2013 IL App (2d) 120956-U
No. 2-12-0956
Order filed September 16, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF LISA M. KNAUF, Petitioner-Appellee, and DANIEL J. LOBNER, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 08-D-2361 Honorable Brian R. McKillip, Judge, Presiding.

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

ORDER

¶ 1 *Held:* The trial court properly interpreted and applied paragraph A of the parties' Marital Settlement Agreement and it properly considered respondent's retirement account withdrawals in determining respondent's net income. The trial court's decision to modify respondent's imputed income from $35,000 per year to $50,000 per year was not an abuse of discretion. Therefore, we held the trial court's order increasing respondent's child support obligation was not an abuse of discretion. We affirmed the judgment of the trial court.

¶ 2 In this post-decree matter, respondent, Daniel J. Lobner, appeals from the trial court's order increasing his monthly child support obligation. Petitioner, Lisa M. Knauf, had filed a motion to modify child support based on respondent's purported increase in his net income. After a hearing,

the trial court imputed an average net annual income of $50,000 to respondent and ordered him to pay child support of $1,166 per month based on that imputed income. Respondent contends that the trial court erred when it considered his withdrawals from his retirement account in calculating his net income and abused its discretion when it ordered him to pay child support based on that imputed income. We affirm.

¶ 3 The record reflects that in November 2009, the trial court issued a judgment for dissolution of marriage to the parties. In the judgment, the trial court incorporated the parties' marital settlement agreement (the Agreement), which contained a provision relating to child support for the parties' two children. Paragraph A of Article IX of the Agreement provided:

> "The parties agree that contribution by Husband toward child support shall be initially set at $595.00 per month, which is based upon twenty-eight percent (28%) of Husband's imputed annual gross income of $35,000.00 and set in accordance with 750 ILCS 5/505. It is acknowledged that until Husband obtains employment sufficient to pay child support and meet his monthly living expenses, he may from time to time withdraw funds from his various retirement accounts. It is acknowledged that these withdrawals are not considered income for child support purposes. That Husband agrees to notify Wife within seven (7) days in the event he takes employment with a guaranteed base pay, commission or salary in excess of $35,000.00 per year."

¶ 4 Thereafter, in June 2011, petitioner filed a motion to modify child support. In support of her motion, petitioner alleged that, upon reviewing respondent's 2010 tax return, respondent earned a gross income of $41,000 from his employment. Petitioner further alleged that the tax return reflected that respondent withdrew in excess of $83,500 from his retirement accounts, from which no child

support was paid. Petitioner alleged that respondent's annual child support obligation was $7,140 and that his tax deduction for vehicle expenses totaled approximately $25,000.

¶ 5 The trial court conducted a hearing on May 23, 2012. Petitioner called respondent to testify as an adverse witness. Respondent acknowledged that his gross monthly income for 2011 was $9,352 and for 2012 was $10,586. From those amounts, respondent pays his annual state and federal income taxes and his self-employment taxes. He pays $347 for health insurance premiums and $595 for child support. Respondent acknowledged that he makes no debt payments on loans exclusively to support his business, nor does he make any mandatory payments for union dues, pension, or 401(k) plans. Respondent acknowledged that he has withdrawn $27,750 in the first four months of 2012. Respondent further acknowledged that the IRA withdrawals were necessary to sustain his lifestyle, which was based on $10,000 per month.

¶ 6 Petitioner testified that she was employed full time at the time of the judgment of dissolution and earned approximately $120,000. Petitioner was terminated from her employment and she regained employment full time and earned approximately $70,000. At the time of the hearing, petitioner was enrolled in school full time and maintained part-time employment, earning approximately $100 to $150 weekly.

¶ 7 Petitioner rested, and respondent moved for a directed finding, arguing that the Agreement states that "he can withdraw money from his IRA to meet his monthly living expenses." Following arguments, the trial court reviewed the provision and stated:

> "[T]his is the way that I see this provision. And that is that the child support was going to be based on an imputed income of $35,000 a year, and that if [respondent] was

unable to meet that through his employment, then he could withdraw from his retirement account to meet it and it would not be considered income.

Frankly, I don't see paragraph A as giving [respondent] the ability to withdraw any amount from his IRA he chooses [] to live on and it not be considered income. The thing about $35,000 a year, that looks like if he takes other employment with a guaranteed base, he has to notify her. *** So the motion is denied."

¶ 8 At the conclusion of the hearing, the parties presented their arguments and the trial court took the matter under advisement. On July 3, 2012, the trial court issued a written ruling. The trial court noted that, in 2009, which was the year when the judgment of dissolution was entered, respondent's income tax return reflected a business income of $4,900 and IRA distributions of $36,600; respondent's adjusted gross income was $37,381. The trial court stated that setting child support and imputed income of $35,000 was consistent with his 2009 income. The trial court continued, "[h]owever, in 2010, 2011, and for the first 4 months of 2012, [respondent's] IRA distributions far exceed those taken in 2009. *** [T]here were $85,000 in distributions in 2010 and another $70,000 in 2011. [Respondent] had withdrawn over $27,000 from his IRA in the first 4 months of 2012."

¶ 9 The trial court noted that both parties seem to agree that respondent was allowed to withdraw from the IRA to meet "reasonable" living expenses. The trial court viewed "reasonable" in light of the provision in the judgment that established the "initial" child support amount and section 505 of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/505 (West 2010)). The trial court further reflected that, based on respondent's income tax returns, his statutory monthly child support obligation would have been $1,390 for 2010 and $1,170 for 2011. The trial court continued,

> "It is hard to imagine or accept that the parties' intent was for [respondent] to support his children as though his net income was $25,500 a year while he lived on net income of $50,000 a year. Not only is that concept difficult to accept, I do not believe that the law allows it.
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> The precise amount of [respondent's] net income is difficult to determine because of the nature of his business and his control over distributions from his IRA and pension. It does appear, however, that he lives a lifestyle that approximates $50,000 a year of net income. Exhibit #3 indicates that, if annualized, [respondent's] IRA distributions for 2012 will be somewhere between $66,000 and $75,000."

¶ 10 Thereafter, the trial court modified respondent's monthly child support obligation to $1,166. On August 8, 2012, the trial court entered its written order, which was substantively similar to its prior written ruling. Respondent filed a timely notice of appeal.

¶ 11 Respondent first contends that the trial court erred when it granted an increase in child support based on his withdrawals from his retirement accounts because the Agreement specifically provided that the withdrawals would not be used in the calculation of net income for child support purposes. Respondent argues that the plain and ordinary meaning of paragraph A provides that his retirement withdrawals should not be considered for income purposes until he had obtained employment with a guaranteed commission or salary in excess of $35,000 per year, which has not occurred. Petitioner counters that the trial court properly reviewed the entire paragraph and not simply the sentence on which respondent relies when it determined that the Agreement did not prohibit including distributions from retirement accounts in the calculation of income.

¶ 12 Prior to reaching the merits, we briefly comment on the procedural posture. For much of this litigation, respondent has asserted that petitioner is attempting to vacate the Agreement in the dissolution judgment pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2010)). In this case, petitioner is not seeking to vacate an order of the trial court, but, rather, seeking to modify child support. Under the Act, parties to a marital settlement agreement may expressly preclude or limit their ability to modify maintenance, but provisions pertaining to child support cannot be made nonmodifiable. See 750 ILCS 5/502(f) (West 2010). Thus, it is not necessary that petitioner seek to vacate the Agreement or the November 2009 dissolution judgment for the trial court to modify the prior child support order.

¶ 13 Generally, with regard to whether the trial court's decision to modify child support was erroneous, we review that decision for an abuse of discretion. *In re Marriage of Rogers*, 213 Ill. 2d 129, 135 (2004). Respondent's first issue, however, appears to challenge the trial court's interpretation and effect of the parties' Agreement, which was incorporated into the dissolution judgment, as it relates to whether withdrawal amounts may be considered income pursuant to paragraph A of Article IX. As noted by our supreme court in *In re Marriage of Coulter*, 2012 IL 113474, ¶ 19, "[a] [joint parenting agreement], like a marital settlement agreement ***, is a contract between the parties and, as such, a court's primary objective is to give effect to the intent of the parties, which must be determined only by the language of the agreement, absent an ambiguity." This issue presents a question of law that we review *de novo*. *Id.*

¶ 14 In this case, the trial court properly interpreted paragraph A of Article IX. "We consider the instrument as a whole and presume that the parties included each provision deliberately and for a purpose." *In re Marriage of Turrell*, 335 Ill. App. 3d 297, 305 (2002). Respondent's child support

obligation was "initially" set at $595. Using "initially" reflects an acknowledgment that the obligation could possibly change at a later date. See *In re Marriage of Bohnsack*, 2012 IL App (2d) 110250, ¶ 9 (giving an agreement's terms their plain and ordinary meaning). Further, the trial court properly interpreted paragraph A to allow future consideration of respondent's withdrawals from his retirement accounts as income. Section 505(a)(1) of the Act (750 ILCS 505(a)(1) (West 2010)) establishes guidelines for child support as a percentage of the obligor's net income, based on the number of children the parties have. Where, as here, the parties have two children, the guidelines provide that child support should be 28% of the obligor's net income. 750 ILCS 505(a)(1) (West 2010). The trial court noted that, at the time of the November 2009 judgment, child support had been set at $595 per month, which amount was based on 28% of respondent's imputed gross annual income of $35,000. The trial court questioned, and then rejected, respondent's interpretation that the child support level would remain at a constant level no matter the amount respondent would withdraw from his retirement accounts. Given that the plain language of the agreement set an "initial" amount of child support based on a specific level of income, and the statutory guidelines for determining child support, respondent's interpretation would clearly produce inequitable results. See *In re Marriage of Sweders*, 296 Ill. App. 3d 919, 923 (1998) (declining to read the marital settlement agreement as proposed by the wife because it would produce "an unusual, unreasonable, absurd, and inequitable result"). Accordingly, we conclude that the trial court properly determined that the Agreement allowed the trial court to consider withdrawals from respondent's retirement accounts in calculating respondent's income for purposes of establishing child support.

¶ 15 As part of this issue, respondent challenges the trial court's ability to consider the retirement assets in calculating his income and child support obligation. This court has previously addressed

whether an IRA distribution could be considered income under the Act. See *In re Marriage of Lindman*, 356 Ill. App. 3d 462 (2005). This court held that, "regardless of [a marital] property settlement, the disbursements [a] petitioner receives from his retirement account are income at the time they are paid." *Id*. at 469; see also *In re Marriage of Eberhardt*, 387 Ill. App. 3d 226, 232 (2008) (agreeing with *Lindman* that, as a matter of law, an IRA awarded to a spouse in a property settlement can be regarded as income when liquidated). Pursuant to *Lindman*, we, therefore, reject respondent's challenge.

¶ 16 Having determined that the trial court's interpretation of paragraph A was proper and that the trial court could properly consider respondent's retirement account withdrawals in determining respondent's income, we turn next to respondent's second contention. Respondent contends that the trial court abused its discretion when it raised his imputed income and ordered an increase in child support. Respondent argues that petitioner failed to establish a substantial change in circumstances and that "[t]here is no evidence or testimony in the record that supports the [t]rial [c]ourt's finding" that his lifestyle averaged a net income of approximately $50,000 such that the trial court was warranted in raising his imputed income.

¶ 17 Section 510(a) of the Act (750 ILCS 5/510(a) (West 2010)) provides that a child support judgment can be modified only upon a showing of a substantial change in circumstances. *In re Marriage of Breitenfeldt*, 362 Ill. App. 3d 668, 673 (2005). The party seeking the modification has the burden of demonstrating that a substantial change in circumstances has occurred. *In re Marriage of Rash & King*, 406 Ill. App. 3d 381, 388 (2010). 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). 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).

¶ 18 In the present case, the record demonstrates that the trial court was aware of respondent's income and expenses for the years 2009, 2010, and 2011, and his child support obligations. The modified award of $1,166 per month exceeded the prior award of $595 based upon the trial court's computation of respondent's substantial increase in imputed income. Other than repeating his claim that the parties agreed that the withdrawals from his retirement account would not be used in the calculation of his child support obligation, respondent offers little else to argue that he has not enjoyed a substantial change in circumstances. See *In re Marriage of Carpenter*, 286 Ill. App. 3d 969, 974 (1997) (substantial change in income of payor spouse is grounds for modifying child support). Given the evidence presented of the increase in respondent's income, we cannot say that no reasonable person would take the view adopted by the trial court. Therefore, we decline to find the trial court's decision to be an abuse of discretion. See *id.*

¶ 19 With respect to respondent's argument that "[t]here is no evidence or testimony in the record that supports the [t]rial [c]ourt's finding" that his lifestyle averaged a net income of approximately $50,000, we reject it as well. 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 Act (750 ILCS 5/505(a)(2) (West 2010)). *In re Marriage of Rash & King*, 406 Ill. App. 3d at 388. We have already determined that the trial court could properly consider respondent's withdrawals from his retirement accounts. See *In re Marriage of Lindman*, 356 Ill.

App. 3d at 469. The initial amount of child support was based on respondent's annual gross imputed income of $35,000 at the time of the dissolution judgment. The evidence at the hearing reflected retirement account withdrawals of $36,600 in 2009, when the judgment of dissolution was entered; $85,000 in 2010; $70,000 in 2011; and more than $27,000 in the first four months of 2012. The trial court acknowledged that the "precise amount" of respondent's net income was difficult to determine because of the nature of his business and his control over distributions from his IRA and pension. However, the evidence also reflected respondent's acknowledgment that the IRA withdrawals were necessary to sustain his lifestyle, which respondent based on $10,000 per month. Faced with an imputed income that was difficult to determine, the trial court addressed and properly determined that based on both the evidence presented and the credibility of the parties, respondent lived a lifestyle that approximated $50,000 a year of net income. The issues that respondent advances require this court to defer to the trial court's judgment. See *In re Marriage of Breitenfeldt*, 362 Ill. App. 3d at 675. Respondent's argument lacks merit; we therefore, defer to the trial court's judgment.

¶ 20 Last, respondent argues that *In re Marriage of Gosney*, 394 Ill. App. 3d 1073 (1994), precluded the trial court from modifying his imputed income. The reviewing court in *Gosney* stated in relevant part:

> "The imputation of income arose in response to noncustodial parents who experienced a reduction in income and sought a corresponding decrease in child support. When the custodial parent questioned the motives of the payor, courts answered by imputing income when appropriate. [Citations omitted.] Illinois appellate courts have developed three primary factors to consider in determining when it is proper to impute income to a noncustodial parent. In order to impute income, a court must find that one of the following

> factors applies: (1) the payor is voluntarily unemployed [Citation omitted]; (2) the payor is attempting to evade a support obligation [Citation omitted]; or (3) the payor has unreasonably failed to take advantage of an employment opportunity [Citation omitted]. If none of these factors are in evidence, the court may not impute income to the noncustodial parent. The determination of net income is reviewed under an abuse of discretion standard." *Id.* at 1077.

¶ 21 In the present case, the record supports a conclusion that respondent was attempting to evade an increased support obligation. The presence of only one factor will justify a decision to impute income to a payor. *In re Marriage of McGrath*, 2012 IL 112792, ¶ 4, n.1. The trial court is in the best position to review the evidence and weigh the credibility of the witnesses. *In re Marriage of Bates*, 212 Ill. 2d 489, 515 (2004). Here, the trial court focused on respondent's withdrawals from his retirement accounts and stated, "[i]t is hard to imagine or accept that the parties' intent was for [respondent] to support his children as though his net income was $25,500 a year while he lived on net income of $50,000 a year. Not only is that concept difficult to accept, I do not believe that the law allows it." Contrary to respondent's conclusion that none of the three *Gosney* factors apply, the record clearly supports the trial court's imputation of income to respondent.

¶ 22 We conclude that the trial court properly interpreted and applied paragraph A of the Agreement and that the trial court could properly consider respondent's retirement account withdrawals in determining respondent's income. The trial court's decision to modify respondent's imputed income from $35,000 per year to $50,000 per year was not an abuse of discretion. Therefore, we hold the trial court's order increasing respondent's child support obligation was not an abuse of discretion.

¶ 23 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 24 Affirmed.