2016 IL App (2d) 160065-U
No. 2-16-0065
Order filed September 12, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF JEFFREY T. JONES, Petitioner-Appellee, v. CYNTHIA JONES, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 14-DV-34 Honorable Mark R. Gerhardt, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's judgment dissolving the parties' marriage was affirmed where: (1) respondent's arguments regarding stock options that petitioner may or may not receive in the future were both forfeited and not ripe for adjudication; (2) the court did not abuse its discretion in declining to require petitioner to compensate respondent's mother for child care services; (3) the court properly classified a portion of petitioner's 401(k) account as his nonmarital property; and (4) the court did not err in failing to take into account certain repairs to the marital residence that were paid for by respondent in anticipation of selling the home.

¶ 2 Respondent, Cynthia Jones, appeals from the order dissolving her marriage to petitioner, Jeffrey Jones. She argues that the court erred in: (1) failing to consider Jeffrey's stock options as income and in excluding the same from the calculation of the child support award; (2) failing to

allocate child care expenses to Jeffrey beyond those associated with the parties' *au pair*; (3) classifying a portion of Jeffrey's 401(k) account as nonmarital property; and (4) failing to take into account certain repairs and maintenance that Cynthia undertook in anticipation of selling the marital residence. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The parties were married on July 12, 1997. They have four minor daughters. On January 14, 2014, Jeffrey filed a petition for dissolution of marriage. In July 2014, the trial court approved a joint parenting agreement that designated Cynthia as the primary residential custodian. The matter proceeded to trial over the course of six days between June 30 and October 16, 2015. Only the parties testified. On December 31, 2015, the court entered an order dissolving the parties' marriage. That order contained language pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016), and Cynthia timely appealed. In the analysis section, we will address the facts that are pertinent to Cynthia's specific arguments on appeal.

¶ 5 II. ANALYSIS

¶ 6 (A) Child Support and Jeffrey's Stock Options

¶ 7 Jeffrey has been employed by Workday Incorporated for four years doing "technical sales." His base salary at the time of trial was $135,000 per year. On top of that, he earned quarterly bonuses and commissions. Jeffrey also described four types of stock benefits that he received through his employment: initial public offering stock, restricted stock units, performance stock units, and the employee stock purchase program. Some of his stock benefits were vested and others were not.

¶ 8 In his written closing argument, Jeffrey proposed that he should pay child support in the base amount of $3,037 per month, along with 26% of any gross income over his base salary per

calendar month. He acknowledged that his stock options were marital property and were subject to division by the court. To prevent potential tax problems, and to avoid having to cooperate with Cynthia to transfer stock, he proposed that he should be awarded all of the vested and unvested stock as part of his portion of the marital property.

¶ 9 In her written closing argument, Cynthia contended that Jeffrey's base child support obligation should be $3,093 per month. Additionally, she asked that he pay 27.49% of his gross income in excess of $11,250 per month ($135,000 ÷ 12 = $11,250). With respect to the stock options, she argued:

> "Third, Jeffrey receives various types of stock compensation. This compensation is in the form of Restricted Stock Units, Performance Stock Units and other forms. *Upon exercise of any of these items allocated to Jeffrey, he ought be obligated to pay a share of his net after tax proceeds for child support purposes.* Unfortunately, there are issues as to the tax rate because this may qualify for long term or short term capital gain [*sic*] treatment. Jeffrey ought be required to pay child support based upon his incremental tax rate associated with the *sale or exercise* of such options.
>
> An alternative to the payment on bonus income and stock related compensation is to have Jeffrey pay Cynthia a set percentage such as 28% of the gross bonuses and other income *upon receipt of such funds* and then reconcile upon the filing of his income tax return to account for the exact amount of support he is to pay. If he has under paid [*sic*] then he must pay the difference to Cynthia within 7 days. If he has overpaid, then he is entitled to credit against future payments on such compensation. This would require that Jeffrey provide his income tax returns to Cynthia upon filing, but no later than April 30 of each year." (Emphasis added.)

Later in her closing her argument, Cynthia again insisted that Jeffrey should pay child support when he exercised his stock options:

> "With respect to stock related compensation, Jeffrey should pay this *upon exercise of his stock options or compensation*, except for that upon emancipation of each of the children for which he should pay the related child support based upon the market value/equity in such remaining stock related grants at the date of emancipation. This will avoid manipulation of waiting until a child is emancipated to *exercise options or sell such stock* thereby avoiding support on income that is ready for the taking but avoided to limit or reduce Jeffrey's child support obligation." (Emphasis added.)

Cynthia requested that the stock interests be divided equally between the parties, but she recognized that it might not be possible to assign the stock to her "on the corporate books." She suggested that the stock could remain in Jeffrey's name and that she could notify him when she intended to exercise the options.

¶ 10 In dividing the marital property in equal proportions, the trial court assigned all of the Workday stock benefits, vested and unvested, to Jeffrey. The court ordered Jeffrey to pay $3,049 per month as his base child support obligation. Jeffrey was also ordered to pay 27.1% of any amounts he received in excess of his base salary of $11,250 per month. Presumably in response to Cynthia's arguments about the potential value of Jeffrey's stock options at the time the children are emancipated, the court "decline[d] to predict the future and order any payments resulting from future income derived from some other source." The court ordered the parties to provide their paystubs to each other four times per year. The judgment of dissolution also required the parties to produce their tax returns to each other within 21 days of filing.

¶ 11 On appeal, Cynthia argues that Jeffrey's stock options should be factored into his child support obligation when such options vest, not when they are exercised. Not only did she fail to raise this argument in the trial court, she actually argued the opposite. Cynthia's newly raised argument is forfeited. See *In re Marriage of Winter*, 2013 IL App (1st) 112836, ¶ 27 (an appellant may not raise issues for the first time on appeal).

¶ 12 Moreover, there is a more fundamental problem: the matter is not ripe for adjudication. "The ripeness doctrine establishes the rule that courts will not render a decision unless a justiciable case or controversy exists and, notably, a hypothetical case or controversy does not satisfy the requirements of the ripeness doctrine." *Simcox v. Simcox*, 131 Ill. 2d 491, 498 (1989). Cynthia clarifies in her reply brief that she is talking only about stock options that Jeffrey may receive from his employment *subsequent to* the dissolution of marriage, not the stock options that he was awarded in the judgment of dissolution. To that end, she attempts to draw a legal distinction between stock options that are earned during the marriage and options that are earned following the divorce. Aside from the fact that Cynthia never raised this argument in the trial court, Jeffrey may or may not be awarded stock options subsequent to the dissolution of marriage, and such options may or may not vest. There is no way to predict how long Jeffrey will work for his present company.

¶ 13 We note that, pursuant to the judgment of dissolution, Jeffrey must pay Cynthia 27.1% of any income that he receives in excess of his base salary. It appears that Jeffrey concedes that income derived from the sale of stock falls within this 27.1% obligation. The only dispute between the parties is *when* any stock options that Jeffrey may receive following the dissolution will become income for purposes of child support: *i.e.*, at the time of vesting or when such options are exercised. We cannot address this hypothetical issue in the abstract. If and when

Jeffrey is awarded stock options after the dissolution, and if and when such options subsequently vest, the parties may litigate the matter in post-dissolution proceedings if they cannot reach an agreement.

¶ 14 (B) Additional Child Care Expenses

¶ 15 Cynthia also contends that the court erred in failing to allocate child care expenses to Jeffrey beyond the expenses associated with the parties' *au pair*.

¶ 16 Both Cynthia and Jeffrey travel extensively for their respective careers. Cynthia's mother moved into the marital home in 2002. From 2002 to 2005, the parties paid her $400 per week to provide child care services. They hired an *au pair* in 2005 and stopped paying Cynthia's mother. However, Cynthia's mother continued to reside at the marital home, and she has helped the parties with child care as needed since then without compensation. Jeffrey moved out of the marital residence in early 2014. When Cynthia subsequently moved to Oak Brook during the pendency of these proceedings, her mother moved with her.

¶ 17 The *au pair* now provides child care services at Cynthia's home in Oak Brook. The *au pair* is only contractually permitted to work 45 hours per week and 10 hours per day. Because Cynthia travels frequently during the workweek, her mother cares for the children when the *au pair* cannot. The need for additional child care is apparently greatest during the overnight hours when Cynthia is traveling.

¶ 18 Cynthia calculated that her mother provides 24-25 hours of child care per week. According to Cynthia, her mother is not willing to continue providing child care without compensation after the parties' divorce. Cynthia testified that she wanted to pay her mother $12 per hour for her services. Cynthia apparently invoiced Jeffrey for such services, but neither Cynthia nor Jeffrey paid Cynthia's mother. As an alternative to paying her mother, Cynthia

testified that she could hire a full-time nanny for $50,000 to $60,000 per year, plus benefits. Jeffrey's position was that Cynthia had complete control of the *au pair*'s schedule and could be more judicious in allocating the *au pair's* available hours.

¶ 19 The trial court divided the *au pair* expenses between the parties but did not order Jeffrey to contribute to additional child care expenses. The court indicated that it generally found Jeffrey's testimony at trial to be more credible than Cynthia's. The court added that Cynthia's testimony was "perhaps nowhere more suspect than when discussing her need for childcare, her move to Oak Brook, and all the resounding effects upon the use of the *Au Pair* [*sic*]."

¶ 20 Cynthia argues that the court erred in failing to allocate child care expenses to Jeffrey beyond those expenses associated with the *au pair*. In addition to establishing a guideline child support obligation, the trial court has discretion to order a parent to contribute to childcare expenses. 750 ILCS 5/505(a)(2.5) (West 2014)[1]; *In re Marriage of Moorthy*, 2015 IL App (1st) 132077, ¶ 74. "An abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful, or unreasonable, or when its ruling rests on an error of law." *McClure v. Haisha*, 2016 IL App (2d) 150291, ¶ 20.

¶ 21 We find no abuse of discretion. The trial court simply did not deem Cynthia's testimony regarding the need for additional child care to be credible. "It is the function of the trial court to assess the credibility of the witnesses and determine the weight to be afforded their testimony."

[1] Many sections of the Illinois Marriage and Dissolution of Marriage Act were amended the day after the trial court entered its judgment of dissolution. See Public Act 99-90 (eff. Jan. 1, 2016). We apply the version of the statutes that were in effect at the time of trial. *In re Marriage of Asta*, 2016 IL App (2d) 150160, ¶ 16 n.1.

In re Marriage of DeBow, 236 Ill. App. 3d 1038, 1050 (1992). In light of the fact that Cynthia's mother lives with her rent-free and has not been compensated for child care services since the parties got an *au pair* more than 10 years ago, the trial court's ruling was not arbitrary, fanciful, or unreasonable. The fact that Cynthia has sent invoices to Jeffrey but has failed to pay her mother herself also supports the trial court's judgment.

¶ 22 (C) Jeffrey's 401(k)

¶ 23 Cynthia next disputes the trial court's finding that a portion of Jeffrey's 401(k) account was his nonmarital property, having been traced to a pre-marital source.

¶ 24 Jeffrey's Oracle Corporation 401(k) account had a value of approximately $650,000 at the time of trial. Jeffrey contended that $19,721.99 of that amount was his nonmarital property because he earned it when he worked for Andersen Consulting from 1992 to 1996, before he met Cynthia. He explained that the Andersen funds were deposited into the Oracle account as a direct rollover shortly after the parties married. He testified that he was positive that he did not deposit the $19,721.99 into any other account or spend the money on any other item. Jeffrey subsequently made additional contributions to the Oracle account. There is no dispute that the Oracle account is marital property, apart from the $19,721.99 at issue.

¶ 25 Jeffrey relied on his trial exhibit number 26 to support his testimony. The first page of that exhibit was a "confirmation of payment" from Andersen Benefits Center dated August 28, 1997. That statement reflects that Jeffrey rolled $19,721.99 from his Andersen 401(k) account into some other account, but it does not identify the account into which Jeffrey deposited the funds. The second and third pages of the exhibit are duplicates of each other, and they indicate that a lump sum check was issued on August 28, 1997, in the amount of $19,721.99. The last two pages of exhibit 26 appear to reflect Jeffrey's investments in the Oracle 401(k) account as of

October 13, 1997. These documents show that the Oracle account had a $0 balance as of June 30, 1997 (about two weeks prior to the parties' marriage); between June 30 and September 30, 1997, there were contributions to the account totaling $20,761.73, along with earnings and interest/dividends of $658.09.

¶ 26 Cynthia testified that the $19,721.99 was not Jeffrey's pre-marital asset. Her understanding of a pre-marital asset was "one that could be traced back." She testified that the funds at issue "got combined with a bunch of other marital assets" and could not be traced back.

¶ 27 The trial court found that $19,721.99 of the Oracle account was Jeffrey's nonmarital property. The court reasoned that this amount was earned by Jeffrey prior to the marriage while working with a previous employer. The court also found that the funds were "clearly traceable as evidenced by Petitioner's Exhibit No. 26 and Petitioner's credible testimony."

¶ 28 The Oracle account was apparently opened during the marriage, so there is a rebuttable presumption that it is marital property. *In re Marriage of Asta*, 2016 IL App (2d) 150160, ¶ 16. Jeffrey could rebut that presumption by providing clear and convincing evidence that one of the exceptions detailed in section 503(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/503(a) (West 2014)) applied. *Asta*, 2016 IL App (2d) 150160, ¶ 16. At the time of trial, section 503(a)(6) of the Act provided that nonmarital property includes property acquired before the marriage. 750 ILCS 5/503(a)(6) (West 2014).[2] We will not reverse the trial

[2] This provision has since been amended to provide that nonmarital property includes "property acquired before the marriage, except as it relates to retirement plans that may have both marital and non-marital characteristics." Public Act 99-90 (eff. Jan. 1, 2016) (amending 750 ILCS 5/503(a)(6) (West 2014)). As previously noted, we must apply the version of the Act that was in effect at the time of trial.

court's classification of property unless the decision is against the manifest weight of the evidence. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 44. "A decision is against the manifest weight of the evidence only when an opposite conclusion is clearly apparent or when the court's findings appear to be unreasonable, arbitrary, or not based upon the evidence." *Romano*, 2012 IL App (2d) 091339, ¶ 44.

¶ 29 Cynthia's primary complaint is that no document introduced at trial directly states that the $19,721.99 was rolled from the Andersen account to the Oracle account. She argues that *In re Marriage of Didier*, 318 Ill. App. 3d 253 (2000), required Jeffrey to submit documentation proving that he deposited the Andersen funds into the Oracle account. To that end, she proposes that the documents in exhibit 26 did not eliminate the possibility that Jeffrey made contributions to the Andersen account between July 12, 1997 (the date the parties married), and August 28, 1997 (the date the check was issued from the Andersen account). Additionally, Cynthia contends, "there is no way to distinguish which portion of the $19,721.99 was earned between July 12, 1997 and August 28, 1997, and how much of those earnings experienced gains during the marriage." She adds that it is "not inconceivable that one or more of Jeffrey's investments within the Anderson [*sic*] Consulting account did particularly well and had significant gains in the month and a half after Jeffrey and Cynthia were married." She also notes that the October 1997 Oracle statement indicated that Jeffrey made deposits during the statement period totaling $20,761.73, not $19,721.99.

¶ 30 The trial court's ruling was not against the manifest weight of the evidence. Based on the parties' trial testimony, there is no actual dispute that Jeffrey worked at Andersen before the marriage and that he accrued certain benefits while working for that company. Nor is there any basis in the record to support Cynthia's speculation in her brief that Jeffrey made contributions to

the Andersen account after the parties were married. Moreover, even if a portion of the $19,721.99 at issue was attributable to interest or gains that accrued during the first month and a half of the parties' marriage, those gains were Jeffrey's nonmarital property. See 750 ILCS 5/503(a)(7) (West 2014) (nonmarital property includes the increase in value of property that was acquired before the marriage). The only question for this court to decide is whether the trial court could have reasonably concluded that Jeffrey traced the disputed funds back to the Andersen account. Contrary to Cynthia's argument, Jeffrey indeed provided documentation corroborating his testimony. Viewed collectively, the documents in exhibit 26 support Jeffrey's testimony that he rolled the balance of his pre-marital Andersen 401(k) into the Oracle account. Furthermore, the trial court found Jeffrey's testimony to be credible.

¶ 31 Cynthia relies heavily on *Didier*. One of the issues in that case was whether the petitioner had shown by clear and convincing evidence that she acquired a certain home and lot via one of the means specified in section 503(a) of the Act. *Didier* 318 Ill. App. 3d at 261-62. The appellate court noted that although the petitioner testified that she acquired the property using the proceeds from the sale of her nonmarital condominium, she provided neither testimony nor documentary evidence tracing the funds. *Didier*, 318 Ill. App. 3d at 262. The court insisted that it was not holding "that a party's testimony may never rise to the level of clear and convincing evidence on the issue of tracing." *Didier*, 318 Ill. App. 3d at 262. Instead, according to the court, "under the circumstances before us, the bare assertion of a nonmarital *source* of a particular sum of money, without supporting documentary evidence such as account records, deposit slips, canceled checks, *etc.*, cannot be deemed clear and convincing." (Emphasis in original.) *Didier*, 318 Ill. App. 3d at 262. Another issue in *Didier* was whether four investment accounts worth approximately $500,000 were the petitioner's nonmarital property. *Didier*, 318

Ill. App. 3d at 264. In support of her contention that the accounts were her nonmarital property, the petitioner merely submitted current balance statements for each account and testified as to the nonmarital source of the funds. *Didier*, 318 Ill. App. 3d at 265. The appellate court explained that, to meet her burden of proof, the respondent "was required to trace the asserted nonmarital source of the funds in the accounts by clear, convincing and affirmative evidence—that is, to differentiate among otherwise fungible dollars X,Y, and Z." *Didier*, 318 Ill. App. 3d at 265. The court determined that the current balance statements for the accounts "failed to satisfy the tracing requirement of affirmatively identifying the *source* of the funds." (Emphasis in original.) *Didier*, 318 Ill. App. 3d at 265.

¶ 32 *Didier* is readily distinguishable. Jeffrey provided clear and unrebutted testimony tracing the $19,721.99 at issue back to the pre-marital Andersen account. He also submitted records that corroborated his testimony and identified the source of the funds. Although Cynthia alerted the trial court to the various perceived shortcomings in Jeffrey's documentation, the court found that Jeffrey met his burden to show that a portion of the Oracle account was his nonmarital property. We cannot say that the court's ruling was against the manifest weight of the evidence.

¶ 33 We note that Cynthia does not raise any argument regarding the transmutation of nonmarital property into marital property due to comingling. See 750 ILCS 5/503(c) (West 2014). Any argument that she could have made along those lines is now forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (points not argued in the appellant's opening brief are forfeited).

¶ 34 (D) Maintenance/Repair of the Marital Residence

¶ 35 Finally, Cynthia argues that, when dividing the proceeds of the sale of the parties' marital home, the court erred in failing to take into account the repairs and maintenance that she undertook in preparation of the sale.

¶ 36 Jeffrey moved out of the marital residence in early 2014. Cynthia subsequently spent approximately $28,000 for home repairs. For example, she refinished the hardwood floors, painted, cleaned the carpets, removed trees, and repaired planks on the back porch. She also had the furnace and air conditioning unit replaced. Cynthia testified that she discussed the matter with Jeffrey before she incurred these expenses, but he would not pay for them. The parties offered conflicting testimony as to whether these repairs were necessary to sell the home. They also disagreed as to an appropriate listing price. A potential sale that was pending at the time of trial fell through. In her closing argument, Cynthia argued that Jeffrey should be responsible for reimbursing her for the costs incurred in preparing to sell the home.

¶ 37 The trial court determined that all of the parties' property, apart from $19,721.99 of the Oracle 401(k) account, was marital. After considering the factors listed in section 503(d) of the Act, the court found that it was appropriate to divide the assets and liabilities equally between the parties. One of the statutory factors that a court must consider when apportioning marital property is "the contribution of each party to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property, including (i) any decrease attributable to a payment deemed to have been an advance from the parties' marital estate under subsection (c-1)(2) of section 501 and (ii) the contribution of a spouse as a homemaker or to the family unit." 750 ILCS 5/503(d)(1) (West 2014).[3] Addressing Cynthia's request for reimbursement for home repairs, the court ruled as follows:

> "Respondent claims that her expenditures to prepare the marital residence for sale should be attributed to her as a contribution to the increase of the value in that marital property.

[3] This provision has also been amended since the time of the trial in this matter. See Public Act 99-90 (eff. Jan. 1, 2016) (amending 750 ILCS 5/503(d)(1) (West 2014)).

> However, the marital residence is found to be a marital asset. The income of both parties during the marriage are marital assets. Therefore, any increase in value, none of which was clearly shown at trial, that could be attributable to the Respondent taking responsibility for these actions was done so with marital funds; i.e., the income of one of the parties, and it is not a deciding factor in the division of property."

With respect to this same statutory factor, the court found that Cynthia had actually *decreased* the value of the marital property by approximately $6,000 by filing her 2014 tax returns individually rather than jointly and claiming numerous deductions which resulted in "an imbalance of funds." The court ultimately ordered the marital residence to be sold and the proceeds divided equally between the parties.

¶ 38 The trial court has discretion in distributing marital property, and we will not disturb the judgment unless that discretion has been abused. *In re Marriage of Henke*, 313 Ill. App. 3d 159, 175 (2000). Cynthia argues that the trial court should have required Jeffrey to reimburse her out of the home sale proceeds for half of the cost of the repairs. She contends that the court "should not have summarily dismissed" her contributions simply because she paid for the repairs with her marital income. Additionally, she notes that she paid for some of the work with credit cards and that some of that debt remains unpaid. According to Cynthia, it is "common sense" that such repairs would make the home more valuable and marketable. She further argues that the court abused its discretion by refusing to admit certain repair invoices that she intended to offer at trial.

¶ 39 The trial court did not abuse its discretion in distributing the proceeds from the sale of the marital home equally. Cynthia focuses exclusively on the "contribution to the marital estate" factor, completely ignoring the other statutory factors that the trial court considered when determining that an equal distribution of the marital property was appropriate. "While the award

of a larger share of marital property to one spouse may be justified in proper circumstances because of that spouse's greater contribution to the marital estate [citations], caution is required to avoid placing too much emphasis on that factor." *In re Marriage of Rapacz*, 135 Ill. App. 3d 1045, 1049 (1985). The trial court also found that Cynthia actually *decreased* the value of the marital property to a certain extent by unilaterally filing a separate income tax return for 2014 rather than filing jointly. Cynthia does not contest that finding.

¶ 40 The parties disagreed about the necessity of the expenses that Cynthia incurred, and the trial court could have found Jeffrey's testimony on this issue to be more convincing than Cynthia's. The court made a general observation in its ruling that Jeffrey was the more credible witness. See *In re Marriage of Jacks*, 200 Ill. App. 3d 112, 119 (1990) ("This court will not second guess the trial court's determination regarding the credibility of witnesses.").

¶ 41 Moreover, although Cynthia emphasizes that she paid for some of the disputed expenses with her credit card, she signed a stipulation during trial that "[e]ach party shall pay his or her own credit card debts without offset against other assets or liabilities." "A stipulation is an agreement between parties or their attorneys with respect to the business before the court, and, generally, matters which have been stipulated to by the parties cannot be disputed on appeal. *In re Marriage of Galen*, 157 Ill. App. 3d 341, 344 (1987).

¶ 42 To the extent Cynthia argues that the court abused its discretion by excluding her repair invoices based on relevance, any error was harmless because the court later allowed her to testify that she spent $28,000 to repair and maintain the home. The court heard Cynthia's arguments on these points and reasonably concluded that her contributions did not justify reimbursement.

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we affirm the judgment of the circuit court of McHenry County.

¶ 45 Affirmed.