

2011 IL App (2d) 100857-U  
No. 2-10-0857  
Order filed December 5, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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<i>In re</i> MARRIAGE OF	)	Appeal from the Circuit Court
PAMELA DIOTALLEVI,	)	of Du Page County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 09-D-1014
	)	
DENNIS DIOTALLEVI,	)	Honorable
	)	Terrence M. Sheen,
Respondent-Appellant.	)	Judge, Presiding.

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JUSTICE BURKE delivered the judgment of the court.  
Justices McLaren and Hutchinson concurred in the judgment.

**ORDER**

*Held:* The trial court did not abuse its discretion by denying the petition to intervene, ordering Dennis to pay child support and reserving Pamela's right to maintenance, allocating the marital assets and debts, or denying the motion to reconsider; affirmed.

¶ 1 Respondent, Dennis Diotallevi, appeals from a judgment for dissolution of marriage entered by the circuit court of Du Page County dissolving the marriage between him and petitioner, Pamela Diotallevi. On appeal, Dennis contends that the trial court abused its discretion by (1) denying the petition to intervene filed by Dennis' family (the Diotallevi family or intervenors); (2) ordering Dennis to pay a substantial part of the debt incurred by the parties during the marriage; (3) ordering

him to pay child support and reserving the issue of Pamela's maintenance for five years; and (4) denying his motion to reconsider. For the reasons that follow, we affirm.

¶ 2

## I. BACKGROUND

¶ 3 Pamela and Dennis were married on November 25, 1984, and four children were born to the parties, whose ages at the time of trial in July, 2010, were 24, 22, 19, and 15. Pamela was 51 years' old, a junior college graduate, and was employed part-time. Dennis was 53 years' old, had three years of college and was unemployed. Pamela filed a petition for dissolution of marriage on May 11, 2009.

¶ 4 Prior to trial, Dennis' family members, Josephine, Donald, Richard, Camille, and Ronald Diotallevi filed a petition to intervene and for other relief on June 30, 2010, requesting an expedited hearing relating to property inherited by Dennis. The petition alleged the following.

¶ 5 In 1995, Dennis inherited a right of first refusal to purchase property located in Morris, Illinois, commonly referred to as the "Tree Farm," and a partial interest in property in Aurora, Illinois, commonly referred to as the "Saw Mill." To exercise his right of first refusal to acquire the Tree Farm and to subsequently purchase this property, Dennis secured funds from his family members in the form of loans and capital investments in 1999. In March, 1999, Dennis purchased the Tree Farm property for \$250,000.

¶ 6 Dennis received the remaining portion of the Saw Mill property as part of a settlement of a law suit. To complete the acquisition of the Saw Mill property, Dennis again used funds and investments borrowed from his family members. The Saw Mill and Tree Farm properties were

placed in a land trust with both Pamela and Dennis as beneficiaries, with no formal recognition of the loans and investments Dennis received from his family members to acquire the properties.<sup>1</sup>

¶ 7 In 2000, Dennis arranged to create an entity known as the Family Tree Nursery, Inc. (Family Tree Nursery), in which Dennis would operate the business and receive all of the income or losses. The underlying properties (the Saw Mill, Tree Farm, and equipment) was believed to remain titled in the name of the land trust. Dennis and the Diotallevi family were to participate in the funds generated by the sale or development of the properties.

¶ 8 Dennis prepared a written agreement to memorialize the Diotallevi family's interest in the assets, entitled "Family Tree Nursery Inc. Operating Agreement" (Operating Agreement). Dennis and Pamela were to have an 80% ownership interest and Dennis' brother, Donald, was to have a 20% interest. The agreement acknowledged the contributions by and debts owed to the Diotallevi family members for the properties. The agreement was later revised and the funds invested by Josephine, Richard, Camille, and Ronald were listed as equity in the properties. Dennis and Pamela signed the agreement. The intervenors attached to the petition a copy of the Operating Agreement, the same copy which Dennis later introduced during the dissolution action.

¶ 9 The petition to intervene alleged that no funds had been repaid. The intervenors sought a declaratory judgment of their rights in the properties and a constructive trust, pursuant to section 408(a)(2) and (3) of the Code of Civil Procedure (735 ILCS 5/2-408(a)(2), (3) (West 2010), asserting that, in her petition for dissolution of marriage, Pamela had sought to divide the properties

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<sup>1</sup> Dennis and Pamela were joint tenants to the marital residence, and they were the sole trustees and held the sole beneficial interest and power of direction in the land trust which held title to the Saw Hill and Tree Farm properties.

between her and Dennis, as sole owners, without recognizing the Diotallevi family interests in the properties. The intervenors believed that their interests in the Tree Farm property, the Saw Mill property, or the Family Tree Nursery would not be properly represented and would be affected by court orders or judgments in the dissolution action. The trial court subsequently denied the petition as untimely. Dennis never filed a motion to join as a third party and the Diotallevi family did not appeal from the trial court's denial of their petition to intervene.

¶ 10 The trial took place three days after the denial of the petition to intervene, on July 22 and 26, 2010. According to the written judgment of dissolution, the testimony revealed that the parties lived beyond their means for many years and relied on family members to help support them. Dennis acknowledged that he quit his job as a limousine driver based on what he asserted was an increase in the cost of driving a limousine. The trial court noted in the judgment that Pamela "became employed part-time rather than full-time, even though at times, her utilities were cut off," and "the adult children of the family, while employed full time, rarely contributed anything to the living expenses of the household, while living there." The court ordered both parties to seek full-time employment to meet their living expenses.

¶ 11 The court determined that the marital estate consisted of the marital home, valued at \$237,885, the Tree Farm property, valued at \$619,200, and the Saw Mill property, valued at \$285,000, and it ordered the parties to list the properties for sale and split the net proceeds between them. The parties were to share equally in the cost of the mortgage, taxes, and insurance of the marital home, of which the remainder of the costs were to be paid by Pamela. The court noted that, because two adult children lived at home, were employed, and emancipated, they should contribute to the food and utility costs of the marital home as well.

¶ 12 As to the Operating Agreement, the court concluded that it did not create an encumbrance against the Tree Farm and Saw Mill properties, as the document itself clearly related to a corporation and the assets of the corporation, and it was not signed by the trust, which was the legal title holder to the properties.

¶ 13 The court determined the marital debt amounted to approximately \$425,190. The court assigned to Pamela \$66,990 of the debt, which consisted of money loaned to Pamela by her family and a \$38,663 debt Pamela owed to Edward Hospital for root canal surgery. The remainder of the debt was assigned to Dennis. It consisted of the money loaned by the Diotallevi family. The court could not precisely define the amounts owed to the Diotallevi family due to the various sums listed in the request to admit, Dennis' "unclear testimony," and his financial statement. The court noted that it was uncertain if the amount owed to Dennis' father's estate and to Dennis' mother were not the same debt. The court believed that most of these debts were incurred by Dennis, unbeknown to Pamela.

¶ 14 A joint parenting agreement was incorporated by reference into the decision, and the court ordered joint custody of the minor child to Pamela and Dennis, with Pamela as the primary residential parent. The court further ordered Dennis to pay \$429 per month for child support. This amount was determined to be 20% of Dennis' net income of \$550, the total rental income Dennis received for storing equipment on the Saw Mill property, income it imputed to Dennis based on evidence that he voluntarily quit his limousine job. Dennis was barred from receiving maintenance, and the issue of Pamela's maintenance was reserved for five years.

¶ 15 The trial court entered the ruling and judgment for dissolution on July 29, 2010. Dennis filed a posttrial motion entitled "Motion to Reconfigure the Court's Opinion/Judgment" on August 11,

2010. Thereafter, Dennis filed a *pro se* notice of appeal on August 26, 2010, which became effective when the motion to reconfigure was denied on December 20, 2010.

¶ 16

## II. ANALYSIS

¶ 17

### Intervention

¶ 18 We start by considering whether the trial court abused its discretion by denying the petition to intervene filed by the Diotallevi family, who have not appealed the ruling. Dennis maintains that the trial court could not properly ascertain the parties' marital assets without determining the rights of the Diotallevi family to the Tree Farm and Saw Mill properties. He maintains that, if the Diotallevi family did have some sort of interest in the properties, sale of the properties would be affected.

¶ 19 We initially question whether Dennis has standing to raise this argument on appeal, as he is not asserting his own legal rights and interests of the Diotallevi family. See *Amtech Systems Corp. v. Illinois State Toll Highway Authority*, 264 Ill. App. 3d 1095, 1103 (1994). Dennis is basing his claim for relief upon the rights of the petitioners who filed the petition, seeking to protect their own adverse interests in the Tree Farm and Saw Mill properties. Furthermore, Dennis never filed a motion to join as a third party and the members of the Diotallevi family, who were denied the right to intervene, never filed a motion to reconsider the denial or filed an appeal from that judgment.

¶ 20 Nevertheless, even if Dennis does have standing, we would find the trial court did not abuse its discretion in denying the petition based on timeliness. The rules of intervention require that an application to intervene be made in a timely manner. See 735 ILCS 5/2-408 (West 2010). A decision denying intervention will be upheld where a party fails to supply the information necessary to make a determination of the timeliness of its petition. It is not an abuse of discretion to deny

intervention where it would serve only to interfere with and hinder the progress of the litigation. See *RTS Plumbing Co., Inc. v. DeFazio*, 180 Ill. App. 3d 1037, 1043 (1989).

¶ 21 In the present case, the petition to intervene was filed more than one year after Pamela filed the petition for dissolution of marriage, less than 30 days before the trial began, and it was not heard until two days before the trial. If the trial court had granted the petition, both Pamela and Dennis would have been prejudiced substantially, as they would not have had adequate time to conduct the requisite discovery and otherwise investigate the claims of the proposed intervenors and to present a defense thereto. Additionally, the Diotallevi family never raised allegations that they were unaware of the proceedings or unaware that the dissolution of marriage action would encompass the division of all real property held solely in the name of Pamela and Dennis, either individually or as sole beneficiaries of any Illinois land trust. The Diotallevi family never sought relief in any court or filed any claim or notice to Pamela or Dennis demanding repayment of any alleged debts or interests in any property held by Dennis or Pamela for a period of at least 10 years, as evidenced in their petition to intervene.

¶ 22 Moreover, Pamela and Dennis were the sole trustees and held the sole beneficial interest and power of direction in the land trust which held title to the Tree Farm and Saw Mill properties. The trustees did not sign the Operating Agreement and the agreement did not give the Diotallevi family any titled interests in the properties.

¶ 23 Contrary to Dennis' assertion, the trial court correctly concluded that the Operating Agreement related only to the corporation and was simply an investment into the Family Tree Nursery, which did not create an encumbrance. An encumbrance is defined as an interest in or right to property, not a contingent, unsecured obligation to pay money. Encumbrances are characterized as liens creating security interests in land, including both those for which land may be subjected to

sale for their payment as well as other restrictions which limit the use of the land granted, but do not subject that land to immediate sale for their payment. *Village of Buffalo v. Illinois Commerce Commission*, 180 Ill. App. 3d 591, 599 (1989). Here, nothing in the Operating Agreement expresses an intent to create secured interests in or rights to the properties by the Diotallevi family. The Operating Agreement merely provides, in relevant part, that the Family Tree Nursery is a corporation, which seems to include Tree Farm, Saw Mill, and physical assets; that Dennis is the owner of the Family Tree Nursery, having an 80% equity position in the business, properties, physical assets, and goodwill of the corporation and Donald has a 20% equity position; that members of the Diotallevi family provided cash for the acquisition of the Family Tree Nursery; and that interest payments on the loans would be paid only if there was sufficient earnings after deducting operating and tax expenses. These provisions clearly indicate that the document itself related solely to a corporation and the assets of the corporation.

¶ 24 A necessary party is one who has a legal or beneficial interest in the subject matter of the litigation and will be affected by the action of the court. *In re Marriage of Olbrecht*, 232 Ill. App. 3d 358, 365 (1992). The cases of *Olbrecht* and *In re Marriage of Peshek*, 89 Ill. App. 3d 959 (1980), relied on by Dennis, are factually distinguishable because, in this case, the trial court could make a complete disposition of the marital properties without the presence of the Diotallevi family. Accordingly, it is difficult to perceive how the trial court abused its discretion in denying the petition to intervene.

¶ 25 Distribution of Marital Assets and Debts

¶ 26 Nevertheless, the question remains whether the trial court abused its discretion in distributing the marital estate and allocating the debts owed the Diotallevi family to Dennis. Dennis contends that it was an abuse of discretion to saddle him with almost all of the parties' substantial debt, that

the obligation of the loans or investments of his family was incurred during the marriage and benefits Pamela as well, and therefore, she should equally bear the responsibility. “ ‘It is well settled that marital debts as well as marital assets must be distributed equitably.’ [Citation.]” *In re Marriage of Underwood*, 314 Ill. App. 3d 325, 328 (2000) (quoting *In re Marriage of Davis*, 292 Ill. App. 3d 802, 807 (1997)). An equitable distribution, however, “does not require mathematical equality.” *In re Marriage of Thornley*, 361 Ill. App.3d 1067, 1071 (2005). “We will not disturb a trial court’s division of marital assets unless it has clearly abused its discretion.” *In re Marriage of Thornley*, 361 Ill. App.3d at 1071. “An abuse occurs when no reasonable person would take the view adopted by the trial court.” *In re Marriage of Nelson*, 297 Ill. App. 3d 651, 658 (1998).

¶ 27 We find the trial court’s distribution of the marital assets and debts was equitable under the circumstances. While Dennis was ordered to pay the debts associated with his family, the court awarded Dennis all rights, title, and interest in the Family Tree Nursery and allocated to Pamela the debts owed to her own family. While the assets of the corporation appeared to consist of the Tree Farm and Saw Mill properties, which the court divided equally between the parties, it is uncertain whether the corporation contained other assets because Dennis never presented any evidence of its worth. Regardless, in reviewing the evidence, the court could not precisely quantify how much money Dennis owed to the Diotallevi family due to the various amounts listed in the request to admit, Dennis’ unclear testimony, and his financial statement. In fact, the court noted that it was unsure if the amount due to the Estate of Diotallevi and Dennis’ mother was not the same debt. A court of review should not second-guess the trial court’s factual findings on the validity of a debt when that finding is based upon the trial court’s assessment of the credibility of witnesses and the weight it gives to their testimony, unless the trial court’s findings are against the manifest weight of the evidence. *In re Marriage of Blazis*, 261 Ill. App. 3d 855, 869 (1994). The debts listed by the

court were approximations of the most that could be owed by Dennis, and the court found that most of the debts were incurred by Dennis without Pamela's knowledge. Based on our review, we can not say that the findings are against the manifest weight of the evidence or that the trial court's distribution was an abuse of discretion.

¶ 28 In its dissolution judgment, a trial court is to consider maintenance, insurance, assets, debts, and other factors, not in isolation, but rather, equitably and as a whole. See 750 ILCS 5/503 (West 2010); *In re Marriage of Ellinger*, 378 Ill. App. 3d 497, 501 (2008). In light of the above findings, and given that Dennis was the major source of the family income during their 25-year marriage, that Pamela only worked full-time for 5 years, and that Dennis is not required to pay maintenance at this time, we are hard-pressed to see how the court abused its discretion. Dennis incurred much of his debt without Pamela's knowledge, and the court was unsure of the actual amount of Dennis' debt.

¶ 29 Child Support and Maintenance

¶ 30 We next address whether the trial court abused its discretion by ordering Dennis to pay \$429 per month for child support and reserving the issue of Pamela's maintenance for five years when he was unemployed. Illinois appellate courts have developed three primary factors to consider in determining when it is proper to impute income to a non-custodial parent. In order to impute income, a court must find that one of the following factors applies: (1) the payor is voluntarily unemployed; (2) the payor is attempting to evade a support obligation; or (3) the payor has unreasonably failed to take advantage of an employment opportunity. *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 1077 (2009). If none of these factors are in evidence, the court may not impute income to the non-custodial parent. *In re Marriage of Gosney*, 394 Ill. App. 3d at 1077. The determination of net income is reviewed under an abuse of discretion standard. *In re Marriage of Gosney*, 394 Ill. App. 3d at 1077.

¶ 31 Regarding child support, Dennis addresses how the last two factors do not apply to him, but he fails to indicate how the first factor is also inapplicable. Clearly, the trial court considered the first and last factors in its determination based on Dennis' testimony that he voluntarily stopped working for his employer and has not attempted to apply for unemployment compensation. Accordingly, we find that the trial court did not abuse its discretion by imputing income to Dennis for child support.

¶ 32 Regarding reserving the issue of maintenance, Dennis argues that there was no evidence that he would ever be able to pay maintenance based on the parties' marital standard of living, and therefore, the trial court should not have reserved the issue. Section 401(b) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/401(b) (West 2010)) authorizes the court to reserve, among other things, the issue of maintenance.

¶ 33 In *In re Marriage of Cohn*, 93 Ill. 2d 190, 199 (1982), our supreme court discussed a number of appropriate circumstances for entering a bifurcated judgment of dissolution and reserving issues such as maintenance. Applicable here, the court noted that such an appropriate circumstance would be if the party ordered to pay maintenance would be unable to do so. *In re Marriage of Cohn*, 93 Ill. 2d at 199. We find that it was not an abuse of discretion to reserve the issue of maintenance with the view that Dennis' long-term financial condition as it relates to his ability to pay maintenance would become clearer in the future. The order does not necessarily signify that maintenance will be awarded to Pamela when the trial court does address the issue.

¶ 34 Motion to Reconsider

¶ 35 Dennis last contends that the trial court abused its discretion by denying his motion to reconsider. In the posttrial motion, Dennis argued the trial court erred in finding that the Operating Agreement did not create an encumbrance against the Tree Farm or the Saw Mill properties. Similar

to the argument regarding the petition to intervene, Dennis maintains that the trial court's error might have affected the allocation of marital debt. Because we previously determined that the trial court correctly found that the Operating Agreement did not create an encumbrance, which affected the allocation of marital debt, the denial of the motion to reconsider was not an abuse of discretion.

¶ 36

### III. CONCLUSION

¶ 37 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 38 Affirmed.