2014 IL App (1st) 1-13-2947-U
Sixth Division
December 26, 2014
No. 1-13-2947

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

IN RE THE MARRIAGE OF:	) Appeal from the Circuit Court of) Cook County
GAYLE R. VAUL-KENNEDY, Petitioner-Appellant,	)))
and	)) No. 10 D 358)
JAMES L. KENNEDY, Respondent-Appellee.	) Honorable) Leida J. Gonzalez,) Judge Presiding

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford and concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment for dissolution of marriage will be affirmed in part and reversed in part where the court: properly applied the "immediate offset approach" to apportion the petitioner's pension; correctly classified certain accounts acquired by the respondent as non-marital property; erred in apportioning the values of the parties' life insurance policies; and properly denied the petitioner's request for contribution for her attorney fees.

¶ 2 On August 16, 2013, the circuit court entered a judgment dissolving the marriage of the petitioner, Gayle Vaul Kennedy, and the respondent, James Kennedy, and distributing the parties assets under section 503 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/501 *et seq*. (West 2010)). The petitioner now appeals, asserting that the circuit court (1) erred in applying the "immediate offset" rather than the reserved jurisdiction approach to allocate her pension; (2) improperly classified certain assets acquired by the respondent during the marriage as non-marital property; (3) assigned the value of the respondent's life insurance policy to her, when in fact it was awarded to the respondent; and (4) erred in denying her request for contribution for her attorney fees when the judgment left her with insufficient liquid assets to pay those fees. We affirm in part, reverse in part, and remand with directions.

¶ 3 The petitioner filed her petition for dissolution on January 13, 2010, and the matter proceeded to a seven-day trial extending from the month of June of 2012 through February of 2013. At trial, the primary focus of dispute was the allocation of the parties' respective pensions, and the classification of certain assets acquired by the respondent as marital or non-marital property.

¶ 4 The parties were married in 1984, when the petitioner was 22 years of age and the respondent was 37 years old. There were two children born of the marriage, Joseph, born October 4, 1989, and Catherine, born January 29, 1992. At the time of the dissolution proceedings, both children were emancipated adults, but still living in the marital home along with the petitioner and the respondent. Catherine, a type 1 diabetic, was taking classes at a local community college and was covered under the petitioner's employer's health insurance plan.

¶ 5 The parties had jointly purchased the marital home, located on Thorndale Avenue in Chicago, on June 29, 1992, for $245,000. The home was financed with a $45,000 mortgage loan

and $100,000 in cash from the parties' bank accounts. In addition, approximately $153,000 of the purchase price came from the respondent's non-marital funds, including $30,000 he brought into the marriage; a loan in the amount of $100,000 from the James L. Kennedy Trust established by his mother, Esther Kennedy; and an additional $12,910 also contributed from the Kennedy trust. Esther subsequently passed away in July of 1992, at which point the respondent, as trustee of her trust, forgave the balance of the $100,000 loan. The parties had made only about two payments on the loan from this trust. The parties stipulated that the current value of the marital residence was $360,000, with an outstanding mortgage of $80,842, leaving equity in the residence in the amount of $279,158.

¶ 6 At the time of the marriage, the respondent worked for the Chicago Police Department (CPD) as a patrolman, which was his position from the inception of his career in 1973 until he retired from the CPD in 2004. After he retired, the respondent worked briefly for a private security firm in 2010, earning a total of $680. This was the last paid position he held. Upon his retirement in 2004, the respondent began collecting monthly benefits under his policemen's pension.

¶ 7 Since 1982, the petitioner was employed as a firefighter/paramedic with the Chicago Fire Department (CFD), where she was still working at the time of the dissolution proceedings. The petitioner additionally worked at two part-time jobs: for Code Red, as an independent contractor teaching first aid and emergency medical techniques, and for Navy Pier, providing first aid for special events. According to the petitioner's income and expenses summary, her gross income for 2011 from both her CFD salary and her part-time employment was $127,786.23.

¶ 8 The parties stipulated to the present value of certain marital assets, including: the marital residence ($279,158); the petitioner's pension plan ($1,437,079) and deferred compensation plan

($689,737); the marital portion of the respondent's pension ($590,632), which was 36% of the total value of the pension account; the respondent's deferred compensation plan, which was rolled over into an IRA ($498,859); various bank and brokerage accounts ($76,754); two life insurance policies ($44,267), and the family's minivan ($16,277).

¶ 9 Testimony pertaining to the pension funds was provided by the parties, along with Wendy Drefahl, of WFA Econometrics. The petitioner testified that, when she began working for the CFD in October of 1982, she immediately commenced participation in the Municipal Employees' Pension Fund (now known as the Fireman's Annuity Fund), making contributions to that fund throughout her employment. According to the petitioner, she was currently 50 years of age and was eligible to retire from work immediately if she so chose. She testified, however, that her mandatory retirement age was 63, and that she had no plans to retire in the next few years.

¶ 10 The respondent, by contrast, testified that his pension had been in payout status since 2004, and that, at the time of the proceedings, he received monthly payments in the amount of $5,373.71, of which $3,439.17 per month was marital, and $1,934.54 was non-marital. According to the respondent, he had consistently deposited his pension checks into the parties' bank accounts where the funds were then used to cover household expenses.

¶ 11 Drefahl was retained by the parties as a controlled pension valuation expert, and prepared the reports of the present value of both pensions. With regard to the petitioner's pension, Drefahl testified that it had the following post-tax, present valuations: $1,168,980.97 as of June 8, 2010; $1,380,638.69 as of August 3, 2011; $1,069,873.46 as of January 5, 2012; and $1,437,079.86 as of May 23, 2012. These amounts were based upon the petitioner retiring at her current age of 50, with a life expectancy of an additional 32.7 years, or to age 82.7, as determined in a federal

report on vital statistics. Drefahl testified that the valuations were also based upon other variable factors, including fluctuating interest rates and tax rates. Drefahl acknowledged that the valuation amounts were contingent upon these variables actually coming to fruition at the time of retirement, and that, if any one of these numbers were "off," the valuation amount would be different than that stated in her report. Drefahl also acknowledged that if the petitioner continued to work, her monthly benefit could potentially increase. Drefahl testified that if respondent retired at age 50, her post-tax pension benefits would be $6246.89 per month.

¶ 12 The parties disputed the proper method under which the pensions should be allocated. The respondent sought distribution of both pensions by the "immediate offset" method, under which an employee spouse is awarded the value of his or her pension amount, and that award would be offset with an award of other marital property to the non-employee spouse. The petitioner agreed to the use of this method with regard to the respondent's pension; however, she argued that, as her pension had not yet reached maturity, it should be allocated using the "reserved jurisdiction" approach, under which the respondent would not immediately receive a share of her pension, but would retain the right to his share only when she retires. The court accomplishes this by retaining jurisdiction to award the benefits in the future through a qualified Illinois domestic relations order (QILDRO).

¶ 13 Drefahl testified that, for purposes of a property offset, it was appropriate to consider the pension valuations that she prepared. However, she admitted that dividing the petitioner's pension through a QILDRO, rather than through the immediate offset method, could be problematic because the respondent would receive nothing until the petitioner decided to retire. Therefore, if either spouse died prior to the petitioner's retirement, the respondent would lose his share of the petitioner's benefits. Further, in the event the respondent's death predated the

petitioner's retirement, the portion of the petitioner's pension that would have gone to the respondent would revert back to the petitioner. Finally, if the petitioner remarried prior to her retirement, the surviving spouse annuity included in her pension plan would be paid to her new spouse, and not to the respondent.

¶ 14 There were additional assets obtained by the respondent during the marriage which he claimed to be non-marital property but which the petitioner alleged were marital: the James L. Kennedy living trust (hereinafter trust #0020), valued at $406,385; a Fidelity Deferred Annuity, valued at $240,857 (hereinafter Fidelity annuity #6179); and 20% of a Fidelity IRA (IRA #6207) worth $19,599 at trial, originally funded with $4,000 contribution from trust #0020. The following evidence was presented regarding these assets

¶ 15 The record establishes that, on April 3, 1990, Esther Kennedy established a trust for the benefit of the respondent, whom she designated as trustee. This was the trust which loaned the parties $100,000, for the purchase of their marital residence, which was later forgiven by the respondent. In January of 1993, following Esther's death, the respondent opened his own trust, #0020, which, according to his testimony, was funded entirely with monies from Esther's trust and from his inheritance from her estate in late 1992. In support of this contention, the respondent introduced into evidence the #0020 trust document, along with monthly statements from the trust dating back to late 1994, which he testified was as far back as the bank still had records, reflecting amounts intermittently deposited into the trust. He testified that he made these deposits directly from the proceeds of his mother's estate as her assets were gradually liquidated. The respondent also introduced a 1994 fiduciary tax return for Esther's trust filed by him, as the fiduciary, reflecting the final tax payment for that trust, along with another document memorializing the creation of trust #0020 with him as trustee. There is no indication from these

documents that the petitioner was given any ownership or exercised any control over the trust. The bank statements for the trust between 1994 and 2004 are in the respondent's name alone, and contain no reference to the petitioner. When the respondent was asked about a statement in his deposition that he "did not know the source of the funds in the trust," he clarified that he meant that he could not recollect whether they came from bonds, certificates of deposit, or other mechanisms of investment, as his mother had many assets and "had her money spread out all over the place."

¶ 16 When questioned about the source of the #0020 trust, the petitioner testified that "not all of it" was non-marital and that she believed some had come from marital savings. However, she later testified that the money in the trust had come from the respondent's inheritance. Further, she admitted testifying in her deposition that the trust fund was where "all of [the respondent's] inherited funds went," and that she knew this because the respondent "made a point of keeping everything separate." Finally, the petitioner conceded that two automobiles purchased by the respondent, both undisputedly non-marital, were acquired with money from trust #0020.

¶ 17 With regard to annuity #6179, the record establishes that it was set up at American Legacy on January 19, 1993, just after the creation of the #0020 trust, with a $50,000 lump sum deposit. It was later transferred to Fidelity Investments in August of 2000.

¶ 18 The parties disputed whether the $50,000 deposit was derived from marital or non-marital funds. According to the respondent's testimony, the annuity was established just days after the creation of the #0020 trust, and the $50,000 was money he inherited from Esther's estate that was then moved into the annuity from the trust. In support of this testimony, the respondent introduced into evidence a quarterly statement for the annuity for the period ending June 30, 2000. The statement indicates a contract date of January 19, 1993, and a "total contribution to

date" of $50,000. In addition, the parties stipulated to a check drawn on the annuity account when the account was later transferred to Fidelity in August of 2000 reflecting an initial "cost basis" of $50,000.

¶ 19 The respondent testified that, after the initial lump sum contribution, no other funds were ever deposited into the annuity account. However, he made withdrawals in March of 2011 in the amount of $56,500, and another in April of 2012 in the amount of $17,034.91, both to pay for their son Joseph's college tuition.

¶ 20 According to the petitioner, she "believed" that the $50,000 deposit came from marital savings accounts. In support of this belief, she testified that at the beginning of the marriage, the couple had begun living on a single paycheck in order to save money for a house. The petitioner introduced into evidence a "Statement of Assets and Liabilities" for the couple dated March 31, 1992, reflecting "cash and mutual funds" in the amount of $14,692, plus investment, retirement, and other non-liquid assets, for a total of $481,738. There is no evidence, however, whether any of these non-liquid assets were sold at or near the time that the #0020 trust and the #6179 annuity were created. Further, on cross-examination, the petitioner admitted that she had no documentation as to where the $50,000 had come from and had "no knowledge of the funds that were put into the account." She admitted that the respondent was the only person with knowledge of what funds were used to open the annuity account.

¶ 21 It was undisputed that, when the #6179 annuity was transferred to Fidelity, it designated the respondent as owner and annuitant and the petitioner as co-owner and primary beneficiary. When question regarding this designation, the respondent testified that he had done it "by mistake" and that he had intended that the petitioner be named exclusively as a beneficiary. According to the respondent, he had established the annuity as a tax shelter for his inheritance

and had intended that trust #0020 would hold all title and right to the account. Both parties acknowledged that the respondent was the sole individual with knowledge of the origin of the funds in the annuity. Further, the petitioner admitted that she never deposited any money into the #6179 annuity, nor did she ever withdraw funds or otherwise exercise any control over that account.

¶ 22 Neil Johnson, a CPA and expert in tax accounting, testified that he was retained by the petitioner to calculate the amount of taxes owed by trust #0020 which were paid by the marital estate. According to Johnson, based upon his review of the trust documents, the intention of trust #0020 was to be a non-marital account.

¶ 23 On August 16, 2013, the trial court entered its judgment for dissolution of marriage, which incorporated a stipulated balance sheet detailing the parties' assets. The court valued the marital estate at $3,765,554, and awarded the petitioner $1,879,441.50, and the respondent $1,886,112.50. The petitioner, who was about 52 years old, was awarded her pension, and the respondent, then 66 years of age, was awarded the marital portion of his police pension. In allocating the pensions, the court found the "immediate offset" approach to be the most equitable method, as it would avoid a QILDRO and the uncertainty of the respondent having to wait for the petitioner to retire in order to collect his share of her benefits. Accordingly, as the petitioner's pension was significantly higher than that of the respondent, the court offset the difference by awarding the respondent a greater amount of the parties' liquid assets.

¶ 24 The petitioner was awarded one-half of the marital portion of the respondent's Fidelity IRA; her own Fidelity IRAs; an advance on her attorney fees; her life insurance account; cash from the parties' bank accounts; and the parties' minivan. The petitioner also was awarded $19,563 worth of her own non-marital assets.

¶ 25 The respondent received the marital portion of his policemen's pension; the petitioner's deferred compensation account; the marital residence; the marital portion of his Fidelity IRA; cash from the parties' bank accounts; and his life insurance account. The respondent was additionally awarded $1,123,786 in assets which the court found to be non-marital, including the #0020 trust, the #6179 deferred annuity, and the #6207 IRA, plus the respondent's two automobiles and gun collection.

¶ 26 The court found the respondent's testimony to be more credible and consistent with the documentary evidence than that of the petitioner, who wavered and contradicted her own prior testimony. The court further found that the respondent's contributions to the marriage, both financial and non-financial, were greater than those of the petitioner. He brought a significant amount of personal funds into the marriage, contributing to the purchase of the marital residence as well as to taxes, tuition and other expenditures. Finally, the court observed that he performed nearly all of the daily household chores and child care, particularly after he retired in 2004. The petitioner now appeals.

¶ 27 The petitioner first argues that the court erred in allocating her pension under the immediate offset rather than the reserved jurisdiction method, because it left her with uncertain pension benefits that she "was not yet receiving and may never receive," while awarding the respondent the vast majority of the parties' liquid and immediately accessible assets as well as nearly all of the income producing investments. Thus, the court's approach resulted in an inequitable apportionment of assets under the Act. We disagree.

¶ 28 There are two approaches to valuing a pension which has not yet matured upon dissolution of a marriage; namely, the immediate offset approach, and the reserved jurisdiction approach. *In re Marriage of Robinson*, 146 Ill. App. 3d 474, 476 (1986). Under the immediate

offset approach, the court determines the present value of a pension benefit at the time of dissolution, awards that benefit to the employee spouse, and then offsets that award with an award of marital property to the nonemployee spouse. *Robinson*, 146 Ill. App. 3d at 476. Conversely, under the reserved jurisdiction approach, the court does not immediately compensate the nonemployee spouse at the time of dissolution; instead, it awards that spouse a percentage of the marital interest in the pension, and then retains jurisdiction over the case so that the nonemployee spouse may receive his or her portion "if, as and when" the pension becomes payable. *Id.*, quoting *In re Marriage of Hunt*, 78 Ill. App. 3d 653, 663 (1979). The immediate offset approach is appropriate when there is adequate actuarial evidence to ascertain the present value of a pension, the employee spouse is close to retirement age, and there is sufficient marital property to allow for an offset. *Robinson*, 146 Ill. App. 3d at 476. The reserved jurisdiction approach, on the other hand, is preferable where it is difficult to place a present value on a pension due to uncertainties regarding vesting or maturation, or when the present value can be determined, but a lack of marital property makes an offset impractical or impossible. See *e.g.*, *In re Marriage of Wisniewski*, 286 Ill. App. 3d 236 (1997); *Robinson*, 146 Ill. App. 3d at 476. Illinois courts employ the reserved jurisdiction method particularly where an interest has not vested at the time of dissolution, because it "divides the risk that a pension will fail to vest." *In re Marriage of Richardson*, 381 Ill. App. 3d 47, 53-54 (2007), citing *Hunt*, 78 Ill. App. 3d at 664. The determination of the proper method of apportionment is dependent upon the facts of each case (*In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 121), and is a matter of trial court discretion, which we will not disturb absent an abuse of discretion. *Richardson*, 381 Ill. App. 3d at 53.

¶ 29 The petitioner does not dispute that her pension was fully vested at the time of the proceedings or that its present value, as determined by Drefahl and pursuant to the petitioner's own stipulation, was approximately $1.44 million. Rather, she argues that, as she has no intention of retiring in the near future, this amount is uncertain and speculative. She further asserts that the court should have taken into account Drefahl's testimony that if she retires in ten years, her pension will be worth only $493,000.

¶ 30 In an offer of proof at trial, over the respondent's objection, the petitioner sought to establish the value of her pension, using its current valuation, if she retired in ten years. Drefahl acknowledged that the petitioner's monthly benefits of $6,246.89 amounted to an annual income of $74,962.68, and a total income over ten years of about $749,627. Accordingly, Drefahl agreed, if the petitioner elected to wait ten years to retire and thereby forego this income, the present value of her pension account would be reduced "hugely."

¶ 31 The trial court disallowed this testimony as speculative, and we agree with this ruling. The petitioner points to no evidence indicating that her pension would not continue to receive contributions while she remained at work, as is customary, and that it would not in fact grow, perhaps significantly, over a ten year period. This was suggested by Drefahl, who testified that the present value of the pension could increase if the petitioner continued to work. Further, as the petitioner gave no indication as to exactly how many years she would continue to work, the proferred testimony regarding the value of her pension in ten years is unduly speculative, and was properly excluded.

¶ 32 Further, the petitioner provides no support for the assertion that her pension is "uncertain." The present value of the parties' respective pensions was determined based upon competent and specific actuarial evidence, to which the petitioner stipulated and cannot now

attempt to disavow. Courts in dissolution proceedings must rely upon such evidence, which by its nature is based upon contingencies and never capable of absolute certainty. Unlike the cases upon which the petitioner relies, the vesting of her pension is not in question, and its present value has been clearly shown. *Cf. In re Marriage of Korper,* 131 Ill. App. 3d 753 (1985); see also *Robinson,* 146 Ill. App. 3d 474; *In re Marriage of Fairchild,* 110 Ill. App. 3d 470 (1982).

¶ 33 In this case, we find no abuse of discretion in the application of the immediate offset approach. As noted by the trial court, an immediate payout will avoid a prolonged entanglement between the parties under a QULDRO while the respondent waits for the petitioner to retire. See *In re Marriage of Simmons,* 87 Ill. App. 3d 651, 659 (1980) (Act seeks to cut off all entanglements between the parties whenever possible). Further, without an immediate payout, the respondent, at age 66, could stand to lose all or part of his share of the petitioner's pension, the parties' largest asset, in the event of either party's death or the petitioner's remarriage. The petitioner, on the other hand, will enjoy the sole discretion to either keep working at a substantial annual salary or retire at any point in the next ten years and collect her pension.

¶ 34 To the extent the petitioner argues that the assets were not equitably divided, we reject her argument. The distribution of property lies within the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of that discretion. *In re Marriage of Agazim,* 176 Ill. App. 3d 225, 231 (1988). An abuse of discretion occurs only where no reasonable person would take the view adopted by the trial court. *In re Marriage of Schneider,* 214 Ill. 2d 152, 173 (2005).

¶ 35 Section 503(d) of the Act requires a division of marital property in just proportions, taking into consideration 12 numerated factors. 750 ILCS 5/503(d). Those factors include the contribution of each party to the marital estate; the value of non-marital property assigned to

each spouse; the parties' respective ages and needs; the respective economic circumstances of the parties, and their individual ability to continue to acquire assets and income. 750 ILCS 5/503(d).

¶ 36 Here, it is true that the respondent received his own pension, the marital residence, the petitioner's deferred compensation benefit, and other liquid assets, including a significant non-marital estate. However, the trial court concluded that he also contributed a substantial amount of his own personal funds to the marriage, including paying a large share of the initial cost and maintenance of the marital residence, paying a substantial portion of his son's tuition, and applying his own pension benefits to household expenses.

¶ 37 We note that, although the petitioner must find a new home and pay the balance of her children's tuition expenses, she is in a better position than the respondent to do so. She still has ten years or more to work for the CFD or other private entities for which she had previously worked. The court noted that, because it awarded the respondent an immediate payout, it did not require her to provide maintenance to the respondent. This gives her a greater ability to acquire assets and build wealth. The respondent, by contrast, is on a fixed income from a pension that is of significantly lower value than that of the petitioner. Thus, there is no basis to find an abuse of discretion in the distribution of the marital estate.

¶ 38 The petitioner next argues that the court misclassified several of the respondent's accounts as non-marital; specifically trust #0020, Fidelity annuity #6179, and 20% of IRA #6207. The petitioner asserts that these accounts, which were undisputedly acquired during the marriage, were not shown by clear and convincing evidence to be attributable to an exclusively non-marital source.

¶ 39 Section 503(a) of the Act establishes a rebuttable presumption that “all property acquired by either spouse subsequent to the marriage” is marital property regardless of how title is held.

750 ILCS 5/503(a) (West 2010). This presumption can be overcome, however, by a showing of clear and convincing evidence that the property falls within one of the exceptions enumerated under section 503(a), including that the property was acquired "by gift, legacy or descent." *In re Marriage of DeRossett*, 173 Ill. 2d 416, 420 (1996); *In re Marriage of Dann*, 2012 IL App (2d) 100343, ¶ 63. Under section 503(b)(1), property designated as non-marital may still be transmuted into marital property by the affirmative act of the contributing spouse. *In re Marriage of Smith*, 86 Ill. 2d 518, 530 (1981); *In re Marriage of Benz*, 165 Ill. App. 3d 273, 279 (1988). In order to preserve the status of a property as non-marital, a party must demonstrate that the property was acquired exclusively by one of the methods enumerated in section 503(a). *Benz*, 165 Ill. App. 3d at 279. The trial court's classification of property as marital or non-marital will not be disturbed on appeal unless it is against the manifest weight of the evidence. *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 669 (2008).

¶ 40 Regarding trust #0020, the record supports the trial court's finding that it was established by the respondent, solely in his name, with funds he inherited from Esther. The trust was set up within months of Esther's death and the closure of the Kennedy trust, of which the respondent was the fiduciary and only beneficiary. Monthly financial statements beginning in 1994 reveal that the #0020 trust was receiving incremental deposits, made by the respondent, of substantial sums of money which the respondent testified were from Esther's assets as they were gradually liquidated. The documentation and testimony, combined with the complete lack of proof that the petitioner has ever exercised any control over the trust, provide clear and convincing evidence that trust #0020 was derived from the respondent's inheritance from Esther and the Kennedy Trust.

¶ 41 We reject the petitioner's assertion that the #0020 trust contained marital funds. Without specifically arguing that the trust had been transmuted into marital property, the petitioner refers us to her testimony that "not all of" the funds in the trust were from the respondent's inheritance. However, this testimony was contradicted by the petitioner's other testimony at trial as well as in her deposition, where she stated that the trust was comprised of inherited funds and that the respondent "made a point of keeping everything separate." Further, her argument that the respondent deposited marital funds into the #0020 trust in 2004 is belied by the record, which, based upon our review, indicates that the respondent was simply moving funds from one trust account to another.

¶ 42 With regard to $400 of these alleged funds, however, we note the respondent's testimony that he accidentally deposited this amount of his income into the #0020 trust at some point in 2004. Nonetheless, while the $400 was clearly marital, we do not deem it sufficient to overturn the trial court's classification of the trust as non-marital. Every act of comingling of accounts does not amount to a transmutation (*In re Marriage of Olson*, 96 Ill. 2d 432, 440 (1983)), and, depending upon the significance of the deposit and the character of the non-marital account, the non-marital account can retain its identity as such even with a deposit of some marital funds. See *In re Marriage of Steel*, 2011 IL App (2d) 080974; *In re Marriage of Henke*, 313 Ill. App. 3d 159, 166 (2000). In light of the fact that the trust was in existence for over ten years as of 2004 and had a value many times that of the disputed deposit, we conclude that the single $400 deposit did not operate to transmute the trust into marital property. See *In re Marriage of Foster*, 2014 IL App (1st) 123078, ¶ 75. Accordingly, we hold that the trial court's classification of the #0020 trust as non-marital property was not contrary to the manifest weight of the evidence.

¶ 43 Next, the petitioner argues that the court erred in finding that the #6179 annuity was non-marital property because, apart from the respondent's own testimony, there was no documentary evidence tracing the $50,000 used to open the account to Esther's estate rather than to the marital savings account. Alternatively, she argues that the respondent's designation of her as a co-owner and beneficiary of the annuity created a presumption that the account was a gift to the marital estate. We disagree with both contentions.

¶ 44 The respondent testified that he established the annuity just days after the #0020 trust as a tax shelter for his inheritance. He further testified unequivocally that the $50,000 sum used to open the account in January 1993 came exclusively from Esther's estate through her trust. Documentary evidence was introduced and proved conclusively that, in close succession after Esther's death, her trust was closed, the #0020 trust was established, and the #6179 annuity was opened with a lump sum of $50,000. Although the respondent did not produce documents specifically tracing this amount back to Esther's trust, he testified that the bank did not have documents going back that far. In any event, there is no suggestion that the Kennedy Trust, which loaned the parties' $100,000 to purchase their home, lacked the requisite funding. The trial court accepted this testimony and evidence, and was in the best position to do so. The determination of the credibility of the parties and their witnesses or the weight to be given the evidence lies with the trier of fact. *In re Marriage of Nagel,* 133 Ill. App. 3d 498, 502 (1985).

¶ 45 The petitioner posits that the $50,000 deposit into the annuity came from the marital bank account, which contained a substantial amount of money that the parties had been saving to purchase a home. However, as her sole support for this argument, she relies upon the parties' Statement of Assets and Liabilities from March of 1992, which reflects liquid assets only in the amount of $14,692. Additionally, her testimony wavered on this issue and was rejected by the

trial court. Based upon the foregoing, there is no basis to conclude that the classification of the annuity as non-marital was against the manifest weight of the evidence.

¶ 46 The petitioner argues that, even assuming the source of the funds in the annuity was non-marital, the designation of her as a co-owner and beneficiary of the account creates the presumption that it was a gift to the marital estate, which was not sufficiently rebutted by the respondent.

¶ 47 The placement of non-marital property in joint tenancy or some other form of co-ownership raises a presumption that it was intended as a gift to the marital estate and the property becomes marital property. *In re Marriage of Orlando*, 218 Ill. App. 3d 312, 317-18 (1991); *In re Marriage of Benz*, 165 Ill. App. 3d 273, 280 (1988). The presumption may be rebutted by clear and convincing evidence that no gift was intended. *Orlando*, 218 Ill. App. 3d at 317-18. In determining whether the contributing spouse has successfully rebutted the presumption of a gift, a court will consider several factors, including the size of the gift relative to the entire estate; which party paid the purchase price or the taxes on the alleged gift; who exercised control and management over the gift property; whether the alleged gift account was kept separate from the parties' other financial accounts. See *Id.*

¶ 48 The respondent testified that it was his intention that ownership of the annuity remain in the #0020 trust and that he never intended to make the account a gift to the marital estate. He further testified that he had accidentally named the petitioner as a co-owner instead of merely a beneficiary. The evidence established that the respondent paid the taxes on the #0020 trust and the #6179 annuity from non-marital funds, and that, despite the petitioner's designation as co-owner, she never made a withdrawal from or deposit into the #6179 annuity, nor exercised any

control over the account. Accordingly, there is no basis to conclude that this classification as non-marital was against the manifest weight of the evidence.

¶ 49 The petitioner also argues that the #6207 IRA contained comingled funds and should therefore have been found to be marital property. However, the sole basis for this argument is that the $4,000 used to establish the IRA was taken from the #0020 trust, which the petitioner claims is marital. In light of our conclusion that the trust was properly classified as non-marital property, we reject this argument.

¶ 50 Next, the petitioner contends that, in apportioning the parties' life insurance policies, the court erroneously credited her with the respondent's plan, worth $28,848, while crediting the respondent with her plan, worth $15,419. She does not dispute the court's valuation of either plan.

¶ 51 We agree with the petitioner that, although each spouse was awarded the value of his or her own life insurance plans, the court nonetheless reversed the respective amounts assigned to each party on its court ordered asset distribution sheet. We therefore reverse the court's award as to life insurance policies and remand this case so that the distribution sheet can be corrected.

¶ 52 Though not raised by the parties, we further observe that "total agreed upon marital assets" line of the distribution sheet also contains an error, in that the amount stated as $3,274,580, should actually be $3,724,580.

¶ 53 The petitioner finally claims that the court erred in denying her request for contribution for her attorney fees in the amount of $40,974. The court added $40,974 in fees paid by the petitioner into the total marital assets, and then allocated that amount as an advance against her share of the marital estate. We find no abuse of discretion in this award.

¶ 54 In general, each party is responsible for the payment of attorney fees that he or she incurs. *In re Marriage of Suriano,* 324 Ill. App. 3d 839, 852 (2001). Under section 508(a) of the Act, however, the court has discretion to order either party to pay a reasonable amount for the other party's attorney fees if the requesting party establishes that she lacks the ability to pay and the opposing party has the resources to pay. *Schneider,* 214 Ill. 2d at 174; 750 ILCS 5/508 (a) (West 2010). Although a party should not be required to divest herself of assets before seeking a fee contribution (*In re Marriage of Minear,* 287 Ill. App. 3d 1073, 1085 (1997)), financial inability to pay exists where "requiring payment of fees would strip that party of her means of support or undermine her financial stability." *Schneider,* 214 Ill. 2d at 174. The trial court's determination on an award of fees is not subject to reversal absent an abuse of discretion. *Id.*

¶ 55 The petitioner contends that the refusal to award contribution for her attorney fees was an abuse of discretion because it fails to consider her still outstanding legal fees, along with the fact that she must pay for a new residence, repay Joseph's college loan debt and pay for the remainder of Catherine's education without sufficient liquid assets.

¶ 56 There is no basis to conclude that the petitioner is financially unable to pay or that such payment will undermine her financial stability. As noted above, she is 14 years younger than the respondent, has an annual income nearly double that of his, with the potential for increased future earnings. The court also awarded the petitioner her vested pension plus approximately $340,000 in pre-tax retirement accounts. The respondent, who incurred comparable legal expenses to those of the petitioner and is on a fixed income, paid his expenses out of his non-marital funds. The petitioner has failed to demonstrate that the award of this amount, which has already been paid, will force her to sell off assets or deprive her of financial stability. Accordingly, there was no abuse of discretion in requiring the petitioner to pay her own fees.

¶ 57 For the foregoing reasons, we reverse that portion of the judgment apportioning the parties' life insurance awards, affirm the remainder of the judgment, and remand.

¶ 58 Affirmed in part, reversed in part, and remanded with directions.