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2012 IL App (4th) 111144-U

Filed 7/16/12

NO. 4-11-1144

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Marriage of,)	Appeal from
AURA MONICA EBERHARDT,)	Circuit Court of
Petitioner-Appellee,)	Sangamon County
and)	No. 10D859
DON FRANK EBERHARDT,)	
Respondent-Appellant.)	Honorable
)	Rudolph M. Braud,
)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Steigmann and Cook concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in its division of the marital property or by denying the ex-husband's requests for maintenance and attorney fees.

¶ 2 In October 2011, the trial court entered a judgment for dissolution of marriage, dissolving the marriage of petitioner, Aura Monica Eberhardt (Monica), and respondent, Don Frank Eberhardt (Don), and setting forth its findings and orders with respect to child custody and support, property division, maintenance, and attorney fees. Don appeals, arguing the court abused its discretion (1) in its division of marital property, (2) by denying Don maintenance, and (3) by denying Don an award of attorney fees. We affirm.

¶ 3 The parties were married on March 6, 1996, and had two children, Luke (born May 2, 2005) and Paul (born August 28, 2007). On October 21, 2010, Monica filed a petition for dissolution of marriage and, on November 9, 2010, Don filed a counterpetition. On July 15,

2011, the parties entered into a custody agreement that was approved by the trial court and set forth in the court's custody and visitation order entered the same date. Pursuant to the agreement and order, Monica was awarded sole custody of the parties' children with Don having visitation.

¶ 4 On July 15 and August 5, 2011, the matter was called for trial. Evidence showed Monica was 43 years old and born in Romania, where she went to medical school and worked as a general practitioner. On December 27, 1995, Monica came to the United States; in March 1996, she and Don were married; and in November 2001, Monica became a United States' citizen. At the time of trial, Don was 64 years old and had worked as a chiropractor for 30 years. As the parties are aware of the evidence presented, it is unnecessary to detail any further evidence.

¶ 5 On October 18, 2011, the trial court entered its judgment of dissolution of marriage. The court incorporated the previous custody and visitation order into its decision and determined that, because Monica was entitled to receive \$1,200 per month in social security benefits for Luke and Paul, Don would no longer be required to pay child support except for amounts he was in arrearage.

¶ 6 With respect to the division of property, the court ordered that the marital residence (valued at \$225,000) be divided equally upon its sale. Don was awarded two vehicles, a Crowne Victoria (\$2,000) and a Ford truck (\$11,000); his business accounts receivable (\$44,000); and his checking account (\$75). Monica was awarded a 2002 BMW (\$9,500), her checking account (\$1,500), and her savings account (\$101.33). The court ordered Monica's SERS retirement account (\$20,000) and deferred compensation account (\$31,000) to be divided equally between the parties. Each party was awarded various personal property.

¶ 7 Further, the trial court denied Don maintenance, noting "Monica's monthly expenses for the children [were] significant and [would] forever increase due to Paul's special needs/care," Monica was "carrying the vast majority of the family's month to month financial burdens," Don would receive a large portion of the marital estate, and Don would not be paying child support. The court also denied Don's claim of dissipation of assets. Finally, the court determined each party should pay his or her own attorney fees. Specifically, the court stated as follows:

"Don is in a very fortunate position with respect to the [c]ourt's ruling on fees. If the [c]ourt follows [*In re Marriage of Haken*, 394 Ill. App. 3d 155, 914 N.E.2d 739 (2009)], this [c]ourt can and should find that Monica's attorney had to spend a significant amount of time defending baseless claims by Don as to Monica's citizenship status and possible deportation—certainly needless and harassing. In addition to the ruling in *Haken*, this [c]ourt has the authority, under [section 508(b) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/508(b) (West 2010)),] which states, in part, that 'if at any time a court finds that a hearing under this Act was precipitated or conducted for any improper purpose, the court shall allocate fees and costs ***,' to impose fees. Improper purposes include harassment."

¶ 8 On November 10, 2011, Don filed a motion for rehearing, challenging the trial court's division of property, denial of his request for attorney fees, denial of his request for

maintenance, and rejection of his dissipation claim. On November 28, 2011, the court conducted a hearing on the motion and denied it.

¶ 9 This appeal followed.

¶ 10 On appeal, Don first argues the trial court abused its discretion with respect to the amount of property it awarded to him. Specifically, he contends the court should have awarded him all of the equity from the sale of the marital home due to his age, the decline in his business, and the disparity of the parties' incomes.

¶ 11 The trial court must divide marital property "in just proportions considering all relevant factors." 750 ILCS 5/503(d) (West 2010). Relevant factors for the court to consider include the following:

"(1) the contribution of each party to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property, including (i) any such decrease attributable to a payment deemed to have been an advance from the parties' marital estate *** and (ii) the contribution of a spouse as a homemaker or to the family unit;

(2) the dissipation by each party of the marital or non-marital property;

(3) the value of the property assigned to each spouse;

(4) the duration of the marriage;

(5) the relevant economic circumstances of each spouse

when the division of property is to become effective, including the

desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children;

(6) any obligations and rights arising from a prior marriage of either party;

(7) any antenuptial agreement of the parties;

(8) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(9) the custodial provisions for any children;

(10) whether the apportionment is in lieu of or in addition to maintenance;

(11) the reasonable opportunity of each spouse for future acquisition of capital assets and income; and (12) the tax consequences of the property division upon the respective economic circumstances of the parties." 750 ILCS 5/503(d) (West 2010).

¶ 12 "The [trial] court has broad discretion in the distribution of marital assets." *In re Marriage of Walker*, 386 Ill. App. 3d 1034, 1042, 899 N.E.2d 1097, 1104 (2008). On review, the court's division of marital assets will not be disturbed absent an abuse of that discretion. *In re Marriage of Thornley*, 361 Ill. App. 3d 1067, 1071, 838 N.E.2d 981, 985 (2005). An abuse of discretion occurs where "no reasonable person would agree with the trial court's decision." *In re Marriage of Donovan*, 361 Ill. App. 3d 1059, 1064, 838 N.E.2d 310, 315 (2005).

¶ 13 As Monica points out, on appeal, Don does not challenge the value the trial court placed on the parties' assets or what assets constituted marital property. Instead, he essentially argues the court failed to properly weigh the relevant factors to find him entitled to "the total equity of the marital home." We disagree.

¶ 14 First, the record shows Don was awarded a larger portion of the marital assets. In particular, he was awarded half the equity of the marital home, two vehicles, the chiropractic business's accounts receivable, and half the value of Monica's retirement and deferred compensation accounts.

¶ 15 Second, relevant situational factors support the trial court's equal distribution of the equity in the marital residence. In reaching its decision regarding the division of property, the court noted Monica "contributed significantly to paying down the debts associated with" the marital residence and "contributed substantially" to the upkeep of Don's chiropractic office "in part by the marriage paying mortgage payments and investing in the business's equipment." The court also considered that Monica did not ask Don's nonmarital estate to reimburse the marriage for those substantial contributions. Additionally, evidence in the record showed Monica had custody of the parties' two young children. Their youngest child had significant special needs both at the time of trial and for the foreseeable future. As the court found, Monica carried "the vast majority of the family's *** financial burdens."

¶ 16 Don argues the trial court overlooked factors important in the division of assets, including the age, health, employability, and income of each party. However, the record shows the court considered relevant factors and appropriately exercised its discretion. In particular, the court found Don was a highly educated individual, was "by most accounts healthy," and could

have a profitable chiropractic business. It stated Don was "a well respected chiropractor capable of maintaining a healthy client base as evidenced from prior business earnings."

¶ 17 Evidence in the record supported the trial court's determination that Don was capable of maintaining a profitable chiropractic practice. Although Don submitted a financial affidavit in July 2011 that showed a gross monthly income of only \$159 (which he acknowledged failed to include the \$1,500 a month in social security benefits he began receiving in June 2010), other financial information he prepared was contradictory. Only months before, in November 2010, Don submitted a financial affidavit that showed gross income of over \$80,000 in 2009; a gross income of \$67,365 from January to October 2010; and a gross monthly income of \$1,611. At trial, defendant testified his November 2010 affidavit was accurate at the time it was prepared. Additionally, in a financial statement Don prepared in November 2009, he reported the value of his office building as \$375,000, accounts receivable as \$44,000, the value of his business as \$170,000, and an annual income of \$64,000. In 2010, Don had bank deposits in excess of \$143,000, and the tax return for his chiropractic business showed gross sales of \$101,657. While he also reported a business loss of \$11,366, he had \$48,467 in deductions that he could not fully explain.

¶ 18 Don also argues the trial court erroneously failed to consider Monica's dissipation of marital assets by finding his dissipation claim was without merit. The court may consider dissipation when dividing marital assets. 750 ILCS 5/503(d)(d) (2010). "Dissipation is defined as the use of marital property for one spouse's benefit or for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown." *In re Marriage of Carter*, 317 Ill. App. 3d 546, 551, 740 N.E.2d 82, 86 (2000). "The issue of dissipation is

generally a question of fact, and the trial court's finding concerning dissipation will not be disturbed unless it is against the manifest weight of the evidence or an abuse of discretion."

Carter, 317 Ill. App. 3d at 551, 740 N.E.2d at 86.

¶ 19 Here, in reaching its decision, the trial court noted Don asked it to find that Monica dissipated marital funds by frequently sending money to her parents. The court found his claim was without merit, noting "the irrefutable testimony" showed Monica's payments to her parents were made prior to the breakdown of the marriage and it was not persuaded that Don was unaware of the payments. The record supports the court's findings, showing Monica sent money to her family throughout the course of the parties' 15-year marriage, with Monica specifically testifying that those payments occurred from 1997 to 2010. Don acknowledged that he knew about the payments but denied knowing the amount of money Monica sent. The court committed no error in finding these circumstances failed to meet the definition of dissipation.

¶ 20 In this instance, the record shows the trial court properly considered relevant factors in determining the division of marital property. It did not abuse its discretion in ordering the parties to equally divide any equity in the marital residence.

¶ 21 On appeal, Don also argues the trial court abused its discretion by denying his request for maintenance. He argues he is entitled to a maintenance award based on the length of the marriage, his contributions to Monica's ability to earn income, the disparity of their income, his age, the poor financial condition of his business, and the standard of living the parties enjoyed during their marriage.

¶ 22 "The trial court has the discretion to determine the amount and duration of an award of maintenance." *Walker*, 386 Ill. App. 3d at 1041, 899 N.E.2d at 1103. "When a party

challenges the trial court's factual findings, a reviewing court will affirm unless the court's findings were clearly against the manifest weight of the evidence." *Walker*, 386 Ill. App. 3d at 1041, 899 N.E.2d at 1103. However, the court's ultimate decision as to maintenance "will not be reversed on appeal absent an abuse of discretion" which "occurs where no reasonable person would adopt the view taken by the trial court." *Walker*, 386 Ill. App. 3d at 1041, 899 N.E.2d at 1103. The burden of showing an abuse of discretion is on the party challenging the court's award or denial of maintenance. *Walker*, 386 Ill. App. 3d at 1041, 899 N.E.2d at 1103.

¶ 23 The Act sets forth the following factors for the trial court to consider when determining whether to award maintenance:

- "(1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance;
- (2) the needs of each party;
- (3) the present and future earning capacity of each party;
- (4) any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage;
- (5) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment or is the custodian of a child making it

appropriate that the custodian not seek employment;

(6) the standard of living established during the marriage;

(7) the duration of the marriage;

(8) the age and the physical and emotional condition of

both parties;

(9) the tax consequences of the property division upon the respective economic circumstances of the parties;

(10) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;

(11) any valid agreement of the parties; and

(12) any other factor that the court expressly finds to be just and equitable." 750 ILCS 5/504(a) (West 2010).

"In considering these factors, the trial court is not required to give them equal weight 'so long as the balance struck by the court is reasonable under the circumstances.'" *In re Marriage of Bradley*, 2011 IL App (4th) 110392, ¶ 36, 961 N.E.2d 980, 988 (2011) (quoting *In re Marriage of Miller*, 231 Ill. App. 3d 480, 485, 595 N.E.2d 1349, 1353 (1992)). Further, "[t]here is no requirement that a maintenance award equalize the parties' net disposable incomes." *In re Marriage of Reynard*, 378 Ill. App. 3d 997, 1003, 883 N.E.2d 535, 540 (2008).

¶ 24 Here, the trial court denied Don's request for maintenance, stating as follows:

"Monica's monthly expenses for the children are significant and will forever increase due to Paul's special needs/care. At present,

Monica is carrying the vast majority of the family's month to month financial burdens. Due to Don receiving a large portion of the marital estate and the [c]ourt not ordering Don to pay current child support, this [c]ourt's denial of maintenance is reasonable and just."

Additionally, the court stated it considered all of those factors set forth in the Act. It specifically determined the parties were "relatively young" and Don was highly educated, healthy "by most accounts," and had the ability to engage in a profitable chiropractic practice.

¶ 25 The record shows the trial court considered appropriate and relevant factors in denying maintenance. As discussed, sufficient evidence supported its factual findings regarding Don's ability to earn income and Monica's current and future financial burdens such that those findings were not against the manifest weight of the evidence. In particular, the evidence showed that, although Monica earned a larger income than Don, she had greater financial responsibilities. Notably, Monica was primarily responsible for providing for the parties' two young children, one of whom would likely require specialized care into the foreseeable future. By contrast, Don was also a highly educated individual who had maintained a profitable chiropractic business for many years. While Don asserts his business is in poor financial condition and not sustainable, his various financial statements were contradictory. Given these factual circumstances, the trial court did not abuse its discretion in denying Don's request for maintenance.

¶ 26 Finally, on appeal, Don also argues the trial court abused its discretion by denying his request for attorney fees. Pursuant to the Act, a trial court "from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order any party to

pay a reasonable amount for his own or the other party's costs and attorney's fees." 750 ILCS 5/508(a) (West 2010). The Act provides that a petition for contribution to fees and costs shall be heard and decided after the final hearing and the close of proofs and before judgment is entered. 750 ILCS 5/503(j) (West 2010). Further, "[a] petition for contribution, if not filed before the final hearing on other issues between the parties, shall be filed no later than 30 days after the closing of proofs in the final hearing or within such other period as the court orders." 750 ILCS 5/503(j)(1) (West 2010). "An appellate court reviews the amount a trial court awards in attorney fees under an abuse-of-discretion standard." *Bradley*, 2011 IL App (4th) 110392, ¶ 26, 961 N.E.2d at 986.

¶ 27 Initially, Monica argues Don has forfeited his claim for attorney fees because he did not file a petition for contribution to fees and costs within 30 days after the close of proofs in the case. However, in a memorandum in support of judgement that Don filed within 30 days after the second trial date, he made a request for attorney fees to which Monica had the opportunity to respond and which the trial court addressed in its judgment. Therefore, we address the merits of the issue.

¶ 28 Here, the trial court ordered each party to pay his or her own attorney fees. Again, the court's findings that Monica had significantly greater financial responsibilities in caring for the parties' two young children and Don had the ability to maintain a profitable chiropractic practice were not against the manifest weight of the evidence. Additionally, the court found Don raised baseless claims during the divorce proceedings that were harassing to Monica and for which it could have imposed fees against him. We note the trial court was in the best position to observe the parties. *In re Marriage of Manker*, 375 Ill. App. 3d 465, 477, 874 N.E.2d 880, 890

(2007) ("A reviewing court will defer to the trial court's findings because the trial court, 'by virtue of its ability to actually observe the conduct and demeanor of witnesses, is in the best position to assess their credibility.' [Citation.]). Under the circumstances presented, we find no abuse of discretion.

¶ 29 In this case, the record supports the trial court's findings and shows it properly considered relevant factors when exercising its discretion and entering its judgment. In so holding, we note our appreciation of the court's effort in preparing a 10-page judgment of dissolution of marriage that set forth its specific findings of fact and law. A written judgment, like the one prepared by the trial court in this case, greatly facilitates appellate review.

¶ 30 For the reasons stated, we affirm the trial court's judgment.

¶ 31 Affirmed.