

NOTICE
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2015 IL App (5th) 130567-U

NO. 5-13-0567

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
THERESA L. CONROY,)	Madison County.
)	
Petitioner-Appellant,)	
)	
and)	No. 11-D-860
)	
ALAN L. CONROY,)	Honorable
)	David Grounds,
Respondent-Appellee.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justice Stewart concurred in the judgment.
Justice Welch dissented.

ORDER

¶ 1 *Held:* Where the trial court correctly entered a maintenance award, but set the monthly amount too low and made the award reviewable in three years, the trial court abused its discretion, and we modify the award. Where the trial court had no way to resolve the evidentiary discrepancies regarding personal property held by each party, the trial court did not abuse its discretion in awarding each party the property he or she possessed.

¶ 2 In the judgment of dissolution, the trial court granted Theresa Conroy maintenance of \$600 per month reviewable in three years. On appeal, Theresa claims that she was entitled to permanent maintenance. Alan argues that the maintenance award should not

be modified. Additionally, Theresa claims that the amount of maintenance is insufficient to meet her needs. Finally, Theresa contends that the trial court's personal property award (awarding each party the items in his or her possession) was flawed, as she was the only party who presented credible evidence as to the value and ownership of the personal property. We conclude that the trial court abused its discretion in both the amount and classification of the maintenance awarded in light of the relative financial position of the parties and the likelihood that Theresa would not be employable in the foreseeable future, and we modify the award. We affirm the trial court's property division award because the award was not contrary to the manifest weight of the evidence.

¶ 3

FACTS

¶ 4 Alan and Theresa met in 1981, had a daughter in 1989, began living together in 1990, and married in 1997. They separated in 2011, and Theresa filed a petition for dissolution of their marriage in the same year. The trial court held a hearing on all contested issues in September 2012. At that time, Alan was 60 years old and Theresa was 58.

¶ 5 Theresa testified that while she did not complete high school, she had obtained her General Education Diploma. In the past, she had worked as a cosmetologist and a licensed practical nurse. She last worked in 2001. While employed as a nurse, she sustained injuries. She testified that because of these injuries, she filed a disability claim with the Social Security Administration. The Social Security Administration declared Theresa totally and permanently disabled in August 2008. As of the date of the hearing, Theresa received \$737 per month in Social Security disability benefits. She was also on

Medicare part AB for health coverage. However, she did not have a Medicare supplemental insurance policy. Theresa was covered under Alan's health insurance plan at the time of the hearing. In addition, Theresa paid approximately \$300 per month in copayments for her prescriptions. These medications would cost between \$700 and \$1,150 without Alan's coverage. Theresa testified that she would be able to obtain a Medicare supplemental insurance policy that covered prescription medication. Prescription coverage would add \$100 per month to the premium, in addition to the copayments or deductible she would need to satisfy.

¶ 6 Theresa testified that when she and Alan separated, she lived in the marital home. Eventually, Theresa agreed to an order directing her to move out of the marital home in exchange for \$2,500 in temporary maintenance. The order stated that Theresa could only remove "items necessary to establish her residence." On the day when Theresa moved, Alan apparently contacted the Madison County Sheriff's Department. The deputies came to the home and instructed Theresa to return many items to the marital home. She was allowed to take two tote bags full of her belongings, a leather couch, two leather chairs, one 36-inch television, a Bose surround-sound system, her clothing, one-half of the pots, pans, and bowls, one-half of the towels and washcloths, and one set of sheets.

¶ 7 Theresa also testified about additional personal property still in Allan's possession that she was asking the court to award her. These items included one bedroom set including the mattress; an antique desk armoire that had been in Theresa's family for generations; an older refrigerator; a picnic table; a leaf blower; an aluminum table; lawn ornaments and fountains; a washer and dryer; a television stand; a dining room table and

chairs; a baker's rack; a 12-gauge shotgun; and a 20-gauge shotgun. She testified that she had provided fair market values of all of the items and testified that she believed the value of the items she desired equaled one-half of the value of all of the property she and Alan had during the marriage. She also identified photographs of the items in question.

¶ 8 Alan testified that he was employed as a truck driver by DeLaurent Construction Company. Work was seasonal, and Alan estimated that he worked about eight months each year. When not working, he received unemployment benefits. He also worked as an inspector of race cars for World Racing Group. He estimated that his World Racing Group income was \$3,000 to \$6,000 annually. Alan also testified that he owned a five-acre tract of farmland, from which he derived income. A copy of Alan's 2010 federal income tax return (filed jointly with Theresa) is in the record on appeal. In 2010, Alan reported \$51,996 in wages—\$47,652 from DeLaurent Construction and \$4,344 from World Racing Group. He reported \$8,870 in unemployment benefits. He claimed a \$4,786 loss of income from the farm acreage. No other income tax returns were included in the record, but 2011 income tax forms and pay stubs reflected Alan's income from DeLaurent Construction and his unemployment benefits. The total income from those two sources was \$44,764. Alan did not provide the court with documentation of his 2011 income from other sources.

¶ 9 Alan also testified about the personal property issue, stating that he believed that Theresa took all that she deserved. He asked the court to award him several items including a diamond ring, his class rings, and a few pocket watches.

¶ 10 The trial court entered a written order on July 5, 2013, resolving all contested issues from the September 2012 hearing. The court awarded Alan the marital home, appraised at \$200,000, along with the associated debt. The court awarded Theresa the equity in the home—\$6,914.65, and ordered Alan to pay Theresa this amount within 90 days. The court also awarded Theresa 50% of the marital portion of Alan's pension. The court does not reference any value, and we are unable to find any financial information about the pension in the record.

¶ 11 Regarding the personal property claims of both parties, the court concluded that Alan and Theresa were in complete disagreement about the facts, and there was no way to reconcile the differences. Therefore, the court ruled that each party should keep the property in his or her possession. However, the court awarded the guns, presently in the possession of the attorneys, to Theresa.

¶ 12 Turning to Theresa's claim for maintenance, the trial court found that there were no disqualifying factors against awarding maintenance. The trial court based its findings regarding Alan's income on his testimony and the exhibits, concluding that he netted approximately \$1,003.53 weekly. The court stated that Theresa is on full Social Security disability, and that while she has job skills, her present earning capacity is limited. The court stated that "[i]t is unclear whether the disability will subside or whether it is permanent." The court noted that there was insufficient marital property from which she could draw funds. The court found that Theresa's age was a detriment to her employability. The court noted that Alan is employed and in good health. The court

considered the tax consequences of a maintenance award. The court awarded \$600 per month, reviewable in 36 months.

¶ 13 The court awarded Theresa \$3,500 of her \$7,383.43 in attorney fees.

¶ 14 Theresa filed a posttrial petition asking the court to modify the judgment of dissolution of marriage. On November 18, 2013, the trial court entered its order, denying Theresa's personal property and maintenance claims. Theresa appeals from the court's September 6, 2012, judgment of dissolution of marriage.

¶ 15 ANALYSIS

¶ 16 On appeal, Theresa argues that the trial court abused its discretion in both the duration and amount of her maintenance award. She also argues that the trial court's order regarding the personal property issue is flawed because she presented the only evidence as to value at trial, and the court's order did not equitably distribute the property based upon that evidence.

¶ 17 Maintenance

¶ 18 The propriety, amount, and duration of a maintenance award are matters that lie within the trial court's discretion, and we will not reverse the award unless we conclude that the trial court abused its discretion. *In re Marriage of Hart*, 195 Ill. App. 3d 839, 851, 551 N.E.2d 737, 744 (1990).

¶ 19 Section 504(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/504(a) (West 2010)) provides that the court may award temporary or permanent maintenance and that the amount of maintenance and the time period during which

maintenance is to be paid shall be determined after the court has considered all relevant factors. The statutory factors that must be considered are as follows:

1. the income and property of each party including marital and nonmarital properties;
2. each party's needs;
3. the present and future earning capacity of each party;
4. any impairment of future earning capacity due to one party devoting time to domestic duties or otherwise having foregone or delayed educational or employment opportunities;
5. the time necessary to enable the party seeking maintenance to acquire appropriate education and training;
6. the standard of living established during the marriage;
7. the duration of the marriage;
8. the age and physical and emotional condition of the parties;
9. the tax consequences of the property division upon each party's economic circumstances;
10. contributions and services by a party to the other party's education, training, or career;
11. any agreement between the parties, and;
12. any other factor that the court finds to be just and equitable. 750 ILCS 5/504(a) (West 2010).

¶ 20 There is no one controlling factor in deciding to award or deny maintenance. *In re*

Marriage of Harlow, 251 Ill. App. 3d 152, 157, 621 N.E.2d 929, 934 (1993). The trial court must view the party's reasonable needs in view of the standard of living established during the marriage. *In re Marriage of Dunlap*, 294 Ill. App. 3d 768, 773, 690 N.E.2d 1023, 1027 (1998) (quoting *In re Marriage of Tietz*, 238 Ill. App. 3d 965, 972, 605 N.E.2d 670, 676 (1992)). Additionally, the hearing date is the relevant time for a proper maintenance analysis. *In re Marriage of Reynard*, 344 Ill. App. 3d 785, 791, 801 N.E.2d 591, 596 (2003). The trial court must consider its decision to award or deny maintenance in the context of the circumstances of the parties at that time. *Id.*

¶ 21 Generally, the party asking the trial court to award maintenance must make efforts to obtain employment. *In re Marriage of Stam*, 260 Ill. App. 3d 754, 757, 632 N.E.2d 1078, 1080 (1994). In that situation, courts must balance the goal of meaningful employment against "a realistic appraisal of the likelihood that the spouse will be able to support herself in some reasonable approximation of the standard of living established during the marriage." *Id.* We also note that the party seeking maintenance should not have to sell or impair assets awarded in a property distribution to provide for his or her own support. *In re Marriage of Cheger*, 213 Ill. App. 3d 371, 378-79, 571 N.E.2d 1135, 1140 (1991).

¶ 22 At the end of the hearing in this case, Theresa's attorney asked the court to award her \$400 per week in maintenance. Instead, the trial court awarded Theresa \$600 per month in temporary maintenance to be reviewed in three years. Theresa complains that this award was an abuse of discretion in that she cannot possibly meet all of her monthly expenses with that amount. The trial court found that Alan netted approximately

\$1,003.53 weekly. The trial court's finding that Alan had \$1,003.53 net weekly income is not disputed on appeal. Alan specifically states in his brief on appeal that the trial court's maintenance award was consistent with the evidence presented at trial. We now turn to the record to analyze the court's maintenance award.

¶ 23 Alan testified that he worked about eight months per year for DeLaurent Construction, and when not working he drew unemployment benefits. Alan filed a financial statement apparently used as an exhibit at trial. He listed monthly expenses at \$3,964.44, plus another \$7,180 in annual expenses. He testified that he had little left over at the end of each month.

¶ 24 Theresa testified that she worked outside of the home until 2001. While employed as the Head Start nurse at the Illinois Valley Economic Development Center in Gillespie, she sustained a traumatic injury when a 150-pound item fell on her. As a result of this work injury, Theresa sustained fractured vertebrae both above and below a disk that had been surgically repaired in 1984. This new vertebral injury was one of the reasons Theresa was awarded a permanent disability by the Social Security Administration in 2008. Between 2001 and 2008, Theresa did not work outside of the home. After receiving her Social Security disability in 2008, Theresa continued to work at home as a wife and mother. Theresa testified that as of September 2012, her monthly disability income was \$737–\$8,844 per year. From this total, we calculate Theresa's 2012 gross weekly income at approximately \$170. Theresa testified she stays with friends and family because she does not have adequate income to afford any type of rental property. Theresa filed her affidavit of income, expenses, assets and debts in 2011

during the time that she was still living in the marital home. At that time, she listed her monthly expenses (which included the mortgage and other home-related living expenses) at \$2,784.25. The record does not contain a more current expense report.

¶ 25 We agree with the trial court's assessment that Theresa is not employable given her age and physical condition. We also concur with the court's finding that Theresa did not receive sufficient marital property from which she could draw funds. Having reviewed the record and the court's order, we agree that the court considered all of the statutory maintenance factors. However, we disagree with the weight that the court apparently accorded certain factors.

¶ 26 There is no absolute right to maintenance when a marriage dissolves, but maintenance is appropriate in circumstances of necessity. *In re Marriage of Bratcher*, 383 Ill. App. 3d 388, 390, 890 N.E.2d 1232, 1234 (2008). In this case, Theresa's present annual income of \$8,844 is well below the national poverty level. The United States Department of Health and Human Services lists the poverty guidelines for an individual in 2012 at \$11,170. *Poverty Guidelines*, U.S. HEALTH & HUMAN SERVICES, aspe.hhs.gov/poverty/12poverty.shtml.

¶ 27 We find that the trial court was correct in awarding maintenance. Theresa currently only receives \$737 per month from the federal government. With the \$600 court-awarded maintenance award, Theresa would have a monthly income of \$1,337, while Alan would have \$3,748. The court's maintenance award is 13.8% of Alan's net monthly income of \$4,348 as determined by the trial court. Alan lives in the marital home. Alan has the ability to work and has job skills with which he could increase his

income if needed. In contrast, Theresa has no home. She is physically disabled and unable to work. She takes numerous expensive prescription medications. While the divorce was pending, Theresa was still listed as a dependent on Alan's health insurance plan, which included prescription drug benefits. Her monthly copays were over \$300—almost half of her disability benefits. Once divorced, the full cost of the prescription medications would be borne by Theresa. The cost of her prescription medications exceeds the amount of her disability benefits. She can purchase a Medicare supplemental insurance plan that includes a prescription drug benefit, but that benefit will cost her approximately \$100 extra per month, in addition to the copayments or deductibles she would be required to pay.

¶ 28 At the hearing, Alan argued that he could not afford any maintenance because he used all of his income to pay for his living expenses. Dissolution of a marriage and maintaining separate households typically results in lifestyle changes for both parties. "Because, in reality, two households are more costly than one, most parties are not able to afford the same standard of living they enjoyed when living together. In those circumstances, the court must apportion the deficit, balancing the parties' claims to their remaining incomes." *In re Marriage of Keip*, 332 Ill. App. 3d 876, 880, 773 N.E.2d 1227, 1230 (2002).

¶ 29 After considering the testimony and evidence introduced at trial and in the record, along with the statutory factors from section 504 of the Act (750 ILCS 5/504 (West 2010)), we find that the trial court's \$600 monthly maintenance award was inadequate. Therefore, we modify the maintenance award to \$1,200 per month. We find that \$1,200

per month strikes "a balance between the reasonable needs of the parties and the ability of [Alan] to pay." *In re Marriage of Keip*, 332 Ill. App. 3d at 882, 773 N.E.2d at 1232. This would provide Theresa with \$1,937 in monthly income, leaving Alan with \$3,148 in monthly income. Given Theresa's age, education, past careers, and her medical disability, we do not believe that Theresa will ever be able to achieve self-sufficiency. Theresa worked when the couple lived together and in the early years of their marriage. After her work injury, the couple apparently agreed that Theresa would stay at home to manage the home and take care of their daughter. Her status as a stay-at-home wife continued throughout the remainder of their marriage—approximately 11 years. The contribution to the family had a value that must be viewed in the totality of the marriage partnership. *Id.* at 882-83, 773 N.E.2d at 1232. While this award does not allow either party to enjoy the lifestyle they enjoyed during their marriage, it does serve to more reasonably provide for Theresa's needs in an amount that Alan can afford.

¶ 30 Furthermore, we find that the court abused its discretion by making the maintenance award reviewable in three years. Theresa was 58 years old and in poor physical health when the court held this trial. Her Social Security disability award was a total and permanent award. There was no evidence offered at trial to suggest that Theresa was employable in the future. Even with the \$1,200 monthly maintenance award, Alan's income remains substantially higher than Theresa's income. If the facts of a case are clear that one spouse has no ability to support herself in the lifestyle enjoyed during the marriage, then an award of reviewable maintenance is an abuse of the trial court's discretion. *In re Marriage of Keip*, 332 Ill. App. 3d at 883-84, 773 N.E.2d at 1233

(quoting *In re Marriage of Carpel*, 232 Ill. App. 3d 806, 828, 597 N.E.2d 847, 863 (1992)). We conclude that the trial court abused its discretion by mandating a review of the maintenance award after three years. We modify the award of maintenance, making the award permanent.

¶ 31 Personal Property Award

¶ 32 Theresa next argues that the distribution of personal property constituted an abuse of the trial court's discretion. We must uphold the trial court's property division decision unless we find that the trial court abused its discretion. *In re Marriage of Siddens*, 225 Ill. App. 3d 496, 500, 588 N.E.2d 321, 324 (1992). The reviewing court does not have to agree with the trial court's property division, but must determine if the trial court acted arbitrarily without employing conscientious judgment, or if in view of all circumstances of the case, no reasonable person would agree with the trial court's decision. *Id.*

¶ 33 Section 503(d) of the Illinois Marriage and Dissolution of Marriage Act requires marital property division in just proportions. 750 ILCS 5/503(d) (West 2010). Proportional asset division does not require mathematical equality. *In re Marriage of Doty*, 255 Ill. App. 3d 1087, 1097-98, 629 N.E.2d 679, 686 (1994). The trial court may award an unequal distribution of property if it properly applied the guidelines set forth in section 503(d) of the Act. 750 ILCS 5/503(d) (West 2010); *In re Marriage of Doty*, 255 Ill. App. 3d at 1097-98, 629 N.E.2d at 686. The guidelines to be considered are as follows:

1. the contribution of a spouse to the marriage;
2. the duration of the marriage;

3. the amounts and sources of each spouse's income;
4. the age, occupation, vocational skills, employability and needs of each spouse;
5. the reasonable opportunity for each spouse's future acquisition of assets and income;
6. whether the apportionment is in lieu of or in addition to maintenance;
7. the tax consequences of the property division;
8. the dissipation of marital or nonmarital property;
9. any antenuptial agreement of the parties; and
10. the value of the property set aside for each spouse. 750 ILCS 5/503(d)(1)-(12) (West 2010).

¶ 34 In this case, Theresa presented her detailed requests and her own estimates of value. Alan presented no evidence, but asked for a few items of sentimental value. The trial court listened to both parties testify at trial and concluded that there was no agreement about who had possession of the items of property at issue. The court noted that Theresa had exclusive possession of the marital home for some time. When she moved out, Theresa testified that Alan made it quite difficult to retrieve the remainder of her belongings. Alan testified that Theresa took most everything from the house, and left the house in shambles. The court stated that there was no way to resolve this discrepancy, and so opted to award Theresa and Alan with all personal property each then possessed. The court awarded Theresa the guns that she requested.

¶ 35 Theresa argues that she provided values for all property items, and that if the court had used her valuations, and granted her the specific items she requested, the distribution

would have been almost equal. She further argues that the court failed to classify the property as marital or nonmarital in nature. Although it would have been a tedious task, Theresa contends that the trial court was required to make a more specific property distribution.

¶ 36 Theresa is correct that she provided valuations of all of the personal property items. However, having reviewed the transcript of the hearing, along with the photographs introduced into evidence, we have no basis to conclude that the trial court abused its discretion. Theresa's testimony failed to persuade the trial court that she was entitled to any additional items of personal property, other than the guns that the court awarded her. A property division does not require precise mathematical equality. *In re Marriage of Doty*, 255 Ill. App. 3d at 1097-98, 629 N.E.2d at 686. Accordingly, we affirm the trial court's personal property award.

¶ 37 CONCLUSION

¶ 38 We conclude that the trial court abused its discretion in determining the amount and duration of the maintenance awarded to Theresa. We therefore modify the court's final judgment pursuant to our authority under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994). We increase the amount of maintenance awarded monthly to \$1,200, and we also make the maintenance order permanent as of the date of the judgment. We affirm the trial court's personal property award.

¶ 39 Affirmed as modified.

¶ 40 JUSTICE WELCH, dissenting:

¶ 41 Although I agree with my colleagues that Theresa's physical limitations impede her from reaching financial self-sufficiency, I do not agree that as a reviewing court we should determine the permanent monthly maintenance amount. At the hearing, Theresa's attorney requested \$400 per week in maintenance, totalling \$1,600 monthly; however, the trial court awarded temporary monthly maintenance of \$600 to be reviewed in three years. On review, my colleagues have modified the award to \$1,200 permanent monthly maintenance. It is well established that the propriety, amount, and duration of a maintenance award are matters within the sound discretion of the trial court, and will not be disturbed on review absent abuse of that discretion. *In re Marriage of Carpenter*, 286 Ill. App. 3d 969, 973 (1997). Here, I do not believe as a reviewing court we should determine the specific dollar amount to be awarded based on the multitude and complexity of the facts in this case, although we have the authority under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), as the trial court stands in the best position as the fact finder to make this determination. I am of the opinion that the appellate court should not be a dumping ground for reconfiguring maintenance. As such, I would reverse and remand so that the trial court may reconsider its awards of maintenance and personal property in accordance with the views expressed in the majority's opinion.