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2019 IL App (3d) 170873-U

Order filed April 30, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
MICHAEL C. DAVIS,)	Tazewell County, Illinois,
)	
Petitioner-Appellant/Cross-Appellee,)	
)	Appeal No. 3-17-0873
and)	Circuit No. 13-D-509
)	
LEANN L. DAVIS n/k/a LEANN L. GODWIN,)	Honorable
)	Timothy J. Cusack,
Respondent-Appellee/Cross-Appellant.)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* The trial court did not err by finding petitioner should pay maintenance from March 2015 to March 2018. The trial court erred by determining attorney Watson's fees were not recoverable and for failing to announce a ruling on petitioner's request for an interim attorney's fees credit.

¶ 2 Petitioner, Michael C. Davis, petitioned for dissolution of marriage from respondent, Leann L. Davis. Petitioner contends the trial court erroneously found his 36-month obligation to pay maintenance under the parties' post-nuptial agreement (PNA) began in March 2015, rather

than in October 2013 when he filed the petition for dissolution of marriage. Further, petitioner claims the trial court neglected to credit him with a prior \$5000 payment towards respondent's interim attorney's fees. On cross-appeal, respondent argues the trial court's award of attorney's fees should be increased to include the fees of attorney Linda Watson, totaling \$28,089.38.

¶ 3

I. BACKGROUND

¶ 4

The parties were married in 2004. During their marriage, the parties executed a PNA, signed on June 19, 2012. The PNA, in pertinent part, provides as follows:

“4.1 The husband shall provide spousal support, or maintenance, to wife at least until such time that the wife has completed her schooling required for professional certificate and/or licensure, in a field of her choice. Schooling for such professional certificate and/or licensure will not exceed 30 months from the time of entrance into said program, excluding the [time for prerequisites].”

4.2 During the aforementioned period, spousal support shall be in the form of a monthly sum amount of \$4,000, which shall be paid on the first working day of each month and shall continue until the wife finds employment in her chosen field or for a maximum of 36 months, whichever is less.”

¶ 5

With respect to attorney fees, the PNA provides:

“4.11 In the event that either party files a petition for legal separation or divorce, the husband shall be responsible for his own legal expenses and 40% of the wife's legal expenses, unless *** she still is in school, wherein the husband shall pay 100% of such expenses.”

¶ 6

On October 8, 2013, petitioner filed for dissolution of marriage from respondent. On February 4, 2015, respondent filed a petition for temporary relief, requesting the payment of

maintenance pending dissolution. The reason for inactivity in the pending dissolution from 2013 to 2015 is not addressed in the record on appeal.

¶ 7 On March 9, 2015, the trial court allowed petitioner's request for leave to file an amended petition for dissolution, and granted respondent's petition for temporary relief. The trial court ordered petitioner to begin paying \$4000 per month in temporary maintenance.

¶ 8 On June 11, 2015, respondent filed a motion for interim attorney's fees, but the trial court reserved ruling until a determination was made on the validity of the PNA. On June 25, 2015, respondent filed a motion to declare the PNA void and unenforceable. Following a hearing, the trial court, on September 15, 2016, denied respondent's motion. Respondent's motion to reconsider was also denied. While challenging the PNA, respondent was represented by attorney Watson, who charged \$28,089.38 in fees from March 23, 2015, to January 24, 2017.

¶ 9 On October 27, 2015, respondent filed a renewed motion for interim attorney's fees. On March 11, 2016, the trial court, Judge Thomas Keith, granted respondent's renewed motion. The trial court ordered petitioner to pay \$5000 in interim attorney's fees to attorney Watson under section 501(c-1) of the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/501 *et seq.* (West 2014) (the Act). On November 14, 2016, the trial court entered a judgment of dissolution of marriage, but reserved the maintenance and attorney's fees issues.

¶ 10 On September 18 and 19, 2017, respondent and petitioner submitted memoranda on, among other things, the outstanding maintenance and attorney's fees issues. Also on September 19, 2017, a hearing was held for the trial court to receive exhibits from the parties. The trial court did not receive testimony during this hearing. A detailed discussion of the parties' positions on the issue of maintenance under the PNA is included in the analysis below.

¶ 11 Respondent was represented by Parker & Parker from October 1, 2013, through March 23, 2015; Linda Watson from March 23, 2015, through January 24, 2017; and Butler, Giraud & Meister, P.C., from January 24, 2017, through the end of the trial court proceedings. For Parker & Parker's fees, respondent sought \$4519.35, which was 40% of the fees from May 2014 to August 2015 when she was not in school (\$1773.10) and 100% of the fees from October 2013 to May 2014 when she was in school (\$2746.25).

¶ 12 For attorney Watson's fees, respondent sought \$28,089.38, which is 100% of the fees incurred from March 23, 2015, to January 24, 2017, when respondent was in school. For Butler, Giraud & Meister, P.C.'s fees, respondent sought \$14,219, which is 100% of the fees incurred after January 24, 2017, when respondent was in school. Due to petitioner's interim payment of \$5000, respondent requested \$41,827.73 in fees $((\$4519.35 + \$28,089.38 + \$14,219) - \$5000)$.

¶ 13 Petitioner argued he was obligated to pay only 40% of Parker & Parker's fees. In so arguing, petitioner differentiated classes that were and were not required for respondent's professional certification. Further, petitioner maintained he was not obligated to pay attorney Watson's fees, as they were incurred from respondent's unsuccessful attempt to declare the PNA void and unenforceable under the Act. Petitioner believed attorney's fees provisions are only applicable when the challenging party prevails on the issue for which fees are claimed. Petitioner did not dispute the award of fees to Butler, Giraud & Meister, P.C.

¶ 14 On December 1, 2017, the trial court, Judge Timothy Cusack, entered an order addressing the remaining unresolved issues. Consistent with respondent's position, the trial court found petitioner's 36-month maintenance obligation began on March 9, 2015, when the trial court entered its temporary maintenance order. Specifically, the trial court found petitioner did not treat prior contributions to the joint marital account as maintenance on his financial affidavit,

dated March 6, 2015. Instead, petitioner first identified payments of maintenance in his November 2016 financial affidavit.

¶ 15 With respect to attorney's fees, the trial court ordered petitioner to pay \$14,219 in uncontested fees for the services of Butler, Giraudo & Meister, P.C. Further, the trial court ordered petitioner to pay \$4519.35 for services provided by Parker & Parker. Regarding the \$28,089.38 charged during attorney Watson's representation, the trial court found, among other things, that it was without evidence to determine which fees, if any, were recoverable. The trial court noted attorney Watson was subpoenaed to testify regarding her fees, but that she filed a motion to quash due to inadequate notice, which led to the cancellation of the hearing scheduled for July 24, 2017.¹ The trial court's final determination required petitioner to pay \$18,738.35 (\$4519.35 + \$14,219). However, the trial court's order was silent on petitioner's prior \$5000 interim payment for attorney Watson's fees. Petitioner filed a notice of appeal on December 27, 2017.

¶ 16 On January 2, 2018, respondent filed a motion to reconsider. Also on January 2, 2018, respondent petitioned for additional interim attorney's fees to defend against petitioner's appeal, and requested that the trial court require petitioner to answer a rule to show cause for unpaid maintenance for December 2017, January 2018, and February 2018.

¶ 17 On April 5, 2018, the trial court denied respondent's motion to reconsider, holding, "most importantly," the absence of testimony or a financial affidavit from attorney Watson prevented a showing that the disputed fees were reasonable, due, and legitimate. In response to the request for a rule to show cause, the trial court entered a \$12,000 judgment for the missed \$4000 in maintenance payments. On May 4, 2018, respondent filed her notice of cross-appeal.

¹Attorney Watson's motion to quash states, "Attorney Watson has no problem tendering the requested documentation pursuant to the subpoena, if given proper notice and adequate time to respond."

¶ 18

II. ANALYSIS

¶ 19

On appeal, petitioner challenges the trial court’s findings pertaining to the start date of the PNA’s 36-month maintenance obligation. In addition, petitioner requests credit for a prior \$5000 interim payment for attorney Watson’s fees, ordered by Judge Thomas Keith on March 11, 2016. On cross-appeal, respondent challenges the denial of attorney Watson’s fees. First, we will address the maintenance issue raised in petitioner’s appeal. Second, we will address the attorney’s fees issues raised in petitioner’s appeal and respondent’s cross-appeal.

¶ 20

A. The PNA’s Maintenance Obligation

¶ 21

Petitioner argues the trial court made a *sua sponte* finding of waiver pertaining to the argument for an October 2013 start date of the 36-month maintenance obligation. Conversely, respondent asserts petitioner improperly focuses on one statement of the trial court, noting petitioner’s arguments about the October 2013 start date “were never tendered in *** response to the petition for temporary relief” filed February 4, 2015. Respondent submits that this isolated statement does not encapsulate the trial court’s ruling or constitute a *sua sponte* waiver.

¶ 22

A *sua sponte* ruling is one that deprives a party of notice and an opportunity to object because the court acts on its own without warning. *Pister v. Matrix Service Industrial Contractors, Inc.*, 2013 IL App (4th) 120781, ¶ 40. Here, the trial court received arguments concerning whether the 36-month maintenance obligation began in October 2013, with the dissolution petition, or in March 2015, with the trial court’s order for temporary maintenance. Before resolving this issue, the trial court stated in its written order that it reviewed “the entire court file, the arguments of both parties, and the audio transcript of the hearing.”

¶ 23

It is true the trial court observed that petitioner’s argument contained in his memorandum of outstanding issues, submitted on September 19, 2017, actually contradicted and were

inconsistent with the information petitioner previously provided in his March 6, 2015, financial affidavit on the maintenance issue. However, after our careful review, we conclude the trial court's statement to this effect accurately described the facts of record. The contradiction and inconsistency in petitioner's argument was one of circumstance, which the trial court considered when resolving the very issue petitioner claims was subject to a *sua sponte* finding of waiver.

¶ 24 Indeed, petitioner's accusation to the contrary misconstrues the record. Nothing in the record indicates the trial court viewed petitioner's arguments concerning the start date of the 36-month maintenance obligation as waived. Moreover, based on this record, it is clear that petitioner was not deprived of notice, an opportunity to object, a warning, or input on the start date of the 36-month maintenance obligation. See *id.*; *Lease Partners Corp. v. R & J Pharmacies Inc.*, 329 Ill. App. 3d 69, 76 (2002).

¶ 25 Similarly, petitioner challenges the trial court's factual findings that, under the terms of the PNA, he did not begin fulfilling his 36-month maintenance obligation in October 2013. Under the Act, "parties may enter into an agreement containing provisions for" maintenance. 750 ILCS 5/502(a) (West 2012). "The terms of the agreement *** are binding upon the court unless it finds *** that the agreement is unconscionable." *Id.* § 502(b). Here, the trial court found, following a challenge by respondent, the PNA was not unconscionable under section 502(a) and (b). See *id.* § 502(a), (b). This ruling is not at issue on appeal. Therefore, the PNA will guide our analysis.

¶ 26 The interpretation of a contract, including a marital settlement agreement such as the PNA in this case, is reviewed *de novo*, and the factual findings informing that interpretation are reversed only if they are against the manifest weight of the evidence. *Asset Recovery Contracting, LLC v. Walsh Construction Co. of Illinois*, 2012 IL App (1st) 101226, ¶ 74; *Blum v.*

Koster, 235 Ill. 2d 21, 33 (2009); See also *International Supply Co. v. Campbell*, 391 Ill. App. 3d 439, 447-48 (2009). A court's primary objective of interpretation is to ascertain and give effect to the parties' intent, the best indicator of which is the language of the agreement. *Blum*, 235 Ill. 2d at 33; *In re Marriage of Frank*, 2015 IL App (3d) 140292, ¶ 11.

¶ 27 Here, the PNA, section 4.1, states petitioner "shall provide *** maintenance[] *** until such time that the wife has completed her schooling required for professional certificate and/or licensure, in a field of her choice[,] *** not [to] exceed 30 months from [her entry] into said program ***." Further, section 4.2 states maintenance "shall be *** a monthly sum amount of \$4,000, which shall be paid on the first working day of each month and shall continue until the wife finds employment in her chosen field or for a maximum of 36 months, whichever is less."²

¶ 28 Sections 4.1 and 4.2 required finite monthly maintenance payments, capped at \$4000 for a 36-month period, to respondent while she was in school and seeking employment. The record reveals that in October 2013 petitioner began depositing his \$13,000 paycheck into the parties' joint marital account, then, after establishing his own nonmarital account in December 2014, continued to make \$4000 deposits to respondent.³

¶ 29 However, according to respondent, whose position the trial court accepted in its written order, these deposits were made when the joint marital account was accessible to and available for the personal expenses of both parties. Thus, on multiple occasions, the parties' overdrew the joint marital account despite petitioner's deposits. As a result, rather than solely providing respondent with exactly \$4000 while she was in school and seeking employment, as required by

²Neither party, in the trial court nor on appeal, has argued sections 4.1 or 4.2 were triggered after March 9, 2015. Indeed, the parties seem to agree the 36-month maintenance obligation was triggered in October 2013, when the petition for dissolution was filed, or March 2015, when temporary maintenance was ordered by the trial court.

³Respondent disagrees petitioner actually made a \$4000 deposit in December 2014.

the PNA, petitioner's actions left respondent with indiscernible and, at times, insufficient support funds. This state of affairs necessitated the petition for temporary relief on February 4, 2015.

¶ 30 Based on the record, we agree that petitioner's actions prior to the temporary maintenance order were representative of maintaining the marital status quo, not maintenance under the terms of the PNA. Therefore, the trial court did not err in its findings that petitioner was noncompliant with the PNA's maintenance obligation before March 9, 2015, and that the 36-month period should begin on that date.

¶ 31 B. Linda Watson's Attorney's Fees

¶ 32 Next, we must address the issues pertaining to attorney Watson's representation of respondent from March 23, 2015, through January 24, 2017. In her cross-appeal, respondent claims the trial court should have ordered petitioner to pay all of attorney Watson's fees, totaling \$28,089.38. In his appeal, petitioner asserts his \$5000 court-ordered interim payment to attorney Watson was an overpayment. Consequently, petitioner urges this court to allow a credit against the \$18,738.35 in attorney's fees found to be owed by the trial court under the PNA. Since the issues raised by petitioner and respondent are related, we review their arguments in tandem.

¶ 33 First, respondent takes issue with the denial of her request for petitioner to pay all of attorney Watson's fees. Respondent asserts the trial court ignored the language of section 4.11 of the PNA and erroneously found testimony or a documentary affidavit from attorney Watson was necessary to determine the fees owed by petitioner for her legal services. Petitioner responds by citing *Powers v. Rockford Stop-N-Go, Inc.* for the proposition that attorney Watson's fees are outside the scope of section 4.11 because they were charged during respondent's failed attempt to have the PNA set aside as void and unenforceable. See 326 Ill. App. 3d 511, 516 (2001). Under either argument, petitioner states he is not responsible for attorney Watson's fees.

¶ 34 Specifically, in *Powers*, the Second District held under a lease agreement, “consistent with the strict construction given [fee-shifting provisions], we feel that it is important to explicitly identify [an implicit limitation] that attorney fees may only be awarded to a prevailing party.” *Id.* In that case, the fee-shifting provision stated, “[e]ach party agrees to pay and discharge all reasonable costs, attorneys’ fees and expenses which may be incurred or made by the other in enforcing the covenants and agreements of this lease.” *Id.* at 515-16.

¶ 35 We recognize, generally, an unsuccessful party cannot compel a prevailing party to pay his or her attorney’s fees. *Mirar Development, Inc. v. Kroner*, 308 Ill. App. 3d 483, 488 (1999). However, contract provisions regarding attorney’s fees are an exception to this rule, and those provisions are strictly construed and enforced at the trial court’s discretion. *Id.*; See also *In re Marriage of Linta*, 2014 IL App (2d) 130862, ¶ 12 (“[O]bligation for the payment of attorney fees in a marriage-dissolution action rests on the party on whose behalf the services were rendered. [Citation.] An exception exists when a contract provides for an award of attorney fees.”). A court must determine the parties’ intent when executing the attorney’s fees provision. *Mirar Development, Inc.*, 308 Ill. App. 3d at 488.

¶ 36 In this case, the language of section 4.11 of the PNA is distinguishable from the provision construed in *Powers*. Unlike the provision in *Powers*, section 4.11 explicitly and unconditionally states petitioner “shall be responsible” for respondent’s legal expenses when a party “files a petition for legal separation or divorce.” The only qualifying language limiting section 4.11 pertains to the particular amount owed by petitioner as a result of respondent attending school. Moreover, section 4.11 is not providing for the specific situation arising from “enforcing the covenants and agreements” of the contract, *i.e.*, challenges to the contract. See *Powers*, 326 Ill. App. 3d at 515-16. Therefore, we conclude *Powers* is distinguishable, and that the contracted

attorney's fees exception to the general rule controls. See *Mirar Development, Inc.*, 308 Ill. App. 3d at 488.

¶ 37 Under section 4.11, petitioner became responsible for respondent's legal expenses when he filed the petition for dissolution. The only question was whether petitioner owed 100% or 40% of respondent's legal expenses, depending on whether or not she was in school. Notably, our court took a similar view of section 4.11 in *Davis v. Davis*, which included petitioner and respondent. See 2019 IL App (3d) 170744, ¶ 10. In resolving petitioner's breach of contract claim, our court held "[t]here are no qualifiers on the requirement that [petitioner] pay the entirety of his legal expenses. *** Regardless of how [petitioner] characterizes it, he is attempting to saddle [respondent] with the costs of his defense of her claim that the [PNA] was unconscionable. Contrary to [petitioner]'s assertion, the expense of defending [respondent's] challenge to the [PNA] was a legal expense connected with dissolution." *Id.* Likewise, as stated above, there are no qualifiers on petitioner's requirement to pay all of respondent's legal expenses connected to the dissolution, which include fees incurred while challenging the validity of the PNA.

¶ 38 Despite the unambiguous language of section 4.11, the trial court, in its discretion, declined to enforce that provision due to a lack of evidence showing attorney Watson's fees were reasonable, due, and legitimate. It is well established, though not addressed in the PNA, that even when there is an agreement between the parties, only reasonable fees are allowed by the trial court and the requesting party has the evidentiary burden of proof. *Collins v. Hurst*, 316 Ill. App. 3d 171, 173 (2000); *Mirar Development, Inc.*, 308 Ill. App. 3d at 488. Therefore, any fees owed by petitioner to attorney Watson must be found by the trial court to be reasonable.

¶ 39 On this issue, our careful review of the record reveals attorney Watson was subpoenaed to testify on her fees at a hearing scheduled for July 24, 2017. However, the record also shows that the hearing was cancelled because attorney Watson challenged the subpoena for lack of notice. We are mindful that this dissolution involved nearly six years of protracted litigation, multiple presiding judges, and acrimonious trial court proceedings. However, pursuant to section 4.11 and the interests of justice, it is necessary to remand the matter for the trial court to provide sufficient notice to attorney Watson and conduct a hearing on the reasonableness of her fees.

¶ 40 Second, petitioner claims he is owed a \$5000 credit, which respondent stated in the trial court was warranted, against the \$18,738.35 found to be owed in attorney's fees under the PNA. Respondent asserts petitioner's argument is waived for not being raised in the trial court. This assertion is unpersuasive. Issues not raised in the trial court are generally forfeited, but that rule limits the parties, not the courts. *In re Marriage of Holthaus*, 387 Ill. App. 3d 367, 377 (2008). Under section 501(c-1)(2), it has been stated that we may hear issues not raised in the trial court if necessary to obtain a just result or to maintain a sound and uniform body of precedent. *Id.* at 378. Further, following nonjury proceedings, litigants may forego postjudgment motions and assert as error grounds raised for the first time on appeal. *In re Marriage of Steadman*, 283 Ill. App. 3d 703, 712 (1996); See also Ill. S. Ct. R. 366(b)(3)(ii) (eff. Feb. 1, 1994).

¶ 41 We conclude forfeiture should be excused in this case. Section 501(c-1) of the Act, under which interim fees were awarded in this case, states “ ‘interim attorney's fees and costs' means attorney's fees and costs assessed *** while a case is pending, in favor of the petitioning party's current counsel, for reasonable fees and costs either already incurred or to be incurred ***.” 750 ILCS 5/501(c-1) (West 2016). This provision is governed by the principles in subsections 501(c-1) (1) through (4). See 750 ILCS 5/501(c-1)(1)-(4) (West 2016).

¶ 42 Relevant to this case, subsection 501(c-1)(2) provides:

“Any assessment of an interim award *** shall be without prejudice to any final allocation [or] any claim or right of either party or any counsel of record at the time of the award. Any such claim or right may be presented by the appropriate party or counsel at a hearing on contribution under subsection (j) of Section 503 or a hearing on counsel’s fees under subsection (c) of Section 508. Unless otherwise ordered by the court at the final hearing between the parties or in a hearing under subsection (j) of Section 503 or subsection (c) of Section 508, interim awards *** shall be deemed to have been advances from the parties’ marital estate. Any portion of any interim award constituting an overpayment shall be remitted back to the appropriate party or parties, or, alternatively, to successor counsel ***.” 750 ILCS 5/501(c-1)(2) (West 2016).

¶ 43 In this case, it is unclear from the record whether the trial court, without specificity, denied petitioner the \$5000 credit, or simply overlooked the fact that a \$5000 credit might be owed under subsection 501(c-1)(2). See 750 ILCS 5/501(c-1)(2) (West 2016). Regardless, we conclude that our decision to remand the matter with directions for a hearing on the reasonableness of attorney Watson’s fees also necessitates the same approach for the interim attorney’s fees credit. After determining which of attorney Watson’s fees, if any, are reasonable and owed by petitioner, the trial court is directed to assess whether a \$5000 credit is owed to petitioner under subsection 501(c-1)(2) of the Act. See 750 ILCS 5/501(c-1)(2) (West 2016).

¶ 44 III. CONCLUSION

¶ 45 The judgment of the circuit court of Tazewell County is affirmed in part and reversed in part. The cause is remanded with directions.

¶ 46

Affirmed in part and reversed in part.
Cause remanded with directions.