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2018 IL App (3d) 170138-U

Order filed March 27, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
SAMUEL E. BALL,)	Peoria County, Illinois.
)	
Petitioner-Appellee,)	Appeal No. 3-17-0138
)	Circuit No. 15-D-292
and)	
)	The Honorable
CHRISTINE ANN TAKATA,)	David A. Brown,
)	Judge, presiding.
Respondent-Appellant.)	

JUSTICE McDADE delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's denial of living expenses was not against the manifest weight of the evidence and its denial of maintenance was not an abuse of discretion.

¶ 2 In December 2014, Samuel Ball and Christine Takata married. The marriage was dissolved in August 2016. Prior to the marriage, Ball and Takata entered into a prenuptial agreement, which was drafted by Takata, a practicing attorney, to reflect the mutually-agreed intent of the parties. It provided, *inter alia*, that Ball would list and sell his home, move into

Takata's residence, and, while sharing her residence, pay a pro rata share of 80% of the couple's living expenses. It also recited that maintenance for either party was prohibited in the event of separation or divorce. In May 2015, Ball, alleging irreconcilable differences, filed a petition for dissolution of marriage. Takata responded seeking temporary maintenance for living expenses, medical expenses, and attorney fees. At trial, Takata requested that the court require Ball to pay \$5000 of her credit card debts, \$8000 in medical expenses, \$14,000 in living expenses at \$1000 a month, attorney fees, and that portion of Ball's 401(k) that he earned during the marriage. The trial court ruled that Takata was not entitled to living expenses or attorney fees but awarded her \$8000 in uncovered medical expenses and 50% of the marital portion of Ball's 401(k). The court further held that Takata was not entitled to maintenance. Takata filed a motion to reconsider, and after further consideration, the trial court modified its decision by determining that the parties were responsible for their own medical expenses and eliminating the \$8000 medical expense award to Takata. It upheld its denial of living expenses and maintenance. Takata appealed. We affirm.

¶ 3

FACTS

¶ 4

Petitioner Samuel Ball and respondent Christine Takata were married on December 13, 2014. The parties had earlier entered into a prenuptial agreement. The agreement contains the following pertinent provisions:

“RECITALS

* * *

H. Christine and Sam have sufficient income and assets to support themselves in the event of a divorce or legal separation, therefore neither Sam nor Christine will be entitled to receive any

maintenance or support from the other in the event of a legal separation or divorce.

* * *

AGREEMENT

* * *

RESIDENCE RIGHTS AND LIVING EXPENSE

OBLIGATIONS

7. The Parties agree to the following regarding their marital residence and living expenses:

a. The Parties shall each be solely responsible for all expenses associated with their current separate residences and other real estate and vehicle loans until such time as said real estate or vehicles are sold.

c. Sam shall list his residence with the common address of [] for sale on or before May 1, 2015 and shall make every effort to sell same before August 1, 2015 ***

d. Upon the sale of Sam's residence in East Peoria IL the Parties shall reside in Christine's residence in Peoria IL until such time as Christine's residence is fully remodeled into a 5 bedroom, 3 bath home without any drainage, electrical, plumbing or other material issues. From the date the Parties first reside in Christine's residence after Sam's residence is sold through the date on which

Christine's residence is sold, Sam shall pay rent to Christine in a pro rata amount equal to 80% of the mortgage payments (PITI) which is presently \$653/month total, plus 80% of the gas/electricity, garbage, water, sewer, internet, groceries, and household supplies related to Christine's residence. Christine shall pay the remaining 20% of the foregoing expenses. In the event that the Parties' incomes change from the date of their marriage to the date on which Sam's residence sells, the Parties shall recalculate their pro rata adjusted gross incomes and pay their respective residence obligations according to these new pro rata calculations, which shall be agreed to in writing by the Parties.

* * *

EMPLOYMENT

* * *

10. Any income earned by either Party during the marriage from their aforementioned businesses or from any other source (other than income from fortuitous gambling type ventures), after payment of their respective pro rata shares of the herein addressed living and vacation expenses shall remain the separate property of the Party earning the additional income.

* * *

DEBTS

16. The Parties agree that all of their separate debts at the time of marriage shall remain their separate debts unless otherwise agreed in writing. The Parties further agree that any jointly incurred debts during the marriage shall be paid jointly on a pro rata basis as set forth herein, and any separate debts incurred during the marriage shall be the sole responsibility of the Party incurring said debt in their name.”

¶ 5 In February 2015, roughly two months into the marriage, the parties went on a ski trip in Colorado. While skiing, Takata sustained eight fractures of her right leg. She remained in the hospital in Colorado and underwent three surgeries. On March 10, Takata returned to her home in Illinois. She did not work in March and April.

¶ 6 In April 2015, Takata obtained an order of protection against Ball and, in June, the order was extended. On August 31, 2016, the parties entered into an agreed order dismissing the order of protection, requiring Ball to maintain Takata on his health insurance and prohibiting him from harassing her about finances.

¶ 7 Ball filed a petition for dissolution of marriage in May 2015, citing irreconcilable differences for the breakdown of the marriage. In Takata’s response to the dissolution petition, she claimed that “Ball committed extreme and repeated acts of mental, emotional, and physical cruelty against the Respondent, without cause or provocation by the Respondent, which caused the breakdown of the marriage.” The parties also signed a stipulation waiving a two-year statutory period of separation and asserting that they had lived separate and apart for a continuous period of not less than six months. In other words, the parties stipulated that, at that time, they had never lived together as husband and wife.

¶ 8 In August 2015, Takata filed a petition for temporary relief and interim attorney fees, seeking payment for her medical expenses, an order requiring Ball to keep Takata on his medical plan, and temporary maintenance. In the petition, Takata claimed that Ball “engaged in a course of abusive and reckless conduct” when he instructed her during their ski trip. Specifically, she alleged that his guidance led her to become disabled and that, subsequently, he abandoned her, refused to communicate with her, and filed for divorce less than three months after their honeymoon.

¶ 9 In Ball’s response, he denied that he abandoned Takata and instead claimed that when she was in the hospital, Takata told him to “ ‘[g]et out of my room or I will call security.’ ” Subsequently, Takata refused to communicate with him except to ask for financial assistance. He also stated that the skiing incident was cited in the emergency order of protection but that abuse was not alleged in the petition.

¶ 10 Ball filed a complaint for declaratory judgment in April 2016, requesting a declaration that the prenuptial agreement was valid and enforceable. The trial court granted the declaratory judgment, determining that the agreement was valid under section 7(a) of the Illinois Uniform Premarital Agreement Act (750 ILCS 10/7(a) (West 2016)), that the court was allowed to conduct a trial on the maintenance issue under section 7(b) of the same Act (750 ILCS 10/7(b) (West 2016)), and that Takata could file a brief on property and maintenance. The court noted that there was a dispute about whether it could review only maintenance under section 7(b) or maintenance, property, and debts.

¶ 11 Takata filed a “memorandum of law in June 2016 in support of a motion for temporary maintenance.” She claimed that she endured undue hardship pursuant to section 7(b) when she suffered a right leg injury while skiing, which kept her bedridden for 2 months and unable to

walk for 11 months. The injury resulted in a decrease in income of \$12,000; \$8386 in credit card debt for necessities she could not afford; and an additional \$3712.12 for out-of-pocket medical expenses, totaling \$24,098.12. She also alleged that she was entitled to attorney fees in the amount of \$6100.

¶ 12 At trial on August 4, 2016, Takata requested that the court require Ball to pay her \$5000 of her credit card debts, \$8000 in medical expenses, and \$14,000 in living expenses incurred from March 2015 to August 2016.¹ Takata requested that the living expenses be apportioned at \$1000 a month. She also sought attorney fees and all of Ball's 401(k) that he earned during the marriage.

¶ 13 With regard to debt allocation, the court found that, pursuant to the prenuptial agreement, the debts incurred using Takata's Citi Bank and Bank of America credit cards were her responsibility and that those debts were not jointly incurred during the marriage. Also, the court noted that Ball never moved in with Takata and, therefore, held that paragraph 7(d) of the agreement, which states that the parties will commit to a pro rata share once Ball moves into Takata's residence, was never triggered. The court also found that paragraph 7(a) provided that the parties were solely responsible for their expenses in their current separate residences until the residences are sold and determined that the living expenses that Takata requested fell under the provisions of that paragraph. The court ruled that Takata was entitled to \$8000 in medical expenses, which it found was jointly acquired debt under the agreement, and 50% of the marital portion of Ball's 401(k).

¹ Takata's attorney confirmed that she was requesting monthly expenses from March 2015 to August 2016 which would, in fact, have totaled \$18,000.

With regard to maintenance, the court found that the maintenance provision stated in the recital was not enforceable. Applying section 504 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/504 (West 2016)), the court determined the following:

“I’m first required to review the factors, to determine whether maintenance is appropriate. If maintenance is appropriate, the Court is to apply the statutory formulas. Ms. Watson argues that whether I apply the statutory factors or use some other approach is discretionary with the Court.

The Court would note that according to at least Section 801 of the act, the act applies to all pending actions and proceedings commenced prior to its effective date with respect to issues on which a judgment has not been entered. Judgment has not been entered in this case. I believe the statutory scheme for maintenance is fully applicable, and looking at that, putting aside for the moment whether maintenance is appropriate, in this event, if I look at the statutory formulas, petitioner’s income, gross monthly income based upon his most recent financial affidavit is 7,379 a month, or \$7,379, multiplied by a factor of .3 results in a \$2,213.70.

Ms. Takata’s, the respondent’s gross monthly income is 4,396, multiplied by a factor of .2 results in a figure of 879.20. Subtracting those two results is a maintenance figure of \$1334.50 per month.

If I add that maintenance amount to Ms. Takata's gross monthly income, it results in a figure of \$5,730.50. That is greater than 40 percent of their combined gross incomes, monthly incomes, combined grossly [sic] monthly incomes, is \$4,710. Subtracting Ms. Takata's income, gross monthly income from the \$4,710, results in a maintenance award of \$314.

According to the Court's calculations, we're using the statutory duration formula. The duration of the marriage is from the date of marriage through the filing of the petition for dissolution of marriage. The date of the marriage was December 13th of 2014.

According to the court file, the petition for dissolution of marriage was filed by Mr. Ball on May 27th of 2015. That is the equivalent of roughly 5.5 months. Since the marriage is less than five years, a factor of .2 is applied, results in a duration calculation under the statute of 1.1 months of maintenance.

The Court has thought about it and considered whether it's appropriate to deviate from those figures. I've also contemplated whether this is really a maintenance case first and foremost.

The maintenance factors are the income and property of each party, any marital property that's apportioned, nonmarital property that's assigned, the financial obligations imposed as a result of the dissolution, the needs of each party, the realistic

present and future earning capacity of each party, impairment of earning capacity during the marriage due to marital duties, or foregone or delayed education or foregone or delayed career opportunities. None of those apply to this case.

Time necessary to acquire education, training, employment, become self-supporting, it's not applicable here. The standard established, the standard of living established during the marriage, the parties still have not combined their collective resources and really established a standard of living during the marriage.

Sounds like during the engagement they enjoyed a nice standard of living, did some travel and recreational activities together, but there really is not much evidence as to the standard of living that was established during the marriage.

Duration of the marriage it was a very, very short marriage. The age, health, station, occupation, amount and sources of income of the parties, I suggest, you know, each has their respective careers that they had prior to coming into the marriage.

I think a lot of evidence today suggests that Ms. Takata, while she certainly had a substantial dip of income during the period of partial disability, has recovered, maybe not physically recovered, but financially recovered nicely. She's – her present monthly gross income is higher than perhaps it's been prior to – even prior to the marriage.

Sources of other public or private income, consequences of property division, tax consequences, I find there are none. There's no contribution by the other parties as to the education, training, career, licensure of the other party.

Bottom line is, this isn't the maintenance case. I don't think it ever really was a maintenance case, and the mere fact that there was a recital in the prenuptial agreement doesn't lead me to that, and the facts and circumstances of the case looking at the – to determine whether maintenance is appropriate, it leads me to that. Even if it is a maintenance case, it would be an award of \$314 for a period of one month, which is not substantial in light of the party's respective incomes and careers, and the court will, as a result, not award any maintenance on this matter.”

¶ 15 With regard to attorney fees, the court ruled that Takata was not entitled to attorney fees because she was financially able to contribute donations to political causes. Specifically, the court stated: “And Ms. Takata, making donations – now, I'm all for people feeling strongly about causes and donating to those causes. I'm all for that. I think that's what – I think that's a good thing all right? But if you're donating to causes you feel strongly about and asking somebody else to pay your attorney's fees, you're going to have to have a better argument for the Court to decide to exercise its discretion to make somebody else pay your fees while you're donating to your special causes, so one of your special causes may be out to [pay] your respective counsel, so the Court will decline to allocate fees.”

against the manifest weight of the evidence. *Jackson v. Mount Pisgah Missionary Baptist Church Deacon Board*, 2016 IL App (1st) 143045, ¶ 70.

¶ 22 The trial court, along with both parties, recognized the prenuptial agreement as a valid and enforceable contract. Furthermore, the evidence shows that Ball did breach the prenuptial agreement because, at the least, he did not list his residence for sale before May 1, 2015. However, Takata is precluded from receiving living expenses as damages under the prenuptial agreement. The provision on which Takata relies for damages is the pro rata amount stated in paragraph 7(d) (*supra* ¶ 4). Looking at the plain language in the agreement, because the date when both parties resided in Takata's residence never occurred, the pro rata amount provision was never triggered. Because Takata has not asked this court to award any other damages flowing from the breach and the agreement does not make any provisions for other damages, Takata has failed to state an adequate claim of damages caused by Ball's breach. Therefore, Takata is not entitled to living expenses.

¶ 23 Citing *Grill v. Adams*, 123 Ill. App. 3d 913, 918 (1984), Takata claims that Ball cannot neglect the conditions of listing and selling his residence or recalculating the pro rata share without liability. A party to a contract cannot take advantage of his own misconduct in failing to fulfill a condition in the agreement. See *Id.* "Where the obligation of one party is subject to the occurrence of a condition precedent, the duty of good faith and fair dealing is imposed upon that party." *Id.* Failure to perform is excused, however, when the performance is prevented by the other party to the contract. *Barrows v. Maco, Inc.*, 94 Ill. App. 3d 959, 966 (1981).

¶ 24 Although we do not know all of the reasons why Takata sought an emergency order of protection—and extension thereof—against petitioner, the existence of the order, along with other evidence of the breakdown of the marriage, demonstrated a good faith basis for Ball's

decision not to sell the only house available for him to live in or to recalculate his pro rata share when it was fairly certain he would never live in Takata's residence. Moreover, it appears that one of the claims underlying the order of protection was that Ball was harassing Takata about finances. It would be nearly impossible for Ball to discuss recalculating the pro rata amounts without running the risk of being accused of violating the protective order. We hold that the trial court's ruling denying Takata living expenses was not against the manifest weight of the evidence.

¶ 25

II. Retroactive Temporary Maintenance

¶ 26

Takata argues that the trial court abused its discretion when it did not award her retroactive temporary maintenance. Specifically, Takata claims that (1) the trial court failed to consider the parties' needs, incomes, debts, and assets under section 504(a) of Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/504(a) (West 2016)); (2) the trial court inaccurately calculated the formula for maintenance in section 504(b-1) of the same Act (750 ILCS 5/504(b-1) (West 2016)); (3) the applicable statute for a maintenance award under a prenuptial agreement is section 7(b) of the Illinois Uniform Premarital Agreement Act; (4) the trial court failed to consider Ball's withdrawal of \$20,000 from his 401(k) accounts and improperly considered Takata's political contributions at trial; and (5) the trial court improperly denied Takata's testimony about her inability to swim at trial.

¶ 27

We first consider Takata's contention that the applicable statute for a maintenance award under a prenuptial agreement is section 7(b) of the Illinois Uniform Premarital Agreement Act. Section 7(b) states that, "If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement undue hardship in light of circumstances not reasonably foreseeable at the time of the execution of the agreement, a

court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid such hardship.” 750 ILCS 10/7(b) (West 2016).

¶ 28 The parties’ prenuptial agreement makes reference to the elimination of maintenance in the recitals. “Recitals to a contract provide explanations of those circumstances surrounding the execution of the contract.” *First Bank and Trust Co. of Illinois v. Village of Orland Hills*, 338 Ill. App. 3d 35, 45 (2003). And as the trial court correctly noted, recitals are preliminary in nature and are generally not binding on the parties or “an effective part of their agreement unless referred to in the operative portion of their agreement.” *Id.* Here, the parties’ maintenance provision is not referenced in the operative portion of the agreement. The maintenance provision is not binding on the parties, and therefore, section 7(b) is not applicable in this case.

¶ 29 Takata’s next two challenges attack the court’s denial of maintenance pursuant to sections 504(a) and 504(b-1) of the Illinois Marriage and Dissolution of Marriage Act. That Act makes the following provisions as to maintenance. Section 504(a) grants the court discretion to award a spouse maintenance in a proceeding for dissolution of marriage. 750 ILCS 5/504(a) (West 2016). Before a court awards maintenance, it must consider certain statutory factors, including “(1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance as well as all financial obligations imposed on the parties as a result of the dissolution of marriage; (2) the needs of each party; (3) the realistic present and future earning capacity of each party; (4) any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage; (5) any impairment of the realistic present or future earning capacity of the party against whom maintenance is sought; (6) the time necessary to

enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment or any parental responsibility arrangements and its effect on the party seeking employment; (7) the standard of living established during the marriage; (8) the duration of the marriage; (9) the age, health, station, occupation, amount of sources of income, vocational skills, employability, estate, liabilities, and the needs of each of the parties; (10) all sources of public and private income including, without limitation, disability and retirement income; (11) the tax consequences of the property division upon the respective economic circumstances of the parties; (12) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse; (13) any valid agreement of the parties; and (14) any other factor that the court expressly finds to be just and equitable.” *Id.*

¶ 30 If a court finds that maintenance is proper, it must order maintenance. 750 ILCS 5/504(b-1) (West 2016). It may do so in accordance with statutory guidelines. 750 ILCS 5/504(b-1)(1) (West 2016). The statutory guidelines provide that maintenance must be calculated by subtracting 30% of the payor’s gross annual income and 20% of the payee’s gross annual income. 750 ILCS 5/504(b-1)(1)(A) (West 2016). Maintenance will not be awarded if the amount is more than 40% of the parties’ combined gross income. *Id.* After the gross annual incomes are subtracted, the duration of the award is calculated by multiplying the length of the marriage by the given statutory factors listed in subsection (b-1)(1)(B). 750 ILCS 5/504(b-1)(1)(B) (West 2016). “In the discretion of the court, any term of temporary maintenance paid by court order pursuant to Section 501 may be corresponding credit to the duration of maintenance set forth in subparagraph (b-1)(1)(B).” 750 ILCS 5/504(b-1)(1.5) (West 2016). The trial court’s grant or denial of temporary maintenance will not be disturbed unless it is an abuse of discretion

or against the manifest weight of the evidence. *In re Marriage of Marthens*, 215 Ill. App. 3d 590, 596 (1991).

¶ 31 We next consider Takata's second claim: that the trial court inaccurately calculated maintenance under section 504(b-1)'s formula. The trial court did improperly base its calculation on the parties' gross *monthly* incomes instead of their gross *annual* incomes as construed in section 504(b-1)(1)(B). However, the challenged calculation had no bearing on the trial court's ruling because (1) it did not award maintenance and (2) there is no evidence that it relied on the calculation when considering whether maintenance should be awarded. In fact, the trial court stated that it had first considered whether maintenance was appropriate in this case and the calculations would be considered to determine whether "it's appropriate to deviate from those figures".

¶ 32 Third, Takata argues that the trial court failed to consider the parties' needs, incomes, debts, and assets under section 504(a). The evidence shows that the trial court considered all the statutory factors, including the parties' needs and incomes. The court reasoned that, based on the evidence, the parties never established a standard of living together during the marriage and determined that maintenance was not necessary. We believe the record supports the trial court's ruling. The parties lived separately throughout their short-term marriage and continued to manage their own debts and assets separately. Although Takata's income did change in 2015, it was not the result of standard of living during the marriage but due to the outcome of an unforeseen skiing injury. Furthermore, section 504(a) does list the parties' debts and assets as factors in considering maintenance (see 750 ILCS 5/504 (West 2016)), and we will not depart from the plain statutory language by reading into it exceptions, limitations, or conditions.

Brunton v. Kruger, 2015 IL 117663, ¶ 24. Therefore, we hold that the trial court did not abuse its discretion when it denied Takata an award for retroactive temporary maintenance.

¶ 33 Fourth, Takata alleges that the trial court ignored Ball’s withdrawal of \$20,000 from his 401(k) accounts and improperly considered her political contributions during its maintenance determination. Takata makes no reference to the record about the trial court’s consideration of her political contributions. We have been unable to find any mention of Takata’s political contributions during the court’s maintenance discussion. However, the trial court did rely on Takata’s political contributions in reaching its determination on attorney fees. Takata did not challenge the trial court’s denial of attorney fees on appeal, and thus, she waived the issue. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (“[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing”).

¶ 34 Furthermore, Takata alleges that the trial court ignored Ball’s withdrawal of \$20,000 from his 401(k) accounts in a subsection of the points and authorities and argument sections of her brief. However, she did not provide any reasoning to support her allegation. An appellant’s brief must contain “[a]rguments, which shall contain the contention of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on.” Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). “The appellate court is not a repository into which an appellant may foist the burden of argument and research.” *Ramos v. Kewanee Hospital*, 2013 IL App (3d) 120001, ¶ 37. This issue is also waived because Takata’s failed to develop and support her argument. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

¶ 35 Fifth, Takata alleges that the trial court improperly denied Takata the opportunity to testify at trial about her inability to swim following the accident. Takata asserts that her testimony would have assisted her argument of undue hardship. The exclusion of testimony at

trial is reviewed for an abuse of discretion. *Gunn v. Sobucki*, 216 Ill. 2d 602, 609 (2005). As stated above, section 7(b), which requires a showing of undue hardship, is not applicable to this case. Moreover, the purpose for which Takata sought to admit her testimony was irrelevant to the trial court's determination of maintenance under section 504(a). Therefore, we determine that the trial court did not abuse its discretion when it excluded Takata's testimony.

¶ 36

CONCLUSION

¶ 37

The judgment of the circuit court of Peoria County is affirmed.

¶ 38

Affirmed.