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2015 IL App (3d) 130981-U

Order filed January 7, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2015

<i>In re</i> MARRIAGE OF	)	Appeal from the Circuit Court
LYNNE P. KINCAID,	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Petitioner-Appellee,	)	
	)	Appeal No. 3-13-0981
and	)	Circuit No. 07-D-547
	)	
BRIAN R. KINCAID,	)	The Honorable
	)	Robert P. Brumund,
Respondent-Appellant.	)	Judge, Presiding.
	)	

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PRESIDING JUSTICE McDADE delivered the judgment of the court.  
Justices Carter and Wright concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Respondent made an unchallenged *prima facie* showing that petitioner did not lack the financial resources to pay her attorneys fees and costs.

¶ 2 Respondent, Brian R. Kincaid, appeals the trial court's decision requiring him to pay the attorney fees and costs of petitioner, Lynne P. Kincaid. Petitioner has not filed an appellee's brief. Upon review, we reverse and remand for further proceedings.

¶ 3 FACTS

¶ 4 In September 2008, a judgment for dissolution of marriage was entered, dissolving the parties' marriage. In July 2011, respondent appealed certain findings made by the trial court. We affirmed in part and reversed in part (Appeal No. 1) (*In re Marriage of Kincaid*, 2012 IL App (3d) 110511)).

¶ 5 While Appeal No. 1 was pending, petitioner moved for appellate fees and costs (interim and prospective) related to her defense. At the hearing, respondent testified he is self-employed. In 2011, respondent's income after payment of business expenses and petitioner's \$128,500 support allocation was \$272,000.

¶ 6 Petitioner testified that her 2011 gross income was \$141,000 and that \$128,000 of that was unallocated support and maintenance. Petitioner's 2012 affidavit indicated she was employed and was earning \$6,000 monthly (\$72,000 annually). The affidavit also indicated that she was receiving \$9,800 per month in unallocated maintenance and support (\$117,600 annually) for a yearly projected gross income of \$189,000. Petitioner testified that she had outstanding debts in excess of \$80,000. Her affidavit disclosed she owed her attorney post judgment fees of \$23,282 and \$6,025 for appellate fees (Appeal No. 1).

¶ 7 When the trial court asked about the status of Appeal No. 1, petitioner's counsel stated: "Briefs have all been completed. We're waiting for the appellate court to set a date for oral argument, if they are going to hear oral argument \*\*\*. The appeal is \$12,000 \*\*\* as we sit here today." At the conclusion of the hearing, the trial court granted petitioner's request for interim and prospective fees and costs. The court also ordered respondent to pay \$12,005 to petitioner before May 1, 2012.

¶ 8 In May 2012, respondent filed a motion for reconsideration where he argued, among other things, that the award of interim fees and costs actually constituted the entire amount of

fees and costs incurred by petitioner. Respondent informed the trial court that there would be no oral argument in Appeal No. 1 and the parties were simply awaiting the appellate court's decision. Upon hearing argument, the court denied respondent's motion for reconsideration. The court's denial order expressly stated "there is no just reason for delaying appeal of the interim appellate attorney fees and cost issue."

¶ 9 In June 2012, respondent appealed from the denial of his motion for reconsideration (Appeal No. 2). Petitioner filed a motion to dismiss for lack of jurisdiction. In her motion, petitioner argued that the award of fees and costs was on an interim basis and therefore, not final. Petitioner also argued that other matters remained pending in the trial court as a result of the reversal and remand of issues in Appeal No. 1. We subsequently entered a minute order dismissing Appeal No. 2 "for lack of jurisdiction."

¶ 10 In November 2012, the trial court entered an order resolving those issues we previously reversed and remanded in Appeal No. 1. On November 13, 2013, the trial court entered an agreed order which provided, *inter alia*, that all of respondent's arrearages from the November 2012 court order had been paid.

¶ 11 On December 12, 2013, respondent filed a notice of appeal (Appeal No. 3) that sought reversal of the trial court's decision that required respondent to pay all of petitioner's attorney fees incurred in Appeal No. 1.

¶ 12 ANALYSIS

¶ 13 At the outset, we clarify our jurisdiction. We previously dismissed Appeal No. 2 for "lack of jurisdiction." Subsequent to this dismissal, the trial court entered an agreed order. The import of the agreed order was: (1) that Appeal No. 1 is now over, (2) all remanded issues as a result of Appeal No. 1 have been decided, (3) respondent was liable for all of petitioner's fees

and costs with respect to Appeal No. 1, and (4) respondent has satisfied his obligation to pay all of petitioner's fees and costs. We find this agreed order is final and appealable. Respondent filed a timely notice of appeal.

¶ 14 The sole issue on appeal is whether the trial court abused its discretion in ordering respondent to pay all of petitioner's fees and costs with regard to Appeal No. 1. Because respondent has made a *prima facie* showing that petitioner did not lack the financial resources to pay her fees and costs, we reverse the trial court's judgment.

¶ 15 Initially, we note that petitioner did not file an appellee's brief. It is not our role to serve as an advocate for the appellee or search the record for reasons to sustain the trial court's judgment. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976). Thus, if the appellant's brief demonstrates *prima facie* reversible error, and the record supports such contentions of error, we may reverse the trial court. *Talandis*, 63 Ill. 2d at 133.

¶ 16 Section 508 of the Illinois Marriage and Dissolution of Marriage Act allows for an award of attorney fees where one party lacks the financial resources and the other party has the ability to pay. 750 ILCS 5/508 (West 2012). "The party seeking an award of attorney fees 'must establish her own inability to pay *and* the other spouse's ability to do so.' " *In re Marriage of Reimer*, 387 Ill. App. 3d 1066, 1076 (2009) quoting *In re Marriage of Puls*, 268 Ill. App. 3d 882, 889 (1994). " 'Financial inability exists where requiring payment of fees would strip that party of her means of support or undermine the party's financial stability.' " *Reimer*, 387 Ill. 3d at 1076 quoting *Puls*, 268 Ill. App. 3d at 889. Thus, the question is not simply which party has the most money, but rather whether the petitioning party has the financial ability to satisfy their respective fees and costs. *Reimer*, 387 Ill. App. 3d at 1076. If the petitioning party does not have the ability, the court then looks to other spouse's ability to do so. *Reimer*, 387 Ill. App. 3d at 1076.

¶ 17 At the time petitioner sought to have her fees and costs paid (2011), petitioner was receiving \$9,800 per month in unallocated maintenance and support. Petitioner testified that her 2011 gross income was \$141,000. Her gross income for 2012 is projected to be \$189,000. Her fees and costs appear to be approximately \$12,000. These facts do not establish that petitioner lacked the financial resources to pay her fees and costs associated with Appeal No. 1. Thus, we hold the trial court's judgment ordering respondent to pay said fees and costs constitutes an abuse of discretion.

¶ 18 In coming to this conclusion, we again emphasize that petitioner has voluntarily chosen to not file an appellee's brief. The practical impact of this choice is that respondent has not alleged any facts that would support a finding that she was unable to pay nor refuted any of respondent's allegations or recitation of facts, thereby leaving him with an unchallenged *prima facie* showing. We will not serve as an advocate for petitioner or search the record for reasons to sustain the trial court's judgment.

¶ 19 For the foregoing reasons, we reverse the trial court's judgment and remand the matter for further proceedings consistent with this order.

¶ 20 Reversed and remanded.