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2015 IL App (3d) 140791-U

Order filed July 28, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
JILL EBERLE,)	Peoria County, Illinois,
)	
Petitioner-Appellee,)	
)	Appeal No. 3-14-0791
and)	Circuit No. 05-D-268
)	
MJ EBERLE,)	Honorable
)	Katherine S. Gorman,
Respondent-Appellant.)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* (1) The trial court erred in finding that respondent's maintenance obligation terminated effective November 23, 2011. (2) The trial court did not abuse its discretion in ordering respondent to pay a portion of petitioner's attorney fees.

¶ 2 On September 24, 2013, the trial court entered a judgment dissolving the marriage of petitioner, Jill Eberle, and respondent, MJ Eberle. On appeal, respondent contends that the trial court erred in finding that his maintenance obligation terminated on November 23, 2011, arguing instead that the obligation terminated in June of 2009. Respondent also argues that the trial court

abused its discretion in granting petitioner's request for attorney fees. We reverse in part, affirm in part, and remand with instructions.

¶ 3

FACTS

¶ 4

On May 4, 2005, petitioner filed a petition for dissolution of marriage and requested that she be awarded maintenance. The parties subsequently agreed to a temporary order, by which respondent agreed to pay petitioner temporary maintenance in the sum of \$1,200 per month.

¶ 5

On July 28, 2011, respondent filed a petition to terminate maintenance, alleging that petitioner was living with her boyfriend. A hearing on the petition took place over the course of two days; in closing arguments, respondent requested that he be reimbursed by petitioner for all maintenance payments he made after the date of her cohabitation.

¶ 6

On November 23, 2011, the trial court granted respondent's petition. In its memorandum order, the court provided a numbered list of 14 facts in favor of termination. The first item on the list read as follows: "Jill's residing on a continuing, regular, conjugal basis with Keith Miller; they met in 2005, when they rarely spent 'evenings' together; since June 2009, they have spent much more home-life time together, as described below." The court found that petitioner and Miller spent 80% of their nights together, noting that "Jill's daughter Alexis testified that they have spent every night together since June 2009; Jill and Keith testified that they spend 3-6 nights per week together; court believes it is somewhere in between." The court's order was silent as to any reimbursement owed by petitioner to respondent.

¶ 7

On September 24, 2013, the parties placed a final partial settlement agreement on the record in open court, which was incorporated into a final judgment for dissolution. Under the terms of the agreement, respondent would purchase petitioner's interest in the marital estate for \$100,000, to be paid within 60 days of the judgment. Respondent would also pay petitioner

\$277,453.26 to equalize the distribution of assets, consisting largely of the parties' real estate holdings.

¶ 8 The parties also presented argument to the court on some contested issues. Among these issues, respondent again sought reimbursement for maintenance paid after the date of cohabitation. Respondent did not present any new evidence at the final hearing regarding the date of cohabitation; rather, he urged the court that he was entitled to reimbursement based upon the earlier finding that cohabitation had begun in June of 2009. The trial court disagreed, finding that "Judge McCoy ruled on November 23, 2011 and did not terminate maintenance effective June, 2009."

¶ 9 The issue of attorney fees was also contested at the final hearing. Petitioner asked the court that respondent be ordered to pay her remaining attorney fees, totaling between \$18,000 and \$20,000. Respondent maintained that petitioner was able to pay her own fees, pointing to the \$100,000 she would be receiving within 60 days, and the \$277,453.26 she would be receiving upon sale of the parties' property. The most recent financial affidavits on record at the time of the final hearing showed that respondent's gross monthly income was \$11,360.00 while petitioner's gross monthly income was \$1,930.43. Petitioner's monthly expenses totaled \$3,616.27; respondent's monthly expenses totaled \$9,563.34. The trial court ordered respondent to pay \$19,000 to petitioner's attorney within 60 days.

¶ 10 ANALYSIS

¶ 11 On appeal, respondent contends (1) that the 2011 court found that cohabitation began in June 2009, and that the 2013 court consequently erred in finding that maintenance terminated in 2011; and (2) that the trial court abused its discretion in awarding attorney fees to petitioner. We agree that the 2011 court found cohabitation began in June 2009, and that respondent is entitled

to reimbursement for any maintenance paid after that date. However, we find that the trial court did not abuse its discretion in awarding attorney fees to petitioner.

¶ 12

I. Maintenance

¶ 13

The obligation of one party in divorce proceedings to pay future maintenance is terminated "if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis." 750 ILCS 5/510(c) (West 2008). It is well-settled that the termination of maintenance payments is triggered by the cohabitation, not when the petition is filed or ruled upon. See *Snow v. Snow*, 322 Ill. App. 3d 953, 956-57 (2001).

¶ 14

In the present case, contrary to the position of the 2013 court, we find that the 2011 court did find that cohabitation commenced in June of 2009. The court began its list of evidence in favor of termination by stating: "[S]ince June 2009, they have spent much more home-life time together, as described below." Each of the following 14 bullet points in favor of termination involved occurrences as of June 2009. The above factual findings are tantamount to a finding that cohabitation began in June of 2009.

¶ 15

Importantly, even if we were to determine that the 2011 court made no finding as to the date of cohabitation, the 2013 court nevertheless erred in finding that maintenance terminated as of November 23, 2011, the date of the ruling. Where a court does not make a finding as to the date of cohabitation, remand is necessary so that the trial court may make such a determination. *Snow*, 322 Ill. App. 3d at 957. However, because we find that the 2011 court did find that cohabitation commenced in June of 2009, such a determination is not necessary on remand. Instead, we remand with directions that the trial court enter a finding that respondent's maintenance obligation terminated as of June 2009, and calculate the amount of overpayment for which respondent is entitled reimbursement.

¶ 16

II. Attorney Fees

¶ 17

Under the Illinois Marriage and Dissolution of Marriage Act, a trial court may order any party to pay for the other party's costs and attorney fees. 750 ILCS 5/508(a) (West 2012). "The party seeking an award of attorney fees must establish her inability to pay and the other spouse's ability to do so." *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005). Financial inability exists where requiring the payment of fees would strip a party of her means of support or undermine her financial stability. *Id.*

¶ 18

Because the trial court is in the superior position to weigh the evidence, a reviewing court will not overturn the trial court's findings simply because the reviewing court may have reached a different decision. *In re Marriage of Pratt*, 2014 IL App (1st) 130465, ¶ 36. Accordingly, a trial court's grant of attorney fees will be reversed only where that court has abused its discretion. *Schneider*, 214 Ill. 2d at 174. An abuse of discretion occurs only where the trial court's ruling is arbitrary, fanciful or unreasonable, or no reasonable person could find as the trial court did. *In re Marriage of Dowd*, 2013 IL App (3d) 120140, ¶ 21.

¶ 19

In the present case, the record before the trial court showed that petitioner's gross monthly income was only \$1,930.43, while her monthly expenses totaled \$3,616.27. Meanwhile, respondent's gross monthly income (\$11,360) was nearly five times that of petitioner, while his monthly expenses totaled \$9,563.34. It is clear from these figures that a \$19,000 payment to her attorney—a sum nearly 10 times her monthly gross income—would undermine petitioner's financial stability. Such a payment would not have the same effect on respondent.

¶ 20

Respondent maintains that petitioner's expected proceeds from the dissolution judgment demonstrate petitioner's ability to pay her own attorney fees. Specifically, respondent points out

that petitioner was to receive \$100,000 from respondent within 60 days of the judgment and \$277,453.26 upon the sale of marital assets. This information, of course, was at the disposal of the trial court when it granted petitioner's request for attorney fees. The trial court could easily have found that taking 20% of the \$100,000 owed to petitioner, when she was already at a deficit of \$1,500 per month, might still have undermined her financial ability. Similarly, the trial court may have been hesitant to speculate on the eventual returns from the sale of marital property. Consequently, we cannot say that the trial court's decision was arbitrary, fanciful or unreasonable, or that no reasonable person could find as the trial court did.

¶ 21

CONCLUSION

¶ 22

The judgment of the circuit court of Peoria County is affirmed in part, reversed in part, and remanded with instructions.

¶ 23

Affirmed in part, reversed in part, and remanded with instructions.