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2012 IL App (3d) 110468-U

Order filed September 26, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

<i>In re</i> MARRIAGE OF TAMMIE L. HANNIGAN,) Appeal from the Circuit Court
) of the 12th Judicial Circuit,
Petitioner-Appellee,) Will County, Illinois,
)
and) Appeal No. 3-11-0468
) Circuit No. 08-D-1945
)
BRIAN J. HANNIGAN,) Honorable
) Robert P. Brumund,
Respondent-Appellant.) Judge, Presiding.

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

ORDER

¶ 1 *Held:* (1) The trial court did not abuse its discretion when considering the former husband's dissipation of marital property in its order dividing the marital estate; (2) the trial court did not abuse its discretion in apportioning the parties' federal income tax debt; (3) the trial court did not abuse its discretion in awarding attorney fees to the former wife; and (4) the court did not abuse its discretion in not allowing the former husband to occupy the marital residence until he was able to stop the contemporaneous foreclosure proceedings .

¶ 2 Tammie and Brian Hannigan were married in 1992. During the entire marriage, the parties resided in the marital residence in Mokena, Illinois. The home was encumbered by a first mortgage and a second mortgage in the form of a home equity line of credit. Brian vacated the marital residence on or about October 8, 2008. Tammie filed a petition for dissolution of marriage on October 30, 2008. By interim order entered on December 9, 2008, Tammie was given exclusive possession of the marital residence, and Brian was ordered to pay the first and second mortgage on a timely basis. The court also ordered that the marital residence be listed for sale. Brian did not make the first mortgage payments as ordered and, in July 2010, the lender began foreclosure proceedings. At that point, Brian stopped making the second mortgage payments, reasoning that to do so would not stop the foreclosure. Tammie vacated the marital residence shortly before the foreclosure proceedings were initiated because she could not maintain the property, and there was the possibility of a short sale.

¶ 3 From May 2009 to August 2010, several contempt proceedings were held regarding Brian's failure to comply with the order to pay the mortgages on a timely basis, as well as several other failures to comply with various court orders.¹ On August 24, 2010, Tammie filed her first notice of intent to claim dissipation of marital assets. Specifically, she alleged that Brian had: (1) used funds from his 401(k) account, a marital asset, for purposes unrelated to the marriage; and (2) failed to timely pay the first and second mortgages as ordered, thus depleting the marital estate. By an amended pleading filed shortly thereafter, Tammie alleged that Brian's action had depleted \$91,320 in marital assets.

1. The record established that Brian was held in contempt and was subjected to incarceration on two separate occasions.

¶ 4 On March 11, 2011, following several days of hearings, the trial court entered a judgment, finding, *inter alia*, that Brian had used marital property for purposes not related to the marriage by failing to make payments as ordered by the court, removing funds from his 401(k) account, and making payments to certain third parties. The court found that the total dissipation was \$36,170 and awarded a judgment to Tammie in the amount of \$18,085. The court also ordered Brian to pay \$35,000 toward Tammie's attorney fees. The court further noted that the marital residence was the subject of a foreclosure proceeding and reserved its ruling on the apportionment of any possible deficiency judgement. The court reiterated its earlier ruling granting possession of the residence to Tammie but held that Brian could occupy the house if and when he was able to refinance or modify the loans currently in default.

¶ 5 Brian filed a timely appeal with this court, alleging the trial court erred in: (1) finding that he dissipated the marital estate; (2) awarding Tammie \$35,000 in attorney fees; and (3) not permitting him to occupy the marital residence during the pendency of the foreclosure proceedings.

¶ 6 ANALYSIS

¶ 7 1. Dissipation of the Marital Estate

¶ 8 Brian first maintains that the trial court erred in finding that he had dissipated marital assets. The Illinois Marriage and Dissolution of Marriage Act (the Act) permits a trial court to take dissipation of marital assets by one party when dividing the marital estate. 750 ILCS 5/503(d)(2) (West 2008). Dissipation of marital assets occurs when a spouse uses marital property for his or her own benefit for a purpose unrelated to the marriage while the marriage is breaking down. *In re Marriage of Aslaksen*, 148 Ill. App. 3d 784, 788 (1986). Whether a given

course of conduct constitutes dissipation depends upon the facts of each particular case. *Id.* A spouse alleged to have dissipated marital funds has the burden of showing, by clear and convincing evidence, that the marital assets were properly spent, and "the explanation given by the spouse charged with dissipation as to how the funds were spent requires the trial court to determine his credibility." *In re Marriage of Dunseth*, 260 Ill. App. 3d 816, 830 (1994). A finding by the trial court that a party has dissipated the assets of the marital estate will not be overturned on appeal absent an abuse of discretion. *Id.* An abuse of discretion occurs when no reasonable person could find as the trial court did. *In re Marriage of Ward*, 267 Ill. 35, 41 (1994).

¶ 9 Brian alleges eight specific instances where the trial court erred in its determination that he dissipated a marital asset: (1) \$1,500 paid to his girlfriend, Adrienne Miller, on November 17, 2008; (2) \$800 paid to his father, Edward Hannigan, on May 8, 2009; (3) \$2000 tax refund check for 2008; (4) \$1,466 removed from Brian's 401(k) to pay for orthodontic work previously ordered by the trial court to be paid from Brian's current income; (5) \$154 removed from Brian's 401(k) account to pay car insurance previously ordered by the court to be paid from Brian's current income; (6) \$2,400 for long term disability insurance premiums not paid by Brian despite a court order to do so; (7) \$7,650 unpaid by Brian on the second mortgage despite a court order to do so; (8) \$19,400 paid to Dr. Robert Shapiro, Brian's retained child custody evaluator. For the foregoing reasons, we find no abuse of the trial court's discretion on any of these matters.

¶ 10 As to the \$1,500 payment to Miller, Brian maintained that the payment was a legitimate marital expense as it was repayment on a loan she made to him to cover a portion of the retainer for his attorney in the instant matter. We find no abuse of discretion on this matter since, as a

matter of law, "expenditures for attorney fees out of the marital assets is a dissipation of marital assets." *In re Marriage of Weiler*, 258 Ill. App. 3d 454, 464 (1994).

¶ 11 Regarding the \$800 payment to Brian's father, Brian maintained that this was repayment of a loan made to Brian on March 18, 2009. Brian produced no evidence at the hearing to establish the existence of an \$800 loan from his father on that date. His bank records entered into evidence established that he made a bank deposit on March 18, 2009, in the amount of \$650 with a notation "Paychecks/Salary." Given the state of the record and the burden on Brian to establish by clear and convincing evidence that the payment to his father was for a marital purpose, it cannot be said that the trial court abused its discretion in finding that the \$800 payment constituted dissipation of a marital asset.

¶ 12 As to the \$2,000 refund check for the couple's 2008 joint tax return, the record established that the check, payable to both Brian and Tammie, was cashed by Brian and used for unspecified expenses. Brian claimed that he used the funds to make a payment on the mortgage. However, the bank records do not support that assertion. Moreover, Brian also testified, somewhat contradictorily, that he used the tax refund to pay "some bills." Given the inconclusive and contradictory nature of the evidence, it cannot be said that the trial court abused its discretion in finding that Brian had failed to establish, by clear and convincing evidence, that the tax refund was expended for marital purposes.

¶ 13 Regarding Brian's payment of \$19,400 to Dr. Robert Shapiro, Brian maintains that Dr. Shapiro's services were retained pursuant to the court's order of a custody evaluation and were, thus, marital expenses. The record established otherwise, showing that Brian made a request of the court to appoint Dr. Shapiro to conduct a custody evaluation pursuant to section 604(b) of the

Act (750 ILCS 5/604 (West 2008)), but the court denied the request. Instead, the court permitted Brian to retain his own expert at his own expense pursuant to section 604.5 of the Act. 750 ILCS 5/604.5 (West 2008). Given these facts, it cannot be said that the trial court abused its discretion in finding that Brian's payment of \$19,400 to Dr. Shapiro for services as his expert in the custody contest was not an expense related to a marital purpose. Dr. Shapiro was retained for the trial strategy purpose of supporting Brian's bid for sole custody of the parties' minor child. As such, the expense was similar to expenses incurred for attorney fees, the payment of which constitutes the dissipation of marital assets. *Weiler*, 258 Ill. App. 3d at 464. Thus, it cannot be said that the trial court abused its discretion in finding that payment to Dr. Shapiro was not related to a marital purpose.

¶ 14 We next address the funds removed from Brian's 401(k) fund for payment to the orthodontist, car insurance, and long-term disability insurance payments, as well as the \$7,500 in unpaid second mortgage payments. Each of these alleged instances of dissipation of marital assets involve Brian's failure to pay a court ordered expense. The trial court addressed this failure to comply with its previous order by ordering these expenses paid out of Brian's 401(k) account, along with its specific finding that Brian's failure to pay these court ordered expenses constituted dissipation of the marital estate.

¶ 15 We find no abuse of discretion in the trial court's ruling. In *Aslaksen*, the court found that, where a party was ordered by the court to make a payment but failed to do so, a finding of dissipation was not an abuse of discretion where the record indicated that the party had current income from which to make the court ordered payment but failed to do so. *Aslaksen*, 148 Ill. App. 3d at 789. The *Aslaksen* court further noted that the burden was upon the party alleged to

have dissipated the marital estate to establish that he used his "best efforts" in meeting the financial obligations required to protect the value of the marital estate. *Id.* Here, the record established that Brian was ordered by the court to make payments on the orthodontist bill, Tammie's disability insurance, and the second mortgage payment during the pendency of the instant proceedings. This order reflected the trial court's intent that these expenses be paid from Brian's current income. When the final and appealable order was entered, these debts had not been paid, and the court ordered them paid from Brian's retirement account. There is no question that Brian's failure to pay the court ordered expenses as they became due and the necessity to pay those expenses from other marital assets diminished the value of the marital estate. Thus, we find that the trial court did not abuse its discretion in finding that Brian's actions on these accounts dissipated the marital estate.

¶ 16 Brian also maintains that the trial court erred in finding that Tammie did not dissipate the marital estate. However, we find nothing in the record to indicate that Brian filed a pleading alleging that Tammie engaged in actions which caused a dissipation to the value of the marital estate. During the hearing, Brian attempted to introduce evidence that Tammie had sold some items of personal property. There is, however, nothing in the record to establish what those items of personal property were or the value the property. There was some testimony from Tammie that she sold some items of personal property and used the funds for a security deposit for housing for her and the parties' minor child. Given this record, we find that the trial court did not abuse its discretion in finding a lack of evidence to support that Tammie engaged in activities leading to the dissipation of the value of the marital estate. *In re Marriage of Marriott*, 264 Ill.

App. 3d 23, 30 (1994) (expenditures for necessary housing expenses incurred by a spouse not living in the marital residence do not constitute dissipation).

¶ 17 For the foregoing reasons, we find that the trial court did not abuse its discretion in finding that Brian had failed to establish by clear and convincing evidence that he did not dissipate the value of the marital estate. Additionally, we find the trial court did not abuse its discretion in finding that Tammie did not dissipate the marital estate as alleged by Brian.

¶ 18 2. Federal Income Tax Debt

¶ 19 Brian next maintains that the trial court erred in allocating the entire joint federal income tax debt to him while at the same time ordering Tammie to pay 40% of all other joint debt. Brian maintains that the income tax debt should have been apportioned on the same 60/40 ratio as all other joint debt. The allocation of marital debt by the trial court will not be overturned on appeal unless it can be said that the court abused its discretion. *In re Marriage of Stufflebeam*, 283 Ill. App. 3d 923, 929 (1996). Here, we find the trial court did not abuse its discretion in ordering Brian to pay the entire tax debt. The record shows that the joint tax debt was the result of Brian liquidating his 401(k) account after being ordered to do so by the trial court. As previously discussed, the need to liquidate the account was precipitated by Brian's failure to follow the trial court's order to pay certain expenses from his current income. Thus, the record supports a conclusion that the entire tax liability was caused by Brian, and it was not, therefore, an abuse of discretion for the trial court to order him to pay the entire tax debt.

¶ 20 3. Attorney Fees

¶ 21 Brian next maintains the trial court erred in ordering him to pay \$35,000 toward Tammie's attorney fees. Requests for attorney fees are governed by sections 503(j) and 508 of

the Act. 750 ILCS 5/503, 5/508 (West 2008). The award of attorney fees is a matter for the trial court's discretion, and the court's award of attorney fees will not be overturned on appeal absent an abuse of that discretion. *In re Marriage of Mantei*, 222 Ill. App. 3d 933, 941 (1992). In ruling on a fee request, the trial court must determine that: (1) the fees requested were reasonable and necessary; and (2) the requesting party is unable to pay the incurred fees and the opposing party has the financial ability to pay the requested fees. *Id.*

¶ 22 Here, the record indicates that, following Tammie's petition for contribution toward her attorney fees, Brian's counsel stipulated that the fees and costs requested in her petition were both reasonable and necessary. Thus, the only contested issue was the parties' relative abilities to pay the requested fees. We note first that Brian's counsel did not request a hearing regarding the parties' respective abilities to pay, thus waiving that issue as well. *In re Marriage of Wolf*, 180 Ill. App. 3d 998, 1009 (1989).

¶ 23 Moreover, even if the issue had not been waived, we find the record supports a finding that Tammie did not have an ability to pay the requested fees. Tammie's expense affidavit showed that she had insufficient funds to meet daily living expenses for herself and the parties' minor child, while Brian's expense affidavit established an ability to pay the requested fees out of assets and current income. Given the record, we cannot say that the trial court abused its discretion in ordering that Brian pay \$35,000 toward Tammie's reasonable and necessary attorney fees.

¶ 24 4. Possession of the Marital Residence

¶ 25 Brian lastly maintains that the trial court erred in denying his request to be granted possession of the marital residence during the pendency of the foreclosure.

¶ 26 Brian cites no authority in support of his position that the trial court committed reversible error. We find, therefore, that the issue has been forfeited on appeal. Ill. S. Ct. R. 341 (eff. July 1, 2008); *Alvarez v. Pappas*, 374 Ill. App. 3d 39, 44 (2007) (points raised on appeal without supporting citation to relevant authority is forfeited on appeal).

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 29 Affirmed.