2017 IL App (5th) 160326-U

NO. 5-16-0326

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
JEFFREY A. MUETH,	)	Clinton County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 09-D-113
	)	
IRIS L.W. MUETH,	)	Honorable
	)	Stanley M. Brandmeyer,
Respondent-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Moore and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in denying ex-wife's petition for rule to show cause regarding college funds of the parties' children. The trial court did not err in terminating child support payments to ex-wife, requiring instead that ex-husband pay child support into a separate account, where the parties' daughter was no longer living with ex-wife.

¶ 2 Respondent Iris L.W. Mueth (ex-wife) appeals from an order of the circuit court of Clinton County, which denied her petition for rule to show cause against petitioner Jeffrey A. Mueth (ex-husband) for converting the parties' children's college funds and terminated payment of child support to ex-wife, requiring instead that ex-husband pay

child support into a separate account for daughter H.M.'s reasonable and ordinary expenses. The two issues raised on appeal are: (1) whether the trial court erred in denying ex-wife's petition for rule to show cause regarding the college funds; and (2) whether the trial court erred in terminating payment of child support to ex-wife, requiring instead that ex-husband pay child support into a separate account. We affirm in part, reverse in part, and remand with directions.

¶ 3 BACKGROUND

¶ 4 The parties married on December 25, 1995. Two children were born during the marriage, C.M. (d.o.b. June 7, 1997) and H.M. (d.o.b. February 17, 1999). The parties were divorced on August 14, 2002. The divorce was only the beginning of this long and protracted litigation.

¶ 5 A judgment of dissolution was entered on December 19, 2003. The parties were granted joint custody, with primary custody going to ex-wife. Pursuant to the judgment, ex-husband was awarded, as custodian, pursuant to the Illinois Uniform Transfers to Minors Act (UTMA) (760 ILCS 20/1 *et seq*. (West 2002)), mutual funds invested through Fidelity Funds for C.M.'s and H.M.'s college expenses. At the time of dissolution, C.M.'s account was worth $9400 and H.M.'s account was worth $5900. The trial court ordered ex-husband to provide an annual accounting of the funds. The order further provided that "said funds shall be exclusively used initially for the benefit of each minor child's college education, the proceeds divided equally between the children, with all remaining amounts from each child's one-half share dispersed to each child upon reaching the age of 22 years."

¶ 6 A joint parenting order was entered by agreement of the parties on April 7, 2004. Both parties agreed that maximum involvement and cooperation on the part of both parents is in the best interests of the children and that neither party should poison the children's minds against the other or encourage or force the children to take sides. On August 18, 2008, ex-wife was allowed to remove the children to Missouri. Ex-husband is remarried and currently resides in New Baden, Illinois.

¶ 7 On June 9, 2015, an agreed order was entered finding C.M. was emancipated and modifying ex-husband's child support to 20% of his net income for the remaining child, H.M., effective June 2015. On September 22, 2015, ex-wife filed a petition for educational expenses for contribution for C.M.'s college expenses. On November 20, 2015, ex-wife filed a three-count petition for rule to show cause against ex-husband. Count II alleged that ex-husband converted C.M.'s college account.

¶ 8 All that remains of the UTMA funds is approximately $1900. Ex-husband testified he transferred the money from the Fidelity Funds accounts into bank accounts, and he used those funds to purchase vehicles for C.M. and H.M. He also spent money from the accounts on gas and insurance, a laptop for C.M., and orthodontic care for H.M. Six months after he purchased the vehicle for C.M., ex-husband took away the vehicle after C.M. was "disrespectful" and "belligerent." Ex-husband later sold the car. The proceeds from the sale were not returned C.M.'s account. H.M. still drives a 2012 Ford Focus ex-husband purchased for her approximately one month before she turned 16. The car was a source of conflict between the parties, as ex-wife did not want C.M. driving between Illinois and Missouri for visitation.

¶ 9 At the time of the hearing on the instant matters, C.M. was 19 and attending St. Louis Community College and continued to reside with ex-wife. C.M. and ex-wife get along. C.M. positively described the home that ex-wife provided for her and her sister. On the other hand, C.M. described her relationship with ex-husband as "strained." C.M. testified she wants the funds in her college account in order to transfer from the community college she is attending to a local four-year university.

¶ 10 The record reflects that unlike C.M. and ex-wife, H.M. and ex-wife do not get along. At the time of the hearing, H.M. was no longer living with ex-wife, having moved out on June 5, 2016, after an argument. H.M. went to live at the home of Carmen Murphy. H.M. described Carmen Murphy as her best friend. Carmen Murphy's mother is also named Carmen Murphy. In order to alleviate confusion, we will refer to the best friend as Carmen and the mother as Ms. Murphy.

¶ 11 Ex-husband is friends with Ms. Murphy. He had been to Ms. Murphy's house on two or three occasions before H.M. moved into her home. They had also gone on outings together with their children, including a trip to the zoo. Ms. Murphy testified at the hearing. She welcomed H.M. into her home. H.M. has her own room at the Murphys' house.

¶ 12 H.M. did not go live with ex-husband in New Baden because she wanted to finish her senior year at the same high school she had been attending since she was a freshman. H.M. was 18 and was scheduled to graduate from Rockwood High School in May 2017.

According to H.M., ex-wife was mentally abusive toward her for several years. H.M. finally moved out of the house after a fight about a phone ex-husband purchased for her.

¶ 13 During H.M.'s first six weeks at the Murphy residence, ex-husband took her shopping, bought decorations for her room, and helped paint her room. He put money on a prepaid card so H.M. could purchase gas. Ms. Murphy pays for H.M.'s expenses, and ex-husband has reimbursed her for H.M.'s personal expenses. During this time, child support payments continued to come out of his pay check and were sent to ex-wife, even though H.M. was no longer living with her.

¶ 14 On June 13, 2016, ex-husband filed a petition to terminate support. Ex-husband asked the court to terminate his obligation to ex-wife on the basis of equitable estoppel because H.M. was no longer residing with ex-wife. Between June 5, 2016, when H.M moved out, and the July 16, 2016, hearing, ex-wife had only given H.M. $20.

¶ 15 On June 17, 2016, ex-wife filed an emergency motion to enforce the joint parenting order of the parties and requested sanctions against ex-husband for violating its terms. Ex-wife asked that the court require H.M. to return to her home. In early July, Ms. Murphy and H.M. obtained emergency orders of protection against ex-wife in Missouri. Ex-husband suggested that H.M. get an order of protection, but did not help her secure it.

¶ 16 According to H.M., ex-wife was showing up at school, cheerleading practice, and Gold's Gym, where H.M. was a member, and was bothering her. Ms. Murphy testified that ex-wife entered her house on June 5, attempting to get H.M. to return home. Ms.

Murphy asked ex-wife to leave. She also testified that the police came to her house on five occasions to check on H.M.'s welfare at the request of ex-wife.

¶ 17 When ex-wife challenged the order of protection, the Missouri court added a requirement that H.M and ex-wife attend counseling. H.M. refused to do so. She testified that she and ex-wife had previously been to counseling with the same counselor. Based on her past experience with the counselor, H.M. did not believe additional counseling would be productive because the counselor was biased in favor of ex-wife.

¶ 18 After a hearing, the trial court denied count II of ex-wife's petition for rule to show cause as to the UTMA funds on the basis that ex-wife no longer has standing to pursue ex-husband for spending C.M.'s college funds. The trial court found that any cause of action for misuse of those funds belongs to C.M., not ex-wife. The trial court denied ex-wife's request for an award of attorney fees. The trial court also denied ex-wife's petition to enforce the parties' joint parenting agreement in which ex-wife sought the court's assistance in securing the return of H.M. to her home. The trial court found the appropriate venue for ex-wife to seek the return of H.M to her home from the home of Ms. Murphy was Missouri, not Illinois.

¶ 19 The trial court denied the petition to terminate child support and ordered ex-husband to pay child support for H.M. into a segregated trust account for the benefit of H.M. "until the minor is emancipated by court order or attains the age of majority pursuant to child support statute which essentially means 18 and out of high school and to be administered by [ex-husband]." Ex-husband is to pay the same amount into the trust

account ($1246 per month) and to accommodate the best interests of H.M. and meet the reasonable and ordinary expenses of H.M. Ex-wife now appeals.

¶ 20 ISSUES

¶ 21 I. CONTEMPT

¶ 22 The first issue raised on appeal is whether the trial court erred in denying ex-wife's petition for rule to show cause why ex-husband should not be held in contempt regarding the UTMA accounts. Ex-wife contends the trial court erred in denying count II of her petition for rule to show cause against ex-husband for converting the children's UTMA accounts and asks us to remand the case with instructions to enter a finding of contempt, along with an award of reasonable attorney fees and costs. Ex-husband responds that (1) ex-wife does not have standing to challenge the UTMA accounts because she was not ordered to pay anything toward C.M.'s or H.M.'s college expenses or toward the UTMA accounts, and (2) payment of the remainder amount to be paid to the children at age 22 is not yet ripe because neither of the children has reached that age. After careful consideration, we agree with ex-wife that the trial court erred in denying count II of her petition for rule to show cause against ex-husband for converting the UTMA accounts.

¶ 23 Whether a party is guilty of contempt is a question of fact for the trial court, whose finding will not be disturbed on appeal unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion. *In re Marriage of Longston*, 103 Ill. 2d 266, 286-87 (1984). As a defense to a contempt action, the responding party need only show that his or her failure to comply with the order was not a willful or contumacious

refusal to pay. *In re Marriage of Hardy*, 191 Ill. App. 3d 685, 689 (1989). In the instant case, the undisputed evidence was that the college funds were depleted, with only about $1900 remaining. The remaining money was no longer in a UTMA account, but was in a Regions Bank account. The burden then shifted to the ex-husband to show that conversion of these funds was not willful or contumacious. *In re Marriage of Chenoweth*, 134 Ill. App. 3d 1015, 1018 (1985).

¶ 24 During his testimony, ex-husband freely admitted he converted the funds in the UTMA accounts which he had been awarded, as custodian, during earlier dissolution proceedings. He transferred the money in the Fidelity Funds accounts in which the UTMA funds were invested to Regions Bank accounts, at least one of which was personal. Ex-husband admitted that by the time C.M. turned 18, "she did not have any funds left because I decided that [H.M.] was deserving of the funds and [C.M.] was not because [C.M.] number one, she didn't abide by the rules." He then went on to admit that he "used the money from a UTMA. It had nothing to do with college." He explained how he purchased a car for C.M. by using money from the UTMA account, but later sold that car. He then used those funds ($12,000) to pay his attorney. We agree with ex-wife that the only reasonable interpretation of ex-husband's testimony is that he knowingly and intentionally violated the terms of the parties' judgment of dissolution.

¶ 25 There was a valid court order requiring that the money in the UTMA accounts be used exclusively for the benefit of each child's college education. If there was any money remaining, then each child would receive one half of the remainder upon reaching the age of 22. That ex-husband chose to cash in the funds to purchase his daughters various

items, including cars, a laptop, and orthodontic care, is bad enough. But using his custodial authority to sell C.M.'s car in order to punish her for violating household rules and then using those converted funds to pay his legal fees is simply outrageous. Thus, the trial court's finding that ex-husband's actions do not constitute contempt is against the manifest weight of the evidence and reflects an abuse of discretion.

¶ 26 Ex-husband asserts that ex-wife lacks standing to challenge his conversion of the UTMA accounts and spending the money in those accounts on expenses not related to the minors' college educations. In support of that argument, ex-husband cites *In re Marriage of Hopwood*, 378 Ill. App. 3d 746 (2008). We find that case distinguishable from the instant case.

¶ 27 In *Hopwood*, the dissolution judgment ordered the husband to pay and hold his ex-wife harmless for a third-party debt her father guaranteed. The husband failed to make the payments, but the father voluntarily chose to repay the debt in order to protect his own credit. The ex-wife later brought a contempt action against her ex-husband for his failure to comply with the dissolution judgment. The *Hopwood* court denied her relief because " 'a cause of action on an indemnity agreement does not arise until the indemnitee either has had a judgment entered against him for damages[ ] or has made payments or suffered actual loss.' " *Id*. at 750 (quoting *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill. 2d 179, 199 (1989)). Because the ex-wife sustained neither loss nor liability, the court found she lacked standing to enforce the indemnity provision of the dissolution judgment. *Id.* The instant case has nothing to do with an indemnity agreement.

¶ 28 A child's right to enforce the educational expense provision of the Illinois Marriage and Dissolution of Marriage Act stems from his or her position as a third-party beneficiary to the parents' settlement agreement contract. *Miller v. Miller*, 163 Ill. App. 3d 602, 612 (1987). "[A] third party who is the direct beneficiary of a contract has standing to enforce the obligations for his benefit incurred under that contract." *Id*. Therefore, where the settlement agreement clearly provides for educational expenses, the child, as third-party beneficiary to the agreement, has standing to bring a claim to enforce his or her rights under the contract. *Id*. at 617. This, however, does not mean that the ex-wife lacks standing to enforce the educational provisions found in the order of dissolution.

¶ 29 Here, ex-wife seeks to ensure that her daughters receive the college educations the parties had been planning for their children for years. Ex-husband converted the children's college funds over which he was made custodian during dissolution proceedings and spent the money on expenses unrelated to college, including his own legal fees. The record is clear that neither daughter is in a financial situation where she could mount her own challenge to ex-husband's conversion of college funds. Under these particular circumstances, we find ex-wife has standing to challenge ex-husband's conversion of college funds.

¶ 30 Ex-husband has also failed to convince us that because the remainder of the amount is not to be paid until the children attain the age of 22, the issue is not yet ripe. Whether or not an issue is ripe generally requires consideration of two factors: (1) the fitness of the issue for judicial decision; and (2) the hardship to the parties in withholding

court consideration. *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 483 (2008) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)). Here, both factors favor the ex-wife.

¶ 31 The record shows that ex-husband has already spent nearly all the money in the accounts on items unrelated to the children's college educations. Therefore, the issue of whether ex-husband should be held in contempt for conversion of such funds is indeed ripe. Accordingly, we reverse that portion of the trial court's order denying ex-wife's petition for rule to show cause and remand with instructions to enter a finding of contempt. As for an award of attorney fees and costs, that matter is better left to the trial court's discretion.

¶ 32 II. CHILD SUPPORT

¶ 33 The second issue we are asked to address is whether the trial court erred in terminating payment of child support to ex-wife, requiring instead that ex-husband pay child support into a separate account. Ex-wife concedes that it would be disingenuous for her to suggest that she should receive child support for H.M. in light of the fact that H.M. no longer lives with her. She contends, however, that given ex-husband's conversion of funds in the UTMA accounts and his conduct in fostering a rift between her and H.M., the order allowing him to pay child support into an account and administer it to accommodate H.M.'s needs should be reversed. She asks that we remand to the trial court with instructions to allow her to be responsible for the child support funds ($1246 per

month) and to provide for H.M. with those funds, with any remaining funds dispersed to H.M. upon her graduation from high school.

¶ 34 The setting or modification of child support is within the trial court's discretion and will not be reversed absent an abuse of that discretion. *In re Marriage of Bussey*, 108 Ill. 2d 286, 296 (1985); *In re Marriage of Sweet*, 316 Ill. App. 3d 101, 105 (2000). An abuse of discretion occurs only where a trial court's ruling is arbitrary, fanciful, or where no reasonable person would take the view adopted by the trial court. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). Ex-wife has failed to cite any cases factually on point with the instant case.

¶ 35 Here, the minor is not living with either parent, but is instead living with a third party, Ms. Murphy. While ex-wife contends this was a carefully plotted move on the part of ex-husband and Ms. Murphy, the record does not support that assertion. Ms. Murphy is the mother of H.M.'s best friend, Carmen. Ms. Murphy is gainfully employed and appears to want nothing more than to help H.M. finish her senior year at the high school she has been attending since she was a freshman.

¶ 36 The trial court fashioned a unique remedy to address the situation where H.M. went to live with Ms. Murphy. Ex-husband is still required to pay child support, but not to ex-wife. The trial court's order requires ex-husband to pay child support into a separate account, either a "trust account or other segregated account for the benefit of the minor until the minor is emancipated by court order or attains the age of majority *** to be

administered by the [ex-husband]." Under the circumstances presented here, we cannot say this order constitutes an abuse of discretion.

¶ 37 CONCLUSION

¶ 38 We affirm that portion of the trial court's order regarding arrangements made for child support, but reverse with regard to ex-wife's petition for rule to show cause. We remand for further proceedings consistent with this order. Finally, we note that the parties' marriage ended in 2002, and that H.M. was due to graduate in May 2017. The only possible matter the parties have left to argue about is the converted college funds. We encourage both parties to address this matter quickly and move on with their lives.

¶ 39 Affirmed in part; reversed in part; remanded with directions.