

No. 1-16-3060

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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IN RE: THE MARRIAGE OF	)	Appeal from the
THOMAS VIVIRITO,	)	Circuit Court of
	)	Cook County.
Petitioner-Appellee,	)	
	)	
v.	)	No. 13 D 1101
	)	
DAWN VIVIRITO,	)	The Honorable
	)	Regina Scannicchio,
Respondent-Appellee.	)	Judge, presiding.

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JUSTICE LAVIN delivered the judgment of the court.  
Presiding Justice Cobbs and Justice Howse concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in declaring retained earnings of a Sub-Chapter S corporation as marital property for the purposes of property distribution. In addition, the trial court's calculation of petitioner's income was not unreasonable. Further, the trial court did not abuse its discretion in its distribution of the marital estate. See 750 ILCS 5/503(d) (West 2016). We affirm.

¶ 2 This appeal arises from a dissolution of marriage proceeding. On appeal, petitioner Thomas Vivirito contends that the trial court erred in declaring the retained earnings of a closely held, non-marital Sub-Chapter S corporation as marital property for the purposes of property

distribution. Petitioner also contends that the trial court erred by imputing petitioner's income.

In addition, the trial court abused its discretion in awarding respondent Dawn Vivirito 60% of the marital estate. We affirm.

¶ 3

### BACKGROUND

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. After 21-years of marriage, petitioner initiated divorce proceedings against respondent on February 7, 2013. The marriage produced three children: Jessica<sup>1</sup>, born February 3, 1997; Bradley, born July 21, 1999; and Grant, born July 19, 2000. Since the birth of their children, respondent primarily worked as a full-time homemaker and stay-at-home mother. Respondent retained her real estate license, but never exceeded more than \$15,000 per year in annual income. Respondent focused much of her time caring for Bradley, who was diagnosed with autism at 20-months-old and received specialized services.

¶ 5 Prior to their marriage, petitioner and his brother, William Vivirito, opened a retail lighting business, The Lighting Brothers, Inc. (Lighting Brothers), with each brother owning 50 percent of the company, which was incorporated as a Subchapter S corporation. Petitioner was employed as the vice-president, while William was employed as the president. At the time of trial, Lighting Brothers maintained a West Suburban Bank operating account of \$751,196.68. In addition, petitioner and William personally jointly held a Bank of America savings account and a PNC Bank savings account, with balances of \$243,380.66 and \$471,777.71. The PNC account was opened in April 2015, a few months prior to trial. In December 2011, petitioner and William loaned \$150,000 from their Bank of America account to Mullens, William's family's corporation, with a 2% interest rate. Mullens repaid the loan in monthly installments of \$4,299, which was then deposited by petitioner and William into their joint Bank of America account.

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<sup>1</sup> Jessica is emancipated and attending college.

The interest was then taxed to petitioner and William individually. Lighting Brothers did not reimburse petitioner and William for the taxes imposed by the Mullens' loan.

¶ 6 On September 21, 2015, trial commenced and spanned the course of five days.

Approximately a year later, the trial court issued its ruling and entered a judgment for dissolution of marriage. The judgment awarded respondent 60% and petitioner 40% of the marital estate. Further, petitioner was ordered to pay permanent maintenance to respondent in the amount of \$5,910 per month, child support in the amount of \$2,541.00 per month and retroactive child support in the lump sum of \$33,840.00. The trial court arrived at these figures by breaking petitioner's income into the following components: (1) income from petitioner's employment with Light Brothers, (2) rental income, and (3) distributions from Light Brothers. In regards to these distributions, the trial court found petitioner and William's testimony to be incredible and determined the reasonable cash requirements of Lighting Brothers by taking:

"the average of the minimum balance and statement balance for the beginning of each year, 2014 and 2015. The January 2014 minimum balance was \$108,176.79 and the statement balance was \$155,911.49; and the January 2015 minimum balance was \$130,057.75 and statement balance was \$187,543.35. The average of these four balances [was] \$112,940.55. The court finds that this amount shall be considered the reasonable, necessary cash required to be kept in the company for operating expenses, and therefore, [was] not part of the marital estate subject to division. The remaining balance of the West Suburban Bank account of \$638,246.11 shall be divided equally between [petitioner] and William and [petitioner's] share of approximately \$319,128 shall be subject to distribution through the marital estate."

The trial court also determined that with respect to the Bank of America and PNC Bank accounts, petitioner and William's testimony was "not credible" regarding the establishment and use of these accounts. Thus, the trial court divided these accounts equally between William and petitioner, whose portion was then distributed to the marital estate according to the judgment. Petitioner filed this timely appeal.

¶ 7

#### ANALYSIS

¶ 8 Petitioner first contends that the trial court erred in declaring the retained earnings from Lighting Brothers as marital property, namely petitioner's interest in the West Suburban Bank, Bank of America and PNC Bank accounts. Under the Illinois Marriage and Dissolution of Marriage Act (the Act) (West 2016)), there is a rebuttable presumption that all property acquired by either spouse after the date of marriage but before the entry of judgment of dissolution is marital property, regardless of how title is held. 750 ILCS 5/503(b) (West 2016). Thus, before a court may dispose of property upon dissolution of marriage, the property must be classified as either marital or nonmarital. *In re Marriage of Didier*, 318 Ill. App. 3d 253, 258 (2000). Property acquired during a marriage is presumptively marital and the presumption can be overcome only by clear and convincing evidence. *In re Marriage of Wojcik*, 362 Ill. App. 3d 144, 154 (2005). Any doubt as to the nature of the property must be resolved in favor of finding that it is marital. *Id.* at 154-55. The trial court's classification will not be disturbed on appeal unless it is contrary to the manifest weight of the evidence. *In re Marriage of Gurda*, 304 Ill. App. 3d 1019, 1023-24 (1999). A finding is against the manifest weight of the evidence only if it is clear from the record that the trial court should have reached the opposite conclusion or if the finding is arbitrary, unreasonable, or not based upon the evidence presented. *Best v. Best*, 223 Ill. 2d 342, 350 (2006).

¶ 9 Illinois courts have observed that retained earnings and profits of a subchapter S corporation in which the spouse has an ownership interest generally remain the corporation's property, and are not considered income to a spouse, until severed from the other corporate assets and distributed as dividends. *In re Marriage of Steel*, 2011 IL App (2d) 080974, ¶ 63. Under certain discrete circumstances, however, retained earnings may properly be considered marital property:

"[t]he first is the extent of the spouse's ability to distribute the retained earnings to himself. When a shareholder spouse has a majority of stock or otherwise has substantial influence over the decision to retain the net earnings or to disburse them in the form of cash dividends, courts have held that retained earnings are marital property. The second is the extent to which retained earnings are considered in the value of the corporation and utilized to fund the corporation's business." (Internal citations omitted.) *Id.*; See *In re Marriage of Joynt*, 375 Ill. App. 3d 817, 821 (2007).

¶ 10 In *Joynt*, the reviewing court affirmed the trial court and determined that the husband's interest in retained earnings of a closely held subchapter S corporation was nonmarital property. The court reasoned that since the husband possessed only a minority percentage of three unequal shares of the company, he was not a controlling shareholder, and thus, could not unilaterally declare or withhold dividends. *Id.* at 821. Further, the court concluded that because the retained earnings were part of the corporate assets and were held by the corporation to pay expenses, they were not marital property. *Id.*

¶ 11 Alternatively, *In re Marriage of Lundahl*, 396 Ill. App. 3d 495, 504 (2009), this court, relying on the principles set forth in *Joynt*, held that the retained earnings at issue were marital property. In this case, the husband was the corporation's sole shareholder and the retained

earnings were not specifically held by the corporation to pay expenses, dividends, or used in connection with the corporation. The husband unilaterally took personal disbursements from the retained earnings from 2004 to 2006 without requiring approval from anyone else. *Id.* at 503. Furthermore, they were personally taxed to the husband who paid the income tax on the earnings. Therefore, we found that the retained earnings constituted the husband's "income, rather than an asset" of the company. *Id.* at 504.

¶ 12 The record before us demonstrates that petitioner, along with his brother William, equally had complete control over Lighting Brother's retained earnings and administered them unilaterally for personal use. They each testified that they took distributions from Lighting Brothers equally, depending upon how the business was prospering and what was going on in their personal lives. Neither brother denied the other a distribution when requested, giving petitioner substantial control over the decision to either retain the net earnings of Lighting Brothers or disburse them in the form of cash to himself and William. See *In re Marriage of Dann*, 2012 IL App (2d) 100343, ¶ 90 citing *Joynt*, 375 Ill. App. 3d at 820 (the main consideration to weigh upon determining if retained earnings are marital property was whether the shareholder spouse had a substantial influence over the decision to retain the net earnings or to disburse them in the form of cash dividends). Further, the trial court noted that "[t]here was little testimony or evidence presented \*\*\* regarding how much cash Lighting Brothers need[ed] to maintain its operating account in order to run the business and fund its daily operations. What the court did receive was vague and difficult to track based upon the sketchy responses" of petitioner and William. See *Chandler v. Maxwell Manor Nursing Home, Inc.*, 281 Ill. App. 3d 309, 318-19 (1996) (it is well-established that credibility determinations should be left to the trier of fact who is in the best position to observe the witnesses, their demeanor, and assess their

relative credibility when there is conflicting testimony on issues of fact). Thus, the trial court's classification of the West Suburban Bank account as marital property, minus Lighting Brothers' calculated operating expenses, was reasonable based upon the evidence presented, which also suggested that the Bank of America and PNC Bank accounts operated as personal, not business, accounts for petitioner and William. Specifically, they utilized The Bank of America account to fund a personal loan to William's family corporation and the repaid loan with interest was then funneled back into the Bank of America account. Lighting Brothers had nothing to do with the operation of or taxes on either of these accounts, which were paid personally by petitioner and William.

¶ 13 Like the trial court, we are also mindful of petitioner's arguably cagey behavior upon filing for dissolution. Petitioner's testimony revealed that, after he initiated dissolution proceedings, he began making overpayments on credit cards he used to purchase goods for Lighting Brothers. For instance, in January 2015, petitioner overpaid his Capital One Visa card by \$60,000, made a \$7,985.23 payment in February (despite having a \$52,014.77 credit card balance) and received a \$59,990 credit balance refund in March. It is unclear from the record what happened to the refunds which were issued as *personal* not corporate checks to petitioner. In addition, Thomas and William's parents gifted them the land and building that Lighting Brothers operates, giving them the advantage of procuring a personal rent from the company which they manipulated at will. From 2013 to 2015, petitioner and William raised Lighting Brothers rent from \$4,000 to \$6,000 a month. Further, petitioner testified that in the three months prior to trial he and William had each taken an \$18,000 advance in rental payments from Lighting Brothers. The trial court also noted that petitioner and William each took a \$96,000 distribution from Lighting Brothers in 2014, but petitioner did not use it to fund any owed

marital expenses. Accordingly, the trial court clearly aimed to make light of petitioner's unconventional business practices, which appeared to commingle personal and business funds, and in doing so find a means to equitably calculate and distribute the marital estate. See *Steel*, 2011 IL App (2d) 080974, ¶ 57 ("[a]ny doubt as to the nature of the property must be resolved in favor of finding that it is marital"). Therefore, we cannot say the trial court unfairly categorized Lighting Brother's retained earnings as marital property.

¶ 14 Moreover, contrary to petitioner's assertion, the record suggests that the trial court's imputing of petitioner's income was not unreasonable. In its ruling, the trial court concluded that petitioner's wages were significantly low starting in 2010 with a gross income of \$36,686 increasing steadily to \$61,115 in 2014. Specifically, the trial court observed that while petitioner's retained earnings expert Michelle Tran suggested petitioner was reasonably compensated for his marital efforts, the data contained in her own report discredited her opinion. In her analysis, Tran utilized two different benchmarks, including the ER Comparison, where petitioner's income never even reached the median income level for the years 2006-2014. In fact, from 2009-2013, petitioner's income was below the lowest 10th percentile. As petitioner and William are solely in control of setting their wages and compensation from Lighting Brothers, the trial court concluded that petitioner "could pay himself considerably more than he currently does; and that this reduced income is purely voluntary." In addition, both petitioner and William testified that there were no specific plans to expand the business or use the stockpiled case funds. Thus, the trial court attributed to petitioner an annual income of \$177,753, comparable to the median income of Tran's ERI Comparison. We again cannot say the trial court's calculation was unreasonable as the record demonstrates that petitioner and William were under-compensating themselves in terms of their salaries while building up



personal income through their Bank of America and PNC Bank accounts, rent compensation, and unexplained overpayment on corporate credit cards. See *Best v. Best*, 223 Ill. 2d 342, 350 (2006) (great deference is afforded to the trial court as the finder of fact because it is in the best position to observe the conduct and demeanor of the parties and witnesses); *Eychaner v. Gross*, 202 Ill. 2d 228, 251, 252 (2002) (a decision is against the manifest weight of the evidence only where an opposite conclusion is clearly apparent or where the findings appear to be unreasonable, arbitrary, or not based on the evidence presented).

¶ 15 Petitioner also contends that the trial court abused its discretion in awarding respondent 60% of the marital estate. Section 503 of the Act governs the distribution of marital property and directs courts to consider various factors and distribute marital property "in just proportions" to the spouses. 750 ILCS 5/503(d) (West 2016). This, however, does not mean that the property must be divided with mathematical equality as long as the trial court has properly applied the statute. *In re Marriage of Drone*, 217 Ill. App. 3d 758, 765 (1991). An approximate equality is equitable, especially in longer marriages. *In re Marriage of Cepek*, 230 Ill. App. 3d 1045, 1048 (1992). The relevant statutory factors to consider are: the contribution of the parties to the marital property; the value of the property set apart for each spouse; the duration of the marriage; the relevant economic circumstances of the parties upon distribution of the property; the age, health, station, occupation, amount and sources of income, vocational skills, and employability of the parties; the custodial provisions for any children; whether apportionment is in lieu of or in addition to maintenance; and the reasonable opportunity of each spouse to acquire capital assets and income in the future. 750 ILCS 5/503(d) (West 2016); *In re Marriage of Eidson*, 235 Ill. App. 3d 907, 911 (1992). The trial court has broad discretion in determining the equitable apportionment of marital property, and abuse of discretion will be found only when no

reasonable person can take view adopted by trial court. *In re Marriage of Adan*, 263 Ill. App. 3d 566, 569 (1994).

¶ 16 In the case *sub judice*, the trial court did not abuse its discretion in its division of the marital estate. The record establishes that the trial court considered the length of the marriage, parties' incomes, earning potential, ability of each party to contribute to the retirement funds, respondent's expenses, child care, and respondent's need to remain in the marital residence in lieu of Bradley's special needs. Further, the trial court solely assigned respondent responsibility of the parties' promissory note debt and she did not receive any portion of the nonmarital component of petitioner's IRA or petitioner's nonmarital building and property. Therefore, based on the record before us, the trial court did not abuse its discretion in its distribution of the marital estate. See *In re Marriage of Jones*, 187 Ill. App. 3d 206, 222 (1989) ("the touchstone of apportionment of marital property is whether the distribution is equitable and each case rests on its own facts").

¶ 17

#### CONCLUSION

¶ 18 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 19 Affirmed.