2018 IL App (4th) 170235-U

NO. 4-17-0235

FILED
March 6, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re MARRIAGE OF JAMES J. McATEE,	)	Appeal from
Petitioner-Appellee,	)	Circuit Court of
and	)	Macon County
ROCHELLE L. McATEE,	)	No. 15D458
Respondent-Appellant.	)	
	)	Honorable
	)	James R. Coryell,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Harris and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not err in the calculation of petitioner's income, the award of maintenance and child support, and the division of marital property.

¶ 2 In October 2016, the trial court entered a judgment for dissolution of marriage between petitioner, James J. McAtee, and respondent, Rochelle L. McAtee. Along with the division of property, the court ordered James to pay child support and maintenance.

¶ 3 On appeal, James argues the trial court erred in (1) the calculation of his income, (2) the award of maintenance and child support, and (3) the division of marital property. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In June 1996, James and Rochelle were married in Decatur, Illinois. Three children were born during the marriage, including Ke. M., born in 1997; Ka. M., born in 2002;

and G.M., born in 2006. In October 2015, James filed a petition for dissolution of marriage. At that time, James was 51 years old and employed by McAtee Financial Services (McAtee Financial). Rochelle was 45 years old and a homemaker.

¶ 6 In May 2016, the trial court conducted a hearing on the petition for dissolution. James testified he is a registered investment advisor and the sole proprietor of McAtee Financial. After graduating from college, he began his career in 1988 with Prudential-Bache Securities (Prudential). He left in August 1995 for Franklin Financial and retained "several" of his Prudential clients. He also purchased the clients from Carl Jacobs that same month.

¶ 7 James purchased office space in 1996 and later built a new office on the same property. James agreed the buildings were marital property, as Rochelle's name was put on the deeds at some point. The business checking account was with Busey Bank, and it was considered marital property. James took the position the business was nonmarital property, although he considered the assets marital property. While at McAtee Financial, James entered into contracts to purchase the business clients of Fred Conrad and Sherry Palmer. Beginning in January 2008, James agreed to pay Conrad $600,000 for his clients in monthly payments of $5000 over 120 months. At the hearing, James stated he had only been paying $2500 per month to Conrad. A June 2010 agreement with Palmer required James to pay $150,000 for her clients in monthly payments of $2000, with an initial payment of $22,500 in December 2010. James testified the payments are made from a marital bank account.

¶ 8 James testified an accountant valued the business at $638,600. Based on his 2012 federal income tax return, James stated his business income for that year was $493,000. His business income for 2013 was $395,841 and $490,861 for 2014. In 2015, James' business income was only $34,624. The lower amount stemmed from activity in 2014, when he was

investigated by the Illinois Secretary of State concerning charges incurred on a large volume of variable annuity sales and bookkeeping errors related thereto. In October 2014, James agreed to pay a fine, was suspended for 45 days, and was unable to sell variable annuities for 9 months. A later mix-up at the Financial Industry Regulatory Authority caused his securities registration to be canceled. It took "over 100 days to amend the consent order and fix it," and he was unable to generate any revenue during that period. In September 2014, James managed $152 million in client assets. After the investigation by the Secretary of State, the asset figure dropped to $85 million, which significantly impacted his income.

¶ 9 The parties lived in a 6000-square-foot, five-bedroom home valued at $615,000. The monthly mortgage payment on the home was $4700, with 5 years left on a 10-year mortgage at a 2.5% fixed interest rate. The parties own property in Mt. Zion, Illinois, valued at $450,000; property valued at $35,000 in Kentucky, which they agreed to sell; and five acres in Mt. Zion, valued at $65,000.

¶ 10 In February 2015, James withdrew $39,000 from his retirement account. He withdrew $38,000 the next month. Prior to 2014, James stated he would normally put $50,000 into his retirement accounts on a yearly basis. When asked about his financial affidavit, James stated his monthly living expenses totaled over $28,000, but changes would have to be made or he would "be bankrupt in a matter of [a] few years."

¶ 11 Rochelle testified she was employed as a lead sales consultant for Von Maur when the parties got married. At that time, she was making $24,000 to $27,000 per year. She stopped working at Von Maur after the birth of Ke. M. Since that time, she worked at Talbot's for about a year, with an income of $10,000. At the time of her testimony, she lived in the marital residence. The parties would buy a new car every two to three years. Every year, the

parties would travel to Cancun for a week, which cost approximately $6000 to $7000. The family would also make annual trips to Florida at a cost of $2000 to $3000. The McAtees were members of the Decatur County Club, although James testified he cancelled his membership. Rochelle continued to maintain her country club membership and listed her monthly living expenses as over $12,000. She sought child support and maintenance totaling $17,000 per month.

¶ 12 In October 2016, the trial court entered the judgment of dissolution of marriage. Therein, the court found McAtee Financial to be marital property, as the business under that name began operating during the marriage. In addition, James presented no evidence identifying any clients he had prior to the marriage, and both original clients and those acquired during the course of the marriage were so commingled as to preclude division.

¶ 13 The trial court stated the issues of maintenance and child support gave it "a great deal of concern." The court found James "earned a great deal of money" in previous years and the parties had a "comfortable lifestyle." However, the amount of assets managed by James had dropped by 38%, and it was impossible for the court to determine whether the drop was permanent or if James was regaining business. The court averaged the incomes from 2013 ($359,658) and 2014 ($455,983) and deducted 10% "to make up for any lost income" and found gross income totaled $30,170 per month. The court ordered James to pay $6000 per month in maintenance and $6767.50 per month in child support.

¶ 14 In September 2016, Rochelle filed a motion for James to contribute to Ke. M.'s college expenses. In November 2016, Rochelle filed a motion to clarify and reconsider the dissolution judgment, arguing the trial court should impose a deadline for James to pay her

$360,745.83, provide life insurance to secure the maintenance and child support obligations, and pay her attorney fees.

¶ 15 James also filed a motion for reconsideration, arguing the trial court erred in its calculation of child support and maintenance by averaging his income for 2013 and 2014, while disregarding his income for 2015 and 2016. James also filed a response to Rochelle's motion for college expenses, stating he was unable to contribute toward those expenses in addition to the child support and maintenance.

¶ 16 In February 2017, the trial court held a hearing on the motions and then took the matter under advisement. In its written order, the court required each party to pay their own attorney fees. The court directed James to pay the balance due for interest in the business on or before July 1, 2017. The court ordered James to pay $10,000 per academic year for Ke. M.'s college expenses, with Rochelle and Ke. M. responsible for the balance. The court also ordered James to maintain a $500,000 life-insurance policy to provide for maintenance and child support. This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 A. James' Income

¶ 19 James argues the trial court erred in determining his income for purposes of maintenance and child support. We disagree.

¶ 20 A trial court is required to determine the minimum amount of child support using a particular percentage of the supporting party's net income based on the number of children. 750 ILCS 5/505(a)(1) (West Supp. 2015). The Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) defines "net income" as the total of all income from all sources, minus certain listed deductions including, *inter alia*, federal and state income taxes, Social Security,

and mandatory retirement contributions. 750 ILCS 5/505(a)(3) (West Supp. 2015). The court's finding as to net income will not be reversed on appeal absent an abuse of discretion. *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1119, 806 N.E.2d 701, 710 (2004).

¶ 21 In fashioning an award of maintenance, a trial court looks at the payor spouse's gross income. 750 ILCS 5/504(b-1) (West Supp. 2015). Gross income is defined as "all income from all sources, within the scope of that phrase in Section 505 of this Act." 750 ILCS 5/504(b-3) (West Supp. 2015). "A court's factual finding as to the parties' annual incomes will be reviewed under the manifest-weight-of-the-evidence standard." *In re Marriage of Walker*, 386 Ill. App. 3d 1034, 1041, 899 N.E.2d 1097, 1103 (2008). A finding is "against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the court's findings are unreasonable, arbitrary, and not based on any of the evidence." *In re Marriage of Bhati*, 397 Ill. App. 3d 53, 61, 920 N.E.2d 1147, 1153 (2009).

¶ 22 In the case *sub judice*, the evidence indicated James has been a financial advisor since 1988 and has earned substantial income, which fluctuates on a yearly basis. The parties' federal tax returns showed James had gross receipts or sales from his business totaling $774,858 (2010), $779,265 (2011), $735,179 (2012), $583,528 (2013), $664,979 (2014), and $224,794 (2015). Given his suspension from doing business, James' income dropped dramatically in 2015. For purposes of child support and maintenance, the trial court averaged the net incomes for 2013 and 2014 and deducted 10% to make up for any lost income. Thus, adding depreciation and/or amortization, the court found income from 2013 totaled $359,658 and $455,983 from 2014. Averaging these amounts and deducting the 10% resulted in an amount of $362,038, or $30,170 per month. The court found the average monthly net income for child support purposes

amounted to $24,170, or $30,170 minus $6000 per month in maintenance. Multiplying the $24,170 by 0.28 resulted in child support totaling $6767.60 per month.

¶ 23 James argues the evidence showed the income he was capable of earning in 2013 and 2014 no longer existed because of his license suspension. He contends he only had business income of $45,313 in 2015. From January to April 2016, he states he had approximately $170,000 in gross income and his monthly expenses averaged $26,545. Thus, he projected his business income for 2016 would be $68,860.

¶ 24 This court has noted a trial court may average a payor spouse's income over several years, especially "in cases where a support-paying parent's income fluctuates significantly." *In re Marriage of Freesen*, 275 Ill. App. 3d 97, 103, 655 N.E.2d 1144, 1148 (1995) (citing *In re Marriage of Carpel*, 232 Ill. App. 3d 806, 819, 597 N.E.2d 847, 857 (1992)). "While a court should not base net income findings upon the mere possibility of future financial resources, neither should it rely upon outdated information which no longer reflects prospective income." *Freesen*, 275 Ill. App. 3d at 103-04, 655 N.E.2d at 1149.

¶ 25 James earns substantial income as a financial advisor, and the years 2013 and 2014 provided the trial court with reliable income figures, as opposed to year 2015 when James' income dropped due to the investigation and suspension. The court found the 2016 income was unclear and noted it was impossible to determine whether James' reduction in income was permanent or if it would recover to previous levels. The court directed the parties to exchange 2016 income tax returns on or before June 1, 2017, and future income tax returns by June 1 during subsequent years. Thus, the income utilized in figuring child support and maintenance is subject to modification should the circumstances so require. Given the facts of this case and the

evidence before it, we find the court's decision to average James' 2013 and 2014 incomes was not against the manifest weight of the evidence.

¶ 26 B. Maintenance and Child Support

¶ 27 James argues the trial court erred in its determination of maintenance and child support. We disagree.

¶ 28 1. *Maintenance*

¶ 29 Section 504(a) of the Dissolution Act (750 ILCS 5/504(a) (West Supp. 2015)) provides that in a dissolution proceeding, the trial court "may grant" maintenance in an amount and for a period of time "as the court deems just." When considering whether a maintenance award is appropriate, section 504(a) sets forth 14 factors for the trial court to consider, 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;
>
> (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 Supp. 2015).

¶ 30 When determining whether a maintenance award is appropriate, the trial court shall state its reasoning and make specific findings of fact referencing each relevant factor from section 504(a). 750 ILCS 5/504(b-2)(1) (West Supp. 2015). If the court concludes maintenance is appropriate, the court shall then determine the duration and amount of maintenance according to section 504(b-1) of the Dissolution Act. 750 ILCS 5/5-504(b-1) (West Supp. 2015). In doing so, " 'the trial court must balance the ability of the spouse to support himself [or herself] in some approximation to the standard of living he [or she] enjoyed during the marriage.' " *In re Marriage of Brankin*, 2012 IL App (2d) 110203, ¶ 10, 967 N.E.2d 358 (quoting *In re Marriage of Shinn*, 313 Ill. App. 3d 317, 322, 729 N.E.2d 546, 550 (2000)).

¶ 31 The trial court has the discretion to determine the amount and duration of an award of maintenance. *In re Marriage of Donovan*, 361 Ill. App. 3d 1059, 1062, 838 N.E.2d 310, 314 (2005). The court's decision in awarding maintenance will not be reversed on appeal absent an abuse of discretion. *Donovan*, 361 Ill. App. 3d at 1062, 838 N.E.2d at 314.

¶ 32 In this case, the trial court noted Rochelle's financial affidavit indicated she needed $12,165.85 per month to meet her and the children's needs. The court required James to pay $6000 per month in maintenance. "Maintenance issues are presented in a great number of factual situations and resist a simple analysis." *In re Marriage of Mayhall*, 311 Ill. App. 3d 765, 769, 725 N.E.2d 22, 25 (2000). Here, the court utilized the best figures available in determining James' gross income for purposes of the maintenance award. Moreover, the court was well aware of the parties' lavish lifestyle during the marriage and Rochelle's alleged financial needs. In reviewing Rochelle's affidavit, the court's statement that "[t]his is hardly a Spartan existence with $800.00 per month in clothing for herself and $500.00 for grooming" indicates it took the pertinent facts into consideration when fashioning a maintenance award.

¶ 33 In contrast, James has not presented a sufficient argument to justify disturbing the trial court's judgment with respect to maintenance. Given the amount of income James has earned and is capable of earning, along with the parties' lifestyle during the marriage, the court could find Rochelle's monthly living expenses were reasonable. We also note, should a change in circumstances occur, the award is subject to modification. See 750 ILCS 5/510(a-5) (West Supp. 2015). Accordingly, we find the court's factual findings were not against the manifest weight of the evidence and the maintenance award did not constitute an abuse of discretion.

¶ 34 2. *Child Support*

¶ 35 The statutory guideline for child support for two children is 28% of the payor's statutory net income. 750 ILCS 5/505(a)(1) (West Supp. 2015). The trial court may deviate from the guidelines where appropriate after considering the best interests of the children and the following factors:

> "(a) the financial resources [of the parties] and needs of the child;
>
> (b) the financial resources and needs of the parents;
>
> (c) the standard of living the child would have enjoyed had the marriage not been dissolved;
>
> (d) the physical, mental, and emotional needs of the child; and
>
> (d-5) the educational needs of the child." 750 ILCS 5/505(2) (West Supp. 2015).

If the court deviates from the guidelines, it shall state the amount of support that would have been required, if determinable, and include the reasons for the variance from the guidelines. 750 ILCS 5/505(a)(2) (West Supp. 2015).

¶ 36 On review, a trial court's determination of the appropriate amount of child support will not be reversed absent an abuse of discretion. *In re Keon C.*, 344 Ill. App. 3d 1137, 1142, 800 N.E.2d 1257, 1261 (2003). An abuse of discretion will be found "only where no reasonable person could agree with the position taken by the trial court." *In re Marriage of Ackerley*, 333 Ill. App. 3d 382, 395, 775 N.E.2d 1045, 1057 (2002).

¶ 37 The trial court ordered James to pay $6767.60 per month in child support. James does not contest the calculation of this figure. Instead, he argues the court did not offset its determination of gross income for any health insurance being paid by him. We note James did not raise this issue in his motion for reconsideration, thereby depriving the court of an opportunity to consider the alleged error. Now on appeal, James wants this court to reverse the child support obligation. We find James has not provided sufficient evidence to support his claim as to the amount of health insurance he paid for himself or the children. Considering our standard of review would require us to find no reasonable person could agree with the court's position, we find he has failed to demonstrate how the evidence presented was sufficient. We therefore find no abuse of discretion.

¶ 38 C. Marital Property

¶ 39 James argues the trial court erred in classifying McAtee Financial as marital property in its division of property. We disagree.

¶ 40 "All the property of the parties to a marriage belongs to one of three estates, namely, the estate of the husband, the estate of the wife, or the marital estate." *In re Marriage of*

Johns, 311 Ill. App. 3d 699, 702, 724 N.E.2d 1045, 1048 (2000). Prior to making a property distribution, the trial court must classify property as marital or nonmarital. *In re Marriage of Henke*, 313 Ill. App. 3d 159, 166, 728 N.E.2d 1137, 1143 (2000). The court's classification of property will not be overturned on appeal unless it is against the manifest weight of the evidence. *Johns*, 311 Ill. App. 3d at 702, 724 N.E.2d at 1048.

¶ 41 Section 503(a) of the Dissolution Act establishes a rebuttable presumption that "all property, including debts and other obligations, acquired by either spouse subsequent to the marriage" is marital property. 750 ILCS 5/503(a) (West Supp. 2015). "A party can overcome this presumption only by a showing of clear and convincing evidence that the property falls within one of the exceptions listed in section 503(a)." *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1017, 909 N.E.2d 221, 228 (2009). Property acquired before the marriage constitutes one of those exceptions. 750 ILCS 5/503(a)(6) (West Supp. 2015). "The party claiming that the property is nonmarital has the burden of proof, and any doubts as to the nature of the property are resolved in favor of finding that the property is marital." *Schmitt*, 391 Ill. App. 3d at 1017, 909 N.E.2d at 228.

¶ 42 The evidence indicated James was employed by Prudential from August 1988 to August 1995. In 1995, James left Prudential, entered into business with Adam Reudemann and Rick Burnett, and they formed BMR Brokerage. James took some accounts and clients with him, and he purchased clients from Carl Jacobs. James stated he, Reudemann, and Burnett acted as independent contractors and split the clients between them. The three eventually split up, and James established McAtee Financial in 1997. The parties were married in June 1996.

¶ 43 In finding McAtee Financial constituted marital property, the trial court stated James' testimony concerning his business associates was "somewhat vague." The court found

Rochelle was "very specific" that the breakup of the business association occurred after their marriage. The court also noted the evidence showed James and Burnett acquired real estate in December 1996. The court went on to state:

> "The business in the present form began operating during the marriage. There is no evidence of which clients [James] had prior to the marriage. There is no evidence that these clients were not retained in part by the effort of [Rochelle] in entertaining and also maintaining a presence in the community that helped attract new clients and retain existing clients."

The court concluded the original clients and those acquired after the parties' marriage were so commingled as to prevent any division.

¶ 44 We find the trial court's decision to find McAtee Financial constituted marital property was not against the manifest weight of the evidence. It is undisputed that McAtee Financial was formed after the parties' June 1996 marriage, and thus it is presumed to be marital property. While James may have brought over some clients he had prior to the marriage, he failed to present evidence identifying who and how many were acquired before the marriage. He also failed to identify how they had been specifically segregated from the marital estate. "Once marital and nonmarital funds are commingled and lose their identity through acquisition of a newly created asset during the marriage, the asset is marital." *In re Marriage of Davis*, 215 Ill. App. 3d 763, 769, 576 N.E.2d 44, 48 (1991). James bought new accounts from Conrad in January 2008 and Palmer in 2010 with the use of marital funds, and the accounts became a part of McAtee Financial. As found by the court, any of James' premarital accounts have been commingled with the postmarital accounts such that a separation is impossible. As James failed

to provide clear and convincing evidence tracing the source or date of acquisition of clients he contended were acquired before the marriage to support his claim, we find the court did not err in its classification of McAtee Financial as marital property.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we affirm the trial court's judgment.

¶ 47 Affirmed.