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2018 IL App (3d) 170647-U

Order filed December 20, 2018

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2018

<i>In re</i> MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
MITCHELL P. NURCZYK,	)	Will County, Illinois.
	)	
Petitioner-Appellant,	)	
	)	Appeal No. 3-17-0647
and	)	Circuit No. 09-D-1561
	)	
GINGER NURCZYK,	)	
	)	Honorable Robert P. Brumund,
Respondent-Appellee.	)	Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Justices Lytton and McDade concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not abuse its discretion in denying petitioner's request for attorney fees.

¶ 2 Petitioner, Mitchell Nurczyk, appeals the trial court's order denying his motion for attorney fees pursuant to section 508(a)(3.1) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/508(a)(3.1) (West 2016)). We affirm.

¶ 3 BACKGROUND

¶ 4 In a 2011 judgment for dissolution of marriage, the trial court awarded respondent, Ginger Nurczyk, maintenance of \$450 per week, subject to an order that suspended Mitchell's maintenance obligation until he received a workers' compensation settlement in excess of \$150,000. In October 2014, Ginger filed an amended petition to set maintenance, asserting that Mitchell received his workers' compensation settlement prior to January 18, 2011, but he failed to pay her any maintenance. Ginger sought an order requiring Mitchell to tender all maintenance accrued since he received his settlement, plus statutory interest, attorney fees, and costs. In June 2015, the court found that Mitchell's obligation to pay maintenance recommenced on August 23, 2011, and it ordered him to pay an arrearage of \$103,732.

¶ 5 In October 2015, Ginger filed a motion to enter a garnishment order. She asserted that one day after the trial court ordered Mitchell to pay the maintenance arrearages, he withdrew \$173,188 from a joint savings account shared with his current wife, leaving the savings account empty. Ginger asked the trial court to enter a garnishment order to be served upon Mitchell's social security benefits and disability pension. In January 2016, the court entered an order awarding Ginger 100% of Mitchell's social security benefits and disability pension until the judgment for maintenance arrearages was satisfied in full with interest and attorney fees.

¶ 6 Mitchell appealed, asserting that the trial court erred in awarding Ginger 100% of his social security benefits and disability pension to satisfy the judgment for maintenance arrearages. *In re Marriage of Nurczyk*, 2017 IL App (3d) 160159-U. He argued that pursuant to section 12-803 of the Code of Civil Procedure (Code) (735 ILCS 5/12-803 (West 2014)), "the garnishment cannot exceed the lesser of either 15% of his gross pay or the amount by which his disposable earnings exceed 45 times the minimum wage set by section 12-803." *Id.* ¶ 17. This court agreed that the trial court erred in awarding Ginger a 100% garnishment of Mitchell's social security

benefits and disability pension. However, we rejected Mitchell’s contention that section 12-803 of the Code governed the garnishment because that section does not apply to support and maintenance situations. *Id.* Instead, we found that the withholding of income to satisfy maintenance arrearages is governed by the Income Withholding for Support Act (750 ILCS 28/1 *et seq.* (West 2014)). *Id.* ¶ 14. The Income Withholding for Support Act follows the federal Consumer Credit Protection Act (15 U.S.C. § 1601 *et seq.* (2000)), which allows for the garnishment of a maximum of 55% of an individual’s disposable income each week. *Id.* ¶ 16. Thus, we reversed the trial court’s judgment and remanded with directions to amend the garnishment order and the qualified domestic relations order (QDRO) not to exceed the withholding of more than 55% of Mitchell’s disposable income. *Id.* ¶ 20.

¶ 7 On remand, Mitchell filed a “petition for attorney’s fees and costs incurred to prosecute appeal and section 2-1401 motion.” Following an August 2017 hearing, the trial court denied Mitchell’s motion. He appeals.

¶ 8 ANALYSIS

¶ 9 On appeal, Mitchell frames his argument as three separate issues. First, he asserts that he “substantially prevailed on all five issues raised in [his direct] appeal” and that he is therefore “entitled to attorney’s fees and costs of each of the five issues.” Second, he contends that Ginger’s “argument that [he] did not substantially prevail is erroneous and mischaracterizes the order entered by the \*\*\* appellate court.” Third, he maintains that “if or when the instant matter is remanded back to the trial court, the matter will need to be returned to a judge other than Judge Robert Brumund.” We note, however, that the ultimate issue in this case is merely whether the trial court erred in denying Mitchell’s request for attorney fees and costs under section 508(a)(3.1) of the Act (750 ILCS 5/508(a)(3.1) (West 2016)). We further note that the issue

Mitchell raises regarding the necessity of remanding to a new judge is unnecessary and irrelevant as both parties note Judge Brumund is retired from the bench.

¶ 10 Section 508(a)(3.1) of the Act provides:

“(a) The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order any party to pay a reasonable amount for his own or the other party’s costs and attorney’s fees. Interim attorney’s fees and costs may be awarded from the opposing party, in a pre-judgment dissolution proceeding in accordance with subsection (c-1) of Section 501 and in any other proceeding under this subsection. At the conclusion of any pre-judgment dissolution proceeding under this subsection, contribution to attorney’s fees and costs may be awarded from the opposing party in accordance with subsection (j) of Section 503 and in any other proceeding under this subsection. Fees and costs may be awarded in any proceeding to counsel from a former client in accordance with subsection (c) of this Section. Awards may be made in connection with the following:

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(3.1) The prosecution of any claim on appeal (if the prosecuting party has substantially prevailed).” *Id.*

We review a trial court’s ruling on a party’s request for attorney fees in a postdissolution proceeding for an abuse of discretion. *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005).

The record shows that at the hearing on Mitchell's motion, counsel for Ginger argued that an award of attorney fees would be inappropriate for two reasons. The first focused on the reason for the appeal in the first place. Specifically, counsel stated:

“the reason the appeal happened at all and the garnishment order happened at all was because [Mitchell] was in contempt of court, willful, contemptuous contempt of court repeatedly, not just occasionally, but continually he has refused to pay any of his obligations with respect to maintenance which as required when you look at the case in front of you, Judge, probably without exaggeration 40 different court appearances to address this willful failure. So we are here as a result of him.”

The order that was entered as a result of his non-payment of maintenance which led to the garnishment and the order, the Qualified Domestic Relations Order were all as a result of his contemptuous action. We feel under the facts and circumstances when you look at the two cases that I have, the first one being discretionary in nature and the second one being more mandatory in nature where in the event every proceeding for enforcement of an order or a judgment when the Court finds that the failure to comply with the order or judgment was without compelling cause. Well, you've gone beyond that. You found him in contempt.

So we suggest respectfully that it would be as a matter of law inappropriate for the Court to even consider exercising its \*\*\* discretion \*\*\* in awarding appellate fees.”

¶ 12 The second part of counsel’s argument concerned their position that Mitchell did not substantially prevail in his appeal because the appellate court rejected his contention that the garnishment could not exceed 15% of his gross pay. Counsel for Mitchell then argued that they did substantially prevail on appeal. Ultimately, as indicated, the trial court denied Mitchell’s request for attorney fees.

¶ 13 Here, Mitchell seems to be under the mistaken impression that an award of attorney fees and costs are mandatory under section 508(a)(3.1) so long as he “substantially prevailed” on the issues he raised in his appeal. He is wrong. Under the plain language of section 508(a)(3.1), a trial court is not required to award attorney fees for the prosecution of an appeal even if a party substantially prevailed, it merely has the discretion to do. See *In re Marriage of Davis*, 292 Ill. App. 3d 802, 811 (1997) (an award of attorney fees is mandatory under section 508(b) of the Act but is discretionary under section 508(a)).

¶ 14 Even assuming, *arguendo*, that Mitchell substantially prevailed on his previous appeal, the record nonetheless supports the trial court’s decision to deny his request for attorney fees. No garnishment order would ever have been necessary in this case but for Mitchell’s failure to fulfill his obligation to pay maintenance. Thus, due solely to Mitchell’s failure to fulfill his obligation, he incurred additional attorney fees and costs. The record indicates that Mitchell would have appealed the trial court’s garnishment order regardless of whether the court ordered a 100% garnishment or a 25% garnishment because Mitchell believed the garnishment order “c[ould not] exceed the lesser of either 15% of his gross pay or the amount by which his disposable earnings exceed 45 times the minimum wage set by section 12-803.” *In re Marriage of Nurczyk*, 2017 IL

App (3d) 160159-U, ¶ 17. Accordingly, we find the trial court did not abuse its discretion in denying Mitchell's request for attorney fees.

¶ 15

#### CONCLUSION

¶ 16

For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 17

Affirmed.