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2012 IL App (3d) 100496-U

Order filed May 22, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

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|--------------------------|---|----------------------------------|
| <i>In re</i> MARRIAGE OF |) | Appeal from the Circuit Court |
| |) | of the 12th Judicial Circuit, |
| LUANNE JELM-EICKHOLTZ, |) | Will County, Illinois |
| |) | |
| Petitioner-Appellee, |) | Appeal Nos. 3-10-0496, 3-10-0834 |
| |) | Circuit No. 99-D-1841 |
| and |) | |
| |) | |
| R. NEAL EICKHOLTZ, |) | Honorable |
| |) | Robert P. Brumund, |
| Respondent-Appellant. |) | Judge, Presiding. |

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Schmidt and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court erred when it ordered the respondent to contribute to college education expenses incurred prior to the filing of the petition to contribute toward those expenses. (2) The trial court did not abuse its discretion in determining that the respondent should pay for one half of the college education expenses incurred after the filing of the petition. (3) The trial court did not abuse its discretion in ordering the respondent to contribute to the petitioner's attorney fees.

¶ 2 Respondent, R. Neal Eickholtz (Neal), appealed from a judgment of the circuit court of Will County ordering to him to pay a certain portion of his son's college expenses. This appeal was docketed as case number 3-10-0496. While this appeal was pending, the trial court ordered Neal to pay \$5000 toward attorney fees for his former spouse, Luanne Jelm-Eickholtz (Luanne). Neal's appeal was docket as case number 3-10-0835. Both appeals were subsequently consolidated by this court. On appeal, Neal contends that: (1) the trial court erred as a matter of law by requiring him to contribute to college expenses incurred before the petition seeking contributions had been filed; (2) the trial court abused its discretion in assigning the expenses he was required to pay; and (3) the trial court abused its discretion in ordering him to pay \$5,000 toward Luanne's attorney fees.

¶ 3 **FACTS**

¶ 4 Neal and Luanne were divorced on July 26, 2002. Three children were born to the marriage, the oldest being Eric. The judgment of dissolution of marriage provided that Neal would pay child support but was silent as to educational expenses for the couple's minor children. Eric enrolled as a freshman at the University of Iowa (Iowa), where he majored in psychology and prephysical therapy. Eric began his studies in August 2008 and completed his first year of school in May 2009.

¶ 5 On June 28, 2009, Luanne filed a petition for college expenses, seeking contribution from Neal for the expenses of the past school year (August 2008 to May 2009), as well as contribution for all subsequent years. A hearing on her petition was held December 21, 2009, which lasted three days.

¶ 6 At the hearing, Eric testified that he chose to enroll at Iowa primarily because Iowa had a highly ranked physical therapy graduate program. Eric wanted to be accepted into the physical therapy graduate program when he finished his undergraduate degree. He knew that acceptance into that program was highly competitive, and he believed that completing his undergraduate degree at the university would help him gain admission to the graduate program.

¶ 7 In choosing Iowa, Eric declined acceptance at six other schools, including St. Ambrose University (St. Ambrose), Augustana College, Marquette University, Bradley University, Knox College, and Keller College. In considering which school to attend, Eric received an estimate that the cost of attending Iowa would be \$32,877 per year. He was awarded \$8,568 in scholarships, \$2,500 in work-study grants, and a student loan in the amount of \$3,500. The expected total out-of-pocket expense to attend Iowa was calculated at approximately \$18,309. In comparison, the estimated cost of attending St. Ambrose was \$22,035 per year. Eric would have received a scholarship from St. Ambrose of \$12,000, and a student loan in the amount of \$3,500. The expected total out-of-pocket expense to attend St. Ambrose was calculated at approximately \$6,535. Despite the difference of \$11,774 in approximate cost, Eric chose Iowa over St. Ambrose.

¶ 8 John Groleau, a certified college finance specialist, testified that he was initially hired by Neal to assist in college planning during Eric's senior year in high school. After Neal and Luanne separated, Groleau was hired by Luanne to continue assisting with Eric's college financial planning. Groleau testified that he recommended that Eric apply to several schools, including the six schools previously mentioned. On direct examination, Groleau expressed some concerns that Eric had chosen Iowa over St. Ambrose, based upon the difference in costs. He opined that Iowa

was the third match from a financial standpoint, while St. Ambrose presented the best financial option. However, under questioning by the trial court, he conceded that there was some advantage in choosing Iowa because it had a graduate program where St. Ambrose did not. He noted that, while attending Iowa as an undergraduate was not a guarantee of admission to the graduate program, it would certainly help, particularly if Eric could cultivate a relationship with a professor as an undergraduate who might then assist him in becoming a graduate assistant. This could result in lower costs for graduate school.

¶ 9 On cross-examination, Groleau testified that he considered Iowa to be a "great fit" for Eric. He further testified that his only concern regarding the extra financial costs of attending Iowa was whether Neal would cooperate. Groleau testified that Neal had made statements that he would not pay "any money at all" toward Eric's college education if Eric did not achieve at least a 30 on his ACT test. Groleau testified that Neal's attitude would make Iowa more difficult for Eric to afford.

¶ 10 The court then accepted into evidence the financial affidavits of both Luanne and Neal and took further testimony regarding the financial status of Luanne, Neal, and Eric, and the ability of each to pay toward Eric's college education.

¶ 11 Following the hearing, the trial court found that Luanne had proven that Eric would benefit to a greater degree from attending Iowa than a less expensive school such as St. Ambrose. The court then ordered Neal to contribute half of Eric's college expenses after scholarships, grants, and student loans to Eric for the 2008-2009, 2009-2010, 2010-2011, and 2011-2012 school years. Although the order provided that Neal and Luanne were each to contribute half of Eric's unmet college expenses, the order further specified that Luanne was "solely responsible for

the parent plus loans for the school years 2008-2009 and 2009-2010" and Neal "shall be solely responsible for the sums remaining for the 2010-2011 and 2011-2012 school years that are due and owing over the \$14,000 scholarships, grants and loans Eric receives." The order also required Neal and Luanne to equally share all "out-of-pocket" expenses for all four school years, those being primarily medical, dental, and travel expenses. The court set the out-of-pocket expenses expended by Luanne for the 2008-2009 school year at \$3,648.66 and ordered Neal to pay half of that amount (\$1,824.16). The order stated that it was final and appealable. Neal filed a timely notice of appeal on July 1, 2010.

¶ 12 On September 10, 2010, the court granted Luanne's petition for contribution from Neal toward her costs and attorney fees and awarded her \$5,000. The trial court based its finding on the financial affidavits of both parties. On October 25, 2010, Neal filed a timely notice of appeal regarding the award of attorney fees. This court subsequently consolidated both appeals.

¶ 13 ANALYSIS

¶ 14 A. Retroactive College Expenses

¶ 15 Neal first maintains that the trial court erred as a matter of law in ordering him to pay a portion of Eric's college expenses that were incurred prior to the date Luanne filed her petition for contribution. Neal is correct. At the time the matter was pending before the trial court, the only decision issued by the Illinois Appellate Court directly addressing this question was *Petersen v. Petersen*, 403 Ill. App. 3d 839 (2010). In *Petersen*, the appellate court held that contributions toward college expenses are in the nature of child support (*In re Marriage of Loffredi*, 232 Ill. App. 3d 709 (1992)), and, thus, were subject to modification only upon petition. *Conner v. Watkins*, 158 Ill. App. 3d 759, 762 (1987). The *Petersen* court then concluded that, as

with any child support obligation, college expenses already incurred could not be recovered retroactively. *Petersen*, 403 Ill. App. 3d at 845-46.

¶ 16 While the matter was pending before this court, our supreme court issued a decision on the *Petersen* appeal, affirming the appellate court's holding that support for college expenses could not be ordered for expenses which predated the filing of the petition. *In re Marriage of Petersen*, 2011 IL 11098, ¶ 18. We find, therefore, that the trial court erred, as a matter of law, in ordering Neal to contribute to Eric's college expenses that were incurred prior to the date that Luanne filed the petition seeking Neal's contribution toward Eric's college expenses. We vacate that part of the order awarding contribution toward any expenses incurred prior to June 28, 2009.

¶ 17 B. Allocation of College Education Expenses

¶ 18 Neal next maintains that the trial court erred in allocating to him half of Eric's unmet educational expenses for attending Iowa that accrued after the date of filing of Luanne's petition. The amount and percentage of allocation of educational expenses will not be overturned on appeal absent a finding that the trial court has abused its discretion. *Street v. Street*, 325 Ill. App. 3d 108, 115 (2001). A clear abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the position adopted by the trial court. *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009).

¶ 19 Here, Neal's argument that the trial court abused its discretion in ordering him to contribute to Eric's college expenses is twofold. First, Neal maintains that he cannot afford to contribute to Eric's college, and the trial court erred in finding otherwise. Second, he maintains that the cost of attending Iowa was unreasonable because a less expensive alternative (St. Ambrose) was available. On appeal, Neal also raises a procedural issue regarding the trial court's

review of the evidence. We review each of these arguments for an abuse of discretion by the trial court.

¶ 20 On the question of whether Neal could afford to contribute to Eric's college expenses, the record contained extensive evidence concerning Neal's financial condition. Neal maintained that his financial affidavit showed that he had no ability to pay anything toward Eric's college education. The trial court, to the contrary, determined that Neal's income exceeded his expenses on a monthly basis by approximately \$1,000 per month. The court also noted that Neal's current wife's income, although segregated from Neal's, was, nonetheless, available to assist with household and living expenses. Additionally, the court noted that Neal had a substantial amount of assets and few, if any, debts. Given the evidence of Neal's financial situation, we cannot say that the trial court's findings were arbitrary, fanciful, unreasonable, or that no reasonable person would take the view adopted by the trial court. *Koster*, 235 Ill. 2d at 36.

¶ 21 Similarly, the argument that attending Iowa was unreasonable in light of the fact that Eric had been accepted to St. Ambrose does not establish that the trial court abused its discretion in ordering Neal to contribute to Eric's educational expenses at Iowa. While the availability of a lower cost educational opportunity is certainly one factor that the trial court should consider (*In re Support of Pearson*, 111 Ill. 2d 545, 551-52 (1986)), cost is only one factor, and circumstances may bode in favor of a more expensive option. See *In re Marriage of Schmidt*, 292 Ill. App. 3d 229, 239-40 (1997).

¶ 22 Here, there is sufficient evidence in the record to overcome the argument that the cost of attending Iowa was unreasonable. The record established that Eric wished to pursue a doctor of physical therapy (DPT) degree and that Iowa had a DPT program, while St. Ambrose did not.

Additional evidence suggested that attending Iowa as an undergrad majoring in physical therapy gave Eric an advantage, though not an absolute guarantee, in applying for the DPT program at Iowa. Neal suggested that either: (a) Eric would be unlikely to get into the DPT program at Iowa even if he graduates from Iowa, as the program is too competitive; or (b) Eric could get into the Iowa DPT program even if he graduates from St. Ambrose. Given the speculative nature of Neal's arguments regarding the relative benefit to Eric from attending Iowa instead of St. Ambrose as an undergrad, we cannot say that the trial court's finding that Eric would benefit from attending Iowa was an abuse of discretion.

¶ 23 We further note the testimony of college financial planning expert Groleau, who testified that financial cost was only one factor in matching a prospective student with a college. He also testified that, while it was not possible to state with any certainty, if Eric attended Iowa, he might have an advantage over a St. Ambrose graduate in securing placement in the Iowa graduate program. According to Groleau, Eric might also benefit from an opportunity, as an Iowa undergraduate, to cultivate a relationship with an Iowa professor which would assist him in gaining admission to the Iowa graduate program. While this is, of course, highly speculative testimony, nonetheless, Groleau was qualified as an expert to testify on the relative "fit" between Eric and the available college options. We find, therefore, that it would not be unreasonable for the trial court to give some weight to Groleau's testimony.

¶ 24 Moreover, to the extent that the petitioner is required to justify the more expensive school by showing special attributes or circumstances warrant attendance at the more expensive school (*People ex rel. Sussen v. Keller*, 382 Ill. App. 3d 872, 881 (2008)), the trial court did not abuse its discretion in finding that Luanne had met her burden by showing that attending Iowa instead of

St. Ambrose gave Eric a greater chance of matriculating into the DPT program at Iowa. While one could disagree with that conclusion, it would not be an arbitrary or fanciful decision.

¶ 25 In addition to the two substantive arguments, Neal also raises a procedural argument regarding the trial court's finding that he was financially able to contribute to Eric's college expenses. Neal points out that, during a colloquy with Luanne's attorney, the trial judge told the parties that the parties would need to establish an exact dollar amount for expenses as the court "was not going to do the math." Neal's attorney pointed out that he had not presented his case in chief yet and asked the court to keep an open mind. The trial judge responded that it had examined the extensive financial affidavits and other documentary evidence, as well as the case law on college expenses, and had "made up my mind." Neal maintains that this statement established that the court had made a decision based upon an incomplete record. See *Street*, 325 Ill. App. 3d at 114.

¶ 26 We note that, while it is unfortunate that the trial judge chose to say that he had made up his mind prior to the close of proofs, nonetheless, the question remains whether the court abused its discretion in finding that Neal should contribute to Eric's college expenses. We find that *Street* is clearly distinguishable from the instant matter. In *Street*, the trial court refused to allow one of the parties to conduct discovery or otherwise inquire into the financial resources available to the other party, including the income from the other party's new spouse. The appellate court held that it would still review the trial court's finding for an abuse of discretion, and held that the lack of sufficient evidence in the record regarding one party's income rendered the trial court's order reversible as an abuse of the court's discretion. *Street*, 325 Ill. App. 3d at 114-15.

¶ 27 Here, in spite of the trial judge's comment that he had made up his mind even though the record was still open, the ultimate order of the court regarding Neal's ability to contribute cannot be said to be an abuse of discretion. Unlike *Street*, the record here contained a complete picture of the financial condition of all the parties and, given the record, it cannot be said that the trial court abused its discretion.

¶ 28 C. Reasonable Attorney Fees

¶ 29 Neal next maintains that the trial court erred in ordering him to pay \$5,000 toward Luanne's attorney fees. The standard of review for an award of attorney fees is whether the trial court abused its discretion. *In re Marriage of Suriano and LaFeber*, 324 Ill. App. 3d 839 (2001). The payment of attorney fees is governed by section 508(a) of the Illinois Marriage and Dissolution of Marriage Act. 750 ILCS 5/508(a) (West 2008). The propriety of an award of attorney fees is dependent upon a showing by the party seeking them of an inability to pay and a demonstration of the ability of the other party to do so. *In re Marriage of Morse*, 240 Ill. App. 3d 296, 312 (1993). This ability or inability to pay must be judged by the relative position of the parties to each other and not by some objective standard. *In re Marriage of Courtright*, 155 Ill. App. 3d 55, 61 (1987).

¶ 30 Here, the trial court made its determination regarding the relative ability of each party to pay attorney fees based entirely upon the financial affidavits of each party. The record established that there was no live testimony or cross-examination regarding the affidavits and that each party stipulated to their admission. We have reviewed the financial affidavits contained in the record, and we cannot say that the trial court abused its discretion in finding that the affidavits established that the relative financial positions of each party regarding their ability to

pay the attorney fees supported an order that Neal contribute \$5,000 toward Luanne's attorney fees.

¶ 31

CONCLUSION

¶ 32 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed in part and vacated in part.

¶ 33 Affirmed in part and vacated in part.