2013 IL App (2d) 120893
No. 2-12-0893
Order filed July 30, 2013

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF MAGDALENA RADZIK,	)	Appeal from the Circuit Court of Lake County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 09-D-113
	)	
CHRISTOPHER J. AGRELLA,	)	Honorable
	)	David P. Brodsky,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The attorney fee agreement was not a contingency fee agreement. The evidence supported the trial court's order that the husband contribute $10,000 to the wife's remaining attorney fees. Affirmed.

¶ 2 On April 16, 2012, the trial court entered a judgment of dissolution of marriage for Magdalena Radzik and Christopher Agrella. That same day, in a separate order, the court required Christopher to contribute $10,000 toward Magdalena's attorney fees. Christopher appeals these attorney fees. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 This case concerns approximately $138,000 in pre-trial attorney fees accrued by Magdalena for work performed by the Coladarci law firm.[1] In March 2011, after it had withdrawn from the case due to Magdalena's inability to pay, the Coladarci firm petitioned for fees pursuant to, *inter alia*, section 503(j) of the Illinois Marriage and Dissolution of Marriage Act (Act). 750 ILCS 5/503(j) (West 2010). The firm attached to the petition: (1) a copy of the fee agreement; (2) affidavits of each of the attorneys who had worked on the case; and (3) itemized billing statements and a full client ledger detailing the work performed.

¶ 5 The fee agreement stated in part:

> "I understand that the principal basis for computing fees is the time spent on services to me by professional personnel multiplied by their individual hourly rates. I further understand that additional factors will be considered in determining the total fees such as the complexity of the work, the efficiency with which it was accomplished, the risks incurred, the extent to which [the firm] may have foregone other client opportunities in order to satisfy

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[1] The total fees were $158,000, but Magdalena's family and Christopher each had paid $10,000. We briefly recount Christopher's prior contribution. On April 24, 2009, the trial court ordered Christopher to pay the Coladarci firm $10,000 in interim fees. He did so. On November 6, 2009, without an evidentiary hearing, the court ordered Christopher to pay an additional $32,000 in interim fees. Christopher appealed. *In re Marriage of Radzik and Agrella*, 2011 IL App (2d) 100374. This court reversed and remanded, holding that the petition for fees was insufficient to establish Magdalena's inability to pay or Christopher's ability to pay. *Id.* at ¶ 53. The record shows that the court awarded no further interim fees, leaving Christopher's total interim fee contribution at $10,000.

> my requirements, *and the nature of the results that are ultimately achieved on my behalf*." (Emphasis added.)

And,

> "The counsel's fees for services may not be contingent upon the securing of a dissolution of marriage, upon obtaining custody, or be based upon the amount of maintenance, child support or property settlement received, except as specifically permitted under Supreme Court rules."

¶ 6 A. Evidence at the Dissolution Hearing

¶ 7 The dissolution case proceeded to trial before the court conducted its hearing on the fee petition. Because Magdalena could no longer afford to have an attorney to represent her, she represented herself at trial. Magdalena testified that she had no assets or income. She admitted that she had not looked for work or kept a job diary during the course of the divorce proceedings, as she had been ordered two years prior. She explained, however, that she was focusing her efforts on representing herself in the divorce proceedings. She could no longer afford an attorney to represent her, and the divorce proceedings took much of her time. She would look for a job when the divorce proceedings concluded. Christopher, on the other hand, historically has had an income of approximately $100,000 per year working as an attorney. Christopher submitted more than 30 exhibits relating to his income, expenses, and debt. Neither party presented a comprehensive financial affidavit as described in Local Rule 11.02. 19th Judicial Cir. Ct. R. 11.02 (eff. Dec. 1, 2006).

¶ 8 In its judgment, the trial court awarded Christopher all of the debt-encumbered marital property, including the marital residence (valued at $630,000 with approximately $665,000 in remaining mortgage payments) and the living room furniture ($4,000). The court also ordered that

Christopher be responsible for all other marital debts, such as: (1) the outstanding balance on the parties' credit cards; (2) between $30,000 and $50,000 in state and federal tax liabilities; and (3) $126,000 lost on a condominium short sale. As to assets, the court ordered that Christopher's $47,000 IRA be split 70/30 in favor of Magdalena. The court awarded as non-marital property an additional $46,000 in IRA funds exclusively to Christopher.

¶ 9 The trial court denied Magdalena maintenance going forward. However, it justified the temporary maintenance Magdalena had received during the proceedings. It noted that, during the proceedings, Magdalena was financially unable to procure a residence of her own while Christopher had lived in the well-appointed marital residence. Additionally, Magdalena's failure to submit a job diary as originally ordered was somewhat understandable due to the time-consuming nature of representing herself against a team of lawyers on issues of custody and finance.

¶ 10 The trial court awarded Christopher sole custody of the parties' two minor children. The court ordered that Magdalena pay $260 per month in child support, based on an imputed income of $16,000 per year. Relating to an earlier petition as to the third daughter, who reached the age of majority during the course of the proceedings, the court ordered that Magdalena pay $25 per week in retroactive child support.[2] In determining the imputed income, the court noted that Magdalena had a sporadic employment history and did not work at all during the marriage. As to outstanding attorney fees for the children's representatives, the court ordered that Magdalena pay 25% and Christopher pay 75%. The court noted that Christopher had already paid approximately $17,000 in such representative fees.

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[2] This child resulted from an earlier relationship of Magdalena's, but Christopher undertook her care.

¶ 11 B. Section 503(j) Fee Petition Hearing

¶ 12 Meanwhile, Christopher had moved to strike the Coladarci fee petition. He argued that: (1) the underlying fee agreement was void as against public policy because it contained a contingency fee not permitted in domestic matters; and, alternatively, (2) the petition did not set forth a sufficient factual basis upon which to grant fees.

¶ 13 The trial court denied the motion to strike, stating that, when read as a whole, the fee was not contingent on the outcome of the divorce proceedings. The court found that the petition set forth a sufficient factual basis to proceed to hearing.[3]

¶ 14 At the hearing, the Coladarci firm clarified that it sought to collect fees only from Christopher, not its own client, Magdalena. The parties did not present new evidence as to their respective financial circumstances. Instead, they relied on the financial evidence presented during the dissolution proceeding. The Coladarci firm presented its 49-page client ledger detailing the work performed. Much of the argument concerning the reasonableness of the fees centered on the litigious nature of the pre-trial proceedings, over which the court had earlier presided.

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[3] Christopher brought his motion to strike pursuant to sections 615, 619, and 619.1 of the Illinois Code of Civil procedure, which concern motions with respect to pleadings. 735 ILCS 5/615, 619, and 619.1 (West 2010). Some question was raised as to whether the petition for fees could be subject to motions to strike under these sections. The trial court did not believe so, but essentially evaded the question by finding that Christopher's motion to strike should fail on the merits, both because the fee agreement was not against public policy and because the fee petition set forth a sufficient factual basis upon which to grant fees.

¶ 15 In its written finding, the trial court began by providing context. It noted that it was granting relief pursuant to section 503(j) of the Act. 750 ILCS 5/503(j) (West 2010). Section 503, generally, addresses the disposition of marital property. Section 503(j), specifically, provides for a hearing on a fee petition after proofs have closed as to all other issues between the parties but before judgment is entered.

¶ 16 The trial court noted that the Coladarci firm sought to collect fees only from Christopher, not Magdalena. Perhaps because of this, the court did not enter an exact fee amount to which Coladarci was entitled. Rather, it stated that, due to the overly litigious nature of the proceedings, it could not find reasonable "all" of the Coladarci fees. The court noted that the Coladarci firm encouraged Magdalena to pursue "devastating" and false accusations of inappropriate sexual conduct in order to obtain custody. The Coladarci firm could not be compensated for fees related to that matter.

¶ 17 However, the Coladarci firm was entitled to fees associated with its defense of Christopher's, almost equally devastating, "unfair[] attempt to portray [Magdalena] as mentally unbalanced and out of control." The court noted Christopher's "uncooperative" and "uncompromising" approach to the case, referring to his "countless motions" over "simple matters" that could have been resolved outside the court.[4] The court characterized Christopher as having nearly "endless" legal resources in that, as an attorney, he could participate in the proceedings. Christopher's ability to assist and participate in the proceedings as an attorney, more than any other factor, drove up the cost of litigation for Magdalena. Because of this, Christopher was able to out-litigate Magdalena, causing her to deplete any financial resources she may have had, and ultimately requiring her to proceed *pro se*. At the hearing, the court disagreed with Christopher when he argued that Magdalena had

[4] An example cited at the hearing was a petition to return Halloween decorations.

voluntarily impoverished herself, and, therefore, she could not argue inability to pay her own attorney fees. The court reminded Christopher that Magdalena did not work during the divorce proceedings because she represented herself, and, therefore, it could not be said with certainty that she had time to work.

¶ 18 The trial court acknowledged that Christopher had borne the vast majority of expenses to date. Among other expenses, he had paid: (1) all costs associated with raising the children; (2) legal fees for the children's representatives; (3) $10,000 to date for Magdalena's legal fees; and (4) $20,000 to date for his own legal fees, with $50,000 remaining due. Additionally, going forward, Christopher would be responsible for nearly all of the marital debt and for a greater share of the remaining child-representative fees.

¶ 19 The trial court further acknowledged that attorney fees are, generally, the responsibility of the party that incurs them. However, it found that Magdalena did not have the ability to pay. Though financially strapped, Christopher did have the ability to contribute. The court ordered Christopher to contribute an additional $10,000 for the Coladarci fees. This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, Christopher challenges the validity of the fee agreement and the trial court's order that he contribute an additional $10,000 for the Coladarci fees. Magdalena did not file a brief in response. However, as the record is simple and the issues can be decided without the aid of an appellee's brief, we proceed. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 22 A. Validity of Fee Agreement

¶ 23 Christopher argues that the Coladarci fee agreement is void as against public policy, and, therefore, the Coladarci firm cannot collect any fees. Specifically, Christopher complains that the

fee agreement contains an impermissible contingency provision. For the reasons that follow, we disagree that the Coladarci firm has sought a contingency fee. Therefore, we reject Christopher's argument.

¶ 24 The Illinois Rules of Professional Conduct prohibit contingency fees in domestic-relations matters. Rule 1.5(d)(1) states:

> "(d) A lawyer shall not enter into an arrangement for, charge, or collect:
>
> (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a dissolution of marriage or upon the amount of maintenance or support, or property settlement thereof, provided, however, that the prohibition set forth in Rule 1.5(d)(1) shall not extend to representation in matters subsequent to final judgments in such cases." 134 Ill. 2d R. 1.5(d)(1) (eff. Aug. 1, 1990).

¶ 25 The common law also prohibits contingency fees for domestic-relations matters. See, *e.g.*, *In re Fisher*, 15 Ill. 2d 139, 153 (1958); *In re Marriage of Malec*, 205 Ill. App. 3d 273, 288-89 (1990); *Liccardi v. Collins*, 180 Ill. App. 3d 1051, 1061 (1989); and *Stoller v. Onuszko*, 10 Ill. App. 3d 598, 599 (1973). Contingency fees in marriage dissolution proceedings are against public policy due to the concern that, if an attorney has a financial interest in the outcome of the case, reconciliation of the parties will either be deterred or prevented. *Malec*, 205 Ill. App. 3d at 290.

¶ 26 What constitutes a contingency fee is not always black-and-white. Certainly, blatant contingency fees, such as pre-determined lump sums based on certain results or fees representing a certain percentage of the award for claims of child support, maintenance, or property distribution, are not allowed. *Malec*, 205 Ill. App. 3d at 288-89; *Stoller*, 10 Ill. App. 3d at 599. However, while a pre-set multiplier would not be appropriate, fees may be "enhanced" in consideration of circumstances. *Malec*, 205 Ill. App. 3d at 288. Considering the results of the case as just one factor

in determining the reasonableness of a fee does not automatically convert the fee into an illegal contingency fee. *Id.*

¶ 27 Looking at the instant fee agreement, we note that the construction, interpretation, or legal effect of a contract is a question of law, to be reviewed *de novo*. *Avery v. State Farm Mutual Auto Insurance Co.*, 216 Ill. 2d 100, 129 (2005). When interpreting a contract, the court considers the intention of the parties, which can best be determined by considering the contract as a whole, reviewing each part in light of the other parts. *Weidner v. Szostek*, 245 Ill. App. 3d 487, 491 (1993). Therefore, a contract is not ambiguous simply because one paragraph, read in isolation, is subject to more than one reasonable interpretation; the court must look to the entire contract to see whether other provisions clearly resolve the ambiguity and leave only one reasonable interpretation. See, *e.g.*, *State Farm v. McFadden*, 2012 IL App (2d) 120272, ¶ 26 (pertaining to the interpretation of an insurance contract).

¶ 28 Here, the fee agreement, when read as a whole, cannot be construed to establish that the Coladarci firm arranged for a contingency fee. As noted, case law does not support the idea that the complained-of phrase, which allows for the consideration of "the nature of the results that are ultimately achieved," clearly connotes a contingency fee. See, *e.g.*, *Malec*, 205 Ill. App. 3d at 288 (considering the results of the case as just one factor in determining the reasonableness of a fee does not automatically convert the fee into an illegal contingency fee). Even if this phrase, in isolation, raises the question of a contingency fee, other provisions of the contract resolve the issue. Though Christopher fails to quote this portion of the fee agreement, the agreement expressly states: "The counsel's fees for services may not be contingent upon the securing of a dissolution of marriage, upon obtaining custody, or be based upon the amount of maintenance, child support or property

settlement received." The agreement also states that "the principal basis for computing fees is the time spent on services." Indeed, here, the firm only seeks fees pertaining to the hourly rate.

¶ 29 In sum, we reject Christopher's argument that the Coladarci firm utilized an impermissible contingency fee agreement.

¶ 30 B. Evidence Supports Contribution

¶ 31 Christopher next argues that, even if the Coladarci firm presented an adequate fee agreement, the evidence did not support the court's order that Christopher contribute $10,000. For the reasons that follow, we disagree.

¶ 32 Attorney fees are generally the responsibility of the party who incurred them. *In re Marriage of Hasabnis*, 322 Ill. App. 3d 582, 598 (2001). In determining whether to award a fee contribution under section 503(j), the court must consider the general reasonableness of the fees, the client spouse's inability to pay, and the contributing spouse's ability to pay. *Id.* at 596-98. Attorney fees under section 503(j) of the Act are awarded after proofs have been closed in the final hearing on all other issues between the parties but before judgment is entered. *Id.* at 594; 750 ILCS 5/503(j) (West 2010). The award of fee contribution to one party from another party shall be based on the criteria for division of marital property under section 503 of the Act, and, if maintenance has been awarded, on the criteria for an award of maintenance under section 504 of the Act. *Id.* The court need not conduct a separate hearing for fees in every instance where preexisting proceedings accommodate the hearing of relevant evidence on the matter. *Id.* at 595 (discussing *In re Marriage of Brackett*, 309 Ill. App. 3d 329, 345 (1999)). In most cases, once the trial court has weighed marital property criteria in section 503 and, if relevant, maintenance criteria in section 504, it will have enough information on record from which to order a fee contribution. *Id.* at 596. The allowance of attorney

fees in a dissolution case and the proportion to be paid by each party are within the trial court's discretion and will not be disturbed on appeal absent an abuse of that discretion. *Id.* at 598.

¶ 33 Here, the evidence supported the reasonableness of at least $10,000 in additional attorney fees, to be paid by Christopher. The Coladarci firm presented evidence that $138,000 in fees remained unpaid. These fees were based entirely on hourly rates. The firm presented a 49-page ledger detailing each hour worked and the type of work performed. The trial court noted that, while some of the work was unnecessary, at least a "portion" was incurred in order to defend against Christopher's frivolous motions. The court stated that Christopher's litigiousness, more than any other factor, drove up the cost of litigation for Magdalena and ultimately required her to proceed *pro se*.

¶ 34 Christopher complains that the firm failed to substantiate the reasonableness of fees because, as admitted at the hearing, the firm did not always contemporaneously record the work performed. True, courts prefer that time records be kept contemporaneously with the performance of tasks. *Malec*, 205 Ill. App. 3d at 290. The rationale is that, the closer in time that the record is made, the more likely it is to be accurate. *Id.* at 291. Still, it is permissible for an attorney to reconstruct hours from whatever information available, such as date books, office records, and court documents. *Id.* The obvious inference is that the contemporaneous nature of the record speaks to weight, not admissibility. Here, the trial court oversaw many of the frivolous petitions against which the firm had to defend. It knew this work had been completed. The court's determination on reasonableness was well-considered, and any attack on this component of the fee order must fail.

¶ 35 The evidence also supports the court's finding that Magdalena's financial status requires a $10,000 contribution from Christopher. Christopher does not dispute that Magdalena has, essentially no assets or income. Rather, he argues that, because Magdalena voluntarily

impoverished herself, she was precluded from claiming that she had an inability to pay. See, *e.g.*, *In re Marriage of Schuster*, 224 Ill. App. 3d 958, 970 (1992) (as to maintenance, voluntary impoverishment precludes request for funds). However, the court expressly addressed this point at the hearing. It stated that it placed less weight on Magdalena's chosen unemployment than it would under ordinary circumstances because Magdalena was using her time to represent herself *pro se* in the face of Christopher's overzealous litigation. Magdalena has virtually no employment history, and, even in imputing an income of $16,000 per year on Magdalena, she would not have had enough money to pay $138,000 in attorney fees. Christopher does not challenge the court's explanation (he ignores it), and we do not find the court's explanation to be unreasonable.

¶ 36 Finally, the evidence supports that Christopher had the ability to contribute $10,000 in attorney fees. Christopher does not substantively challenge the finding. Indeed, he acknowledges that, in the divorce proceeding, he submitted his relevant financial documents. His complaint is that this evidence was not introduced during a separate hearing on the fee petition. However, this is of no import where, as here, the fees are awarded under section 503(j). See, *e.g.*, *Hasabnis*, 322 Ill. App. 3d at 595 (the court need not conduct a separate hearing for fees in every instance where preexisting proceedings accommodate the hearing of relevant evidence on the matter).

¶ 37 Alternatively, Christopher argues that, even if the evidence supported the court's order of contribution, this court should reverse because, technically, the firm did not follow Local Rule 11.02 in filing its fee petition. Rule 11.02 requires that any petition for fees be accompanied by a financial affidavit, the party's last two pay stubs, the party's last three federal income tax returns, and record of any additional income not reflected in the pay stubs. 19th Judicial Cir. Ct. R. 11.02 (eff. Dec. 1, 2006). Neither the Coladarci firm nor Magdalena presented these documents alongside the fee petition.

¶ 38 In certain proceedings, these documents can constitute the sole proof in support of a fee award. See, *e.g.*, *Radzik*, 2011 IL App (2d) 100374, ¶¶ 6, 40 (a section 501(c-1) petition for interim fees does not require an evidentiary hearing and, had the parties submitted current affidavits and supporting documentation under Rule 11.02, they would have procured the sort of non-testimonial evidence required). An affidavit is a written declaration sworn to before a person with legal authority to administer oaths. *Weydert Homes v. Kammes*, 395 Ill. App. 3d 512, 518 (2009). Affidavits are a substitute for testimony taken in open court, but they are often subject to higher scrutiny because they are not subject to cross-examination. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 338 (2002). We have already established that, for the purposes of awarding fees under 503(j), it is of no import whether the evidence was submitted during the dissolution hearing or during the fee petition hearing (assuming no intervening evidentiary submissions or rulings). Certainly, where, as here, a party testified, rather than submitted an affidavit, that she had no income, we will not reverse on the technicality that she did not submit an affidavit stating the same.

¶ 39 For the aforementioned reasons, we affirm the trial court's order requiring Christopher to contribute $10,000 to Magdalena's attorney fees.

¶ 40 III. CONCLUSION

¶ 41 For the aforementioned reasons, we affirm the trial court's judgment.

¶ 42 Affirmed.