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2011 IL. App. (3d) 100295-U

Order filed October 28, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

In re MARRIAGE OF	)	Appeal from the Circuit Court
BEATA KULAWIAK n/k/a	)	of the 12th Judicial Circuit
BEATA KILJAN,	)	Will County, Illinois,
	)	
Petitioner-Appellant,	)	Appeal No. 3-10-0295
	)	Circuit No. 02-D-1971
and	)	
	)	
JOSEPH S. KULAWIAK,	)	The Honorable
	)	Robert J. Baron,
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: Although the trial court correctly found that the marital settlement agreement was unconscionable because the respondent-husband concealed a major marital asset, it erred when it failed to award the respondent-mother child support from the date of of the judgment for dissolution, which essentially enforced the unconscionable agreement. The trial court, however, did not abuse its discretion when it valued the concealed marital asset as of the date of the judgment of dissolution, instead of the date of the hearing on the petitioner-mother's motion for relief from judgment.

¶ 2 Beata Kiljan, the petitioner, filed a third amended petition for relief from judgment, requesting that the court order retroactive child support because her former husband, Joseph Kulawiak, the respondent, fraudulently represented the existence of a marital loan to avoid making child support payments. Beata also requested that the court vacate the portion of the parties' marital settlement agreement whereby she waived her interest in any retirement account owned by Joseph because he fraudulently concealed his retirement account from her. The trial court held that the issue of retroactive child support was barred by *res judicata*, but found that the marital settlement agreement was unconscionable, and that it would not have approved it had it known of the existence and value of Joseph's retirement account. The court thus awarded Beata half of the value of Joseph's retirement account, and valued it on the date of the entry of the judgment of dissolution. The court, however, declined to award Beata retroactive child support, finding the matter was barred by *res judicata*.

¶ 3 Beata appeals, contending that the trial court: (1) erred when it found that the issue of retroactive child support was barred by *res judicata* because Joseph did not properly plead *res judicata* as an affirmative defense, and Joseph had previously avoided his child support obligations through fraud and deceit; and (2) abused its discretion when it valued Joseph's retirement account as of the date of the judgment of dissolution, as opposed to the date of the instant hearings, after Joseph fraudulently concealed it. In this case, we do not believe that the trial court abused its discretion when it valued Joseph's retirement account. However, because we agree with the trial court's finding that the marital settlement agreement was unconscionable, we vacate the portion of it contested by Beata, and remand the cause for the trial court to set Joseph's child support obligation from the date of the judgment of dissolution.

¶ 4 FACTS

¶ 5 Beata Kulawiak, now known as Beata Kiljan, the petitioner, and Joesph Kulawiak, the respondent, were married on September 7, 1990. Beata subsequently gave birth the the parties' three daughters, namely, Sonia, on November 12, 1992; Priscilla, on November 24, 1996; and Tribecca on November 19, 2000. Thereafter, the parties separated, and the trial court entered a judgment of dissolution on March 21, 2003.

¶ 6 The judgment of dissolution provided for joint legal custody of the parties' children, with Beata as the residential custodian. It also incorporated a marital settlement agreement. Under paragraph 2.4 of the martial settlement agreement, the parties agreed to reserve the issue of child support for a period of at least five years because Joseph was going to remain solely liable on "certain marital debts" and because Beata could support herself and the minors. The terms of paragraph 2.4 also provided that Beata would not seek child support for the five year period from the date of the judgment of dissolution, nor would she seek the payment of back child support for the five year period after the entry of the judgment for dissolution. After five years, the parties agreed that child support would be set by section 505 of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/505 (West 2002)). The settlement agreement specifically indicated that Joseph took responsibility for a debt to "Wrigley's Credit Union" in the approximate amount of $30,000, and it was Joseph's agreement to pay this debt that prompted Beata's agreement to forgo child support and refrain from seeking retroactive child support during the five year period subsequent to the entry of the judgment of dissolution.

¶ 7 The marital settlement agreement also provided that the parties had fully disclosed their wealth, property, and income. Thus, pursuant to paragraph 6.1(d)(2), Beata waived any interest

she may have had in any pension or retirement account owned by Joseph, based on his representation that he had none.

¶ 8 On August 8, 2005, Beata filed a *pro se* motion for relief from judgment and to modify child support. In it, she expressed that she made a mistake that by waiving child support in exchange for having Joseph pay the Wrigley Credit Union loan, and that she would abide by her agreement to refrain from seeking back child support, but she sought child support payments from Joseph from that point forward. Consequently, the court entered an agreed order whereby Joseph agreed to pay Beata $150 per month in child support, as he was "solely liable for the parties' credit union debt as lump sum unallocated support obligation." Additionally, Beata agreed that she would not attempt to seek an increase in Joseph's child support obligation until after March 21, 2008.

¶ 9 The record specifically indicates that Beata began investigating the existing of the Wrigley Credit Union loan in April 2006. At that time, she sent two letters to Joseph's counsel requesting verification of this debt, to which she received no response. The Child Support Enforcement Division of the Illinois Department of Healthcare and Family Services intervened, and Beata subsequently received letters from the Wrigley Credit Union in August 2006 and February 2007 indicating that Joseph did not have an active account there, and that the loan from the Wrigley Credit Union had been fully paid as of October 19, 2001.

¶ 10 In February and March 2007, respectively, Beata filed a second *pro se* motion to modify child support, and a motion to dismiss the child support order entered on August 29, 2005. In these motions, she claimed that she had discovered that the $30,000 loan to Wrigley Credit Union did not exist at the time of the entry of the judgment of dissolution, as Joseph had not had

an active account at the credit union since October 19, 2001. Beata alleged that Joseph advanced the existence of the Wrigley Credit Union loan to avoid paying child support.

¶ 11 Beata retained counsel, who filed a motion to increase child support and a petition for relief from judgment on July 25, 2007. After a hearing, the trial court found that the provision in paragraph 2.4 of the marital settlement agreement providing for no modifications of the child support for five years was void as being in contravention of public policy. On December 11, 2007, the court entered a child support order in accordance with section 505 of the Act, and set Joseph's obligation at $282.50 per week. The court set a hearing on Beata's petition for relief from judgment.

¶ 12 During opening statements at the May 19, 2008, hearing on Beata's petition for relief from judgment, Joseph's counsel spoke of Joseph's Wrigley 401K Savings Plan (savings plan), and advised that Joseph had a loan secured by the savings plan, and not the Wrigley Credit Union. Because Beata was unaware of the existence of a 401K savings plan, the court continued the cause to permit Beata time to subpoena records and amend her pleadings. During her investigation, Beata discovered that Joseph's savings plans was worth $338,909.24 as of June 18, 2008, and that it had contained $118,225.11 as of the time of the judgment of dissolution.

¶ 13 Beata filed a second amended petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2008)), seeking to vacate paragraph 2.4 of the marital settlement agreement because it was procured through fraud and void because it was in contravention of public policy; and thus, she requested child support from the time of March 21, 2003, to December 11, 2007, in accordance with section 505 of the Act. She specifically alleged that Joseph fraudulently concealed the existence of his savings

plan by misrepresenting the nature of the alleged $30,000 debt as a debt to the Wrigley Credit Union, and not as an encumbrance on his savings plan. Beata also requested that the court award her half of the current value of the savings plan because her waiver of any interest in it was induced by Joseph's deception and deceit.

¶ 14 On May 8, 2009, Beata filed a third amended petition for relief from judgment pursuant to section 2-1401 of the Code. In it, she added a count that alleged that the marital settlement agreement was unconscionable. The court conducted a hearing on Beata's third amended petition on September 15, 16, and 17, 2009. During his opening statement, Joseph's counsel contended, among other things, that Beata's request for retroactive child support was *res judicata* because she had twice before sought, and received, an amendment to child support she received from Joseph. Beata's counsel responded that the marital settlement agreement was unconscionable because Joseph fraudulently advanced the existence of a loan to the Wrigley Credit Union in order to prevent paying child support and to keep his savings plan hidden from Beata. Counsel further noted that accounting for the $150 per month Joseph paid in child support between October 29, 2005, and December 11, 2007, he avoided payment of $59,977.51, which was the amount of child support he would have owed under the statutory guidelines between the time of March 21, 2003, and December 11, 2007.

¶ 15 At these hearings, Joseph essentially testified that Beata knew about the existence of the savings plan. He also contended that Beata knew of the existence of the loan secured by the savings plan, and that she was the one who referred to it as the Wrigley Credit Union loan. He acknowledged that as of December 2002, the outstanding balance on this loan was approximately $30,000, and also that he borrowed money from his mother to pay this loan and

was making payments to her. Beata, on the other hand, testified that she was completely unaware of the existence of Joseph's savings plan until April 2008. She also testified that the parties had taken out loans from the Wrigley Credit Union during their marriage.

¶ 16 The court found, beyond a reasonable doubt, that Beata did not know of the existence of Joseph's savings plan until May 2008. The court also found that a loan existed, although its true nature was not disclosed by Joseph at the time of the entry of the judgment of dissolution. The court declined to make any further findings at the conclusion of these hearings, and permitted the parties to submit a written argument is support of their respective positions. The court subsequently entered an order that denied Beata's request for retroactive child support, finding that it was barred by *res judicata* due to the previous modifications in August 2005 and December 2007. Concerning the matter of whether Joseph fraudulently concealed his savings plan from Beata, the court found that Beata did not know of the existence of Joseph's savings plan. It awarded her half of the value of the savings plan as of the date of the entry of the judgment of dissolution on March 21, 2003, specifically one-half of $118,225.11, "plus any increase in the net asset value that may have accrued since the entry of the judgment on March 21, 2003." It also found "that the marital settlement agreement [was] unconscionable[,]" and that it "would not have approved the agreement if [it] had been aware of the existence and net asset value of the [savings plan] at the time of the prove up."

Beata appeals.

¶ 17 ANALYSIS

¶ 18 On appeal, Beata argues that the court: (1) erred when it found that the issue of retroactive child support was barred by *res judicata* because Joseph did not properly plead *res*

judicata as an affirmative defense, and Joseph had previously avoided his child support obligations through fraud and deceit; and (2) abused its discretion when it awarded Beata the value of Joseph's savings plan as of the date of the judgment of dissolution, as opposed to the date of the instant hearings, given that Joseph fraudulently concealed it from Beata. In her appellate brief, Beata specifically states that she is not challenging the trial court's findings of fact, but is only challenging the court's "remed[ies]."

¶ 19 Taking the issues in reverse order, we first conclude that the trial court did not abuse its discretion when it awarded Beata half of the value of Joseph's savings plan as of the date of the judgment of dissolution. However, because we also conclude that the portions of the marital settlement that touched and concerned the concealed savings plan, including the alleged Wrigley Credit Union loan, are unconscionable, we vacate paragraph 2.4, and remand the cause for the trial court to set Joseph's child support obligation from the date of the judgment of dissolution.

¶ 20 At the outset, we note that this court sanctioned Joseph for failing to timely file his appellate brief, and did not permit him to file an untimely brief. Thus, although he also filed a notice of appeal, his contentions of error are waived pursuant to Supreme Court Rule 341(h)(7) and (i) (eff. July 1, 2008), as he has not presented argument to support them.

Savings Plan

¶ 21 We first consider whether the trial court abused its discretion when it awarded Beata the value of Joseph's savings plan as of the date of the judgment of dissolution, as opposed to the date of the hearing on Beata's third amended petition, given that Joseph wrongfully concealed it from Beata.

¶ 22 When a party challenges a trial court's findings of fact on appeal, the reviewing court must determine whether the findings were against the manifest weight of the evidence. See *People ex rel. Sussen v. Keller*, 382 Ill. App. 3d 872 (2008). However, an appellate court reviews a trial court's ultimate determination on the division of marital property for an abuse of discretion. See *In re Marriage of Hubbs*, 363 Ill. App. 3d 696 (2006). A trial court abuses its discretion when its decision is arbitrary, fanciful, or unreasonable, and when no reasonable person could adopt the view of the trial court. *In re Marriage of Lindman*, 356 Ill. App. 3d 462 (2005). In an instance where one spouse wrongfully conceals assets from the other spouse in dissolution proceedings, a trial court acts within its discretion when it values the asset at its increased amount on the date of the later hearing, as opposed to its lesser amount on the date of dissolution. See *In re Marriage of Hale*, 278 Ill. App. 3d 53 (1996).

¶ 23 In this case, we do not believe that the court abused its discretion when it awarded Beata one-half of the value of Joseph's savings plan as of the date of the judgment of dissolution, as opposed to one-half of its increased value as of the time of the later hearings.

¶ 24 Essentially, a trial court has the discretion to value improperly concealed properly as of the date of a later property division hearing, *i.e.*, at a time when the value of the property has increased from the time of the entry of the judgment of dissolution. However, we have found no statutory or case law that mandates that a court must value the previously concealed property at the higher amount. Furthermore, the record indicates that the court conducted a three-day hearing on Beata's petition, permitted the parties to submit written arguments on their respective positions, and took the matters in Beata's third amended petition under advisement before it issued a decision. In short, the trial court carefully considered its discretion when it fashioned

the instant division of Joseph's savings plan. While we acknowledge Beata's argument that the trial court's determination to distribute the savings plan at the lower net asset value does not punish Joseph for concealing the asset, we simply do not believe that no reasonable person would agree with the trial court's determination to value the asset at its lower value as of the date of the entry of the judgment of dissolution. Consequently, the trial court did not abuse its discretion in doing so.

¶ 25 We do note, however, that the trial court awarded Beata one-half of the value of the savings plan as of the date of the entry of the judgment of dissolution, "plus any increase in the net asset value that may have accrued since the entry of the judgment on March 21, 2003." We presume that "accru[als]" means any interest earned on Beata's portion. If it does not, on remand, we order the trial court to award Beata the proper interest on the portion of the savings plan that it awarded to her.

¶ 26 Child Support

¶ 27 Beata next contends that the trial court erred when it determined that *res judicata* barred it from awarding Beata retroactive child support because Joseph did not properly plead *res judicata* as an affirmative defense, and Joseph had previously avoided his child support obligations through fraud and deceit.

¶ 28 In general, a trial court does not have the power to retroactively modify a parent's child support obligation. See *In re Marriage of Ingram*, 259 Ill. App. 3d 685 (1994). Thus, child support is modifiable only as to installments that accrue after the party moving for a modification gives the other party notice of the filing of their motion for modification. 750 ILCS 5/510 (West 2008).

¶ 29 However, a court has the power to vacate an unconscionable agreement. See *In re Marriage of Johnson*, 339 Ill. App. 3d 237 (2003) (appellate court affirmed trial court's grant of former husband's section 2-1401 petition in the interest of justice and fairness, although the husband did not act with due diligence in presenting it, as the marital settlement agreement was unconscionable because the amount the wife was to receive under it greatly exceeded the value of the marital estate). Another district of this appellate court has concluded that, if a trial court discovers that one spouse shielded certain marital assets from the other spouse, thereby preventing the other spouse from making an informed decision to enter into the property settlement, or the trial court from making a fair and equitable distribution of the marital property, the court should find the settlement unconscionable and vacate it. See *In re Marriage of Burch*, 205 Ill. App. 3d 1082 (1990). Likewise, courts have also denied enforcement of child support agreements that they have declared void as against public policy (See *Nelson v. Nelson*, 340 Ill. App. 463 (1950)), as this finding renders the offending provision unenforceable and lacking of any legal obligation (*In re Marriage of Macino*, 236 Ill. App. 3d 886 (1986)). Thus, relief under section 2-1401 may be available to set aside a settlement agreement that is unconscionable or was entered into because of duress, coercion, or fraud. *In re Marriage of Hoppe*, 220 Ill. App. 3d 271 (1991).

¶ 30 We conclude that because the trial court found that the marital settlement agreement was unconscionable, it should have vacated paragraph 2.4 of the marital settlement agreement and set the proper amount of child support starting from the date it entered the judgment of dissolution.

¶ 31 Specifically, the trial court found that the marital settlement agreement was unconscionable due to the existence and net value of Joseph's savings plan, and also found that if

it had had this information, it would not have approved the agreement. Given these findings, it should not have enforced paragraph 2.4, a contested term of an unconscionable agreement, against Beata, as she too may have never agreed to enter this unconscionable arrangement had she been furnished with complete and truthful information about Joseph's financial picture. This belief is buttressed by our conclusion that Joseph intentionally misrepresented the nature of the $30,000 loan to conceal a valuable marital asset, namely, his savings plan. We cannot sanction such an action. We also note that the trial court had previously found that Beata's agreement to refrain from seeking a modification of child support was void as against public policy.

¶ 32 We acknowledge that the trial court was correct in its belief that it generally could not enter an order for retroactive child support, and that since it had previously modified child support, the issue of child support may have been rendered *res judicata* had Joseph properly raised this affirmative defense. However, "the doctrine of *res judicata* was intended to be used as a shield, not a sword" (*Thornton v. Williams*, 89 Ill. App. 3d 544 (1980)), and in all fairness, we conclude that it should not be employed to advance the terms of an unconscionable agreement against the innocent party. We also question whether *res judicata* would apply under these facts. Specifically, Joseph's duplicity in concealing his savings plan may prevent a court from finding an identity between the former and latter of causes of action, as the former cause of action concerned the facts as represented by Joseph, and the latter cause of action, the one on which we base our conclusion, concerns the facts as they truly existed.

¶ 33 Nonetheless, based on our review of the record, the appeal before us essentially involves an unconscionable marital settlement agreement that the trial court would not have approved had it been furnished with complete information, a contested provision that the trial court had

previously found was void in contravention of public policy, and a substantial marital asset that was not disclosed at the time the marital settlement agreement was entered. Therefore, in this case, we conclude that justice and fairness dictate that we vacate the contested portion of the marital settlement agreement, *i.e*., paragraph 2.4.

¶ 34 When part of a judgment is vacated, the effect is to leave the case as if that part of the judgment had never been entered." *In re Marriage of Hale*, 278 Ill. App. 3d 53 (1996). Here, since we have vacated paragraph 2.4, the effect on the proceedings is as if the provision had never been entered. Consequently, we must remand the cause to the trial court for it to determine the proper amount of child support Joseph owes Beata for the period of time between March 21, 2003, and December 11, 2007, subtracting the value of the $150 monthly payments he made from October 29, 2005, to December 11, 2007, and any other payments he may have made during this period.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed in part, and reversed in part. The cause is remanded consistent with this order to vacate the relevant portion of the marital settlement agreement and for the court to set the appropriate amount of child support arrearage.

¶ 37 Affirmed in part, reversed and remanded in part.