2017 IL App (3d) 160491-U

Order filed January 17, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

In re MARRIAGE OF SARAH DIANE METZGER, Petitioner-Appellant, and LAWRENCE DAVID METZGER, Respondent-Appellee.	)))))))))))	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois. Appeal No. 3-16-0491 Circuit No. 08-D-565 Honorable Kim Kelley, Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Holdridge and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held*: A circuit court order granting a husband more overnight visits with his daughter was a modification of time with the daughter, thus a modification of visitation and not a modification of custody where the parties had joint legal custody and the order did not make any rulings with respect to custody. The order that the husband had no continued obligation to pay half of the daughter's private school tuition was not an abuse of discretion considering the daughter's age at the time of the agreed dissolution, the husband's remarriage, the parties' relative incomes, and the husband's increased child support obligation.

¶ 2 The petitioner wife, Sarah Metzer, appeals from a circuit court judgment modifying the visitation schedule with her daughter with respondent husband, Lawrence Metzger, and modifying the husband's child support obligation with respect to the daughter's private school tuition.

¶ 3 FACTS

¶ 4 The parties divorced in 2008. At that time, an agreed Judgment of Dissolution of Marriage was entered. The judgment divided the parties' marital assets and debts and set forth the custody, visitation, and child support obligations regarding the parties' minor daughter, who was two years old at the time. The judgement provided that the parties were vested jointly with the care, custody, and control over their daughter, and that the wife would be the primary possessory parent. The judgment set forth specific visitation times for the husband, primarily Tuesday evenings and alternating weekends.

¶ 5 On December 13, 2011, another agreed order was entered. The order increased the amount of the child support paid by the husband and modified "visitation/custody" to specify the time with each party during summer vacation, Christmas vacation, and spring break. The visitation schedule was also modified to give the husband an extra evening during the school year and to change the visitation schedule during the summer months.

¶ 6 The wife filed a petition for the modification of child support on September 17, 2014, arguing that the husband's income had substantially increased. In response, the husband filed a petition to modify, acknowledging that an increase in child support was appropriate, but seeking, *inter alia*, modifications to delete his requirement to contribute to half the daughter's private school tuition and to contribute toward the daughter's health insurance premium. The husband

also sought a modification of the visitation schedule to allow him overnights on the evenings that he had visitation with the daughter. The wife filed a motion to dismiss the husband's petition.

¶ 7 The circuit court increased the husband's child support. After hearings, the circuit court denied the motion to dismiss and entered orders with respect to the other issues raised by the husband. Relevant to this appeal, the circuit court deleted the husband's obligation to pay any of the daughter's private school tuition and modified the visitation schedule to allow the husband overnights on Tuesday and Wednesday. The parties reached an agreement regarding health insurance whereby each party would maintain the daughter on their policies and each would pay one half of the uncovered healthcare expenses. The wife appealed.

¶ 8 ANALYSIS

¶ 9 The wife argues the circuit court actually modified custody of the daughter, rather than just visitation and parenting time. The husband contends that this issue was waived because it was raised for the first time in the wife's motion to reconsider but, in any event, the modification to the visitation schedule was not an abuse of discretion. The wife also argues that the circuit court erred in deleting the husband's obligation to pay half of the private school tuition. The husband contends that this was also not an abuse of discretion.

¶ 10 The wife contends that the husband's petition to modify specifically sought to modify visitation but that he was actually seeking a modification in custody. Therefore, the wife argues that the husband could not succeed on a theory that was not contained in his petition. While the husband argues that this issue was waived, we find that the motion to reconsider properly alleged that the circuit court erred in the application of existing law. See *North River Insurance Co. v. Grinnell Mutual Reinsurance Co.*, 369 Ill. App. 3d 563, 572 (2006).

¶ 11 Section 602.1 of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), prior to the 2016 amendment, specified that joint custody was custody determined pursuant to a Joint Parenting Agreement or a Joint Parenting Order. 750 ILCS 5/602.1(b) (West 2014). The parties' Joint Parenting Agreement in this case provided for joint legal custody, with each party having the right to see the daughter in accordance with judgments or orders entered by the court. The Judgment of Dissolution of Marriage provided that the care, custody, and control would be vested jointly with the parties, the wife was to be the primary possessory parent, and the judgment set forth the husband's times to see and be with the daughter.

¶ 12 Section 607 of the IMDMA, again prior to the 2016 amendment, provided that a "court may modify an order granting or denying visitation rights of a parent whenever modification would serve the best interests of the child." 750 ILCS 5/607(c) (West 2014). Visitation was defined as "in-person time spent between a child and the child's parent." 750 ILCS 5/607(a)(1)(West 2014). The modification provision did not require proof of a substantial change of circumstance, but only required the court to consider whether a modification of a visitation order would be in the minor's best interest. In determining the best interests of a child, the circuit court considers the factors listed in section 602(a) of the Act. 750 ILCS 5/602(a) (West 2014). On appeal, we will not reverse a circuit court's decision regarding the modification of visitation unless it was against the manifest weight of the evidence or an abuse of discretion. *In re Marriage of Adamson*, 2016 IL App (3d) 150105, ¶ 10.

¶ 13 Section 610 of the IMDMA governed custody modification, which was warranted when "in the case of a joint custody arrangement that a change has occurred in the circumstances of the child or either or both parties having custody, and that the modification is necessary to serve the best interest of the child." 750 ILCS 5/610(b)(West 2014).

¶ 14 The circuit court's order in this case modified the in-person time spent between the daughter and both parents. There is no mention in the circuit court, or argument by the parties, that the parties or the court sought to change the joint custody agreement. Pursuant to the terms of the Joint Parenting Agreement, the parties still had joint legal custody of the daughter and that agreement was not modified by the circuit court's order modifying the in-person time with the daughter. The Joint Parenting Agreement also established that the wife was the primary possessory parent, which was still true after the modification, albeit at a lesser amount. Thus, we find that the circuit court modified visitation, and its order was not against the manifest weight of the evidence or an abuse of discretion.

¶ 15 With respect to the issue of private school tuition, the parties' agreed Judgment for Dissolution of Marriage contained an agreement to equally split the cost of their daughter's school registration and other school fees. The judgment did not specifically mention "tuition." The dissolution was finalized on November 21, 2008, at which time the daughter was two years old. The husband testified that the daughter began attending parochial school when she was three years old, and he split the cost of the tuition equally with the wife since that time. The wife argues that the issue of private school tuition was determined by agreement of the parties in the judgment for dissolution, so any changes by the circuit court were a matter of contract interpretation and subject to *de novo* review. The husband argues that this agreement was in the nature of child support and was therefore modifiable upon a showing of a substantial change in circumstances, which this court reviews under an abuse of discretion standard.

¶ 16 Generally, agreed orders are not judicial determinations of the parties' rights but rather agreements between the parties and are subject to the rules of contract interpretation. *In re Marriage of Kolessar & Signore*, 2012 IL App (1st) 102448, ¶ 19. However, in marriage

dissolution proceedings, while "property disposition agreements between spouses are binding upon the court, unless unconscionable ***the court is not bound by agreements providing for the support, custody, and visitation of the children." *Blisset v. Blisset*, 123 Ill. 2d 161, 167 (1988). Thus, in order to make our determination, we look at the document itself.

¶ 17 The provision whereby the parties agreed to equally split the cost of their daughter's school registration and other school fees appears in one of the subparagraphs in section 5 of the agreed dissolution, which is the section that addresses the custody, visitation, and support of the daughter. This bolster's the husband's argument that it was in the nature of child support and not a part of the property settlement. We find, therefore, that this was an agreed provision in the nature of child support.

¶ 18 In order to modify a child support provision, a party must allege and demonstrate that a substantial change in circumstances has occurred since the time of the entry of the agreed order that necessitates and warrants a modification of the agreement between the parties. 750 ILCS 5/510(a) (West 2012); *In re Marriage of Petersen*, 2011 IL 110984, ¶ 18. A circuit court, however, enjoys broad discretion in determining the modification of child support, and we will not overturn its decision unless there is an abuse of discretion. *McClure v. Haisha*, 2016 IL App (2d) 150291, ¶ 20 (citing *In re Marriage of Hill*, 2015 IL App (2d) 140345, ¶ 17).

¶ 19 In this case, the husband testified that the daughter was only two years old at the time of the dissolution and was not in any school. The husband testified that he agreed to the private school preschool when the daughter turned 3 because it was cheaper than daycare, but that the public school system was very good in their area. The daughter was in the fourth grade at the time of the hearing. The father testified that due to his increased child support obligation, in

conjunction with the fact that he was remarried and had another child, he could not afford to contribute to the private school tuition.

¶ 20 The circuit court found that, considering the parents' incomes, including the increased amount of child support the husband paid to the wife, and the fact that private school was elective, the parties' relative incomes were such that the husband would no longer be required to contribute to the tuition if the wife chose to continue sending the daughter to private school. We find that the father demonstrated a substantial change in circumstances since the entry of the agreed order and find no abuse of discretion in the circuit court's order concluding that the father's child support obligation did not include paying half of the daughter's private school tuition.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Tazewell County is affirmed.

¶ 23 Affirmed.