2012 IL App (2d) 110988-U
No. 2-11-0988
Order filed July 13, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF PHILLIP E. STILES,	)	Appeal from the Circuit Court
	)	of Stephenson County.
Petitioner-Appellant,	)	
	)	
and	)	No. 10-D-192
	)	
DIANNE STILES,	)	Honorable
	)	Theresa L. Ursin,
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: (1) Absent the parties' agreement, the trial court's award of nonmodifiable maintenance was improper as a matter of law; (2) with the amount of maintenance now modifiable upon a substantial change in circumstances, the trial court did not abuse its discretion in setting the amount, as it reasonably estimated (as opposed to imputed) petitioner's income, was not required to credit him for his house payments, and properly compensated for respondent's unemployment (though she was not relieved of the obligation to seek employment of the kind she had previously had).

¶ 1 Petitioner, Phillip E. Stiles, appeals from a judgment for dissolution of marriage, challenging the amount and nonmodifiability of the maintenance award to respondent, Dianne Stiles. He asserts that the court erred as a matter of law when it made the maintenance nonmodifiable for a fixed

period. He further asserts that the court abused its discretion by imputing income to him, by deeming his mortgage payments unreasonable, and by assuming that respondent would remain unemployed, and that the court therefore set the maintenance payments too high. We agree that nonmodifiable maintenance was unauthorized. However, we conclude that the court did not impute income to him and that, at least with the award modifiable, the other issues that petitioner raises did not result in an award that is an abuse of discretion. We therefore affirm the award as modified to make the maintenance modifiable.

¶ 2 I. BACKGROUND

¶ 3 On December 29, 2010, petitioner filed a petition for dissolution of his marriage to respondent. Petitioner was then 55, and respondent 59. The parties had three children, all adults. He was employed as a physician's assistant; she was unemployed. Respondent answered, admitting all allegations and asking for a dissolution with costs charged to petitioner.

¶ 4 Respondent filed a "Proposed Property and Debt Apportionment" in which she asserted that the parties had a previous separation; she moved out-of-state and took a full-time job (with benefits) as a teacher's aide. Not quite a year before the current dissolution filing, the parties temporarily reconciled after petitioner persuaded her to quit her job and return to Freeport, where they had lived before the separation.

¶ 5 Petitioner proposed that respondent should receive maintenance of $1,200 a month for five years. He would retain the marital residence and assume responsibility for the first mortgage of $176,000 and the second mortgage of $10,000. (An account statement shows that this was a home-equity line of credit that was nearly fully drawn at the time.)

¶ 6 The court held an evidentiary hearing on June 14, 2011. Petitioner put on testimony by Mark Gridley, who had been the person responsible for negotiating petitioner's salary for petitioner's employer, FHN. In November 2010, petitioner and FHN negotiated a new contract. Petitioner's base salary became $117,959 a year ($9,830 a month). FHN would compensate him for any extra on-call nights separately. Gridley testified that the reduction (from a base of $166,000 a year) was predicated on petitioner's previous salary being much higher than the industry average. The median pay for a physician's assistant in petitioner's area of practice was $105,000 a year, which was what Gridley initially proposed as a base salary. The salary was subject to further review based on the income that petitioner generated for FHN.

¶ 7 Petitioner had grossed about $230,000 in 2010. This was the result of his taking on extra days on call, of bonuses, and of his voluntarily taking shifts at FHN's "Fast Care" clinics in Shopkos. Gridley expected the shifts at the clinics to become less available because FHN was moving the clinics to a "fully staffed model." The extra on-call days would remain available and be paid at $100 for weekdays and $166 for weekends. Quarterly bonuses, which had previously been up to $10,000 a year, would no longer be available. (Petitioner's written contracts, which he introduced at the hearing, suggested a yearly maximum of $9,000.) Petitioner would continue to receive student-loan forgiveness of $10,000 a year. (The contracts appear to provide for $15,000 a year, but only for a fixed number of years.)

¶ 8 Gridley agreed that part of the impetus for the salary reduction had been dissatisfaction with petitioner's work by two of the three physicians under whom he worked. However, FHN had awarded petitioner some of the discretionary bonuses. Petitioner's employment limited his ability to get part-time employment outside FHN. This was partly contractual—the new and old contracts

had noncompetition clauses—and partly practical—the on-call requirements would make other employment difficult. The parties' 2010 tax return showed a gross income from wages for the two of $220,166. Respondent would not have been working that year. For 2009, it showed $225,620, which potentially included some of respondent's wages.

¶ 9 Petitioner testified that the Medicare administration had, in 2000, decided that it would not pay for the services of physicians' assistants with the license type that petitioner then had. Petitioner therefore returned to college in 2002. He graduated in 2004 with a degree that allowed him to be licensed to provide Medicare-compensable services, but with more than $100,000 in student-loan debt.

¶ 10 Respondent testified that she had started out in nursing school in the early 1970s and had then obtained a surgical technician's certification. She married petitioner in 1979 and stopped working. While the parties' children were young, she operated an in-home daycare business. Later, she worked as a nurse's aide. She worked as a classroom aide for autistic children for 16 years, resumed work as a nurse's aide when petitioner went back to school, and worked at a combination of nurse's aide and school jobs after that. When the parties moved to Freeport, she worked at a nursing home as an activities aide.

¶ 11 During her initial separation from petitioner, she moved to Aberdeen, South Dakota, where the parties had lived for years and where one daughter lived. She worked at first as a retail sales clerk, and then got a job as a school paraprofessional.

¶ 12 She returned to Freeport to try to save the marriage, and, at the time of the hearing, she had been unemployed for over a year. She had investigated school paraprofessional jobs in the Freeport area and near Aberdeen, South Dakota, but found that the districts were cutting back. She had just

let an Illinois certified nursing assistant license expire; she could get it reinstated by taking the certification examination again. Since returning from South Dakota, she had made only informal employment-related inquiries.

¶ 13 The court ruled that, "extrapolating from the percentage increases," it projected that petitioner's gross income would be about $160,000 a year. It ruled that petitioner's base pay decrease had not been voluntary. It stated that "there's no way we can expect [respondent] to start a new career"; "she stayed home with the children." The court said that the house was more than petitioner needed and that it was not going to use the expenses as a measure of his housing expenses. The court ordered $700 a week (equaling $36,400 a year and 23% of petitioner's gross income) in "permanent, nonmodifiable maintenance" reviewable when respondent reached the age of 65.

¶ 14 The court entered the written dissolution judgment on September 2, 2011. The court made a fee award to petitioner's attorney on September 27, 2011. Petitioner filed a notice of appeal on September 30, 2011.

¶ 15 II. ANALYSIS

¶ 16 On appeal, petitioner argues first that the court erred as a matter of law when it made the maintenance nonmodifiable until respondent turned 65. He further argues that the court abused its discretion when it "imputed" income to him while assuming that respondent would never return to work. He asserts that a part of that abuse of discretion was the court's suggestion that he sell the house to be able to afford the maintenance. Respondent counters with an argument that seemingly conflates nonmodifiable maintenance with permanent maintenance. She also asserts that the court did not impute income.

¶ 17 The issue of the modifiability of maintenance is clear-cut as a result of the well-established interpretation of section 510(a-5) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/510(a-5) (West 2010)). The issue of whether nonmodifiable maintenance was an option available to the court is, at root, a matter of statutory interpretation and thus subject to *de novo* review. See *In re Marriage of McGrath*, 2012 IL 112792, ¶ 10 (a court has no discretion in the interpretation of a statute even within a discretionary decision). Maintenance has to be modifiable unless the parties expressly agree to make it nonmodifiable:

> "[A]bsent the parties' express agreement, the Act does not permit a court to make a maintenance award nonmodifiable and nonreviewable. By stating that '[a]n order for maintenance may be modified or terminated only upon a showing of a substantial change in circumstances,' section 510(a-5) of the Act (750 ILCS 5/510(a-5) (West 2004)) sets forth the conditions for modification or termination of maintenance and, thus, implicitly provides that all awards of maintenance are modifiable." *Blum v. Koster*, 235 Ill. 2d 21, 42 (2009).

Respondent argues that *Blum* is distinguishable because of the specifics of the case. The facts in *Blum* were of course different. However, the *Blum* court based its ruling on a general interpretation of what section 510(a-5) permits. The meaning of the section does not change with the circumstances. Respondent cites *In re Marriage of Nord*, 402 Ill. App. 3d 288, 305 (2010), as more closely on point, but that case does not address the modifiability of maintenance, but rather whether permanent maintenance is appropriate. Here, the court erred as a matter of law by making the award nonmodifiable.

¶ 18 The issue of whether the court abused its discretion in setting the amount of maintenance requires more discussion. We review the overall appropriateness of a maintenance award on an

abuse-of-discretion standard. *E.g.*, *In re Marriage of Brankin*, 2012 IL App (2d) 110203, ¶ 26. An abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *In re Marriage of Carpenter*, 286 Ill. App. 3d 969, 973 (1997). Much that the court had to decide was necessarily speculative. The speculativeness made the court's choice to make the maintenance nonmodifiable particularly problematic. Once that aspect is gone, and one recognizes that various changes of circumstance are, in fact, likely, then the court's choices look to be mostly reasonable and certainly within its discretion. There are three issues here: petitioner's income; petitioner's living expenses; and respondent's employment potential.

¶ 19 Because petitioner's employment contract was new when the court set maintenance, and because the compensation structure was complex, the court necessarily had to estimate if it wanted to set a fixed-dollar amount of maintenance. (Because one contributor to petitioner's income, taking extra on-call days, both was highly in his control and had a high nuisance factor for him, a maintenance order as a base-amount-plus-percentage would have been a likely source of further litigation.) The court said that it extrapolated based on previous years.

¶ 20 Petitioner argues that the court "imputed income" to him. That phrase is mostly used when the court finds a bad-faith reduction in income and attributes to an obligor income that does not exist. See *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 1077 (2009) ("In order to impute income, a court must find that one of the following factors applies: (1) the payor is voluntarily unemployed [citation]; (2) the payor is attempting to evade a support obligation [citation]; or (3) the payor has unreasonably failed to take advantage of an employment opportunity [citation]"). The court here did not impute income in that sense of the phrase. Rather, it estimated.

¶ 21 The court had petitioner's employment contracts from 2010 and 2011. These show the base salary, fixed-amount add-ons, indefinite-amount add-ons, and on-call pay. The court had petitioner's gross wage income for 2010 and 2009 from the parties' tax returns. (Some income of respondent's might be included in 2009, but it does not seem to be a large amount.) Those figures were $220,166 for 2010 and $225,620 for 2009. If one subtracts the fixed amounts from the relevant base pay, one gets an estimate for the income that petitioner derived from the indefinite-amount add-ons and on-call pay. If then one adds that estimate to the new base pay and relevant fixed-amount add-ons, one has an estimate of petitioner's new gross income based on an assumption that the indefinite-amount add-ons and on-call pay will remain unchanged. This is an extrapolation from petitioner's prior income.

¶ 22 Because the record contains more than one year of gross income data, and because the record does not fully establish the correct value for some numbers in the calculation, the calculation can be done more than one way. Without attempting to exhaust possible ways to do the calculation, we did it several ways and obtained estimates ranging from $157,582 to $165,852. This is consistent with the $160,000 estimated by the court. Thus, there was no "imputation" of income, only an estimate, and the estimate was reasonable.

¶ 23 The $160,000 estimate does not take into account testimony of Gridley's that suggested that petitioner's prospects for certain work that would increase his income probably would be getting harder for petitioner to get. That testimony was too qualitative to be incorporated in an estimate in any logical way. While this optimistic estimate might not be ideal from petitioner's perspective, any such potential reductions, if they become a reality, would potentially represent a change in circumstances warranting a reduction in maintenance. 750 ILCS 5/510(a-5) (West 2010).

¶ 24 The court stated that it was not taking petitioner's approximate $2,000 a month in house payments into account in setting maintenance. It suggested that he could live acceptably in cheaper accommodations. Petitioner objects. He asserts that the "trial court exceeded the bounds of reason when it awarded the marital residence to [petitioner] only to hold that the expenses attendant to that home [were] an inappropriate consideration for setting maintenance because it thinks that the house is 'certainly more than he needs as a single person.' " "This trial court was arbitrary and unconscionable when it implicitly acknowledged that [petitioner] could not afford to pay the $700 per week maintenance—even if he made the imputed income—unless he sells his house." On this point, we deem that petitioner's argument is not cogent. He seems to imply that, if a court awards a party an asset and an associated liability, it abuses its discretion if it does not ensure that the party has the income to keep the asset. That is not a principle of law.

¶ 25 The final issue is the acceptability of the court's assumptions about respondent's employment potential. One could take the court's comments to suggest that the court would not expect her to seek new employment. It said that "[a]t this point there's no way that we can expect her to start a new career," and "[s]he stayed home with the children." It is true that respondent had had a year-and-a-half period of unemployment when the hearing took place. It is also true that her jobs were at the low-paying end and clearly secondary to petitioner's employment. But she was nearly always employed.

¶ 26 The court did not abuse its discretion in basing its maintenance award on respondent's current lack of employment. However, to the extent that it suggested that no expectation existed that respondent try to resume employment of the kind she had generally held, it went against something that is implicit in rulings on maintenance.

> "As a general rule, '[m]aintenance is intended to be rehabilitative in nature to allow a dependent spouse to become financially independent. Permanent maintenance is appropriate, however, where a spouse is unemployable or employable only at an income substantially lower than the previous standard of living.' " *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 652 (2008) (quoting *In re Marriage of Samardzija*, 365 Ill. App. 3d 702, 708 (2006)).

On the facts here, respondent clearly needed some permanent maintenance to allow her to maintain her lifestyle. However, that lifestyle was based at least in part on her working. Nothing suggests that the current award was not a proper response to her current circumstances. That, however, cannot be taken as license to respondent to give up seeking employment of the kind that she previously had. This again is something that our making the award modifiable corrects.

¶ 27 In sum, once it is corrected to be modifiable, the maintenance award was an appropriate response to the circumstances at the time. We change it only to make it modifiable—it remains reviewable when respondent turns 65.

¶ 28 III. CONCLUSION

¶ 29 For the reasons we have stated, we modify the maintenance award so that it is modifiable, but otherwise affirm the judgment.

¶ 30 Affirmed as modified.