2013 IL App (2d) 110894-U
No. 2-11-0894
Order filed April 25, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF AMY K. McCORMICK,	)	Appeal from the Circuit Court of Winnebago County.
Petitioner-Appellee,	)	
and	)	No. 04-D-1073
DAVID A. McCORMICK,	)	Honorable Joseph J. Bruce,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice Hutchinson concurred in the judgment.

ORDER

Held: We reversed the trial court's finding that petitioner was not in contempt for violating a visitation order: petitioner did not contest that she violated the order, and her rationale—primarily that the children had other commitments—established that the violations were willful; we remanded for determination of a sanction.

¶ 1 David A. McCormick appeals from an order that combined a denial of his petition for a rule to show cause with a ruling that his ex-wife, Amy K. McCormick, was not in contempt of court when she failed to comply with a visitation order entered in the underlying dissolution-of-marriage

action. (Amy was the petitioner in that action, David the respondent.) David seeks a contempt finding and an award of certain attorney fees.

¶ 2 Because the original record was insufficient to exclude the possibility that the appeal was premature, we initially dismissed the appeal. However, we instructed David that he could properly file a petition for rehearing and to supplement the record to show the appeal's timeliness. David filed such a petition, which we now grant.

¶ 3 We now hold that, because Amy admitted that, on some days the court scheduled visitation, she did not try to comply with the orders, the court erred in denying David's petition. We reverse the finding of no contempt and remand the matter for determination of attorney fees.

¶ 4 I. BACKGROUND

¶ 5 The appeal arises out of postdecree litigation in a dissolution-of-marriage action. The court entered a dissolution judgment on April 7, 2006. The parties had ongoing conflicts over visitation.

¶ 6 David filed the original petition for a rule to show cause on July 20, 2010, and an amended petition on January 14, 2011. He asserted a series of violations of the visitation order and asserted that, although he was then *pro se*, enforcement efforts had cost him $1,982 in legal fees. The court denied the petition in an order dated August 11, 2011; the order also resolved several visitation matters that were apparently also pending. The order did not contain a finding of immediate enforceability and appealability pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). David filed his notice of appeal on September 8, 2011.

¶ 7 We initially held that the record was insufficient to allow a determination of jurisdiction: the appeal was potentially premature. We recognized that the trial court intended that the order of August 11, 2011, resolve all pending claims. (Indeed, the court made clear that any claim a party

wished to survive would have to be raised at the hearing.) However, we also noted that, even if the order did resolve all claims then pending, any filing of a new pleading within 30 days after August 11, 2011, would have delayed appealability until the court resolved all new claims. See *John G. Phillips & Associates v. Brown*, 197 Ill. 2d 337, 340 (2001) (holding that any claim filed within 30 days after an order otherwise final as to the action—including a claim filed after a party files a notice of appeal—prevents the order from becoming automatically appealable). Thus, the absence of most initial pleadings from the record prevented us from positively determining our jurisdiction. We therefore dismissed the appeal with the instruction that David could petition for rehearing, asking to supplement the record to show the lack of prematurity.

¶ 8 David filed a timely petition for rehearing. He included in his supplemented record all filings after August 11, 2011. The record as supplemented shows that neither party had filed any new claim in the 30 days after the August 11, 2011, order. David has thus shown that the appeal is not premature, and we address its merits.

¶ 9 In David's petition for rule to show cause (as amended), he alleged that Amy had repeatedly and willfully violated the visitation order. The context of the violations is this: the children were then 12, 14, 16, and 19, but the 19-year-old had lived with David for four years while he was in high school; Amy lived in Roscoe (which is north of Rockford and a few miles south of Beloit, Wisconsin); David lived in Yorkville (Roscoe and Yorkville are about an hour and 20 minutes apart by car).

¶ 10 The court addressed the petition at an evidentiary hearing. It did not separate the proceedings into a decision on whether a rule to show cause should issue and another hearing on the evidence; it simply had one informal evidentiary hearing with a single ruling at the end. It specifically

described the proceedings as "expedited" and "somewhat of an informal procedure," and asked if either party objected. Neither did.

¶ 11 David told the court that he had complaints concerning 43 visitation times with one son, 39 times with another, and 19 times with the third. The court requested that David present evidence of the five incidents that he deemed the most serious.

¶ 12 David first told the court about the New Year's Eve holiday of 2008, on which he was entitled to have visitation; he had agreed that one boy could make his own individual plans. On December 30, the two boys he expected to join him began to text him to ask for permission to go to a sleepover. He told them that they had to be ready for him to pick them up at their house at 11 a.m. on December 31. He went to the house and waited for an hour, but neither the boys nor Amy ever arrived. He tried to call Amy, but she did not answer. He also sent her texts, which he showed the court.

¶ 13 The court asked Amy for her response. She did not challenge David's claim that she and David had agreed that David would pick up the boys at 11 a.m. Instead, she said that she had not encouraged the boys to go to the sleepover and she complained that David was using permission to skip visitation as a reward when he perceived one of the boys showing loyalty to him. The boys often wanted to do things with friends at times they were supposed to be with David, but she did not encourage this. She did not know where she had been at 11 and did not remember if she had received calls. Counsel for Amy represented that David's then-counsel had contacted him on New Year's Eve to alert him to the problem.

¶ 14 David's next instance was one son's failure to arrive on time for summer visitation that was to start on August 1, 2010, and was to last two weeks. David asserted that, on July 30, Amy e-

mailed him to tell him that one son would not come because he thought that he would miss football practices. The son was not ready at the scheduled time, but the parties had further contact, and the son started the visit late.

¶ 15 Amy responded, saying that the incident in question was typical—that David was not reliable in getting the boys to the practices and that he did not respect the boys' commitments to their teams. She also said that she would not physically force any of the boys to go with David. She said that she was "not scheduling" the boys, and that she would be happy if David would take them and get them to all of their practices.

¶ 16 David's next instance was Easter 2010 visitation. On the Easter weekend the year of the hearing, only the oldest boy who lived with Amy was at the house for David to pick up for a scheduled visit. Amy said that the other two could not go "[b]ecuase Kellen had a doubleheader" and "Brennan had a baseball clinic."

¶ 17 Next, concerning a weekend visitation, David testified that he had told Amy that he had planned a weekend trip for all the boys. He noted that he had not seen any of them for three weeks because they and Amy had gone on vacation in Colorado. During the visit at issue, the youngest stayed home to play dodgeball with friends. Amy's explanation was this:

> "I guess this has escalated over seven years, really[.] I know Brennan was really upset and [I] tried to talk to him. And I think that, honestly, with him being the youngest, he struggles the most with being able to have a discussion with his dad and *** even though Brennan is in baseball and football and wants to try out for basketball, there's not a whole lot of activity that this boy does. So this dodge-ball tournament was with four little girls that

had asked him to play, and one of them he liked a lot. And even though it doesn't seem really huge to [David], I knew it was huge to him."

¶ 18 Amy had one witness, Josh Moulden, who testified that he and Amy were close, but they were not "together" because of issues relating to the divorce. He went to many of the boys' games, but only rarely saw David there. He testified that David missed some scheduled visitation times.

¶ 19 In response to Amy's questions, David agreed that he had missed approximately a quarter of the visitations. He said that the missed times were all because of back surgery that he had at some time not specified.

¶ 20 At the same hearing, the court addressed Amy's petition seeking modification of visitation to "reasonable and seasonable." The court said that such a schedule, which would require the parties to cooperate with one another, would "never work here."

¶ 21 The judge noted that he had been a divorce lawyer for 25 years and a judge in divorce court for 5 years. He said, "This is probably one of the most difficult cases that I've had."

"Now, if this were all one party's fault, this would be easier for me. *** . *** I think that [Amy] is *** going more overboard on whatever the kids want to do is a priority for the kids. *** As opposed to taking the position that *** some activities are not as important as visitation."

He told the parties that unorganized activities were "preferences," and further said:

"[S]ome activities *** [are] necessary to get the kids to, and some it's a parenting decision. *** So I think you[, Amy,] go overboard on this issue. It's not that you're crazy or out of line or, you know, I don't want to even say contempt of court. I just want to say that you're—that you go overboard on it."

¶ 22 The court then made modifications to the visitation schedule in an attempt to give David more uninterrupted time with his sons. David filed a notice of appeal relating to the contempt issue as previously discussed.

¶ 23 II. ANALYSIS

¶ 24 On appeal, David argued that Amy admitted that she did not comply with the visitation order as to days when the boys had conflicting events and that her explanations show that the violations were willful. He asserts that the existence of contempt is an issue of fact, so that we should overturn if the trial court's ruling is against the manifest weight of the evidence. He asks that this court reverse the ruling that Amy was not in contempt and award the fees he incurred in attempting to enforce the orders.

¶ 25 Because Amy has not filed an appellate brief, this court must decide this appeal under the principles of *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33 (1976). Under the principles of *Talandis*, a reviewing court has several options when the appellee does not file a brief:

> "[In the absence of an appellee's brief, w]e do not feel that a court of review should be compelled to serve as an advocate for the appellee or that it should be required to search the record for the purpose of sustaining the judgment of the trial court. It may, however, if justice requires, do so. Also, it seems that if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal. In other cases if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record the judgment of the trial court may be reversed." *Talandis*, 63 Ill. 2d at 133.

Illinois reviewing courts have taken *Talandis* to give them three options: (1) when justice requires, actively seek bases for sustaining the judgment of the trial court; (2) when the issues are simple, decide the case on the merits; and (3) reverse when the appellant's brief shows *prima facie* error. *Thomas v. Koe*, 395 Ill. App. 3d 570, 577 (2009).

¶ 26 This case is exceptionally close to *In re Marriage of Charous*, 368 Ill. App. 3d 99 (2006), in which we held that the trial court should have held the residential parent in contempt, so here a decision on the merits is simple and appropriate. Amy effectively conceded that she was placing her judgment of the best interest of the children above the visitation order, so the court lacked a proper basis to hold that she was not in contempt.

¶ 27 Contempt cases have long been reviewed on what is essentially abuse-of-discretion basis. For the relevant standard, we frequently cite *In re Marriage of Logston*, 103 Ill. 2d 266, 286-87 (1984), in which the supreme court stated:

> "This court has not stated the standard of appellate review for a contempt finding, but our appellate court often has stated that whether a party is guilty of contempt is a question of fact for the trial court, and that a reviewing court will not disturb the finding unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion."

However, in *In re Marriage of Barile*, 385 Ill. App. 3d 752, 759 n.3 (2008), we noted that that formulation is problematic:

> "To varying degrees, the appellate court has invoked the *Logston* standard [citations], invoked only the manifest-weight standard [citations], and invoked only the abuse-of-discretion standard [citation]. *** [I]n other contexts, the [supreme] court has recently cautioned against the application of the abuse-of-discretion standard to findings of

fact. See *Best v. Best*, 223 Ill. 2d 342, 348-50 (2006) (rejecting long-held belief that abuse-of-discretion standard applies to factual finding of abuse under Domestic Violence Act); see also *People v. Vincent*, 226 Ill. 2d 1, 17 n. 5 (2007) ('[t]he abuse of discretion standard is not tied to any quantum of proof')."

In *Barile*, we nevertheless adhered to the *Logston* standard, as "the supreme court has not specifically altered the standard of review in this context." *Barile*, 385 Ill. App. 3d at 759 n. 3 (2008). We adhere to that standard in this case as well.

¶ 28 The substantive law of a contempt claim, unlike the standard of review, *is* well settled:

> "The existence of an order of the trial court and proof of willful disobedience of that order are essential to any finding of indirect civil contempt. [Citation.] The burden initially falls on the petitioner to prove by a preponderance of the evidence that the alleged contemnor has violated a court order. [Citation.] The burden then shifts to the alleged contemnor to show that noncompliance with the court's order was not willful or contumacious and that he or she had a valid excuse for failure to follow the court order. [Citation.] Contumacious conduct consists of 'conduct calculated to embarrass, hinder, or obstruct a court in its administration of justice or lessening the authority and dignity of the court.' [Citation.]" *Charous*, 368 Ill. App. 3d at 107-08.

Whether a party has violated an order is a straightforward fact question. Whether the violation is willful is a bit harder. A violation is not willful if a "valid excuse" exists. *Barile*, 385 Ill. App. 3d at 759. A more difficult question is what constitutes a valid excuse.

¶ 29 The law does not necessarily require utmost efforts to comply; certainly avoidance of clear threats to life or health takes priority, as does obedience to other court orders or law (*In re Marriage*

of Kneitz, 341 Ill. App. 3d 299, 304 (2003)). On the other hand, if the alleged contemnor has knowingly created the obstacle to compliance, the obstacle is not a valid excuse. *Kneitz*, 341 Ill. App. 3d at 304. The Fifth District has treated a teenage child's desire to pursue her own interests as a valid excuse, at least where the residential parent encouraged compliance. *In re Marriage of Tatham*, 293 Ill. App. 3d 471, 480 (1997). However, the *Charous* court, citing several earlier cases and H. Gitlin, *Gitlin on Divorce* § 14-2(c), at 14-31 (3d ed. 2001), stated that the child's *preferences* are not an excuse at all. *Charous*, 368 Ill. App. 3d at 111-12. Both *Charous* and *Tatham* appear to agree that the parent cannot simply accede to the child's preferences. Thus, a child's simple reluctance to visit is not a valid excuse. Here, intense resistance is not at issue.

¶ 30 Extracurricular activities are a legitimate *visitation factor*, but not a valid excuse for disobeying an order. The *Charous* court accepted that a nonresidential parent who lived near the children could be effectively bound to get the children to such activities if the activities were scheduled in compliance with the joint parenting agreement. *Charous*, 368 Ill. App. 3d at 109. However, if the activities chosen by the residential parent conflicted with the schedule, the residential parent should have sought to change the schedule in court, rather than unilaterally modifying it. The court can develop a visitation schedule that explicitly accounts for extracurricular activities (provided that the result is not a qualitative visitation restriction). *In re Marriage of LaTour*, 241 Ill. App. 3d 500, 505 (1993). This, rather than unilateral modification of the schedule, is an appropriate response to conflict between extracurricular activities and formally scheduled visitation.

¶ 31 Here, the fact of contempt is clear. Amy never contested the fact that the order had been violated. Moreover, her own descriptions of her motivations established the violations as willful.

Every time, she justified the violation as something that she deemed to be better for the boy involved, or, in the instance of the New Year's schedule, as simply not her idea. Thus, when the court said, "It's not that you're crazy or out of line or, you know, I don't want to even say contempt of court," it misled Amy by suggesting that she could legitimately second-guess the visitation schedule.

¶ 32 As we noted, this case strikingly parallels *Charous*, and the results are the same. In *Charous* we stated:

> "The petition [for a rule to show cause] alleged that [the mother] consistently 'condoned or encouraged' the children to miss their visitation time with [the father]. Specifically, the petition alleged that the children had refused to spend a single night at [the father's] home since the parenting agreement was entered." *Charous*, 368 Ill. App. 3d at 101.

However, the mother in *Charous*, unlike Amy here, generally tried to get the children to go to ordered visits (*Charous*, 368 Ill. App. 3d at 102-03). Moreover, the visitation issues involved were similar, primarily conflicts between extracurricular activities and visitation, but also social-activity conflicts with visitation. The mother "testified that she was responsible for deciding whether the children would be involved in extracurricular activities and that she permitted the children to be involved in these activities even though they interfered with [the father's] visitation," but that the children also themselves scheduled conflicting activities. *Charous*, 368 Ill. App. 3d at 103-04.

¶ 33 The trial court's ruling, in which it denied the father's petitions, also has much in common with the ruling here:

> "I will tell both parents that you're both at fault. You know, Mr. Charous, I was told, and I told you before, about the things that your son complained of why you weren't—if you went

> to practice, you had your nose in a newspaper reading all the time. You didn't care about going where he wanted to go. You wanted to do what you wanted to do, and I'll have to say Mr. Charous, somewhere along the line between your divorce and today's date, you dropped the ball. *** Mrs. Charous, I don't believe that you're helping to foster the situation at all, and I place a lot of the blame at your feet[.] *** [A]nd I'll say it on the record now, you're both bad parents. *** Does it rise to the level of me being able to hold Mrs. Charous in contempt, no." *Charous*, 368 Ill. App. 3d at 106.

¶ 34 We applied the *Logston* standard of review in *Charous*, to hold that the court had committed reversible error. First, the mother had admitted that violations of the order had occurred several times. *Charous*, 368 Ill. App. 3d at 108. On appeal, the mother "initially argue[d] that the evidence introduced at trial established that the children were unable to regularly visit with David primarily because of their busy extracurricular schedules." *Charous*, 368 Ill. App. 3d at 109. We held that, although the visitation order contemplated the children keeping up a full schedule of activities with the father's participation, the mother had frustrated the intent of the order by failing to consult with the father in picking and scheduling activities. *Charous*, 368 Ill. App. 3d at 110. The mother also argued that "her failure to comply with the visitation schedule was the result of the children's refusal to visit [the father]." *Charous*, 368 Ill. App. 3d at 111. As noted, we held that that was not an acceptable excuse. Further, we noted that the mother "d[id] not even attempt to offer any explanation" for violations such as the visitation missed because of a birthday party. *Charous*, 368 Ill. App. 3d at 113. We therefore held that the trial court thus should have entered an order finding the mother in indirect civil contempt. *Charous*, 368 Ill. App. 3d at 113. The applicability of our reasoning in *Charous* to the facts here is obvious.

¶ 35 As in *Charous*, we reverse the finding of no contempt. David seeks attorney fees as a contempt sanction; although he is currently acting *pro se*, he had counsel for some of the events at issue. In a dissolution case, the court should award attorney fees "[i]n every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification." 750 ILCS 5/508(b) (West 2010). Such an award of fees is proper here. The trial court should determine which fees are attributable to David's enforcement attempts and order Amy to pay those fees.

¶ 36 III. CONCLUSION

¶ 37 For the reasons we have stated, we reverse the finding that Amy was not in contempt and remand the matter for the determination of attorney fees.

¶ 38 Reversed and remanded with directions.