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2015 IL App (4th) 140599-U

NO. 4-14-0599

FILED
April 23, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: MARRIAGE OF ROBERT J. BLUMTHAL, Petitioner-Appellee, and DEBRA L. BLUMTHAL, Respondent-Appellant.	))))))))	Appeal from Circuit Court of Sangamon County No. 11D354 Honorable Brian T. Otwell, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion by making maintenance reviewable.

(2) The trial court did not abuse its discretion in the amount of maintenance, considering the amount of indebtedness it allocated to petitioner.

(3) The trial court made a finding that was against the manifest weight of the evidence when finding that petitioner had not dissipated any marital assets, but the court was not required to charge the dissipation against him in its distribution of the marital estate.

¶ 2 In March 2014, the trial court dissolved the marriage of petitioner, Robert J. Blumthal, and respondent, Debra L. Blumthal. For three reasons, respondent appeals from the judgment of dissolution.

¶ 3 First, respondent argues the trial court abused its discretion by limiting the duration of maintenance or, in other words, by awarding rehabilitative maintenance. This

argument is based on a misconception. The court awarded *reviewable* maintenance, not *rehabilitative* maintenance. There is a difference.

¶ 4 Second, respondent argues the trial court abused its discretion in the amount of maintenance. Because the trial court allocated to petitioner almost five times the amount of indebtedness that it allocated to respondent, we find no abuse of discretion in the amount of maintenance.

¶ 5 Third, respondent argues that by finding no dissipation of marital assets by petitioner, the court made a finding that was against the manifest weight of the evidence. We agree. But the court did not have to charge the dissipation against petitioner in the distribution of marital assets.

¶ 6 Therefore, we affirm the trial court's judgment.

¶ 7 I. BACKGROUND

¶ 8 A. The Marriage

¶ 9 The parties married on March 5, 1983. While married to respondent, petitioner adopted her biological daughter, who at all relevant times has been an emancipated adult.

¶ 10 B. Marital Breakdown and Separation

¶ 11 From June to December 2010, the parties underwent marital counseling, which proved unsuccessful. They separated in April 2011, and that same month, petitioner filed a petition for dissolution of marriage.

¶ 12 C. Indebtedness

¶ 13 The marital indebtedness greatly exceeds the marital assets. As the trial court found in the judgment of dissolution, "[t]his [was] due primarily to the fact that they underpaid their joint income taxes every year from 2003 through 2009." For that period, the unpaid income

taxes, together with interest and penalties, amounted to $161,684. For 2010, the Internal Revenue Service (IRS) determined an additional deficiency for petitioner in the amount of $15,143.

¶ 14 D. Income and Living Expenses

¶ 15 1. *Petitioner*

¶ 16 Petitioner is an optometrist at Prairie Eye Center, and he previously had a side business treating Medicare patients in nursing homes. It is unclear whether the side business can be fully revived. The trial court wrote in its judgment of dissolution:

> "[Petitioner] is 63 years of age and is employed as an optometrist where he earns a gross annual salary of approximately $122,000.00. In addition to that income, he operated an optometry business treating Medicare patients at nursing homes which provided net income in excess of $20,000.00 per year. During the pendency of these proceedings, [petitioner's] Medicare license lapsed, and he was unable to earn this additional income. [Petitioner] claims (and [respondent] denies) that [respondent] failed to forward the notice to renew his license after he left the marital residence. Assuming this to be true, it remains unclear why he would not recognize his license was up for renewal independently of the mailed notice and take appropriate action. Just before the trial in this matter, his license was reinstated, although he testified that he would be unable to recover the largest part of his business for an indefinite period."

¶ 17 The trial occurred on June 23 and September 11, 2012, and on the final day of trial, the parties submitted their financial affidavits. According to petitioner's financial affidavit (petitioner's exhibit No. 1), his gross monthly income is $9,958.74, his net monthly income is $7,335.74, and his total monthly living expenses are $6,687.65.

¶ 18 2. *Respondent*

¶ 19 Respondent likewise has a profession, as a school counselor, but she is hampered by medical problems. The trial court wrote:

> "[Respondent] is 57 years of age and was employed as a school counselor, earning approximately $60,000.00, until she was involuntarily terminated from that position in 2011. She suffers from several medical conditions, including degenerative disc disease and fibromyalgia which prevent her from working full time. She works part time as a therapist, but her income from this occupation has been nominal. [Respondent] receives pension benefits from the Teacher's Retirement System in the monthly amount of $3,101.00, and her gross annual income is somewhat in excess of $36,000.00."

¶ 20 On September 3, 2013, after the close of evidence, respondent moved to "supplement the record" with a letter, dated August 29, 2013, from her physician, Diane Widicus. Because it does not appear, however, that the trial court ever ruled on this motion (which petitioner opposed) and because the letter never was admitted in evidence, we will disregard the letter.

¶ 21 According to respondent's financial affidavit, her gross monthly income is $5,271.58, her net monthly income is $4,925.44 ($5,271.58 – statutory deductions totaling $346.14), and her monthly living expenses are $5,033.

¶ 22 E. Dissipation

¶ 23 1. *Petitioner*

¶ 24 At trial, respondent contended that petitioner had dissipated marital assets by spending money on girlfriends, namely, Jenay Whitty and Jeananne Kenny. Respondent disputed that Whitty ever was his girlfriend. Instead, he testified he gave Whitty and her roommate, Melissa Jones, an all-expense-paid trip to St. Petersburg, Florida, as a reward for their assistance in his nursing home practice. They had done the billing for him, a task which he hated.

¶ 25 Respondent admitted, however, that from June 2011 onward, he was romantically involved with Kenny. He took several trips to North Carolina to visit her, and she also accompanied him to a couple of optometric conferences.

¶ 26 Respondent was an avid attendee of optometric conferences. He testified he regularly won a national award for getting 50 credit hours of continuing medical education each year.

¶ 27 2. *Respondent*

¶ 28 The trial court found that respondent had dissipated marital assets, but the court found no dissipation by petitioner. The court wrote in its judgment of dissolution:

> "In March, 2011, as retribution for his perceived philandering, [respondent] removed [petitioner's] Jeep from the Bloomington airport where he had left it before flying to Florida for an

> optometric conference. She then traded the Jeep and her vehicle in for a new Pontiac for herself. As a result, [petitioner] incurred $1,320.00 for auto rental fees which this Court regards as dissipation by [respondent]. After the short sale of their residence, the parties received a $3,000.00 check representing a refund of escrowed amounts. Upon [petitioner's] signing the check, [respondent] absconded with same and never accounted to him for the proceeds, another act of dissipation by [respondent]. The parties did not meet their burden with regard to the other dissipation claims by each, involving money removed from marital accounts for living expenses and amounts spent or charged for independent vacations."

¶ 29 It does not appear, however, that in the division of marital assets, the trial court charged any dissipation against respondent. On page 5 of the judgment of dissolution, in a column for petitioner and another column for respondent, the court allocated the assets and debts. In respondent's column, there is no item for dissipation.

¶ 30 II. ANALYSIS

¶ 31 A. Maintenance

¶ 32 1. *The Duration of Maintenance: The Difference Between Rehabilitative Maintenance and Reviewable Maintenance*

¶ 33 Respondent argues "it was reversible error for the trial court to make the maintenance award limited or rehabilitative in nature." In her view, the "pure speculation" that petitioner would retire on June 1, 2016, when he would become eligible to receive a portion of respondent's retirement benefits, did not justify limiting the duration of the maintenance.

¶ 34 Actually, the maintenance is not limited in duration; the maintenance is not rehabilitative. Rather, it is reviewable.

¶ 35 There are five kinds of maintenance: (1) maintenance in gross (7 Nichols Ill. Civ. Prac. § 131:129, at 333 (2006);16A Ill. Law and Prac. *Divorce; Dissolution of Marriage* § 132 (2004)), also called "lump-sum maintenance" (*id.*, § 130, at 43); (2) unallocated maintenance, which is maintenance combined with child support in a single amount (*In re Marriage of Hoppe*, 220 Ill. App. 3d 271, 286 (1991)); (3) permanent maintenance, also called "periodic or indefinite maintenance" (7 Nichols Ill. Civ. Prac. § 131:129, at 333); (4) rehabilitative maintenance, also called "transitional maintenance," which is maintenance paid for a fixed period of time (*id.*); and (5) reviewable maintenance, also called "reserved jurisdiction maintenance," which the trial court reviews on a specified date in the future, to determine whether payments should continue and, if so, the amount of the continued payments (*id.*). Nichols explains:

> "Reviewable maintenance, sometimes called reserved jurisdiction maintenance, differs from indefinite or rehabilitative maintenance in that it is awarded as periodic payments for a specific time period, subject to a review at the end of the time period as to whether to continue in terms of both time and amount. It does not presuppose self-sufficiency at the end of a specific time period, as does rehabilitative or transitional maintenance. In effect, it says the trial court wants to see the parties' circumstances as they exist in three, four, or whatever number of years. At that time, the court is to review the maintenance award and determine if the dependent spouse has become self-sufficient. If so, maintenance

> will terminate. If not, it will continue, presuming either the dependent spouse has made a good-faith effort to become self-sufficient, or, due to other factors, the dependent spouse cannot realistically attain self-sufficiency at the standard of living enjoyed during the marriage. The question then becomes for how long and at what amount maintenance should continue." *Id.*

¶ 36 Thus, making maintenance reviewable on a specified date does not mean limiting the duration of maintenance to that date. Depending on the circumstances existing on the date of review, the maintenance could end, or, alternatively, it could continue in the same amount, a lesser amount, or a greater amount. See *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009).

¶ 37 2. *The Amount of Maintenance*

¶ 38 Respondent contends that in view of the disparity between their incomes, the comfortable life she and petitioner had together, and the amounts he spent on vacations and female friends after the separation, the trial court abused its discretion by awarding her only $1,200 a month in maintenance. See *In re Marriage of Dunlap*, 294 Ill. App. 3d 768, 772 (1998).

¶ 39 The trial court found that petitioner, 63 years old, earned approximately $122,000 a year as an optometrist at Prairie Eye Center and that before his license or certification to treat Medicare patients lapsed, he earned an additional $20,000 a year, or maybe more, treating patients in nursing homes. The court appeared to accept petitioner's testimony that his license to treat Medicare patients had lapsed and that even though his license had since then been reinstated, "he would be unable to recover the largest part of this business for an indefinite

period." Thus, with the nursing home practice gone, it appears that petitioner's current earnings are approximately $122,000 a year from Prairie Eye Center.

¶ 40 Respondent, 57 years old, was employed as a school counselor, earning approximately $60,000 a year, until she was involuntarily discharged from that job in 2011. She testified she had health problems and that she consequently was unable to work full-time. The trial court appeared to believe her in that respect. The court found in its order: "[Respondent] suffers from several medical conditions, including degenerative disc disease and fibromyalgia[,] which prevent her from working full time. She works part time as a therapist, but her income from this occupation has been nominal." She receives $3,101 a month in pension benefits from the Teacher's Retirement System, and her gross annual income is "somewhat in excess of $36,000.00."

¶ 41 With $1,200 a month in maintenance, amounting to $14,400 a year ($1,200 x 12), respondent's gross income will be $50,400 a year ($36,000 + $14,400), compared to petitioner's gross income of $107,600 a year ($122,000 - $14,400). Granted, petitioner's income will be more than twice as great as respondent's income, but the trial court was "not convinced that [respondent's] inability to work full time equate[d] to an inability to earn substantial income." Also, the court allocated to petitioner almost five times the indebtedness that it allocated to respondent: $162,809 to him and $33,685 to her. (These figures actually represent the difference between the assets and indebtedness that the court allocated to each party. As the court remarked in its order, "the parties' marital estate is deep under water.") So, if, as petitioner states in his financial affidavit, his monthly net income is $7,335.74 (gross monthly income of $9,958.74 - statutory deductions totaling $2,623), $1,200 a month in maintenance will bring his income down to $6,135.74. Excluding the temporary maintenance of $2,300 a month, he listed

monthly living expenses of $4,387.65 ($6,687.65 - $2,300). The difference between $6,135.74 and $4,387.65 is $1,748.09, which, arguably, he will need to make headway on an indebtedness of $162,809. True, the court originally awarded $2,300 in temporary maintenance, but that was before the court allocated $162,809 of indebtedness to petitioner.

¶ 42 Respondent argues: "[I]t was pure speculation on the trial court's part that somehow the [IRS] would become aggressive and that this would impact Petitioner's ability to pay maintenance." Arguably, this way of thinking is precisely why the parties now face a liability of $161,684 to the IRS, with ever-increasing interest and penalties. Maybe it is time to start taking the IRS seriously. From the notices of deficiency in the record, it appears that the IRS means business. Although, as respondent says, "[p]etitioner indicated throughout the proceedings he was contesting the tax assessments and that they were inaccurate," the trial court, as the trier of fact, evidently was unimpressed by this news, for the court found that the parties did in fact "underpa[y] their joint income taxes every year from 2003 through 2009." This underpayment of income taxes was the primary reason why the marital estate was "deep under water."

¶ 43 Petitioner will be the one doing most of the bailing. Given the allocation of the indebtedness, we find no abuse of discretion in the amount of maintenance. See 750 ILCS 5/504(a)(1), (a)(2) (West 2012).

¶ 44 B. Dissipation

¶ 45 Section 503(d)(2) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/503(d)(2) (West 2012)) provides: "[The court] shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors, including *** the dissipation by each party of the marital or non-marital property ***." 750 ILCS 5/503(d)(2)

(West 2012). Dissipation is "a spouse's use of marital property for his or her sole benefit for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown." (Internal quotation marks omitted.) *In re Marriage of Berberet*, 2012 IL App (4th) 110749, ¶ 50.

¶ 46 Respondent argues that petitioner dissipated marital assets by spending funds on Jenae Whitty and Jeananne Kenny.

¶ 47 1. *Jenae Whitty*

¶ 48 As for Whitty, respondent makes the following allegations in the "Argument" section of her brief.

¶ 49 First, respondent alleges that on January 19, 2010, petitioner gave Whitty a check in the amount of $1,000 and that on May 20, 2010, he gave her another check in the amount of $1,000. The record substantiates these allegations. Respondent cites no evidence, however, that in January or May 2010, the marriage already was "undergoing an irreconcilable breakdown." *Id.*

¶ 50 Second, respondent alleges that petitioner "provided [Whitty an] all-expense paid trip to Florida[] [and] rented a convertible for her to drive during her trip." The record likewise substantiates this allegation. According to petitioner's testimony, this Florida trip was in March 2011, and he paid the way of not only Whitty but also her roommate, Melissa Jones. Petitioner denied, however, that he ever was romantically involved with Whitty, and apparently there is no suggestion he ever was romantically involved with Jones. According to him, Whitty and Jones had helped him with his nursing home practice—checking eye pressures, taking patient histories, loading and unloading equipment, and doing the billing—and he gave them the Florida vacation as a reward or bonus. Evidently, they had heard, or he had told them, he was going to the

American Optometric Society's conference in Tampa, Florida, and when they expressed thinly veiled envy, he hit upon the idea of giving them a beach vacation in St. Petersburg. Petitioner's attorney asked him:

> "Q. Tell the Court—I think we did this before, but tell the Court why you paid for your two assistants to go to Florida?
>
> A. Okay. In 2000—between 2009 and 2010, we made about—I made about 20 extra thousand dollars gross and I contributed those years due to some of the help that I had, because they helped me with moving equipment and doing billing and I was—I hated doing billing. So I only assumed that it was—that I was being made efficient. So they said, ['O]h, you're going to Florida.['] I said, ['S]ure.['] I said, ['I]f you ladies would like to go,['] I said, [']I'll cover your expenses if you go to the beach while I go to school.[']
>
> Q. So you did?
>
> A. And I did.
>
> Q. How much did it cost you?
>
> A. The airfare and the car rental was a thousand and the hotels were 800 and some. I gave them both a couple of hundred dollars for food.
>
> Q. And they stayed together in a hotel where?
>
> A. Uh-huh.
>
> Q. In Petersburg?

A. They stayed in St. Petersburg beach.

Q. And you went to your conference in Tampa?

A. In downtown Tampa."

¶ 51 From this testimony, which the trial court, as the trier of fact, could have believed, it appears that petitioner's motive was to reward the loyalty and productivity of his employees and to strengthen their incentive to continue assisting him in his nursing home practice. Respondent might regard this bonus as extravagant. She might be right, and she might be wrong. But the germane question is whether it had a purpose related to the marriage. See *Berberet*, 2012 IL App (4th) 110749, ¶ 50. Keeping good help in the nursing home practice, or at least keeping good help available, is a purpose related to the marriage. Thus, the court did not have to agree with respondent that the all-expense paid Florida vacation for Whitty and Jones was for petitioner's "sole benefit" and "for a purpose unrelated to the marriage." *Id.*

¶ 52 Third, respondent alleges that petitioner bought "tanning packages for Ms. W[h]itty and another woman." The other woman was Jones, and, again, one might reasonably infer that petitioner's motive was to reward his employees in the nursing home practice and to increase the allure of working for him.

¶ 53 Fourth, respondent alleges that petitioner "provided an all-expense paid trip to St. Louis for Witty and her son." This allegation is unaccompanied by any citation to the record; therefore, the allegation is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *Kreutzer v. Illinois Commerce Comm'n*, 2012 IL App (2d) 110619, ¶ 40; *Engle v. Foley & Lardner, LLP*, 393 Ill. App. 3d 838, 854 (2009).

¶ 54 Fifth, respondent alleges that petitioner "purchased a computer for Ms. Witty in the same month he was not paying anything toward the marital home, real estate taxes, or

utilities." Likewise, this allegation is unaccompanied by any citation to the record; therefore, the allegation is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *Kreutzer*, 2012 IL App (2d) 110619, ¶ 40; *Engle*, 393 Ill. App. 3d at 854.

¶ 55 2. *Jeananne Kenny*

¶ 56 Respondent writes:

> "Petitioner traveled with Ms. Kenny in September, 2011, to Indiana, spending $270.00 for their lodging at the Comfort Inn and another $423.00 at a Hilton hotel. During this same time period, July, 2011, Petitioner purchased plane tickets to travel from Illinois to North Carolina to continue his affair with Ms. Kenny who lived in North Carolina. He purchased tickets again to North Carolina in August, 2011. Petitioner and Ms. Kenny also vacationed together in Philadelphia. Petitioner and Ms. Kenny traveled by limo while in Philadelphia. [Citation to a volume of the record, without a page number.] The following month, Petitioner spen[t] another $397 for lodging at the Chicago Westin Hotel for lodging [*sic*]. Petitioner flew to North Carolina yet again in October and November of 2011 to visit Ms. Kenny.
>
> *** From January through May of 2012, Petitioner flew to North Carolina each month, sent Ms. Kenny flowers and also paid for both of their meals at several restaurants. [Citation to record.] They traveled to Georgia together and Petitioner paid for their lodging in the amount of $880.00. [Citation to record.]"

¶ 57 By and large, the record substantiates these representations, although there are a few material omissions. Petitioner testified that the trip to Philadelphia was to visit his son, Mark Blumthal. It is true that petitioner's girlfriend, Kenny, accompanied petitioner on this trip to Philadelphia, but it is unclear to what extent, if any, she made the trip more expensive for him than it otherwise would have been. Granted, petitioner spent $143.07 at the Pizzeria Stella and $108 at the Famous Fourth Street Delicatessen in Philadelphia, and hence one might infer that he paid for more than his own meal, but he testified he had dinner not only with Kenny but also with his two sons and his son's girlfriend. As for the limousine, it was merely transportation to or from the airport.

¶ 58 Also, respondent fails to mention that when staying at the Chicago Westin in September 2011 and at the Glenn Autograph Hotel in March 2012, petitioner was attending optometric conventions, according to his testimony. So, these appear to be legitimate business trips. True, Kenny accompanied him, but he testified that "[the hotel room was] the same price [regardless of] whether [it was occupied by] one or two people."

¶ 59 With those qualifications, the record appears to substantiate what respondent says about petitioner's trips with Kenny or to Kenny. Travel means airfare and hotel bills. The appellate court has held that vacations with girlfriends amount to dissipation. *In re Marriage of Tabassum*, 377 Ill. App. 3d 761, 780 (2007). The trial court made a finding that was against the manifest weight of the evidence when it found that petitioner's trips to North Carolina to see Kenny were not dissipation. See *id.*

¶ 60 As petitioner points out, however, even if he dissipated marital assets by his frequent trips to North Carolina, it does not follow that the trial court was required to charge these amounts against him in the division of the marital assets. "The trial court is not *required* to

charge against a party the amounts found to have been dissipated but *may* do so." (Emphases in original.) *In re Marriage of Murphy*, 259 Ill. App. 3d 336, 340 (1994). We ask whether the trial court abused its discretion in the division of the marital estate. *In re Marriage of Hubbs*, 363 Ill. App. 3d 696, 699-700 (2006).

¶ 61 We find no abuse of discretion because both parties dissipated marital assets and ultimately the judicial consequence for both parties was the same: nothing. The trial court found that respondent had dissipated marital assets, but it does not appear that the court charged the dissipation against her in the division of the marital estate. A reasonable person could take the view that because both parties dissipated the marital estate, neither party should receive a remedy for the other's dissipation. See *McNeil v. Ketchens*, 397 Ill. App. 3d 375, 397-98 (2010) ("The court abused its discretion only if no reasonable person could agree with the court's decision.").

¶ 62 III. CONCLUSION

¶ 63 For the foregoing reasons, we affirm the trial court's judgment.

¶ 64 Affirmed.