

NOTICE

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2014 IL App (5th) 130251-U

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).

NO. 5-13-0251

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
KEVIN JOHNSON,)	St. Clair County.
)	
Petitioner-Appellee,)	
)	
and)	No. 12-D-679
)	
ANNETTE JOHNSON,)	Honorable
)	Randall W. Kelley,
Respondent-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Welch and Justice Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in awarding the marital home, the Volvo, and the grandfather clock to petitioner or in ordering each party to pay his or her own attorney fees. The trial court did, however, abuse its discretion in ordering petitioner to pay respondent rehabilitative maintenance for only two years. Therefore, pursuant to our authority under Supreme Court Rule 366(a)(5), we modify the duration of the award of maintenance in the amount of \$500 per month from two years to four years.

¶ 2 Respondent, Annette Johnson, appeals from an order of the circuit court of St. Clair County which *inter alia* divided assets between petitioner, Kevin Johnson, and respondent, awarded respondent two years' rehabilitative maintenance at the rate of \$500

per month, and ordered each party to pay his and her own attorney fees. The issues raised in this appeal are: (1) whether the trial court erred in awarding the marital home to petitioner; (2) whether the trial court erred in failing to award respondent permanent maintenance; (3) whether the trial court erred in awarding the 2013 Volvo XC 90 and grandfather clock to petitioner; and (4) whether the trial court erred in ordering each party to pay his and her own attorney fees. We affirm with modification.

¶ 3

FACTS

¶ 4 The parties were married on December 16, 1985, in Ohio. A judgment of dissolution was entered on March 6, 2013. Three children were born during the marriage. Two of the children were emancipated. A third child, Matthew, was still a minor and has cerebral palsy. By stipulation of the parties, respondent was awarded sole custody of Matthew with petitioner to have visitation every other weekend and alternating holidays. The parties also stipulated that petitioner would pay respondent \$1,453 per month in child support.

¶ 5 Petitioner is retired from the Air Force and receives \$2,301.44 per month in retirement benefits. Petitioner agreed that his military retirement accrued during the parties' 27-year marriage and that respondent is entitled to half of his military retirement, which amounts to \$1,150.72 per month. While the parties agreed on several issues, they did not agree on all issues. A hearing was conducted on March 6, 2013, to address the remaining issues.

¶ 6 Both parties testified at the hearing. Petitioner testified that he works for the Department of Defense as an information security specialist and is paid \$1,991.25

biweekly. Respondent testified that throughout the parties' marriage, she worked mostly part-time jobs in the food service industry, averaging around 15 hours per week. Respondent held such jobs throughout the marriage because the focus was on petitioner's Air Force career for which the family relocated several times. At the time of the hearing, respondent worked for the Scott Air Force Base Commissary where she was working approximately 18 hours per week with a net income of \$685.55 per month. Respondent applied for numerous other jobs, but was unable to secure better employment. She testified she was taking two classes at the local junior college and wanted to pursue a degree in radiology technology. She planned to go two years to the junior college and then transfer to a four-year college to earn her degree. Respondent sought \$3,500 per month in permanent maintenance, while petitioner testified that if he was required to pay maintenance, he would prefer to pay no more than \$500 per month. Respondent acknowledged that petitioner would not have an additional \$3,500 per month to pay her maintenance after paying her child support and paying his own expenses.

¶ 7 Both parties testified they wanted to be awarded the marital home. An appraisal was not done on the home, but a "best-guess estimate" showed the current value of the marital home at \$165,837, with an outstanding mortgage of \$154,954. The parties owned three vehicles, a 2013 Volvo XC 90 valued at \$43,000, with a loan balance of over \$32,000 remaining and a monthly payment of \$953, a 2012 Chrysler 200 valued at \$22,500, with a loan balance of \$4,722.48, and a monthly payment of approximately \$400 per month, and a 1999 Chevy Venture valued at approximately \$3,000, with no outstanding loan balance. Respondent testified that the Volvo was a gift from petitioner,

while petitioner disagreed that the Volvo was a gift. Petitioner said it was meant to be a family vehicle.

¶ 8 The parties also had several bank accounts, retirement accounts, and items which constituted marital personal property which they could not agree how to distribute. The evidence showed the parties have the following accounts and account balances:

1. USAA x9831	\$69.16
2. USAA x1269	\$2,920.02
3. USAA x9858	\$1,089.96
4. Regions x7060	\$187.83
5. Regions x6610	\$5,044.45
6. Regions x7613	\$80.38
7. SAC Federal x1352-9	\$34,659.85
8. SAC Federal x8037	\$2,828.30
9. SAC Federal x1352-0	\$52,684.22
10. DOD Thrift Plan	\$23,458.20
11. Prudential 401K	\$8,844.84

The thrift plan and 401K are not joint accounts, but are accounts established through petitioner's employment.

¶ 9 After hearing all the evidence, the trial court awarded petitioner the marital home, along with all debt thereon. The trial court awarded petitioner the 2013 Volvo XC 90 and the debt thereon. The trial court awarded respondent the 2012 Chrysler 200 and the debt thereon, as well as the 1999 Chevy Venture. As for the bank and retirement accounts, the

trial court awarded \$544.45 from Regions x6610 and \$52,684.22 from the SAC Federal x1352-0 account to respondent. The trial court awarded respondent \$12,500 from petitioner's thrift savings plan and \$5,500 from petitioner's 401K. The trial court awarded all remaining accounts and balances to petitioner.

¶ 10 The trial court awarded respondent one-half of petitioner's military retirement valued at approximately \$1,068 per month with the survivor benefit plan option, but ordered respondent responsible for the cost of the survivor benefit plan option. The trial court ordered petitioner responsible for the parties' credit card debt of \$626.24. The trial court also awarded several other items, but the one respondent disputes is the award of the grandfather clock to petitioner. The trial court ordered each party to pay his or her own attorney fees. Respondent filed a timely notice of appeal. Petitioner did not file a brief.

¶ 11 ANALYSIS

¶ 12 The first issue raised on appeal is whether the trial court erred in awarding the marital home to petitioner. Respondent argues the trial court abused its discretion in awarding the marital home and its equity to petitioner. Respondent insists that because of her lack of resources and education, she will not be able to purchase a home in the future, especially since she is also the sole custodial parent of Matthew who suffers from cerebral palsy. Respondent contends that the trial court should have awarded her the marital home or, in the alternative, should have ordered the home sold and the profit divided equally between the parties.

¶ 13 Section 503(d) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/503(d) (West 2010)) requires a trial court to divide marital property "in just proportions considering all relevant factors." The benchmark of proper and just apportionment is whether it is equitable in nature, which does not require mathematical equality. *In re Marriage of Thornley*, 361 Ill. App. 3d 1067, 1071, 838 N.E.2d 981, 985 (2005). Factors relevant in determining the just apportionment of marital property include the contributions of each party, including the contribution of a spouse as a homemaker, the value of property assigned to each spouse, the duration of the marriage, the relevant economic circumstances of each spouse, the custodial provisions for children, the reasonable opportunity of each spouse for future acquisition of assets and income, and the tax consequences of the property division upon the respective economic circumstances of the parties. 750 ILCS 5/503(d)(1), (3), (4), (5), (9), (11), (12) (West 2010)). In general, a reviewing court will not disturb a trial court's division of marital assets unless it has abused its discretion. *In re Marriage of Crook*, 211 Ill. 2d 437, 453, 813 N.E.2d 198, 206 (2004). An abuse of discretion occurs only where no reasonable person would take the view adopted by the trial court. *In re Marriage of Nelson*, 297 Ill. App. 3d 651, 658, 698 N.E.2d 1084, 1090 (1998).

¶ 14 In the instant case, the evidence shows the marital residence with very little equity. The marital residence was estimated to be worth \$165,837, with a mortgage of \$154,954. Petitioner was awarded the marital home, but was also awarded the debt thereon. With respondent's limited income, it would be virtually impossible for her to make the mortgage payments, as well as pay property taxes, utilities, and repairs. While it is

unfortunate that respondent is unable to remain in the home, at least Matthew will be spending alternating weekends with his father at a place in which he is comfortable. Moreover, even if the trial court ordered the house sold and the profits divided equally among the parties, there is no guarantee that a profit would have been realized in light of the substantial debt still owed on the home. Under these circumstances, we cannot say the trial court erred in awarding the marital home and the corresponding debt to petitioner.

¶ 15 The second issue raised on appeal is whether the trial court erred in failing to award respondent permanent maintenance. Respondent argues the trial court's award of rehabilitative maintenance in the amount of \$500 per month for two years constituted an abuse of discretion because it is too low and for too short a duration.

¶ 16 Section 504(a) of the Act sets forth 12 factors for the trial court to consider in deciding whether to grant maintenance, including the income of each party, the needs of each party, the present and future earning capacity of each party, any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage, the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, the standard of living established during the marriage, and the duration of the marriage. 750 ILCS 5/504(a)(1)-(12) (West 2010). The proper guideline for determining the amount of maintenance is the recipient's reasonable needs in light of the standard of

living established during the marriage. *In re Marriage of Culp*, 341 Ill. App. 3d 390, 398, 792 N.E.2d 452, 459 (2003).

¶ 17 As a general rule, maintenance is intended to be rehabilitative in nature so as to allow a dependent spouse to become financially independent. While permanent maintenance is appropriate in some instances, it is only appropriate in cases where a spouse is unemployable or employable at an income substantially lower than the previous standard of living. *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 652, 895 N.E.2d 1025, 1038 (2008). The trial court is vested with considerable discretion with regard to the amount and duration of maintenance, and its decision in awarding maintenance will be reversed on appeal only where there is an abuse of discretion. *In re Marriage of Donovan*, 361 Ill. App. 3d 1059, 1062, 838 N.E.2d 310, 314 (2005).

¶ 18 In the instant case, the trial court awarded respondent maintenance of \$500 per month for 24 months. We note that the parties' 27-year marriage was of significant duration and that respondent contributed to the marriage not only by working as a homemaker, but also by having various jobs in the food service industry. It is clear that petitioner's career in the Air Force took precedence during the parties' marriage and that petitioner's retirement benefits and his current civilian job leave him in a better financial position than respondent, although respondent certainly benefits from petitioner's military career by receiving half of his military pension. Respondent testified that she was taking classes at a local junior college and hoped to become a radiology technician. She planned to go to the junior college for two years and then transfer to a four-year college and

complete her final two years in order to earn a degree and be able to obtain a better job with a higher earning capacity than she currently has working at the commissary.

¶ 19 While respondent insists she is entitled to a higher award of maintenance and that it should be a permanent award, we are unconvinced. Nevertheless, due to the parties' different earning capacities, the standard of living enjoyed during the marriage, respondent's age (50), and respondent's future plans to rehabilitate herself so as to become financially independent, we can find no basis in the record for setting the maintenance award for such a short duration. Despite the great deference we pay to a trial court's award of maintenance, we conclude that here, the trial court abused its discretion in ordering rehabilitative maintenance for only two years when respondent was clear that it would take her four years to complete the education necessary to obtain better employment.

¶ 20 Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994) permits a reviewing court, in its discretion, to make any order or grant any relief that a particular case may require. Therefore, pursuant to our authority under Supreme Court Rule 366(a)(5), we modify the term of rehabilitative maintenance, extending it from two years to four years. We believe an award of \$500 per month for four years strikes a better balance and gives respondent a better chance to actually rehabilitate herself and obtain adequate employment.

¶ 21 The third issue raised on appeal is whether the trial court erred in awarding the Volvo XC 90 and the grandfather clock to petitioner. Respondent argues that the trial court originally awarded her the clock, but then erred in writing its order and awarded the clock to petitioner. As for the car, respondent contends it was a Christmas gift to her

from petitioner, and, based upon the parties' own admissions, it should have been awarded to her. We disagree.

¶ 22 As previously set forth, section 503(d) of the Act requires a trial court to divide marital property "in just proportions considering all relevant factors." 750 ILCS 5/503(d) (West 2010). Our review of the record reveals the following discussion about the grandfather clock:

"[The Court]: Do you care if she gets the clock?

[Petitioner]: I do, Your honor.

[The Court]: Why?

[Petitioner]: Because those are the two items we brought from Germany. And my thought is ***

[The Court]: What two?

[Petitioner]: The shrunk and the clock.

[The Court]: Those are two separate things, the shrunk—

[Petitioner]: Yes, they are, Your Honor.

[The Court]: Which do you want, the shrunk or the clock, ma'am?

[Respondent]: I want both of them.

[The Court]: Well, if you get one, which do you want?

[Respondent]: I want the shrunk.

[The Court]: All right. The books, can you guys split them up?

[Petitioner]: Actually, your Honor, those are my books. Most of them are technical books. Most of them are—

[The Court]: Are they mostly his books?

[Respondent]: But the shrunk is—and the clock is mine, I thought, Your honor, so—

[The Court]: All right. You get the shrunk and the clocks. He gets the books and the firearms. You don't have an FOID card, anyway, do you?

[Respondent]: No."

In the heat of battle, the trial court announced respondent would get the clock, but after further review, the trial court was obviously swayed by petitioner's argument that the two items purchased in Germany should be split between the parties and, therefore, awarded the grandfather clock to petitioner. Considering the record before us and respondent's own stated preference for the shrunk, which she was awarded pursuant to the trial court's written order, we cannot say the trial court's award of the grandfather clock to petitioner was an abuse of discretion.

¶ 23 As for the Volvo, the record shows that \$32,002.83 was still owed on the car and that its monthly payments were in excess of \$950. Because the car was never paid in full, we fail to see how it could be a true gift. Moreover, given the current economic capacities of the parties, the trial court's decision to award respondent the Chrysler 200 with its associated debt of \$4,722.48 as well as a 1999 Chevy Venture valued at \$3,000 with no associated debt makes sense. Accordingly, we cannot say the trial court's decision to award the Volvo, along with its considerable debt, to petitioner rather than respondent was an abuse of the trial court's discretion.

¶ 24 The final issue is whether the trial court erred in ordering each party to pay his or her own attorney fees. Respondent argues that the trial court erred in denying her request for contribution toward attorney fees without a hearing. In support of her position, respondent cites *In re Marriage of Brackett*, 309 Ill. App. 3d 329, 722 N.E.2d 287 (1999). However, we find *Brackett* distinguishable from the instant case.

¶ 25 In that case, the record contained no indication as to the amount of attorney fees owed. *In re Marriage of Brackett*, 309 Ill. App. 3d at 345, 722 N.E.2d at 300. In the instant case, respondent's attorney filed an affidavit on March 6, 2013, specifically stating as follows:

"[Respondent] retained me on July 18, 2012. My legal fees are \$200.00 per hour for court time and \$200 per hour for non-court time. She has paid me \$3,000 and has total fees and costs of \$4,469.00 and has a remaining balance due and owing of [sic] \$1,471.94."

Therefore, in the instant case, unlike *In re Marriage of Brackett*, there was evidence as to how much in attorney fees was owed. Furthermore, here the trial court could ascertain how much more would likely be owed based upon respondent's attorney's fee of \$200 per hour.

¶ 26 A party seeking an award of attorney fees must show that he or she is unable to pay the fees while the other party is able to do so. *In re Marriage of McGuire*, 305 Ill. App. 3d 474, 479, 712 N.E.2d 411, 414 (1999). Generally, attorney fees are the responsibility of the party for whom the services were rendered. *In re Marriage of McGuire*, 305 Ill. App. 3d at 479, 712 N.E.2d at 414. A trial court's determination of

whether one spouse should pay the attorney fees of the other and in what proportion lies within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *In re Marriage of McGuire*, 305 Ill. App. 3d at 479, 712 N.E.2d at 414.

¶ 27 In the instant case, the record shows respondent is able to pay her attorney fees as evidenced by the fact that she already paid \$3,000 in attorney fees. Respondent was also awarded over \$70,000 in cash from the parties' accounts. Accordingly, under the circumstances presented here, we cannot say the trial court abused its discretion in ordering each party to pay his or her own attorney fees.

¶ 28 **CONCLUSION**

¶ 29 For the foregoing reasons, we conclude that the trial court abused its discretion in determining the duration of maintenance awarded to respondent. We, therefore, modify the final judgment pursuant to our authority under Supreme Court Rule 366(a)(5) by increasing the award of maintenance from a period of two years to four years. In all other respects, we affirm the trial court's decision.

¶ 30 Modified in part and affirmed in part.