

NOTICE
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2018 IL App (5th) 160433-U

NO. 5-16-0433

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
JOYCE ILENE HARTUNG,)	Jackson County.
)	
Petitioner-Appellee,)	
)	
and)	No. 14-D-194
)	
JEFFREY WAYNE HARTUNG,)	Honorable
)	W. Charles Grace,
Respondent-Appellant.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's denial of maintenance is affirmed where the respondent entered into an antenuptial agreement waiving any interest in the petitioner's retirement benefits or pension plans, which also constituted a waiver of the income generated from those plans, the petitioner's sole source of income is her retirement benefits, and any maintenance award would be based on those benefits.

¶ 2 The respondent, Jeffrey Hartung, appeals the order entered by the circuit court of Jackson County that he was not entitled to maintenance because he entered into an antenuptial agreement with the petitioner, Joyce Hartung, where he waived any interest in

her retirement benefits or pension plans, and such waiver constituted a waiver of the income generated from those plans. For the following reasons, we affirm.

¶ 3 Jeffrey and Joyce were married on October 24, 1998. Prior to their marriage, they entered into an antenuptial agreement, which provided for the division of assets and included the following waiver: "The parties acknowledge that under this Agreement they are each waiving a right to a share of any funds held by the other in any retirement plan or pension fund." The attachment to the agreement identified two retirement accounts: Joyce's civil service cumulative retirement and her Thrift Savings Plan (TSP) retirement with civil service.

¶ 4 On December 4, 2014, Joyce filed a petition for dissolution of the marriage. In the petition, Joyce argued that Jeffrey was not entitled to maintenance pursuant to the antenuptial agreement because her only source of income was her retirement benefits. Attached to the petition was the executed antenuptial agreement. On February 17, 2015, Jeffrey filed an answer to the petition, which requested, in pertinent part, that the court award him maintenance.

¶ 5 At the May 10, 2016, hearing on the maintenance issue, Joyce testified that she is 63 years old, she is retired from her employment as a claims representative at the Social Security Administration, and she receives a gross pension of approximately \$3243 per month. She also receives approximately \$100 per month (gross) from her TSP. Her civil service retirement and TSP retirement are her only sources of income, and any maintenance award would be paid from those retirement disbursements. She is unable to

return to work because she has a prosthetic shoulder and knee, and her other knee needs to be replaced.

¶ 6 The antenuptial agreement was drafted by Joyce's attorney, and Jeffrey was not represented by counsel. Joyce read the agreement, understood its contents, and understood the concept of maintenance. She acknowledged that there was nothing in the agreement about maintenance. She testified that it would be a hardship for her to pay maintenance to Jeffrey.

¶ 7 Jeffrey testified that he is 63 years old, and his only source of income is social security disability in the amount of \$1426.90 per month (gross). His only assets are clothes, books, a computer, a bicycle, and a few pieces of furniture. There has been a "marked" change in his standard of living since the parties' separation, and maintenance is necessary to improve his standard of living to increase it to what he was accustomed to during the marriage. He acknowledged that he waived any right to Joyce's retirement benefits when he signed the antenuptial agreement. He read the agreement and understood its contents before signing. However, he did not waive any right to maintenance.

¶ 8 During arguments, Jeffrey's counsel argued that Jeffrey waived his right to any interest in Joyce's retirement but did not waive any right to maintenance and requested maintenance in the amount of \$718.12 for 12 years, 9 months. In response, Joyce's counsel acknowledged that there was no waiver of maintenance in the antenuptial agreement but argued, in pertinent part, that awarding Jeffrey maintenance would award him a "piece" of Joyce's retirement.

¶ 9 On June 22, 2016, the trial court entered an order denying maintenance. The court noted that, pursuant to section 503(b)(2) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/503(b)(2) (West 2014)), all pension and retirement benefits acquired by either spouse after the marriage and before judgment of dissolution is presumed marital property and that this presumption can be overcome under section 503(a)(4) of the Act (750 ILCS 5/503(a)(4) (West 2014)) by a showing, through clear and convincing evidence, that the benefits were properly excluded by a valid agreement of the parties. The court noted that the following requirements are necessary for a valid antenuptial agreement: that it is in writing; that the agreement does not cause an unforeseen condition of penury, due to a spouse's lack of property or employability; that the parties entered into the agreement with full knowledge, free of fraud or coercion; and the agreement is fair and reasonable.

¶ 10 The trial court found that no issue had been raised as to whether the antenuptial agreement was fair and equitable nor had any issue been raised concerning coercion or fraud. The court noted that any waiver of maintenance must be express and explicit in the agreement and found that maintenance was not waived in the antenuptial agreement. The court concluded that Jeffrey was not at extreme poverty levels as his 2015 social security benefit income was \$15,695, which is above the \$11,880 federal poverty guideline for a single individual, and he has \$281.11 in discretionary income. The court found that it was shown, by clear and convincing evidence, that the parties entered into the agreement with a full account of their individual finances, and the agreement is fair and reasonable. The court further concluded that Joyce's income, which consisted of

payments from her retirement and pension benefits, was waived in the antenuptial agreement and, therefore, denied maintenance.

¶ 11 On July 21, 2016, Jeffrey filed combined motions for reconsideration and modification of judgment and order denying maintenance, arguing that he had not waived any right to maintenance as there was no clear and explicit waiver in the antenuptial agreement. Jeffrey also argued that, once Joyce converted the retirement fund benefits into income, it should no longer be considered part of the retirement fund. Thus, he argued that he was not asking for a share of Joyce's retirement or pension fund but was instead seeking maintenance from her income. On August 15, 2016, the court, citing *In re Marriage of Munford*, 173 Ill. App. 3d 576 (1988), entered an order by docket entry, finding that a waiver of a share of the retirement plan constituted a waiver of the income generated from the plan. On September 8, 2016, the court entered a judgment for dissolution of marriage, which indicated, in pertinent part, that maintenance was barred as to both parties. Jeffrey appeals.

¶ 12 Jeffrey contends that the trial court erred in applying section 503 of the Act (750 ILCS 5/503 (West 2014)), which deals with the disposition of marital property, to determine whether he was entitled to maintenance under section 504 of the Act (750 ILCS 5/504(a) (West 2014)) because he sought a maintenance award, not an award of property, *i.e.*, an interest in her retirement benefits. He acknowledges that the antenuptial agreement contained a waiver of any share of the retirement plans or pension funds but argues that the waiver does not include a waiver of the income received from those plans or funds, noting that the antenuptial agreement does not mention any income received

from those plans or funds. He further argues that section 504(a) of the Act (750 ILCS 5/504(a) (West 2014)) specifically instructs the court to consider all sources of income, including retirement benefits and nonmarital property, when determining whether an award of maintenance is appropriate. He argues that the plain language of the antenuptial agreement did not include a waiver of maintenance, that the parties did not intend to waive maintenance in the agreement, and, thus, the court erred when it failed to determine the issue of whether he was eligible for maintenance under section 504.

¶ 13 Joyce concedes that a waiver of maintenance must be explicit and that Jeffrey has not waived any right to maintenance under the antenuptial agreement. However, she argues that, because her only source of income is payments received from her retirement accounts, any awarded maintenance would derive from those benefits. Thus, there is no income for a maintenance award.

¶ 14 The limited issue here is whether the waiver of Jeffrey's interest in Joyce's retirement accounts includes a waiver of any payments received from those benefits. The following cases are instructive on this issue: *In re Marriage of Munford*, 173 Ill. App. 3d 576 (1988); *In re Marriage of McLauchlan*, 2012 IL App (1st) 102114; and *In re Marriage of Knutson*, 2016 IL App (3d) 150496.

¶ 15 In *In re Marriage of Munford*, the trial court granted the former wife's request for an increase of her monthly maintenance on the basis that the former husband had received income from his retirement benefits, which resulted in an increase in his income. 173 Ill. App. 3d at 578. Although the parties had entered into a marital settlement agreement where the former wife waived any interest in his " pension and/or profit

sharing plans,' " the court concluded that this waiver was not a waiver of the income generated from the plans. *Id.* at 579. The appellate court reversed, finding that the order increasing the former husband's maintenance obligation based on his receipt of income from his retirement benefits was actually a modification of the parties' property settlement. *Id.* at 579-80. The court noted that property settlement provisions are only modifiable where the court finds that the execution of the agreement was accompanied by fraud, coercion, or misrepresentation. *Id.* at 579. The court found that the trial court improperly rewrote and modified the parties' property settlement agreement where the former wife had not alleged, nor was there any evidence of, intent by the parties to distinguish between waiver of the plans and the income derived therefrom or the existence of fraud, coercion, or misrepresentation in connection with the execution of the agreement. *Id.* at 580.

¶ 16 In *In re Marriage of McLauchlan*, the parties had also entered into a marital settlement agreement, waiving " 'any and all interests, or partial interest(s) in and to the retirement plan(s) the other party is receiving pursuant to [the] terms of the Agreement.' " (Emphasis omitted.) 2012 IL App (1st) 102114, ¶ 5. The former husband sought a modification of his maintenance obligation based on his change in employment status and his dwindling retirement accounts. *Id.* ¶¶ 6, 20. The trial court found that he had experienced a substantial change in circumstances meriting a modification but concluded that the marital settlement agreement contemplated that money withdrawn from his retirement accounts would be included as his income in the maintenance calculation. *Id.*

¶ 13. Thus, the court modified his maintenance obligation downward to 20% of his gross income from all sources, which included his retirement account withdrawals. *Id.* ¶ 20.

¶ 17 On appeal, the court, finding *Munford* instructive, concluded that the trial court could not subsequently modify the parties' property settlement agreement by awarding maintenance based on the former husband's withdrawals from his retirement plans in which the former wife had waived any and all interest in without showing that the agreement was accompanied by fraud, coercion, or misrepresentation. *Id.* ¶ 25. Like *Munford*, the former wife made no allegations of fraud, coercion, or misrepresentation, nor was there any indication in the language of the agreement that the parties intended to distinguish between the waiver of the retirement plans and the income generated from those plans. *Id.* The court noted that, if the parties decide to settle their property rights by mutual agreement rather than by statute, they are bound to the terms of the agreement. *Id.* ¶ 21. The court stated: "Under such circumstances neither Illinois case law nor section 504(a) permits the trial court to consider withdrawals from retirement accounts when deciding whether to modify maintenance and in setting the amount of a new maintenance award." *Id.* ¶ 29. Thus, the court concluded that the inclusion of the retirement account withdrawals as income in determining the maintenance amount was an improper modification of the parties' property settlement agreement. *Id.* ¶ 25.

¶ 18 *In re Marriage of Knutson* addressed the same issue as *Munford* and *McLauchlan*, *i.e.*, whether the court improperly considered the former husband's pension benefits as income, and, in doing so, improperly modified the parties' marital settlement agreement. 2016 IL App (3d) 150496, ¶ 9. However, it reached a different conclusion. *Id.* ¶ 11. The

former husband sought a modification in his maintenance obligation on the basis that his involuntary termination of his employment had substantially reduced his income. *Id.* ¶ 4. The trial court reduced his maintenance obligation but considered his pension benefits as income for the purposes of calculating the new maintenance amount. *Id.* ¶ 6.

¶ 19 The appellate court affirmed, noting that section 510(a-5)(6) of the Act (750 ILCS 5/510(a-5)(6) (West 2014)) specifically required the court to consider retirement benefits when maintenance is being reviewed, modified, or terminated. *Id.* ¶ 11. In reaching this conclusion, the court rejected the former husband's reliance on *Munford* and *McLauchlan*, finding both cases distinguishable because there was an express waiver of the retirement benefits. Specifically, the court noted that, in "both cases, the First District held that because the parties expressly waived their rights to the pension or retirement benefits in the property settlement agreement, the trial court's order basing the maintenance modification on the income from such benefits amounted to a modification of the parties' property settlement agreements as opposed to a modification of maintenance." *Id.* ¶ 12.

¶ 20 The court noted that, although the marital settlement agreement included an express waiver of the former husband's deferred compensation plan and one of his defined contribution plans, there was no such express waiver in his pension benefits, and the generic waiver contained in the marital settlement agreement did not include a waiver of the pension benefits. *Id.* ¶¶ 13-14. Thus, the court found that the trial court did not abuse its discretion in considering the pension benefits as income when determining the maintenance amount. *Id.* ¶ 11.

¶ 21 Here, the parties entered into a mutual agreement to determine their property rights, and Joyce's retirement and pension plans were distributed in accordance with that agreement. Like *Munford* and *McLauchlan*, the antenuptial agreement includes an unambiguous, express waiver in the retirement benefits, and there is no indication that the parties intended to distinguish between the waiver of the retirement plans and the income generated from those plans. Thus, a maintenance award based on Joyce's retirement benefits, her only source of income, would be contrary to the terms of the parties' expressed intent and would result in an improper modification of the antenuptial agreement.

¶ 22 Joyce concedes that Jeffrey has a need for maintenance and had the parties dissolved their marriage when she was receiving income from her employment, Jeffrey would have likely been eligible for maintenance. However, that did not occur, and we therefore conclude that Jeffrey's waiver of any share of Joyce's retirement or pension plans in the antenuptial agreement constituted a waiver of the income generated from the plans. Moreover, we note that Jeffrey has made no argument concerning the validity of the antenuptial agreement. Thus, we find that the agreement is valid and enforceable.

¶ 23 For the foregoing reasons the judgment of the circuit court of Jackson County is hereby affirmed.

¶ 24 Affirmed.