

2012 IL App (2d) 100950-U
No. 2-10-0950
Order filed March 21, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

SABRINA COONEY,)	Appeal from the Circuit Court
)	of Du Page County.
Petitioner-Appellant,)	
)	
v.)	07-F-0377
)	
MICHAEL BALMER,)	Honorable
)	Timothy J. McJoynt,
Respondent-Appellee.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Bowman concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion in permitting respondent to file an untimely response to a request to admit or in admitting previous contracts between the parties into evidence. The trial court did not err in finding that respondent possessed an equity interest in the property, that the parties' 2005 contract contained sufficient consideration, and the contract was not unconscionable. The trial court did not err in denying petitioner retroactive child support. Finally, although the contractual provision crediting respondent with \$35,000 child support was unenforceable because it violated public policy, the equities and fundamental fairness demanded that respondent be given \$35,000 credit child support payments. Thus, we affirmed the judgement of the trial court.

¶ 1 On June 27, 2007, the Illinois Department of Healthcare and Family Services (the Department) and petitioner, Sabrina Cooney, filed a petition to determine the existence of the father

and child relationship against respondent, Michael Balmer. The petition alleged that respondent was the biological father of the minor child, who was born on March 11, 1992. After the parties agreed that respondent was the biological father of the minor, the Department was granted leave to withdraw. Thereafter, petitioner filed a motion for declaratory judgment seeking retroactive and permanent child support. As part of her motion, petitioner argued that a previous contract between the parties giving respondent an advance credit toward child support payments in the amount of \$35,000 was unenforceable. Respondent filed a cross-motion for declaratory judgment, claiming the contract was enforceable. The trial court ruled that the contractual provision for an advance payment of child support fees was unenforceable because it violated public policy, but concluded that the rest of the contract was enforceable. As a result, the trial court ordered the parties to calculate child support arrearages from September 15, 2005, through the date of the minor's emancipation at a rate of \$400 per month and to apply a \$35,000 credit to respondent against that amount. Petitioner appeals, contending (1) the trial court erred by concluding that respondent's response to petitioner's request to admit complied with Illinois Supreme Court Rule 216(c) (Ill. S. Ct. R. 216(c) (eff. Jan. 1, 2000)); (2) the trial court abused its discretion by permitting two other contracts into evidence; (3) the trial court's finding that respondent possessed an equity interest in the property was against the manifest weight of the evidence; (4) the trial court's finding that the contract contained adequate consideration was against the manifest weight of the evidence; (5) the trial court erred in denying retroactive child support and recalculating petitioner's child support payments; and (6) the contract is void because it violates public policy. We affirm.

¶ 2

I. Background

¶ 3 Only the facts necessary to resolve this appeal will be recited. Petitioner gave birth to the

minor on March 11, 1992. Although a father was not listed on the minor's birth certificate, respondent later acknowledged that he was the biological father. The parties were not married, but resumed dating in 1996. In 1997, respondent rented a house in Winfield (the property) on a rent-to-own agreement. Respondent made repairs to the property to make it more habitable, and in September 1997, petitioner and the minor moved into the property. Petitioner purchased the property in 2008, and respondent was not listed on the mortgage, purchase agreement, or other paperwork related to the purchase of the property. The parties and the minor lived together in the property until May 2002, when the parties' relationship soured.

¶ 4 On March 23, 2002, the parties entered into a contract regarding the home and child support. The contract provided that respondent would move out of the home, but would contribute labor and capital equal to one-half of the cost of repairs. The contract provided that respondent would pay petitioner \$667 per month, \$400 of that amount being allocated toward child support. The contract further provided that respondent would receive one-half of any profit earned if the home was sold.

¶ 5 On February 1, 2003, the parties entered into a second contract that amended the prior contract. The contract accounted for petitioner refinancing the mortgage for the property, acknowledged that petitioner paid respondent a lump sum of \$1,000, and reduced respondent's monthly payment to her to \$600. The contract provided that any profits from selling the property would be shared evenly between petitioner and respondent.

¶ 6 Subsequently, petitioner removed \$110,000 in equity from the property through a home equity line of credit. Thereafter, the parties entered into a third contract dated September 15, 2005. The contract acknowledged that petitioner removed \$110,000 in equity from the property and that, pursuant to the prior agreements, respondent was entitled to \$55,000. The contract provided that,

“in consideration for the sums received by [petitioner] from borrowings on the equity in the [property],” respondent was entitled to (a) a lump sum \$10,000 cash payment; (b) a \$10,000 lump sum payment at the time of the sale or transfer of the property; and (c) a \$35,000 credit against future child support payments. The September 15, 2005, contract specified that petitioner and respondent had previously agreed that respondent would pay child support of \$400 per month and that he was current with his payments. The contract further provided that the parties agreed:

“[B]y reason of [respondent’s \$35,000] credit, [respondent] is deemed to have pre-paid a sum in excess of all remaining child support payments and no other child support payments shall be required of him in the future.”

The contract provided that, in exchange, respondent would waive and release his equity in the property and that petitioner would be the sole owner of the property.

¶ 7 On June 27, 2007, petitioner and the Department filed a petition to determine the existence of a father-child relationship. The petition sought, in part, to establish paternity and payment from respondent for current and retroactive child support from the date of the minor’s birth. On October 9, 2007, respondent voluntarily admitted paternity and was adjudicated as the minor’s father. On May 12, 2008, the Department was granted leave to withdraw.

¶ 8 On January 26, 2009, petitioner filed a motion for declaratory judgment. Petitioner’s motion contended that the September 15, 2005, contract, which is “at the heart of the parties’ controversy” was invalid and unenforceable for want of consideration, being unconscionable, and against public policy. On March 12, 2009, respondent filed a motion for declaratory judgment, arguing that the September 15, 2005 contract was valid and enforceable.

¶ 9 On March 27, 2009, petitioner served respondent via United States mail with a request to

admit facts pursuant to Supreme Court Rule 216. On April 28, 2009, respondent filed his response to the request to admit with the trial court, but did not serve petitioner with the response. On April 30, 2009, petitioner filed a motion to have facts deemed admitted. Petitioner attached respondent's response to her motion. On October 16, 2009, the trial court denied petitioner's motion.

¶ 10 After a bench trial, during which both sides submitted evidence and testimony, the trial court issued its ruling on July 30, 2010. The trial court found that respondent possessed an equity interest in the property; petitioner removed equity from the property; and petitioner used that equity for her own benefit. The trial court held that the parties entered into the September 15, 2005, contract freely and voluntarily, and that the contract contained adequate consideration. The trial court further ruled that petitioner was not entitled to retroactive child support. With respect to the September 15, 2005, contract, the trial court held that it was enforceable and that “[petitioner] breached the contract by taking equity.”

¶ 11 Regarding child support, the trial court found that the contractual provision entitling respondent to an advance payment of \$35,000 in child support violated public policy. As a result, the trial court voided that provision but found that the rest of the contract was enforceable. Nonetheless, the trial court stated that it “can't take away the fact that [respondent] did pay money to [petitioner.] She got the child support and nobody came back to attack that transaction to [until now.]” The trial court ordered that respondent be given a \$35,000 credit towards child support. The trial court ordered the parties to calculate child support arrearages from September 15, 2005, through the date of the minor's emancipation, which occurred on May 22, 2010, in the amount of \$400 per month and then subtract \$35,000 from that arrearage amount. The trial court's written order provided that the total amount child support arrearage was \$23,200. The trial court concluded that

respondent overpaid child support by \$11,800, and therefore, ordered petitioner to pay respondent that amount as a result of his overpayment. Petitioner timely appealed.

¶ 12

II. Discussion

¶ 13

A. Response to Petitioner's Request to Admit

¶ 14 Petitioner's first contention on appeal is that the trial court erred in permitting respondent to file his responses to petitioner's request to admit because his response was not submitted within the time frame required by Supreme Court Rule 216. According to petitioner, the trial court erred in admitting the responses on the basis that she suffered no prejudice from respondent's failure to comply with Rule 216. Petitioner argues that trial court should not have considered prejudice because respondent was not able to demonstrate good cause for not complying with the Rule.

¶ 15 Supreme Court Rule 216 permits a party to serve upon another party a written request for the admission of the truth of any specified fact. Ill. S. Ct. R. 216 (eff. Jan. 1, 2011). Rule 216(c) specifies that any facts requested to be admitted will be deemed admitted unless the responding party serves a response within 28 days. Ill. S. Ct. R. 216(c) (eff. Jan. 1, 2011). Our supreme court addressed Rule 216 in *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334 (2007). Construing Rule 183 and Rule 216, the supreme court first stated that "requests to admit constitute discovery." *Id.* at 347. The court held:

"In determining whether good cause exists under Rule 183 for the grant of an extension of time to remedy an unintentional noncompliance with a procedural requirement, the circuit court may not take into consideration facts and circumstances of record that go beyond the reason for noncompliance. Rather, we reaffirm [*Bright v. Dicke*, 166 Ill. 204 (1995)]'s holding that the plain language of Rule 183 specifically makes good cause a

prerequisite to relief, and that the burden of establishing good cause rests on the party seeking relief under Rule 183. The circuit court has the sound discretion to consider all objective, relevant evidence presented by the delinquent party with respect to why there is good cause for its failure to comply with the original deadline and why an extension of time should now be granted. The circuit court may receive evidence with respect to whether the party's original delinquency was caused by mistake, inadvertence, or attorney neglect, but may not engage in an open-ended inquiry which considers conduct that is unrelated to the causes of the party's original noncompliance. We decline, however, to specifically define what constitutes good cause within this context, as that determination is fact-dependent and rests within the sound discretion of the circuit court. Absent an abuse of discretion, the decision of the circuit court on this issue will not be disturbed." *Vision Point of Sale*, 226 Ill. 2d at 353.

"Abuse of discretion" is the most deferential standard of review, next to no review at all. *In re D.T.*, 212 Ill. 2d 347, 357 (2004). An abuse of discretion occurs when no reasonable person would agree with the position adopted by the trial court, and therefore, cannot occur when reasonable people could differ as to the outcome. *In re Marriage of Sanfratello*, 393 Ill. App. 3d 641, 646 (2009).

¶ 16 Petitioner's argument that the trial court erred in admitting respondent's response to her request to admit is misplaced. As our supreme court expressed in *Williams v. A.E. Staley Manufacturing Co.*, 83 Ill. 2d 559 (1980), discovery is not a tactical game. *Id.* at 566. Rather, "[d]iscovery is intended as, and should be, a cooperative undertaking by counsel and the parties, conducted largely without court intervention, for the purpose of ascertaining the merits of the case and thus promoting either fair settlement or fair trial." *Id.* Here, the record reflects that respondent

filed his response with the trial court on April 28, 2009. Because petitioner served respondent with the request to admit by mail dated March 27, 2009, the effective date for that service was four days later pursuant to Supreme Court Rule 12(c) (Ill. S. Ct. R. 12)(c) (eff. Dec. 29, 2009)), or April 1, 2009. Therefore, respondent filed his response with the trial court within 28 days of being served. In addition, petitioner's counsel was in possession of the responses by, at the latest, April 30, 2009, when the response was attached to her motion to have facts deemed admitted. While respondent did not have the response served on petitioner in strict accordance with the rule, the trial court was nevertheless permitted to consider all relevant evidence underlying the alleged delinquency, including respondent's filing the responses with the trial court within 28 days. See *Vision Point of Sale*, 226 Ill. 2d at 353. As a result, the trial court could have reasonably concluded that, because respondent filed the response with trial court, there was good cause for granting respondent an extension and admitting the response. Therefore, the trial court's determination to admit the response was not a decision in which no reasonable person would agree with, and we hold that no abuse of discretion occurred.

¶ 17 B. Trial Court's Decision to Admit Prior Contracts

¶ 18 Petitioner's second contention on appeal is that the trial court erred in admitting the 2002 and 2003 contracts into evidence. According to petitioner, because the trial court determined that the parties' 2005 contract supplanted the prior two contracts and controlled the issue before the court, it erred in admitting the two prior contracts.

¶ 19 Petitioner's contention is unavailing. The admissibility of evidence rests with the sound discretion of the trial court, and its decision will not be reversed unless it constitutes an abuse of discretion. *Napcor v. JPMorgan Chase Bank, NA*, 406 Ill. App. 3d 146, 155 (2010). As noted

above, the “abuse of discretion” standard is the most deferential standard of review (*In re D.T.*, 212 Ill. 3d at 357) and occurs only when no reasonable person would agree with the position adopted by the trial court (*Sanfratello*, 393 Ill. App. 3d at 646). In addition, it is “ ‘ axiomatic that error in the exclusion or admission of evidence does not require reversal unless one party has been prejudiced or the result of the trial has been materially affected.’ ” *Spaetzel v. Dillon*, 393 Ill. App. 3d 806, 814 (2009) (quoting *Stricklin v. Chapman*, 197 Ill. App. 3d 385, 388 (1990)). Here, the trial court could have concluded that the 2002 and 2003 contracts were relevant to determine whether and to what extent respondent possessed an equity interest in the property. See *Voykin v. Estate of DeBoer*, 192 Ill. 2d 47, 57 (2000) (stating that evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without that evidence). Moreover, petitioner does not argue, nor does the record reflect, any prejudice or that the proceedings were materially affected as a result of the prior contracts being admitted. See *id.* Therefore, we conclude that the trial court did not abuse its discretion.

¶ 20 C. Respondent’s Equity Interest in the Property

¶ 21 Petitioner’s next contention on appeal is that the trial court’s finding that respondent had an equity interest in the property was against the manifest weight of the evidence. Petitioner argues that it “defies logic” that the labor respondent put into the property gave him an equity interest. Petitioner further argues that “[t]he fact that [she] signed the prior contracts is irrelevant because the court specifically held that the 2005 contract supplanted and took the place of the prior contracts and that the 2005 contract controls the issues.”

¶ 22 The standard of review we apply when a challenge is made to a trial court’s ruling following a bench trial is whether the trial court’s judgment is against the manifest weight of the evidence.

Bazydlo v. Volant, 164 Ill. 2d 207, 215 (1995); *Wildman, Harrold, Allen & Dixon v. Gaylord*, 317 Ill. App. 3d 590, 598 (2000). A trial court's judgment will be found against the manifest weight of the evidence when its findings appear to be unreasonable, arbitrary, or not based on evidence. *Wildman, Harrold*, 317 Ill. App. 3d at 599. This court must resolve questions of testimonial credibility in favor of the prevailing party and draw from the evidence all reasonable inferences in support of the trial court's judgment. *Id.* (citing *H&H Press, Inc. v. Axelrod*, 265 Ill. App. 3d 670, 679 (1994)). We will not reverse a trial court's decision if differing conclusions can be drawn from conflicting testimony unless an opposite conclusion is clearly apparent. *Wildman, Harrold*, 317 Ill. App. 3d at 599 (citing *Buckner v. Causey*, 311 Ill. App. 3d 139, 144 (1999)).

¶ 23 In the current matter, the trial court's finding that respondent had an equity interest in the property was consistent with the manifest weight of the evidence. The evidence established that petitioner acknowledged respondent's equity interest by signing the 2002 and 2003 contracts. The 2002 contract provided, in relevant part, that respondent would contribute to one-half of the labor and money necessary for the cost of repairs to the property. The contract further provided that respondent would receive half of any profit made from the sale of the property. The contract specified that the property had a second mortgage and that respondent was responsible for 5/12 of that loan, which amounted to \$67 per month. The contracts provided that both petitioner and respondent must agree in writing before obtaining any loans that would affect the balance of equity in the property. In addition, the 2003 contract provided that, as a result of petitioner refinancing the mortgage on the property, she would pay respondent \$1,000 and that respondent would no longer owe petitioner a \$67 monthly payment toward the second mortgage. The 2003 contract also acknowledged the original agreement and that the parties would share any profits from the sale of

the property. Because we must draw from the evidence all reasonable inferences in support of the trial court's judgment, the evidence supported the trial court's conclusion that respondent had an equity interest in the property. Therefore, the trial court's finding was not against the manifest weight of the evidence. See *Wildman, Harrold*, 317 Ill. App. 3d at 599.

¶ 24 D. Consideration for 2005 Contract

¶ 25 Petitioner's next contention is that the trial court erred in concluding that adequate consideration existed for the 2005 contract. Petitioner argues that, because she received money from the home equity line of credit from the bank through a loan, and the bank was not acting as respondent's agent, petitioner did not receive consideration for the \$35,000 in child support credits.

¶ 26 Petitioner's argument is misplaced. Illinois law is well settled that consideration is a bargained-for exchange of promises or performances, and that any act that benefits one party or is a detriment to the other party is sufficient consideration to support a contract. *In re Marriage of Tabassum*, 377 Ill. App. 3d 761, 770 (2007). “ ‘ A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.’ ” *Ross v. May*, 377 Ill. App. 3d 387, 391 (2000) (quoting *Hartbarger v. SCA Services, Inc.*, 200 Ill. App. 3d 1000, 1012 (1990)).

¶ 27 Here, the parties' 2005 contract clearly contained a bargained-for exchange. Petitioner agreed to pay respondent \$10,000 by September 24, 2005, an additional \$10,000 upon the property being sold or transferred, and to give him a \$35,000 credit toward future child support payments. In return, respondent agreed to relinquish his interest in the property. In essence, petitioner was able to use the home equity line of credit to purchase respondent's equity share in the property. Because we already held that the trial court's finding that respondent had an equity interest in the property

was consistent with the manifest weight of the evidence, his relinquishment of that equity in return for petitioner's performance constituted adequate consideration.

¶ 28 E. Trial Court's Determination That the Contract was not Unconscionable

¶ 29 Petitioner's next contention on appeal is that the trial court's determination that the contract was not unconscionable was against the manifest weight of the evidence. In support of this contention, petitioner argues that respondent made "incessant demands and threats" toward her, compelling her to sign the contract. Petitioner further argues that the contract is substantively unconscionable because the terms are one-sided in respondent's favor.

¶ 30 A finding of unconscionability can be based on procedural unconscionability, substantive unconscionability, or a combination of both; and the determination of whether a contract is unconscionable is a question of law subject to *de novo* review. *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 21 (2006). With respect to petitioner's claim of procedural unconscionability, a contract is procedurally unconscionable if an impropriety in the process of forming the contract deprived a party of meaningful choice. *In re Marriage of Tabassum*, 377 Ill. App. 3d at 775. Petitioner's claim is based on duress, which can consist of oppression, undue influence, or taking undue advantage of another's stress, to the point where that person is deprived of the exercise of free will. *Id.* Duress is measured by an objective test, and the person alleging duress bears the burden of proving by clear and convincing evidence that she or he was " ' bereft of the quality of mind essential to the making of the contract.' " *Id.* (quoting *In re Marriage of Hamm-Smith*, 261 Ill. App. 3d 209, 215 (1994)). While the issue of procedural unconscionability is usually subject to *de novo* review, because the claim rests on the issue of duress here, we use the manifest-weight-of-the-evidence standard of the review. See *Tabassum*, 377 Ill. App. 3d at 775 n.3. As noted above, a trial

court's finding is against the manifest weight of the evidence when it appears to be unreasonable, arbitrary, or not based on the evidence. *Wildman, Harrold*, 317 Ill. App. 3d at 599. We will not reverse a trial court's decision if differing conclusions can be drawn from conflicting testimony unless an opposite conclusion is clearly apparent. *Id.* (citing *Buckner*, 311 Ill. App. 3d at 144).

¶ 31 In the current matter, the trial court's determination that petitioner freely entered into the contract was consistent with the manifest weight of the evidence. The trial court was presented with conflicting testimony regarding the circumstances under which petitioner entered into the contract. Respondent testified that he was angry after learning that petitioner used the property to obtain a home equity line of credit. Petitioner testified that she signed the contract because she felt that she had no other choice. However, the record also reflects, as the trial court noted, that petitioner's attorney suggested modifications to the contract, which were incorporated. See *Tabassum*, 377 Ill. App. 3d at 767-77 (concluding that a trial court's finding of duress, and finding of procedural unconscionability, was against the manifest weight of the evidence because the party alleging duress was represented by counsel and that changes to the agreement were made between the first and final drafts). Therefore, although there was conflicting testimony, we will not reverse the trial court because an opposite conclusion from the trial court's determination is not clearly apparent. See *Wildman, Harrold*, 317 Ill. App. 3d at 599.

¶ 32 We next turn to petitioner's argument that the contract was substantively unconscionable. Substantive unconscionability concerns the actual terms of the contract and occurs when the contract is so one-sided due to an overall imbalance in obligations and rights imposed by the bargain that one party is oppressed. *Kinkel*, 223 Ill. 2d at 28. Stated differently, unconscionable terms have been defined as being "improvident, totally one-sided, and oppressive." *In re Marriage of Richardson*,

237 Ill. App. 3d 1067, 1080 (1992). We review this issue *de novo*, but to the extent that we must consider factual findings in our analysis, we will use the manifest-weight-of-the-evidence standard. See *Tabassum*, 377 Ill App. 3d at 777.

¶ 33 In the current matter, the record is devoid of any indication that the terms of the contract were improvident, one-sided, or oppressive. Petitioner used the property to secure a \$110,000 home equity line of credit. She secured the loan without respondent's knowledge despite him having an equal equity share in the property. The contractual terms provided that, as a result of petitioner receiving the loan and respondent being entitled to one-half of the loan received, she would pay respondent \$10,000 by a date certain, give him a \$35,000 credit toward child support payments, and pay him an additional \$10,000 when the property was sold or transferred. In return, respondent would relinquish any equity rights he had in the property. While we are cognizant that petitioner was solely responsible for repaying the loan, she received in return the benefit of respondent no longer having an equity interest in the property. As noted above, petitioner was, in essence, able to use the home equity line of credit as a mechanism to purchase respondent's equity interest in the property. Therefore, we reject petitioner's contention.

¶ 34 F. Retroactive Child Support

¶ 35 Petitioner's next contention is that the trial court abused its discretion in denying her request for retroactive child support. Petitioner argues that respondent had an obligation to support the minor from birth, but did not do so from 1992 until 1997, when the parties began living together. Therefore, according to petitioner, the trial court did not properly apply the statutory factors enumerated in section 14(b) of the Illinois Parentage Act of 1984 (the Parentage Act). 750 ILCS 45/14(b) (West 2006).

¶ 36 Section 14(b) of the Parentage Act provides that a trial court “may order any child support payments to be made prior to the commencement of the action.” *Id.*; *Department of Public Aid ex rel. McFarland v. Thompson*, 218 Ill. App. 3d 1099, 1104 (1991). Section 14(b) provides that, in determining whether such payments should be ordered, the trial court shall consider all relevant factors in determining a support award under the Illinois Marriage and Dissolution of Marriage Act (the Marriage Act) (750 ILCS 5/101 *et seq.* (West 2006)) and other equitable factors including, but not limited to: (1) the father’s prior knowledge and circumstances of the child’s birth; (2) the father’s prior willingness or refusal to help raise or support the child; (3) the extent to which the mother informed the father of the child’s needs or attempted to seek or require his help in rearing or supporting the child; (4) the reasons the mother did not file the action earlier; and (5) the extent to which the father would be prejudiced by the delay in bringing the action. 750 ILCS 45/14 (West 2006). “The standard of review for a current or retroactive child support award in paternity cases is whether the award is an abuse of discretion or the factual predicate for the decision is against the manifest weight of the evidence.” *In re Janssen*, 292 Ill. App. 3d 219, 223 (1997).

¶ 37 In the current matter, the trial court did not abuse its discretion in denying petitioner retroactive child support. The record reflects that the trial court carefully considered the statutory factors outlined in section 14(b) of the Parentage Act. In rendering its ruling, the trial court noted that respondent was aware of the minor’s birth and that the evidence reflected that respondent helped support the minor from as early as 1997. The trial court also emphasized that it was unsure why petitioner not did bring the action earlier. Because it is clear from the record that the trial court properly considered the statutory factors outlined in section 14(b) of the Parentage Act, and the record reflects that respondent supported the minor before petitioner brought her action for child

support, the trial court's finding was not against the manifest weight of the evidence. See *Janssen*, 292 Ill. App. 3d at 225 (holding that because a trial court's finding regarding retroactive child support was consistent with the evidence, its ruling was not against the manifest weight of the evidence).

¶ 38 G. Contractual Provision to Credit Child Support

¶ 39 The penultimate issue on appeal is whether the provision in the parties' 2005 contract crediting respondent with \$35,000 in child support payments is enforceable. Petitioner maintains that the contractual provision is unenforceable because it violates public policy for three reasons: (1) awarding an equitable interest to unmarried cohabitants contravenes the purpose of the Marriage Act; (2) the agreement is unenforceable unless found by the court to be in the minor's best interest; and (3) the contractual provision is "tantamount to an agreement" that petitioner will not seek child support. We disagree with petitioner's arguments.

¶ 40 *1. The Marriage Act*

¶ 41 Petitioner first argues that the contractual provision violates public policy in that it contravenes the Marriage Act by granting mutually enforceable rights to knowingly unmarried cohabitants. In support of this argument, petitioner cites *Hewitt v. Hewitt*, 77 Ill. 2d 49 (1979), and *Ayala v. Fox*, 206 Ill. App. 3d 538 (1990). In *Hewitt*, our supreme court held that the plaintiff, who lived with the defendant for five years in an unmarried, family-like relationship to which three children were born, could not recover her equitable share of the profits and properties accumulated by the parties during that period. *Hewitt*, 77 Ill. 2d at 65-66. The basis of the supreme court's holding was that the "practical effect" of permitting such relief would be the reinstatement of common-law marriage. *Id.* Subsequently, in *Ayala*, this court followed *Hewitt* and concluded that

the plaintiff did not have an equity interest in a property she lived in with the defendant even though she contributed to the mortgage, taxes, and insurance payments. *Ayala*, 206 Ill. App. 3d at 539. The reviewing court noted that the parties were not married and that the plaintiff was “seeking recovery based on rights closely resembling those arising from a conventional marriage, namely, an equitable interest in the ‘marital’ residence.” *Id.* at 542.

¶42 We find *Hewitt* and *Ayala* distinguishable, and therefore, unpersuasive to the matter presently before us. Subsequent to those decisions, we held in *Kaiser v. Flemming*, 315 Ill. App. 3d 921 (2000), that the plaintiff could recover money she gave the defendant to pay off the mortgage on his home. In *Kaiser*, the parties were living together in an unmarried relationship. *Id.* at 923. The defendant suggested that the plaintiff, who previously received a lump sum payment from the dissolution of her prior marriage, use that money to help the defendant pay off his mortgage which, according to him, would enable them both to save more money. *Id.* As a result, the plaintiff gave the defendant a check for \$47,188.38, the amount remaining on his mortgage, which the defendant used to pay off the mortgage. *Id.* The parties shared expenses while living together, but the plaintiff ultimately moved out after the relationship strained. *Id.* at 924. The plaintiff attempted to get the money she contributed to the mortgage back from the defendant but he refused, telling her that he would repay her the amount when the property sold, deducting her share of the utility bills that he paid while she lived the in the property. *Id.* This court held that the plaintiff could recover that money she contributed toward the defendant’s mortgage, and in so doing, distinguished *Ayala*. Specifically, we concluded “Unlike the plaintiff in *Ayala*, the plaintiff here alleged rights substantially independent from her nonmarital relationship with the defendant. *** Further, the plaintiff in *Ayala* sought additional relief akin to a marital relationship and based her claims on the

fact that she and the defendant ‘lived together as husband and wife.’” *Id.* at 926.

¶ 43 Here, similar to the plaintiff in *Kaiser*, respondent’s equity claim in the property is substantially independent from his nonmarital relationship with petitioner. While the parties did live together as a family unit for a period of time, the record reflects that respondent’s claim to an equity in the property was not primarily based on that relationship. Instead, it was based on the capital and labor he contributed to make the property habitable. In addition, the record reflects that, although respondent sought an equity interest in the home, he did not seek any additional relief akin to a marital relationship. See *id.* Therefore, because respondent’s equity interest in the property is substantially independent from his nonmarital relationship with petitioner, we conclude that awarding him an equity interest does not violate the purpose of the Marriage Act.

¶ 44 *2. Minor’s Best Interest*

¶ 45 Petitioner next argument that the contract violates public policy is premised because the contract was an extrajudicial child support agreement that was not approved by a court. In support of this argument, petitioner relies on *Blisset v. Blisset*, 123 Ill. 2d 161 (1988). In *Blisset*, the plaintiff filed a petition to collect delinquent child support payments from the defendant. *Id.* at 164. The defendant argued that the plaintiff released him from his child support obligations in exchange for his agreement to surrender his visitation rights. *Id.* The reviewing court held that the agreement to waive child support was not enforceable because the parties failed to obtain judicial approval of their agreement, “but rather usurped the judicial function by modifying the court-ordered child support obligation themselves.” *Id.* at 168.

¶ 46 We agree with petitioner that a contract releasing one party from his or her child support obligations without judicial approval is unenforceable because it violates public policy. As our

supreme court stressed in *Blisset*, safeguarding the best interests of minors by establishing in court that they will have adequate financial support in the absence of child support payments is paramount. See *id.* Therefore, because the parties did not attempt to get court approval for their agreement that a \$35,000 credit toward respondent's future child support payments was in the minor's best interest, that contractual provision is unenforceable because it violates public policy.

¶ 47 Nonetheless, while the contractual provision providing respondent with a \$35,000 advance credit toward child support is unenforceable, prior Illinois courts have held that, if equity demands, a party may be given credit for either voluntary or involuntary overpayment of child support. In *In re Marriage of Tollison*, the respondent overpaid child support payments of \$4,697.78. *In re Marriage of Tollison*, 208 Ill. App. 3d 17, 19 (1991). The respondent argued that he was entitled to reimbursement for the overage. *Id.* The reviewing court noted that the general rule is that no credit is given for the voluntary overpayment of child support, even if the overpayment resulted from the mistaken belief that the payment was legally required. *Id.* at 19-20. However, the court further noted that an exception to the rule existed where the equities of the circumstances demanded, provided that the credit would not result in hardship. *Id.* at 20. The court concluded:

“[The respondent] cannot be denied relief simply because no procedural mechanism or current legal procedure exists to undo the error. The law is replete with legal theories such as constructive trusts, implied in law contracts, etc., the underlying principle of which is that one person should not profit at the expense of another because of a wrong or mistake. These doctrines were crafted to provide justice where it otherwise would not be done.” *Id.*

For the exception to the general rule that no credit towards a voluntary overpayment of child support to be applicable, a court must conclude that the equities demand a credit and no hardship would

result to the minor. See *In re Marriage of Olsen*, 229 Ill. App. 3d 107, 114-15 (1992).

¶ 48 Although *Tollison* involved a credit for the overpayment of child support, whereas this case involves an advance credit towards future child support payments, we find the reviewing court's reasoning persuasive. The equities in this case dictate that respondent be allowed to apply the unaccounted \$35,000 from his share of the equity in the property toward child support. As we held above, the trial court's finding that respondent had an equity interest in the property was consistent with the manifest weight of the evidence. Petitioner borrowed money by using equity in the property without informing respondent beforehand. Petitioner also did not remit to respondent his share of the money that was borrowed. To allow petitioner to profit at the expense of respondent due to her refusal to give him his fair share of the home equity line of credit would be contrary to our prior holding enforcing the 2005 contract and contrary to the ends of justice.

¶ 49 Moreover, the record is devoid of any indication that the minor would be harmed by providing respondent with a credit toward child support. We recognize that petitioner testified that she did not believe that a prepayment of child support was in the minor's interest. However, her testimony did not address the issue of how the minor would have been harmed by respondent's advance payment toward child support, or explain what necessities she would not be able to provide for the minor without the \$35,000 in child support payments. More important, although the 2005 contract provided respondent with a \$35,000 credit toward child support, it still required him to pay for one-half of the minor's necessary medical, dental, and counseling services not covered under insurance, one-half of the minor's college expenses, and one-half of any "extraordinary fees" from extracurricular activities that the parties agreed to in advance. Therefore, after considering the equities and the lack of any indication that the minor would suffer harm, we conclude that

fundamental fairness demands that respondent be given a \$35,000 credit toward child support payments from the date of the petition's filing through the minor's emancipation. See *Tollison*, 208 Ill. App. 3d at 20 (“While there appears to be no precedent providing that [the respondent] must be given a credit for his involuntary overpayments, fundamental fairness demands that such credit be given.”).

¶ 50 We affirm the portion of the trial court's order entering a judgment against petitioner and in favor of respondent for \$11,800. The record reflects that the minor was emancipated on May 22, 2010, and as a result, respondent owed \$23,200 in child support from the date of the contract through the minor's emancipation. Because the equities demand that petitioner not be permitted to profit at respondent's expense by obtaining a home equity line of credit without remitting to respondent his equitable share, and the minor would not be harmed, we agree with the trial court's determination that petitioner should be responsible for the difference.

¶ 51 *3. Agreement Prevents Petitioner from Seeking Child Support*

¶ 52 Petitioner's final argument in support of her contention that the contractual provision crediting respondent with \$35,000 in child support is unenforceable is that the provision is tantamount to an agreement that she will not seek child support or child support modification. Petitioner cites *In re Marriage of Rife*, 376 Ill. App. 3d 1050 (2007). In *Rife*, the parties entered into a marital settlement agreement providing that, if the wife attempted to modify the visitation, residency, or support structure for the children expressed in the agreement, she would lose her right to withdraw funds from an investment retirement account. *Id.* at 1052. The reviewing court held that enforcing the agreement was contrary to public policy because it had the effect of “chilling [the wife's] exercise of her right to seek judicial intervention in the best interests of the children.” *Id.* at

1064. In reaching its determination, the reviewing court rejected the husband's argument that, because the wife used the \$1,900 monthly withdrawal from the IRA for support and she could petition the court for an additional \$1,900 in support if her right to withdraw from the IRA was forfeited, the agreement did not prevent her from seeking judicial intervention. *Id.*

¶ 53 *Rife* is distinguishable. In that case, the wife would suffer a clear and unmistakable financial harm if she sought court intervention, *i.e.*, the loss of \$1,900 per month from the IRA withdrawal. Conversely, here, the contract did not provide that petitioner would lose access to any funds or otherwise suffer financial harm if she sought to seek court intervention to protect the minor's best interest. Instead, the contract provided that respondent would receive an advance credit of child support payment to account for a portion of the equity he was entitled to from the home equity line of credit. In addition, as we emphasized above, the contract still required respondent to pay for one-half of the minor's medical bills not covered by insurance, one-half of his college expenses, and one-half of any extraordinary extracurricular activities. The contractual provision at issue here does not have the same deterrent effect on seeking judicial intervention, when doing so would be in the best interest of the minor, as the contract in *Rife*. We, therefore, decline to disturb the trial court's judgment.

¶ 54

III. Conclusion

¶ 55 For the forgoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 56 Affirmed.