

NOTICE
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2019 IL App (4th) 180763-U
NO. 4-18-0763
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
September 6, 2019
Carla Bender
4th District Appellate
Court, IL

<i>In re</i> MARRIAGE OF)	Appeal from
MICHELLE KOSS,)	Circuit Court of
Petitioner-Appellant,)	Livingston County
and)	No. 16D74
BRETT KOSS,)	
Respondent-Appellee.)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court. Justices Knecht and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding the trial court did not abuse its discretion in awarding petitioner rehabilitative maintenance.

¶ 2 In February 1993, petitioner, Michelle Koss, and respondent, Brett Koss, were married. In June 2016, petitioner filed a petition for dissolution of marriage. In December 2017, the trial court entered an order dissolving the marriage and reserving all ancillary issues, including maintenance. In October 2018, the court entered a supplemental judgment ordering respondent to pay petitioner rehabilitative maintenance for a period of 36 months in the amount of \$800 per month.

¶ 3 Petitioner appeals, arguing the trial court abused its discretion in awarding non-guideline rehabilitative maintenance. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 In June 2016, petitioner filed a petition for dissolution of marriage. The petition alleged the parties married on February 11, 1993, and had three children: Rebecca Koss (born October 1, 1995), Michael Koss (born October 22, 1997), and Sarah Koss (born January 7, 2000). In July 2016, the trial court entered an agreed order that required respondent pay petitioner \$800 per month in temporary child support and \$800 per month in temporary maintenance. In December 2017, the court entered an order dissolving the marriage and reserving all ancillary issues, including maintenance. On June 1, 2018, respondent filed a motion to terminate child support, alleging the parties' youngest child was 18 years old and had graduated high school.

¶ 6 A. Hearing on All Remaining Issues

¶ 7 On June 1, 2018, the court commenced a hearing on all remaining issues and respondent's motion to terminate child support. A transcript of the June 1, 2018, proceedings is not in the record on appeal. In August 2018, the court held a continued hearing on all remaining issues and heard the following evidence.

¶ 8 1. Respondent

¶ 9 Counsel for petitioner re-called respondent, who appeared *pro se*, to testify regarding his 2017 income and "an update of his retirement." Petitioner's exhibit No. 8A showed respondent accumulated \$14,685.71 in contributions to the State Employees' Retirement System. Respondent's estimated retirement benefit was \$1438.13 per month. Respondent's 2014 income tax return showed an adjusted gross income of \$66,387. Respondent's 2015 income tax return showed an adjusted gross income of \$66,680. In 2016, respondent had gross income of \$71,325.45. Respondent's 2016 income tax return showed an adjusted gross income of \$63,990. In 2017, respondent had gross income of \$71,083.89. Respondent testified

petitioner's exhibit No. 19 was a paycheck list showing his gross income from January 1, 2018, through May 30, 2018, was \$30,065.

¶ 10 Respondent filed a financial affidavit indicating his income, assets, debts, and monthly expenses as of August 5, 2017. The affidavit indicated a gross monthly income of \$6160 and monthly paycheck deductions of \$3124.04, including \$800 per month in child support and \$800 per month in maintenance. At the August 2018 hearing, respondent testified his financial affidavit did not reflect a \$500 per month car payment. Although the affidavit listed monthly dependent expenses, respondent acknowledged the parties' children had all turned 18 years old.

¶ 11 *2. Petitioner*

¶ 12 Petitioner testified the parties married on February 12, 1993. At that time, petitioner did not work because she attended college. The parties moved to Florida in the early 1990s and petitioner stopped attending college. Petitioner did not return to work in Florida because she had a large sum of money from a traffic accident. According to petitioner, she never intended to work because she "wanted to be a stay-at-home mom, a wife, and a mother." The parties moved back to Illinois in 1995 and petitioner worked as a preschool teacher at her church for a year before she got pregnant with the parties' first child. The parties agreed petitioner would stay home with their children. The parties' two oldest children attended public school for grade school and private school for high school. Petitioner home schooled the youngest child from third grade through eighth grade.

¶ 13 Petitioner testified that in December 2010, she earned a bachelor's degree in elementary education from Trinity Christian College. Petitioner had \$19,000 in student loans.

Because petitioner incurred the student loans during the course of the marriage, she asked that respondent bear responsibility for one-half of the debt.

¶ 14 In January 2016, petitioner began substitute teaching. When asked what caused her to begin working in 2016, petitioner testified, “[Respondent] wanted me to get employment, and he knew that I didn’t want to be a teacher. After my degree, I had decided that really wasn’t what I wanted to do with my life. But we talked about it, and he said that if I started subbing that maybe my anxiety for it would go away and I would get used to being in the classroom again ***.” Substitute teaching did not offer benefits like health insurance, but petitioner earned a Teacher Retirement System (TRS) benefit with minimal contributions during the course of the marriage.

¶ 15 According to petitioner, respondent held “security and painting” jobs and “he either owned his own business or worked for the Chicago Park District or the State of Illinois.” In September 1999, the parties bought a house in Chicago. In 2014, the house was foreclosed on and the parties moved to Dwight, where respondent obtained a new job at Fox Center. Petitioner testified the family vacationed regularly in the previous 10 years, including two or three Caribbean cruises, two Disney trips, and shorter trips through a vacation club. The vacation club required yearly dues of \$520; respondent was not interested in the vacation club and petitioner testified she was willing to take over the responsibility of paying the dues.

¶ 16 At the time the parties separated, petitioner drove a 2015 Kia Sorento and previously drove a 2006 Toyota Sienna. Petitioner testified the cars were relatively new and not 20 year-old “beaters.” According to petitioner, respondent did not drive newer cars. Petitioner stated, “He inherited a truck from his uncle that he drove for a while, and he just had a regular car.”

¶ 17 Since the parties separated, petitioner had been unable to maintain her lifestyle. Petitioner testified, “Well, my income is like one-tenth what it was. So I live modestly I would say, thriftily.” Petitioner rented a two bedroom apartment in Dwight where she lived with her youngest daughter. Petitioner recently moved to Galva so her daughter could attend a community college.

¶ 18 Petitioner’s 2016 income tax return showed an adjusted gross income of \$14,782, including \$4400 in maintenance. Petitioner’s 2017 income tax return showed an adjusted gross income of \$16,992, including \$9600 in maintenance. Petitioner earned an average of \$8000 to \$9000 dollars per year from substitute teaching.

¶ 19 From June 2016 through December 2016, petitioner worked at Casey’s as a cashier. Petitioner testified she had a herniated disk in her lower back that prevented her from standing or sitting for long periods. Petitioner left her employment at Casey’s because it was too painful to be on her feet for an eight hour shift. Petitioner was able to substitute teach two to three days a week. Petitioner testified substitute teaching was a perfect job, but she could not supplement her income during the summers with jobs that required her to stand for long periods.

¶ 20 Petitioner testified migraine headaches impacted her ability to work. Petitioner suffered one or two migraines per month that required her to take to her bed for one or two days. Petitioner did not take prescription medication for her headaches. According to petitioner, she sought medical treatment for her migraines numerous times but the doctors failed to prescribe medication to reduce the severity, length, or frequency of her migraines. Petitioner testified substitute teaching allowed her the flexibility to manage her migraines and back issues.

¶ 21 According to petitioner, she enrolled in a library technician associate’s certificate program and completed two classes. Because she already had a bachelor’s degree, petitioner did

not qualify for federal aid for the library technician certificate. Petitioner testified she was saving money to pay for the classes and anticipated enrolling in an online program in January 2019. Petitioner hoped to take one class per semester and complete the certificate in three years. Once petitioner completed the certificate, she anticipated earning between \$15 and \$18 per hour.

¶ 22 Petitioner's exhibit No. 6 showed a tax debt of \$5459.32 for 2014 and petitioner's exhibit No. 7 showed that respondent had a tax debt of \$5690.43 for 2016. Petitioner testified the 2014 debt had been paid. Petitioner asked that respondent be responsible for the 2016 tax debt because she warned him to change his number of dependents and his status from married to single. According to petitioner, respondent failed to follow her advice, which resulted in the 2016 tax debt.

¶ 23 Petitioner testified the parties previously split the funds in their joint bank account. According to petitioner, the only retirement assets were her small TRS pension and respondent's state pension. Petitioner's only income was through her employment and maintenance.

¶ 24 *3. Respondent*

¶ 25 After petitioner's counsel finished presenting evidence, respondent testified he owed more than \$6000 in back taxes because he could not afford to pay maintenance and have his employer withhold sufficient funds from his paychecks to cover his tax burden. According to respondent, he and petitioner did not have a discussion or agreement about her obtaining her bachelor's degree. Respondent testified the parties argued about petitioner's refusal to work. Respondent stated, "I drove junk cars. We had a junky minivan. It wasn't until the last few years did I have a nice, steady paycheck; and she always refused to work."

¶ 26 According to respondent, he suffered a back injury when he worked for the Chicago Park District. A doctor diagnosed respondent with “an L4-L5 herniated disk,” and “the doctor at that point said most people, almost 80% have L4-L5.” Respondent testified the herniated disk was uncomfortable but did not prevent him from working. Respondent further testified, “As far as the migraines go, when [petitioner] was under, and I forget the medication, but it was a natural ingredient in her diet she didn’t have migraines. Okay? She has migraines when she’s not really taking care of herself.”

¶ 27 *4. Closing Argument*

¶ 28 Counsel for petitioner asked the trial court to award petitioner permanent maintenance in the amount of \$1638.66 per month. Alternatively, petitioner requested maintenance for the duration of the marriage, which was 24 years and 10 months. Additionally, petitioner asked that respondent be responsible for the marital debts, including various credit cards, car loans, back taxes, and one-half of petitioner’s student loan debt, as well as petitioner’s attorney fees. Finally, petitioner asked the court to evenly divide respondent’s pension.

¶ 29 Respondent argued he also incurred attorney fees and asked the trial court to order the parties to bear their own attorney fees. Respondent argued petitioner should bear responsibility for her student loan debt, as she was the sole beneficiary of her education. Respondent asked the court to order rehabilitative maintenance instead of permanent maintenance. Respondent argued petitioner was younger, healthier, and more educated than he was and she had the ability to earn significantly more money if she chose to do so.

¶ 30 *B. Trial Court’s Ruling*

¶ 31 In October 2018, the trial court entered a detailed supplemental judgment. In its findings of fact, the court found petitioner exaggerated her testimony regarding the extent of her

health issues and the number of vacations the parties had taken. The court found petitioner's demands to be unreasonable, particularly in light of the minimal value of the marital estate. The court found the parties lived beyond their means and had nothing left to divide except the debt. The court found "that [respondent] was a much more credible witness than [petitioner] and to the extent their testimony is inconsistent, the court [found respondent's] testimony to be more credible."

¶ 32 The trial court made the following findings of fact regarding respondent's testimony:

"[Respondent] is 50 years old and resides in an apartment in Bloomington, Illinois with his son. [Respondent] testified that his son helps him with living expenses when needed. He has been employed full time at Fox Center in Dwight for the past 5 years earning \$35.00/hour. He does not work overtime. His gross earnings in 2017 were \$71,083.89. He testified that he has no other source of income. For the majority of his adult life he worked as a painter and was self-employed for a period of time during the marriage. He testified that he has approximately 6 college credits, but does not plan to return to college. Husband suffers from a number of health issues including COPD, diabetes, sleep apnea, rheumatoid arthritis, and has 2 dislocated discs in his back. He testified that it is difficult for him to work and it exacerbates his medical conditions, but he intends to continue working as long as he can. [Respondent] testified that he provided

the sole means of financial support for the family and his wife stayed home and cared for the children. He currently provides health insurance for the children. He testified that they took family vacations every few years, but for the most part lived modestly. He always drove an old vehicle and [petitioner] drove an older mini-van that was falling apart. Their marital home was foreclosed upon in 2012 or 2013.”

¶ 33 The trial court found permanent maintenance inappropriate. Specifically, the court found petitioner capable of greater earning capacity than respondent. As previously indicated, the court found petitioner exaggerated her testimony regarding her physical limitations and found petitioner had the ability to work full-time as a teacher, but chose not to. The court found petitioner healthier than respondent and her future earning capacity greater than respondent’s given respondent’s deteriorating health. The court further found the parties lived modestly and more recently lived beyond their means, contrary to petitioner’s testimony. The court noted the parties had no assets of any value and lost their home and a vehicle to foreclosure. The court concluded maintenance was appropriate but found it inappropriate to award maintenance in accordance with statutory guidelines.

¶ 34 The court equally divided respondent’s state pension and awarded petitioner her TRS pension. The court allocated the marital debt as follows: (1) each party was responsible for their own credit cards and automobile loans, (2) respondent was responsible for his tax debts, and (3) the parties were equally responsible for petitioner’s outstanding student loan debt. The court further ordered respondent to pay \$900 toward petitioner’s attorney fees and thereafter

ordered the parties to pay their own remaining attorney fees. Finally, the court ordered maintenance as follows:

“The court having found that it is inappropriate to award maintenance to [petitioner] in accordance with the statutory guidelines due to the marital debt apportioned to [respondent], the future earning capacity of [petitioner], the respective health of the parties, [petitioner’s] education[,] and the modest standard of living during the marriage, hereby orders [respondent] to pay rehabilitative maintenance to [petitioner] for a period of 36 months in the amount of \$800.00 per month ***.”

¶ 35 This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 On appeal, petitioner argues the trial court abused its discretion in awarding her rehabilitative maintenance in the amount of \$800 per month for 36 months.

¶ 38 Where a spouse is not employable or only employable at a lower income as compared to the spouse’s previous standard of living, a permanent maintenance award is appropriate. *In re Marriage of Walker*, 386 Ill. App. 3d 1034, 1044, 899 N.E.2d 1097, 1105 (2008). However, permanent maintenance is not limited to a spouse who is not employable and courts give consideration to more permanent maintenance awards to a wife who has undertaken to raise and support the family. *In re Marriage of Nord*, 402 Ill. App. 3d 288, 305, 932 N.E.2d 543, 557 (2010). “Rehabilitative maintenance is appropriate where the spouse is employable at an income that would provide the spouse the approximate standard of living enjoyed during the marriage.” *Id.* The trial court is in the best position to determine whether rehabilitative or

permanent maintenance is more appropriate. *Id.* Accordingly, we review a trial court's maintenance award for an abuse of discretion. *In re Marriage of Schneider*, 214 Ill. 2d 152, 173, 824 N.E.2d 177, 189 (2005).

¶ 39 The court must make an initial determination as to whether a maintenance award is appropriate. 750 ILCS 5/504(a) (West 2016). In making this determination, the court must consider all relevant factors, including the following:

“(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)(1)-(14) (West 2016).

Once the court determines a maintenance award is appropriate, the court shall order either (1) guideline maintenance or (2) a non-guideline award of maintenance made after the court’s consideration of the relevant factors set forth in subsection (a). 750 ILCS 5/504(b-1)(1), (2) (West 2016).

¶ 40 In this case, the trial court carefully considered the evidence and arguments put forth by both parties and entered a thoughtful, detailed written order. The court considered the division of the marital property and the financial obligations imposed on the parties as a result of the dissolution. The court also considered each party's contributions to the family and their respective earning capacities. The court concluded petitioner had a significantly greater earning capacity than her testimony let on. Petitioner had a bachelor's degree in elementary education and could seek employment as a teacher. Instead, she only pursued substitute-teaching opportunities, and the court determined she did not wish to work full time. However, the court determined rehabilitative maintenance for a period of 36 months was appropriate. Petitioner testified she was pursuing a library technician certificate that would take three years to complete. The court clearly considered the time necessary for petitioner to acquire additional education to enable her to support herself through appropriate employment as an alternative to putting her bachelor's degree to use. The court specifically considered the standard of living established during the marriage, the duration of the marriage, and the "age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and the needs of each of the parties." 750 ILCS 5/504(a)(9) (West 2016).

¶ 41 As noted above, rehabilitative maintenance is appropriate where a spouse is employable at an income sufficient to maintain the spouse's previous standard of living. In this case, the trial court specifically found petitioner's testimony regarding her physical limitations to be incredible. The court additionally found petitioner's earning capacity to be sufficient to provide her an equivalent standard of living as she enjoyed during the marriage. While petitioner stayed home with the children and supported the family, she also earned a bachelor's degree in

