

2016 IL App (1st) 142969-U
No. 1-14-2969
March 22, 2016

SECOND DIVISION

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).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

IN RE THE MARRIAGE OF FAEZEH)	Appeal from the Circuit Court
SOLOMON,)	Of Cook County.
)	
Petitioner-Appellant,)	
)	No. 11 D 3011
v.)	
)	The Honorable
GARY SOLOMON,)	Regina Scannicchio,
)	Judge Presiding.
Respondent-Appellee.)	

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Pierce and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held:* When a husband voluntarily transfers property to his wife as a gift, without fraud or coercion, and the husband and wife provide conflicting testimony, the circuit court must consider the documentary evidence, to determine whether there is clear and convincing evidence that a gift occurred between spouses. Moreover, when there is an unfavorable evidentiary presumption because one party fails to produce evidence under his control, the other party is still required to present evidence which establishes a *prima facie* case.

¶ 2 On March 24, 2011, Faezeh Solomon filed a petition for dissolution of marriage against her husband Gary Solomon. On March 4, 2014, the circuit court entered a judgment of

dissolution of marriage. Faezeh appeals and claims that the circuit court erred when it found that Gary did not have the requisite donative intent when he gifted jewelry he inherited from his mother to Faezeh. Faezeh also claims that the circuit court erred when it accepted Gary's testimony and determined that he had a negative net worth, despite attaching an unfavorable evidentiary presumption to his testimony because he failed to produce documents under his control.

¶ 3 We find that the circuit court erred when it ignored documentary evidence and relied exclusively on the conflicting testimony of Faezeh and Gary and found that Gary did not have the requisite donative intent to gift jewelry he inherited from his mother to Faezeh. *Welch v. Worsley*, 330 Ill. 172, 230-32 (1928); *Vallarta v. Lee Optical of Missouri, Inc.*, 12 Ill. App. 3d 112, 116 (1973).

¶ 4 Next, we find that the circuit court did not err when it found that Gary's net worth was negative, despite the unfavorable evidentiary presumption it attributed to Gary's testimony regarding the value of his trusts, because Faezeh failed to present evidence which established her *prima facie* case. *Bethune Plaza Inc. v. State Department of Public Aid*, 90 Ill. App. 3d 1133, 1141 (1980). Accordingly, we affirm in part and reverse in part the circuit court's judgment of dissolution of marriage.

¶ 5 **BACKGROUND**

¶ 6 Gary and Faezeh were married on February 8, 2004 and executed an antenuptial agreement on February 28, 2004. On March 24, 2011, Faezeh filed a petition for dissolution

admitted to the genuineness of the document. Gary admitted that he created this document at trial. But Gary testified that "any transfer to Faezeh of the items listed was for her lifetime."

¶ 12 The Circuit Court's Judgment Regarding the Edna Solomon Jewelry

¶ 13 In its judgment of dissolution of marriage on March 4, 2014, the trial court stated that it was not considering issues of marital property and intersposal gifts, but that it was making a determination only as to Gary's donative intent. The circuit court found that because there was no formal record in the antenuptial agreement gifting all of Edna Solomon's jewelry to Faezeh, "the Court [was] left only with the testimony and credibility of the parties in determining the status of Edna Solomon's jewelry." The circuit court found that the "parties' testimony is completely contradictory even as to the exact pieces of jewelry Faezeh received from Gary, which were inherited from Edna Solomon." The circuit court found Gary's testimony was credible and found that he presented clear and convincing evidence that he did not intend to gift the Edna Solomon jewelry to Faezeh. The circuit court ordered Faezeh to return the jewelry to Gary within 30 days of the entry of the judgment of dissolution. For any jewelry Faezeh sold, transferred or otherwise disposed of, the circuit court ordered Faezeh to complete an accounting within 30 days and give Gary any and all proceeds received within 60 days after receipt for donation to the Northwestern Mutual Hospital.

¶ 14 In Faezeh's April 3, 2014 motion to reconsider the March 4, 2014 judgment of dissolution of marriage, Faezeh argued that the circuit court erred when it found that Gary did not gift the Edna Solomon jewelry to her, at a minimum, in a life estate and erred when it ordered Faezeh to return the jewelry to Gary.

¶ 15 The circuit court denied Faezeh's motion to reconsider and found that Gary did not gift the jewelry to Faezeh because he did not have the requisite donative intent. The circuit court also found that Gary did not vest Faezeh with a life estate and that life estates cannot be created orally.

¶ 16 Gary's Net Worth

¶ 17 The parties prepared an antenuptial agreement in the event the marriage was dissolved. Paragraph 8 of the antenuptial agreement required Gary to pay a certain amount of money to Faezeh in the event of their divorce, based on the length of their marriage. According to the terms of the agreement, if their marriage lasted, "at least 7 years and less than 10 years", Gary would be required to pay \$1,500,000 to Faezeh subject to the following limitation: "any amount which Faezeh otherwise would receive pursuant to this paragraph in excess of \$350,000 shall be limited to one-fourth of Gary's "Net Worth" in excess of \$1,400,000."

¶ 18 According to paragraph 8(b) of the antenuptial agreement, Gary's net worth meant:
"the fair market value of Gary's assets (other than life insurance or proceeds thereof), (i) reduced by Gary's outstanding liabilities, (ii) increased by any gifts Gary makes to third parties after the date of this Agreement which exceed the annual exclusion for gifts by unmarried persons pursuant to Sections 2503(b) and 2513 of the Code (now \$11,000 per person per year), and (iii) calculated as if Gary owned all interests held in trust for his benefit and also the assets of any revocable trust of which he is grantor. To determine Gary's Net Worth, the parties shall use the "Appraisal Value" of all non-publically traded assets."

¶ 19 According to the schedule of Gary's assets attached to the antenuptial agreement, on December 31, 2003, his total assets minus his total liabilities, was a net worth of \$426,000. His net worth minus exempt assets, was -\$911,000. In the judgment of dissolution of marriage, the circuit court determined that the proper date for determining Gary's net worth was March 28, 2011: the day Faezeh filed her action for dissolution of marriage.

¶ 20 The circuit court found that Gary's net worth, on March 28, 2011, was -\$28,694.58. Faezeh received \$350,000 from Gary pursuant to the antenuptial agreement and an agreed order was entered on July 30, 2012.

¶ 21 During discovery, Faezeh sought information regarding Gary's trusts accounts. Gary produced trust agreements for three trusts that owned 50% of the Donald Bruce and Company: (1) the Gary B. Solomon Trust (date of trust document April 16, 1984); (2) the Gary B. Solomon OCP Trust (under agreement dated December 1, 1986); and (3) the GBS Investment Trust. The trustee for all three trusts was James K. Gardner with a listed address of 3600 North Talman Avenue, Chicago, Illinois. The company's address was listed at 6323 North Avondale Avenue, Suite 243 B, Chicago, Illinois. Each trust agreement granted Mr. Gardner the power to designate a successor trustee. Gary was listed as the sole beneficiary of each trust.

¶ 22 A fourth trust, the Gary B. Solomon Revocable Insurance Trust dated April 5, 1968 held real estate. During the discovery process, Faezeh made attempts to obtain additional records regarding Gary's trusts but was unsuccessful. On January 31, 2013, the circuit court entered an order requiring Gary to disclose the "identity of the trustee of any trusts of which he has a

beneficial interest and identify all property (real or personal) held by the trusts." Gary did not disclose this information and on March 18, 2013, the circuit court allowed Faezeh to add the Gary B. Solomon Revocable Insurance trust dated April 5, 1968, the Gary B. Solomon OCP Trust (under agreement dated December 1, 1986), and the GBS Investment Trust as third party respondents.

¶ 23 Faezeh maintained that the address Gary provided for the trusts was not accurate and, because she did not have the proper information, she could not properly serve the trusts. Faezeh requested, on numerous occasions during the discovery process, that Gary disclose any records relating to his trusts or assets held in his trusts, but these requests went unanswered.

¶ 24 Faezeh issued numerous subpoenas to various entities and individuals with whom Gary had a business and financial relationship, including Mr. Gardner. Mr. Gardner informed Faezeh that he had resigned as trustee and provided no information to Faezeh. Faezeh was able to obtain tax returns relating to Gary's trusts from Gary's accountant, Andrew Maheras, but the returns did not provide any information as to the assets held in trust nor the identification of the trustee. At trial, Faezeh did not call Mr. Maheras as a witness and she did not introduce the tax returns into evidence.

¶ 25 Among the subpoenas issued was a subpoena to Mr. Samuel Tenenbaum, Gary's business and estate attorney. After Mr. Tenenbaum failed to produce the documents Faezeh requested and failed to appear for his deposition on May 29, 2012, Faezeh filed a motion to compel Mr. Tenenbaum's discovery deposition. At the hearing on Faezeh's motion to compel on August

13, 2012, the circuit court did not compel the deposition because of Mr. Tenenbaum's illness but, instead, ordered Gary to produce all financial documents in his possession that he had not already produced. Gary produced no additional documents.

¶ 26 On February 6, 2013, Gary's attorney informed Faezeh's attorneys in a letter that "there currently is no trustee serving for these trusts" and "the trusts are currently without assets." This letter was not accompanied by any trust documentation indicating that the trusts lacked trustees or assets, nor was it accompanied by an affidavit of completeness. During the trial on May 14, 2013, Gary testified that he was "probably acting as the trustee" to the trusts but didn't have enough legal background to be sure.

¶ 27 After Gary failed to produce any additional documents in compliance with the circuit court's January 31, 2013 order, the circuit court entered an order granting Faezeh leave of court to "issue subpoenas for both records and depositions to J. Samuel Tenenbaum and that Gary shall authorize Tenenbaum to produce the records requested, over objection of counsel." Faezeh received no additional documents pursuant to the court's order.

¶ 28 On April 12, 2013, Faezeh filed a motion to continue based on Gary's failure to comply with discovery and her motion was denied. Mr. Tenenbaum's deposition was taken on April 22, 2013. He objected to a number of questions and declined to produce the requested documents on the grounds of attorney-client privilege.

¶ 29 During the trial, Gary revealed his interest in two additional trusts that were not disclosed during discovery, the Gary B. Solomon Insurance Trust Number Two (under agreement dated September 15, 1995) and also Gary B. Solomon Irrevocable Insurance Trust

Agreement (under agreement dated April 21, 1998). When called to testify, Mr. Tenenbaum, for the first time, produced records¹ that were responsive to Faezeh's subpoena. Faezeh objected to the production of these documents in the middle of trial because of the short time her counsel had to review the documents, but the objection was overruled and the trial continued.

¶ 30 The only witnesses Faezeh called to testify at trial, other than herself, were Mr. Tenenbaum and Gary. Faezeh testified that she did not have any familiarity with Gary's business dealings and Mr. Tenenbaum testified about Gary's estate planning and trusts. Tenenbaum also testified that he did not believe that Gary had taken any action in the divorce proceedings to limit his net worth or limit the amount of money that he would have to pay Faezeh, and that he did not know how many trusts Gary had. Mr. Tenenbaum did not testify about the value of Gary's property or his liabilities. Gary was the only witness that testified regarding his assets and liabilities.

¶ 31 Faezeh, filed a motion for sanctions, pursuant to Supreme Court Rule 219 (c), and sought to bar Gary's testimony or evidence related to the value of Gary's assets in his trust that were used to determine his net worth. The circuit court took the motion under advisement and denied the motion for sanctions, but found an unfavorable evidentiary presumption as to "Gary's testimony and evidence as it related to any trust assets or liabilities in which Gary failed to produce evidence, which was under his control."

¹ The records produced included: (1) a bill from Coney & Mark to Gary Solomon for December 2008; (2) a memo from Martin Tish from Neil, Gerber & Eisenberg from 2002; (3) a bill from Chuhak & Tecson from April 20, 2009 – February 2012; (4) a retainer agreement between Gary Solomon, Donald Bruce and Chuhak & Tecson, PC; and (5) bills from Neil, Gerber & Eisenberg from November 1, 2006 – June 30, 2007.

¶ 32 The Circuit Court's Judgment Regarding Gary's Net Worth

¶ 33 In the March 4, 2014 judgment for dissolution of marriage, the circuit court found that the date Faezeh filed her petition for dissolution of marriage, March 28, 2011, was the date for determining Gary's net worth and that Gary's net worth on that date was - \$28,694.58. Based on Gary's negative net worth and following the provisions in the antenuptial agreement, the circuit court also found that Faezeh was not entitled to any more than the \$350,000 she has already received from Gary.

¶ 34 The circuit court found that the only testimony presented regarding Gary's assets and liabilities from various time frames during the marriage was from Gary. The circuit court found that Faezeh provided "no direct testimony as to the value of asset [*sic*] or financial accounts or liabilities." Although Faezeh presented the testimony of Mr. Tenenbaum, he only testified to Gary's estate planning and trust, did not testify as to the value of Gary's property or Gary's liability, and "added no evidence to the determination of Gary's net worth."

¶ 35 The circuit court noted that in its March 18, 2013 order it granted Faezeh's motion to add the Gary B. Solomon Revocable Insurance trust dated April 5, 1968, the Gary B. Solomon OCP Trust (under agreement dated December 1, 1986), and the GBS Investment Trust as third party respondents, but Faezeh did not call any third party respondents at trial. Moreover, the circuit court noted that the third party respondents did not appear in the dissolution proceedings, they were not held in default, and Faezeh did not present any evidence by a third party respondent.

¶ 36 The circuit court found an "unfavorable evidentiary presumption" as to Gary's testimony and evidence in regards to trust assets or liabilities in which Gary failed to produce evidence that was under his control. The circuit court also found Gary to be a credible witness, but found his testimony regarding "his interest in and to the Solomon Family Real Estate Trust, the insurance trusts and GBS Investment trust vague and incomplete. Faezeh however, was unable to rebut such testimony."

¶ 37 The circuit court further found that "both parties had the burden of providing sufficient evidence for the court to fairly determine the property to be distributed or in this matter the net worth of Gary for the determination of an award to Faezeh. The parties each failed to provide clear and concise testimony and/or documents to support their positions. As such [*sic*] Faezeh's motion for partial summary judgment and Gary's motion for directed finding was denied."

¶ 38 The circuit court considered all of the evidence that was presented and found that Gary's net worth was -\$28,694.58 and that Faezeh was not entitled to any more than the \$350,000 she had already received pursuant to the antenuptial agreement. Because of Faezeh's repeated attempts to gain Gary's compliance with her discovery requests, the circuit court ordered Gary to pay \$25,000 in attorneys' fees to Faezeh.

¶ 39 Faezeh filed a motion to reconsider the judgment of dissolution on April 3, 2014. The memorandum opinion denying the motion to reconsider the March 4, 2014 judgment of dissolution was entered August 21, 2014. Faezeh timely filed her notice of appeal on September 19, 2014.

¶ 40

ANALYSIS

¶ 41

Standard of Review

¶ 42

We note, when a circuit court makes factual findings after a trial, that we will uphold the court's findings unless they are against the manifest weight of the evidence. *Auto Owners Insurance Co. v. Miller*, 138 Ill. 2d 124, 128 (1990) (citing *Cosmopolitan National Bank v. County of Cook*, 103 Ill. 2d 302, 318 (1984)). A factual finding is against the manifest weight of the evidence only when, after viewing the evidence in its light most favorable to the determination at issue, the reviewing court concludes that no rational trier of fact could have made the same finding. *Price v. Industrial Commission*, 278 Ill. App. 3d 848, 852-53 (1996).

¶ 43

The Edna Solomon Jewelry

¶ 44

On appeal, Faezeh maintains that the law presumes that a gift is made where property is transferred from one spouse to another and therefore, Gary had the burden of rebutting this presumption with clear and convincing evidence that he did not intend to gift the Edna Solomon jewelry to Faezeh. Faezeh also maintains that because Gary failed to rebut the presumption with clear and convincing evidence, the circuit court erred in finding that Gary did not intend to gift the Edna Solomon jewelry to Faezeh.

¶ 45

We find that, under Illinois law, it is well settled that property voluntarily conveyed by a husband to a wife, without fraud or coercion, is presumed to be a gift. *Pollard v. Pollard*, 12 Ill. 2d 441, 445 (1957); *Baker v. Baker*, 412 Ill. 511, 514 (1952); *Bowman v. Peterson*, 410 Ill. 519, 524-25 (1952). Moreover, when there is a conflict in the oral testimony, documentary evidence is of paramount importance and greater weight is given to the

documentary evidence than to testimonial evidence. *See Welch*, 330 Ill. at 230-32; *Vallarta*, 12 Ill. App. 3d at 116; *State Bank of East Moline v. Young*, 149 Ill. App. 3d 460, 464 (1986).

¶ 46 In its judgment of dissolution of marriage, the circuit court found that because there was no formal record in the antenuptial agreement gifting all of Edna Solomon's jewelry to Faezeh, "the Court [was] left only with the testimony and credibility of the parties in determining the status of Edna Solomon's jewelry" and that the "parties' testimony is completely contradictory even as to the exact pieces of jewelry Faezeh received from Gary, which were inherited from Edna Solomon." The court also found Gary's testimony more credible than Faezeh's testimony. The court based its judgment entirely on the credibility of Gary's testimony and did not consider a document Gary authored on April 19, 2011 entitled "ITEMS I GIFTED TO FAEZEH FROM MY MOTHER'S JEWELRY COLLECTION," that Faezeh entered into evidence. The document did not contain any language that limited Faezeh's ownership in the jewelry to a life estate.

¶ 47 We find the circuit court's failure to consider the document Gary authored in its judgment of dissolution of marriage to be error because, with Faezeh and Gary's testimony conflicting, more weight should have been given to the document Gary authored than to the parties' conflicting testimony. *Welch*, 330 Ill. at 230-232; *Vallarta*, 12 Ill. App. 3d at 116.

¶ 48 In *Welch*, after the decedent passed, proof of heirship was made showing that the decedent's sister was the sole heir of the deceased. *Welch*, 330 Ill. at 174. Ena Welch filed a petition maintaining that she was the decedent's daughter and his sole heir. The probate court found that Welch was not the daughter of the decedent and dismissed her petition. *Welch*,

330 Ill. at 174-75. Welch filed an appeal in the circuit court of Cook County and the circuit court set aside the finding of the probate court and found that Welch was the daughter and the sole heir of the decedent. *Welch*, 330 Ill. at 175. Conservators of the decedent's sister filed an appeal with the Illinois Supreme Court and the supreme court transferred the appeal to the appellate court. *Welch*, 330 Ill. at 175. The appellate court reversed the judgment of the circuit court and found that Welch was not the daughter or the sole heir of the deceased. *Welch*, 330 Ill. at 175. Welch filed a petition for a writ of certiorari to the supreme court and it was allowed. *Welch*, 330 Ill. at 175.

¶ 49 The supreme court looked beyond the oral testimonies and found that Welch's case was not supported by any writing or document, but simply consisted of oral testimony of *Welch* and her 74 witnesses. *Welch*, 330 Ill. at 230-32. The supreme court affirmed the decision of the appellate court, finding that Welch was not the daughter or the sole heir of the decedent. *Welch*, 330 Ill. at 232. The supreme court held that Welch's oral testimony and that of her witnesses was not supported by any documentary evidence and because the defendants' oral testimonies, which contradicted Welch's oral testimonies, were corroborated by all of the written and documentary evidence, the judgment of the circuit court was against the manifest weight of the evidence. *Welch*, 330 Ill. at 232.

¶ 50 Illinois case law makes it clear that the circuit court should have given more weight to the document Gary authored than to Gary's testimony. *Welch*, 330 Ill. at 230-32; *Vallarta*, 12 Ill. App. 3d at 116. Here, the circuit court relied solely on the credibility of Gary's oral

testimony and gave no weight to the document he authored that would corroborate Faezeh's oral testimony.

¶ 51 Because the circuit court considered Faezeh and Gary's conflicting testimony and did not consider the documentary evidence, we find that the circuit court's finding that Gary lacked donative intent was against the manifest weight of the evidence. Gary's document did not contain any language that limited Faezeh's ownership in the jewelry to a life estate nor was there any mention that the jewelry would be transferred to a third party upon the termination of the life estate. The document Gary authored supported Faezeh's position and the presumption that Gary's voluntary transfer of his mother's jewels to Faezeh, without fraud or coercion, was a gift. When this court considers the document Gary authored, Gary's testimony fails to rebut the presumption that his voluntary transfer of his mother's jewels to Faezeh was a gift. Therefore, we hold that the circuit court erred when, faced with conflicting testimony, it did not consider documentary evidence that contradicted Gary's testimony in its judgment of dissolution of marriage. *Welch*, 330 Ill. at 230-32; *Vallarta*, 12 Ill. App. 3d at 116.

¶ 52 Supreme Court Rule 366(5) provides that "the reviewing court may, in its discretion *** enter any judgment and make any order, that ought to have been given or made, and make any other and further orders and grant any relief *** that the case may require." Ill. S. Ct. R. 366 (5) (eff. Feb. 1, 1994). Where a cause is tried by a court without a jury and where the parties have had the opportunity to present all of their evidence, there is no need to remand the matter to the circuit court for a new trial. *See Vallarta*, 12 Ill. App. 3d at 116 (citing

Dayton Scale Co. v. General Market House Co., 335 Ill. 342, 345-46 (1929)). Accordingly, we reverse the judgment of the circuit court and the case is remanded with directions to enter judgment for the petitioner, Faezeh, with respect to ownership of the Edna Solomon jewelry. *Vallarta*, 12 Ill. App. 3d at 116.

¶ 53

Valuation of Gary's Estate

¶ 54

Next, Faezeh maintains that the circuit court erred when, after finding that an unfavorable evidentiary presumption attached to Gary's failure to produce documentary evidence regarding any trust assets or liabilities that were under his control, the circuit court accepted Gary's testimony that his trusts had no value. She maintains that the unfavorable evidentiary presumption should have resulted in more than an award of attorneys' fees; it should have resulted in a finding unfavorable to Gary as it related to his net worth. Faezeh maintains that the circuit court should have: (1) found that Faezeh established her *prima facie* case and Gary had to rebut the presumption that the value of Gary's asserts would have left Faezeh with the maximum amount recoverable under the antenuptial agreement (\$1,500,000), or (2) stopped the trial and allowed for additional discovery.

¶ 55

Our supreme court has held that an unfavorable evidentiary presumption, or a presumption against the party, arises if that party fails to produce evidence which is under his control. *Tepper v. Campo*, 398 Ill. 496, 505 (1947); *Hudson v. Hudson*, 287 Ill. 286, 298-99 (1919)). This court has more recently held that an unfavorable evidentiary presumption arises if a party fails, without a reasonable excuse, to produce evidence which is under his control. *In re Marriage of Leff*, 148 Ill. App. 3d 792, 803 (1986); *Berlinger's Inc. v. Beef's Finest*,

Inc., 57 Ill. App. 3d 319, 325 (1978); *Dollison v. Chicago, Rock Island & Pacific Railroad Co.*, 42 Ill. App. 3d 267, 277 (1976). However, this presumption does not relieve the plaintiff of the responsibility of establishing her *prima facie* case. *Hudson*, 287 Ill. at 299; *Gage v. Parmelee*, 87 Ill. 329, 343 (1877); *Bethune Plaza Inc.*, 90 Ill. App. 3d at 1141; *Dollison*, 42 Ill. App. 3d at 277.

¶ 56 In *Bethune*, the State of Illinois Department of Public Aid found Bethune Plaza, Inc., a nursing home, guilty of receiving kickbacks from a pharmacy. *Bethune Plaza Inc.*, 90 Ill. App. 3d at 1135. The only evidence introduced at the hearing was records and checks of the pharmacy and testimony that Bethune refused to produce invoices to the pharmacy or to explain the checks. *Bethune Plaza Inc.*, 90 Ill. App. 3d at 1135. Bethune's officers refused to answer questions and asserted their Fifth Amendment rights at the hearing. *Bethune Plaza Inc.*, 90 Ill. App. 3d at 1135. The circuit court affirmed the Department's decision. *Bethune Plaza Inc.*, 90 Ill. App. 3d at 1135. Bethune appealed and the appellate court was charged with determining whether the Department's decision was supported by the evidence. *Bethune Plaza Inc.*, 90 Ill. App. 3d at 1139. On appeal, the Department maintained that Bethune's failure to produce evidence at the hearing gave rise to a presumption that the evidence withheld was adverse to Bethune. *Bethune Plaza Inc.*, 90 Ill. App. 3d at 1140. The appellate court found that an unfavorable evidentiary presumption does not relieve the plaintiff from the burden of establishing a *prima facie* case and that the Department did not establish a *prima facie* case when it failed to produce any evidence showing that any money received by Bethune from the pharmacy was in return for Bethune's channeling business to it in

connection with Medicare-Medicaid patients. *Bethune Plaza Inc.*, 90 Ill. App. 3d at 1141. Accordingly, the appellate court reversed the circuit court. *Bethune Plaza Inc.*, 90 Ill. App. 3d at 1141.

¶ 57 Here, like the Department in *Bethune*, Faezeh did not present evidence which established a *prima facie* case that Gary's net worth was positive despite issuing numerous subpoenas to entities and individuals with whom Gary had a business relationship. The only testimony Faezeh presented was her own and the testimony of Gary and Mr. Tenenbaum. Faezeh admitted that she had no knowledge of Gary's net worth and Mr. Tenenbaum testified to Gary's estate planning and his trusts but he offered no evidence as to the value of Gary's trust or liabilities. Only Gary testified to the actual value of his trusts and the evidence presented established that Gary's net worth was negative. There is no evidence in the record that Gary destroyed evidence. In addition, Faezeh did not call Gary's accountant, Mr. Maheras as a witness, she did not call the third party respondents as witnesses, and she did not request default judgments against the third party respondents. Finally, Faezeh did not proffer for admission into evidence the Donald Bruce balance sheets or the tax returns from Mr. Maheras.

¶ 58 The circuit court found that Gary did not comply with the discovery rules and found an unfavorable evidentiary presumption with respect to the possibility that other trusts could have existed. Because of that finding the circuit court sanctioned Gary with attorneys' fees. We cannot find that Gary withheld or destroyed evidence that would prove Gary's trusts had

a positive value when Faezeh did not present evidence which established a *prima facie* case that Gary had a positive net worth.

¶ 59 Faezeh cannot establish her *prima facie* case by merely asserting that because Gary did not produce documents that she requested in her notice to produce, that Gary's trusts had value. Faezeh must present evidence to establish her *prima facie* case even when an unfavorable evidentiary presumption attaches. *Bethune Plaza Inc.*, 90 Ill. App. 3d at 1141. Therefore, we find that the circuit court's judgment was not against the manifest weight of the evidence when it found that Gary's net worth was negative. *Bethune Plaza Inc.*, 90 Ill. App. 3d at 1141. Accordingly, we affirm the circuit court's March 4, 2014 judgment of dissolution of marriage with respect to Gary's net worth.

¶ 60

CONCLUSION

¶ 61

The circuit court erred in its judgment of dissolution of marriage when it relied solely on Gary's testimony and did not consider documentary evidence that contradicted Gary's testimony and supported the rebuttable presumption that Gary's voluntary transfer of his mother's jewels to Faezeh was a gift. *Welch*, 330 Ill. at 230-32; *Vallarta*, 12 Ill. App. 3d at 116. Even when there is an unfavorable evidentiary presumption because one party fails to produce evidence under his control, the other party is still required to present evidence which establishes a *prima facie* case. Therefore, because Faezeh did not present evidence which established her *prima facie* case of Gary's net worth, the circuit court's judgment was not against the manifest weight of the evidence. *Bethune Plaza Inc.*, 90 Ill. App. 3d at 1141.

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Accordingly, we affirm the judgment of the circuit court in part and reverse in part with directions consistent with this order.

¶ 62 Affirmed in part and reversed in part; cause remanded with directions.