2012 IL App (2d) 120503-U
Nos. 2-12-0503 & 2-12-0799 cons.
Order filed December 18, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF TODD A. TUCKER, Petitioner-Appellant, and DEBRA A. TUCKER, Respondent-Appellee.	))))))))))	Appeal from the Circuit Court of Ogle County. No. 05-D-58 Honorable Michael T. Mallon, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in applying section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) instead of section 610(a) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/610(a) (West 2010)) to respondent's petition to vacate a prior agreed custody order. The trial court also did not err in granting the petition to vacate. Finally, the trial court acted within its discretion in modifying child support pursuant to statutory guidelines. Therefore, we affirmed.

¶ 2 Following the dissolution of their marriage, petitioner, Todd A. Tucker, and respondent, Debra A. Tucker, agreed to the entry of a post-decree order changing the residential custody of their children from Debra to Todd. Within one year, Debra filed a motion pursuant to section 2-1401 of

the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)) to vacate the agreed order, which the trial court granted. Todd contends that Debra was required to bring her motion pursuant to section 610(a) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/610 (West 2010)) because it sought a change in custody within two years of the entry of a custody judgment, and that Debra's motion should have been dismissed. Todd further argues that the trial court should have modified child support to a level below the statutory guidelines. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Todd and Debra were married on October 5, 1996. The parties had two daughters: Avery, born in May 1998, and Ruby, born in January 2001. The parties' marriage was dissolved by a judgment for dissolution of marriage entered on June 2, 2005. The dissolution judgment incorporated the parties' property settlement agreement and their joint parenting agreement (JPA). Under the JPA, the parties had joint custody of the children; Debra was deemed to be the residential parent and Todd was granted liberal time with the children. The property settlement agreement required Todd to pay child support of $400 bi-weekly. On March 4, 2009, the child support was increased to $600 bi-weekly.

¶ 5 In late 2010, Debra informed Todd that she would be moving from Byron, Illinois, to Oregon, Illinois. As neither parent wanted to remove the children from Byron schools, they agreed to the entry of an order on February 11, 2011, whereby Todd was designated as the residential parent, thus permitting the children to remain within the Byron school district. The agreed order gave Debra "reasonable and seasonable visitation of the parties' minor children as the parties may agree and as has been previously provided for by agreement of the parties." The order further stated that "[a]ll

other terms and conditions of the Judgment of Dissolution not modified herein shall remain in full force and effect."

¶ 6 On November 28, 2011, Todd filed a motion to modify child support. He noted that the February 2011 agreed order designated him as the children's residential custodian. Todd alleged that Debra was employed full time; that upon information and belief, she earned more than he; and that she was capable of providing child support to him. Todd requested that the trial court modify child support in one or more of the following ways: (1) terminate the child support he was paying Debra; (2) require Debra to pay him an appropriate amount of child support; and/or (3) divide non-covered medical expenses, extra-curricular activity expenses, and other child-related expenses equally.

¶ 7 Before Todd's motion was heard, Debra filed a motion on January 23, 2012, pursuant to section 2-1401 of the Code, seeking to vacate the February 11, 2011, order. Debra alleged that she "had been misled and fraudulently advised by [Todd] as to the nature, purpose and intention of" the order, and that she "was under [a] mistaken understanding of the law as to the nature of joint custody and the residential designation thereunder and the full extent of said Agreed Order." Debra alleged that at the time of the entry of the order, she was faced with a potential move because of the "short sale" of her home, and she was attempting to ensure that the children could remain in their schools. Debra alleged that Todd indicated that no changes would be made with reference to the children. Debra alleged that after the entry of the February 2011 order, the children remained in her residential care; that Todd continued to pay child support as previously ordered; and that Todd exercised visitation pursuant to the original dissolution judgment.

¶ 8 Debra further stated in an affidavit attached to the motion that: the parties both desired to have their children remain in the Byron school district; she anticipated moving to Oregon, Illinois, the parties discussed the move, and they agreed that she would drive the children to Byron on her way to work so that they could go to the Byron schools; Todd presented her with an agreed order prepared by his attorney; at all times the parties understood that the children's actual residency would not change; and ultimately Debra did not move to Oregon but instead found another residence within Byron.

¶ 9 On February 9, 2012, Todd filed a motion to dismiss Debra's motion, alleging that while it was brought pursuant to section 2-1401, it was actually a motion seeking modification of a custody order, and it failed to comply with section 610(a).

¶ 10 The trial court held a hearing on Todd's motion to dismiss on February 14, 2012. Todd argued that Debra could not use section 2-1401 as a means to essentially modify custody, but instead had to satisfy the requirements of section 610(a). Debra argued that the February 2011 order was entered based on fraud or mutual mistake, and it was therefore appropriate to seek to vacate the order under section 2-1401. She argued that the parties agreed to the order just to satisfy school residency requirements in case she had to move, and after the entry of the order, the parties did not change their day-to-day routine. Debra maintained that Todd's motion to modify child support, which relied in part on the residency change, showed that Debra was mistaken and defrauded. The trial court stated that it did not see how fraud was involved other than perhaps the parties defrauding the school district, and it questioned whether section 2-1401 would apply for mutual mistake.

¶ 11 On March 1, 2012, the trial court orally denied Todd's motion to dismiss Debra's motion to vacate the February 2011 agreed order. It stated that caselaw provided that a section 2-1401 motion

could be an appropriate motion under circumstances of mutual misunderstanding or if the order was potentially against public policy, and the parties were using the court to allow the children to stay in the Byron school district. The trial court entered its written order denying Todd's motion to dismiss on April 9, 2012.

¶ 12 Also on April 9, 2012, the trial court held a hearing on the merits of Debra's section 2-1401 motion to vacate. Todd testified as follows. In November or December 2010, Debra informed him that she was potentially moving from Byron to Oregon due to a short sale on her house. Debra initially wanted to change the children's residential address to Todd's without court involvement. Todd was not comfortable with that arrangement because he worked for the Byron forest preserve and had health insurance through the school district, and he did not want to defraud the school district. Todd also called the school and found out that they could be fined if the children were not listed under their custodial address. Todd expressed his concerns to Debra, and she said that she understood. Debra later suggested that Todd could become the residential parent, without a modification of the time they spent with the children. At some point Todd mentioned possibly changing child support, but Debra did not want to proceed with the order if it involved any change to "time or money." Todd agreed because he wanted the children to stay in the same schools, in the town where he lived. Debra asked that Todd have his attorney prepare the order; Debra was not represented at the time of the dissolution or for purposes of the order. Todd agreed that they made him the residential parent to keep the children in the Byron school district, that it was "done just on paper for the school," and that Debra did not want to go forward if there were going to be any other changes.

¶ 13 Todd testified that when the agreed order was first entered, his parenting time remained unchanged from the time of the dissolution. He had the girls every Tuesday and Wednesday, with alternating Wednesday overnights, and alternating weekends overnight. In a 14-day period, they would be with him five nights. In September 2011, however, the children started coming to his house every day after school, in addition to his previous visitation. Todd agreed that this was done at his request, and it saved them both money for the babysitter. Todd estimated that he had the children about 50% of the time during their waking hours. Todd agreed that Debra registered the children for school, took them shopping for clothing, and paid for their extracurricular activites.

¶ 14 Debra testified that she had initially thought that they could just use Todd's address for school purposes because he had joint custody, but Todd informed her that the address had to be that of the residential parent. They talked at length prior to the entry of the agreed order that it would not change anything other than "on paper." Debra understood that to mean that there would be no changes in child support or visitation, and nothing changed afterward. Debra thought that she was "protected" based on the last line of the agreed order. However, based on Todd's motion to modify child support, Debra thought she and Todd interpreted the nature and intent of the agreed order differently, and after meeting with an attorney, she believed that she was mistaken as to what the law meant and what the nature of joint custody and the residential designation would be.

¶ 15 Debra agreed that starting in September 2011, the children went to Todd's house every day after school, and he provided them with snacks. The arrangement was Todd's suggestion so that they would not have to go to a babysitter, and Avery was getting too old for a babysitter anyway. Sometimes, Todd would not be there after school with the children. Debra testified that she calculated that Todd had the children 37% of the time during one month.

¶ 16 The trial court stated as follows. The case involved two good parents who were working for the best interests of their children, and they decided that the children's best interests included staying in the Byron schools. The parties were mutually mistaken that Debra was going to be moving outside of the Byron school district, and they entered the agreed order to keep the children in the Byron schools. "Certainly the order [was] against public policy." Based upon the mutual mistake that Debra would be moving and the fact that nothing changed after the order except that Todd kept the kids a little bit after school, the trial court concluded that it must vacate the February 2011 order.

¶ 17 Soon after, on April 19, 2012, Debra filed a petition to increase child support. She alleged that, upon information and belief, Todd had received a substantial increase in pay since the time of the March 2009 child support order. She further alleged that the children's needs and expenses had increased, and that the dissolution judgment did not address the costs of extracurricular activities.

¶ 18 On May 8, 2012, Todd filed a notice of appeal of the April 9 orders denying his motion to dismiss and granting Debra's motion to vacate. The appeal was docketed as No. 2-12-0503.

¶ 19 On July 2, 2012, the court heard oral argument on both parties' child support motions. Todd argued as follows. When the parties were divorced, child support was set at 28% of Todd's net pay. At the present time, he was paying $600 bi-weekly. There was a substantial change in circumstances in that, as of September 2011, Todd was spending more time with the children. The girls were coming to his house after school every day from about 3 p.m. until Debra came home from work, which was at about 5:30 or 6:30 p.m. Thus, each parent was with the children roughly half of the children's waking hours. He acknowledged that 28% of his current salary would be $687 bi-weekly. However, he was requesting a downward deviation from statutory child support based on the parties both making around $80,000 and their ability to meet the children's financial needs. His financial

disclosure statement showed that his monthly expenses, including child support, exceeded his net monthly income by $1,971.62. Debra's monthly expenses exceeded her net monthly income by $1,423.04, but she did not include child support in her income calculation, and her expenses included minimum monthly payments of $1,250 on $54,233 in credit card debt. Further, her claimed expenses were not "all that realistic," such as having $1,000 for monthly food expenses. Todd requested that the trial court reduce his bi-weekly child support to $200 or, alternatively, equally divide all child-related expenses.

¶ 20 Debra argued that it would be unworkable to divide all of the children's expenses because it would result in the parties micromanaging each other's checkbooks. She further maintained that, based on the exhibits the parties submitted to the court, at the peak Todd had the girls only 37% of the time, and that was only for one month. Now that it was summer, the children were not going to Todd's house after school, and the coming school year the bus would be able to drop the children off at her house after school. Debra argued that although Todd disputed the $1,000 per month she listed for food expenses for three people, he listed the same amount for his household, which included his new wife and baby. Also, Todd did not account for his new wife's income in the financial affidavit. Debra maintained that her credit card debt was a result of the dissolution and the decline in the real estate market. She argued that Todd should pay 28% of his net income as child support, as well as half of all extracurricular expenses.

¶ 21 The trial court stated that child support guidelines had become "fairly entrenched" in the legal system because prior to that, parties were always contesting each other's spending patterns. It was "fantastic when a good parent like Todd [did] what [he was] doing," but the trial court did not think that it was a basis to deviate from the guidelines. It stated that it understood Debra's dilemma with

the real estate market. The trial court denied Todd's motion regarding child support and granted Debra's petition to increase child support. It ordered that Todd pay $687 bi-weekly as well as 50% of all extra-curricular expenses up to $750. The trial court entered a written order to this effect on July 12, 2012.

¶ 22 Todd timely appealed the child support order, and it was docketed as case No. 2-12-0799. This court subsequently granted Todd's motion to consolidate the appeal with case No. 2-12-0503, *i.e.*, his prior appeal of the April 9, 2012, orders.

¶ 23 II. ANALYSIS

¶ 24 A. Whether the Trial Court was Required to Apply Section 610(a)

¶ 25 On appeal, Todd first argues that the trial court erred in failing to apply section 610(a) to Debra's motion to vacate, rather than section 2-1401. The issue of which statute applies is a question of law that we review *de novo*. *In re Parentage of R.B.P.*, 393 Ill. App. 3d 967, 970 (2009).

¶ 26 Section 610(a) provides, in pertinent part, as follows:

> "Unless by stipulation of the parties or except as provided in subsection (a-5), no motion to modify a custody judgment may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health." 750 ILCS 5/610(a) (West 2010).

If this procedural prerequisite is met, the case then proceeds to an evidentiary hearing where the trial court applies the legal standards contained in subsection (b) (750 ILCS 5/610(b) (West 2010)) to determine whether the modification petition should be granted. *Department of Public Aid ex rel. Davis v. Brewer,* 183 Ill. 2d 540, 554-56 (1998). Section 610(a) reflects a legislative policy that

strongly favors the finality of child-custody judgments while, at the same time, allowing for relief in emergency situations at times where modification would otherwise be prohibited. *In re Marriage of Noble*, 192 Ill. App. 3d 501, 508 (1989).

¶ 27 Section 2-1401 allows for relief from final orders and judgments more than 30 days but less than two years after their entry. 735 ILCS 5/2-1401 (West 2010). Under section 2-1401, a party may challenge a final judgment by bringing to the trial court's attention issues of fact outside the record which, if known when the judgment was entered, would have affected the judgment. *In re Marriage of Morreale*, 351 Ill. App. 3d 238, 241 (2004). In general, to obtain relief under section 2-1401, a party must set forth specific factual allegations showing the existence of a meritorious defense or claim; due diligence in presenting the defense or claim in the original action; and due diligence in filing the section 2-1401 petition. *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 94 (2006). The allegations of a section 2-1401 petition must be proved by a preponderance of the evidence. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 223 (1986).

¶ 28 Todd argues that the February 2011 agreed order was a custody judgment, making Debra's motion to vacate that order effectively a motion to modify a custody judgment. Therefore, according to Todd, the trial court was required to apply section 610. Todd argues that since Debra's petition to vacate was brought within two years of the February 2011 order, section 610(a) required that Debra show that there was reason to believe that the children's environment may seriously endanger their physical, mental, moral, or emotional health. See 750 ILCS 5/610(a) (West 2010). Todd maintains that Debra's motion and accompanying affidavit are devoid of any hint of such endangerment.

¶ 29 Todd cites *Noble*, 192 Ill. App. 3d 501. There, the trial court vacated a joint-custody order after the father filed a petition for a change in primary custody based on the child's best interests within two months of the order's entry. *Id.* at 503, 509. This court stated that a petition to change the primary custody of a child is a modification under section 610, and a petition that fails to allege the statutory grounds of child endangerment is subject to dismissal upon a motion to dismiss. *Id.* at 506. The father argued that the trial court was not required to apply section 610(a) because it had vacated the prior judgment based on a finding that the judgment resulted from the mother's fraud upon the court. *Id.* at 509. We stated that fraud such as false testimony or concealment would render the judgment voidable, subject to collateral attack under section 2-1401, but the father never moved to vacate the judgment and never alleged fraud or misrepresentation. *Id.* at 509-10.

¶ 30 Returning to the instant case, we conclude that the trial court did not err in applying section 2-1401 rather than section 610(a) to Debra's petition to vacate. Had Debra sought a change in custody based on current circumstances, section 610(a) would clearly apply. In such a scenario, Debra would have to show a belief of endangerment to the children because her motion was filed within two years of a custody judgment. See 750 ILCS 5/610(a) (West 2010). However, Debra did not seek a new custody judgment or contest the children's well-being but rather sought to vacate the prior agreed custody order based on allegations of fraud and mutual mistake. Grounds for relief under section 2-1401 have traditionally included fraud and mutual mistake of fact, among others. *In re Marriage of Hamm-Smith*, 261 Ill. App. 3d 209, 214 (1994).

¶ 31 Our conclusion is further supported by *In re Custody of Mayes*, 86 Ill. App. 3d 644 (1980). There, the parties' settlement agreement gave the mother custody of the children. *Id.* at 644-45. About nine months later, the trial court entered an agreed order changing the custody to the father.

Three months after that, the mother filed a petition to vacate the agreed order under what is now section 2-1401, alleging that it was procured through fraud and coercion. *Id.* at 645. The trial court found that the father had committed fraud in obtaining the agreed order, and it vacated the order. It then conducted a new custody hearing, after which it gave custody to the father, and the mother appealed. *Id.* The appellate court concluded that, under the circumstances of the case, the trial court did not err in holding the custody hearing because it had to balance the policies favoring custodial continuity with the policies disfavoring fraud. *Id.* at 648. The appellate court further held that the trial court was not required to apply section 610. *Id.* at 647-48.

¶ 32 Although the facts in the case at bar differ from *Mayes*, especially in that the living arrangements of the children here did not change as a result of the February 2011 agreed order, *Mayes* is noteworthy in that the mother was permitted to collaterally attack an agreed custody order based on fraud and coercion, and the appellate court held that the trial court was not required to apply section 610 under the facts of the case. Even *Noble*, the case cited by Todd, recognizes that custody judgments can be subject to collateral attack under section 2-1401 in circumstances of fraud or misrepresentation. *Noble*, 192 Ill. App. 3d at 509-10. As such, Debra could properly proceed with her petition to vacate under section 2-1401, and the trial court did not err in denying Todd's motion to dismiss.

¶ 33 B. Whether Debra was Entitled to Relief Under Section 2-1401

¶ 34 Todd next argues that the trial court erred in granting Debra's section 2-1401 petition. When a section 2-1401 petition is granted after an evidentiary hearing, as in this case, we will not disturb the trial court's ruling unless it is against the manifest weight of the evidence. *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 35; *Domingo v. Guarino*, 402 Ill. App. 3d 690, 699 (2010).

A decision is against the manifest weight of the evidence where the opposite conclusion is clearly evident. *Roepenack*, 2012 IL App (3d) 110198, ¶ 35.

¶ 35 Todd argues that Debra advanced two theories in her petition, those being fraud and mistake, but the trial court found that Debra had no claim of fraud against him. Thus, the only theory that remained was mistake, which the trial court relied on in granting her motion to vacate. Citing *Burchett v. Goncher*, 235 Ill. App. 3d 1091, 1094-95 (1991), Todd argues that an agreed order can be set aside only by the parties' agreement or by a showing that it resulted from fraudulent misrepresentation, coercion, incompetence of a party, gross disparity in the parties' bargaining positions, or newly discovered evidence. Missing from this list is the grounds of mistake. However, this court has acknowledged such language from prior caselaw and concluded that agreed orders may be modified or vacated under the standards applied to all section 2-1401 petitions. *In re Marriage of Rolseth*, 389 Ill. App. 3d 969, 971-72 (2009). Mutual mistake of fact can serve as a basis for section 2-1401 relief. *Hamm-Smith*, 261 Ill. App. 3d at 214. Todd's argument is therefore without merit.

¶ 36 Todd further argues that section 2-1401 is not intended to relieve a party from the consequences of his own mistake or negligence. See *Smith*, 114 Ill. 2d at 222. Todd argues that if the mistake was that Debra did not understand the law when she agreed to the order, she should not benefit from her own mistake and negligence in not obtaining independent counsel. Todd maintains that if the mistake was that Debra thought that she was moving away from Byron, but ultimately did not do so, the mistake was one of her own fault. Todd argues that neither of these " 'mistakes' " serves as grounds for vacating an agreed order.

¶ 37 The trial court's ruling was based in part on mutual mistake, rather than unilateral mistake. A mutual mistake of fact occurs where the contract's terms violate both parties' understanding. *In re Marriage of Breyley*, 247 Ill. App. 3d 486, 491 (1993). In other words, there is a mutual mistake where the parties are in actual agreement but the written agreement does not express the parties' real intent. *In re Marriage of Johnson*, 237 Ill. App. 3d 381, 391 (1992). " 'A mutual mistake of fact which was unknown to the court at the time of judgment and which would have prevented the entry of such judgment is a proper ground for relief under section 2-1401.' " *Breyley*, 247 Ill. App. 3d at 491 (quoting *Galligan v. Washington*, 163 Ill. App. 3d 701, 708 (1993)).

¶ 38 The trial court stated that the parties were mutually mistaken that Debra was going to be moving outside of the Byron school district. We recognize that to invalidate an agreement, a mistake must relate to a past or present fact material to the contract, and mistaken predictions will not invalidate the contract. *Corcoran v. Northeast Illinois Regional Commuter R. R. Corp.*, 345 Ill. App. 3d 449, 454 (2003). However, the trial court also found that the parties entered the agreed order to keep the children in the Byron schools and that nothing changed after the order except the girls were at Todd's house "a little bit" after school. We note that both parties testified that they agreed to the February 2011 order to allow their children to remain in the Byron schools, that it was done solely "on paper" for school purposes, that they knew Debra would not go forward if there were going to be any other changes, and that their actual custody arrangements did not change as a direct result of the agreed order. The order itself stated that "[a]ll other terms and conditions of the Judgment of Dissolution not modified herein shall remain in full force and effect." Thus, there was evidence that the agreed order violated both parties' understanding at the time it was entered that it would serve only to secure the children's continuing enrollment in Byron schools, whereas the actual terms giving

Todd residential custody had potential implications for future custody and child support determinations. See, *e.g.*, *Galvez v. Rentas*, 403 Ill. App. 3d 491, 497 (2010) (custodial parent did not have any duty to pay child support). Thus, there was evidence of mutual mistake. *Cf. Breyley*, 247 Ill. App. 3d at 491 (petitioner alleged sufficient facts to show mutual mistake where written marital settlement agreement did not reflect the parties' actual agreement regarding child support and child custody).

¶ 39 Todd additionally argues that Debra failed to demonstrate due diligence in either presenting her claim to the trial court or in filing her section 2-1401 petition. Todd maintains that Debra should have pursued the motion to vacate as soon as she knew she was not moving, which was by at least August 2011, instead of waiting until January 23, 2012, after Todd filed his November 2011 motion regarding support. Todd contends that Debra should not be rewarded for agreeing to an order and then, nearly one year later, deciding that she should not have so agreed.

¶ 40 Todd failed to challenge Debra's diligence in the trial court, thereby arguably forfeiting the issue for review. See *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15 (arguments not raised in the trial court are forfeited and cannot be raised for the first time on appeal). Even otherwise, there was evidence supporting a finding of diligence. Due diligence is determined by looking at the reasonableness of the petitioner's conduct in light of the circumstances. *Hirsch v. Optima, Inc.*, 397 Ill. App. 3d 102, 113 (2009). Language in the agreed order that Debra would have "reasonable and seasonable visitation with the parties' minor children as the parties may agree and as has been previously provided for by agreement of the parties" and that "[a]ll other terms and conditions of the Judgment of Dissolution not modified herein shall remain in full force and effect" support Debra's testimony that she tried to reflect the parties' understanding that the custody change would be only

"on paper" to allow the children to remain in school. Thus, there was evidence of diligence for her claim in the original action. There was also evidence of diligence in filing the section 2-1401 petition, as Debra filed it less than two months after Todd filed his motion to modify child support relying in part on the custodial change, contrary to evidence of the parties' intent when they entered the agreed order.

¶ 41 In sum, because there was evidence of a meritorious defense of mutual mistake and evidence of due diligence, the trial court's grant of Debra's section 2-1401 petition to vacate the agreed order was not against the manifest weight of the evidence.

¶ 42 C. Child Support

¶ 43 Last, Todd argues that the trial court erred by not deviating from the statutory guidelines for child support. We address this issue in terms of whether the trial court erred in: (1) denying Todd's motion to modify child support and in (2) granting Debra's motion to modify child support and setting child support at 28% of Todd's net income plus half of all extracurricular activities.

¶ 44 Section 510(a)(1) of the Dissolution Act (750 ILCS 5/510(a)(1) (West 2010)) provides that an award of child support can be modified "upon a showing of a substantial change in circumstances." The party seeking the modification has the burden of demonstrating that a substantial change in circumstances has occurred. *In re Marriage of Rash and King*, 406 Ill. App. 3d 381, 388 (2010). Once a substantial change in circumstances is established, the trial court may proceed to consider a modification of child support pursuant to the factors listed in section 505(a)(2) of the Dissolution Act (750 ILCS 5/505(a)(2) (West 2010)). *Id.* We will not disturb a trial court's determination that there has been a substantial change in circumstances warranting a modification of child support absent an abuse of discretion. *In re Marriage of Razzano*, 2012 IL App (3d)

110608, ¶ 13; see also *In re Marriage of Rogers*, 213 Ill. 2d 129, 135 (2004) (modification of child support payments is generally within the trial court's sound discretion). But *cf. In re Marriage of Armstrong*, 346 Ill. App. 3d 818, 821 (2004) (trial court's determination of whether there has been a substantial change of circumstances is one of fact and will not be disturbed unless it is against the manifest weight of the evidence). An abuse of discretion occurs where the ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would decide as the trial court did. *In re Marriage of Anderson*, 409 Ill. App. 3d 191, 199 (2011).

¶ 45 Todd alleged in his motion that each parent had the children about 50% of the time; that he was designated the residential parent under the agreed order; that, upon information and belief, Debra earned more than he did; and that Debra was capable of providing support to Todd for the children. However, the agreed order naming Todd as the residential parent was vacated; the parties' financial statements showed that Debra did not earn more than he did; and the trial court found during the section 2-1401 hearing that Todd had been spending only "a little bit more" time with the children than before.[1] In short, Todd failed to meet his burden of showing that a substantial change in circumstances occurred since the entry of the prior child support award that would justify a decrease in child support. Thus, the trial court did not abuse its discretion in denying Todd's motion to modify child support.

¶ 46 Regarding Debra's petition to increase child support, Debra alleged that, upon information and belief, Todd had received a substantial increase in pay; that the children's needs and expenses

[1]Even otherwise, "[r]elating a parent's child support obligation to visitation is inconsistent with the support statute, which bases support primarily on the financial resources and needs of the parents and the child." *In re Marriage of Newberry*, 346 Ill. App. 3d 526, 531 (2004).

had increased; and the children had substantial extracurricular activities which she had solely been paying.

¶ 47 The Dissolution Act provides percentage guidelines for determining appropriate levels of child support which 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 two children, 28% of the noncustodial parent's net income is presumed to be an appropriate level of child support. 750 ILCS 5/505(a)(1), (2) (West 2010). The parties here agreed that under the statutory guidelines, 28% of Todd's current net income was $687 bi-weekly, as opposed to the $600 bi-weekly payments he had been making under the 2009 order. Thus, there was evidence of a substantial change in circumstances warranting an increase in child support. See *In re Marriage of Eberhardt*, 387 Ill. App. 3d 226, 231 (2008) (a change in income is a grounds for modification).

¶ 48 Compelling reasons must exist to overcome the presumption that the child support guidelines represent an appropriate child support award. *In re Keon C.*, 344 Ill. App. 3d 1137, 1141-42 (2003). 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. *In re Marriage of Stanley*, 279 Ill. App. 3d 1083, 1086 (1996). 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 2010). 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).

¶ 49 Todd argues that compelling reasons justified a deviation from the statutory guidelines. He argues that it is clear that the children's needs are being met because they have the privilege of costly extracurricular activities, and their standard of living does not appear to have been impacted by their parent's divorce. Todd maintains that the parties' financial resources and needs must be considered. He argues that the parties' incomes are nearly identical, and considering the child support payments, Debra's monthly income considerably exceeds his. Todd cites *In re Marriage of Cornale*, 199 Ill. App. 3d 134, 137 (1990), for the proposition that where each parent's income is more than sufficient to provide for the child's reasonable needs, the court is justified in setting a figure below the statutory guidelines. Todd further states that nearly all of his child support payments are going to Debra's minimum credit card payments for her substantial debt rather than the children's needs. Lastly, Todd argues that his extended visitation with the child can be considered in determining child support. See *In re Marriage of Demattia*, 302 Ill. App. 3d 390, 394 (1999).

¶ 50 Debra argues that Todd earns about $10,000 more than she does and has far fewer financial liabilities. She also maintains that while he listed his household expenses on his financial affidavit, he did not include his current's wife income. Debra argues that Todd also made no showing that the child support payments would result in a windfall to her, and even including them she would have less than $500 per month after meeting her living expenses. Debra argues that the children should not be required to live at minimum standards to allow Todd a child support deviation. Finally, she argues that at the peak Todd only spent 37% of the time with the children, that it is undisputed that

she buys all of the children's clothing, and that the costs of maintaining the children's standard of living at their home remains the same for the custodial parent regardless of visitation.

¶ 51 We conclude that the trial court's decision not to deviate from the statutory child support guidelines was not an abuse of discretion. We reject Todd's argument that all of his child support payments are going toward Debra's payment of debt, as it cannot be denied that she spends money on the children, and her debt payments can just as easily and more appropriately be labeled as coming out of her own income. Also, contrary to Todd's argument, the parties' incomes and resources are not comparable when considering that Todd's household income also includes his current wife's income and that Debra has more debt. Moreover, even if a trial court may award child support below the guideline amount where the parents' income is more than sufficient to provide for the children's reasonable needs, it is not automatically required to do so. *In re Marriage of Hubbs*, 363 Ill. App. 3d 696, 707 (2006). Instead, the trial court must balance the consideration that the child support award should not be a windfall for the custodial parent with consideration of the standard of living that the children would have enjoyed without the dissolution, which is not based on just the child's needs. *Id.* at 707-08. For example, in this case the children would be benefitting from the parties' combined income had they remained married, and living a lifestyle commensurate with that joint income. Regarding the amount of time spent with the children, the trial court may consider extended visitation rights, but the law does not require a downward deviation because of that factor. *Demattia*, 302 Ill. App. 3d at 394. In fact, in *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1119 (2004), the appellate court held that the trial court did not err in failing to abate the father's child support responsibility during the summer months that the child lived with him, as the

mother still had to finance the child's housing, clothing, and upcoming school expenses during that time, which is similar to the situation here.

¶ 52 Based on all of these considerations, the trial court acted within its discretion in determining that Todd did not present compelling reasons requiring deviation from the child support guidelines. *Cf. Hubbs*, 363 Ill. App. 3d at 705-06, 708 (trial court did not abuse its discretion in not deviating downward from the guidelines where, among other things, the mother earned about $70,000 per year and the trial court imputed a net income of $70,000 per year to the father).

¶ 53 III. CONCLUSION

¶ 54 For the reasons stated, we affirm the judgment of the Ogle County circuit court.

¶ 55 Affirmed.