

2015 IL App (1st) 143615  
No. 1-14-3615  
December 8, 2015

SECOND DIVISION

**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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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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KYLE A. DILGER and TRAVIS S. DILGER,	)	Appeal from the Circuit Court
	)	Of Cook County.
Plaintiffs-Appellees,	)	
	)	
v.	)	No. 10 CH 19557
	)	
LAINÉ GURLEY,	)	The Honorable
	)	Franklin Valderrama,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE NEVILLE delivered the judgment of the court.  
Justices Simon and Hyman concurred in the judgment.

**ORDER**

¶ 1 *Held:* Mother breached fiduciary duty to her children when she used funds from children's accounts to pay children's educational expenses without obtaining leave from the divorce court for the use of the funds. Trial court correctly ordered Mother to reimburse the children for the use of their funds. The record did not show the kind of outrageous conduct needed for an award of punitive damages. Because the parties had a *bona fide* dispute over the amount and timing of the debt, the case did not warrant an award of prejudgment interest.

¶ 2 A divorce decree made Laine Gurley custodian of funds belonging to her two children, Kyle Dilger and Travis Dilger. Laine transferred the funds to her personal account and used

them to pay Kyle's and Travis's educational expenses. Kyle and Travis sued Laine for breaching her fiduciary duties as custodian of their funds. The trial court granted a motion for summary judgment in favor of Kyle and Travis, awarding them restitution of the funds Laine transferred to her personal account, plus punitive damages and prejudgment interest.

¶ 3 In this appeal, we affirm the award of compensatory damages, as we find that the divorce decree made Laine and her ex-husband principally responsible for paying Kyle's and Travis's educational expenses, and Laine breached her duties when she used the children's funds for their education without leave of the divorce court. However, we find that the evidence does not support the award of punitive damages or prejudgment interest.

¶ 4 BACKGROUND

¶ 5 Laine Gurley divorced Christopher Dilger in 2001. The court awarded Laine sole custody of Kyle and Travis. In the judgment dissolving the marriage, the court said:

"Laine presently controls two custodial accounts at Kemper for the benefit of the children. As of the time of trial, the combined balances were approximately \$32,479.00. These are the children's accounts, and they are to be used solely for the children's benefit. \*\*\*

\* \* \*

\*\*\* The State of Illinois zero coupon bonds [with a total value of \$5,000] and the two custodial accounts at Kemper shall be the separate property of the children and shall remain their separate property, to be used only for their benefit. Laine

shall maintain and manage the bonds and custodial accounts for the benefit of the children.

\* \* \*

\*\*\* The expenses of the children's post high school education shall be paid by the parties in accord with the provisions of 750 ILCS 5/513, or such other statutory provision as may be in effect at the appropriate time."

¶ 6 From 2005 through 2007, Laine transferred the balance of the Kemper funds into her personal account, and she liquidated the bonds and deposited the proceeds into her personal account. She used all of the funds from the Kemper accounts and the bonds, along with substantial amounts of her personal savings, to pay college expenses for Kyle and Travis.

¶ 7 In May 2010, Kyle and Travis filed this lawsuit against Laine, charging her with breaching her fiduciary duties as custodian of their accounts. Kyle and Travis filed a motion for partial summary judgment on the complaint, arguing two separate bases for finding that Laine owed them restitution. Laine attached to her response bank statements, which showed that her accounts retained very small amounts after she paid for Kyle's and Travis's education.

¶ 8 The circuit court entered a partial summary judgment in favor of Kyle and Travis, finding that Laine's response admitted to facts showing a breach of her fiduciary duties. Kyle and Travis filed separate motions for summary judgment on damages, and they filed separate motions for reconsideration of the partial summary judgment insofar as it denied summary judgment on a second count of their complaint.

¶ 9 The circuit court first granted Kyle's motion for summary judgment on damages. In its order, dated September 19, 2013, the court said,

"[Laine's] rationale that she used the funds to pay for [Kyle's] educational expenses and not for her own benefit [is] unavailing. The Judgment for Dissolution is clear and unambiguous in that the parties subject to the dissolution judgment were responsible for payment of [Kyle's] educational expenses. [Laine's] suggestion that the Judgment for Dissolution allowed her to use [Kyle's and Travis's] trust funds for their educational expenses is unsupported by the plain language of the Judgment for Dissolution. If in fact [Laine] needed to use part or all of [Kyle's] funds to pay [Kyle's] educational expenses, [Laine] should have applied to the court pursuant to 750 ILCS 5/513 to obtain permission to do so."

¶ 10 The court found Laine liable to Kyle for \$2,500 from the bonds, \$17,797 from the Kemper funds, plus attorney fees, awarded as punitive damages, and prejudgment interest. The circuit court left pending Travis's similar motion for summary judgment, and the motions of both Kyle and Travis for reconsideration of the order for partial summary judgment.

¶ 11 On December 27, 2013, Laine filed a motion for reconsideration of the order dated September 19, 2013. In the motion, Laine argued that she properly used Kyle's funds to pay his educational expenses, because section 513(j) of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/513(j) (West 2012) (current version at 750 ILCS 5/513(b) (West 2012))) includes the financial resources of the child as a factor for the court

to consider in allocating college expenses, and the divorce decree expressly incorporated section 513 by reference. See *In re Marriage of Thurmond*, 306 Ill. App. 3d 828, 834 (1999). Laine offered no response to the circuit court's holding that she needed to seek the divorce court's permission before using the children's funds for their education. Laine also argued that because she and Christopher never put the bonds in the names of Kyle and Travis, the bonds remained her property, which she properly used to meet the educational needs of Kyle and Travis.

¶ 12 Laine raised the same arguments concerning section 513(b) and the bonds in her response to Travis's motion for summary judgment on damages.

¶ 13 The circuit court found Laine's motion to reconsider untimely, and it denied the motion. The court also denied Kyle's and Travis's motion to reconsider the order granting partial summary judgment and entered a judgment in favor of Laine on the second count of the complaint. The court granted Travis's motion for summary judgment on damages, awarding him \$2,500 for the bonds, \$14,682 for the Kemper fund, plus attorney fees as punitive damages, and prejudgment interest.

¶ 14 The attorney representing Kyle and Travis presented to the court an affidavit concerning his fees and costs. Based on the affidavit, the court awarded Kyle and Travis \$38,177.06 in fees and costs as punitive damages. Laine now appeals.

¶ 15 ANALYSIS

¶ 16 We review the orders granting motions for summary judgment *de novo*. *Crum & Forsters Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 390 (1993). Laine

argues that the evidence leaves disputed issues of material fact as to (1) whether she breached her fiduciary duties, and (2) whether the \$5,000 bonds remained property of Laine and Christopher after the divorce. Laine also argues that the evidence does not warrant the award of punitive damages or prejudgment interest.

¶ 17 Fiduciary Duties

¶ 18 Laine admits that the divorce decree imposed on her fiduciary duties as custodian of the Kemper accounts for Kyle and Travis. She contends that she did not breach her fiduciary duties because she used all of the funds in the Kemper accounts for Kyle's and Travis's college expenses. Although the parties have not shown us any closely similar Illinois cases, and our research uncovered none, several similar cases from other jurisdictions offer some guidance.

¶ 19 In *Erdmann v. Erdmann*, 226 N.W.2d 439 (Wisc. 1975), a divorce decree made Erdmann the custodian of a fund for the benefit of his two children, and it provided that he would pay the college expenses of the children. When Erdmann had no job, he withdrew money from the fund to pay college expenses for one child and support expenses for the other. The trial court directed Erdmann to reimburse the fund for the amount he withdrew. The *Erdmann* court said:

" . . . Where the parent, who has resources of his own sufficient to maintain his children, is also guardian of their estate, his obligation to support them out of his own means is not changed thereby. . . . In such cases recourse on the ward's estate

is not permitted. \*\*\*' [*Moore v. Moore*, 31 S.W. 532, 534 (Tex. Civ. App. 1895), aff'd 33 S.W. 217].

Holding the fund here established to involve property that belonged to the two children of the parties, we see an obvious benefit to the appellant, as custodian, using the funds to make support payments that he would otherwise have had to make as parent out of his own funds. We do not see the benefit to the children deriving from the use of their property to make the payments that, if their fund was not used, their father would be required to make out of his income or assets. \*\*\* [W]e hold that the fund created for the benefit of the children could not be used by this custodian to make payments he was ordered by the court, as their parent, to make for their support and maintenance. This would not close the door to the funds being used to defray major medical expenses or to provide for support or education where the parent ordered to pay for such expenses was unable to do so. However, where the fund is court-created and the fund involved represents property of the children who are the sole beneficiaries of the fund, the parent-custodian here was required to apply to the court which created the fund to establish the fact of his inability as parent to make the payments ordered, and of the need or benefit to the children in using the fund to make such payments as custodian. Where no application is made to the court for modification of the provisions of a divorce judgment relating to support and maintenance of minor children, the law in this state remains that: 'A father of sufficient means must

support his child, and it is not a defense that either the mother-custodian, or the child itself, has independent means. . . .' [*Schade v. Schade*, 80 N.W. 2d 416, 420 (Wis. 1957), quoting *Commonwealth ex rel. Firestone v. Firestone*, 45 A.2d 923, 924 (Pa. Super. 1946)]." *Erdmann*, 226 N.W.2d at 442-44.

¶ 20 Because Erdmann had not applied to the divorce court for permission to use the fund for the children's expenses, the *Erdmann* court affirmed the order directing him to reimburse the fund for all amounts he withdrew.

¶ 21 Similarly, a California court held that a father acting as custodian of his children's assets could not use those assets to satisfy a court order for support. *Newman v. Newman*, 123 Cal. App. 3d 618, 621 (1981). A Colorado court held that a father, as trustee of a trust for his children's benefit, could not use the trust income to reduce his support obligation. *In re Marriage of Wolfert*, 598 P.2d 524, 526 (Colo. App. 1979). A Connecticut court held that a trial court abused its discretion when it permitted a father, acting as custodian for his children's funds, to use those funds to meet his support obligations. *Weisbaum v. Weisbaum*, 477 A.2d 690, 692-93 (Conn. App. 1984). See also *Trunko v. Trunko*, 642 S.W.2d 673, 677 n. 7 (Mo. Ct. App. 1982); *In re Hoak*, 364 N.W.2d 185, 190-91 (Iowa 1985); *Shinkoskey v. Shinkoskey*, 19 P.3d 1005, 1009-10 (Ut. App. 2001).

¶ 22 The Pennsylvania Supreme Court explained that a parent's obligation to support and meet the educational needs of his child "is paramount and the children's means should not be considered" in determining the parent's duty to pay the child's expenses, unless the parent demonstrates to the court that he lacks sufficient assets to support his children. *Sutliff v.*



*Sutliff*, 528 A.2d 1318, 1324 (Pa. 1987). If the parent demonstrates such need, "the court should state, on the record, both the children's total needs and the parent's reasonable contribution." *Sutliff*, 528 A.2d at 1324.

¶ 23 We find *Erdmann*, *Sutliff*, and the other cases cited above persuasive. The divorce decree here imposed on Laine fiduciary duties as custodian of her children's assets, and it required her to pay her share of their college expenses. If she needed to invade the children's funds to pay the costs of their education, she had a duty first to apply to the divorce court for permission to use the funds. We affirm the order granting summary judgment in favor of Kyle and Travis on the issue of breach of fiduciary duty, and the award of compensatory damages equal to all funds withdrawn from their accounts. See *Erdmann*, 226 N.W.2d at 442-44.

¶ 24 Bonds

¶ 25 Next, Laine contends that she raised an issue of material fact concerning ownership of the bonds. The divorce decree said, "The State of Illinois zero coupon bonds \*\*\* shall be the separate property of the children and shall remain their separate property." We find that the divorce decree unambiguously made the bonds the property of Kyle and Travis, and Laine only acted as custodian of the bonds. See *In re Estate of Bresler*, 159 Ill. App. 3d 535, 540-41 (1987). Laine admitted that she used the proceeds from sale of the bonds to pay educational expenses for Kyle and Travis, and she never sought permission from the divorce court for her use of the bonds. Thus, the trial court correctly included the value of the bonds in the judgment entered against Laine.

¶ 26 Punitive Damages

¶ 27 Next, Laine challenges the imposition of punitive damages. Kyle and Travis argue that Laine did not properly preserve the issue for review. The circuit court's order dated September 19, 2013, included the court's decision to award punitive damages to Kyle. Laine filed a motion for reconsideration of that decision on December 27, 2013, long after the time for filing a motion for reconsideration. See *Lampe v. Pawlarczyk*, 314 Ill. App. 3d 455, 475 (2000). Kyle's unresolved timely motion for reconsideration of a prior order did not extend the time for filing Laine's motion for reconsideration of the September order. *Putz v. Schulte*, 104 Ill. App. 3d 128, 132 (1982). The trial court expressly found Laine's motion untimely, and denied the motion on its merits.

¶ 28 However, in her timely response to Travis's motion for summary judgment on damages, Laine argued that the court lacked any grounds for awarding Travis punitive damages. The circuit court decided the issue on the merits. Thus, Laine adequately preserved the issue for review insofar as the circuit court awarded Travis punitive damages. We exercise our discretion to review the issue insofar as the circuit court awarded Kyle punitive damages. See *Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1, 11 (1996).

¶ 29 The parties disagree on the standard of review. We adopt the following standard, found in *Caparos v. Morton*, 364 Ill. App. 3d 159, 178 (2006):

"In reviewing a trial court's decision to award punitive damages, this court takes a three-step approach, considering: (1) whether punitive damages are available for the particular cause of action, using a *de novo* standard; (2) whether, under a

manifest weight of the evidence standard, the defendant or defendants acted fraudulently, maliciously or in a manner that warrants such damages; and (3) whether the trial court abused its discretion in imposing punitive damages."

¶ 30 We also agree with the *Caparos* court that a court may impose punitive damages on a party who has intentionally breached a fiduciary duty. *Caparos*, 364 Ill. App. 3d at 178. However, "punitive damages are not favored in the law, and courts must be cautious in seeing that they are not improperly or unwisely awarded." *In re Estate of Wernick*, 127 Ill. 2d 61, 83 (1989). "Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence." Restatement (Second) of Torts § 908, comment b, at 465 (1979), *quoted in Loitz v. Remington Arms Co.*, 138 Ill. 2d 404, 415 (1990). "Since the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, these damages can be awarded only for conduct for which this remedy is appropriate—which is to say, conduct involving some element of outrage similar to that usually found in crime. The conduct must be outrageous, either because the defendant's acts are done with an evil motive or because they are done with reckless indifference to the rights of others." Restatement (Second) of Torts § 908, comment b, at 464-65 (1979), *quoted in Loitz*, 138 Ill. 2d at 415-16..

¶ 31 The circuit court here found only that Laine acted willfully in violating her fiduciary duties. She knew that she had fiduciary responsibilities as custodian of her children's funds, and she intentionally transferred the funds to her personal account and used the funds to pay for Kyle's and Travis's educational expenses.

¶ 32 A commentator discussing *Sutliff* noted that parents who also act as custodian of their children's funds often assume that they can use the funds for the child's education, even when a court order makes the parent responsible for paying for the child's education. Jacques T. Schlenger, et al., *Use of Custodial Accounts to Fulfill Parents' Support Obligations. Sutliff v. Sutliff*, 489 A.2D 764 (*Pa. Super. Ct.*, 1985), 13 Est. Plan. 239, 241 (1986). The common confusion about the permissible use of the funds makes punitive damages inappropriate. See *Loitz*, 138 Ill. 2d at 414-17. We note that the circuit court made no finding of outrageous conduct. See *Loitz*, 138 Ill. 2d at 415-16. Evidence in the record provides some grounds to believe the divorce court would have permitted Laine to use the children's funds for their education had she requested leave so to use the funds. See 750 ILCS 5/513(j) (West 2012) (current version at 750 ILCS 5/513(b) (West 2012)). Instead, the evidence shows Laine guilty of a not uncommon misunderstanding of her rights and responsibilities under the divorce decree. See Schlenger, *Use of Custodial Accounts*, 13 Est. Plan. At 240-41. The circuit court's finding that Laine committed the kind of misconduct that warrants an award of punitive damages is contrary to manifest weight of the evidence. See *Schmidt v. Ameritech Illinois*, 329 Ill. App. 3d 1020, 1039 (2002).

¶ 33 Prejudgment Interest

¶ 34 Finally, Laine argues that the trial court should not have awarded Kyle and Travis prejudgment interest on the compensatory damages. Again, Kyle and Travis argue that Laine waived the issue by failing to raise it with regard to Kyle before her untimely motion for reconsideration. But she timely raised the issue in her response to Travis's motion for

summary judgment on damages, and she properly preserved the issue for review insofar as the circuit court awarded prejudgment interest to Travis. We exercise our discretion to review the issue with regard to the judgment entered in favor of Kyle. See *Edgar*, 174 Ill. 2d at 11.

¶ 35 "As a general rule, prejudgment interest is recoverable only where authorized by the agreement of the parties or by statute. [Citation.] An exception exists in proceedings brought in equity. In such cases, a court may be justified in awarding interest based on equitable grounds." *Kouzoukas v. Retirement Board of Policemen's Annuity & Benefit Fund*, 234 Ill. 2d 446, 474 (2009). The parties agree that no statute or agreement authorized the award of prejudgment interest. The court entered the award as an exercise of its equitable powers. "Whether equitable circumstances support an award of interest is a matter lying within the sound discretion of the trial judge. [Citations.] Such a determination will not be disturbed on review unless it constitutes an abuse of discretion." *Wernick*, 127 Ill. 2d at 87.

¶ 36 To decide whether to add to a judgment an equitable award of prejudgment interest, a court should consider the purpose of prejudgment interest. "The rationale underlying an equitable award of prejudgment interest in a case involving a breach of fiduciary duty is to make the injured party complete by forcing the fiduciary to account for profits and interest he gained by the use of the injured party's money. [Citations.] The injured party is thus compensated for any economic loss occasioned by the inability to use his money." *Wernick*, 127 Ill. 2d at 87. Generally, the court should not award prejudgment interest where the

parties have a *bona fide* dispute over the amount owed. *Bank of Chicago v. Park National Bank*, 277 Ill. App. 3d 167, 173 (1995).

¶ 37 Here, Laine's conduct consistently showed that she believed the divorce decree permitted her to decide how and when to use the funds for Kyle's and Travis's benefit, and she chose to use the funds for their college education. She paid a considerable additional sum from her personal accounts for her children's college education. We find Laine's use of the funds supported by a *bona fide*, but mistaken, interpretation of the divorce decree. Again, we note that evidence in the record concerning the balance of Laine's personal accounts suggests that if Laine had sought leave from the divorce court, that court might have permitted her to use Kyle's and Travis's funds for their education. Moreover, the funds remained available for some time after she transferred them to her own account. She explained that she transferred the funds out of the Kemper accounts because market instability made those investments appear unsafe. Thus, even if the parties do not dispute the amounts in the accounts at the time of transfer, Laine has a *bona fide* basis for claiming that she did not misuse the funds until years later, when she paid the college fees and the amount left in her account fell below the sum she transferred from the Kemper funds. *Russell v. Klein*, 46 Ill. App. 3d 660, 666 (1977). Given the circumstances in this case, we find that the circuit court abused its discretion when it awarded Kyle and Travis prejudgment interest on the compensatory damages.

¶ 38

## CONCLUSION

¶ 39

The divorce decree imposed the duty of paying for Kyle's and Travis's college education primarily on Laine and Christopher. If Laine needed to resort to Kyle's and Travis's funds to meet her obligation to pay their educational expenses, she needed first to seek leave of the divorce court to use the funds. She breached her fiduciary duties when she used her children's funds to meet her obligation to pay for their education. We affirm the award to Kyle and Travis of the amounts Laine transferred from their accounts to her account, including the value of the bonds designated in the divorce decree as property of Kyle and Travis. However, we find no evidence of the kind of outrageous misconduct that might support an award of punitive damages. Because the parties had a *bona fide* dispute concerning how much Laine owed and when she owed it, we also find the award of prejudgment interest unwarranted. We affirm the award of compensatory damages but reverse the award of punitive damages and prejudgment interest.

¶ 40

Affirmed in part, reversed in part.