2013 IL App (4th) 120358-U

NO. 4-12-0358

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
January 9, 2013
Carla Bender
4th District Appellate
Court, IL

In re: the Marriage of	)	Appeal from
ANTHONY J. FITZGERALD, SR.,	)	Circuit Court of
Petitioner-Appellant and	)	Champaign County
Cross-Appellee,	)	No. 01D554
and	)	
BRENDA K. FITZGERALD, n/k/a BRENDA K.	)	
STANDIFER,	)	Honorable
Respondent-Appellee and	)	Arnold F. Blockman,
Cross-Appellant.	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in denying ex-husband's second supplemental motion for summary judgment in regard to his second amended petition to terminate QILDRO and enforce judgment of dissolution of marriage because there were contested facts.

Trial court properly denied ex-husband's second amended petition to terminate QILDRO and enforce judgment of dissolution of marriage.

Trial court did not abuse its discretion in denying ex-wife's motion for contribution for attorney fees.

¶ 2 In postdecree litigation, Anthony Fitzgerald filed a petition to terminate an agreed qualified Illinois domestic relations order (QILDRO) which stated how a portion of his pension, agreed to in the marital settlement agreement, was to be distributed to Brenda Fitzgerald, his former wife, now known as Brenda K. Standifer. After filing his petition, Anthony later sent a

request to admit to Brenda to which he claimed she did not timely reply. He filed a motion for summary judgment based on what he deemed to be admissions by Brenda for failing to reply in a timely manner. The trial court denied his motion. Ultimately, the trial court denied his petition to terminate the QILDRO as he had agreed to the language of the QILDRO and ~~had~~ previously agreed to the amount of his pension given to his wife and it was not limited by the present value of that amount at the date of dissolution of marriage.

¶ 3 After the denial of Anthony's petition to terminate the QILDRO, Brenda filed a motion for contribution for attorney fees. After a hearing on the motion, the trial court denied any contribution, finding the parties equally brought on the litigation and its costs by their sloppy drafting of the agreed-upon marital settlement agreement and the QILDRO and, although Anthony had greater income than Brenda, neither party was in a position to pay their own attorney fees, let alone contribute to the fees of the other. We affirm the judgments of the trial court.

¶ 4 I. BACKGROUND

¶ 5 Anthony Fitzgerald and Brenda Fitzgerald were married on January 25, 1992. On July 10, 2002, the trial court entered a written judgment of dissolution of marriage as to grounds only. On August 12, 2003, the court entered a judgment of dissolution as to ancillary matters. Incorporated in that ancillary judgment was a marital settlement agreement, which included the division of Anthony's benefits in his State University Retirement System (SURS) plan as part of the disposition of property.

¶ 6 The relevant portion of the marital settlement agreement reads:

"2.5 Retirement Plans., The exception to paragraph 2.4 is that Wife

> shall have a share of the Husband's pension with the Illinois State Universities Retirement System (hereinafter 'SURS'). The Wife's share shall be one-half of the Husband's pension with SURS acquired from the date of Marriage (January 25, 1992) through July 15, 2003, and one-half of the interest attributable to and accruing upon that sum from the date of the marriage to July 15, 2003. The Wife's share of the retirement sum shall be reduced by $25,000 which reflects the Husband's interest in the former marital residence which he shall quit claim to the Wife. The Wife's share of those retirement funds with SURS shall be awarded in an Illinois Qualified Domestic Relations Order. The parties agree that as of August 7, 2003, the actual amount to be awarded to Wife is $16,337.28. Both parties agree to execute any documents necessary or required by SURS to effect this apportionment and shall do so no later than September 30, 2003."

¶ 7 A QILDRO was entered on August 12, 2003. Section 3 of the QILDRO provided only for a lump sum payment of $16,377.28 to Brenda if Anthony retired at that time and took his pension as a lump sum payment. It made no provision for any monthly payments to Brenda if Anthony took his pension in monthly payments.

¶ 8 On March 9, 2007, Anthony filed a motion for entry of modified QILDRO stating he had "now retired" and the format of the QILDRO had been modified by SURS and a modified QILDRO acceptable to SURS was needed. He included with his motion a proposed QILDRO

requiring SURS to pay to Brenda a monthly benefit of $901.20 from his gross monthly benefit of $4,344 per month. Anthony failed to request a limitation on the total to be paid to Brenda. On June 8, 2009, both parties signed a stipulation and order for the entry of a new QILDRO; Anthony signed a consent for issuance of the new QILDRO and the new QILDRO was initialed by both parties and entered by the court. The new QILDRO provided in pertinent part:

> "(III) the Retirement System shall pay the indicated amounts of the member's retirement benefits to the alternate payee under the following terms and conditions:
>
> (A) The Retirement System shall pay the alternate payee pursuant to one of the following methods (complete the ONE option that applies):
>
> (1) $1,056.34 per month (enter amount);
>
> OR
>
> * * *
>
> (D) Payments to the alternate payee under this Section III shall terminate (check/complete the ONE option that applies):
>
> (1) x upon the death of the member or the death of the alternate payee, whichever is the first to occur; OR
>
> (2) ___ after ___ payments are made to the alternate payee (enter any set number) or

> upon the death of the member or the death of the alternate payee, whichever is the first to occur."

Anthony elected to take his pension benefits in monthly payments, the 2009 QILDRO provided Brenda was to receive $1,056.34 of the Anthony's monthly benefits, which were then in the amount of $5,510.36. Brenda's share equals roughly 19.17% of the SURS interest or one-half of the fraction of the number of months between the date of the parties' marriage and July 15, 2003, the valuation date used by the parties in determining values at the time of the dissolution of marriage, divided by the total number of months Anthony worked for the University of Illinois.

¶ 9 On December 8, 2010, Anthony filed a motion for summary judgment, in which he claims Brenda was limited in the amount of benefits she could receive from his SURS payments to the $16,337.28 amount mentioned in the marital settlement agreement and, pursuant to the QILDRO entered in 2009, she had received an additional $7,917.91. Therefore, he asked the court to enter a judgment in his favor against Brenda for that amount. He also requested the trial court terminate immediately the 2009 QILDRO he previously requested be entered. In support of his motion, he referenced the fact on November 22, 2010, he served upon Brenda a request to admit facts by mail. Despite the fact he filed his motion for summary judgment on December 8, 2010, he contends Brenda should be deemed to have admitted the facts in his request to admit as she did not respond within 28 days of service, or December 22, 2010. Brenda actually did respond to the request to admit facts and filed her response with the trial court on December 20, 2010, and mailed it to Anthony.

¶ 10 On April 13, 2011, Brenda filed her response to the motion for summary

judgment. On April 14, 2011, the trial court ruled it could not grant the motion for summary judgment and gave Anthony 30 days to file an appropriate motion.

¶ 11 On April 15, 2011, Anthony filed a petition to terminate QILDRO and enforce the judgment of dissolution of marriage. On April 25, 2011, Anthony filed a first supplemental motion for summary judgment. On May 5, 2011, Anthony filed a second supplemental motion for summary judgment as well as a first amended petition to terminate QILDRO and enforce the judgment of dissolution of marriage. On May 6, 2011, Brenda filed a motion to dismiss both Anthony's filings from May 5 as well as a response to the summary judgment motion.

¶ 12 On May 10, 2011, the trial court dismissed Anthony' s pleadings and allowed him leave to file amended pleadings. On May 24, 2011, Brenda filed a new motion to dismiss. On June 17, 2011, the trial court heard evidence on Brenda's motion to dismiss and continued the hearing until August for more evidence. On June 23, 2011, Anthony filed a second amended petition to terminate the QILDRO and enforce the judgment of dissolution of marriage. On July 15, 2011, Brenda filed a motion to dismiss Anthony's second amended petition.

¶ 13 On August 9, 2011, the trial court heard evidence on Brenda's motion to dismiss and denied it. On August 30, 2011, Brenda filed motion to reconsider. On September 15, 2011, the court denied Brenda's motion to reconsider.

¶ 14 On October 6, 2011, Brenda filed a response to the second amended petition to terminate QILDRO and enforce the judgment of dissolution of marriage. On November 29, 2011, Brenda filed a response to Anthony's second supplemental motion for summary judgment and filed a motion for summary judgment herself.

¶ 15 On March 20, 2012, the trial court heard arguments on all issues remaining.

Brenda's motion for summary judgment and Anthony's second supplemental motion for summary judgment were both denied as the trial court found the case presented genuine issues of material fact precluding summary judgment for either party. On March 28, 2012, the trial court, upon stipulated evidence, denied Anthony's second amended petition to terminate QILDRO and enforce judgment of dissolution of marriage. Brenda requested contribution to her attorney fees.

¶ 16 On April 3, 2012, Brenda filed a petition for contribution to attorney fees. On April 12, 2012, the trial court heard Brenda's evidence and arguments in regard to her request for attorney fees and denied it. This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 A. Denial of Anthony's Second Supplemental Motion for Summary Judgment

¶ 19 The standard for reviewing a summary judgment order is *de novo*. *JP Morgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 461, 939 N.E.2d 487, 490 (2010).

¶ 20 Anthony first argues his motion for summary judgment should have been granted by the trial court because Brenda failed to deny all the statements set forth in the request to admit facts served in November 2010 on a timely basis and, therefore, she is deemed to have admitted them. See Ill. S. Ct. R. 216 (eff. Jan. 1, 2011). The facts Anthony requested be admitted all pertained to his theory as to why the QILDRO entered in 2009 should be terminated and Brenda ordered to refund her "overpayment".

¶ 21 As stated, Anthony's request to admit was mailed to Brenda on November 22, 2010. Pursuant to Illinois Supreme Court Rule 12 (eff. Dec. 29, 2009), date of service is deemed to be November 26, 2010, four days after mailing. Brenda then had 28 days after November 26, 2010, to serve Anthony with a response. Brenda filed her response with the trial court on

December 20, 2010, and mailed it to Anthony the same day. Thus, the date of service on Anthony is deemed to be December 24, 2010, four days after mailing. December 24, 2010, is 28 days after November 26, 2010, Brenda's response was timely. The trial court was correct not to consider all statements in the request to admit facts to be admitted for failure to file a timely response. In fact, Brenda denied many of the facts requested to be admitted.

¶ 22 Anthony's second argument is the trial court "misinterpreted" the portion of the marital settlement agreement dividing his SURS retirement benefits. The agreement was incorporated into the judgment of dissolution of marriage as covering "ancillary matters." In addition to the division of retirement benefits, the agreement provided Brenda would receive title to the marital residence and all proceeds from its later sale. Anthony's equity interest in the home was taken care of by the provision in section 2.5 dealing with retirement plans by providing Brenda's share of the SURS benefits would be reduced by $25,000, which reflected Anthony's interest in the marital residence. The language of the marital settlement agreement was the "parties agree that as of August 7, 2003, the actual amount to be awarded to Brenda is $16,337.28." Anthony argued, after subtracting the home equity credit to him, Brenda's total benefits were determined to be $16,337.28, and her share of retirement benefits was limited to that amount.

¶ 23 Brenda argued the $16,337.28 amount was the parties' *estimate* of the value to be awarded her as of the time noted in the marital settlement agreement (August 6, 2003) if Anthony retired at that time and received his SURS benefits in a lump sum payment, as reflected in the language of the QILDRO adopted at that time to effectuate a payment to Brenda if Anthony retired and took a lump sum retirement benefit. The parties disagreed on the significance of the

$16,337.28 figure and the trial court was justified in denying Anthony's motion for summary judgment on the basis of disputed issues of material fact.

¶ 24 B. Denial of Second Amended Petition to Terminate QILDRO

¶ 25 The grant or denial of the petition to terminate the 2009 QILDRO depends upon the interpretation of a marital settlement agreement incorporated into the judgment of dissolution of marriage. The standard of review is *de novo*. *Blum v. Koster*, 235 Ill. 2d 21, 33, 919 N.E.2d 333, 340 (2009).

¶ 26 Anthony argues a trial court loses jurisdiction to amend a judgment of dissolution after 30 days of its entry, but its jurisdiction to enforce the judgment does not end. See *In re Marriage of Allen*, 343 Ill. App. 3d 410, 412, 798 N.E.2d 135, 137 (2003). Consequently, the trial court had the authority to enter the QILDRO on June 8, 2009, only if it was acting in conformance to the original judgment. He contends the language of the marital settlement agreement limited Brenda's share of his SURS benefits to $16,337.28, and the QILDRO entered in 2009 must conform to that figure or it was not legally entered and must be terminated.

¶ 27 The entry of the 2009 QILDRO was not an amendment or modification of the judgment of dissolution of marriage. As the trial court noted, the language of the marital settlement agreement did not state Brenda was *limited to* $16,337.28 in benefits for Anthony's SURS account. Instead, it stated "as of August 7, 2003" the amount to be awarded to Brenda is $16,337.28. This language, which is not ambiguous, does not state nor imply this was the maximum amount she could ever receive. Anthony was not yet retired and did not retire for another four years. When he did retire, he took his pension benefits in monthly payments and not a lump sum. Interest also accrued on the originally stated sum of $16,337.28.

¶ 28 The trial court did not set the figures in the marital settlement agreement, nor did it set the monthly payments figures in the 2009 QILDRO. These were agreed-upon settlement figures arrived at by the two parties. Further, the parties checked the box on the QILDRO form for benefits payments to Brenda continuing until one or the other party dies. Another choice was available: limiting her payments to a specific number. This box was not checked. This was language agreed upon by the parties. We conclude Anthony wants the court to extricate him from agreements he made while represented by the same counsel throughout these proceedings—agreements he no longer likes and with which he no longer agrees. An agreed order is generally binding on the parties and cannot be amended or varied without the consent of each party. See *In re Marriage of Rolseth*, 389 Ill. App. 3d 969, 971, 907 N.E.2d 897, 900 (2009). Further, even the terms of a property settlement agreement, while not usually modifiable by the court after 30 days of the entry of judgement, can be modified by agreement of the parties and the trial court may, but need not, ratify any modifications but shall enforce the agreement. See *Semmens v. Semmens*, 77 Ill. App. 3d 936, 939, 396 N.E.2d 1282, 1285 (1979).

¶ 29 The 2009 QILDRO did not modify the terms of the property settlement agreement. Brenda suggested, through several calculations, the amount she was receiving under the 2009 QILDRO is approximately 19% of the total pension benefits paid to Anthony each month. The duration of the parties' marriage represented 19% of the years in which Anthony worked and accumulated his pension. No modification in the property settlement was agreed to in the marital settlement agreement. Anthony did nothing to refute these calculations. Further, the parties ultimately agreed, prior to the entry of the 2009 QILDRO, Anthony received all of the monthly benefits of his pension plan between his retirement in 2007 and entry of the 2009 QILDRO. This

represented the $25,000 credit to which he was entitled under the marital settlement agreement. All portions of the property settlement agreement were fulfilled at the time of entry of the 2009 QILDRO.

¶ 30 Illinois courts have recognized "freezing" an interest in a public pension plan as of the date of the dissolution deprives a former spouse of realizing any of the growth in value of the marital share occurring during the years after the dissolution and before pension payments begin. See *In re Marriage of Wisniewski*, 286 Ill. App. 3d 236, 244, 675 N.E.2d 1362, 1368-69 (1997); *In re Marriage of Alshouse*, 255 Ill. App. 3d 960, 963, 627 N.E.2d 731, 733 (1994). The actual benefit at the time of retirement, not the estimated benefit at the time of the parties' dissolution, should be used when calculating a former spouse's benefit amount.

¶ 31 We find the trial court did not err in denying Anthony's second amended petition to terminate the QILDRO and enforce judgment of dissolution of marriage. The language of the marital settlement agreement was not ambiguous and language of the 2009 QILDRO agreed with that of the settlement agreement.

¶ 32 C. Attorney Fees

¶ 33 After the trial court denied Anthony's motion for summary judgment and his second amended petition to terminate QILDRO, Brenda filed a petition for contribution to attorney fees she incurred beginning on December 2, 2010, and through April 3, 2012, in regard to Anthony's attempt to terminate the 2009 agreed QILDRO. On April 12, 2012, after a hearing, the trial court denied the petition. Brenda cross-appeals the denial of her petition.

¶ 34 The standard of review on an award or denial of attorney fees is abuse of discretion or whether the trial court's findings of fact are against the manifest weight of the

evidence. *In re Marriage of Charles*, 284 Ill. App. 3d 339, 342, 672 N.E.2d 57, 60 (1996).

¶ 35 Brenda presented evidence she had an outstanding balance with her attorney of $13,963.64. Anthony owed $17,168 to his attorney. Brenda was not employed due to her need to care for her six-year-old disabled son from a later marriage. She receives $1,134.68 per month from SURS and a Social Security disability payment for her son of $682.20 per month. She receives $22 per month in food stamps. Brenda is divorced from the father of her disabled son and his nine-year-old brother. Although the father is ordered to pay $225 per week in child support, he is behind in payments and Brenda only received a total of $453 for the month of March 2012. She has no other source of income. According to her financial affidavit, Brenda's monthly expenses exceeded her monthly income.

¶ 36 Anthony had a bank account balance of $2,800 after receipt of a federal tax refund of $4,200 he received the prior week. He used much of the refund to pay bills, pay for car repairs and pay for insurance for his children's cars. Anthony testified he lived with his girlfriend in her home and paid $800 per month toward expenses. He is liable on a car loan he cosigned for his son in the amount of $6,200 which is heading toward collection. Anthony's sole source of income is SURS benefits of $4,886.64 gross per month and $3,938.81 net per month. He no longer works as a handyman because his arthritis has progressively gotten worse and he suffered a heart attack. In his financial affidavit, he listed total monthly living expenses of $3,758, which included medical bills, dental bills, contributions to household expenses beyond the $800 he always contributes and various expenses for grandchildren who have lived with him for almost two years without financial contribution. Some of these expenses were not actually incurred monthly.

¶ 37 In deciding whether to order Anthony to make any contribution toward Brenda's attorney fees, the trial court considered the parties' relevant economic circumstances and concluded although Anthony has more income and is better off than Brenda, neither party had the ability to pay the "huge amount of attorney fees" incurred by both sides, which totaled approximately $30,000. The court stated the litigation stemmed from inartfully drafted settlement agreements and QILDROs which, while not ambiguous, were not well drafted. The court stated both parties were responsible for the wording as these were agreed-upon settlements and orders. The court refused to order Anthony to contribute to Brenda's attorney fees.

¶ 38 Brenda argues the trial court abused its discretion as it could have ordered Anthony to contribute something toward her attorney fees without ordering him to pay the entire amount. The court clearly stated Anthony was in a better financial situation than Brenda. A party seeking a contribution to attorney fees under section 508(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/508(a) (West 2010)) must no longer show an inability to pay and an ability to pay by the other spouse. *In re Marriage of Haken*, 394 Ill. App. 3d 155, 168, 914 N.E.2d 739, 745 (2009). Brenda notes in the exhibit showing SURS payments, Anthony is having SURS overwithhold his taxes from his monthly payments and could be receiving $4,200 in net monthly payments if not for this overwithholding. He could be receiving that additional $200 per month in income and he admitted a lot of the expenses listed in his financial affidavit were not actually incurred monthly. Anthony could contribute up to $500 monthly toward her attorney fees while her monthly expenses exceed her income.

¶ 39 Brenda also argues section 508(a) provides the trial court may award attorney fees from the opposing party in accordance with subsection (j) of section 503 of the Act. 750 ILCS

5/508(a) (West 2010). She also argues section 503(j) provides an award of contribution for attorney fees is based on the criteria for division of marital property found in section 503(d). 750 ILCS 5/503(j)(2) (West 2010). Brenda argues the court in this case did not consider the criteria of section 503(j) except for subsection 503(d)(5), the relevant economic circumstances of each spouse. See 750 ILCS 5/503(d)(5) (West 2010).

¶ 40 We note, however, section 503(j) and its requirement is applicable to requests for contribution to attorney fees *before* a final judgment is entered. See 750 ILCS 5/503(j) (West 2010). Section 508 is applicable to contributions to attorney fees in general. See 750 ILCS 5/508 (West 2010); *Blum*, 235 Ill. 2d at 46-47, 919 N.E.2d at 348 (section 503(j) does not apply to postdecree petitions for contribution of attorney fees).

¶ 41 A petitioner need not be destitute to receive an award of attorney fees but, on the other hand, a respondent need not be destitute to avoid paying a petitioner's attorney fees. "Neither party's estate should be exhausted, nor their economic stability undermined." *In re Marriage of Mantei*, 222 Ill. App. 3d 933, 941, 583 N.E.2d 1192, 1198 (1991).

¶ 42 In this case, Anthony's financial affidavit appears to provide him with $20 of disposable income per month. Brenda argues some of the expenses listed were not really monthly expenses but simply occurred in the past month. However, Anthony testified to more expenses, such as the collection on the $6,200 loan he cosigned, which were not listed on the financial affidavit. We may have ordered Anthony to pay something in contribution to Brenda's attorney fees, but we cannot say the trial court abused its discretion in finding neither party is able to pay their own attorney fees, much less those of the other party. We also note the number of motions filed by both parties that did little to advance a resolution of this simple dispute. It

was not an abuse of discretion for the trial court to deny Brenda's petition for contribution to attorney fees.

¶ 43 III. CONCLUSION

¶ 44 We affirm the trial court's judgment on the issues raised in both appeal and cross-appeal.

¶ 45 Affirmed.