

2018 IL App (1st) 170571-U

No. 1-17-0571

Order filed June 1, 2018

Fifth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the
SUSAN O’GARA,)	Circuit Court of
)	Cook County.
)	
Petitioner-Appellant,)	No. 12 D2 30453
)	
and)	Honorable
)	Mark Joseph Lopez,
MICHAEL O’GARA,)	Judge, presiding.
)	
Respondent-Appellee.)	

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

- ¶ 1 *Held:* This court affirmed the order of the circuit court denying the former wife’s petition for maintenance.
- ¶ 2 The petitioner, Susan O’Gara (Susan) appeals from an order of the circuit court of Cook County denying her petition for maintenance from the respondent, Michael O’Gara (Michael or

Mike). On appeal, Susan contends that the court erred when it refused to impute income to Michael. For the reasons set forth below, we affirm the order of the circuit court.

¶ 3 BACKGROUND

¶ 4 On October 9, 2012, Susan filed a petition for the dissolution of the parties' marriage. On February 4, 2014, a judgment was entered dissolving the marriage of the parties. Incorporated into the judgment was the parties' marital settlement agreement (MSA). Several provisions of the MSA are pertinent to the issue raised on appeal and are set forth below.

¶ 5 Article II of the MSA dealt with the parties' rights to maintenance. In section 2.1 of Article II, Michael waived his right to receive maintenance from Susan. Section 2.2 of the maintenance provision provided as follows:

“SUSAN's right to maintenance is reserved for 12 years from the date of the entry of the Judgment for Dissolution of Marriage. If SUSAN does not file a petition for maintenance prior to the 12th anniversary of the entry of the judgment for dissolution of marriage she shall be barred from filing a petition for maintenance. MIKE, upon obtaining employment shall immediately notify SUSAN of his employment status and send her confirmation of his employment as well as all documents related to his employment, including, but not limited to pay checks, benefit information, employment agreements and the like. MIKE, until he is employed, shall maintain a job diary which he shall tender to SUSAN every 60 days showing the efforts he is making to find employment. This shall include all correspondence, emails and the like between MIKE and potential employers. MIKE shall tender his personal and business tax returns, every year to SUSAN by the 16[th] of every April to verify his income or lack thereof.”

¶ 6 Article IV of the MSA dealt with the property of the parties. With regard to Compass Capital Corporation (CCC), Michael's former employer, section 4.6(A) provided in pertinent part as follows:

“Each of the parties shall receive 50% of the income generated by CCC, less Professional Fees. MIKE will ensure that as he receives a payment from CCC that he will immediately deposit 50% of the amount received via electronic bank transfer into an account designated by SUSAN and shall immediately tender to her the documentation received from CCC and not documentation prepared by him, verifying the amount received by MIKE.”

Section 4.6(C) provided as follows:

“In the event that SUSAN files a petition for maintenance, the payments to MIKE by CCC shall not be considered in determining the amount of maintenance that SUSAN will be receiving.”

¶ 7 On July 15, 2014, Susan filed a petition seeking to hold Michael in indirect civil contempt for failing to provide her with his job diary as required by section 2.2 of the MSA. At the time of the contempt proceeding, Michael was enrolled at the Catholic Theological Union, working towards a master's degree in pastoral studies. On October 7, 2014, following a hearing, the circuit court entered an order finding that Michael had “no justification not to comply with paragraph 2.2 of the parties Judgment for Dissolution entered February 4, 2014.” The order further provided in pertinent part as follows:

“1. MICHAEL shall apply for employment commensurate with his education and business background.

2. MICHAEL shall purge himself by maintaining a job diary and every sixty days shall submit said diary to SUSAN representing what effort he has made to find employment. Said diary shall contain the name of all companies or persons contacted with their contact numbers, date of contact, all emails, correspondence, notes, memorandums or any other documentation evidencing the contact made. Said diary shall contain a job description of what he is applying for, as well as the result of all contact.”

¶ 8 On May 1, 2015, Susan filed a petition seeking maintenance from Michael. Susan alleged that her current income was insufficient to sustain the affluent lifestyle she enjoyed during the parties’ marriage. She further alleged that Michael failed to comply with the October 7, 2014, order requiring him to seek employment commensurate with his education and business background, and to keep a job diary. Susan requested that the trial court impute income to Michael of \$300,000 and to award her maintenance reflecting that amount.

¶ 9 In his response to Susan’s petition, Michael agreed that the parties enjoyed an affluent lifestyle during their marriage. However, prior to the dissolution of their marriage, the parties suffered financial difficulties that rendered them insolvent. Michael denied Susan’s allegations that he had not sought employment and had not kept a job diary. Based on her income and the assets she had acquired, he disputed Susan’s need for maintenance.

¶ 10 A hearing on Susan’s petition for maintenance was held over three dates: September 8, October 2, and October 8, 2015. The evidence set forth below is taken from the bystander’s report approved by the trial court and filed by the parties as part of this appeal.

¶ 11 Susan

¶ 12 Susan and Michael were married for 36 years. During the marriage, Susan was a stay-at-home mother, raising the parties' three children.¹ While she also operated an interior design business, it was not intended to be a source of income for the family. During the parties' marriage, they owned a \$2 million residence, drove Lexus and Mercedes automobiles, enjoyed extensive travel and liberal use of credit cards, and belonged to a country club. Their affluent lifestyle was possible since Michael generated income in excess of \$500,000 as vice-president of marketing in CCC's railcar leasing division.² In November 2012, Susan moved to Colorado because the marital residence was sold, and Michael refused to support her during the dissolution proceedings.

¶ 13 Susan had resided in Colorado since November 2012. She leased the basement portion of a friend's residence, though she had access to the entire 2,800 square foot residence. In addition to her interior design business, she worked part-time at the Denver Design Center. However, her employment hours had been reduced recently.

¶ 14 Susan had more liquid assets than Michael because she received 55% of the marital estate, and she continued to work while Michael remained unemployed. Susan acknowledged that she had a bachelor's degree in business and was mentally and physically capable of finding full-time employment. She further acknowledged that she had not attempted to find full-time employment or to further her education.

¶ 15 According to her financial affidavit, Susan's gross monthly income was \$1,340 per month. After expenses, her monthly deficit was \$7,800. Susan had \$370,000 in retirement assets,

¹ Two of the children are emancipated. The youngest child is in college, and her support is not at issue in this appeal.

² The bystander's report does not set forth whether the \$500,000 was the amount of yearly or monthly income Michael generated for CCC or the amount of his yearly or monthly commissions.

liquid assets of \$7,700 and debts in excess of \$65,000. In order to support herself and the parties' youngest child, who was in college, Susan was living off of the assets she was awarded in the dissolution.

¶ 16 Michael

¶ 17 According to Michael, while the parties enjoyed an affluent lifestyle, they lived beyond their means. Their money problems began in 2010 due to downturns in the railcar leasing business. Michael chose to pursue a project with a long-standing client. He formed Bridlewood Capital Group (BCG) in December 2010. In May 2011, Michael terminated his employment with CCC. He conceded that his departure from CCC was unrelated to the economy. In September 2011, Michael's client withdrew its funding from the project. Without recourse under his contractual arrangement and having funded BCG from his own resources, he chose not to sue his client.

¶ 18 As a result, the parties could no longer afford their \$25,000-per-month lifestyle. They cancelled their credit cards and country club membership. Michael sold the Mercedes to pay for a wedding for one of their daughters. By April 2012, the parties were no longer able to pay their mortgage, and the residence was sold in a "short sale" in November 2012.

¶ 19 Michael explained that the \$785,000 BCG made in 2012 could not be repeated in 2013 and 2014. The 2012 earnings resulted from a brokered transaction for a seven-year lease which was designed to provide a steady commission to BCG. Six months later, a dispute arose resulting in a discounted one-time payment to BCG of the commissions due on the lease. In September 2014, BCG ceased operations.

¶ 20 At the time of the hearing, Michael had been unemployed for two years. He attempted to find employment in his previous area of expertise but due to his age and the decline in the industry, he was unsuccessful.³ Michael lived in a rented one-bedroom apartment.

¶ 21 In September 2014, Michael enrolled in a master's degree program in pastoral studies from which he would graduate in May 2016. He planned to utilize his business and finance experience in conjunction with his master's degree. At the time of the hearing, Michael was interning at the Beloved Retreat at Old St. Patrick's Church. While Michael maintained that he kept a job diary of his efforts to obtain employment, he did not produce any job diaries at the hearing. However, among the exhibits admitted at the hearing was an August 17, 2015, letter from Michael to Susan, which updated his May 18, 2015, report to her of his education and post-graduation plans for future employment.

¶ 22 As of September 8, 2015, Michael had gross earnings of \$50,000. He had assets of \$330,000 in a 401(k) and \$43,000 in a Schwab account. His liabilities included: \$8,000 for federal taxes, \$42,000 in student loans, a \$20,000 loan for his daughter's college education, and a BCG-related loan of \$278,445.96, assigned to him under the MSA.⁴

¶ 23 April 20, 2016 Order

¶ 24 On April 20, 2016, the trial court issued its ruling on Susan's petition for maintenance. Based on the evidence presented at the hearing, the trial court found that Michael had intentionally and in bad faith placed himself in a negative financial position solely for the purpose of avoiding his financial obligations to Susan.

³ Michael was 57 years old at the time the petition for dissolution was filed in 2012.

⁴ The MSA stated it was a family loan in the amount of \$250,000.

¶ 25 Based on the statutory factors set forth in section 504(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 50/504(a) (West 2014)), the trial court determined that Susan was candidate for maintenance. Based on the length of the parties' marriage and the evidence of the income of both parties, the court imputed to Michael an annual gross income of \$250,805. In finding that an upward deviation from the support guidelines was appropriate, the trial court stated as follows:

“In entering the maintenance award the Court finds that maintenance guidelines are not appropriate. First and foremost, because the parties joint income exceeds \$250,000.00 but more importantly, because of the unique nature of the parties agreement to share Michael's gross earnings from his railcar leasing business equally, and thereafter, Michael deliberately impoverishing himself and electing to go to school and earning de minimis [*sic*] income.”

The court awarded Susan \$6,250 per month in maintenance retroactive to May 1, 2015, the date her petition for maintenance was filed.

¶ 26 Michael's Petition for Reconsideration

¶ 27 In his petition for reconsideration of the April 20, 2016, order, Michael maintained that in awarding maintenance to Susan, the trial court failed to consider certain relevant factors and misstated the evidence. Michael asserted that he had terminated his employment with CCC in April 2011, prior to the parties' separation and the filing of Susan's petition for dissolution of marriage. The income Michael received from CCC since April 2011 was part of his termination and compensation agreement with CCC, severing all of his rights to further compensation from CCC after that date. Michael further asserted that the court failed to consider that BCG was

formed prior to the end of his business relationship with CCC. In 2012, based on the lease commission payment, he received \$317,000 in net income from BCG, which then had a loss of \$91,000 in 2013. The demise of BCG was based solely on its lack of business opportunities for generating income.

¶ 28 Michael asserted that the trial court failed to consider that between January 2013 to September 2014, he attempted to secure employment but was unsuccessful. With his master's degree in pastoral studies, he planned to use his financial and business experience to develop marketing plans. Michael asserted that the evidence established that Susan did not require maintenance since she had greater assets than he, and the marital debt had been assigned to him.

¶ 29 December 27, 2016, Orders

¶ 30 On December 27, 2016, the trial court entered two orders. In the first order, the court granted Michael's petition for reconsideration. The court acknowledged that it failed to correctly address the time frame of Michael's relationship with CCC and BCG. It further acknowledged that it failed to apply the relevant law in reviewing the issue of maintenance when it applied pre-decree facts known to all the parties rather than the postjudgment facts. The court found the record reflected that Susan's income and assets currently exceeded those of Michael. The court noted that, while the parties had been married for 36 years, they had agreed to the reservation of maintenance for 12 years. In the court's view, the reservation period gave Michael ample time to complete his studies and become reemployed. In light of the 12-year reservation of maintenance, the denial of Susan's petition was without prejudice.

¶ 31 In the second order, the trial court vacated its April 20, 2016, order and entered an amended order. The court determined that there was no basis in the record to impute income to

Michael. The court found that Michael's termination of his employment with CCC and the ceasing of the operations by BCG were done in good faith and not to avoid financial responsibility to Susan. The court rejected Susan's allegation that Michael showed bad faith by leaving the railcar leasing business, finding that nothing in the MSA required Michael to remain in the railcar leasing business. While Susan was a candidate for maintenance, the current income and assets of the parties required that her petition be denied at this time.

¶ 32 The amended order provided that Michael's obligation under the MSA to maintain a job diary remained in full force and effect. The amended order also provided that the October 7, 2014, order requiring Michael to engage in a job search commensurate with his work history and job experience was stayed until further notice.⁵ The court retained jurisdiction for enforcement purposes.

¶ 33 On January 25, 2017, Susan filed a notice of appeal from both orders issued on December 27, 2016.

¶ 34 ANALYSIS

¶ 35 The sole issue on appeal is whether the trial court's refusal to impute income to Michael was error.

¶ 36 I. Standard of Review

¶ 37 The amount and duration of an award of maintenance are reviewed for an abuse of discretion. *In re Marriage of Patel*, 2013 IL App (1st) 112571, ¶ 67. An abuse of discretion will be found only where no reasonable person would take the view adopted by the trial court. *Patel*,

⁵ Citing its duty to correct errors in its rulings, the trial court acknowledged that it erred in its order of October 7, 2014, by requiring Michael to seek employment commensurate with his education and employment history. It had considered Michael's earnings from CCC and BCG to be postjudgment earnings when in fact his commissions from CCC and the formation of BCG were pre-judgment.

2013 IL App (1st) 112571, ¶ 67. The party claiming an abuse of discretion in the denial of an award of maintenance bears the burden of showing the abuse of discretion. *In re Marriage of Homann*, 276 Ill. App. 3d 236, 240 (1995).

¶ 38

II. Discussion

¶ 39 Under the terms of the judgment for dissolution of marriage, Susan retained the right to seek maintenance from Michael. One of the relevant factors the trial court considers in determining whether a maintenance award is appropriate, is “the present and future earning capacity of each party.” 750 ILCS 5/504(a)(3) (West 2014).

¶ 40 Susan contends the trial court erred by refusing to impute income to Michael. In order to impute income, the trial court was required to find one of the following factors: (1) the payor was voluntarily unemployed; (2) the payor was attempting to evade a support obligation; or (3) the payor had unreasonably failed to take advantage of an employment opportunity. *In re Marriage of Lichtenauer*, 408 Ill. App. 3d 1075, 1089 (2011). “Imputation is appropriate in cases of voluntary unemployment or voluntary underemployment.” (Emphasis omitted.) *In re Marriage of Ruvola*, 2017 IL App (2d) 160737, ¶ 39.

¶ 41 Susan argues that Michael’s current reduced income is the result of his voluntary unemployment and that by pursuing a degree in pastoral studies, he will remain voluntarily under-employed. She further argues that the trial court overlooked Michael’s failure to search for work and to keep a job diary. Susan points to the evidence establishing the affluent lifestyle the parties enjoyed during the marriage, which on her own she cannot currently afford. She relies on the evidence of Michael’s past earnings to establish that he has the ability to pay her maintenance so as to enable her to enjoy the same lifestyle she had during their marriage. Susan maintains that

Michael failed to prove that he could not find employment at his previous salary level, citing his failure to produce his job diary or other evidence that he had actively sought such employment.

¶ 42 “As the trier of fact in a bench trial, the court is in a superior position to observe the demeanor of the witnesses while testifying, to judge their credibility and to determine the weight their testimony and the other trial evidence should receive.” *In re Estate of Bennoon*, 2014 IL App (1st) 122224, ¶ 72. “The reviewing court takes questions of testimonial credibility as resolved in favor of the prevailing party and must draw from the evidence all reasonable inferences in support of the judgment.” *Estate of Bennoon*, 2014 IL App (1st) 122224, ¶ 72.

¶ 43 The trial court determined that none of the factors for imputing income applied. The court specifically found that in terminating his employment with CCC and in ceasing the operations of BCG, Michael acted in good faith and not to evade his financial responsibility to Susan. Susan cited Michael’s failure to produce his job diaries to prove that he had not sought employment commensurate with his earning capabilities. However, the trial court found Michael’s testimony that he could not find a job in the railcar leasing business and intended to use his master’s degree and his prior business experience to generate future earnings credible. There was no evidence that Michael refused a reasonable offer of employment. Moreover, there was evidence that beginning in 2010, two years prior to the commencement of the dissolution proceeding, the parties’ affluent lifestyle could no longer be financially sustained by Michael’s earnings. In denying Susan’s petition for maintenance, the trial court noted that the denial was without prejudice and that the 12-year reservation period would allow Michael to finish his education and become reemployed. To that end, the court ordered Michael to continue to provide job diaries.

¶ 44 Susan's reliance on *Lichtenauer, In re Marriage of Sweet*, 316 Ill. App. 3d 101 (2000), and *In re Marriage of Smith*, 77 Ill. App. 3d 858 (1979), is misplaced. In all three cases, the alleged decrease in income was due to a voluntary change by the party seeking to reduce the support obligation, and the change occurred after dissolution proceedings had been commenced. In the present case, Michael terminated his employment with CCC and started up BCG prior to Susan's filing for dissolution of their marriage.

¶ 45 "A reviewing court will not set aside a judgment following a bench trial unless the judgment is against the manifest weight of the evidence." *Estate of Bennoon*, 2014 IL App (1st) 122224, ¶ 70. "A judgment is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the finding is unreasonable, arbitrary, or not based on the evidence presented." *Estate of Bennoon*, 2014 IL App (1st) 122224, ¶ 70.

¶ 46 Applying the above principles to the present case, we conclude that the manifest weight of the evidence presented at the hearing supported the trial court's determination that there was no basis to impute income to Michael. Therefore, the trial court did not abuse its discretion in denying Susan's petition for maintenance without prejudice.

¶ 47 **CONCLUSION**

¶ 48 The judgment of the circuit court is affirmed.

¶ 49 Affirmed.