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Child Law

The newsletter of the Illinois State Bar Association's Section on Child Law

A Note From the Editor

BY AMANDA G. HIGHLANDER

Welcome to the first issue of the 2019-2020 Child Law Section Council newsletter! This promises to be a great year for, not only the committee, but its newsletter. I would like to give a special thank you to the authors who contributed their work to this issue who made this publication possible. Thank you!

All the best,
Amanda G. Highlander■

ISBA Child Law Section Council to Present Child Representative/GAL Continuing Legal Education Program

BY JOSETTE ALLEN

The Child Law Section Council of the ISBA is very pleased to offer a two-day, 10-plus hour continuing legal education (CLE) course for family law and domestic relations guardian *ad litem*/child representatives, to take place in Springfield at the Administrative Office of the Illinois Courts (AIOC) on October 16 and 17, 2019.

The Section Council, which has been planning and coordinating the CLE since last year, has had a dedicated subcommittee that set the agenda, secured speakers and coordinated with the Section Council as a whole to ensure that the CLE will be informative, entertaining, relevant and useful. Robert Ackley, a longtime council member, CLE co-coordinator, and member of the planning subcommittee, said, "We're expecting a great program with excellent presenters—the participants will be well-informed and well-armed to discharge their duties as GALs and child representatives."

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How Applicable Is the Decision of *In re Marriage of Salvatore*? Only Time and Future Appeals Will Tell

BY AMY SILBERSTEIN

Who else thought the following scenario would be a "substantial change in circumstances" to allow you to modify your child support obligation? *You are paying child support under the old percentage-based child support law and your former spouse, who was unemployed at the time of your divorce, gets a full-time job and goes from earning zero dollars to approximately $3,451 per month.* Shouldn't this new full-time income earned by your former spouse be a considered substantial change in circumstances to allow you to recalculate your child support from the old percentage-based formula to the new income shares under the July 1, 2017 law?

If you are one of those people who, like me, thought that this scenario should constitute a substantial change in circumstances, according to the Illinois Appellate Court for the Second District, we are all wrong. On March 8, 2019, the Illinois Appellate Court for the Second District determined the answer to this to be a big NO, that the full-time employment of your formerly unemployed ex-spouse does not constitute a substantial change in circumstances necessary to modify child support in its opinion issued for *In re Marriage of Salvatore,* 2019 IL App. (2d) 180425. Instead, the appellate court determined that "there is nothing to warrant a modification of Daniel's child support obligation because the parties contemplated their present circumstances when they entered the JPA and MSA."[1]

Overview of the Facts

When Brenda and Daniel Salvatore were divorced on August 26, 2015, they had three minor children and Brenda Salvatore had the majority of the parenting time. At the time of the parties' divorce, Brenda was unemployed, although it was undisputed that she had previously performed office work for dental offices and worked as a registered nurse at various times during the parties' marriage. Daniel was a dentist with his own practice, and according to the parties' settlement agreement, Daniel earned approximately $25,312 per month from his thriving dental practice. His total gross earnings exceeded $400,000.00 annually. Pursuant to the Illinois child support law in place at the time of the parties' divorce, Daniel agreed to pay to Brenda 32 percent of his net income, which was the amount of $8,100.00 per month for child support. It is also worth noting that both parties waived maintenance and Brenda remarried shortly after the entry of the judgement of dissolution. Along with remarrying shortly after the entry of the parties' Judgment, Brenda also became employed and began working as a triage nurse, earning an income much greater than her income at the time of the divorce, which was zero dollars.

Post-Decree Proceedings and Analysis

On November 1, 2017, just a few months after the new Illinois child support law for income shares went into effect, Daniel filed a petition to modify child support. In his initial filing, Daniel argued only that his income had decreased and its decrease was a substantial change in circumstances. Daniel later was granted leave to amend his petition to add a second allegation that Brenda's new employment and income was a substantial change in circumstances to warrant the child support modification.

Although both Brenda's hours worked and income earned varied, according to Brenda's financial affidavit, she had earned approximately $3,451.00 per month in 2017. Brenda's total gross income for the 2017 tax year was approximately $23,500.00, which included time Brenda had taken off for a maternity leave that year.

According to the appellate opinion, during the trial court hearing, Daniel testified that his individual 2017 tax return reflected a gross income that was much lower than what he had earned for prior years. However, Daniel also acknowledged that there were discrepancies between the gross receipts from his business checking and those shown on his business's tax returns, and also that Daniel had deposited other large sums into his personal checking account, which were not reflected in his gross income. Since Daniel's tax returns did not accurately reflect Daniel's true income, which should have been higher, the trial court did not grant Daniel's argument that his income had dropped and that he had experienced a substantial change in circumstances. The trial court also rejected Daniel's argument that Brenda's new income constituted a substantial change in circumstances.

Appellate Court Analysis

When looking to whether the trial court made the right decision and correctly interpreted the martial settlement agreement, the appellate court used the *de novo* standard of review, as a question of law.[2]

Daniel's argument that Brenda's income was a substantial change in circumstances was denied because the court ultimately determined that the parties' Judgment for Dissolution of Marriage, which incorporated the parties' Marital Settlement Agreement

("MSA") and Joint Parenting Agreement ("JPA"), did not contemplate that Brenda would remain unemployed as long as she was receiving child support. In fact, the trial court actually found that there was language to support the contrary, including language regarding health insurance that indicated both parties' employers and both parties' incomes. Although Daniel's counsel argued that this reciprocal language was a "contingency provision that should not be considered in determining the parties' intent with respect to child support," earlier Illinois case law had already established otherwise.[3] "A marital settlement agreement is construed in the manner of any other contract, and the court must ascertain the parties' intent from the language of the agreement."[4] The appellate court further determined that "if the health insurance provision in the MSA were the only provision that contemplated Brenda's future employment, then we might be inclined to favor counsel's argument."[5] Additionally, Brenda's employment was not a specified trigger event to modify child support.

Further working against Daniel's argument was the fact that the parties' JPA also contemplated Brenda's eventual employment in at least two sections. The JPA provided that each party must keep the other apprised of their respective places of employment and phone numbers of places of employment. It also included language related to make up time for missed parenting time due to reasons "other than for work related cancellations."[6]

Given that the parties' contemplated Brenda's eventual employment in both their MSA and JPA, the appellate court determined that the trial court correctly refused to consider Brenda's income as a basis for determining whether there was a substantial change in circumstances to warrant a modification of child support.

The appellate court also made explicit point in the published opinion to include that it would have affirmed the trial court's ruling even if the parties' MSA and JPA had not contemplated Brenda's future employment. The appellate court wrote that since the child support statute allows for a deviation from the minimum support guidelines based on "the financial resources and needs of the custodial parent," due to the parties' specific circumstances, it would have found an abuse of discretion by the trial court and Daniel's child support obligation would not have been modified, even if Brenda's income could have been properly considered.[7]

Closing Thoughts

Maybe I am just speaking for myself, but Salvatore is one of the case opinions we have all been waiting for since July 1, 2017. Although the statute is very clear that the passage of the new July 1, 2017 statute itself was not a substantial change in circumstances to constitute a modification in child support, the truth is that since the passage of the July 1, 2017 income-shares statute, many child support obligors have been going to court to attempt to modify (i.e., reduce) their original pre-July 2017 child support obligation, even when there is no true substantial change in one's circumstances to warrant a modification. A calculation of child support using the income-shares statute almost always comes out with an obligation that is less than one's child support obligation would have been under the former income percentage-based calculation.

Since the income-shares statute was passed just a little more than two years ago, there have been few published opinions related to the modification of child support obligations set using the percentage-based calculation to become recalculated using the income-shares calculation. While the opinion issued for Salvatore will likely not be the be-all and end-all opinion on this issue, it will be interesting to see whether other districts agree with this precedent set by the Illinois Appellate Court for the Second District in the future. With a slightly different set of facts, it is reasonable to think that the outcome of Salvatore may have been completely different. Perhaps in a scenario where the previously unemployed former spouse began earning close to, the same as, or more than what the other former spouse earned, the court might have found differently. Had *Salvatore* been a scenario like that, it would not have been surprising if the court had instead determined that the previously unemployed former spouse's new income did constitute a substantial change in circumstances to require a recalculation of child support. *Salvatore* can also serve as a reminder to us practitioners to the way that our settlement agreements will be interpreted in post-decree litigation, and a lesson to be very intentional with the language we choose to include within the agreements.

Only future appeals on the same topic will provide more clarity as to whether the second district came to the "right" conclusion in deciding not to consider Brenda's new full-time income as a basis to recalculate child support. I expect that other districts may not immediately defer to the precedent set by *Salvatore*, but only time, and future appeals, will tell. ■

1. *In re Marriage of Salvatore*, 2019 IL App. (2d) at 34.
2. *Id*. at 22; *Blum v. Koster*, 235 Ill. 2d. 21, 33 (2009).
3. *Salvatore*, *supra* note 1 at 26-27.
4. *Blum*, *supra* note 2 at 33.
5. *Salvatore*, *supra* note 1 at 27.
6. *Id*. at 29.
7. *Id*. at 34.