

Rule 23 order filed  
June 19, 2014;  
Modified upon Denial of  
Rehearing August 6, 2014

2014 IL App (5th) 120511-U  
NO. 5-12-0511

NOTICE  
This order was filed under  
Supreme Court Rule 23 and  
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by any party except in the  
limited circumstances allowed  
under Rule 23(e)(1).

IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

<i>In re</i> MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
ANGELA M. BARKER,	)	Madison County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 11-D-991
	)	
MONTY W. BARKER,	)	Honorable
	)	Ben L. Beyers II,
Respondent-Appellee.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.  
Justices Goldenhersh and Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court erred in imputing an artificially exaggerated level of yearly income to Mother when determining the amount of maintenance to be awarded, and further erred in not awarding her permanent maintenance.

¶ 2 Petitioner, Angela M. Barker (Mother), appeals following a judgment of dissolution entered by the circuit court of Madison County. We reverse in part and remand in part.

¶ 3 Mother and respondent, Monty W. Barker (Father), were married in 1991. In order to marry Father, Mother left her job in New Jersey, sold her house, and moved to

Illinois. At the time of the marriage, Mother had \$40,000 from the sale of her home which she kept in a separate bank account. Mother testified, however, that all of these monies were gone by the end of the parties' marriage with the last of the funds being used to purchase a vehicle for the parties' son. Father previously had been married and had primary physical custody of his three minor children. Mother agreed to take care of these three children as part of the marriage arrangement in addition to raising the parties' own son, born in 1992. At the time of the hearing on the dissolution of the marriage, Mother was 60 years old and Father was 53.

¶ 4 After the parties' son was born, Mother did not work outside the home for several years. After that, she worked as a substitute teacher or secretary for the school district where the children went to school. By 1996, all three of Father's children had returned to live with their mother, leaving Mother with only the parties' son to raise. In 2008, Mother went back to school to earn a master's degree in education in an effort to better herself and earn a greater income. In so doing, she incurred student loan debt in the amount of \$35,000. Since completion of her master's degree, however, Mother has not been able to find a job using her advanced degree. She testified that she had applied for over 40 different positions after earning her degree but had yet to be hired. Mother believed it was because of her advanced age and the general state of the economy in the education field. In 2011, Mother earned a total of \$18,385.

¶ 5 Father has worked at the same place for some 30 years. Because he does not have a college degree, he cannot advance any further with the company. His salary for the past several years, however, has averaged more than \$100,000 a year. The parties gross

earnings in 2012 were \$126,846. Despite this income level, the parties' finances were in disarray. The parties accumulated significant credit card debt over the course of the marriage. At the time of the dissolution, the total joint credit card debt exceeded \$56,829. The total credit card debt, however, with cards held in individual names added in, was nearly \$133,940. Both parties clearly lived lifestyles beyond their means for a substantial period of time prior to the filing of the petition for dissolution of their marriage. Father's financial statement listed his monthly income at approximately \$9,384 with expenses of \$4,475 a month. Mother's financial statement listed her monthly income at \$1,728 with expenses of \$4,638. Mother requested an award of permanent maintenance in the amount of \$3,000 per month but was awarded \$1,500 for 24 months. In setting this amount, the court imputed \$50,000 of yearly income to her. Specifically, the court stated that Mother had the ability to drastically increase her income and required her "to secure employment more commensurate with her education as soon as possible."

¶ 6 Mother argues on appeal that the court erred not only in awarding her rehabilitative maintenance, but also in imputing \$50,000 in yearly income to her. We recognize that an award of maintenance is within the sound discretion of the trial court, and we are not to disturb an award of maintenance unless the trial court abused its discretion. *In re Marriage of Schneider*, 214 Ill. 2d 152, 173, 824 N.E.2d 177, 189 (2005). An abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *In re Marriage of Schneider*, 214 Ill. 2d at 173, 824 N.E.2d at 189. We conclude the court abused its discretion by imputing a yearly income of \$50,000 to Mother.

¶ 7 Generally speaking, in order to impute income, a court must find that a spouse is voluntarily unemployed, is attempting to evade a support obligation, or has unreasonably failed to take advantage of an employment opportunity. See *In re Marriage of Lichtenauer*, 408 Ill. App. 3d 1075, 1089, 945 N.E.2d 119, 131 (2011). Mother testified that she had applied for over 40 positions in an attempt to use her master's degree, but had no success in gaining advanced employment. Mother is now 60 years old, and the likelihood of her acquiring such a position as she grows older becomes less and less, especially in light of the fact that employers in her field tend to hire younger teachers right out of school who traditionally are lower on the pay scale. It is true that a party seeking maintenance has an affirmative obligation to seek suitable employment. See *In re Marriage of Cantrell*, 314 Ill. App. 3d 623, 732 N.E.2d 797 (2000). Mother appears to have made efforts to do so. She went back to school to earn a master's degree in the hopes of bettering her chances for employment in a field that she was already working in; applied for numerous positions; and even attempted to earn secondary income by selling cosmetics. Nevertheless, the court ignored these efforts, and without any basis in the record or any reasonable explanation, concluded that Mother could earn \$50,000 a year and even ordered her to do so as soon as possible. This creation of evidence where none existed is, to say the least, troubling.

¶ 8 We too are concerned that Mother added to the already heavy debt-burdened marriage by incurring \$35,000 in student loans to secure a degree that would, hopefully, open new opportunities for her. Unfortunately, this did not occur, and perhaps Mother should have known of this reduced possibility of employment through her work in the

school system. This does not mean, however, that the court could pull a number from thin air and impute such an inflated level of income to Mother when she had never earned more than \$18,000 a year while the parties were married. We therefore agree that the court erred in imputing \$50,000 of income to Mother without any basis in the record to support the notion that Mother would be able to secure any job at that pay level.

¶ 9 We are also troubled by the award of rehabilitative maintenance given the circumstances presented here. The parties were married 21 years. Mother gave up her job in New Jersey to move to Illinois to marry Father. She stayed at home for several years to help raise his children as well as the parties' own son. When she did return to the work force, she did so at the children's school so she could maintain the same hours outside the home as did the children. Mother's contribution of 21 years of marital service should not be punished, but rather viewed in the totality of the agreed-to marriage partnership. See *In re Marriage of Keip*, 332 Ill. App. 3d 876, 883, 773 N.E.2d 1227, 1232 (2002). Additionally, Father, who is several years younger than mother, earns a significantly larger salary than does Mother, who is now over 60 years old. Rather than granting Mother's request of permanent maintenance, the court instead awarded rehabilitative maintenance of \$1,500 a month for a period of only 24 months. Recognizing that the propriety of a maintenance award is within the discretion of the trial court, again we find that the court abused its discretion in this instance. See *In re Marriage of Carpel*, 232 Ill. App. 3d 806, 828, 597 N.E.2d 847, 863 (1992) (when one spouse is unable to support herself in the manner in which the parties lived during the marriage, it is abuse of discretion to award only rehabilitative maintenance). It is clear

that the court is not bound to award the amounts requested by the parties. And, it is true that both parties will need to modify their lifestyles to meet their expenses. But, Mother's monthly expenses already greatly exceed her income, and Mother now has to pay 40% of the marital debt in addition to her own debts. Mother should not be forced to sell everything she has just to make ends meet, especially when the parties agreed that Mother would stay at home with the children and run the household during this 21-year marriage. By ignoring the contributions Mother made as a homemaker and caretaker for their child as well as for Father's three minor children, the court also ignored the policies underlying maintenance. A balance must be achieved between providing maintenance as an incentive to Mother to attempt to achieve self-sufficiency and a "realistic appraisal" of whether such self-sufficiency is even possible under the circumstances. See *In re Marriage of Keip*, 332 Ill. App. 3d 876, 883, 773 N.E.2d 1227, 1233 (2002); *In re Marriage of Carpenter*, 286 Ill. App. 3d 969, 972-73, 677 N.E.2d 463, 466-67 (1997). Additionally, permanent maintenance is not limited just to spouses who are unemployable. See *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 652-53, 895 N.E.2d 1025, 1039 (2008) (affirming a maintenance award to ex-wife who had a law degree and earning potential of more than \$100,000 per year). Permanent maintenance is also appropriate where a spouse is "only employable at a lower income as compared to the spouse's previous standard of living." *In re Marriage of Walker*, 386 Ill. App. 3d 1034, 1044, 899 N.E.2d 1097, 1105 (2008). When faced with lengthy marriages in which the recipient of maintenance served as caregiver for the parties' children, Illinois courts generally give consideration to a more permanent award of maintenance to those spouses

who have undertaken to raise and support the family. See *In re Marriage of Nord*, 402 Ill. App. 3d 288, 305, 932 N.E.2d 543, 557 (2010). Accordingly, we reverse the award of temporary maintenance and award Mother permanent maintenance. We remand this cause for a proper determination of the amount of maintenance to be awarded, as well as any arrearages that may be due, after correcting for the improper imputation of income to Mother.

¶ 10 Mother next finds fault with the court's apportionment of debt. Besides ordering Mother to pay 40% of the joint credit card debt, the court also assigned Mother all credit card debt held in her name alone, plus her student loans. This added another \$54,487 of debt, bringing her total debt repayment to \$76,219. Father was assigned the \$23,623 in credit card debt in his name alone plus 60% of the joint credit debt bringing his total to \$57,720. The record is clear that Mother incurred a significant student loan debt, but the court should not use the division of debt to punish Mother for, as the court stated, "recklessly open[ing] numerous lines of credit that the parties simply could not afford" prior to the breakdown of the marriage. In our opinion, the court abused its discretion in its division of the marital debt. We, therefore, also remand the issue of apportionment of debt to be taken into consideration with the recalculation of the award of maintenance.

¶ 11 The final issue which must be addressed on appeal prior to remanding this cause is a claim of dissipation of assets. Mother contends that Father took out a \$5,000 loan from his retirement account without her agreement or consent. The court acknowledged the lack of consent and allocated the loan to Father's share of the retirement account. Mother was then awarded 50% of the total account before the loan. Contrary to Mother's

assertion, we believe the issue of dissipation was taken into account and properly addressed.

¶ 12 For the foregoing reasons, we reverse the judgment of the circuit court of Madison County and remand this cause for further proceedings consistent with this disposition. We further deny Father's petition for rehearing claiming that the May 21, 2013, order appealed from was interlocutory. The court's judgment of dissolution of marriage was entered October 15, 2012. Mother's notice of appeal from the October 15, 2012, order was filed timely on November 8, 2012. It is this order with which this court is concerned. It is this order which is final. Father's third motion to reconsider, the one on which the May 21, 2013, order was issued, was filed on April 8, 2013, more than 30 days past any judgment of record. A party cannot continually file successive motions to reconsider outside the original 30-day time frame to keep jurisdiction alive in the circuit court. The May 21, 2013, order therefore is of no consequence.

¶ 13 Reversed in part; remanded in part with directions.