

2012 IL App (2d) 110854-U
No. 2-11-0854
Order filed June 12, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF DONNA L. MELLEN,)	Appeal from the Circuit Court
)	of Stephenson County.
Petitioner-Appellee,)	
)	
and)	No. 09-D-180
)	
DANIEL L. MELLEN,)	Honorable
)	Theresa L. Ursin,
Respondent-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion in denying respondent maintenance.

¶ 1 Following a bench trial, the trial court dissolved the petitioner's, Donna L. Mellen's, and respondent's, Daniel L. Mellen's, 23-year marriage. Respondent appeals, arguing that the court abused its discretion in denying him maintenance. We affirm.

¶ 2 I. BACKGROUND

¶ 3 The parties were married on October 11, 1986. They had three children: Ross (born in 1990), who was in college during the pendency of the case, Paige (born in 1993), who was a high school

senior and who turned 18 during the proceedings, and Brooke (born in 1996). On November 12, 2009, about 23 years after the parties were married, Donna petitioned for its dissolution.

¶ 4 A bench trial commenced on December 8, 2010. Petitioner, age 46, lives in Freeport. She works as a physical therapist assistant and earns about \$63,000 per year. Petitioner also receives \$480 per month per minor child (with one payment to end when Paige turns 18) in social security disability benefits (for respondent's disability). A physical confrontation between petitioner and respondent in October 2009 resulted in petitioner seeking the divorce.

¶ 5 Petitioner testified that the couple incurred a lot of debt during the marriage and that they should have been more responsible. She currently has only one credit card that she can use, and it has a \$300 limit. Petitioner testified that her "credit is ruined." She has \$500 in her IRA and no other retirement savings. She previously withdrew about \$90,000 from retirement assets to pay the parties' credit card debt, and they still have over \$40,000 in such debt (which could possibly be negotiated down to \$15,000). The debt on her GMC Envoy vehicle, which is worth about \$10,000, is \$14,000.

¶ 6 Addressing the two financial affidavits that she filed in this case, petitioner denied that she artificially inflated the figures in her second affidavit. Petitioner believes she underestimated her expenses in the first affidavit and explained that she had not utilized actual bills when estimating her expenses in compiling the document.

¶ 7 Respondent, age 46, has been diagnosed with spinocerebellar ataxia, a degenerative neurological disorder. He receives social security disability benefits equaling about \$1,808 per month (tax free) after a \$110 Medicare deduction. He has no other sources of income. Respondent had worked for Sundstrand for 20 years and was fired in the spring of 2008. He subsequently

worked at five different jobs, but was fired from each for not being able to perform his duties. Respondent last worked in 2009 at Sears for three days. Addressing his disability, respondent testified that his spinocerebellar ataxia affects his short-term memory and he carries a notebook to help remember such details. He walks with a cane and has to plan ahead for each step he takes to minimize the risk of falling. He does not have a cellular telephone, but has a land line. Respondent spends between \$10 to \$100 per week on food. Respondent testified that, due to lack of money, he has on several recent occasions eaten only soup or sandwiches. However, he conceded that, some months, he spends \$500 on groceries. He has not purchase clothes for 1 1/2 years.

¶ 8 The parties' assets are as follows: \$32,000 from the sale of the marital residence (originally \$76,000); \$67,000 in respondent's section 401(k) plan; \$32,000 in a retroactive social security disability award to respondent; several vehicles; and petitioner's \$500 IRA.

¶ 9 The parties' annual income during the final years of their marriage, as reflected in their federal tax returns, was as follows: \$112,000 in 2006; \$97,000 in 2007, and \$103,000 in 2009. The marital residence was a four-bedroom, 2,000-square-foot, ranch-style home situated on a 3/4-acre lot. Petitioner currently rents a three-bedroom, ranch-style home from her brother for \$600 per month. Respondent rents a two-bedroom mobile home for \$500 per month. His home contains two bathrooms, is 86 feet long and 16 feet wide, and is in a park-like setting. Respondent has no garage and does his own yard work.

¶ 10 Dr. Laura Dent, respondent's neurologist, testified that she began treating respondent in November 2009. He reported that he had difficulties with his walking, coordination, memory, and vision. His speech was somewhat slurred. An examination and subsequent testing led Dr. Dent to diagnose spinocerebellar ataxia, which is a neurodegenerative disorder that affects the cerebellum

of the brain and impacts coordination, cortical spinal tracts, and movement. An MRI revealed atrophy of respondent's cerebellum. The disease affects walking, balance, and fine motor skills. Over years or decades, symptoms worsen and people become wheelchair-bound, lose hand functions, may develop tremors, and their speech becomes slurred (sometimes to the point of incomprehension). Some people also have swallowing difficulties such that it becomes unsafe for them to eat. There is no cure for the disease, and nothing can halt its progression, although there are a few limited symptomatic treatments. People with any neurodegenerative disorder can develop cognitive and mood difficulties; these are part of the degenerative process. By June 2010, respondent's motor symptoms were worse (including that he had been experiencing falls), but his memory was a little better. Respondent did have some difficulty swallowing, but a therapist showed him techniques to address it. Dr. Dent further opined that, in 7 to 10 years, respondent will likely have vision problems for which corrective glasses or an eye patch might help, impaired speech, swallowing issues that might require dietary restrictions, and that he could be using a walker or be wheelchair-confined. Also, he will require a handicapped-accessible residence and assistance with dressing, feeding (perhaps a feeding tube), and bathing.

¶ 11 Joan Brooks, a certified public accountant, testified on respondent's behalf as to the effect on petitioner's federal income tax refund if she paid respondent maintenance under three scenarios: no award; \$15,000 per year (\$3,120 in an additional tax refund), and \$18,000 per year (\$3,707 in an additional tax refund).

¶ 12 On May 27, 2011, the court dissolved the parties' marriage, ordering joint custody of Brooke and ordering that petitioner maintain medical insurance for her. It further found that respondent engaged in extreme and repeated acts of mental cruelty toward petitioner and that petitioner is able

to support herself and should be barred from claiming maintenance. As to respondent, the court found that he was “a maintenance candidate,” in that he is fully disabled, the marriage was of a relatively long duration, and petitioner “has income.” As to the parties’ finances, the court commented:

“The parties never had the income to sustain the spending habits they had. When [respondent] asked for maintenance based on his—the family’s prior lifestyle, the Court gives very little weight to that. The lifestyle was unsustainable. For example, the real estate taxes couldn’t be paid. There was a Disney trip; that was an expense the parties couldn’t afford. There was a big house that couldn’t be maintained.

*** [Petitioner] spent very foolishly for many years. [Respondent] was blissfully unaware.”

¶ 13 However, the court further noted that ordering maintenance “would essentially be taking food out of Brook[e]’s mouth in order for that to be—maintenance to be paid to” respondent. The court found that, “in lieu of receiving a cash maintenance monthly amount, the Court is going to order substantial assets of this family to” respondent. “So essentially he will be receiving maintenance, but it is of a lump sum amount as opposed to a monthly amount.” Accordingly, the court ordered that the remaining \$32,000 of the social security settlement that respondent received be credited to him, in addition to his \$67,000 retirement account (even though both items were marital property), “in order to be considered a lump-sum maintenance amount.” The trial court further commented that petitioner did not have substantial disposable income to warrant monthly maintenance. However, it noted that petitioner’s first affidavit was “naively understated” or the second affidavit was “inflated” and that this was troublesome, as the court wanted “a true financial affidavit, and I don’t think I got that.”

¶ 14 The court found that the parties' standard of living during the marriage did not reflect "sound financial undertakings." They had significant debt, "almost all of which will be allocated to Donna; Donna has a minor child to support; and Daniel will be awarded more of the marital estate in lieu of maintenance." Accordingly, the court noted that respondent was denied maintenance of any kind (specifying that he and petitioner were "forever barred" from seeking it) and "in lieu [*sic*] of the property and debt allocation herein, [] [he] instead will receive a vast majority of the marital estate and virtually none of the marital debt." The court further determined that the social security disability payments that the children received due to their father's disability (about \$11,000) would be construed as respondent's sole child support obligation. Addressing the parties' debts, the court allocated all of respondent's medical bills to respondent and remainder of the debt (primarily credit card debt) to petitioner. Addressing the vehicle allocation, the court found that it was uncontested that petitioner would receive the Envoy and pay the debt on that vehicle; that she would also receive the 1986 Buick, which would be "turned over to Ross"; and that respondent would receive the Dodge Caravan. The court acknowledged the high mileage on the Caravan, but stated that, "between the assets that he's receiving and the lack of any debts[,] [] he should be able to arrange a new vehicle or new transportation." Finally, the court reserved ruling on several issues (*i.e.*, attorney fees, allocation of the home sale proceeds, and allocation of contested personal property).

¶ 15 Less than one month later, on June 22, 2011, respondent moved to reconsider. On June 23, 2011, the court ruled on the reserved issues. As to the house sale proceeds, it ordered that about \$9,300 be allocated to attorney fees and the remainder as follows: 40% to petitioner and 60% to respondent. "The court orders this disproportionate share based on prior finding of [respondent's] needs, balanced by the need of [petitioner] to have some liquidity from the remaining marital asset."

On August 4, 2011, the trial court denied respondent's motion to reconsider and found that its order was final and appealable and that there was no just cause to delay its enforceability or appealability.

On August 26, 2011, respondent filed his notice of appeal.

¶ 16

II. ANALYSIS

¶ 17 Initially, we address petitioner's claim that this court lacks jurisdiction because respondent filed his motion to reconsider (which was directed at the May 27, 2011, judgment) prior to the trial court's June 23, 2011, order addressing the reserved issues. We conclude that we have jurisdiction over this appeal. In the May 27, 2011, dissolution judgment, the trial court, *inter alia*, denied respondent maintenance and reserved ruling on certain issues. As certain matters remained pending, this was not a final order. On June 22, 2011, respondent moved to reconsider the May 27, 2011, denial of maintenance. See 735 ILCS 5/2-1203 (West 2008) (a motion to reconsider a judgment must be filed within 30 days after the challenged judgment is entered). The trial court, on June 23, 2011, entered its order on the reserved issues. Because respondent's motion to reconsider remained pending, the June 23, 2011, order on the reserved issues was not final as to the entire action. See *In re Adoption of Ginnell*, 316 Ill. App. 3d 789, 792 (2000) (entire controversy not resolved, where matters of child support, visitation, and a ruling on a motion to reconsider remained pending and undetermined). On August 4, 2011, the trial court issued its ruling on respondent's motion to reconsider. Because this order disposed of the remaining pending motion in the case, it constituted a final order as to the entire action (albeit with superfluous Rule 304(a) language). See *In re Guzik*, 249 Ill. App. 3d 95, 98 (1993) (a final judgment is one that fixes absolutely and finally the rights of the parties in the lawsuit; it is final if it determines the litigation on the merits so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment). Respondent filed his

notice of appeal within 30 days of the August 4, 2011, order (on August 26, 2011). Accordingly, this appeal is timely and we have jurisdiction.

¶ 18 Turning to the merits, respondent argues that the trial court abused its discretion in denying him maintenance. He contends that, contrary to the general rule that maintenance is awarded in cases where one spouse is unemployable due to disability, the trial court gave no weight to his disabling disease. Respondent requests that we vacate the court's judgment and remand for a maintenance award. For the following reasons, we reject respondent's argument.

¶ 19 A trial court's determination regarding maintenance will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Uehlein*, 265 Ill. App. 3d 1080, 1089 (1994). An abuse of discretion occurs when no reasonable person would take the trial court's view. *In re Marriage of Werries*, 247 Ill. App. 3d 639, 652 (1993).

¶ 20 In deciding whether to award maintenance and the amount of maintenance, the trial court should review and consider the relevant statutory factors, including:

“(1) the income and property of each party, including marital property apportioned *** to the party seeking maintenance;

(2) the needs of each party;

(3) the present and future earning capacity of each party;

(6) the standard of living established during the marriage;

(7) the duration of the marriage;

(8) the age and the physical and emotional condition of both parties.” 750 ILCS 5/504(a)

(West 2008).

¶ 21 In determining whether maintenance should be granted or denied, no one statutory factor is dispositive. *In re Marriage of Harlow*, 251 Ill. App. 3d 152, 157 (1993). However, a trial court is required to consider the parties' health and economic circumstances as they exist when the court rules on the maintenance award. *In re Marriage of Brooks*, 138 Ill. App. 3d 252, 265 (1985). It is incumbent upon a trial judge to take a spouse's physical condition into account as a significant factor in determining whether an award of maintenance is proper. See *In re Marriage of Marcello*, 247 Ill. App. 3d 304, 313 (1993). Accordingly, maintenance is generally "appropriate where a spouse is not employable because of a physical condition." *In re Marriage of Chapman*, 285 Ill. App. 3d 377, 382 (1996); see also *In re Marriage of Brackett*, 309 Ill. App. 3d 329, 340 (1999). "A dependent former spouse is entitled to continue to live in some approximation to the standard of living established during the marriage, unless the payor spouse's financial situation indicates otherwise." *Chapman*, 285 Ill. App. 3d at 382; see also *In re Marriage of Dunseth*, 260 Ill. App. 3d 816, 833 (1994).

¶ 22 Here, respondent argues that, in making its maintenance determination, the trial court did not consider his needs. He asserts that the court disregarded his disability and, instead, took into account petitioner's spending habits, the expenses of an emancipated adult child, the equities of the property distribution, and considered that the parties have one minor child (without considering that she will be emancipated in three years). Respondent urges that petitioner can improve her position by paying the debts or negotiating them down, that she is gainfully employed, that Brooke is provided for by the disability benefits she receives, and that respondent's condition will only deteriorate. At a minimum, respondent contends, the trial court should have reserved the maintenance issue to review upon Brooke's high school graduation.

¶ 23 We reject respondent’s argument. First, the cases upon which he relies are distinguishable. See *Brackett*, 309 Ill. App. 3d at 342-43 (1999) (trial court’s award of rehabilitative, instead of permanent, maintenance following dissolution of 20-year marriage reversed, where difference in parties’ financial situations was “staggering;” ex-wife had multiple sclerosis and was unable to work and ex-husband was able to pay permanent maintenance, earned over \$90,000 per year, had a sizable 401(k) account, and children’s college educations were provided for through wise investments); *Chapman*, 285 Ill. App. 3d at 382-84 (trial court abused its discretion in failing to award ex-wife maintenance, where she was disabled and unable to perform routine daily tasks, her only source of income was \$636 in monthly disability benefits, her only assets were her 401(k) plan, personal items of limited value, and a vehicle worth \$6,000, and where the ex-husband earned adequate income and was capable of providing maintenance because he had few debts and no dependents; trial court gave too much consideration to the marriage’s short duration—less than five years—and did not adequately consider the other relevant factors); *In re Marriage of Shields*, 167 Ill. App. 3d 205, 208-09 (1988) (maintenance award to ex-husband affirmed, where the ex-wife, age 45, earned \$42,000 and the ex-husband, age 69, received \$1,290 in monthly annuity and social security payments, which “barely” paid for his care and other expenses, and where he was confined to a nursing home and unlikely to ever work again; case involved “exceptional conditions,” including that the ex-wife had to pay nonmarital tax debt of ex-husband, she was gainfully employed and in good health, and she had been awarded disproportionate amount of marital assets). The present case is distinguishable from the case law upon which respondent relies because petitioner was allocated essentially all of the marital debt, which was significant considering the parties’ income, and respondent was awarded essentially all of the assets. Thus, petitioner is not in the same position as the ex-husband in

Brackett, who had substantial retirement and college savings, the ex-husband in *Chapman*, who had few debts and no dependents, or the ex-wife in *Shields*, who was awarded a disproportionate share of the marital assets. Second, it has been noted that “a party’s poor health results in an increased share of the marital assets or an increased maintenance award.” *In re Marriage of Bonneau*, 294 Ill. App. 3d 720, 731 (1998) (citing cases). The trial court’s selection of the former was not unreasonable.

¶ 24 Respondent further contends that the trial court substituted the benchmark for determining the *amount* of maintenance (*i.e.*, the recipient’s reasonable needs in light of the standard of living established during the marriage) for the benchmark in determining *whether* to award maintenance in the first place (*i.e.*, consideration of the disabled spouse’s condition). Stated differently, he notes that it is the amount of maintenance that is contingent on the payor’s finances, not the award itself. Respondent argues that the parties’ marital expenditures “blinded” the court to respondent’s disability and needs and that it ignored that petitioner has the ability to improve her financial position and that she has no legal obligation to spend money on her adult children. Further, respondent suggests that, even if the maintenance amount petitioner can afford does not put him back in the position he enjoyed during the marriage, it will ensure he enjoys a standard of living more equal to petitioner’s.

¶ 25 We reject these claims. The trial court found that respondent was “a maintenance candidate” due, in part, to his full disability. The other bases upon which it found that he was a candidate were that the marriage was of a relatively long duration (*i.e.*, 23 years) and that petitioner earned income. The court’s findings and comments concerning the parties marital debt were not impermissible because they were made in the context of assessing the *amount* of any maintenance award.

Although, as respondent notes, different factors must be considered when deciding each matter, “[p]roperty division and maintenance issues are necessarily intertwined[.]” *In re Marriage of Emery*, 179 Ill. App. 3d 744, 750 (1989). The court’s comments addressed the fact that the parties had a financially unsustainable lifestyle and that this precluded any maintenance award that approximated this unsustainable standard of living. In sum, the trial court properly considered respondent’s disability in assessing whether he was a maintenance candidate and, next, properly considered the parties’ finances in assessing whether to award any maintenance amount.

¶ 26 Respondent also complains that the trial court impermissibly considered the cause of the parties’ debt load, instead of the specific impact of the debt on petitioner’s ability to pay and that it did not consider the consequences of respondent’s disability. We disagree. The court specifically found that petitioner did not have substantial disposable income to pay maintenance. As to respondent’s disability, the court commented that respondent was being allocated the parties’ assets and none of its debts.

¶ 27 Respondent next argues that the trial court impermissibly considered expenses for an adult child and did not consider that their minor child will soon reach majority. First, he argues that the court, although acknowledging that petitioner had no legal obligation to support Paige, nevertheless considered that petitioner paid for certain of Paige’s expenses. This, in essence, burdened respondent with a (non-educational) support obligation because it resulted in the denial of maintenance to him. Second, respondent complains that the court erred by ignoring that the minor child Brooke will be an adult in three years. He suggests that the court impermissibly speculated that petitioner’s responsibility to Brooke will never change. Respondent asserts that petitioner’s responsibility to Brooke will end: she will be an adult in less than three years and petitioner may or

may not be responsible for Brooke's post-secondary education, which, too, will eventually end. Respondent asserts that the court should have reserved jurisdiction to review his need for maintenance no later than when Brooke reaches the age of majority. We disagree.

¶ 28 First, the primary bases upon which the court denied respondent maintenance were that he was awarded essentially all of the marital assets and that petitioner was allocated essentially all of the marital debt. Second, as to petitioner's expenses relating to Paige, the court specifically noted that petitioner had no legal obligation to support her and that Paige was still in high school during the proceedings. "She's over 18, but she's still in high school until the end of the month, and it appears clear that Paige for sure continues to be an ongoing financial burden. Now, the Court can't really consider her once she graduates from high school and she's already 18, but it's clear there's expenses anyway." The court found that, because there were "minor children" to consider (a reference to both Paige and Brooke), respondent should be denied maintenance. We cannot conclude that the foregoing reflects an abuse of discretion. The court acknowledged the law and the fact that Paige, although age 18, was still in school. Finally, as to Brooke, respondent's argument is not well-taken. Although Brooke will reach majority in three years, it remains that petitioner is obligated to support her and that the disability benefits Brooke receives for respondent's disability inherently are meant to attempt to replace only *one* parent's (*i.e.*, respondent's) support obligation.

¶ 29

III. CONCLUSION

¶ 30 For the foregoing reasons, the judgment of the circuit court of Stephenson County is affirmed.

¶ 31 Affirmed.