

NOTICE

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2012 IL App (5th) 120022-U
NO. 5-12-0022
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
SHERRYL JONES,)	Madison County.
)	
Petitioner and Counterrespondent-Appellee,)	
)	
and)	No. 08-D-1192
)	
ROGER D. JONES,)	Honorable
)	Elizabeth R. Levy,
Respondent and Counterpetitioner-Appellant.)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court considered the factors in section 503(d) of the Illinois Marriage and Dissolution of Marriage Act, and thus, its division of marital property was not an abuse of discretion. The trial court did not abuse its discretion in deviating from the statutory guidelines for child support where the deviation was reasonable and was based on the factors in section 505(a)(2) of the Act. The trial court did not err in denying a motion for reconsideration where no newly discovered evidence was presented.

¶ 2 On December 3, 2008, Sherryl Jones filed a petition for dissolution of marriage from Roger Jones. On January 12, 2009, Roger filed a counterpetition for dissolution of marriage. On September 23, 2011, a judgment for dissolution of marriage was entered. Roger filed a motion to reconsider/motion for a new trial, which was denied. He filed a timely notice of appeal. We affirm.

¶ 3 **BACKGROUND**

¶ 4 Sherryl and Roger were married in Madison County, Illinois, on October 6, 1990. The

parties had two children, Cody Darren Jones, born March 18, 1992, and Kaci Nicole Jones, born July 10, 1995.

¶ 5 On December 3, 2008, Sherryl filed a petition for dissolution of marriage from Roger alleging extreme and repeated mental cruelty. The same day she filed a petition for temporary child custody, child support, maintenance, and attorney fees. On January 12, 2009, Roger filed a counterpetition for dissolution of marriage alleging irreconcilable differences.

¶ 6 On April 16, 2009, the court entered a temporary order. The parties were awarded joint legal custody of the children and were to share physical custody on a week-to-week basis. Roger was ordered to pay child support in the amount of \$213 per week, a deviation from the support guidelines because of the amount of time the children would spend with him.

¶ 7 During the course of litigation, Cody was emancipated. On September 15, 2010, Roger and Sherryl appeared *pro se* at a hearing about the dissolution. The court entered an order finding that it was in the best interest of Kaci that the parties be awarded joint legal and physical custody of her pursuant to the terms of the custody judgment and joint parenting agreement entered that date. Pursuant to the terms of the agreement, Roger was ordered to pay child support in the amount of \$180 per week. The parties stipulated that the value of the marital residence was \$133,000. The matter was set for a hearing on all remaining issues on November 18, 2010.

¶ 8 Sherryl and Roger each appeared *pro se* at trial on November 18, 2010. Roger and Sherryl presented evidence as to the value of the marital property and marital debt. The stipulated value of the marital home was \$133,000, and Roger testified that there was a mortgage on the house in the amount of \$31,413.75 and a line of credit against the house in the amount of \$53,288.56. Roger testified that the parties owned an undeveloped lot with

a value of \$52,500. The lot had a mortgage on it in the amount of \$33,149. A copy of Roger's petition for chapter 13 bankruptcy was admitted into evidence. The petition showed creditors holding secured claims on the marital home, the lot, and a 2007 Chevrolet Silverado. Pursuant to the bankruptcy payment plan, Roger was to pay \$635 per month for 60 months on these secured claims. Roger's Plumbers & Fitters Local 101 Pension Fund report of benefits as of September 30, 2009, was admitted into evidence and showed an accrued benefit of \$1,533.65. Roger's 401(k) savings plan was admitted into evidence and showed a total account value as of June 30, 2010, of \$9,460.86. Roger's affidavit of assets and liabilities was admitted into evidence and showed gross monthly income of \$12,559.

¶ 9 Sherryl's chapter 7 bankruptcy order of discharge was entered into evidence. Her retirement plan statement for the Olin Community Credit Union 401(k) Plan and Trust was admitted into evidence, and it showed an investment value of \$13,640.79 as of September 30, 2010. She testified that the credit union name had changed to First Mid-America Credit Union. Sherryl's affidavit of assets and liabilities was admitted into evidence and showed income of \$3,600 per month.

¶ 10 Roger testified that he made \$12,500 per month because, at that time, he worked a significant amount of overtime. He informed the court that his job was at the "peak point" of overtime and that the amount of overtime he worked would be declining. A copy of his social security statement showing his taxed social security earnings was admitted into evidence. It showed that between 2001 and 2007, he earned between \$60,000 and \$70,000 annually. In 2008 he earned \$95,523 and in 2009 he earned \$105,301.

¶ 11 On September 23, 2011, the judgment of dissolution of marriage was entered. The court ordered Roger to pay \$180 per week in child support pursuant to the custody judgment and joint parenting agreement. The court noted that the amount was less than the statutory guidelines, but found a deviation was reasonable "as long as Roger pays for all uninsured

medical, dental, optical, orthodontic, prescription drug and counseling expense for Kaci as well as her extracurricular and school activities including but not limited to prom expenses, sports, class trips, and college application and test fees as well as visiting of colleges." The court noted that Roger testified he intended to purchase a vehicle for Kaci and ordered him to be responsible for the car insurance. The court ordered Roger to maintain Kaci on his health insurance plan so long as the plan was available to him through his place of employment or union.

¶ 12 Roger was awarded the marital home and was ordered to assume and be held liable for all debts and expenses relating to the property including the first and second mortgages, all other liens, real estate taxes, utilities, and repairs. Roger was awarded the unimproved lot and was ordered to assume all debts and liabilities on it including the mortgage, all other liens, and real estate taxes. Roger was awarded the 2007 Chevrolet Silverado pickup truck and the 1998 GMC truck. He was ordered to be liable for any debts and expenses related to the vehicles pursuant to the chapter 13 bankruptcy plan. Sherryl was awarded the 1999 Pontiac Grand Am and was ordered to be liable for any debts and expenses related to it. Each party was awarded any checking or savings accounts in his or her name only or in his or her name with another person other than the other party to the dissolution. Each party was awarded the personal property in his or her possession, and Sherryl was awarded the treadmill, curio cabinet, and Giant mountain bicycle in Roger's possession at the time of the hearing. Sherryl was awarded one-half of the marital portion of Roger's Plumbers & Fitters Local 101 Pension Fund and was awarded the preretirement and postretirement survivor's annuity for said portion. Sherryl was awarded one-half of the marital portion of Roger's 401(k) savings plan from the Plumbers & Fitters Local 101. Sherryl was awarded her retirement plan now known as the First Mid-America Credit Union 401(k) Plan and Trust. Roger was ordered to pay Sherryl \$48,000 for her share of the equity in the marital property

and in lieu of maintenance. Roger was ordered to pay Sherryl the \$48,000 in installments of at least \$800 per month.

¶ 13 On October 21, 2011, Roger filed a motion for reconsideration/motion for a new trial. He alleged that he recently learned that Sherryl had an additional 401(k) or pension plan which the court did not consider in its ruling, that the fair market value of the home was less than \$133,000, and that his employment changed subsequent to trial resulting in a substantial loss of income. He asked that he be allowed to present new evidence concerning the second pension, the value of the marital home, and his current income. Finally, Roger argued that Sherryl was awarded all the equity in the marital home and such a division of marital property was not warranted under the factors set out in section 503(d) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/503(d) (West 2010)). The court heard oral arguments, and on December 15, 2011, denied Roger's motion for reconsideration/motion for new trial. Roger filed a timely notice of appeal.

¶ 14 ANALYSIS

¶ 15 Initially, we note that Sherryl did not file an appellee's brief. While it is permissible for a reviewing court in the exercise of its inherent authority to dismiss an appeal for the appellant's failure to file a brief within the time prescribed by the rules of court, the judgment of the trial court should not be reversed *pro forma* for the appellee's failure to file a brief. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131 (1976). Where the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the reviewing court should decide the case on its merits. *Id.* at 133. We will decide this case on its merits because it involves a simple record and the claimed errors can be decided without the aid of an appellee brief.

¶ 16 Roger argues that the trial court erred by awarding Sherryl an inequitable share of the marital estate. The division of property in dissolution actions is governed by section 503(d)

of the Illinois Marriage and Dissolution of Marriage Act (the Act), which provides that in a dissolution proceeding, the court is to divide the parties' marital property without regard to marital misconduct and in just proportions considering all relevant factors. 750 ILCS 5/503(d) (West 2010). The relevant factors the court is to consider include the contribution of each party to the acquisition, preservation, or increase or decrease in value of the marital or nonmarital property; the value of the property assigned to each spouse; the duration of the marriage; the relevant economic circumstances of each spouse when the division of property is to become effective; the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties; whether the apportionment is in lieu of or in addition to maintenance; and the reasonable opportunity of each spouse for future acquisition of assets and income. 750 ILCS 5/503(d) (West 2010). "The trial court has broad discretion in applying these factors and is authorized to award either property or maintenance, both property and maintenance, or property in lieu of maintenance." *In re Marriage of Demar*, 385 Ill. App. 3d 837, 853 (2008).

¶ 17 The trial court's division of marital property will not be overturned absent an abuse of discretion. *Id.* at 852. The issue for the reviewing court is not whether it agrees with the trial court's division of marital assets, but whether the trial court "acted arbitrarily without employing conscientious judgment or whether, in view of all the circumstances of the case, the trial court exceeded the bounds of reason so that no reasonable person would follow the trial court's position." *In re Marriage of Zweig*, 343 Ill. App. 3d 590, 599 (2003). While section 503(d) requires the division of marital property to be in just proportions, a proportional asset division does not require mathematical equality. *Id.* The trial court does not abuse its discretion if it properly applied the section 503(d) guidelines when making an unequal distribution of property. *Id.* at 599-600.

¶ 18 In the instant case, the trial court awarded Roger the marital home and an unimproved

lot and ordered him to assume the debt on both properties. There was approximately \$19,350 of equity in the unimproved lot. The marital home had approximately \$48,297 of equity in it. Sherryl was awarded \$48,000 as her share in the marital property and in lieu of maintenance. Roger was awarded the 2007 Chevrolet Silverado and the 1998 GMC truck. He testified that while the 1998 GMC truck was titled in his name, it belonged to the couple's son. Sherryl was awarded the 1999 Pontiac Grand Am. Roger's Plumbers & Fitters Local 101 Pension Fund and his Plumbers & Fitters Local 101 401(k) plan were divided equally. Sherryl was awarded her 401(k) plan with an approximate value of \$13,640.79.

¶ 19 At the time Sherryl filed for dissolution of marriage, the parties had been married for 18 years. Roger possessed greater vocational skills and employability than Sherryl. Roger earned significantly more income than Sherryl. The apportionment was in lieu of maintenance. In reviewing the trial court's order, we find that the court adequately considered all the elements necessary to a proper determination.

¶ 20 Roger complains that he is required to assume all the marital debt. Pursuant to his bankruptcy payment plan, Roger was to pay \$635 per month for the secured assets of the marital home, the unimproved lot, and the Silverado. Roger was awarded these assets in the judgment of dissolution.

¶ 21 Roger compares his case to *In re Marriage of Goforth*, 121 Ill. App. 3d 673 (1984), and *In re Marriage of Calisoff*, 176 Ill. App. 3d 721 (1988). In *In re Marriage of Goforth*, the husband was awarded only Christmas decorations and a plaque and was ordered to pay \$128,000 in debts, while the wife was awarded the house without debt, the household furnishings, and her automobile. *In re Marriage of Goforth*, 121 Ill. App. 3d at 677-78. The court found that while there was a great disparity in education and earning capacity, it did not warrant granting all the benefits of the marriage to the wife and imposing all of the burdens on the husband. *Id.* at 680. The court found that the trial court's disposition was an abuse

of discretion. *Id.*

¶ 22 In *In re Marriage of Calisoff*, the trial court awarded the wife assets worth \$168,900 including the marital home, while awarding the husband only \$37,390 in assets and requiring him to assume nearly all of the marital debt totaling nearly \$63,000. *In re Marriage of Calisoff*, 176 Ill. App. 3d at 726. The appellate court found that by distributing the marital property and debts in such an inequitable manner, the trial court did not put the husband in a position from which he could start anew. *Id.* The court recognized that there was a disparity in the parties' earning capacities, but found that it did not warrant granting all the benefits of the marriage to the wife and imposing all of its burdens on the husband. *Id.* The court found that the trial court abused its discretion. *Id.*

¶ 23 The instant case is distinguishable from *Goforth* and *Calisoff*. In *Goforth* and *Calisoff* the wives were granted all the benefits of the marriage and the husbands were assigned all the debt. In this case, while Roger was ordered to assume the debts, he was also awarded the assets on which the debts were incurred. Both parties were allowed to keep the personal property in their possession, and Roger's 401(k) plan and pension plan were divided equally. Roger was not denied all the benefits of marriage while being assigned all the debts. Unlike the husbands in *Goforth* and *Calisoff*, Roger was in a position from which he could start anew.

¶ 24 In awarding the marital property, the trial court adequately considered the factors in section 503(d) of the Act. In doing so, it elected to award property in lieu of maintenance. "A trial court is encouraged to provide for a spouse's needs through its distribution of marital property rather than through an award of maintenance." *In re Marriage of Sevon*, 117 Ill. App. 3d 313, 318 (1983). In view of all the circumstances of the case, we cannot say that the trial court exceeded the bounds of reason so that no reasonable person would follow its position.

¶ 25 Roger next argues that the trial court erred by awarding Sherryl equity in the marital home. He argues that because Sherryl was listed as a creditor in his bankruptcy petition and he disclosed the pending dissolution of marriage proceedings, Sherryl's interest in the marital home was that of an unsecured creditor. Thus, he argues, the trial court's award of equity in the home to her was an abuse of discretion. "A party forfeits an issue for appellate review unless he has raised the issue both at trial and in a posttrial motion." *Tully v. McLean*, 409 Ill. App. 3d 659, 664 (2011). Roger failed to raise this issue at trial or in a posttrial motion; accordingly, the issue is forfeited.

¶ 26 Roger argues that because the property division was, in part, in lieu of maintenance, the trial court erred by basing its division of property on his 2010 income, which was substantially higher than in previous years. In determining the property division, the trial court reviewed Roger's social security statement which showed his taxed social security earnings from 1984 through 2009. At trial, Roger testified that he normally earned less than his income at the time of the trial. He told the court that he was "on an overtime job" and the job was at its peak point. He stated that the amount of overtime would be declining. Nothing in the trial court's order indicates that the division of marital property was based on Roger's 2010 income. The trial court specifically stated that it based its decision on the credibility and demeanor of the parties, the testimony, the exhibits, and the record. Trial court deliberations are limited to the record, and it is presumed that the trial court considered the admissible evidence when reaching its conclusion. *People v. Thomas*, 364 Ill. App. 3d 91, 99-100 (2006). Roger failed to show that the trial court did not consider all relevant evidence. The trial court did not abuse its discretion when dividing the marital property.

¶ 27 Roger argues that the trial court erred in its determination of child support because it failed to consider that he had equal custodial time with Kaci. The judgment of dissolution of marriage provided that Roger pay \$180 per week in child support. The court found that

"this is below the statutory guidelines as shown by the paycheck stubs provided by Roger at the hearing." The court found that a deviation from the guidelines was reasonable "as long as Roger pays for all the uninsured medical, dental, optical, orthodontic, prescription drug and counseling expenses for Kaci as well as her extracurricular and school activities including but not limited to prom expenses, sports, class trips, and college application and test fees as well as visiting of colleges."

¶ 28 A child support award is a matter within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Einstein v. Nijim*, 358 Ill. App. 3d 263, 273 (2005). Section 505(a)(1) of the Act sets forth guidelines for determining the percentage amount of child support. 750 ILCS 5/505(a) (West 2010). Section 505(a)(2) of the Act provides, in pertinent part:

"(2) The above guidelines shall be applied in each case unless the court makes a finding that application of the guidelines would be inappropriate, after considering the best interests of the child in light of evidence including but not limited to one or more of the following relevant factors:

- (a) the financial resources and needs of the child;
- (b) the financial resources and needs of the custodial parent;
- (c) the standard of living the child would have enjoyed had the marriage not been dissolved;
- (d) the physical and emotional condition of the child, and his educational needs; and
- (e) the financial resources and needs of the non-custodial parent." 750 ILCS 5/505(a)(2) (West 2010).

¶ 29 In the instant case, the trial court found that a deviation from the statutory guidelines was reasonable. At the time of the trial, Roger testified that he earned \$12,500 per month.

Sherryl's affidavit of assets and liabilities showed income of \$3,600 per month. Roger clearly had greater financial resources than Sherryl. Because of the disparity in income between her parents, the child support award enables Kaci to enjoy the standard of living that she would have had if her parents' marriage had not dissolved. Furthermore, "while both divorced parents are responsible for the care and well-being of their children, it does not follow that their burden is equal and it is only equitable that the parent with the disproportionately greater income than the other bear a greater share of the costs of support." *In re Marriage of Rogliano*, 198 Ill. App. 3d 404, 413 (1990). Even though Roger shares physical custody of Kaci, he has a disproportionately greater income than Sherryl and should bear a greater share of the costs of Kaci's support. The trial court did not abuse its discretion when determining the child support award.

¶ 30 Roger argues that the trial court erred in its determination of child support because it failed to average his income. "A trial court's finding of net income is within the discretion of the trial court and will not be disturbed absent an abuse of discretion." *In re Marriage of Garrett*, 336 Ill. App. 3d 1018, 1024 (2003). When future income is uncertain, it is appropriate to consider prior years' documentation to ascertain income trends; however, deviations from reliable current income patterns require a compelling showing of a definitive pattern of economic reversals. *In re Marriage of Schroeder*, 215 Ill. App. 3d 156, 161 (1991). We note that the comprehensive scheme for calculating a child support obligation based on net income in section 505(a) of the Act makes no mention of averaging a payor's previous income. 750 ILCS 5/505(a) (West 2010).

¶ 31 In the instant case, Roger provided his social security statement which showed that his income increased every year from 1984 until 2009, with two slight decreases in 2005 and 2006. Roger's past earnings do not show a definitive pattern of economic reversals. Roger testified that he was working a peak number of overtime hours and that he anticipated that

his income would decrease. In determining the child support award, the trial court stated it considered the exhibits and the record. While the trial court could have determined Roger's income by averaging it over the previous years, it was not required to do so. Based upon the record before us, we cannot say that no reasonable person would have ordered the child support at issue. Accordingly, we conclude that the trial court did not abuse its discretion in ordering Roger to pay \$180 per week in child support.

¶ 32 Lastly, Roger argues that the trial court erred in denying his motion for reconsideration/motion for a new trial. He asserts that the fact that his income had decreased was newly discovered evidence that made it probable that, had the trial court known about this information, it would have reached a different conclusion. We review the trial court's ruling on a motion to reconsider for an abuse of discretion. *In re Custody of M.C.C.*, 383 Ill. App. 3d 913, 919 (2008). A motion for reconsideration draws the court's attention to newly discovered evidence, changes in the law, or errors in the court's previous application of existing law. *Id.* "The purpose of a motion for reconsideration is to alert the court of any errors that it has made and to allow an opportunity for their correction." *Hart v. Valspar Corp.*, 252 Ill. App. 3d 1005, 1009 (1993). Where newly discovered evidence is sufficiently conclusive or decisive in character to make it probable that a different result would have been reached by the trial court, a new trial is warranted. *Id.*

¶ 33 "To justify setting aside a prior order based on newly discovered evidence, (1) the party seeking to overturn the order must show due diligence in discovering the evidence; (2) the party must also show that he could not have produced the evidence at the first trial by exercising due diligence; (3) the party must demonstrate that the evidence is so conclusive that it would probably change the trial result; (4) the evidence must be material and relate to the issues; and (5) the evidence cannot be merely cumulative or serve the sole purpose of impeachment." *In re Marriage of Wolff*, 355 Ill. App. 3d 403, 409 (2005).

¶ 34 Roger argues that the decrease in his income was newly discovered evidence. At trial, Roger testified that he was working peak hours and that he anticipated that his overtime would decrease. He could have asked his employer to provide an affidavit or other evidence that the decline in workload would reduce the amount of overtime available to him and might result in a reduction in his hourly rate. There was no newly discovered evidence. This evidence was cumulative to Roger's testimony, and by exercising due diligence, he could have produced corroborating evidence at the first trial. Thus, the trial court did not abuse its discretion in denying Roger's motion for reconsideration/motion for a new trial.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, the judgment of the circuit court of Madison County is affirmed.

¶ 37 Affirmed.