that there was a substantial change in circumstances warranting child support in that she had

insufficient funds or income to support Gina without Michael's assistance and that Michael was gainfully employed, earned a substantial income, and was well able to pay support. At the hearing, Mary essentially fashioned her filing as one to *set*, rather than to *modify*, custody and, accordingly, requested statutory guideline support (of 20%), which she calculated at $5,265 per month based on Michael's 2008 income. Michael responded that the agreed order had abated his child support obligation and, thus, Mary's request for guideline support constituted a request to modify his obligation, which, in turn, required Mary to show there had been a substantial change in circumstances; he argued that she did not prove such change. Although the bases for the trial court's findings are somewhat unclear, the court awarded Mary $3,000 per month for the seven months ending in Gina's graduation from high school (November 2008 to May 2009).

¶ 28 As to Mary's first argument—that the court's *sua sponte* deviation is erroneous because Michael never requested a deviation from statutory guidelines—we reject it outright for failure to cite to any relevant authority. Mary fails to cite to any case supporting her claim that Michael was required to request a deviation (in response to a petition that Mary filed seeking support from him). See Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006) (failure to cite to relevant authority results in forfeiture of argument). *Roper v. Johns*, 345 Ill. App. 3d 1127, 1130 (2004), upon which she relies, holds only that, where the former husband-appellant appealed the trial court's increase of his child support obligation, the court committed no error "by failing to deviate *sua sponte* from the presumptively appropriate [statutory] guidelines," where the husband never requested that the trial court deviate from the guidelines. *Roper* does not affirmatively state that the trial court *errs* when it *does* deviate from the statutory guidelines in a case where the party from whom support is sought never requested a deviation.

¶ 29 Mary's next argument—that Michael did not present sufficient evidence to support a downward deviation from guideline child support—also fails. The premise of Mary's argument is that her motion seeking child support was one seeking to *set* (as opposed to *modify*) child support and, therefore, guideline support should have been awarded. Section 505 of the Act (750 ILCS 5/505 (West 2010)) governs child support awards in dissolution proceedings. Section 505(a)(1) establishes guidelines to determine the minimum amount of support. Guideline support is expressed as a percentage of the supporting parent's net income, and the percentage varies with the number of children being supported. 750 ILCS 5/505(a)(1) (West 2010). The guideline support amount for one child is 20% of the supporting parent's net income. 750 ILCS 5/505(a)(1) (West 2010). The trial court must award the guideline amount unless the court: (1) makes a finding, after considering the best interests of the child, that the application of the guidelines would be inappropriate; (2) states the amount of support that would have been required under the guidelines, if determinable; and (3) indicates the reason or reasons for the variance from the guidelines. 750 ILCS 5/505(a)(2) (West 2010). Mary maintains that Michael did not present sufficient evidence to overcome the presumption that the guidelines apply. Relying primarily on the disparity in the parties' incomes and assets, Mary urges that the evidence demonstrated that a guideline award was appropriate in light of the standard of living Gina would have enjoyed had the parties not divorced.

¶ 30 Michael disagrees with Mary's characterization of her motion. He notes that the dissolution judgment set child support (from Michael to Mary) at $3,000 per month. When residential custody of Gina was transferred to Michael in March 2008 (pursuant to the agreed order), Michael's support obligation was abated, not terminated. Michael contends that Mary's November 12, 2008, filing, seeking child support (and her request at the hearing for an amount greater than $3,000) should be characterized as a motion to *modify* (not to *set*, as Mary claims) his support obligation, wherein she

was required to prove a substantial change in circumstances. Michael maintains that Mary failed to assert any substantial change in circumstances warranting an increase in support.

¶ 31 We agree with Michael's characterization of Mary's motion and that Mary failed to plead and prove that there had been a substantial change in circumstances. In her November 2008 filing, she alleged only that Michael is gainfully employed, earns substantial income, and is well able to pay child support. As to her financial condition, Mary alleged only that she does not have sufficient funds or income to support Gina without Michael's assistance. Critically, she did not allege any facts reflecting a *change* in her own or Michael's finances or obligations. Similarly, at the hearing, the focus of which was allocation of college expenses, no evidence was presented from which the trial court could have reasonably determined that there was a substantial change in circumstances warranting a change in Michael's child support obligation. As Michael notes, Mary presented no evidence showing that Gina's standard of living would not be met by the same $3,000 per month to which Mary had agreed in the dissolution judgment. Significantly, Mary presented no evidence of Michael's 2001 income, which was utilized in calculating his $3,000 monthly child support obligation upon the parties' divorce. At the hearing, Mary requested $5,625 in monthly guideline support (based on her calculation of Michael's 2008 income). However, at the hearing and on appeal, Mary fails to specify (and the record is silent) whether or not the initial, $3,000 monthly support order was based on a guideline amount. Thus, based on the record before us, we cannot determine that the evidence reflected a substantial change in circumstances. Finally, we reject Mary's argument that the change in custody back to Mary in and of itself constituted a substantial change in circumstances; this change merely returned the parties to the status quo.

¶ 32 Finally, we need not address Mary's third argument— that the trial court's order cannot stand because the court failed to make express written findings as to its reasons for deviating from

guideline support. This argument is based on Mary's characterization of her filing as one seeking to *set* child support, a claim we rejected above.

¶ 33 In summary, the trial court did not err in awarding Mary $3,000 per month in child support for the period November 2008 to May 2009.

¶ 34 III. CONCLUSION

¶ 35 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed in part and reversed in part.

¶ 36 Affirmed in part and reversed in part.