2018 IL App (2d) 180106-U
No. 2-18-0106
Order filed December 10, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF ERIKA K. FORD f/k/a Erika K. Soltow, Petitioner-Appellee, and JEFFREY M. SOLTOW, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Lee County. No. 10-D-55 Honorable Jacquelyn D. Ackert, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting Erika's petition to modify child support, in not deviating from statutory child support guideline amounts, or in its interpretation of the child support statute. Therefore, we affirmed.

¶ 2 Respondent, Jeffrey M. Soltow, appeals from the trial court's order granting the petition to modify child support filed by petitioner, Erika K. Ford, f/k/a Erika K. Soltow. Jeffrey argues that: (1) the trial court should have denied the petition because Erika failed to show that there was a substantial change in circumstances; (2) the trial court abused its discretion by failing to deviate downward from statutory child support guidelines; and (3) the trial court erred in strictly

interpreting the word "overnight" in the child support statute and therefore not applying the shared physical care child support guidelines. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The parties married in 2000. They had three sons, born in 2001, 2003, and 2005. The parties' marriage was dissolved on June 8, 2010. The dissolution judgment incorporated the parties' joint parenting agreement and their property settlement agreement. The joint parenting agreement provided that the parties would have joint custody of the children, with Erika being the residential parent. Jeffrey was to have parenting time every other weekend from Friday afternoon until Sunday at 7:30 p.m., and every Monday and Wednesday from after school/work until 7 p.m. The property settlement agreement stated that the parties agreed to deviate downward from the statutory guidelines and set child support at $213 every two weeks, representing 15% of Jeffrey's net income. According to the uniform order of support, his child support obligation would otherwise have been $454.40. The reasons listed for the deviation in the uniform order were the amount of time each party spent with the children and the ability of both parties to support them.

¶ 5 On February 11, 2011, Erika filed a motion to modify child support, alleging that there had been a substantial change in circumstances. She filed a financial affidavit listing her gross salary as $5,516 monthly and $66,192 yearly. Jeffrey filed a financial affidavit that listed a bi-weekly gross income of $1,950.85. In the trial court's June 14, 2011, order, it stated as follows. That transcripts from the prior hearing showed that a deviation in child support was granted based on the amount of time Jeffrey spent with the children and based on Jeffrey's mother providing daycare at no cost to the parties. The former consideration was appropriate whereas the latter consideration was not. Erika's net income was higher than Jeffrey's after taking child

support into consideration, and her financial condition was better. There was no change in the amount of time Jeffrey spent with the children. The trial court concluded that a child support increase was appropriate, but that a downward deviation from statutory guideline support was also appropriate based on the amount of time Jeffrey spent with the children, the parties' relative financial circumstances, and Erika's higher net income. The trial court ordered Jeffrey to pay bi-weekly child support of $293.84, which was 20% of his net income. It stated that the guideline child support would have been 32% of his net income.

¶ 6 In an agreed order entered on May 13, 2014, the parties agreed that Jeffrey would still have visitation every other weekend. However, they modified that agreement such that the children would have the choice to stay until Monday morning on the first visitation of the month, and that they would stay until Monday morning the second visitation of the month. Jeffrey's weekday visitation remained unchanged.

¶ 7 On April 13, 2016, the Illinois Department of Healthcare and Family Services (HFS) filed a petition to intervene and a petition to modify child support. It alleged that there had been a substantial change in circumstances in that Jeffrey's income had significantly increased.

¶ 8 A hearing on the petition took place on September 6, 2017. Erika was represented by counsel at the time, and HFS was no longer involved. Erika's financial affidavit listed her gross monthly income as $6,834, and Jeffrey's financial affidavit listed his gross monthly income as $5,564.68.

¶ 9 We summarize Jeffrey's testimony. The parties' children were currently 16, 14, and 11 years old. He worked at Aramark, and his 2016 gross income was $65,677.19. The children stayed with Jeffrey and his current wife every Monday and Wednesday until 7 p.m. and every other weekend from Friday night until Monday morning. During the summer, two of the boys

also stayed overnight on Mondays and Wednesdays. This summer arrangement was the result of mediation as opposed to court order. Jeffrey fed the children dinner every evening that they were with him. Jeffrey also paid for the eldest son's cell phone and gave him money for gas. As the children had grown, their expenses had increased. Jeffrey and Erika equally split extracurricular expenses for the children. Jeffrey did not take vacation time with the children in the summer of 2017 because the kids were too involved with summer sports. Jeffrey shared household expenses with his wife.

¶ 10 Brenda Soltow, the children's stepmother, testified that she tracked the number of nights the children had spent at her and Jeffrey's house. They spent 112 nights at the house in 2016, and she projected that they would be spending about 111 nights at the house in 2017.

¶ 11 Erika testified as follows. During Mondays and Wednesday in the summer, and on Sunday nights, the children had the option to stay overnight with Jeffrey rather than returning to Erika's house at 7 p.m. Two of the three children usually stayed, while one of the children came home at 7 p.m. Jeffrey had about 95 overnights per year with the children under the prior court order and about 119 overnights counting the additional summer weekday overnights. Each parent was allowed two weeks straight of vacation time with the children over the summer. Erika used her vacation time with them, but Jeffrey did not. When Erika traveled for work, the children had the option of staying with Jeffrey. When the kids were with Jeffrey, they ate at his house.

¶ 12 The children's expenses had increased as they had grown older. The children were constantly eating and were involved in a lot of sports and activities. Erika had bought a car for the eldest child and paid for car insurance, maintenance, and gas. Jeffrey had said that he would do the same for their middle son. Erika also bought cell phones for the two younger children.

When child support had previously been set, Jeffrey was earning about $40,000 per year.

¶ 13 The trial court issued a written ruling on October 3, 2017. It stated that Jeffrey acknowledged that he would not exercise 146 or more overnight visits with the children that year. It found "no reason to deviate from the child support formula provided by statute that became effective on July 1, 2017." It ordered that Jeffrey pay $250.10 in weekly child support.

¶ 14 Jeffrey filed a motion to reconsider on October 31, 2017, which the trial court denied on January 9, 2018. In response to Jeffrey's arguments, it stated that the new child support statute allowed for deviation but did not require deviation. It stated that whether to deviate was within its discretion, and that it had chosen not to do so. Jeffrey timely appealed.

¶ 15 II. ANALYSIS

¶ 16 A. Standard of Review

¶ 17 We initially address the standards of review for the issues on appeal. Jeffrey cites *Gay v. Dunlap*, 279 Ill. App. 3d 140, 144-45 (1996), where the court stated that we will reverse a trial court's child support determination only if the trial court abused its discretion, or the factual predicate for the decision was against the manifest weight of the evidence. The court further stated that we review *de novo* questions of law, and that when facts are not in dispute, their legal effect is a matter of law. *Id.* at 145. He also cites *In re Marriage of Hughes*, 322 Ill. App. 3d 815, 819 (2001), where the court stated that it would review *de novo* whether a substantial change in circumstances could include conditions contemplated by the dissolution judgment, because the issue involved the legal effect of undisputed facts. Jeffrey argues that because the substance of this appeal concerns facts that are not in dispute, we should review *de novo* whether they constitute a substantial change in circumstances. He argues that we should review the trial court's decision whether to deviate from the statutory child support guidelines for an abuse of

discretion. See *In re Marriage of Hill*, 2015 IL App (2d) 140345, ¶ 28.

¶ 18 We agree with Jeffrey that we will not disturb a trial court's ruling regarding whether to deviate from statutory child support guidelines absent an abuse of discretion. See *id.* However, we disagree that we review *de novo* whether there has been a substantial change in circumstances. To the contrary, we will not reverse such a determination unless it is against the manifest weight of the evidence (*In re Marriage of Sorokin*, 2017 IL App (2d) 160885, ¶ 24) or constitutes an abuse of discretion (*In re Marriage of Saracco*, 2014 IL App (3d) 130741, ¶ 15). *Gay* is distinguishable because that case involved the legal question of whether a certain type of deduction was permissible in determining child support obligations. *Gay*, 279 Ill. App. 3d at 145. Similarly, *Hughes* looked at whether, as a matter of law, a substantial change of circumstances could include circumstances that were contemplated by the dissolution judgment. *Hughes*, 322 Ill. App. 3d at 819; see also *Saracco*, 2014 IL App (3d) 130741, ¶¶ 15-16 (disagreeing with application of *de novo* standard of review in *Hughes*). In contrast, here the issue involves whether the particular facts of this case constitute a substantial change in circumstances, as opposed to a broader legal issue, making *de novo* review inappropriate.

¶ 19 Finally, Jeffrey's third issue on appeal involves the interpretation of a statute, which is a question of law that we review *de novo*. *Bank of New York Mellon v. Laskowski*, 2018 IL 121995, ¶ 12.

¶ 20 B. Substantial Change in Circumstances

¶ 21 Turning to the merits, Jeffrey first argues that Erika failed to present any evidence showing a substantial change in circumstances. He again cites *Hughes*. There, the trial court granted the mother's petition to modify, finding that the cessation of maintenance payments to her constituted a substantial change in circumstances. *Hughes*, 322 Ill. App. 3d at 817-18. The

appellate court reversed, holding that a financial change contemplated by the dissolution judgment was not a substantial change in circumstances. *Id.* at 819.

¶ 22 Jeffrey argues that *Hughes* applies here because there has been no change to justify modification. He maintains that throughout this case's history, the parties deviated from the statutory support guidelines due to the amount of time the children were with Jeffrey and because of Erika's greater income. Jeffrey notes that these grounds for a downward deviation were specified in the original agreement and remained in place during the June 4, 2011, modification. Jeffrey maintains that when the 2017 hearing took place, he was spending even more time with the children. He argues that he had about "116 overnights" at the time of trial[1] as compared to 73 overnights under the June 2011 order. He also points out that Erika's income remained higher than his income.

¶ 23 Erika argues that the trial court did not abuse its discretion in finding that she had proven that there was a substantial change in circumstances. She cites *Hughes*, 322 Ill. App. 3d at 819, for the proposition that to establish a substantial change in circumstances, the moving party must show an increase in the children's needs and an increase in the supporting parent's ability to pay support. She argues that both conditions have been met here. Erika notes that Jeffrey listed a bi-weekly income of $1,950.85 in 2011, which equals an annual income of $50,722.10, whereas he testified that he earned $65,677.19 in 2016. She further points out that Jeffrey testified that he shared household expenses with his wife, and that both parties testified that the children's expenses had increased as they had become older.

[1] This number appears to be a typographical error, as Brenda testified that the children spent 112 nights at the house in 2016 and would be spending about 111 nights at the house in 2017. Erika testified that Jeffrey had about 119 overnights per year with the children.

¶ 24 Section 510(a)(1) of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/510(a)(1) (West 2016)) provides that an award of child support can be modified "upon a showing of a substantial change in circumstances." The party seeking the modification has the burden to prove that a substantial change in circumstances has occurred. *Saracco*, 2014 IL App (3d) 130741, ¶ 13. In determining whether there has been such a change, courts look at both the circumstances of the parents and the children. *In re Marriage of Mulry*, 314 Ill. App. 3d 756, 760 (2000). Such circumstances can include that the children's needs have increased and that the supporting parent's income has increased. See *Hughes*, 322 Ill. App. 3d at 819; see also *In re Marriage of Garrett*, 336 Ill. App. 3d 1018, 1021 (2003) (a court may increase child support solely based on a parent's increased ability to pay, and it may presume that the cost of raising a child increases as the child ages).

¶ 25 Although Jeffrey emphasizes circumstances that have not changed, namely that he spends a great deal of time with the children and that Erika has a higher income, there were clearly circumstances that had changed, in that Jeffrey was earning about $15,000 more per year than at the time of the previous court order, and both parties agreed that the children's expenses had increased as they had grown older. Accordingly, it was not against the manifest weight of the evidence or an abuse of discretion for the trial court to conclude that Erika had met her burden of proving that there was a substantial change of circumstances.

¶ 26 C. Deviation from Statutory Child Support Guidelines

¶ 27 Jeffrey next argues that the trial court abused its discretion in failing to deviate from the statutory child support guidelines. Jeffrey maintains that the trial court focused only on the fact that he did not have 146 overnights with the children[2] when considering whether to deviate from

[2] If each parent has 146 or more overnights per year with the child, they are considered to

the statutory guidelines, but the statute states that the trial court "may deviate from the child support guidelines if the application would be inequitable, unjust, or inappropriate." 750 ILCS 5/505(a)(3.4) (West Supp. 2017). Jeffrey points out that, therefore, the trial court could have chosen to deviate from the child support guidelines even without consideration of overnights. He argues that it abused its discretion by not doing so based on the amount of time the children spent at his house. He highlights the evidence that the children were at his house two weeknights per week and would eat dinner there, and that during the summer, two of the three children would also stay overnight on those weeknights. Jeffrey argues that the trial court's failure to deviate from the guidelines was inappropriate because it put him, "a father who sees his children on nearly a daily basis," on the same level as a parent who does not exercise any parenting time.

¶ 28 Section 505(a)(2) of the Marriage Act states that the trial court shall determine child support by applying the child support guidelines "unless the court makes a finding that application of the guidelines would be inappropriate, after considering the best interests of the child and evidence which shows relevant factors, including, but not limited to," (1) the child's financial resources and needs; (2) the parents' financial resources and needs; (3) the standard of living the child would have enjoyed absent a dissolution of marriage; and (5) the child's physical and emotional condition, and educational needs. 750 ILCS 5/505(a)(2) (West Supp. 2017).

¶ 29 Section 505(a)(3.4) of the Marriage Act provides further guidance on the issue of deviation from statutory child support guidelines. It states:

> "In any action to establish or modify child support, whether pursuant to a temporary or final administrative or court order, the child support guidelines shall be used

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have "[s]hared physical care," and the trial court is to use the HFS shared physical care worksheet to calculate child support. See 750 ILCS 5/505(a)(3.8) (West Supp. 2017).

> as a *rebuttable presumption* for the establishment or modification of the amount of child support. The court may deviate from the child support guidelines if the application would be inequitable, unjust, or inappropriate. Any deviation from the guidelines shall be accompanied by written findings by the court specifying the reasons for the deviation and the presumed amount under the child support guidelines without a deviation. These reasons may include:
>
> (A) extraordinary medical expenditures necessary to preserve the life or health of a party or a child of either or both of the parties;
>
> (B) additional expenses incurred for a child subject to the child support order who has special medical, physical, or developmental needs; and
>
> (C) any other factor the court determines should be applied upon a finding that the application of the child support guidelines would be inappropriate, after considering the best interest of the child." (Emphasis added.) 750 ILCS 5/505(a)(3.4) (West Supp. 2017).

¶ 30 Thus, there is a rebuttable presumption that child support should be awarded according to the guidelines. *Id.* Compelling reasons must be shown to overcome the presumption that the guidelines should be applied. *In re Tate Oliver B.*, 2016 IL App (2d) 151136, ¶ 44. The parent seeking a deviation from the child support guidelines has the burden of producing evidence justifying the deviation. *In re Marriage of Tworek*, 2017 IL App (3d) 160188, ¶ 22.

¶ 31 We reject Jeffrey's assertion that the trial court was unaware that it could deviate from the guideline support amount even though the children did not spend 146 nights at Jeffrey's house. In its initial ruling, the trial court stated that it found "no reason to deviate from" the statutory formula; the trial court did not indicate that it was precluded from doing so. During the

hearing on Jeffrey's motion to reconsider, the trial court clearly acknowledged that the child support statute allowed for deviation, but it stated that it had exercised its discretion in choosing not to deviate from the guidelines.

¶ 32 We further conclude that the trial court acted within its discretion in not deviating from the guidelines. Jeffrey's bases for a downward deviation rest on prior support orders providing for a deviation, the amount of time he continues to spend with the children, and Erika's higher income. However, a prior child support order alone does not justify deviating from the guidelines. *Stanley*, 279 Ill. App. 3d at 1987. Similarly, the trial court may consider that a parent has extended visitation rights, but it is not required to deviate from statutory child support guidelines because of this factor. *In re Marriage of Sobieski*, 2013 IL App (2d) 111146, ¶ 55; *In re Marriage of Demattia*, 302 Ill. App. 3d 390, 394 (1999); see also *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1119 (2004) (the trial court did not err in not abating the father's child support payments during the summer months that the child lived with him). Finally, the parties' respective incomes were taken into account in applying the child support guidelines. See 750 ILCS 5/505(a)(1) (West Supp. 2017). Accordingly, the trial court did not abuse its discretion in determining that there were no compelling reasons to deviate from the statutory child support guidelines.

¶ 33 D. Application of Child Support Guidelines

¶ 34 Jeffrey's final argument on appeal is that the trial court erred by not applying the shared physical care child support guidelines. As stated, such guidelines apply if "each parent has 146 or more overnights per year with the child." 750 ILCS 5/505(a)(3.8) (West Supp. 2017). Jeffrey argues that the trial court erred by strictly interpreting the word "overnight." He argues that although the "income shares approach" to child support, embodied by statutory changes that

became effective in 2017 (see 750 ILCS 5/505 (West Supp. 2017)), is new in Illinois, Indiana also uses an income shares approach. He cites Indiana Child Support Guideline 6 (eff. Oct. 1, 1989), *available at* https://www.in.gov/judiciary/rules/child_support/#g6, which states that a credit should be given to the noncustodial parent for the number of overnights that the child spends with that parent each year. Jeffrey highlights a portion of the commentary to the rule, which states:

> "An overnight will not always translate into a twenty-four hour block of time with all of the attendant costs and responsibilities. It should include, however, the costs of feeding and transporting the child, attending to school work and the like. Merely providing a child with a place to sleep in order to obtain a credit is prohibited." Indiana Child Support Guideline 6 (eff. Oct. 1, 1989), Commentary, *available at* https://www.in.gov/judiciary/rules/child_support/#g6.

Jeffrey maintains that the trial court erred in finding that evenings that the children did not sleep at his house could not be counted as overnights, even though they ate dinner there.[3] He again points out that the 2010 and 2011 child support orders deviated downward from the child support guidelines based on the amount of time he spent with the children, and that despite spending even more time with them now, the trial court here applied the standard statutory guidelines. He argues that he must now pay $1,075.43 per month as opposed to paying $150.80 per month under the shared physical care child support guidelines.

¶ 35 Erika argues that section 505(a)(3.8) unambiguously applies to only overnights with a child, and that the Indiana child support guidelines are inapplicable here. She contends that the

[3] Jeffrey does not state how many evenings the children spent at his house each year, but we presume from his argument that they spent at least 146 evenings with him.

evidence at the hearing showed that Jeffrey spent about 111 overnights annually with two of the parties' three children, with considerably fewer overnights for the third child, which falls short of the 146 overnights required to apply the shared physical care child support guidelines.

¶ 36 We agree with Erika's position. In construing a statute, our primary objective is to ascertain and give effect to the legislature's intent, which is best indicated by the statute's language, when given its plain and ordinary meaning. *Corbett v. County of Lake*, 2017 IL 121536, ¶ 30. "If the language of a statute is clear and unambiguous, we will apply it as written, without resort to other aids of statutory construction." *Cassidy v. China Vitamins, LLC*, 2018 IL 122873, ¶ 58. Here, the clear and unambiguous meaning of "overnight" is that the child stays at the parent's house for the night. The statute provides that the shared physical care child support guidelines apply if "each parent has 146 or more overnights per year with the child" (750 ILCS 5/505(a)(3.8) (West Supp. 2017)), which did not occur in this case.

¶ 37 As the meaning of "overnight" is unambiguous, we need not resort to extrinsic aids of statutory construction, so Jeffrey's reliance on Indiana law is not relevant. We further note that it would offer little assistance because it applies to a completely different statutory scheme in which a parent is given credit for every overnight with a child during a given year (see Indiana Child Support Guideline 6 (eff. Oct. 1, 1989), *available at* https://www.in.gov/judiciary/rules/child_support/#g6), as opposed to Illinois's threshold of 146 overnights. Even otherwise, Jeffrey's reliance on the guideline is undermined by Indiana caselaw. In *Young v. Young*, 891 N.E.2d 1045, 1048 (Ind. 2008), the Indiana supreme court stated that "neither this comment nor any other portion of the guidelines suggest that a visit may qualify as an overnight if the child does not physically stay overnight with the noncustodial parent."

¶ 38 Accordingly, the trial court correctly determined that the shared physical care child support guidelines did not apply to this case.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the Lee County circuit court.

¶ 41 Affirmed.