NO. 5-09-0390

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re MARRIAGE OF MICHAEL WEAVER, Petitioner-Appellant, and DEBORAH C. WEAVER, Respondent-Appellee	))))))))))	Appeal from the Circuit Court of Monroe County. No. 05-F-39 Honorable Dennis B. Doyle, Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Goldenhersh and Spomer concurred in the judgment.

R U L E 2 3 O R D E R

Held: The trial court did not abuse its discretion when it did not apply the statutory guidelines for child support in a split custody case but considered the best interests of the children in light of the evidence, including the relevant factors listed in section 505(a)(2) of the Illinois Marriage and Dissolution of Marriage Act (740 ILCS 5/505(a)(2) (West 2008)). The trial court did not abuse its discretion in ordering each party to pay one-half of the guardian *ad litem* fees and his or her own attorney fees.

The petitioner, Michael Weaver, appeals from the judgment of the circuit court of Monroe County finding that each parent is financially capable of providing for the child in his or her custody, ordering each party to pay one-half of the guardian *ad litem*'s fee, and ordering each party to pay his or her own attorney fees. We affirm.

BACKGROUND

The marriage of Michael and Deborah Weaver was dissolved on April 19, 2001. The trial court awarded Deborah the custody of the parties' four minor children–Adam, Evan, Erin, and Alex. Adam and Evan were no longer minors at the time the child support order

at issue was entered. Erin was born February 8, 1992, and Alex was born June 11, 1994. On May 2, 2005, the trial court entered an order setting the child support owed by Michael at $595 per month. It found that Adam was a 19-year-old college student who was completely alienated from Michael. It found that "it is not fair for a father to pay child support for an adult who will have nothing to do with him." The court ordered as follows: "[F]or every year that Evan is in college as a full time student as determined by the university and obtaining at least a B average *** [Michael is ordered to] contribute said $750.00 per semester for Evan's higher educational expenses. Said sums to be deducted from the $10,000.00 a year owed by mother to father."

On February 28, 2007, Michael filed an emergency petition for temporary custody alleging that on February 14, 2007, Deborah relinquished custody of Alex to his care, custody, and control.

On March 5, 2007, the children's guardian *ad litem* filed a report. The guardian *ad litem* wrote that Deborah "indicated that she fears that Alex will continue to act out to the point of severely harming other family members in his quest to be able to live with his father." The guardian *ad litem* indicated that she suspected that Deborah's "fears are legitimate." She wrote that Michael subtly and outwardly encouraged Alex's negative behavior "because it also serves his agenda–to gain physical control over Alex to prove that he is the 'better parent'." The guardian *ad litem* reported that she believed that Alex needed long-term inpatient treatment for his behaviors, but she believed that Michael would undermine that treatment. She recommended a temporary change in custody for Alex from Deborah to Michael "with great reluctance." She felt that Deborah was the more stable, appropriate parent but that Michael had gone to great lengths to undermine her parenting, Alex's education, and Alex's relationship with others. The guardian *ad litem* recommended that Alex continue with his present counseling and psychiatrist, that both parents engage in

individual counseling to learn more appropriate ways to deal with Alex and each other, and that Alex have alternating weekend visitation with Deborah.

On March 5, 2007, the trial court entered an interim temporary custody modification, awarding temporary custody of Alex to Michael and ordering that, because each party had the custody of one of the parties' minor children, no child support be exchanged during this interim time, retroactive to March 1, 2007.

On May 30, 2007, Michael filed a petition for the permanent custody of Alex and for child support. On July 14, 2008, the trial court suspended Michael's custodial time with Erin and transferred the primary custody of Alex to him. The trial court set the issues of child support, the allocation of guardian *ad litem* fees, and attorney fees for a hearing.

On August 1, 2008, Deborah filed a petition to modify child support and for a contribution for payment of attorney fees. The parties' petitions for child support and attorney and guardian *ad litem* fees were heard on March 10, 2009, and May 19, 2009.

Deborah testified that she is the president of Taylor and Associates, a court reporting firm. Deborah testified that she owns Midwest Litigation Services, a court reporting and video firm that provides deposition services to attorneys and organizations. She also owns Courtroom Technology Consultants, doing business as Midwest Trial Services. That firm provides trial support to attorneys during a trial. She stated it has no employees or payroll and does not provide benefits. Deborah testified that she is a one-third owner in DWKW Investments, LLC, a holding company for the building that houses her office. She testified that the company provides a car to her and her husband, but she derives no income from it.

Deborah testified that her monthly net income was $7,400. Her sworn March 10, 2009, financial statement showed her monthly net income as $7,472.54. Deborah testified that based on her 2009 year-to-date earnings, she would make less than she did in 2008. She attributed the reduction in income to tort reform in Missouri, which significantly affected her

medical malpractice-related work.

Michael Weaver testified that he is an investigator for the Maune Raichle law firm and that he earns $5,000 per month. His sworn March 10, 2009, financial statement showed his monthly net income as $3,043.92.

Michael testified that for a period of six weeks in January and February 2008, he went to California to install American Living display units in JCPenney stores. He stated that he was paid $1,200 per week. He stated that he earned approximately $5,000 in additional income but that it was a one-time occurrence.

Michael testified that Alex has attention deficit hyperactivity disorder (ADHD) and short-term memory problems. He stated that the public school district provides special services to address Alex's special needs but that they are unable to provide everything he needs. Michael testified that he wants to take Alex somewhere for remedial instruction.

Deborah testified that she provides health insurance for all four children. Her monthly insurance premium was $1,200 to $1,300. She stated that she pays the medical bills for the children not covered by insurance. She stated that Erin had extensive physical therapy on her knee due to a soccer injury. Adam suffers from psoriasis and takes expensive medicine to treat it. The deductible on the medical insurance is $4,500, leaving her to pay about $375 per month in uncovered insurance costs before the full benefits are realized.

Deborah testified that beyond the typical expenses for a child, she pays for traveling expenses for Erin to play on a traveling club soccer team and the Olympic Development Program Team for Missouri. Deborah testified that colleges are trying to recruit Erin based on her soccer ability. Deborah estimated that Erin's soccer costs were $200 to $300 per month. Additionally, Erin is seeing a counselor at the suggestion of the guardian *ad litem*. The $80-per-visit cost is not covered by insurance. Erin goes to Sylvan Learning Center for tutoring in math at a cost of $35 per hour. She attends one to two times per week. She also

takes two classes at St. Louis University at a cost of $360 per class.

Deborah testified that the couple's oldest son, Adam, attends college and that she pays his tuition. She stated that his tuition is more than $17,000 per year. Their second son Evan graduated from Lewis and Clark Community College and then attended Southern Illinois University at Edwardsville until Christmas break of 2008. He was taking a break from school but intended to return the next semester. Deborah paid for his tuition at both schools.

Michael did not contribute anything towards Adam's educational expenses. Michael testified that he did not pay anything toward Evan's tuition at Lewis and Clark Community College or Southern Illinois University. He stated that, while at Lewis and Clark Community College, Evan resided with him. Michael stated that Evan worked for Deborah.

On June 24, 2009, the trial court entered an order on the parties' cross-motions to modify child support. The court found that because the parties agreed to split the custody of their two remaining minor children, the minimum support guidelines did not apply. It further found, after considering the best interests of the children, that each parent was capable of providing for the child in his or her custody, and neither parent was ordered to pay child support, retroactive to February 14, 2007. Each party was ordered to pay one-half of the guardian *ad litem* fees, and each party was ordered to pay his or her own attorney fees.

On June 30, 2009, the trial court entered an order amending the June 24, 2009, order apportioning guardian *ad litem* fees. Each party was to pay 50% of the fees, with credit for amounts already paid. A judgment was entered against Michael in the sum of $3,886.39 and Deborah in the sum of $1,921.29.

Michael filed a timely notice of appeal.

ANALYSIS

On appeal, Michael argues that the trial court abused its discretion when it failed to apply the minimum statutory child support guidelines. "Motions to modify child support

must be decided on the facts and circumstances of each case ***." *In re Marriage of Garrett*, 336 Ill. App. 3d 1018, 1020 (2003). As a result, the modification of child support payments lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Rogers*, 213 Ill. 2d 129, 135 (2004). With the exception of no review at all, the abuse-of-discretion standard is the most deferential standard of review available. *People v. Coleman*, 183 Ill. 2d 366, 387 (1998). A trial court abuses its discretion only where no reasonable person would take the view adopted by the trial court or when its decision is arbitrary, fanciful, or unreasonable. *People v. Anderson*, 367 Ill. App. 3d 653, 664 (2006).

Section 510(a)(1) of the Illinois Marriage and Dissolution of Marriage Act (the Act) provides that an order for child support may be modified upon a showing of a substantial change in circumstances. 750 ILCS 5/510(a)(1) (West 2008). In the instant case, there is no dispute that there had been a substantial change in circumstances.

Parents have an obligation to financially support their children. *In re Marriage of Duerr*, 250 Ill. App. 3d 232, 238 (1993). "A strict mathematical application of the guidelines where there is split custody of the children is not contemplated by the statute." *In re Marriage of Keown*, 225 Ill. App. 3d 808, 812 (1992). "In split custody cases a trial court may disregard the statutory guidelines in the Act and may instead consider the factors listed in section 505 of the Act." *In re Marriage of Steadman*, 283 Ill. App. 3d 703, 708 (1996). Because the trial court is not obligated to apply the guidelines in a split custody case, the trial court is not required to state its reasons for deviating from the guidelines. *In re Marriage of Steadman*, 283 Ill. App. 3d at 709. Courts have a responsibility to protect the best interests of the children in child support matters; therefore, a court should not refuse to consider whether child support is appropriate in a split custody case. *In re Marriage of Wittland*, 361 Ill. App. 3d 785, 787-88 (2005). While the guidelines do not apply in split custody cases, the

factors set forth in section 505 do apply and should be considered. *In re Marriage of White*, 204 Ill. App. 3d 579, 582 (1990).

When determining child support where the guidelines do not apply, section 505(a)(2) of the Act provides that the court should consider the best interests of a child in light of the evidence, including but not limited to one or more of the following relevant factors:

> "(a) the financial resources and needs of the child;
>
> (b) the financial resources and needs of the custodial parent;
>
> (c) the standard of living the child would have enjoyed had the marriage not been dissolved;
>
> (d) the physical and emotional condition of the child, and his educational needs; and
>
> (e) the financial resources of the non-custodial parent." 750 ILCS 5/505(a)(2) (West 2008).

The sworn financial statements filed by the parties on March 10, 2009, show that both parties spent most of their net income each month. Deborah's financial statements showed that her house had a market value of $450,000 and that she owed $472,000 on it and that she had a $10,000 debt on a car, $50,000 in legal fees, and approximately $105,000 in credit card debt. Her financial statement showed a retirement account valued at $53,000 and an account at Wachovia valued at $25,000.

Michael's financial statement listed a mortgage payment of $575 per month. He testified that he resides with his girlfriend and that this amount represents one-half of the mortgage payment on her house. He testified that even though his bank records for January 2008 through January 2009 only showed two mortgage payments and a partial payment of real estate taxes, he recalled paying more. Other than a $13,000 debt on his car, Michael's financial statement did not show any other debt. When asked if he paid off the $6,000 in

debt that appeared on a prior financial statement, he responded that the statute of limitations ran on the debt and that it was no longer collectible.

Michael testified that there were no extraordinary expenses for Alex. Alex participates in wrestling and track at his school. The registration fee is $50 per sport. Michael paid $75 for wrestling shoes. Alex does not take any lessons or have any other special expenses relating to his activities.

Michael testified that if he could afford it, he would take Alex somewhere they could "figure out what kinds of remedial things need to be done to get him so he is more on par with his peers." Alex receives special education services at his school, but Michael testified he felt that Alex needed more help. While Michael asserted that Alex needed additional services, he presented no information about potential programs or costs. Deborah testified that depending on the services, her health insurance might cover a part of the cost. Deborah testified that since Alex had moved in with Michael, he "was taken off all his medicine." As far as she knew, he was not being "followed up with any pediatrician" even though he had "been on medicine for a very long time to deal with his ADHD." She stated that she has not received bills or notices of insurance copays for Alex.

Deborah testified that she pays the health insurance for all four children. She also pays Adam's college tuition and has paid Evan's tuition and plans to pay it when he returns to school. Erin is a high-achieving child and is enrolled in programs to foster these abilities. Deborah pays Erin's soccer and educational expenses.

The trial court, after considering the factors in section 505(a)(2), found that each parent was capable of providing for the child in his or her custody. It held that each parent was responsible for the expenses of the child in his or her care and that neither was liable for child support. We cannot say that this decision is arbitrary, fanciful, or unreasonable or that no reasonable person would adopt this view.

Michael next argues that the trial court's failure to order Deborah to contribute towards his attorney fees was an abuse of discretion. The party for whom the services are rendered is primarily responsible for the payment of his or her attorney fees. *In re Marriage of Adams*, 348 Ill. App. 3d 340, 344 (2004). Under section 508 of the Act, the court, after a hearing and the consideration of the financial resources of the parties, may order one party to pay a reasonable amount for the other party's costs and attorney fees. 750 ILCS 5/508(a) (West 2008). "The party seeking an award of attorney fees must establish her inability to pay and the other spouse's ability to do so." *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005). "Financial inability exists where requiring payment of fees would strip that party of her means of support or undermine her financial stability." *In re Marriage of Schneider*, 214 Ill. 2d at 174. A trial court's decision to award or deny attorney fees will be reversed only if the court abused its discretion. *In re Marriage of Schneider*, 214 Ill. 2d at 174. "A trial court abuses its discretion when it acts arbitrarily, acts without conscientious judgment, or, in view of all of the circumstances, exceeds the bounds of reason and ignores recognized principles of law, resulting in substantial injustice." *In re Marriage of Pond*, 379 Ill. App. 3d 982, 987-88 (2008).

Michael argues that, pursuant to *In re Marriage of Haken*, the party seeking contribution for attorney fees need not show an inability to pay. *In re Marriage of Haken*, 394 Ill. App. 3d 155, 163 (2009). *In re Marriage of Haken* is distinguishable from this case because it involves an appeal from a dissolution judgment. At the conclusion of any judgment of dissolution proceedings, where one spouse requests the other spouse to contribute to the payment of attorney fees, section 508(a) requires the court to consider the factors contained in section 503(j). 750 ILCS 5/508(a), 503(j) (West 2008). The court in *In re Marriage of Haken* found that making an inability to pay a prerequisite to a fee award would "eviscerate[] the statutory directive in section 503(j)(2) to consider the criteria for the

division of marital property under section 503(d) in making contribution awards." *In re Marriage of Haken*, 394 Ill. App. 3d at 161. The reasoning in *In re Marriage of Haken* does not apply in the instant case. This case involves a request for attorney fees in a child support modification case, not a request at the conclusion of a judgment of dissolution proceeding. As a result, the statutory directive in section 508(a) to consider the section 503(j) factors in evaluating the request for attorney fees does not apply.

In the instant case, Michael failed to establish his inability to pay and Deborah's ability to pay his attorney fees. The sworn financial statements of the parties show that they both spend approximately their entire monthly net income. Michael did not show that the payment of attorney fees would strip him of his means of support or undermine his financial stability. The trial court found each party responsible for his or her own attorney fees. In view of all the circumstances, we cannot say that the trial court abused its discretion by acting arbitrarily or without conscientious judgment.

Michael lastly challenges the 50/50 division of responsibility for the guardian *ad litem* fees. He does not challenge the reasonableness or necessity of the fees. Section 506(b) of the Act requires that a guardian *ad litem* be compensated for reasonable and necessary fees. 750 ILCS 5/506(b) (West 2008). The provisions of section 508 of the Act apply to fee petitions brought under section 506(b). Because section 508 applies to both attorney fees and guardian *ad litem* fees, our analysis of whether the trial court abused its discretion in ordering each party to pay his or her own attorney fees applies to the trial court's award of guardian *ad litem* fees. We cannot say that the trial court abused its discretion.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Monroe County is affirmed.

Affirmed.