2018 IL App (2d) 160588-U
No. 2-16-0588
Order filed February 14, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF KEVIN S. MARTZ Petitioner-Appellee, and BASIA M. MARTZ, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 12-D-2355 Honorable Timothy J. McJoynt, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's not treating petitioner's withdrawals from his 401(k) plan as reimbursable advances from his share of the marital estate was neither against the manifest weight of the evidence nor an abuse of discretion; respondent's argument that the 401(k) withdrawals constituted dissipation of the marital estate is forfeited because it was not presented at trial; the trial court's determination that the parties share in the tax consequences of the withdrawals was not an abuse of discretion. Affirmed.

¶ 2 Respondent, Basia M. Martz, appeals from the Judgment of Dissolution of Marriage entered after trial and from the final order on her motion for reconsideration. Specifically, respondent contends that the trial court erred (1) in failing to characterize withdrawals made by

petitioner, Kevin S. Martz, from his 401(k) retirement account to pay his litigation expenses, and income taxes and penalties associated with the withdrawals, as advances from the marital estate; (2) in failing to find that these payments were dissipation of the marital estate; and (3) in ordering the parties to share equally in income taxes attributable to these withdrawals. For the reasons stated below, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The parties were married in 1988. On November 8, 2012, petitioner filed for dissolution of the parties' marriage, citing irreconcilable differences as grounds. At that time, both petitioner and respondent were fifty years old and employed as software engineers at Alcatel-Lucent. They had four children during their marriage, three of whom were minors when the petition for dissolution was filed.

¶ 5 The matter proceeded to trial, which occurred on twenty-eight dates from May 2014 to March 2015. As noted by the circuit court, the primary dispute concerned custody of and visitation with the parties' two youngest children, and most of the pretrial proceedings and trial evidence was dedicated to custody and parental alienation issues. Multiple lay and expert witnesses were called, including the parties, to resolve these issues. The instant appeal, however, does not arise from this primary dispute but, rather, from the trial court's rulings on the parties' use of their retirement accounts to pay attorney fees, litigation costs, and associated taxes and penalties.

¶ 6 On June 17, 2014, the trial court entered the first in a series of agreed qualified domestic relations orders (QDROs) directing the parties to withdraw specified amounts from their respective 401(k) plans, with the net to be paid toward the other party's attorney fees. This appeal only involves withdrawals and payments occurring prior to the entry of the QDROs, in

particular three withdrawals petitioner made from his 401(k) account totaling approximately $120,000.

¶ 7 On April 3, 2015, the trial court entered its Judgment with a Letter of Opinion. The court ruled that petitioner properly withdrew the $120,000 from his 401(k) account and that he should not bear sole responsibility for the tax liability incurred for the withdrawals. Evidence and trial court rulings pertinent to our resolution of the issues on appeal are addressed in the analysis section below.

¶ 8 Respondent filed a motion for reconsideration, part of which focused on the issues raised in her appeal. The trial court denied this part of the motion for reconsideration. Respondent timely appealed.

¶ 9 II. ANALYSIS

¶ 10 A. Advances

¶ 11 Respondent first argues that the trial court erred in failing to characterize petitioner's withdrawals from his 401(k) plan for the payment of attorney fees as advances from his share of the marital estate. Respondent contends that section 502(c-1)(2) of the Marriage and Dissolution of Marriage Act (750 ILCS 5/502(c-1)(2) (West 2016)) (Act) creates a presumption that attorney fees will be treated as advances. At the same time, respondent acknowledges that a trial court may order otherwise.

¶ 12 "A reviewing court applies the manifest-weight-of-the-evidence standard to the factual findings of each factor on which a trial court may base its property disposition, but it applies the abuse-of-discretion standard in reviewing the trial court's final property disposition ***." *In re Marriage of Vancura*, 356 Ill. App. 3d 200, 205 (2005). A decision is against the manifest weight of the evidence only when an opposite conclusion is clearly apparent or when the court's

findings appear to be unreasonable, arbitrary, or not based upon the evidence. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 44. An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court. *In re Marriage of Nord*, 402 Ill. App. 3d 288, 292 (2010).

¶ 13 "The trier of fact is charged with assessing the credibility of testimony at trial. [Citation.] A reviewing court will defer to the trial court's findings because the trial court, by virtue of its ability to actually observe the conduct and demeanor of witnesses, is in the best position to assess their credibility." (Internal quotation marks omitted.) *In re Marriage of Manker*, 375 Ill. App. 3d 465, 477 (2007). "On appeal, a reviewing court will take questions of witness credibility as resolved in favor of the prevailing party and must draw from the evidence all reasonable inferences that support the judgment." *Flynn v. Henkel*, 369 Ill.App.3d 328, 333 (2006).

¶ 14 Section 502(c-1)(2) of the Act provides in part: "[u]nless otherwise ordered by the court ***, interim awards, as well as the aggregate of all other payments by each party to counsel ***, shall be deemed to have been advances from the parties' marital estate." It is well established both that section 502(c-1)(2) creates a presumption that attorney fees will be treated as advances and that this presumption does not apply where the court orders otherwise. See, *e.g.*, *In re Marriage of Holthaus*, 387 Ill. App. 3d 367, 378 (2008).

¶ 15 Here, the evidence and admissions show that, prior to the entry of the agreed QDROs, which equalized the payment of attorney fees and costs, respondent spent $283,606 on the litigation. Her testimony reveals that she retained and paid five attorneys and seven experts during this time period. She stated that approximately $180,000 of her fees and costs was paid with "personal loans." The evidence does not disclose the total amount of respondent's pre-

QDROs litigation expenses that came from the marital estate. During the same time period, petitioner testified that he spent $143,980.05 in attorney fees and costs and that approximately $100,000 of this amount was withdrawn from his 401(k) account. Petitioner also testified that he withdrew approximately $20,000 more from the account to be paid toward his daughter's college expenses.

¶ 16 In ruling that petitioner's 401(k) withdrawals were not reimbursable to the marital estate, the trial court found credible petitioner's testimony that the funds were withdrawn for litigation and college expenses. The court questioned respondent's testimony and claims in discovery documents regarding personal loans, stating that she had not proven their existence and that "these costs to some extent were unnecessarily incurred by her at least with the duplication of legal services and as to the consulting of many different types of experts and thus she is solely responsible for these personal loans if they do exist." Noting that "both parties are gainfully employed and there are similar amounts of income," the court stated its intent "for each party to pay for their own fees." Although both parties used marital estate assets to pay for the litigation, the fees and costs incurred by respondent "surely outpaced the Petitioner's spending in this regard" and "to some extent *** this was her own doing." The court concluded that it was "not inclined to have the Petitioner 'share' in the Respondent's legal expense."

¶ 17 On appeal, respondent asserts that the trial court was obligated to make an "express finding" that it intended not to treat attorney fees as advances from the parties' marital estate. The two cases cited by respondent do not support this assertion. See *Holthaus*, 387 Ill. App. 3d at 371-72, 378 (trial court's decision fell "squarely within the confines of the statute" where the court ordered that, subject to the division of the marital estate, which was skewed so as to compensate the husband for attorney fees incurred as a result of the wife's behavior during the

proceedings, the parties were to be responsible for their respective attorney fees); *In re Marriage of Liszka*, 2016 IL App (3d) 150238, ¶¶ 60-62 (no error when trial court did not equalize parties' attorney fees where parties' fee payments were not the same). Here, as in *Holthaus* and *Lizka*, the trial court's order, which did not treat petitioner's payments of attorney fees as advances from the marital estate, falls squarely within the confines of the statute.

¶ 18 Respondent notes that attorney fees and costs incurred by the parties after entry of the first QDRO were financed equally and states that doing so "was in concert with the statutory presumption that such fees are to be treated as advances of parties' marital assets." The court, however, was under no obligation to order equal payment for fees and costs incurred prior to the entry of the QDROs. See *Lizka*, 2016 IL App (3d) at ¶ 60 (no section of the Act requires a court to "equalize" attorney fees between the parties). To the contrary, prior to the entry of agreed QDROs, the court had discretion over how the parties' payment of fees and costs should be treated. See *Holthaus* and *Lizka*, *supra*. The court's finding that respondent was the more litigious party is not against the weight of the evidence. That the court chose to adjust the marital assets accordingly and not treat petitioner's withdrawals from his 401(k) plan as reimbursable advances from his share of the marital estate was not an abuse of discretion.

¶ 19 Respondent urges us to follow *In re Marriage of Heroy*, 385 Ill. App. 3d 640 (2008), and direct the trial court to credit respondent with $50,000, or half of the $100,000 petitioner withdrew from his 401(k) account for payment of his attorney fees and costs. *Heroy*, however, is distinguishable from the present case. In *Heroy*, the trial court consistently deemed payments for legal fees and expenses to be "advances from the marital estate." *Heroy*, 385 Ill. App. 3d at 667-68. The appellate court remanded with directions to correct an imbalance resulting from an error in the trial court's calculations. Here, the court did not treat petitioner's 401(k) withdrawal

payments as advances from the marital estate and expressly found that respondent's greater litigation expenditures were "to some extent *** her own doing." Accordingly, no imbalance needs correcting, and we decline respondent's invitation to follow *Heroy*.

¶ 20 B. Dissipation

¶ 21 Respondent next argues that the trial court should have found that petitioner's withdrawals from his 401(k) plan were dissipation of the marital assets. Dissipation, as used in section 503(d)(1) of the Act, refers to the "use of marital property for the sole benefit of one of the spouses for a purpose unrelated to the marriage at a time that the marriage is undergoing an irreconcilable breakdown." [Internal quotation marks omitted.] *In re Marriage of O'Neill*, 138 Ill. 2d 487, 497 (1990). "Once a *prima facie* case of dissipation is made, the charged spouse has the burden of showing, by clear and convincing evidence, how the marital funds were spent." *In re Marriage of Tabassum & Younis*, 377 Ill. App. 3d 761, 779 (2007). Whether dissipation occurred is a question of fact determined by the trial court, and such a determination will not be disturbed unless it is against the weight of the evidence. *In re Marriage of Holthaus*, 387 Ill. App. 3d 367, 374 (2008). A decision is against the manifest weight of the evidence only when an opposite conclusion is clearly apparent or when the court's findings appear to be unreasonable, arbitrary, or not based upon the evidence. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 44.

¶ 22 Respondent alleges that petitioner's use of the $120,000 withdrawn from the 401(k) account constitutes dissipation. Respondent's only notice of dissipation, filed June 2, 2014, did not allege any dissipation related to the 401(k) withdrawals, nor was it amended after petitioner testified about the withdrawals on September 5, 2014. Respondent first raised the issue of dissipation with respect to the withdrawals after trial in her written closing argument. The trial

court briefly considered respondent's argument in its opinion letter and in ruling on the motion for reconsideration, concluding that although "[b]oth sides took out monies from their retirement accounts," no dissipation was shown.

¶ 23 We are persuaded by the relevant authorities that the "failure to give notice and make any allegation of dissipation regarding the [withdrawals] at trial constitutes [forfeiture] of the issue" on appeal. See *In re Marriage of Evanoff & Tomasek*, 2016 IL App (1st) 150017, ¶ 42 (issue "waived" on appeal where notice of dissipation did not allege any dissipation related to a home equity loan nor did party make an allegation of dissipation regarding the home equity loan at trial); see also *Zito v. Zito*, 196 Ill.App.3d 1031, 1036 (1990) (finding "waiver" of a dissipation issue because the husband failed to provide notice at the trial court level). Accordingly, we do not consider respondent's arguments regarding dissipation.

¶ 24 C. Tax Consequences

¶ 25 Respondent's third contention is that the trial court did not consider petitioner's 401(k) withdrawals, or the taxes and fees incurred as a result, when it ordered the parties to file joint tax returns in 2013 and 2014 and share in all taxes due. She claims it was inequitable and an abuse of discretion to give petitioner "the benefit of using marital funds to defray his litigation costs while requiring [respondent] to share in the tax consequences of [petitioner's] unilateral withdrawal of those marital funds."

¶ 26 Tax consequences of a property distribution are one of the factors to be considered by the court in making a property distribution upon dissolution of marriage. *In re Marriage of Olson*, 223 Ill. App. 3d 636, 650 (1992). An appellate court will only find an abuse of discretion in apportioning marital property where no reasonable person would have adopted the court's decision. *Id.* at 648. "[T]here is no requirement that marital property be divided equally

between the parties. [Citation.] The court is directed to divide the property 'in just proportions considering all relevant factors.' " *In re Marriage of Miller*, 112 Ill. App. 3d 203, 207-08 (1983) (quoting from section 503(d) of the Act). "[A]n unfavorable tax result is not evidence of an abuse of the court's discretion. To the contrary, the court may choose which party is required to bear tax consequences," even if such requirement may result in an unequal division of property. *Id*. at 208.

¶ 27 With respect to ordering the parties to file joint returns, the trial court reasoned: "Both sides took out monies from their retirement accounts and this will cause substantial tax liabilities to both of them—thus the reason for filing jointly for 2013 and 2014. They will share this burden due to both of their voluntary conduct in waging this expensive war over the last year between themselves." We conclude that requiring both parties to bear the tax consequences of the court's property division, even if doing so results in an unequal division of property, does not constitute an abuse of discretion.

¶ 28 Respondent argues that "[s]ince the 401(k) Withdrawals themselves were dissipation or advances from the marital estate, the income taxes and penalties caused by them should have been characterized the same way." The argument is a counterfactual conditional because we leave undisturbed the trial court's determination not to treat the withdrawals as advances and its finding that no dissipation of the marital estate occurred.

¶ 29 We find unpersuasive respondent's citation to *In re Marriage of Malters*, 133 Ill. App. 3d 168 (1985). In *Malters*, the appellate court found error in the trial court's "apparent failure to consider the tax consequences" of the transfer of certain property and directed the court to consider those tax consequences on remand. *Id.* at 182. Here, the trial court did consider the tax consequences of the 401(k) withdrawals: it recognized that a "tax liability was created" by the

withdrawals, acknowledged respondent's argument that it was "unfair to *** saddle her with half of this tax liability," and determined that the parties "will share this burden." Thus, *Malters*, where the trial court's "apparent failure to consider the tax consequences" was held to be "contrary to the statute and, therefore, error," is distinguishable and does not persuade us that the trial court here committed similar error.

¶ 30 III. CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 32 Affirmed.