2017 IL App (2d) 151174-U
No. 2-15-1174
Order filed June 28, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF MARTIN BIEDERMANN, Petitioner/Counter-Respondent- Appellee and Cross-Appellant, and ELIZABETH BIEDERMANN, Respondent/Counter-Petitioner- Appellant and Cross-Appellee.	))))))))))))	Appeal from the Circuit Court of Lake County. No. 13-D-1775 Honorable Elizabeth M. Rochford, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Jorgensen and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's classification of an investment account as marital property was not against the manifest weight of the evidence where it was titled in wife's name and funded exclusively with husband's non-marital property. Also, the trial court did not abuse its discretion in awarding maintenance to respondent for a specified term without providing an explicit means to extend the duration of maintenance. Therefore, we affirmed.

¶ 2 Respondent, Elizabeth Biedermann, appeals from portions of the judgment dissolving her marriage to petitioner, Martin Biedermann. Elizabeth contends that the trial court erred in finding that she failed to rebut the presumption that an investment account titled in her sole name

was marital property, and erred in awarding her maintenance for a specified term without also making it reviewable or otherwise providing an explicit means by which the duration of maintenance could be extended. Martin cross-appeals, arguing that the trial court erred in not classifying the investment account as his non-marital property. Because both parties failed to rebut the presumption that the account was marital property, and because the judgment does not preclude Elizabeth from seeking to modify the maintenance award upon a showing of a substantial change in circumstances, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Martin and Elizabeth were married on May 20, 2000, and one child was born of the marriage in 2006. Martin filed a petition for dissolution of marriage on September 30, 2013, and Elizabeth thereafter filed an answer and a counter petition. A trial was held over four days in March and April 2015.

¶ 5 At trial, Martin testified as follows. He saw an estate planning attorney in 2002 because he had recently married Elizabeth and had enough funds at the time to worry about estate taxes. He and Elizabeth set up a trust, and their estate planning attorney recommended splitting their accounts between them. He could not remember whether the estate planning attorney advised him on how to title certain accounts. Soon after seeing the attorney, Martin opened an Ameritrade investment account in Elizabeth's sole name, which he intended to use for long term savings and inexpensive stock trades. Martin opened the account in Elizabeth's name, rather than in the name of Elizabeth's revocable living trust, because he "thought that the trust was good by itself and wasn't aware that [the Ameritrade account] needed to be set up that way."

¶ 6 From approximately 2003 to 2007, Martin received various gift funds from his father in the form of checks payable to Martin totaling "at least $400,000." He had no documents that

would reflect the total more precisely. Martin recalled that the first gift check he received from his father was for $100,000. He deposited most of the checks his father gave him into the Ameritrade account, but "some of them might have gone into the marital account." He conducted stock trades in the Ameritrade account by logging on to the Ameritrade website and utilizing its on-line trading dashboard. He made all of the stock trades listed on the parties' 2011 and 2012 income tax returns. He usually opened the monthly Ameritrade statements that were mailed to the marital residence.

¶ 7 A stockbroker was assigned to the Ameritrade account, who Martin met with at the broker's office at least four or five times. The broker also handled the pension and profit-sharing funds for Martin's company, Biedermann & Sons. To Martin's knowledge, Elizabeth had never spoken with the broker until 2006 or 2007, when they met him at a function held at Arlington Park. On several occasions, Martin conducted trades that required the broker's assistance, including purchasing shares during certain initial public offerings (IPOs). Martin used his personal e-mail account to communicate with the broker. Martin gave Elizabeth the password for his personal e-mail account at some point, but she did not access it regularly. The e-mail account Elizabeth regularly accessed was an account that Martin had set up prior to the marriage. Martin also exchanged several e-mails with the broker in an effort to obtain a line of credit when they needed funds for a home improvement project at the marital residence. When the document for the line of credit arrived, he gave it to Elizabeth to sign.

¶ 8 Martin never told Elizabeth that he was gifting the funds in the Ameritrade account to her, nor did he intend to make a gift of the account to her. Prior to the initiation of the divorce proceedings, Elizabeth never said anything to Martin that indicated to him that she believed the funds in the Ameritrade account were a gift.

¶ 9 After Martin filed for dissolution of their marriage, Elizabeth changed the username and password for the Ameritrade account, after which Martin was unable to access the account. Nevertheless, Martin continued to effectuate trades by emailing Elizabeth instructions regarding what stocks he wanted to buy or sell. Elizabeth generally followed these instructions, and Martin could not recall any instance when Elizabeth refused to make a trade that he requested. Martin agreed that after losing on-line access to the account, he would have been unable to withdraw any funds from the Ameritrade account. Subsequent to Elizabeth seeking the Ameritrade account as her non-marital property in the dissolution action, Martin opened an Ameritrade account solely in his name because he wanted to be assured that it was his non-marital property. Said account contained gift funds that he received for Christmas and his birthday from his mother.

¶ 10 Elizabeth testified as follows. While they were at home sometime in 2002 or 2003, she and Martin had a conversation concerning the Ameritrade account, and Martin told her that he was giving her the account as a gift and that he was "setting up a stock account for [her]." She could not recall if anyone else was present during the conversation or what she replied to Martin, if anything. She never asked Martin why he was gifting the money to her, and she could not recall if Martin ever told her why he was making the gift to her. She had not asked him for the gift. She had a "pretty good indication" as to why Martin gifted her the account, which was related to activity in which she caught him engaging at work prior to making the gift. Martin did not reference this activity during their conversations regarding the gift, and their marital trouble was not mentioned in relation to the Ameritrade account or to any deposit to it. Elizabeth did not make any deposits into or withdrawals from the account. They had a subsequent conversation at

their home that may have been within a year of the prior conversation, wherein she asked Martin about a tax return. During that conversation, Martin identified the account as a gift to her.

¶ 11 After Elizabeth changed the username and password to the Ameritrade account, she did not always follow Martin's directions regarding buys and sells. She instead relied on her own independent judgment on whether or not to place the trades. She also made trades on her own. Prior to the divorce filing, she did not handle the Ameritrade account herself, but she discussed it with Martin at least monthly. Martin solicited Elizabeth's input regarding whether she thought certain IPOs would be a good investment. She received daily e-mails from Ameritrade informing her of the account balance. During conversations with her, Martin would refer to the Ameritrade account as "your account," meaning Elizabeth's. The value of the Ameritrade account as of March 2015 was in excess of $552,000.

¶ 12 Richard Greenswag testified as follows. He was an attorney specializing in business law and estate planning for 35 years. He met with Martin and Elizabeth regarding estate planning in 2002, and he prepared a pour-over will and living revocable trust for each of them. Both of the wills provided that assets in a party's estate would pass to their respective living trust. Each party was the beneficiary and trustee of their respective trust, with the other spouse named as primary successor trustee. Upon the death of one spouse, the surviving spouse would have a right to receive the income from the other spouse's trust, as well as a limited ability to invade the trust's principal. Though he could not recall their exact conversation, he would have advised the Biedermanns to fund the trusts during their lifetimes. He has had clients who formed trusts but failed to transfer title of assets into the trust's name. It was his impression that Martin knew how to transfer title to a revocable living trust. He did not assist Martin in transferring any assets, and he would not have advised Martin to transfer assets into Elizabeth's sole name.

¶ 13 Greenswag also testified generally regarding estate planning, including the benefits of reducing estate taxes and avoiding probate through the use of wills and trusts. He recommends placing assets into a revocable living trust rather than in one's own name to in order to avoid probate. He also testified that the unified credit is a tax credit given against estate taxes. The unified credit was about $1 million per person in 2002, and it could be utilized regardless of whether assets were titled individually or in the name of a trust. He explained that if an unmarried person passed away with a $2 million dollar estate, the unified credit would offset the tax liability of the first million dollars, and taxes would be incurred beginning with the second million. If a married couple had $2 million in assets that were all in one spouse's name, there would be a risk that if the other spouse passed away first, they would be unable to take advantage of their unified credit exemption. That same married couple could structure their estates so that no tax would be owed by having the spouse with $2 million in assets transfer title to $1 million in assets to the other spouse so that it did not matter for tax purposes which spouse passed away first. For both spouses to take advantage of their unified credit, they each must have assets either in their name or titled to their trust. For clients such as the Biedermanns, if one spouse did not have sufficient assets to fully fund the unified credit exemption, he would advise them to transfer enough funds to that person so that he or she could also take advantage of the credit.

¶ 14 The parties submitted written closing arguments to the trial court. Elizabeth argued that Martin gifted her the Ameritrade account, and requested she be awarded the account as her non-marital property. She also sought reviewable maintenance in the amount of 30% of Martin's monthly income for eight years. Martin argued that Elizabeth failed to overcome the presumption that the Ameritrade account was marital property, and argued that the evidence

instead established that the account was his non-marital property. Martin requested that maintenance be denied.

¶ 15 On August 11, 2015, the trial court entered a judgment of dissolution of marriage. The trial court found that although Martin originally received the money as a gift from his father, Martin "commuted" it to a marital asset when he used it to fund the Ameritrade account that he opened in Elizabeth's name. It then found that Elizabeth failed to overcome the presumption that the account was marital property. The trial court characterized Elizabeth's testimony regarding conversations with Martin wherein he gifted the account to her as "vague and not reliable." It found credible Martin's testimony that he opened the account in Elizabeth's name for marital estate planning purposes. Finding that the funds were part of the marital estate, the trial court divided the account consistent with how it divided the other marital assets—55% to Elizabeth, and 45% to Martin. The trial court also ordered Martin to pay maintenance of $1700 per month for 126 months (10.5 years). Both parties sought reconsideration of the trial court's ruling regarding the classification of the Ameritrade account as marital property, among other issues. Elizabeth's motion raised no disagreement with the maintenance award. On October 28, 2015, the trial court ruled on the parties' respective motions, and reaffirmed its ruling concerning the marital characterization of the Ameritrade account. This appeal and cross-appeal followed.

¶ 16 ANALYSIS

¶ 17 The disposition of property in a dissolution of marriage proceeding is governed by section 503 of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/503 (West 2014)). All property owned by the parties in a dissolution proceeding belongs to one of three estates—the husband's estate, the wife's estate, or the marital estate. *In re Marriage of Werries*, 247 Ill. App. 3d 639, 641-42 (1993). Before a court may dispose of property upon

the dissolution of marriage, it must determine whether the property is marital or non-marital. *In re Marriage of Henke*, 313 Ill. App. 3d 159, 166 (2000). After the trial court classifies the property, it awards each spouse their non-marital property and divides the marital property into just proportions. 750 ILCS 5/503(d) (West 2014). A trial court's classification of property as marital or non-marital will not be disturbed on appeal unless it 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 on the evidence. *Id.*

¶ 18 We first address Martin's cross-appeal, wherein he maintains that the trial court erred in not awarding him the account as his non-marital property. Under the Marriage Act, there is a rebuttable presumption that all property acquired by either spouse during the marriage is marital, regardless of whether title is held individually or in some form of co-ownership. 750 ILCS 5/503(b)(1) (West 2014); *Romano*, 2012 IL App (2d) 091339, ¶ 45. The presumption of marital property can be overcome by clear and convincing evidence that the property was acquired by one of the methods listed in section 503(a) of the Marriage Act (750 ILCS 5/503(a) (West 2014)), which is the exclusive list of non-marital property. *In re Marriage of Smith*, 86 Ill. 2d 518, 528 (1981). The burden of proof is on the party claiming that the property is non-marital. *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1017 (2009). The following types of property are non-marital under section 503(a):

> "(1) property acquired by gift, legacy or descent;
>
> (2) property acquired in exchange for *** property acquired by gift, legacy or descent;
>
> * * *

(7) the increase in value of property acquired by a method listed in paragraphs (1) through (6) of this subsection." 750 ILCS 5/503(a) (West 2014).

¶ 19 Here, Elizabeth does not dispute that the source of the money that funded the Ameritrade account was various gifts that Martin received from his father. As already noted, the trial court made findings to this effect. Thus, Elizabeth all but concedes that Martin rebutted the marital property presumption with respect to the initial receipt of the funds, in that he established that the property was acquired by gift under section 503(a)(1) of the Marriage Act.

¶ 20 Martin argues that the trial court's finding that he "commuted [the funds] to a marital asset when he opened the account in Elizabeth's name" invokes a concept, "commut[ation]," that is not recognized in the law. To the extent the court meant "transmute," he argues that the funds were not transmuted because they were not commingled with marital funds resulting in a loss of identity. He stresses that no funds other than the gifts he received from his father were added to the account at any time, and that the funds were traced back to their non-marital source.[1]

¶ 21 While Martin may well be correct that no funds other than the gifts he received from his father were deposited into the Ameritrade account, his argument fails to acknowledge that property can be transmuted even in the absence of comingling. It is well established that property that would otherwise be classified as non-marital under section 503(a) may be presumptively transmuted into marital property by an affirmative act of the contributing spouse.

[1] We observe that Martin's testimony tracing the gifts from his father lacked exactness. Martin was unsure how many checks he was given, when he deposited them, or in what amounts the checks were made out. However, Elizabeth does not dispute that the funds in the account originated as gifts from Martin's father. Therefore, we can only affirm the trial court's finding that Martin originally received the funds as gifts from his father.

In re Marriage of Olson, 96 Ill. 2d 438-39 (1983); *In re Marriage of Cecil*, 202 Ill. App. 3d 783, 787 (1990); *In re Marriage of Rink*, 136 Ill. App. 3d 252, 257 (1985). "In order to preserve the status of property as non-marital, one must prove that the entire property was acquired exclusively by one of the methods listed in section 503(a), and that its character was not subsequently altered by action of the owner." *Smith*, 86 Ill. 2d at 531. A common example of such an affirmative act is the placement of non-marital property into a joint tenancy or some other form of co-ownership with the other spouse. See, *e.g.*, *Berger v. Berger*, 357 Ill. App. 3d 651 (2005); *Cecil*, 202 Ill. App. 3d 783; *In re Marriage of Marriott*, 264 Ill. App. 3d 23 (1994); *In re Marriage of Orlando*, 218 Ill. App. 3d 312 (1991). Placing non-marital property into a form of co-ownership with the other spouse raises a presumption that a gift was made to the marital estate, and the property will then be deemed marital. *Cecil*, 202 Ill App. 3d at 787; *In re Marriage of Benz*, 165 Ill. App. 3d 273, 280 (1988). The "donor" spouse may rebut the presumption by clear, convincing, and unmistakable evidence that no gift was intended. *In re Marriage of Rink*, 136 Ill. App. 3d 252, 257 (1985). Any doubts as to the nature of the property are resolved in favor of finding that the property is marital. *Schmitt*, 391 Ill. App. 3d at 1017.

¶ 22 Because the marital gift presumption would have arisen had Martin deposited the funds into a joint account bearing both his and Elizabeth's names, we can discern no reason why the presumption should not likewise arise where Martin deposited the funds into an account bearing only Elizabeth's name. Simply put, the fact that the account is not jointly held should not preclude the marital gift presumption from arising where the account is titled only in the name of the spouse who opposes the non-marital characterization. Here, Martin's affirmative act of depositing his non-marital funds into an account bearing only his wife's name raised the presumption that he made a gift to the marital estate. The question, therefore, is whether Martin

rebutted the presumption by clear, convincing, and unmistakable evidence that no gift to the marital estate was intended.

¶ 23 After reviewing all of the evidence and testimony adduced at trial, the trial court's ruling that Martin transmuted the gifts he received from his father into marital property was not against the manifest weight of the evidence. Notwithstanding his testimony concerning his estate planning intent, Martin's actions indicate that he also intended to give Elizabeth a shared present interest in the funds. Importantly, Martin made little effort to preserve the non-marital status of the gifts he received from his father. Upon receipt of each of the checks, Martin deposited them into an account bearing only his wife's name. "There are steps [the husband] could have taken to make sure his nonmarital assets retained their distinct identity, if that was his desire." *In re Marriage of Gattone*, 317 Ill. App. 3d 346, 354 (2000). It is axiomatic that placing non-marital funds into an account bearing only the other spouse's name is inconsistent with the intent to preserve those funds as part of the contributing spouse's non-marital estate.

¶ 24 Martin also took no steps to limit Elizabeth's access to the account. See *Rink*, 136 Ill. App. 3d 252 (husband's non-marital funds remained non-marital despite deposit into joint account where husband did not intend to give wife an ownership interest in the accounts, never allowed her to make a withdrawal, and never gave her access to the passbooks; joint tenancy was established for convenience due to the husband's disability). Elizabeth received daily e-mails from Ameritrade informing her of the account balance, and she had the log-in credentials necessary to access the account on-line. After Martin initiated dissolution proceedings, Elizabeth changed the username and password necessary to access the account, and Martin's access to the account was thus severed. Elizabeth testified that she then began to make trades as she saw fit, in addition to placing "some" of the trades Martin requested. Martin agreed that he could not

place any stock trades on his own during this time, and Elizabeth could have refused to place the trades that he requested. We also note that, although she never withdrew funds from the account, Elizabeth certainly could have at any point.

¶ 25 Martin's trial court petition seeking to regain access to the account is also telling. Therein, he did not argue that the account was his non-marital property, but he instead described it as "the parties [*sic*] Ameritrade account." He also stated that the parties' account at Merrill Lynch, from which he regularly paid marital bills, was nearly exhausted. Martin argued that "[t]he parties need to use the funds in the Ameritrade account to pay bills and get current" in order to "save both their credit." Though these statements may not rise to the level of an admission, they indicate that Martin viewed the Ameritrade account as marital property—even during much of the trial court litigation.

¶ 26 We also observe that Martin testified only to his lack of intent to make a gift specifically to Elizabeth's non-marital estate—at no point did he testify as to his lack of intent to make a gift to the marital estate. Similarly, the trial court findings that Martin points to in his cross-appeal bear only on whether a gift was made to Elizabeth's non-marital estate. The court found Elizabeth's testimony "vague and not reliable" concerning conversations where he told her "the Ameritrade account was a gift *to her*." (Emphasis added.) The court also found that Martin's testimony that the account was opened "in Elizabeth's name for marital estate planning purposes" was credible, and that his "retention of all investment control supported his testimony that he never intended a gift." While these findings were central to the trial court's determination that the funds were not gifted to Elizabeth's non-marital estate, they do not support Martin's argument that the court should have awarded the account to him as *his* non-marital property.

¶ 27 Other than highlighting the lack of commingling, Martin advances no argument in his cross-appeal that attempts to rebut the presumption of a gift to the marital estate, much less rebuts it by clear, convincing, and unmistakable evidence. Because we find that Martin failed to rebut the presumption of a gift to the marital estate, we accordingly reject his alterative argument that he is entitled to reimbursement. See 750 ILCS 5/503(c)(2) (West 2014); See also *Werries*, 247 Ill. App. 3d at 642 (noting that there is no right to reimbursement when a gift has been made).

¶ 28 We next address Elizabeth's arguments. In her appeal, Elizabeth contends that the trial court erred in finding that she failed to overcome the presumption that the Ameritrade account was marital property.

¶ 29 It is possible for one spouse to make a gift of marital property to the other spouse, which the recipient could then claim as their non-marital property. *In re Marriage of Severns*, 93 Ill. App. 3d 122, 125 (1981). A gift is the voluntary gratuitous transfer of property from donor to donee where the donor manifests intent to make such a gift and absolutely and irrevocably delivers the property to the donee. *Romano*, 2012 IL App (2d) 091339, ¶ 51; see also *In re Marriage of Davis*, 215 Ill. App. 3d 763, 772 ("there must be a donative intent to pass title and relinquish all present and future dominion over the property" in order to be a gift).

¶ 30 It is well established that the titling of property in one spouse's name is insufficient to establish a gift to that spouse's non-marital estate. See *In re Marriage of Deem*, 123 Ill. App. 3d 1019, 1021 (1984) (mere proof that title to a tract was placed in one party's name does not rebut the marital presumption of section 503); see also *In re Marriage of Hegge*, 286 Ill. App. 3d 138, 141 (1996) (the Marriage Act creates a rebuttable presumption that all property acquired during the marriage is marital property regardless of the manner in which title is held). "Illinois courts

have expressly rejected the position that transfer of title to one spouse is sufficient to rebut the presumption of marital property, which exists 'regardless of whether title is held individually or by the spouses in some form of co-ownership.' " *Davis*, 215 Ill. App. 3d at 772.

¶ 31 Elizabeth maintains that there is "substantial evidence beyond the manner in which title was held" that Martin made a gift of the Ameritrade account to her. Seeking to establish that Martin had donative intent, Elizabeth relies on her own testimony that Martin told her that he was making a gift of the account to her, and on Martin's testimony that he intentionally opened the account in Elizabeth's name and that he "set [it] up" for her. She also highlights Martin's testimony that he opened a subsequent Ameritrade account in only his name to hold gifts he received from his mother to ensure that those gifts would be his non-marital property. With respect to delivery, Elizabeth argues that Martin was "forced to acquiesce" to her control of the account when she changed the log-in credentials to the account such that Martin could no longer access the account on-line. She states that "[t]he irrevocable nature of the transfer [became] clear when [she] terminate[d] Martin's online access to the account and start[ed] trading [stocks] herself." She also highlights Martin's testimony that he never withdrew funds from the account.

¶ 32 Elizabeth directs our attention to two cases, which she contends are helpful in evaluating the status of the Ameritrade account. In *In re Marriage of Barnett*, 344 Ill. App. 3d 1150 (2003), a husband transferred a joint account containing pre-marital funds into his wife's sole name in an effort to protect it from two pending malpractice suits. *Id*. at 1153-54. At trial, he testified that after transferring the account, he understood that he did not have any ownership interest in it and that it was no longer a joint account, but he anticipated that it would return to joint ownership after he retired. *Id*. at 1154. His wife testified that her husband gave her the account as a gift because he was substantially older than she was and because he wanted her to "feel secure." *Id*.

The trial court ruled that the husband gifted the account to his wife such that it was her non-marital property. *Id*. On appeal, the court held that the trial court's classification of the account as the wife's non-marital property was not against the manifest weight of the evidence. *Id*. at 1155. The appellate court stated that the trial court did not rely on the mere fact of transfer, but that additional evidence supported the ruling. It noted that the trial court specifically stated that it found the wife's testimony more credible than the husband's, and that the husband ceased dealing with the account after the transfer. *Id*.

¶ 33 Elizabeth also points to *In re Marriage of Weiler*, 258 Ill. App. 3d 454 (1994). There, a husband made a $4,000 contribution of marital funds to his wife's individual retirement account (IRA) for tax purposes, and the trial court classified the contribution as marital property. *Id*. at 462. The appellate court reversed, finding that the wife had sustained her burden in proving that the contribution was a gift. *Id*. at 463. The appellate court noted that the husband testified as to his intent to make a gift of the $4,000 and that the money be put into his wife's IRA, as well as to his knowledge that the contribution would be within his wife's sole control.

¶ 34 Martin counters that both cases are factually distinguishable, and instead directs our attention to *Davis*, 215 Ill. App. 3d 763. There, the appellate court reversed a ruling awarding the parties' residence to the wife as her non-marital property based upon the transfer of title to her sole name during the marriage. The appellate court noted that the testimony of the husband and his estate planning attorney established that the residence was conveyed to the wife not as a gift, but "to create more equally divided assets" as part of an estate tax planning scheme. *Id*. at 772-73. The court also noted that the husband continued to control the home by making the mortgage, tax, and insurance payments, and by making improvements to it. *Id*. at 772. In reaching its holding, the appellate court cited with approval *In re Marriage of Parr*, 103 Ill. App.

3d 199 (1981) (marital presumption not rebutted where husband quitclaimed his interest in condominium to wife for business and tax purposes), *In re Marriage of Leff*, 148 Ill. App. 3d 792 (1986) (affirming trial court's determination that husband lacked donative intent when he transferred title to the parties' residence to protect it from a potential malpractice suit, his name remained on the mortgage, and he made all of the mortgage, tax, and insurance payments on the property), and *In re Marriage of Wittenauer*, 103 Ill. App. 3d 53 (1981) (real property acquired during the marriage was not a gift where husband placed title in wife's name as an estate planning device and never relinquished control of the parcel).

¶ 35 Elizabeth attempts to distinguish *Davis* and the cases cited therein by stressing that they all involve the transfer of real property over which the husband continued to exercise dominion and control subsequent to the alleged gifting. She notes that in *Barnett*, the court stated that "the asset in the present case was not a residence over which the donor continued to exercise dominion." *Barnett*, 344 Ill. App. 3d at 1155. She contends that, unlike the husband in *Davis*, Martin "could not do anything with the account that is comparable to paying the bills on the residence and making home improvements." She also argues that, unlike the husband in *Wittenauer*, Martin could not exercise control over the account "the way a farmer can [operate] his farm and [earn] farm income."

¶ 36 We believe that the facts of the instant matter more closely resemble *Davis* than either *Weiler* or *Barnett*, which we view as distinguishable. Notably, in *Weiler*, the husband acknowledged twice at trial that he intended to make a gift of the funds that his wife claimed as her non-marital property, as well as admitted that he surrendered sole control and direction of the funds to her. *Weiler*, 258 Ill. App. 3d at 458. Here, Martin made no such admission, but instead testified that he did not tell Elizabeth that it was a gift to her, nor did he intend it to be. The trial

court found this testimony more credible than Elizabeth's. Martin also retained all investment control subsequent to the alleged gifting, as the trial court found. Said account management was consistent with the parties' established practice, as Elizabeth testified that Martin managed all of their accounts.

¶ 37 Elizabeth argues that Martin admitted that he "set up" the account for her, until Martin's counsel objected. During Martin's testimony, the following exchange occurred.

> "[Elizabeth's counsel]: I am going to show you what has been marked as Respondent's Exhibit Number 10, sir. Is that a statement of that Ameritrade account that you set up for Elizabeth?
>
> [Martin]: It appears to be, yes.
>
> [Martin's counsel]: Well, hold on. I am a little slow on the draw here. His testimony has been that the account was opened in her name, which is a little different than set up for Elizabeth.
>
> [Elizabeth's counsel]: I asked him did he set it up for Elizabeth, and he said 'yes.'
>
> * * *
>
> [Martin's counsel]: Well, but the question hasn't been asked. The question has not been asked, 'Did you set up that account for Elizabeth.'
>
> [Elizabeth's counsel]: Sir, did you set up that account for Elizabeth?
>
> [Martin]: No."

Based on this exchange, it is apparent that Martin did not testify that he made a gift of the account to her non-marital estate. Rather, Elizabeth's counsel asked him to identify a document upon which he would base his next set of questions. When Martin replied "[i]t appears to be,

yes," he was simply identifying a monthly statement from the Ameritrade account rather than conceding that he gifted the account to her.

¶ 38 Although Martin acknowledged that he intentionally opened the account in Elizabeth's name, just as in *Davis*, he testified that he did so for estate planning purposes. In the trial court's detailed written findings, it specifically found Martin's testimony credible, and stated that it found Elizabeth's testimony regarding the alleged gift "vague and not reliable." Such a credibility determination was within the trial court's purview, as it was in the best position to see the witnesses and observe their demeanor. See *In re Marriage of Anderson*, 409 Ill. App. 3d 191, 199 (2011) (trial court is in the best position to weigh the evidence and judge the credibility of the witnesses). Martin's testimony that he intended no gift to Elizabeth's non-marital estate was also supported by the parties' estate planning attorney, who testified that he discussed with Martin and Elizabeth the importance of dividing their assets between them. Though it is clear that Martin failed to follow his attorney's advice by funding the trust, this omission does not somehow suggest that Martin intended to gift the account to Elizabeth's non-marital estate.

¶ 39 Martin's admission that he opened a subsequent Ameritrade account in his sole name for depositing birthday and Christmas gifts he received from his mother also does not bolster Elizabeth's argument. While he agreed that he titled this account in his name so that he would be assured that it was his non-marital property, he also testified that he opened the account during the pendency of the dissolution proceeding and after Elizabeth sought the Ameritrade account at issue here as her non-marital property.

¶ 40 *Barnett* is also distinguishable, as its findings were opposite of those made by the trial court in the instant matter. In *Barnett*, the trial court found the wife's testimony concerning the gift to be more credible than the husband's, and it was persuaded by the fact that the husband

ceased dealing with the account after the transfer. Here, not only did the trial court find Martin's testimony concerning the titling of the account more credible than Elizabeth's, but it also noted that Martin retained all investment control and broker communication, which demonstrates that Martin did not make a gift to Elizabeth's non-marital estate.

¶ 41 Contrary to Elizabeth's argument, *Barnett* does not suggest that intangible financial assets should be treated differently for purposes of gift analysis, or that such assets are incapable of being controlled. While the *Barnett* court did comment that the financial account at issue "was not a residence over which the donor continued to exercise dominion," it went on to note that the husband "did not deal with [the account] after it was transferred." *Barnett*, 344 Ill. App. 3d at 1155. Thus, the *Barnett* court recognized that the way in which one exercises control over an asset varies depending on the type of asset at issue.

¶ 42 With the exception of how he titled it, Martin exerted control over the account subsequent to the alleged gifting in every meaningful way that one can exert control over such an asset. Elizabeth testified that Martin had the log-in information for the account, that he managed the account, and that he placed stock trades with it. Moreover, Martin had an ongoing relationship with the broker, met with him on several occasions at the broker's office, and corresponded with him from his personal e-mail account. Martin's lack of withdrawals from the account does not suggest that he lacked control over it, as his effort to preserve the account was consistent with his testimony that the account be used for long term savings.

¶ 43 Indeed, Elizabeth's only exertion of control over the account occurred during the dissolution proceeding, when she changed the log-in credentials used to access the account on-line. Even after severing Martin's access, however, she continued to place at least some of the trades Martin requested. After Martin filed a petition seeking to regain direct access to the

account, Elizabeth filed a response referring to the account as "the parties' Ameritrade account," and stated that she was fearful that Martin would exhaust it. Like Martin, she did not then assert that the account was her non-marital property.

¶ 44 We find that, based on all of the above, the trial court's classification of the account as marital property was not against the manifest weight of the evidence. In short, Martin failed to rebut the presumption of a gift to the marital estate, and Elizabeth failed to prove that the account was a gift to her non-marital estate by clear, convincing, and unmistakable evidence.

¶ 45 Finally, we address Elizabeth's contention that the trial court erred in its maintenance award. A maintenance award is within the court's discretion, and the court's decision on maintenance will not be disturbed on appeal absent an abuse of discretion, which exists only where no reasonable person would take the view adopted by the court. *In re Marriage of Smith*, 2012 IL App (2d) 110522, ¶ 46. Elizabeth argues that the trial court's decision to award maintenance for a "term of 10.5 years or 126 months from the date of judgment," without also making it reviewable or otherwise providing an explicit means to extend the duration of maintenance was in error. She notes that, absent an agreement by the parties (750 ILCS 5/502(f) (West 2014)), courts may designate a permanent termination for the receipt of maintenance only in marriages whose duration is less than ten years. See 750 ILCS 5/504(b-4.5) (West Supp. 2015). Elizabeth stresses that her maintenance award "must be subject to the review provisions" of the Marriage Act because the marriage exceeded 10 years. She does not challenge the amount or the duration of the maintenance award.

¶ 46 Review proceedings and modification proceedings are separate and distinct mechanisms by which the reconsideration of maintenance can occur. *In re Marriage of Golden*, 358 Ill. App.

3d 464, 469 (2005). Review proceedings are held pursuant to prior orders of court, while modification proceedings can be initiated by the parties without a prior order of court. *Id*.

¶ 47 Though the trial court declined to award Elizabeth "reviewable" maintenance, the judgment nevertheless preserves her right to seek modification of the maintenance award—it neither bars maintenance beyond the 126-month term, nor designates the term's completion as a "permanent termination." The only difference between the trial court's award of maintenance for the specified term of 126 months with no explicit provision for review and an order expressly making it subject to review is the burden of proof. See *In re Marriage of Mayhall*, 311 Ill. App. 3d 765, 770 (2000). Section 510 of the Marriage Act allows for the modification of maintenance upon a showing of a substantial change in circumstances. 750 ILCS 5/510(a-5) (West 2014). An award for a fixed term may be extended (or shortened). *Mayhall*, 311 Ill. App. 3d at 770. Elizabeth's ability to extend the duration of maintenance beyond the 126-month term is limited only to the extent that she must seek the modification before the term of support ends (*In re Marriage of Carpel*, 232 Ill. App. 3d 806 (1992); *Rice v. Rice*, 173 Ill. App. 3d 1098, 1102 (1988)), and she must demonstrate a substantial change in circumstances (750 ILCS 5/510(a-5) (West 2014)). Thus, trial court did not abuse its discretion in awarding Elizabeth maintenance for a 126-month term.

¶ 48 III. CONCLUSION

¶ 49 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 50 Affirmed.