

NOTICE
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2017 IL App (5th) 160427-U

NO. 5-16-0427

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).

DIRK F. BORGS MILLER,)	Appeal from the
)	Circuit Court of
Petitioner-Appellee,)	Jackson County.
)	
v.)	No. 09-D-215
)	
ELAINE S. BORGS MILLER,)	Honorable
)	William G. Schwartz,
Respondent-Appellant.)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Justices Welch and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court abused its discretion in modifying the parties' marital settlement agreement regarding college expenses without conducting a full and proper hearing.

¶ 2 The appellant, Elaine Borgsmiller (Elaine), appeals from the circuit court's order granting the appellee's, Dirk Borgsmiller (Dirk), petition for college expenses. Elaine contends that there was not a substantial change in circumstances to warrant modification of the marital settlement agreement. She also argues that the court abused its discretion when it ordered her to pay 20% of the children's future college expenses. We vacate and remand.

¶ 3

BACKGROUND

¶ 4 On January 22, 2013, the parties divorced and entered into a marital settlement agreement (MSA), which contained a provision for college expenses for their three children—Karl, Erika, and Kurt. At the time the MSA was entered, the parties had \$108,699 in an Edward Jones college fund account (the EJC account). The MSA required Dirk to maintain ownership of the EJC account, make appropriate disbursements for the children's college expenses, and provide Elaine with online access.

¶ 5 In October 2014, Dirk filed a petition for college expenses requesting Elaine to make additional contributions because the funds in the EJC account would be depleted by December 2014. Dirk explained that two of their children, Karl and Erika, attended college and that their youngest child, Kurt, would be enrolled for the Fall 2015 semester. Dirk requested that the circuit court determine the parties' contribution for all remaining college expenses. Elaine subsequently filed a motion to dismiss asserting that Dirk failed to allege facts demonstrating a substantial change in circumstances. Dirk responded by asserting that the depletion of the funds in the EJC account amounted to a substantial change in circumstances.

¶ 6 In January 2015, the circuit court denied Elaine's motion to dismiss. The court noted that Dirk's petition for college expenses was in the nature of child support, which required a showing of a substantial change in circumstances to warrant modification of the MSA. The court found that the EJC account had been depleted. The court also found that all three children would be enrolled in college by the Fall 2015 semester. Thus, the

court determined that a substantial change in circumstances had occurred since the entry of the MSA. The court set Dirk's petition for hearing.

¶ 7 In October 2015, the circuit court held a hearing on Dirk's petition. Elaine was called as an adverse witness and testified to the following. She was employed as a legal assistant and also cleaned a local business for additional income. Elaine's financial statements, which contained a detailed summary of her income, expenses, and overall financial accounts, were admitted into evidence. Elaine's financial statements showed that her 2013 annual income was \$82,622; she had contributed \$5,500 to an individual retirement account; and she had invested \$4,818.34 in a 529 plan that had been used for Kurt's college expenses in 2015. Pursuant to the MSA, Elaine had acquired tax-sheltered investment accounts that were worth approximately \$450,000. Elaine's annual income was expected to decrease to approximately \$37,000 in November 2016 when her \$2,000 monthly maintenance income ended.

¶ 8 Dirk testified to the following. He was an 80% owner of a business in Carbondale, Illinois. Dirk's income tax returns from 2012-14 were admitted into evidence. His tax returns showed that his income from the business had significantly increased each year and that he had earned over \$145,000 in 2014. An Excel spreadsheet, which was admitted as demonstrative evidence, detailed the funds that had been disbursed from the EJC account for Karl's college expenses from September 2011 to June 2015. The spreadsheet showed that the EJC account had an initial balance of \$108,699 in April 2012. With full control of the EJC account, Dirk explained that he transferred funds from the account to his personal checking account before he paid college-related expenses for each child.

Dirk's personal checking account statements were also admitted into evidence and showed previous wire transfers from his checking account to the children's personal accounts. Dirk had designated each child's college-related expenses by placing the child's name next to the record of withdrawal on his bank statements. At the time of the hearing, Karl had graduated from college, Erika was a junior at Loyola University, and Kurt was a freshman at the University of Illinois. The entirety of the EJC account had been used to cover all of Karl's college expenses and a large portion of Erika's expenses.

¶ 9 During Elaine's case-in-chief, she testified that she had reviewed all of the purported college-related withdrawals from Dirk's personal checking account statements and prepared various exhibits showing that Dirk had failed to account for \$20,416 from the EJC account. At the close of the evidence, the following exchange took place:

"MR. REED [Counsel for Dirk]: Your Honor, I have an unusual request. I would ask, prior to calling any rebuttal witnesses, that there be a continuance. I would ask the opportunity for my client to attach a supporting document to every expenditure that's set forth on our Exhibit [6], and address directly with those documents the allegation made in their case in chief that there is 20,000 dollars missing from the college account.

THE COURT: Go ahead.

MR. DUNHAM [Counsel for Elaine]: Your Honor, I'm going to, of course, oppose this. *** Our calculations come completely from information given to us. I think it is highly unusual *** someone who is resting to ask for a continuance.

THE COURT: Gentlemen, what I'm going to do is I'm going to order that Attorney Reed will have 21 days to file such documentation regarding the 20,000 dollar differences he deemed appropriate. Attorney Dunham will have 14 days following that to respond thereto.

* * *

MR. DUNHAM: Your Honor, if there's something in those documents that I may want to take somebody's deposition about —

THE COURT: No."

The court adjourned the proceedings but provided Dirk with additional time to file documentation to account for the alleged discrepancy, as stated above.

¶ 10 In November 2015, Dirk filed a letter with two attached exhibits stating that the court had granted him leave to submit additional documentation regarding all withdrawals from the EJC account. Dirk claimed that these exhibits accounted for all funds expended from the EJC account and that \$136,958.45 had been transferred from the EJC account to his personal checking account to cover college expenses. Dirk explained that the exhibits contained all purported transfer verifications, bank statements, various financial records, and deposit slips from his personal checking account.

¶ 11 Elaine then filed a letter asserting that Dirk's exhibits had failed to account for the \$20,416 discrepancy. Elaine attached nine exhibits that purportedly demonstrated her income, as well as \$51,137.05 in additional expenditures for the children. She alleged that she had recently discovered that Dirk had accumulated sufficient funds to construct a wedding garden facility, renovate his home, and develop plans to build a hotel. Elaine requested that the circuit court hold a hearing to allow her to cross-examine Dirk regarding all "post-hearing, recently discovered, evidence." Subsequently, Dirk filed a motion to strike Elaine's exhibits arguing that they were unrelated to his exhibits and that no motion had been filed to reopen evidence. In response, Elaine claimed that the court had granted both her and Dirk leave to file additional documentation, and that her nine exhibits were "highly probative regarding the merits of the pending motion." The record is unclear if the parties' letters and accompanying exhibits were admitted into evidence.

¶ 12 In July 2016, the circuit court entered an order granting Dirk's petition for college expenses. The court did not address the supplemental documents or the motions filed by the parties after the hearing. However, the court made the following finding:

"As of December, 2014, funds within the [EJC] account were depleted. The Court **SPECIFICALLY FINDS** that these funds were used for education expenses and were not dissipated by [Dirk]. A satisfactory accounting for them has been made." (Emphasis in original.)

Based on the children's future educational needs and the financial resources of the parties, the court ordered Dirk to pay 80%, and Elaine 20%, of the children's future college expenses.

¶ 13 In August 2016, Dirk filed a posttrial motion for clarification of the circuit court's order. Dirk requested that the court's order be retroactively effective as of the Fall 2015 semester. He also requested that the court establish a method of reimbursement for Elaine's share of the expenses. Subsequently, Elaine filed a motion to reconsider, or in the alternative, requested that the court's order become effective for the Fall 2017 semester. Shortly thereafter, the court entered an order that established a method of reimbursement for Elaine's share of the expenses and made the court's order effective for the Fall 2015 semester. The court also denied Elaine's motion for reconsideration. Elaine filed a timely notice of appeal.

¶ 14

ANALYSIS

¶ 15 Elaine raises several issues on appeal pertaining to the circuit court's order granting Dirk's petition for college expenses. First, Elaine argues that there had not been a substantial change in circumstances to warrant modification of the MSA. Second, in

modifying the college expense provision of the MSA, the court's finding that the disputed EJC funds were used for college-related expenses was not supported by the evidence. Third, the court failed to give proper weight to the substantial amount of money that Elaine spent on the children's college-related expenses and the considerable income disparity between the parties. In response, Dirk asserts that the depletion of funds in the EJC account constituted a substantial change in circumstances, that the EJC account was used for college expenses, and that the apportionment of future college expenses between the parties was well within the court's discretion.

¶ 16 Educational expenses awarded under section 513(a) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/513(a) (West 2014)) are considered a form of child support. *In re Marriage of Chee*, 2011 IL App (1st) 102797, ¶ 9. A party seeking modification of a provision for payment of college expenses bears the burden of proving a substantial change in circumstances since the entry of the original provision. 750 ILCS 5/510(a)(1) (West 2014); see also *In re Marriage of Sassano*, 337 Ill. App. 3d 186, 194 (2003). A substantial change in circumstances is "some change in circumstances of any nature that would justify equitable action by the court in the best interests of the child." (Emphasis in original.) *In re Marriage of Singleteary*, 293 Ill. App. 3d 25, 34-35 (1997). A court's determination of whether certain facts establish a "substantial change" involves the weighing and balancing of those facts. *In re Marriage of Saracco*, 2014 IL App (3d) 130741, ¶ 16. A court's independent factual findings will not be disturbed unless deemed to be against the manifest weight of the evidence. *Id.* "A judgment is against the manifest

weight of the evidence only when the opposite conclusion is clearly apparent." *In re Parentage of J.W.*, 2013 IL 114817, ¶ 55.

¶ 17 Here, the circuit court determined that a substantial change in circumstances had occurred based on the depletion of funds from the EJC account and the need for additional contributions to cover the children's college expenses. The court relied on evidence that in 2012 the parties had \$108,699 in the EJC account and were only paying college expenses for Karl. However, at the time Dirk filed his petition in October 2014, Karl and Erika were attending college and Kurt was expected to be enrolled for the Fall 2015 semester. Also, the EJC account contained insufficient funds to pay for all three children's college expenses and the MSA did not provide for alternative funding. Thus, we conclude that the court's determination that a substantial change in circumstances had occurred was not against the manifest weight of the evidence.

¶ 18 We next address Elaine's contention that the circuit court abused its discretion in permitting Dirk to introduce additional evidence after the hearing and in ordering her to pay 20% of the children's future college expenses. In particular, Elaine argues that the court's finding was against the manifest weight of the evidence where \$20,416 was not accounted for by Dirk. In addition, Elaine argues that the court, in finding that she could afford to pay 20% of the children's college expenses, failed to consider the \$51,137.05 that she had spent on the children's college expenses and the considerable income disparity between the parties. In response, Dirk contends that the court properly analyzed the financial records and acted within its discretion, and even if the court did err in allowing the submission of additional exhibits after the hearing, it was harmless in nature.

¶ 19 A party has a right to a meaningful hearing prior to the court granting the opposing party's requested relief (*Dickson v. Dickson*, 58 Ill. App. 3d 828, 830 (1978)), which would include a full hearing and the right to have witnesses appear and be cross-examined in proceedings to modify support provisions of a divorce decree. *Regan v. Regan*, 38 Ill. App. 2d 383, 384 (1962). It is well-established that concepts of fair play require that all parties to an action be given a fair opportunity to confront and then rebut evidence which might be damaging to their position. *People v. Barham*, 337 Ill. App. 3d 1121, 1129 (2003). The circuit court's decision regarding the admission of evidence will not be reversed absent an abuse of discretion. *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill. App. 3d 18, 32 (2008). An abuse of discretion is likely to occur when a party is prevented from impeaching witnesses, supporting the credibility of impeached witnesses, or responding to new points raised by the opponent. *Fedt v. OakLawn Lodge, Inc.*, 132 Ill. App. 3d 1061, 1068 (1985).

¶ 20 At the hearing on Dirk's petition for college expenses, the circuit court declined Dirk's request for a continuance to obtain supporting documentation to show that each withdrawal from the EJC account had been used for college expenses. Instead, the court allowed the submission of this evidence without a full and proper evidentiary hearing. The court also denied Elaine's subsequent request to hold a hearing on all supplemental exhibits. Without a hearing, Elaine was unable to cross-examine Dirk and could not challenge the exhibits.

¶ 21 Moreover, a full and proper evidentiary hearing is required to allow all relevant evidence to be adduced by the parties so that the court can resolve the factual disputes

and make a reasoned determination as to the outcome. Without this, the court failed to develop an adequate record that this court can review. As a result, we are unable to determine whether the court considered both of the parties' supplemental letters, which contained unsworn summaries of purported facts, and the exhibits with supporting financial materials. Had these documents been admitted, a determination unclear from the record, they would have been admitted without adequate foundation. Thus, we conclude that the court abused its discretion when it failed to conduct a full and proper hearing before it modified the MSA.

¶ 22 Accordingly, the circuit court should hold a hearing that comports with proper procedure, which allows for the admission of all relevant evidence, and affords the parties a reasonable opportunity to challenge the evidence. The court should consider all competent evidence necessary to determine each parent's contribution, if any, towards college expenses and should make appropriate findings based on the properly admitted evidence. We express no opinion, however, as to whether that amount should be more, less, or equal to the division previously determined by the court.

¶ 23 **CONCLUSION**

¶ 24 Accordingly, we affirm the circuit court's finding that a substantial change in circumstances existed to merit a modification. We vacate and remand this cause for a further hearing consistent with this order to determine each parent's appropriate contribution, if any, towards their children's college-related expenses.

¶ 25 Affirmed in part; vacated and remanded in part.