No. 3-10-0238 , consolidated with 3-10-0376 for decision

Order filed February 16, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

In re the Marriage of:	)	Appeal from the Circuit Court of the
	)	Thirteenth Judicial Circuit,
LOIS VIRLEE,	)	LaSalle County, Illinois,
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 76-D-318
	)	
MICHAEL VIRLEE,	)	The Honorable
	)	James L. Brusatte,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Carter and Justice Holdridge concur in the judgment.

ORDER

Held: Where the parties' divorce was finalized under the Divorce Act without allocating a portion of the husband's pension to the wife, the wife's petition to receive a marital portion of the husband's pension under the Illinois Marriage and Dissolution of Marriage Act was properly denied.

Petitioner appeals the trial court's judgment denying her petition for a portion of respondent's retirement benefits. Respondent appeals the trial court's judgment denying his motion for sanctions based on that petition and denying his motion for a finding of indirect civil

contempt against petitioner. For the following reasons, we affirm.

BACKGROUND

Petitioner, Lois Virlee, and respondent, Michael Virlee, married in 1967. Throughout the duration of the marriage, Michael worked as a teacher and participated in the Teacher's Retirement System (TRS) pension plan. The pension plan listed Michael as the owner of the plan. Michael failed to designate a contingent beneficiary, so Lois became the default contingent beneficiary of the plan as Michael's wife. In June 1976, the circuit court of LaSalle County entered a judgment of divorce. The parties' property settlement, tendered to the court, did not discuss ownership of the pension or division of the future pension benefits. Paragraph 13 of the divorce decree provided, in part, that "each party hereto hereby releases the other from any right or interest in property now owned or hereafter acquired by the other party, except as otherwise provided herein.".

On October 1, 1977, the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) became effective.

In 1978, Michael stopped teaching and withdrew all of his contributions to TRS. In 1982, Michael returned to teaching and began to repay TRS. That same year, Michael named his children contingent beneficiaries of his retirement benefits. In 1992, Michael inquired to TRS how to change his contingent beneficiary to his "wife" but he did not name that person. In 1998 Michael completed repaying TRS all of the contributions he previously withdrew.

The 1976 divorce judgment also provided as follows:

> "[T]he real property owned by the parties hereto shall remain in joint tenancy and *** [Lois will] be allowed to remain in

> possession of said residence house together with the minor children. Said possession to terminate upon the happening of any of the following: When the youngest child of the parties reaches 18 years of age ***. * * * Upon the happening of any of the above, the residence house is to be sold and the net proceeds received therefrom divided equally between the parties."

Lois and Michael's youngest child reached 18 years of age in 1990. Michael asked Lois to sell the house in 1990 and again in 1997. Lois refused to sell the house. Michael did not ask again.

Michael retired and began receiving retirement benefits from TRS in 2004. Lois does not receive any portion of Michael's retirement benefit. Lois personally requested Michael provide her a share of his pension. He refused. In May 2009, Lois filed a petition in the circuit court of LaSalle County titled Petition for Determination and Allocation of Retirement Benefit of Defendant. The petition sought an order to pay Lois a portion of Michael's retirement benefit pursuant to the Dissolution Act.

In June 2009 Michael filed a petition titled Petition for Adjudication of Indirect Civil Contempt based on Lois's refusal to sell the residence, and requested a judgment to enforce that provision. In July 2009 Lois filed a motion for summary judgment on the pleadings. In December 2009, Michael filed a motion for sanctions, fees, and costs based on Lois's petition. In January 2010 Lois filed a second motion for summary judgment.

In February 2010 the circuit court of LaSalle County held a hearing on Lois's petition and motions for summary judgment, and Michael's petition for adjudication of civil contempt.

Following the hearing, the trial court denied Lois's motion for summary judgment and granted Michael's oral motion to dismiss the May 2009 petition. The court denied Michael's petition to enforce the provision in the divorce decree requiring Lois to sell the house. The court also denied Michael's motion for sanctions, fees, and costs.

In March 2010 Michael filed a notice of appeal from the trial court's judgment that Lois is not in indirect civil contempt of the 1976 divorce decree and denying his motion for sanctions, fees, and costs. This court docketed that appeal as No. 3-10-0238. In May 2010 the court denied Lois's motion to reconsider the judgment denying her petition and granting Michael's motion to dismiss. In May 2010 Lois filed a notice of appeal from the February 2010 judgment. This court docketed Lois's appeal as No. 3-10-0376.

In October 2010, this court, on its own motion, entered an order consolidating Lois and Michael's appeals for decision.

ANALYSIS

Lois argues that the trial court erred in denying her petition for a marital share of Michael's pension because paragraph 13 of the parties' divorce decree is insufficient to waive her "rights" in the pension. Lois argues that she is a co-owner of the pension with an equal interest in the property. Lois argues that she developed rights in the future benefits under the pension plan throughout the duration of the parties' marriage. Consequently, she argues, the general language in the divorce decree is insufficient to relinquish her "right in the pension assets" because rights in a pension can be relinquished only through a QILDRO issued on the plan administrator.

Lois's claim of partial ownership of Michael's pension is only true if the Dissolution Act,

rather than the former Divorce Act, applies to its disposition. See *Norris v. Norris*, 16 Ill. App. 3d 879, 880 (1974) (under the Divorce Act "[a]ll other property *** was declared the sole property of the defendant, title always having been in his name alone"). Lois argues that, as a result of the failure to adjudicate the disposition of the pension in the divorce decree, the Dissolution Act now applies to the pension pursuant to section 801(b) of the Dissolution Act, and the court's decision in *Kujawinski v. Kujawinski*, 71 Ill. 2d 563, 577 (1978). Section 801(b) of the Dissolution Act reads as follows:

> "(b) This Act applies to all pending actions and proceedings commenced prior to its effective date with respect to issues on which a judgment has not been entered." 750 ILCS 5/801(b) (West 2006).

In *Kujawinski*, the court wrote as follows:

> "Had the legislature chosen to apply the concept of equitable distribution of property only to property acquired after the Act became effective, the full impact and purposes of the new act would not have been felt for at least a generation. [Citation.] Such prospective application would continue the very inequity which the legislature sought to remedy and would place the present generation of married couples at a decided disadvantage in comparison with subsequent generations of married couples." *Kujawinski*, 71 Ill. 2d at 577.

Michael argues that *Kujawinski* is inapposite because the trial court entered the divorce decree

and all matters were fully litigated, including disposition of his pension, *before* the effective date of the Dissolution Act.

The trial court entered the parties' divorce decree, including paragraph 13 waiving any claim Lois had to Michael's property "now owned or hereafter acquired," prior to the effective date of the Dissolution Act. Lois argues that Michael's pension is, nonetheless, an "issue[] on which a judgment has not been entered," to which the Dissolution Act applies. 750 ILCS 5/801(b) (West 2006). See *West v. West*, 76 Ill. 2d 226, 234 (1979), quoting *Staub v. Staub*, 67 Ill. App. 3d 1004 (1978) (" 'the legislature attempted through section 801(b) to allow *** those issues which had not been fully litigated prior to the effective date of the new act to be decided under the new law. It is not this section's intent to require the relitigation of issues already decided under the previous law").

In support of her argument that the divorce decree is not final as to the disposition of Michael's pension, Lois notes the fact that the pension was not a subject of the divorce proceedings, the parties never discussed or presented evidence on the pension, and the trial court never considered the pension plan or any right Lois may have had to the pension. Lois also notes that the pension was not susceptible to division at the time the court granted the parties' divorce because the information needed to determine the value of the pension and any share due to each spouse was not yet available. She argues that the pension had no real value until it matured to the point it was sufficient to fund a retirement plan and, therefore, it was not subject to division at that time.

Michael responds Lois waived any interest she had in his pension pursuant to paragraph 13 of the divorce decree, the decree was a final judgment as to his pension, and, therefore, the

Dissolution Act does not apply to her petition. Michael notes the absence of language in the divorce decree reserving distribution of his pension and of any language finding special equities that might entitle Lois to a share of his pension. "[P]rovisions for 'special equities' [in the Divorce Act] permitted the court to invade the property of the title-owning spouse for the purpose of transferring it to the other spouse upon termination of the marriage." *Kujawinski*, 71 Ill. 2d at 575. Michael argues that, due to the absence of special equities, Lois had no right to a share of his pension when the trial court entered the divorce decree. Michael further argues that, applying the Divorce Act to Lois's current petition, the petition fails to state that she has any right to a share of his pension because the current petition fails to allege special equities.

"Generally, a statutory amendment will not be given retroactive effect absent a clear expression of legislative intent. [Citation.]" *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 198 (2009). Section 801(b) of the Act is a clear expression of legislative intent of the retroactive effect of the Dissolution Act. If section 801(b) applies in this case, we are bound to hold that the Dissolution Act applies to Lois's petition. *Konetski*, 233 Ill. 2d at 198 ("We must honor the legislature's expressed intent on retroactive application in the absence of a constitutional prohibition"). To determine whether section 801(b) applies to give the Dissolution Act retroactive effect to Lois's petition and the disposition of Michael's pension, we must determine whether the pension was an issue on which judgment was entered in the 1976 divorce decree.

There is no dispute that the divorce decree does not specifically address Michael's pension or whether, subsequent to the parties' divorce, Lois was to receive a share of the pension upon Michael's retirement. The decree recites that "the parties hereto have acquired certain personal property during the course of their marriage, namely: household furniture and

furnishings, a 1970 Olsmobile [*sic*] automobile, a 350 Honda motorcycle, a 1969 wheel camper and camping supplies, and a Sea King boat and motor." The decree lists the parties' real property only as the "residence house" in Streator, and recites that the "parties *** have acquired certain debts and obligations." Paragraph 12 of the divorce decree states that Lois "waives alimony and support for herself" and paragraph 13 states that "each party *** hereby releases the other from any right or interest in property now owned or hereafter acquired by the other party, except as otherwise provided herein."

The divorce decree was a final judgment with regard to Michael's pension only if paragraph 13 encompasses the pension. We hold that paragraph 13 applies to waive any claim Lois may have had to an equitable share of Michael's pension under the Divorce Act. Although under the Divorce Act the pension was in fact Michael's property, under then-existing law Lois may have had a legal right to an equitable share of that property. Under section 17 of the Divorce Act:

> " 'Whenever a divorce is granted, if it shall appear to the court that either party holds the title to property equitably belonging to the other, the court may compel conveyance thereof to be made to the party entitled to the same, upon such terms as it shall deem equitable.' [Citation.] While courts in divorce actions are thus empowered to determine the property rights of the parties solely upon the basis of equitable ownership and regardless of fault in the dissolution of the marriage, special circumstances and existing equities sufficient to justify the conveyance are required to

be alleged in the complaint and established by the evidence. [Citations.] Relief cannot be granted where there are no allegations of equities or special circumstances in the complaint." *Persico v. Persico*, 409 Ill. 608, 610 (1951).

To compel a conveyance under section 17 of the Divorce Act, "[s]pecial circumstances and equities must be alleged and proven." *Overton v. Overton*, 6 Ill. App. 3d 1086, 1090 (1972). Those special circumstances and equities include "the contribution of money or services other than those normally performed in the marriage relationship which has directly or indirectly been used to acquire or enhance the value of the property." *Id.* Under the Divorce Act, "[t]he rights and interest a wife has in the property of her husband by virtue of the marriage relation alone will not support a conveyance of property under Sec. 17 of the Divorce Act." *Id.*

Lois's complaint does not request any of Michael's separate property. The complaint asks that in addition to "any other and further relief as the Court shall seem meet and just," that she be allowed to remain in possession of the parties' residence, for an award of the household furniture, a car, and support for the minor children. Lois's complaint for divorce does not allege equitable ownership of any of Michael's property. The complaint fails to allege any of the types of contributions to the marital relationship that courts recognized under the Divorce Act as giving rise to an equitable interest in property belonging to a spouse. In *McGaughy v. McGaughy*, 410 Ill. 596, 609 (1951), the court noted that "[w]here the wife makes no contribution to the acquiring of the real estate, the court would not be justified, upon granting a divorce to her, in decreeing the title of the husband's land to her except in cases of some special equity arising out of the particular facts in the case." Lois's complaint failed to allege any particular facts of her

financial contributions to the marriage or Michael's inability to pay alimony. *Id.*, at 610 (citing *Lipe v. Lipe*, 372 Ill. 39 (1927) (affirming award of husband's property to wife where "wife had actually put $4500 into the land and *** the husband was deeply in debt and had no money with which to pay alimony").

> "[I]t is usually imperative that the party claiming the interest plead with specificity allegations of the equities that, if proven, would allow the court to order a conveyance. In the absence of such a plea the court's hands are tied. It cannot direct a transfer under section 17 even upon facts shown by the evidence to demonstrate equitable merit otherwise sufficient to warrant a divesture of the holding spouse's interest in the property.' *Shumak v. Shumak*, 30 Ill. App. 3d 188, 191-192 (1975).

At the time of the parties' divorce, the Divorce Act also provided as follows:

> "When a divorce is decreed, the court may make such order touching the alimony and maintenance of the wife or husband *** as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just ***. The court may order the husband or wife, as the case may be, to pay to the other party such sum of money, or convey to the party such real or personal property *** as settlement in lieu of alimony, as the court deems equitable.
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> * * *

> Irrespective of whether the court has or has not in its decree made an order for the payment of alimony or support it may at any time after the entry of a decree for divorce, upon obtaining jurisdiction of the person of the defendant *** make such order for alimony and maintenance of the spouse *** as, from the evidence and nature of the case, shall be fit, reasonable and just, but no such order subsequent to the decree may be made in any case in which the decree recites that there has been an express waiver of alimony or a money or property settlement in lieu of alimony or where the court by its decree has denied alimony.
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> * * *
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> The court may, on application, from time to time, terminate or make such alterations in the allowance of alimony and maintenance *** as shall appear reasonable and proper." 40 Ill. Rev. Stat. §18 (1976).

Under section 18, an order granting Lois a share of Michael's retirement benefit was *possible* under the former Divorce Act absent pleading and proof of special equities.

> "Section 18 *** does not require the showing of special equities. This section authorizes a decree for conveyance of title to property *to the party entitled to alimony* where title to property rather than periodical alimony is more equitable." *Yoselle v. Yoselle*, 54 Ill. App. 2d 354, 357-358 (1964).

However, the complaint for divorce does not request alimony. Lois in fact waived alimony in the divorce decree. Unlike her claim that paragraph 13 of the divorce decree was not intended as a waiver of her rights in Michael's pension, Lois does not dispute the effect of her waiver of alimony. As a result of Lois's waiver of any right to alimony, she cannot now ask the court to convey the pension to her under section 18 of the Divorce Act. "[T]here being no order for alimony in this case, the statute does not confer upon the court power to retain jurisdiction of the persons and subject-matter for the purpose of later providing for alimony for the wife." *Smith v. Johnson*, 321 Ill. 134, 141 (1926); *Maginnis v. Maginnis*, 323 Ill. 113, 117 (1926) (requiring that the provision for alimony in the decree take the form of a periodic allowance to trigger operation of section 18 permitting alterations in the allowance of alimony and maintenance as shall appear reasonable and proper).

We find that under then existing law, the complaint for divorce did not give rise to any claim of a right to an equitable share of Michael's pension. Thus, the pension remained Michael's separate property. *Norris*, 16 Ill. App. 3d at 880. Lois specifically released her interest in an equitable share of Michael's property under the Divorce Act. We also hold that the divorce decree effectively forecloses any claim Lois may have had to a marital share of Michael's pension under the Dissolution Act. Even were we to conclude that the pension did not become Michael's "property" until he retired,[1] Lois's current petition would still fail. Lois released any interest in property Michael "hereafter acquired." Absent such release of future property acquisitions, the retroactivity provision of the Dissolution Act might have become relevant to

[1] " 'It has long been settled that compulsory participation in a statutory pension plan confers no vested rights.' [Citation.]" *People ex rel. Illinois Federation of Teachers, AFT, AFL-CIO v. Lindberg*, 60 Ill. 2d 266, 273 (1975)."

determine whether Lois is entitled to a marital share of Michael's pension. Here, however, the divorce decree specifically foreclosed any consideration of the proper disposition of property acquired by either party subsequent to the entry of the divorce decree.

We find no grounds for Lois to claim any right to an equitable or marital share of Michael's pension. The trial court's judgment dismissing her petition is affirmed.

Michael also cross-appealed the trial court's judgment denying his petition for a finding of contempt and his motion for sanctions, fees, and costs pursuant to Supreme Court Rule 137 and section 508(b) of the Dissolution Act. The entirety of Michael's argument that the trial court abused its discretion in denying his petition for a finding of civil contempt is that the divorce decree clearly directed Lois as to what actions were required of her, and that she failed to comply with the decree despite his requests she do so.

Lois responds Michael waived his right to enforce the property settlement agreement and force a sale of the parties' former residence by failing to act for over 19 years. She asserts that Michael took no action to enforce the settlement in 1990 when the parties' youngest child reached 18 years of age, but admits that he did ask her to sell the home in 1997. Lois also admits that Michael obtained the right to force a sale of the home in 1990, and that he continued to have that right thereafter, but, she argues, the doctrine of *laches* bars Michael from seeking to enforce the property settlement agreement now, when, as a result of his inaction, she has suffered prejudice. Specifically, she has continued to reside in and make improvements to the home throughout that time, resulting in a change in position while she reasonably believed that Michael had no further interest in the home.

"*Laches* is an equitable doctrine that precludes the assertion

> of a claim by a litigant whose unreasonable delay in raising that claim has prejudiced the opposing party. [Citation.] The party asserting *laches* as a defense to a claim must prove two elements: (1) lack of diligence by the party asserting the claim; and (2) injury or prejudice as a result of the delay to the party asserting *laches.* [Citation.] The decision as to whether to apply *laches* to a given case rests within the sound discretion of the trial court, and we will not disturb that decision absent an abuse of discretion." *In re Marriage of Davenport*, 388 Ill. App. 3d 988, 993 (2009).

The trial court refused to find that *laches* applied to Michael's petition. The court was careful to note that "I do not have a petition to enforce the decree in front of me. I have a contempt petition." The trial court properly concluded that *laches*, as a defense to enforcement of the decree, was not relevant to Michael's petition.

> "Contempt that occurs outside the presence of the trial court is classified as indirect contempt. [Citation.] The existence of an order of the trial court and proof of willful disobedience of that order is essential to any finding of indirect civil contempt. [Citation.] The burden initially falls on the petitioner to prove by a preponderance of the evidence that the alleged contemnor has violated a court order. The burden then shifts to the alleged contemnor to show that noncompliance with the court's order was not willful or contumacious and that he or she had a valid excuse

> for failure to follow the court order. [Citation.] Whether a party is guilty of indirect civil contempt is a question for the trial court, and its decision will not be disturbed on appeal unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion." *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 41 (2010).

The trial court's judgment that Lois is not in indirect civil contempt of the divorce decree is not an abuse of discretion.

> " 'A trial court abuses its discretion when it acts arbitrarily, without conscientious judgment, or, in view of all of the circumstances, exceeds the bounds of reason and ignores recognized principles of law, resulting in substantial injustice.' [Citation.]" *In re Marriage of Daebel*, ___ Ill. App. 3d__, ___ (No. 2-09-1248 September 15, 2010).

The record reflects that the trial court applied conscientious judgment to carefully consider the testimony, and applied appropriate principles of law to Michael's petition. The court stated that it could not "find by a preponderance of the evidence that [Lois] engaged in willful contempt under this evidence." The court considered a conversation in 1990, when Michael broached the subject of selling the house with Lois, when the right to enforce that portion of the divorce decree first arose. During that conversation, when Lois disagreed with Michael, the evidence was that Michael told Lois that he "washed his hand of it" and stated that if Lois agreed to pay the expenses associated with the house, "that he wasn't going to proceed at that time, at least."

The trial court also considered a 1997 conversation during which, Lois testified, Michael stated that she could keep the house but requested five thousand dollars when she sold it. Michael testified that he did not remember the specifics of that conversation. The court concluded as follows:

> "What I have here is parties that had a judgment that neither one of which enforced when it could have been enforced, and the gentleman's own words stating that he wasn't going to enforce it if she would continue to pay the expenses relating to the house."

The court also considered Michael's request that he made within the last year that Lois sell the house, but it noted that Michael's latest request occurred "in the middle of contested litigation."

The trial court noted that the issue was not whether Lois correctly believed that she did not have to sell the house, but whether she subjectively believed that she did not have to sell the house. Based on the parties' conduct, the court concluded that she did subjectively believe that she did not have to sell the house. The court held that Lois's subjective belief provided "a *** reason for doing what she did." The court held that the evidence failed to prove willful contempt of the divorce decree but noted that its ruling "does not mean *** that this provision has in any way been changed, modified or abrogated" and that it was possible the provision could still be enforced. The court merely held that the evidence proved that Lois's "noncompliance with the court's order was not willful or contumacious." *Id.*

We agree that the parties' statements and conduct gave Lois a subjective belief that she did not have to sell the house and that her subjective belief was reasonable. We find that the trial

court's judgment is based on the evidence and is supported by the law. See *Cutler v. Northwest Suburban Community Hospital, Inc.*, ___ Ill. App. 3d ___, ___ (No. 2-09-1074 November 29, 2010) (finding plaintiff's good-faith basis for refusing to comply with order "was not a 'deliberate and contumacious disregard for the court's authority' "). Accordingly, the trial court's judgment as to the petition for contempt is affirmed.

Finally, we affirm the trial court's judgment denying Michael's motion for sanctions, fees, and costs. Michael filed a motion for sanctions, fees, and costs pursuant to Supreme Court Rule 137 and section 508(b) of the Dissolution Act.

> "Supreme Court Rule 137 permits the trial court to impose sanctions against a party or its counsel where a motion or pleading is filed that is 'not well grounded in fact, not supported by existing law, or lacks a good-faith basis for modification, reversal, or extension of the law, or is interposed for any improper purpose.' [Citations.]" *Yunker v. Farmers Automobile Management Corp.*, ___ Ill. App. 3d ___, ___ (2010).

Section 508(b) of the Dissolution Act reads, in pertinent part, as follows:

> "If at any time a court finds that a hearing under this Act was precipitated or conducted for any improper purpose, the court shall allocate fees and costs of all parties for the hearing to the party or counsel found to have acted improperly. Improper purposes include, but are not limited to, harassment, unnecessary delay, or other acts needlessly increasing the cost of litigation."

750 ILCS 5/508(b) (West 2006).

We find that Lois's petition was founded on a good-faith basis for extension of law and was not interposed for any improper purpose. The court has noted, with regard to the passage of the Dissolution Act, as follows:

> "The primary legislative objective [in passing the Dissolution Act was] to create a system of property division upon dissolution of marriage that is more equitable than that which previously existed in this State. It is evident that the legislature recognized glaring inequities in the earlier law and favored change. For instance, by giving both spouses an interest in 'marital property' upon dissolution of marriage, the legislature sought to award economic credit in the distribution of property for indirect or domestic contributions to the accumulation of property and sought to replace the concept of post-marital support through alimony with one of post-marital stability through a just distribution of marital property and assets." *Kujawinski*, 71 Ill. 2d at 576.

The purpose of Lois's petition was, clearly, to correct what this State now recognizes was an inequity in the distribution of property following the parties' divorce. This is not an improper purpose. Further, we find that the petition raised a good faith argument that the divorce decree failed to address the pension, and, therefore, that the Dissolution Act might apply retroactively pursuant to section 801(b). The petition was based on the facts and grounded on a good-faith interpretation of the law. Accordingly, the trial court's judgment denying Michael's petition for

sanctions, fees, and costs is affirmed.

CONCLUSION

The circuit court of LaSalle County's order is affirmed.

Affirmed.