

2012 IL App (2d) 120552-U  
No. 2-12-0552  
Order filed December 21, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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|---|---|-------------------------------|
| <i>In re</i> MARRIAGE OF DONNA J. WALKER,     | ) | Appeal from the Circuit Court |
|   | ) | of Kane County.               |
| Petitioner,                                   | ) |                               |
|   | ) |                               |
| and   | ) | No. 09-D-1025                 |
|   | ) |                               |
| SCOTT W. WALKER,                              | ) |                               |
|   | ) |                               |
| Respondent-Appellee                           | ) | Honorable                     |
|   | ) | Robert P. Pilmer,             |
| (Douglas B. Warlick & Associates, Appellant.) | ) | Judge, Presiding.             |

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JUSTICE HUTCHINSON delivered the judgment of the court.  
Justices Schostok and Birkett concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The trial court considered all of the evidence presented at trial and at the hearing for contribution and did not abuse its discretion when it denied petitioner's counsel's petition for contribution of fees.
- ¶ 2 In August 2011, the trial court entered a judgment dissolving the marriage between petitioner, Donna J. Walker, and respondent, Scott W. Walker. The judgment denied petitioner's counsel's, appellant Douglas B. Warlick & Associates, petition for contribution of attorney fees for trial. Following entry of the dissolution judgment, counsel filed a motion to reconsider the portion of the

trial court's order denying his petition for contribution of fees and also filed an amended petition for contribution of fees, which the trial court denied following a hearing. Counsel now appeals, contending that the trial court abused its discretion when it refused to order respondent to contribute to petitioner's attorney fees. We affirm.

¶ 3 I. Background

¶ 4 The parties were married on July 28, 2000, and had two minor children. On July 15, 2009, petitioner filed a petition for dissolution of marriage, citing irreconcilable differences.

¶ 5 On May 11, 2011, counsel filed a petition for contribution of attorney fees. The petition alleged that respondent earned \$108,000 per year as a firefighter, and petitioner was unemployed as a stay-at-home mother who lacked sufficient financial resources to pay her attorney fees and costs.

¶ 6 Trial commenced on May 11, 2011. Petitioner testified that the parties had been living separately since August 2009. Petitioner testified that she and the minors lived with her parents, with the minors sleeping in a spare bedroom while she slept on a couch. Petitioner testified that respondent was paying \$784.61 every other week in child support.

¶ 7 Petitioner testified that she worked for Northern Trust from 1987 until 2000 as a proof operator, where she earned approximately \$33,000 per year. Petitioner testified that, based on an agreement between her and respondent, she quit her job in June 2000 to raise the parties' children. Petitioner testified that, during the marriage, she worked in the lunchroom at the children's elementary school, earning approximately \$100 per week. Petitioner testified that she held that job for a little more than three years, and she held no other employment during the course of the marriage. Petitioner testified that, since her separation, she held no other jobs, but that she had applied for jobs at Macy's, Jewel, Sam's Club, Walmart, and Harris Bank, among others. Petitioner

testified that she also contacted people she formerly worked with at Northern Trust to inquire about job openings and that she was currently going to school to get a certificate in medical billing. Petitioner testified that a childhood friend, Albert Kuda, owned AAA Silt Fencing, Inc. Petitioner testified that she “helped him out,” but had “never been employed” and was “never paid by his business.”

¶ 8 With respect to attorney fees, petitioner testified that she borrowed \$25,000 from her parents, which she had yet to pay back. Petitioner testified that respondent did not give her \$3,000 in cash on August 11, 2009, as payment of child support arrearage, as testified to by respondent.

¶ 9 On cross-examination, petitioner acknowledged that she and Kuda dated when she was 14 years old. Petitioner acknowledged that she went on a multi-day trip with Kuda to Dallas to attend a seminar related to Kuda’s “trade.” Petitioner testified that she attended “approximately five” classes at the convention and that Kuda paid for her expenses, including airfare and lodging. Petitioner admitted that she had an email account through AAA, and that she did not have email accounts with any other potential employers. Petitioner testified that she goes to AAA’s office in Romeoville “three out of five” days per week, and occasionally more. Petitioner testified that she would typically arrive between 9 a.m. and 10 a.m., and stay until about 1 p.m, but would stay longer if she “had things [she] needed to do.” Petitioner testified that she helped Kuda notarize waivers, write letters to customers, stuff envelopes, and occasionally called clients to schedule appointments. Petitioner testified that she had not had any “face-to-face” interviews since the parties separated.

¶ 10 Petitioner called respondent as an adverse witness. Respondent testified that he was a battalion chief with the Addison Fire Protection District. Respondent testified that he also worked as a paramedic for Paramedic Services, Incorporated, from 2000 through the fall of 2009, when he

resigned. Respondent testified that he earned \$108,071.13 from the Addison fire department and performing census work in 2010. Respondent testified that his income was currently limited to wages he earned from the Addison fire department. Respondent's income tax returns, which were entered into evidence, reflected a gross income of \$108,071.13 for 2010; \$133,685 for 2009; \$114,936 for 2008; and \$139,475 for 2007.

¶ 11 Respondent testified that he was current with his child support payments to petitioner. Respondent acknowledged a court order from September 30, 2009, showing that he owed petitioner a child support arrearage of \$2,741.61. Respondent testified that the arrearage did not remain outstanding because, on August 11, 2009, he made a \$3,000 cash payment to petitioner. Respondent testified that his son gave petitioner the money in an Amcore Bank envelope while respondent and his son were at his elementary school.

¶ 12 With respect to attorney fees, respondent testified that he paid the guardian *ad litem* a \$1,500 retainer, and that \$4,500 remained outstanding to the guardian *ad litem*. Respondent testified that he had currently paid \$18,000 to his attorney. To pay his attorney fees, respondent used money he received in a settlement agreement from a workers' compensation case and also borrowed approximately \$6,000 from his parents. Respondent testified that he had an outstanding balance of \$4,000 for his attorney fees.

¶ 13 On re-direct examination, petitioner testified that she paid her current attorney \$5,000, which her mother loaned to her. On cross-examination, petitioner acknowledged that she paid her current attorney \$15,000, but owed him an additional \$11,000. Petitioner testified that she owed her former attorneys \$4,500 and \$729, respectively. Petitioner acknowledged that respondent used \$4,500 from a workers' compensation case settlement to pay her former counsel. However, after respondent

wrote the check, an attorney at the law firm that formerly represented her endorsed the check to her. Petitioner clarified that her parents had already paid her former attorneys before respondent wrote a check to that firm.

¶ 14 On August 19, 2011, the trial court entered a judgment dissolving the parties' marriage. The trial court awarded the parties joint custody, with petitioner being awarded residential custody. The trial court ordered respondent to pay petitioner \$1,536 per month in child support and maintain health insurance for the children, and for the parties to evenly split the children's agreed-upon activities and uncovered medical expenses. The trial court further ordered respondent to pay petitioner \$364 per month in maintenance, which would increase to \$764 per month upon the sale of the marital home. The judgment provided that maintenance would terminate after 36 months.

¶ 15 The judgment further provided that the parties would split evenly the net proceeds from the sale of the marital residence. The trial court awarded petitioner \$16,141.47 from respondent's 457(b) plan, which represented 100% of the marital portion of that account, and 50% of respondent's interest in his pension with the Addison Fire Protection District Firefighters' Pension Fund. The trial court further awarded petitioner \$254.03 in a Harris Bank checking account. The trial court awarded respondent 50% of the marital portion of his firefighter pension; a property in Apache County, Arizona, valued at \$600; \$786.17 in a Bank of America checking account; \$47.40 in a Bank of America savings account; \$182.13 in a Scott Trade account; and \$5,980.73 in a Bright Start account with the children as the beneficiaries. The trial court further awarded respondent the nonmarital portion of his 457(b) plan, totaling \$77,107.93. The trial court awarded each party various investment accounts containing nominal sums, and awarded petitioner the Harris Bank Uniform

Transfer to Minors Act account holding \$1,062.24, which could only be used for the children. The trial court ordered that each party would be responsible for their own attorney fees.

¶ 16 On September 19, 2011, petitioner's counsel filed a motion to reconsider and an amended petition for contribution of fees for trial. Counsel's motion to reconsider sought to have the trial court correct specified provisions in its judgment. The motion further argued that the trial court erred in not ordering respondent to contribute to petitioner's fees because the trial court ruled on the issue before counsel could file an amended petition that included fees incurred during trial. Counsel's amended petition for contribution of fees for trial argued that petitioner owed in excess of \$22,500 in attorney fees through September 15, 2011, and that she lacked sufficient assets and financial resources to pay her attorney fees and costs. Following a hearing on April 24, 2012, the trial court denied counsel's motion to reconsider and his amended petition for contribution of fees.

¶ 17 On May 8, 2012, counsel filed a motion to clarify, vacate, or modify the trial court's April 24, 2012, order. Petitioner argued that the trial court erred in not granting his amended petition for contribution of fees. After the trial court denied the motion, petitioner's counsel timely appealed.

¶ 18 II. Discussion

¶ 19 The only issue in this appeal is whether the trial court abused its discretion in not ordering respondent to contribute to petitioner's attorney fees. Counsel asserts that the trial court abused its discretion in light of the gross disparity of income between the parties, petitioner's inability to pay, respondent's ability to pay, that respondent used marital funds to pay his attorney fees while petitioner did not, and that the trial court did not grant him a hearing on his petition when a "substantial amount" of fees were incurred subsequent to the trial.

¶ 20 Section 508(a) of the Illinois Marriage and Dissolution of Marriage Act (the Act) provides that a court “may order any party to pay a reasonable amount for his own or the other party’s costs and attorney fees.” 750 ILCS 5/508(a) (West 2010). Section 508(a) of the Act further provides, “[a]t the conclusion of the case, contribution to attorney’s fees and costs may be awarded from the opposing party in according with subsection (j) of [s]ection 503.” 750 ILCS 5/508(a) (West 2010). While attorney fees are generally the obligation of the party who incurred them, a trial court can require one party to pay a “reasonable amount” for the other party’s attorney fees if the party seeking fees demonstrates that he or she is unable to pay and that the other party is able to pay. *In re Marriage of Pond*, 379 Ill. App. 3d 982, 987 (2008). A party is deemed “unable to pay” fees if payment would strip the party’s means of support or undermine the party’s financial security, and therefore, an “[i]nability to pay does not require a showing of destitution.” *Id.* When determining whether to award attorney fees, a court should consider the allocation of assets and liabilities, maintenance, and the relative earning abilities of the parties. *In re Marriage of Suriano*, 324 Ill. App. 3d 839, 852 (2001). With respect to earning ability, a court may consider both current and prospective income. *Pond*, 379 Ill. App. 3d at 987. A trial court’s decision to award or deny fees will be reserved only if the trial court abused its discretion. *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005). A trial court abuses its discretion when it acts arbitrarily, without conscientious judgment, or in light of all the circumstances, exceeds the bounds of reason and ignores recognized principles of law that results in a substantial injustice. *Pond*, 379 Ill. App. 3d at 987-88.

¶ 21 In this case, we conclude no abuse of discretion occurred in the trial court’s determination to deny counsel’s petitions for attorney fees. In *In re Marriage of Krivi*, 283 Ill. App. 3d 772 (1996), the trial court ordered the respondent to pay more than \$19,000 of the \$27,175.92 in attorney fees

the petitioner had incurred. *Id.* at 780. The trial court concluded that the award was warranted because the respondent had a more secure and better paying job, while the petitioner was unable to meet her current expenses. *Id.*

¶ 22 On appeal, the reviewing court reversed, concluding that the trial court abused its discretion when it ordered the respondent to contribute to the petitioner's attorney fees. In doing so, the reviewing court considered the petitioner's yearly net income, including child support payments from respondent. *Id.* at 781-82. The reviewing court concluded that "we do not believe that [the petitioner] has demonstrated an inability to pay her own attorney fees, nor do we believe that her economic stability would be undermined if she had to pay attorney fees," noting that the "ability to pay does not mean the ability to pay without pain or sacrifice." *Id.* at 782. The reviewing court further concluded that "[m]ore importantly, we believe that the petitioner's inability to pay is self-imposed." *Id.* The reviewing court noted that the evidence reflected that the petitioner worked only slightly more than 26 hours per week in the first 10 weeks of 1992 and that she could have increased her hours or found a part-time job to generate additional income. *Id.*

¶ 23 We find the court's reasoning in *Krivi* persuasive to this case. Initially, we note that the trial court ordered respondent to pay petitioner \$1,535 per month in child support and \$364 in maintenance, with maintenance increasing to \$764 per month following the sale of the residence. Between child support payments and maintenance, petitioner's monthly income would be approximately \$1,900.

¶ 24 Moreover, the trial court noted in its judgment that petitioner had "been spending [three to five] days per week" at Kuda's business performing various office-related duties. Petitioner testified that she would typically arrive at approximately 9 a.m. and stay until approximately 1 p.m., and

sometimes stay later. Petitioner acknowledged that she had an email address through AAA and went to a seminar in Dallas related to AAA's "trade," where she attended approximately five classes and received a certification. While petitioner testified that she was not paid for the work she performed at AAA, the trial court could have concluded that her testimony was not credible. See *In re Marriage fo Strum*, 2012 IL App (4th) 110559, ¶ 6 (noting that questions of credibility and conflicting testimony are matters for the trial court to resolve as the trier of fact). Based on this testimony, the trial court could have concluded that petitioner had the potential to generate income beyond her child support and maintenance payments, and that if she was unable to pay her attorney fees, that inability was self-imposed due to her voluntary choice to work for free. See *Krivi*, 283 Ill. App. 3d at 782.

¶ 25 We further reject counsel's argument that the trial court failed to take into consideration that respondent paid for his attorney fees with marital funds, thereby dissipating marital assets, while petitioner did not. Petitioner's argument is not supported by the record. The record reflects that respondent gave petitioner \$4,500 from a workers' compensation settlement to pay for her attorney fees, whereupon her attorney turned around and endorsed the check to petitioner. In addition, respondent testified that he used his portion of the workers' compensation settlement to pay for his attorney fees, and that he borrowed \$6,000 from his parents, and still had \$4,000 outstanding in attorney fees. The trial court could have found this testimony credible and concluded that respondent did not dissipate marital assets to pay for his attorney fees. See *Strum*, 2012 IL App (4th) 110559, ¶ 6.

¶ 26 Finally, we reject counsel's argument that the trial court abused its discretion when it refused to grant petitioner a hearing on her petition for contribution towards attorney fees when a substantial

amount of fees were incurred subsequent to trial. In *In re Marriage of Brackett*, 309 Ill. App. 3d 329 (2000), this court held that, pursuant to sections 508(a) and 503(j) of the Act, a “trial court *must* hear and decide a party’s petition for contribution of attorney fees and costs after the close of the proofs on all other issues.” (Emphasis in original.) *Id.* at 344-45. However, we cautioned against a “too literal reading” of the statutory requirement, concluding that a trial court is required “to hear, through testimony or otherwise, additional proofs when a petition for contribution” is filed in accordance with section 503(j). *Id.* at 345. Because the record in *Brackett* did not indicate that the trial court made a separate ruling on the respondent’s petition for contribution or that evidence was presented during any of the proceedings regarding the amount of attorney fees owed by the respondent or the petitioner, the reviewing court remanded the matter so the trial court could consider evidence on the respondent’s petition for contribution. *Id.* at 345-46.

¶ 27 Here, unlike *Brackett*, the record clearly indicates that the trial court heard testimony during trial with respect to the amount of attorney fees each party had paid and the amount that remained outstanding. Further, counsel attached to his amended petition for contribution an itemization of time incurred through September 15, 2011. The certified bystander’s report for the April 24, 2012, proceedings reflects that the trial court considered the arguments from each party before denying counsel’s amended petition for fees, and the record is devoid of any indication that the trial court failed to consider the testimony from the trial or counsel’s itemized billing statement through September 15, 2011. See generally *Dowd & Dowd Ltd. v. Gleason*, 352 Ill. App. 3d 352, 389 (2004) (noting that, absent evidence to the contrary, a trial court is presumed to have considered competent evidence).

¶ 28 In sum, we conclude that, in light of the evidence presented both at trial and as attached to counsel's petitions for contribution, the trial court's determination to deny counsel's petitions for contribution was not arbitrary or without conscientious judgment. Therefore, the trial court did not abuse its discretion in denying counsel's amended petition for contribution. See *Schneider*, 214 Ill. 2d at 175.

¶ 29

### III. Conclusion

¶ 30 For the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

¶ 31 Affirmed.