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2013 IL App (3d) 120055-U

Order filed May 24, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
DIANE L. CORWELL,)	Rock Island County, Illinois,
)	
Petitioner-Appellant)	
Cross-Appellee,)	
)	Appeal No. 3-12-0055
and)	Circuit No. 09-D-5155
)	
ROBERT CORWELL,)	
)	
Respondent-Appellee)	Honorable Clarence M. Darrow,
Cross-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.

Justice Carter concurred in the judgment.

Justice McDade concurred in part and dissented in part.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in finding the parties' antenuptial agreement valid and enforceable, and did not err in striking the agreement's maintenance waiver provision as unfair and unreasonable. The trial court abused its discretion in failing to award petitioner maintenance in gross, or in the alternative, ordering respondent to secure the periodic maintenance award with a life insurance policy.

¶ 2 The petitioner, Diane Corwell, filed for divorce in Rock Island circuit court on September 28, 2009. The respondent, Robert Corwell (Bob), discovered the parties' antenuptial agreement nearly a year and a half later and filed an amended answer asserting the agreement as an affirmative defense.

¶ 3 Diane filed a motion for a declaratory order regarding enforcement of the antenuptial agreement. On June 3, 2011, the trial court found that the agreement was valid and enforceable, with the exception of the maintenance waiver provision.

¶ 4 Following the hearing on the remaining issues, the trial court entered a judgment of dissolution and confirmed its June 3 order in its entirety. The trial court awarded Diane permanent maintenance in the amount of \$6,516 per month, distributed property in accordance with the terms of the antenuptial agreement and its June 3 order, and ordered Bob to pay Diane \$12,500 as reimbursement for one-half the contents taken from the parties' safe deposit box. The trial court denied Diane's claim to Bob's business, Family Tailored Homes, as well as her claims for a lump-sum reimbursement of lost social security benefits, attorney fees, and a 2007 Escalade.

¶ 5 Both parties filed posttrial motions and, after reviewing the evidence, the trial court reduced Diane's maintenance to \$6,190 per month.

¶ 6 Diane appeals, claiming, *inter alia*, that the trial court erred in finding the antenuptial agreement enforceable; in failing to award her a larger monthly maintenance amount, or in the alternative, maintenance in gross; and in failing to reimburse her for her lost social security benefits.

¶ 7 Bob cross-appeals, claiming the trial court erred in striking the maintenance waiver

provision and in finding that he dissipated marital assets.

¶ 8 We affirm in part, reverse in part, and remand with instructions.

¶ 9 BACKGROUND

¶ 10 I. History of the Proceedings

¶ 11 Diane Corwell filed for divorce on September 28, 2009. At the time of filing, Diane and Bob had been married for 31 years.

¶ 12 Bob filed an answer to Diane's petition on October 15, 2009. A copy of the parties' antenuptial agreement (the agreement) was subsequently unearthed at the deposition of the parties' attorney, Gary Gelbach. The original agreement was never located. Following discovery of the agreement, Bob filed an amended answer to the petition for dissolution, asserting the agreement as an affirmative defense.

¶ 13 Diane filed a motion for a declaratory order regarding enforcement of the antenuptial agreement, arguing that the agreement should not be enforced as it was not a true and complete copy, that it was no longer valid due to a five-year limitations clause, and that Bob did not fully disclose the value of his assets. On June 3, 2011, the trial court issued an order holding that the antenuptial agreement was valid and enforceable, with the exception of the maintenance waiver provision. The trial court struck the maintenance waiver to prevent harm to Diane, as “the parties had been married for over 30 years and during that time Bob established and maintained control over Diane’s business, personal and retirement finances.” The order allowed Diane to proceed on a claim for maintenance. The remainder of the property was distributed pursuant to the terms of the agreement. The order did not include Rule 304(a) language. Diane filed a motion requesting the court make a 304(a) finding, which the trial court denied.

¶ 14 On June 30, 2011, an order was entered dividing the parties' joint Fifth Third account to be applied to the parties' legal fees.

¶ 15 The remaining issues were heard at hearing on August 11, 2011. To avoid duplicative evidence, the trial court limited the hearing to issues that were relevant in light of the trial court's prior ruling on the enforceability of the property distribution provisions of the antenuptial agreement.

¶ 16 The trial court entered a judgment of dissolution of marriage on October 24, 2011. Relevant to this appeal, that order provided that: (1) Bob pay monthly maintenance to Diane in the amount of \$6,516; (2) Diane be reimbursed \$12,500 for Bob's dissipation of \$25,000 from the parties' safe deposit box; and (3) that each party was awarded any and all assets titled in his or her own name.

¶ 17 Both parties filed posttrial motions for reconsideration. After reviewing the evidence, the trial court issued an order providing that: (1) Diane's monthly maintenance award was amended to \$6,190; and (2) the 2006 Lexus that was not previously addressed in the judgment of dissolution was awarded to Bob as property of Family Tailored Homes and Bob's nonmarital property.

¶ 18 II. The Parties and Their Marriage

¶ 19 On or about January 1980, Diane went to work as a sales associate for Family Tailored Homes, a business owned by Bob. Bob and Diane began a romantic relationship shortly thereafter and, according to Diane, the couple became engaged in the late summer of 1980.

¶ 20 The parties were married on December 11, 1980. At the time of their marriage, Bob was 52 and Diane was 33. Bob had six children from a prior marriage. Diane had two children from

a prior marriage; Bob later adopted both. No children were born of the marriage, and all children are emancipated.

¶ 21 While married, Bob and Diane enjoyed an expensive lifestyle and accumulated substantial wealth. They owned multiple properties in Illinois and Florida and drove luxury vehicles. They traveled frequently. They owned boats and were members of the local country club. They enjoyed the ability to give gifts and entertain family and friends without financial constraint.

¶ 22 Both parties acknowledge that the breakdown of the marriage is attributable to disagreements regarding finances. On September 16, 2009, Bob and Diane met with Diane's attorney, Frank Mitvalsky, the parties' accountant, John Berge, and the parties' estate planning attorney, Gary Gelbach, in an attempt to resolve some of Diane's financial questions and concerns.

¶ 23 Berge testified that at the meeting, he had to explain to Diane that Family Tailored Homes did not have the resources to continue to pay her \$805 per week while she was not selling real estate. Berge testified that Diane refused to accept that her disbursements of \$805 per week were discontinued, and she refused to resume work selling real estate.

¶ 24 Diane filed for divorce 12 days later on September 28, 2009. She testified that she "absolutely did not think about divorce" until 2009, and that she thought her marriage was a happy one "until [she] found out things" about some financial issues.

¶ 25 III. Use of Specific Marital Funds

¶ 26 A. The Safe Deposit Box

¶ 27 Testimony elicited at trial indicated that Bob removed cash from the parties' safe deposit

box at Sauk Valley Bank sometime between the September 16 meeting with attorneys and September 28, 2009. In her affidavit, Diane attested that \$21,000 was the amount removed. On April 7, 2011, she testified that the amount was "almost \$25,000." Bob testified that the amount taken was only approximately \$5,000.

¶ 28 The trial court found Diane's assertion that Bob removed approximately \$25,000 in cash from the parties' safe deposit box credible. The court further found that the removal of funds happened after the breakdown of the marriage and constituted dissipation by Bob. The court ordered Bob to pay \$12,500 to Diane as reimbursement for the funds removed.

¶ 29 **B. Gains from Life Insurance Investments**

¶ 30 Throughout the parties' marriage, Bob made certain life insurance investments. In 2007, one investment earned an income of \$178,419. Bob deposited the gain in his trust.

¶ 31 Diane made a dissipation claim in regard to the \$178,419 in investment income as well. In the judgment of dissolution, the trial court denied the claim, finding that it occurred prior to the breakdown of the marriage and, thus, did not constitute dissipation.

¶ 32 **VI. The Antenuptial Agreement**

¶ 33 At the time Diane filed for divorce, neither party possessed a copy of the parties' antenuptial agreement. A copy was subsequently discovered during the deposition testimony of the parties' estate planning attorney, Gary Gelbach. Gelbach testified that he "had the files" from the parties' prior attorney, Phillip Ward, who prepared the agreement. Bob proffered this copy of the agreement to the trial court as a true and accurate copy of the parties' agreement signed on December 10, 1980.

¶ 34 The agreement is comprised of 12 pages. The first six pages is the actual agreement,

with the last six pages being "Schedule A: Property of Robert M. Corwell, and Schedule B: Property of Diane L. Bielema." The schedules are each signed by both Bob and Diane. Both schedules contained some blanks, presumably to allow them to fill in up-to-the-minute values for certain assets.

¶ 35 Of particular importance to this appeal, paragraph 7 of the agreement outlines the parties' rights in the events of divorce. It provides, in pertinent part, the following:

"The parties hereto agree that in the event that a Judgment of Divorce, Dissolution of Marriage or Legal Separation shall be entered in a proceeding between them, each party shall retain any property owned by him or her at the time of the marriage, and his or her proportional share of any property acquired by the parties after the marriage and held or owned by them as tenants in common, tenants by the entireties or joint tenants, and the beneficial interest of any trust acquired after the marriage. Husband shall further pay to Wife as soon as practicable following the entry of any such judgment a sum of money not to exceed \$100,000.00 as and for an equitable lump sum settlement in lieu of all rights to alimony, maintenance, support, dower, community interest, homestead, inheritance, descent, distribution and all other property rights and all other right, title, claim, interest and estate Wife might have by reason of the marital relationship, under any present or future law, or which she might have or be entitled to claim in, to or against the property and assets of Husband, real, personal or mixed, or his estate, whether now owned or hereafter in any manner acquired by Husband.

Provided, however, this \$100,000.00 sum to be paid to wife shall first be reduced by the following:

(a) The fair market value of any property acquired by the Wife after the marriage and held or owned by her separately; and

(b) The fair market value of the Wife's proportional share of any properties acquired after the marriage and held by the parties as tenants in common, joint tenants or tenants by the entireties; and

(c) The fair market value of the Wife's beneficial interest in any trust, which beneficial interest is acquired after the marriage."

¶ 36 The parties offered conflicting testimony regarding the authenticity of the copy and the substance of the agreement itself. Diane claimed that the first time the agreement was ever discussed was "almost the day we signed it." She maintained that Bob did not really want the agreement, but that he asked her to sign it to show his children that she was not marrying him for money.

¶ 37 Diane stated that the first time she saw the agreement in written form was on the date it was signed. Diane testified that she did not review the whole document. Instead, she only focused on the fact that it contained a five-year limitation clause. Diane stated that if the agreement had not contained a five-year limitation clause, she would have demanded that it be amended to include it. When asked at trial how her signature came to be on the document, she answered, "[q]uite honestly, I don't know, but I did sign something the day we got married. I do not remember signing this *** I signed a five-year agreement." Diane has continuously asserted that the copy of the agreement proffered by Bob was only a portion of the agreement that was

actually signed by the parties, and that the page or pages explaining the five-year limitation are missing.

¶ 38 After the agreement was signed, Diane testified that she and Bob took it with them that day and kept the original in the safe deposit box at their residence. She maintains that the agreement was kept in that safe deposit box until approximately 1986, when they moved all their personal paperwork to a safe deposit box at Amcor Bank. Diane stated that the reason the agreement was not transferred to the safe deposit box at the bank was that it was no longer in effect.

¶ 39 Diane offered conflicting testimony regarding the whereabouts of the agreement. Diane testified that she did not remember taking any physical act to destroy the agreement executed by the parties. She later testified she did not remember destroying the document, saying, "I threw it away. I don't remember if I tore it up or how I—." Diane's testimony that she threw the document in the trash was impeached by deposition testimony indicating that she was not aware what became of the document. She stated, "We moved a lot times. It might have got destroyed in one of the moves. I assume I destroyed it."

¶ 40 Diane maintains that the parties never discussed the agreement again. Bob and Diane participated in estate planning with attorney Gelbach for approximately 9 to 10 years. Despite all of those meetings, the topic of the agreement was never broached or discussed.

¶ 41 Diane points to the fact that schedule A of Bob's assets had over 50 properties listed, yet he did not assign any values to those properties. Bob admitted that at least two of the properties listed on Diane's schedule of assets were actually owned by Bob and Diane as tenants in common. Bob conceded that he never gave Diane a list "that contained an accurate portrayal of

his true total worth before [he] married [Diane]."

¶ 42 Bob, on the other hand, maintains that he raised the issue of an antenuptial agreement with Diane after they became engaged, although he cannot recall her reaction. Bob hired Phillip Ward to prepare the agreement and provided attorney Ward with all of the information for the preparation of the schedule of assets. The schedule was a summary of all the property he owned at the time, giving values as best he could.

¶ 43 Bob testified that he gave a copy of the agreement to Diane prior to the date it was signed, and that she brought that copy to their office in Sterling the day before they were married. The agreement was signed and notarized by the office manager, Olive Selover. Bob asked Ms. Selover to put the document in a safe place. Diane also recalled that Ms. Selover notarized the document after it was signed.

¶ 44 Bob has never been able to locate the original. He admitted that it was possible that the original was shredded or lost in the course of moving; however, he is not aware of it actually being shredded. Bob further testified that he and Diane never agreed that the document be altered or that it would no longer bind them. He testified that to his knowledge, the document was complete. Bob maintains that the antenuptial agreement executed by the parties never contained a five-year limitation.

¶ 45 V. Family Tailored Homes

¶ 46 Bob testified that he is, and always has been, the sole shareholder of Family Tailored Homes. Bob also pointed out that Diane was an officer of Family Tailored Homes. In this capacity, she frequently signed documents pertaining to Family Tailored Homes or the Corwell Family Limited Partnership that she did not read prior to signing. Diane testified that she did not

need to because she thought she was half-owner, and she would normally only look to the signature page of whatever she was signing. Diane received and signed numerous documents indicating that she had no ownership interest in Family Tailored Homes.

¶ 47 In 1988, Bob and Diane together purchased a ReMax franchise called ReMax-FTH. Both Family Tailored Homes and ReMax-FTH were managed out of the same office. Diane testified that when the parties purchased the ReMax franchise, she stopped being an employee and became an owner. This was evidenced by her business cards, which later identified her as broker/owner of Family Tailored Homes. In reality, the ReMax franchise was run through Family Tailored Homes. Diane stated that this was of no concern to her, as she was led to believe that Family Tailored Homes was "she and Bob's." Diane believed herself to be a co-owner because at all relevant times, the parties referred to Family Tailored Homes as "our company." Bob, on the other hand, testified that he referred to it as "our company" with all his employees.

¶ 48 As further evidence of her co-ownership, Diane points to the method by which she was compensated by Family Tailored Homes. Specifically, beginning in approximately 1993, Diane's gross commissions from the sale of real estate were paid back into Family Tailored Homes to cover overhead. These earnings were not reported to the Internal Revenue Service (IRS). Diane testified that for the period beginning in 2002 and ending in 2006, she earned over \$600,000 in gross commissions. Bob points to evidence that total gross commissions for Bob and Diane together from 1999 through 2008 was \$816,000.

¶ 49 Diane received a \$50,000 annual salary and later a draw or distribution in lieu of salary; under both circumstances, her net pay was \$805 per week. Her compensation never varied and

was not tied to any measure of performance.

¶ 50 When John Berge became the accountant for Family Tailored Homes in 1991, he proposed that the business alter the method in which Diane was compensated, such that she would receive a draw or distribution rather than a salary. Berge stated that the reason for this change was to save on payroll taxes and to avoid liability for paying Diane unreasonable compensation. The distribution was classified as a repayment of a note to Family Tailored Homes.

¶ 51 As a result of the change from a salary to a draw or distribution, Diane receives significantly less social security income than she otherwise would have. Diane testified that as of August 2010, she receives \$773 per month in social security benefits. Berge testified that Diane's social security income is approximately \$500 less per month than it would have been had she been paid \$50,000 per year from 1994 to 2009. Diane's expert witness, Brian Neff, a certified public accountant (CPA), testified that Diane's social security income is \$657 less per month than it would have been if she had earned and reported an income of \$60,000 per year from 1993 to 2009. He concluded that the net present value of those lost benefits to Diane is \$124,721. Berge testified that if Bob predeceases Diane, her social security income would increase to an amount commensurate with what she would have earned absent the diversion.

¶ 52 VI. The Corwell Family Limited Partnership

¶ 53 In 1992, Bob and Diane, along with their eight children, formed the Corwell Family Limited Partnership. The purpose of the partnership was to transfer wealth from Bob and Diane to their children in advance of their death in order to avoid estate taxes. All eight children and Diane are beneficiaries under the trust. Bob's interest in the partnership is 1%, Diane's is 2%,

and the eight children share the remaining 97%. The original investment in the partnership was \$819,000.

¶ 54 The agreement for the partnership stated that no capital could be increased without the knowledge and consent of all the other partners. Diane testified that despite these limitations, Bob continued to transfer assets to and from the Corwell Family Limited Partnership without Diane's knowledge or consent. He also encumbered the partnership with debt without Diane's knowledge or consent. Some of the properties that Bob transferred into the partnership were properties developed by both Bob and Diane after they were married and after the original partnership agreement was executed. Diane stated that she did not discover these transfers until after the parties separated. The evidence reflected that Bob would withdraw money from both the Corwell Family Limited Partnership and Family Tailored Homes for personal use. During cross-examination, Bob's CPA conceded that Bob moved money back and forth between the entities much the same as if the money was being transferred between four pockets on the same pair of pants.

¶ 55 Bob testified that he transferred additional assets to the partnership in 2002. He stated that the assets transferred were solely in his name, not his and Diane's.

¶ 56 ANALYSIS

¶ 57 I. Admissibility of the Antenuptial Agreement

¶ 58 Initially, Diane contends that "the 'best' or 'secondary' evidence rule precludes enforcement of the alleged agreement." Despite Diane's word choice, this argument is one of admissibility, and we find the trial court properly admitted the copy of the parties' antenuptial agreement.

¶ 59 The "best" or "secondary" evidence rule provides that in order to establish terms of a written contract, the original must be produced unless it is shown to be unavailable for some reason other than the serious fault of the proponent. *Sears, Roebuck & Co. v. Seneca Insurance Co.*, 254 Ill. App. 3d 686, 691 (1993). "To introduce secondary evidence of a writing, the proponent must show: (1) the prior existence of the original; (2) the loss, destruction or unavailability of the original; (3) the authenticity of the substitute; and (4) its own diligence in attempting to procure the original." *Id.*

¶ 60 Furthermore, Illinois Rule of Evidence 1004 provides that, "[t]he original is not required and other evidence of the contents of a writing, recording, or photograph is admissible if *** [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." Ill. R. Evid. 1004 (eff. Jan. 1, 2011).

¶ 61 Here, the trial court "did not find it significant that Bob is/was unable to locate the original antenuptial agreement and proceeded with this action as if it did not exist. Bob's explanation was reasonable and credible." There was no allegation that Bob destroyed the document in bad faith. Rather, Diane asserted that the antenuptial agreement entered into evidence was not the true agreement and the actual antenuptial agreement expired after five years. Bob refuted this, and Diane cannot offer any evidence of this "five-year version" other than her testimony. The trial court found that "her testimony regarding such a provision in the agreement is inconsistent with her testimony that she did not read the antenuptial agreement."

¶ 62 Indeed, Diane repeatedly contradicted herself. She claimed that she did sign an antenuptial agreement the day before they were married, but that she did not read it. Despite not having not read the document, in the very next breath she was adamant that it contained a five-

year limitation. She maintained that she and Bob took it with them and she kept the original in the safe deposit box at their residence. Then she stated that the document did not make it to the safe deposit box at the bank because it was no longer in effect. While she claimed it was destroyed, she did not remember when, or how. She later stated that "she assumed she destroyed it."

¶ 63 It is within the trial court's purview to make credibility determinations as to witnesses and evidence. See *In re Marriage of Stopher*, 328 Ill. App. 3d 1037, 1041 (2002). Furthermore, the admission of evidence lies within the sound discretion of the trial court and will not be reversed absent a showing of an abuse of that discretion. *Colella v. JMS Trucking Co. of Illinois, Inc.*, 403 Ill. App. 3d 82, 90 (2010). We find no abuse of discretion in the trial court's decision to admit the copy of the parties' antenuptial agreement as a true and accurate copy of the original document.

¶ 64 II. Enforcement of the Antenuptial Agreement

¶ 65 Having found that the trial court properly admitted the parties' antenuptial agreement, we now turn to Diane's contention that the agreement is unenforceable. Specifically, Diane argues: (1) "the actions of the parties throughout their 31-year marriage demonstrate their mutual agreement to no longer be bound by the document;" and (2) that "Bob failed to establish that enforcement of the terms of the agreement would produce an equitable result in resolving the property and maintenance issues within the parties' dissolution action."

¶ 66 A premarital agreement made between the parties prior to the 1990 enactment of the Illinois Uniform Premarital Agreement Act (750 ILCS 10/1 *et seq.* (West 2010)) is governed by the general rules of contract interpretation. *In re Marriage of Murphy*, 359 Ill. App. 3d 289, 299

(2005). Such an agreement will be enforced "if it meets the following requirements: (1) an unforeseen condition of penury is not created due to lack of property resources or lack of employability; (2) the agreement is entered into with full knowledge and without fraud, duress, or coercion; and (3) the agreement is fair and reasonable." *Id.* (citing *Warren v. Warren*, 169 Ill. App. 3d 226 (1988)). "In order for an antenuptial agreement to be fair and reasonable, Illinois requires that the agreement guarantee both parties an equitable financial settlement in lieu of a waiver of their rights to property or maintenance." *Id.* at 300.

¶ 67 The parties offer conflicting standards of review. Diane contends that our review of the trial court's order regarding the enforceability of the agreement should be manifest weight of the evidence, since antenuptial agreements are subject to ordinary principles of contract interpretation, and a trial court's finding of fact can only be overturned if it was contrary to the manifest weight. See *In re Marriage of Best*, 387 Ill. App. 3d 948 (2009); *Meade v. Kubinski*, 277 Ill. App. 3d 1014 (1996). Bob contends that the proper standard of review is abuse of discretion, as reviewing courts have not expressly enunciated a standard for reviewing the enforceability of antenuptial agreements entered into prior to the 1990 enactment of the Illinois Uniform Premarital Act. See *In re Marriage of Murphy*, 359 Ill. App. 3d at 299-300; *Eule v. Eule*, 24 Ill. App. 3d 83, 86-88 (1974); *Berger v. Berger*, 357 Ill. App. 3d 651, 657-58 (2005).

¶ 68 In *Murphy*, the enforceability of the parties' antenuptial agreement was upheld on appeal "[b]ecause this court finds that the terms of the agreement are fair and reasonable, reversal in this case would be inappropriate." *Murphy*, 359 Ill. App. 3d at 300. We find that the "fair and reasonable" finding enunciated in *Murphy* and others can be likened to an abuse of discretion standard. An abuse of discretion occurs only when the trial court's ruling "is arbitrary, fanciful,

or unreasonable, or where no reasonable person would take the view adopted by the trial court.' " *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 61. On the other hand, a "decision is against the manifest weight of the evidence only when an opposite conclusion is clearly apparent or when the court's findings appear to be unreasonable, arbitrary, or not based upon the evidence." *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 44. The trial court's finding passes muster under either standard.

¶ 69 A. Antenuptial Agreement Rescinded by Parties' Conduct

¶ 70 Diane contends that the trial court erred in finding the agreement valid and enforceable because the conduct of the parties throughout the course of their 31-year marriage demonstrated that they no longer intended to be bound by its terms. Diane directs this court to authority from jurisdictions outside of Illinois where destruction of the original antenuptial agreement evidenced an intent to no longer be bound. See *Tillman v. Smith*, 526 So.2d 730 (Fla. 1988) (finding that the premarital agreement of the parties was revoked when husband tore up the agreement); *Carter v. Carter*, 656 S.W.2d 257 (Ky. 1983). We find this argument unpersuasive, particularly because it was Diane who testified that she might have actually destroyed the document herself.

¶ 71 We do recognize, however, that as with any contract, a party may rescind an antenuptial agreement by engaging in a course of conduct which clearly evidences an intent to abandon its terms. *In re Marriage of Burgess*, 123 Ill. App. 3d 487, 489-90 (1984). This might occur by a commingling of marital or nonmarital property or by conduct which shows an intent to ignore the agreement and treat nonmarital property as marital property. *Id.*

¶ 72 The trial court found that "Bob's behavior and treatment of property was not sufficiently

inconsistent with the antenuptial agreement so as to demonstrate an intent on his part to abandon its terms and thereby rescind the agreement." While we acknowledge that reasonable minds may differ on this point, we cannot say that no reasonable person would adopt the view taken by the trial court. Indeed, it is questionable that it was only after the agreement was fortuitously discovered during depositions that Bob remembered its existence. However, the trial court has a superior vantage point when it comes to credibility determinations and weighing conflicting evidence such that its decisions in that regard are entitled to great deference. See *In re Marriage of Rife*, 376 Ill. App. 3d 1050, 1058-59 (2007).

¶ 73 The agreement clearly contemplated and allowed for each party to make lifetime transfers of property to the other or to their estate plans. The agreement provided that any separate property acquired prior to the marriage would remain the sole property of that party, and that any property acquired during the marriage with separate funds would similarly be awarded to that party in the event of divorce. Finally, the agreement allowed for the parties to have the full right to own, control, and dispose of his or her property the same as if the marriage did not exist.

¶ 74 It was undisputed that Family Tailored Homes was Bob's business prior to the parties' marriage, but Diane asserts that Family Tailored Homes and the ReMax franchise were owned by "Bob and Diane Corwell." When transacting business with others, Bob and Diane Corwell were portrayed as one entity. While the evidence tends to support that assertion, that alone does not serve to invalidate the antenuptial agreement. Nor does how the Corwells held themselves out to the public undermine Bob's clear intention to keep the parties' nonmarital property separate.

¶ 75 A review of the record makes clear that Bob's estate plan, asset management, and property transfers during the parties' marriage sought to provide Diane varying degrees of limited access to his assets during his life and upon his death. The fact that he made such transfers does not render his actions inconsistent with the terms of the antenuptial agreement, and the trial court's finding in that regard is supported by the evidence.

¶ 76 A. Enforcement of the Agreement Would be Inequitable

¶ 77 Diane posits that Bob failed to establish that the terms of the agreement would produce an inequitable result in resolving the property and maintenance issues. This argument is essentially a "totality of the circumstances" argument, where Diane lists a myriad of reasons that cut in favor of finding the agreement unenforceable.

¶ 78 As part of this argument, Diane asserts that: (1) Bob failed to establish that the agreement was executed with Diane's full knowledge; (2) the agreement was unfair since it waives maintenance; (3) enforcement of the agreement would preclude Diane from maintaining the standard of living to which she became accustomed during the marriage; (4) Bob owed Diane a fiduciary duty throughout the course of their marriage to manage their financial affairs fairly; and (5) since her earnings were paid into Family Tailored Homes (a nonmarital asset per the terms of the agreement), funds were commingled and it would be unfair to allow Family Tailored Homes to be the exclusive property of Bob. We include in this analysis Diane's argument that she is entitled to a lump-sum reimbursement for her lost social security benefits, as that argument is essentially one of unfairness.

¶ 79 We note that Diane makes many of the same arguments throughout her brief, just couched in slightly different terms. We find that the trial court considered all of these arguments

in striking the maintenance waiver provision and fashioning a maintenance award.

¶ 80 In regard to Diane's argument that Bob failed to meet his burden in proving that there was full disclosure at the time the agreement was signed, "[p]arties engaged to be married, prior to signing a pre-nuptial agreement, are in a confidential relationship with each other. [Citation.] Further, where the provisions made for the spouse receiving maintenance are largely disproportionate to the value of the other spouse's estate, there arises a presumption of concealment of the assets. [Citation.] In such a case, the burden of proof shifts to the party who claims that the agreement is valid." *In re Marriage of Drag*, 326 Ill. App. 3d 1051, 1056 (2002).

¶ 81 In this case, the trial court found the presumption of concealment of assets naturally arises as the antenuptial agreement would provide Diane with her own individual assets and a maximum payout of \$100,000. This amount is clearly disproportionate to Bob's net worth. However, the court proceeded with a detailed analysis of schedule A of the premarital agreement, noting that it consisted of four pages that listed his assets and the values associated therewith, and it was signed by both parties. While Bob's schedule A of assets did not set out values for the approximately 60 parcels of real property, the trial court was not concerned based upon the market in which they were located, and Diane's testimony she was a realtor with experience in valuing real estate via comparables in that marketplace.

¶ 82 We find this situation analogous to that in *Yockey v. Marion*, 269 Ill. 342, 347 (1915), where our supreme court found the facts sufficient to prove the petitioner-wife was not ignorant of the nature, character and value of the property and estate of her intended husband. Mr. Yockey was a farmer, and before the parties' marriage, Mrs. Yockey was his housekeeper when

he owned 80 acres of land and had a life estate in another 120 acres. *Id.* at 348; see also *Fleming v. Fleming*, 85 Ill. App. 3d 532, 539 (1980) (finding that evidence presented at trial indicates that plaintiff had sufficient specific knowledge of the decedent's assets derived from decedent and his family to execute a valid antenuptial agreement).

¶ 83 Diane's contention that she will no longer enjoy the extravagant lifestyle she became accustomed to during the parties' marriage also does not cut in favor of invalidating the agreement. In fact, this argument seems to miss the point—the predominate purpose of most antenuptial agreements is to protect the party bringing substantial assets and wealth into the marriage. Furthermore, a trial court has the power to strike a maintenance waiver provision in an antenuptial agreement to mitigate the potential harm to spouses that could result in the strict enforcement such provisions. *In re Marriage of Burgess*, 138 Ill. App. 3d 13, 15 (1985). In this instance, the trial court did just that. Diane does not allege that enforcement of the agreement would result in her becoming a public charge (and that is clearly not the case). *Id.* Nor does she contend that she would be forced to sell her assets or impair her capital in order to generate income from which she can support herself in the manner enjoyed during the marriage, which is similarly discouraged by the courts. See *Head v. Head*, 168 Ill. App. 3d 697, 701 (1988). While Diane may not be able to maintain her country club membership with a maintenance award of \$6,190 per month, this is nothing more than a mere change in economic circumstance, and thus we cannot say that Diane's circumstances are so dire that it would be grossly unfair to enforce the agreement. *Burgess*, 138 Ill. App. 3d at 15. We must look to the antenuptial agreement, not the common law or statutory factors that apply in the absence of an antenuptial agreement.

¶ 84 Finally, Diane contends that trial court erred in denying her claim for a lump-sum

reimbursement of social security income given the accounting machinations utilized by Bob and his accountant.

¶ 85 We disagree. The trial court clearly stated that it took Diane's reduced social security benefits into consideration in calculating her monthly maintenance award. Having stricken the maintenance waiver provision, the trial court was obliged to formulate a maintenance award that is fair and reasonable under the circumstances. Ultimately, a trial court's task in this regard is almost metaphysical—100 different trial judges could have come up with 100 different numbers for a proper maintenance award. It is not necessary (or possible) to review every single calculation the trial court made in arriving at a "fair and reasonable" maintenance award. The sum is not subject to precise calculation. We find that the award, in light of other property awarded, passes the fair and reasonable test.

¶ 86 III. Maintenance and Bob's Cross-Appeal from Maintenance Award

¶ 87 A. Maintenance

¶ 88 Diane further alleges that the trial court erred in failing to award her maintenance in gross, or in the alternative, in failing to order that Bob secure his maintenance obligation by either life insurance, life insurance trust, or by his estate. Bob cross-appeals, alleging that the trial court erred in striking the maintenance waiver provision, as it was fair and reasonable and thus should have been enforced in its entirety.

¶ 89 First, we find that the trial court's order striking the maintenance provision was fair and reasonable in light of the circumstances of this case. Bob argues that this case is distinguishable from *Warren v. Warren*, 169 Ill. App. 3d 226 (1988), and *Eule v. Eule*, 24 Ill. App. 3d 83. In those cases, the court upheld the parties' antenuptial agreements, but struck the maintenance

waiver provisions where the wives received no financial settlement upon dissolution. Although maintenance waivers are disfavored in Illinois, a waiver will be enforced if it was given in exchange for significant financial consideration. *In re Marriage of Martin*, 223 Ill. App. 3d 855, 857 (1992).

¶ 90 Bob urges this court to instead follow the reasoning set forth in *In re Marriage of Berger*, 357 Ill. App. 3d 651 (2005). The *Berger* court found that the antenuptial agreement did not leave the wife, Leslie, without a financial settlement. *Id.* at 657. Under the agreement, she was entitled to one-half the value of the marital residence, which at the time of the parties' divorce was valued at \$2.8 million. *Id.* In addition, she kept her nonmarital assets, valued at approximately \$322,000 and the \$800,000 home she purchased while the parties were separated. *Id.* Unlike the women in *Warren* and *Kolflat v. Kolflat*, 636 So. 2d 87 (Fla. 1994), Leslie had a graduate degree in advertising. She had significant work experience, and while she did stop working for several years to raise the parties' daughter, she owned her own business at the time of dissolution, which tax returns showed was profitable. *Id.* Despite the fact that her husband's personal wealth was far greater than Leslie's, the court found the maintenance waiver fair and reasonable on the basis of those facts. *Id.* at 658.

¶ 91 In *Warren*, on the other hand, the court struck down the maintenance waiver provision in the antenuptial agreement after finding it unfair or unreasonable. *Warren*, 169 Ill. App. 3d 226 (1988). The court initially found that the wife signed the antenuptial agreement willingly, without fraud, duress or coercion, and had full knowledge of her future husband's assets at the time. *Id.* at 230. Although her assets were modest, they were sufficient to keep her from suffering the condition of penury. *Id.* Nonetheless, the reviewing court found the maintenance

waiver unfair due to the wife's financial circumstances. She had not worked since before the couple was married and had approximately \$33,000 in assets, including a \$30,000 house. *Id.* at 231. In comparison, her husband was worth \$1.5 to \$2 million with \$700,000 in debts. *Id.* The court based its finding on two circumstances: (1) the agreement's complete lack of financial settlement for the wife; and (2) the lavish lifestyle the couple enjoyed together for many years, which the wife had no hope of continuing on her own. *Id.*

¶ 92 Obviously, the facts of the case at bar present a unique set of circumstances. We see Bob's point—Diane was not left completely without financial settlement. In fact, quite the opposite is true. The agreement itself called for Diane to receive a lump sum not to exceed \$100,000 in the event of the parties' divorce. As for property distribution, Diane received her half of those properties titled jointly. These included half of the joint Florida "summit house" property, or \$637,500; half of the Florida condo, or \$109,500; half of the residence in Hampton, Illinois, or \$310,000; and half of the joint residence in Sterling, Illinois, or \$70,000. That is approximately \$1,127,000 in assets from real property alone. There is also no question that Diane was a successful businesswoman, having gained her real estate broker's license and earning gross commissions upwards of \$600,000 over approximately four years.

¶ 93 That being said, however, we find that the trial court properly struck the maintenance waiver provision under the circumstances. In addition to considering the factors of section 504(a) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/504(a) (West 2010)), the trial court noted that Bob and his accountant contrived a plan that diverted required social security contributions attributable to Diane's labors back into Bob's company. The court gave little credence to Berge's testimony that the plan was a good faith attempt to avoid an

unreasonable compensation claim by the IRS. Given that Diane went 16 years with virtually no contributions to social security, she is now drawing social security benefits at a much lower rate, as acknowledged by both parties. It hardly matters that the benefits may increase upon Bob's death, as Bob is alive now and Diane is receiving significantly less than she otherwise would.

¶ 94 Other factors also contributed to the trial court's decision, such as the fact that Bob did not correct Diane's belief that they were in a joint economic venture, the duration of the marriage, the parties' agreement that Diane would retire when she was 62 and her reliance on the same, Diane's lack of employability at anywhere near her former level, and Diane's health setbacks. Considering all of these elements, we cannot say the trial court's determination that the maintenance waiver was unfair and unreasonable was in error.

¶ 95 B. Maintenance in Gross

¶ 96 Diane contends that the trial court erred in failing to award her maintenance in gross. In support of this argument, she points to the relative ages of the parties, the duration of the marriage, the disparate property division resulting from the enforcement of the antenuptial agreement, and Bob's ability to pay an award of maintenance in gross through an allocation of his IRA. We agree.

¶ 97 Periodic maintenance, such as the type the trial court awarded in this case, is the common type of maintenance and typically takes the form of an order to pay a spouse a specified amount at regular intervals. *In re Marriage of Mass*, 102 Ill. App. 3d 984, 994 (1981). By contrast, maintenance in gross involves an order to pay a spouse "a definite total sum upon the entry of the decree or a definite total sum in installments over a definite period of time." *Id.* The distinguishing characteristics of maintenance in gross are its definite sum and its vesting date. *In*

re Marriage of Hildebrand, 166 Ill. App. 3d 795, 799 (1988).

¶ 98 "Historically, periodic maintenance is the preferred form of maintenance, and an award in gross was appropriate only in exceptional circumstances." *In re Marriage of D'Attomo*, 2012 IL App (1st) 111670, ¶ 25 (citing *Lamp v. Lamp*, 81 Ill. 2d 364, 374 (1980)). In *In re Marriage of Freeman*, 106 Ill. 2d 290, 298 (1985), our supreme court found that under the Illinois Marriage and Dissolution of Marriage Act, a trial judge was authorized to award maintenance in gross if he or she found it appropriate and just in a particular case. 750 ILCS 5/504(a) (West 2010). The overriding intent in awarding maintenance in gross is to buoy the recipient spouse's financial security by minimizing the risks inherent in a periodic maintenance award. See *Brandis v. Brandis*, 51 Ill. App. 3d 467, 471 (1977). Both the form and amount of alimony to be awarded lie within the discretion of the trial court and such award will not be reversed absent an abuse of discretion. *Riordan v. Riordan*, 47 Ill. App. 3d 1019, 1023 (1977).

¶ 99 We find that the trial court abused its discretion in awarding Diane periodic maintenance in lieu of maintenance in gross by failing to take into account not only Bob's advanced age, but also Diane's age. Bob is 83 years old; Diane is 64. The likelihood that he will predecease Diane is high. The likelihood that Diane will survive Bob by at least 20 years is also high. After Bob's death, even if Diane's social security benefits jump back up to a level commensurate with what she would have been receiving had her income not been diverted to Family Tailored Homes, her monthly expenses would far outweigh that amount. Diane's monthly maintenance award could potentially cease tomorrow. We acknowledge that could be the case with any maintenance award, as there is really no guarantee of tomorrow. But here, the circumstances clearly warrant some type of security for Diane given her age and Bob's advanced age. Furthermore, Bob has

the assets and financial wherewithal to make either a definite, lump-sum maintenance in gross payment or secure Diane's anticipated maintenance by a life insurance policy or collateral trust. See *In re Marriage of Drury*, 317 Ill. App. 3d 201, 207. The trial court found that Bob's financial sleights of hand *vis-à-vis* Diane over the course of the marriage strongly favored striking the maintenance waiver provision. It therefore seems unreasonable in light of the relative ages of the parties to leave that award unsecured.

¶ 100 Furthermore, we note that since the filing of this appeal, the legislature has amended section 504 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/504 (West 2010) to include the following:

"(f) An award ordered by a court upon entry of a dissolution judgment or upon entry of an award of maintenance following a reservation of maintenance in a dissolution judgment may be reasonably secured, in whole or in part, by life insurance on the payor's life on terms as to which the parties agree, or, if they do not agree, on such terms determined by the court ***." 750 ILCS 5/504(f) (West 2010).

¶ 101 In denying Diane's claim for her maintenance award to be secured by a life insurance policy on Bob, the trial court relied on *In re Marriage of Ellinger*, 378 Ill. App. 3d 497 (2008). In *Ellinger*, the trial court held that it had the discretion to require husband to maintain a life insurance policy as security for his maintenance obligation. In finding that the trial court erred as a matter of law, this court found that the language of section 510(c) did not permit securing a maintenance award with a life insurance policy. *Id.* at 500; 750 ILCS 5/510(c) (West 2006).

¶ 102 There is, however, a split among the appellate courts on this issue. In *In re Marriage of*

Walker, 386 Ill. App. 3d 1034, 1045 (2008), the Fourth District upheld the trial court's order requiring the husband to maintain a life insurance policy to secure maintenance payments to his ex-wife in the event of his death. In so finding, the court noted "that while the Dissolution Act does prohibit maintenance payments after a payor's death, the Dissolution Act does not prohibit payments during a payor's life that may have an effect after the payors death." *Id.* (citing *In re Marriage of Vernon*, 253 Ill. App. 3d 783, 789 (1993)). Finally, the *Walker* court noted that if the legislature wanted to declare that an action is prohibited, the legislature should be specific. *Id.* at 1051.

¶ 103 We note that the trial court was correct in relying on *Ellinger*, because when there is a conflict among districts, the circuit court is bound by the decisions of the appellate court in the district in which it sits. *Rein v. State Farm Mutual Automobile Insurance Co.*, 407 Ill. App. 3d 969, 978 (2011). However, in light of the recent amendment to section 504(f) (750 ILCS 5/504(f) (West 2012)), and the fact that we find the trial court abused its discretion in failing to award Diane maintenance in gross, the trial court would be well within its discretion in ordering Bob to maintain a life insurance policy to secure Diane's maintenance payments on remand.

¶ 104 We, therefore, reverse and remand, with instructions for the trial court to determine the proper amount to award Diane as maintenance in gross, or in the alternative, to consider ordering Bob to secure a periodic maintenance award with a life insurance policy.

¶ 105 C. Reduction of Diane's Monthly Maintenance Award

¶ 106 We now turn to Diane's argument that the trial court erred in reducing her periodic monthly maintenance award from \$6,516 to \$6,190. Having remanded the issue to the trial court with the option of either awarding Diane maintenance in gross, or ordering Bob to secure her

periodic monthly maintenance award with a life insurance policy, we must address if the reduction in the monthly award was proper.

¶ 107 The trial court has discretion to determine the propriety, amount, and duration of a maintenance award. A reviewing court will not reverse the trial court's maintenance determination absent an abuse of discretion. *In re Marriage of Bratcher*, 383 Ill. App. 3d 388, 390 (2008). As we have noted in the preceding paragraphs, the trial court carefully considered the statutory factors of section 504(a) of the Dissolution Act (750 ILCS 5/504(a) (West 2010)) in striking the maintenance waiver provision and in crafting Diane's maintenance award. The trial court took into account Bob's accounting scheme for Family Tailored Homes and Diane's arguments regarding lost social security benefits. In reducing Diane's monthly maintenance award, we cannot say that the trial court abused its discretion by recalculating that amount based on information that it omitted from its initial calculation.

¶ 108 IV. Dissipation Award

¶ 109 Diane also argues that she is entitled to a dissipation award greater than the \$12,500 she has already received. Specifically, she argues the trial court erred in denying her claim to the \$178,419 gain from life insurance investments made by Bob.

¶ 110 "Dissipation refers to a spouse's use of marital property for his or her sole benefit for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown." *In re Marriage of Berberet*, 2012 IL App (4th) 110749, ¶ 50 (quoting *In re Marriage of Hubbs*, 363 Ill. App. 3d 696, 700 (2006)). The spouse charged with dissipation must show, by clear and convincing evidence, how the marital funds were spent. *In re Marriage of Dunseth*, 260 Ill. App. 3d 816, 830 (1994). In making its decision as to dissipation, the trial

However, as Bob was the party charged with dissipation, he "has the burden of showing, by clear and specific evidence, how the marital funds were spent." *In re Marriage of Tietz*, 238 Ill. App. 3d 965, 983 (1992). "If the expenditures are not documented adequately by the person charged with dissipation, courts will affirm a finding of dissipation." *Id.* at 984. Bob admitted to removing some cash from the safe deposit box, but claims that it was only \$5,000. Again, the trial court found Diane's testimony credible on this point. Given that the money was removed directly following the financial meeting with accountants and attorneys, and immediately prior to the filing of this action, we cannot say that the trial court's determination with regard to Bob's dissipation was against the manifest weight of the evidence.

¶ 115

V. Attorney Fees

¶ 116 Diane also argues that the trial court erred when it failed to order Bob to pay her attorney fees, as he has the resources to pay those fees while she does not.

¶ 117 We review a trial court's decision regarding attorney fees for an abuse of discretion. *In re Marriage of Plotz*, 229 Ill. App. 3d 389, 392 (1992). Generally, the party for whom legal services were rendered is responsible for those fees. *In re Marriage of Rushing*, 258 Ill. App. 3d 1057, 1064 (1993). However, section 508(a) of the Illinois Marriage and Dissolution Act provides that a court may order an ex-spouse to pay a reasonable amount for attorney fees necessarily incurred by the other spouse in connection with the maintenance or defense of any proceeding under the Act. *Id.*; 750 ILCS 5/508(a) (West 2010). A party seeking an award must show a financial inability to pay the fees and corresponding ability of the ex-spouse to pay the fees. *Id.*; see also *In re Marriage of McFarland*, 160 Ill. App. 3d 721 (1987).

¶ 118 Diane is correct in asserting that the issues in this dissolution action were complex. That

alone, however, does not warrant an award of attorney fees in her favor. Bob clearly has the ability to pay, however, the record before us does not establish that Diane is correspondingly unable to pay those fees. Diane has assets valued at \$1,127,000, in addition to a maintenance award. Moreover, much of Diane's legal fees have already been paid from the division of the parties' joint Fifth Third Bank account. As such, we cannot say that the trial court's denial of Diane's claim for attorney fees constituted an abuse of discretion.

¶ 119 VI. Classification of Family Tailored Homes and Distribution of Marital Property

¶ 120 Diane argues that Family Tailored Homes should be classified as a marital asset, or in the alternative, the marital estate should be reimbursed for Diane's contribution to Bob's nonmarital asset. Diane also separately argues that the trial court should have ordered an unequal distribution of property pursuant to section 503 (750 ILCS 5/503 (West 2010)).

¶ 121 In regard to the classification of Family Tailored Homes, Bob contends that the trial court properly found that the asset was titled solely to Bob and was distributed as such pursuant to the terms of the antenuptial agreement. Bob also states that the trial court did not classify Family Tailored Homes as either marital or nonmarital property.

¶ 122 On review, the trial court's determination that an asset is nonmarital will be overturned only if that determination is against the manifest weight of the evidence. *In re Marriage of Leisner*, 219 Ill. App. 3d 752, 757 (1991). First, we note that our reading of the judgment of dissolution leads us to the conclusion that the trial court did classify Family Tailored Homes as a nonmarital asset when it denied Diane's claim to the 2007 Escalade. In so finding, the trial court stated, "[t]he evidence is clear that the vehicle is owned by Family Tailored Homes, Inc., a non-marital company owned by Bob." This determination was not against the manifest weight of the

evidence. We also find that the trial court properly distributed Family Tailored homes to Bob in accordance with the parties' antenuptial agreement.

¶ 123 Diane argues that in the alternative, the marital estate should be reimbursed for her contribution to Bob's nonmarital asset pursuant to section 503(c)(2) of the Dissolution Act (750 ILCS 5/503(c)(2) (West 2010)), insofar as the fruits of her labor are reflected in the value of Family Tailored Homes.

¶ 124 Under the Dissolution Act, reimbursement is required when one estate of property makes a contribution to another estate of property or when a spouse contributes personal efforts to nonmarital property. 750 ILCS 5/503(a)(7) (West 2010); *In re Marriage of DiAngelo*, 159 Ill. App. 3d 293 (1987). "In the case of personal efforts, no reimbursement is to be made unless the effort is significant and results in substantial appreciation of the non-marital property." *In re Marriage of Jelinek*, 244 Ill. App. 3d 496, 507 (1993). "In determining whether the marital estate is entitled to reimbursement from a nonmarital business for the contribution of personal efforts of a spouse, the court may inquire as to whether the spouse was reasonably compensated by the business for those efforts. If the spouse has already been reasonably compensated for the personal effort, no reimbursement is necessary." *In Re Marriage of Werries*, 247 Ill. App. 3d 639, 648 (1993) (citing *In re Marriage of Perlmutter*, 225 Ill. App. 3d 362, 372 (1992)).

¶ 125 The evidence presented at trial makes clear that Diane was reasonably compensated throughout her employment at Family Tailored Homes. She received a \$50,000 annual salary, and later, a draw or distribution in lieu of salary; under both circumstances her net pay was \$805 per week. No reimbursement is warranted in this instance where Diane's salary during the marriage is marital property and, thus, the marital estate has already been compensated.

Perlmutter, 225 Ill. App. 3d at 372. In addition to her salary, Diane enjoyed a lifestyle far and above what that salary would support. The trial court's denial of Diane's claim for reimbursement was not against the manifest weight of the evidence.

¶ 126 Finally, Diane's argument that the trial court should have ordered an unequal distribution of property pursuant to section 503 (750 ILCS 5/503 (West 2010)) also fails. "Although the law prescribes the rights of a husband and wife in the property of each other, persons may, by agreement, exclude the operation of law and determine for themselves what rights they will have in each other's property during the marriage." *In re Marriage of Burgess*, 123 Ill. App. 3d 487, 489 (1984) (citing *Volid v. Volid*, 6 Ill. App. 3d 386 (1972)). Indeed, the Illinois Marriage and Dissolution of Marriage Act specifically recognizes that the operation of marital property laws may be excluded by agreement. 750 ILCS 5/503(a)(4) (West 2010). Here, the trial court distributed the property in accordance with the terms of the agreement. We, therefore, find that the trial court did not err in denying Diane's claim to Family Tailored Homes.

¶ 127 VII. Interlocutory Appeal Pursuant to Illinois Supreme Court Rule 304(a)

¶ 128 Finally, Diane argues that the trial court erred in not allowing her to pursue an interlocutory appeal as to the validity of the antenuptial agreement. This issue is obviously moot as we address the validity of the agreement here.

¶ 129 CONCLUSION

¶ 130 For the foregoing reasons, we reverse the judgment of the Rock Island circuit court in part, holding that it abused its discretion in failing to award petitioner maintenance in gross and in failing to reimburse petitioner for lost social security benefits. We remand those issues for further proceedings consistent with this order. We affirm all remaining findings of the trial court

judgment, including the holdings that the parties' antenuptial agreement was valid and enforceable and the striking of the maintenance waiver provision.

¶ 131 Affirmed in part, reversed in part, and the cause is remanded.

¶ 132 JUSTICE McDADE concurring in part, dissenting in part.

¶ 133 I concur with the majority on all issues except the issue regarding the classification of the Family Tailored Homes (FTH). The majority holds that the trial court's non-marital classification of FTH was not against the manifest weight of the evidence. I disagree.

¶ 134 I acknowledge that under the prenuptial agreement FTH would be Bob's non-marital property. The parties actions, however, over at least the latter portion of their 31-year marriage repudiated this provision of the agreement. The evidence is:

(1) Bob would refer to FTH as "our company."

(2) Diane's business card, after 2008, identified her as "broker/owner."

(3) Diane's gross commissions from the sale of real estate during the years 2002-2007 totaled \$600,000. Those commissions were paid into FTH which Diane testified she would not have done if she had not been an "owner" of the company.

(4) Diane's annual salary was \$50,000. At some point, Bob's accountant proposed, and it was agreed, that Diane would receive a "draw" or "distribution" rather than a salary. The reason asserted for this change was to save on payroll taxes as a benefit to the company. Under general economic and tax principles, a

"draw" or "distribution" is more commonly a remuneration for a principal than an employee. Employees are often given "bonuses." Moreover, the "distribution" was *classified* as a repayment of a note FTH owed to Bob. Absent some ownership interest, Diane would have no obligation to facilitate the company's repayment of a debt to Bob.

(5) The parties together purchased a ReMax franchise called ReMax-FTH thus making it marital property. Both FTH and the ReMax franchise were managed out of the same office. In reality, the ReMax franchise was run through Family Tailored Homes. The fact that the ReMax franchise was purchased/owned by both parties and run through Family Tailored Homes establishes a clear intent by the parties to also treat FTH as marital property.

¶ 135 I acknowledge that Diane signed documents on behalf of FTH, some of which indicated that Bob was the sole shareholder of FTH. She stated, however, that she did not read any of the corporate documents prior to signing them. As a matter of practice she would simply sign the last page of the document without reviewing its content. While this may appear foolish in a business context, it is not at all unusual in marital situations where there is mutual trust and reliance. The signing of such documents is not necessarily inconsistent with a sincerely held belief that she shares ownership of the company with Bob.

¶ 136 In light of the above facts, I believe the trial court's classification of FTH as non-marital

was against the manifest weight of the evidence. Therefore, I respectfully concur in part and dissent in part.