2017 IL App (2d) 160957-U
No. 2-16-0957
Order filed September 28, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re THE MARRIAGE OF HUGH JOHNSON,	)	Appeal from the Circuit Court of Du Page County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 12-D-2046
	)	
KAREN JOHNSON,	)	Honorable
	)	Linda E. Davenport,
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Pursuant to our mandate in a prior appeal, the trial court properly prevented petitioner from introducing new evidence, as we clearly had remanded the cause not for a new evidentiary hearing, but only for a proper consideration of the evidence introduced at the first one; (2) the trial court did not err in deeming marital all of the funds in petitioner's retirement accounts, as petitioner did not clearly establish the value of any nonmarital portion.

¶ 2 Following a remand from this court, petitioner, Hugh Johnson, appeals the trial court's order finding that none of the funds in his individual retirement accounts (IRAs) was his nonmarital property. Petitioner contends that the court erred in (1) refusing to allow him to

introduce new evidence that was not presented at the first trial in this matter and (2) finding that none of the funds was his nonmarital property. We affirm.

¶ 3 Petitioner sought to dissolve his marriage to respondent, Karen Johnson. Although the parties reached a settlement on several issues, the matter proceeded to a contested hearing on other issues, including property division.

¶ 4 As relevant here, petitioner testified that he began working for Merrill Lynch in 1988. He had 401(k) and employee stock ownership plans with Merrill Lynch. The parties married in 1995. At that time, his retirement benefits were worth approximately $50,000.

¶ 5 Petitioner was laid off by Merrill Lynch in 2005. He subsequently rolled those plans into five IRAs solely in his name. He used some of them primarily as investment vehicles, while others maintained their identity as retirement accounts. There was also a Merrill Lynch account in respondent's name, and the parties apparently maintained a joint account as well.

¶ 6 In closing argument, petitioner's counsel, after requesting that various items of property be considered nonmarital, stated, "The IRA accounts, again, should simply be divided between the parties by an appropriate either Qualified Domestic Relations Order or in some other fashion the Court deems appropriate; but we believe that a 50/50 split is appropriate under the circumstances."

¶ 7 The dissolution judgment provided, *inter alia*, that "Petitioner shall be entitled to receive 50% of the marital portion of all retirement accounts held in Respondent's name and Respondent shall be entitled to receive 50% of the marital portion of all retirement accounts held in Petitioner's name."

¶ 8 Both parties filed motions asking the court to reconsider various aspects of its judgment. The court denied both motions. Petitioner then filed a motion seeking "clarification" on several

issues. One such issue was the court's division of the retirement accounts. Petitioner noted his testimony that all of his retirement accounts were created from the rollover of his 401(k). Using the date of his hiring by Merrill Lynch, the date of the marriage, and the date of the dissolution judgment, petitioner's counsel calculated that respondent's share of the retirement accounts was 37%. The court denied the motion, stating that it had "summarily rejected" petitioner's contention that any portion of the retirement accounts was nonmarital.

¶ 9 Petitioner appealed. He argued in that first appeal that the dissolution judgment provided that only the " 'marital portion' " of the retirement accounts was to be divided between the parties but the court had never explicitly decided what portion of the accounts was marital. *In re Marriage of Johnson*, 2016 IL App (2d) 150346-U, ¶¶ 5, 9-10. Petitioner argued that the court had denied his motion for clarification based on the mistaken belief that it had already decided the issue.

¶ 10 Noting that the judgment ordered that only the "marital portion" of the retirement accounts be divided, and that the record did not disclose that the court ever explicitly decided what portion of the funds was marital, we reversed the order denying petitioner's motion for clarification. We directed the court to "decide, based on a proper consideration of the evidence, the amount of [petitioner's] IRAs that represents his nonmarital property." *Id.*, ¶ 14. We did not necessarily preclude a finding that no part of the IRAs is nonmarital property, but "such a finding must be based on a reasonable inference from the evidence." *Id.*

¶ 11 Following remand, the case was assigned to a different judge. Petitioner moved to admit a large amount of documentary evidence that was not presented at the first trial. Noting that "this really wasn't an apparently huge issue at the trial," petitioner's counsel argued that the additional evidence was necessary to allow the trial court to decide the issue that we directed it to consider

on remand. Respondent objected, contending that our mandate was limited to a consideration of the evidence presented at the first trial and that, in any event, allowing petitioner to introduce additional evidence would give him a "second bite at the apple."

¶ 12 The court ultimately barred the new evidence, stating, "I believe when it says the evidence, it's referring to the evidence that was available at the time of trial." The court then conducted a hearing that consisted primarily of a recapitulation of the evidence at the first trial. During the "second trial," the court established, through questioning of the attorneys, that petitioner did not include his retirement accounts as nonmarital assets in either his pretrial memorandum or his financial declaration statement. There was no pretrial stipulation that the accounts were nonmarital. Moreover, petitioner never testified to the specific amount of money transferred into each of the IRAs.

¶ 13 At the conclusion of the hearing, the court again ruled that all of the funds in the IRAs were marital. The court stated:

> "About an hour and a half ago when we began, there was just a fundamental difference that I had, counsel, with the idea that of what presumptions are. And the presumptions are that all assets are marital unless there is a specific finding and you meet a burden to determine that they are nonmarital in nature.
>
> So we start with the presumption that everything is marital under the statute under 750 ILCS, and then we move from there. Mr. Johnson took the trouble of identifying specifically in a trial memo as well as I believe in a financial declaration that he had certain nonmarital assets. *** He never identified in the financial declarations dated June 25th, 2014, on page five, paragraph six, that he had any expectation that his retirement assets were nonmarital. *** He didn't even identify what the amount was that was

> actually transferred. Other than he said he had about [$]50,000. The court in a trial can not utilize guesstimates. He himself didn't even indicate he had an intent that this was nonmarital."

Petitioner timely appeals.

¶ 14 Petitioner contends that the court wrongly decided that it had no discretion to permit additional evidence following remand from this court and, to the extent that the court exercised its discretion, it abused it. He argues that the evidence bore directly on the issue this court directed the court to address. He further contends that, regardless of whether his offer of proof is considered, the court erred by finding that none of petitioner's retirement funds was nonmarital. He argues that the court improperly placed on him the burden of proving that the source of the funds was nonmarital and that the undisputed evidence shows that he acquired a portion of the funds before his marriage.

¶ 15 Petitioner first contends that the court erred by barring the additional evidence. Our mandate directed the court to "decide, based on a proper consideration of the evidence, the amount of [petitioner's] IRAs that represents his nonmarital property." *Id.* A circuit court must follow the specific directions of the appellate court's mandate to ensure that its order is in accord with the decision of the higher court. *In re Marriage of Pitulla*, 256 Ill. App. 3d 84, 88 (1993). When a reviewing court remands a case with instructions that are general, however, the circuit court is required to examine the appellate court's opinion and exercise its discretion in determining what further proceedings would be consistent with the opinion on remand. *In re Marriage of Blinderman*, 283 Ill. App. 3d 26, 35 (1996).

¶ 16 Here, the trial court correctly recognized that our mandate required it to decide the issue based on "the evidence," *i.e.*, the evidence existing in the record. The primary focus of our order

was to require the court to articulate a rationale based on the (existing) evidence for its conclusion that no portion of petitioner's retirement accounts was nonmarital. We did not intend to allow the parties to relitigate the issue by presenting evidence that could have been presented at the first trial. Petitioner essentially concedes that he raised this issue as something of an afterthought at the first trial, and he should not be allowed to produce voluminous new evidence on this issue now.

¶ 17 Petitioner next contends that, even without his offer of proof, the evidence shows that a percentage of the retirement accounts was his nonmarital property. We agree with the trial court's ultimate conclusion that petitioner failed to establish the present value, if any, of the nonmarital portion of his retirement vehicles.

¶ 18 In a marriage dissolution action, it is the burden of both parties to provide the trial court with sufficient evidence to evaluate and distribute the marital property. *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 663 (2008). "We will not reverse a trial court's value determination unless it is against the manifest weight of the evidence." *Id.* "Where the parties have had the opportunity to present evidence at trial, they should not be allowed on appeal to take advantage of their failure to do so." *In re Marriage of Wisniewski*, 286 Ill. App. 3d 236, 246 (1997); see *In re Marriage of Thomas*, 239 Ill. App. 3d 992, 995 (1993) (party who failed to introduce any evidence of goodwill associated with his business could not claim that trial court erred in failing to assign a value to this element).

¶ 19 Generally, a party claiming that property that would otherwise be marital is in fact nonmarital bears the burden of proof. *In re Marriage of Hegge*, 285 Ill. App. 3d 138, 141 (1996). To meet that burden, the party must trace the asserted nonmarital source of the funds in the

accounts by clear, convincing, and affirmative evidence. *In re Marriage of Didier*, 318 Ill. App. 3d 253, 265 (2000).

¶ 20 After remand, the court observed that petitioner listed in his pretrial memorandum and financial statements several items of property that he contended were nonmarital. These included rental properties and an inheritance, but did not include any portion of his retirement assets. In closing argument after the first trial, petitioner's counsel simply requested that the IRAs be split 50/50 between the parties. Petitioner contended for the first time in his motion to clarify that some portion of the IRAs was nonmarital. See *In re Marriage of DiAngelo*, 159 Ill. App. 3d 293, 296 (1987) (pension acquired before marriage was petitioner's nonmarital property).

¶ 21 In the motion, petitioner relied almost exclusively on his testimony that he had approximately $50,000 in retirement assets when the parties married. He baldly contended that, according to the "standard calculation," respondent's share of his IRAs was 37%. However, the issue here was far more complex than simply dividing the time he worked at Merrill Lynch while married by the entire time he worked at Merrill Lynch.

¶ 22 Petitioner testified that he had both a 401(k) plan and an employee stock ownership plan (ESOP) while at Merrill Lynch. He testified that he rolled both accounts into five IRAs solely in his name. The trial court questioned whether the ESOP could even be considered a retirement plan. While petitioner asserts that it was, the record contains virtually no information about the nature of either plan.

¶ 23 Petitioner further testified that he used some of the resulting IRAs primarily as investment vehicles and that he contributed between $250,000 and $400,000 to them in approximately 2010 in order to "get back in the market." The source of those funds is unclear. He testified that, at most, two of the accounts maintained their identity as retirement accounts.

Respondent also had an IRA exclusively in her name. The source of the funds for that account is unclear.

¶ 24 The court noted that the accounts were never listed as petitioner's nonmarital property in any pretrial filings. There was no stipulation that the accounts were nonmarital, and petitioner did not testify that he intended the accounts to remain his nonmarital property. Further, petitioner never testified to the exact value of the accounts when he got married; he said only that they were worth approximately $50,000. In light of these factors, the trial court accurately observed that any attempt to quantify the nonmarital portion of petitioner's retirement funds at this point would be a "guesstimate."

¶ 25 Given petitioner's failure to clearly establish the value of any nonmarital portion of his retirement accounts, the court did not err in deeming all of the funds to be marital.

¶ 26 The judgment of the circuit court of Du Page County is affirmed.

¶ 27 Affirmed.