2023 IL App (3d) 220333-U

Order filed January 23, 2023

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2023

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| *In re* MARRIAGE OF<br>KETURAH S. KELLY,<br><br>Petitioner-Appellant,<br><br>and<br><br>COLIN D. KELLY,<br><br>Respondent-Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court<br>of the 18th Judicial Circuit,<br>DuPage County, Illinois.<br><br>Appeal No. 3-22-0333<br>Circuit No. 16-D-1848<br><br>The Honorable<br>Linda E. Davenport,<br>Judge, Presiding. |

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JUSTICE HETTEL delivered the judgment of the court.
Justices McDade and Peterson concurred in the judgment.
Justice McDade specially concurred.

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**ORDER**

¶ 1 *Held*: Trial court did not abuse its discretion in denying mother's motion to vacate agreed order transferring custody of children to father where mother did not present credible evidence that she was under duress when order was entered.

¶ 2 Petitioner Keturah Kelly and respondent Colin Kelly were married in 2008 and had two children together. In 2016, Keturah filed a petition for dissolution of marriage. In 2017, the trial court entered a judgment for dissolution and a parenting allocation judgment awarding custody of the children to Keturah and no parenting time to Colin. In 2020, the court entered an agreed order

allowing Colin to have parenting time with the children. In November 2021, Keturah filed a petition to restrict Colin's parenting time, and one month later, Colin filed a petition for removal and modification of decision-making and parenting time. At a hearing on March 9, 2022, the trial court entered an agreed order transferring custody of the children to Colin. Less than one month later, Keturah filed a motion to vacate the agreed order. The trial court denied Keturah's motion to vacate. Keturah appeals that decision, arguing that (1) she was under duress when she agreed to the order, and (2) the court lacked authority to enter the order because Colin's petition was improper. We affirm the trial court's denial of Keturah's motion to vacate.

¶ 3 I. BACKGROUND

¶ 4 The parties were married in October 2008. They had two children together: Z.D.K., born in July 2008, and Z.Y.K., born in August 2011. In September 2016, Keturah filed a petition for dissolution of marriage. Keturah alleged that she and Colin had lived separate and apart since April 2012, with her and the children living in Aurora, and Colin lived in Tampa, Florida. Colin filed a counter-petition and an amended counter-petition for dissolution of marriage.

¶ 5 At the dissolution trial on August 24, 2017, Colin failed to appear personally or through counsel. Thus, the court entered a judgment for dissolution of marriage and a parenting allocation judgment without any input from Colin. Those judgments awarded Keturah custody and "sole decision-making for the children" and restricted Colin from having any contact or parenting time with the children until "further order of Court." Colin was ordered to pay Keturah child support of $972 per month and monthly maintenance of $1,310. The court also ordered Colin to reimburse Keturah for all the children's expenses incurred since September 1, 2015, totaling $19,999.50.

¶ 6 In October 2019, Colin filed a petition seeking a hearing to determine whether it was in the children's best interests to have no contact or parenting time with him. In March 2020, Colin filed

an emergency petition to restrict Keturah's parenting time, alleging that "[t]he children's mental and physical health as well as their emotional development is seriously endangered as a result of the course of conduct that Keturah has taken during her parenting time." Colin alleged that Keturah was charged with two counts of domestic battery in April 2019 for hitting Z.D.K. and was indicated by the Illinois Department of Children and Family Services (DCFS) in May 2019 for "cuts, bruises, welts, abrasions, and oral injuries" for the same incident.

¶ 7 In March 2020, the trial court appointed a guardian *ad litem* for Z.D.K. and Z.Y.K., and Colin filed a petition seeking modification of the parental allocation judgment and an order granting him parenting time and turnover of the children to his custody. Colin alleged that since the court's judgment was entered in 2017, a "substantial change in circumstances has occurred." Colin sought parenting time as well as an order granting him physical possession of the children.

¶ 8 In October 2020, the court entered an agreed order that (1) provided Colin supervised parenting time with the children every other weekend, (2) required the parties to use the services of Aubrey Benton for family/reunification support therapy, (3) entitled Colin to Zoom calls every week with the children to be observed by Benton, (4) entitled both parties to access the children's school and medical records, (5) required both parties to follow all recommendations of the children's medical and therapeutic providers, and (6) required both parties to "advise the other of where he/she and the children reside." A previous order entered by the court required the parties to exclusively use Our Family Wizard (OFW) for communication.

¶ 9 In March 2021, Colin filed a petition for rule to show cause and a petition to enforce the October 2020 order. Colin alleged that Keturah (1) unilaterally cancelled his visits with the children, (2) discontinued family therapy, (3) interfered with his Zoom calls with the children, (4) prevented him access to the children's school and medical records, (5) did not follow the therapist's

recommendations, (6) did not provide him with the children's address, and (7) failed to timely respond to him in OFW. In April 2021, the trial court entered an order granting Colin unsupervised parenting time with the children every other weekend and Facetime communication with the children daily.

¶ 10 On November 23, 2021, Keturah filed an emergency petition to restrict Colin's parenting time. On December 21, 2021, Colin filed a petition for removal and to modify decision-making and parenting time. On January 3, 2022, Keturah filed a response and motion to strike Colin's petition.

¶ 11 The hearing was set for March 9, 2022, on Keturah's motion to strike, Colin's removal petition, and Keturah's emergency petition. On that date, Attorney Jason Polcyn sought leave to enter his appearance as counsel for Keturah, which the trial court allowed. Polcyn then orally requested a continuance, which the trial court denied. Polcyn stated he wanted to speak with Colin's attorney to possibly "work some agreement out." The trial court agreed to give the parties' attorneys time to confer. Later, Polcyn reentered the courtroom and stated: "I believe we're going to have a full agreement, Your Honor." Keturah also entered the courtroom, sat down, and the trial court recited the terms of the agreement that counsel provided to her.

¶ 12 The trial court explained that the agreement required the children to relocate to Missouri with Colin the Saturday after school recessed for spring break. The agreement required Keturah to "execute releases to allow all medical, optical and dental records to be transferred to Colin" and provided that Colin would "have sole-decision-making with regard to medical, dental, optical care *** [and] education." The agreement further provided that Keturah would have parenting time with the children on Memorial Day weekend within 20 miles of Colin's residence. The court stated that if the Memorial Day visitation went well, it would "welcome" a motion to increase parenting

time and allow the parenting time to take place at or near Keturah's residence. The agreement also provided that the children would communicate with Keturah three times a week through Duo. Neither party objected to the court's summarization of the agreement.

¶ 13 On the same date, the trial court entered an agreed order "supersed[ing] all previous orders regarding the allocation of parental rights/responsibilities and parenting time." The written order was consistent with the trial court's verbal summarization and further provided that Keturah would have parenting time on alternating weekends from Friday at 7:00 p.m. until Sunday at 6:00 p.m. beginning on Memorial Day weekend. Until October 1, 2022, Keturah's parenting would be exercised within 20 miles of Colin's home. After October 1, 2022, Keturah could start exercising parenting time in the Chicagoland area. The agreement prohibited Keturah's mother from being present during Keturah's parenting time. The agreement also required Colin to "immediately" enroll the children in school, select a pediatrician for them and enroll them in therapy and required Keturah to "immediately execute all releases necessary to transfer the children's educational and medical records to the children's educational and medical providers." Pursuant to the agreement, Keturah voluntarily withdrew "all pending pleadings filed by her without prejudice."

¶ 14 On March 21, 2022, five days before the transfer of the children was to take place, Colin filed an emergency petition for contempt and immediate turnover of the children. He alleged that Keturah refused to comply with the provisions of the March 9, 2022, agreed order because she would not provide him with the documents necessary to enroll the children in school and with medical providers. The court held a hearing on Colin's petition and entered an order requiring Keturah to immediately remove the children from school and turn them over to Colin, along with all their belongings, clothing, medication, birth certificates, social security numbers and insurance

information. Keturah became visibly upset with the court's ruling, and the trial court asked Keturah to "step outside" if she could not control herself.

¶ 15 On April 7, 2022, Keturah filed a motion to vacate the March 9, 2022, agreed order, arguing that (1) she was under duress when she agreed to the order, and (2) the order was unconscionable because it removed the children from their lifelong home and primary caregiver. On June 29, 2022, Keturah filed an emergency petition to restrict parenting time and for immediate turnover of the children to her, alleging that on June 26, 2022, she received a phone call from Colin's girlfriend, Crystal, who told her that Colin gets drunk and abuses her and the children. Two days later, Keturah saw a mark on Z.D.K.'s forehead during a video call and alleged that the mark was caused by Colin.

¶ 16 The trial court held a hearing on Keturah's emergency petition on July 1, 2022. At the hearing, Kim Giovanni, the children's guardian *ad litem*, testified that she spoke to Colin and Crystal. According to Giovanni, Z.D.K. has "adjusted very, very well" to his move to Missouri with his father. He "got very high marks on his report card," is socialized and is being tested for advanced high school classes. Giovanni reported that Z.Y.K. "is having a harder time adjusting to the change." However, the family is in counseling, and Crystal has a daughter close in age to Z.Y.K., who Z.Y.K. can talk to. Giovanni reported that Keturah "has called the police for wellness checks at least five separate times" since the spring. Giovanni said no charges were filed by the police or child services as a result of Keturah's calls. The court determined that the issues raised in Keturah's petition did not constitute an emergency but ordered Colin (1) not to consume alcohol or have alcohol in his home, and (2) set up and use a device to monitor his alcohol use.

¶ 17 On July 25, 2022, the trial court held a hearing on Keturah's motion to vacate. Keturah testified that she retained Jason Polcyn to represent her the day before the March 9, 2022, hearing.

Prior to the hearing, Polcyn told her he was going to file an appearance and ask for a continuance while she waited in the hallway outside the courtroom. When Polcyn came out of the courtroom, he told Keturah she was "in contempt of court" and needed to "get in agreement with the respondent" or else she "was going to be held in court *** with a $50,000 bond", she would "go to jail", and she would "never see [her] children again." Keturah said Polcyn's statements caused her to go into "emotional distress at that moment." She said she "went into shock," started crying "and one of my other witnesses had to hold me up because I was in emotional distress, and I could not breathe." Keturah said she went to the bathroom and tried to pull herself together. When she returned, Polcyn told her that her only option was to enter the agreement or she would "go to jail and pay Colin's attorney fees and child support." She testified that she felt like she had no choice but to agree to the order. She believed she was "under duress" when she agreed to the order.

¶ 18 Keturah's mother, Patricia Davis, testified that when she came to the courthouse on March 9, 2022, Keturah was already there. Davis observed Polcyn arrive, go into the courtroom, come back into the hallway and have a conversation with Keturah. Davis described Keturah as "distraught" after that conversation. According to Davis, Keturah ran to the bathroom crying and looked like she was "almost going to faint." Keturah did not faint because her friend caught her. After that, Davis, Keturah and Keturah's friend waited in the hallway. Davis described Keturah as "very emotionally distressed."

¶ 19 Tamra Hawkins, a friend of Keturah's, testified that she was also at the courthouse on March 9, 2022, and observed Keturah speaking with her attorney several times. According to Hawkins, "There was a point where she was walking down the hallway. I heard her like let out kind of like a shrill, like, you know, like a cry. And when she stopped in the hallway, I ran towards her. She was crying. I gave her a hug. She was like limp in my arms, you know, and I was trying

to hold her up." Hawkins described Keturah as "completely confused, crying" and "under distress."

¶ 20 Polcyn testified that after the court granted him leave to appear on March 9, 2022, he engaged in a series of conversations with Keturah. Before the agreed order was entered on March 9, 2022, Polcyn explained the terms of the order to Keturah and she agreed to those terms. Keturah asked him questions about the terms of the order, which he answered. Polcyn denied telling Keturah that she was in contempt of court, that she had to agree to the judge's recommendation, or that she had to agree to the order that was drafted. Polcyn denied telling Keturah that she would go to jail or have to post a $50,000 bond if she did not agree with the order. He also denied telling her she would never see her kids again. Polcyn testified that Keturah was crying at times on March 9, 2022. He denied observing Keturah unable to breath, fainting, or physically held up or caught by someone else. He denied hearing Keturah shriek. Polcyn agreed that Keturah was not in his line of sight the entire time he was in the courthouse on March 9, 2022.

¶ 21 The trial court denied Keturah's motion to vacate, finding the testimony of Keturah, Davis and Hawkins to be "not credible." According to the trial court's recollection, as well as video footage, Keturah came into the courtroom at approximately 10:45 a.m. on March 9, 2022, sat down, and the court went through the proposed agreement "in detail" with her. According to the court, Keturah agreed to the terms of the order and was "not crying" or "having trouble breathing." The Court opined that Keturah "did not appear distraught at all" on March 9, 2022.

¶ 22 II. ANALYSIS

¶ 23 "Parents have a fundamental right to make decisions regarding the care, custody and control of their children." *In re M.M.D.*, 213 Ill. 2d 105, 113 (2004). Parents may enter into agreed orders modifying the custody arrangements of their children. See *In re Marriage of Yabush*, 2021

IL App (1st) 201136, ¶ 20; *In re Marriage of Abu-Hashim*, 2014 IL App (1st) 122997, ¶ 4; *In re Marriage of Nau*, 355 Ill. App. 3d 1081, 1083 (2005); *In re Marriage of Clarke*, 194 Ill. App. 3d 248, 250 (1990); *In re Marriage of Oliver*, 155 Ill. App. 3d 181, 182 (1987); *Hursh v. Hursh*, 26 Ill. App. 3d 947, 948 (1975).

¶ 24 "Fit parents are presumed to act in the best interests of their children[.]" *In re R.L.S.*, 218 Ill. 2d 428, 442 (2006). "The right of fit parents to decide what is in their children's best interests is of constitutional magnitude." *In re Marriage of Coulter & Trinidad*, 2012 IL 113474, ¶ 25. "Their considered opinion regarding the best interests of their children, as reflected by their agreements regarding custody, visitation, and removal, is entitled to great deference by the court." *Id.*

¶ 25 The absence of a proper petition or motion pending before the court does not deprive the trial court of the authority to act where the parties agree concerning a matter that requires resolution by the court. *People ex rel. Gibbs v. Ketchum*, 284 Ill. App. 3d 70, 78 (1996). A trial court may enter an agreed order to change child custody even if neither party filed a valid petition or motion for modification of the previous custody order. See *Nau*, 355 Ill. App. 3d at 1084-86; *Gibbs*, 284 Ill. App. 3d at 77-79.

¶ 26 An agreed order is a recordation of the parties' private agreement, not an adjudication of the parties' rights. *In re Haber*, 99 Ill. App. 3d 306, 309 (1981). Once an agreed order has been entered, it is generally binding on the parties and cannot be amended or changed without the consent of both parties. *M.M.D.*, 213 Ill. 2d at 114. However, an agreed order can be set aside if the party seeking vacatur "shows that the order resulted from fraud, duress, coercion, unfair dealing, gross disparity in the position or capacity of the parties, or newly discovered evidence." *In re Tammy D.*, 339 Ill. App. 3d 419, 423 (2003) (citing *Haber*, 99 Ill. App. 3d at 309). A motion

to vacate an agreed order should not be granted simply because a proper pleading requesting the relief the parties agreed to was never filed. See *In re Marriage of Rolseth*, 389 Ill. App. 3d 969, 973 (2009); *Nau*, 355 Ill. App. 3d at 1086; *Gibbs*, 284 Ill. App. 3d at 78.

¶ 27 Evidence that an agreement was entered into as the result of coercion, fraud or duress must be clear and convincing for a court to set aside the agreement. *Burchett v. Goncher*, 235 Ill. App. 3d 1091, 1097 (1991). Duress is defined as "the imposition, oppression, undue influence or the taking of undue advantage of the stress of another whereby one is deprived of the exercise of his free will." *In re Marriage of Riedy*, 130 Ill. App. 3d 311, 314 (1985). A party asserting duress bears the burden of establishing, by clear and convincing evidence, that she lacked the quality of mind and meaningful choice essential to making the agreement. *In re Marriage of Hamm-Smith*, 261 Ill. App. 3d 209, 215 (1994). "[S]tress alone does not rise to the level of duress, as stress is common." *In re Marriage of Baecker*, 2012 IL App (3d) 110660, ¶ 47. Additionally, for a claim of duress to justify vacatur of an agreed order, the wrongful act or acts must have been committed by the opposing party or his counsel. See *id*.

¶ 28 When a party files a motion to vacate an agreed order within 30 days of its entry, section 2-1301 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1301 (West 2020)) applies. See *Draper and Kramer, Inc. v. King*, 2014 IL App (1st) 132073, ¶ 25. In determining if a court should vacate an order under section 2-1301, "[t]he overriding consideration is whether the ends of justice will best be served." *Baltz v. McCormack*, 66 Ill. App. 3d 76, 77 (1978). The decision to grant or deny a motion to vacate an order under section 2-1301 is within the sound discretion of the trial court, and its decision will not be reversed absent an abuse of discretion. *Jackson v. Bailey*, 384 Ill. App. 3d 546, 548 (2008). An abuse of discretion occurs "only where no reasonable person would take the position adopted by the trial court; that is, where the trial court acted arbitrarily or

ignored recognized principles of law." *Id.* at 548-49. "The trial judge, as the trier of fact, is in the 'superior position to determine the credibility of the witnesses and the weight to be given their testimony.' " *1472 N. Milwaukee, Ltd. v. Feinerman*, 2012 IL App (1st) 121191, ¶ 21 (quoting *Aetna Insurance Co. v. Amelio Brothers Meat Co.*, 182 Ill. App. 2d 863, 865 (1989)).

¶ 29 Here, the trial court did not abuse its discretion in denying Keturah's motion to vacate the agreed order. To support her claim of duress, Keturah testified and presented the testimony of two witnesses: her mother and her friend. Keturah testified that she was under duress because Polcyn told her that if she did not agree to the order, she would (1) go to jail, (2) be required to pay a $50,000 bond, (3) never see her children again, (4) be ordered to pay Colin's attorney fees, and (5) be required to pay child support to Colin. However, Keturah's testimony was directly refuted by Polcyn, who denied making any of those statements to Keturah.

¶ 30 The record also refutes the testimony of Keturah's witnesses. Polcyn, who was in the hallway much of the time Keturah was, denied hearing Keturah yell or appear so visibly upset that she was unable to breath, nearly fainted or had to be held up by another person, as Davis and Hawkins claimed. Additionally, the trial judge, who had the opportunity to observe Keturah during the proceeding, did not see Keturah crying or having trouble breathing. According to the trial court, Keturah did not seem distraught at all at the March 9, 2022, hearing. The trial court was in a superior position to evaluate the credibility of Keturah's assertions of duress based on its observations of Keturah's appearance and demeanor during the relevant proceeding. See *Feinerman*, 2012 IL App (1st) 121191, ¶ 21.

¶ 31 Keturah's claims of duress were not only unbelievable but also legally insufficient. To justify vacatur of the agreed order, Keturah had to establish that her duress was caused by Colin or his attorney. See *Baecker*, 2012 IL App (3d) 110660, ¶ 47. However, Keturah never made any

such allegation. She alleged only that her own counsel caused her duress, a claim that her counsel vehemently denied. Under these circumstances, Keturah failed to present clear and convincing evidence of duress, and the trial court did not abuse its discretion in denying Keturah's motion to vacate.

¶ 32 Keturah additionally argues that the trial court had no authority to enter the agreed order requiring the children to relocate to Missouri with Colin because there was not a proper petition for relocation before the court. Pursuant to section 609.2(b) of the Illinois Marriage and Dissolution of Marriage Act, a petition for relocation is to be filed by "[a] parent who has been allocated a majority of the parenting time or either parent who has been allocated equal parenting time." 750 ILCS 5/609.2(b) (West 2020). Keturah argues that because Colin did not have equal parenting time or a majority of parenting time with the children when he filed his petition for removal, his petition was improper.

¶ 33 We reject Keturah's argument because the trial court never ruled on Colin's petition for removal; instead, the trial court entered an order that was agreed to by the parties. Since the parties entered an agreement allowing the children to relocate to Missouri with Colin, a valid relocation petition was unnecessary, and the absence of a valid petition does not justify vacatur of the parties' agreed order. See *Rolseth*, 389 Ill. App. 3d at 973, *Nau*, 355 Ill. App. 3d at 1086; *Gibbs*, 284 Ill. App. 3d at 78. In the agreed order, Keturah voluntarily withdrew all pending pleadings filed by her, including her motion to strike Colin's petition, and agreed that the children would move to Missouri and reside with Colin. Thus, the absence of proper petition to relocate is irrelevant.

¶ 34 For all these reasons, we affirm the trial court's denial of Keturah's motion to vacate the agreed order entered on March 9, 2022.

¶ 35 III. CONCLUSION

¶ 36 The judgment of the circuit court of DuPage County is affirmed.

¶ 37 Affirmed.

¶ 38 JUSTICE McDADE, specially concurring:

¶ 39 I concur in the decision in this case affirming the circuit court's denial of Keturah's motion to vacate an agreed order previously submitted by the parties and entered by the court.

¶ 40 The issue presented to us was limited to the question of whether Keturah consented to the agreed order voluntarily or because of duress or coercion. I would feel significantly more confident in our decision if Keturah had been asked, prior to entry of the order, if her consent was voluntary and there was a response in the record to aid our analysis.

¶ 41 We also were not asked in this appeal to consider whether the terms of the agreement itself were fair or were in the children's best interest. Those are questions that would have been appropriate to the earlier decision to accept and enter the agreed order, but not ones the trial court was required to explicitly address.

¶ 42 I offer this clarification in this special concurrence because, as drafted, the "background" information in our order—our statement of facts—could give rise to a perception that these children were merely pawns in a parental power struggle and that their best interests were and are of no concern to parents or courts. As the majority has noted, our courts accord "fit" parents a presumption that their actions are undertaken in their children's best interests, and their decisions are entitled to great deference. Supra ¶ 24. We also presume that judges know and follow the law unless the record demonstrates otherwise. In re Jonathon C.B., 2011 IL 107750, ¶ 72. We assume that the best interests of these children have been front and center throughout this phase of the dissolution proceedings, but, considering the extremely sensitive and emotional nature of these

cases, it would be so much more reassuring to find concrete confirmation of that consideration in the written record.