

2014 IL App (2d) 131213-U  
No. 2-13-1213  
Order filed December 5, 2014

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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<i>In re</i> MARRIAGE OF	)	Appeal from the Circuit Court
SHERRY BERWANGER,	)	of Lake County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 09-D-1970
	)	
STEVEN BERWANGER,	)	Honorable
	)	Veronica M. O'Malley,
Respondent-Appellant.	)	Judge, Presiding.

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JUSTICE SPENCE delivered the judgment of the court.  
Presiding Justice Burke and Justice Zenoff concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) The trial court properly denied respondent's petition to divide child support between the parties, as the parties' marital settlement agreement provided that respondent would pay full child support despite their shared custody of the children; (2) without an official record of the relevant hearing, we could not say that the trial court abused its discretion in denying respondent's petition for attorney fees, which denial in any event was supported by the documentary evidence that the parties had roughly even assets and incomes.

¶ 2 Respondent, Steven Berwanger, appeals the trial court's order modifying his child-support obligation to petitioner, Sherry Berwanger. He contends that the court erred by requiring him to pay the full guideline child-support amount when the parties share custody of their two

children. Because the marital settlement agreement (MSA) specifically provides that Steven will pay the full amount despite the shared-custody arrangement, we affirm.

¶ 3 On April 16, 2012, the trial court dissolved the parties' marriage. They have two children, Andrew and Kaylin. When the dissolution judgment was entered, both parties were unemployed. The family business, Berwanger Insurance Agency, was sold and, as it was marital property, the parties divided the proceeds. Both then began looking for work.

¶ 4 The dissolution judgment incorporated a joint parenting agreement (JPA) and an MSA. The JPA provides that the parties will have equal custody of the children. The MSA contains the following provision:

“3.3 Child Support Obligation: STEVEN is currently unemployed and has a Bachelor's degree in Marketing. STEVEN has an ongoing duty to seek employment and will immediately notify SHERRY upon his having obtained employment within 24 hours thereof providing the name, address and telephone number of his employer. STEVEN will tender SHERRY a copy of his first paystub for purposes of setting court-ordered statutory child support within 30 days thereof. Upon attaining employment STEVEN shall pay to SHERRY 28% of STEVEN's approximate monthly net income from employment determined in accordance with 750 ILCS 5/505(a)(3), and which amount is consistent with the minimum support guidelines in accordance with 750 ILCS 5/505(a)(1). SHERRY is currently unemployed and has a Master's Degree in Education. SHERRY has an ongoing duty to seek employment and will immediately notify STEVEN upon her having obtained employment within 24 hours thereof providing the name, address and telephone number of her employer. SHERRY will tender STEVEN a copy of her first paystub within 30 days thereof.

At the time of the Judgment, SHERRY is currently unemployed. In lieu of child support, STEVEN shall pay the monthly mortgage, insurance and taxes for the marital home for April 1, 2012. For the month of May 2012 and thereafter, until such time as STEVEN obtains employment, STEVEN shall pay \$1,100 per month to SHERRY as and [sic] for child support. Child support shall be modified upon STEVEN obtaining employment. STEVEN shall not have any obligation to pay child support from any income other than his income from employment due to the fact that the parties share custody of the children. The parties stipulate that STEVEN's employment shall constitute a substantial change in circumstances for the purpose of a petition to modify support.”

¶ 5 Steven petitioned to modify child support. He contended that there had been a substantial change in circumstances in that both parties had found work. At a hearing on the motion, Steven testified that he was unemployed at the time of the judgment and had been paying child support and other expenses out of the proceeds from the sale of Berwanger Insurance. All but \$8,000 of those proceeds had been spent to pay his debts from the divorce, living expenses, and child support.

¶ 6 Steven testified that he found employment in September 2012, with a gross salary of \$5,000 per month. His employment income still did not cover his expenses, and he continued to use the proceeds from the sale of Berwanger Insurance to pay them.

¶ 7 Sherry testified that she was also unemployed at the time of the judgment and had been receiving unemployment benefits of \$1,900 per month. In January 2013, she went to work for Sears, grossing \$5,000 per month.

¶ 8 Steven argued that, pursuant to *In re Marriage of Smith*, 2012 IL App (3d) 110522, the court should apportion the guideline 28% child-support amount between the parties because they shared custody of the children. The trial court disagreed, stating, “The judgment controls here, folks. This judgment has mandatory language.”

¶ 9 The court did find a substantial change in circumstances in that both parties had found employment. Per the agreement, the court ordered Steven to pay child support of 28% of his employment income, which came to \$969.71 per month.

¶ 10 Steven then filed a petition for contribution to his attorney fees. The trial court denied the petition, finding that the parties had approximately equal income and assets. Steven appeals.

¶ 11 Initially, Sherry contends that we lack jurisdiction of the order modifying child support. She argues that the order was entered on June 6, 2013, but Steven did not file his petition for attorney fees until July 8, 2013, more than 30 days later, and thus did not extend the time to appeal. Generally, a notice of appeal must be filed within 30 days of the judgment appealed from. Ill. S. Ct. R. 303(a)(1) (eff. May 30, 2008). However, while the June 6 order decided the petition to modify child support, it continued the matter for proceedings on other pending matters. Further, the order did not contain language that would have made the ruling immediately appealable. See Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). Moreover, as Sherry acknowledges, the thirtieth day after June 6, 2013, was a Saturday. Thus, Steven’s fee petition, filed on July 8, was timely. See 5 ILCS 70/1.11 (West 2012).

¶ 12 Turning to the merits, Steven first argues that the trial court erred by requiring him to pay the full guideline amount when the parties share equally the custody of the children. The Illinois Marriage and Dissolution of Marriage Act (the Act) provides that the minimum child support amount for two children should be 28% of the supporting party’s net income. 750 ILCS

5/505(a)(1) (West 2012). However, the Act also provides that the parties may execute an MSA providing for the disposition of property, maintenance, “and support, custody and visitation of their children.” 750 ILCS 5/502(a) (West 2012). The MSA, except for provisions concerning child support and custody, binds the trial court unless the agreement is unconscionable. 750 ILCS 5/502(b) (West 2012). While child support and custody provisions do not bind the trial court, the court should not set aside an MSA that adequately protects the children’s interests unless the MSA is against public policy or was the result of fraud, coercion, or duress. *In re Marriage of Sheetz*, 254 Ill. App. 3d 695, 701 (1993).

¶ 13 While Steven argues that the trial court ignored recognized principles of law, he himself ignores that the court merely followed the parties’ MSA. As Steven does not suggest that the MSA is against public policy, resulted from fraud, coercion, or duress, or is otherwise unconscionable, the court could not simply disregard it. *Smith* is distinguishable for the simple reason that the parties there had no agreement concerning child support.

¶ 14 Steven argues that Sherry’s increased income was also a substantial change in circumstances warranting a reduction in his child-support obligation. Again, however, the trial court merely followed the parties’ MSA; the MSA expressly contemplated what occurred here. It stated that each party would have custody of the children 50% of the time. Both parties were unemployed at the time and Steven would pay temporary child support of \$1,100 per month. When the parties found jobs, they could petition the court to modify child support. From that point on, Steven would pay 28% of his net monthly income. The apparent consideration for Steven’s agreement to pay the full guideline amount despite having custody of the children half the time is that he would “not have any obligation to pay child support from any income other than his income from employment due to the fact that the parties share custody of the children.”

Thus the MSA shows a conscious decision on Steven's part to forgo having the court allocate child support between the parties, in exchange for not having any outside income considered in his support obligation.

¶ 15 Steven further argues that the MSA did not require application of the statutory guideline amount. He contends that a "reasonable interpretation of the MSA is that Steve agreed to pay 28% of his net income as child support until such time as he filed a petition to modify child support." However, this is simply not what the MSA says. It says that he would pay \$1,100 per month until he obtained employment and that "[u]pon attaining employment Steven shall pay to Sherry 28% of Steven's approximate monthly net income." It is simply not reasonable to assume that the parties meant that "upon attaining employment but before filing a petition to modify child support," which period would presumably be brief, Steven would pay 28% of his income, but could thereafter ask the court to set support at some lower amount. The most logical reading of the MSA is that Steven would pay \$1,100 monthly until he found work, which the parties agreed would be a substantial change in circumstances. He could then petition the court to set support at 28% of his employment income—but not income from other sources—which is exactly what the trial court did.

¶ 16 Steven next contends that the trial court erred in refusing to order Sherry to contribute to his attorney fees in bringing the petition to modify child support. Section 508 of the Act allows for an award of attorney fees where one party lacks the financial resources to pay the full amount of fees incurred and the other party has the ability to contribute to that amount. 750 ILCS 5/508 (West 2012). The party seeking a fee award must establish his or her inability to pay and the other party's ability to do so. *In re Marriage of Puls*, 268 Ill. App. 3d 882, 889 (1994). Financial inability exists where requiring payment of fees would strip that party of her means of

support or undermine her financial stability. *Id.* A trial court's decision to award or deny fees will be reversed only if the trial court abused its discretion. *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005).

¶ 17 Although Steven argues that the trial court's findings are erroneous, he has not provided a transcript or a certified bystander's report of the proceedings. An appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claimed error and, in the absence of such a record, we presume that the trial court's order followed the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Thus, we presume that the evidence at the hearing supports the trial court's order. Moreover, the documentary evidence in the record, to which Steven refers, supports the trial court's finding that the parties had roughly even assets and incomes. Thus, Steven has not established an entitlement to fees.

¶ 18 The judgment of the circuit court of Lake County is affirmed.

¶ 19 Affirmed.