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2017 IL App (3d) 160159-U

Order filed May 19, 2017

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2017

<i>In re</i> MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
MITCHELL P. NURCZYK,	)	Will County, Illinois,
	)	
Petitioner-Appellant,	)	
	)	Appeal No. 3-16-0159
and	)	Circuit No. 09-D-1561
	)	
GINGER NURCZYK,	)	Honorable
	)	Robert P. Brumund,
Respondent-Appellee.	)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justices Carter and O'Brien concurred in the judgment.

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**ORDER**

- ¶ 1           *Held:* The trial court erred when it awarded 100% of petitioner's social security benefits and disability pension to satisfy a maintenance arrearage.
- ¶ 2           Petitioner, Mitchell P. Nurczyk, appeals from the trial court's order awarding respondent, Ginger Nurczyk, 100% of Mitchell's social security benefits and disability pension to satisfy a judgment of arrearage for failure to pay spousal maintenance. We reverse and remand with directions.

FACTS

¶ 3

¶ 4 On July 8, 2011, the trial court entered a judgment for dissolution of marriage pursuant to a marital settlement agreement. The agreement awarded, in pertinent part, maintenance to be paid by Mitchell to Ginger. A qualified domestic relations order (QDRO) was entered to grant Ginger the ability to receive periodic payments from Mitchell's disability pension.

¶ 5 On June 1, 2015, the trial court entered an order finding Mitchell in arrears of more than 12 months' maintenance payments. The court entered judgment against Mitchell in the amount of \$103,732.64.

¶ 6 Thereafter, the trial court entered a written order awarding Ginger 100% of Mitchell's social security benefits and disability pension until the judgment for maintenance arrearages was satisfied in full with interest, as well as attorney fees. The trial court also asked the parties to prepare an amended QDRO regarding Mitchell's disability pension.

¶ 7 On January 28, 2016, the trial court entered a garnishment order as to 100% of Mitchell's social security benefits. No amended QDRO was entered as to Mitchell's disability pension.

¶ 8 Subsequently, Mitchell filed a motion to reconsider. The trial court denied the motion, and entered an amended QDRO directing the administrator of Mitchell's disability pension plan to direct 100% of Mitchell's pension payments to Ginger. Mitchell filed a timely notice of appeal.

¶ 9 After the notice of appeal was filed, Ginger filed a petition for interim and prospective appellate attorney fees. Following a hearing, the trial court ordered Mitchell to pay Ginger's appellate attorney fees in the amount of \$6000 within 30 days. When Mitchell failed to pay the attorney fees within 30 days, the trial court issued a rule to show cause. Mitchell failed to appear at the hearing, and the trial court entered an order finding he offered no defense or response to

the rule to show cause. The court found Mitchell's failure to pay the appellate attorney fees was without compelling cause or justification, and set a hearing to purge the finding. The hearing was scheduled for September 28, 2016. The record does not show that the hearing occurred.

¶ 10 Prior to the date of the hearing on the rule to show cause, Ginger filed a motion in this court for sanctions. Mitchell responded to the motion, and this court entered a minute order taking the motion with the case.

¶ 11 ANALYSIS

¶ 12 Initially, we address Ginger's motion for sanctions. Her motion seeks the dismissal of Mitchell's appeal as a sanction for Mitchell's failure to pay her prospective appellate attorney fees. Ginger filed the petition for prospective attorney fees in the trial court after Mitchell filed his notice of appeal. As the record does not show the completion of the purge hearing, this issue remains pending in the trial court. Thus, the issue of prospective appellate attorney fees is not properly before this court. See *In re Marriage of Ruchala*, 208 Ill. App. 3d 971, 975-76 (1991). Consequently, we deny Ginger's motion for sanctions and turn to the merits of Mitchell's appeal.

¶ 13 Mitchell argues that the trial court erred in awarding Ginger 100% of his social security benefits and disability pension to satisfy the judgment for support arrearages. Because Illinois has adopted the garnishment limits as expressed in federal law (750 ILCS 28/35(c) (West 2014)), the most that can be withheld from Mitchell's weekly wage for family support purposes is 55% of the weekly earnings (15 U.S.C. § 1673(b)(2) (2000)).

¶ 14 Withholding income to satisfy arrearages in maintenance is controlled by the Income Withholding for Support Act (750 ILCS 28/1 *et seq.* (West 2014)). *Crank v. Crank*, 374 Ill. App. 3d 1115, 1121 (2007). The relevant portion of the Income Withholding for Support Act governing how much of an obligor's wages can be garnered per week for support states:

“Withholding of income under this Act shall not be in excess of the maximum amounts permitted under the federal Consumer Credit Protection Act [15 U.S.C. § 1601 *et seq.* (2000)].”  
750 ILCS 28/35(c) (West 2014).

¶ 15 The relevant portion of the Consumer Credit Protection Act, provides:

“(2) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed—

(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual’s disposable earnings for that week.” 15 U.S.C. § 1673(b)(2)(A) (2000).

The above percentage rises to 55% if disposable earnings for any workweek are subject to garnishment to enforce support more than 12 weeks in arrears. 15 U.S.C. § 1673(b)(2) (2000).

¶ 16 In this case, the parties do not dispute that Mitchell is currently supporting a new spouse and that he is more than 12 months’ in arrears. Therefore, the applicable limitation is 55% of Mitchell’s disposable earnings for that week. Consequently, section 1673(b)(2) prohibits the trial court from awarding Ginger 100% of Mitchell’s social security benefits and disability pension to satisfy Mitchell’s support arrearage. The trial court therefore erred in awarding Ginger 100% of Mitchell’s social security benefits and disability pension to satisfy the arrearage judgment.

¶ 17 In reaching this conclusion, we reject Mitchell’s argument that section 12-803 of the Code of Civil Procedure (735 ILCS 5/12-803 (West 2014)) governs the amount that can be garnished from his social security benefits and disability pension. Specifically, Mitchell argues

that the garnishment cannot exceed the lesser of either 15% of his gross pay or the amount by which his disposable earnings exceed 45 times the minimum wage set by section 12-803. *Id.* Section 12-803, however, does not apply in support and maintenance situations. See *In re Marriage of Schomburg & Osland*, 2016 IL App (3d) 160420, ¶¶ 23-24. As noted above, Illinois has specifically adopted the limits set by the federal Consumer Credit Protection Act. *Supra* ¶¶ 13-14.

¶ 18 We also reject Ginger’s argument that the garnishment limitations are inapplicable because Mitchell’s social security benefits and disability pension are not “earnings” as defined by the Consumer Credit Protection Act. Instead, Ginger argues that Mitchell’s benefits are marital property that is not subject to garnishment limitations. In support of her contention, Ginger relies on section 503(b)(2) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/503(b)(2) (West 2014)), which defines pension benefits as an allocation of marital *property*. Though such benefits are labeled as property under the statute, section 503(b)(2) is inapplicable to the instant proceedings, as it governs the division of property upon the dissolution of marriage. The instant case involves a garnishment proceeding to satisfy support arrearages. Again, the controlling provision is the Income Withholding for Support Act. *Supra* ¶ 14.

¶ 19 **CONCLUSION**

¶ 20 The judgment of the trial court of Will County is reversed and remanded with directions to amend the garnishment order and QDRO not to exceed the limits established by the Consumer Credit Protection Act.

¶ 21 Reversed and remanded with directions.