

Rule 23 order filed  
January 15, 2013.  
Modified upon denial of  
rehearing July 31, 2013.

2013 IL App (5th) 110454-U

NO. 5-11-0454

IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

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<i>In re</i> MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
CYNDIE M. AHRENS,	)	St. Clair County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 06-D-315
	)	
TIMOTHY D. AHRENS,	)	Honorable
	)	Randall W. Kelley,
Respondent-Appellant.	)	Judge, presiding.

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

**ORDER**

¶ 1 *Held:* Where the trial court determined that certain properties were marital in nature, the judgment was correct and must be affirmed. The trial court's award of a set dollar amount of stock was fair and in keeping with the remainder of the order dividing marital property. The court did not abuse its discretion in awarding attorney fees.

¶ 2 FACTS

¶ 3 Timothy D. Ahrens appeals from the court's November 4, 2010, judgment of dissolution of marriage and from the court's September 21, 2011, order denying his posttrial motion. The majority of the issues on appeal involve classification of property as being marital or nonmarital. Timothy failed to produce discovery material which resulted in his being barred from testifying at trial about those matters. Additionally, assets were commingled between personal and corporate entities. The court concluded that several assets were marital due to the discovery issues and the commingling of assets. Timothy also claims

that the trial court erred in awarding attorney fees.

¶ 4 Factual Background of Marriage

¶ 5 Timothy and Cyndie were married on February 14, 1994. At present, Cyndie is 52 years of age and is unemployed. Timothy is currently 53 years of age and is self-employed. There were no children born during the marriage.

¶ 6 The Real Estate

¶ 7 Buss Branch Road in Waterloo. A house located on Buss Branch Road in Waterloo was the marital home. The land was purchased about three to four months after they married, and the house was built soon thereafter. The court concluded that the value was \$1,350,000, and that the property was marital. The court found that \$282,000 was paid on the land from T.A. Contracting, Inc.—Timothy's nonmarital business. Timothy claimed that the money from the T.A. Contracting, Inc., account to cover the checks was premarital funds. Timothy contended that nonmarital funds were utilized and that the amount of those funds should be excluded from any amount awarded to Cyndie.

¶ 8 Cyndie's attorney requested documentation of the checking accounts in question in legal production requests. The information was not produced. At trial, Timothy began to testify to his knowledge of how much money was in the T.A. Contracting account before their marriage. Cyndie's attorney objected to this line of questioning due to the lack of discovery received before trial. The objection was sustained. Timothy made no offer of proof after the objection was sustained. Ultimately, the trial court concluded that without evidence supporting Timothy's claim, the asset must be considered completely marital in nature.

¶ 9 Daugherty Farm. This farm, located on Kopp Road in Waterloo, Illinois, was purchased in 1999 in joint title between Timothy, Cyndie, and Timothy's three children. The three children did not contribute to the purchase of the property. The court found the

property to have a value of \$453,000. T.A. Contracting paid \$379,665 towards the purchase. At trial, Timothy testified that this amount was a loan by T.A. Contracting and that it was supposed to have been paid back. He testified that the loan agreement was not written. Alternatively, he contends that the money from T.A. Contracting was nonmarital, and thus Daugherty Farm is a nonmarital asset. He also argues that he gifted one-fifth interests in Daugherty Farm to each of his three children. After making this gift, only 40% of the value of the farm could be construed as marital.

¶ 10 Old Highway 141 Property in Fenton, Missouri. This Missouri property was purchased on April 21, 2004, and was jointly titled in the names of Timothy, Cyndie, and Timothy's three children. Timothy claims that all three children contributed to the purchase of the property. The evidence at trial was that the Fenton property was paid for by T.A. Contracting. According to Timothy, all five owners of the property were supposed to pay back T.A. Contracting for their share of the purchase price. No written documents were ever prepared, with the repayment agreement being verbal. The property was valued at \$96,000. Although the evidence failed to show that any of the five owners made contributions or repayments of their portions of the purchase price, the trial court made a finding that "[t]he parties agreed that all owners contributed an equal share to purchase the property."

¶ 11 Other Marital Property. The parties agreed that property located on Decker in St. Louis, Missouri, and purchased on April 28, 2003, was marital. The value was found to be \$4,550.

¶ 12 Nonmarital Properties. The trial court found that 209 acres in Bourbon, Missouri, and a piece of realty located on Hawkins Road in St. Louis, Missouri, were nonmarital, and in its judgment, both were awarded to Timothy.

¶ 13 The Corporations

¶ 14 There are two corporate entities that the trial court found nonmarital in nature. Both

were Missouri corporations. T.A. Contracting, Inc., was created on June 4, 1984, and H.I.A., Inc., was created on December 2, 1991, and dissolved on October 8, 2009.

¶ 15 Vehicles and Equipment

¶ 16 The trial court determined that there were multiple vehicles and pieces of farm equipment purchased during the marriage with marital money. The marital money used to pay for these vehicles and equipment came from the Daugherty Farms property farm account. All items remained in Timothy's possession, and there was no debt on any of the items. The trial court concluded that the items were worth \$50,000, based upon the evidence presented at trial.

¶ 17 Bancorp Stock

¶ 18 At the time of the trial, Timothy owned Bancorp stock worth \$550,000. He provided statements from 2004, 2005, and 2006, to document the value. Timothy testified that the stock was purchased by T.A. Contracting, Inc., but during discovery and at trial, Timothy provided no proof of its purchase by the corporation. Timothy also provided no documentation to establish the date of purchase. Because the only evidence the trial court had began with a 2004 statement, the trial court ruled that the property was a marital asset.

¶ 19 Attorney Fees

¶ 20 Cyndie sought attorney fees in the amount of \$10,013.37. The trial court noted that there was a vast income disparity between Cyndie and Timothy, and also noted that Cyndie had no ability to pay her fees without Timothy's assistance. Timothy requested two continuances of the trial setting, which increased fees. Timothy requested one of these continuances because a witness was unavailable, but when the case ultimately went to trial, Timothy did not call that witness. The trial court commented that Timothy's failure to call this witness at trial most likely meant that his original continuance request for that purpose was made in bad faith.

¶ 21

## ISSUES, LAW, AND ANALYSIS

¶ 22 Timothy appeals not only from the trial court's November 4, 2010, judgment of dissolution of marriage but also from the trial court's September 21, 2011, order denying his amended posttrial motion.

¶ 23

### Real Property Division

¶ 24 Timothy claims that the trial court erroneously labeled some of the properties as marital, when the source of the funding for those properties was nonmarital, earned by his nonmarital corporation, T.A. Contracting, Inc. For the reasons that follow, we disagree with this argument.

¶ 25 The trial court's decision to classify property as either marital or nonmarital will not be reversed on appeal unless the decision is contrary to the manifest weight of the evidence. *In re Marriage of Smith*, 265 Ill. App. 3d 249, 253, 638 N.E.2d 384, 387 (1994). Marital property is statutorily defined as "all property acquired by either spouse subsequent to the marriage." 750 ILCS 5/503(a) (West 2008).

¶ 26 Marital Home at Buss Branch Road in Waterloo. The Buss Branch property was purchased after the parties' marriage and is therefore presumptively marital property. 750 ILCS 5/503(a) (West 2008). "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." *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1017, 909 N.E.2d 221, 228 (2009). "A party can overcome this presumption only by a showing of clear and convincing evidence that the property falls within one of the exceptions listed in section 503(a) of the Illinois Marriage and Dissolution of Marriage Act \*\*\*." *Id.* Income from property acquired before marriage is nonmarital if the income is not attributable to the personal effort of a spouse. 750 ILCS 5/503(a)(6), (a)(8) (West 2008).

¶ 27 Timothy argues that because the Buss Branch property was bought with money from

his nonmarital business—T. A. Contracting—that the property is nonmarital. However, the mere fact that the money used for the purchase of the Buss Branch property came from the T.A. Contracting account does not overcome the presumption that the Buss Branch Road property is marital property. As previously stated, the couple married in February 1994, and the Buss Branch Road land was purchase in June 1994. The court found that \$282,000 was paid on the land from the T.A. Contracting account. Cyndie does not dispute that the property was purchased with money from the T.A. Contracting account.

¶ 28 It is undisputed that T.A. Contracting was nonmarital, a business Timothy started prior to the marriage. Cyndie made no claim that the business itself was part of the marital estate or that she should be reimbursed for any contribution the marital estate made to T.A. Contracting. Timothy's position, however, is that because the business was nonmarital, any income derived from the business was also nonmarital. Timothy further contends that premarital assets of T.A. Contracting were used in the purchase of the property. He argues that the court erred in not finding the Buss Branch property nonmarital or alternatively not reimbursing him for his nonmarital contribution to the marital estate.

¶ 29 Timothy's arguments are simply wrong as they are based on facts not in evidence and on a conflation of sections 503(a)(6), (a)(8), and (c)(2) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/503(a)(6), (a)(8), (c)(2) (West 2008)).

¶ 30 We begin by examining Timothy's claim of premarital assets. The only evidence put forth by Timothy to support this claim was a handwritten entry in an exhibit which was part of a purported prenuptial agreement stating that there was \$150,000 in the T.A. Contracting account at the time of the marriage and \$600,000 in accounts receivable. The trial court found that the prenuptial agreement was invalid, and Timothy did not appeal that ruling. Timothy offered no further documentation to support his claim that there were premarital monies in the T.A. Contracting account or accounts receivable monies owed to T.A.

Contracting. Simply put, Timothy did not put forth any sustainable evidence of premarital assets belonging to T.A. Contracting.

¶ 31 Having correctly concluded that there was no proof that the purchase of property came from premarital funds, the court was faced with the question as to whether the income derived from T.A. Contracting, used in purchasing the property, was marital income. Again, this was Timothy's burden to prove otherwise.

¶ 32 Timothy makes the incorrect blanket assertion that income from nonmarital property is nonmarital. Income from property, such as T.A. Contracting, acquired before marriage is nonmarital "if the income is *not* attributable to the personal effort of a spouse." (Emphases added.) 750 ILCS 5/503(a)(6), (a)(8) (West 2008). The spouse claiming the income to be nonmarital must prove by clear and convincing evidence that it is "not attributable to personal efforts of [the] spouse." 750 ILCS 5/503(a)(8) (West 2008); *In re Marriage of Schmitt*, 391 Ill. App. 3d at 1018, 909 N.E.2d at 229 (citing *In re Marriage of Dunlap*, 294 Ill. App. 3d 768, 779, 690 N.E.2d 1023, 1030 (1998)).

¶ 33 The trial court found that "all the money contributed into the account from his labors during marriage was marital income. When the marital money was then used to purchase real estate or personalty during the marriage it became marital property." Timothy did not dispute at trial, nor does he argue before this court, that the income was generated from a source other than his personal efforts. As the court correctly noted under the case law "remuneration of whatever form to a spouse is considered marital property." See *In re Marriage of Henke*, 313 Ill. App. 3d 159, 728 N.E.2d 1137 (2000).

¶ 34 Timothy's reliance on case law he claims holds otherwise is misplaced, as the cases are inapposite. The cases he cites deal with issues of reimbursement of contributions—from a marital estate to a nonmarital estate and vice versa. Contributions under section 503(c)(2) do not arise in this case as the only asset in question is that of Timothy's income, which the

court found to be attributable to his personal efforts and thus marital. "It is axiomatic that one type of estate, such as the marital estate, cannot be reimbursed from another type of estate, such as the nonmarital estate, until the asset is classified in a particular estate." *In re Marriage of Steinberg*, 299 Ill. App. 3d 603, 609, 701 N.E.2d 254, 258 (1998). In the *In re Marriage of Booth* case cited by Timothy, the court made the following observation about income, after deciding that the marital estate was not entitled to any reimbursement of contributions: "[W]e are well aware that sole proprietorship, noncorporate business net income might be considered income attributable to the *personal effort* of the owner and thus marital property." (Emphasis in original.) *In re Marriage of Booth*, 255 Ill. App. 3d 707, 711, 627 N.E.2d 1142, 1145-46 (1993). A similar statement regarding income was made by the court in *In re Marriage of Samardzija*, 365 Ill. App. 3d 702, 850 N.E.2d 880 (2006), another case cited by Timothy. In *In re Marriage of Samardzija*, the major issue was contribution of nonmarital funds to the marital estate. A secondary issue also was "income" from nonmarital property. The court decided that "profit bonuses" from stock, which had been given to the spouse as a gift, was not marital property. Importantly, the court then noted: "According to Diamond [the stock company's accountant], the bonuses were only given to stockholders and were not based on employment." *Id.* at 707, 850 N.E.2d at 885.

¶ 35 It was Timothy's burden to prove by clear and convincing evidence that the money from the T.A. Contracting account that was used to purchase the Buss Branch property was not attributable to Timothy's personal efforts and thus nonmarital. Timothy did not put forth any sustainable evidence that the funds used to purchase the property were not attributable to his personal efforts. Further, the evidence showed that the T.A. Contracting account was used to pay for all manner of family expenses, such as groceries, utility bills, appliances, and several vehicles. There was no effort by Timothy to segregate this account to the business.

¶ 36 The court's findings with respect to the nature of the T.A. Contracting account was



as follows:

"The Branch Road property, when considering the manifest weight of evidence as produced at trial, was purchased from the TA Contracting account which was funded with marital funds of the parties co-mingled with some non-marital funds but insufficient to constitute the account as non-marital. No evidence was offered by Respondent, although having been given multiple opportunities to clarify to clearly distinguish the marital/non-marital characterization of this account. The Court was left with no reasonable alternative but to find the account marital and thus the purchase of the Buss Branch property as marital."

We further add that despite repeated production requests by Cyndie's counsel, Timothy refused to produce any statements from the T.A. Contracting account during the pendency of the divorce matter. Timothy should not now profit from his willful failure to comply with discovery requests.

¶ 37 We find that the trial court's order is not contrary to the manifest weight of the evidence.

¶ 38 Daugherty Farms Property. This property was paid for out of T.A. Contracting funds and was titled in five names—Cyndie, Timothy, and three of Timothy's children. The children did not contribute to the property payment. Timothy testified that the approximate \$340,000 of T.A. Contracting funds was a loan to the Ahrens family that had to be repaid. No evidence of a loan exists. No evidence of repayment on that loan exists. The income derived from T.A. Contracting was marital. Timothy had no proof that T.A. Contracting had financial assets before the Ahrens married. Therefore, we find that the trial court properly classified this property as marital. Timothy argues, however, that only 40% of the value of the property was marital because he and Cyndie only owned 40% of the property. On appeal, he argues that the trial court erred in failing to conclude that the remaining 60% of the value was a gift

to his three children.

¶ 39 As previously stated, we note that there is a rebuttable presumption that all property acquired by a spouse during the marriage is marital property regardless of how the title is held. 750 ILCS 5/503(b) (West 2008); *In re Marriage of Hagshenas*, 234 Ill. App. 3d 178, 186, 600 N.E.2d 437, 443 (1992). A second presumption exists regarding gifts during the marriage from a parent to a child. The transfer to a child is presumptively a gift, but that presumption may be overcome by clear and convincing evidence establishing the contrary. *In re Marriage of Hagshenas*, 234 Ill. App. 3d at 186, 600 N.E.2d at 443. In cases where the designation of a property as marital or nonmarital is subject to both of these presumptions, Illinois law holds that the two presumptions cancel each other out. *Id.* at 186-87, 600 N.E.2d at 444. "That is, the presumption of a gift to a child is canceled out by the conflicting presumption that all property acquired after marriage is marital property, and, thus, the trial court is free to determine the issue of whether the asset in question was marital or nonmarital property without resort to the presumption." *Id.* at 187, 600 N.E.2d at 444.

¶ 40 In this case, neither party cites to testimony or evidence supporting or contrary to the presumption of the gift to Timothy's three children. The trial court was free to analyze the evidence and make its own determination without regard to these presumptions. The property was purchased with marital income. The three children did not contribute to the purchase of the property. Having heard the testimony of the parties, and seen the evidence presented, the trial court concluded that all of the Daugherty Farms property was marital.

¶ 41 We note that the issue of the Daugherty Farms property was raised in Timothy's posttrial motion and in his amended posttrial motion. However, he does not argue that the property was a gift and makes no mention of donative intent. He merely states that the property is titled in the names of five people. In response, the trial court denied this portion of Timothy's motion and stated:

"The Kopp Road [Daugherty Farms] property was purchased when considering the manifest weight of the evidence, with marital funds. While Respondent's children were added to the deed, there was no evidence of contribution to the purchase by them. The property is marital with each party awarded one-half (½). If the Respondent wishes to give same [*sic*] or all of his one-half (½) to the children, that is his prerogative."

¶ 42 From our review of the arguments and the record, and in recognition that the trial court observed the parties when they testified and had an ability to judge their credibility, we find no basis to conclude that the trial court's classification of this property as marital is contrary to the manifest weight of the evidence.

¶ 43 Old Highway 141 Property in Fenton, Missouri. This property was also titled in the names of Cyndie, Timothy, and Timothy's three children. The trial court stated in its order that the parties agreed that the property was titled in this manner and that the property had a value of \$96,000. The trial court then stated, "The parties agreed that all owners contributed an equal share to the purchase of the property."

¶ 44 Timothy mischaracterizes the court's order as ordering Timothy to pay Cyndie for one-half of the value of this property. The trial court explains its order in denying Timothy's posttrial motion as follows:

"The Court gave Petitioner a dollar amount, not a percentage of the real estate. The dollar amount was less than one-half (½) of each property. Considering the manifest weight of the evidence the property awarded to Petitioner is property found to be her fair share."

¶ 45 Timothy does not argue that the amount of money awarded Cyndie as her fair share was inappropriate. However, the court references that overall amount awarded Cyndie, and so we briefly address this issue. The trial court's determination on property division is only

restricted by reason and will not be overturned unless it can be shown that the trial court abused its discretion. *In re Marriage of Siddens*, 225 Ill. App. 3d 496, 500, 588 N.E.2d 321, 324 (1992). The issue for the reviewing court is not whether it necessarily agrees with the trial court's determination as to marital asset division, but whether the trial court acted arbitrarily without employing conscientious judgment, or if in view of all circumstances of the case, the trial court exceeded the bounds of reason so that no reasonable person would follow the trial court's position. *Id.* at 500, 588 N.E.2d at 324.

¶ 46 Section 503(d) of the Illinois Marriage and Dissolution of Marriage Act requires marital property division in just proportions. 750 ILCS 5/503(d) (West 1996). Proportional asset division does not require mathematical equality. *In re Marriage of Doty*, 255 Ill. App. 3d 1087, 1097-98, 629 N.E.2d 679, 686 (1994).

¶ 47 The same analysis applies to the trial court's determination regarding the Old Highway 141 property as applied to the Daugherty Farms property. The property was purchased during the marriage and was therefore presumptively marital in nature. However, Timothy also titled the property in the names of his three children. While he does not specifically argue that this titling of property was intended as a gift to his children, he does argue that at most, 40% of this property could have been construed as marital. There is conflict as to whether the three children made any contribution towards the purchase of this property valued at \$96,000. The trial court's order stated that they did, but the record lacks evidence to support this finding. Regardless, the trial court's order, while determining that the property was marital in nature, does not specify what percentage was marital. Timothy argues that the trial court determined that 100% of the property was marital.

¶ 48 The total value of all properties at issue was \$1,903,500. The trial court awarded Cyndie \$950,000. The court stated that amount was "her fair share of the above marital real estate." The amount awarded Cyndie was not quite 50%. Based upon our review of the

arguments and the record, we find no reason to conclude that the trial court's order finding that the Old Highway 141 property in Fenton, Missouri, was marital property was contrary to the manifest weight of the evidence.

¶ 49

#### Bancorp Stock

¶ 50 Timothy argues that the trial court erred in awarding Cyndie any portion of the Bancorp stock because he did not personally own the stock. The owner of the stock was listed as T.A. Contracting, Inc. He contends that the stock was a nonmarital asset.

¶ 51 The trial court did not make a finding of the value of the stock at dissolution, but from the record, we know that the value was \$550,000. The court declined to award Cyndie one-half of the shares because of the other property awarded to her in the judgment. The court awarded \$100,000 in Bancorp stock to Cyndie and directed Timothy to cooperate in signing documents necessary to effect this transfer.

¶ 52 Earlier in this order, we held that assets purchased with funds from T.A. Contracting during the marriage were marital assets. Therefore, shares of Bancorp stock purchased during the marriage by T.A. Contracting were marital assets. We confirm the trial court's order to this effect. With respect to the dollar amount of the stock ordered transferred to Cyndie, we find nothing in the record to conclude that the trial court acted arbitrarily without employing conscientious judgment. *In re Marriage of Siddens*, 225 Ill. App. 3d at 500, 588 N.E.2d at 324.

¶ 53

#### Attorney Fees

¶ 54 Timothy finally claims that the trial court erred in awarding Cyndie \$9,000 in attorney fees. On appeal, he argues that because the trial court awarded Cyndie \$950,000 for her interest in real estate purchased during the marriage, \$25,000 as her share of farm equipment, and \$100,000 of Bancorp stock, she clearly had the financial ability to pay her own \$9,000 legal bill. He did not argue in either his posttrial or amended posttrial motion that the legal

fees award was inappropriate.

¶ 55 Generally, a court's award or denial of attorney fees will not be disturbed absent an abuse of discretion. *In re Marriage of Uehlein*, 265 Ill. App. 3d 1080, 1090, 638 N.E.2d 706, 715 (1994). Despite the court's authority to grant attorney fees, it is presumed that the individual on whose behalf the attorney's services were performed will pay 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. *In re Marriage of Westcott*, 163 Ill. App. 3d 168, 179, 516 N.E.2d 566, 572 (1987). The spouse seeking attorney fees need not divest capital assets or deplete his or her means of support, thereby undermining economic stability. *In re Marriage of Marthens*, 215 Ill. App. 3d 590, 599, 575 N.E.2d 3, 9 (1991). The court must also consider the amount of time necessary on a case. See *In re Marriage of Winton*, 216 Ill. App. 3d 1084, 1092, 576 N.E.2d 856, 861 (1991). Additionally, the trial court is allowed to rely upon its own judgment and experience when deciding the value of the services provided. See *In re Marriage of Walters*, 238 Ill. App. 3d 1086, 1102, 604 N.E.2d 432, 445 (1992).

¶ 56 We must determine whether or not the trial court abused its discretion in reaching this decision. At the time of the judgment, Cyndie was in school pursuing a degree to be a medical assistant, and therefore was not yet earning income. Timothy was earning income, and the trial court awarded him all income-producing assets ensuring an ongoing stream of income. Factually, the case was problematic from a discovery perspective. Cyndie's counsel made numerous efforts to obtain discovery necessary to preparation of her case. Difficulty in obtaining discovery from Timothy was known to the court. Obviously, increased discovery costs will occur if one side is failing to cooperate. Because of all of these issues, we find that the trial court's award of \$9,000 of Cyndie's legal fees was not an abuse of the

court's discretion.

¶ 57

#### CONCLUSION

¶ 58 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed.

¶ 59 Affirmed.