2015 IL App (1st) 140104-U

FIFTH DIVISION
JUNE 26, 2015

No. 1-14-0104

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF RUTH J. HORA, Petitioner-Appellee, v. DAVID M. HORA, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County No. 80 D 016817 Honorable Mark J. Lopez, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Palmer and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in dismissing former husband's amended motion to modify a judgment of dissolution, where a provision that the unallocated maintenance and support to be paid to the former wife was generally nonmodifiable was not void.

¶ 2 Respondent David M. Hora (David) appeals from an order of the circuit court of Cook County granting a motion by petitioner Ruth J. Hora (Ruth) to dismiss David's amended motion to modify a judgment for dissolution of marriage. On appeal, David maintains the circuit court

erred in dismissing his amended motion to modify the judgment, arguing that the provision in the parties' marital settlement agreement for nonmodifiable unallocated maintenance and support, as well as a related provision requiring David to maintain a life insurance policy, were void. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Ruth and David were married on June 9, 1962. The parties had three children: David, born on April 24, 1965; Susan, born on September 14, 1966; and Michael, born on March 20, 1970.

¶ 5 On August 5, 1980, Ruth filed a petition for dissolution of marriage in the circuit court of Cook County. On May 2, 1983, the circuit court entered a judgment for dissolution of marriage, which incorporated a marital settlement agreement (agreement) of the parties. Article II of the agreement provided the parties would have joint custody of their two minor children, with Ruth having physical custody of the minor children. Article IV of the agreement, titled "Unallocated Maintenance and Support," provided in part:

> A. Husband agrees to and shall pay the Wife, as and for her support and the support of DAVID, SUSAN and MICHAEL, (the children of the parties) the following sums each and every month:
>
> 1. For the month of April 1983, THREE THOUSAND and No/100 ($3,000.00) DOLLARS; and
>
> 2. Commencing May 1, 1983, and for each and every month thereafter to and through December 31, 1983, the sum of NINE THOUSAND TWO HUNDRED and No/100 ($9,200) DOLLARS per month; and

3. Commencing January 1, 1984 and for each and every month thereafter to and through September 30, 1984, the sum of FOUR THOUSAND TWO HUNDRED and No/100 ($4,200.00) DOLLARS per month; and

4. Commencing October 1, 1984 and for each and every month thereafter to and through June 30, 1989 the sum of THREE THOUSAND THREE HUNDRED THIRTY THREE and No/100 ($3,333.00) DOLLARS per month; and

5. (a) Commencing July 1, 1989, and each and every month thereafter, the sum of TWO THOUSAND EIGHT HUNDRED THIRTY THREE and No/100 ($2,833.00) DOLLARS per month, for a total of THIRTY FOUR THOUSAND and No/100 ($34,000.00) DOLLARS per year, to be paid each and every year thereafter as non-modifiable maintenance to Wife, defeasible and terminable only upon death of Wife, Wife's remarriage, or Wife's cohabitation with a nonrelative male on a regular resident, conjugal continuing basis.

(b) Husband and Wife further acknowledge and agree that the maintenance paid to Wife is non-modifiable, which means that Wife shall not have the right to seek or obtain an increase in support no matter what changes occur in either her circumstances or the circumstances of Husband, and Husband shall not have the right to reduce or terminate maintenance, no matter what his change or Wife's change in circumstances; and maintenance shall continue unencumbered and not be

> terminated for any of the circumstance [*sic*] concerning either Husband or Wife's economic condition, and maintenance shall be for an indefinite period, except for Wife's death, remarriage or cohabitation as previously set forth."

If Ruth remarried or cohabited, the monthly payments due under subparagraphs 3 and 4 would be reduced to $700 per minor child, but subparagraphs 1 and 2 were "non-modifiable" in any event.

¶ 6 Article V of the agreement generally provided that a trust fund existed to provide for the college education of their children, and that David would be solely responsible for such expenses if the trust fund was exhausted or insufficient. Article VI of the agreement, which addressed medical, dental and optical expenses, provided that David's obligation to the children would end upon full emancipation as defined in Article VII, while his obligation to Ruth would terminate only upon the conditions listed in Article IV.

¶ 7 Article XII of the agreement generally provided that David's obligations under Articles IV, V, VI and VIII (which addressed the property distribution to Ruth) would be secured by a life insurance policy (policy). The policy had a face value of approximately $280,000. The agreement required David to designate Ruth as the irrevocable beneficiary of the policy until his obligations under the agreement were satisfied in full.

¶ 8 Article XVI of the agreement contained a number of general provisions. Paragraph G of Article XVI, titled "Construction of Agreement," provided in part that in the event a court of competent jurisdiction held any term or provision of the agreement invalid, "the remaining terms and provisions shall not be affected thereby and shall continue in full force and effect."

¶ 9 On March 22, 2004, David filed a petition to modify maintenance pursuant to section 510 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/510 (West 2002)).

David, alleging that his income would decline substantially upon his retirement in July 2004, sought a modification of his maintenance payments to Ruth and his obligation to maintain the policy. The record on appeal does not indicate any proceedings on this petition.

¶ 10 On July 2, 2004, David filed a petition to modify the judgment of dissolution. In addition to the prior allegations regarding David's retirement decreasing his income, David sought modification or rescission of the judgment of dissolution on the theories of mutual mistake and unjust enrichment. David alleged that Ruth had represented she suffered from Scleroderma, which David claimed would have reduced Ruth's life expectancy to only a few years.

¶ 11 On July 19, 2004, Ruth filed a motion to dismiss the petition pursuant to section 2-619 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2004)). Ruth argued: (1) the circuit court lost jurisdiction to modify or rescind the final judgment of dissolution 30 days after its entry and a collateral attack was untimely after two years under section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2004)); (2) the failure to timely challenge the judgment precluded the judgment from being modified, pursuant to the principles of *res judicata*; and (3) section 510 of the Act did not permit modification of the judgment when the parties agreed to make the relevant provisions of the judgment nonmodifiable. On August 17, 2004, David filed a response to the motion to dismiss the petition, characterizing the petition as brought under section 2-1401 of the Code and arguing Ruth's misdiagnosis was not initially discoverable due to mutual mistake or fraudulent concealment by Ruth. On September 15, 2004, the circuit court entered an order granting Ruth's motion to dismiss the petition, but granted David leave to file an amended petition to modify the judgment.

¶ 12 On September 29, 2004, David filed an amended petition to modify the judgment of dissolution, pursuant to section 2-1401 of the Code, based on the theories of mutual mistake and

fraudulent concealment of Ruth's medical status. David also sought a modification of the unallocated maintenance and support (and the obligation to maintain the policy) under section 510 of the Act, based on the decrease in David's income. On October 13, 2004, Ruth filed a motion to dismiss the amended petition, pursuant to section 2-619 of the Code, arguing: (1) child support was not at issue following the emancipation of the parties' children; (2) David could not seek relief under section 510 of the Act pursuant to section 2-1401 of the Code; (3) the amended petition was barred by the statute of limitations for section 2-1401 petitions; and (4) David failed to exercise due diligence in pursuing a section 2-1401 petition after paying maintenance to Ruth for over two decades. On October 26, 2004, David filed a response to the motion to dismiss his amended petition, arguing: (1) the text of the settlement and judgment established unallocated support and maintenance; and (2) the circuit court had jurisdiction, based on mutual mistake and fraudulent concealment. On November 4, 2004, the circuit court entered an order granting Ruth's motion to dismiss David's amended petition.

¶ 13 On February 1, 2013, David filed a third motion to modify the judgment for dissolution of marriage. David alleged the parties no longer have minor children and asserted he is unable continue the payment of the premiums on the policy. The motion referred to section 510 of the Act. The motion did not refer to section 2-1401 of the Code and did not allege mutual mistake or fraudulent concealment by Ruth. On March 27, 2013, Ruth again filed a motion to dismiss the motion pursuant to section 2-619 of the Code, arguing: (1) David's obligation under the settlement and judgment was not limited to the minor children; (2) the obligation to maintain the policy is nonmodifiable; and (3) the circuit court's November 4, 2004, order was a final judgment on the merits of the issues raised barring relitigation of the issue. On May 15, 2013, David filed an amended motion to modify the judgment for dissolution of marriage, which referred to section

2-1401 of the Code and the allegations regarding mutual mistake or fraudulent concealment of Ruth's medical status. On May 28, 2013, the circuit court granted David leave to file the amended motion and indicated that Ruth's motion to dismiss would be deemed to be directed to David's amended motion.

¶ 14 On September 9, 2013, the circuit court entered an order granting Ruth's motion to dismiss David's amended motion. The court observed that David asserted the quarterly premium on the policy had increased from $700 to $1,460. The court also found that David's financial obligations to the parties' children had long been terminated. Citing *In re Marriage of Doermer*, 2011 IL App. (1st) 101567, which relied in turn on *Blum v. Kostner*, 235 Ill. 2d 21 (2009), the circuit court reasoned that David's request was essentially a request to modify maintenance, not child support. Accordingly, the circuit court concluded the section of the Act providing that child support payments are subject to a right to modification was not applicable in this case. Thus, the circuit court concluded that the language of the agreement and judgment providing the payments at issue were not modifiable was controlling. The circuit court also concluded that the language of the agreement and judgment established that David's obligation to maintain the policy remained in effect as long as David's obligation to pay maintenance to Ruth continued.

¶ 15 On October 9, 2013, David filed a motion to reconsider the September 9, 2013, order. On November 5, 2013, Ruth filed a response to the motion for reconsideration. On November 26, 2013, denying David's motion to reconsider. On December 18, 2013, David filed a timely notice of appeal to this court.

¶ 16 ANALYSIS

¶ 17 On appeal, David argues the trial court erred in denying his amended motion for modification of the judgment of dissolution. David argues that the provision of the judgment

providing for unallocated maintenance and support is void and has been since its inception. David also argues the provision of the judgment requiring him to maintain the policy is void because it was based on the void provision barring modification of the unallocated maintenance and support.

¶ 18 David's amended motion for modification of the judgment was filed pursuant to section 2-1401 of the Code, which allows a court to vacate a judgment more than 30 days after the entry of the judgment. *In re Marriage of Morreale*, 351 Ill. App. 3d 238, 241 (2004). Ordinarily, a section 2-1401 petition must be filed no later than two years after entry of the order or judgment. 735 ILCS 5/2-1401(c) (West 2012). Moreover, in order to obtain relief under section 2-1401 of the Code, a petitioner must typically establish by a preponderance of the evidence: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim; and (3) due diligence in filing the petition. *Smith v. Airoom, Inc*., 114 Ill. 2d 209, 220-21 (1986).

¶ 19 The amended petition at issue in this appeal, however, involved subsection (f) of section 2-1401 of the Code, seeking to vacate the judgment as void. See *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002); 735 ILCS 5/2-1401(f) (West 2012). The two-year limitations period does not apply to petitions brought on grounds of voidness. *Sarkissian*, 201 Ill. 2d at 104. It is "well settled that '[a] judgment, order or decree entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved, is void, and may be attacked at any time or in any court, either directly or collaterally.' " *Id*. at 103 (quoting *Barnard v. Michael*, 392 Ill. 130, 135 (1945)). Moreover, when attacking a judgment as void, the petitioner need not allege a meritorious defense to the original action or due diligence. *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 379 (2005).

¶ 20 "A void judgment is from its inception a complete nullity and without legal effect." *Id*. at 380. Given the consequences of declaring an order or judgment a nullity as the result of a collateral attack, courts should only declare an order or judgment void when there is no other alternative. *Id*. A section 2-1401 petition seeking relief based on an argument that the underlying order or judgment is void is reviewed *de novo*. *Deutsche Bank National Trust Co. v. Hall-Pilate*, 2011 IL App (1st) 102632, ¶ 12.

¶ 21 David argues the provisions of the judgment of dissolution reflecting the parties' agreement that the unallocated maintenance and support was nonmodifiable is void and has been void from its inception under section 502(f) of the Act (Ill. Rev. Stat. 1980, ch. 40, ¶ 502(f)). Section 502(f) provided (and provides) that a judgment may expressly preclude or limit modification of terms set forth in the judgment by agreement of the parties, except for terms concerning the support, custody or visitation of children. See 750 ILCS 5/502(f) (West 2014) (substantially similar language). David relies on Illinois case law typified by *In re Marriage of Semonchik*, 315 Ill. App. 3d 395 (2000).

¶ 22 In *Semonchik*, the parties were married in 1980 and divorced in 1995. *Id*. at 396-97. The parties had two children, who were both born in January 1985. *Id*. at 397. The judgment for dissolution of marriage incorporated the terms of a marital settlement agreement pursuant to which James Semonchik (James), the former husband, was to pay his former wife, Roxanne Semonchik (Roxanne), "*unallocated child support and maintenance*," until October 1, 1998. (Emphasis added.) *Id*. at 397. In May 1997, when the children were 12 years old, James filed a motion to modify support. See *id*. at 397. The trial court ultimately found James was unemployed, which was a "substantial change in circumstances warranting the modification of support obligation," and abated James's support obligation to the filing date of James's motion to

modify support. *Id*. at 398. In May 1998, Roxanne filed a petition to reestablish maintenance and child support, alleging that James had become employed. The trial court granted Roxanne's petition and ordered James to pay unallocated family support until January 2000. *Id*. at 398-99.

¶ 23 On appeal, James argued that the trial court lacked discretion to extend his support obligation beyond the time period clearly and unambiguously agreed upon by the parties—October 1, 1998. *Id*. at 402-03. The appellate court disagreed, ruling that "where a marital settlement agreement contains an unallocated combination of child support and taxable maintenance payment, that payment is subject to the statutory right to modification contained in the *** Act." *Id*. at 403 (citing *In re Marriage of Steadman*, 283 Ill. App. 3d 703 (1996) and *In re Marriage of Gleason*, 266 Ill. App. 3d 467 (1994)); see 750 ILCS 5/502(f) (West 2012). Thus, regardless of the terms in the marital settlement agreement stating the maintenance terms were nonmodifiable, "where the parties choose to lump maintenance in with child support, creating an 'unallocated' support payment, that 'unallocated' support payment is, by statute, modifiable." *Semonchik*, 315 Ill. App. 3d at 403; accord *In re Marriage of Sassano*, 337 Ill. App. 3d 186, 193 (2003); see also *In re Marriage of Iqbal & Khan*, 2014 IL App (2d) 131306, ¶¶ 25-42 (postnuptual agreement's terms relating to child custody were unenforceable as contrary to public policy); *In re Marriage of Rife*, 376 Ill. App. 3d 1050, 1065 (2007) (clause requiring former wife to transfer an individual retirement account to former husband if she filed petition to modify child visitation, residency, or support was void).

¶ 24 In this case, the circuit court disagreed with David's reliance on cases such as *Semonchik*, instead relying on *In re Marriage of Doermer*, 2011 IL App (1st) 101567. In *Doermer*, the judgment of dissolution incorporated a marital settlement agreement requiring the former husband (Richard) to pay unallocated maintenance and support for the parties' minor child

(Caitlin) to the former wife (Kathleen). *Id*. ¶ 4. The marital settlement agreement also included a nonmodification clause, providing for certain events, including payment over 84 consecutive months, which would terminate maintenance to Kathleen. *Id*. Child support payments would continue until Caitlin was emancipated. *Id*. On June 22, 2009, Kathleen filed a petition for extension of maintenance. *Id*. ¶ 6. On July 16, 2009, Caitlin reached the age of majority and became emancipated from Richard and Kathleen. *Id*. ¶ 7. The circuit court ultimately dismissed Kathleen's petition. *Id*. ¶ 13.

¶ 25 The *Doermer* court, after considering *Semonchik*, relied on our supreme court's decision in *Blum* for support. *Id*. ¶ 26. In *Blum*, the parties entered into a marital settlement agreement, which provided that the former husband, Steven Blum (Steven), would pay his former wife, Judy Koster (Judy), *unallocated maintenance and support*, " 'for her and the minor children, commencing April 1, 2000, *** for a total of *** (61) consecutive months. Judy's right to receive maintenance and Steven's obligation to pay maintenance after April 30, 2005 is *reviewable*.' " (Emphases added.) *Blum*, 235 Ill. 2d at 33. In January 2005, Steven filed a petition to terminate Judy's maintenance after April 30, 2005, arguing that their children had attained the age of majority and that he was paying for their college expenses. *Id*. at 26. Following a trial, the circuit court entered an order reducing Judy's monthly maintenance beginning May 1, 2005, and limiting maintenance to three years. *Id*. at 27. The circuit court's order also stated the order was nonmodifiable as to duration and amount. *Id*. at 28. The appellate court reversed, ruling that the trial court's reduction of Judy's maintenance was not supported by the evidence and that the circuit court "exceeded its statutory authority in making its award of maintenance nonmodifiable." *Id*. On appeal, our supreme court observed that although the parties' initial award was unallocated maintenance and support, the children were

emancipated by the end of the 61-month period. See *id*. at 35. The *Blum* court ruled that because only maintenance was at issue by the end of the 61-month period, "the terms of the marital settlement agreement [were] binding on the parties and the court." *Id*. at 32.

¶ 26 The *Doermer* court similarly concluded that Kathleen's petition to modify was essentially a request to extend maintenance because child support was no longer at issue after Caitlin's emancipation. *Doermer*, 2011 IL App (1st) 101567, ¶ 26. Accordingly, the appellate court concluded "that the terms of the marital settlement agreement governed and Kathleen was not entitled to an automatic statutory right to modify the support award." *Id*.

¶ 27 In this case, the circuit court relied on *Doermer* because the parties' children were emancipated, thus permitting David's amended petition to be read as a petition addressing only a reduction or termination of maintenance. On appeal, David's briefs do not cite or discuss *Doermer* or *Blum*. Even if David had attempted to distinguish *Doermer* and *Blum*, however, he could not establish the disputed provisions of the judgment of dissolution in this case are void.

¶ 28 Our supreme court discussed the legal distinction between void and voidable judgments in *In re Marriage of Mitchell*, 181 Ill. 2d 169 (1998). In *Mitchell*, the parties entered into a marital settlement agreement, which set forth the former husband's child support obligation in terms of a percentage of income, rather than an exact dollar amount as required by the applicable provision of the Act. Pursuant to the agreement, the parties revisited the child support issue annually. *Id*. at 171. Six years later, at a hearing on another issue, the trial court *sua sponte* modified the child support award after concluding that it was void and unenforceable for violating the Act. *Id*. at 172. The former wife appealed.

¶ 29 On appeal, the former husband argued that the trial court lost its jurisdiction by entering the judgment and subsequent orders that expressed the child support award in terms of a

percentage of his income. Our supreme court agreed that the trial court had erred. The *Mitchell* court, however, cited the well established rule that "[o]nce a court has acquired jurisdiction, an order will not be rendered void merely because of an error or impropriety in the issuing court's determination of the law." *Id*. at 174. Acknowledging the circuit court entered a judgment that was contrary to the Act, the *Mitchell* court nevertheless held that the erroneous child support determination was merely voidable, and not void, because the trial court had subject matter jurisdiction over the parties, the dissolution proceedings, and the child support award. *Id*. at 175.[1]

¶ 30 Our supreme court further clarified the jurisdiction of the circuit court in *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325 (2002). In that case, our supreme court observed that "[w]ith the exception of the circuit court's power to review administrative action, which is conferred by statute, a circuit court's subject matter jurisdiction is conferred entirely by our state constitution." *Id*. at 334. Following the principle set forth in *Belleville Toyota, Inc*., and consistent with *Mitchell*, the appellate court has recognized that a court in a dissolution of marriage proceeding does not exceed its jurisdiction merely because it overlooks or misapplies the provisions of the Act. *In re Marriage of David*, 367 Ill. App. 3d

[1] David's briefs relied in part upon *In re Marriage of Sheetz*, 254 Ill. App. 3d 695, 700 (1993), which held that a child support order expressed in terms of a percentage of income was void. David's reply brief acknowledged that, after the decision in *Mitchell*, *Sheetz* may no longer accurately state the law on that issue, but nevertheless maintained that *Mitchell* did not change the basic rules that a void order is without legal effect from its inception and may be attacked at any time. Although *Mitchell* did not alter those basic rules regarding void judgment, the decision did clarify which judgments are considered void and which judgments are merely voidable.

908, 916 (2006); see also *In re Marriage of Waller*, 339 Ill. App. 3d 743, 751 (2003) (trial court's failure to adhere to provisions of the Act governing educational expenses and modification of child support did not deprive the trial court of jurisdiction).[2] The fact that the legislature may create justiciable matters under the Act does not change the fact that the jurisdiction of the circuit court flows from the Illinois constitution, not the legislature. *In re Marriage of Cozzi-DiGiovanni & DiGiovanni*, 2014 IL App (1st) 130109, ¶ 42 (citing *Belleville Toyota, Inc.*, 199 Ill. 2d at 336) (addressing an award of attorney fees under section 508 of the Act).

¶ 31 In this case, the trial court had jurisdiction over the parties and over the dissolution proceeding in general. See *Mitchell*, 181 Ill. 2d at 175. Thus, the court had jurisdiction over the award of child support (*id*.) and the award of maintenance (see Ill. Rev. Stat. 1980, ch. 40, ¶ 504). Even if David had presented an argument that cases such as *Semonchik* controlled this case, rather than *Doermer*, any error in providing that the unallocated maintenance was nonmodifiable would merely render that aspect of the judgment voidable, not void. See *Mitchell*, 181 Ill. 2d at 175; *David*, 367 Ill. App. 3d at 916. Accordingly, David's amended petition was an untimely collateral attack of the judgment of dissolution. Thus, David has failed to establish that the circuit court erred in dismissing his amended petition to modify the judgment of dissolution.

¶ 32 CONCLUSION

¶ 33 For all of the aforementioned reasons the judgment of the circuit court of Cook County is affirmed.

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[2] David's reply brief attempted to distinguish *Mitchell*, based upon the Second District's opinion in *In re Roe*, 352 Ill. App. 3d 1155, 1163 (2004), but *Roe* was overruled by the Second District in *David*, 367 Ill. App. 3d at 917.

¶ 34 Affirmed.