2017 IL App (2d) 150984-U
No. 2-15-0984
Order Filed April 20, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF ELLEN MICHELI, Petitioner-Appellee and Cross-Appellant, and JOHN MICHELI, Respondent-Appellant and Cross-Appellee.	)))))))))))	Appeal from the Circuit Court of Lake County. No. 09-D-1256 Honorable Charles D. Johnson, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The capping of maintenance and equal division of unvested stock options and restricted stock units was not an abuse of discretion.

¶ 2 This is the second appeal and cross-appeal from a marriage dissolution judgment. Following a remand to the circuit court, respondent, John Micheli, and petitioner, Ellen Micheli, dispute maintenance and the equal division of unvested stock options and restricted stock units (RSUs) as marital property.

¶ 3 First, at trial, the court ordered John to pay temporary maintenance of $3,700 per month plus 20% of his future bonuses, with the order reviewable after seven years. In the prior appeal, the parties disputed the duration of the maintenance and whether it could include an uncapped amount based on a percentage of future bonuses. We held that the uncapped maintenance based on a percentage of John's future bonuses was an abuse of discretion but that the duration of the maintenance was not. *In re Marriage of Micheli*, 2014 IL App (2d) 121245, ¶¶ 25, 29 (*Micheli I*).

¶ 4 On remand, the trial court reinstated the maintenance award but capped it based on a total income of $320,000. Ellen cross-appeals the order, arguing that the trial court misapplied our mandate and improperly recalculated maintenance based on John's total income rather than Ellen's reasonable needs.

¶ 5 Second, at trial, the court ordered that John's vested stock options would be exercised and divided equally, but in an order clarifying the judgment, the court then apparently awarded John all of his *unvested* stock options and RSUs. On cross-appeal, Ellen argued that she is entitled to one-half of the unvested stock options and RSUs. John responded that the court awarded him the unvested stock options and RSUs in exchange for Ellen receiving a larger share of the defined contribution retirement plans. We agreed with Ellen that the court abused its discretion in awarding John all of the unvested stock options and RSUs, because the award was unrelated to its distribution of the defined contribution retirement plans and disparately impacted the division of the marital estate. *Micheli I*, 2014 IL App (2d) 121245, ¶ 37.

¶ 6 On remand, the court found the unvested stock options and RSUs to be marital property and divided them equally. John appeals the order, arguing that the court failed to consider the

assets' vesting schedules according to *In re Marriage of Hunt*, 78 Ill. App. 3d 653 (1979), or properly apportion them. We affirm.

¶ 7 I. BACKGROUND

¶ 8 On June 28, 2012, the trial court entered the judgment for dissolution of marriage, which contained the following findings. The parties were married on October 1, 1988. At the time, they both worked at Allstate Insurance Company in New York. Ellen reduced her hours to part-time to care for the children. In 1997, the family moved to Illinois, where John continued working for Allstate and Ellen stopped working outside the home. In 2005, Ellen returned to the workforce, employed part-time as an administrative assistant for Adlai Stevenson High School, and in August 2011 she began working full-time in that position. At the time of dissolution, John was a senior vice president of finance at Allstate.

¶ 9 The trial court found that, during the marriage, the parties lived a reasonable lifestyle, accumulating savings in the form of cash accounts, investments, retirement savings, college savings accounts for the children, and equity in the marital residence. Besides the mortgage on the residence, the parties had no significant debt.

¶ 10 Pursuant to section 503(d) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/503(d) (West 2012)), the court divided the parties' assets equally, with certain exceptions. John's 401(k) retirement account and Ellen's individual retirement account were divided so Ellen received 60% and John received 40%. The parties also received their respective vehicles, checking accounts, and savings accounts.

¶ 11 Pursuant to section 504(a) of the Dissolution Act, the court ordered John to pay seven years' maintenance of $3,700 per month, plus 20% of gross future bonuses after child support was deducted. The court noted that the parties were married for 24 years and both were 48

years old. The court emphasized that marriage is a partnership and that Ellen's homemaking services were as significant as John's financial contributions. The court found that it would be inequitable to saddle Ellen with the burden of her reduced earning potential while allowing John to continue in the advantageous position he reached through their joint efforts.

¶ 12 John and Ellen each filed a posttrial motion. John challenged as excessive the amount and duration of maintenance, specifically requesting an annual cap. Ellen also challenged the maintenance award, arguing that it should be reviewable after seven years or, if it shall terminate after seven years, it should be nonmodifiable during that time.

¶ 13 On October 9, 2012, the trial court upheld the maintenance award and declared that it was not subject to review for seven years, but could be reviewed thereafter. The court also clarified its ruling on the stock options and the RSUs: the vested options were divided equally and the unvested stock options and RSUs were granted to John.

¶ 14 A. Maintenance

¶ 15 In the first appeal, John argued, *inter alia*, that the maintenance award was an abuse of discretion because the duration was too long and the amount was uncapped, based on a percentage of his future bonuses. Ellen responded that maintenance should be permanent. We affirmed the duration of the maintenance but determined that it improperly included an uncapped amount based on a percentage of John's future bonuses. We concluded that ordering John to pay 20% of his bonuses as uncapped maintenance set up a potential windfall for Ellen and had no evidentiary relation to her present needs or the parties' standard of living during the marriage. *Micheli I*, 2014 IL App (2d) 121245, ¶ 25. We stated that "[o]n remand, the trial court should recalculate the monthly maintenance amount or at least cap the amount from John's future bonuses. If the trial court determines that $3,700 per month is inadequate to meet Ellen's needs

and maintain her standard of living during the marriage, it may add a capped portion of John's future bonuses." *Micheli I,* 2014 IL App (2d) 121245, ¶ 25.

¶ 16 Judge David P. Brodsky entered the dissolution judgment following the trial, but Judge Charles D. Johnson addressed the matter on remand, entering a written order on April 27, 2015. After expressly adopting the facts found at trial, including that Ellen had made no attempt to "economize or moderate," Judge Johnson rejected Ellen's claim that she needed a net annual income of $110,000 to maintain the lifestyle established during the marriage. Judge Johnson accepted John's evidence that his base salary was $274,260, which appeared to be consistent with the child support amount ordered at trial. However, Judge Johnson concluded that "a cap on John's income for maintenance purposes would be less than the cap set on his income for child support purposes" and would take into account the lifestyle during the marriage. The court set a total annual income cap of $320,000, which would be comprised of $274,260 from base salary and $45,740 from bonuses, or a monthly maximum bonus of $3,811. Thus, for seven years, Ellen would receive monthly maintenance of $3,700 plus up to $762 from John's bonuses. Depending on the bonus, monthly maintenance would be $3,700 to $4,462.

¶ 17 B. Unvested Stock Options and RSUs

¶ 18 In the first appeal, Ellen argued on cross-appeal that the trial court erred in awarding John all of his unvested stock options and RSUs. In the original judgment, pursuant to section 503(d) of the Dissolution Act (750 ILCS 5/503(d) (West 2012)), the court divided the parties' assets equally, including John's vested stock options. At the time of dissolution, the most recent statement of John's portfolio valued the investments as follows: (1) vested stock options potentially worth $125,505, (2) unvested stock options potentially worth $244,501, and (3) unvested RSUs potentially worth $360,058. The values of the unvested stock options and

RSUs were not specified in the judgment, but the judgment states that they "shall be divided equally between the parties (50% awarded to John and 50% awarded to Ellen)." In his motion to clarify, John asserted that the values of the unvested stock options and RSUs must be determined.

¶ 19 On October 9, 2012, the court ordered that "John shall immediately exercise all Allstate vested stock options and vested [RSUs] held in the Fidelity account and the net value, after taxes are paid, shall be equally divided between the parties. The unvested stock options and unvested [RSUs] shall remain John's property, if hereafter acquired; and the value of the unvested options and [RSUs]." The court apparently intended to modify the judgment by awarding John all of the unvested stock options and RSUs. Ellen argued that the court made no findings to explain why the unvested stock options and RSUs were treated differently than their vested counterparts.

¶ 20 We observed that Judge Brodsky's original inclusion of both vested and unvested stock options and RSUs in the division of marital property was consistent with section 503(b)(3) of the Dissolution Act, which provides, in relevant part, that options acquired during marriage but before a judgment of dissolution or a declaration of invalidity of marriage are presumed to be marital property, even if they have not vested and even if their value cannot be ascertained. 750 ILCS 5/503(b)(3) (West 2012); *Micheli I*, 2014 IL App (2d) 121245, ¶ 34 (citing *Hmelyar v. Phoenix Controls*, 339 Ill. App. 3d 700, 705-06 (2003)). We also noted that, at dissolution, a court must allocate options between the parties, even though the options' values might be unascertainable and the actual property division might occur at a later date. 750 ILCS 5/503(b)(3) (West 2012); *Micheli I*, 2014 IL App (2d) 121245, ¶ 34.

¶ 21 Section 503(b)(3) does not mention RSUs, but Judge Brodsky initially determined that John's RSUs were marital property subject to distribution. Like stock options, RSUs are a form

of deferred compensation. Upon the expiration of the restriction, an owner automatically receives the RSUs, which become fully tradable common stock. Before they vest, the owner of the RSUs receives taxable quarterly dividends generated by the company. *Micheli I*, 2014 IL App (2d) 121245, ¶ 35.

¶ 22 We determined that, despite the trial court's original stated intent of dividing the stock options and RSUs equally, the court apparently awarded 100% of the unvested stock options and RSUs to John. The court heard evidence that the marital estate was worth $868,840, excluding the marital residence and the unvested stock options and RSUs. John received $381,989, or 44%, and Ellen received $486,851, or 56%, of that portion of the marital estate. However, the estimated value of the unvested stock options and RSUs was $604,558, which we found to be "very significant." After accounting for the unvested stock options and RSUs, John's share increased to $986,547, or 67%, while Ellen's remained at $486,850, which now amounts to only 33% of the estate. *Micheli I*, 2014 IL App (2d) 121245, ¶ 36.

¶ 23 The estimated values of the unvested stock options and RSUs were based on John's April 2011 financial statement, but they illustrated the disparate impact of the decision to deviate from the original ruling that divided the stock options and RSUs equally. The uncertainty of the values of the unvested stock options and RSUs was not an impediment to an equitable distribution when they become vested. We held that the decision to award John all of the unvested stock options and RSUs was an abuse of discretion. *Micheli I*, 2014 IL App (2d) 121245, ¶ 37.

¶ 24 On remand, Judge Johnson reinstated the original order that divided the vested stock options, unvested stock options, and RSUs equally. Relying on Judge Brodsky's finding that these assets were marital, Judge Johnson declined to apply the *Hunt* formula, which he

accurately described as " 'a commonly used method for dividing pensions' martial portions *where the marital interest in a pension benefit is determined* by dividing the number of years or months of marriage during which pension benefits accumulated by the total number of years or months benefits accumulated prior to retirement or being paid.' " (Emphasis added.) *In re Marriage of Kehoe & Farkas*, 2012 IL App (1st) 110644, ¶ 29. Judge Johnson concluded that "the trial court has already determined that all stock options and RSUs are marital property, therefore, the court need not indulge the *Hunt* formula for such a determination, and will not do so."

¶ 25 On September 10, 2015, the trial court disposed of the parties competing motions to reconsider, and this timely appeal and cross-appeal followed.

¶ 26 II. ANALYSIS

¶ 27 A. Maintenance

¶ 28 On remand, the court awarded Ellen seven years' maintenance comprised of $3,700 per month plus 20% of John's future bonuses based on a total income cap of $320,000. On cross-appeal, Ellen argues that the court misapplied our mandate and recalculated maintenance based on John's total income rather than Ellen's reasonable needs.

¶ 29 The parties dispute our standard of review. Ellen advocates *de novo* review of the maintenance order in terms of whether the court complied with our mandate on remand. Ellen conflates whether the court followed our directions in reconsidering the issue and whether the ultimate ruling was reversible error. John correctly frames the ultimate issue as whether the trial court abused its discretion in setting maintenance.

¶ 30 The trial court is bound by this court's mandate and should consult the opinion to determine what the mandate requires. *PSL Realty Co. v. Granite Investment Co.*, 86 Ill. 2d 291,

308-309 (1981). Whether the trial court complied with the mandate is a question of law, subject to *de novo* review. *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 352 (2002). Our mandate stated in part that "in accordance with the views expressed in the attached Decision the judgment of the trial court is Affirmed in part, Reversed in part and Remanded." In turn, our decision stated that "[o]n remand, the trial court should recalculate the monthly maintenance amount or at least cap the amount from John's future bonuses. If the trial court determines that $3,700 per month is inadequate to meet Ellen's needs and maintain her standard of living during the marriage, it may add a capped portion of John's future bonuses." *Micheli I*, 2014 IL App (2d) 121245, ¶ 25. As a matter of law, the trial court complied with the mandate on remand by recalculating maintenance, which we may review in this cross-appeal.

¶ 31 Temporary maintenance is designed to be rehabilitative and to allow a dependent spouse to become financially independent. *In re Marriage of Smith*, 2012 IL App (2d) 110522, ¶ 44. In awarding maintenance, the trial court considers the following factors: (1) the income and property of each party; (2) the respective needs of each party; (3) the present and future earning capacity of each party; (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 appropriate education, training, and employment and whether that party can support himself or herself through appropriate employment, or whether, as the custodial parent, it is not appropriate for the party to seek employment; (6) the standard of living during the marriage; (7) the duration of the marriage; (8) the age and physical and emotional condition of both parties; (9) the tax consequences of the property division; (10) the contributions by the party seeking maintenance to the education and career of the other party; (11) any valid agreement of the parties; and (12)

"any other factor that the court expressly finds to be just and equitable." 750 ILCS 5/504(a) (West 2012).

¶ 32 A trial court has wide latitude in considering what factors to use in determining reasonable needs, and the trial court is not limited to the factors listed in the Dissolution Act. *Smith*, 2012 IL App (2d) 110522, ¶ 46. " 'No one factor is determinative of the issue concerning the propriety of the maintenance award once it has been determined that an award is appropriate.' " *Smith*, 2012 IL App (2d) 110522, ¶ 46 (quoting *In re Marriage of Murphy*, 359 Ill. App. 3d 289, 304 (2005)). A maintenance award is within the court's discretion, and the court's decision will not be disturbed absent an abuse of discretion, which exists only where no reasonable person would take the view adopted by the court. *Smith*, 2012 IL App (2d) 110522, ¶ 46.

¶ 33 At trial, Ellen submitted extensive documentary evidence of her expenses. When setting maintenance in the original judgment, Judge Brodsky excluded certain expenses as excessive. Ellen argues that, on remand, her reasonable needs should have been calculated simply by subtracting those amounts from a total that she had requested. A review of the original judgment confirms Judge Johnson's finding that these amounts were merely examples of Ellen's inflated expenses, not a tacit acceptance of the reasonableness of her other expenses. The judge did not abuse his discretion in declining to use the inflated expenses in some strict mathematical formula to set maintenance.

¶ 34 Ellen also argues that implementing an income cap disregarded our comment in *Micheli I* that a cap for child support was improper. She argues that a cap on maintenance is similarly improper. We observed that maintenance is designed to allow the recipient spouse to maintain the standard of living enjoyed *during* the marriage, while child support may exceed the

children's needs or deviate from the statutory guidelines if necessary to enable the children to enjoy the standard of living they would have enjoyed if the marriage had not been dissolved. John conceded that Judge Brodsky had deviated from the statutory guidelines by capping child support. *Micheli I*, 2014 IL App (2d) 121245, ¶ 24. The capped maintenance that was ordered on remand is consistent with setting an amount that reflects Ellen's lifestyle during the marriage. Unlike the children, a recipient spouse is not entitled to the standard of living he or she would have enjoyed if the marriage had not been dissolved.

¶ 35 John argued at trial that, to maintain her lifestyle, Ellen required only $5,400 per month, which would be comprised of $3,750 from her employment income and the remainder from temporary maintenance.[1] Ellen testified that she was seeking maintenance of "roughly around $4,400" per month. The maintenance order entered on remand awarded Ellen $3,700 to $4,462 per month, depending on the amount of John's bonus. Judge Johnson stated that he considered the factors of section 504 of the Dissolution Act, and the order corresponds to Ellen's testimony at trial and her lifestyle during the marriage. Moreover, Judge Johnson could have considered the increased award of the unvested stock options and RSUs in ordering less maintenance than Ellen requested on remand.

¶ 36 Capping maintenance removed the risk of a windfall for Ellen while allowing her to maintain the standard of living that she enjoyed during the marriage. Seven years' maintenance in the range provided, followed by the opportunity to review, is not so inadequate that no

[1] The June 28, 2012, dissolution judgment mistakenly states that "John claimed that Ellen only needed five thousand eight hundred dollars ($5,800) to preserve a lifestyle constant with the one the parties shared during the marriage." In fact, the transcript shows that John argued that the amount was $5,400.

reasonable person would take the view adopted by the court on remand.

¶ 37 B. Unvested Stock Options and RSUs

¶ 38 Judge Brodsky initially divided the vested stock options, unvested stock options and RSUs equally, but later modified the judgment to award John all of the unvested stock options and RSUs. We found this to have a disparate effect on the division of marital property, and on remand, Judge Johnson reinstated the original order that divided the vested stock options, unvested stock options, and RSUs equally.

¶ 39 John appeals from the equal division of the unvested stock options and RSUs, arguing that Ellen was unjustly enriched with assets that John earned after the marriage ended. In his opening brief, John initially contends that these assets are nonmarital property until they vest, and therefore, the court should have considered their vesting schedules, applied the *Hunt* formula, and found that the portions vesting after the June 28, 2012, dissolution judgment are his nonmarital property. Under *Hunt*, a court calculates the marital portion by dividing the period of marriage during which pension benefits accumulated by the total period during which benefits accumulated prior to retirement or being paid. See, *e.g.*, *Kehoe*, 2012 IL App (1st) 110644, ¶ 29. In his reply brief, John apparently concedes the classification of the unvested stock options and RSUs as marital property but quarrels with their equal division. John invokes the recently-amended subsections 503(b)(3)(i) and (ii), which are consistent with that principle and provide that a trial court's allocation of marital stock options should consider:

> "(i) All circumstances underlying the grant of the stock option and restricted stock or similar form of benefit including but not limited to the vesting schedule, whether the grant was for past, present, or future efforts, whether the grant is designed to promote future performance or employment, or any combination thereof.

(ii) The length of time from the grant of the option to the time the option is exercisable." 750 ILCS 5/503(b)(3)(i)-(ii) (West Supp. 2015).

¶ 40 Ellen responds that (1) John incorrectly relies on the most recent version of section 503(b)(3), which became effective during the pendency of this appeal and on vesting schedules that were not admitted at trial; (2) the *Hunt* formula does not apply to stock options or RSUs in a marriage dissolution; and (3) Judge Johnson properly exercised his discretion according to the law of the case.

¶ 41 In the prior appeal, we observed that the trial court's original inclusion of both vested and unvested stock options and RSUs in the division of marital property was consistent with section 503(b)(3) of the Dissolution Act, which provides, in relevant part, that options acquired during marriage but before a judgment of dissolution or a declaration of invalidity of marriage are presumed to be marital property, even if they have not vested and even if their value cannot be ascertained. *Micheli I*, 2014 IL App (2d) 121245, ¶ 34 (citing 750 ILCS 5/503(b)(3) (West 2012)). Since the filing of this appeal, the legislature amended section 503(b)(3) to make explicit what we had inferred. The amended statute provides that "restricted stock or similar form of benefit" is to be treated the same as stock options. Pub. Act 99-90 (eff. Jan. 1, 2016) (amending 750 ILCS 5/503(b)(3) (West 2012)). Moreover, subsection 503(b)(3)(i) was amended to expressly prescribe consideration of "the vesting schedule" of "the stock option and restricted stock or similar form of benefit." Pub. Act 99-90 (eff. Jan. 1, 2016) (amending 750 ILCS 5/503(b)(3)(i) (West 2012)).

¶ 42 Ellen insists that we must adhere to version of the statute that does not mention restricted stock or vesting schedules, but even under that version, Judge Johnson could have considered the vesting schedule as a circumstance underlying the grants, including whether the grant was for

past, present, or future efforts, whether the grant was designed to promote future performance or employment, or any combination thereof. 750 ILCS 5/503(b)(3)(i) (West 2012). We conclude that, although the court could have considered the vesting schedule on remand to allocate a portion of the marital assets unequally, the equal division of the unvested stock options and RSUs is consistent with either version of the statute and is not an abuse of discretion. Although the order is silent on the point, the allocation possibly took into account the cap placed on Ellen's maintenance.

¶ 43 Judge Johnson ruled that he would decide the issues on remand according to the evidence adduced at trial. As Ellen points out, John did not present the vesting schedule at trial and only mentioned it during argument on remand. At trial, John testified vaguely that the RSUs vested after "four years" and the stock options vested after "about four or five years." John has cited no trial testimony regarding dates or circumstances that would affect vesting.

¶ 44 Moreover, contrary to John's assertion, the record does not show that Ellen acquiesced on remand to using any vesting schedule in allocating the unvested stock options and RSUs. Her counsel acknowledged the existence of a document purporting to be a vesting schedule for the RSUs, but that was in the context of pointing out the lack of a schedule for the stock options. Counsel did not concede that the RSUs' vesting schedule was relevant, let alone appropriate for making the allocation. John presented no competent evidence to rebut the statutory presumption that all the stock options and RSUs granted after the marriage were marital.

¶ 45 John's reliance on section 503(b)(3)(i) and (ii) is misplaced because those factors are to be considered in allocating marital stock options, not defining whether they are marital or nonmarital. *Hunt* and the other cases that John cites offer little guidance as they were decided before the legislature enacted the statutory presumption that all stock options granted during the

marriage are marital property. We need not decide the parties' remaining arguments because they either lack merit or are not dispositive of the appeal or cross-appeal.

¶ 46 III. CONCLUSION

¶ 47 The judgment of the circuit court of Lake County is affirmed.

¶ 48 Affirmed.