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2013 IL App (3d) 120198-U

Order filed March 7, 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,
DANNY B. FORSYTH,)	Rock Island County, Illinois,
)	
Petitioner-Appellee,)	Appeal No. 3-12-0198
)	Circuit No. 08-D-494
v.)	
)	
SANDRA BLACK-FORSYTH, n/k/a)	
SANDRA BLACK,)	Honorable
)	Mark A. Vandewiele,
Respondent-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion by classifying the marital residence as marital property or when dividing marital assets. The matter is affirmed but remanded to the trial court to enter a separate order clarifying that petitioner is solely responsible for a debt to the City of Rock Island.

¶ 2 Respondent, Sandra Black-Forsyth, now known as Sandra Black, (“Sandra”) appeals a dissolution order distributing the marital assets and debts of the parties. We affirm the court’s

marriage to Danny. In 1989, Sandra deeded the property to Danny in joint tenancy because “we were in a business adventure [*sic*] and [we] needed the equity in joint tenancy for a business line of credit.” Danny made a few mortgage payments in 2006, but Sandra made all the previous and remaining mortgage payments from her own separate checking account. Sandra also borrowed approximately \$26,000 from her parents to maintain the marital home and pay other marital expenses.

¶ 8 In November of 2009, the marital home was appraised for \$147,000 but this appraisal was not introduced into evidence for the court to consider. Sandra testified the home was actually worth \$124,000 due to needed, substantial repairs.

¶ 9 Danny attended various colleges, but did not receive a degree. According to Danny’s resumé, beginning in 1984, he was first employed as vice president, and then president, of Environmental Associated Services in Engineering (EASE), a company he owned jointly with his wife, Sandra. Danny was responsible for project management and sales for EASE, while Sandra served as lead consultant for environmental health and safety issues. The couple sold their business, EASE, in 1999. However, prior to this sale, Danny, serving as president of the business at that time, failed to file either the final 1099 form or pay the quarterly employment taxes for the third and fourth quarters of 1999. This omission resulted in the federal government placing a lien on Sandra’s personal savings and checking accounts and resulted in the garnishment of her wages. In total, Sandra personally paid \$62,191.15 in interest, taxes, and penalties due to Danny’s oversight. Danny paid approximately \$16,000 to satisfy this debt.

¶ 10 The record reveals that sometime after the sale of EASE in 1999, Danny became affiliated with a company called Spill and Erosion Control, Inc., until their client, Murphy Brothers, went

bankrupt. After Murphy Brothers closed, Danny received a “payment” of \$78,000 from them, which he claimed he used to pay off inventory and rent that he owed to his former business partner, Mike Bawden, for Spill and Erosion Control, LLC, a company Danny owned after Spill and Erosion Control, Inc.

¶ 11 In 2007, Danny became involved with Blue Chip Industries by attempting “to do a turnaround” of this company, resulting in loans totaling over \$1,000,000. The bank foreclosed on Blue Chip Industries in November 2009. Danny was employed by Excel Consultants, Inc. at the time of the 2010 hearing.

¶ 12 Danny also owed a debt to the City of Rock Island (“the City”) in an amount somewhere between \$14,000 to \$17,000, according to different sections of record. This particular amount of debt was incurred in conjunction with EASE, and Danny agreed to be personally liable to repay the City. However, since 2005, Danny did not make his payments according to his agreement with the City, and default notices were being sent to Sandra’s address.

¶ 13 In addition, Danny contributed to the marriage by paying for food and clothing for Sandra’s children. He claimed that she “spoiled” the children, and suggested she dissipated marital assets by purchasing expensive clothing for the children at Von Maur.

¶ 14 The trial court issued a detailed written opinion on June 10, 2010, regarding the resolution of the contested issues and the court’s findings. The court considered all of the factors contained in section 503(d) of the Illinois Marriage and Dissolution of Marriage Act (the Dissolution Act) (750 ILCS 5/503(d) (West 2010)) and valued the marital home as close as practicable to September 14, 2009, the date the marriage was dissolved. The court found, based

on the testimony, the parties were living apart by 2002, and paying their own bills from their respective checking accounts.

¶ 15 The court found the home qualified as a marital asset because the house was placed in joint tenancy with Danny in 1989, even though Sandra made the majority of mortgage payments. The court considered Sandra's claim that the marital home was worth \$124,000 due to its poor condition, but accepted the reported October² 2009 appraisal value of \$147,000. After subtracting 10% of the costs associated with selling the real estate from the purported appraised value, the court assigned a value to the marital residence of \$132,300. When calculating the equity in the home, the court subtracted the amount of the mortgage remaining on the property (\$75,000) and the debt owed to Sandra's parents (\$26,500). The court found the equity in the marital home to be \$30,800.

¶ 16 The court also determined Sandra accumulated \$55,533.15 in multiple retirement accounts and ordered Sandra to transfer \$16,513.47 to Danny by qualified domestic relations order (QDRO). The court noted that Danny claimed he did not have a retirement account, but noted that any account that may be discovered to belong to Danny as of the date of dissolution in 2009, would be awarded to Sandra.

¶ 17 With regard to the marital debts, the court assigned Sandra the balance of the home mortgage (\$75,000), the debt to her parents (\$26,500), and a credit card debt of \$6,395. Based on Danny's failure to produce various business records within his control, the court inferred the records were adverse to Danny's interests. The court surmised Danny's undisclosed corporate

² Sandra testified the appraisal occurred in November 2009, but the court stated the appraisal occurred in October 2009.

endeavors and the resulting assets were sufficient to cover Danny's personal guarantees of debts and other loans. Accordingly, the court assigned Danny to pay these multiple debts which exceeded \$2,000,000.

¶ 18 Regarding the "dissipation" claim for the federal tax lien, the court found Sandra paid approximately \$62,000, compared to Danny's \$16,000, in tax consequences attributable to the couple's joint business, EASE. The court ruled Danny should reimburse Sandra \$23,000 in order to equalize the tax liability burden.

¶ 19 Before dividing the marital assets equally, the court noted Sandra was 61 years of age, had stable employment for the past six years, a college degree, but less years available to earn income. The court noted Danny had a sporadic work history, multiple failed business projects, no college degree, but noted that at age 53, Danny had more years available for employment and his most recent employment generated slightly more income than Sandra's current position. The court also recognized both parties enjoyed good health and found each party had sufficient income to pay his or her respective attorney's fees.

¶ 20 The court detailed its calculations in paragraph 102 of the written opinion issued on June 10, 2010. The court ordered Sandra to transfer \$16,513.47 from her accounts to Danny by a QDRO prepared by Danny's attorney. The court assigned \$15,800 in the home's equity to Sandra and \$15,000 in equity to Danny. In total, not including the \$23,000 dissipation award, Sandra received a total of \$31,819.68 of the assets and Danny received \$31,513.47.

¶ 21 The court further directed Sandra's attorney to incorporate these findings into a "Judgment of Dissolution of Marriage." Sandra's attorney prepared the order. Initially, the parties were unable to reach an agreement regarding the form and contents of the proposed

written order to be submitted to the court for signature. On August 31, 2010, Danny's attorney filed a written objection to the proposed order prepared by Sandra's counsel.

¶ 22 Eventually, four months after the court issued its written opinion to guide the parties when preparing the final order, the attorneys submitted an agreed order for the court's signature on October 27, 2010. The court signed the order as submitted and approved by both parties on that date. Specifically, paragraph 13 of the final order for dissolution contained the following language:

“The totals assets in the retirement accounts and the equity in the house equal \$86,333.00. The husband has been ordered to reimburse the wife one-half of the EASE tax lien of \$46,000.00 that she paid. Therefore, \$23,000.00 is awarded off the top to the wife, thereby reducing the pool of assets available for distribution to \$63,333.00.

Therefore, the husband should receive assets of **\$31,666.50.**” (Emphasis added.)

This paragraph did not precisely mirror the court's written opinion that Danny should receive \$31,513.47.

¶ 23 On November 24, 2010, without taking issue with this slight financial discrepancy, Sandra filed a motion for reconsideration and a request to reopen evidence which the court denied on February 14, 2012. Sandra appeals.

¶ 24 ANALYSIS

¶ 25 On appeal, Sandra argues the trial court committed several errors such as determining that the home became marital property, failing to find Danny dissipated marital assets in excess of \$23,000, dividing the marital assets equally, improperly assigning debt, and failing to award Sandra her attorney's fees as requested. Danny responds the trial court's findings were proper.

¶ 27 Sandra begins by arguing the trial court should not have classified the Rock Island home, which she owned prior to the marriage, as a marital asset. She also contends the court erroneously determined the value of the home based on an appraised value of \$147,000. It is undisputed that Sandra acquired the home during her first marriage and later transferred the title to the home into a joint tenancy with Danny in 1989, after their marriage in 1984. We review the trial court's ruling for an abuse of discretion. *In re Marriage of Sanfratello*, 393 Ill. App. 3d 641, 652 (2009).

¶ 28 Sandra agrees her decision to grant Danny a joint tenancy in the property created a presumption she intended to gift the residence to the marital estate but argues she rebutted the presumption. *In re Marriage of Gattone*, 317 Ill. App. 3d 346, 352 (2000). The case law provides the trial court should consider certain factors when determining whether Sandra rebutted the presumption of gift. Those factors include: (1) the size of the gift relative to the size of the marital estate; (2) who purchased the property, paid the taxes, and made improvements on the property; (3) when the asset was purchased; and (4) how the parties handled their prior financial dealings with each other. *In re Marriage of Marriott*, 264 Ill. App. 3d 23, 39 (1994). However, the central question is the intent of the alleged donor. *Id.*

¶ 29 While Sandra testified she did not intend to make a gift of her home she owned prior to her marriage to Danny, "such testimony is not necessarily the most persuasive evidence of intent." *Id.* at 39. The record shows Sandra owned the property prior to her second marriage, and she paid most of the mortgage payments after this marriage from her separate checking account. However, the record also shows the undisputed use of the property as the marital home

supports the court's finding that Sandra intended to gift the home to the marital estate. *Id.* at 40. Further, Sandra testified that she placed the home in joint tenancy to provide the couple with sufficient equity to start their joint business endeavor together. Based on this record, we reject the notion that Sandra rebutted the presumption of gift by clear and convincing evidence. Therefore, we conclude the trial court did not erroneously determine the marital residence should be viewed as a marital asset.

¶ 30 Value of the Marital Home

¶ 31 Next, Sandra contends the trial court improperly assigned a value of \$132,300 to the home. In this case, Sandra testified that the home had been recently appraised in November 2009 at \$147,000, but was only worth \$124,000 because of much needed repairs. Neither party submitted a written appraisal for the court's consideration by the time of the June 7, 2010 hearing. The trial court's valuation of marital property will not be disturbed unless the valuation was against the manifest weight of the evidence. *In re Marriage of Lee*, 246 Ill. App. 3d 628, 636 (1993).

¶ 32 Based in part on Sandra's testimony concerning the most recent appraisal, the court subtracted 10% of \$147,000 as reasonable costs that would be associated with selling the marital asset. The property value of \$132,300 was more than the \$124,000 advocated by Sandra, but less than the \$147,000 for the appraised value based Sandra's testimony. Therefore, we conclude the trial court's valuation, based on rational considerations, was not against the manifest weight of the evidence and was within the range presented by the parties to the court. See *In re Marriage of Weinberg*, 125 Ill. App. 3d 904, 910 (1984) (where valuation is within the range testified to by experts, it ordinarily will not be disturbed on appeal).

¶ 33

Dissipation

¶ 34 Sandra next alleges the court should have found that Danny dissipated funds from the marital estate in the amount of \$78,000 when he deposited funds from Murphy Brothers into his personal account. However, the record suggests Sandra also deposited her own income into her personal checking account during the same time frame and throughout the marriage. In this case, the couple continuously maintained separate checking accounts from the beginning of their marriage, and consistently paid their own individual expenses from their personal and separate accounts for at least seven years before the marriage was dissolved in 2009.

¶ 35 Based on the history of this couple's financial affairs, simply placing the payment from Murphy Brothers into a personal account would not necessarily support the view that dissipation occurred. Taking into consideration the testimony at trial, the court found any dissipation by Danny was "de minimus" [*sic*]. In a similar fashion, the court also found, contrary to Danny's accusations, that Sandra had not dissipated marital income. Based on the court's detailed opinion, we conclude the court considered the testimony with regard to the Murphy Brothers funds, but concluded dissipation did not occur when Danny exercised control over these funds by placing them in his own personal account.

¶ 36 In contrast, the court actually found some of Danny's other conduct constituted dissipation following the closure of EASE which triggered serious tax consequences. These tax penalties, approximating \$78,000 in total, were disproportionately shouldered by Sandra who paid \$46,000 more than Danny. The court labeled this uneven tax burden a "dissipation" and ordered Danny to reimburse Sandra \$23,000. Whether or not this amount involved dissipation in the traditional sense, it is apparent the trial court was attempting to equitably even out an

undisputed tax debt which was not proportionally paid by each spouse during the course of the marriage.

¶ 37 To achieve this result, it appears the court subtracted the \$23,000 dissipation award from \$55,533.15, the undisputed value of the retirement accounts. After careful study of the court's written opinion, we conclude the court divided the remaining \$32,533.15 as evenly as possible, in an effort to equalize assets, given the number of retirement accounts. The court determined Danny's share of the retirement funds, after considering dissipation, would be \$16,513.47 and directed Danny's attorney to prepare the requisite QDRO. This allowed Sandra to keep the remaining \$39,019.68 in her retirement accounts. Thus, by ordering Sandra to transfer \$16,513.47, we conclude the court achieved a fair result. Although Sandra suggests another method of calculation in this appeal, we do not consider the court's method to constitute an abuse of discretion.

¶ 38 We note that the calculations set out in the final order, approved by the parties and signed by the court on October 27, 2010, do not mirror the court's written opinion. The language at issue, drafted into the final judgment order by Sandra's attorney, reads as follows:

“The totals assets in the retirement accounts and the equity in the house equal \$86,333.00. The husband has been ordered to reimburse the wife one-half of the EASE tax lien of \$46,000.00 that she paid. Therefore, \$23,000.00 is awarded off the top to the wife, thereby reducing the pool of assets available for distribution to \$63,333.00. Therefore, the husband should receive assets of **\$31,666.50.**” (Emphasis added.)

¶ 39 The amount of \$31,666.50 is slightly higher than the precise amount of \$31,513.47 as determined by the court. However, the difference is slight and was approved by both parties before the court signed the final order on October 27, 2010. It is relevant to this court that Sandra's attorney prepared this order, which included a slightly higher amount that benefitted Danny by \$153.03. Further, both attorneys approved the order before it was submitted for the court's signature. Therefore, we conclude, in spite of a very slight variation from the calculation set out in the court's June opinion, the amount of \$31,666.50 controls. Therefore, we decline to remand the matter to the trial court for recalculation

¶ 40 Equal Apportionment of Assets

¶ 41 Sandra next argues the trial court improperly divided the marital assets equally between the parties. A trial court's division of marital property is reviewed for an abuse of discretion. *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 661 (2008).

¶ 42 Sandra argues that the trial court should not have evenly divided the marital assets because she diligently saved money for retirement while paying for repairs to the home and making mortgage payment to maintain the value of the home as an asset. She points out Danny made very few mortgage payments and claims to have saved nothing for his retirement. Sandra argues the court should not have awarded Danny an equal portion of the \$55,533.15 contained in Sandra's retirement accounts or approximately half of the equity contained in the marital residence.

¶ 43 We agree with the court's finding that Sandra was the main contributor to the marital assets. Nonetheless, the court's final order on October 27, 2010, equally divided the \$30,800 in equity in the marital home and the remaining amount in Sandra's retirement accounts after

accounting for the \$23,000 dissipation award. The court specifically considered the factors outlined in section 503(d) of the Dissolution Act and carefully detailed its findings in a written decision issued on June 10, 2010. 750 ILCS 5/503(d) (West 2010). Such factors included the length of the marriage, the educational status of the parties, the fact that neither party was in poor health, that fact that Sandra was stable in her employment but had fewer working years than Danny, and the fact that Danny had a unusual work history but was currently earning more per month than Sandra. After careful consideration of the appropriate factors, the court reached an equitable decision to divide the amount of equity in the home and the value of the retirement accounts minus dissipation on a 50/50 basis. In light of the 26 year marriage, we conclude the court the court did not abuse its discretion in the case at bar.

¶ 44 Attorney Fees

¶ 45 Next, Sandra argues Danny should have been ordered to pay Sandra's attorney's fees. The award of attorney fees is dependent upon a showing that one party lacks the inability to pay his or her fees, and the other party has the ability to do so. *In re Marriage of Davis*, 292 Ill. App. 3d 802, 812 (1997). Financial inability does not require destitution, but does require a showing that paying the attorney fees would undermine the economic stability of the requesting party. *Id.* The trial court found that each party in this case had sufficient income to pay his or her attorney's fees. That finding is supported by the record.

¶ 46 Debt

¶ 47 Sandra does not dispute the court's allocation of debt, but submits one debt was overlooked by the court in its ruling. Sandra argues the trial court should have clearly assigned the debt to the City of Rock Island to Danny, but overlooked this debt. On appeal, Danny does

not contest that he is solely responsible for this debt, but instead argues the trial court apparently felt no need to address this issue since Danny was already personally responsible for that debt. Since Danny agrees the debt is his alone, we remand the matter to the trial court to clarify the court's order by a separate order, as agreed by the parties in this appeal.

¶ 48

CONCLUSION

¶ 49 For the foregoing reasons, we affirm the trial court's ruling regarding the determination of the marital home as a marital asset, the allocation of equity in the home and existing retirement accounts to each party, and Sandra's attorney's fees. The court's allocation of debt should be clarified on remand to clearly provide that Danny is responsible for the City of Rock Island debt of less than \$17,000. The judgment of the circuit court of Rock Island county is affirmed and remanded with directions.

¶ 50 Affirmed and remanded with directions.