

NOTICE
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2019 IL App (5th) 160405-U

NO. 5-16-0405

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
DELLA R.K. FIELD,)	Bond County.
)	
Petitioner-Appellee and Cross-Appellant,)	
)	
and)	No. 13-D-1
)	
DENNIS M. FIELD,)	Honorable
)	Ronald R. Slemer,
Respondent-Appellant and Cross-Appellee.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Overstreet and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held:* Where the trial court found that Della R.K. Field was entitled to an attorney fees award, we affirm the finding. Where the trial court’s award of attorney fees did not constitute an abuse of discretion, we affirm the award. Where the trial court properly found that some of the expenses at issue were not included in the agreement between the parties, we affirm the order. Where the trial court properly excluded a deposit made before the parties entered into the agreement, we affirm the order requiring reimbursement of the deposited amount. Where the trial court excluded college tuition and fees expenses from the amount to be reimbursed on the basis that it was a revocable promise of a gift, we find that order to be erroneous and modify the order.

¶ 2 Dennis M. Field (Dennis) appeals from the trial court's August 17, 2016, order awarding Della R.K. Field (Della) an extra \$6500 in living expenses and \$17,209 in attorney fees representing 40% of her total fees. Della cross-appeals from the same order and argues that the trial court should have awarded her a total of \$19,107.48 in extra expenses and should have awarded her 75% of her attorney fees. For the reasons that follow in this order, we affirm the order that Della was entitled to attorney fees, affirm the court's award of attorney fees, affirm part of the living expenses order that excluded items not contemplated in the agreement of the parties, affirm the \$6500 reimbursement ordered because the deposit predated the agreement, conclude that the order that found that the college tuition and fees expense was a revocable promise to gift was erroneous, and modify the order directing Dennis to reimburse Della to include the amount of the college tuition and fees.

¶ 3 **BACKGROUND**

¶ 4 Della and Dennis were married in 2005. Throughout the marriage, Della was employed as a business manager for a church, while Dennis was employed as an attorney in private practice. Two children were born during the marriage—a boy born in 2005 and a girl born in 2009. Della also had two children from a previous marriage who lived with them. When the petition for dissolution of marriage was filed in January 2013, the oldest, a girl, was studying at the University of Illinois, while the younger boy was in high school in 2013 and later enrolled at Eastern Illinois University in the fall of 2013.

¶ 5 Della filed her petition for dissolution of marriage on January 4, 2013. In the petition, Della asked the court to award her attorney fees.¹ On January 10, 2013, Dennis emailed Della with a proposal. He proposed that he move back into the marital home until June 2013, and that he would “continue to pay all of our expenses” during that time. He also offered to pay Della’s share of his stepdaughter’s spring tuition and fees bill from the University of Illinois.

¶ 6 At a hearing held on January 11, 2013, the parties announced to the court that they had an agreement to resolve all issues. In reviewing the terms of the agreement on the record, Dennis’s attorney noted that his client “has agreed while they are living together to pay their living expenses.” The term “living expenses” was not defined. Later during the hearing, Dennis’s attorney informed the court that cell phone expenses for everyone would be included as a “living expense.” Dennis’s attorney also stated on the record that his client “would agree to be responsible for [stepdaughter]’s tuition” and more specifically “would agree to pay approximately a third of the tuition that is due at University of Illinois for the upcoming semester.” Dennis then added: “Yes, for this spring. Absolutely.” Later in the hearing, Della clarified that Dennis’s agreement to pay tuition also included the fees, but not housing. Not everything was decided at this hearing, but each party stated on the record that the terms that were stated at the hearing were correct. The court reminded both parties that the terms were not modifiable. At

¹In this case, Della was first represented by attorney Kevin Sybert, and then by attorney Kathleen Buckley. In her two petitions seeking attorney fees, she requests reimbursement for fees billed by both attorneys.

some later date, the formal judgment would be reduced to writing, submitted to the court, and entered. During the hearing, Della's request for attorney fees was not mentioned.

¶ 7 Later in January 2013, Della emailed Dennis with her list of approximate monthly living expenses. She estimated that the monthly expenses totaled \$6148. She later emailed Dennis again mentioning that she had forgotten to add vitamins and vehicle maintenance to the list. At a hearing on March 14, 2014, Della testified that this list was not complete, but was intended to provide Dennis with an approximation of the monthly expenses.

¶ 8 During the months that Dennis lived in the marital residence after the January 11, 2013, hearing, he made several deposits to the joint checking account between January 25, 2013, and May 31, 2013, that totaled \$29,186.19. Despite these deposits and a beginning balance of \$4078.33 and a January 3, 2013, deposit of \$6587.50, the amount of money was insufficient to cover the expenses for those five months. During that five-month period, there were bills that had been incurred in December 2012 but would not become due until January 2013. Furthermore, because the agreement was to pay for living expenses for the five months, Della argued that bills that had been incurred in May 2013 but would not become due until June 2013 should also be included in the arrangement. In addition, Della claimed that \$6219.60 must be excluded from the total amount deposited for monthly living expenses because that amount represents her one-third share of her daughter's spring 2013 tuition and fees bill from the University of Illinois. She argues that the tuition and fees were not part of the "living expenses."

¶ 9 Dennis moved out of the marital residence on May 31, 2013.

¶ 10 On September 30, 2013, the trial court finalized the parties' marital settlement agreement, joint parenting agreement, and judgment of dissolution of marriage. Paragraph 4.3 of the marital settlement agreement included the terms of the "living" expenses:

"The parties acknowledge that during the period in which the Temporary Order is in place, from January 11, 2013, until no later than June 1, 2013, husband shall not be under any monthly obligation to pay the monthly amount of child support to wife. In exchange therefore, while husband is residing in the former marital residence, husband shall pay the living expenses for the residence, including utility bills, cell phone bills, mortgage payments, taxes and insurance on the former marital residence. Husband shall provide insurance for the parties' motor vehicles during the period of his residency in the marital home."

Both parties signed the marital settlement agreement on September 30, 2013. Neither party objected to those terms or suggested modifications.

¶ 11 The trial court also entered a separate order on September 30, 2013, that outlined and reserved two outstanding issues: whether Dennis paid the correct amount for living expenses as contemplated in the marital settlement agreement and whether Della had the right to request or waived the right to request attorney fees.

¶ 12 On October 17, 2013, Della filed a petition asking the trial court to hold Dennis in indirect civil contempt for not paying all of the living expenses. She also filed a petition asking for an award of attorney fees. An initial hearing on the petitions was held in March 2014. Before the trial court entered its order, Della asked the court to reopen the proofs in order to conduct additional discovery of Dennis's income. The trial court granted the request. Two years later, in March 2016, the court held an additional hearing

on Della's petitions. Thereafter, on May 6, 2016, Della filed an amended petition asking for an award of attorney fees.

¶ 13 The trial court entered its order on June 3, 2016, denying the contempt petition because of the disagreement between Della and Dennis about the nature of the living expenses agreement. The court held:

“On the issues of contempt, it is impossible to find a party in contempt for not performing as agreed or ordered when no one can say exactly what the party was to do. The Motions for Indirect Civil Contempt are denied. The behavior was not contumacious, but there were incidents in which the Husband, an attorney, was not forthright.”

¶ 14 Despite the denial of that petition, the trial court had previously indicated in its September 30, 2013, order that the matter of whether Dennis paid the correct amount of “living” expenses was outstanding. Based upon the testimony at the two hearing dates, as well as the documentary evidence admitted, the court stated that the parties were not able to agree whether Dennis contributed \$22,192, \$35,000, or \$39,852 for the expenses. The court found that many of the claimed “household expenses” were luxury items—new cell phones, party supplies, stationery, picture frames, traffic ticket fines, and gifts. The court held, “[o]n the household expenses, the court finds that there is insufficient evidence to require the Husband to pay additional sums for household expenses for those four months.”

¶ 15 Also in its June 3, 2016, order, the trial court found that Dennis should pay 45% of Della's incurred attorney fees. The court disregarded Dennis's argument that Della had not sought attorney fees, because she had explicitly done so in her petition for dissolution of marriage. The court also found that Della had not waived attorney fees at the court's

January 11, 2013, hearing. The court noted that Della was not awarded maintenance, that the couple's standard of living during the marriage was high, that there was a wide disparity in income and future earning potential, and there was a clear disparity between the resources each had been awarded. In addition, the court stated that the case was complex and contested with limited access to Dennis's financial information and that Dennis had failed to comply with some of the court's orders, and thus Della had to expend legal fees in order to obtain compliance with those orders. The court awarded Della 45% of her attorney fees, for a total of \$19,360.

¶ 16 Della filed a motion to reconsider the court's order, arguing that the luxury items referenced in the court's orders were simply part of the household's living expenses. In addition, Della contended that the trial court should have subtracted the amount used to pay for her daughter's tuition and fees at the University of Illinois because Dennis agreed to pay that, and because that amount could not be considered as part of the living expenses. Della pointed out that Dennis received the benefit of his bargain in that he was able to live in the marital home for five additional months, but that she had not received the benefit of her bargain because he did not cover all of the expense to which he had agreed. Della also asked the trial court to reconsider her attorney fees award in light of the complexity of obtaining Dennis's financial information, and asked the court to increase the percentage to 65%.

¶ 17 Dennis also filed a motion to reconsider, arguing that in order to seek attorney fees, the petitioner must file the motion before judgment is entered. Furthermore, Dennis

alleged that there are different standards for prejudgment and postjudgment attorney fees awards, and that the trial court lacked a factual basis to award any fees.

¶ 18 The trial court entered its order on August 17, 2016. The court noted that Dennis refused to cooperate with discovery, and his refusals increased the time and cost of litigation. The court held that the itemized bills were reasonable and the expenses were necessary. The court also renewed its previous finding that there was a clear disparity in the resources of the parties. However, the trial court lowered the percentage of attorney fees awarded to 40% for a total of \$17,209. The court also modified its earlier order with respect to the “living expenses.” The court reiterated that many of the expenses sought were for luxury items. In addition, the court disallowed the septic tank repair. The court also took issue with Della’s request that the court subtract the amount paid for Della’s daughter’s college tuition and fees. The court noted that Dennis’s promise was a promise of a gift and therefore was not binding. However, the court determined that Della’s argument that the approximate \$6500 deposited by Dennis in early January 2013, before Della filed her petition for dissolution of marriage, should be subtracted from the amounts he claims he deposited towards the living expenses. The court ordered Dennis to pay Della that additional \$6500.

¶ 19 From this order, Dennis appeals, and Della cross-appeals.

¶ 20 ANALYSIS

¶ 21 Attorney Fees

¶ 22 On appeal of an attorney fees award, we will not reverse a trial court’s order unless we conclude that the trial court abused its discretion. *In re Marriage of Heroy*,

2017 IL 120205, ¶ 13, 89 N.E.3d 296. The presumption is that each party will pay his or her own attorney fees. *In re Marriage of Sanborn*, 78 Ill. App. 3d 146, 152, 396 N.E.2d 1192, 1197 (1979). A party who seeks attorney fees must establish (1) his or her own inability to pay his or her own fees and (2) the ability of the opposing party to pay the fees requested. *Marriage of Heroy*, 2017 IL 120205, ¶ 19. The “inability to pay” requirement is met “if, after consideration of all the relevant statutory factors, the court finds that requiring the party to pay the entirety of the fees would undermine his or her financial stability.” *Id.*

¶ 23 The Illinois Marriage and Dissolution of Marriage Act (Act) contains two relevant sections that reference attorney fees. The trial court’s orders did not specifically indicate that it based its award on either section. Section 503 involves the trial court’s disposition of property and debts and consideration of attorney fees as part of the disposition, while section 508 only involves attorney fees. See 750 ILCS 5/503(j), 508 (West Supp. 2015).

¶ 24 Section 503(j) of the Act sets a time limit for filing a petition for attorney fees. The petition must be filed after the proofs are closed “in the final hearing on all other issues between the parties (or in conjunction with the final hearing, if all parties so stipulate) and before judgment is entered.” *Id.* § 503(j). If the petition for attorney fees is not filed before the final hearing, the petition “shall be filed no later than 14 days after the closing of proofs in the final hearing or within such other period as the court orders.” *Id.* § 503(j)(1). Despite the specific time requirements of section 503(j), Illinois courts have held that a trial court retains jurisdiction to hear a petition for attorney fees if the trial court entered the judgment of dissolution before deciding the petition for attorney fees.

In re Marriage of Anderson, 2015 IL App (3d) 140257, ¶ 13, 49 N.E.3d 410 (citing *In re Marriage of Cozzi-DiGiovanni*, 2014 IL App (1st) 130109, ¶ 40, 14 N.E.3d 729). The court retains jurisdiction because the requirements of section 503(j) are “not jurisdictional prerequisites for a party’s contribution petition.” *Id.* Except in cases involving administrative review, the court’s jurisdiction is derived from the constitution, not from the legislative enactment. *Marriage of Cozzi-DiGiovanni*, 2014 IL App (1st) 130109, ¶ 42 (quoting *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 335, 770 N.E.2d 177, 185 (2002), citing Ill. Const. 1970, art. VI, § 9). See also *In re Marriage of Lindsey-Robinson*, 331 Ill. App. 3d 261, 269, 771 N.E.2d 976, 982 (2002) (holding that although the wife’s petition for attorney fees was untimely pursuant to section 503(j) of the Act, the time limit did not create a jurisdictional bar to the court’s consideration of the petition filed after the judgment of dissolution was entered).

¶ 25 Section 503(j) also states that the criteria for any award must be based on the factors used to distribute the property and debts. 750 ILCS 5/503(j) (West Supp. 2015).

The 12 criteria to be considered are:

“(1) each party’s contribution to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property ***;

(2) the dissipation by each spouse of the marital property ***;

(3) the value of the property assigned to each spouse;

(4) the duration of the marriage;

(5) the relevant economic circumstances of each spouse when the division of property is to become effective ***;

(6) any obligations and rights arising from a prior marriage of either party;

- (7) any prenuptial or postnuptial agreement of the parties;
- (8) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;
- (9) the custodial provisions for any children;
- (10) whether the apportionment is in lieu of or in addition to maintenance;
- (11) the reasonable opportunity of each spouse for future acquisition of capital assets and income; and
- (12) the tax consequences of the property division upon the respective economic circumstances of the parties.” *Id.* § 503(d).

¶ 26 Section 508 of the Act allows the court to award attorney fees on an interim basis before the judgment of dissolution and in postjudgment cases. *Id.* § 508. Any petition for interim fees pursuant to section 508 is also subject to section 503(j) and therefore the court must consider the 12 property division factors. *Id.* § 508(a). The court does not need to consider the 12 factors in a postjudgment petition for attorney fees related to the other party’s failure to comply with a court order. *Id.* § 508(b).

¶ 27 Here, Della filed her petition seeking attorney fees after the trial court had entered its judgment on September 30, 2013. Citing to section 503(j) of the Act, Dennis argues that any award for attorney fees was waived by her failure to comply with the timing requirements. He argues that the purpose of the rule requiring that the petition be filed prior to judgment is to allow the trial court to determine whether to award attorney fees in light of the distribution of property and debts. Dennis also argues that Della’s request for attorney fees in her January 4, 2013, dissolution petition was insufficient, because the parties had tentatively agreed to a settlement on January 11, 2013, and she did not

specifically reserve her right to attorney fees at that prove-up. In response, Della argues that the trial court properly concluded that she had not waived her right to attorney fees. She also argues that her petitions for attorney fees should have been filed pursuant to section 508(a) (the first petition) and 508(b) (the second petition) instead of pursuant to section 503(j).

¶ 28 Della's first petition sought an attorney fees award from the inception of the case until October 8, 2013, covering all fees up to the September 30, 2013, judgment plus the filing of the petition seeking attorney fees, while her second petition sought attorney fees from October 11, 2013, through May 4, 2016. The total amount of Della's attorney fees was \$44,436.18.

¶ 29 Turning first to the validity of the petitions, we find that Dennis's claim that Della waived her right to seek attorney fees by not stating her intention in court on January 11, 2013, is flawed. We note that Della asked for an award of attorney fees in her dissolution petition. While Della may not have restated on the record that she was seeking an attorney fees contribution on January 11, 2013, her silence cannot automatically be construed as her waiver. Individuals may waive a statutory right if the waiver is voluntary, knowing, and intentional. *Elsener v. Brown*, 2013 IL App (2d) 120209, ¶ 83, 996 N.E.2d 84 (citing *Village of Bellwood v. American National Bank & Trust Co.*, 2011 IL App (1st) 093115, ¶ 25, 952 N.E.2d 148). As the record of the January 11, 2013, contains no reference to attorney fees, we find that Della did not waive her right to seek attorney fees.

¶ 30 We next turn to Dennis’s claim that Della is not entitled to attorney fees because she had not complied with the timing requirement of section 503(j) of the Act. 750 ILCS 5/503(j) (West Supp. 2015). Della filed both petitions pursuant to section 503(j) of the Act. Recognizing the time limitation of section 503(j), Della now argues that both petitions were filed in compliance with section 508 of the Act, and that her citation to section 503(j) was incorrect. *Id.* § 508. Generally, a mistake of this type is not fatal, and treated as “harmless surplusage.” *O’Banner v. McDonald’s Corp.*, 173 Ill. 2d 208, 211, 670 N.E.2d 632, 633-34 (1996) (concluding that the appellant’s mistake in citation to a supreme court rule in his notice of appeal was not fatal because his notice contained sufficient language to invoke the appellate court’s jurisdiction and because neither supreme court rule mandated inclusion of a citation). We find that whether or not Della complied with section 503(j) and whether her petitions fit within the meaning of section 508 are irrelevant because of the trial court’s September 30, 2013, order entered contemporaneously with the final dissolution judgment. In that order, the trial court reserved jurisdiction to decide the contested issue of attorney fees.

¶ 31 We next address Dennis’s contention that the trial court’s award of attorney fees was improper because the trial court had not considered all of the statutory factors of section 503(d) of the Act. Initially, we turn to the language of section 503(d), which requires the trial court to consider “all relevant factors ***.” 750 ILCS 5/503(d) (West Supp. 2015). The court is not required to make specific factual findings as to each factor because not all of the factors will be “relevant.” See *In re Marriage of Benz*, 165 Ill. App. 3d 273, 288, 518 N.E.2d 1316, 1324 (1988). Here, the trial court noted the disparity

between the resources of the parties at the time of the orders and in the future and noted that despite the wide disparity in income, Della was not going to receive maintenance. The court stated that it had reviewed the testimony of the parties and the record. This case was somewhat unique in that the parties settled the property division without requiring the court to make any determinations. Here, Della got to keep the marital house, which she owned prior to marrying Dennis. Dennis got to keep other real estate, which he owned prior to marrying Della. Dennis got to keep his own retirement funds, his bank accounts, and his vehicle. Della got to keep her own retirement funds, her bank accounts, and her vehicle. Dennis got to keep all rights, title, and interest to his law firm partnership and to the building it occupied. Dennis was required to pay Della one-half of a \$38,459 shareholder note.

¶ 32 Dennis was a personal injury trial attorney and Della was an office manager. Dennis is a 30% shareholder in his law firm. He also has a 30% interest in the building owned by his firm with approximately \$370,000 in equity. As of March 2014, Dennis had \$195,000 in retained earnings in his law firm. In 2012, Dennis earned \$119,980 and Della earned \$33,887. In 2013, Dennis earned \$90,918, and Della earned \$35,085. Dennis also had a 10% profit sharing contribution not included in his income statements, and receives approximately \$14,000 in annual expense reimbursement from his firm. Combining the incomes, Della earned 22% to Dennis's 78% in 2012, and Della earned 28% to Dennis's 72% in 2013. Realistically, Della is not likely to receive large increases in pay, whereas Dennis is in a field that is often lucrative.

¶ 33 In light of the specific facts of this case, we do not find any basis to conclude that the trial court erred in determining that Della was entitled to attorney fees. Dennis's earnings are substantially higher than Della's earnings. We also find that he has substantially more assets than Della because of his partnership interest in his law firm and his 30% interest in the building. We conclude that if Della had to pay all of her attorney fees, her financial stability would be seriously undermined. *Marriage of Heroy*, 2017 IL 120205, ¶ 19. Furthermore, we find that Dennis has the means to contribute to Della's attorney fees. *Id.*

¶ 34 Having determined that the trial court properly concluded that Della was entitled to attorney fees, we turn to Della's claim in her cross-appeal that the percentage awarded was too low, and thus the trial court abused its discretion in the amount of the award. Della seeks an award of 75% of her attorney fees, or a total amount of \$32,267.76. In the June 3, 2016, attorney fees award, the trial court awarded 45% of the total fees amount—\$19,360. In the subsequent August 17, 2016, attorney fees award, the trial court lowered the percentage of fees awarded to 40%—\$17,209.

¶ 35 From our review of the record, we find no basis to conclude that the trial court abused its discretion in only awarding Della 40% of the attorney fees she incurred. While we acknowledge that the case continued on with financial discovery for almost two years, the decision to continue discovery was Della's decision. Della does earn less income than Dennis. Dennis does have the means to contribute to the fees Della incurred. While we agree that those factors warrant an award of attorney fees, we do not agree that the trial court's ultimate award constituted an abuse of discretion.

¶ 36 An abuse of discretion occurs when “ ‘the trial court’s ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.’ ” *Blum v. Koster*, 235 Ill. 2d 21, 36, 919 N.E.2d 333, 343 (2009) (quoting *People v. Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000)). The question is not if this court would have awarded Della a different percentage, but whether any reasonable person could have come to the same conclusion as the trial court. *In re Marriage of Patel*, 2013 IL App (1st) 112571, ¶ 95, 993 N.E.2d 1062. Given this standard, we find that a reasonable person could have awarded the identical percentage to Della. Thus, we affirm the trial court’s award of attorney fees.

¶ 37 Living Expenses

¶ 38 The other issue in this case involves the living expenses associated with the five months that Dennis lived with Della. Dennis contends that he paid what was agreed to, whereas Della claims that he underpaid her by \$19,107.48. We agree with the trial court’s assessment that money already in the checking account and the \$6500 deposit made prior to the date that Della filed her petition for dissolution and prior to Dennis agreeing to pay all of the living expenses cannot be included as payments towards the five months of expenses. During the five months, Dennis deposited \$29,966.59. From that amount, \$6219.60 was used to pay for Della’s daughter’s tuition and fees bill at the University of Illinois.

¶ 39 The marital settlement agreement entered by the trial court on September 30, 2013, outlined what some of the living expenses were. Living expenses included “utility bills, cell phone bills, mortgage payments, taxes and insurance on the former marital

residence” and “insurance for the parties’ motor vehicles.” Childcare expenses, food, and household items were not included in the list, but were part of the expenses listed in the emails between the parties after Dennis proposed this arrangement. Originally, Della estimated the monthly household expenses at \$6148. If we used Della’s estimate, that would amount to \$30,740 for the five months that Dennis lived in the house. Dennis argues that his deposits equaled the amount of the estimated expenses, and thus he owes no more. The trial court originally came to the same conclusion in its June 3, 2016, order, but then determined in its August 17, 2016, order that it had incorrectly given Dennis credit for the approximate \$6500 deposit he had made prior to the agreement reached by the parties in early January 2013. The trial court disapproved the “luxurious” purchases of cell phones, party supplies, stationery, picture frames, traffic ticket fines, and gifts as compensable living expenses. Additionally, the trial court would not allow the expenses for repair of the septic tank because Dennis had rejected the repair before Della filed for dissolution of their marriage. Whether or not these expenses were “luxurious,” they should not have been included in “living” expenses. We find no abuse of discretion and agree with the court’s assessment that Della is not entitled to receive the entire amount that she requested—the additional \$12,593.48.

¶ 40 Della asks us to award her the \$6219.60 for her daughter’s tuition expense, as that tuition expense was subject to a separate agreement and should not have been considered part of the household’s living expenses. The trial court held that Della was not entitled to reimbursement for that amount because the child was not Dennis’s child, and was merely

a promise of a gift. The court found that a promise of a gift is not binding. Given the factual context of this case, we disagree.

¶ 41 To be considered a valid gift, the donor must deliver the monetary gift to the donee with the intent to pass his claim of right to the money to the donee. *Pocius v. Fleck*, 13 Ill. 2d 420, 427, 150 N.E.2d 106, 111 (1958). The intent to pass the claim must be absolute and irrevocable, and the donor must relinquish “all present and future dominion and power over the subject matter of the gift.” *Id.* (citing *In re Estate of Jarmuth*, 329 Ill. App. 619, 630, 70 N.E.2d 336, 340 (1946)). Gifts can be revocable until the gift is executed. *Meyer v. Meyer*, 379 Ill. 97, 104, 39 N.E.2d 311, 314 (1942). The burden of proving a gift is on the donee. *Pocius*, 13 Ill. 2d at 427. The proof must be clear and convincing. *Estate of Jarmuth*, 329 Ill. App. at 630.

¶ 42 In this case, Dennis made a written promise to pay his stepdaughter’s spring college tuition bill by email in January 2013. This was included as an incentive to get Della to agree to allow him to return to the marital home even though they had “separated” as a couple. In court on January 11, 2013, in the partial prove-up of the settlement agreement, Dennis’s attorney informed the court that Dennis would be responsible for paying his stepdaughter’s spring tuition bill. In response to his attorney’s assertion, Dennis stated on the record that he would “absolutely” pay for his stepdaughter’s spring tuition. In addition, paragraph 5.10 of the marital settlement agreement entered by the trial court on September 30, 2013, states as follows:

“In exchange for his residency in the former marital residence until the entry of form judgment in this matter on June 1, 2013, husband shall pay the sum of approximately \$5,000.00 representing wife’s share (1/3) of the tuition and fees,

excluding room and board, at the University of Illinois for wife's daughter *** for Spring, 2013, school semester.”

Dennis was therefore under a court order to pay for his stepdaughter's tuition.

¶ 43 In addition to the court order to pay the tuition bill, we also find that contrary to the trial court's ruling, Dennis's payment was a gift. Dennis lived in the house until the end of May 2013. Dennis's written promise by email and his January 11, 2013, statement on the record established Dennis's intent to gift the tuition money. The tuition bill was paid with Dennis's deposited money before he vacated the house, and thus the gift was no longer revocable.

¶ 44 We find that the trial court's order was erroneous for excluding the tuition payment from the amount Dennis was ordered to pay Della. As stated earlier, the tuition bill was not part of the living expenses. Therefore, the tuition amount must be subtracted from the total amount of money Dennis deposited into the checking account. Pursuant to the powers granted to this court by Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we modify the trial court's August 17, 2016, order that directed Dennis to reimburse Della \$6500 for additional living expenses and add the requirement that Dennis also pay Della \$6219.60 for her share of her daughter's spring 2013 tuition and fees payment. Dennis will be required to pay Della \$12,719.60 for the additional living expenses and college tuition and fees.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, we affirm the Bond County circuit court's August 17, 2016, judgment in part and modify the judgment. We affirm the trial court's order

finding that Della was entitled to an award of attorney fees, and we affirm the award of attorney fees. Pursuant to the powers granted to this court by Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we modify the trial court's August 17, 2016, order to increase the amount Dennis must reimburse Della for household expenses and college tuition and fees from \$6500 to \$12,719.60.

¶ 47 Affirmed in part; judgment modified.