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2011 IL App (4th) 100970-U

Filed 12/7/11

NO. 4-10-0970

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Marriage of)	Appeal from
KIMBERLY J. SMITH,)	Circuit Court of
Petitioner-Appellee,)	Greene County
and)	No. 09D22
JEFFREY T. SMITH,)	
Respondent-Appellant.)	Honorable
)	James W. Day,
)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Cook concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where the trial court did not abuse its discretion in denying permanent maintenance to Jeffrey, we find no error;
- ¶ 2 Where the court misclassified the insurance policy as marital property but Jeffrey was not negatively impacted, we find no reversible error;
- ¶ 3 Where the trial court's finding that Kimberly did not dissipate certain assets was not against the manifest weight of the evidence, we find no error;
- ¶ 4 Where the court did not abuse its discretion in refusing to offset the present value of the parties' pension benefits, we find no error; and
- ¶ 5 Where the court did not abuse its discretion in the division of marital assets, we find no error.
- ¶ 6 In June 2010, the trial court issued a judgment of dissolution of marriage between petitioner, Kimberly J. Smith, and respondent, Jeffrey T. Smith. In August 2010, the court

entered an order disposing of the remaining issues.

¶ 7 On appeal, Jeffrey argues the trial court erred in (1) denying his claim for permanent maintenance, (2) determining the cash value of his life-insurance policy was marital property, (3) not charging Kimberly with the value of certain property, (4) refusing to offset the present value of the parties' pension benefits and other assets, and (5) failing to award him 60% of the marital estate. We affirm.

¶ 8 I. BACKGROUND

¶ 9 Kimberly and Jeffrey were married in March 1987. Two children were born to the parties during the marriage and are both now emancipated. In May 2009, Kimberly filed a petition for dissolution of marriage.

¶ 10 In June 2010, the trial court issued a judgment of dissolution of marriage and conducted a hearing on the remaining issues. Lisa Scranton, a real-estate appraiser, testified the marital residence and 40 acres in Hillview had a fair-market value of \$300,000. She also appraised the parties' cabin in Kampsville and found the fair-market value was \$22,500.

¶ 11 Kimberly testified she was 46 years old and has an associate's degree in nursing. The parties have two daughters, Lindsey, age 22, and Sarah, age 19. Kimberly is the Director of Nursing at the Jacksonville Developmental Center and has worked there for approximately 22 years. Her wages were approximately \$65,000 in 2008, but because of a wage furlough program, her wages were approximately \$62,000 in 2009. She has also worked as a "per diem nurse" at the Scott County Nursing Center but quit the job "due to financial obligations" and problems with her feet. She grossed approximately \$4,100 per year at the nursing home.

¶ 12 At one time, Kimberly bought and sold purses off the Internet but terminated the

business in 2009. Her inventory of remaining purses was damaged when they got wet in storage. In her financial affidavit, Kimberly listed her monthly net income as \$3,472.60. Her living expenses totaled \$3,991. Her deferred compensation account totaled \$36,350.

¶ 13 On cross-examination, Kimberly testified the parties separated in April 2009. After moving out, Kimberly rented a storage unit where she stored 90 to 100 purses. She valued the purses at \$5 to \$10 a piece. Once the purses got wet, she threw them away. She did not make a claim against the owner or insurer. Kimberly also testified she quit her part-time nursing job because she wanted Jeffrey to be responsible for the girls' education. She stated she took a safe but not the \$3,000 in cash inside.

¶ 14 Jeffrey testified he was 49 years old and worked in the maintenance department of the North Greene School District. His gross income per month totaled \$2,489.94. He listed his monthly expenses as \$4,956.27. Jeffrey worked on a part-time basis at Casey's General Store but quit after the parties separated. He also worked part-time at Green Gables, a local bed and breakfast, doing landscape work. He grossed approximately \$3,900. The proprietors told him to give them a call after the divorce was finalized to return to work.

¶ 15 Jeffrey stated he had the safe prior to the marriage, and the parties typically kept \$3,000-4,000 inside. He believed the money was still there at the time of separation. After an order of protection was filed against him, he was told to vacate the marital home. When he was allowed to return, the safe was gone. Jeffrey had an American Funds account valued at \$35,301.47. He stated the parties maintained an inventory of approximately 150 purses prior to the separation. None of the purses remained when he was allowed back into the marital home. He stated the average selling price was \$30.

¶ 16 Thomas Langford, a forensic economist, testified on Jeffrey's behalf. He reviewed the value of pensions for Kimberly with the State Employees' Retirement System and for Jeffrey with the Illinois Municipal Retirement Fund. The present cash value of Kimberly's pension was \$248,348.31. The present cash value of Jeffrey's pension was \$116,133.26.

¶ 17 Jerry Joyce, a real-estate appraiser, testified the fair-market value of the Hillview property was \$270,000. He valued the cabin at \$20,800.

¶ 18 In August 2010, the trial court entered its written judgment on the remaining issues. The court reserved jurisdiction on the issue of the parties' pensions. Despite Jeffrey's request for permanent maintenance, the court denied it, finding he had primary employment as well as the opportunity to continue with part-time work. The court averaged the property appraisals and valued the Hillview property to be \$285,000 and the Kampsville property to be \$21,650. Jeffrey was given the first opportunity to purchase the Hillview and Kampsville properties; otherwise each party would receive one-half of the proceeds at a public sale. The court awarded certain personal property to each party but stated the evidence was insufficient to charge Kimberly or Jeffrey with the value of the purses, missing money, or missing property.

¶ 19 In September 2010, Jeffrey filed a posttrial motion, arguing the trial court erred in, *inter alia*, (1) denying him maintenance, (2) not making an unequal division of marital property, (3) failing to include the purses and money in the safe in the marital estate, (4) failing to offset the present value of Kimberly's pension against other assets, including his pension, and (5) failing to award him the real estate to offset the value of Kimberly's pension.

¶ 20 In November 2010, the trial court conducted a hearing on Jeffrey's motion and denied it, except to require each party to assume and pay one-half of the credit card debt to Bank

of America. The court later entered an order to clarify that the parties' pensions should be divided equally pursuant to a Qualified Illinois Domestic Relations Order (QILDRO). This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 A. Maintenance

¶ 23 Jeffrey argues the trial court abused its discretion in denying his claim for \$750 per month in permanent maintenance. We disagree.

¶ 24 Section 504(a) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/504(a) (West 2008)) sets forth 12 factors for the trial court to consider in deciding whether to grant maintenance, including the following:

"(1) the income and property of each party, including marital property apportioned and non[]marital property assigned to the party seeking maintenance;

(2) the needs of each party;

(3) the present and future earning capacity of each party;

(4) any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage;

(5) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through

appropriate employment or is the custodian of a child making it appropriate that the custodian not seek employment;

(6) the standard of living established during the marriage;

(7) the duration of the marriage;

(8) the age and the physical and emotional condition of

both parties;

(9) the tax consequences of the property division upon the respective economic circumstances of the parties;

(10) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;

(11) any valid agreement of the parties; and

(12) any other factor that the court expressly finds to be just and equitable."

¶ 25 The trial court has the discretion to determine the amount and duration of an award of maintenance. *In re Marriage of Donovan*, 361 Ill. App. 3d 1059, 1062, 838 N.E.2d 310, 314 (2005). The court's decision in awarding maintenance will not be reversed on appeal absent an abuse of discretion. *Donovan*, 361 Ill. App. 3d at 1062, 838 N.E.2d at 314. "Where an abuse of discretion in awarding or denying maintenance is claimed, the burden of showing such an abuse rests with the claiming party." *In re Marriage of Homann*, 276 Ill. App. 3d 236, 240, 658 N.E.2d 492, 495 (1995).

¶ 26 In the case *sub judice*, Jeffrey argues he was entitled to maintenance because he

received no income-producing property, his monthly expenses considering his income, his present and future earning capacity as compared to Kimberly, and the length of the parties' marriage. The evidence indicated Jeffrey was 49 years old and worked in the maintenance department of the North Greene School District. He earns approximately \$34,000 per year at his main source of employment and has earned up to \$3,800 at Green Gables. He claims he has no prospects for a promotion. In his financial affidavit, he listed his monthly expenses as approximately \$4,900. Kimberly, age 46, works as the Director of Nursing at the Jacksonville Developmental Center and earns between \$60,000 and \$65,000 per year. Her monthly expenses totaled approximately \$3,900. The parties were married for 23 years.

¶ 27 The trial court indicated it considered the factors set forth in section 504 of the Dissolution Act. The court found Jeffrey had part-time work with Green Gables and that employment could resume after the finalization of the divorce. The court also noted Jeffrey worked part-time at Casey's General Store until he quit to get more work done at home.

¶ 28 While it is clear that Kimberly makes more than Jeffrey, it appears Jeffrey has the ability to work part-time to increase his income. Jeffrey complains he will spend more than he takes in given his \$4,900 in monthly expenses. However, that figure is questionable. In looking at his calculations, Jeffrey testified the \$400 monthly payment for Kimberly's car was paid by her, thereby lowering his monthly expenses to \$4,500. He testified he paid those expenses every month out of his salary and with extra money given to him by his parents, who gave him a "couple hundred dollars here and there." They did not give him \$2,000 a month. Moreover, no evidence indicated Jeffrey went into debt during the year of separation despite his claim that his expenses exceeded his income.

¶ 29 Jeffrey has not met his burden in showing the trial court erred in denying his request for permanent maintenance. Jeffrey has shown his ability to work and meet his monthly needs despite his claimed monthly expenses. The court awarded each party one-half of the proceeds from the sale of two parcels of real estate valued at over \$300,000 and gave Jeffrey the right to purchase those parcels. We find the court did not abuse its discretion in denying Jeffrey's request for permanent maintenance.

¶ 30 B. Life-Insurance Policy

¶ 31 Jeffrey argues the trial court's determination that the cash value of his Monumental life-insurance policy was marital property was against the manifest weight of the evidence. While we agree the court misclassified the insurance policy as marital, we find Jeffrey was not negatively impacted.

¶ 32 Prior to disposing of property upon dissolution, the trial court must classify property as either marital or nonmarital. *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1017, 909 N.E.2d 221, 228 (2009). Nonmarital property includes property acquired prior to the marriage. 750 ILCS 5/503(a)(6) (West 2008). In the division of property, "each spouse is to receive his or her own nonmarital property." *In re Marriage of Werries*, 247 Ill. App. 3d 639, 649, 616 N.E.2d 1379, 1388 (1993); see also 750 ILCS 5/503(d) ("the court shall assign each spouse's non-marital property to that spouse"). The trial court's classification of property as marital or nonmarital will not be disturbed on appeal unless is against the manifest weight of the evidence. *In re Marriage of Lundahl*, 396 Ill. App. 3d 495, 502, 919 N.E.2d 480, 486 (2009).

¶ 33 In this case, the life-insurance policy constituted nonmarital property. The trial court included it in Jeffrey's marital assets. Notwithstanding the mislabeled classification of the

property, Jeffrey was awarded the proceeds of the policy, as he should have since he was entitled to receive his own nonmarital property. We find the court's classification of the life-insurance policy resulted in no adverse consequences.

¶ 34 C. Missing Property

¶ 35 Jeffrey argues the trial court failed to charge Kimberly with the value of the missing purses, money, personal property, and funds removed from the joint checking account. Kimberly argues, *inter alia*, that Jeffrey's dissipation claim has been waived because the claim was not made until after the close of evidence. However, Jeffrey's attorney questioned Kimberly about the purses, the safe, the joint checking account, and the personal property such that the whereabouts and use of those items were being questioned and explanations were needed. See *In re Marriage of Henke*, 313 Ill. App. 3d 159, 178, 728 N.E.2d 1137, 1151 (2000) (finding the party was on notice that the expenditure of funds was being questioned).

¶ 36 "Dissipation is the use of marital property for one spouse's sole benefit or for a purpose unrelated to the marriage at a time when the marriage is undergoing irreconcilable breakdown." *In re Marriage of Miller*, 342 Ill. App. 3d 988, 994, 796 N.E.2d 135, 141 (2003). Whether a party has engaged in conduct constituting dissipation is a question of fact, and a trial court's determination on the issue of dissipation will not be reversed on appeal unless it is against the manifest weight of the evidence. *In re Marriage of Vancura*, 356 Ill. App. 3d 200, 204, 825 N.E.2d 345, 350 (2005).

"The spouse charged with dissipation of marital funds has the burden of showing, by clear and specific evidence, how the marital funds were spent. [Citation.] Vague and general testimony

that marital funds were used for marital expenses is inadequate to meet that burden, and the trial court is required to find dissipation when the spouse charged with dissipation fails to meet that burden." *In re Marriage of Carter*, 317 Ill. App. 3d 546, 552, 740 N.E.2d 82, 86 (2000).

¶ 37 As to the purses, Kimberly testified she had approximately 90 to 100 purses worth \$5 to \$10 a piece placed in storage after moving out of the residence. After the purses got wet, she threw them away. She did not pursue a claim against the storage company or its insurer. Jeffrey claimed there were 150 purses worth \$30 each in the parties' inventory prior to separation. Here, the evidence was insufficient to charge Kimberly with the value of the purses. Nothing indicates the purses were intentionally destroyed or that Kimberly has a claim against the storage owner or the insurer.

¶ 38 Jeffrey claims Kimberly removed numerous items of personal property. He created an itemized list of missing items, and the appraiser put a value on the items sight-unseen. However, the evidence presented was insufficient to state even a *prima facie* case of dissipation.

¶ 39 Jeffrey claims Kimberly took \$3,000 from the safe at the time of separation. Jeffrey testified the safe was gone after he returned to the house following the order of protection. Kimberly testified that, although she took the safe, the same was empty except the rack inside of it. The credibility of the parties and the weight to give to the evidence rests with the trial court. *Werries*, 247 Ill. App. 3d at 642, 616 N.E.2d at 1384. The evidence failed to show dissipation on Kimberly's part.

¶ 40 Jeffrey also claims Kimberly took \$3,000 from the parties joint checking account

upon separation and deposited those funds in her Bags Galore account. However, Jeffrey withdrew funds from the RECO Credit Union in excess of \$4,000 and claimed to have paid bills and his attorney. The trial court found the evidence insufficient to charge Kimberly or Jeffrey with the missing money. If anything, it appears the trial court cancelled out the missing amounts. We find no abuse of discretion.

¶ 41 D. Pension Offset

¶ 42 Jeffrey argues the trial court abused its discretion in refusing to offset the present value of the parties' defined pension benefits and other assets. We disagree.

¶ 43 "[A]ll property acquired by either spouse subsequent to the marriage" constitutes marital property (750 ILCS 5/503(a) (West 2008)), including pensions accruing during the marriage (750 ILCS 5/503(b)(2) (West 2008)). *In re Marriage of Brackett*, 309 Ill. App. 3d 329, 338, 722 N.E.2d 287, 295 (1999); *In re Marriage of Abma*, 308 Ill. App. 3d 605, 615, 720 N.E.2d 645, 654 (1999) (pension rights earned during the marriage are considered marital property under the Dissolution Act).

¶ 44 We have noted trial courts employ two different methods to distribute pension benefits: (1) the present-value or immediate offset approach and (2) the reserved-jurisdiction approach. *In re Marriage of Culp*, 399 Ill App. 3d 542, 547, 936 N.E.2d 1040, 1045 (2010).

"When using the immediate-offset approach, the trial court 'determines the present value of the pension plan, awards the entire pension to the employed party, and awards the other party enough other marital property to offset the pension award.' [Citation.] Frequently, this method is impractical 'either because of valuation

difficulties or because the couple lacks sufficient readily divisible assets to provide an offsetting property award.' [Citation.] Thus, the reserved-jurisdiction method is often the more feasible approach.

Pursuant to the reserved-jurisdiction approach, the trial court reserves jurisdiction to divide the pension ' "if, as[,] and when" the pension becomes payable. [Citations.]' Under this approach, a court determines the marital interest in a pension benefit 'by dividing the number of years or months of marriage during which pension benefits accumulated by the total number of years or months benefits accumulated prior to retirement or being paid.' [Citation.] 'The value of the marital interest is then calculated by multiplying the amount of each benefit payment as it is disbursed by the marital interest percentage.' [Citation.]" *Culp*, 399 Ill. App. 3d at 547, 936 N.E.2d at 1045.

¶ 45 Jeffrey's expert, Thomas Langford, calculated the present value of Kimberly's pension to be \$266,052.61 and Jeffrey's pension to be \$116,133.26. In his written closing argument, Jeffrey asked the trial court to utilize the immediate-offset approach. Kimberly stated the only fair way to divide the pension benefits would be through the entry of a QILDRO, "an Illinois court order that creates or recognizes the existence of an alternate payee's right to receive all or a portion of a member's accrued benefits in a retirement system." 40 ILCS 5/1-119(a)(6) (West 2008). The court decided on the reserved-jurisdiction approach and later clarified its

ruling by ordering an equal division of the pension benefits through a QILDRO.

¶ 46 One of the practical problems with the immediate-offset approach is the difficulty in valuation. Although Langford testified to his figures, he also noted his calculations were based on assumptions such as life expectancy and interest rates. The changing nature of these factors indicates the calculations may not be firmly set in stone or provide an accurate view of the parties' pension assets. Moreover, the parties were not approaching retirement, thereby leading to the possibility of future uncertainty.

¶ 47 Another problem with the immediate-offset approach is the parties may lack readily divisible assets to provide an offsetting property award. Jeffrey contends the trial court should have awarded him the marital residence and the cabin as an offset. However, the properties did not provide readily divisible assets to support the immediate-offset approach. Moreover, any offset in this case would necessarily require Kimberly to write a check to Jeffrey to cover the amount, but she would receive no benefit until retirement. We find the trial court did not abuse its discretion in denying Jeffrey's request to use the immediate-offset approach and instead using the equal division of the pension benefits through the QILDRO.

¶ 48 E. Marital Estate

¶ 49 Jeffrey argues the trial court abused its discretion in failing to award him 60% of the marital estate. We disagree.

¶ 50 Section 503(d) of the Dissolution Act requires the trial court to divide marital property "in just proportions" considering the enumerated and relevant factors. 750 ILCS 5/503(d) (West 2008). Such factors include, in part, the value of the property assigned to each spouse, the duration of the marriage, the age, health, occupation, sources of income, employ-

ability, and needs of each of the parties, and the reasonable opportunity for each spouse for future acquisition of capital assets and future income. 750 ILCS 5/503(d) (West 2008). In dividing marital property, the distribution by the court need not be equal so long as it is equitable.

Werries, 247 Ill. App. 3d at 649, 616 N.E.2d at 1388. The division of marital property will not be reversed on appeal absent an abuse of discretion. *In re Marriage of Drury*, 317 Ill. App. 3d 201, 210-11, 740 N.E.2d 365, 371 (2000). In that regard, the court's distribution of assets will only be disturbed on appeal if no reasonable person would agree with the trial court's decision.

In re Marriage of Claydon, 306 Ill. App. 3d 895, 898, 715 N.E.2d 1201, 1203 (1999).

¶ 51 Jeffrey argued the trial court failed to consider his nonmarital estate contributed \$27,000 to the acquisition of the parties' first home. He also contends Kimberly's age and earning power compared to his, along with the disparity in income, justified an unequal division. Nothing indicates the trial court did not consider this amount in its award of property. On the issues of earning power and disparity of income, the court found no reason to deviate from an equal division of assets. We find no abuse of discretion in the court's award.

¶ 52 III. CONCLUSION

¶ 53 For the reasons stated, we affirm the trial court's judgment.

¶ 54 Affirmed.