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2014 IL App (3d) 140067-U
Consolidated with 140171

Order filed July 28, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

In re MARRIAGE OF CHERYL NEWBERRY,)	Appeal from the Circuit Court
)	of the 21st Judicial Circuit,
)	Kankakee County, Illinois,
Petitioner-Appellee,)	
)	Appeal Nos. 3-14-0067, 3-14-0171
and)	Circuit No. 10-D-415
)	
TIMOTHY NEWBERRY,)	Honorable
)	Michael D. Kramer,
Respondent-Appellant.)	Judge, Presiding.
)	

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* In a dissolution of marriage proceeding, with custody disputed, the trial court did not abuse its discretion in denying the husband's motion for a mental health examination of the wife where there was no factual support for his allegation that the wife's mental health negatively impacted her ability to parent their children or affected the relationship between her and the children. The trial court also did not abuse its discretion in denying the husband's motion to depose the wife's former treating physician where the physician had moved out of state and had not treated the wife for five years. The trial court properly considered the husband's undue litigiousness in ordering him to contribute to the wife's attorney's fees.

¶ 2 In a marriage dissolution action, the respondent husband, Timothy Newberry, appealed the order giving custody of their two minor children to the petitioner wife, Cheryl Newberry. The husband also appealed the order that he pay \$2000 of the wife's attorney's fees.

¶ 3 **FACTS**

¶ 4 Cheryl and Timothy Newberry were married on December 14, 1985. During their marriage, they had four children. On November 5, 2010, Cheryl filed a petition for dissolution of marriage. At the time, Cheryl was 44 years old, Timothy was 47 years old, and three of the parties' children were still minors. Cheryl sought custody of the minor children. Timothy filed a motion for an order that Cheryl submit to a mental health examination (pursuant to Illinois Supreme Court Rule 215). Timothy alleged that he was the best fit parent to maintain custody of the parties' minor children, and he alleged that Cheryl's mental condition was at issue. Specifically, Timothy alleged that the examination was necessary to determine if Cheryl suffered from bi-polar disorder. Cheryl filed a motion to dismiss the motion, which was granted by the trial court. Timothy filed a first amended motion, but that motion was withdrawn when Timothy obtained new counsel. Prior to the trial of the case, Timothy's new counsel filed a second amended motion for a 215 examination, which the trial court took with the case. The trial court denied without prejudice Timothy's motion for authorization to depose Cheryl's former treating physician pursuant to Illinois Supreme Court Rule 204(c) (eff. Dec. 16, 2010). The physician had moved to Utah, and had not treated Cheryl in five years, but, more importantly, the trial court found that there still had not been any disclosure from a

witness or party that somehow a mental issue had affected the relationship between either parent and the children.

¶ 5 Nine witnesses testified at the trial, including both parties, their two adult children, one of the two children who were still minors at the time of the trial, and several of Cheryl's friends. The parties' adult daughter, Carolyn Newberry, testified that she lived with her mother her entire life, other than one week after the separation. However, during that week, she had an argument with her father and called the police. After that, Carolyn returned to her mother. Carolyn testified that she participated in a number of sports when she was younger. Her mother attended all of her events, and her father did not attend any of those events. He did attend her 8th grade and high school graduations. Carolyn testified that she does not visit with her father. Carolyn did not believe her mother suffered from any mental health or emotional issues. Carolyn did testify that she saw a ghost at the old marital home, which was the same ghost that Cheryl claimed to have seen.

¶ 6 Another adult daughter, Lauren Newberry, testified that she lived with her mother and her three sisters, but she was going away to school the next week. She testified that she was close to her mother, and she was a good mom. Lauren testified that she visited her father twice a month, but his house was not clean and she would only go in the house for 15 or 20 minutes at a time. Lauren also did not believe her mother had any mental issues, and she was tired of her dad saying those things about her mom. While in high school, Lauren was involved in cheerleading and softball, and her mother would attend most, if not all, of the events. Timothy rarely attended any events. Lauren testified that she had not seen any ghosts, but she had talked to her mother about the ghost her mother saw.

¶ 7 One of the minors, M.N., testified that she saw her father on most Sundays and talked to him on the telephone almost every day. They would go to church together. M.N. did not like the visits and spent most of the time watching her younger sister. It bothered her when her dad said bad things about her mom. She testified that her mother helped her with her homework, and her mother went to her cheerleading events. Her dad went to a couple of her cheerleading events. She testified that her mother provided her food, clothes, and care, and she wanted to stay living with her mother. She said that she believed in ghosts and was afraid of old houses.

¶ 8 Two friends of Cheryl's testified that their daughters were friends with M.N. and J.N., and they were around Cheryl often. They trusted Cheryl, and allowed their children to stay overnight with Cheryl and her children. Neither had ever seen Cheryl show any indication of mental health issues.

¶ 9 Patricia Dulin, Cheryl's sister-in-law, testified that Cheryl was a good mother and that she did not see any signs of mental illness. Patricia acknowledged the ghost discussions, but said that those discussions were humorous.

¶ 10 Cheryl testified that she provided all the care for the children, including getting them to school and taking them to doctors. Cheryl testified that she was the only parent to attend the children's activities, do homework with the children, and she also did the housework, grocery shopping and cooking. Timothy was usually gone, because of his work. Cheryl testified that she had not seen a doctor or taken any medication in the previous six years. Sometime after M.N. was born in 1999, Cheryl had been prescribed Sarafem for pre-menstrual issues. There was also an exhibit that indicated that she filled a Sarafem prescription in 2005. She also testified that she saw a ghost in the marital residence, around 10 years earlier, but it was something the family laughed about. She

also had heard organ music coming from the wall in the home of an elderly patient. Cheryl complied with a drug test, which was negative.

¶ 11 Timothy testified that Cheryl had told him that she was depressed, and she suffered from insomnia. He believed that there was something wrong with Cheryl, and he felt that the children were not safe when they were with Cheryl. He denied the children's testimony that he was rarely at their activities and events.

¶ 12 At the end of the testimony, the trial court denied Tim's amended motion for mental health examination pursuant to Rule 215. The trial court entered a memorandum decision, granting sole custody of the minor children to Cheryl. It noted that it was not even a close case, and it was in the best interest of the minor children that she remain their caregiver. The trial court found that a number of the statutory factors favored Cheryl, and none of the factors favored Tim. Also, it found that Tim's claim that Cheryl suffered from mental health issues that had an effect on the children was not borne out by the evidence. Timothy was granted visitation, and ordered to pay child support at the statutory rate. The trial court divided the marital property, and ordered Timothy to pay his own attorney's fees. The issue of Cheryl's attorney's fees was reserved. A Judgment of Dissolution of Marriage was entered in accordance with the memorandum decision.

¶ 13 Cheryl filed a petition for an award of fees and costs, pursuant to 750 ILCS 5/508(a) (West 2010). The petition alleged that Timothy had filed numerous harassing motions that caused delays, and it sought contribution from Timothy for the fees incurred in the defense of those motions. It also alleged that Timothy was earning more income than Cheryl. In its memorandum of decision, the trial court noted the general propositions that each party generally bears his or her own costs and that it had to consider the financial circumstances of the parties in making an award of contribution

toward attorney's fees. However, the trial court also noted that another relevant factor in making a contribution award was the undue litigiousness of a party. Thus, the trial court awarded \$2000, to be paid by Timothy to Cheryl's counsel. This was approximately one-third of the fees incurred by Cheryl, the amount the trial court estimated was due to Timothy's undue litigiousness. Timothy appealed the judgment of dissolution and the award of attorney's fees.

¶ 14

ANALYSIS

¶ 15

Timothy argues that the trial court erred in not allowing a mental health examination of Cheryl pursuant to Illinois Supreme Court Rule 215(a). Also, Timothy argues that the trial court erred in denying Tim's motion to depose Cheryl's treating physician.

¶ 16

Rule 215 provides:

¶ 17

“In any action in which the physical or mental condition of a party or of a person in the party's custody or legal control is in controversy, the court, upon notice and on motion made within a reasonable time before the trial, may order such party to submit to a physical or mental examination by a licensed professional in a discipline related to the physical or mental condition which is involved.” Ill. S. Ct. R. 215 (eff. Mar. 28, 2011).

¶ 18

As Timothy points out, the “good cause” requirement contained in a prior version of Rule 215 has been eliminated, to meet the objective of “minimal judicial involvement” Ill. S.Ct. R. 215, Committee Comments (eff. Jan.1, 1996). Although the committee removed the good cause requirement from Rule 215(a), it still left the trial court with discretion to grant or deny the motion. Rule 215 is a rule of discovery; it “does not permit unlimited and indiscriminate mental and physical examinations of persons but by its

terms gives a trial court discretion to order such examinations only when certain requirements are met.” *Fosse v. Pensabene*, 362 Ill. App. 3d 172, 181 (2005) (quoting *In re Stevenson’s Estate*, 44 Ill.2d 525, 529–30 (1970)). The person sought to be examined must be a party or a person in the party’s custody or legal control and the physical or mental condition of that person must be in controversy. *Fosse*, 362 Ill. App. 3d 172, 181; Ill. S. Ct. R. 215(a) (eff. Mar. 28, 2011). The rule also states that if the requirements are met, the court “may” order the requested examination. The word “may” indicates the intent to leave the grant or denial of relief to the trial court’s discretion. *People v. Garstecki*, 234 Ill.2d 430, 443 (2009) (use of “may” indicates that a rule is permissive). Thus, we find that under the amended Rule 215(a), the trial court maintains discretion to grant an examination request, subject to the two requirements of the rule: the person sought to be examined must be a party or a person in the party’s custody or legal control and the physical or mental condition of that person must be in controversy.

¶ 19 In this case, Timothy did not present any credible evidence that Cheryl’s mental condition was in controversy. Timothy made a number of allegations regarding Cheryl’s mental health, but there was no factual support to support his allegation that Cheryl’s mental health negatively impacted her ability to parent their children. Actually, there was no evidence that any mental issue affected the relationship between either parent and the children. Without addressing the issue of whether the second amended motion was timely filed, we find that the trial court did not abuse its discretion in denying the motion for a 215 examination. We also find no error in the trial court’s dismissal of Timothy’s original motion for a 215 examination. The motion was dismissed because it failed to allege any behavior that might call into question Cheryl’s mental health specifically as it relates to her ability to have custody of the minor children.

¶ 20 Timothy argues that the trial court erred in denying his motion to depose Cheryl's former treating physician, which was again an inquiry into Cheryl's mental health. Cheryl argues that the denial of the motion was not an abuse of discretion because the physician was currently in Utah and had not provided Cheryl medical care since 2007. The trial court denied the motion without prejudice, noting that there still had not been any disclosure from a witness or party that indicated somehow that a mental issue had affected the relationship between either parent and their children. Discovery determinations are reviewed for an abuse of discretion. *Manns v. Briell*, 349 Ill. App. 3d 358, 362 (2004). We find no abuse of discretion in the denial of the motion, especially when the physician would have no current relevant treating information.

¶ 21 Finally, Timothy argues that the trial court erred in ordering him to contribute to Cheryl's fees pursuant to section 508 of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act). 750 ILCS 5/508 (West 2010). As a general rule, each litigant bears the cost of their own attorney fees. *McNiff v. Mazda Motor Company of America, Inc.*, 384 Ill. App. 3d 401, 404 (2008). However, section 508 of the Dissolution Act provides that, after considering the financial resources of the parties, the trial court may order either party to pay a reasonable amount for his own or the other party's costs and attorney's fees. 750 ILCS 5/508(a) (West 2010). The party seeking an award of attorney fees must establish her inability to pay and the other spouse's ability to do so. *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005). Also, a trial court may consider a party's misconduct when determining whether to award attorney fees. *In re Marriage of Reimer*, 387 Ill. App. 3d 1066, 1076 (2009). A trial court's decision to award or deny fees will be reversed only if the trial court abused its discretion. *In re Marriage of Snow*, 277 Ill.App.3d 642, 653 (1996).

¶ 22 Timothy argues that the trial court abused its discretion because it gave no indication that it considered the parties' financial circumstances. The trial court's order, however, stated that it reviewed the evidence and stipulations received at trial. The trial court also noted that it had to consider the financial circumstances of the parties in making a contribution award. The fact that the trial court did not make specific findings with respect to the financial circumstances of the parties does not make the contribution award an abuse of discretion because the trial court is presumed to have understood and followed the law. See *In re Marriage of Powers*, 252 Ill. App. 3d 506, 510 (1993) (absent an affirmative showing to the contrary, reasonable presumptions are in favor of the action of the trial court and the trial court is presumed to have understood and applied the law correctly). Based on the financial information contained in the record, we find no abuse of discretion in the trial court's order that Timothy contribute \$2000 toward Cheryl's attorney's fees.

¶ 23 CONCLUSION

¶ 24 The judgment of the circuit court of Kankakee County is affirmed.

¶ 25 Affirmed.