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2019 IL App (3d) 170642-U

Order filed January 11, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

In re MARRIAGE OF)	Appeal from the Circuit Court
JAY P. KOYAK,)	of the 13th Judicial Circuit,
)	La Salle County, Illinois,
Petitioner-Appellant,)	
)	Appeal No. 3-17-0642
and)	Circuit No. 08-D-519
)	
JENNIFER E. KOYAK,)	Honorable
)	Joseph P. Hettel,
Respondent-Appellee.)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court correctly determined that the Marital Separation Agreement was ambiguous. The trial court did not err by determining that the mortgage payment referenced in the Marital Separation Agreement constituted a non-modifiable property settlement. The trial court did not abuse its discretion by imputing income to Jay from funds Jay's appraisal business paid directly to Jay's current spouse. The trial court did not abuse its discretion by denying Jay's request for the retroactive application of the modifications to his new child support obligations.
- ¶ 2 On July 28, 2014, Jay P. Koyak filed a petition for modification of child support alleging a substantial change in circumstances. On March 15, 2017, the trial court ruled that the mortgage

payment provision referenced in both Article V and Article VII of the Marital Separation Agreement was intended to be treated as non-modifiable property settlement. When calculating Jay's income for purposes of his modified child support payment, the trial court imputed income to Jay based on business funds that were transferred directly to Jay's current spouse. The trial court also denied Jay's request for retroactive application of the modified child support figure. Jay appeals and assigns error to these three rulings.

¶ 3

I. BACKGROUND

¶ 4

On June 7, 2011, the trial court entered a judgment for dissolution of marriage (judgment of dissolution) dissolving the marriage of petitioner, Jay P. Koyak, and respondent, Jennifer E. Koyak. During the course of their marriage, the parties had two children, Allison, born April 27, 1999, and Benjamin, born October 8, 2003. The court's judgment of dissolution included a Marital Separation Agreement (MSA) wherein the parties divided assets and debts, waived their right to maintenance, and listed a schedule for monthly payments that became Jay's sole responsibility.

¶ 5

In addition, the judgment of dissolution included a Joint Parenting Agreement (JPA) wherein the parties agreed to share custody of their children and where each party was classified as the residential parent. At the time the parties came to the above-listed agreements, Jay was represented by counsel, while Jennifer proceeded *pro se*.

¶ 6

A. MSA Language Pertaining to Marital Residence and Real Property

¶ 7

Article V of the MSA is titled by subject matter and labeled as "MARITAL RESIDENCE AND REAL PROPERTY." Article V, paragraph 5 provides:

"Jay has acquired a house located at 137 Cedar Creek Lane, Oglesby, LaSalle County, Illinois. Said residence is awarded to Jay as his sole and separate property. Jay

shall assume, pay, and be solely responsible for payment of the mortgage, real estate taxes, and homeowner's insurance, and the gas, electric, water, sewer, and cable up to a total sum of \$500.00 per month for said residence until May 31, 2017. In addition, Jay shall pay the cost of Jennifer's auto insurance up to \$100.00 per month and cellular telephone charges *up to* \$115.00 per month until May 31, 2017. In the event that the residence is transferred or sold prior to May 31, 2017, Jay shall continue to pay the aforementioned *expenses* on behalf of Jennifer. Payment of the aforementioned *sums* by Jay are *in lieu* of direct child support as set forth in Article VII, paragraph 3. (Emphasis added.)

Beginning June 1, 2017 until the graduation of the parties' child Benjamin from high school, Jay shall assume, pay, and be solely responsible for payment of the mortgage, real estate taxes, and homeowner's insurance for said residence. In the event of Jay's death prior to the graduation of the parties' child, Benjamin, from school, the aforementioned payments shall immediately terminate. Further, in the event of Jay's death prior to the graduation of the parties' child, Benjamin, from school, title to the premises shall transfer to Jennifer provided she can refinance or pay any debt which then encumbers the residence. Jennifer shall have exclusive possession of the residence until Benjamin graduates from high school.

Upon graduation of the parties' child, Benjamin, from high school, Jay shall transfer all right, title and interest in and to said residence to Jennifer, provided she can obtain financing and remove Jay from responsibility for the balance remaining on the mortgage that encumbers the home. It is agreed that the balance remaining on the

mortgage that encumbers the home will not exceed \$48,000.00 at the time that Benjamin graduates from high school in June 2022.

Until June 2022, Jay may not sell or transfer the residence without Jennifer's consent. In the event that Jay elects to sell the residence prior to Benjamin's graduation from high school, the net proceeds of the sale after payment of any debts that encumber the residence and usual and customary closing costs would be paid by Jay to Jennifer. In the event that Jay becomes unable to make payments on the mortgage that encumbers the residence, Jennifer shall have the right to refinance the mortgage and make the necessary payments. In that event, title to said residence shall be transferred to Jennifer."

¶ 8 B. MSA Language Pertaining to Custody, Visitation, and Child Support

¶ 9 Article VII of the MSA is clearly labeled as "CUSTODY, VISITATION, AND CHILD SUPPORT." Article VII, paragraph 3 of the MSA provides:

"In lieu of direct child support, Jay shall pay the expenses related to the residence as set forth in Article 5, paragraph 5 above. Specifically, Jay shall assume, pay, and be solely responsible for payment of the mortgage, real estate taxes, and homeowner's insurance, and the gas, electric, water, sewer, and cable up to a total sum of \$500.00 per month for said residence until May 31, 2017. The amount paid by Jay pursuant to said paragraph exceeds 28% of Jay's income as contemplated by the statutory guideline."

¶ 10 C. 2014 Petition to Modify Child Support

¶ 11 On June 26, 2014, Jay filed a petition to modify visitation alleging that there had been a substantial change in circumstances because their oldest child now lived with Jay full time, *inter alia*. On July 28, 2014, Jay filed a petition for modification of child support. The petition for modification of child support again alleged a substantial change in circumstances in that both

children now resided primarily with Jay. Due to this change in circumstances, Jay requested that the payments set forth in Article V, paragraph 5, and Article VII, paragraph 3 of the MSA be terminated.

¶ 12 On August 8, 2014, Jennifer filed a motion to dismiss Jay's petition to modify child support. Jennifer asserted that there had been no substantial change in circumstances because the MSA specified that all parenting time was by agreement of the parties, and that the expenses to be paid by Jay pursuant to the MSA constituted a non-modifiable property settlement. On February 16, 2016, the trial court denied Jennifer's motion to dismiss.

¶ 13 On December 6, 2016, the trial court conducted a hearing on Jay's petition to modify child support.¹ Jay testified that at the time of the dissolution, the children were residing with each parent roughly equal amounts of time. According to Jay, in August 2013, the parties' daughter began residing with Jay full-time. Jay also testified that the parties' son began to reside with him more than 50% of the time because Jennifer changed jobs. Jay testified that pursuant to the agreement, he was paying expenses for Jennifer's household of approximately \$1150 in the form of a mortgage payment, plus additional property taxes. Jay paid approximately \$100 per month in homeowner's insurance on the residence at 137 Cedar Creek Lane (the Cedar Creek residence), up to \$500 per month in utilities for the Cedar Creek residence, approximately \$115 per month for cell phone bills, approximately \$100 for auto insurance per month, and \$5500 per year in tuition.

¶ 14 On cross-examination, Jennifer's counsel asked Jay about the parties' respective positions around the time of the dissolution, including the intent behind certain provisions in the property settlement agreement. Jay's counsel objected on the grounds the plain language of the

¹Counsel indicated before the hearing that Jay only wished to move forward with the petition to modify child support obligations.

agreement had no missing or ambiguous terms in the agreement, thus eliciting parol evidence was improper.

¶ 15 The court ruled that such evidence concerning the parties' intent and relative positions at the time of the agreement was relevant and admissible at that time, pending the court's legal interpretation of the agreement. The trial court stated that if a subsequent review of the case law did not allow the trial court to consider such evidence, the trial court would not consider the evidence. In response, Jay's counsel raised a standing objection to any line of questioning concerning the parties' intent and relative positions at the time of the agreement.

¶ 16 Following the court's ruling, Jay testified on cross-examination that Jennifer did not receive any part of Jay's appraisal business and did not receive any maintenance from Jay for purposes of the dissolution. Jay testified that prior to the dissolution, Jennifer dropped out of nursing school and worked for the appraisal business for a short time until the parties separated. Jay selected and purchased the Cedar Creek residence, in his name, for Jennifer and the children to reside. Jay put \$51,000 down on the purchase of the home, leaving a mortgage balance of approximately \$150,000. The mortgage balance has since been reduced to approximately \$120,000.

¶ 17 After the judgment of dissolution on June 7, 2011, Mary Jo, Jay's current spouse, worked for Jay's appraisal business and earned \$21,250 as Jay's employee in 2012. According to Jay, Mary Jo earned \$32,500 as an employee of Jay's appraisal business in 2013 and 2014. Jay and Mary Jo were married in 2015. During the same year, 2015, Mary Jo began operating her own appraisal business. In 2015, Mary Jo received \$17,500 as an employee of Jay's appraisal business, a \$15,000 dollar decrease from the prior two years, and earned an additional \$59,100

from her own appraisal business. The entirety of the additional income earned from Mary Jo's appraisal business came from Jay's appraisal business.

¶ 18 Jennifer testified and explained that during the dissolution she was looking at properties in the \$75,000 to \$100,000 range, but Jay wanted to have the children live in two nice homes. Jennifer stated that the Cedar Creek residence was significantly more expensive than the homes in her price range. Jay and Jennifer initially put down \$51,000 of marital funds on the house or 25% of the purchase price leaving a mortgage in the amount of \$153,000. Jennifer admitted that her income level at that time would not make this home affordable for her and the children. Thus, the agreement ensued whereby Jay would pay the expenses related to Jennifer's home. Jennifer also testified that she paid for several repairs on the house. Again, Jay's attorney objected to parol evidence about the purchase of the home. Jennifer also explained that she filed bankruptcy before the dissolution was finalized as part of her and Jay's agreement. The trial court took the matter under advisement.

¶ 19 D. The Trial Court's 2017 Ruling

¶ 20 The court issued a ruling on March 15, 2017. The trial court found that the MSA was ambiguous in two instances and stated:

“The first question that needs to be answered regarding the Judgment is whether it is ambiguous. Clearly, Jay's inclusion of the words “in lieu of direct child support” was meant to make the payments outlined in Article 5, Paragraph 5 modifiable. Additional support for the child support/modifiable argument can be found in the second to last sentence of the fourth Paragraph, which contemplates Jay becoming unable to make the payments.

Arguments for ambiguity start in the second to last sentence of the first full Paragraph of Sub-Paragraph 5, which reads: “In the event that the residence is transferred or sold...., Jay shall continue to pay the aforementioned expenses on behalf of Jennifer.” How can the “aforementioned expenses” include the mortgage, taxes and insurance of a house that’s been sold? Perhaps the aforementioned expenses, in lieu of child support, only include the utilities, auto insurance and cell phone? It is unclear, when one considers the above language, whether the mortgage, taxes and insurance are included. Further ambiguity arises in the fourth Paragraph of Sub-Paragraph 5. The Paragraph starts out reading that Jay may not sell or transfer the residence without Jennifer’s consent; the next sentence refers to Jay’s ability to elect to sell the residence prior to Benjamin’s graduation.”

¶ 21 Based on these ambiguities in Article V, the court overruled Jay’s objection to the parol evidence of the intent of the parties regarding the purchase of the Cedar Creek residence. The trial court then concluded that the monthly mortgage payment on the Cedar Creek residence in Jay’s name represented a non-modifiable property settlement, but all other monthly payments Jay was making, including but not limited to property taxes and insurance on the Cedar Creek residence, did not qualify as part of the non-modifiable property settlement and would be treated by the court as modifiable payments representing Jay’s child support obligation.

¶ 22 The trial court found a substantial change in circumstances warranted a modification of the amount of child support primarily because the oldest child now resides with Jay almost all of the time. Jennifer submitted her current financial affidavit to the court. The court did not receive a current financial affidavit from Jay and relied on information contained in Jay’s income tax

documents.² The trial court made new child support calculations based on the information contained in the parties' tax returns. When computing Jay's income, the trial court imputed Mary Jo's appraisal business income of \$59,100 as part of Jay's annual income, but subtracted \$15,000, which represented the drop in Mary Jo's previous salary from Jay's appraisal business from 2014 to 2015. After completing these calculations, the trial court ordered Jay to pay child support in the amount of \$888 per month.

¶ 23 Based on the evidence, however, the court found a hardship would be imposed on Jennifer if the court's modifications applied retroactively beginning on the 2014 filing date of Jay's petition to modify child support.

¶ 24 On April 17, 2017, Jay filed a motion to reconsider. The trial court denied Jay's motion to reconsider on August 29, 2017. Jay appeals.

¶ 25 II. ANALYSIS

¶ 26 On appeal, Jay contends the provisions of the MSA were unambiguous, contrary to the trial court's finding of ambiguity. Jay also submits the trial judge compounded the first error by finding the mortgage payment outlined in the MSA constituted a non-modifiable property settlement. Jay also challenges the trial court's decision imputing income to Jay from his current spouse after their marriage in 2015, and the court's decision not to apply the modification of Jay's support obligation retroactively.

¶ 27 In opposition, Jennifer urges this court to affirm the trial court's ruling finding the monthly mortgage payment on the Cedar Creek residence in the amount of \$1150 was intended by the parties to constitute a non-modifiable property settlement.

²The parties do not take issue with the mathematical calculations or formula used by the trial court when calculating each party's income.

¶ 28

A. Ambiguity

¶ 29

We first resolve whether the language in the MSA is ambiguous. Throughout the course of the litigation in this matter, and on appeal, the parties spent a great deal of time arguing whether the MSA is or is not ambiguous for purposes of allowing the trial court to consider parol evidence. The primary objective when construing an MSA is to give effect to the intent of the parties. *In re Marriage of Frank*, 2015 IL App (3d) 140292, ¶ 11. “The best indicator of the parties’ intent is the language used in [the MSA].” *Id.* Accordingly, when the agreement is unambiguous, intent is derived solely from the language of the agreement and extrinsic evidence, or parol evidence, is not allowed. *Id.*, ¶ 12. However, when an MSA is ambiguous, the court may hear parol evidence to aid in its decision concerning the parties’ intent. *Id.* Our review of whether the terms of the MSA are ambiguous is *de novo*. *In re Marriage of Dundas*, 355 Ill. App. 3d 423, 426 (2005).

¶ 30

In this case, the court has prepared a very thorough and thoughtful analysis regarding the trial court’s finding that the MSA was ambiguous. Applying *de novo* review, we reach the same conclusion as the trial court, namely, that the MSA contains ambiguous language.

¶ 31

After a careful review of the language contained in the four corners of the MSA, we agree with the trial court’s finding that the language in Articles V and VII listing Jay’s monthly payments intended to be paid “in lieu of child support” are in direct conflict with other language concerning contingencies triggered if Jay sells the Cedar Creek residence. This court is unable to articulate the ambiguity any better than the trial court. Therefore, for purposes of this appeal, we adopt the logic employed by the trial court in its March 15, 2017, order as set forth below:

“The first question that needs to be answered regarding the Judgment is whether it is ambiguous. Clearly, Jay’s inclusion of the words “in lieu of direct child support” was

meant to make the payments outlined in Article 5, Paragraph 5 modifiable. Additional support for the child support/modifiable argument can be found in the second to last sentence of the fourth Paragraph, which contemplates Jay becoming unable to make the payments.

Arguments for ambiguity start in the second to last sentence of the first full Paragraph of Sub-Paragraph 5, which reads: “In the event that the residence is transferred or sold...., Jay shall continue to pay the aforementioned expenses on behalf of Jennifer.” How can the “aforementioned expenses” include the mortgage, taxes and insurance of a house that’s been sold? Perhaps the aforementioned expenses, in lieu of child support, only include the utilities, auto insurance and cell phone? It is unclear, when one considers the above language, whether the mortgage, taxes and insurance are included. Further ambiguity arises in the fourth Paragraph of Sub-Paragraph 5. The Paragraph starts out reading that Jay may not sell or transfer the residence without Jennifer’s consent; the next sentence refers to Jay’s ability to elect to sell the residence prior to Benjamin’s graduation.”

¶ 32 In addition to the trial court’s observations, our careful review of the MSA exposes additional ambiguities due to conflicting labels, terminology, and narrative language incorporated into the MSA. For example, ten itemized “sums” contained in Article V and the eight itemized “expenses” contained in Article VII are described in both places as payments “*in lieu of direct child support.*” (Emphasis added.) The source of the difference between Article V and Article VII is that Article VII does not include payments for “expenses” for “Jennifer’s auto insurance up to \$100.00 per month and cellular telephone charges up to \$115.00 per month until May 31, 2017,” as monthly payments “*in lieu of direct child support.*” (Emphasis added.) Article

V does include auto insurance up to \$100.00 per month and cellular telephone charges up to \$115.00 per month as payments to fulfill child support obligations, as we read the MSA.

¶ 33 Further confusion abounds because the monthly mortgage payment on the Cedar Creek residence was listed as one of the “sums” addressed within Article V, labeled “MARITAL RESIDENCE AND REAL PROPERTY,” and also simultaneously listed as one of the “expenses” within Article VII, labeled “CUSTODY, VISITATION, AND CHILD SUPPORT.” Under both Articles, the monthly mortgage payment, along with the other payments, were to be paid “*in lieu of direct child support.*” (Emphasis added.) Logically, the monthly mortgage payment on the Cedar Creek residence could not be both a non-modifiable sum pertaining to real property and also a modifiable expense pertaining to child support. This confusion strikes at the heart of this case and is further evidence of the ambiguous nature of the MSA.

¶ 34 The trial court’s observations of inconsistencies in the MSA language and our independent comparisons of the inconsistencies in the type of payments “in lieu of child support” cause us to unanimously conclude, as did the trial court, that the language of the MSA was ambiguous and parol evidence was necessary to construe the intent of the parties.

¶ 35 B. The Modifiability of the Mortgage Payment

¶ 36 On appeal, Jay contends the trial court should have included the mortgage payment as part of Jay’s modifiable child support obligation to his children. Jay argues the “*in lieu of direct child support*” language contained within the MSA unequivocally demonstrates that the mortgage payment constituted modifiable child support. (Emphasis added.) Our review and interpretation of the MSA is *de novo. Id.*

¶ 37 Confusion arising out of conflicting labels for the mortgage payment addressed in Article V and Article VII is easily resolved. The case law states that “neither the label attached nor the

method of payment prescribed in the judgment conclusively determines the nature of the instant award.” *In re Marriage of Rowden*, 163 Ill. App. 3d 869, 872 (1987). Rather, the court must look to the substance of the decree to determine the essential character of the obligation. *Id.* at 872-73.

¶ 38 We find guidance in the Second District’s decision in *In re Marriage of Pihaly*, 258 Ill. App. 3d 851 (1994). Similar to the instant case, the agreement in *In re Marriage of Pihaly* referred to the petitioner’s payments on the marital residence’s mortgage, real estate taxes, and insurance as “child support” or “additional child support.” *Id.* at 855-56. The agreement in that case stated that the petitioner, who owned one-half interest in the marital residence, would receive one-half of the proceeds upon sale of the home. *Id.* at 852, 856. Despite the label of child support, the court reasoned that child support payments are typically made for the benefit of the children “with no residual benefits for the parent making the payments. *Id.* at 856. While the payments tended to support the children, the payments would be recouped upon sale of the home. *Id.* Thus, the court found the payments did not constitute child support. *Id.*

¶ 39 In this case, upon Benjamin’s graduation in 2022, Jay’s mortgage payments would end and Jennifer would receive the title to the Cedar Creek residence subject to a mortgage balance not to exceed \$48,000. Assuming the property holds its value, the end result is that in 2022 Jennifer will receive and realize the financial benefits from Jay’s monthly mortgage payments on a house he owns. The parol evidence establishes that in 2022 Jennifer will receive the title to a home with over \$100,000 in equity and a very small remaining balance on the mortgage in comparison to the purchase price. Obviously, since both children will be emancipated in 2022, this residual benefit has no impact on the children. For this reason, we conclude that the trial

court correctly determined that the mortgage payments were intended as part of a non-modifiable property settlement between the parties.³

¶ 40 C. Computation of Jay's Income

¶ 41 Jay takes issue with the trial court's decision to impute a portion of Mary Jo's income, beginning in 2015, to Jay for purposes of calculating Jay's child support obligation.⁴ The trial court's determination of net income and child support is reviewed under the abuse of discretion standard. *In re Marriage of Carlson-Urbanczyk and Urbanczyk*, 2013 IL App (3d) 120731, ¶ 14. A trial court abuses its discretion only when the court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the same view adopted by the trial court. *Christmas v. Dr. Donald W. Hugar, Ltd.*, 409 Ill. App. 3d 91, 100 (2011). Generally, Illinois courts may impute income to a parent for purposes of calculating that parent's statutory child support obligation where the parent is voluntarily unemployed, is attempting to evade a support obligation, or unreasonably failed to take advantage of an employment opportunity. *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 1077 (2009).

¶ 42 Here, the trial court found that with the exception of \$15,000, Mary Jo's appraisal income was funneled through Jay's appraisal business to Mary Jo in order to disguise a portion of Jay's income. The end result benefited Jay by reducing his net income on paper for the purpose of reducing his child support.

¶ 43 Based on our careful review of the record, we note that Jay did not provide the trial court with a reasonable explanation for the amounts Jay's business paid to Mary Jo's business in 2015. Without a logical explanation concerning why Jay's appraisal business suddenly funneled Mary

³Jennifer has not filed a cross appeal in this matter challenging the court's ruling that all payments, exclusive of the mortgage, constituted modifiable child support.

⁴The parties do not take issue with the mathematical calculations or formula used by the trial court when calculating each party's income.

Jo's appraisal business \$59,100, we cannot say the trial court's ruling to impute Mary Jo's income was an abuse of discretion. Therefore, we conclude the trial court did not abuse its discretion by imputing all but \$15,000 of Mary Jo's income from Jay's business to Jay's business income for purposes of child support calculations.

¶ 44 D. Retroactive Application of Modification

¶ 45 Lastly, Jay asserts the trial court abused its discretion by denying Jay's request to make the child support modification retroactive to the date Jay filed the petition to modify child support. We disagree. The decision of whether or not to apply the modification of child support retroactively is within the trial court's discretion. *In re Marriage of Sweet*, 316 Ill. App. 3d 101, 109 (2000).

¶ 46 Based on the record, in spite of an increase in Jennifer's income attributable to her efforts, Jennifer's 2015 expenses still exceeded her income at the time of the 2017 hearing. The gap in her income and expenses resulted, in part, to repairs needed to maintain the Cedar Creek residence, of which Jay was the true owner. In addition, Jay failed to submit a current financial affidavit to the court demonstrating Jay would suffer a hardship if the modification was not retroactive.

¶ 47 The record reveals that the trial court's decision to deny Jay's request for a retroactive reduction in child support back to 2014 was well articulated by the trial court and well reasoned. Furthermore, the documentation and testimony of the parties contained in this record support the trial court's decision. For these reasons, we affirm the trial court's 2017 denial of Jay's request to apply the modification of Jay's child support obligation retroactively back to 2014.

¶ 48 III. CONCLUSION

¶ 49 The judgment of the circuit court of La Salle County is affirmed.

¶ 50

Affirmed.