

NOTICE

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2014 IL App (4th) 140150-U

NO. 4-14-0150

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

November 14, 2014
Carla Bender
4th District Appellate
Court, IL

In re: MARRIAGE OF ELIZABETH H. JENSEN,)	Appeal from
Petitioner-Appellee,)	Circuit Court of
and)	Coles County
PHILLIP M. JENSEN,)	No. 09D134
Respondent-Appellant.)	
)	Honorable
)	Teresa K. Righter,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Knecht and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding that the trial court did not err by (1) distributing 55% of the marital estate to the petitioner, (2) finding that the respondent dissipated marital property, and (3) awarding the petitioner maintenance that increased over time.

¶ 2 In January 2011, the trial court dissolved the marriage of petitioner, Elizabeth H. Jensen, and respondent, Phillip M. Jensen. In May 2012, the court entered a written order (1) awarding approximately 55% of the marital estate to Elizabeth, (2) ordering Phillip to reimburse Elizabeth for portions of the marital estate that he had dissipated, and (3) reserving the issue of maintenance for a later date. Phillip appealed, and in May 2013, this court dismissed for lack of jurisdiction because the trial court's May 2012 order was not a final order. *In re Marriage of Jensen*, 2013 IL App (4th) 120355, ¶ 45, 988 N.E.3d 1102.

¶ 3 In November 2013, the trial court resolved the remaining issues by entering a maintenance order that required Phillip to pay Elizabeth (1) \$300 per month for 12 months (ret-

roactive to January 1, 2013); (2) \$500 per month for 18 months (beginning January 1, 2014); and (3) \$1,000 per month for 90 months (beginning July 1, 2015).

¶ 4 Phillip appeals, arguing that (1) the trial court abused its discretion by awarding approximately 55% of the marital estate to Elizabeth, (2) the court's finding that Phillip dissipated marital property was against the manifest weight of the evidence, and (3) the court abused its discretion by ordering Phillip to pay maintenance that increased over time. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 Phillip and Elizabeth married in May 1987. The couple had three children: Matthew, Mary, and Sarah.

¶ 7 A. The Court's Temporary Order and Judgment of
Dissolution of Marriage

¶ 8 In June 2009, Elizabeth filed her petition for dissolution of marriage. At that time, she was 46 years old and Phillip was 48. In August 2009, Elizabeth stated in a financial affidavit that she had monthly income of \$4,190 and monthly expenses of \$12,478. Elizabeth's monthly expenses included support for her children, who at the time were 12, 17, and 19 and living at home.

¶ 9 In September 2009, the trial court entered an agreed-upon temporary order directing Phillip to pay Elizabeth \$2,600 biweekly for unallocated maintenance and support. In November 2010, the trial court granted Phillip's motion to modify the temporary maintenance and support order, reducing Phillip's support payments to \$1,553.

¶ 10 In January 2011, the trial court entered an order dissolving the marriage and reserving all other issues.

¶ 11

B. The August 2011 Hearing

¶ 12 The following evidence was presented at the August 2011 hearing on all remaining issues.

¶ 13 In May 1987, the same month that Elizabeth and Phillip married, Phillip completed his board certification to become a licensed dentist. From 1987 until 1991, Elizabeth worked as a physical therapist while Phillip completed his postgraduate training at Michael Reese Hospital in Chicago, where he studied surgery and internal medicine. Matthew was born in December 1989. At the completion of Phillip's training, the couple decided that Elizabeth—who had a bachelor's degree in physical therapy from St. Louis University—would assume childrearing duties for the family and Phillip would become the sole financial provider. For the first two years after Phillip's training, he worked for Kaiser Permanente (a healthcare consortium) in Portland, Oregon. The couple's second child, Mary, was born in March 1992. In July 1993, Phillip joined Affiliates of Oral Surgery (Affiliates) in Coles County, Illinois. The couple's third child, Sarah, was born in October 1996.

¶ 14 In the fall of 1997, Phillip ended his employment at Affiliates. Phillip and Elizabeth decided that Phillip would open his own dental-surgery practice in Neoga, Illinois. Elizabeth cleaned Phillip's office and, according to Phillip, "did what was necessary to get that office up and running." Beginning in the summer of 1998, Elizabeth worked at the front desk of Phillip's office on a temporary basis. In October 2003, Phillip opened a second office in Effingham, Illinois. Phillip would sometimes see patients on weekends and as late as midnight, during which time Elizabeth stayed at home and cared for the children.

¶ 15 In June 2008, several of Phillip's family members and employees staged an intervention for Phillip, who had become addicted to Demerol, a narcotic painkiller. Phillip agreed to

be admitted to a treatment center in Oregon, where he stayed from June until September 2008. Phillip also obtained services from the Illinois Professionals Health Program, an organization that assists healthcare professionals suffering from substance-abuse problems. Phillip used approximately \$50,000 of marital funds to treat his drug addiction.

¶ 16 Phillip relapsed in March 2009. In May 2009, Phillip began a romantic relationship with Sarah Tobias. Elizabeth filed for dissolution of marriage the following month. In July 2009, Elizabeth separated from Phillip and began working as a physical therapist at Sarah Bush Lincoln Health Center. Elizabeth testified that her work as a physical therapist required physical exertion. In 2009 and 2010, Elizabeth began noticing numbness and pain in her hands and wrists, as well as pain in her lower back. Although Elizabeth had undergone diagnostic testing in relation to these problems, her testimony did not reveal a diagnosis or prognosis.

¶ 17 In April 2011, the Illinois Department of Financial and Professional Regulation suspended Phillip's license to practice. That same month, the trial court granted, in part, Phillip's petition for termination of support and maintenance, staying Phillip's maintenance obligation.

¶ 18 Matthew and Mary both testified that they were attending colleges out of state and relied upon money from separate Uniform-Gift-to-Minors accounts to pay for their tuition, fees, and rooming expenses. The money in those accounts came partially from Phillip's earnings and partially from money inherited from Phillip's parents. Aside from the Uniform-Gift-to-Minors accounts, Phillip had not made any other contributions to Matthew or Mary's post-high-school education expenses. In addition to their part-time jobs, Matthew and Mary also relied upon money provided by Elizabeth for their general living expenses. The youngest child, Sarah, was in high school and living with Elizabeth at the time of the hearing.

¶ 19 The trial court admitted Phillip's 2008, 2009, and 2010 corporate tax returns, as

well as the couple's 2008 and 2009 joint returns and their 2010 individual returns. Phillip's oral-surgery practice reported yearly gross receipts of approximately \$611,000 in 2008, \$763,000 in 2009, and \$652,000 in 2010. The couple reported combined yearly income of approximately \$322,000 in 2008 and \$340,000 in 2009. For 2010, Phillip reported personal income of approximately \$207,000 and Elizabeth reported personal income of approximately \$130,000, which included \$60,000 from Phillip's unallocated maintenance and support payments. The court also admitted a financial statement, which Phillip and Elizabeth completed in May 2009, valuing Phillip's oral-surgery practice at just over \$1 million.

¶ 20 The trial court also admitted statements from Phillip's checking account showing that in December 2009, February 2010, and October 2010, Phillip wrote checks to Tobias totaling \$5,650. Phillip also wrote checks to a jewelry store to purchase jewelry for Tobias, including (1) a \$506.94 check in June 2009 for the purchase of earrings and (2) two checks in October and November 2010 for the purchase of an \$8,000 engagement ring.

¶ 21 In an amended financial affidavit filed in April 2011, Elizabeth estimated her total monthly expenses at approximately \$10,600 and her total monthly income, including Phillip's maintenance and support payments, at approximately \$9,500. Phillip's August 2011 financial affidavit (executed after his license was suspended) reflected zero income and estimated monthly expenses of approximately \$2,200. Phillip testified at the hearing that he was actively seeking reinstatement of his license to practice dental surgery, although he was unsure as to when his license would be reinstated.

¶ 22 C. The Trial Court's Memorandum Opinion and November 2011 Order

¶ 23 Later in August 2011, following the hearing, the trial court issued a memorandum opinion in which it made certain findings of fact and allocated the marital property roughly even-

ly between Elizabeth and Phillip. The court found that although Elizabeth was entitled to maintenance, Phillip was unable at that that time to pay maintenance due to "a temporary lack of income" and certain debt obligations. Accordingly, the court stated that it would revisit the issue of maintenance in six months. (The court directed Phillip's attorney to draft an appropriate order based upon the memorandum opinion. The court formally entered that order in November 2011.)

¶ 24 D. Elizabeth's December 2011 Posttrial Motion

¶ 25 In December 2011, Elizabeth filed a posttrial motion arguing, in part, that the trial court's November 2011 order failed to (1) address the issue of dissipation of marital assets and (2) appropriately allocate marital property. As to the dissipation issue, Elizabeth sought an order (1) finding that Phillip dissipated \$14,156 in marital assets and (2) directing Phillip to contribute that same amount back into the marital estate, with Elizabeth receiving a 60% proportionate share.

¶ 26 Elizabeth further contended that a 60 to 40% allocation of the marital property in her favor would have been more appropriate in light of (1) the length of the marriage, (2) the contributions that Elizabeth made to Phillip's career, (3) the disparity in earning potential, (4) the fact that Phillip will likely regain his license to practice oral surgery, (5) the potential effect of Elizabeth's physical conditions on her ability to work, (6) the costs to the marital estate of Phillip's substance-abuse treatment, and (7) Elizabeth's contributions to the children following her separation from Phillip.

¶ 27 At a February 2012 hearing on Elizabeth's posttrial motion, Elizabeth alleged—without dispute from Phillip—that (1) Phillip's license to practice oral surgery had been reinstated and (2) Phillip intended to open a new practice in Springfield in May 2012.

¶ 28 In March 2012, the trial court entered a written order on Elizabeth's posttrial motion. The court, noting that it had failed to address dissipation of marital assets in its November 2011 order, found that Phillip dissipated \$14,156 in marital assets. The court ordered Phillip to reimburse 60% of that sum (\$8,494) to Elizabeth.

¶ 29 The trial court also modified its previous order to award Elizabeth 62% of a \$327,950 Individual Retirement Account (IRA) belonging to Phillip. (The court's original order awarded Elizabeth 50% of that IRA.) Both parties agree that the court's March 2012 order resulted in an overall 55 to 45% allocation of marital property in Elizabeth's favor.

¶ 30 E. Phillip's First Appeal and This Court's Dismissal

¶ 31 In April 2012, Phillip appealed from the trial court's March 2012 order. In May 2013, this court dismissed Phillip's appeal for lack of jurisdiction, concluding that because the trial court reserved ruling on the issue of maintenance, the court's March 2012 order was not final. *Marriage of Jensen*, 2013 IL App (4th) 120355, ¶ 45, 988 N.E.3d 1102.

¶ 32 F. The October 2013 Hearing on Maintenance

¶ 33 In October 2013, the trial court held a hearing on maintenance and other unresolved issues, including post-high-school education expenses, child support, and attorney fees. Phillip testified that his license had been reinstated and he began seeing patients at his new oral-surgery practice in Springfield in July 2012. The 2012 tax return for Phillip's new practice reflected total income of approximately \$233,000. However, the practice ended 2012 with a net loss of over \$100,000 due to the significant start-up costs and loans associated with the business. According to Phillip's updated financial affidavit, he had monthly income of \$8,000 and monthly expenses of \$12,626. Between January and September 2013, Phillip wrote checks to himself from his corporate account totaling \$112,100.

¶ 34 Elizabeth, who remained employed full-time at Sarah Bush Lincoln Health Center, testified that she continued to use her own income to supplement Matthew's and Mary's college expenses. Elizabeth's updated financial affidavit reflected total monthly income of \$5,690 and total monthly expenses of \$6,002.

¶ 35 The trial court admitted, by stipulation, exhibits showing (1) bank statements from Phillip's various accounts; (2) Phillip's personal and corporate tax returns; (3) Phillip's personal and corporate income and receipts; (4) corporate profit and loss calculations; (5) corporate balance sheets; (6) expenditures Phillip made to open his new practice; (7) Phillip's withdrawals from his account at the investment firm of Richards, Merrill, and Peterson; and (8) an accounting of Elizabeth's payments to Matthew and Mary for college expenses from 2010 to 2013. (We note that the aforementioned exhibits cover hundreds of pages and span several volumes of the record on appeal. Although the court considered these exhibits in rendering its maintenance order, Phillip's brief on appeal contains virtually no discussion of the exhibits, nor does it challenge the court's findings of fact that were based upon the exhibits.)

¶ 36 G. The Trial Court's November 2013 Maintenance Order

¶ 37 In November 2013, the trial court entered a maintenance order that required Phillip to pay Elizabeth (1) \$300 per month for 12 months (retroactive to January 1, 2013); (2) \$500 per month for 18 months (beginning January 1, 2014); and (3) \$1,000 per month for 90 months (beginning July 1, 2015). In so ordering, the court found that "[Phillip's] income will increase the longer his practice is open. There is no reason to believe he won't make as much in the new practice as he did in the prior practice once the new practice is established."

¶ 38 In February 2014, in response to Elizabeth's allegation that Phillip had not begun making maintenance payments, the trial court entered an order to withhold Phillip's income for

maintenance. (This order reflected the same payment schedule as embodied in the court's November 2013 order.)

¶ 39 This appeal followed.

¶ 40 II. ANALYSIS

¶ 41 Phillip argues that (1) the trial court abused its discretion by awarding approximately 55% of the marital estate to Elizabeth, (2) the court's finding that Phillip dissipated marital property was against the manifest weight of the evidence, and (3) the court abused its discretion by ordering Phillip to pay maintenance that increased over time. We address Phillip's contentions in turn.

¶ 42 A. Allocation of the Marital Estate

¶ 43 This court has explained the standard of review applicable to the trial court's distribution of marital property, as follows:

"Section 503(d) of the [Illinois Marriage and Dissolution of Marriage Act] requires the trial court divide marital property in just proportions considering all relevant factors. 750 ILCS 5/503(d) (West 2006). The court has broad discretion in the distribution of marital assets. [Citation.] The touchstone of proper and just apportionment is whether it is equitable in nature. [Citation.] An award of property in just proportions does not mean equal proportions, and a trial court does not abuse its discretion in awarding a larger share of the marital property to one party." (Internal quotation marks omitted.) *In re Marriage of Walker*, 386 Ill. App. 3d 1034, 1042, 899 N.E.2d 1097, 1104 (2008).

¶ 44 Section 503(d) of the Act sets forth 12 relevant factors for the trial court to consider in dividing marital property. 750 ILCS 5/503(d) (West 2010). Phillip essentially argues that the court abused its discretion by giving greater weight to some of the factors that favored Elizabeth, while giving comparatively less weight to some of the factors that favored Phillip. In his brief to this court, Phillip rehashes the evidence presented at the hearing and restates the arguments he made to the trial court. He notes, among other things, that (1) Elizabeth contributed less to the marital estate, (2) Elizabeth spent money in excess of her income following her separation from Phillip, (3) Phillip had no income or license to practice at the time of the hearing on allocation of marital property, and (4) Elizabeth and Phillip were of comparable age and health at the time of the hearing. Given these factors, Phillip contends that "anything other than a 50/50 apportionment of the marital estate constitutes an abuse of discretion." (In other words, Phillip asserts that the court had no discretion under the facts of this case.)

¶ 45 The trial court found, based upon "the significant disparity in earnings and earning potential, the duration of the marriage, [Elizabeth's] contribution to [Phillip's] profession, and other testimony presented," that "a fair and equitable distribution of the parties' marital assets and debts" required a 55 to 45% distribution in Elizabeth's favor. Phillip does not allege that the court considered any improper factors, nor does he challenge the court's designation of any property as marital or nonmarital. Phillip's abuse-of-discretion argument is premised upon the court having no meaningful discretion in this case. Contrary to Phillip's assertion, "[a] trial court abuses its discretion only where its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court." *In re A.W., Jr.*, 397 Ill. App. 3d 868, 873, 921 N.E.2d 1275, 1279 (2010). Phillip falls woefully short of meeting this standard. We conclude that the court properly exercised its discretion by dividing the marital estate as it did.

¶ 46

B. Dissipation of Marital Property

¶ 47 "Dissipation generally has been defined as the use of marital property for the sole benefit of one of the spouses for a purpose unrelated to the marriage at a time that the marriage is undergoing an irreconcilable breakdown." *In re Marriage of D'Atto*, 2012 IL App (1st) 111670, ¶ 36, 978 N.E.2d 277. "Whether dissipation has occurred is a question of fact to be determined by the trial court, and such a determination will not be disturbed on appeal unless it is against the manifest weight of the evidence." *In re Marriage of Holthaus*, 387 Ill. App. 3d 367, 374, 899 N.E.2d 355, 361 (2008).

¶ 48 Section 503(a) of the Act defines marital property as "all property acquired by either spouse subsequent to the marriage" (750 ILCS 5/503(a) (West 2010)), except for certain exceptions (which do not apply here). In this case, the trial court found that Phillip dissipated marital property by writing checks to Tobias and to jewelers for the purchase of jewelry for Tobias. Phillip made these expenditures in 2009 and 2010, prior to the dissolution of the marriage. Phillip contends that the money he spent for Tobias's benefit should not be considered marital property because, at the time of those expenditures, Phillip was paying unallocated maintenance and support to Elizabeth. Phillip cites no authority for this proposition. He simply asserts that "[i]t is unfair and inappropriate to provide free spending of income for the recipient but restrict the spending of income by the payer." Phillip's argument ignores the issue at hand.

¶ 49 Elizabeth has never claimed that she was allowed "free spending of income" prior to the dissolution of the marriage. Indeed, if Phillip had claimed and proved that Elizabeth, after an irreconcilable breakdown of the marriage but prior to dissolution, used marital property for her sole benefit and for a purpose unrelated to the marriage, Phillip would have had a valid claim of dissipation of marital property against Elizabeth. Phillip has made no such claim. His fair-

ness argument (for which he cites no authority) is based upon the hypothetical unfairness that would result if Elizabeth had been given free rein to spend marital assets without consequence. Those are not the facts of this case.

¶ 50 Phillip's expenditures for Tobias's benefit fit squarely within the common-law definition of dissipation. Accordingly, the trial court's finding of dissipation was not against the manifest weight of the evidence.

¶ 51 C. Maintenance

¶ 52 Section 504(a) of the Act provides, in pertinent part, that "the [trial] court may grant a temporary or permanent maintenance award for either spouse in amounts and for periods of time as the court deems just, without regard to marital misconduct, in gross or for fixed or indefinite periods of time." 750 ILCS 5/504(a) (West 2010). "The amount of a maintenance award lies within the sound discretion of the trial court, and this court must not reverse that decision unless it was an abuse of discretion." *In re Marriage of Nord*, 402 Ill. App. 3d 288, 292, 932 N.E.2d 543, 548 (2010). "An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court." *Id.*

¶ 53 In this case, the trial court ordered Phillip to pay maintenance that increased over time, maxing out at \$1,000 per month for 90 months beginning July 1, 2015. The court fashioned this increasing maintenance schedule based, in part, on its finding that "[Phillip's] income will increase the longer his practice is open." At the time the court entered this ruling, Phillip's new oral surgery practice had been operational for approximately 1 1/2 years and its overall income was on an upward trajectory. As is true of almost all maintenance orders, the court's order in this case was based upon a reasoned prediction as to the payor's future financial circumstances. If the court's prediction does not pan out, and Phillip's income does not increase to a level

sufficient to justify the court's maintenance award, Phillip may seek modification or termination of maintenance at the appropriate time. As it stands now, however, Phillip has not shown that the court's maintenance award was an abuse of discretion.

¶ 54 As a final matter, we note that Phillip cites several cases in his brief in which the trial court entered maintenance orders that more closely resembled the order Phillip would have liked to see in this case. In each of Phillip's cited cases, however, the appellate court *affirmed* the trial court's maintenance order, concluding that the court acted within its discretion. All too often, appellants attempt to support their abuse-of-discretion arguments by citing cases in which the reviewing court affirmed a trial court's judgment when applying the abuse-of-discretion standard. While these cases sometimes show what the trial court *could* have done in the instant case, they are usually useless to show what the trial court *could not* have done. Under the abuse-of-discretion standard, we will reverse the trial court only if it acted *outside the bounds of its discretion*. It is completely unhelpful when appellants attempt to make this showing by focusing upon other things the court could have done *within its discretion* to achieve an arguably better result.

¶ 55 III. CONCLUSION

¶ 56 For the reasons stated, we affirm the trial court's judgment.

¶ 57 Affirmed.