2013 IL App (5th) 120535-U

NO. 5-12-0535

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
LINDA K. BOTTOM,	)	Madison County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 10-D-1225
	)	
BRIAN D. BOTTOM,	)	Honorable
	)	David Grounds,
Respondent-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in awarding Mother sole custody of the parties' minor children and in imputing income to Father in setting child support. The court also equitably disposed of all remaining property and liabilities between the parties.

¶ 2 Respondent, Brian D. Bottom (Father), appeals following a judgment of dissolution of marriage entered by the circuit court of Madison County. We affirm.

¶ 3 Father and petitioner, Linda K. Bottom (Mother), were married in October of 1994. Prior to the dissolution of their marriage, the parties had two children, one born in 1999 and the other in 2009. Mother is a teacher earning approximately $57,000 a year and had the primary responsibility for the day-to-day parenting of the parties' children. Father currently is a self-employed landscaper and owns his own business, which operates at a loss. Prior to starting his own business, he was an architectural draftsman earning approximately $50,000

per year. Father's financial statement indicated that he earned a gross yearly income of $33,000 from his landscaping business.

¶ 4 As part of the dissolution of the parties' marriage, Mother was awarded full custody of both children. The court also awarded Mother her pension, child support based on an imputed earnings figure for Father, and, as her nonmarital property, 82 acres of farm ground and woods that had been gifted during the marriage by Mother's parents (the Nappiers). She was also given all of the parties' debt totaling some $128,660.39, including a $48,000 judgment lien against Father and Father's business. Father was awarded his business and no debt. All other property had already been divided by the parties prior to the dissolution.

¶ 5 Father argues on appeal that the court erred in finding the farmland gifted to both parties during the marriage to be Mother's nonmarital property. Father also believes that the court erred in imputing income to him for setting child support. He further asserts the court erred in not awarding the parties joint custody of the parties' children.

¶ 6 Turning to the issue of custody and child support first, we find no error in the court's decision to award sole custody of the children to Mother and ordering Father to pay child support based on an imputed figure. The primary consideration in determining any custody issue is the best interests of the child or children. 750 ILCS 5/602 (West 2010). We recognize that the trial court is given wide discretion in making custody determinations given that the trial court has the superior opportunity to judge the credibility of the witnesses, to consider the needs of the child or children, to evaluate the evidence and witnesses, and to resolve any conflicts in the testimonies. *In re Marriage of Karonis*, 296 Ill. App. 3d 86, 88, 693 N.E.2d 1282, 1284 (1998). Accordingly, the court's determination concerning custody shall not be overturned unless it is against the manifest weight of the evidence or a clear abuse of discretion. *In re Marriage of Marsh*, 343 Ill. App. 3d 1235, 1240, 799 N.E.2d 1037, 1041 (2003); *In re Marriage of Seitzinger*, 333 Ill. App. 3d 103, 108, 775 N.E.2d 282, 286

(2002).

¶ 7 Father does not dispute that Mother is the appropriate residential parent, nor does he contest the visitation schedule. He only disputes the award of sole custody of the parties' children to Mother. Section 602.1 of the Illinois Marriage and Dissolution of Marriage Act (Act) provides that the court may enter an order of joint custody if such would be in the best interests of the child or children, taking into account the ability of the parents to cooperate effectively and consistently in matters that affect joint parenting. 750 ILCS 5/602.1 (West 2010). See also *In re Marriage of Seitzinger*, 333 Ill. App. 3d at 108, 775 N.E.2d at 286-87. Here, the trial court was provided with an extensive opportunity to observe both parties' temperaments, personalities, and capabilities. The record further reveals that Mother consistently has been the primary caretaker of both children during the parties' marriage, a role which she continued in after the parties' separation and dissolution of marriage. Even when the children are in Father's care, they rely on Mother to ensure that their schedules are maintained and obligations met. Father, on the other hand, lacks the requisite knowledge concerning the children's medical providers and educators. He has issues with their oldest child's underlying learning disability and infrequently attends the children's extracurricular events. Father's overall contribution to decisions pertaining to the children's education, health, and welfare is, at best, limited. Additionally, Father frequently fails to return or answer Mother's calls or texts and prefers to communicate with her via the children. Lack of communication alone supports the award of sole custody to Mother. Stated simply, the parties lack the ability to make joint decisions for the benefit of their minor children. We agree that the award of sole custody to Mother is appropriate in this instance.

¶ 8 Turning next to the issue of child support, we acknowledge that the amount of an award of child support is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *In re Marriage of Clabault*, 249 Ill. App. 3d 641,

651, 619 N.E.2d 163, 170 (1993). Faced with an income that was difficult to determine, the court set a support amount based upon Father's ability to earn a gross yearly income of $39,000. Prior to starting his own business, Father was making approximately $50,000 a year. His financial statement indicated that he now earns a yearly income of $33,000. Father did not provide any professional valuation of the business. While the business consistently has operated at a loss, the business also has tangible assets and the tax returns show deductions for expenses that clearly are of a personal nature. When it is difficult to ascertain the net income of one parent, the court may consider that parent's past earnings in determining his or her net income for purposes of making an award of child support. *In re Marriage of Karonis*, 296 Ill. App. 3d at 92, 693 N.E.2d at 1287. Father's children should not be forced to suffer financially for his decision to continue to operate an unprofitable business. See *In re Marriage of Sweet*, 316 Ill. App. 3d 101, 107, 735 N.E.2d 1037, 1043 (2000) (child support obligor's rights to be employed in whatever vein he or she may choose does not supersede children's right to receive appropriate support). While a party's desire to remain self-employed is not insignificant, the interests of the other parent and children sometimes take precedence. *In re Marriage of Sweet*, 316 Ill. App. 3d at 107, 735 N.E.2d at 1043. Given that Father's stated income did not adequately reflect his ability to earn, setting child support at a level more appropriate to his skills and experience was not an abuse of the court's discretion. Accordingly, imputation of income was appropriate in this instance.

¶ 9 The other issue of contention in this appeal is the disposition of the 82-acre farm gifted by Mother's parents, the Nappiers, during the marriage. Brian believes the farm was gifted to them as a couple, and, therefore, the property should be classified and distributed as marital property.

¶ 10 In order to dispose of property in a dissolution of marriage, the court must first classify the property as marital or nonmarital. 750 ILCS 5/503 (West 2010). The Act creates

a rebuttable presumption that all property acquired by either spouse after the marriage, but before the entry of the judgment of dissolution, is marital property, regardless of how title is held. 750 ILCS 5/503(b) (West 2010). In order to overcome this presumption, the party challenging it must present clear and convincing evidence that the property falls within one of the statutory exceptions listed in the Act. *In re Marriage of Wanstreet*, 364 Ill. App. 3d 729, 735, 847 N.E.2d 716, 721 (2006). Section 503(a)(1) of the Act also states that property acquired by gift, legacy, or descent is nonmarital in nature. 750 ILCS 5/503(a)(1) (West 2010). Accordingly, a transfer from a parent to his or her child is presumed to be a gift. *In re Marriage of Wanstreet*, 364 Ill. App. 3d at 735, 847 N.E.2d at 721. Where both presumptions are present, these conflicting presumptions cancel each other out, and neither party is under the obligation to prove his or her case by clear and convincing evidence. *In re Marriage of Wanstreet*, 364 Ill. App. 3d at 739, 847 N.E.2d at 724. The trial court is then free to determine whether the property is marital or nonmarital using a manifest weight of the evidence test. *In re Marriage of Wanstreet*, 364 Ill. App. 3d at 737, 847 N.E.2d at 723; see also *In re Marriage of Hagshenas*, 234 Ill. App. 3d 178, 187, 600 N.E.2d 437, 444 (1992). The most relevant evidence in determining the nature of property is donative intent. And, the evidence most relevant in determining donative intent is the testimony of the donor or transferring parent. *In re Marriage of Wanstreet*, 364 Ill. App. 3d at 738, 847 N.E.2d at 724; *In re Marriage of Simmons*, 221 Ill. App. 3d 89, 92, 581 N.E.2d 716, 720 (1991). Here the donor parent, Linda Nappier, testified that the transfer of the farm, despite transferring the property into joint tenancy, was to be a gift to Mother as an advance on her inheritance. She further testified that she did so with the understanding that her grandson would eventually own the property. Other evidence revealed that the property had belonged to Mother's family for several generations. Once title was transferred to Mother and Father, Mother was the one responsible for payment of all bills associated with the farm and for all

decisions relating to the farming operation. With such evidence before it, the trial court concluded that the farm ground was nonmarital property. The court therefore awarded Mother the property, but also required her to pay all outstanding indebtedness associated with the farm ground. This indebtedness consisted of the delinquency stemming from the sale of the marital residence, past-due taxes, and a judgment lien entered against Father and his business which had been placed against the former marital residence. Again, a trial court's classification of property generally will not be disturbed on appeal unless it is contrary to the manifest weight of the evidence. *In re Marriage of Jelinek*, 244 Ill. App. 3d 496, 503, 613 N.E.2d 1284, 1289 (1993).

¶ 11 More importantly in this instance, the trial court's distribution of property or debt will not be reversed absent an abuse of discretion. *In re Marriage of Seitzinger*, 333 Ill. App. 3d at 112, 775 N.E.2d at 290; *In re Marriage of Marthens*, 215 Ill. App. 3d 590, 598, 575 N.E.2d 3, 8 (1991). Even if we were to find that the court erred in classifying the farm ground as nonmarital property, we cannot say the court abused its discretion in the overall distribution of property and debt in this instance. The court found that Father owed Mother $62,389.17 for reimbursement of credit card debt, his share of medical bills for the children, and his medical and car insurance. Taking into account the debt associated with the farm ground in dividing the marital estate, Father was absolved of all debt based upon the allocation of property. The end result is that Father has his business free from debt and Mother has the farm, her pension, and a debt of $128,660.39, more than a third of which represents a judgment lien against Father. We will affirm the trial court if there is any basis in the record to support the court's decision. See *In re Marriage of Divelbiss*, 308 Ill. App. 3d 198, 207, 719 N.E.2d 375, 381 (1999). Accordingly, we conclude that the court reached an equitable result given the circumstances presented.

¶ 12 For the aforementioned reasons, we affirm the judgment of the circuit court of

Madison County.

¶ 13 Affirmed.