FILED
February 17, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 160542-U

NO. 4-16-0542

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In Re: MARRIAGE OF	)	Appeal from
TRACY L. BACON,	)	Circuit Court of
Petitioner-Appellee,	)	Macoupin County
and	)	No. 15D154
WILLIAM B. BACON,	)	
Respondent-Appellant.	)	Honorable
	)	April G. Troemper,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Harris and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err by characterizing the parties' marital property, awarding permanent maintenance, or equalizing attorney fees.

¶ 2 Petitioner, Tracy L. Bacon, filed for divorce from respondent, William B. Bacon, in November 2015. The trial court granted petitioner's petition and dissolved the parties' marriage and distributed the marital estate. In addition, the court awarded petitioner permanent maintenance and equalized the parties' attorney fees. Respondent appeals the court's judgment, alleging the court erred by (1) concluding the marital home was entirely marital property, (2) concluding a particular sum of $14,200 was marital property, (3) granting petitioner permanent maintenance, and (4) awarding attorney fees to petitioner. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. The Parties

¶ 5 Petitioner and respondent were married on April 25, 1987, in Waverly, Illinois. The parties stipulated their separation occurred on July 31, 2015. Upon separation, petitioner moved into her parents' home in Waverly, Illinois, and respondent remained in the marital residence in Palmyra, Illinois. The parties have two adult children.

¶ 6 Petitioner is a "material handler" with the Dickey John Corporation and works for a rate of $13.27 per hour. In 2015, she earned a total of $28,256.90 through her employment with Dickey John. Petitioner has prior part- and full-time experience in primarily clerical-type roles. Petitioner did not work from 1989 to 1996 because she remained home with the children. Petitioner was 48 years old when the divorce petition was filed.

¶ 7 Respondent is a heavy-duty truck technician employed by Smokey Jennings Chevrolet. Respondent is also the mayor of the Village of Palmyra. In 2015, he earned a total of $61,623.30—$56,718.30 through his employment with Smokey Jennings and $4,905 through his mayoral position. Respondent was employed full-time by Smokey Jennings throughout the entire marriage. Respondent was 49 years old when the divorce petition was filed. In 2014, respondent was involved in a car accident. Respondent has existing injuries from this accident and may need surgery in the future to alleviate pain in his shoulder.

¶ 8 Both parties submitted financial affidavits in connection with this case. Petitioner listed monthly expenses of $1,917.71 and a net monthly income of $1,704.40. Petitioner lived with her parents at the time she filled out the affidavit, so she had limited house-related expenses. Respondent listed monthly expenses of $3,325.72 and a net monthly income of $3,604.10. In

their posttrial memoranda, both parties alleged the other overstated monthly expenses. Petitioner alleged respondent overstated his food, household, and household maintenance expenses. Respondent alleged petitioner overstated her gas, insurance, and car maintenance expenses. Petitioner requested permanent monthly maintenance of $641, which respondent conceded was the correct calculation pursuant to the statutory guidelines.

¶ 9 B. Property

¶ 10 The assets at issue on appeal include the marital residence and a sum of $14,200 deposited into respondent's retirement account with Maloney Securities.

¶ 11 The marital residence, located in Palmyra, Illinois, was purchased in June 1999 for $170,000 and is currently valued at $160,000. The property was titled jointly in both petitioner's and respondent's names. To purchase the property, the parties tendered two separate down payments of $20,000 and $39,500. The $20,000 payment was comprised of the proceeds from the sale of a truck, baseball memorabilia, and silver—all of which respondent testified he owned prior to the marriage. The $39,500 payment was tendered as a cashier's check with both petitioner and respondent listed as the remitters. The sum was comprised of withdrawals from respondent's savings accounts with Bank of Palmyra and Bank of Modesto, both of which respondent testified were opened prior to the marriage. Respondent admitted into evidence the passbook for the Bank of Modesto account, which showed a balance of $7,008.23 on the day prior to the marriage. Respondent admitted on cross-examination he would deposit his paychecks, or a portion thereof, into the Bank of Modesto throughout the marriage, and he would withdraw money from that account as needed to pay bills and other expenses throughout the marriage. Respondent did not admit any records for the account with the Bank of Palmyra, but

testified he had "[$]21,000 nonmarital" in that account. The remaining balance of the purchase price for the marital residence was financed through a mortgage with Carrollton Bank, which has been paid to date in accordance with the terms of the mortgage. The mortgage balance was approximately $35,000 at the time the parties filed the posttrial memoranda.

¶ 12 The $14,200 sum at issue was allegedly the proceeds from the sales of guns inherited by respondent's mother. Respondent testified his father passed away in October 2006 and left several guns to his mother, and together, they sold some of the guns in 2007 and 2008, generating $14,200 in cash. Respondent offered into evidence a piece of notebook paper with handwritten notes listing names, types of guns, dates, and values. Respondent testified the notes represented various sales, and he wrote some of the notes, while his mother wrote the other notes. His mother did not testify. The piece of paper was admitted into evidence but was limited to only those notes made by respondent.

¶ 13 According to respondent's testimony, he kept the $14,200 sum in cash along with the remaining guns stored in his safe at his house. On July 17, 2015, respondent deposited, via cashier's check, a sum of $14,200 into his Maloney Securities retirement account. On direct examination, respondent was asked whether the any of the guns belonged to him, to which he respondent stated: "Not yet. Not until she passes on." Later on direct examination, when asked why the cash was left sitting in his safe from 2007 and 2008 to 2015, respondent stated: "It was just my dad's money, the other stuff setting in there just my dad's stuff and just setting there. Mom didn't need it. So it just set there." However, respondent also testified on direct examination he believed his mother gifted him the $14,200 sum. When asked on cross-examination whether he invested the sum on behalf of his mother, respondent stated he invested

the sum "[i]n [his] account with her permission."

¶ 14 The parties had various other marital and nonmarital property not at issue in this appeal.

¶ 15 C. Trial Court's Judgment

¶ 16 In July 2016, the trial court, in accordance with the parties' wishes, awarded respondent the marital residence, and ordered each party retain property in his or her possession and property titled in his or her respective name. The court ordered respondent pay petitioner (1) $62,500 to reimburse her for her half of the equity in the marital residence, less one-half of the costs to refinance the mortgage to remove her name; (2) $28,500 representing her share of dissipated funds, cash held by respondent, and the value of respondent's tools; and (3) $2,578 to equalize attorney fees. Finally, the court ordered respondent pay petitioner $641 permanent monthly maintenance, citing several statutory factors favoring the maintenance award.

¶ 17 The trial court specifically rejected respondent's argument he was entitled to reimbursement for the down payments on the marital residence, concluding it was entirely marital property. The court stated respondent failed to overcome the presumption the down payments were a gift to the marriage. The court also specifically rejected respondent's argument the $14,200 sum was nonmarital property, concluding respondent failed to present clear and convincing evidence it was nonmarital.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 A. Characterization of Property

¶ 21 Section 503(a) of the Illinois Marriage and Dissolution of Marriage Act

(Dissolution Act) defines marital property as "all property acquired by either spouse subsequent to the marriage." 750 ILCS 5/503(a) (West 2014). This general rule has several exceptions including "property acquired by gift, legacy or descent" and "property acquired before the marriage." 750 ILCS 5/503(a)(1), (6) (West 2014).

¶ 22 "Transmutation occurs '[w]hen marital and non-marital property are commingled by contributing one estate of property into another resulting in a loss of identity of the contributed property.' " *In re Marriage of Foster*, 2014 IL App (1st) 123078, ¶ 74, 17 N.E.3d 781 (quoting 750 ILCS 5/503(c)(1) (West 2012)). "The principle of transmutation is based on the presumption that the owner of the nonmarital property intended to make a gift of the property to the marital estate." *In re Marriage of Olson*, 96 Ill. 2d 432, 439, 451 N.E.2d 825, 828 (1983). To overcome this presumption, the party must show, by clear and convincing evidence, the intent for the nonmarital property to retain its nonmarital status despite being commingled with marital property. *In re Marriage of Nagel*, 133 Ill. App. 3d 498, 502, 478 N.E.2d 1192, 1195 (1985).

¶ 23 The trial court must classify the property as marital or nonmarital before dividing the marital property between the parties. See 750 ILCS 5/503(a) (West 2014). The party claiming property, or a portion thereof, is nonmarital bears the burden of proving that status by clear and convincing evidence. *In re Marriage of Hegge*, 285 Ill. App. 3d 138, 141, 674 N.E.2d 124, 126 (1996). "Any doubts as to the nature of the property are resolved in favor of finding that the property is marital." *Id.* The court's classification of property as marital or nonmarital will not be disturbed unless the classification is against the manifest weight of the evidence. *In re Marriage of Lundahl*, 396 Ill. App. 3d 495, 502, 919 N.E.2d 480, 486 (2009).

¶ 24 1. *Marital Home*

¶ 25 Respondent argues a portion of the equity in the marital residence is his nonmarital property because the down payments for the property were comprised of (1) $20,000 in proceeds from the sales of a truck, baseball memorabilia, and silver respondent testified he owned prior to the marriage; and (2) cash taken from two different bank accounts, both of which respondent testified were opened prior to the marriage. In his brief, respondent states: "No evidence was introduced indicating that these were a gift to the marriage, and no testimony was elicited from [petitioner], either disputing the payments, or characterizing them as a gift." Petitioner argues respondent failed to trace the funds by clear and convincing evidence and failed to overcome the presumption the funds were a gift to the marriage. Respondent misses the mark. The fact he contributed these funds, which may have originally been nonmarital property, to purchase the marital residence creates the presumption the contribution was a gift; petitioner was not required to present evidence indicating the contribution was not intended to be a gift. Respondent bore the burden of proving, by clear and convincing evidence, he did not intend for these contributions to constitute a gift to the marriage.

¶ 26 The trial court specifically concluded the marital residence was entirely marital property. The court noted respondent "presented some evidence that he used non-marital funds as the down payment" but ultimately concluded respondent failed to present clear and convincing evidence to overcome the presumption the contribution was a gift to the marriage.

¶ 27 Assuming, *arguendo*, the funds were actually nonmarital, we agree with the trial court's conclusion respondent failed to overcome the presumption the contributions were a gift to the marriage. Twelve years into the marriage, the parties purchased the marital residence in joint tenancy. The parties tendered two down payments, one of which was a cashier's check listing

both as remitters. The remaining balance of the purchase price was secured by a mortgage in both parties' names. The record does not show any evidence indicating respondent intended the contributions he alleges are nonmarital to remain nonmarital, and the burden of proving this fact—by clear and convincing evidence—rested with respondent himself. See *In re Marriage of Marx*, 281 Ill. App. 3d 897, 902, 667 N.E.2d 734, 737 (1996) (the husband failed to overcome the presumption where he contributed $20,000 in nonmarital funds to a down payment on a home but did not present evidence he "exercised exclusive control over the $20,000 or made it clear that he expected to receive the $20,000 back when the property was sold in any different fashion than he would receive back a marital contribution."). Assuming, *arguendo*, the funds were actually nonmarital, we conclude respondent failed to rebut the gift presumption, and any nonmarital property used toward the down payment on the marital residence was transmuted into marital property.

¶ 28 Respondent cites section 503(c)(2) of the Dissolution Act to argue he is entitled to reimbursement for his contributions to the down payment on the marital residence despite transmutation. Section 503(c)(2) states: "When one estate of property makes a contribution to another estate of property, *** the contributing estate shall be reimbursed from the estate receiving the contribution notwithstanding any transmutation; provided, that no such reimbursement shall be made with respect to a contribution that is not retraceable by clear and convincing evidence or that was a gift[.]" 750 ILCS 5/503(c)(2) (West 2014). Respondent again misses the mark. The second sentence in this section indicates the reimbursement is only available when the party overcomes the presumption, which respondent failed to do. We conclude the trial court did not err by declining to reimburse respondent for his contributions and

characterizing the marital residence as entirely marital property.

¶ 29 2. *Maloney Securities Deposit*

¶ 30 Respondent argues he is entitled to reimbursement for $14,200 from his Maloney Securities retirement account because the sum is nonmarital. At the evidentiary hearings, respondent testified he believed his mother had gifted the sum to him, then he indicated the funds "[were] just [his] dad's money," and then at another point, he testified he invested the sum "[i]n [his] account with [his mom's] permission." Now, respondent again claims this sum is his nonmarital property because his mother gifted the funds to him. The only evidence relating to the gun sales, other than respondent's testimony, was pictures of guns and a piece of notebook paper with handwritten notes allegedly memorializing gun sales, which was accepted into evidence on a limited basis. The trial court specifically rejected the notion the $14,200 sum belonged to his mother, "as no credible evidence was presented to support the argument, and his mother was unavailable to be cross-examined."

¶ 31 The only credible evidence we have is on July 17, 2015, prior to the date of separation, respondent deposited $14,200 into his Maloney Securities account, an account the trial court classified as marital. Respondent did not present clear and convincing evidence showing this $14,200 sum was nonmarital property, and consistent with our jurisprudence, the trial court was correct to resolve this uncertainty in favor of classifying the sum as marital property. We conclude the trial court's classification of the sum was not against the manifest weight of the evidence.

¶ 32 B. Permanent Maintenance

¶ 33 Section 504(a) of the Dissolution Act allows a trial court to, in its discretion,

award maintenance to either spouse upon marital dissolution. 750 ILCS 5/504(a) (West 2014). The statute sets forth several factors to be considered when determining whether a maintenance award is appropriate. *Id.* The decision to award maintenance is within the trial court's discretion and will not be disturbed absent an abuse of discretion. *In re Marriage of Schneider*, 214 Ill. 2d 152, 162, 173, 824 N.E.2d 177, 183, 189 (2005). "A trial court abuses its discretion when it acts arbitrarily, without conscientious judgment, or, in view of all of the circumstances, exceeds the bounds of reason and ignores recognized principles of law, resulting in substantial injustice." *In re Marriage of Haken*, 394 Ill. App. 3d 155, 160, 914 N.E.2d 739, 743 (2009). The party seeking reversal bears the burden of showing the trial court abused its discretion. *Schneider*, 214 Ill. 2d at 173, 824 N.E.2d at 189.

¶ 34 The trial court cited several statutory factors to conclude maintenance was appropriate in this case. Those factors include the following: (1) the income of the parties, including the property to be awarded as a result of the marital dissolution; (2) the needs of the parties; (3) the present and future earning capacity of the parties; (4) the impairment of petitioner's present and future earning capacities foregone by devoting time to domestic duties; (5) the ability and time necessary to enable petitioner to acquire appropriate training or education to increase her future earning capacity; (6) the standard of living established during the marriage; (7) the length of the marriage; (8) the age and physical and emotional condition of the parties; (9) the tax consequences of the property division; (10) contributions and services by petitioner to the career of respondent; and (11) any valid agreements by the parties. See 750 ILCS 5/504(a) (West 2014).

¶ 35 Respondent argues the trial court abused its discretion for several reasons.

Respondent alleges petitioner's financial affidavit was contradicted by her testimony, which tended to show her living expenses were less than those listed in the affidavit. Respondent argues petitioner did not spend a substantial amount of time out of work to perform domestic duties, but in the next sentence, respondent states petitioner was not gainfully employed from 1989 through 1996. Respondent cites existing injuries to his shoulder, knee, and arm, which will allegedly require surgery in the not-too-distant future, thus diminishing his income. Finally, respondent argues the parties lived frugally throughout their marriage, which he believes should negate the need for maintenance.

¶ 36 Respondent cites *In re Marriage of Andrew*, 258 Ill. App. 3d 924, 628 N.E.2d 221 (1993), to argue maintenance should be denied where the party received a large property award. We find *Andrew* distinguishable. In *Andrew*, the trial court denied maintenance, meaning the question on appeal was whether the denial was an abuse of discretion. Here, the question is whether the award was an abuse of discretion. Additionally, the property award in *Andrew* was "well in excess of $1 million" (*Id.* at 928, 628 N.E.2d at 224), whereas, petitioner's property award totaled $93,578, less than 10% of the award in *Andrew*.

¶ 37 The remaining cases cited by respondent indicate the trial court must consider statutory factors, and the trial court here did consider these factors. See *In re Marriage of Brown*, 241 Ill. App. 3d 305, 608 N.E.2d 967 (1993) (trial court must consider property division); *In re Marriage of Chapman*, 285 Ill. App. 3d 377, 674 N.E.2d 432 (1996) (trial court must consider age and physical condition); *In re Marriage of Harlow*, 251 Ill. App. 3d 152, 621 N.E.2d 929 (1993) (trial court must consider the standard of living enjoyed during the marriage); *In re Marriage of Mohr*, 260 Ill. App. 3d 98, 631 N.E.2d 785 (1994) (trial court must consider

the reasonable needs of the parties); see also *In re Marriage of Gunn*, 233 Ill. App. 3d 165, 598 N.E.2d 1013 (1992) (party seeking maintenance must show the necessity for maintenance).

¶ 38 Examining the totality of the relevant factors examined by the court, petitioner alleged she was unable to meet her monthly obligations even though she was living with her parents, and she correctly noted her obligations will increase when she is able to live independently. Though the parties may have lived frugally during the marriage, they did live independently, and the gross difference between the parties' income indicates petitioner would be unable to maintain the standard of living she enjoyed during the marriage, however frugal. Petitioner's age, education, and training indicate her earning capacity is unlikely to substantially increase in the future or equal that of respondent's. We also reject respondent's argument petitioner did not spend a substantial amount of time out of the workforce or contribute the advancement of respondent's career. By remaining home to raise the children from 1989 to 1996, seven years, petitioner enabled respondent to continue working and advancing his career. Further, despite arguing he will need surgery, respondent's testimony indicates surgery is merely a possibility, as further tests are required to determine whether the surgery is necessary. A trial court considering all these factors could reasonably determine petitioner needed permanent maintenance. We are unpersuaded by respondent's arguments and conclude the trial court did not abuse its discretion by awarding permanent maintenance to petitioner.

¶ 39 C. Attorney Fees

¶ 40 Respondent next argues the trial court ordered him to pay petitioner $2,578 for attorney fees. Petitioner, citing *In re Marriage of Toth*, 224 Ill. App. 3d 43, 50, 586 N.E.2d 436, 440 (1991), responds this sum was not a payment for attorney fees pursuant to section 508 of the

Dissolution Act (750 ILCS 5/508 (West 2014)) but rather was an equalization of funds dissipated from the marital estate.

¶ 41 With respect to attorney fees, the trial court's order stated:

> "[Respondent] paid $10,000.00 to his current counsel. [Petitioner] has paid $3,044.00 to her attorneys as shown by Exhibit D. Thus, to equalize payments from marital funds, [respondent] should pay to [petitioner] the sum of $2,578.00 as shown on the Balance Sheet. *** Based on the distribution of marital assets and debts, each party will have the ability to pay any remaining balance of his or her own attorney's fees in this case."

¶ 42 We agree with petitioner and conclude the award of $2,578 to petitioner was not an award for attorney fees pursuant to section 508 of the Dissolution Act. Rather, this award was an equalization of the marital funds respondent and petitioner used to pay their respective attorneys. The trial court indicated the parties would be responsible for any remaining balance of their own attorney fees.

¶ 43 Respondent has made no argument relating to equalization or dissipation, and we thus conclude any such argument has been forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (points not properly argued in the appellant's brief are forfeited and may not be argued in the appellant's reply brief or at oral argument).

¶ 44 III. CONCLUSION

¶ 45 We affirm the trial court's judgment.

¶ 46 Affirmed.