2014 IL App (2d) 130117-U
No. 2-13-0117 and 2-13-0131 cons.
Order filed May 29, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF BRENDA MacNEIL, Petitioner-Appellee and Cross-Appellant, and DAVID MacNEIL, Respondent-Appellant and Cross-Appellee.	)))))))))))	Appeal from the Circuit Court of Du Page County. No. 07-D-0780 Honorable Robert A. Miller, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Hudson concurred in the judgment.

ORDER

¶ ~~1~~ *Held*: The trial court properly ruled that the Marital Settlement Agreement was ambiguous and admitted parol evidence to determine the intent of the parties regarding the duration of child support payments; no emancipation event was specified in the MSA and, therefore, the statutory provision regarding the modification and termination of child support controlled; the trial court properly applied the statutory guidelines for the amount of support owing; the trial court properly ordered the modified support payments were due and owing retroactive to the date of the petition for modification of child support.

¶ 2 In case No. 2-13-0117, respondent, David MacNeil, appeals the portion of the trial court's October 18, 2012, order terminating child support for two of the parties' three children.

In case No. 2-13-0131, petitioner, Brenda MacNeil, appeals the portion of the trial court's October 18 order granting David an upward modification in child support, retroactive to January 24, 2011, and finding a support arrearage as a result of the modification. Both David and Brenda also appeal from the trial court's January 9, 2013, order denying their motions to reconsider. The two cases were consolidated on appeal. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The parties were married in Scotland in 1989; three children were born during the course of their marriage. On April 10, 2007, Brenda filed a petition for dissolution of marriage. At the time of the filing of the petition, the children were ages 16, 14 and 12. On June 20, 2007, the trial court entered a judgment for dissolution of marriage. Incorporated into the judgment was a marital settlement agreement (MSA) entered into by the parties, which awarded the parties joint custody of their three minor children with David being the primary residential parent.

¶ 5 Pertinent to this appeal is Article VI of the MSA that provided, *inter alia*, for child support and maintenance. Article VI ¶ 6.1(A) of the MSA provided that Brenda would receive maintenance in the amount of "$25,000 per month as an employee of MacNeil Automotive[1] for a period of ten years," totaling $3,000,000.

Article VI ¶ 6.1(D) stated:

> "D. In no event, unless the parties otherwise agree, shall the Wife be entitled to more than $25,000 per month for a period of ten (10) years for total payment of $3,000,000. *The parties acknowledge that the Wife's child support obligation has been factored into this amount on a net after tax basis*." (Emphasis added.)

[1] MacNeil Automotive is an Illinois corporation owned by David.

The MSA further provided that these payments represented "non-modifiable, non-reviewable maintenance."

¶ 6 Article VI ¶ 6.9 of the MSA provided for $3,000 per month in child support, payable from Brenda to David. This paragraph specifically provided that "[t]he parties have factored into the gross maintenance the net child support."

¶ 7 Additionally, Article III ("Medical and Related Expenses) ¶ 3.2 provided that David would maintain health insurance for each child until "emancipation" or, if any child pursued college or vocational school education, then upon graduation, but not beyond the age of 23. Article IV ("Life Insurance for Children") ¶ 4.8 addressed life insurance and specified that both David and Brenda were obligated to maintain life insurance through the children's college with a right to terminate when the children graduate from college or reach 23 years of age, whichever occurred first.

¶ 8 On January 24, 2011, Brenda filed a petition to modify child support pursuant to section 510(a)(1) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/510(a)(1) (West 2010)) based on an alleged "substantial change in circumstances." Brenda requested that: (1) her payments of $3,000 per month be reduced by one-third, retroactive to the date of the filing of the petition, because the parties' oldest child had attained the age of 18; (2) her payments be further reduced by an amount of $1,000 per month effective June 2011, when the parties' second child turned 18; and (3) her payments be terminated upon the youngest child's 18th birthday in June 2013.

¶ 9 In response to Brenda's motion to modify child support, David asserted that the parties had agreed to include in the nonmodifiable maintenance amount an extra $5,000 per month before tax in order for Brenda to pay David $3,000 per month in child support. Using the 40%

tax rate set forth in the MSA, the parties' calculation resulted in Brenda paying David $3,000 per month child support, which equaled the amount David netted after he took the tax deduction. After acknowledging that child support can never be made nonmodifiable, David argued that no emancipation provisions were contained in the MSA because the parties anticipated the continued payment of $5,000 additional maintenance per month, and in turn, the parties also intended that child support would continue for the duration of the ten years.

¶ 10 On August 24, 2011, Brenda filed a motion for partial summary judgment, which was denied on November 13. The trial court indicated that there was an issue as to whether or not it was anticipated that the child support payments would extend over the ten-year period and would cover post-high school expenses. Thereafter, a hearing was held on the motion to modify.

¶ 11 Brenda testified that, under the MSA, the parties agreed that she would receive $300,000 in nonmodifiable maintenance each year for ten years. Further, the parties agreed that she would pay $3,000 per month in child support to David. This amount was below the statutory guideline consistent with section 505(a) of the Act (750 ILCS 5/505(a) (West 2010)) because the parties agreed that the guideline amount of $4,800 per month was too high. Brenda stated that she filed her petition to modify based on the emancipation of the oldest child at age 18, and that since that time, the second child had also become emancipated. She stated that, based on the emancipation dates, she was asking for a reduction in the support payments of $1,000 per month for 6 months for the first child, and a reduction of $2,000 per month for 14 months for the two children combined.

¶ 12 On cross-examination, Brenda stated that her monthly income had increased to $27,000. Additionally, David paid all of the children's expenses.

¶ 13 David testified as an adverse witness that he agreed to pay all uninsured medical costs, maintain life insurance, and to pay for college or post-high school education for the children "until 23 years or graduation from university." He also admitted that the MSA did not provide that child support would be nonmodifiable. The MSA did not indicate how long child support would be paid, nor did it state under what conditions it could be modified. The MSA did specify that the $25,000 per month maintenance amount was nonmodifiable.

¶ 14 David's Motion for a Directed Finding was denied, the court stating "[t]he fact that child support was factored in to the maintenance doesn't necessarily mean that it was supposed to be for ten years at a certain amount."

¶ 15 Brenda then testified as an adverse witness. She stated that, during negotiations on the settlement agreement, she originally requested $30,000 per month in maintenance, then the amount "went down to 20,000. And then back up to 25." The final agreement was that she would receive $25,000 per month from David, $5,000 of which was intended to cover child support that she would pay to him. After 40% of the $5,000 was withheld for taxes, she paid David $3,000 per month in child support.

¶ 16 David testified that the final agreement was for David to pay Brenda $20,000 per month in maintenance, plus $5,000 to cover the child support amount being paid from Brenda to David. Under the MSA terms, David was responsible for all uninsured medical bills and for maintaining health insurance for all three children.

¶ 17 On October 18, 2012, the trial court found that a substantial change in circumstances had occurred in that two of the children had become emancipated within the meaning of section 510(a)(1) the Act (750 ILCS 5/510(a)(1) (West 2010)), and that the MSA did not contain a provision extending child support beyond emancipation. The trial court then stated:

¶ 18 "But I'm also taking a look at what the payments should then be. There was an objection to [Brenda's Comprehensive Financial Statement] being entered into evidence. There was an objection as to the financial needs of [Brenda]. There was an objection as to whether or not the children are self-supporting.

In order for me to deviate from the guidelines, I have to consider the financial resources and needs of the child. The financial resources and needs of the custodial parent, the standard of living the child would have enjoyed, the physical and emotional condition of the child, the financial resources and needs of the noncustodial parent. Those are things I have to consider in order to deviate from the guidelines.

Frankly, I was not given the information that would allow me to deviate from the guidelines. Even though the guidelines were deviated from when the Marital Settlement Agreement was entered into, I'm not bound to say that the same financial circumstances exist now as they did then. In fact, I've heard that [Brenda's] income is actually increased since the time the Marital Settlement Agreement has gone into effect—or was entered.

In addition some cases support the proposition that as a child becomes older, the finance needs of the child can increase. Nonetheless, I am not bound to find that there should be a deviation from guidelines simply because that was the case in 2007. It's not a matter of me finding that the guidelines should not be deviated from based on the evidence. I shall apply the guidelines unless I take into consideration these other factors which haven't been presented."

¶ 19 Taking into consideration the dates of the two older children's emancipation and following the statutory guidelines of section 505(a)(1) for percentages of net income, the trial

court devised a formula addressing the various time periods involved with each child's emancipation. The trial court then ordered Brenda to pay child support in amounts consistent with this formula, retroactive to January 24, 2011, the date Brenda filed her petition to modify. The net result of the modification was a retroactive arrearage of $15,961.88 owing to David. Also, commencing May 1, 2012, and going forward, the trial court ordered Brenda to pay David $3,456 per month for child support.

¶ 20 Brenda and David each filed motions to reconsider, which were both denied. They each timely appealed.

¶ 21 II. ANALYSIS

¶ 22 On appeal, David argues that the trial court erred when it granted Brenda's petition for modification of child support. Specifically, David maintains that the emancipation of the parties' two children did not constitute a "substantial change in circumstances" as contemplated by section 510 of the Act such that it justified a departure from the MSA provisions regarding child support payments. David further asserts that "Brenda has effectively conceded the correctness of David's position that the circuit court committed reversible error by her failure to respond to several of David's arguments."

¶ 23 In her cross-appeal, Brenda asserts that the trial court erred when it modified Brenda's child support payment to comport with statutory guideline percentages, the net result of which was a higher child support obligation for Brenda. Brenda further asserts that the trial court erred when it ordered that the new child support amount be applied retroactively.

¶ 24 A. Marital Settlement Agreement Provisions

¶ 25 It is well settled that the rules of contract construction are applicable to the interpretation of any marital settlement agreement, and that a court's primary objective is to give effect to the

intent of the parties. *In re Marriage of Hall*, 404 Ill. App. 3d 160, 166 (2010). The intent of the parties must be determined only by the language of the agreement, absent an ambiguity. *Blum v. Koster*, 235 Ill. 2d 21, 33 (2009). Because the interpretation of a marital settlement agreement is a question of law, we review it *de novo*. *In re Marriage of Hendry*, 409 Ill.App.3d 1012, 1017 (2011). We note that we owe no deference to the trial court's interpretation of the MSA, as it involves no factual findings but is a purely legal question, much like the interpretation of a statute or contract. *In re Marriage of Rice*, 2011 IL App (1st) 103753 ¶ 25.

¶ 26 An ambiguity exists when an agreement contains language that is susceptible to more than one reasonable interpretation, and parol evidence may be used to decide what the parties intended. *Allton v. Hintzsche, 373 Ill.App.3d 708, 711 (2007).* The interpretation of the contract language then becomes a question of fact, and the trial court's determination of the intent of the parties will not be overturned unless it is contrary to the manifest weight of the evidence. *Installco Inc. v. Whiting Corp*., 336 Ill. App. 3d 776, 783 (2002) (citing *Bradley Real Estate Trust v. Dolan Associates Ltd*., 266 Ill. App. 3d 709, 712 (1994). "A finding is against the manifest weight of the evidence if the opposite conclusion is clear from the record or if the finding is unreasonable, arbitrary, and without a basis in the evidence." *In re Marriage of Tabassum & Younis*, 377 Ill. App. 3d 761, 773 (2007).

¶ 27 We are presented with the issue of unallocated support, where, according to David, a portion of the amount of spousal maintenance agreed to by the parties was earmarked a return payment for child support. David argues that under the terms of the MSA, Brenda was obligated to pay him child support for the full ten years and that there was no emancipation event contemplated relative to the child support. He points to the general language of the MSA regarding the ten-year period, and also to the terms of the MSA delineating the parties'

obligations to carry life insurance and his obligations regarding health insurance for the children. These obligations were to continue until each child graduated from college or each child reached the age of 23.

¶ 28 However, the agreement does not state when child support could be terminated. Our review of the MSA has found nothing that determines either how an emancipation event would affect support, or that emancipation would not affect support. The MSA discloses no clear expression of the intent of the parties regarding termination of child support payments. Therefore, we find that the MSA was ambiguous in its terms.

¶ 29 The trial court properly heard testimony from both Brenda and David as extrinsic evidence of the parties' intent. It appears the parties attempted to reach a middle ground between Brenda's maintenance request and David's presumed goal of lowering the amount of maintenance as much as possible. The agreed arrangement afforded David the income tax deduction allowed for maintenance payments. By "factoring in" child support, and increasing the maintenance amount by $5,000, David was able to reap an income tax advantage for part of the maintenance award.

¶ 30 Nothing in the evidence presented leads us to conclude that the trial court's findings, made after hearing the parties' testimony, were against the manifest weight of the evidence. While section 510(d) of the statute allows an extension of parental obligations for support beyond minority, it requires an agreement in writing for the child support to extend beyond emancipation. 750 ILCS 510(d) (West 2010). David expects this court to extrapolate from the existing clauses in the MSA and conclude that the parties intended an unexpressed result.

¶ 31 In arguing that the plain language of the MSA and the parol evidence adduced at trial establish that the children's emancipation did not warrant modification, David relies on three

cases that he claims are analogous to the situation here: *In re Marriage of Mulry*, 314 Ill. App.3d 756 (2000); *In re Marriage of Neuman*, 295 Ill. App.3d 212 (1998); and *In re Marriage of Hughes*, 322 Ill. App.3d 815 (2001), where modifications to support were not allowed. These cases are inapposite since they either contained express provisions in the MSA regarding termination of support or the "changed circumstances" were events that had been contemplated by the parties while reaching an agreement. In *Mulry*, the husband expressly agreed in the MSA to pay child support and educational expenses for the children until their emancipation, and the MSA contained a separate section that specifically defined "Emancipation Event" as college graduation or age 23. *Mulry*, 314 Ill. App. 3d 757-58, 760. As we have stated, the termination of child support was not addressed in the MSA in this case. The statements regarding "factoring in" the child support amount cannot be viewed as a definitive expression of the duration of the support payments.

¶ 32 In *Neuman*, the parties' agreement expressly included an award for "permanent maintenance." The husband alleged certain factors to support his claim of changed circumstances; *i.e.*, that the wife would receive social security disability benefits and that his own living expenses would increase. *Neuman*, 295 Ill. App. 3d at 217. The court held that these factors were known to the husband at the time of the agreement and did not demonstrate changed circumstances. *Id*. The result in *Neuman* does not apply to this situation where the MSA was ambiguous in its terms and the duration of child support, not maintenance, is at issue.

¶ 33 Similarly, the facts in *Hughes* are distinguishable. The appellate court held that the wife had not met her burden of showing that a substantial change in circumstances warranted a modification of child support; the termination of her spousal support and the cessation of her car payments that increased the husband's available income were anticipated when the judgment for

dissolution of marriage was entered. *Hughes*, 322 Ill. App. 3d at 819. Therefore, these events did not constitute a "substantial change." *Id*. In this case, we find no express provision in the MSA whereby the David and Brenda agreed to extend child support beyond the each child's emancipation at age 18, and we determine the trial court's findings were not against the manifest weight of the evidence.

¶ 34 Therefore, David's argument fails. The trial court did not err when it ruled that the MSA terms were ambiguous and allowed parol evidence regarding the intent of the parties. The trial court's finding that there was no emancipation provision in the MSA was not against the manifest weight of the evidence. Therefore, the determination that emancipation terminated the child support payments was not against the manifest weight of the evidence.

¶ 35 B. Modification of Child Support

¶ 36 Section 510 of the Illinois Marriage and Dissolution of Marriage Act (Act) provides for modification and termination of provisions for maintenance, support, and educational expenses. 750 ILCS 5/510 (West 2010). The modification of a child support obligation is a judicial function, administered exclusively by the court as a matter of discretion. *In re Marriage of Smith*, 347 Ill. App. 3d 395, 400 (2004). "Generally speaking, the modification of child support payments lies within the sound discretion of the trial court, and a trial court's modification order will not be disturbed on appeal, absent an abuse of discretion." *In re Marriage of Rogers*, 213 Ill. 2d 129, 135 (2004). An abuse of discretion occurs in declining to modify a child-support obligation only when no reasonable person would agree with the court's decision. *In re Marriage of Sassano*, 337 Ill.App.3d 186, 194 (2003).

¶ 37 Section 510(a) of the Act enables a trial court to modify an existing order for child support (1) upon the showing of a substantial change in circumstances; or (2) without the

necessity of such a change, upon a showing of (a) an inconsistency of at least 20% between the amount of the existing order and the amount of child support that results from application of the guidelines specified in section 505 of the Act, or (b) a need to provide for health care needs or health insurance for the child. 750 ILCS 5/510(a) (West 2010). Upon satisfaction of either requirement for modification, section 510 mandates that the trial court then follow statutory guidelines provided in section 505 of the Act. *Anderson v. Heckman*, 343 Ill.App.3d 449, 454 (2003).

¶ 38 Brenda argues in her cross-appeal that the trial court abused its discretion when it ordered her to pay "increased" child support to David. Brenda characterizes the new amount set by the trial court as an "increase" in child support, while David argues that the trial court set the child support at the statutory guideline.

¶ 39 Brenda also argues that the trial court had no authority to increase child support, "much less make it retroactive," because neither party requested an increase, and, further, she had no notice that relief was possible other than what was in the pleadings. When Brenda petitioned for a modification of child support, she raised the issue of child support. Her prayer for relief requested that the court find a "substantial change in circumstances warranting a modification and reduction of child support," specifically reducing the amount of child support by $1,000 for each emancipation event, ultimately terminating child support in June 2013, when the youngest child would become emancipated. Additionally, her prayer for relief included "such other relief as in equity is deemed just."

¶ 40 Brenda relies on *In re Marriage of Zukausky*, 244 Ill.App.3d 614, 619 (1993), a Second District case that held that respondents in child support modification actions must file a cross-petition if the relief they seek is different from the relief sought by the petitioner. Brenda

correctly points out that when, based on the emancipation of the parties' oldest child and anticipating the emancipation of the parties' two younger children, she petitioned the trial court to reduce her child support obligation, David did not file a pleading asking for an "increase" in her child support obligation. However, we find the reasoning of *In re Marriage of Florence*, 260 Ill. App. 3d 116, 122-23 (1994), persuasive; there, the court held that the respondent was placed on notice that modified child support was sought, even though the trial court ordered relief that was not sought in the pleadings. *See also People ex rel. Gibbs v. Ketchum*, 284 Ill. App. 3d 70, 78 (1996) (while there was no pending petition or motion before the trial court in this case, that fact alone will not deprive the court of the authority to act where the parties agree in a stipulation concerning some matter which requires resolution by the court).

¶ 41 The Act is clear that the trial court shall award the guideline child support unless the court makes findings otherwise, states the amount that would have been applied under the statutory minimum guidelines, and indicates the reason for the variance. See 750 ILCS 5/505(a)(2) (West 2010); *In re Marriage of Singleteary*, 293 Ill.App.3d 25, 36 (1997). Here, the trial court set child support at the statutory minimum guideline amount, consistent with section 505(a) of the Act. 750 ILCS 5/505(a) (West 2010). We find that the trial court's order modifying child support best served the interests of the children in this case. Therefore, the upward adjustment from the original amount of child support was not an abuse of discretion.

¶ 42 Regarding the amount of child support, the premise of Brenda's argument is the assumption that the agreed-upon amount of $3,000 per month in child support was apportioned in increments of $1,000 per child. Just as the MSA was silent regarding the termination of the child support award, there is nothing to indicate that the intention of the parties was to allocate $1,000 for each child. "Unallocated child support is not necessarily reduced pro ratably when a

child becomes emancipated"; rather, it is "a matter solely for judicial determination." *In re Marriage of Ferraro*, 211 Ill. App. 3d 797, 800 (1991).

¶ 43 Section 505(a) of the Act provides a rebuttable presumption that a specified percentage of a noncustodial parent's income is an appropriate award of child support, and this presumption also applies to modification proceedings. *Department of Public Aid ex rel. Nale v. Nale*, 294 Ill.App.3d 747, 751-52 (1998). The party seeking deviation from the statutory guidelines bears the burden of producing evidence justifying the deviation, and overcoming the presumption requires compelling reasons. *Id*. at 752. When determining whether to deviate from the statutory guidelines, a trial court's consideration of the factors set forth in section 505(a)(2) of the Act is mandatory, not discretionary. *Singleteary*, 293 Ill. App. 3d at 36. Here, the trial court stated in its findings: "I was not given the information that would allow me to deviate from the guidelines." According to her testimony, Brenda's self-employment income had increased, bringing her monthly income to more than the $25,000 per month maintenance income. However, Brenda's own objection to David's attempt to admit her comprehensive financial statement was sustained on relevancy grounds. She cannot now complain of error where the trial court followed the statutory guideline.

¶ 44 Finally, we determine that the trial court properly ordered the child support amount retroactive to the date Brenda filed her petition. See 750 ILCS 5/510(a) (West 2010) ("the provisions of any judgment respecting maintenance or support may be modified only as to installments accruing subsequent to due notice by the moving party of the filing of the motion for modification"). The limitation on retroactivity in the Act insures that the payor spouse is put on notice prior to any change being made with respect to the original child support and expense obligations. See *In re Marriage of Petersen*, 2011 IL 110984, ¶ 18. Since Brenda was the

movant in the motion to modify support, she cannot now argue unfairness attributable to lack of notice. The trial court did not abuse its discretion when it ordered Brenda to pay the statutorily recommended amount of child support to David, retroactive to the date of Brenda's petition to modify.

¶ 45

¶ 46 III. CONCLUSION

¶ 47 For the reasons stated, we affirm.

¶ 48 Affirmed.