2013 IL App (3d) 120659-U

Order filed July 25, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

In re MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
JULIENNE A. CUMMINGS,	)	Peoria County, Illinois,
	)	
Petitioner-Appellee,	)	
	)	Appeal No. 03-12-0659
and	)	Circuit No. 08-D-642
	)	
ALEXANDER J. CUMMINGS,	)	Honorable Richard D. McCoy and
	)	Honorable Kevin R. Galley,
Respondent-Appellant.	)	Judges Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Lytton concurred in part and dissented in part.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion when distributing the marital assets, imputing income to respondent for purposes of child support and maintenance. The provision in the judgment regarding potential modification of maintenance in the future is not ripe for our review.

¶ 2 On July 18, 2012, the trial court entered a judgment dissolving the marriage of petitioner,

Julienne (Julie) Cummings, and respondent, Dr. Alexander (A.J) Cummings. On appeal, A.J argues the trial court abused its discretion by awarding Julie a larger share of the marital estate, imputing income to him for purposes of child support and maintenance, and ordering the proportional increase of maintenance payments in the future if a subsequent court order decreases child support after the youngest child graduates from high school. We affirm.

¶ 3 FACTS

¶ 4 The parties were married on July 30, 1988, and six children were born during this 24-year marriage. Julie graduated college in 1988 with a degree in social work, but was not employed outside the household after 1996, following the birth of their first child. In 1995, A.J. began working on a part-time basis as an emergency room (ER) physician at OSF Saint Francis Medical Center (OSF). In 1997, A.J. assumed full-time employment as an ER physician at OSF and served in that capacity until he resigned in August 2011. By all accounts, A.J. was an extremely competent ER physician.

¶ 5 On October 27, 2008, Julie filed a petition for dissolution of marriage. In 2008, A.J. earned $394,207.90 in annual income and the couple's children ranged in age from 3 years to 12 years of age. On December 9, 2008, the trial court entered an agreed temporary order directing A.J. to deposit his paychecks and all other income into an existing joint checking account.

¶ 6 On April 8, 2009, the court entered an agreed order which required A.J. to pay Julie $4,486 every two weeks for temporary child support and pay $2,050 toward his share of the approximately $4,200 monthly mortgage payment. A.J. earned $388,595.55 in annual income as an ER physician for 2009.

¶ 7 In December 2009, Julie filed a petition for a rule to show cause requesting the court to

find A.J. in contempt of court due to his refusal to pay temporary support, healthcare costs, mortgage payments, and to maintain life insurance for his family's benefit. The court entered an order on April 29, 2010, which found A.J. owed mortgage payment arrears of $13,830 and past due medical expenses of $2,400.77. To facilitate compliance, the court specifically directed A.J. to pay his $2,050 share of the mortgage payment on the first of each month beginning May 1, 2010.

¶ 8 On May 26, 2010, Julie filed another petition for rule to show cause requesting the court to find A.J. in contempt of court for failing to pay his share of the May 2010 mortgage payment on May 1 as required by the April 29, 2010 court order. On June 15, 2010, the court found A.J. wilfully failed to pay $2,050 toward both the May and June 2010 mortgage payments. The court ordered A.J. to pay $4,100 within three days or to report to jail. A.J.'s income for 2010 was $367,553.58.

¶ 9 In August 2011, A.J. resigned from his position as an ER physician at OSF. The parties presented conflicting explanations to the court of the circumstances surrounding A.J.'s resignation. A.J. claimed he resigned from OSF because the stress of the divorce impacted his job performance, and Julie claimed A.J. faced work-related accusations of sexual harassment.

¶ 10 A.J.'s final paycheck from OSF, dated September 9, 2011, documented he earned $14,833.47 every two weeks and would have earned $385,670.22 for the year based on this amount. After his resignation, A.J.'s income decreased $10,000 each month as compensation for his lost wages based on his disability insurance, reducing his annual income to $120,000.

¶ 11 It is undisputed that after his employment at OSF ended on or around August 30, 2011, A.J. ceased paying the court-ordered child support, at the rate of $4,486 every two weeks, and

also refused to pay $2,050 toward his share of the monthly mortgage payment. Consequently, Julie's parents began contributing to the support and care of their six grandchildren as A.J.'s arrearages in court-ordered payments grew larger.

¶ 12 On September 1, 2011, one to two days after resigning his position as an ER physician, A.J. filed a motion requesting the trial court to abate his court-ordered financial obligations to his family due to the recent change in the amount of his income. In support of this request, A.J. stated that he was "informed by his employer, OSF St. Francis Medical Center, that he would be fired or was given the opportunity to resign. He chose to resign, therefore his last day of employment was on or about August 30, 2011."

¶ 13 On September 13, 2011, the trial court entered another temporary order pertaining to support issues. The court directed the parties to liquidate a joint Smith Barney account containing approximately $106,000 and to set aside $4,800 to pay for health insurance for the family; $33,000 to pay monthly child support and maintenance as it comes due in the future; and $6,000 for fees to the guardian *ad litem* (GAL). The court also noted in its order that the funds should be used to pay "any arrearage due to Julie (claimed to be $12,500)" and further ordered any remaining funds from the $106,000 Smith Barney account to be divided equally between the parties.

¶ 14 On February 1, 2012, the trial court entered an agreed order requiring A.J. to liquidate another $36,000 Smith Barney account to pay $3,024.72 toward GAL fees and $1,000 toward attorney fees. After the payment of GAL and attorney fees, the court directed A.J. to equally divide the remaining balance of this $36,000 account to pay debts and expenses until the date of trial on the remaining contested issues. The trial court also ordered A.J. to obtain steady

employment and submit weekly job application reports to Julie's counsel.

¶ 15 Three weeks later, at a review hearing on February 22, 2012, the trial court found A.J. to be non-compliant with the court's February 1, 2012, order regarding his search for employment. Therefore, the court entered an order requiring A.J. to apply for at least one job on a daily basis, excluding weekends, and required him to apply for any open ER positions within 100 miles of Peoria.

¶ 16 On March 15, 2012, Julie filed a Motion to Force Employment, which the trial court heard on March 20, 2012. Appearing *pro se,* A.J. explained to the court that Dr. Jim Hubler offered him an ER physician position at a hospital in Macomb, Illinois. The position in Macomb would provide a base salary of approximately $296,000, working twelve 12-hour days each month, with an ability to obtain additional work shifts.

¶ 17 Dr. Barry Miller, who had been A.J.'s doctor for 14 years, also testified during the March 20, 2012, hearing and explained A.J. visited him on February 17, 2012. According to Dr. Miller, A.J. suffered from anxiety and post-traumatic stress disorder. In Dr. Miller's professional opinion, A.J. was unable to work as an ER doctor due to increased stress, anxiety, and fatigue. The trial court admitted Dr. Miller's written report and findings into evidence.

¶ 18 During cross-examination, Dr. Miller admitted A.J. visited him in October 2011 and, following this visit, Dr. Miller completed a form necessary for A.J. to qualify for benefits under his disability insurance policy. Dr. Leonard Yang, A.J's former supervisor and a friend of both parties, testified that it is highly stressful working as an ER doctor.

¶ 19 The court received a brief statement from A.J. and heard arguments from both parties. The trial court found Dr. Miller's report to be "the most bizarre report" ever submitted to the

court. The judge found that the contents of Dr. Miller's report reveals Dr. Miller's role involved "being a legal advocate on [A.J.'s] behalf instead of a medical advocate." At the conclusion of the hearing, the court ordered A.J. to pay $7,835 to Julie out of each one of his monthly disability checks. The court also ordered A.J. to accept the employment offer from Dr. Hubler.

¶ 20 The hearing on the contested financial and property issues began on April 3, 2012, and continued over a number of non-consecutive days.[1] During this hearing, A.J. explained to the court that Dr. Hubler ultimately withdrew his offer of employment once A.J. informed Dr. Hubler about his self-confessed emotional and psychiatric difficulties. In spite of losing this employment opportunity, A.J hoped to build his own practice performing aesthetic medicine but he admitted that, as the date of the hearing, he did not have any paying clients.

¶ 21 The parties moved into their marital residence, located in Princeville, Illinois, in 2007. According to a September 2009 appraisal, the marital residence had a value of $700,000. The balance on the mortgage for the home was approximately $400,000, with a monthly payment of $4,200, and a line of credit balance of approximately $106,000. The parties also owned a 78-acre "Ten Fold Farm," located in Mossville, Illinois, with a value of $279,000.

¶ 22 In addition to real estate, the parties owned gold, silver, and diamonds valued at approximately $175,000. The parties also owned a 2006 Mercedes, 2005 Toyota Sienna, 2003 Chevy Suburban, a 2001 Grand Prix, and various trailers, tractors, and all-terrain vehicles. Additionally, A.J. had a substantial gun and sword collection and numerous patents and

[1] The parties previously reached an agreement regarding custody and visitation issues in November 2011. Therefore, the evidence presented during the hearing on contested matters did not address issues related to the children.

trademarks.

¶ 23 At the time of the hearing on the contested issues, the parties held approximately $13,300 in various accounts and maintained college savings accounts for each child, totaling approximately $210,000 for all six children. In addition, A.J had a thrift and savings account from OSF, valued at $258,092.74.

¶ 24 A.J. incurred substantial credit card debt shortly after the parties separated, which he used for living expenses and a vacation for the children. At the time of the hearing in 2012, A.J. had an outstanding balance of $41,319.96 for past due child support and maintenance and $16,550 for unpaid mortgage payments, through the date of trial.[2]

¶ 25 On July 3, 2012, the court issued its detailed ruling, stating that it had "reviewed the applicable statutory provisions." The court found Julie to be more credible than A.J. and also found Dr. Miller's testimony and report to be "bizarre," replete with evidence of complicity, and indicated Dr. Miller was acting as A.J.'s legal advisor rather than a concerned medical provider.

¶ 26 With regard to A.J.'s employment, the court found that at the time of A.J.'s "voluntary termination, [his] resignation from the staff" at OSF in September of 2011, A.J. would have earned $385,670.22 for 2011. Based on the evidence, the court found A.J.'s average income was $377,184.80 between 2007 and 2010. The court explicitly found A.J. voluntarily terminated his employment in 2011, during the pending dissolution proceedings due to allegations centering on A.J.'s behavior. The court stated: "You [A.J.] weren't fired. You [A.J.] weren't terminated by your employer. You [A.J.] resigned" as a "result of your conduct." The court continued: "Your

[2]Julie requested the trial court award her these amounts in addition to her share of the assets because the trial court ordered the parties to liquidate joint assets due to A.J.'s failure to make ongoing support payments while employed.

[A.J.] claim is I can't work. I'm stressed out. I have depression. I have distraction. I have insomnia, and that I'm only prepared to do that [*sic*] as a physician what I want to do, get into an aesthetic medicine. I'm not convinced of that frankly."

¶ 27 The court also found that A.J. did not show a "bona fide, good faith, genuine demonstration that [he was] seeking subsequent employment" resulting in a situation where a $10,000 monthly disability payment constituted A.J.'s sole income. The court noted A.J's resistance "at most every turn in this case *** to addressing the responsibilities that you have, not only in terms of your ability to make a living consistent with your education, your experience, your training, but also with reference to the obligations you have to your children and in terms of timely making child support payments." The court also emphasized that the court was forced to order the liquidation of marital assets due to A.J.'s uncooperative nature and unwillingness to pay financial obligations as ordered by the court beginning in 2009. Consequently, because A.J. had not complied with previous court orders in a timely fashion, the court awarded the marital residence, and all associated mortgage debt, to Julie. The court also awarded Ten Fold Farm to Julie, knowing Julie might be compelled to sell the farm in the future in order to provide the cash necessary to support the children and herself. The court distributed a majority of the personal items, tangible assets, and accounts as requested by the parties. The court further directed A.J. to obtain a $1,000,000 life insurance policy and to pay the cost of COBRA health insurance for 36 months.

¶ 28 The court imputed annual income to A.J. in the amount of $385,670.22, by using the income he received in his last pay stub dated September 9, 2011. Based on the statutory percentage of 50 percent for the support of six children, the court ordered A.J. to pay $5,000

every two weeks for child support. Pursuant to paragraph 8A, "child support shall terminate on July 15, 2023, or when the youngest child has graduated from high school, whichever is later." Paragraph 8B of the judgment provides that A.J. shall pay $1,000.00, to Julie, every two weeks for maintenance until "terminated or modified by the court by future court order" and that maintenance would be reviewed *de novo* 24 months from the date of judgment. In addition, paragraph 8E of the judgment states that "if child support is modified as the children become emancipated, the amount of maintenance shall be increased so that the total amount of child support and maintenance remains at $6,000.00 every two weeks."

¶ 29 In total, the court's distribution of assets and existing debt resulted in Julie receiving 54 percent and A.J. receiving 46 percent of assets. The court noted that due to the length of the marriage, number of children, and Julie's contributions as a homemaker, the unequal distribution was appropriate and the distribution was the "only viable way of getting the financial concerns raised in this case from the testimony and evidence viably addressed." The court entered judgment, reflecting its July 3, 2012, findings, on July 18, 2012. A.J. timely appeals.

¶ 30 ANALYSIS

¶ 31 On appeal, A.J argues the trial court abused its discretion by disproportionately distributing the marital assets and liabilities in favor of Julie. A.J. also alleges the trial court improperly imputed income to him for purposes of child support and maintenance. Finally, A.J. claims the court's order regarding child support and maintenance is invalid because the order allows for a contingency that maintenance payments would automatically increase in the future. Julie responds the court's rulings were proper.

¶ 32 I. Distribution of Marital Assets and Liabilities

¶ 33 Section 503 of the Illinois Marriage and Dissolution of Marriage Act (Act) lists several factors a trial court should consider when determining the distribution of marital assets, and further provides that marital property should be divided in "just proportions" after considering all relevant factors. 750 ILCS 5/503(d) (West 2010). The touchstone of a proper and just apportionment is whether the distribution is equitable, which does not require mathematical equality. *In re Marriage of Thornley*, 361 Ill. App. 3d 1067, 1071 (2005). A trial court's division of property will only be reversed where it constitutes an abuse of discretion. *Id*. An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. *In re Marriage of Polsky*, 387 Ill. App. 3d 126, 135 (2008). In this case, the trial court carefully considered the factors set forth in section 503, including the duration of the marriage, the number of children, and Julie's substantial contributions as a homemaker. 750 ILCS 5/503(d) (West 2010).

¶ 34 Citing to A.J.'s demonstrated pattern of non-payment and his ongoing disinterest in seeking gainful employment as a physician, the court awarded Julie the marital residence, subject to a significant amount of existing mortgage debt due to two encumbrances. The court, mindful that Julie may find it necessary to sell the real estate and use the proceeds to support herself and the children at some point in the future, also awarded Julie the unencumbered farm property. The court specifically articulated that it would be unreasonable to expect Julie to seek or obtain employment while raising six young children.

¶ 35 In this case, the trial court divided the marital assets with a 54/46 split in favor of Julie after taking into consideration the considerable amount of marital debt and A.J.'s history of non-compliance with previous court ordered financial obligations during the prolonged dissolution

proceedings. Based on these valid, well-stated reasons supported by the unusual facts of record, we conclude the court's slightly unequal distribution of the marital assets did not constitute an abuse of discretion.

¶ 36 II. Imputation of Income to Husband

¶ 37 Next, A.J. argues the trial court erred when it imputed income to him which was commensurate with his earning potential and prior employment income. A.J. maintains his monthly disability income of $10,000 should have dictated the amount of statutory child support and his ability to pay other court-ordered amounts for maintenance.

¶ 38 Courts have the authority to compel parties to pay maintenance (*In re Marriage of Lichtenauer*, 408 Ill. App. 3d 1075, 1089 (2011)) and child support at a level commensurate with a payor's earning potential. *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 1077 (2009). A trial court's finding of net income is within the discretion of the trial court and will not be disturbed absent an abuse of that discretion. *In re Marriage of Garrett*, 336 Ill. App. 3d 1018, 1024 (2003). An abuse of discretion occurs where no reasonable person would agree with the position adopted by the trial court. *In re Marriage of Sanfratello*, 393 Ill. App. 3d 641, 646 (2009). It is well-established that in order to impute income for purposes of child support or maintenance, a court must find that one of the following factors applies: (1) the payor is voluntarily unemployed, (2) the payor is attempting to evade a support obligation, or (3) the payor has unreasonably failed to take advantage of an employment opportunity. *Gosney*, 394 Ill. App. 3d at 1077.

¶ 39 Although the presence of only one factor will justify a decision to impute income to a payor, we consider all three factors for purposes of a thorough analysis. With regard to the first

Gosney, factor, based on A.J.'s own account that his employer did not terminate his employment and, in fact, A.J. admitted to resigning on his own accord, the court's finding that A.J. resigned as a result of his own conduct is supported by the record. This finding alone is sufficient to support the trial court's imputation of income.

¶ 40 Next, *Gosney* allows a trial court to consider whether A.J.'s actions established that he attempted to evade the payment of support obligations. In this case, the trial court focused on A.J.'s history and pattern of non-compliance with his court-ordered support obligations during the prolonged dissolution proceedings. In spite of continued, steady income levels averaging $377,000 from 2007-2010, the court found it necessary to order both parties to liquidate two Smith Barney accounts, worth approximately $142,000, due to A.J.'s refusal to pay court-ordered obligations, similar to those he routinely paid during the course of the marriage. Therefore, the record demonstrates A.J.'s effort to evade paying support.

¶ 41 The third *Gosney* factor allows the court to consider whether the payor unreasonably failed to take advantage of an employment opportunity. Here, A.J. received a job offer in his field of expertise, after the court required him to submit applications for ER positions within a 100 mile radius of Peoria. In spite of the court's order of March 20, 2012, requiring A.J. to accept this position, A.J. did not begin working at the hospital in Macomb.

¶ 42 Consequently, Julie filed a motion requesting the court to compel A.J. to accept this employment opportunity extended by Dr. Hubler. During the hearing on this motion, the court learned A.J. informed Dr. Hubler that he suffered from serious mental health infirmities. As a result, Dr. Hubler withdrew his employment offer which would have paid a base salary of $296,000. The court considered whether A.J. had a legitimate health issue involving post

traumatic stress disorder and rejected this reason as a justification for A.J. to turn down or sabotage the employment offer from Dr. Hubler. The trial court is in the best position to review the evidence and weigh the credibility of the witnesses. *In re Marriage of Bates*, 212 Ill. 2d 489, 515 (2004).

¶ 43 In this case, after making the necessary credibility determinations, the court found the significant reduction of family income to $120,000 per year was the result of A.J.'s purposeful and deliberate actions designed to avoid the payment of ongoing family expenses. These findings are supported by the record. Therefore, we conclude the trial court properly imputed A.J.'s prior income to him when calculating the amount of statutory child support and when setting a small amount for bi-weekly maintenance payments.

¶ 44 III. Maintenance Modification

¶ 45 Finally, A.J. argues the provision in the judgment which seems to require an automatic increase in maintenance in response to any future, court-ordered, decrease in the amount of child support, is contrary to section 510 of the Act, which limits the modification of maintenance. 750 ILCS 5/510 (a-5) (West 2010). During oral argument before this court, Julie's counsel did not contest A.J.'s argument that an automatic increase in maintenance seems to violate section 510. Julie argues, instead, that the issue regarding any potential increase in maintenance is moot because maintenance will not be reviewed by the court until sometime after July 2014, according to the terms of the judgment of dissolution.

¶ 46 Our careful review of the judgment of dissolution establishes A.J. must pay $1,000 for maintenance and $5,000 for child support every two weeks. According to paragraph 8A, child support "*shall terminate on July 15, 2023*, or when the youngest child has graduated from high

school, whichever is later." (Emphasis added). In comparison, according to paragraph 8B, *maintenance* continues until modified by future court order, and is subject to *de novo* review 24 months from the date of the judgment, specifically sometime around July 2014. Finally, paragraph 8E provides that "*if* child support is modified as the children become emancipated, the amount of maintenance shall be increased so that the total amount of child support and maintenance remains at $6,000.00 every two weeks." (Emphasis added).

¶ 47 The provisions in the judgment can be construed together to favor A.J. by automatically *prohibiting* any increase in maintenance beyond the amount of any future reduction of the amount of child support occurring after the emancipation of any child. Either party must petition the court to modify child support or maintenance before all of the children are emancipated. The judgment provides maintenance cannot be modified, in any event, until after July 2014, approximately one year after the mandate will issue with respect to this appeal. Therefore, we conclude this issue related to maintenance is premature since no decrease in child support has been ordered to date and no modification of maintenance is possible until next summer. However, we have confidence that when the trial court has an opportunity to conduct a *de novo* review of maintenance after July 2014, the court will follow the mandates of section 510 and will not automatically increase, decrease, or terminate the amount of maintenance without properly considering the requirements of the statute.

¶ 48 CONCLUSION

¶ 49 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

¶ 50 Affirmed.

¶ 51 JUSTICE LYTTON, concurs in part and dissents in part.

¶ 52 I concur with the majority's rulings that the trial court did not abuse its discretion in distributing the marital assets or imputing income to A.J. However, I dissent from the majority's refusal to consider and declare invalid the provision in the judgment of dissolution that requires an automatic increase in Julie's maintenance as the parties' children become emancipated.

¶ 53 The majority finds that appellate review of the maintenance provision would be "premature." I disagree.

¶ 54 For this court to have jurisdiction over an issue, it must be "ripe for decision." See *Village of Maywood Board of Fire & Police Commissioners v. Department of Human Rights of the State of Illinois*, 296 Ill. App. 3d 570, 575 (1998). The ripeness doctrine precludes courts from entering a judgment unless an actual controversy is presented. *Id*. An actual controversy exists if there is a legitimate dispute requiring an immediate and definite determination of the parties' rights, the resolution of which would help terminate all or part of the dispute. *Id*.

¶ 55 There is a two-prong inquiry that courts use in determining if an issue is ripe: first, courts look at whether the issue is fit for judicial decision; second, they look at any hardship to the parties that would result from withholding judicial consideration. *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 490 (2008). Fitness for judicial decision usually means that the issue is legal, rather than factual. *Id*. at 491.

¶ 56 Here, the issue, whether the automatic increase in maintenance provision contained in the judgment violates the Act, is a legal question. Thus, the first prong of the ripeness inquiry is satisfied. See *id*. The second prong is also satisfied. It is the policy of this state to "prevent a multiplicity of suits and piecemeal appeals." *Schoen v. Caterpillar Tractor Co.*, 77 Ill. App. 2d 315,

334 (1966). By refusing to rule on the maintenance provision, the majority is encouraging, rather than preventing, a multiplicity of suits and piecemeal appeals because A.J. will be forced to file another action in the trial court, objecting to the provision, and another appeal in this court if the trial court upholds the provision.

¶ 57 Having found that the provision for an automatic increase in maintenance is ripe for consideration, I would declare it invalid. "An order for maintenance may be modified *** only upon a showing of a substantial change in circumstances." 750 ILCS 5/510(a-5) (West 2010); *Shive v. Shive*, 57 Ill. App. 3d 754, 760 (1968). A change in maintenance is appropriate only after a court considers the factors outlined in sections 504(a) and 510(a-5) of the Act and determines that the needs of the spouse receiving alimony have changed or the ability of the other spouse to pay alimony has changed. *In re Marriage of S.D.*, 2012 IL App (1st) 101876, ¶ 44. Here, the provision at issue, which automatically increases maintenance without consideration of the relevant factors of the Act, the payor's ability to pay, or the needs of the payee, is improper. An automatic increase in maintenance violates the Act and should be stricken from the dissolution judgment.