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2017 IL App (3d) 160767-U

Order filed September 19, 2017

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2017

<i>In re</i> MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 9th Judicial Circuit,
MICHELLE T. ANDERSON, n/k/a	)	Knox County, Illinois,
MICHELLE R. THOMPSON,	)	
	)	
Petitioner-Appellant,	)	Appeal No. 3-16-0767
	)	Circuit No. 15-D-138
and	)	
	)	
BRYAN C. ANDERSON,	)	Honorable
	)	Scott Shiplett,
Respondent-Appellee.	)	Judge, Presiding.

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JUSTICE McDADE delivered the judgment of the court.  
Presiding Justice Holdridge and Justice Schmidt concurred in the judgment.

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**ORDER**

¶ 1       *Held:* (1) Circuit court did not abuse its discretion in finding that a downward deviation from statutory child support guidelines was proper; however (2) circuit court abused its discretion in setting the amount of the deviation at 50%.

¶ 2       Petitioner, Michelle T. Anderson, appeals from the circuit court's judgment for dissolution of marriage. Petitioner takes exception only to the amount ordered for child support, which the court set at a biweekly amount of \$317.30. Petitioner argues that this amount, a 50%

downward deviation from statutory guidelines, constitutes an abuse of discretion on the part of the circuit court. We affirm in part, vacate in part, and remand for further proceedings.

¶ 3

### FACTS

¶ 4

Petitioner filed a petition for dissolution of marriage on August 3, 2015. According to the petition, petitioner and respondent, Brian C. Anderson, were married on October 26, 2002. Petitioner and respondent had three children together, ranging in age from 5 to 10 years old at the time the petition was filed.

¶ 5

Petitioner also filed a petition for temporary relief in which she sought, *inter alia*, temporary child support at the statutory rate of 32%. In a temporary order of support, the circuit court found that respondent's net income was \$1,681.25 biweekly, and ordered him to pay \$538 biweekly in child support.

¶ 6

Petitioner and respondent were able to settle all issues related to assets and debts, as well as significant decision making and parenting time. The agreed parenting order named petitioner the residential parent and respondent the nonresidential parent. Respondent was awarded parenting time with the children on alternating weekends, plus one overnight and one evening per week. The parties also delineated a number of holidays for which they would alternate years with the children. The order also awarded each party two nonconsecutive uninterrupted weeks of parenting time during the children's summer vacation.

¶ 7

The court held a hearing on the issues of current and retroactive child support on July 8, 2016. The court also received a filing from petitioner titled "Recapitulation of Income," accompanied by copies of respondent's 2015 W-2 and final wage statement. Respondent's wage statement showed a gross year-to-date income of \$69,786.46 and a biweekly net pay of \$1,456.24. After subtracting various items, such as income taxes and union dues, petitioner

calculated respondent's net income for child support purposes to be \$51,561. Petitioner thus requested biweekly payments of \$634.60, representing 32% of respondent's net income.

Respondent filed a wage statement from July 2016, which showed that \$538 was being deducted from his paycheck for child support, resulting in a biweekly net pay of \$983.58. The wage statement showed \$201 deducted from respondent's biweekly gross pay for health insurance.

¶ 8 At the hearing, respondent testified that he was employed by the Galesburg police department, and was currently assigned to Peoria Multi-County Narcotics Enforcement Group. Respondent testified that he should pay less than the statutory 32% because he would have the children 40% of the time, he made less money than petitioner, and he covered the children's health insurance. Respondent testified: "I'm paying \$402 every month in \*\*\* health insurance for my children, which I feel should go towards the child support." Respondent testified that he was "struggling" financially. Respondent pointed out that he would still be paying for things for the children, such as a home, utilities, food, clothes, and shoes.

¶ 9 Respondent testified that he was dating someone, and he often paid for their dinners together. He also recounted occasional weekend trips, as well as a \$200 hunting trip in Texas. Respondent agreed that he spent \$125 on a dinner in Peoria with his girlfriend. He had also spent money on concerts and \$300 on a golf membership. Each of these expenditures occurred after he began paying temporary child support.

¶ 10 Respondent explained that the separation had made his work schedule less flexible. He was unable to work overtime, as he had during the marriage, and thus was earning less money. He testified that he was currently renting a residence from a friend. The friend knew of respondent's financial hardship, and gave respondent a \$150 discount in rent.

¶ 11 Petitioner testified that she was a homemaker and described taking care of her children as her “full-time job.” She received income from periodic distributions from a trust established by her father. Petitioner agreed that she receives \$4000 per month in “eight or nine” months of the year and \$5000 per month in the remaining months, all before tax. She also frequently received a larger distribution at the end of the year; in 2015, for example, she received an extra distribution of \$12,500. Her total pretax income from the trust in 2015 was \$65,500. She would still have to pay income tax on that amount. When asked what her historical income tax payments have been, petitioner responded that she did not know.

¶ 12 Petitioner testified that she was presently covered by respondent’s health insurance, but would be responsible for finding her own health insurance after the divorce. Because of health problems, she required a plan with good coverage. She testified that the plans she had looked into ranged in price from \$500 to \$750 per month. Petitioner was not requesting respondent cover her health insurance, but was requesting that he cover the children’s insurance, as well as one-half of their extracurricular expenses.

¶ 13 Petitioner testified that she was dating an individual who lived with her. They went to dinner alone up to twice a week. They also went to movies and concerts. Petitioner’s partner worked at a law firm, contributed to household expenses, and assisted with the children. Petitioner held a masters degree in counseling, and was board certified in that field. Her licenses were up to date. If she were to work, petitioner would work as a counselor in a school. Petitioner testified that she had no intent to go to work.

¶ 14 In closing, counsel for petitioner calculated that 32% of respondent’s income would amount to a biweekly support payment of \$634.60. Counsel urged that the court either apply that support retroactive to the time of the divorce filing—resulting in an \$8300 retroactive arrearage

for respondent—or retroactive to the request for temporary support—resulting in a \$3,241.60 arrearage. Counsel also requested respondent pay one-half of out-of-pocket medical costs and extracurricular costs.

¶ 15 Counsel for respondent argued that while respondent was willing to pay for one-half of out-of-pocket medical and extracurricular expenses, those amounts should be deducted from child support. Counsel requested that respondent be ordered to pay 60% of the statutory guideline amount, reflecting the 40% of time spent with the children.

¶ 16 On July 11, 2016, the court delivered its ruling in a letter to the parties. In the letter, the court stated that it had, in previous cases, approved zero-support orders where the parents' incomes were similar and parenting time was split 50/50. The court wrote: "If there is a disparity in income, child support becomes the vehicle by which some parity is reached, allowing the children to live comfortably with both parents." The court found that the actual division of quality parenting time was approximately split 65/35 in favor of petitioner, and further found that the income of each party was roughly the same, around \$65,000. The court noted that respondent's obligation under the statutory guidelines would be \$634.60 biweekly. The court also pointed out that because petitioner could work in a school, her work schedule would line up identically to the children's schedules. The court concluded:

"Considering \*\*\* the financial resources and needs of the parents, and the standard of living that the children would have enjoyed had the parents not been divorced, the court particularly looks at the parity of income, the \$400/month insurance payment, the mother's earning potential, and the division of parenting time, the Court believes that a downward deviation is appropriate. The Court will deviate by 50% resulting in a bi-weekly support amount of \$317.30."

The court continued: “Considering that support is somewhat less than that set in the Temporary Order, the Court will not impose any retroactive support obligation, nor will it consider there to have been any overpayment.” The court’s calculations and support ruling was later incorporated into paragraph C of a judgment for dissolution of marriage filed on November 17, 2016. The court’s ruling denying retroactive support was incorporated into paragraph D of that judgment.

¶ 17 ANALYSIS

¶ 18 On appeal, petitioner argues that the circuit court abused its discretion both in ordering a deviation from the statutory support guidelines and in setting that deviation at an amount of 50%. Petitioner also argues that the circuit court abused its discretion in refusing to order retroactive child support.

¶ 19 The Illinois Marriage and Dissolution of Marriage Act (Act)<sup>1</sup> sets the guideline amount for a parent paying support for three children at 32% of the payor’s net income. 750 ILCS 5/505(a) (West 2014). The Act holds that the guideline amount should be applied unless the court, in considering the best interests of the children, determines that a deviation is appropriate. *Id.* The Act further provides a nonexclusive list of five factors relevant to a court’s deviation determination: (1) the financial resources and needs of the children; (2) the financial resources and needs of the parents; (3) the standard of living the children would have enjoyed had the marriage not been dissolved; (4) the physical, mental, and emotional needs of the children; and (5) the educational needs of the children. 750 ILCS 5/505(a)(2) (West 2014).

¶ 20 A rebuttable presumption exists in favor of the statutory guideline child support amount. *In re Marriage of Abu-Hashim*, 2014 IL App (1st) 122997, ¶ 35. “The proponent of a deviation

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<sup>1</sup>In the time since the hearing in the present case, the General Assembly has significantly revised the Act, including the section governing child support. For the purposes of this appeal, however, we will refer exclusively to the version of the Act in effect in July 2016.

bears the burden of producing evidence that compelling reasons exist to justify the deviation.” *Id.* The circuit court’s award of child support will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Scafuri*, 203 Ill. App. 3d 385, 391 (1990). “An abuse of discretion occurs only when the trial court’s decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court.” *Seymour v. Collins*, 2015 IL 118432, ¶ 41.

¶ 21 I. Deviation from Guidelines

¶ 22 In the present case, respondent’s child support obligation under the statutory guidelines would be \$634.60 biweekly. In finding that a deviation from those guidelines was appropriate, the circuit court cited the parity in the parties’ incomes, the division of parenting time, respondent’s exclusive contribution to the children’s health insurance, and petitioner’s earning potential. We find the court’s determination that a deviation was appropriate was not arbitrary, fanciful, or unreasonable.

¶ 23 Respondent’s wage statement showed that he was taking home only \$983.58 every two weeks under the temporary support order, which set support at \$538 biweekly. Petitioner, meanwhile, had a similar gross income. While she testified that she would pay income tax on that amount, no evidence was presented showing what that tax would be. Petitioner testified that she would pay between \$500 and \$750 per month for her own health insurance, but no other evidence was presented regarding deductions from her gross income.

¶ 24 A child support obligation set at the guideline amount would leave respondent with an approximate net income of \$887 every two weeks, or just over \$23,000 annually.<sup>2</sup> In turn,

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<sup>2</sup>Support set at the guideline amount of \$634.60 would represent an increase of \$96.60 from the \$538 respondent paid under the temporary support order. A reduction of his net pay by that amount (\$96.60) would result in a new net pay of \$886.98.

petitioner would receive approximately \$16,500 annually, on top of a gross income already similar to respondent's. It is clear that the three children would enjoy a significantly reduced standard of living in the 35% of time spent with respondent, compared to their time spent with petitioner. The circuit court did not abuse its discretion in finding that a deviation was necessary to avoid such a disparity.

¶ 25 Petitioner argues that the parity or similarity in the parties' incomes "is not a valid basis for a deviation" from the guidelines. Petitioner cites to *Abu-Hashim*, a case in which the circuit court awarded the guideline amount, and the appellate court wrote: "[T]he parties were not high-income individuals, and the similar yearly income is not a compelling reason to deviate from the statutory guidelines." *Abu-Hashim*, 2014 IL App (1st) 122997, ¶ 36. Similarly, petitioner cited to *In re Marriage of Demattia*, 302 Ill. App. 3d 390 (1999), in which the circuit court applied the guideline support amount despite the parents' identical incomes, and the appellate court affirmed.

¶ 26 The cases cited by respondent do not dictate a particular result in this case, given the highly deferential abuse of discretion standard employed. In each of petitioner's cited cases, the appellate court affirmed the circuit court's award of a guideline amount. That is, the higher court found that the lower court did not abuse its discretion in finding the parity of incomes was not enough to deviate from the guidelines. It does *not* follow from those rulings that a court that *does* deviate from the guidelines because of income parity must have abused its discretion. In other words, it is possible that neither position is so unreasonable or arbitrary that "no reasonable person would take the view adopted by the trial court." *Seymour*, 2015 IL 118432, ¶ 41.

¶ 27

## II. Amount of Deviation



¶ 28 While petitioner references an “extreme downward deviation” within her argument that the circuit court abused its discretion in deviating at all, we analyze the issues separately. Thus, while we find—for the reasons set forth above—that the circuit court did not abuse its discretion in finding that a deviation was appropriate (*supra* ¶¶ 22-26), we must next consider whether the court abused its discretion in setting the *amount* of that deviation.

¶ 29 Initially, we agree that the amount of the deviation in the present case is nothing if not significant. The 50% downward deviation results in petitioner receiving \$317.30 less every two weeks than she would under the guidelines. Annually, petitioner will receive \$8,249.80 less than she would under the guidelines.

¶ 30 It is also significant that the circuit court granted respondent a downward deviation *even greater* than the deviation respondent requested at the hearing on the matter. Respondent requested that he be required to pay only 60% of the guideline amount, based on his estimation that he would be with the children 40% of the time. The circuit court actually disagreed with respondent’s estimation, finding that he would spend only 35% of the time with the children, yet it nevertheless awarded an even greater deviation (50%).

¶ 31 Further, while the circuit court repeatedly invoked respondent’s \$201 biweekly insurance deduction as a factor in granting a 50% deviation, it is unclear the role that this factor played.

Curiously, the circuit court wrote in a footnote that the insurance payment was not a factor

“as a mathematical calculation *per se*, as this has previously been subtracted from his gross income in arriving at a net income and further reduction would be ‘double-dipping’ of credit for this expenditure, but if there were no deviation the Court would then Order [petitioner] to pay 50% of this premium and only deduct \$200 in determining [respondent’s] net.”

¶ 32 The court’s reasoning is concerning for at least two reasons. Primarily, if the circuit court was not considering the insurance payment “as a mathematical calculation *per se*,” it is unclear how that payment would play any role in reducing respondent’s support obligation. Second, the court’s alternative—wherein it would not deviate from the guideline amount, order petitioner to pay \$100.50 biweekly to split the insurance payment, and deduct only a half payment in calculating respondent’s net income—would result in an effective biweekly support amount of \$565.58,<sup>3</sup> a far cry from the \$317.30 actually awarded.

¶ 33 The circuit court’s decision to award respondent a greater deviation than even respondent requested, based upon unclear reasoning, was arbitrary and unreasonable. We therefore vacate paragraph C of the judgment of dissolution and remand for reconsideration of the issue of child support. Pursuant to section I of this order (*supra* ¶¶ 22-26), the circuit court on remand may continue to deviate from the statutory support guidelines.

¶ 34 III. Retroactive Support

¶ 35 Petitioner also argues that the circuit court should have awarded retroactive support “[e]ven given its drastic downward deviation from guideline support.” Given our *vacatur* of paragraph C of the dissolution judgment, which set the support amount, we must also vacate paragraph D, in which the court relied upon and referenced that amount in denying retroactive support. Thus, in setting a new support amount on remand, the circuit court must also necessarily rule again on the issue of retroactive support.

¶ 36 CONCLUSION

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<sup>3</sup>The math is as follows: Respondent’s net income was calculated to be \$51,561. By recouping one-half of the \$201 insurance payment (\$100.50) every two weeks, respondent’s net income would increase to \$54,174. At 32%, his biweekly support obligation would be \$666.76. Petitioner, in turn, would be paying respondent \$100.50 as her half of the insurance payment, resulting in an effective transfer from respondent to petitioner of \$566.26.

¶ 37 The judgment of the circuit court of Knox County is affirmed in part and vacated in part.

¶ 38 Affirmed in part and vacated in part.

¶ 39 Cause remanded.