

NOTICE
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2015 IL App (4th) 140779-U
NO. 4-14-0779

FILED
June 8, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

In re: MARRIAGE OF)	Appeal from
NANCY L. O'BRYAN,)	Circuit Court of
Petitioner-Appellant,)	Macon County
and)	No. 13D51
GUY O'BRYAN,)	
Respondent-Appellee.)	Honorable
)	James R. Coryell,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Pope and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court reversed the trial court's order awarding certain property in this dissolution proceeding and remanded with directions.

¶ 2 In February 2013, petitioner, Nancy L. O'Bryan, filed a petition for the dissolution of her marriage to respondent, Guy O'Bryan. In August 2014, the trial court entered the judgment of dissolution of marriage, awarded each party certain property, and required Guy to pay monthly maintenance and partial attorney fees.

¶ 3 On appeal, Nancy argues the trial court erred in awarding Guy certain nonmarital property. We reverse and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In February 2013, Nancy filed a petition for dissolution of marriage. The parties were married in August 1984 and no children were born during the marriage. At the time of the

petition, Nancy was 63 years old and Guy was 62 years old. Nancy also filed a petition for temporary relief, requesting possession of a 2004 Chevrolet Monte Carlo, certain household goods and furniture, and maintenance from Guy.

¶ 6 In April 2014, the trial court conducted a hearing on the petition. Nancy testified she lived and was employed as a caregiver in Madisonville, Kentucky. Nancy has a high-school education. During the marriage, she worked at Godfather's Pizza for a period of 10 years. She then worked as a nanny for 18 years.

¶ 7 Guy worked as a sales representative for Delta Industries. He made \$45,000 in 2011, \$52,000 in 2012, and \$68,000 in 2013. This was his third marriage, his second marriage ending in divorce in 1983. Nancy and Guy had lived in a house that Guy had acquired prior to their marriage. It was titled in his name and had never been transferred into her name. Guy inherited \$67,390 from his father in 1998 and received \$43,107 from the sale of a Florida condominium in 2010.

¶ 8 A. Farmland

¶ 9 In 1996, Guy created the Guy E. O'Bryan Trust with money he had received from his grandparents' inheritance. His intention in creating the trust was to keep property separate from Nancy. Nancy's name has never been on the trust account. During the marriage, 33 acres of farmland were acquired in Shelby County for approximately \$86,000, with title to the property taken in the name of the trust. Guy stated he purchased the property with money he inherited from his grandparents—\$40,000 from his grandmother in 1983 and \$50,000 from his grandfather in 1996. Nancy's name has never been on the farm title.

¶ 10 B. Financial Accounts

¶ 11 Guy maintained an account at Soy Capital Bank, stating it had been in use since

his employment at Aggregate Equipment in the 1970s. He stated he used this account for his business expenses as a salesman.

¶ 12 An account at Hickory Point Bank was opened in January 1994. In May 2013, Guy changed the name on the account from his name to the name of the trust. His earnings from Delta Industries had been directly deposited into this account. Guy acknowledged this account contained marital money.

¶ 13 Guy had three CEFCU accounts. In October 2009, Guy transferred the account from his name as an individual to his trust. Guy stated the origin of money in a CEFCU certificate of deposit was from the 401(k) he had at Aggregate Equipment in the 1970s. Guy testified to making multiple withdrawals in \$5,000 increments in late 2012 and early 2013 totaling \$50,000, stating he spent the money on trips to Las Vegas, San Diego, San Antonio, Florida, and New England. In March 2013, Guy paid a lump-sum amount of \$27,437.47 from the CEFCU account as a maintenance payment.

¶ 14 Guy had a checking account at PNC Bank (No. 1705). Guy stated this account is used for farm expenses. Guy also maintained a money-market account at PNC Bank (No. 8577). In January 2008, Guy transferred the account from his name as an individual to his trust. He used this account to hold money after cashing in a CD until he could find another investment.

¶ 15 C. Investment Accounts

¶ 16 Guy had a "Panorama Plus" variable annuity with Mass Mutual titled in his name only. The annuity had a value of approximately \$154,000 as of March 2013. In April 2013, Guy transferred the annuity into the trust. Although the annuity was issued in April 1995, Guy claimed it was nonmarital property as the funds started out with Connecticut Mutual in the 1970s.

¶ 17 Guy had a "Panorama Passage" variable annuity from Mass Mutual titled in his name only. Guy subsequently transferred the annuity from his name to the name of the trust. The annuity was issued in February 2000, and Guy stated he purchased it with money he inherited from his father.

¶ 18 Guy had an account with American Century Investments. He stated he acquired the account in the 1970s when it was Blunt, Ellis, and Loewi. His financial affidavit from his divorce in 1983 listed this latter account and valued it at \$22,800. Guy stated he rolled over the money several times and moved it around because companies went out of business.

¶ 19 Guy had a Raymond James account at Hickory Point Bank. The March 2014 statement shows a balance of \$52,814. The account was held in the name of the trust. Guy stated he funded the account in 2000 with money he inherited from his father.

¶ 20 D. Household Goods

¶ 21 Nancy testified that at the time of the separation she removed from the former marital residence items of clothing, a mixer, a fan, and a television. She estimated the marital property that remained had a fair-market value of \$10,000. She requested that Guy pay her \$5,000 for her interest in the property.

¶ 22 E. Vehicles, Boats, Trailers

¶ 23 Nancy testified she had a 2004 Chevrolet Monte Carlo worth \$4,100. Guy had in his possession a 2013 Chevrolet Impala worth approximately \$13,400, which was purchased with funds from his trust. The Impala was titled solely in Guy's name. Also with funds from his trust, Guy purchased a 2005 Chevrolet Impala that was titled only in his name. The car had a fair-market value between \$2,000 and \$7,000. In 1997, Guy purchased a 1986 Chevrolet pickup truck out of money he inherited. The truck was titled solely in his name.

¶ 24 Guy acquired a 30-foot Rinker boat and trailer in 1997. Both were titled in Guy's name only and were purchased with money from the trust. The boat had a fair-market value of approximately \$15,000. A 2000 Yamaha jet ski and trailer were also acquired during the marriage and titled in the name of the trust. The jet ski had a value of approximately \$1,500.

¶ 25 F. Cemetery Lots

¶ 26 Guy acquired two cemetery lots in 1992, paying \$200 from the trust. The lots are titled in Guy's name only. No fair-market value was provided.

¶ 27 G. Trial Court Order

¶ 28 In June 2014, the trial court entered an order, finding Guy "has a substantial amount of non-marital property, house, farmland, numerous investments including the contents of a trust." The court found this left Nancy "with almost nothing." Thus, the court awarded her 100% of the Mass Mutual Profit Sharing 401(k), the Hickory Point Bank account, and the 2004 Monte Carlo. Guy's June 2014 financial affidavit lists the amount of the 401(k) at \$135,117 and the trust at \$494,057. The court noted Guy had removed cash from numerous accounts, some of which were nonmarital, but Nancy had not raised a claim of dissipation. The court also ordered Guy to pay Nancy \$750 per month in maintenance and her attorney fees in the amount of \$4,000. The court entered the judgment of dissolution of marriage in August 2014. This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 Nancy argues the trial court erred in awarding Guy certain nonmarital property, including farmland, numerous investments, and the contents of the trust. Because we are unable to make an adequate determination of what property the court considered marital and nonmarital, and the reasons for doing so, we reverse the court's judgment and remand with directions.

¶ 31 Before distributing property in a dissolution of marriage case, the trial court must first classify the property as either marital or nonmarital. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 44, 968 N.E.2d 115. Section 503(a) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) defines "marital property" as "all property acquired by either spouse subsequent to the marriage." 750 ILCS 5/503(a) (West 2012).

¶ 32 Section 503(b)(1) of the Dissolution Act creates a rebuttable presumption that all property acquired after marriage and before dissolution of marriage is marital property. 750 ILCS 5/503(b)(1) (West 2012). To overcome this presumption, a party seeking to have property classified as nonmarital must show by clear and convincing evidence the property falls within one of the exceptions in section 503(a). *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1017, 909 N.E.2d 221, 228 (2009). When marital and nonmarital property are commingled resulting in a loss of identity of the contributing estates, the commingled property is deemed transmuted to marital property. 750 ILCS 5/503(c)(1) (West 2012). Also, even where title to property is placed in the name of one person, "there is a presumption that the property is marital property, which presumption can be overcome only by clear, convincing, and unmistakable evidence." *In re Marriage of Barnett*, 344 Ill. App. 3d 1150, 1154, 802 N.E.2d 279, 282 (2003). "The party claiming that the property is nonmarital has the burden of proof, and any doubts as to the nature of the property are resolved in favor of finding that the property is marital." *Marriage of Schmitt*, 391 Ill. App. 3d at 1017, 909 N.E.2d at 228.

¶ 33 The trial court's classification of property as marital or nonmarital will not be overturned on appeal unless it is against the manifest weight of the evidence. *Marriage of Schmitt*, 391 Ill. App. 3d at 1017, 909 N.E.2d at 228. "A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be

unreasonable, arbitrary, or not based on evidence." *Bazydlo v. Volant*, 164 Ill. 2d 207, 215, 647 N.E.2d 273, 277 (1995).

¶ 34 In the case *sub judice*, the record includes testimony, along with some documentary evidence, regarding the purchase of farmland, the contents and funding sources of financial and investment accounts, along with household goods, vehicles, boats, and trailers, and even cemetery lots. In its June 2014 order, the entire findings of the trial court on these issues are as follows:

"Defendant has a substantial amount of non-marital property, house, farmland, numerous investments including the contents of the trust he established items are set forth in the attachment to Defendant's Statement of Position.

This leaves the Plaintiff after a thirty (30) year marriage with almost nothing. She is to be awarded 100% of the Mass Mutual Profit Sharing 401(k) ***, the Hickory Point Bank account and the 2004 Monte Carlo.

The cash removed from numerous accounts cannot be accounted for. Some of the accounts were non-marital and are not subject to claim. No dissipation was raised for this. Claim is denied."

The court did not provide amounts for the various accounts or values for the property, goods, and vehicles. The court did not specifically delineate the nonmarital and marital property awarded to each party. The court also did not make credibility findings based on the parties' testimony or state which credible evidence it relied on in making its decision.

¶ 35 We note that "[i]n drafting the Dissolution Act, the legislature strongly favored the presumption of marital property, setting a high evidentiary hurdle for litigants attempting to overcome the presumption." *In re Marriage of Didier*, 318 Ill. App. 3d 253, 262, 742 N.E.2d 808, 815 (2000). While oral testimony may be used to establish clear and convincing evidence, "the bare assertion of a nonmarital *source* of a particular sum of money, without supporting documentary evidence such as account records, deposit slips, canceled checks, *etc.*, cannot be deemed clear and convincing." (Emphasis in original.) *Didier*, 318 Ill. App. 3d at 262, 742 N.E.2d at 815.

¶ 36 In this case, much of Guy's testimony regarding alleged nonmarital property involved oral testimony with little documentary support. It is unclear what evidence the trial court considered to be clear and convincing evidence of nonmarital property. Without more from the court, we cannot adequately consider whether its ultimate decision was against the manifest weight of the evidence. Thus, we reverse the court's judgment and remand for the court to determine whether Guy overcame the presumption of marital property with clear and convincing evidence and, if so, state the evidence relied upon in making that conclusion. Should the parties disagree with the court's findings, they may appeal that ruling.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we reverse the trial court's judgment and remand with directions.

¶ 39 Reversed and remanded with directions.