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2018 IL App (3d) 160723-U

Order filed January 4, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

| | | |
|--------------------------|---|-------------------------------|
| <i>In re</i> MARRIAGE OF |) | Appeal from the Circuit Court |
| |) | of the 12th Judicial Circuit, |
| BRENDA MUTZBAUER, |) | Will County, Illinois. |
| |) | |
| Petitioner-Appellee, |) | |
| |) | Appeal No. 3-16-0723 |
| and |) | Circuit No. 10-D-2349 |
| |) | |
| TIMOTHY MUTZBAUER, |) | |
| |) | The Honorable |
| Respondent-Appellant. |) | Victoria M. Kennison, |
| |) | Judge, presiding. |

JUSTICE McDADE delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Presiding Justice Carter, dissenting.

ORDER

¶ 1 *Held:* The circuit court erred when it extended an award of maintenance.

¶ 2 The circuit court entered an order extending the payment of maintenance to the petitioner, Brenda Mutzbauer, from the respondent, Timothy Mutzbauer. On appeal, Timothy argues that the court's decision was against the manifest weight of the evidence and an abuse of discretion. We reverse and remand with directions.

¶ 7 The parties' income and expense affidavits were introduced into evidence. Brenda listed her monthly expenses as \$1,800 and her prior year's gross income as \$6,000. She was not employed. In addition to the student loan debt, she listed credit card debt of approximately \$15,000 and unpaid medical bills of \$5,200. She did not have any bank accounts, employment benefits, or other assets. Timothy listed his monthly expenses as \$2,939.57 and his prior year's gross income as \$103,357, which included a bonus that was no longer available. He listed his gross monthly income as \$5,952 and, after \$4,114.45 in deductions that included the unallocated support payment, his net monthly income as \$1,837.55. He stated he had \$1,100 in his checking account and \$1,400 in his savings account, and that he had \$11,122.38 in credit card debt. He also listed his 401k as having a fair market value of \$32,000.

¶ 8 In announcing its ruling, the court stated that it had considered the parties' income-expense affidavits, motions, exhibits, and testimonies. The court stated:

“But in any case, [Timothy], based on your total 2015 year to date income, I am looking at [Brenda's] lack of income, your current income, the length of the marriage, all of the 510 factors of the Illinois Marriage & Dissolution of Marriage Act that the Court has to consider, as well as Section 504 pertaining to maintenance. Clearly there is a large discrepancy – a huge discrepancy between your ability to earn income and her ability to earn income, not to mention just the standard of living that you are living compared to what she is living.”

The court then found that Timothy had the ability to pay maintenance and Brenda had a great need for it. Maintenance was set at \$2,248 per month, which was reviewable after October 1, 2019, as long as Brenda filed a motion for extension.

¶ 9 Timothy questioned the court’s decision, stating that Brenda had not made any attempt at finding employment. The court responded:

“I understand, sir, but what I’m hearing is that she’s losing her license because of her eyesight. I don’t know what she’s capable of. I don’t find that she had like any ability right now. You know, if you think that she does, then that will be something that you may want to speak to an attorney. Right now, ma’am, you are not able to find any employment?”

Brenda responded no, and the court stated, “[t]hat’s basically what I found.”

¶ 10 Thereafter, Timothy did retain an attorney, who filed a motion to reconsider in February 2016. The motion alleged, *inter alia*, that the circuit court failed to elicit testimony from Brenda on her efforts at finding employment and becoming self-supporting.

¶ 11 In July 2016, the circuit court held a hearing on the motion to reconsider, at which the court allowed Timothy’s attorney to ask some questions of Brenda. Brenda testified that she had not received any diagnosis related to her vision and that she last talked to an eye doctor approximately four years ago, although he refused to set up an appointment for her. She also testified that her current eyeglass prescription was approximately eight years old. Regarding her driver’s license, Brenda stated that she had failed her last vision test—three years ago—at the Department of Motor Vehicles, but that she begged them to renew her license, and they did so. She testified that her driver’s license was valid and that it had a restriction that required her to

wear her prescription eyeglasses to drive. However, she stated that she did not drive because she was too scared to do so.

¶ 12 The court continued the hearing based on other matters not at issue in this appeal. In addition, a date was set for Brenda to be deposed by Timothy's attorney. During that deposition, Brenda stated that she had over 15 years of experience as a receptionist at a dentist's office and another business. She had not worked since 2012. She stated that she applied for one job in 2012 and had been rejected by many other businesses, who told her they were not hiring. In 2013, she inquired about working at Jewel, but her call was not returned. In 2014, she attended a job fair that included approximately 30 companies, but she was unable to secure employment. She did not look for a job in 2015 or 2016. She thought her vision problems were a liability for her ability to find a job. She stated, "I gave it up [looking for a job]. I gave up looking for it because it's too hard to see."

¶ 13 In November 2016, the circuit court resumed the hearing on Timothy's motion to reconsider. The court denied Timothy's motion, stating that "[d]ealing with two pro se people that the Court had at the time, that was the best that could be done at the time." The court also stated:

"I accepted the representations of [Brenda] at the time, that her eyesight was failing. And I believed at that time that that, in essence, was – she was unable to find work based upon her other testimony, the limited testimony.

And I acknowledge it was limited testimony regarding her efforts to look for, for jobs. But those two things together at the time I thought was [*sic*] sufficient."

Further, while it acknowledged that Timothy’s counsel had presented a good argument, the court stated that it was “not going to give [Timothy] a second bite at the apple because he didn’t like the ruling, he decides then to go out and hire an attorney when he should have hired the attorney to begin with to have the proper discovery done there.” Accordingly, the court denied the portion of Timothy’s motion related to Brenda’s efforts at obtaining employment.²

¶ 14 Timothy appealed.

¶ 15 ANALYSIS

¶ 16 On appeal, Timothy argues that the circuit court erred when it extended the maintenance order. Timothy claims that Brenda presented no evidence regarding her efforts at obtaining employment. He also claims that Brenda perpetrated a fraud on the court by misrepresenting her vision issues and, as such, his failure to pursue discovery prior to the hearing should be excused.

¶ 17 Section 504(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) provides a list of factors that courts are required to consider when determining whether to award maintenance, including:

“(1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance as well as all financial obligations imposed on the parties as a result of the dissolution of marriage;

(2) the needs of each party;

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

² The court reversed itself on other matters and thereby granted Timothy’s motion in part, but those matters are not at issue in this appeal.

(4) any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage;

(5) any impairment of the realistic present or future earning capacity of the party against whom maintenance is sought;

(6) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment or any parental responsibility arrangements and its effect on the party seeking employment;

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

(8) the duration of the marriage;

(9) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and the needs of each of the parties;

(10) all sources of public and private income including, without limitation, disability and retirement income;

(11) the tax consequences of the property division upon the respective economic circumstances of the parties;

(12) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;

(13) any valid agreement of the parties; and

(14) any other factor that the court expressly finds to be just and equitable.” 750 ILCS 5/504(a) (West 2016).

¶ 18 Section 510 of the Act controls the modification and termination of provisions for maintenance. 750 ILCS 5/510 (West 2016). Of relevance to this case, subsection (a-5) provides that “[a]n order for maintenance may be modified or terminated only upon a showing of a substantial change in circumstances. In all such proceedings, as well as in proceedings in which maintenance is being reviewed, the court shall consider the applicable factors set forth in subsection (a) of Section 504 and the following factors:

“(1) any change in the employment status of either party and whether the change has been made in good faith;

(2) the efforts, if any, made by the party receiving maintenance to become self-supporting, and the reasonableness of the efforts where they are appropriate;

(3) any impairment of the present and future earning capacity of either party;

(4) the tax consequences of the maintenance payments upon the respective economic circumstances of the parties;

(5) the duration of the maintenance payments previously paid (and remaining to be paid) relative to the length of the marriage;

(6) the property, including retirement benefits, awarded to each party under the judgment of dissolution of marriage, judgment of legal separation, or judgment of declaration of invalidity of marriage and the present status of the property;

(7) the increase or decrease in each party's income since the prior judgment or order from which a review, modification, or termination is being sought;

(8) the property acquired and currently owned by each party after the entry of the judgment of dissolution of marriage, judgment of legal separation, or judgment of declaration of invalidity of marriage; and

(9) any other factor that the court expressly finds to be just and equitable.” 750 ILCS 5/510(a-5) (West 2016).

¶ 19 The Act requires the circuit court to make specific factual findings related to its decision to award maintenance. 750 ILCS 5/504(b-2)(1) (West 2016) (requiring, as of January 1, 2015, that “[t]he court shall state its reasoning for awarding or not awarding maintenance and shall include references to each relevant factor set forth in subsection (a) of this Section”); 750 ILCS 5/510(c-5) (West 2016) (requiring, as of January 1, 2012, that “[i]n an adjudicated case, the court shall make specific factual findings as to the reason for the modification as well as the amount, nature, and duration of the modified maintenance award”). An award of maintenance is a matter

within the circuit court's discretion. *In re Marriage of Smith*, 2012 IL App (2d) 110522, ¶ 46. An abuse of discretion occurs only when no reasonable person would take the position adopted by the circuit court. *Id.* In addition, the circuit court's factual findings will not be disturbed unless they are against manifest weight of the evidence, which occurs only if the opposite conclusion was clearly evident or if those findings were arbitrary, unreasonable, or not based on any of the evidence presented. *Id.*

¶ 20 The Fifth District has articulated an important aspect of maintenance's goal of financial independence:

“Although there is a mandated duty to acquire financial independence, and rehabilitative maintenance is an incentive to assist a spouse in achieving that goal, it is the trial judge who is better able to determine if such an incentive is necessary, and that determination will not be overturned absent a clear abuse of discretion. The trial court can also assess whether the spouse receiving maintenance will realistically be able to fully or partially support him or herself through employment with the standard of living established during the marriage. The longer one is married without employment the more difficult it will be to obtain a marketable skill and assimilate back into the work force.” *In re Marriage of Gunn*, 233 Ill. App. 3d 165, 178-79 (1992).

¶ 21 Initially, we note that our review of the circuit court's decision assumes that the court rejected the evidence Timothy presented in his motion for reconsideration and at the hearing on that motion, which we believe is evident in the court's comments that it was not allowing

Timothy a “second bite at the apple.” Thus, the context for our analysis is what the court knew at the time it issued its decision to extend the maintenance order.

¶ 22 In light of all of the factors courts are required to consider in maintenance determinations, we find that neither the circuit court’s factual findings nor its maintenance order find adequate support in the record. In particular, there was no evidence to support the court’s findings that Brenda was losing her eyesight or that she could not secure employment. Rather, the court simply accepted Brenda’s unsubstantiated claims without requiring any evidentiary support as contemplated by the applicable statutory scheme. While the court mentioned the substantial income disparity between the parties, that finding was not based on a complete consideration of the statutory factors. No evidence was presented on Brenda’s potential earning capacity (750 ILCS 5/504(a)(3), (4) (West 2016)) or, significantly, her efforts at securing employment after the divorce (750 ILCS 5/510(a)(2) (West 2016)). Thus, the court’s assessment of the parties’ income disparity failed to assess whether Brenda even *could* earn income or at what level, contrary to the mandatory statutory considerations. Under these circumstances, we hold that the circuit court’s factual findings related to Brenda’s eyesight and her ability to secure employment are against the manifest weight of the evidence. Because the court’s maintenance order was premised on these factual findings, we further hold that the order constituted an abuse of the court’s discretion.

¶ 23 Our decision in this case should not be read to foreclose the possibility of maintenance for Brenda. Rather, a maintenance decision should be made after the presentation and consideration of all relevant evidence at a properly conducted hearing. See, *e.g.*, *In re Marriage of Rosen*, 126 Ill. App. 3d 766, 778 (1984). Under these circumstances, we hold that the circuit court abused its discretion when it extended the maintenance order, and we remand the case for

the circuit court to conduct a new hearing on Brenda’s motion to extend maintenance (see Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994) (authorizing the reviewing court to make any “further orders *** that the case may require”)).

¶ 24 Our resolution of the first issue obviates the need to address Timothy’s argument that Brenda perpetrated a fraud on the court. Any issues related to Brenda’s eyesight will be addressed in the new hearing on her motion to extend maintenance.

¶ 25 CONCLUSION

¶ 26 The judgment of the circuit court of Will County is reversed and the cause is remanded with directions for the court to conduct a new hearing on Brenda’s motion to extend maintenance.

¶ 27 Reversed and remanded with directions.

¶ 28 PRESIDING JUSTICE CARTER, dissenting.

¶ 29 I respectfully dissent from the majority's decision in the present case. I would affirm the trial court’s order extending the payment of maintenance to the petitioner, Brenda Mutzbauer, from the respondent, Timothy Mutzbauer. I would find that the trial court’s decision was not against the manifest weight of the evidence and was not an abuse of discretion.

¶ 30 In 2013, the parties entered into an agreed order providing for unallocated family support reviewable 33 months after January 1, 2013. Brenda filed a motion to extend child support and spousal maintenance on August 28, 2015. When the parties provide for a general review of maintenance, there is no burden imposed on the moving party to prove a substantial change in circumstances; rather, the trial court, in its discretion, is required to consider the relevant factors in sections 504(a) and 510(a-5) of the Act (750 ILCS 5/504(a), 510(a-5) (West 2016)) in

determining whether to continue, modify, or terminate maintenance. *Blum v. Koster*, 235 Ill. 2d 21, 35-36 (2009); *In re Marriage of Golden*, 258 Ill. App. 3d 464, 471 (2005).

¶ 31 A trial court's decision regarding maintenance upon conducting a review of maintenance will not be disturbed on appeal absent a clear abuse of discretion. *Blum*, 235 Ill. 2d at 36. A clear abuse of discretion occurs only when the ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *Id.*; *People v. Hall*, 195 Ill. 2d 1, 20 (2000). With this legal background in mind, I will discuss the issues presented on appeal.

¶ 32 I would find that there is sufficient evidence in the record from Brenda's own testimony to support the trial court's finding that Brenda was losing her eyesight and could not secure employment. Although the majority mentions in its decision that Timothy alleged in his motion to reconsider that the trial court had failed to elicit testimony from Brenda on her efforts at finding employment and becoming self-supporting, the trial court bears no such burden of proof. Rather, the parties should present evidence, and Brenda did present evidence below. The condition of a person's own health from one's sensory observations and personal knowledge has long been a proper subject of lay-witness testimony in Illinois and does not need to be substantiated by other witnesses. See Ill. R. Evid. 701 (eff. Jan. 1, 2011); *Lauth v. Chicago Union Traction Co.*, 244 Ill. 244, 249-50 (1910) (appellee testified in his own behalf as to his ailments and so did lay witnesses as to appellee's physical condition); *Chicago City Ry. Co. v. Van Vleck*, 143 Ill. 480, 485 (1892); see also *U.S. v. Jones*, 739 F.3d 364, 369 (7th Cir. 2014) (difference between lay testimony and expert testimony). Uncertainty about a party's future health can be a basis for continued reviewable maintenance. *In re Marriage of Stam*, 260 Ill. App. 3d 754, 757 (1994). Brenda also presented her efforts at finding employment in the past

and the difficulties she confronted. In contrast, Timothy presented only argument regarding alleged fraud and suspicion, without evidence, regarding Brenda's eyesight.

¶ 33 As to findings of fact, although section 510(c-5) of the Act (750 ILCS 5/510(c-5) (West 2016)) provides that a court make specific factual findings as to the reasons for modification of maintenance, when the basis for the award is established in the record, I would argue it is not mandatory that explicit findings be made for each statutory factor. See *Blum*, 235 Ill. 2d at 38. I would conclude that the trial court properly considered the applicable factors and that the record supports its decision.

¶ 34 I would also note that the purpose of a motion to reconsider, such as the one filed in the present case, is to bring to the trial court's attention newly discovered evidence, changes in the law, or errors in the court's application of existing law. *Simmons v. Reichardt*, 406 Ill. App. 3d 317, 324 (2010). A trial court's ruling on a motion to reconsider should not be disturbed on appeal absent an abuse of discretion. *Id.* In the instant case, I would find that the trial court did not abuse its discretion in ruling upon Timothy's motion to reconsider and would affirm the trial court's denial of that motion.

¶ 35 In sum, because I believe that the trial court properly granted Brenda's motion to extend the payment of maintenance and that the trial court properly denied Timothy's motion to reconsider that ruling, I would affirm the trial court's judgment. I dissent from the majority's decision in this case, which reverses the trial court's ruling and remands this case for the trial court to conduct a new hearing on Brenda's motion.