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2015 IL App (3d) 140868-U

Order filed April 1, 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 12th Judicial Circuit,
NICOLE BUDICK,)	Will County, Illinois.
)	
Petitioner-Appellant,)	
)	
and)	Appeal No. 3-14-0868
)	Circuit No. 12-D-1417
KRISTOFER BUDICK,)	
)	
Respondent-Appellee.)	Honorable David Garcia,
)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice McDade and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held:* Petitioner forfeited her argument that the court erroneously excluded evidence by failing to: (1) make an adequate offer of proof at trial; and (2) argue that the outcome would have been different had the court considered the excluded evidence. The trial court abused its discretion in imputing income to petitioner where evidence did not establish that she could make such income.

¶ 2 Petitioner, Nicole Budick, and respondent, Kristofer Budick, had four children during their marriage. Nicole filed a petition for dissolution of marriage in July of 2012. She requested sole custody, care, control, and education of the children. Kristofer filed a counterpetition for

dissolution requesting sole care, custody, and control of the children. At trial, the court excluded custody reports prepared by a court-appointed evaluator. The court heard testimony from the parties and Kristofer's mother. Ultimately, the court ordered joint care, custody, and control of the minor children with Kristofer being the primary residential parent. Kristofer also had final decision making if the parties failed to reach an agreement regarding a child-related issue. The court awarded Nicole rehabilitative maintenance of \$1,000 for 12 months, after imputing an income of \$20,000 to her.

¶ 3 Nicole appeals, arguing that the court erred by: (1) excluding from evidence the custody reports; and (2) imputing income to her. For the following reasons, we affirm in part, reverse in part, and remand.

¶ 4 **BACKGROUND**

¶ 5 Nicole and Kristofer had four children during their marriage. Hal.B. is nine years old, Han.B. is eight years old, K.B. is six years old and He.B. is three years old. Nicole requested that the court award her sole custody of the children, subject to reasonable visitation for Kristofer. Kristofer's counterpetition requested that the court award him sole custody of the children.

¶ 6 Prior to trial, Kristofer filed a motion to appoint a 604(b) evaluator. The court granted Kristofer's motion and appointed Dr. Robert Shapiro as the evaluator.

¶ 7 The day of trial, Kristofer's counsel advised the court that Shapiro provided two custody reports. He did not intend to call Shapiro as a witness. Nicole appeared *pro se*. The court barred Nicole's proposed witnesses from testifying; she failed to disclose such witnesses prior to trial. The court then told Nicole:

"THE COURT: You're the plaintiff. You're the one that filed the petition, so you've got to start.

MS. BUDICK: Okay. Well, I had — — we have two custody reports that were recommended through Mr. Budick and his lawyer — —.

[Kristofer's Counsel]: Objection, hearsay.

THE COURT: Sustained.

MS. BUDICK: Okay, I do not even know where to start. I mean, it's up because we are not agreeing with custody. I am going for joint residential. He wants custody. I want custody."

¶ 8 The trial court then questioned Nicole and elicited the following testimony. The parties had four children during the marriage. Nicole was not pregnant at the time of trial. The parties separated about two years ago. She testified about marital property and debt, which has no bearing on the present appeal; we will not discuss such testimony.

¶ 9 The following then took place:

"THE COURT: And you're asking the Court for residential custody?

MS. BUDICK: Correct.

THE COURT: Do you have any testimony today why you should get residential custody?

MS. BUDICK: I have, you know, the two custody reports that were in — —.

[Kristofer's Counsel]: Again, I'm going to object.

THE COURT: Sustained.

THE COURT: Why do you feel that you need to have custody other than, you know, the hearsay stuff."

¶ 10 Nicole was a stay-at-home mom for 10 years; she primarily cared for the children during the marriage. The children resided with Kristofer for the previous six months.

¶ 11 On cross-examination, she stated that she resided in the marital home, which was in foreclosure. When asked where she intended to live after the foreclosure, she replied, "Wherever I can find a place to rent." Prior to trial, the court ordered her to seek employment and to complete a job diary. Nicole provided the court with her job diary; she filled out the diary during the required period of time, with the exception of one month while she was incarcerated. She looked for any position that she could find. Nicole applied to Silver Cross Hospital for a secretarial position. During the marriage, she received a certification for medical coding, but was unable to find a medical coding job due to her lack of experience. Nicole was incarcerated for one month for failing to comply with a court-ordered drug test. She admitted that she occasionally smoked marijuana.

¶ 12 Kristofer also testified at the hearing. He resides in a three-bedroom, two-bathroom house located in the same school district that the children attend. Kristofer was a journeyman electrician, earning approximately \$78,000 per year. Neighbors and family members assisted in caring for the children when he worked. He also provided testimony concerning the children's extracurricular activities and medical and dental appointments. None of the children suffered from any medical conditions. He suffered from an ulcer. Nicole was in fairly good health.

¶ 13 The children participated in counseling. Pursuant to the counselor's recommendations, Kristofer agreed to a temporary parenting schedule that provided Nicole with unsupervised visitation every other weekend; weekday visitation was complicated due to the children's activities. During the marriage, the children's performance in school was mediocre, but the children excelled after they moved in with Kristofer.

¶ 14 Kristofer knew that Nicole smoked marijuana in the marital home prior to the separation, but he did not know whether she continued to do so. Friends and family told him that she used marijuana frequently after the parties separated. He heard rumors that Nicole used prescription pills, but did not personally know if she did so. During the marriage, Nicole worked in retail at Tuesday Morning when he was laid off. Nicole correctly disciplined the children.

¶ 15 On cross-examination, Kristofer admitted to smoking marijuana during the marriage; he bought marijuana for Nicole in the past. An employer never fired him or laid him off for failing a drug test. He stated that Nicole was a good mother and had been a stay-at-home mom for 10 years.

¶ 16 Janice Budick, Kristofer's mother, testified that she lived with Kristofer and the children for the past six months. She cared for the children while Kristofer worked. Janice also did household chores during the day. Kristofer drove the children to soccer practice and helped them with their homework. Janice did not have contact with Nicole, other than seeing her at the children's soccer games. Janice heard that Nicole used marijuana. Nicole did not cross-examine Janice.

¶ 17 Ultimately, the court ordered joint care, custody, and control of the children with Kristofer as the residential parent. He also had final decision-making authority if the parties disagree on any issue concerning the children. The court awarded Nicole visitation every other

weekend and every Tuesday after school until 7 p.m. Once Nicole obtains employment and establishes housing, the court will revisit visitation and parenting time. The court also awarded Nicole \$1,000 per month for rehabilitative maintenance for 12 months, only after it imputed income of \$20,000 to Nicole. The court stated that, "I'm going to impute that income because I think, you know, isn't it that if she went to work at McDonald's, isn't that what she would make — —."

¶ 18 Nicole appeals. We affirm in part, reverse in part, and remand.

¶ 19 ANALYSIS

¶ 20 I. 604(b) Report

¶ 21 Nicole argues that the court improperly excluded the 604(b) report as hearsay. Kristofer did not file an appellee's brief.

¶ 22 We need not determine whether the trial court erred by excluding the evidence as hearsay. *People v. Wallace*, 35 Ill. 2d 620, 623 (1966). Where an appellant claims that the court erred in excluding evidence, the reviewing court will not consider the claim unless the excluded evidence is made part of the record. *Id.* Where the court excludes evidence, the proponent must make an adequate offer of proof of such evidence. *Guski v. Raja*, 409 Ill. App. 3d 686, 695 (2011). Failure to make an adequate offer of proof results in forfeiture of the issue on appeal. *Id.*

¶ 23 Here, Nicole mentioned she had custody reports that the court excluded based on hearsay. Nicole failed to make an adequate offer of proof. The record merely indicates that Nicole had two custody reports, but does not establish what is contained in the custody reports. We acknowledge that Nicole is *pro se*, but the rules of procedure apply to her the same. *People v.*

Bond, 178 Ill. App. 3d 1020, 1023 (1989); *Lewis v. Heartland Food Corp.*, 2014 IL App (1st) 123303. Accordingly, we find that Nicole forfeited the issue on appeal.

¶ 24 Nicole's argument fails on yet another level. Erroneously excluded evidence is ground for a new trial *only* where such evidence, if admitted, would have changed the outcome of the trial. *People v. Sims*, 167 Ill. 2d 483, 516 (1995).

¶ 25 Nicole failed to argue that the outcome would have been different had the court considered the custody reports; she only argues that the court erroneously excluded the evidence as hearsay. Further, we are unable to determine whether the reports would have affected the outcome; the record does not contain a copy of the custody reports. We, accordingly, affirm the trial court's ruling.

¶ 26

II. Imputing Income

¶ 27 Nicole argues that the parties presented insufficient evidence to impute income and that the court cannot take judicial notice of Nicole's employment opportunities.

¶ 28 We review a court's ruling imputing income under an abuse of discretion standard. *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 1077 (2009). We will find an abuse of discretion where the court's finding is arbitrary or fanciful, or where no reasonable person would agree with its position. *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009).

¶ 29 Nicole argues that we should consider the following three factors when determining whether the trial court erred in imputing income: (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. *Gosney*, 394 Ill. App. 3d at 1077. We find that the three factors do not apply to the present case. The factors apply to a noncustodial, *payor* spouse. Here, Nicole is the payee spouse. Thus, we will determine whether the trial court abused its

discretion without consideration of such factors. See *In re Marriage of S.D.*, 2012 IL App (1st) 101876, ¶ 36 (the court did not contemplate the factors but, rather, considered the evidence presented when determining whether the trial court abused its discretion by imputing income to the *payee* spouse). We find that factors one and three above would be among the relevant factors to consider when imputing income to a payee spouse.

¶ 30 We find that the trial court abused its discretion in imputing income of \$20,000 to Nicole. This case is easily distinguishable from cases where the court properly imputed income. See *In re Marriage S.D.*, 2012 IL App (1st) 101876, ¶¶ 36-37 (the court imputed income to the payee spouse where she earned \$10,000 in income during the two years prior to trial and an expert testified as to the amount of income the spouse should be able to obtain as a licensed social worker); *In re Marriage of Hubbs*, 363 Ill. App. 3d 696 (2006) (court imputed income where evidence established spouse's income for the previous three years and that he recently rejected a job that would have paid more than the imputed amount); *Blum v. Koster*, 235 Ill. 2d 21 (2009) (court reduced maintenance where the spouse's steps toward financial independence "minimal" despite the fact that future earning potential as an attorney was promising).

¶ 31 To the contrary, this case is similar to *In re Marriage of Gosney*, 394 Ill. App. 3d at 1078, where the court held that the trial court improperly imputed income. There, evidence established that the spouse was unemployed at the time of trial and he could not find an available position in his area of expertise. *Id.* The trial court imputed an income of \$350,000. *Id.* The court held that no evidence established that a job of such income was available to someone of the spouse's experience at the time of trial; the trial court abused its discretion in imputing an income of \$350,000. *Id.*

¶ 32 Here, Nicole was a stay-at-home mom for 10 years. Aside from her retail job, she did not earn any income. In addition, Kristofer's testimony that Nicole worked in retail proved neither how much she earned, nor how long or when during the marriage she worked. Her education consisted of a certificate in medical coding; she testified she did not qualify for the available medical coding positions due to her lack of experience. This is even more of an abuse of discretion than *Gosney*. There, the court had evidence of the spouse's past income. *Gosney*, 394 Ill. App. 3d at 1078. Here, neither party presented evidence of Nicole's past income or her earning potential. In order to earn \$20,000, Nicole would have to work 50 weeks per year, 5 days a week, 8 hours a day, earning approximately \$10 per hour. The record does not establish that it is possible to make such money working at McDonald's. We, accordingly, find that the trial court abused its discretion in imputing an income of \$20,000. We, therefore, reverse in part and remand for a hearing to establish maintenance obligations.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit clerk of Will County is affirmed in part, reversed in part, and remanded for a maintenance award hearing.

¶ 35 Affirmed in part and reversed in part; cause remanded.