2016 IL App (2d) 151272-U
No. 2-15-1272
Order filed June 20, 2016



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| *In re* MARRIAGE OF<br>KRISTIN D. HARDY, f/k/a Kristin D. Jury,<br><br>Petitioner-Appellant,<br><br>and<br><br>KEITH R. JURY,<br><br>Respondent-Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court<br>of Kane County.<br><br><br><br>No. 06-DK-1283<br><br>Honorable<br>Kevin T. Busch,<br>Judge, Presiding. |

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

**ORDER**

¶ 1 *Held*: (1) The judgment converting an award of rehabilitative maintenance to maintenance in gross was vacated and the cause was remanded, because the trial court failed to consider statutory factors; and (2) the trial court's denial of petitioner's petition for contribution to attorney fees was affirmed, where petitioner failed to present a complete record.

¶ 2 Petitioner, Kristin D. Hardy, f/k/a Kristin D. Jury, appeals from a judgment of the circuit court of Kane County reducing her periodic maintenance award and awarding maintenance in gross for 48 months in its place. Kristin also appeals an order denying her motion for

contribution to attorney fees. For the following reasons, we affirm in part, vacate in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 Kristin and respondent, Keith R. Jury, were married on September 24, 1988. The marriage was legally dissolved on April 24, 2008. The judgment of dissolution of marriage (JDOM) required Keith to pay Kristin $9,700 per month as maintenance until their daughter, Morgan, graduated from high school. Upon that event, maintenance was reviewable. The JDOM further provided that Kristin would have the burden of proving her good-faith efforts to attain self-sufficiency and her continuing need for maintenance at the review.

¶ 5 On May 23, 2014, Keith filed a motion to terminate child support and maintenance. On May 27, 2014, the court terminated child support but continued the motion with respect to termination of maintenance. Also on May 27, 2014, Kristin filed a motion to review and extend maintenance. Thereafter, she filed a motion for Keith to contribute to Morgan's college expenses.[1] On March 19 and 20, 2015, the court conducted an evidentiary hearing on both parties' motions regarding maintenance.

¶ 6 The evidence showed as follows. Kristin, 48 years of age, was currently living in Perry, Ohio. The parties' son, Austin, was 24 years old and in the military. Morgan was a university freshman in Tampa, Florida. At the time of the divorce, Kristin's expenses were approximately $15,000 per month. At the present time, her expenses were approximately $11,000 per month. Beginning in 2011, Kristin began work toward an associate's degree in nursing, and she obtained employment as a hospital floor nurse in 2014. She worked from 7 p.m. to 7:30 a.m. three nights

[1] Keith volunteered in open court to assume 100% of Morgan's college expenses, and the court so ordered. Consequently, that issue is not germane to this appeal.

per week, earning $25.36 per hour. Her job benefits included medical and dental insurance and a retirement plan. Kristin testified that her associate's degree would not afford her advancement. According to Kristin, a bachelor's degree in nursing also would not be beneficial. She would need to obtain a master's degree in nursing to qualify for an administrative position and higher earnings. She testified that she could not continue to work full time and reach her educational goals.

¶ 7 Kristin testified that it would take her longer than normal to achieve those goals because of a learning disability. She studied 10 to 12 hours per day for a class while obtaining her associate's degree, and she received special accommodations. She testified that it takes her longer than normal to learn and retain information, which impacts her career and her ability to take tests.

¶ 8 Kristin testified that, during the marriage, they had a timeshare in Mexico and traveled to Disney World, Washington D.C., Las Vegas. They took family trips to Ohio. The family automobiles included Hondas, Jeeps, used Suburbans, and a Yukon Denali XL. Kristin shopped in local malls and local markets. She testified that the family ate out six or seven days per week. She lived in a 5 bedroom, 6 ½ bath home with a furnished basement, a living room, sun room, eat-in kitchen, office, and family room.

¶ 9 After the divorce, her lifestyle changed "drastically." Because of economic uncertainties, she moved into a two-bedroom, 2 ½ bath home, with no basement "villa." During the marriage, she did not need to think about money, but now she had to "money mise." She drives to locations rather than flying, and, instead of purchasing airline tickets without regard to cost, she relies on frequent flyer miles. She also relies on family and friends for accommodations. Kristin testified that she needed $9,700 in maintenance per month to meet her current expenses.

¶ 10 Lee Knutson, a vocational counselor, testified that Kristin hired him to identify how she could maximize her earning potential and work toward a less physically demanding nursing job. Knutson opined that Kristin needed to gain work seniority and pursue a bachelor's degree in nursing. He testified that she was currently competing against much younger nurses and ran the risk of injury as a floor nurse. Knutson's advice was to cut her work schedule to one shift per week while she studied for her bachelor's degree, which could take several years. With a bachelor's degree, she could earn between $66,000 and $96,000 per year.

¶ 11 The report of Lisa F. Naatz, a licensed clinical psychologist, was stipulated into evidence. The report was prepared in 2006 and concluded that Kristin met the criteria for a reading disorder, a mathematics disorder, a disorder of written expression, and developmental dyslexia.

¶ 12 Keith, age 53, testified to his work and earnings history. He was an engineer currently employed as a vice president at Exelon. His earnings had significantly increased since the divorce. As of February 2015, his total earnings for the year were approximately $450,000. Keith's home was valued at approximately $500,000. He lived with his fiancée, and he paid all of their expenses. He traveled for pleasure. Keith testified that he believed that Kristin had secreted over $300,000 in assets, because that amount disappeared from her savings account.

¶ 13 The judge (Kevin T. Busch, presiding) made the following findings in his ruling. The JDOM ordered rehabilitative maintenance. Judge Busch stated that he would not do a "*de novo*" review of the section 504 factors[2] that the previous circuit judge considered, including the parties' lifestyle during the marriage. Judge Busch remarked that the parties' lifestyle during the marriage was no longer a "primary consideration" and that arguments pertaining to that factor were appropriately addressed only at the original trial on the dissolution petition. Judge Busch

[2] 750 ILCS 5/504 (West 2014).

also ruled that Keith's "greatly" increased income since the divorce was relevant only to whether he was able to pay maintenance at a rate similar to what he was paying. Kristin could not "reap the benefit" of Keith's increased, nonmarital income.

¶ 14 Judge Busch then looked at Kristin's efforts to become self-sufficient and made the following findings. Kristin did not begin pursuing a career until several years after the divorce. Then she pursued a viable career and established the ability to support herself. She makes over $55,000 annually. Judge Busch dismissed Kristin's learning disability, because, according to the judge, she has been successful in her occupation despite it. Little weight was placed on Knutson's testimony. However, Judge Busch nevertheless took "at face value" Knutson's testimony that Kristin would be able to earn between $66,000 and $90,000 per year in Ohio with a bachelor's degree.[3] In light of Knutson's testimony, the court questioned Kristin's credibility in testifying that a bachelor's degree would do her no good and that a master's would be required for advancement. The court did not know what happened to over $300,000 in Kristin's bank account, and Kristin did not attempt to explain the missing money. However, Judge Busch also found that Keith's testimony regarding the money was not "compelling" and that it was impeached. A time frame of two to four years to obtain a bachelor's degree was not unreasonable. Kristin's needs and expenses had decreased since the divorce. Kristin inflated her expenses on her financial statement filed with the court. While the evidence almost eliminated Kristin's need for maintenance, it nevertheless would be appropriate for Keith to pay some maintenance while Kristin obtained a bachelor's degree.

¶ 15 Judge Busch incorporated his oral findings in his written order of March 30, 2015, reducing the amount of maintenance to $4,000 per month for a period of 48 months, after which

[3] However, Knutson testified that the average for Ohio was between $47,000 and $78,000.

maintenance would terminate. On April 23, 2015, Keith filed a motion to clarify the court's ruling on college expenses, and the court modified its order regarding college expenses on June 11, 2015.

¶ 16 On April 29, 2015, Kristin filed a verified petition for contribution to attorney fees incurred in the maintenance dispute. She alleged that her total fees and costs were $49,233.38 and that she owed $29,315.75 of that amount. She alleged her inability to pay and Keith's ability to pay. On November 24, 2015, the court denied her petition, finding that Kristin made an insufficient showing of her inability to pay her attorney fees. That finding was based on the court's "inference" that Kristin "may have" secreted over $300,000 in cash. Kristin filed a timely notice of appeal on December 14, 2015.

¶ 17 II. ANALYSIS

¶ 18 Kristin's numerous arguments fall into three categories: (1) the court was statutorily barred from converting the award to maintenance in gross in a review proceeding; (2) this case is not appropriate for an award of maintenance in gross; and (3) the court should have awarded permanent maintenance. In contending that the court abused its discretion in denying her petition for permanent maintenance, Kristin asserts that the court erroneously disregarded: (1) the lifestyle she enjoyed during the marriage; (2) Keith's increased earnings since the entry of the JDOM; and (3) her learning disability. She also contends that the court erroneously based its decreased award on speculative evidence of her future earnings.

¶ 19 The four common types of maintenance include: permanent maintenance, rehabilitative maintenance for a fixed term, rehabilitative maintenance with a review date, and maintenance in gross. *In re Marriage of Shen*, 2015 IL App (1st) 130733, ¶ 84. Maintenance in gross involves a definite total sum upon the entry of the judgment or a definite total sum in installments over a

definite period of time. *Shen*, 2015 IL App (1st) 130733, ¶ 86. What distinguishes maintenance in gross from other types of maintenance is its definite sum and vesting date. *Shen*, 2015 IL App (1st) 130733, ¶ 86.

¶ 20 Section 504(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/504(a) (West 2014)) provides that the court can grant temporary or permanent maintenance in amounts and for periods of time as the court deems just, without regard to marital misconduct, in gross or for fixed or indefinite periods of time, after considering the following factors: (1) the income and property of each party; (2) the respective needs of the parties; (3) the present and future earning capacity of the parties; (4) any impairment to the parties' present or future earning capacity resulting from domestic duties or delayed education or employment opportunities due to the marriage; (5) the time necessary for the party seeking maintenance to acquire the necessary education or training; (6) the standard of living during the marriage; (7) the duration of the marriage; (8) the age, physical, and emotional condition of the parties; (9) the tax consequences of the property division; (10) the contributions of the party seeking maintenance to the education and career of the other spouse; (11) the valid agreement of the parties; and (12) any other factor that the court expressly finds to be just and equitable. *In re Marriage of Patel*, 2013 IL App (1st) 112571, ¶ 83.

¶ 21 Section 510 provides for modification and termination of awards of maintenance, support, educational expenses, and property disposition. (750 ILCS 5/510 (West 2014). A judgment regarding maintenance can be modified only upon a showing of a substantial change in circumstances. 750 ILCS 5/510(a-5) (West 2014). In proceedings to modify, review, or terminate maintenance, the court must consider the factors enumerated in section 504(a), as well as those additional factors enumerated in section 510(a-5). 750 ILCS 5/510(a-5) (West 2014).

The following factors are enumerated in section 510(a-5): (1) any change in the employment status of either party and whether the change has been made in good faith; (2) the efforts, if any, made by the maintenance recipient to become self-supporting; (3) any impairment of the present and future earning capacity of either party; (4) the tax consequences of the maintenance payments upon the respective circumstances of the parties; (5) the duration of maintenance payments relative to the length of the marriage; (6) the property, including retirement benefits, awarded to each party in the divorce; (7) the parties' increase or decrease in income since the divorce; (8) the property acquired and currently owned by each party after the divorce; and (9) any other factor that the court expressly finds to be just and equitable. No one factor is determinative. *Patel*, 2013 IL App (1st) 112571, ¶ 84. Nor is the trial court required to give equal weight to each factor, so long as the court's balancing of the factors is reasonable. *Patel*, 2013 IL App (1st) 112571, ¶ 84.

¶ 22 We emphasize strongly that our supreme court has mandated that, unless the parties have agreed to specific terms for the modification or termination of maintenance in a written agreement pursuant to section 502 of the Act (750 ILCS 5/502 (West 2014)), the trial court *must* consider the statutory factors set forth in subsections (1) through (12) of section 504(a) in postdecree modifications of maintenance. *Blum v. Koster*, 235 Ill. 2d 21, 31 (2009). We also emphasize strongly that this court has been crystal clear that, when determining the amount and duration of maintenance, the trial court *must* balance the ability of the spouse to support himself or herself *in some approximation to the standard of living that he or she enjoyed during the marriage*. *In re Marriage of Brankin*, 2012 IL App (2d) 110203, ¶ 10. Keith acknowledges this standard at page 10 of his brief. Accordingly, the trial court's belief that it could not consider the

section 504(a) factors, and that arguments directed to those factors were inappropriate, requires vacatur of the judgment modifying maintenance in this case and remand.

¶ 23 On remand, we direct the court to consider each of the section 504(a) factors and each of the section 510(a-5) factors. In doing so, we instruct the court to consider Kristin's learning disability when considering section 504(a)(8), which includes a party's physical condition. Further, the court is specifically directed to balance Kristin's ability to support herself in some approximation to the standard of living that she enjoyed during the marriage. See *Brankin*, 2012 IL App (2d) 110203, ¶ 10. The court shall make findings on the record with regard to each of the 504(a) and 510(a-5) factors.

¶ 24 Because three issues that Kristin raises on appeal are likely to arise on remand, we will address them. First, the parties disagree as to the application of the 2015 amendments to the Act. Kristin liberally relies on the amendments in support of her position that the award of maintenance in gross was improper. Keith correctly points out that section 801(d) of the Act (750 ILCS 5/801(d) (West 2014)) provides that we apply the law as it existed at the time of the judgment being appealed. *In re Marriage of Smith*, 162 Ill. App. 3d 792, 797 (1987). The purpose of section 801(d) is to allow the correction on appeal of errors made in applying the law at the time of the original hearing. *Smith*, 162 Ill. App. 3d at 795-96. Section 801(d) also provides that the trial court on remand shall apply the law as it existed at the time of the original hearing. *Smith*, 162 Ill. App. 3d at 795-96. Consequently, the 2015 amendments are not relevant.

¶ 25 Second, Kristin maintains that the trial court was prohibited from changing the character of maintenance in a postjudgment proceeding. Kristin asserts that the court was statutorily barred from converting the award of rehabilitative maintenance to maintenance in gross.

¶ 26 This issue presents a question of statutory interpretation that is subject to *de novo* review. *Petersen v. Wallach*, 108 Ill. 2d 439, 444 (2002). The fundamental principle of statutory construction is to determine and give effect to the intent of the legislature. *Petersen*, 108 Ill. 2d at 444. The best means to determine legislative intent is through the statutory language. *Petersen*, 108 Ill. 2d at 444. Statutory language must be given its plain and ordinary meaning, and where the language is clear and unambiguous, we apply the statute without aids of statutory construction. *Kurczak v. Cornwell*, 359 Ill. App. 3d 1051, 1057 (2005). Courts will not interpret a statute so as to achieve an absurd result. *Chatam Foot Specialists, P.C. v. Health Care Service Corp.*, 216 Ill. 2d 366, 396 (2005).

¶ 27 Kristin contends that once a certain category of maintenance is awarded under section 504, it cannot be changed in a modification or termination proceedings. Her argument proceeds thusly. Section 504(a) contains a reference to temporary maintenance, permanent maintenance, and maintenance in gross. That paragraph is followed by enumerated factors 1-12. Section 510(a-5) directs the court to consider only the enumerated factors 1-12 in a review proceeding and does not include a direction to consider the types of maintenance mentioned in section 504(a). This argument is akin to asking us to read only the adjectives in a sentence to derive the meaning of the whole sentence. Obviously, the criteria for granting maintenance cannot exist in a vacuum. Furthermore, Kristin herself urges us to change the award of rehabilitative maintenance to permanent maintenance. We agree with the court in *In re Marriage of Culp*, 341 Ill. App. 3d 390, 396 (2003), that, where warranted by the facts, a court can modify the type of maintenance after a review proceeding.

¶ 28 Kristin further asserts that an award of maintenance in gross is inappropriate under the facts of the present case. She asserts that our supreme court in *Blum* eliminated maintenance in

gross. While the supreme court stated that absent the parties' express agreement, the Act does not permit a court to make an award of maintenance nonmodifiable and nonreviewable, the court was discussing periodic maintenance. *Blum*, 235 Ill. 2d at 42. The court specifically stated that maintenance in gross is an exception. *Blum*, 235 Ill. 2d at 42. Thus, *Blum* did not eliminate maintenance in gross. Without deciding or opining whether the award of maintenance in gross in this case was an abuse of the court's discretion, we nevertheless are mindful, and Keith agrees, that, absent exceptional circumstances, periodic maintenance is the judicially preferred form of maintenance. *Patel*, 2013 IL App (1st) 112571, ¶ 85. Consequently, if, on remand, the trial court again determines that an award of maintenance in gross is appropriate, the court shall justify the exercise of its discretion on the record.

¶ 29 Next, we turn to Kristin's contention that the court erred in denying her petition for contribution to attorney fees. The allowance of attorney fees and the amount awarded are within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion. *In re Marriage of Suriano and LaFeber*, 324 Ill. App. 3d 839, 846 (2001). An abuse of discretion occurs when no reasonable person could find as the trial court did. *In re Marriage of Stufflebeam*, 283 Ill. App. 3d 923, 929 (1996). The reviewing court must analyze whether the trial court acted arbitrarily, that is, without conscientious judgment, or whether it exceeded the bounds of reason and ignored recognized principles of law so that substantial injustice resulted. *Suriano*, 324 Ill. App. 3d at 846.

¶ 30 Unfortunately, the record does not contain the transcript of the hearing on the motion. The trial court's written order contains a finding that Kristin made an insufficient showing of her inability to pay. The order further recites that this finding was based on the court's "inference" that Kristin "may have" secreted $300,000 in cash. If we were to assume, as Kristin urges us to

do, that the court's "inference" was drawn from evidence adduced at the hearing on the maintenance review, it would be only that, an assumption. To make such an assumption is precipitate, because the trial court's oral ruling after the maintenance review hearing indicated that the evidence raised only "the question" of whether Kristin was concealing assets. The court answered its own question with the words, "I don't know." An inference is a factual conclusion that can rationally be drawn by considering other facts. *People v. Velez*, 2012 IL App (1st) 101325, ¶ 28. "I don't know" would not support an inference. The question in our minds, therefore, is whether something occurred at the hearing on the motion for contribution to attorney fees that would support the inference.

¶ 31 The burden is on the appellant to furnish a record that is sufficient to support her claim of error. *In re Marriage of Chesrow*, 255 Ill. App. 3d 613, 623 (1994). Where the record is lacking, the appellate court will indulge every presumption favorable to the order entered by the trial court. *Chesrow*, 255 Ill. App. 3d at 623. Any doubts arising from the incompleteness of the record will be resolved against the appellant. *Chesrow*, 255 Ill. App. 3d at 623. Accordingly, we presume that the order denying Kristin's motion for contribution to attorney fees was in conformity with the law and had a sufficient factual basis. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Thus, we affirm the court's order denying Kristin's petition for contribution to attorney fees.

¶ 32 III. CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed in part, vacated in part, and remanded with directions.

¶ 34 Affirmed in part; vacated in part; cause remanded with directions.