

appellant was 55 years of age. The appellee was disabled and unemployed and the appellant ran an in-home day care service and worked at a Dollar General store. The parties had been married on January 31, 1973. Two children had been born, both of whom were adults. The parties had lived separate and apart for more than 12 years. When the appellee left the marital home, one minor child still lived there with the appellant. The appellant continued to live there at the time of the trial. The appellee's financial disclosure statement did not list the home as an asset. The appellant's financial disclosure statement did list the home as an asset but noted that it was titled in the appellee's name.

At the trial the only issue before the court was the classification and disposition of the marital home. Only the two parties testified. The following pertinent evidence was adduced.

The appellee testified that he had received the marital home as a gift from his parents. He first learned of the gift in 2003 when his mother told him. The appellee's father had died in 1977. The appellee identified a deed dated April 27, 1988, in which the appellee's mother, Anna Mae Lee, conveyed the property to the appellee. The deed was recorded April 28, 1988. However, while he lived in the house with the appellant, the appellee believed that his mother owned the home. While the parties lived in the house, they paid the mortgage payments. After the parties' separation, the appellant continued to live in the house without paying any rent.

While the parties lived in the house, they installed new kitchen cabinetry. The appellee's mother paid to have a new roof put on the house. The appellant operates a day care business in the home. The appellee had never conveyed any interest in the home to the appellant.

The parties made mortgage payments on the house while they lived there, but when they were financially unable to do so, the appellee's mother made them. Although the appellant worked throughout the marriage, the appellee denied that she had contributed to

the mortgage payments.

At the time the parties separated, the mortgage had been paid off. The appellee testified that his mother had paid the real estate taxes and insurance premiums. The appellee had contributed nothing for the upkeep of the house since the separation.

The appellant testified that she had resided in the marital home since 1973. She had operated a day care business there for 23 years. She knew in 1988 that the house had been deeded to the appellee, because at that time he had wanted to take out a mortgage on it to put on a new roof. He asked his mother to deed the property to him and she did. However, the appellee's mother "made [the appellee] put up a lien on the house so that her name would be on it still." According to the appellant, there was no value on the lien. The appellant further testified that the appellee had known in 1988 that he had been deeded the house.

At the time the house was deeded to the appellee in 1988, there was no money owing on it. Prior to that time, the appellant had made monthly payments on the mortgage because the appellee had been unemployed. Even though the appellee's mother owned the home, the appellant made the mortgage payments for a period of time. The appellant has paid the real estate taxes and insurance premiums on the home since 1996. The appellee's mother had not made these payments. The appellant had also made substantial improvements to the property since the appellee left. She had replaced all the carpeting, sided the side and the back of the house, and put up a fence and a sidewalk. The most recent real estate tax bill had been for \$2,400.

According to the appellant, the appellee's parents had the house built shortly after the parties married in 1973. The parties were in their early twenties, and the appellee's parents took out the mortgage for the construction of the home. However, the parties made the mortgage payments. The property was not conveyed to the appellee until 1988, after the mortgage had been paid off.

On December 1, 2009, after receiving written closing argument from the parties, the circuit court entered its order finding that the marital home was the appellee's separate, nonmarital property and awarding it to the appellee. The court rejected the appellant's argument that a resulting trust had been created in her by virtue of her payments on the mortgage, taxes, insurance, and improvements. It found that the home was clearly a gift to the appellee from his mother in 1988 and was therefore his nonmarital property. The court also rejected the appellant's claim for reimbursement for her payments of taxes, insurance, and improvements.

The appellant filed a motion to reconsider or vacate the judgment, or for a rehearing or a new trial, seeking to introduce into evidence a notice of a lien that had been recorded simultaneously with the deed from the appellee's mother to the appellee in 1988. The notice of lien states the following: "Anna Lee claims a lien on [the home] for money advanced to [the appellee] in connection with the purchase price and payment of the mortgage on said property. Title has been legally held in the name of Anna Mae Lee and her now deceased husband, Leslie Lee. This claim or lien will be extinguished by payment by [the appellee] to Anna Mae Lee or by the death of Anna Mae Lee, whichever occurs first." The motion further alleges that any payments the appellee's mother had made on the mortgage were merely advances which were to be repaid, that payments by the appellee on the home were made with marital funds, and that title to the marital residence was held in the name of the appellee's parents only as security for the mortgage payments, which were made using the parties' marital funds. The motion argues that, accordingly, the home should be classified as marital property. The motion concludes that the conveyance of the home to the appellee was not a gift at all but was made once the mortgage had been paid in full by marital funds.

On September 22, 2010, the circuit court entered its order denying the appellant's posttrial motion. The court held that in order to introduce new evidence after a judgment has

been entered, the newly discovered evidence must have existed before the initial hearing but not yet been discovered or otherwise obtainable. That was not the case here; the appellant knew of the existence of the lien in 1988, just as she knew of the existence of the deed. In any event, the circuit court held that the introduction of the notice of lien would not have changed its decision without additional evidence regarding who made what payments and when.

We address first the appellant's argument that the circuit court erred in denying her posttrial motion and refusing to consider the notice of lien recorded along with the deed conveying the property to the appellee. The appellant argues that the notice of lien is convincing evidence that the home was not a gift to the appellee but that the parties were obligated to pay for the house and did so out of marital funds. The circuit court denied the appellant's motion, finding that the notice of lien was not newly discovered evidence because the appellant knew of the lien and the recorded notice thereof was available, at the time of the trial, and because, in any event, its introduction would not have changed the circuit court's decision in the absence of additional testimony. The appellant responds that one of the prayers of her posttrial motion was for a reopening of the proofs or a new evidentiary hearing at which she could have introduced additional testimony.

We note initially that the appellant's posttrial motion was filed within 30 days of judgment pursuant to section 2-1203(a) of the Illinois Code of Civil Procedure. 735 ILCS 5/2-1203(a) (West 2010). The decision to grant or deny a motion for reconsideration lies within the discretion of the circuit court and will not be reversed absent an abuse of that discretion. *General Motors Acceptance Corp. v. Stoval*, 374 Ill. App. 3d 1064, 1078 (2007). Where such a motion is based on newly discovered evidence, it must appear that due diligence was used to discover the evidence for trial and that the evidence is so conclusive that it would probably change the result. *In re Marriage of Rosen*, 126 Ill. App. 3d 766, 775

(1984). Newly discovered evidence is evidence that was not available prior to the hearing, and trial courts should not allow litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling. *Stoval*, 374 Ill. App. 3d at 1078. If evidence offered for the first time in a posttrial motion could have been produced at an earlier time, the circuit court may deny its introduction into evidence. *Stoval*, 374 Ill. App. 3d at 1077.

As the circuit court found, the appellant did not bring any newly discovered evidence to the court's attention in her posttrial motion. As indicated by her testimony at the trial, the appellant had been aware of the existence of the lien, if not the recorded notice thereof, since 1988, when the deed conveying the property to the appellee was executed and recorded. Nevertheless, the appellant made no effort to obtain a copy of the notice of lien until after the circuit court had ruled against her. The notice of lien had been in existence since 1988, when it was recorded contemporaneously with the deed. Had the appellant exercised even minimal diligence she could have easily obtained a copy of the notice of lien prior to trial. She did not do so and offered no reasonable excuse for her failure to do so. There is no evidence in this case that the appellee in any way attempted to conceal the existence of the lien or the notice thereof from the appellant. Indeed, it was a matter of public record and the appellant herself testified that she learned of the existence of the lien in 1988. The circuit court did not abuse its discretion in denying the appellant's posttrial motion and in refusing to consider the notice of lien.

The appellant argues that the circuit court erred in classifying the marital home as the appellee's separate nonmarital property. Under section 503 of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/503 (West 2010)), there is a rebuttable presumption that all the property obtained by either spouse after the date of the marriage but before the entry of a judgment of dissolution is marital property, regardless of how title is

held. *In re Marriage of Didier*, 318 Ill. App. 3d 253, 258 (2000). This presumption can only be overcome by a showing that the property falls within one of the statutory exceptions listed in section 503(a) of the Act, in this case, that the property was obtained by a gift from the appellee's mother. 750 ILCS 5/503(a) (West 2010). The party claiming that the property was obtained by a gift and is therefore nonmarital has the burden of proof. *In re Marriage of Didier*, 318 Ill. App. 3d at 258. Any doubts regarding the nature of the property are resolved in favor of finding that the property is marital. *In re Marriage of Didier*, 318 Ill. App. 3d at 258.

Although normally the presumption is that property obtained during the marriage is marital, in this case there is a countervailing presumption: that a transfer from a parent to a child is a gift. *In re Marriage of Didier*, 318 Ill. App. 3d at 258. While normally either one of these presumptions can only be overcome by clear and convincing evidence, in cases where a determination of the nature of the property at issue is found to be subject to both of these conflicting presumptions, the presumptions are considered to cancel each other out and a simple manifest-weight-of-the-evidence standard is applied. *In re Marriage of Didier*, 318 Ill. App. 3d at 258-59. That is, the presumption of a gift to a child is canceled out by the conflicting presumption that all the property obtained during the 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 either presumption. *In re Marriage of Didier*, 318 Ill. App. 3d at 259.

Therefore, it was the appellee's burden at the trial to establish by the manifest weight of the evidence that he and he alone obtained the marital home as a gift from his mother. *In re Marriage of Didier*, 318 Ill. App. 3d at 259. The appellee did not carry this burden, and the circuit court's classification of the marital home as the appellee's nonmarital property is contrary to the manifest weight of the evidence.

A gift is a voluntary gratuitous transfer of property from a donor to donee where the donor manifests an intent to make a gift and absolutely and irrevocably delivers the property to the donee. *In re Marriage of Didier*, 318 Ill. App. 3d at 259. One of the elements of a gift is that the transfer must be gratuitous. *In re Marriage of Didier*, 318 Ill. App. 3d at 261.

In the case at bar, the evidence is undisputed that the home was obtained during the marriage. The manifest weight of the evidence demonstrates that the parties made mortgage payments on the home during the marriage using marital funds. At times when the parties were unable to do so, the appellee's mother made payments on the mortgage, but according to the appellant's testimony, she retained a lien on the house. These facts do not establish either donative intent on the part of the appellee's mother or that the transfer was gratuitous. Any doubts regarding the nature of the property must be resolved in favor of finding that the property is marital. *In re Marriage of Didier*, 318 Ill. App. 3d at 258.

It is noteworthy here that the appellee's mother did not testify at the trial. The evidence most relevant in determining donative intent is the donor's own testimony. *In re Marriage of Wanstreet*, 364 Ill. App. 3d 729, 738 (2006). While the testimony of the transferring parent is not always necessary to prove that a transfer was a gift, its absence is a strong indication that it was not. *In re Marriage of Wanstreet*, 364 Ill. App. 3d at 739.

It is apparent from the wife's unrebutted testimony that when the parties were young and newly married, the appellee's parents took out a mortgage and built a house for the young couple but that the parties were expected to, and did, make the mortgage payments on the house throughout the marriage. To the extent the appellee's mother made payments for the couple when they were financially unable, she expected to have a lien against the house to secure repayment of those amounts. According to the appellant's testimony, the appellee's mother asserted her lien at the time she agreed to execute the deed conveying the property to the appellee.

We are reminded again that the appellee had the burden of proving by the manifest weight of the evidence that the conveyance of the house was a gift. He failed to carry this burden.

The circuit court's finding that the appellee obtained the house through a gift from his mother and its classification of the house as the appellee's nonmarital property is contrary to the manifest weight of the evidence. Accordingly, we reverse the judgment of the circuit court and remand this cause to the circuit court for an equitable disposition of the parties' marital property.

For the foregoing reasons, the judgment of the circuit court of Jackson County is hereby reversed, and this cause is remanded for further proceedings not inconsistent with this order.

Reversed; cause remanded.