

2011 IL App (2d) 101154-U
No. 2-10-1154
Order filed November 30, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF DEBORAH L. HALL,)	Appeal from the Circuit Court
)	of Lake County.
Petitioner-Appellee,)	
)	
and)	No. 02-D-2321
)	
PAUL A. HALL,)	Honorable
)	David P. Brodsky,
Respondent-Appellant.)	Judge, Presiding.

ORDER

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

Held: The trial court did not abuse its discretion in reinstating respondent's obligation to pay maintenance and imputing to him an annual salary of \$190,000.

¶ 1 In August 2004, the trial court entered a judgment dissolving the marriage between petitioner, Deborah L. Hall, and respondent, Paul A. Hall. The judgment, which incorporated a marital settlement agreement, provided that respondent would pay petitioner \$2,600 per month in maintenance. In May 2008, the trial court entered an order temporarily abating respondent's obligation to pay maintenance until he obtained full-time employment, earning a salary in excess of \$100,000 per year. In June 2009, petitioner filed a petition for contribution to college expenses,

to reinstate maintenance, and for interim and prospective attorney fees. After conducting a hearing, the trial court found that respondent was earning in excess of \$100,000 per year and imputed to him a salary of \$190,000 per year; as a result, the trial court ordered respondent to pay petitioner \$3,939.16 per month in maintenance commencing in September 2010. The trial court further ordered respondent to pay petitioner maintenance retroactively from the date respondent's maintenance obligation abated. Contending that the trial court's determination was against the manifest weight of the evidence, respondent now timely appeals. We affirm.

¶ 2

I. Background

¶ 3 The record reflects that the parties were married on May 31, 1975, and two children were born of the marriage. On August 31, 2004, the trial court entered a judgment dissolving the parties' marriage. The judgment incorporated a marital settlement agreement, which obligated respondent to pay petitioner \$2,600 per month for maintenance.

¶ 4 On January 14, 2008, respondent filed a motion to modify maintenance and child support obligations. Respondent argued that his maintenance and child support obligations should be modified because his employment with ConAgra involuntarily terminated on January 8, 2008. On May 13, 2008, the trial court entered an order temporarily abating respondent's child support and maintenance obligations until he obtained full-time employment with an annual gross salary in excess of \$100,000. The order required respondent to notify petitioner within seven days of obtaining such employment, and at that point, maintenance would be reinstated. The order further provided that the new maintenance obligation would be calculated by subtracting no less than \$27,000 from respondent's new salary and multiplying that sum by 29%. That amount would be equal respondent's annual maintenance obligation, which would be paid in two monthly installments equal to one-twelfth of respondent's annual maintenance obligation.

¶ 5 On June 26, 2009, petitioner filed a petition for contribution to college expenses, to reinstate maintenance, and for interim and prospective attorney fees. Count I requested that the trial court order respondent to contribute to college expenses incurred on behalf of the parties' daughter. Count II alleged that respondent was earning sufficient income to pay maintenance pursuant to the terms of the trial court's May 13, 2008, order. Count III alleged that petitioner was unable to pay her attorney fees and requested that the trial court order respondent to pay a \$5,000 retainer for petitioner's attorney fees and prospective fees.

¶ 6 The trial court conducted a hearing regarding the petition on August 18, 2010. Petitioner testified first on her behalf. Petitioner testified that her federal tax return for 2008 reflected a business income of \$1,251 and that her 2009 tax return reflected a business loss of \$497. Petitioner further testified that her 2009 tax return reflected \$150,320 in income resulting from her selling her interest in a 401(k) retirement plan. Petitioner testified that her business earned between \$3,000 and \$5,000 from January 1, 2010, to the hearing date and that she had no other source of income.

¶ 7 Petitioner next called respondent as an adverse witness. Respondent testified that his gross income for 2008 was \$98,879.91, his total income in 2009 was \$99,542, and his adjusted gross income in 2009 was \$92,809. Respondent testified that he has a 49% ownership interest in a company named AIV Biology and Food Safety Consultants, LLC (AIV). Respondent testified that his current wife, Indaue, is his partner and she owns a 51% interest in AIV. Respondent testified that AIV earned \$768,244 in 2009 and, of those earnings, \$519,737 was allocated for guaranteed payments to the company's owners. Indaue received a guaranteed payment of approximately \$427,000. Respondent testified that his and Indaue's accountant determined the guaranteed payment amounts based on their contributions to AIV, but later clarified that he and Indaue determined the

guaranteed payments. Respondent testified that the percentage of work he does for AIV varies depending on the project. Petitioner rested after respondent's testimony.

¶ 8 Respondent first called Jeffrey Travis, respondent's and Indaue's accountant. Travis testified that he prepared the tax returns for respondent, Indaue, and AIV for the previous two years. Travis testified that respondent's income in 2008 was approximately \$96,000. Travis further testified that Indaue's income from AIV in 2009 was \$535,578 and respondent's income from AIV that year was \$95,043. Travis testified that the difference in income resulted from conversations he had with Indaue and her role of generating business for AIV. Respondent's tax return for 2009, which the trial court admitted as an exhibit, reflected that his total income for 2009 was \$99,542 and his adjusted gross income was \$92,806.

¶ 9 Travis further testified that AIV's initial capitalization of \$230,000 came from a trust belonging to Indaue's family and that the company's operating agreement permitted disproportionate allocation of earnings based on multiple factors, including performance, work provided, and capital contributions. Travis testified that he used the phrase "guaranteed payments" on AIV's tax returns, which is compensation for services without regard to net income. Travis testified that Indaue "had the most substantial economic effect" to AIV.

¶ 10 During cross-examination, Travis admitted that Indaue determined both her and respondent's income from AIV. Travis acknowledged that, typically, guaranteed payments are deducted from an entity's income before earnings are distributed to owners based on their percentage of ownership. Responding to a question from the trial court, Travis acknowledged that the amount of guaranteed payments from AIV was determined by respondent and Indaue. Travis further clarified that the amount of guaranteed payments from AIV was determined by production of the owners and general business criteria, but he did not use a specific formula to determine guaranteed payments.

¶ 11 Respondent next called Indaue. Indaue testified that she is a microbiologist food manager with Mars Pet Care and that she also started AIV in 2005 with respondent. Indaue testified that the difference in guaranteed payments from AIV to her and respondent resulted from her bringing in more business to AIV and because she also does the financing and marketing for the company. Indaue testified that the majority of work respondent performs with AIV is traveling and meeting with clients. Indaue further testified that, because she has other full-time employment, she runs AIV by working at night and on weekends. On cross-examination, Indaue acknowledged that she nominated respondent for the National Center for Food Safety and Technology award and that a brochure sent out for that award listed respondent as the president and chief operating officer of AIV. Indaue acknowledged that in 2009, she received 85% of the income from AIV while respondent received 15%, yet in previous years, she and respondent split the earnings from AIV in proportion to their respective ownership interests. Indaue maintained that AIV's distribution of guaranteed payments and income are not the same, but admitted that respondent maintains a 49% interest in AIV.

¶ 12 Respondent next testified on his behalf. Respondent testified that he had not been employed full time since January 2008. Respondent testified that he is currently looking for full-time work while also working part time for AIV. Respondent testified that he discussed with Travis and Indaue how the earnings from AIV should be allocated. During cross-examination, respondent admitted that his title while he worked at ConAgra was vice president of global food safety, and his annual salary was \$190,000. Respondent further admitted that he previously was the chief global food safety officer at Kraft Foods and believed his annual salary was \$160,000 with a bonus of up to 20% of his salary.

¶ 13 After closing arguments, the trial court found that petitioner established by clear and convincing evidence that respondent was employed full time and earning in excess of \$100,000 per year. The trial court concluded that it was “not reasonable” to calculate respondent’s income based on respondent’s, Indaue’s, and Travis’ testimony. Instead, the trial court stated:

“[W]e have for the year 2009 [AIV] earning an income somewhere in the neighborhood of \$630,000. [Respondent] is a 49% owner of [AIV]. In all the previous years of [AIV], the amounts were divided in exact proportion to the partnership interest *** .

The testimony was clear, and I asked [Travis] what was the formula to be used, and he was unable to tell me what the exact formula was. [Travis] said [he got his input from Indaue and respondent], and that he takes pretty much the direction of [Indaue] as to what the percentage to be.

That’s a formula the [c]ourt finds to be non-existent. The only true figures that the [trial court] has been presented with is the amount of partnership interest in [AIV]. That is what the parties have done traditionally and that is really the only concrete figure that the [trial court] has taken.”

The trial court then imputed to respondent an income of \$190,000 per year. The trial court concluded that respondent was making approximately \$190,000 when he was working at ConAgra and Kraft; further, respondent made approximately \$98,000 for six months in 2008. In reaching its determination, the trial court concluded that it was not going to determine respondent’s income by calculating AIV’s earnings and his 49% ownership in that company. As a result, the trial court ordered respondent to pay petitioner maintenance in the amount of \$3,939.16 per month commencing September 1, 2010. The trial court further awarded that monthly amount of maintenance retroactively to the date petitioner filed her petition on June 26, 2009, for a retroactive

award of \$55,148. Finally, the trial court concluded that the abated amount of maintenance from May 13, 2008 through June 26, 2009, to be calculated at \$2,600 per month pursuant to the parties' marital settlement agreement, was \$33,800. Respondent timely appealed after the trial court denied his motion to reconsider.

¶ 14

II. Discussion

¶ 15 The only issue in this appeal is whether the trial court erred in finding that respondent was making in excess of \$100,000 per year and awarding petitioner maintenance based on respondent's salary of \$190,000. In support of this contention, respondent argues that three witnesses testified that his salary during the years 2008, 2009, and 2010 was less than \$100,000 and that his earnings were not manipulated to reflect a lesser salary. Respondent also emphasizes that the only other witness, petitioner, did not proffer testimony regarding respondent's income. According to respondent, the trial court improperly disregarded these witnesses' testimony and erred in concluding his salary was \$190,000.

¶ 16 As a reviewing court, we will not disturb a maintenance award absent an abuse of discretion. *In re Marriage of O'Brien*, 393 Ill. App. 3d 364, 382 (2009) (citing *In re Marriage of Schneider*, 214 Ill. 2d 152, 173 (2005)). “ ‘Where an abuse of discretion in awarding or denying maintenance is claimed, the burden of showing such an abuse rests with the claiming party.’ ” *In re Marriage of Donovan*, 361 Ill. App. 3d 1059, 1062 (2005) (quoting *In re Marriage of Homann*, 276 Ill. App. 3d 236, 240 (1995)). A trial court abuses its discretion when no reasonable person would take the view adopted by the trial court (*Schneider*, 214 Ill. 2d at 173), or when it is clear that the trial court acted arbitrarily or without conscientious judgment (*Donovan*, 361 Ill. App. 3d at 1063).

¶ 17 In the current matter, the trial court did not abuse its discretion by awarding petitioner maintenance after imputing to respondent a salary of \$190,000 per year. Although respondent,

Travis, and Indaue testified that respondent's income during the years 2008, 2009, and in 2010 through the date of the hearing was less than \$100,000, the trial court could have found this testimony not credible. See *In re Marriage of Manker*, 375 Ill. App. 3d 465, 477 (2007) ("The trier of fact is charged with assessing the credibility of testimony at trial"). The record reflects that respondent testified that he was making \$190,000 per year when he lost his job with ConAgra as vice president of global food safety. At that time, he also owned a 49% interest in AIV, a food safety consulting business started by Indaue. Indaue owned a 51% interest in AIV. Despite respondent's testimony that he worked for AIV on a part-time basis while looking for full-time work, Indaue admitted on cross-examination that a brochure for a food safety award she nominated respondent for advertised him as the president and chief operating office of AIV. In addition, Indaue acknowledged on cross-examination that, during the years 2006, 2007, and 2008, she and respondent shared the earnings from AIV in proportion to their respective ownership percentage. However, in 2009, Indaue received 85% of the earnings from AIV while respondent received only 15%. AIV's tax return for 2009 reflected that respondent received a guaranteed payment of \$92,710 that year, while Indaue received a guaranteed payment of \$427,027. As the trial court noted, Travis, AIV's accountant, used a "non-existent" formula to determine how the earnings, including guaranteed payments, from AIV would be distributed between Indaue and respondent. That is, Travis received direction from Indaue and respondent in determining the distribution. Based on this evidence, the trial court could have reasonably concluded that respondent's income from AIV was being manipulated so that respondent could avoid his maintenance obligations, and therefore, the trial court could have imputed a salary to respondent of \$190,000 based on his previous salary in the food safety industry. As a result, the trial court did not act arbitrarily or without conscientious judgment

in ordering respondent to pay petitioner maintenance based on him earning a \$190,000 annual salary. See *Donovan*, 361 Ill. App. 3d at 1063.

¶ 18 We find support for our determination in *In re Marriage of Lichtenauer*, 408 Ill. App. 3d 1075 (2011). In that case, the reviewing court upheld the determination of the trial court to impute a higher salary to the petitioner for the purposes of maintenance award after concluding that the circumstances surrounding the petitioner's current wages of \$71,000 per year were contrived to conceal his full current salary. *Id.* at 1090. Relying on *In re Marriage of Smith*, 77 Ill. App. 3d 858 (1979), the court in *Lichtenauer* first noted that “[t]he case law provides that the ability of the maintenance-paying spouse to contribute to the other's support can be properly determined by considering both current and future ability to pay ongoing maintenance.” *Lichtenauer*, 408 Ill. App. 3d at 1088. The court in *Lichtenauer* then reiterated that Illinois law is “well settled” that income can be imputed for the purposes of a maintenance award if one of the three following factors were present: (1) the payor is voluntarily unemployed; (2) the payor is attempting evade a support obligation; or (3) the payor unreasonably failed to take advantage of an employment opportunity. *Id.* at 1089 (citing *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 1077 (2009); *In re Marriage of Rogers*, 213 Ill. 2d 129 (2004)).

¶ 19 Turning to the merits, the court in *Lichtenauer* held that the trial court did not abuse its discretion in imputing additional income to the petitioner despite his testimony that his salary was lower. The court noted that the record reflected that the petitioner voluntarily opted to sell his share in two businesses during the pendency of his divorce from the respondent and decided to forego an opportunity to buy into a new company. *Lichtenauer*, 408 Ill. App. 3d at 1089. Instead, the court noted, the petitioner brought his girlfriend into the new business by lending her money to become the majority shareholder in that company. The petitioner's girlfriend became president of the

company, earning an annual salary of \$120,000. *Id.* The court further emphasized that the new company was similar to one of the companies that the petitioner had sold his interest in during the divorce, and although he had previous corporate and ownership experience, the new company employed him as a senior project manager paying him a \$34 hourly rate. *Id.* The court also rejected the petitioner's argument that he never earned in excess of \$100,000 in wages, stating that his argument "oversimplifies" his earning ability. *Id.* Thus, according to the court, the trial court's determination that the circumstances surrounding the petitioner's salary were contrived to conceal his current income and minimize the value of his financial assets was based on the evidence and the trial court's credibility determinations. *Id.* at 1090. As a result, the court in *Lichtenauer* held that the trial court properly imputed additional income to the petitioner. *Id.* at 1091.

¶ 20 The holding in *Lichtenauer* is instructive here. As noted above, the record reflects that during the years 2006, 2007, and 2008, respondent and Indaue distributed the income from AIV in proportion to their respective ownership interests. However, in 2009 and after respondent lost his job as vice president of global food safety with ConAgra, 85% of the income earned from AIV was distributed to Indaue, while only 15% was distributed to respondent. Indaue also admitted on cross-examination that a brochure for a food safety award listed respondent as the president and chief operating officer of AIV. Travis acknowledged that he did not use a set formula to determine how income from AIV should be distributed between respondent and Indaue, but rather testified that it was based on his conversations with respondent and Indaue. While Travis and Indaue proffered testimony that the disparity in earnings from AIV resulted from Indaue contributing more to AIV, the trial court could have rejected that testimony as not credible. See *Manker*, 375 Ill. App. 3d at 477. Thus, similar to *Lichtenauer*, the trial court here could have concluded from the evidence and its own credibility determinations that respondent and Indaue arranged for AIV's earnings to be

distributed in a contrived manner so respondent could avoid his court-ordered maintenance obligations. See *Lichtenauer*, 408 Ill. App. 3d at 1090-92.

¶ 21 Accordingly, we conclude that the trial court did not abuse its discretion by imputing more income to respondent and setting his maintenance obligations based on an annual salary of \$190,000.

¶ 22 III. Conclusion

¶ 23 For the foregoing reasons, we affirm the judgment of the circuit court of Lake County.

¶ 24 Affirmed.