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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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IN RE THE MARRIAGE OF JAMES A.	)	Appeal from the Circuit Court
ANDERSON,	)	of Cook County.
Petitioner-Appellee,	)	
v.	)	
	)	No. 99 D 6640
PATRICIA M. ANDERSON,	)	
Respondent,	)	
	)	The Honorable
BERGER SCHATZ,	)	Raul Vega,
Appellant.	)	Judge Presiding.

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JUSTICE PUCINSKI delivered the judgment of the court.  
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court's denial of the appellant's petition for attorney's fees was affirmed where the appellant failed to present evidence that the respondent lacked the ability to pay or that the transfer of assets by the petitioner was done to avoid payment to the respondent.

¶ 2 Appellant Berger Schatz, a matrimonial and family law firm, appeals from an order from the circuit court denying its petition for setting final fees, brought pursuant to section 508 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/508(a)(3.1) (West 2012)) ("Act")

and filed against petitioner, James Anderson ("James"). Because Berger Schatz failed to carry its burden in establishing that it was entitled to fees, we affirm.

¶ 3

### BACKGROUND

¶ 4

James and respondent, Patricia Anderson ("Patricia"), were married on February 3, 1951. On November 4, 1988, a judgment of dissolution of marriage, which incorporated a marital settlement agreement, was entered by the superior court of the State of California, County of San Diego, and on June 1, 1992, that judgment was enrolled in the circuit court of Cook County. As a part of that judgment, James was ordered to pay maintenance to Patricia.

¶ 5

In 2008, James filed a motion to terminate maintenance. In 2009, Berger Schatz filed its appearance on behalf of Patricia and, later that year, filed a petition for rule to show cause based on James' failure to pay maintenance beginning in January 2009. James filed a response, admitting the arrearage and claiming he did not have the funds available to pay maintenance.

¶ 6

In April 2010, following a hearing, the circuit court granted James' motion to terminate maintenance retroactive to January 2009 and denied Patricia's petition for rule to show cause. The circuit court noted that both parties were 80 years old and that Patricia lived in a senior citizens home. The circuit court determined that James owned a primary residence in Chillicothe, Illinois, with his current wife, in addition to a home in Wisconsin. James was responsible for the mortgage on the Illinois residence and taxes and insurance on both properties. The court also found that James displayed a substantial change in circumstances since entry of the order relative to maintenance.

¶ 7

Patricia filed an appeal requesting that the trial court's order granting James' motion to terminate maintenance and denying her petition for rule be reversed and the matter remanded. On March 31, 2011, this court issued its mandate in which it agreed with the circuit court that

James displayed a substantial change in circumstances; however, this court remanded the matter to the circuit court to reconsider the issues of maintenance and contempt, advising the circuit court to take full account of the value of James' property, including his real estate.

¶ 8 In April 2012, the circuit court issued its order in accordance with the appellate court remand. The circuit court found that James had sufficient property to continue to pay Patricia maintenance but only in the amount of \$500 per month. The circuit court also found that James' failure to pay maintenance was not contemptuous.

¶ 9 Subsequently, Patricia filed a petition for fees following appeal, brought pursuant to section 508(a) of Act, requesting \$26,582.32 in attorney fees incurred in connection with her appeal. Patricia argued that she had substantially prevailed in the appeal. 750 ILCS 5/508(a). Patricia also argued that James had sufficient financial resources, including the Illinois and Wisconsin residences, to pay her attorney fees while Patricia was still living in an assisted living facility, had \$50,000 in credit card debt and had no real assets other than an investment account and social security income, which had been depleted to pay living expenses.

¶ 10 James followed with a motion to reconsider or, in the alternative, a motion to terminate his maintenance obligation. James claimed that the Illinois residence "is owned, at least in part, by his second wife," that the residence "cannot be monetized" due to his wife's refusal to sell or take out a mortgage. James stated that Patricia received cash for her interest in the Wisconsin home in the dissolution of marriage. James contended that the Wisconsin property had already been included in the division of property in the original award of maintenance. James argued it would be inequitable to award Patricia a share of that property through a continuation of maintenance. Patricia filed her response and in October, 2012, the court denied James' motions.

¶ 11 Shortly thereafter, Patricia filed another petition for rule to show cause for indirect civil contempt based on James' failure to pay maintenance. James responded that he had no funds with which to pay the ordered maintenance. The court found that James had shown good cause as to why he should not be held in contempt of court and a date was set for hearing on Patricia's petition for fees following the appeal.

¶ 12 In May 2013, Berger Schatz filed its motion to withdraw as attorney for Patricia, which was granted. On June 25, 2013, Berger Schatz filed its petition for setting final fees and costs, requesting an order against James in the amount of \$26,583.32. James responded by arguing that although the relevant statute permits a court to consider whether a party substantially prevailed on appeal, it does not mandate the award of fees. James further argued that he had no funds with which to pay the requested fees and that his attorneys wrote off significant sums or did not bill for time, because James had no money with which to pay their fees.

¶ 13 In October 2013 Berger Schatz filed a notice to produce requesting numerous documents within 28 days. On January 14, 2014, Berger Schatz filed a notice to produce at trial pursuant to Illinois Supreme Court Rule 237. Il. S. Ct. R. 237 (eff. July 1, 2005). The record does not contain any response to these requests by James.

¶ 14 At the January 15, 2014, hearing on Berger Schatz's petition for setting final fees, Berger Schatz clarified that the hearing was for contribution of attorney fees against James only and that the outstanding balance was \$24,217.02 after subtracting amounts for fees already paid by Patricia. Although the attorneys argued the parties' abilities to pay the attorney's fees, the only evidence presented during the hearing was the impromptu testimony of James on the ownership of the Illinois and Wisconsin homes and his available cash. James testified that his current wife owned the Illinois residence, which had a mortgage. With respect to the Wisconsin home, James

testified that he had transferred it to his current wife's name "based on estate planning." Finally, James testified that his savings and Morgan Stanley accounts were both completely depleted.

¶ 15 After hearing arguments, the circuit court denied the petition for fees, stating as follows:

"You know, if Mr. Anderson had not transferred legal title to these properties, I would agree with you, I would have ordered him to pay some of your fees. Because while he doesn't have the liquid cash, he would have an interest in his properties that he had exercise and control over. But having conveyed these properties, and he not being the legal title holder, and based on what his monthly income is from his retirement and social security, I have to find that Mr. Anderson does not have the ability to pay fees on a contribution basis.

\* \* \*

\*\*\*[W]e're not here to declare a fraudulent conveyance. I'm stuck with the conveyance that was done, unless there's a court that finds that these were fraudulent conveyances and that that [*sic*] then frees me up to go ahead and award fees based on that."

¶ 16 Berger Schatz then filed this timely appeal.

¶ 17 ANALYSIS

¶ 18 On appeal, Berger Schatz argues that the circuit court erred in denying its fee petition because the circuit court should have taken into account the Illinois and Wisconsin homes when determining whether James had the ability to pay. According to Berger Schatz, a finding of fraudulent conveyance was not necessary for the circuit court to take the homes into account and, even if it were, there was sufficient evidence to conclude that James' transfers of the homes were fraudulent. We need not decide the question of whether the trial court should have considered James' transfers of the homes in determining James' ability to pay, because we conclude that

Berger Schatz failed to overcome the preliminary hurdle of establishing that Patricia lacked the ability to pay her own attorney's fees. Nevertheless, even if the trial court were required to consider James' transfers of the homes, Berger Schatz failed to present evidence sufficient to conclude that James' transfers of the homes were done to avoid payment to Patricia.

¶ 19 At the outset, we note that no appellee's brief has been filed in this case. Nonetheless, we will address the merits of this appeal under the principles set forth in *First Capital Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976) (in absence of an appellee's brief, a reviewing court should address an appeal on the merits where the record is simple and the claimed errors are such that the court may easily decide the issues raised by the appellant).

¶ 20 Generally speaking, attorney's fees are to be paid by the person on whose behalf the services were rendered. *In re Marriage of Patel*, 2013 IL App (1st) 112571, ¶ 113. Under Section 508(a) of the Act, a court may order one party to contribute to the payment of the other party's attorney's fees. 750 ILCS 5/508(a). The amount to be paid is to be based on the same criteria used to divide marital property or, where maintenance was awarded, to determine the amount of maintenance. 750 ILCS 5/503(j) (West 2012). In addition, to prevail on a petition for contribution to attorney's fees, the spouse seeking contribution must establish his or her inability to pay and the other spouse's ability to pay. *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005). An inability to pay does not require a showing of destitution, but only that payment of the fees would strip the spouse of his or her means of support or undermine his or her financial stability. *In re Marriage of Pond*, 379 Ill. App. 3d 982, 987 (2008).

¶ 21 The circuit court's determination on a petition for fees will not be disturbed absent an abuse of discretion. *Schneider*, 214 Ill. 2d at 174. An abuse of discretion occurs when the circuit court "acts arbitrarily, acts without conscientious judgment, or, in view of all of the

circumstances, exceeds the bounds of reason and ignores recognized principles of law, resulting in substantial injustice." *Pond*, 379 Ill. App. 3d at 987-88.

¶ 22 We conclude that the circuit court did not abuse its discretion in denying Berger Schatz's petition for fees because Berger Schatz failed to present any evidence that Patricia was unable to pay her own attorney fees. Although the circuit court did not rely on this as a basis for denying the petition, we may affirm on any ground found in the record. *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 666 (2007).

¶ 23 At the hearing on the petition, Berger Schatz did not present any evidence regarding Patricia's current ability to pay the fees she owed to Berger Schatz. Rather, when discussing Patricia's ability to pay, Berger Schatz vaguely referred to "the record" as demonstrating Patricia's inability to pay. The record as presented on appeal, however, contains only testimony from Patricia given at the December 16, 2009, hearing on James' motion to terminate maintenance. That testimony, however, went to Patricia's financial status as it existed at the time of that hearing—over four years before the hearing on Berger Schatz's fee petition—and had no relevance to Patricia's ability to pay at the time Berger Schatz sought payment of its fees.

¶ 24 When asked about Patricia's current ability to pay, Berger Schatz responded as follows:

"All that I have is what the record professes. I have lost contact with my client. She no longer is at—I believe she's in the State—she probably was moved from the State facility that she was in to another one and I could not secure forwarding information as to where that is, but I presume, based on the testimony, that she is still in a State facility, which then, according to Mr. Anderson, would be receiving approximately \$100.00 a month of income, beyond the funds, the room and board that's provided by the State."

It is not clear from the transcript what testimony of James Berger Schatz was referring to, as the testimony given by James at the hearing on Berger Schatz's fee petition did not discuss the amount of any income Patricia might have had. Rather, James simply stated that Patricia was in a nursing home (but he could not say exactly where), that she had no assets, and that her Chase account "probably went down the tube" because of her debt. There was no testimony or other evidence presented regarding Patricia's current costs of living, payment of those costs, the amount of her debt, sources of income, or other assets and liabilities. Accordingly, Patricia's ability or inability to pay her attorney's fees at the time of Berger Schatz's fee petition was not established, and the circuit court did not abuse its discretion in denying the petition.

¶ 25           Berger Schatz contends in its brief that James admitted that Patricia did not have the ability to pay. The testimony referenced by Berger Schatz in support of this assertion is the same as that discussed above. James stated that Patricia was in a nursing home and did not have any assets. But it was clear from his testimony that he only had a vague understanding of Patricia's financial situation, as he did not know what nursing home she was living in and he could only say that her bank account was "probably" gone due to her debt. As discussed, this testimony does not establish Patricia's total costs of living, if and how those costs were being paid, who was paying those costs, how much debt she had at the time, whether she had any income, or whether she had obtained any other assets or liabilities since 2009. Moreover, when the circuit court asked James' counsel whether he would stipulate to Patricia's inability to pay, James' counsel refused.

¶ 26           Because there was no evidence of Patricia's current inability to pay her attorney fees, the trial court did not abuse its discretion in denying Berger Schatz's fee petition.



¶ 27 Our conclusion that Berger Schatz failed to present sufficient evidence of Patricia's inability to pay means that we need not consider Berger Schatz's contention that the trial court erred in concluding that it could not consider James' transfers of the Illinois and Wisconsin homes without a finding of fraudulent conveyance. Nevertheless, we note that even if we were to agree with Berger Schatz's contention that property conveyances made by a spouse in an effort to avoid payment to the other spouse may be considered even absent a fraudulent conveyance finding, Berger Schatz failed to demonstrate that James' transfers were done to avoid payment to Patricia.

¶ 28 The only evidence on the nature of James' transfers of the homes was James' testimony. James testified that the home in Illinois had always belonged to his new wife and that he never had any interest in it. With respect to the Wisconsin home, James testified that since the previous hearing, he had transferred it to his new wife's name for estate planning purposes. Berger Schatz did not present any evidence to contradict this testimony. Even the testimony elicited from James on cross-examination—that James' new wife signed the quitclaim deed at James' request and that she did not pay James anything to transfer the home to her name—was not inconsistent with James' testimony that the transfer of the Wisconsin home was made for estate planning purposes.

¶ 29 Berger Schatz pointed out at the hearing that the record indicates that James had previously claimed to have an interest in the Illinois home, but then disclaimed that interest during his testimony at the hearing on Berger Schatz's fee petition. Even assuming that James did have an interest in the Illinois home that he subsequently transferred to his new wife, nothing in James' testimony established that the transfer was done with the purpose of avoiding payment to Patricia.

¶ 30 Berger Schatz relies on the timing of James' transfers to support its contention that the transfers were done to avoid a finding that he had an ability to pay attorney fees. According to Berger Schatz, the appellate court's ruling and the circuit court's subsequent denial of James' motion to terminate maintenance, coupled with the pending petition for fees, was incentive for James to transfer the houses to his wife to avoid losing them. Again, the problem with this contention is that there is no evidence to support it. First, although James testified that he transferred the Wisconsin home to his new wife at some point after the December 16, 2009, hearing, there was no evidence presented as to whether that transfer occurred before or after the appellate court's ruling, the trial court's denial of his motion to terminate maintenance, or Berger Schatz's filing of its petition for fees. Likewise, assuming that James did have an interest in the Illinois home that he transferred to his new wife, there was no evidence as to when that transfer occurred. Thus, it is impossible to say that these events were catalysts for James' transfers of the houses.

¶ 31 Finally, Berger Schatz takes issue with James' failure to comply with discovery requests issued by Berger Schatz. According to Berger Schatz, as a result of James' failure to respond to its notices to produce, it did not learn of the transfer of the Wisconsin home until James testified at the hearing on Berger Schatz's fee petition and, thus, was limited in the pre-hearing remedies it could explore or pursue. The discovery propounded by Berger Schatz, however, did not include any requests for documents or information related to the transfer of the Wisconsin house. Rather, with respect to the houses, the discovery only included requests for documents related to the transfer of the Illinois house and to the value of the Wisconsin home. Accordingly, because Berger Schatz did not request any information regarding the transfer of the Wisconsin home, it cannot be said to have been prejudiced by James' failure to provide such information.

¶ 32 We specifically note that we do not address the question of whether a trial court must consider property transfers in determining parties' abilities to pay. Rather, we assume (without deciding) that where property transfers are alleged to have been made for the purpose of avoiding payment to the other spouse, the trial court must consider them. In this case, we conclude only that Berger Schatz failed to make the requisite initial showing that James' transfers were made with the purpose of avoiding payment to Patricia.

¶ 33 CONCLUSION

¶ 34 In sum, we conclude that the circuit court did not abuse its discretion in denying Berger Schatz's fee petition because Berger Schatz failed to produce any evidence of Patricia's inability to pay her own attorney fees. Moreover, even if Berger Schatz had established Patricia's inability to pay, and assuming the validity of Berger Schatz's contention that the trial court is required to consider property transfers made with the purpose of avoiding payment, Berger Schatz failed to demonstrate that James' transfers of the homes were made with the purpose of avoiding payment. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 35 Affirmed.