

2012 IL App (2d) 120231-U
No. 2-12-0231
Order filed December 5, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
ROBIN DREYFUS f/k/a)	of Lake County.
Robin Goldstein,)	
)	
Petitioner-Appellant,)	
)	
v.)	No. 99-D-739
)	
NEAL GOLDSTEIN,)	Honorable
)	Jane D. Waller and
)	Veronica M. O'Malley,
Respondent-Appellee.)	Judges, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Schostok concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court abused its discretion in denying wife's petition for rule to show cause in that husband was delinquent in paying child support for the period after parties' daughter enrolled in college but had not yet reached the age of 18.
- ¶ 2 Several years after the dissolution of their marriage, petitioner, Robin Dreyfus, and respondent, Neal Goldstein, filed a series of post-decree motions. At a prove-up hearing in July 2007, the parties reached an oral agreement that disposed of all pending motions. The trial court

entered a written agreed order in which Neal agreed to pay child support and the college expenses of the parties' only child, Lindsay, but no child support termination date was set.

¶ 3 In September 2010, Lindsay enrolled in college, and Neal began paying her college expenses but stopped paying child support. On December 3, 2010, Lindsay turned 18 years old, and a few days later, Neal filed a motion to clarify the parties' agreement, arguing that they had agreed to end child support when Lindsay entered college. The trial court initially denied the motion and found Neal to be in contempt, ruling that the support obligation did not terminate until the end of December 2010. However, upon reconsideration, the court vacated the contempt finding and found that the parties had intended that Neal's child support obligation would terminate when Lindsay entered college, even though she had not yet attained the age of 18.

¶ 4 Robin appeals, arguing that Neal's motion to clarify should have been denied and her petition for rule to show cause should have been granted because the trial court's finding directly contradicts the court's prior orders regarding the parties' agreement. We agree. First, Neal did not appeal those orders, rendering the matter *res judicata*. Second, to the extent that Neal's motion to clarify is actually a motion to modify support, the motion was untimely, as it was filed after Lindsay attained the age of emancipation. Third, the parties' agreement that Neal would pay both child support and college expenses before Lindsay turned 18 is consistent with section 510(d) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act), which contemplates payment of child support, college expenses, or both. 750 ILCS 5/510(d) (West 2010); *In re Marriage of Mulry*, 314 Ill. App. 3d 756, 759 (2000). We hold that Neal's support payment for December 2010 should be prorated to reflect that his child support obligation terminated on December 3, 2010, when Lindsay turned

18. We affirm in part and reverse in part the trial court's order that granted Neal's motion to reconsider the contempt order.

¶ 5

I. FACTS

¶ 6

A. Agreement Regarding Child Support and College Expenses

¶ 7 Robin and Neal were married on January 7, 1989, and their daughter, Lindsay, was born on December 3, 1992. The parties' marriage was dissolved on October 10, 1995. In 2006, the parties began filing a series of post-decree motions.

¶ 8 On July 26, 2007, the parties reached an oral agreement that disposed of all the pending motions, and the agreement was transcribed at a prove-up hearing. Robin testified to the terms of the agreement, including those regarding child support and college expenses. Neal agreed to pay \$3,000 per month in child support starting on August 1, 2007, as well as \$11,000 in retroactive support. Neal also agreed to "pay 100 percent of any college or university costs for either a private school or a state school for Lindsay," including room, board, tuition, books, laboratory fees, and travel four times per year between home and the university. In exchange for Neal's promise to pay all of Lindsay's college expenses, Robin agreed that she would not petition for an increase in child support for the remainder of Lindsay's minority. If Robin did petition for an increase in support, Neal's promise to pay all college expenses would be withdrawn, and the trial court would set his obligation at the time of the petition, according to the statutory factors. Neal retained the right to seek a reduction in his obligation to pay child support or college expenses if his financial circumstances deteriorated. Robin also testified that the parties agreed to withdraw all currently pending motions, so that the only matter remaining was the entry of a written order embodying the terms of the agreement. Neal testified that Robin had "truly and accurately" described the

settlement. Neither party testified to any date or event upon which child support or the college expense obligation would terminate.

¶ 9 Nearly three months later, on October 17, 2007, the trial court entered an “agreed order” that ostensibly represented the parties’ agreement. It appears that Robin’s counsel prepared the typewritten order, to which Neal or Judge Waller made handwritten changes. One of the typewritten provisions stated that Neal’s child support obligation “shall continue on a monthly basis until Lindsay’s eighteenth birthday.” Added to that provision was the handwritten phrase “or her entry into college, whichever occurs first.” Robin, Neal, the parties’ attorneys, and Judge Waller signed the order, but it is unclear whether the handwritten change was made before or after the signatures.

¶ 10 On November 13, 2007, Robin moved to strike the handwritten term as not part of the agreement. Robin argued that the parties never agreed that Neal’s child support obligation would terminate if Lindsay entered college before turning 18 years old. Robin pointed out that the prove-up of the settlement agreement showed that the parties did not address the termination of Neal’s child support obligation. Robin explained that Neal previously had proposed that child support should terminate when Lindsay graduated from high school, but that Robin rejected the term. Robin insisted that “ ‘said sum shall continue on a monthly basis until Lindsay’s 18th birthday,’ ” which Robin argued is consistent with section 510(d) of the Dissolution Act. On February 26, 2008, the court orally granted Robin’s motion to strike and set aside the agreed order in its entirety.

¶ 11 On April 3, 2008, Neal raised the child support termination issue again by moving for reinstatement of the October 17, 2007, order as the agreement of the parties. Alternatively, Neal asked the court to specify that the child support obligation would terminate when Lindsay graduated from high school. On May 15, 2008, the trial court denied the motion but reserved Neal’s right to

petition for modification or termination of child support in the future. The court ordered the parties to again prepare an agreed order that reflected the agreement reached at the July 26, 2007, prove-up hearing.

¶ 12 On June 26, 2008, the trial court entered a second agreed order, which stated that “commencing on November 1, 2007, and each month thereafter, [Neal] shall pay to [Robin] as and for child support for the benefit of their minor child, Lindsay, the sum of \$3,000.00 per month.” The court specifically found that the first agreed order entered on October 17, 2007, did not reflect the intent of the parties because it provided that child support would end if Lindsay began college, even if she was not yet 18 years old. The court wrote that “[f]ollowing the prove-up, the parties reached an impasse over the issue of termination of child support. After an informal conference with the court, an order was entered to which [Robin] objected because it contained a provision to which she had not agreed in the prove-up.” For two years, Neal paid the child support obligation without objection.

¶ 13 B. Motion To Clarify and Contempt Proceedings

¶ 14 On May 26, 2010, Lindsay graduated from high school, and on August 28, 2010, she left home and enrolled in college. Neal began paying all of Lindsay’s college expenses but also unilaterally stopped paying child support, starting with the September 2010 installment. Lindsay turned 18 years old on December 3, 2010.

¶ 15 On December 16, 2010, Neal filed a motion to clarify the second agreed order, arguing that (1) his child support obligation should have terminated when Lindsay entered college because requiring Neal to pay child support as well as Lindsay’s college expenses was unjust and inequitable; (2) Robin owed a contribution for certain unallocated expenses like medical and dental costs while

Lindsay was in college; and (3) his obligation to pay Lindsay's college expenses should terminate when she obtains her baccalaureate degree or when she attains the age of 22, whichever occurs first. Neal pointed out that Lindsay had enrolled in Sarah Lawrence College and cited a publication calling it the most expensive college in America.

¶ 16 On January 27, 2011, Robin filed a petition for a rule to show cause for Neal's nonpayment of child support while Lindsay was enrolled in college. In response, Neal reiterated his argument that the second agreed order should be interpreted to mean that his child support obligation terminated when he began paying Lindsay's college expenses.

¶ 17 On March 1, 2011, Judge O'Malley, who was newly assigned to the case, found Neal in indirect civil contempt for the child support arrearage and ordered him to pay \$12,000 in support for September 2010 through December 2010, plus 9 percent statutory interest. The court also denied Neal's motion to clarify in its entirety.

¶ 18 On March 10, 2011, Neal moved for reconsideration of the court's orders. Neal argued again that he did not owe support for September through December because he had paid all of Lindsay's college expenses. Neal alternatively argued that, because Lindsay turned 18 years old on December 3, 2010, he could owe, at most, only two days' support in December 2010. The court denied the motion on May 12, 2011. However, on May 25, 2011, the court *sua sponte* revisited Neal's previously-denied motion to reconsider and ordered the parties to reargue the matter in light of the recently discovered case of *In re Marriage of Loffredi*, 232 Ill. App. 3d 709 (1992).

¶ 19 On August 29, 2011, the trial court reversed course and found that the intent of the parties was for child support to terminate when Lindsay began college. The court interpreted the second agreed order, entered on June 26, 2008, to mean that educational expenses are in the nature of child

support such that Neal should not have to pay both while Lindsay was under 18 and enrolled in college. The court found that Neal did not owe child support from September 2010 through December 2010. The court vacated the contempt order, denied Robin's petition for the rule to show cause, and found Neal's motion to clarify to be moot based on the new ruling. Robin filed a motion to reconsider, which the trial court denied on February 8, 2012. Robin filed a timely notice of appeal on February 27, 2012.

¶ 20

II. ANALYSIS

¶ 21

A. Appellate Briefing

¶ 22 Before considering the merits of this appeal, we must first address Neal's request to dismiss Robin's *pro se* brief for failing to comply with Illinois Supreme Court Rule 341(h) (eff. July 1, 2008), which sets out the requirements for appellants' briefs. The rule lists the sections of the brief that shall be included, as well as requirements for each section. First, Neal argues that Robin does not identify the correct standards of review for the various allegations of error she raises. Ill. S. Ct. R. 341(h)(3) (eff. July 1, 2008) ("The appellant must include a concise statement of the applicable standard of review for each issue, with citation to authority, either in the discussion of the issue in the argument or under a separate heading placed before the discussion in the argument."). Second, Neal argues that Robin's argument section does not "contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Third, Neal argues that Robin has waived several arguments by raising them for the first time on appeal.

¶ 23 Where an appellant's brief violates the requirements of our supreme court rules, the appellate court has the discretion to strike the brief and dismiss the appeal or disregard the appellant's

arguments. *Carter v. Carter*, 2012 IL App (1st) 110855, ¶ 12. However, where the violations of supreme court rules are not so flagrant as to hinder or preclude review, the striking of a brief in whole or in part may be unwarranted. *Carter*, 2012 IL App (1st) 110855, ¶ 12. To the extent that Robin's brief does not comply with Rules 341(h)(3) and (h)(7), those violations do not hinder our review of the case, because we have the benefit of the record before us, as well as the parties' citations to the record on appeal. Moreover, the doctrine of forfeiture is a limitation on the parties, not on the reviewing court (*Niles Township High School District 219 v. Illinois Educational Labor Relations Board*, 369 Ill. App. 3d 128, 137 (2006)), and we address Neal's claims in the relevant sections below. We decline to strike Robin's brief entirely because the violations of supreme court rules are not so flagrant as to hinder or preclude review.

¶ 24 Robin appeals from (1) the May 25, 2011, order in which the court *sua sponte* reopened proofs on Neal's motion to clarify; (2) the August 29, 2011, order in which the court vacated the contempt order, denied Robin's petition for the rule to show cause, and found Neal's motion to clarify to be moot based on the new ruling; and (3) the February 8, 2012, denial of Robin's motion to reconsider the August 29, 2011, order. Robin alleges the following trial errors: (1) the proceedings on Neal's motion to reconsider were flawed in that the motion did not introduce new evidence or law or identify a mistake in the court's application of existing law and that the trial court improperly reopened proofs *sua sponte* on Neal's motion; (2) the issue of whether child support should terminate when Lindsay enrolled in college is *res judicata* or the law of the case, as the court improperly allowed Neal to relitigate previously adjudicated matters; (3) the record does not support the trial court's finding that the parties had agreed that child support would terminate when Lindsay enrolled in college; (4) the trial court erred in determining that Neal's child support obligation

terminated automatically when Lindsay enrolled in college, even though Neal had not petitioned for termination; and (5) the trial court erred in holding that Neal had met his child support obligation by paying Lindsay's college expenses.

¶ 25 For the reasons set forth below, we conclude that the trial court abused its discretion in denying Robin's petition for a rule to show cause. Our holding on the merits obviates the need to consider Robin's procedural argument that Neal's motion to reconsider was flawed.

¶ 26 B. Motion to Clarify

¶ 27 At the prove-up hearing on July 26, 2007, the parties testified to their agreement on all remaining issues, including the terms of Neal's obligation to pay child support and college expenses for Lindsay. Robin objected to the first written order as not representing the parties' agreement that had been set forth at the hearing. Accordingly, on June 26, 2008, the trial court entered a second "agreed order," specifically finding that the first agreed order did not reflect the intent of the parties because the order provided that child support would end on the earlier date of Lindsay turning 18 years old or enrolling in college. The court found that the parties had "reached an impasse over the issue of termination of child support" and reserved the issue for the parties to address later. Neal paid child support according to the terms of the agreement until Lindsay enrolled in college.

¶ 28 In his motion to clarify, Neal raised three issues regarding (1) when his child support obligation should have terminated; (2) whether Robin owed a contribution for certain of Lindsay's unallocated expenses; and (3) when his college expense obligation should terminate in the future. The trial court dismissed as moot Neal's motion to clarify the parties' agreement. Neal did not appeal that order when it was entered, and at this point, he has neither cross-appealed nor argued in the context of Robin's appeal that the order was erroneous. This appeal turns on our review of the

denial of Robin's petition for rule to show cause. Thus, we need not review the trial court's disposition of Neal's motion to clarify.

¶ 29

C. Rule to Show Cause

¶ 30 We conclude that the trial court abused its discretion in denying Robin's petition for a rule to show cause. Generally, provisions regarding child support contained in a marital settlement agreement and incorporated into a judgment of dissolution are enforced through contempt proceedings. *In re Marriage of Berto*, 344 Ill. App. 3d 705, 711 (2003) (citing 750 ILCS 5/502(e) (West 2010)). The contempt petition is known as a "petition for rule to show cause," and a rule is issued when the court grants such a petition. A rule to show cause is one means by which to bring an alleged contemnor before the trial court when the failure to comply with a court order is the alleged contemptuous behavior. *Berto*, 344 Ill. App. 3d at 711. A reviewing court will not overturn a trial court's decision to discharge a rule to show cause absent a clear abuse of the trial court's discretion. *Berto*, 344 Ill. App. 3d at 712.

¶ 31 In determining that the rule to show cause should have been issued, we conclude that Neal did not comply with the terms of the parties' agreement regarding child support. The terms of a marital settlement agreement, or in this case, the oral agreement and subsequent written orders incorporated into the judgment of dissolution of marriage, are subject to the rules of contract interpretation. See *Reda v. Estate of Reda*, 408 Ill. App. 3d 379, 384 (2011). To determine the parties' intent we must give the instrument's language its plain and ordinary meaning. If the language of the instrument is unambiguous, we must determine the parties' intent solely from the terms of the instrument without considering parol or extrinsic evidence. We also must consider the

instrument as a whole, and the parties' intent shall not be determined from detached portions of a contract or from any clause standing by itself. *Reda*, 408 Ill. App. 3d at 384.

¶ 32 In this case, the language of the oral agreement and the subsequent orders entered thereon unambiguously show the parties' intent. At the prove-up hearing on July 26, 2007, the parties testified that they had reached an agreement on all of the issues raised in their post-decree motions. Specifically, Robin testified to the terms of Neal's obligation to pay child support and college expenses for Lindsay, and Neal testified that Robin's testimony accurately described the agreement. Neither party testified to a date or event on which child support would end, which could have been construed as an ambiguity, until Robin objected to the first written agreed order that purportedly represented the parties' intent.

¶ 33 The first agreed order contained a new, handwritten provision that child support would end when Lindsay began college or turned 18 years old, whichever occurred first. After reviewing the transcript of the prove-up hearing, Judge Waller agreed that the handwritten provision was not part of the agreement. The court found that the parties had "reached an impasse over the issue of termination of child support," and the second agreed order omitted the handwritten term. The second agreed order stated that "commencing on November 1, 2007, and each month thereafter, [Neal] shall pay to [Robin] as and for child support for the benefit of their minor child, Lindsay, the sum of \$3,000.00 per month." The order did not identify an event or date on which child support would terminate. Neal admits on appeal that the parties never reached an agreement on termination, stating "it is evident that the parties were *never* clear as to what the exact meeting of the minds was with regard to when Neal's obligation to pay child support directly to Robin ended." (Emphasis in original.)

¶ 34

1. *Res Judicata*

¶ 35 In the proceedings on the petition for rule to show cause and the motion to clarify, Judge O'Malley ultimately determined that the parties intended for Neal's \$3,000 per month child support obligation to end when Lindsay entered college, even though she was not yet 18. Robin argues that her petition should have been granted because there was no dispute that the parties had *not* agreed on a date or event for terminating child support, and therefore the interpretation of the child support provision regarding termination was *res judicata* or the law of the case.

¶ 36 Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008). *Res judicata* bars not only what was actually decided in the first action, but also whatever could have been decided. *Hudson*, 228 Ill. 2d at 467. Three requirements must be satisfied for *res judicata* to apply: (1) the rendition of a final judgment on the merits by a court of competent jurisdiction; (2) the existence of an identity of cause of action; and (3) the parties or their privies are identical in both actions. *Hudson*, 228 Ill. 2d at 467.

¶ 37 The second agreed order entered on June 26, 2008, was the final appealable order on all issues in the litigation that had arisen since 2006, including the matter of child support. The factual issue was resolved when the trial court explicitly chose not to include in the order a date or event that would cause support to terminate, so as not to influence any potential future modification or termination proceedings. In other words, the parties expressly left unresolved the issue of when child support should terminate. If Neal objected to leaving this term unresolved or otherwise wished to rescind the agreement, he could have appealed the second agreed order, but he failed to do so. The

clause (3) of Section 505.2, 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* and, with respect to maintenance, only upon a showing of a substantial change in circumstances.” (Emphasis added.) 750 ILCS 5/510 (West 2010). Thus, the circuit court has no authority to modify child support obligations until a petition for such modification is filed (*In re Marriage of Sawyer*, 264 Ill. App. 3d 839 (1994)), and a petition to enforce a dissolution of marriage judgment is distinct from a petition to modify a dissolution of marriage judgment (*Loffredi*, 232 Ill. App. 3d 709). Neal paid child support according to the terms of the agreement until Lindsay enrolled in college, at which point he unilaterally stopped making payments. Soon thereafter, Robin filed her petition for a rule to show cause for the nonpayment.

¶ 41 Neal did not appeal or otherwise object to the second agreed order, which had left unresolved the issue of when child support would terminate. Instead, Neal presented the court with a motion to “clarify,” which actually attempted to retroactively modify the child support obligation by insisting that the college expenses he was paying were in the nature of child support. By filing his motion on December 16, 2010, Neal requested termination of child support after the installments for September 2010 through December 2010 had accrued. To the extent that Neal’s motion to clarify was actually a petition for termination under section 510(a) of the Dissolution Act, the motion should have been denied as untimely.

¶ 42 That said, Neal’s failure to timely petition for termination does not leave his child support obligation open-ended. Section 510(d) provides in relevant part that “[u]nless otherwise provided in this Act, or as agreed in writing or expressly provided in the judgment, provisions for the support of a child are terminated by emancipation of the child ***.” 750 ILCS 5/510(d) (West 2010). The

parties correctly agree that Lindsay became emancipated on December 3, 2010, when she turned 18 years old. Neal's child support obligation ended on that date by operation of statute. See 750 ILCS 5/510(d) (West 2010).

¶ 43 3. Educational Expenses As Child Support

¶ 44 To avoid this result, Neal attempts to define "child support" as including educational expenses. Neal cites *Loffredi* in arguing that child support and college expenses are one in the same, and therefore, his obligation to pay \$3,000 per month in child support automatically terminated when he began paying Lindsay's college expenses. This automatic termination, Neal concludes, obviated the need for him to file a petition for termination. We disagree.

¶ 45 The issue in *Loffredi* was whether a dissolution judgment which provides for payment of children's college expenses is modifiable. *Loffredi*, 232 Ill. App. 3d at 711. The appellate court looked to section 502(f), which deals with modification of settlement agreements, and determined that a provision for college expenses in a settlement agreement is "in the nature of child support" pursuant to section 502(f) and may be modified. *Loffredi*, 232 Ill. App. 3d at 711. Thus, the court held that a trial court has the authority to modify provisions of a marital settlement agreement pertaining to payment of college expenses. *Loffredi*, 232 Ill. App. 3d at 712. "The pertinent question in determining whether to grant a petition for modification of a provision for payment of college expenses is the same as that on a petition to modify any other support term. That is, whether the petitioner has shown a substantial change in circumstances [citation.]" *Loffredi*, 232 Ill. App. 3d at 714.

¶ 46 In *Loffredi*, the appellate court stated that a provision in a dissolution judgment for the payment of a child's college expenses is a term "in the nature of child support." *Loffredi*, 232 Ill.

App. 3d at 714. However, *Loffredi* does not foreclose a parent's obligation to provide additional means of support for the child. Section 510(d), which governs termination of child support, contemplates a parent's obligation to pay "support or educational expenses, or both." 750 ILCS 5/510(d) (West 2010); *Mulry*, 314 Ill. App. 3d at 759.

¶ 47 The proceedings in this case completely undermine Neal's proposition that the parties intended for his payment of college expenses to be a substitute for monthly child support. The transcript of the June 26, 2007, prove-up hearing and the orders entered thereon show that the parties did not agree on a date or event that *would* terminate child support. However, the record makes clear that the parties agreed that Lindsay's enrollment in college *would not* terminate child support automatically if she had not yet attained the age of 18. By expressly removing language that Neal's child support obligation would terminate if Lindsay enrolled in college before turning 18, the parties showed an unambiguous intent that child support and college expenses were distinct financial obligations.

¶ 48 The express terms of the second agreed order afforded Neal the right to timely move to terminate his child support obligation around the time Lindsay was entering college. In that motion, Neal could have alleged all legal and equitable reasons to terminate child support, such as that Robin was unjustly enriched and enjoying a windfall from Neal's payment of both support and educational expenses. Neal failed to file such a motion, and under the terms of the second agreed order and the operation of section 510(d) of the Dissolution Act, he was obligated to pay support until Lindsay turned 18 years old.

¶ 49 We note that, when Judge O'Malley initially found Neal to be in contempt for nonpayment, the judge incorrectly ruled that Neal owed child support for the entire month of December 2010,

when in fact he owed support only for the first two days of the month. On remand, Neal's child support obligation should be prorated accordingly. We reach no opinion on the remaining matters that Neal raised in his motion to clarify, including his claim for contribution for unallocated expenses while Lindsay is in college and the date on which Neal's obligation to pay college expenses should expire. Neal's motion to clarify was denied as moot, and neither Robin nor Neal address the issues on appeal. The trial court never considered these issues, which are not properly before this court.

¶ 50

CONCLUSION

¶ 51 We hold that Neal's \$3,000 per month child support obligation ended on December 3, 2010, when Lindsay attained the age of 18. For the reasons stated, the judgment is affirmed in part and reversed in part, and the cause is remanded for further proceedings consistent with this disposition.

¶ 52 Affirmed in part and reversed in part; cause remanded.