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2013 IL App (3d) 120644-U

Order filed October 10, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

In re MARRIAGE OF)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
DARIN COOK,)	Will County, Illinois,
)	
Petitioner-Appellant,)	Appeal No. 3-12-0644
)	Circuit No. 06-D-932
and)	
)	
WIDIAASTUTI COOK,)	Honorable
)	Bennett J. Braun,
Respondent-Appellee.)	Judge, Presiding.
)	

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* Although there was no finding that a husband's job change was an attempt to evade his obligations to his wife and child, the trial court did not abuse its discretion in imputing income to the husband in establishing a maintenance award based upon his prior employment when the job change left the husband severely underemployed and with uncertain earnings.
- ¶ 2 In a dissolution of marriage proceeding, the respondent wife, Widiaastuti Cook, was

granted spousal maintenance in the amount of \$600 per month, with an additional \$150 per month arrearage. The petitioner husband, Darin Cook, appealed.

¶ 3

FACTS

¶ 4 The parties were married on October 3, 1986, and they had one child together in 2003. Both parties were college educated. The wife had a bachelor's degree in Management Information Systems, and had worked as a PC specialist until 2000, when she became a full-time homemaker. The wife obtained a certified nursing assistant certificate in 2006. From 2006 until 2011, the wife worked for several companies, at an hourly wage ranging from \$9 to \$18. At the time of the maintenance hearing, the wife reported that she had been unemployed since July 2011 due to a knee injury. The husband had a bachelor's degree in Construction Technology, and worked as a civil engineer from 1991 until 2006. His annual salary at the end of his employment was approximately \$80,000. He voluntarily left his position on June 9, 2006, and began day-trading as a full-time occupation. In March 2009, the husband began a pizza delivery service in addition to his day-trading. His gross income delivering pizzas increased to approximately \$500 per week in 2010. The husband filed a petition for dissolution of marriage in May 2006.

¶ 5 A Judgment of Dissolution of Marriage was entered on July 9, 2009, and the wife was awarded sole custody of the minor child. The judgment provided that the husband would pay the wife child support in the amount of \$500 per month, based on an imputed gross annual income of \$40,000. There was no maintenance award in the judgment, but the wife's right to request maintenance from the husband was reserved for one year after the entry on the judgment.

¶ 6 Within the year, the wife filed a motion for maintenance. After a hearing, the trial court found that the husband was severely under-employed, although it did not find that the husband's

job change was an attempt to evade his obligations to his wife and child. The trial court found that the husband had an earning capacity of, at a minimum, \$75,000 per year. It found that the wife received relatively nominal assets from the marital estate, due in large part to the husband's depletion of his retirement account for day trading. The trial court found the wife's needs to be at least \$3000 per month, and that she had an extremely limited current earning capacity due to a physical injury. After the injury resolved, the trial court found the wife's earning capacity to be approximately \$25,000 to \$35,000 per year. It entered an order providing that the husband would pay the wife \$600 per month in maintenance, retroactive to the date of filing. The husband's motion for reconsideration was denied.

¶ 7

ANALYSIS

¶ 8 The husband appealed, arguing that the trial court should not have awarded maintenance to the wife because the husband did not have the ability to pay and the wife did not provide any documentary evidence in support of a physical injury demonstrating need. Also, the husband argues that the trial court erred in imputing his annual income after his change of career. He contends that the trial court erred when it found that he was severely underemployed, and that he had an earning capacity of \$75,000.

¶ 9 Section 504(a) of Illinois Marriage and Dissolution of Marriage Act sets forth the factors that a trial court considers in deciding whether to grant or deny maintenance in a dissolution proceeding. 750 ILCS 5/504(a) (West 2010). However, the trial court has wide latitude to consider the needs of the parties and is not limited to the factors enumerated in section 504. *In re Marriage of Lichtenauer*, 408 Ill. App. 3d 1075 (2011). We will not disturb a maintenance award on review absent an abuse of discretion. *In re Marriage of Schneider*, 214 Ill. 2d 152

(2005).

¶ 10 In the case at bar, the trial court specifically considered the statutory factors. It found that the husband had the ability to pay, based upon his earning capacity, and that the wife's earning capacity was temporarily impacted by a physical injury. The husband argues that the wife's injury was not proven because no documentary evidence was ever admitted to substantiate the claim, only the wife's testimony. However, the wife's oral testimony was evidence, which was unrebutted, and the husband was afforded the opportunity to cross-examine the wife at the maintenance hearing.

¶ 11 As for the husband's earning capacity, the trial court imputed income to the husband, finding that he was underemployed. The husband argues that the trial court erred in imputing the income, and that he did not have the ability to pay. Illinois appellate courts have developed three primary factors to consider in determining when it is proper to impute income for purposes of child support and maintenance: (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. *Lichtenauer*, 408 Ill. App. 3d at 1089; *In re Marriage of Gosney*, 394 Ill. App. 3d 1073 (2009). However, when considering the ability of one spouse to contribute to the other's support, courts should consider the level at which the spouse is able to contribute, not merely the level at which he is willing to work. *Lichtenauer*, 408 Ill. App. 3d at 1088. Courts have the authority to compel parties to pay maintenance at a level commensurate with a payor's earning potential. *Gosney*, 394 Ill. App. 3d at 1077. Also, it is appropriate for courts to consider past earnings, when current earnings are uncertain. *In re Marriage of Morse*, 240 Ill. App. 3d 296 (1993). A trial court's finding of net income is within the discretion of the

trial court and will not be disturbed absent an abuse of that discretion. *In re Marriage of Garrett*, 336 Ill. App. 3d 1018 (2003).

¶ 12 The trial court found that the husband’s decision to leave his engineering job was not an attempt to evade his obligations to his wife and child, but it was still a voluntary decision, made after filing the petition for dissolution of marriage, that resulted in the husband being “severely” underemployed. So, while the husband was not unemployed, his decision to work as a day-trader greatly impacted his income, and the trial court was within its discretion to consider the husband’s past earnings and earning potential to impute additional income. See *In re Sweet*, 316 Ill. App. 3d 101 (2000). Finding no abuse of discretion, we affirm the maintenance award.

¶ 13 CONCLUSION

¶ 14 The judgment of the circuit court of Will County is affirmed.

¶ 15 Affirmed.