

**NOTICE**  
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2014 IL App (5th) 140012-U

NO. 5-14-0012

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

**NOTICE**  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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<i>In re</i> MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
ADAM M. VARGO,	)	Saline County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 09-D-144
	)	
VICTORIA A. VARGO,	)	Honorable
	)	William J. Thurston,
Respondent-Appellant.	)	Judge, presiding.

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JUSTICE GOLDENHERSH delivered the judgment of the court.  
Presiding Justice Welch and Justice Stewart concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court properly granted petitioner's section 2-1401 petition vacating the marital settlement agreement and child custody and joint parenting agreement on the basis of fraudulent inducement.

¶ 2 After protracted and acrimonious dissolution of marriage litigation, Adam Vargo (husband) and Victoria Vargo (wife) entered into a marital settlement agreement and child custody and joint parenting agreement. Subsequent to this agreement, and circuit court judgment, husband filed a petition for relief of judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)) alleging that he was

fraudulently induced into entering the agreement. Specifically the element of fraudulent inducement alleged by husband was that wife knowingly and deliberately misled husband into believing she would not relocate her residence, along with that of the parties' minor child, from Southern Illinois. In fact, wife and the minor child relocated approximately 300 miles north to the Greater Chicago area. After a hearing, the circuit court entered an order finding that wife fraudulently induced husband into the agreement noted above and set it aside on the basis of fraud on the part of wife. For the reasons set forth below, we affirm the order of the circuit court.

¶ 3 BACKGROUND

¶ 4 Husband and wife were married in March of 2005 and produced one minor child who was five years old at the time of trial. Proceeding for dissolution of marriage commenced in the fall of 2009. Although both parties sought temporary custody of their minor child and mediation was unsuccessful in reaching an agreement concerning custody, the parties did reach an agreed temporary order consisting of joint custody, a visitation schedule for husband, and an agreed amount of child support.

¶ 5 Treva O'Neil was appointed by the court as guardian *ad litem*. Her report, filed in February of 2011, recommended that it was in the minor child's best interest that custody, education, and control be awarded to wife with weekend and weekday visitation of husband.

¶ 6 A consistent area of contention between the parties, and the issue at the core of this appeal, was whether wife would remain in the Southern Illinois area, as noted in the guardian *ad litem*'s report:

"They [husband's parents] don't believe [wife] will remain in the area, and if the court gives [wife] custody, 'she will be out of here in a flash.' \*\*\*

\* \* \*

[Husband] and his family's biggest fear is that Victoria will move [minor child] from Southern Illinois. [Wife] has stated repeatedly that she does not plan to do so. She has now been in Marion, Illinois since 2007, has friends, loves her neighbors and community and her church family. \*\*\*

\* \* \*

Lastly, [husband] and his family's hostility to [wife] is unsettling. The thing they fear the most is that [wife] will remove [minor child] from the area. One would think, that this would mean that they would go overboard assuring her that they will be there for her and that Southern Illinois will be a great place for *she* and [minor child]. This is certainly not the case." (Emphasis in original.)

¶ 7 Subsequent to filing her report, the guardian *ad litem* attempted to mediate issues between the parties. In the course of mediation, husband asked for an agreement on a geographic radius restricting how far wife could move from Southern Illinois. The report of the guardian *ad litem*, as well as testimony by husband in later hearings concerning his postdecree petition, indicated that wife consistently said she had "no plans" to leave Southern Illinois.

¶ 8 In October of 2011, a judgment of dissolution was entered which incorporated the parties' marital settlement agreement and child custody and joint parenting agreement.

That agreement provided that wife would be primary residential custodian and husband would have alternating weekend visitation. The agreement also provided for weekday visitation for husband with the minor child from 10 a.m. on Wednesday until 8 a.m. Thursday, prior to the minor attending kindergarten and upon full-time kindergarten attendance on Wednesday from 6 p.m. until Thursday at 6 p.m. The agreement also indicated the parties were required to make joint decisions as to schools, medical treatment, and religious training.

¶ 9 In March of 2012 wife filed a petition for modification of judgment indicating that she had accepted employment with the Chicago Autism Academy. Discovery was conducted, including the deposition of wife and of Laura Hartwell, the head of said academy. Wife filed a motion for voluntary dismissal of the petition one day prior to hearing on said petition concerning visitation and other matters that would be modified due to a move. Within 10 days, wife moved to Franklin, Illinois, approximately 300 miles from Saline County. This move was made without court consideration or modification of the visitation schedule and without notice to husband. Husband later testified that his first knowledge of the move was when, while on vacation with the minor child on August 10, 2012, he received an email from wife giving the new address. On August 21, 2012, husband filed his petition for relief from judgment and motion for temporary custody. The circuit court held hearings on this petition on August 9, 2013, August 30, 2013, September 6, 2013, and September 13, 2013.

¶ 10 Husband testified during these hearings that his consistent fear in the course of these proceedings was that wife would move from the area with his daughter. He further

testified that on numerous occasions, including a letter from wife's counsel, her subsequent counsel, and the guardian *ad litem*'s report, that wife had indicated she had "no plans" to move. During mediation just prior to the joint parenting agreement wife told husband that she had no plans to leave the area. Husband further testified that at the time he entered into the child custody and joint parenting agreement, he had no reason to believe that wife intended to dishonor the contract. Husband now is convinced that she intended to move to Chicago at the time the contract was agreed upon. During the hearings, the following testimony was solicited from husband:

"Q. [Attorney for husband:] And is it true that those agreements, specifically the [c]hild [c]ustody and [v]isitation agreement incorporated the mid-week overnight visitation?

A. They did.

Q. And is it true that they provided you with the assurance that indeed [wife] would stay in [S]outhern Illinois?

A. It did.

Q. Would you have entered into the [c]hild [c]ustody and [j]oint [p]arenting [a]greement if it had—if [wife] had not told you she was staying in [S]outhern Illinois?

A. No, I would not have."

Husband further testified that he relied on the provisions of the agreement concerning schooling, weekend visitation, and midweek visitation as stated above. Husband testified

that if he had known wife had plans to leave Southern Illinois in two years, he would not have entered into the agreement.

¶ 11 Wife was deposed in July 2012 in connection with a hearing on her petition to modify judgment. Her petition to modify was dismissed a few days after her deposition, and approximately one week later, husband appeared at the marital home to pick up the minor child for a family vacation in Florida. He indicated that wife was sitting in the driveway of the home and, instead of having husband come to the door to take the child, the normal procedure, wife was sitting in the car in the driveway with garage doors closed. On that same date, about a half hour after he had picked up the minor child, he received an email from wife giving him wife's new address in Frankfort, Illinois, that she would pick up their daughter the following week, and that the daughter would be available for scheduled visitations in Frankfort.

¶ 12 A key witness in these proceedings was Tammy Daech. Daech testified that wife came to her home in October of 2010 and indicated that her house was "technically for sale" but that it was not actually for sale because she planned to move in two years when a friend of hers could obtain a job for her at a school for children with autism. Daech also said wife stated she hated Southern Illinois and that it was filled with rednecks and hillbillies. In her brief, wife's counsel strongly questioned the credibility of Daech's testimony, noting various problems Daech had recalling facts and details.

¶ 13 Another matter brought up during hearings on the petition was wife's living with a man, one Brian West, and becoming pregnant by him. When asked whether she had ever considered telling husband that she was pregnant by the man she was living with and that

he no longer had to send checks to her, she answered, "No." The court noted in its order that wife had known West for years, that they were not dating at the time of her July 2012 deposition, but were living together by the fall of that year and that she continued to accept maintenance payments from husband despite language in the marriage settlement agreement that she was no longer entitled to such payments under these circumstances.

¶ 14 Wife testified that she had conducted a job search in the Southern Illinois area during the pendency of the divorce, which included online applications in the Harrisburg, Carterville, Carbondale, and Johnston City areas. She also testified that 26 days after she signed the joint parenting agreement, she had sent a resume to Laura Hartwell, a longtime friend and acquaintance in the Chicago area who the record indicates was the head of an institute for children suffering with autism. Wife further testified that although she had attended Southern Illinois University, she did not inquire if the University had a placement office for special education teachers. She further indicated she did not know there were special education districts in Southern Illinois in eight counties, including Saline.

¶ 15 After these extensive hearings, the circuit court granted husband's 2-1401 petition. (735 ILCS 5/2-1401 (West 2012)). The circuit court framed the issue in the following manner:

"Whether [wife] fraudulently induced [husband] to enter into the [m]arital [s]ettlement [a]greement and [c]hild [c]ustody and [j]oint [p]arenting [a]greement as alleged in the [husband's] [p]etition for [r]elief from [j]udgment."

The court further delineated the elements of fraud which it noted husband had to establish by clear and convincing evidence as follows:

"To prove fraud, [husband] must establish by clear and convincing evidence that:

- (1) [Wife] made a false statement of material fact;
- (2) Knowing it or believing it to be false;
- (3) Made with the intent to induce [husband] to act;
- (4) Which [husband] reasonably relied on; and
- (5) [Husband] suffered damages."

In its analysis, the court noted that the dissolution action remained unresolved for more than 21 months and then resulted in an agreement in less than three weeks. The trial court emphasized this two- to three-week period, noting that after the guardian *ad litem* intervention and the parties being unsuccessful in resolving their dispute concerning the minor child "less than three weeks after the [guardian *ad litem*] told the attorneys that such a hearing was necessary, the parties reached settlement and executed a [j]oint [p]arenting [a]greement." The court further noted wife testified that 26 days after executing the agreement, she forwarded her resume to Laura Hartwell concerning employment at the Chicago Autism Academy. Testimony indicated that there had been conversations concerning the job prior to wife sending her resume. Wife further testified she had communicated with Hartwell by Facebook from November 2010 up to the time of her employment. The trial court noted:

"In other words, [wife] testified that she had no idea that her friend, Laura Hartwell, who had been in contact with her from at least 11 months prior to the [j]udgment of [d]issolution, had any association with the Chicago Autism Academy. Seven days after the [j]udgment of [d]issolution entered, [wife] indicates that she first became aware of Ms. Hartwell's autistic son. And that, oddly, Ms. Hartwell, the principal of a school for autistic children, and who would seemingly have almost limitless access to such information from her workplace, was seeking advice from [wife], as to services for her autistic son.

Hartwell's testimony differs from [wife's] testimony on September 13, 2013. There, she indicated that in November 2011, during a phone conversation with Hartwell, [wife] asked if Hartwell knew of any jobs or people/contacts in Southern Illinois. That is when [wife] stated she first learned that Hartwell as principal of a school. In other words, [wife] testified that during the conversation in which she was asking Ms. Hartwell for information/contacts for a job, she first discovered that Ms. Hartwell was a school administrator and could provide such information.

5. With respect to her relationship with Brian West, [wife] testified that she had known him for years. That they were not dating at the time of her July 24, 2012, deposition, but he had moved into her apartment by fall of 2012. [Wife] continued to accept maintenance payments from [husband] despite language in the [m]arriage [s]ettlement [a]greement indicating she no longer was entitled to such payments.

6. The court also notes that the gravamen of [wife's] justification for the move to Frankfort was that she needed a job, that she had to work to support her daughter, that not a single acceptable job was available in the southern part of Illinois, that the only job available was located near Chicago, and she accepted the job and moved. [Wife] no longer works at the Chicago Autism Academy, and in fact, is not currently working outside the home."

¶ 16 After noting wife's justification for moving from Southern Illinois was her need for employment so that she could support her daughter and that no acceptable job was available in Southern Illinois, the court also noted that she is no longer employed at the Chicago Autism Academy and is not currently employed outside the home. Further commenting on the evidence, the court wrote:

"7. Laura Hartwell, at [wife's] request[,] drafted a letter which falsely indicated that the Chicago School of Autism had full time day care on site for the children of staff. [Wife] stated 'absolutely not' when asked whether the letter was manufactured for the benefit of the court. Hartwell testified that the letter was drafted to help [wife] in possible future litigation. She admitted the school had no such day care program. [Wife] later thanked Hartwell, stating in an Email 'Your creativity about the child care is greatly appreciated. LOL'"

¶ 17 The court then commented on the testimony of Tammy Daech, who claims she met wife in October of 2010 during Southern Illinois University's homecoming weekend. Daech also indicated that wife stated she had a home for sale, but it was not actually for sale since she was planning to move *in two years* because a friend in the northern part of

the state was able to get her a job as a teacher. Daech testified that wife indicated she hated living in Southern Illinois which she considered full of rednecks and hillbillies.

¶ 18 The court considered the testimony of husband who indicated that he would not have entered into the child custody and joint parenting agreement if he had known at the time that wife intended to move from Southern Illinois. As an indication of that position, husband pointed to the midweek overnight visitations stated above as part of the agreement.

¶ 19 After extensive summation of the evidence produced before the court, the court found as follows;

*"10. [Husband] has overcome all presumptions relating to the validity of [finding] the parties' agreement, and has proven by clear and convincing evidence that [wife] made false statements of material fact, knowing or believing them to be false, made with the intent to induce [husband] to act. [Husband] reasonably relied on these statements and suffered damages as a result.*

*The court finds that [wife] fraudulently induced [husband] to enter into the [c]hild [c]ustody and [j]oint [p]arenting [a]greement. False statements of fact, made by [wife], including, but not limited to the express language in the [c]hild [c]ustody and [j]oint [p]arenting [a]greement, were relied on by [husband], and induced him to enter into the agreement. The [j]oint [p]arenting [a]greement contains specific and precise language which*

*indicated and evidenced an intent by [wife] to stay in the Southern Illinois area, including the following:*

1. It is predetermined and agreed by the parties that the *minor child shall continue to receive primary care physician's services from her existing facility*, same being SIMCA. (Article I, Sec. C);
2. However, given the limited number of Lutheran based churches in the Harrisburg area, [husband] shall be entitled to take the child to a Christian belief church of his choice. (Article I, Sec. D);
3. It is further predetermined and agreed by the parties that the [minor] child shall begin *part-time preschool program during 2011*. [Wife] shall not enroll the child in a program that conflicts with [husband's] weekday visit. (Article I, Sec. E);
4. [Husband] shall have the following weekly parenting times with the minor child:
  - a. Alternating weekends from 6:00 p.m. on Friday until 6:00 p.m. on Sunday;
  - b. *Every Wednesday from 10:00 a.m. until Thursday at 8:00 a.m.* (until she begins attending Kindergarten on a full time basis). On the limited occasions when [husband] is unable to participate in all of his parenting time due to employment requirements that are outside of his control, [wife] and [husband] shall mutually discuss and agree upon a reasonable make up time for [husband], with a goal that it

will be added on to times consistent with [husband's] parenting days with [minor child];

- c. *Every Wednesday from 6:00 p.m. until Thursday at 6:00 p.m. (once she begins attending Kindergarten on a full time basis);*
- d. [Husband] shall be responsible for transporting the child for his parenting time, with the exception that [wife] shall pick up the child to end the Sunday visit and *shall deliver the child for the Wednesday 6:00 p.m. visit once the child begins attending Kindergarten on a full time basis; (Article II, Sec. B, Par. 1).*" (Emphasis added.)

Based on its findings, after reviewing the evidence, the circuit court determined that husband had proven by clear and convincing evidence that he was fraudulently induced into entering the child custody and joint parenting agreement and marital settlement agreement and set said agreement aside due to fraud on the part of wife. Wife timely appealed.

¶ 20

#### ANALYSIS

¶ 21 The parties essentially agree that the standard of proof we apply to analysis of this appeal is that the allegations of fraud must be proven by clear and convincing evidence. In our opinion, that standard was met. Wife argues that the court erred in numerous respects, among them finding that wife had made misrepresentations or false statements to husband. As noted above and reflected in the record and the circuit court's order, wife consistently indicated she had "no plans" to move from Southern Illinois prior to the execution of the agreement. At no time did she indicate she was staying in Southern

Illinois. As further indicated above, husband testified that he would not have signed this agreement had he known of wife's plans for an imminent move. Wife attacks the testimony of Tammy Daech, citing problems of memory of facts and details. Husband argues that despite indistinct memory, her testimony was unrebutted. Wife also argues that husband's reliance on wife's statements about no plans to move was not justified and reasonable in that the child custody and joint parenting agreement failed to restrict wife from moving from the Southern Illinois area and argues that, to the contrary, the language of the agreement anticipated a possible move. Wife argues, and the record substantiates, that her only representation prior to the signing of the agreement was that she had "no plans" to move.

¶ 22 Husband, on the other hand, argues that this is a simple case of fraud. He notes the provisions of the agreement indicating substantial visitation, most importantly the midweek visitations and other provisions of the agreement indicating activities for the minor child in the area. Husband argues that the testimony of wife and of Laura Hartwell is not worthy of belief, arguing that in emails entered in evidence at the hearing, wife and Hartwell conspired to present the Chicago Autism Academy job opportunity in the most favorable light. This included hedging as to the existence of child care facilities on-site and convincing a judge that the position at the Autism Academy was a great and worthwhile opportunity. In effect, husband argues wife and Hartwell created documents in order to mislead the trial court.

¶ 23 A joint parenting agreement and marital settlement agreement may be set aside pursuant to petition under section 2-1401 if it was entered into because of fraud. *In re*

*Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 30. As noted above, the parties do not dispute the elements of fraud must be proven by clear and convincing evidence. The elements of fraud required to be shown by husband are that wife made a false statement or statements of material fact knowing or believing them to be false and made with the intent to induce husband to act; that husband reasonably relied upon said misrepresentation and, as a result, suffered damages. *In re Marriage of Broday*, 256 Ill. App. 3d 699, 703 (1st Dist. 1993). The settled law in Illinois is that clear and convincing evidence is a level of proof resting between preponderance and beyond reasonable doubt necessary to convict in a criminal trial. *Duncan v. Cannon*, 204 Ill. App. 3d 160, 164 (1st Dist. 1990). Crucial to our determination of this appeal is the position of the trial court in regard to determining the credibility of witnesses. The trial court is in the superior position to judge the credibility of witnesses, and its evaluation of credibility is entitled to great deference. That determination will not be disturbed unless it is against the manifest weight of the evidence. *Hendrix v. Riverway Harbor Service St. Louis, Inc.*, 314 Ill. App. 3d 800, 807 (5th Dist. 2000).

¶ 24 As indicated by its extensive detailed and well-written order, the trial court clearly was convinced husband met the standard of clear and convincing evidence. The court found, as stated above, that husband had overcome all presumptions in favor of the validity of the joint parenting agreement and that wife had made false statements of material fact knowing them to be false with the intent to induce husband to sign the agreement. The court further found husband's reliance on these statements was reasonable and that he suffered damage as a result. The court emphasized provisions of

the joint parenting agreement which it interpreted as a stated intent by wife to stay in Southern Illinois, including:

"1. It is predetermined and agreed by the parties that the *minor child shall continue to receive primary care physician's services from her existing facility, same being SIMCA. (Article I, Sec. C);*

2. However, given the limited number of Lutheran based churches in the Harrisburg area, [husband] shall be entitled to take the child to a Christian belief church of his choice. (Article I, Sec. D);

3. It is further predetermined and agreed by the parties that the [minor] child shall begin *part-time preschool program during 2011. [Wife] shall not enroll the child in a program that conflicts with [husband's] weekday visit. (Article I, Sec. E);*

4. [Husband] shall have the following weekly parenting times with the minor child:

a. Alternating weekends from 6:00 p.m. on Friday until 6:00 p.m. on Sunday;

b. *Every Wednesday from 10:00 a.m. until Thursday at 8:00 a.m. (until she begins attending Kindergarten on a full time basis). On the limited occasions when [husband] is unable to participate in all of his parenting time due to employment requirements that are outside of his control, [wife] and [husband] shall mutually discuss and agree upon a reasonable make up time for [husband], with a goal that it*

will be added on to times consistent with [husband's] parenting days with [minor child];

- c. *Every Wednesday from 6:00 p.m. until Thursday at 6:00 p.m. (once she begins attending Kindergarten on a full time basis);*
- d. [Husband] shall be responsible for transporting the child for his parenting time, with the exception that [wife] shall pick up the child to end the Sunday visit and *shall deliver the child for the Wednesday 6:00 p.m. visit once the child begins attending Kindergarten on a full time basis; (Article II, Sec. B, Par. 1).*" (Emphasis added.)

The judgment of the circuit court indicates, and the record supports, its conclusion that the testimony of wife and Hartwell was not credible and that the testimony of husband and Daech was. We defer to the credibility determination made by the circuit court and find ample support for that determination in the record before us. The provisions of the joint parenting agreement, the emails between wife and Hartwell noted above, the testimony of husband and Daech, and the timing of wife's actions, which the trial court delineated in a time chart attached to its order, provide overwhelming evidence of fraud.

¶ 25 Accordingly, we affirm the order of the circuit court of Saline County setting aside the child custody and joint parenting agreement on the basis of fraud on the part of wife.

¶ 26 Affirmed.