2019 IL App (2d) 180624-U
No. 2-18-0624
Order filed May 20, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF BRAD D. MUNDSCHENK,	)	Appeal from the Circuit Court of Lake County.
Petitioner-Appellant,	)	
and	)	No. 07-D-938
NANCY B. MUNDSCHENK,	)	Honorable Elizabeth M. Rochford,
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: In light of the incomplete record on appeal, we could not hold that the trial court abused its discretion in granting respondent's petition for educational expenses.

¶ 2 Brad D. Mundschenk, the petitioner in a dissolution-of-marriage proceeding, appeals from the trial court's grant of a petition by the respondent, Nancy B. Mundschenk, in which she sought an order requiring Brad to pay some of the higher education expenses of their son, Troy. We hold that Brad has not met his burden to show that the court erred in entering the order and then denying Brad's motion to reconsider. We therefore affirm.

¶ 3 I. BACKGROUND

¶ 4 On June 29, 2017, Nancy filed a "Petition for Costs Tuition and Fees for Higher Education." As amended on November 7, 2017, it alleged that, on July 31, 2009, the court had entered a judgment dissolving Nancy's marriage to Brad. According to the petition, the dissolution judgment had incorporated a marital settlement agreement (MSA) that in turn contained an article relating to postsecondary educational expenses. No full copy of the MSA exists in the record. However, a copy of one page of the MSA, which Nancy appended to her original petition, includes a principal relevant section:

> "6.1 The parties shall pay for a college, university or vocational school education for the children of the parties, which obligation is predicated upon the scholastic aptitude of each child. The extent of the parties' respective obligations hereunder shall be determined by the provisions of 750 ILCS 3/5/513 of the Illinois Marriage and Dissolution of Marriage Act, or by any similar or comparable provision in force at the time in question. Said expenses shall include, but not be limited to, tuition, room and board, lodging, books, assessments and charges, clothing, transportation expenses between school and home, registration and other required fees, professional and/or fraternity or sorority dues and any other reasonable and necessary expenses."

The wording of section 6.4 is available to us only in a quotation included in one of Brad's filings:

> " 'All decisions affecting the children's education, including the choice of college or other institution, shall be made jointly by the parties and shall consider the expressed preferences of the child…In the event the parties cannot agree upon any issue related to a child's education, said issue shall be submitted to a Court of competent jurisdiction for determination upon proper notice, petition and hearing.' " (Emphases omitted.)

¶ 5 Nancy's petition further alleged that Troy Mundschenk, the parties' youngest child, had been accepted to Rensselaer Polytechnic Institute (RPI). The petition alleged that RPI had estimated that Troy's annual costs for tuition, room and board, books, and living expenses would be $25,260 after the application of his aid package. The petition asked that Brad contribute to payment of those expenses and that he add Troy to his health insurance plan or pay for RPI's plan.

¶ 6 Brad responded with what amounted to a general denial.

¶ 7 On April 6, 2018, following a two-day evidentiary hearing, the court entered a written order requiring Brad to pay $6300 per year toward Troy's expenses retroactive to the petition's filing and to pay half of Troy's health insurance premium. The court found that Nancy had failed to communicate with Brad about Troy's choice of schools until after Troy had committed to attend RPI. However, it also found that "the parties' inability to effectively communicate would have made any effort to jointly select the school impossible and accordingly any failure to comply with Article VI, Section 6.4 of the MSA [was] not an impediment to Respondent's pursuit of the *** Petition." It further concluded that Brad was capable of making the payments based on his past ability to make support payments:

> "12. The Court finds that Petitioner earned gross income of $58,000.00 previously during a time when he had an obligation of child support and that he contributed approximately $14,000.00 [per] year in support for the children of the marriage;
>
> 13. The Court finds that Petitioner presently earns gross income of $75,000.00 and has no obligation of child support;
>
> * * *

18. The Court finds that Petitioner's obligation of child support upon Troy Mundschenk's emancipation was $580.00 per month [(that is, $6960 per year).]"

¶ 8 The court did not believe Brad's claim that he needed to save $300 per month for retirement: "The Court finds that [Brad's] assertion that he now needs to pay $300.00 per month towards retirement saving is disingenuous and not credible." (Brad was 62 years old in 2018.)

¶ 9 Brad filed a motion to reconsider in which he raised multiple issues, including those that he now raises on appeal:

1. The court erred in finding as follows:

a. That Brad's need for retirement funds should not be a consideration in the award;

b. That the lack of effective communication between Brad and Nancy prevented them from working together with Troy to choose a college;

c. That no custodial account for Troy existed; and

d. That Brad had sufficient resources to pay what the court required of him.

2. The court neglected to address the prejudice Brad suffered when Nancy allowed Troy to enroll in an expensive college without consulting him and should not have made the award absent the required consultation.

3. Because the court never established Troy's out-of-pocket costs, it lacked the information to set an award amount properly; the share that it required Brad to pay could be anywhere from 21% to 33% of the total costs.

¶ 10 The court denied Brad's motion to reconsider on July 9, 2018. The order does not establish the nature of the hearing that took place, and Brad's brief does not address the motion's

denial. The order does note that no other matters were pending and that the case was " 'off call.' "

¶ 11 Defendant filed a timely notice of appeal. The common-law record starts with Nancy's filing of the petition for Troy's expenses. The only report of proceedings included is that of the evidentiary hearing on the petition. The exhibits introduced at that hearing are not a part of the record.

¶ 12 II. ANALYSIS

¶ 13 On appeal, Brad's claims of error are essentially similar to those in the motion for reconsideration. We address them in the order they appear in the brief: (1) Nancy failed to comply with section 6.4's requirement for consultation on college choice, and the lack of the required consultation should have precluded the award; (2) the court erred in concluding that no custodial account for Troy's benefit existed; (3) the court failed to establish Troy's actual out-of-pocket expenses, so Brad's contribution might be as much as 33% or as little as 21% of those expenses; (4) the court erred in failing to consider Brad's need to save money for retirement; and (5) the court erred in determining that Brad had the ability to pay the award. Nancy has not filed an appellate brief. We nevertheless consider the appeal on its merits. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976) ("if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal").

¶ 14 Because the record in this appeal does not include a transcript of the hearing on Brad's motion to reconsider, the rule in *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984), applies in our analysis. Under *Foutch*, where the record is incomplete, we must "presume[] that the order entered by the trial court was in conformity with law and had a sufficient factual basis" and must

resolve against the appellant "[a]ny doubts which may arise from the incompleteness of the record." *Foutch*, 99 Ill. 2d at 392. This is because the "appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error" (*Foutch*, 99 Ill. 2d at 391-92)—a rule that is equally applicable to a decision made after an evidentiary hearing. We also note that a court is "authorized to take judicial notice of facts established in other proceedings in the same case before it." *In re C.M.J.*, 278 Ill. App. 3d 885, 891 (1996) (citing *In re Brown*, 71 Ill. 2d 151, 155 (1978)). Thus, where the court apparently took note of its past conclusions—as when it noted a history of acrimony and poor communication between Brad and Nancy—we presume that the court was correct, as we lack the part of the record in which any evidence to contradict the conclusion would be found. Further, because we lack a transcript of the hearing on the motion to reconsider, we cannot assume that the court's written order of April 6, 2018, reflects the court's final reasoning.

¶ 15 We review an award of educational expenses for an abuse of discretion. *In re Marriage of Koenig*, 2012 IL App (2d) 110503, ¶ 11.

¶ 16 Turning to Brad's arguments, we first conclude that Nancy's probable noncompliance with the MSA's provision on joint college decision-making did not preclude the court from ordering Brad's educational support for Troy. An MSA is a contract and is interpreted accordingly. *E.g.*, *In re Marriage of Haller*, 2012 IL App (5th) 110478, ¶ 26. Initially, we reject Brad's implication that Nancy's compliance with section 6.4 of the MSA was a condition precedent for enforcement of section 6.1 against Brad. A "condition precedent" in a contract is a condition that must be met before another promise in the contract becomes an obligation. *Crystal Lake Ltd. Partnership v. Baird & Warner Residential Sales, Inc.*, 2018 IL App (2d) 170714, ¶ 74. "Conditions precedent are generally disfavored; in resolving doubts about whether

a contract contains a condition precedent, interpretations that reduce the risk of forfeiture are favored." *Navarro v. Federal Deposit Insurance Corp.*, 371 F.3d 979, 981 (7th Cir. 2004) (citing Restatement (Second) of Contracts § 227(1) (1981)). Neither section 6.1 nor section 6.4 contains any language suggesting that consultation about college choice under section 6.4 was a condition precedent for an award of expenses under section 6.1. In any event, since we do not have the text of the entire MSA available to us, we must assume that the remaining portion of the MSA supported the court's interpretation of the two sections. Thus, the terms of the two sections are independent promises, and whether the court should have imposed some penalty on Nancy for noncompliance with section 6.4 is thus separable from its implementation of the agreement embodied by section 6.1.

¶ 17 Second, we reject Brad's argument that the court failed to require Nancy to use a custodial account to pay for Troy's education and erred in disallowing questions intended to probe whether such an account existed. Brad has failed to provide a sufficient record on appeal to support this claim. First, he argues that the court's decision is contrary to the MSA, which, he argues, was written to imply that a custodial account existed for Troy. But the record does not contain the relevant portion of the MSA. Thus, we must assume that the court interpreted it properly. Brad also argues that there was evidence of "a significant balance" in Nancy's account and that those funds "might have been a custodial account within the scope of Article VI, Section 6.5." Here again, we lack access to a relevant portion of the evidence, the trial exhibits. We thus cannot evaluate the court's conclusion that Nancy's account had nothing to do with any custodial account for Troy.

¶ 18 Third, we do not agree that the court acted unreasonably in making Brad pay an amount that might be from anywhere 21% to 33% of Troy's overall out-of-pocket expenses. Nancy was

not employed, and she was selling belongings to pay for her share of Troy's expenses. Thus, even if Brad's share is at the higher end of the range, his $6,300 contribution is not obviously excessive. See 750 ILCS 5/513(j)(1) (West 2016) (an award must be based on, *inter alia*, "[t]he present and future financial resources of both parties.")

¶ 19 Fourth, it is true that the court was required to consider Brad's retirement savings. 750 ILCS 5/513(j)(1) (West 2016). In addition, we are puzzled by the court's April 6, 2018, finding that Brad's request for an award that allowed $300 in retirement savings was "disingenuous and not credible." Brad was 62 years old, and the evidence suggested that he had little in the way of retirement savings. Thus, his desire to save $300 per month for retirement was reasonable. But Brad raised precisely that issue in the motion to reconsider, and we do not know how the court responded to it. Based on the principles of *Foutch*, we presume that the court did ultimately consider Brad's retirement needs. With the limited record before us, we also presume that, under all the circumstances, that consideration did not require the court to reduce the award.

¶ 20 Five, based on the record on appeal, it is not possible for us to determine straightforwardly whether Brad can afford to pay the award. As we lack information available to the trial court—particularly the exhibits at the hearing—we assume that the court decided correctly.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated above, we hold that Brad has not met his burden to show that the court abused its discretion in its award of education expenses for Troy under the terms of the MSA. We thus affirm the order granting Nancy's petition.

¶ 23 Affirmed.