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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
CAROL FLYNN,)	of Du Page County.
)	
Petitioner-Appellee,)	
)	
and)	No. 10-D-1538
)	
JAMES FLYNN,)	Honorable
)	Brian R. McKillip,
Respondent-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion in distributing the marital property and ordering permanent maintenance; challenge to award of attorney fees was forfeited.

¶ 1 The circuit court of Du Page County entered a judgment for dissolution of the marriage between the parties, Carol and James Flynn. James appeals, arguing that the trial court erred in distributing the marital property, awarding maintenance, and ordering him to pay for \$1,400 of Carol's attorney fees. We affirm.

¶ 2 BACKGROUND

¶ 3 Carol and James were married in 1977 and had three children, all of whom are now adults. James left school in the ninth grade. James has worked in the construction business for almost 40 years and has had the same employer for the last 27 years. Carol graduated from high school. Carol now works as a senior bookkeeper and has been with her employer for almost 30 years. In 2010, James earned \$97,407 and Carol earned \$51,604. On July 9, 2010, Carol filed a petition for dissolution. At the time of trial, Carol was 51 years old and James was 53 years old.

¶ 4 The trial of the dissolution occurred on May 18, 19 and 31, 2011. The testimony at trial established that Carol handled all of the family's finances throughout their 33-year marriage. She would deposit James's and her own paychecks into a joint bank account, give James \$20 per workday for spending money, and pay bills from the joint account. The parties accumulated substantial debt during the course of the marriage, including home equity loans, auto loans, a student loan for their daughter, credit card debt, and personal loans. Many of these loans were in both their names. Carol testified that, perhaps as many as eight years earlier, she began signing James's name on legal documents including loan documents. She testified that James signed his own name to such documents at the beginning of their marriage, but after a while he no longer wanted to sign his own name and instructed her to sign his name instead. In general, she discussed the loans with James prior to taking them out, but she conceded that she did not do so for her own personal loans from her 401(k). In 2006, Carol signed both their names on a home equity loan in the amount of \$150,000. All of the proceeds except for approximately \$8,800 were used to pay off various credit card debts, car loans, and an earlier home equity loan. The remaining \$8,800 was placed in their joint bank account and used for bills. James testified that he did not authorize Carol to sign his name and did not know about any of the parties' debts.

¶ 5 The parties' financial documents (checking account statements, credit card statements, bills, and so on) were kept in a locked filing cabinet to which Carol had the only key. Carol testified that the cabinet was kept locked to keep their financial matters private from their children, at least one of whom lived at home until 2009, and that she would have given James the key if he had asked for it. James did not testify that he ever asked Carol for the key, or sought to take over handling the family's financial matters. Both parties testified that, throughout their marriage, discussions about money would turn into fights.

¶ 6 On the first day of trial, James stated that he would be arguing that Carol dissipated substantial marital funds. The only previous notice Carol received of James's dissipation claim was a reference to dissipation in a letter sent a few days before trial from James's attorney to Carol's attorney. The exact amount of the alleged dissipation was not specified. In closing, James argued that all of the parties' existing debts (except for the loan to buy his truck) should be viewed as dissipation because he had not known that any of them were being incurred.

¶ 7 The parties disputed when the breakdown of the marriage occurred. Carol testified that communication between James and her began to break down during the summer or fall of 2009, when she would get "the silent treatment" and, although they would start talking again, nothing was ever resolved. She first contemplated filing for divorce around Christmas 2009, and began sleeping in the children's bedroom sometime in the next few months. James testified that he and Carol stopped acting like a couple in 2000 or so, when they had no interests or hobbies together, did not take vacations together, and acted more like roommates. James thought about divorce on many occasions but did not act on his feelings because he did not want to be the one to break the family up. In 2004 James bought Carol a ring for their 25th wedding anniversary. The parties agreed that

they had sex about five times per year before 2008; in 2009, they had sex only twice; and they stopped speaking completely and began sleeping in separate bedrooms in May or June of 2010.

¶ 8 The parties owned a home in Carol Stream. At the time of trial the home equity loan on the house was about \$114,000. Both parties had retirement benefits, all of which were acquired during the marriage. James had a union pension. Carol had a 401(k) account valued at \$165,000, subject to a \$24,000 loan that she took out in June 2010, the balance on which was \$21,000 at the time of trial. She used the proceeds of this loan to pay for car repairs and pay bills, including some of the children's expenses, and also used \$5,000 to pay her divorce attorney. Carol drove a 2003 Highlander valued at \$13,000, and James drove a Ford pickup truck with a net value of \$6,000. The parties' other personal property included a bank account of \$3,500, two computers, furnishings at the house and in a storage locker, and a jug full of change. Carol and James also had a pending lawsuit arising from a personal injury to Carol.

¶ 9 On June 8, 2011, the trial court issued a memorandum of opinion. In it, the trial court rejected James's claim of dissipation on several grounds. The trial court noted that James had given Carol almost no advance notice that he would be claiming dissipation. Moreover, the claim itself was vague, merely characterizing the parties' debts as dissipation. The trial court found that the breakdown of the marriage occurred in the summer and fall of 2009, and so no debts incurred before then could be considered. Moreover, the testimony at trial did not support a claim for dissipation: James had not presented evidence that any of the proceeds from the loans or the credit card expenditures were used for a purpose unrelated to the marriage.

¶ 10 The trial court then distributed the marital property. It divided both parties' retirement benefits equally (James's pension to be divided via a qualified domestic relations order), but made

Carol solely responsible for repaying the \$21,000 loan from her 401(k). It gave the Highlander to Carol and the truck to James, made James responsible for the lien on the truck, and awarded James the \$3,500 bank account in lieu of the difference in value between the two vehicles. The trial court ordered that the house be sold and the proceeds used to pay off the parties' remaining liabilities, including the home equity loan and the student loan. James would remain in possession of the house and would pay the taxes and utilities until the sale; each party would pay half of the monthly home equity loan payment; and the parties were to cooperate in selling the house. The trial court divided the other personal property in roughly equal proportions, reserving jurisdiction to allocate any proceeds from the personal injury lawsuit if and when they were received.

¶ 11 The trial court also awarded Carol permanent maintenance of \$1,750 per month, stating that it sought to roughly equalize the parties' future income. In setting maintenance, the trial court took into account the factors contained in section 504 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/504 (West 2010)), in particular the first, second, third, and seventh factors. As to the first factor, the income and property of each party, James's income was approximately twice that of Carol's, and their property (*i.e.*, their share of the marital estate) was approximately equal. Both parties' needs were roughly equal (the second factor). In connection with the third factor, the present and future earning capacity of each party, the trial court noted that James testified that he did not feel that he would be able to keep working until retirement age, and both parties testified regarding various physical ailments but admitted that these ailments currently did not prevent them from working full-time. The trial court found that there was no reason to believe that either party's income would change significantly in the near future. The duration of the marriage (the seventh factor) was lengthy, 33 years. The trial court granted Carol permanent rather than

temporary or rehabilitative maintenance on the ground that Carol had a well-established work history that nonetheless yielded an income substantially lower than James's income. Maintenance could be modified under section 510 (a-5) of the Act upon a substantial change in circumstances and could be terminated upon the occurrence of the events set out in section 510(c) of the Act. Attorney fees were to be equalized at \$7,500, with each party to bear the cost of any fees incurred on their own behalf above that amount.

¶ 12 On June 24, 2011, a judgment for dissolution reflecting these rulings was entered. James filed a motion for reconsideration, arguing that the trial court erred in not finding dissipation (and therefore in its distribution of marital property) and in granting Carol maintenance. The trial court denied the motion, and James filed a timely notice of appeal.

¶ 13 ANALYSIS

¶ 14 On appeal, James seeks to raise three issues: the trial court's rulings regarding dissipation and its distribution of the marital property; the trial court's award of maintenance to Carol; and the trial court's ruling regarding attorney fees. Carol asserts that the last issue was forfeited because James did not raise it in the trial court. We agree. The only reference to attorney fees in James's motion for reconsideration was in his prayer for relief, in which he asked that the parties be ordered to bear their own fees and costs. However, he made no argument in that motion as to why that relief would be warranted, nor did he suggest that the trial court's ruling regarding attorney fees was flawed in any way. A reviewing court will not consider arguments not presented to the trial court (*Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 127 (2010)), and arguments raised for the first time on appeal are deemed forfeited (*Jeanblanc v. Sweet*, 260 Ill. App. 3d 249, 254 (1994)).

Accordingly, we decline to consider James's arguments on appeal regarding attorney fees and turn to the remaining issues.

¶ 15 We begin with James's arguments relating to dissipation and property distribution. A trial court has broad discretion in the division of marital assets, and we will reverse its determinations only if it is clear that the trial court has abused that discretion. *In re Marriage of Wojcik*, 362 Ill. App. 3d 144, 161 (2005). One of the factors that the trial court must consider in distributing the marital estate is any dissipation of that estate by either party. 750 ILCS 5/503(d)(2) (West 2010). Dissipation occurs when marital property is used for the sole benefit of one spouse for a purpose unrelated to the marriage when the marriage is undergoing an irreconcilable breakdown. *In re Marriage of O'Neill*, 138 Ill. 2d 487, 497 (1990). Whether dissipation has occurred is a question of fact, and we will not overturn the trial court's determination of that issue unless it is against the manifest weight of the evidence. *In re Marriage of Holthaus*, 387 Ill. App. 3d 367, 374 (2005).

¶ 16 In this case, James argued at trial that all of the marital debts incurred since the beginning of 2006 except for his truck loan should be considered dissipation because he did not know that Carol was incurring the debts. There are several difficulties with this approach. First, James failed to identify any specific expenditures that he believed constituted dissipation, one element of a *prima facie* case for dissipation. See *In re Marriage of Manker*, 375 Ill. App. 3d 465, 476-77 (2007) (party claiming dissipation must make "a preliminary showing of dissipation before the burden shifts to the party charged with dissipation to refute the accusations"); see also *In re Marriage of Landwehr*, 225 Ill. App. 3d 149, 151 (1992) (finding of dissipation could not be sustained where the record did not indicate which specific amounts comprised the dissipation). The failure to identify the alleged dissipation with specificity also impaired Carol's ability to defend herself against the dissipation

claim. In this case, the prejudice to Carol's ability to mount a defense to such a wide-ranging accusation was heightened by the fact that she did not receive notice that James intended to claim dissipation until just before trial.

¶ 17 James's *prima facie* showing of dissipation was also deficient because he did not allege that Carol used the parties' marital property solely for her own benefit for a purpose unrelated to the marriage. *O'Neill*, 138 Ill. 2d at 497. The deficiency in James's allegations was echoed by the evidence adduced at trial, which failed to show any self-dealing in Carol's expenditures of the family's income. Indeed, James specifically testified that, if he had been asked, he would have agreed with several of Carol's decisions regarding expenditures, such as her payment of living expenses and car insurance for the parties' adult children. (We leave aside here Carol's use of money from her 401(k) to pay her divorce lawyer, which the trial court resolved by making Carol responsible to repay all of the loan from her 401(k).) On appeal, James bases his claim of dissipation on his lack of knowledge about the extent to which Carol was incurring debt, not on any assertion that she used marital assets for her own benefit. However, dissipation requires some indication that the expenditures in question were for a purpose unrelated to the marriage. *Id.* On this basis alone, we would affirm the trial court's finding that dissipation was not proven.

¶ 18 James cites *In re Marriage of Lee*, 246 Ill. App. 3d 628 (1993), for the proposition that a spouse's lack of knowledge about expenditures is sufficient to allow a finding of dissipation, but the facts in that case are distinguishable. There, the husband for three years had regularly transferred \$20,000 into trust accounts for the children's education without telling his wife; in the few months before the parties' separation, he suddenly transferred over \$266,000 into such trusts. In finding that this was dissipation, the court viewed this sudden change in the pattern of contributions as indicating

an intent to secrete marital assets outside of the marital estate. *Id.* at 634-35. In this case, however, there was no sudden change in Carol's handling of the family's finances. Rather, the evidence showed an accumulation of debt over the course of the marriage. There was no evidence of the intent to divert assets from the marital estate immediately before the separation similar to that present in *Lee*.

¶ 19 Finally, the approach advocated by James disregards the evidence that he had the ability to gain information about the parties' finances if he had wanted to do so. The checking account used by Carol was a joint account and the credit cards were either in James's name alone or in both of their names. Moreover, although Carol handled the household finances and had the only key to the filing cabinet where their financial records were stored, James did not testify that Carol ever refused to give the key to him. Rather, both parties testified that discussions about their finances would turn into fights, Carol would tell James that he could see the bills or take over managing the family's finances if he wanted, they would stop speaking to each other for a few days, and James would let the matter drop. It appears that this pattern held true throughout their entire marriage. While this pattern would certainly make it unpleasant for James to insist on reviewing the family's finances, it did not make it impossible.

¶ 20 The facts in this case are thus distinguishable from *In re Marriage of Zweig*, 343 Ill. App. 3d 590 (2003), cited by James in support of his arguments. In *Zweig*, not only did the wife handle the couple's finances without input from her husband, she demonstrated an intent to benefit herself by gaining power of attorney over her husband's investment assets, liquidating them, transferring the proceeds into accounts in her own name, and keeping for herself the \$13,000 of interest generated annually by the bonds bought with those funds. *Id.* at 592. When the husband asked for

financial information during this time the wife refused to give it to him. *Id.* at 593. Thus, not only was the husband unaware of how the couple's financial arrangements were being handled, the wife actively blocked his ability to learn that information and engaged in self-dealing. Similarly, in *In re Marriage of Vancura*, 356 Ill. App. 3d 200, 205 (2005), the husband deposited into his own personal account a \$16,000 check intended for the parties' jointly-owned car dealership. Here, by contrast, all of the parties' money was handled through a joint checking account and credit cards that were titled in such a manner that they were accessible to James. There was no showing that James was prevented from learning the parties' financial condition if he had wanted to press the issue.

¶ 21 James further argues that the trial court erred in finding when the marriage was "undergoing an irreconcilable breakdown." See *Holthaus*, 387 Ill. App. 3d at 373 (courts should look to when this process is in motion, not to when the breakdown is completed). The date of the breakdown of the marriage, like the issue of dissipation generally, is a factual determination, and we will not reverse the trial court's finding unless it is against the manifest weight of the evidence. *Id.* at 374. However, because we find that James failed to put forth a *prima facie* claim for dissipation, we need not reach this issue. *Manker*, 375 Ill. App. 3d at 476-77.

¶ 22 We turn to James's arguments regarding the trial court's award of \$1,750 per month in permanent maintenance to Carol. An award of maintenance is within the trial court's discretion, and we will not reverse the trial court's determination unless it is clear that it has abused that discretion. *In re Marriage of Schneider*, 214 Ill. 2d 152, 173 (2005). An abuse of discretion occurs where no reasonable person would take the view of the trial court. *Id.* The party challenging the award of maintenance bears the burden of showing such an abuse of discretion. *Id.*

¶ 23 James first argues that the trial court should not have awarded Carol permanent maintenance unless she showed that she lacked sufficient income and assets to provide for her reasonable needs, citing *In re Marriage of Heller*, 153 Ill. App. 3d 224, 233 (1987). However, *Heller* was citing the language of section 504(a) of the Act as it existed at that time. As Carol points out, section 504(a) has been amended since *Heller*, removing the requirement cited there, and now provides simply that “the court may grant a temporary or permanent maintenance award for either spouse in amounts and for periods of time as the court deems just,” taking into account the factors listed in that section. 750 ILCS 5/504(a) (West 2010).

¶ 24 James further argues that the trial court abused its discretion in weighing the section 504(a) factors. James’s primary contentions in this regard are that the trial court erred in finding that the parties’ needs were roughly equal and that the disparity in income was likely to continue for the foreseeable future. As to the first point, James contends that the trial court should not have relied upon Carol’s financial affidavit, which did not reflect her living situation at the time of trial. He points out that although Carol listed the home equity loan payments and utility expenses associated with living in the former marital home, Carol moved out of that home and went to live with one of the parties’ daughters, where she paid no rent or utilities. Carol was still living in her daughter’s home at the time of trial, over a year later. In response, Carol points out her testimony that she continued living with her daughter in part because she was not receiving any temporary maintenance or other support during the dissolution, and that she had priced condominiums in the area and was seeking to move into a home of her own as soon as she saved the necessary down payment.

¶ 25 The weighing of evidence, including evidence that is weak or contradictory, is the province of the trial court. *In re Marriage of Matchen*, 372 Ill. App. 3d 937, 946 (2007). Here, the trial court

was aware of James's arguments regarding the inaccuracies in Carol's financial affidavits as well as Carol's testimony regarding her needs. Accordingly, the court's finding that the parties' needs were roughly equal took into account the flaws in the evidence. Moreover, it is clear that the trial court viewed the parties as having similar needs: both parties required housing (including Carol, who was not required to continue living with her daughter) and were likely to have similar utility and other household expenses. There were no ongoing medical expenses for either party. Neither spouse had significantly greater debts to pay, although it appears that Carol's responsibility to repay the loan from her 401(k) exceeds the amount of James's truck loan, reflecting a deliberate decision by the trial court to impose that greater obligation on Carol due to her greater responsibility for causing the indebtedness. The record does not support James's contention that the trial court incorrectly assessed the parties' needs.

¶ 26 James also argues that the trial court erred in finding that the disparity in income between Carol and him was likely to continue for the foreseeable future. He argues that he is unlikely to be able to perform his physically demanding work for much longer and will soon be either unemployed or drawing a much lower retirement income, while Carol can continue at her job indefinitely. Here again, however, the record supports the trial court's finding that, despite testimony from both parties about physical ailments, both were able to continue their current work. Moreover, despite its label of "permanent" maintenance, the maintenance award to Carol expressly provides that James may seek modification in the event that there is a substantial change in circumstances, such as retirement, disability, or evidence that, despite the passage of a reasonable amount of time, Carol is no longer seeking to move out of her daughter's home. Accordingly, we find no error in the trial court's assessment of the parties' income.

¶ 27 James argues that the trial court should have taken Carol's dissipation into account in determining whether maintenance should be granted, but as we have discussed above we find no error in the trial court's determination that Carol did not dissipate marital assets.

¶ 28 James also argues that the trial court set the amount of maintenance too high. The trial court stated that it was awarding maintenance to Carol despite the fact that she had a steady income because her income was unlikely ever to reach the level of James's income and the court believed that, given the parties' lengthy marriage, it was appropriate to grant Carol maintenance in an amount which would make the parties' income roughly equal. Given the evidence presented at trial, this approach was not an abuse of discretion. James asserts that the trial court incorrectly calculated the amount needed to equalize the parties' income, but our review of the record does not support his assertion. James also contends that the trial court should not have taken the parties' standard of living during the marriage into account, because the parties were evidently living beyond their means and thus the amount "necessary" for Carol to sustain this level after the divorce would be artificially high. However, although the trial court stated that it had reviewed all of the factors listed in section 504(a) of the Act, which would include the parties' standard of living during the marriage, the trial court never referred specifically to this factor. Moreover, the trial court's memorandum opinion discloses that it was well aware of the debt that had accumulated over the course of the marriage. The record does not support the suggestion that the trial court improperly relied on this factor in setting Carol's maintenance.

¶ 29 In support of his argument that maintenance was set too high, James cites *In re Marriage of Drury*, 317 Ill. App. 3d 201 (2000), and *In re Marriage of Brankin*, 2012 IL App (2d) 110203. *Drury* does not support James's arguments. In *Drury*, the trial court awarded the wife \$600 per

month in maintenance for three years only. On appeal, the wife did not contend that the monthly amount was too low, but she argued that it should be permanent, not temporary. The appellate court agreed and ordered that the award of maintenance should be permanent, as the wife was unlikely ever to match the earning capacity of her husband. *Drury*, 317 Ill. App. 3d at 210. However, as *Drury* did not involve any issue regarding the amount of maintenance, it is not apposite to James's argument here.

¶ 30 James cites *Brankin* because there, a husband earning a very high salary (over \$360,000) was ordered to pay \$3,000 per month in maintenance, approximately 10 percent of his income. Both parties in that case appealed: the husband argued that maintenance was too high, while the wife argued that it was too low. The appellate court affirmed the trial court's award. *Id.* ¶ 24. James argues that, applying the same percentage as in *Brankin*, ordering him to pay \$1,750 of his much smaller salary was an abuse of discretion. *Brankin* is distinguishable on its facts, however. For instance, the trial court in *Brankin* found that the wife's monthly shortfall of expenses versus her income was approximately \$300 to \$800. *Id.* ¶ 16. By contrast, Carol's shortfall is larger. Moreover, due to the husband's high salary in *Brankin*, even a relatively small percentage of that salary was sufficient to meet the wife's needs and go beyond that to provide an approximation of the standard of living during the marriage. That is not the case here. In short, as other courts have observed, maintenance depends on the facts of each case (see *Drury*, 317 Ill. App. 3d at 208 (citing *In re Marriage of Mayhall*, 311 Ill. App. 3d 765, 769 (2000)) and thus the amount of maintenance set in one case is not dispositive of the maintenance determination in a different case. Neither *Drury* nor *Brankin* demonstrate that the trial court's award of maintenance in this case was an abuse of discretion.

¶ 31

CONCLUSION

¶ 32 For all of the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 33 Affirmed.