

NOTICE
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2014 IL App (4th) 130481-U
NO. 4-13-0481

FILED
July 9, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

In re: MARRIAGE OF)	Appeal from
ROBIN J. GALLAGHER,)	Circuit Court of
Petitioner-Appellee,)	Livingston County
and)	No. 07D126
SANDRA GALLAGHER, n/k/a SANDRA)	
NISHIJIMA-LaBARBARA,)	Honorable
Respondent-Appellant.)	Robert M. Travers,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justice Steigmann concurred in the judgment.
Presiding Justice Appleton dissented.

ORDER

¶ 1 *Held:* The appellate court affirmed in part, vacated in part, and remanded with directions. (1) The court found the trial court's order of retroactive child support was void and remanded with directions. (2) The court found the trial court did not err in ordering respondent to contribute to her daughter's college expenses and determining the amount of those expenses.

¶ 2 In February 2009, the trial court entered a judgment to dissolve the marriage of petitioner, Robin J. Gallagher, and respondent, Sandra Gallagher, n/k/a Sandra Nishijima-LaBarbara. In March 2011, Robin filed a petition for Sandra to contribute to their daughter's college expenses. In February 2013, the court ordered both parties to contribute \$700 per month toward the college expenses.

¶ 3 On appeal, Sandra argues the trial court erred in (1) ordering her to pay part of her daughter's college expenses and (2) determining the amount of those expenses. We affirm in

part, vacate in part, and remand with directions.

¶ 4

I. BACKGROUND

¶ 5 Robin and Sandra were married in November 1980. A daughter, Courtney, was born in May 1994. After 27 years of marriage, Robin filed a petition for dissolution of marriage in September 2007. In February 2009, the trial court entered the judgment of dissolution. The parties voluntarily entered into a marital settlement agreement resolving the matters of property, maintenance, and custody. As part of the judgment, Sandra was awarded half of Robin's 401(k) plan plus an additional \$25,000. Sandra was also awarded certain savings bonds. Robin received the marital residence in Pontiac and the east 25 acres of a farm in Ramsey. Sandra received the 40 acres of the Ramsey farm on which a house was located. In a later addendum, the parties agreed that Robin would receive the 25 acres of the Ramsey farm that included the house and Sandra would receive a different 40 acres. Robin was given sole custody of Courtney, and Sandra provided no child support.

¶ 6

In March 2011, Robin filed a petition to establish child support, asking the trial court to require Sandra to contribute toward Courtney's college expenses. In October 2012, the trial court conducted a hearing on the petition.

¶ 7

Sandra testified she moved out of the marital residence in August 2008 and lived on the couple's farm in Ramsey. She did not have any income at the time and borrowed money from her uncle. She also became ill, was treated for depression, and became suicidal. Sandra left Ramsey and moved to Chicago. She performed medical billing for a doctor, and she rented a condominium from him for \$1,200 per month, which she paid with an inheritance. She left the condominium and moved into an apartment above her sister's business and paid rent totaling \$875 per month.

¶ 8 In July 2009, Sandra married Richard LaBarbara. In 2010, Sandra and Richard had a total income of \$57,228. Sandra's income amounted to \$12,936.92 from Jewel Foods, \$865 from Walls Flower Shop, and \$2,128.95 from the farm in Ramsey. Through the end of September 2012, Sandra received \$18,392.96 in gross income from Jewel Foods.

¶ 9 In 2010, Robin had a gross income of \$105,410, minus a farm loss of \$16,401, for a total income of \$89,009. In 2011, Robin had a gross income of \$106,005, minus a farm loss of \$14,522, for a total income of \$91,483.

¶ 10 Sandra testified she agreed to change the division of the Ramsey farm because she wanted Courtney to have 25 acres with the house and have a place for her horses. Sandra stated she received money from an inheritance in 2008 through 2011. She claimed the money amounted to \$204,992.95.

¶ 11 Sandra testified she paid \$130,000 for a home in Grayslake, Illinois, in August 2010. From the sale of the Ramsey acreage, Sandra paid \$30,000 in attorney fees, \$20,000 on her vehicle, and \$60,000 on a down payment for the Grayslake house. Sandra's husband works as a union electrician but had been laid off. When he is not working, Sandra uses the inheritance money to pay the mortgage and other bills.

¶ 12 In February 2013, the trial court entered its written order. The court found Courtney was attending Joliet Junior College to obtain an associate's degree and expressed an intent to further her education at Southern Illinois University with a focus on agriculture. Courtney received scholarships that would pay for her tuition for two years of junior college. Another scholarship from Future Farmers of America could be applied to additional fees. The court also noted Courtney would work during the summer and use her earnings for spending money. Robin agreed to maintain health insurance coverage on Courtney and had purchased a

car and insurance for her.

¶ 13 The trial court found both parents had adequate financial resources to contribute to Courtney's educational expenses. Further, Courtney had made substantial financial contributions to pay for her educational expenses by way of the scholarships and had performed well academically to receive those scholarships. The court found the start-up expenses for Courtney's education amounted to \$2,400 with a continuing monthly obligation of \$1,800. The court required both parents to contribute \$700 per month toward Courtney's educational expenses. The court also required Sandra to pay \$5,293.07 in retroactive child support spanning February 2009 to March 2011.

¶ 14 In March 2013, Sandra filed a motion to reconsider, asking the trial court to lower the amount she was required to contribute. Sandra argued the court erred by failing to consider the income disparity of the parties, failing to consider the prior gifts she gave Courtney and the savings bonds available to her, and in calculating the amount of the expenses. In May 2013, the court denied the motion. This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 A. Retroactive Child Support

¶ 17 Before we begin our analysis on the issue of college expenses, we note again the trial court ordered Sandra to pay \$5,293.07 in retroactive child support spanning February 2009 to March 2011. Section 510(a) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) provides that provisions of any judgment respecting maintenance or child support may be modified "only as to installments accruing subsequent to due notice" by the party seeking the change. 750 ILCS 5/510(a) (West 2010). "This insures that the respondent is put on notice prior to any change being made with respect to the original child support and expense

obligations." *In re Marriage of Petersen*, 2011 IL 110984, ¶ 18, 955 N.E.2d 1131. As such, retroactive awards of child support are prohibited. *Marriage of Petersen*, 2011 IL 110984, ¶ 10, 955 N.E.2d 1131 (noting modifications under section 510(a) are not retroactive); *Conner v. Watkins*, 158 Ill. App. 3d 759, 762, 511 N.E.2d 200, 202 (1987).

¶ 18 Here, Robin filed his petition to establish child support in March 2011. Thus, any award of child support would begin from that time forward, and the trial court's decision to order retroactive child support from February 2009 to March 2011 was improper and void. See *People v. Thompson*, 209 Ill. 2d 19, 27, 805 N.E.2d 1200, 1205 (2004) (stating "courts have an independent duty to vacate void orders and may *sua sponte* declare an order void").

Accordingly, that portion of the court's order requiring Sandra to pay \$5,293.07 in retroactive child support must be vacated. As Robin's June 28, 2013, filing in the trial court indicates the child-support arrearage has been paid in full, we remand to the trial court for an order requiring Robin to refund this amount to Sandra.

¶ 19 B. College Support

¶ 20 Sandra argues the trial court erred in ordering her to pay college support of \$700 per month. We disagree.

¶ 21 Section 513(a)(2) of the Dissolution Act allows a trial court to "award sums of money out of the property and income of either or both parties *** as equity may require" to pay the college expenses for a child. 750 ILCS 5/513(a) (West 2010). When making the decision, the court is to consider all relevant factors, including the financial resources of the parents, the standard of living the child would have enjoyed had the marriage not dissolved, the child's financial resources, and the child's academic performance. 750 ILCS 5/513(b) (West 2010). "However, a court should not order a party to pay more for educational expenses than he or she

can afford." *In re Marriage of Thurmond*, 306 Ill. App. 3d 828, 834, 715 N.E.2d 814, 818 (1999).

¶ 22 "The petitioner bears the burden of proving that the respondent should contribute toward the college expenses of their child and the burden of showing how much the respondent should contribute." *People ex rel. Sussen v. Keller*, 382 Ill. App. 3d 872, 879, 892 N.E.2d 11, 17 (2008). After the petitioner presents the necessary evidence, "the respondent has the burden of going forward with evidence that would 'equally balance' the petitioner's evidence." *Sussen*, 382 Ill. App. 3d at 879, 892 N.E.2d at 17 (quoting *In re Marriage of Taylor*, 89 Ill. App. 3d 278, 283, 411 N.E.2d 950, 954 (1980)).

¶ 23 A trial court's decision to order the parties to contribute to a child's educational expenses will not be reversed absent an abuse of discretion. *Thurmond*, 306 Ill. App. 3d at 834, 715 N.E.2d at 818. "A clear abuse of discretion occurs when 'the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.'" *Blum v. Koster*, 235 Ill. 2d 21, 36, 919 N.E.2d 333, 342 (2009) (quoting *People v. Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000)).

¶ 24 In the case *sub judice*, Sandra argues the trial court abused its discretion in requiring both parties to pay \$700 per month for college expenses despite "the enormous income gap" between them. Sandra claims Robin made over five times more than her and she "has a poverty level income." We find Sandra's reliance solely on her own income fails to paint an accurate picture of her ability to contribute to her daughter's college expenses.

¶ 25 The trial court found Sandra's net income for 2011 to be approximately \$15,300. In her reply brief, Sandra indicated she expected her 2012 gross income to be \$21,881 following a raise. Her current husband had income of \$46,851 in 2011. While the trial court declined to

impute an income level for Sandra above her net earnings, this court has held "a trial court can consider the parties' assets and other elements of financial resources, even the financial status of a current spouse, to determine whether payment of support would endanger the ability of the support-paying party and that party's current spouse to meet their needs." *In re Marriage of Deike*, 381 Ill. App. 3d 620, 627, 887 N.E.2d 628, 635 (2008); see also *In re Marriage of Cianchetti*, 351 Ill. App. 3d 832, 835, 815 N.E.2d 17, 19 (2004) (finding the income of the respondent's new husband can be "properly used to examine the extent to which her income can be freed through reliance on her husband for support"). Sandra testified that when her husband is working, he pays all the bills.

¶ 26 Here, the evidence indicates Sandra's new husband earns income that is used to contribute to their living expenses. As Sandra is not reliant solely on her income to support her and her husband, a portion of her income can go toward her daughter's college expenses.

¶ 27 Besides her claim of gross income disparity between the parties, Sandra also points out that, while she did receive a large inheritance, she only has \$20,000 left. Moreover, she claims she has no money remaining from the sale of farmland, as the funds went toward a new house and attorney fees. While we have found Sandra's income is sufficient to require contribution on her part, we also note the record indicates she has over \$360,000 in retirement funds. See *Deike*, 381 Ill. App. 3d at 627, 887 N.E.2d at 635 (stating that when looking at a parent's ability to pay, "their financial resources include all money or property to which the parent has access"). The trial court found the financial resources of the parties were more than adequate to require contribution for education expenses. We find the court did not abuse its discretion in doing so.

¶ 28 In a final argument, Sandra argues she already gave Courtney \$60,000 worth of

real estate, \$8,500 in savings bonds, and a \$1,500 certificate of deposit, and Courtney received \$1,000 in a cash scholarship. However, Sandra's testimony indicated the gift of land was so Courtney could keep her horses, and nowhere did she claim the land was meant to act as an advance of assets to be used for college expenses. Moreover, as to the savings bonds, Robin points out the bonds were cashed in for at most \$1,525, a point Sandra does not dispute. Sandra failed to show Courtney had sufficient financial resources that would amount to a significant contribution toward her nontuition expenses.

¶ 29 C. College Expenses

¶ 30 Sandra argues the trial court erred in finding her daughter's college expenses amounted to \$1,800 per month. We disagree.

¶ 31 Section 513(a)(2) of the Dissolution Act provides the educational expenses covered "include, but shall not be limited to, room, board, dues, tuition, transportation, books, fees, registration and application costs, medical expenses including medical insurance, dental expenses, and living expenses during the school years and periods of recess." 750 ILCS 5/513(a)(2) (West 2010). This court will reverse a trial court's findings of fact only if they are against the manifest weight of the evidence. *Sussen*, 382 Ill. App. 3d at 877, 892 N.E.2d at 16. "A decision is against the manifest weight of the evidence when the opposite conclusion is clearly evident or where it is unreasonable, arbitrary or not based on the evidence." *Cianchetti*, 351 Ill. App. 3d at 834, 815 N.E.2d at 19.

¶ 32 In this case, the trial court noted Robin thoroughly outlined Courtney's expenses in an exhibit and found those expenses amounted to \$1,800 per month. In its order, the court listed monthly expenses for rent, utilities, Internet access, cellular phone, registration and transportation, gasoline, and clothing/grooming. The amounts listed total \$1,446.11. The court

also listed a housing deposit of \$253.75, a yearly fee of \$650 for fees and books, and a \$3,300 yearly fee for tuition. Adding the housing deposit and the monthly average for the fees, books, and tuition to the monthly expenses results in a total of \$1,796.42 per month.

¶ 33 We find the trial court's calculations were not against the manifest weight of the evidence. While Sandra argues the amount is excessive, she has failed to present any evidence to support that opinion or show the listed expenses were exorbitant or unnecessary.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm in part, vacate in part, and remand with directions.

¶ 36 Affirmed in part and vacated in part; cause remanded with directions.

¶ 37 JUSTICE APPLETON, dissenting.

¶ 38 While I agree with the majority's decision with regard to the reduction of the respondent's retroactive child support obligation, I write separately to dissent from the method used by the trial court to determine the respective obligations of the parties for their daughter's educational support.

¶ 39 It is, of course, entirely right and proper for parents to assist their children in securing the benefits of higher education. However, the parental obligation for educational support is limited to the respective abilities of the divorced spouses to contribute to those expenses. *In re Support of Pearson*, 111 Ill. 2d 545, 552 (1986). The analysis and decision of the trial court is not a blind fifty-fifty proposition, but rather, requires an analysis of each parent's ability to contribute. *In re Marriage of Thurmond*, 306 Ill. App. 3d 828, 834 (1999). See also 750 ILCS 5/513(b) (West 2010). In addition, the trial court must consider the financial resources of the child. *In re Marriage of Fleming*, 80 Ill. App. 3d 1006, 1009-10 (1980); *Larsen v. Larsen*, 126 Ill. App. 3d 1072, 1074 (1984).

¶ 40 First, I find the trial court erred in considering the income or income potential of respondent's new spouse. *In re Marriage of Cianchetti*, 351 Ill. App. 3d 832, 835 (2004). There, the court held the former wife's new husband was not obligated to pay for her children's education expenses except to the extent which the new husband's income could be used to free up the wife's income based on his support. *Cianchetti*, 351 Ill. App. 3d at 835.

¶ 41 In this case, the income disparity between the parties is extreme. Therefore, I would find that the trial court's order imposing an equal division of the responsibility for the child's higher education constitutes an abuse of discretion.

¶ 42 Second, the trial court also failed to consider the assets available to the child. *Larsen*, 126 Ill. App. 3d at 1074. The child was gifted substantial property by her mother and, while it is reasonable for the trial court not to require liquidation of the child's Livingston County acreage, the annual income from that farmland should be a substantial factor in allocating responsibility to pay for her college education.

¶ 43 For the foregoing reasons, I would reverse *in toto* the trial court's order, allocating responsibility to provide a higher education for the child, and remand for a new hearing to (1) establish the total costs of that education; (2) ascertain the child's reasonable ability to provide for her college expenses through scholarships, grants, and her own income; and (3) determine a division of the parents' obligations to provide her with an education based on the financial ability of each parent.