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FILED
Jun 14 2011, 8:52 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

KAREN L. VANDERBOSCH,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 02A03-1007-DR-357
	)	
THOMAS S. VANDERBOSCH,	)	
	)	
Appellee.	)	

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable Thomas J. Felts, Judge
Cause No. 02C01-9606-DR-821

June 14, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Karen Vanderbosch (Mother) appeals from the trial court's order finding that Thomas Vanderbosch (Father) overpaid child support, giving Father a credit for that overpayment, and finding that one of the parties' children repudiated his relationship with Father and thereby eliminated Father's obligation to contribute to post-secondary educational expenses. Mother presents several issues for our review, which we restate as the following:

1. Whether the trial court erred in adjudicating Mother's motion to correct error after such time as the motion was deemed denied?

2. Whether the trial court abused its discretion in finding that Father's overpayment of child support was involuntary, and thus, that Father was entitled to a credit in the amount of the overpayment?

3. Whether the trial court abused its discretion in concluding that one of the children repudiated his relationship with Father?

4. Whether in Indiana the doctrine of repudiation should be refined, modified, or overruled?

5. Whether the trial court abused its discretion in finding the affidavit submitted by Mother in support of her motion to correct error/motion for relief from judgment was inadmissible?

We reverse and remand.

During the course of their marriage, Mother and Father had four children, Joseph, born January 14, 1986; Carol, born December 18, 1987; Scott, born June 7, 1991; and Mark, born May 8, 1993. On January 20, 1998, the trial court entered an order dissolving the parties' marriage, awarding Mother primary physical custody of the four children, and ordering Father to pay child support in the amount of $359.00 per week plus an additional sum of $91.00 per week toward a support arrearage determined to be $10,528.00. Father was granted supervised visitation with the children each Wednesday from 6:00 p.m. to 8:30 p.m. and on alternate weekends from Friday at 6:00 p.m. until Sunday at 6:00 p.m. with such visits

to occur at Father's mother's home. Father's request for unsupervised visitation was conditioned upon Father completing a seminar and an evaluation regarding anger control issues and his parenting abilities.

On March 23, 2000, the trial court modified Father's child support obligation to $242.00 per week effective January 11, 2000[1] and to $262.00 per week beginning August 1, 2000. The court also found that Father was in arrears in the amount of $4420.00 and ordered Father to pay toward the arrearage at a rate of $58.00 per week. The child support and arrearage were to be paid pursuant to an income withholding order that the court activated that day.[2]

Over nine years later, on September 22, 2009, Mother filed a petition for modification of support, submitting as changed circumstances the increasing age of the minor children and the present enrollment of the two eldest in college.[3] Mother specifically sought a modification of Father's child support obligation to include provisions for Father's contribution to post-secondary college expenses and his continued contribution to the education of the two youngest children in a parochial school. In response, on December 3, 2009, Father filed a verified petition for emancipation as to Joseph and Carol (the two eldest children) because they were both over twenty-one years of age.[4] On the same day, Father

[1] The modification in Father's child support obligation was made retroactive to January 11, 2000, the day Father filed his petition requesting the modification.

[2] The income withholding order was never adjusted until the trial court's order following the latest proceedings in this case.

[3] We note that Joseph attended the University of Louisville in pursuit of a Doctorate in Dentistry. Carol attended Syracuse University, New York, and is seeking a degree in architecture.

[4] It appears from the record that the parties resolved by agreement Father's verified petition for emancipation of the parties' two eldest children. Their emancipation is not at issue in this appeal.

also filed a motion requesting the court to determine his arrearage "if any" and "for all other just and proper relief in the premises." *Appellant's Appendix* at 73.

The parties appeared for a hearing on December 8, 2009, and agreed to present their evidence in a "summary fashion." *Transcript* at 4. On December 17, 2009, the trial court entered an order modifying Father's child support obligation to $211.00 per week effective December 3, 2009, finding that Father had overpaid his support obligation in the amount of $13,207.66,[5] and crediting such overpayment to cover his portion of the parochial school tuition of the two remaining unemancipated children. The court further found that Scott had repudiated his relationship with Father and thereby obviated the need for Father to contribute any support for Scott's college education expenses.[6]

On January 15, 2010, Mother filed a motion to correct error and/or motion for relief from judgment and attached thereto a supporting affidavit. Father filed a memorandum in opposition to Mother's motions. The court held a hearing on the pending motions on May 12, 2010.[7] On June 21, 2010, the court entered an order in which it found that Mother's supporting affidavit was inadmissible. The court granted Mother a partial rehearing on the matter of repudiation (upon finding that the repudiation determination as to Scott was premature and unsupported by the evidence) and Father's contribution to college education expenses. The court also affirmed that portion of its December 2009 order concerning

[5] During the December 8 hearing, the parties agreed that Father had overpaid on his support obligation by $13,401.06. We cannot account for the discrepancy in the amount of the overpayment.

[6] Scott was set to graduate from Concordia Lutheran High School in May 2010 and was planning to attend Purdue University and pursue a degree in chemical engineering. The court found that the issue of Mark's college education expenses was not ripe for determination because Mark was not scheduled to graduate from high school until May 2011.

Father's overpayment of child support, but set aside the portion of its order that allowed Mother to retain Father's overpayment as a credit toward Scott's and Mark's parochial school expenses and ordered Mother to repay Father the amount of the overpayment. Mother now appeals.

1.

Mother argues that the trial court erred in adjudicating her motion to correct error after it was deemed denied. Father agrees and consents to the trial court's belated order on Mother's motion to correct error being vacated. Pursuant to Ind. Trial Rule 53.3(A), a motion to correct error is deemed denied if the trial court fails to rule on such motion within thirty days after it was heard. This rule is self-activating upon the passage of thirty days. *Demmond v. Demmond*, 706 N.E.2d 566 (Ind. Ct. App. 1999), *trans. denied*.

Here, the court held a hearing on Mother's motion to correct error on May 12, 2010. The trial court was required to rule on Mother's motion by June 11, 2010, i.e., within thirty days of the hearing. The trial court, however, did not enter its order on Mother's motion to correct error until June 21, 2010, after the motion was deemed denied by virtue of the time limit set forth in T.R. 53.3. We thus conclude that the trial court's belated order on Mother's motion to correct error is void. *See Wurster Const. Co., Inc. v. Essex Ins. Co.*, 918 N.E.2d 666 (Ind. Ct. App. 2009). The trial court's order on Mother's motion to correct errors must therefore be vacated.

2.

[7] The transcript of this hearing is not in the record on appeal.

Mother argues that the trial court abused its discretion in finding that Father was entitled to a credit against his financial obligation relating to future tuition to private parochial school for the youngest two children in the amount of his overpayment.[8] Mother maintains that Father delayed in seeking a modification until such time as she sought an increase in child support. Mother thus characterizes Father's overpayment as voluntary and as such, contends Father is not entitled to a credit, but rather, his overpayment should be regarded as a gift. In response, Father asserts that because the overpayment was by operation of an income withholding order activated by the court, his overpayment was involuntary. He maintains that the credit in his favor was proper.

At the hearing on Mother's motion for modification of child support and Father's motion to determine arrearage, the parties agreed that Father had overpaid his support obligation. The court determined that Father was entitled to a credit in the amount of his overpayment and directed that such monies be applied to Mark and Scott's future tuition expenses at Concordia Lutheran High School, a private parochial school. The court further determined that after Father's credit for tuition, his obligation to pay for Mark's and Scott's parochial school tuition ceased.

With regard to credits for future support responsibilities, our Supreme Court has noted:

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[8] The trial court specifically found as follows:

> 2.9 There is a support overpayment made by Father to Mother in the amount of $13,207.66 as of December 2, 2009. Mother shall retain this overpayment as Father's payment for a portion of Mark and Scott's tuition and fees at Concordia Lutheran High School. After this credit for this tuition, Father is no longer obligated to pay for any of Mark and Scott's Concordia Lutheran High School education, up to and including both sons' graduation from high school.

> Indiana courts have generally prohibited child support obligors from attempting to satisfy their future support responsibilities through non-conforming payments that exceed the amount owed the support recipient. In such cases, our courts have held that "child support payments cannot be applied prospectively to support not yet due at the time of the overpayment." *Drwecki v. Drwecki*, 782 N.E.2d 440, 448 (Ind. Ct. App. 2003) (*quoting Matson v. Matson*, 569 N.E.2d 732, 733 (Ind. Ct. App. 1991)). The general rule prevents a non-custodial parent from building up a substantial credit and then later refusing to make support payments, which "would thwart the court's purpose of providing regular, uninterrupted income for the benefit of the children." *Id.* at 448-49. Where a parent voluntarily overpays his or her child support in an attempt to receive a prospective credit, the excess amount is properly treated as a gratuity to the children and no credit is granted. *See Holy v. Lanning*, 552 N.E.2d 44, 45 (Ind. Ct. App. 1990) (noting that any excess child support payment made by an obligor should be treated as a gratuity or as voluntary contributions for the support of the children).

Brown v. Brown, 849 N.E.2d 610, 615-16 (Ind. 2006). The rationale underlying this rule does not fully apply where the obligor does not voluntarily build up a substantial credit. *Drwecki v. Drwecki*, 782 N.E.2d 440.

We begin by noting that the overpayment stems from Father's continued payment of the $58 per week toward the arrearage after the arrearage was satisfied. Mother argues that Father's payments should be deemed voluntary because the impetus was on Father to come to the court and request relief from the income withholding order once the arrearage was paid off. Father asserts that to consider a thirteen thousand dollar overpayment to be a gift is "ridiculous." *Transcript* at 31. He maintains that his overpayment was involuntary because it was pursuant to an income withholding order. He also claims that he was not informed and that he was not aware that his arrearage had been satisfied.

We do not dispute that Father was not notified that his arrearage had been paid off. That said, it was Father's responsibility, as the payor of child support, to monitor his payment

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Appellant's Appendix at 48.

of his child support obligation as well as his payments toward his arrearage so as to comply with the court's order. The impetus was therefore on Father to notify the court when such arrearage was satisfied and to request an abatement of his child support payment. We find that putting the impetus on Father to notify the court as to when his arrearage was satisfied is not too much of a burden. To be sure, given that Father was ordered to pay $58 per week toward a $4420.00 arrearage, it takes little more than thirty seconds to calculate that Father's arrearage would have been satisfied in approximately eighteen months. At such time as the arrearage became satisfied, Father could have notified the court. Father, however, neglected to monitor the payment of his arrearage and to that end, Father cannot now claim that his continued payment of $58.00 (originally earmarked as payment toward the arrearage) after the arrearage was satisfied was involuntary.

Under these circumstances, we simply cannot say that because the monies were pursuant to an income withholding order that the payments should automatically be deemed involuntary. *Cf. Carpenter v. Carpenter*, 891 N.E.2d 857 (Ind. Ct. App. 2008) (finding father's overpayments were involuntary where father, after being notified that his arrearage had been paid, immediately took steps to reduce his wage assignments to reflect discontinuance of arrearage payments). In other words, there is nothing to suggest that Father's continued payment of $58 a week for over seven years after the arrearage was satisfied was in some manner involuntary. To be sure, Father took no action to abate his support obligation until Mother filed her motion seeking a support modification and Father's contribution to post-secondary education expenses. Under the facts of this case, we find it appropriate to consider Father's excess payments to be a gratuity for the benefit of the

children. We therefore conclude that the trial court erred in crediting Father with the amount of his overpayment.

3.

Mother argues that the trial court abused its discretion in finding that Scott had repudiated his relationship with Father and thereby, that Father need not contribute to Scott's college education expenses. Specifically, Mother argues that there is insufficient evidence in the record to support the court's determination as to repudiation.

We begin by noting that the parties agreed to present their case in a "summary fashion," i.e., the parties spent the majority of the hearing framing the issues and summarizing the evidence. The court then confirmed with each of the parties that the representations made by their respective attorneys were accurate. Father agreed with his attorney's representations and had nothing to add. Mother agreed with her attorney's representations but sought to supplement the record with evidence of educational expenses for the parties' four children dating back to 1996. After some discussion, the trial court allowed Mother's additional information.

While there is no prohibition on the use of a summary proceeding, especially in instances where, as here, the parties agree to such, we have "caution[ed] against widespread use of the procedure in heavily contested cases because of the limits it places on appellate review." *Trout v. Trout*, 638 N.E.2d 1306, 1308 (Ind. Ct. App. 1994), *trans. denied*. The issue presented here concerns whether one of the parties' children has repudiated his relationship with Father. This is a fact-sensitive determination that is not well suited for a summary proceeding.

Repudiation of a parent is "a complete refusal to participate in a relationship with his or her parent." *Norris v. Pethe*, 833 N.E.2d 1024, 1033 (Ind. Ct. App. 2005) (citing *Bales v. Bales*, 801 N.E.2d 196 (Ind. Ct. App. 2004), *trans. denied*). Under certain circumstances, repudiation will obviate a parent's obligation to pay certain expenses for the child, including college expenses. *Norris v. Pethe*, 833 N.E.2d 1024. "[W]here a child, as an adult over eighteen years of age, repudiates a parent, that parent must be allowed to dictate what effect this will have on his or her contribution to college expenses for that child." *McKay v. McKay*, 644 N.E.2d 164, 166 (Ind. Ct. App. 1994) (citation omitted). Moreover,

> adult children who willfully abandon a parent must be deemed to have run the risk that such a parent may not be willing to underwrite their educational pursuits. Such children, when faced with the answer 'no' to their requests, may decide to seek the funds elsewhere; some may decide that the time is ripe for reconciliation. They will not, in any event, be allowed to enlist the aid of the court in compelling that parent to support their educational efforts unless and until they demonstrate a minimum amount of respect and consideration for that parent.

Id. at 167 (quotation omitted).

Here, the record is scant in terms of evidence relevant to a determination of repudiation, and the trial court recognized as much in its belated order on Mother's motion to correct error. Indeed, the entirety of the evidence on this subject is that Father claims he has not spoken with Scott or Mark in five years and that they have stopped returning an undisclosed number of phone calls and e-mails. In contrast to Father's meager evidence of repudiation, Mother acknowledges that Father "is withdrawn from the lives of the children," *Transcript* at 28, but asserts that Father has not demonstrated any interest in having a relationship with them.[9] We cannot say that Father's non-

[9] We further note that the records of the divorce proceedings indicate that Father was to have only supervised visitation with his children until such time as he completed a seminar on parenting and an anger assessment. In the order dissolving the marriage and awarding Mother custody of the children, the court acknowledged that Mother and Father have drastically different parenting styles and directed Father and Mother to attend

descript assertion that Scott has not returned phone calls or e-mails is sufficient evidence from which a determination of repudiation can be made. As noted above, repudiation by a child is a complete refusal to participate in a relationship with his or her father. Repudiation is more than poor communication. *See Staresnick v. Staresnick*, 830 N.E.2d 127 (Ind. Ct. App. 2005). To find repudiation, there must be evidence the parent stood with open arms to maintain a relationship with his or her *adult* child and that the child completely rejected such efforts and refused to participate in the relationship. *McKay v. McKay*, 644 N.E.2d 164.[10]

We further acknowledge that the trial court in its belated order on Mother's motion to correct error recognized that its determination that Scott repudiated his relationship with Father was premature because Scott was not yet an adult as he had not yet turned eighteen. To correct its errors in these regards, the trial court granted Mother rehearing on the issue of repudiation. Because the trial court's order was entered after the motion to correct error was deemed denied, we found the trial court's order, including that portion directing rehearing on the issue of repudiation, to be void. Having concluded that the evidence before the court was insufficient to support a finding of repudiation, we remand to the court to reconsider the evidence and hold a new hearing if necessary in order to make a determination on the issue of Scott's repudiation of his relationship with Father.

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sessions to increase their knowledge of non-violent parenting skills. There is no evidence in the record evidencing that Father ever complied with the trial court's directives or exerted any effort, other than an unaccounted for number of phone calls and e-mails, to maintain a relationship with his children.

[10] In *McKay*, following an acrimonious divorce, the relationship between father and his sons deteriorated to the point where father voluntarily relinquished his visitation rights. A few years later, father sought treatment for depression and attempted reconciliation with his children. When informal efforts failed, Father filed a petition with the court to enforce his visitation rights. Father continued in his efforts to reestablish a relationship with his children. Despite his efforts, Father's twenty-year-old adult son testified that he had no interest in reestablishing a relationship with his father and that nothing could be done to change his mind. The adult son considered his mother and step-father to be his parents and admitted that all he wanted from his father was money. Based on the circumstances, the court concluded that the adult son had repudiated his relationship with his father.

Subsequent to this determination, the trial court is directed to reconsider Father's contribution, if any, to Scott's college expenses.

4.

Mother asks this court to refine, modify, or overrule Indiana's version of the repudiation doctrine. Mother contends this is necessary due to its application in cases such as this where there is an underlying history of domestic violence. In this vein, Mother asserts that the doctrine does not "neatly align with 'the realties [sic] of modern life.'" *Appellant's Brief* at 24 (quoting *A.B. v. S.B.*, 837 N.E.2d 965, 970 (Ind. 2005)). In support of her request, Mother sets forth the evolution of the doctrine since its adoption by this court in *McKay, supra,* and offers little more in support of why we should revisit the doctrine. Mother asserts only that in light of this case, "with its underlying history of domestic violence", the doctrine should be refined. *Appellant's Brief* at 24. Mother, however, does not cite to any portion of the record that supports her claim of domestic violence. Given the lack of cogent argument and the minimal record before this court, we decline Mother's request to refine, modify, or overrule the doctrine of repudiation.

5.

Mother argues that the trial court abused its discretion in finding the affidavit she submitted in support of her motion to correct error and/or motion for relief from judgment to be inadmissible. In her affidavit, Mother describes how the relationships between Father and the children deteriorated in the years following the divorce. Mother also sets forth Father's lack of effort and perceived lack of interest in the lives of their children. This evidence bears upon the court's determination as to repudiation. We concluded above, however, that the record before the court from which the court made its determination of repudiation (which does not include this affidavit) does not sufficiently establish that Scott repudiated his

relationship with Father. The information contained in the affidavit does not change this conclusion. On remand for a determination of repudiation, if Father so desires to argue, Mother will have the opportunity to present to the court evidence contained in her affidavit that refutes Father's claim of repudiation. We need not therefore address the propriety of the trial court's determination as to the admissibility of Mother's affidavit.

Judgment reversed and remanded.

BAILEY, J., and BROWN, J., concur.