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2011 IL App (3d) 110068-U

Order filed September 19, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

<i>In re</i> MARRIAGE OF LISA A.	)	Appeal from the Circuit Court
ABERNATHY, n/k/a LISA DREW,	)	of the 12 <sup>th</sup> Judicial Circuit
	)	Will County, Illinois
Petitioner-Appellee,	)	
	)	Appeal No. 3-11-0068
and	)	Circuit No. 04-D-331
	)	
JAMES W. ABERNATHY,	)	Honorable
	)	Robert J. Baron
Respondent-Appellant.	)	Judge Presiding

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JUSTICE LYTTON delivered the judgment of the court.  
Presiding Justice Carter and Justice McDade concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Ex-husband was denied a full hearing on ex-wife's request for maintenance where he requested a continuance so that he could provide new information to the court and the trial court never allowed him to do so.

¶ 2 After six children and 27 years of marriage, Lisa Abernathy, n/k/a Lisa Drew, filed for divorce from James Abernathy in 2004. In 2007, the trial court entered a final judgment for dissolution, which reserved for three years the issue of maintenance to Drew. Before three years passed, Drew filed a motion seeking maintenance. Shortly thereafter, Abernathy filed a petition to

reduce child support. A hearing on Drew's motion and Abernathy's petition was held. At the hearing, Abernathy requested a continuance so he could provide an updated income/expense affidavit. The trial court never ruled on Abernathy's request. Following the hearing, the trial court ordered Abernathy to pay Drew maintenance in the amount of \$2000 per month. On appeal, Abernathy argues that he was denied his right to a full hearing. We reverse and remand.

¶ 3 Drew and Abernathy were married in 1978. They had six children together. In February 2004, Drew filed a petition for dissolution of marriage. In December 2005, the trial court entered a bifurcated judgment for dissolution of marriage, reserving the issues of custody, child support, maintenance, division of property and debts, and attorney fees. On April 27, 2007, the parties entered into an oral property settlement agreement, which was incorporated into a final judgment for dissolution of marriage, resolving all outstanding issues. Pursuant to the judgment and prior court orders, Abernathy was ordered to make biweekly child support payments of \$850 to Drew for the parties' three minor children. The judgment reserved Drew's right to maintenance "for the future consideration of this court for a period of three years."

¶ 4 On May 14, 2008, after one of his children turned 18, Abernathy filed a motion to modify child support. On June 10, 2008, the trial court entered an order reducing Abernathy's child support to \$1527 per month.

¶ 5 On November 6, 2009, Drew filed a *pro se* motion seeking maintenance and increased child support from Abernathy. According to the motion, changes in circumstances, including inflation, the ages of the children, increased medical costs and an increase in Abernathy's income, supported her requests. On February 24, 2010, Abernathy filed a petition to reduce child support, arguing that his current child support obligations were causing him undue hardship because his salary had

decreased and he had a three-year old child to provide for from a new relationship. Attached to the petition was an income/expense affidavit completed by Abernathy on January 27, 2010.

¶ 6 On May 28, 2010, Drew's attorney filed a petition for modification of judgment, seeking to increase Abernathy's child support obligation and/or require Abernathy to pay her maintenance. On July 7, 2010, Drew's attorney filed an amendment to Drew's November 6, 2009, *pro se* motion, alleging additional changes in circumstances in that (1) she was no longer receiving an annual lump sum of \$38,500 to \$26,000 from lottery winnings, (2) she was diagnosed with diabetes and had increased medical expenses, (3) her vehicle was repossessed following a traffic accident involving the parties' son, (4) four of the parties' children still lived with her, (5) she was earning only \$26,000 per year in her job, (6) her general living expenses had increased, and (7) Abernathy's income had increased. On September 8, 2010, Drew filed a hearing memorandum in which she requested \$1898 to \$2615 in monthly maintenance from Abernathy.

¶ 7 A hearing on Drew's request for increased child support and/or maintenance and Abernathy's petition to reduce child support was held on September 16, 2010. At the hearing, Abernathy appeared *pro se*. When the trial court asked Abernathy his position on Drew's request, Abernathy argued that Drew was "getting enough" since he was paying her over \$1500 a month in child support. The trial court indicated that it would be awarding Drew maintenance but was not sure the amount and planned to take the issue under advisement. Drew's counsel requested a temporary order for maintenance. The court granted the request and ordered Abernathy to pay Drew \$2000 per month in temporary maintenance.

¶ 8 When Abernathy asked the court how he was going to live, the court instructed Abernathy to provide an income/expense affidavit. Abernathy requested a continuance and asked that "nothing

be awarded until I get the opportunity to do that." Drew's attorney advised the court that Abernathy completed an income/expense affidavit in January 2010, and gave a copy of that document to the court. When Abernathy stated, "I can't afford to pay \$2,000 per month," the court responded by saying, "I am looking at your expense affidavit and I think you can afford it." The court entered a written order requiring Abernathy to continue his current child support payments in addition to paying Drew \$2,000 per month in maintenance pending a final decision by the court.

¶ 9 On October 29, 2010, the court entered a written order in which it found that Abernathy earns \$97,394 annually, while Drew earns \$26,857 annually and is "not likely able to improve her income beyond her current job." The court reduced Abernathy's monthly child support obligation to \$1,432, but required Abernathy to pay permanent monthly maintenance of \$2000 to Drew, retroactive to the date of Drew's motion.

¶ 10 One month later, Abernathy filed a motion, requesting that a full evidentiary hearing be held on Drew's request for increased child support and/or maintenance. A hearing on the motion was held on December 28, 2010. The trial court denied the motion, explaining:

"I gave this man an opportunity for a full hearing. I expected him to be here.

He just stood in front of me and only wanted to give me one piece of information. I would have heard any witnesses he wanted to call. Anything he would have like done. He had offered nothing for me to work with.

I did the best I could with what was presented to me. And as far as I'm concerned, I made the right decision based on the right information."

¶ 11 A party has a right to a meaningful hearing prior to the entry of an order granting the opposing party the relief it requests. *Dickson v. Dickson*, 58 Ill. App. 3d 828, 830 (1978). "An

evidentiary hearing, including the right to present witnesses and engage in cross-examination, must be given if properly requested in domestic relations cases." *In re Marriage of Giammerino*, 81 Ill. App. 3d 998, 999 (1980); see also *Regan v. Regan*, 38 Ill. App. 2d 383, 384 (1962) (a court must provide a full hearing, including the right to have witnesses appear and be cross-examined, when it is requested).

¶ 12 However, it is the obligation of the party desiring a full hearing to request one. See *Miller v. Miller*, 94 Ill. App. 2d 138, 142 (1968). It is incumbent on a party to inform the trial court that it has evidence to offer. *Flatley v. Flatley*, 42 Ill. App. 3d 494, 496 (1976).

¶ 13 Here, at the hearing on Drew's request for child support and/or maintenance and Abernathy's petition to reduce child support, Abernathy requested a continuance so that he could present new evidence to the court. The court never ruled on Abernathy's request but, instead, relied on a nine-month old income/expense affidavit to determine Abernathy's ability to pay maintenance to Drew. Because Abernathy notified the court that he had evidence to present but was denied his right to do so, he was denied a full and fair hearing. On remand, the parties should be given the opportunity to present evidence and witnesses at a full evidentiary hearing.

¶ 14 The order of the circuit court of Will County is reversed and remanded.

¶ 15 Reversed and remanded.