2013 IL App (3d) 110905-U

Order filed June 6, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

In re PARENTAGE OF:	)	Appeal from the Circuit Court
CARLI THOMPSON	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
JOHN THOMPSON,	)	
	)	
Petitioner-Appellee,	)	Appeal No. 03-11-0905
	)	Circuit No. 98-FP-396
v.	)	
	)	
CHERYL BUTIR n/k/a CHERYL BALDO,	)	
	)	Honorable Matthew G. Bertani,
Respondent-Appellant.	)	Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion by ordering mother and father to equally share the out-of-pocket college expenses for their daughter. The court's refusal to hold father in contempt of court was not against the manifest weight of the evidence. Therefore, the trial court was not authorized to order father to purge contempt by paying any additional amounts for support or unpaid medical expenses.

¶ 2 The court entered an agreed order of parentage and support on April 20, 1999, which ordered father to pay statutory child support plus uncovered health-related expenses, submit annual financial information to mother, and ordered the parties to pay, when due, the post-high school educational expenses as determined by the court. On September 13, 2010, mother filed a petition for rule to show cause alleging father's failure to comply with the agreed order and, later, filed a petition requesting the court to order father to pay all college expenses. Father filed a counterpetition for contribution to college expenses and petition for a rule to show cause against mother.

¶ 3 After a hearing, in a detailed written order, the court ordered the parents to share college expenses equally after those expenses were reduced by Carli's substantial scholarships and grants. The court ordered each parent to pay $9,000 per year toward college expenses and denied both petitions for contempt. Mother appeals. We affirm the judgment of the circuit court.

¶ 4 BACKGROUND

¶ 5 Petitioner-appellee John Thompson (father) filed a petition for declaration of parentage, against respondent-appellant Cheryl Butir, n/k/a /Cheryl Baldo, (mother) in 1998 regarding Carli Thompson, born April 2, 1993. On April 20, 1999, the parties entered into an agreed order resolving custody, child support, and visitation, while preserving the issue of contributions for post-high school education expenses. The relevant clause of this agreement provided:

> "The parties shall pay, when due, the educational expenses of a college, university, or vocational school education for the [c]hild of the parties. The extent of the parties' respective obligations hereunder shall be determined in accordance with the provisions of Section 513 of the Illinois Marriage and Dissolution of Marriage Act, or by any

applicable statutory provision in force at the time in question."

¶ 6 On September 13, 2010, mother filed a petition for rule to show cause alleging father had not provided copies of his "W-2's, 1099's, and tax returns" within 30 days of filing those documents and had not paid medical expenses as required by the agreed order. Mother asked the court to find father in contempt and order father to reimburse her for unpaid medical expenses and shortages in child support resulting from the increases in father's net income after 1999. She also requested attorney fees and "such other relief as the Court deems just and equitable."

¶ 7 Father's response to the contempt petition described the child support allegations as more akin to a motion to modify child support which failed to state a cause of action pursuant to section 510 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/510 (West 2010)). Additionally, father denied failure to pay the full amount of court-ordered child support and alleged he voluntarily increased his child support in 2006, without court involvement, from $350 bi-monthly to $550 bi-weekly, and paid additional money for Carli's living expenses as follows: $1,200 in an annual allowance, $950 annually for clothing, $495 annually for school fees, $425 for SAT tutoring, $750 for Carli's school ring, $250 for Carli's iPhone, $100 monthly for Carli's phone bill, $4,800 toward the purchase of a vehicle, $1,560 annually for motor vehicle gas expenses, and $500 annually for oil changes for Carli's vehicle. Father indicated he paid Carli's health insurance premium of $3,000 per year. In his response, father alleged mother did not directly request the financial information from father or request reimbursement from him for uncovered medical expenses for payment.

¶ 8 Thereafter, mother filed a "Petition for Contribution to College Expenses," on May 27, 2011, pursuant to section 513 of the Act. 750 ILCS 5/513 (West 2010). This petition asserted

father should be ordered to pay 100 percent toward Carli's college expenses and to pay mother's attorney fees since she was not employed.

¶ 9 On June 2, 2011, father filed a combined petition to terminate child support, a petition for rule to show cause, and a counter-petition for contribution to college expenses. Father's rule to show cause was based on mother's failure to consult with father regarding Carli's college decision as ordered in 1999. The court entered a written order, on June 2, 2011, terminating father's obligation to pay regular child support, since the original order of withholding terminated on that date because Carli was now 18 and had graduated from high school. The court scheduled the remaining matters for further discovery and hearing.

¶ 10 The court held a combined hearing on all pending pleadings on September 16, 2011. For purposes of this hearing, the parties agreed to stipulate to financial exhibits and documents, agreed no testimony would be presented, and presented oral arguments to the court based on the agreed exhibits and existing case law.

¶ 11 After taking the matter under advisement, the court entered a detailed written "Memorandum Opinion and Order," on November 3, 2011, reciting the nature of the agreed exhibits. The court also recognized Carli would be attending DePaul University, after qualifying for grants and scholarships of approximately $26,570 towards her freshman year, leaving a balance of costs and fees for her first year of college in the amount of approximately $18,000.

¶ 12 In its written order, the court found that mother was not employed and lived exclusively upon the income and assets of her financially successful husband, Carmen Baldo. The court noted that the couple's prenuptial agreement "absolves Carmen Baldo of any responsibility with regard to the child [Carli]." Based on that prenuptial agreement, the court noted that mother

would receive $1,300,000 in assets if Carmen predeceased mother, and at least $2,500 for each month they were married in the event of a divorce. Further, the court found that Carmen was "a man of considerable means," and the 2004 prenuptial agreement provided Carmen had total net assets of $3,462,728 at that time. The court further found Carmen's adjusted gross income in 2009 was $179,890 and his adjusted gross income for 2010 was $209,654.[1] Based on mother's income and expense affidavit, the court found that, although mother earned no income, she reported $8,453 in monthly expenses which included a $625 monthly expense for travel, a $300 monthly expense for personal grooming, and a $4,500 monthly expense for a mortgage, insurance, and taxes.

¶ 13 The court found father admitted he had the means to contribute to Carli's college expenses and sold an automobile recycling business in 2006, with a "gain on a final payment in 2010 of $1,158,227," before investing the proceeds into father's new. but not yet profitable. business. The court found that father owned three residences: one in Illinois, Wisconsin, and Florida; and three rental properties with 2010 net rental income of $205,877, but the equity in these properties was not listed in the financial documentation.[2] The court noted that the "Indiana Adventures" property, owned by father, appeared to generate $216,000 in annual income and appeared to be unencumbered with a mortgage. Based on father's income expense affidavit, the court found father's monthly income to be $17,156 and his monthly expenses to be $16,370. Regardless, the trial court found that father had "ample resources from which to pay some or all

[1] Based on the evidence, Carmen's income resulted from his partial ownership of a business.

[2] Father's attorney argued that two of the three properties had substantial mortgages against them.

of the expenses."

¶ 14 Next, the court order applied the factors required by section 513 of the Act (750 ILCS 5/513 (West 2010)) to determine the parties' contribution to college expenses. The court stated the case law allowed it to consider the income and resources of a parent's current spouse, not for purposes of actually paying for the college expenses of his or her stepchild, but to determine to what extent the parent's income or financial resources could be "freed up for educational expenses." The trial court determined that the section 513 language regarding "financial resources of both parents" included all the money or property to which a parent had access, which "may include that parent's income, her property and investment holdings, as well as money or property that could be available to her through her new spouse," citing *In re Marriage of Drysch*, 314 Ill. App. 3d 640, 644-45 (2000).

¶ 15 The trial court noted that, although mother's income expense affidavit reported no income, it documented that mother's spouse paid her monthly expense of $8,453 regularly. The court applied the holding of *In re the Marriage of Rogers* (213 Ill. 2d 129 (2004)), before finding each parent had "significant financial resources and the ability to contribute to college expenses." The trial court order specifically stated:

> "To hold otherwise would allow a man or woman who marries well to eschew college contributions no matter how well he or she might live. In short, [mother's] vacation budget alone would nearly fund a 50% contribution."

The court examined the section 513 factor regarding the standard of living the child would have enjoyed had the marriage not been dissolved or the union been preserved. Finding the parties were not married, the court decided Carli would have had similar and ample resources

available to her in either parent's custody and was not currently "wanting for anything." Concerning Carli's own financial resources, the court focused on Carli's significant grants and scholarships totaling $26,570.

¶ 16 Regarding the cross-petitions for contribution to college expenses, the court ruled as follows:

> "A. Carli shall be responsible for one third of the gross annual cost of her education, however, all grants and scholarships (and any loans she might undertake) shall be credited to her one third.
>
> B. The Parties shall each be responsible for one half of the remaining college expenses for DePaul University, with the out-of-pocket expenses for the fall 2011, spring 2012 semester being approximately $18,000.00, or $9,000.00 a piece.
>
> C. College Expenses shall mean tuition, registration fees, student activity fees, athletic fees, food contract, housing, University charged medical fee, orientation fees, CTA-U-Pass, books and school supplies.
>
> D. Each parent's obligation shall be contingent upon the child maintaining a C average on an academic year basis.
>
> E. The request of each of the Parties for attorneys fees in conjunction with their Petitions concerning educational expenses is denied.
>
> F. The child and each parent shall sign any consents necessary for the educational institution to provide the supporting parent or parents with access to the child's academic transcripts, records and grade reports. The failure to execute the required consent may be a basis for a modification or termination of the support

obligation."

¶ 17 As to mother's petition for rule to show cause, the court agreed father was ordered to provide "all W-2's, 1099's and income tax returns," but observed mother had not directly requested father to provide her with any of these documents from 1999 through 2010. Emphasizing mother received copies of father's financial information from 2007 to the present as part of discovery, the court declined to hold father in contempt.

¶ 18 Mother requested the court to enter an order finding father should have paid more than $350 bi-monthly beginning on the date his income exceeded $1,750 bi-monthly, the original basis for the child support payment. The court found mother's request for an increased amount of child support beginning after 1999 was not in order and "such relief would constitute a retroactive modification of child support not allowed under Illinois law." The court observed father voluntarily increased his court-ordered support payments over the years as his income increased. The court then denied both parents' cross-petitions seeking findings of contempt and corresponding sanctions, including attorney fees .

¶ 19 Mother filed a timely notice of appeal.

¶ 20 ANALYSIS

¶ 21 On appeal, mother challenges two rulings. First, she argues the trial court's apportionment of college expenses involved an abuse of discretion. Second, mother contends the trial court erred in its decision finding Carli's father was not in contempt of court for his failure to tender financial records to mother, and refusing to order father to pay 20 percent of his actual income and unpaid medical expenses from 1999 to date. Father contends the court correctly ordered mother to pay one-half of Carli's college expenses, after grants and

scholarships, and properly denied mother's petition alleging father was in contempt of court for failing to give mother his tax information each year.

¶ 22 We first consider whether the court erred by requiring mother pay any portion of Carli's college expenses since mother was not gainfully employed. In Illinois, contributions to college expenses fall under the provisions of section 513 of the Act and are considered a form of child support that must be awarded in conjunction with the provisions of sections 505 and 510 of the Act. 750 ILCS 5/513, 515, 510 (West 2010); *In re Marriage of Peterson*, 2011 IL 110984 ¶ 13. Therefore, any modification of child support payments, including the award of college education payments, lies within the sound discretion of the trial court, and a trial court's modification order will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Rogers*, 213 Ill. 2d 129, 135 (2004).

¶ 23 Section 513 of the Act requires a trial court to consider certain statutory factors before determining whether a parent should be ordered to contribute to any portion of the college expenses of a child. These factors include the financial resources of both parents, the financial resources of the child, the child's academic performance, in addition to considering the standard of living the child would have enjoyed had the parent's relationship continued. 750 ILCS 5/513(b) (West 2010). The only factor mother focuses on in this appeal is whether the trial court properly evaluated the financial resources of both parents.

¶ 24 We begin by reviewing the court's determination that Carli's father's should pay one-half of her college expenses in the amount of $9,000 per year. Father admitted he had the financial means to contribute to Carli's education in this amount. The court agreed after finding father sold one business in 2006 for $1,158,227, and reinvested those proceeds into his new and

current business. In addition, the court recognized father owned one residence in each Illinois, Wisconsin and Florida, and three additional rental properties at other locations.

¶ 25 Next, we review the court's finding that mother also had the ability to contribute fifty percent, or $9,000 per year, toward her daughter's college expenses. Although physically able to work, mother's current marriage allows her to enjoy a comfortable lifestyle without seeking employment, due in part to both the success and generosity of her current spouse. In this case, mother contends the court should have focused only on the amount of income she produces, and argues the income level of her current spouse is irrelevant to the court's determination of her ability to contribute to share Carli's college expenses with Carli's father and Carli herself.

¶ 26 The case law provides that a trial court may properly consider all of the money or property accessible to either parent when determining ability to contribute to the college expenses of a child. Specifically, cases recognize our lawmakers employed the term "resources" when identifying the proper measure of each parent's ability to pay. *Drysch*, 314 Ill. App. 3d at 644-46. Had the legislature intended only for employed parents to contribute to college expenses, a more narrow term such as net income, wage, or salary would have been incorporated into the statute. *Id*. Therefore, we conclude the trial court properly considered the resources available to mother, including the income of her current spouse, when determining an appropriate award of child support in the form of mother's contribution to college expenses.

¶ 27 In the case at bar, the court determined mother's current spouse was a man of "considerable means." The record reveals, when mother's marriage to Carmen began in 2004, the prenuptial agreement between the parties reported he held net assets worth $3,462,728 at that time. Due to the financial stability of her husband, mother was able to meet her monthly

personal expenses in the amount of $8,452, memorialized in her income and expense affidavit submitted to the court. Since mother was not employed, the court concluded mother's current husband provided regular monthly support, and/or "gifts" in this amount, for his wife's personal use and enjoyment.

¶ 28 In fact, after reviewing the expenses mother listed in her affidavit, the judge accurately observed mother's "vacation budget alone would nearly fund a 50% contribution" to Carli's college expenses. Since mother's vacation budget of $625 per month would equal $7,500 per year, we agree with the court's factual determination of mother's ability to contribute to college expenses was firmly rooted in the facts of record.

¶ 29 However, mother takes issue with the judge's decision to consider the finances available to mother due to a bountiful marriage as an available resource for mother's share of her daughter's college expenses. We note the prenuptial agreement absolved mother's husband of any responsibility to support Carli. Yet, our supreme court has addressed the issue of voluntary monetary gifts from family members in the context of establishing a parent's resources to pay statutory child support obligations. *Rogers*, 213 Ill. 2d 129. The *Rogers* court held that regular annual monetary "gifts," to a father from his family members, "represented a valuable benefit to the father that enhanced his wealth and facilitated his ability to support [his child]" and, therefore, qualified as income for the father for child support purposes. *Id.* at 136-38.

¶ 30 Since college education payments are in the nature of child support, we conclude the *Rogers* holding is applicable to the instant case and similar to the unique facts presented to the trial court in the case at bar. Therefore, the trial court properly considered mother's regular monetary "gifts" from her current spouse before finding mother had the ability to contribute

$9,000 per year towards her daughter's college expenses.

¶ 31 Finally, mother contends that the trial court should have held father in contempt of court for failing to tender to her his annual tax information, thus allowing him to continue paying less than 20 percent of his actual current and growing net income from 1999 to date. Mother claims father neglected to provide her his W-2's, 1099's and income tax returns for each year after 1999 in order to verify he was paying the correct amount of child support. Additionally, although mother admits she failed to request reimbursement for medical expenses from father in the past, she asks the court to order father to reimburse her for these payment through a petition for contempt.

¶ 32 In this case, mother did not file a petition seeking to modify child support, but only sought additional retroactive child support as a remedy in her contempt petition. However, she asserts father contemptuously failed to pay 20 percent of his actual net income beginning sometime after the 1999 order. To purge the contempt, mother requests an order requiring father to pay all past due shortages for court-ordered child support and unpaid medical charges.

¶ 33 However, the court's finding of contempt must precede any order defining the conditions necessary to remedy the contemptuous conduct. In this case, the trial court examined the facts and the language of the agreed court order before finding father was not in contempt of court. Whether a party is guilty of indirect civil contempt becomes a question of fact for the trial court, and a reviewing court will not disturb that finding unless it is against the manifest weight of the evidence, or the record reflects an abuse of discretion. *In re Marriage of Logston,* 103 Ill. 2d 266, 286–87 (1984).

¶ 34 The 1999 order at issue requires father to provide mother with his W-2's, 1099's and

income tax returns for each year. The record shows mother did not directly ask father for his W-2's, 1099's and income tax returns until 2010. After her request, and pursuant to discovery, father provided documentation of his income beginning with 2007. In addition, mother did not submit the bills for unpaid medical expenses to father before seeking to trigger the contempt powers of the court to compel compliance.

¶ 35 The agreed 1999 order also required father to pay a specific sum of money, in the set amount of $350 on a bi-monthly basis. Father paid this amount and substantially more (over $800 bi-monthly), between 2004 and 2007, until the present. Therefore, the record reveals father was in compliance with the 1999 court order. We conclude the court properly refused to hold father in contempt of court and that decision was not against the manifest weight of the evidence.

¶ 36 In conclusion, we would be remiss if we did not compliment the trial court on the detailed written order dated November 3, 2011. The trial court's order was well-organized, thoughtfully-prepared, and provided this court with a neutral summary of the evidence, arguments, and legal analysis of the applicable case law.

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, we affirm the ruling of the circuit court.

¶ 39 Affirmed.