2018 IL App (2d) 170928-U
No. 2-17-0928
Order entered October 30, 3018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF	)	Appeal from the Circuit Court
ADAM HEFNER n/k/a/,	)	of Du Page County.
ADAM KAMIENIAK,	)	
	)	
Petitioner-Appellant,	)	
	)	No. 08-DV-222
and	)	
	)	
ANITA KAMIENIAK,	)	Honorable
	)	John W. Demling,
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Birkett and Spence and concurred in the judgment.

ORDER

Held: Where petitioner failed to present sufficient evidence that substantial change in circumstances occurred, trial court did not abuse discretion by denying his motion f*or modification in child support; the version of the Act applicable here, was the v*ersion that was in effect when petitioner filed his motion to modify (750 ILCS 5/801(c)); because the parties contemplated that respondent would obtain employment after the termination of spousal support, per an agreed order, respondent's earned income was not relevant regarding whether a substantial change in circumstances had occurred as to motion to modify child support; trial court affirmed.

¶ 1 Petitioner, Adam Kamieniak, appeals the trial court's order denying his motion to modify his child support payment to his former wife, respondent, Anita Kamieniak. On appeal,

petitioner argues that the trial court erred by failing to consider respondent's increase in income when determining whether a substantial change in circumstances had occurred. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 The parties married in December 1997 and had two children together: M.K., born September 20, 2002, and P.K., born June 30, 2004. Both children continue to have special needs and require multiple forms of therapy and medical treatment. Beginning with M.K'.s birth, respondent stayed home with the children.

¶ 4 In January 2008, petitioner filed a petition for dissolution of marriage. At that time, petitioner worked as a marketing manager for AT&T, earning $68,858.04 in 2007. In February 2009, the parties entered into a joint parenting agreement designating respondent as the primary residential parent. In May 2009, the parties entered into a marital settlement agreement wherein they agreed that petitioner would pay respondent unallocated family support equal to 50% of his net income from all sources. However, in no event was petitioner to pay less than $2500 per month in "unallocated family support" for the first 72 months following the entry of the agreed order.

¶ 5 In May 2012, the trial court entered an agreed order terminating "unallocated family support" and setting petitioner's child support obligation at 28% of his net income from all sources. However, in no event was petitioner to pay less than $3500 per month.

¶ 6 On October 13, 2016, petitioner filed a motion to modify child support alleging a substantial change in circumstances since the May 2012 order. Petitioner alleged that "By Agreed Order dated May 29, 2012[,] the parties modified the Judgment for Dissolution of Marriage and terminated unallocated support, waived further maintenance, and set a child support amount." Petitioner alleged that since the entry of the May 2012 agreed order, his

income decreased, his income-tax liability increased, his employer reduced its contributions to his health insurance premiums, "the needs of the children did not amount to what was represented," respondent's income increased, and respondent had "additional resources to contribute to the children's expenses."

¶ 7 In December 2016, respondent filed a motion for a rule to show cause alleging that, in July 2015, petitioner unilaterally reduced child support payments to less than the amount that he was obligated to pay respondent under the May 2012 order. Respondent also alleged that petitioner had failed to maintain the children's health and dental insurance, to provide proof of life insurance, and to tender copies of tax returns, leaving respondent unable to determine the amount of child support arrearages.

¶ 8 The hearing on petitioner's motion to modify child support was held on October 19, 2017. The testimony and documentary evidence established the following. In 2005, petitioner was diagnosed with Leukemia; he received a bone marrow transplant, and he was declared to be in remission. Since 2009, petitioner has been the CEO and manager of Gateway Marketing Interactive, doing business as AND Agency, LLC, of which petitioner's new wife, Ewa, was a 60% owner. Petitioner controls when distributions of profits are made to Ewa and to the other shareholders. In 2012, petitioner reported W-2 earnings of $95,726. At the time of the hearing, petitioner's paystubs reflected a salary of $97,098. Petitioner's and Ewa's joint 2012 and 2015 tax returns showed total gross income of $233,775 and $234,106, respectively. In June 2017, petitioner had quintuple bypass surgery. Due to health concerns, petitioner works between 20 and 25 hours a week.

¶ 9 Before 2013, respondent earned no income; each month she relied on $2500 support from petitioner, which she characterized as "maintenance," and $1000 a month from returns on investments. In 2013, respondent earned a bachelor's degree in nursing and began employment

as a nurse at a hospital. She typically worked between 32 and 36 hours every two weeks, and she earned $50,000 annually from her nursing job. She also received rental income of $1300 a month from a condominium that she owned debt free.

¶ 10 On October 19, 2017, after hearing argument of counsel, the trial court stated, the following in pertinent part:

> "[Respondent] now is earning substantially more than she did when the order of May 29, 2012, was entered.
>
> The court takes judicial notice of the fact that in May of 2012 the statutory criteria [sic] for child support was based upon a percentage of the payor's income. The payee's income was not relevant to the determination of child support.
>
> * * *
>
> At that point in time, the payee's income was not relevant to the determination of statutory guidelines.
>
> At the present time, as of July 1st of 2017, the legislature for the State of Illinois has adopted an income shares formulation as it relates to child support; and, in that formula, the income of the payor and the payee are both relevant with respect to the determination of child support."

The trial court found that, under "the law prior to July 1st of 2017," there "has been no substantial change in circumstances."

¶ 11 On October 19, 2017, the trial court entered an order denying petitioner's motion to modify child support.

¶ 12 On October 25, 2017, the trial court held a hearing on respondent's petition for rule to show cause and petition for attorney fees. The trial court ruled on respondent's petition for rule

to show cause, in part, ordering petitioner to pay respondent arrearages. The trial court granted respondent leave to file a petition for attorney fees.

¶ 13 On November 15, 2017, and November 29, 2017, petitioner filed his notice and amended notice of appeal, respectively.

¶ 14 II. ANALYSIS

¶ 15 Petitioner argues that the trial court erred by failing to apply the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/101 et seq.) as amended by Public Act 99-764, effective, July 1, 2017. Public Act 99-764 (eff. July 1, 2017) changed section 505 of the Act (750 ILCS 5/505) to make Illinois an "income shares" model. Respondent counters that the Act as amended by Public Act 99-764 (eff., July 1, 2017) does not apply because petitioner filed his motion in October 2016.

¶ 16 To address this issue, we must engage in statutory construction, which is a question of law subject to *de novo* review. *Lawler v. University of Chicago Medical Center*, 2018 IL 120745, ¶ 12. The goal of statutory construction is to ascertain and give effect to the intent of the legislature. *Id.* The best indicator of the legislature's intent is the plain language of the statute, which must be given its plain and ordinary meaning. *Id.*

¶ 17 Section 801(c) of the Act provides that "This Act applies to all proceedings commenced after its effective date for the modification of a judgment or order entered prior to the effective date of this Act." 750 ILCS 5/801(c) (West 2016). Here, petitioner filed his petition to modify child support on October 13, 2016. Thus, his petition was filed after the effective date of Public Act 99-90 but before the effective date of Public Act 99-764 (eff. July 1, 2017). The petition sought modification of the trial court's March 2012 order, an order entered prior to the effective date of Public Act 99-90. Therefore, petitioner's petition clearly fell within section 801(c). See *In re Marriage of Carstens*, 2018 IL App (2d) 170183, ¶ 29. As such, the changes effectuated by

Public Act 99-90 govern these proceedings. *Cf. In re Marriage of Benink*, 2018 IL App (2d) 170175, ¶ 29 (changes effectuated by Public Act 99-90 did not apply to parties' petitions for modification of child support because the petitions were filed prior to January 1, 2016).

¶ 18 The proceeding at bar commenced on October 13, 2016, with the filing of the petition for modification of the trial court's March 2012 order. Thus, the version of the Act applicable here is the version in effect on October 13, 2016. Regardless, both versions of section 5/510(a)(1) of the Act provide that a court may modify a child support order "upon a showing of a substantial change in circumstances." 750 ILCS 5/510(a)(1) (West 2016); 750 ILCS 5/510(a)(1) (West Supp. 2017).

¶ 19 Petitioner contends that the trial court erred by failing to consider respondent's increase in income to determine whether a substantial change in circumstances occurred. Respondent argues that her income is not relevant to determine whether a substantial change in circumstances occurred.

¶ 20 A parent seeking a modification of child support, based on a substantial change in circumstances, has the burden of proof to establish that a substantial change in circumstances has occurred since the entry of the prior support order. *In re Marriage of Sorokin*, 2017 IL App (2d) 160885, ¶ 28. If the party proves a substantial change in circumstances, then, and only then, may the trial court consider the statutory factors contained in section 505 to determine the amount of child support. 750 ILCS 5/505(a) (West 2016); *In re Marriage of Rash & King*, 406 Ill. App. 3d 381, 388 (2010). Therefore, petitioner's argument that the trial court erred by failing to consider the statutory guidelines in section 505 puts the cart before the horse.

¶ 21 The issue before us is whether the trial court abused its discretion by finding that petitioner failed to establish that a substantial change in circumstances occurred. A trial court's determination that there has been a substantial change in circumstances to warrant the

modification lies within the court's discretion and will not be disturbed absent an abuse of that discretion. *In re Marriage of Sassano*, 337 Ill. App. 3d 186, 194 (2003). A trial court abuses its discretion when no reasonable person would agree with the decision. *Sassano*, 337 Ill. App. 3d at 194.

¶ 22 Here, the record shows that, in May 2012, the trial court entered an agreed order that modified the parties' 2009 marital settlement agreement. The May 2012 agreed order "terminated" petitioner's "obligation" to pay "respondent unallocated family support." According to petitioner's motion to modify, this May 2012 agreed order "terminated unallocated support, waived further maintenance, and set a child support amount." Unallocated support is considered maintenance for federal tax purposes; however, substantively, unallocated support is child support and maintenance. *In re Marriage of Kincaid*, 2012 IL App (3d) 110511, ¶ 25; *In re Marriage of Gleason*, 266 Ill. App. 3d 467, 468 (1994) ("unallocated support may be considered maintenance for Federal income tax purposes. In reality, however, it is child support and maintenance for respondent").

¶ 23 Here, in May 2012, the trial court entered an agreed order terminating "unallocated family support" and setting petitioner's child support obligation. Further, petitioner alleged in his motion to modify that "By Agreed Order dated May 29, 2012[,] the parties modified the Judgment for Dissolution of Marriage and terminated unallocated support, waived further maintenance, and set a child support amount." Where the possibility of a particular event or series of events is contemplated and provided for in a marital settlement agreement, the occurrence of the event will not constitute a substantial change in circumstances. *In re Marriage of Hughes*, 322 Ill. App. 3d 815, 819 (2001). Here, the termination of unallocated support as reflected in the May 2012 agreed order indicates that the parties contemplated the possibility that respondent would become employed and earn an income. We acknowledge that the trial court

did not make this specific finding. However, this court is not bound by the trial court's reasoning and may affirm on any basis supported by the record. See *Mutual Management Services, Inc. v. Swalve*, 2011 IL App (2d) 100778, ¶ 11. Because the record indicates that the parties contemplated that respondent would earn an income after unallocated maintenance was terminated, the trial court properly refused to consider respondent's earned income in determining whether a substantial change in circumstances had occurred. Further, the trial court did not abuse its discretion by finding that petitioner failed to establish a substantial change in circumstance occurred.

¶ 24 Petitioner contends that respondent's increase in income alone should be considered a substantial change in circumstances. To support his argument, petitioner cites numerous cases, none of which support his position: *In re Marriage of Turk*, 2015 IL 116730, *In re Marriage of Schuster*, 224 Ill. App. 3d 958 (1992), and *In re Marriage of Rai*, 189 Ill. App. 3d 559 (1989). The supreme court in *Turk* did not address whether a substantial change in circumstances had occurred. Rather, the issue was whether section 505 of the Act permits an award of child support to a noncustodial parent. *Turk*, 2015 IL 116730, ¶ 1. In both *Schuster* and *Rai*, the appellate court rejected the husbands' arguments that they should be excused from paying child support due to the wives' substantial incomes and economic self sufficiency. See *Schuster*, 224 Ill App. 3d at 974-75; *Rai*, 189 Ill. App. 3d at 571.

¶ 25 Finally, petitioner argues that he established a substantial change in circumstances due to his declining health and the resulting impact on his income. Specifically, petitioner argues that the May 2012 agreed order establishes that his income at that time was $150,000 a year. To support this position, petitioner cites to the May 2012 agreed order, which provided "Petitioner shall pay to Respondent child support in an amount equal to 28% of his net income from all sources, but in no event shall the monthly payment be less than $3,500."

¶ 26 However, petitioner's testimony during the hearing on his motion contradicts his argument. At the hearing, petitioner was asked, "And so by entering into that agreed order, is it fair to say that you were acknowledging that your approximate annual net income at that time was around $150,000?" Petitioner replied, "Not from my perspective, no, it wasn't." Petitioner testified that the amount of $3500 a month "was just an amount that both me and [respondent] agreed upon *** [respondent] asked for more and we agreed on [$3500] as a—sort of a fair number."

¶ 27 Further, the record supports the trial court's finding that petitioner's income had not changed since the last order. The record reveals that, in 2012, petitioner reported W-2 earnings of $95,726. At the time of the hearing, petitioner's paystubs reflected a salary of $97,098. Regarding petitioner's health, he cites to nothing in the record indicating how his health has affected his income. Accordingly, the trial court did not abuse its discretion by finding that no substantial change in circumstances had occurred and by denying petitioner's motion to modify child support.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we affirm the trial court's order.

¶ 30 Affirmed.