2018 IL App (1st) 172871-U
Order filed: August 24, 2018

FIRST DISTRICT
FIFTH DIVISION

No. 1-17-2871

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re the Marriage of:	)	Appeal from the
	)	Circuit Court of
HELEN JONAS,	)	Cook County.
	)	
Petitioner-Appellee,	)	
	)	No. 2014 D 5374
and	)	
	)	
GABRIEL CORDOVA,	)	Honorable
	)	Jeanne Cleveland Bernstein,
Respondent-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Reyes and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: Order granting petition to modify child-support obligation is reversed, and this matter is remanded for further proceedings, where circuit court improperly granted the contested petition without an evidentiary hearing.

¶ 2 Respondent-appellant, Gabriel Cordova, appeals from a number of postdissolution orders entered by the circuit court relating to the modification of his child-support obligation and providing for retroactive payments as to an arrearage. On appeal, Gabriel argues that the circuit court erred by failing to: (1) conduct an evidentiary hearing on a petition filed by petitioner-appellee, Helen Jonas, to modify Gabriel's child-support obligation; (2) apply recent amendments to the child support statute; and (3) consider the parties' agreements, which had

been made part of their dissolution judgment. Because we conclude that the circuit court improperly granted Helen's petition without an evidentiary hearing, we reverse and remand for further proceedings.[1]

¶ 3 I. BACKGROUND

¶ 4 On June 10, 2014, Helen filed a petition for the dissolution of her marriage to Gabriel. The petition alleged that: the parties were married on July 7, 2007; they had two minor children, one born on October 2, 2007, and the other born on October 21, 2009 (the children); and the parties had been living separately since June 2010. Helen requested that she and Gabriel be awarded joint custody of the children. In his answer to the petition, and in a cross-petition for dissolution of marriage, Gabriel sought sole custody, care, and control of the children and requested that Helen pay child support.

¶ 5 The circuit court entered a judgment for dissolution of marriage (dissolution judgment) on May 12, 2015. The judgment incorporated the parties' marital settlement agreement (MSA), and joint parenting agreement (JPA). The MSA stated that Helen and Gabriel would have joint legal custody of the children and "named" Helen as "the residential parent." However, paragraph 1(D) of the JPA provides: "GABRIEL and HELEN agree that HELEN shall be the residential parent with respect to Education and GABRIEL shall be the residential parent for Medical and related issues." The visitation schedule contained in the JPA includes the following provision:

> "GABRIEL shall be entitled to regular parenting time with the children on alternate weekends commencing on Friday after school and ending on Sunday at 5:00 p.m., no later than 8:00 p.m. and on Monday overnight to Tuesday wherein he shall take

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

> the children to school and Thursday after school overnight until Friday wherein he shall take the children to school."

¶ 6 The MSA provides that Helen and Gabriel would split the costs of the minors' extracurricular activities, as well as the costs of school fees and tuition through high school graduation, with a maximum payment by Gabriel of $5,500 per year as to these expenses. As to child support, the JPA provides:

> "GABRIEL shall pay to HELEN as and for child-support, the sum of $200.00 per month which represents an amount below statutory guidelines. Said amount has been arrived at in light of the fact that GABRIEL will parent the children as much time as HELEN parents the children and in light of the fact that he will be contributing no more than $5,500.00 towards the children's educational and extracurricular expenses. Said obligation shall continue until the youngest child is emancipated."

¶ 7 On January 21, 2016, Helen filed a petition under section 510 of the Illinois Marriage and Dissolution Act (Act) (750 ILCS 5/510 (West 2016)), which sought to modify Gabriel's child support obligation based on a substantial change in circumstances. Helen alleged that she had been unemployed since July 2015 and, although she had been seeking new employment, she had become temporarily disabled after breaking her foot in October 2015. Helen maintained that Gabriel had earned a gross income of $69,000 in 2013 and that, on "information and belief," he also received a military disability pension of $500 per month. She asked that "a guideline child support [order] be entered based on [Gabriel's] net income." The petition included a certification signed by Helen, pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2016)), but included no further evidentiary proof.

¶ 8 In a March 8, 2016, order, Gabriel was granted 28 days to respond and the petition was set for status on April 14, 2016. At that status, Gabriel was granted an additional 28 days to respond, and a pretrial conference was set for May 13, 2016. Additionally, the parties were ordered to exchange financial disclosure statements pursuant to Cook County Circuit Rule 13.3.1 (Cook Co. Cir. Ct. R. 13.3.1 (Jan. 1, 2003)).

¶ 9 However, on May 10, 2016, an order was entered again requiring the parties to exchange Rule 13.3.1 disclosure statements and the pretrial conference was continued to June 20, 2016. The pretrial conference was continued to August 12, 2016, then to August 31, 2016. The order setting the pretrial conference for August 31, 2016, also directed Gabriel to provide a financial affidavit, his 2014 and 2015 tax records, and end-of-year and year-to-date paystubs by August 29, 2016. On August 31, 2016, the matter was continued to October 14, 2016, for status on the production of documents and the possible appointment of a child representative. On that date, the matter was continued for a November 15, 2016, status on settlement "and/or" the appointment of a child representative. On November 15, 2016, the matter was continued to January 17, 2017, for a pretrial conference and the parties were ordered to appear.

¶ 10 On January 17, 2017, the parties appeared with counsel. Gabriel, at that time, had not filed a responsive pleading to the petition to modify child support. Although there is no transcript of the proceedings, the parties agree that the court held a pretrial conference on that date. Furthermore, on that date the court entered an order indicating that Helen's motion to modify child support was "before the court" and the court was "fully advised." The order: (1) directed Gabriel to pay Helen 28% of his net pay in child support based on his 2016 earnings; and (2) found that arrearages in child support would be calculated beginning on January 21, 2016 (the date the petition to modify was filed by Helen), after accounting for any child support payments

Gabriel may have already made. Gabriel was to turn over certain tax forms to his attorney within 7 days of receipt. He was granted leave to file a motion to amend the dissolution judgment and to modify custody. The court also set the case for a February 8, 2017, status as to the entry of child support. In a separate order, the parties were referred to private mediation on the issue of parenting time. That order stated that discovery on financial allocation and parental responsibility issues would not be stayed during mediation.

¶ 11 On February 16, 2017, Gabriel filed a petition to vacate the January 17, 2017, order. In the petition, he alleged that the issue of child support was discussed at a "brief" pretrial conference, but the court did not conduct an evidentiary hearing before entering the order which modified his child support payment. Gabriel asserted that, during the pretrial conference, "it was alleged that Helen was the residential parent and that she spent more time with the child." Gabriel argued that the court was not made aware that the JPA provided that Helen was a residential parent with respect to education, that he was the residential parent with respect to medical and related issues, and that he was to pay $200 per month in child support based on the understanding that he would parent the children as much as Helen would.

¶ 12 On February 28, 2017, the circuit court entered an order requiring Gabriel to produce proof of his 2016 income taxes and other financial records. The court directed Helen to produce "proof of trust." The child support modification issue was set for a "pretrial/hearing" on May 16, 2017.

¶ 13 On May 16, 2017, the circuit court entered an order which denied Gabriel's motion to vacate the January 17, 2017, order and instructed both parties to exchange financial information. Helen was to exchange "complete information regarding [trust] including bank statements"

within 7 days, and the parties were to begin mediation within 14 days. The matter was set for status on July 6, 2017. On that date, a status on mediation was set for September 15, 2017.

¶ 14 On July 19, 2017, Helen filed a petition for rule to show cause and other relief alleging that Gabriel had not paid the increased child support based upon 28% of his net income, which she alleged was $1,290 per month, or the child support arrearage of $21,020, pursuant to the order of January 17, 2017. Instead, Gabriel had continued to pay $200 per month in child support, pursuant to the dissolution judgment. On September 5, 2017, the circuit court gave Gabriel time to respond to the petition, appointed a child representative, and set a hearing on the petition for rule on October 11, 2017.

¶ 15 In Gabriel's verified response to the petition for rule to show cause, he admitted that a "temporary" child support order was entered "without prejudice" on January 17, 2017. He asserted that the issue of permanent child support was still pending. In an affirmative defense, Gabriel attacked the January 17, 2017, order as setting forth an improper "straight percentage" child-support obligation, which was ambiguous as to the exact amount to be paid. Gabriel stated that Helen had refused to cash his recent child-support checks, and even ripped up one of the checks, put it an envelope, and mailed it back to him.

¶ 16 On October 11, 2017, the court heard arguments on the petition for rule to show cause. The court entered an order on that date setting Gabriel's child support arrearage at $26,677.69, based upon the January 17, 2017 order, with interest of 9% due on any amounts not paid after January 17, 2017. The order did not state how the arrearage amount of $26,677.69 had been calculated, and did not give a specific amount of modified monthly child support payments. The court discharged the petition for rule to show cause and set the case for October 12, 2017, "for entry of a child support order [and] determination of arrears."

¶ 17 On October 19, 2017, the circuit court entered a uniform order for support requiring Gabriel to pay $1,289.74 per month in child support, as well as $100 per month toward the outstanding arrears of $26,677.69. The obligation to pay the support will terminate on October 21, 2027. The order listed Gabriel's net annual income as $55,276. The case was continued to December 12, 2017, for a report from the child representative.

¶ 18 In response to Gabriel's motion requesting a finding under Supreme Court Rule 304(a) (eff. Mar. 8, 2016) as to the child support orders, on November 16, 2017, the court entered an order stating that the October 19, 2017, order was a permanent child support order. The order further stated that all issues between the parties had been resolved, there were no pending motions, and the child representative was discharged. Gabriel appealed, and his notice of appeal states that he is appealing from the final order of November 16, 2017, "and any and all orders leading up to and included in said judgment including but not limited to the orders of: January 17, 2017; May 16, 2017; and October 19, 2017."

¶ 19 II. ANALYSIS

¶ 20 On appeal, Gabriel argues that the circuit court erred by failing to: (1) conduct an evidentiary hearing before modifying his child support obligations under section 5/510(a)(1) of the Act; (2) apply amendments to the Act that became effective prior to the time it entered the October 19, 2017, order; and (3) consider the terms of the MSA and JPA, which Gabriel contends should have resulted in a deviation from the Act's guidelines regarding child support and were also relevant to the issue of retroactive child support. We find the first issue dispositive.

¶ 21 Section 5/510(a)(1) of the Act provides 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). 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; *In re Marriage of Saracco*, 2014 IL App (3d) 130741, ¶ 13. If a party seeking a modification establishes that there is a substantial change in circumstances, the circuit court may modify the child support obligation in accordance with the factors listed in section 505(a) of the Marriage Act. 750 ILCS 5/505(a) (West 2016); *In re Marriage of Rash and King*, 406 Ill. App. 3d 381, 388 (2010).

¶ 22 Motions to modify child support turn on the individual facts and circumstances of each case. *In re Marriage of Garrett*, 336 Ill. App. 3d 1018, 1020 (2003). The decision to modify a child support payment lies within the discretion of the trial court and we will disturb the decision only where there has been an abuse of discretion. *Id*. The failure to hold an evidentiary hearing on a request to modify child support may be considered an abuse of discretion. *In re Marriage of Burbridge*, 317 Ill. App. 3d 190, 193 (2000).

¶ 23 Gabriel first argues that the relevant facts were disputed, and therefore the court abused its discretion in granting an increase in his child support payment and awarding retroactive child support in the January 17, 2017, and October 11, 2017, orders without first conducting an evidentiary hearing. In response, Helen does not dispute that no evidentiary hearing was held, or that if the issue was in fact disputed, it would have been error for the circuit court to decide her petition to modify without such an evidentiary hearing.

¶ 24 Rather, Helen asserts that neither party requested a hearing on her petition to modify, and, following the pretrial conference, an agreed order was entered. Helen further maintains that the parties represented their positions during the pretrial conference, the court made recommendations and, "[b]ut for the acceptance of the [c]ourt's recommendations at the pretrial

by the parties no order adjudicating the pending petition for modification of [child] support would have been entered." Finally, Helen contends that, because the record does not contain a report of the proceedings, it will be presumed that the orders entered by the trial court were in conformity with law and had a sufficient factual basis pursuant to *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 25 First, we reject Helen's contention that the record reflects that the circuit court's decision to modify Gabriel's child-support obligation was made without a hearing by the agreement of the parties, as well as her alternative assertion that the record is insufficient for us to come to a contrary conclusion.

¶ 26 The record contains a total of five orders specifically identified as being "agreed," with four such orders entered prior to the January 17, 2017, order. Thus, the parties and the circuit court clearly understood how to indicate for the record when an orders entered by the circuit court were in fact agreed. In contrast, none of the relevant orders at issue here—those entered on January 17, 2017, May 16, 2017, and October 19, 2017—contain any indication that they were entered by the agreement of the parties.

¶ 27 Moreover, the January 17, 2017, order, in which the circuit court first concluded that Gabriel would have to pay Helen 28% of his net pay in child support and also pay arrearages in child support, was immediately followed by Gabriel's filing of a petition to vacate. Therein, Gabriel alleged that the order was improperly entered following a "brief" pretrial conference instead of an evidentiary hearing, and without the circuit court considering contested evidence regarding the amount of time each parent would be responsible for caring for the children.

¶ 28 Finally, the record—particularly the record with respect to the petition for rule—clearly indicates that the parties thereafter continued to debate the exact nature of the trial court's prior

order. And, the uniform order for support entered on October 19, 2017, clearly indicates that it was entered only after a "hearing," contains no indication that it was entered after an "evidentiary" hearing, and specifically indicates that it was not entered "[b]y agreement of the parties."

¶ 29 Despite the lack of any report of proceedings, we find this record more than sufficient to establish that the factual and legal basis for granting Helen's petition to modify Gabriel's child-support obligation was in fact disputed, and no agreement with respect to the petition was reached below. The only remaining question, then, is if Helen's petition could be granted following only a pretrial conference and without an evidentiary hearing. We find that it could not.

¶ 30 As has long been recognized that "[i]t is axiomatic that all parties to a lawsuit are entitled to a full and complete trial on the merits of all matters properly in issue. [Citation.] It is equally clear that a preliminary hearing, held for a restricted and specified purpose, cannot be considered a full trial of all matters in contention." *General Magnetic Corp. v. Erickson*, 75 Ill. App. 2d 472, 475 (1966). More specifically, courts have recognized that with respect to the modification of child custody or child support, in the "absence of an agreement between the parties, a hearing by the court, with evidence by all sides being presented and considered, is necessary." *In re Marriage of Staszak*, 223 Ill. App. 3d 335, 341 (1991); *In re Marriage of Breyley*, 247 Ill. App. 3d 486, 493 (1993); *In re Marriage of Burbridge*, 317 Ill. App. 3d at 193.

¶ 31 Because there was no agreement with respect to Helen's petition to modify child support, an evidentiary hearing was necessary prior to the determination of that petition. See *In re Marriage of Burbridge*, 317 Ill. App. 3d at 193. For this reason, we reverse the circuit court's

judgment and remand the cause to the circuit court for an evidentiary hearing on the merits of Helen's petition.

¶ 32 Having agreed with Gabriel on this issue, we need not address the remaining issues he raises on appeal. Nevertheless, we do note that one of his arguments involved the application of recent amendments to section 505 of the Act, which changed the method by which any possible modifications to child support should be calculated. See Public Act 100-15 (eff. July 1, 2017) (amending section 505 of Act to provide for an award of child support based on an income-shares model, rather than the former a percentage-of-obligor income model). Because these amendments were effective before any evidence will be received at an evidentiary hearing or any order modifying Gabriel's child-support obligation will be entered upon remand, and because Helen has no vested right to modification of Gabriel's obligations under the preexisting version of the Act, the current version of the Act should be applied below. See *Pierce v. Pierce*, 69 Ill. App. 3d 42, 44 (1979); *Josic v. Josic*, 78 Ill. App. 3d 347, 350 (1979); see also *Dardeen v. Heartland Manor, Inc.*, 186 Ill. 2d 291, 300 (1999) (there is no vested right in the mere continuance of a law, and the legislature has an ongoing right to amend a statute).

¶ 33 III. CONCLUSION

¶ 34 For the foregoing reasons, we reverse the judgment of the circuit court and remand for further proceedings consistent with this order.

¶ 35 Reversed and remanded.