2012 IL App (3d) 100753-U
(Consolidated with 100919)

Order filed February 28, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

In re MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
GREGORY GOSNEY,	)	Will County, Illinois
	)	
Petitioner-Appellant,	)	
	)	Appeal No. 3-10-0753
and	)	Circuit No. 00-D-1315
	)	
MARGARET GOSNEY, n/k/a	)	
MARGARET FINNEGAN,	)	
	)	Honorable Robert P. Brumund,
Respondent-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justice Holdridge specially concurred in the judgment.
Justice Carter dissented.

ORDER

¶ 1 *Held*: The trial court's finding that respondent provided petitioner with proper notice of

her motion to modify maintenance was not against the manifest weight of the evidence. Moreover, the trial court did not err in interpreting the modification provision of the marital settlement agreement. However, the trial court abused its discretion when imputing income to petitioner.

¶ 2 In September of 2005, respondent, Margaret Gosney, now known as Margaret Finnegan, filed a postdissolution motion (Margaret's motion) to extend and increase the amount of maintenance or unallocated support paid by her ex-husband, petitioner, Gregory Gosney. Following a bench trial in 2010, the trial court granted Margaret's motion in part, increased maintenance and child support payments, and made the increase retroactive. Gregory appeals, claiming: (1) the trial court erred in finding Margaret gave him proper notice of her motion; (2) the trial court erred as a matter of law when interpreting the marital settlement agreement and finding it allowed for Margaret to seek an increase in maintenance; and (3) that the trial court erred when determining the amount of his income for 2008 and 2009. We affirm in part and reverse in part.

¶ 3 FACTS

¶ 4 This is the third time this case has been before this court. For a detailed recitation of the facts see *In re Marriage of Gosney*, 394 Ill. App. 3d 1073 (2009) (*Gosney II*). In this appeal, Gregory first argues that the trial court erred when it found that the effective date of Margaret's motion for the purpose of retroactive payments was September 2005. The trial court's finding in that regard was made after a bench trial and, as such, will not be reversed on appeal unless it is against the manifest weight of the evidence. See *Meyers v. Woods*, 374 Ill. App. 3d 440, 449

(2007). A finding is against the manifest weight of the evidence only if it is clearly apparent from the record that the trial court should have reached the opposite conclusion or if the finding itself is unreasonable, arbitrary, or not based upon the evidence presented. *Id.* at 449.

¶ 5 After reviewing the evidence presented at the bench trial on this issue, we hold that the trial court's finding of a September 2005 effective date (date of due notice) for retroactive payments was not against the manifest weight of the evidence. The trial court had before it the testimony of the two attorneys involved. Gregory's attorney (and his attorney's secretary) testified that they never received Margaret's motion or any notice regarding the motion until July 2006, when the motion was renoticed for a hearing by Margaret's attorney. Gregory's attorney acknowledged, however, that items sent to or from his office had been lost in the mail in the past. Margaret's attorney, on the other hand, testified that in September 2005, he filed Margaret's motion, sent and faxed a notice of the motion to Gregory's attorney, and tendered a copy of Margaret's motion to Gregory's attorney in court. Margaret's attorney acknowledged, however, that he did not file the notice of motion with the clerk because it was not his practice to do so in Will County at the time. The trial court also had before it a copy of Margaret's motion with the September 2005 filing date-stamped on it and an unstamped copy of the notice of motion with proper proof of service, which Margaret's attorney identified as a copy of the notice that he sent in September of 2005 to Gregory's attorney. The trial court found that all of the testimony was credible and that Gregory's attorney probably did not receive the motion or notice because they were lost in the mail. Based upon the evidence presented and the standard of review, we find no

error in the trial court's ruling. *Id.* at 449.

¶ 6 As his second point of contention, Gregory argues that the trial court erred in interpreting the marital settlement agreement and in finding it allowed Margaret to seek an increase in maintenance after the 2004 reduction. The marital settlement agreement provided that the amount of maintenance or unallocated support payable under the agreement was "non-reviewable and non-modifiable except by husband in cases of extraordinary circumstances such as loss of employment or a significant reduction in income." The agreement further provided that all terms, other than those relating to child custody, visitation, and child support were "non-modifiable." Gregory asserts that the plain language of the agreement as noted precluded Margaret from seeking to increase or modify maintenance.

¶ 7 The interpretation of a marital settlement agreement, like any other contract, is a question of law and is subject to *de novo* review on appeal in accordance with the general rules applicable to contract interpretation. See *Blum v. Koster*, 235 Ill. 2d 21, 33 (2009). The primary goal of contract interpretation is to give effect to the intent of the parties. See *Blum*, 235 Ill. 2d at 33; *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007); *In re Marriage of Schurtz*, 382 Ill. App. 3d 1123, 1125 (2008). If the language of a contract is clear and unambiguous, the intent of the parties must be determined solely from the language of the contract document itself, which should be given its plain and ordinary meaning, and the contract should be enforced as written. *Virginia Surety Co.*, 224 Ill. 2d at 556; *J.M. Beals Enterprises, Inc. v. Industrial Hard Chrome, Ltd.*, 194 Ill. App. 3d 744, 748 (1990); *Reaver v.*

Rubloff-Sterling, L.P., 303 Ill. App. 3d 578, 581 (1999); *Schurtz*, 382 Ill. App. 3d at 1125. However, if the contract language is ambiguous, the meaning of the contract language must be ascertained through a consideration of extrinsic evidence. *Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007); *Schurtz*, 382 Ill. App. 3d at 1125.

¶ 8 In the present case, the agreement was silent as to the parties' rights upon a reduction of the maintenance or unallocated support. Thus, the agreement was ambiguous on that issue. The trial court heard extrinsic evidence on the matter in the form of the testimony of Margaret and Gregory. Margaret testified that it was her understanding that she would receive $480,000 in maintenance or unallocated support ($10,000 per month for 48 months) and that the $10,000 would be reinstated after a reduction if Gregory's income went back up until the entire $480,000 was paid. Gregory did not provide testimony to the contrary. Gregory merely testified that he wanted the provision in question added to the agreement so that he would not be required to pay $10,000 per month if he lost his job. Gregory did not state what his understanding was regarding Margaret's ability to increase maintenance or unallocated support after a reduction occurred. Based upon the evidence presented, we conclude that the intent of the parties was that Margaret could increase maintenance or unallocated support after a reduction occurred if Gregory's income significantly increased to the extent that it constituted extraordinary circumstances. Although Gregory also claims that the increase here did not constitute "extraordinary circumstances" as contemplated in the agreement, we find no merit to that argument since Gregory used the "extraordinary circumstances" of the significant decrease in his income to obtain a reduction in

2004.

¶ 9 Gregory further asserts that the trial court erred in making child support retroactive to September 2005. We find this argument to be nothing more than a reassertion of Gregory's first argument and reject it for the reasons stated above.

¶ 10 As his final point of contention on appeal, Gregory argues that the trial court erred in determining his net income for the purpose of child support by adding certain business expenses of his employer to his income. Gregory's employer is also his current wife. Gregory asserts that the trial court's ruling was erroneous, claiming there was no indication of bad faith or an attempt to evade child support on his part and as section 505(a)(3)(h) of the Illinois Marriage and Dissolution of Marriage Act (the Act) allows a party to deduct from net income "[e]xpenditures for repayment of debts that represent reasonable and necessary expenses for the production of income." See 750 ILCS 5/505(a)(3)(h) (West 2008).

¶ 11 A trial court's determination of the appropriate amount of child support will not be reversed on appeal unless the award is an abuse of discretion or the factual predicate for the award is against the manifest weight of the evidence. *Slagel v. Wessels*, 314 Ill. App. 3d 330, 332 (2000).

¶ 12 In *Gosney II*, a different panel of this court found that the trial court improperly imputed income to Gregory. *Gosney*, 394 Ill. App. 3d at 1078-79. The *Gosney II* court held that the trial court abused its discretion when imputing a gross income of $350,000 to Gregory when testimony indicated Gregory anticipated $110,000 of income for 2008, and no evidence existed

to support a conclusion that he voluntarily reduced his income. *Id*.

¶ 13 Similarly, we find the trial court abused its discretion when imputing income to Gregory based upon his wife and employer deducting 14% of the entire overhead of the business from his income. The *Gosney II* court made clear that Illinois law allows for the imputation of income in three instances: (1) when the payor is voluntarily unemployed; (2) when the payor is attempting to evade a support obligation; or (3) when the payor has unreasonably failed to take advantage of an employment opportunity. *Id.* at 1077. No evidence in the record would support a finding that Gregory was voluntarily unemployed or that he unreasonably failed to take advantage of an employment opportunity. At best, the "sham" relationship, as described by the trial court, between Gregory and his current wife/employer evinced an attempt to evade support obligations by artificially lowering his reported income.

¶ 14 In focusing on the "14%" figure, the trial court disregarded the only evidence in the record regarding how much income Gregory generated for his wife's business and what expenses were deducted therefrom. During cross-examination of Gregory, Margaret's attorney put forth evidence indicating that in 2008, Gregory generated $86,250 in income for the business from which $43,352 in expenses were deducted. His 2008 W-2 indicates he was paid the remainder, $42,898. The trial court found this to be an unreasonable amount and imputed income to Gregory of $115,000 for 2008. We find, as did the *Gosney II* court, there is simply no basis in the record to impute that amount of income to Gregory. Again, it was Margaret's attorney who introduced evidence indicating that, at best, Gregory generated $86,250, yet, the trial court found,

for child support purposes, he should be held to have earned $115,000.

¶ 15 Margaret's attorney further introduced testimony showing that in 2009, Gregory generated $177,771 of income for his employer. From that, $70,521 worth of expenses were deducted. The W-2 issued to Gregory for 2009 indicates he earned the difference, $107,250. Nevertheless, the trial court found Gregory "had gross receipts in 2009 of $215,000."

¶ 16 We acknowledge the principle of law that allows a trial court to impute income to a noncustodial parent for child support purposes. Clearly, trial courts possess such authority and discretion. *In re Marriage of Adams*, 348 Ill. App. 3d 340 (2004); *In re Marriage of Rogers*, 213 Ill. 2d 129 (2004). We find, however, that when there is no basis in the record to support the amount of added income a trial court thrusts upon the noncustodial parent, it abuses that discretion. Not only is there no evidence to support the conclusion that Gregory made $115,000 in 2008 and $215,000 in 2009, but again, Margaret's own exhibits (defense exhibit No. 2; defense exhibit No. 3) indicate he generated substantially less than those amounts. The dissent points to no evidence to support the trial court's figures.

¶ 17 Additionally, the trial court's and dissent's findings that the employer's deductions from Gregory's revenue were excessive illustrates a break from the reality of the private sector. What private sector employee that generates $178,000 in revenues is paid $178,000? Under what business model would an employee keep 100% of the revenue he generated while the employer paid for all of the business expenses? The simple answer is none. As the record contains no basis to impute the additional sums of money onto Gregory's income for 2008 and 2009, we hold

the trial court abused its discretion in doing so. As such, we reverse the portion of the trial court's order which calculated Gregory's 2008 income at $115,000 and 2009 income at $215,000.

¶ 18 Furthermore, Gregory's income computes to approximately 50% (2008) and 60% (2009) of what he generated. Regardless of how his employer got there, there is nothing unreasonable about an employee "eating" 50% to 60% of what he "kills." In the real world, not many (if any) salespersons work on 50% to 60% commissions. Since Gregory sells services, not manufactured goods, the law seems more analogous. What associate in a law firm is paid 50% to 60% of his or her billable hours? Some make a smaller percentage and some highly prized associates may make a larger one. There is nothing unreasonable about paying an employee 50% to 60% of what the employee generates. While no one tells the associate that he or she is paying expenses, the associate (and in many cases, even a junior partner) is paid less than he or she bills with the surplus going to pay expenses and to senior partners' salaries. This is just how the real world works. Think about it: given time and enough employees, even Warren Buffet would go broke if he started a business, let every employee keep 100% of what the employee generated, and all the while paying all the expenses himself. We should not get caught up in labeling. There was nothing unreasonable about the deductions from Gregory's pay in relation to what he generated, no matter what method was used to get there.

¶ 19 CONCLUSION

¶ 20 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed in part, reversed in part and remanded.

¶ 21 Affirmed in part, reversed in part, and remanded.

¶ 24 CARTER, J., concurring in part and dissenting in part:

¶ 25 I concur with the majority's analysis and conclusions on all of the issues presented on appeal, except for the last issue. On that issue–the amount of income imputed by the trial court to Gregory for 2008 and 2009–I disagree with the majority and would affirm the trial court.

¶ 26 In the present case, although Gregory was only an employee of his current wife's business and had no ownership interest in the business, his wife was deducting 14% of the entire overhead of the business from his income as if he were a partner in the business. The effect of that deduction was to drastically reduce Gregory's net income by several thousand dollars for the time period in question. There was no written agreement for office-sharing between Gregory and his wife that called for a reduction or that established a debt that was required to be repaid by Gregory. In addition, no evidence was presented by Gregory to establish that the expenses in question aided in the production of his income. Nor was any evidence presented to establish that 14% was a reasonable amount, if in fact it was appropriate to deduct those expenses from Gregory's income in the first place. The trial court found that Gregory's testimony regarding his net income with the expenses deducted was "incredible" and that the deduction of the expenses was a "sham." Based upon the lack of evidence presented to establish that the expenses were legitimate, reasonable, or consistent with section 505(a)(3)(h) of the Act, I would conclude that the trial court's factual findings are not against the manifest weight of the evidence. With those findings intact, I would hold that the trial court's determination of Gregory's income for the time period in question did not constitute an abuse of discretion.

¶ 27 For the foregoing reasons, I respectfully concur in part and dissent in part from the majority's order in the present case. I would affirm the judgment of the trial court in its entirety.

¶ 22 JUSTICE HOLDRIDGE, specially concurring:

¶ 23 I concur in the judgment, including the finding that the trial court abused its discretion in imputing income to the petitioner. I find the discussion in paragraph 18 to be unnecessary to the disposition, and, thus, I do not join in that portion of the disposition.