

NOTICE
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2014 IL App (5th) 120539-U

NO. 5-12-0539

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).

ANTOINETTE M. BALL,)	Appeal from the
)	Circuit Court of
Petitioner-Appellee,)	St. Clair County.
)	
v.)	No. 08-D-521
)	
GARY R. BALL,)	Honorable
)	Stephen R. Rice,
Respondent-Appellant.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* Where there was no evidentiary support establishing that Antoinette M. Ball's efforts increased the value of nonmarital realty, the court's award of \$17,000 was arbitrary and must be reversed. Where the trial court did not abuse its discretion in awarding Antoinette a house located at 6049 LL Road in Cahokia, the judgment is affirmed. The trial court's alternating approach to the distribution of numerous small items of property did not constitute an abuse of discretion. Where the trial court's award of attorney fees was in accordance with sections 503(d) and 503(j) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/503(d), (j) (West 2010)), the award is affirmed.

¶ 2 Gary R. Ball appeals from the trial court's order dividing marital and nonmarital property and awarding attorney fees to Antoinette M. Ball. We affirm in part and reverse in part.

¶ 3

FACTS

¶ 4 Gary and Antoinette (referred to as Toni in this order) had a lengthy relationship beginning in 1988. They married in 2001 and separated in November 2008 when Gary changed the locks on the marital home barring Toni access to the home and its contents. They had no children together. During the marriage, Gary became disabled and was unable to work, and lost his health insurance benefits. Toni began working in the Touchette Hospital system in order to obtain health insurance for the couple. After she filed for dissolution of marriage, she began working for the hospital system full time in the central supply department. According to the record, it seems that the major conflict that led Toni to file for divorce began in June 2008 and involved a property and bar the couple owned in Cahokia called Toni's Carol Inn.

¶ 5 Toni's Carol Inn. Toni owned the bar business. Gary owned the property. Gary essentially had a verbal month-to-month lease with Toni to operate the bar from his property. Toni started managing this bar in 1990.

¶ 6 Prior to 1990, there was a different bar on this Cahokia site called Carol's. A fire destroyed that bar. Gary and a partner, Neil Sanders, obtained the property and built a new building on the site. The two men also attended auctions to obtain restaurant and bar equipment in order to outfit the building as a bar.

¶ 7 Toni signed a written lease with both men in 1990. The written lease was in force until 1996. Gary and Neil split as partners in the property, and after an exchange of other properties, Gary became the sole owner of the property in question. After Gary became the sole owner of the property, the lease essentially converted to a month-to-month

tenancy, and the monthly rent increased. Toni paid monthly rent, as reflected in Internal Revenue Service Form 1099s provided to Gary. She testified that she paid rent up until she lost her liquor license in July 2008. Gary testified that she stopped paying rent sometime in 2006 and that he wanted to sell the property at that time.

¶ 8 Gary paid real estate taxes on the property. Toni paid for all expenses and taxes related to the bar business.

¶ 9 On June 25, 2008, Toni went to the Cahokia City Hall to obtain her new liquor license for the bar. The mayor advised her that Gary told him that she had no lease on the property from which she operated the bar. The mayor explained that with no lease, he could not renew the liquor license. Toni immediately hired an attorney and filed for dissolution of her marriage and for a temporary restraining order seeking to bar Gary from selling the property. The St. Clair County circuit court issued the restraining order on June 30, 2008. On July 1, 2008, before Gary received a copy of the order, he entered a contract for deed with Dale Lattina and Dale Lattina, Jr., to sell the property and most of the contents of the building for \$215,000. An addendum attached to the contract contained an extensive list of bar-related furniture, equipment, and other personalty included in the sale of the real estate. Thereafter, Gary locked Toni out of her bar. As Toni testified, she may have owned the bar, but without the facility or access to her supplies, she had no means to continue her business. She has not tried to find another building to rent for use as a bar.

¶ 10 Toni testified that in August 2008, the Lattinas formally asked her to remove her items (anything not on the addendum to the contract for deed) from the bar. After the

30-day notice expired, the Lattinas filed a forcible entry and detainer suit. The Lattinas packed up Toni's items—anything not listed in the contract addendum—and stored them in a portion of the bar that would eventually house their new kitchen. From the record of the hearing on the forcible entry and detainer suit, the Lattinas testified that they packed all of Toni's items, including a pool table, some bar stools, a cigarette machine, a television, and paper products. Toni testified in the forcible entry and detainer case that there were many other items that belonged to her and were still within the bar, including a freezer, glassware, two file cabinets, bar supplies, a bottle collection, and a sign collection, as well as many items she stored in drawers and cabinets in the bar. The court granted the Lattinas' request and set a date by which Toni must have her items removed. The record is not clear about whether she retrieved only the items that Gary and the Lattinas determined were hers, or if she received the other items that she described in court.

¶ 11 At trial, Toni argued that she was entitled to a portion of the sales proceeds from the sale of the building and contents. She acknowledged that the property itself was premarital, but claimed that the property was sold with tangible and intangible assets derived from Toni's Carol Inn. She further argued that she increased the value of the property in that it was sold with the contents to operate a bar and restaurant, and that after its sale the new owners opened a bar and restaurant. She claimed that the building was valued at \$83,787 for property tax purposes and that since it sold for \$215,000, she was responsible for the difference of \$131,213 as the value of her business assets or her personal contributions. In the property distribution, the trial court awarded Toni all rights

to her business. Regarding the valuation Toni proposed, the court noted that the property tax valuation of a piece of real estate is not indicative of the fair market value. On June 4, 2012, the court entered an initial order finding that Toni's efforts increased the value of the property, that there was insufficient evidence to accurately determine the value of Toni's contribution, and that her efforts were worth at least \$15,000 in value. In its July 31, 2012, judgment entry, the court awarded Toni \$17,000 as the amount to which she was entitled.

¶ 12 The 6049 LL Road Property. During the marriage, Gary and Toni purchased a house in Waterloo. After the purchase, Toni's parents, the D'Angelos, lived in the house. Gary testified that the purchase was intended as an investment. Toni testified that they purchased the house so that her parents could live there. The deed lists both Gary and Toni as joint owners of the property, and the mortgage lists both as joint obligors. Trial testimony and documents admitted into evidence established that the D'Angelos paid \$18,043.38 as the down payment on the house. Toni's parents thereafter paid \$600 per month into an escrow account in Toni and Gary's name. With the monthly payments, Gary and Toni paid the mortgage, taxes, and insurance. Gary had not received any monthly payments from Toni's parents since June 2008. After the D'Angelos moved into the house, they added a garage and a sunroom, and made improvements to the lot grading. Gary testified that he did general maintenance, electrical, plumbing, and HVAC work on the house.

¶ 13 On the date of the hearing, the mortgage balance was \$59,046. Gary testified to his personal opinion that the property was worth approximately \$128,000. He testified

that he added the garage and sunroom. Gary applied for the various permits and zoning permissions needed for these house additions. Toni acknowledged that Gary framed out the sunroom. In its order, the trial court stated that the Gary's and Toni's testimonies about the 6049 LL property were very different and in conflict. In awarding the house to Toni, the court stated:

"Based upon the most credible testimony and the reasonable inferences to be drawn from the documentary evidence, plus the inferences to be drawn from the payments received and made, the Court believes [Toni's] assertion that the property was purchased for the sole purpose of enabling [Toni's] parents to acquire and maintain the property as their residence."

¶ 14 Other Property/Liabilities Awarded by the Court. The parties entered into a stipulation in September 2011 regarding division of most of the assets.

¶ 15 As nonmarital property, the trial court awarded Gary the marital home in Waterloo, the property in which Toni had the bar, a Roark timeshare, a Pioneer Fund, Wal-Mart shares, and a Lincoln National pension fund. A Roth IRA and a traditional IRA were marital assets, but Toni agreed that Gary should retain all rights to both IRAs. The court also awarded Gary three marital pieces of real estate located in Cahokia, with a combined value of \$17,500, along with the associated liabilities of \$24,783.38 for delinquent taxes and liens.

¶ 16 The court awarded Toni all guns in her possession, an American United Life policy, and the rights and interest in the business, Toni's Carol Inn. The court also

determined that Toni was responsible for debt related to Sam's Club, J.C. Penney's, and the loan against her American United Life policy.

¶ 17 In addition to the items contained within the stipulation, the court also made several other property awards. The court determined that Gary's personal injury award was marital property and awarded Toni 30% of the total—\$6,852.76. The court awarded Gary a tractor, boat, trailer, and motor. Each party received two vehicles. Gary received a Corvette and a 2004 Ford F150, while Toni received a Toyota Rav 4 and the proceeds from her sale of a 2002 Ford Explorer. The court directed the parties to sell an Emerald timeshare and to divide the net proceeds equally. The court awarded Toni her savings and investment plan from her employer, an income tax refund from Toni's Carol Inn of \$2,334, and a Universal Guarantee Life Insurance policy along with any related debt.

¶ 18 Disputed Personal Property. Both Gary and Toni submitted a list of his and her premarital property as well as marital property. In total, the parties provided the court with 16 pages of listed personal property items. After the court awarded the larger items (cars, tractor, boat), the court was left with a very large number of smaller items. The trial court's order required the parties to match up their lists. Anything listed on both lists as belonging to Toni, she was to receive, and the same for Gary's items. Anything that did not match up from the nonmarital lists plus the items on the marital property list, were handled separately by the court:

"All other personal property shall be divided on an alternating basis:

Antoinette is awarded the first item on the page and Gary is awarded the second item on the page *** and so on."

The parties were given 30 days in which to exchange the items of personal property.

¶ 19 Attorney Fees. Toward the conclusion of the case, Toni's attorney filed a petition for attorney fees accompanied by the attorney's affidavit asking for an award of \$6,736.50. The court did not call the petition for hearing, but ruled on the petition in the court's July 31, 2012, judgment entry. The court ordered Gary to pay Toni \$2,500 towards her attorney fees.

¶ 20 LAW AND ANALYSIS

¶ 21 On appeal, Gary claims that the trial court's property division was improper. Particularly, he claims that the trial court incorrectly awarded Toni \$17,000 as her contribution to the value of his nonmarital property—the bar property in Cahokia. He also argues that the trial court should not have awarded the 6049 LL Road property to Toni. He claims that the personal property division should have been specific and not alternated back and forth between him and Toni. Finally, he claims that the trial court erred in awarding Toni attorney fees without a hearing.

¶ 22 The trial court's property division decision must be guided by reason and will not be overturned unless it can be shown that the trial court abused its discretion. *In re Marriage of Siddens*, 225 Ill. App. 3d 496, 500, 588 N.E.2d 321, 324 (1992). On appeal, it is not mandatory that the court agree with the trial court's property division decisions. *Id.* Instead, our review must determine whether the trial court's decision was arbitrary—one made without employing conscientious judgment—or if in view of all circumstances of the case, the trial court's decision went so far that no reasonable person would follow that decision. *Id.*

¶ 23 Section 503(d) of the Illinois Marriage and Dissolution of Marriage Act (Act) requires marital property division in just proportions. 750 ILCS 5/503(d) (West 2010). However, a proportionate asset division does not require mathematical equality. *In re Marriage of Doty*, 255 Ill. App. 3d 1087, 1097-98, 629 N.E.2d 679, 686 (1994). The trial court's property distribution can be unequal if the court applied the section 503(d) guidelines. 750 ILCS 5/503(d) (West 2010); *Marriage of Doty*, 255 Ill. App. 3d at 1097-98, 629 N.E.2d at 686. The Act lists guidelines the court must consider in dividing marital property including the contribution of a spouse to the marriage, the duration of the marriage, the amounts and sources of each spouse's income, the age, occupation, vocational skills, employability, and needs of each spouse, the reasonable opportunity for each spouse's future acquisition of assets and income, whether the apportionment is in lieu of or in addition to maintenance, the tax consequences of the property division, the dissipation of marital or nonmarital property, any antenuptial agreement of the parties, and the value of the property set aside for each spouse. 750 ILCS 5/503(d)(1)-(12) (West 2010).

¶ 24 We first analyze the \$17,000 award to Toni as representative of her contribution to the value of the property and contents sold by Gary. Gary and Neil Sanders purchased the land after the former bar located on the land burned. The price paid for the property was not included in the record. Gary and Neil built the new building and initially furnished the building in 1990 for use as a bar. The amount of money Gary and Neil spent is also not included in the record. Therefore, there is no basis in the record to

determine the exact increase or decrease in value from that basis to the \$215,000 sales price in 2008, 18 years later. The parties agree that the property is a nonmarital asset.

¶ 25 From 1990 when Gary and Neil completed the construction and furnishing of the bar, Toni operated her bar business in that location. Toni claimed that she increased the value of the property. She presented evidence from property tax bills from which she concluded and argued that the increase in value of the property was \$131,213. She also testified that she purchased numerous items for the bar business over the years, and that not everything was returned to her after the property and contents were sold. Toni provided no specifics as to missing items and associated values.

¶ 26 Gary argued that his sale of the property and some of its contents was a standard real estate sale of his nonmarital asset and that, consequently, Toni should not receive any of the proceeds of that sale. The trial court disagreed and made its initial decision that the property value was increased by Toni's contributions by "at least" \$15,000. When the trial court made its actual award, Toni received \$17,000. The trial court's order provided no insight into how the \$15,000 and \$17,000 amounts were determined.

¶ 27 We disagree with the trial court's award. The real estate was a nonmarital asset. The contract for deed by which Gary sold the property to the Lattinas is a real estate contract. The Lattinas purchased a property with specified contents. They did not purchase a business. The evidence presented by Toni failed to prove that she increased the market value of the property.

¶ 28 The burden of proof to establish that Toni increased the value of the property was with Toni. The only evidence she offered was the increased valuations from property tax

bills. There was no evidence that she added permanent fixtures or any addition(s) to the building during the 18 years she operated the bar in this building. Toni claimed that the Lattinas did not give her back all of her bar business items. She was a party to the forcible entry and detainer action the Lattinas filed against her. If the Lattinas did not return all of Toni's items, as detailed in their list of property they stored for her, or if there were other items of property Toni claimed were missing, she could have sought replevin from the Lattinas within that action, or in a separate action.

¶ 29 In its June 4, 2012, findings of fact and order, the trial court rejected Toni's only evidence, stating, "[t]he Court is mindful that valuation of property for tax purposes is not indicative of the true fair market value of property at sale." Despite the rejection of this evidence, in the next sentence the court continued, "[t]he court finds that [Toni]'s efforts through her business increased the value of the Property." Concluding that there was insufficient proof to accurately determine the value of Toni's contribution, the court randomly determined that her efforts increased the value of the property by at least \$15,000.

¶ 30 This was not a sale of Toni's bar business. In fact, the court awarded Toni that business. This was the sale of realty, which included certain contents. The court struggled with placing a value on Toni's efforts and linking those efforts directly to an increase in market value of the nonmarital realty. The reality is that Toni failed to establish any increase in value of the property. She provided no expert testimony on property valuation. Her only "evidence" was the property tax bills, and the trial court rejected this evidence.

¶ 31 Even if Toni had been able to prove that her efforts increased the value of the property, the result would have been a commingling of marital and nonmarital estates. 750 ILCS 5/503(c) (West 2010). Any reimbursement for Toni's efforts would have gone to the marital estate—not to Toni herself. *In re Marriage of Steinberg*, 299 Ill. App. 3d 603, 610, 701 N.E.2d 254, 259 (1998).

¶ 32 We reach the conclusion that the trial court's award of \$17,000 was arbitrary and therefore constituted an abuse of discretion. We reverse that portion of the July 31, 2012, order.

¶ 33 Gary next argues that the trial court erred in awarding Toni the house located at 6049 LL Road in Cahokia. He presents no legal authority for his argument, but argues that the facts supported the opposite conclusion.

¶ 34 Having reviewed the evidence and testimony, we find that the trial court did not abuse its discretion in awarding the house to Toni. The court had to deal with conflicting testimony about the purpose of the purchase. The court had the ability to assess each witness's credibility in testifying. The trier of fact must "assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence." *People v. Graham*, 392 Ill. App. 3d 1001, 1009, 910 N.E.2d 1263, 1271 (2009).

¶ 35 Gary claimed that the house was an investment, while Toni said that the house was purchased for her parents. Toni's parents made the substantial down payment and made monthly "rent" payments of \$600 from which mortgage, insurance, and taxes were paid. Gary performed certain maintenance tasks around the home and helped to build a

sunroom. The trial court was able to make its credibility determinations when the witnesses testified. Having reviewed the testimony, we find that Gary's testimony about this property, along with the other documentary evidence, was inconsistent with purchase of the house solely as an investment.

¶ 36 Gary also claims that the trial court erred in dividing the remaining marital property by alternating awards between the parties. The trial court awarded all major assets separately. What remained was a large number of line entries of things like dishes, collectibles, and small appliances. The parties did not have these items valued. In this situation, with so many items to be distributed and with no valuation, the court's solution was appropriate. The court set a specific date by which the parties were to meet and exchange items held in each other's possession. The parties would always have the ability to exchange items each received if they did not want certain items awarded in the alternating system utilized.

¶ 37 Gary finally argues that the trial court erred in granting Toni's request for attorney fees at the end of the case.

¶ 38 Generally, courts determine that attorney fees in a dissolution case are the responsibility of each party. *In re Marriage of Cantrell*, 314 Ill. App. 3d 623, 630, 732 N.E.2d 797, 803 (2000); *In re Marriage of Westcott*, 163 Ill. App. 3d 168, 179, 516 N.E.2d 566, 572 (1987). A court's award or denial of attorney fees will not be disturbed unless the court of review finds that the trial court abused its discretion. *In re Marriage of Uehlein*, 265 Ill. App. 3d 1080, 1090, 638 N.E.2d 706, 715 (1994). The spouse seeking attorney fees is not required to divest capital assets or deplete his or her means of

support, thereby undermining economic stability. *In re Marriage of Marthens*, 215 Ill. App. 3d 590, 599, 575 N.E.2d 3, 9 (1991).

¶ 39 Gary argues that because there was no hearing on Toni's petition, there was no basis to award the fees as Toni failed to establish her inability to pay and his ability to do so. He cites to section 508 of the Act in support of his position. 750 ILCS 5/508(a) (West 2010). Section 508(a) states:

"The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order any party to pay a reasonable amount for his own or the other party's costs and attorney's fees." *Id.*

¶ 40 Another important part of section 508(a) states that "[a]t the conclusion of [the case], contribution to attorney's fees and costs may be awarded from the opposing party in accordance with subsection (j) of Section 503." *Id.* As the trial court's award of attorney fees occurred at the conclusion of the case, we must turn to section 503(j) for guidance.

¶ 41 Section 503(j) indicates that the court must hear and decide the petition for attorney fees incurred in the proceeding. 750 ILCS 5/503(j) (West 2010). "Any award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 ***." 750 ILCS 5/503(j)(2) (West 2010).

¶ 42 In this case, the hearing was in keeping with section 503(j) of the Act, and while the hearing was not solely about the petition for attorney fees, the trial involved all remaining matters in this dissolution case. 750 ILCS 5/503(j) (West 2010). The court considered the section 503(d) factors for the division of property, and thus considered the

abilities of the parties to afford attorney fees. 750 ILCS 5/503(d) (West 2010). We conclude that the trial court did not abuse its discretion in awarding Toni attorney fees.

¶ 43

CONCLUSION

¶ 44 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed in part and reversed in part.

¶ 45 Affirmed in part and reversed in part.