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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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<i>In re</i> MARRIAGE OF	)	Appeal from the Circuit Court
LEVI LEAKE,	)	of Du Page County.
	)	
Petitioner-Appellee,	)	
and	)	No. 13-D-1708
	)	
TOYAH WILSON,	)	Honorable
	)	John W. Demling,
Respondent-Appellant.	)	Judge, Presiding.

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PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.  
Justices Burke and Hudson concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not abuse its discretion in setting maintenance, in distributing the marital property, or in ordering that each party be responsible for their own attorney fees.

¶ 2 The respondent, Toyah Wilson, appeals from the judgment of the circuit court of Du Page County dissolving her marriage to petitioner, Levi Leake. Toyah argues: (1) the trial court's maintenance award was improper; (2) the trial court erred in ordering that each party be responsible for their own attorney fees; and (3) the trial court's division of marital assets was not equitable. We affirm.

¶ 3 **BACKGROUND**

¶ 4 The parties were married on July 13, 2002. Two children were born to the parties: Anaiya, born July 12, 2006, and Malia, born June 6, 2010. On August 16, 2013, Levi filed a petition for dissolution of marriage. On August 28, 2014, the parties entered an agreement concerning custody and visitation. This agreement was ultimately incorporated into the judgment for dissolution. A bench trial in the matter commenced on January 9, 2015.

¶ 5 At trial, Toyah testified that she received a doctorate degree in clinical psychology in October 2003. She had about \$225,000 in student loans. She believed that \$37,000 of the student loan debt was incurred during the marriage. In 2002, she had an internship and earned \$16,000. Following graduation in 2003, she worked at Northeastern Illinois University as a training director and staff psychologist for an annual salary of \$38,000. Since 2007, she was self-employed as a psychologist in private practice. At the time of trial, she had 35 active clients. Toyah testified that she generally earned annual gross income of \$80,000 to \$90,000, before business expenses and state, federal, and self-employment taxes were deducted. Her adjusted gross income, after all expenses and taxes, was between \$60,000 and \$70,000. She estimated her average business expenses as \$2,000 per month.

¶ 6 In September 2002, the parties purchased a townhome in Naperville. The title of the property was in both their names. However, at some point Levi wanted to refinance and her student loans were an impediment, so only Levi was named on the mortgage. She and Levi always maintained separate checking accounts. Since 2003, she had paid for the household utilities, car insurance, groceries, and entertainment. Levi would pay the residential mortgage. However, he sometimes did not have enough money so he would withdraw money from Toyah's account to cover the shortfall.

¶ 7 Toyah further testified that the parties purchased an investment property during the marriage. She made contributions toward the investment property during the marriage, but she

did not track her contributions. She and Levi helped each other so if Levi needed money for repairs or the mortgage, he would take it out of her account. Her name was on the title to the investment property but it was not on the mortgages because of her student loans. Without her name on the mortgage loans, they were able to secure lower interest rates. She did not know that there was a second mortgage of \$69,000 on the investment property. She acknowledged that she hired and paid an appraiser to value the investment property. However, she had not had contact with the appraiser and did not know the property's value. She did not know if there was any equity in the property or if the property needed repairs. She did not want the investment property awarded to her because it was always Levi's endeavor. The parties also took out a loan to purchase a Disney timeshare for \$10,000. The monthly assessment to maintain the timeshare was \$200.

¶ 8 Toyah testified that she had leased a 2010 Lexus RX350. Levi originally made the lease payments but she started to make the payments in August 2014. She returned the Lexus to the dealership in February 2015. Because of a significant mileage overage, she incurred \$6,400 in debt upon returning the car. She then purchased a Nissan Rogue. She acknowledged that 80% of her car expenses were written off as a business expense on her tax returns.

¶ 9 Toyah identified Levi's Exhibits 1, 24, and 25, the parties' 2013, 2012, and 2011 joint tax returns and testified that the information contained in those exhibits was accurate. She filed 2014 tax returns separate from Levi and owed \$9,700 to the federal government and \$2,000 to the state. Pursuant to the federal tax returns, her business expenses for 2011, 2012, and 2013 were \$13,972, \$17,366, and \$40,026, respectively.

¶ 10 Toyah identified a December 22, 2014, financial disclosure statement. It was admitted as Levi's Exhibit 8. Therein, she listed her gross annual income as \$7,542.96 per month. Her net monthly income, including child support, was \$5,600 per month. It also listed a monthly

mortgage payment of \$1,516. She acknowledged that she did not pay the mortgage but anticipated doing so upon the dissolution. She hoped to obtain the townhome in the dissolution so that she could provide consistency to the children as they were grounded in that community and the local school. She wanted to refinance the mortgage in her own name. To do that, she would need to pay down some of her student loans. She had not investigated her ability to obtain a mortgage. She believed it would take her about two years to pay down debt and refinance in her own name. She valued the townhome at \$165,000 based on comparable sales in the area and a comparative market analysis that someone had performed for her. The outstanding mortgage on the townhome was \$189,000. Since August 2014, she had received monthly child support of \$2,400. She paid about \$1,800 per month in childcare expenses. She had about \$25,000 in credit card debt.

¶ 11 Toyah acknowledged that she had a whole life insurance policy. The death benefit was \$750,000. She was not sure of the present cash value of the policy. She paid \$81 per month to maintain the policy. She did not have any retirement benefits, savings, stocks, or bonds. At the time of her testimony, she had paid her attorney about \$21,000. On May 1, 2015, Toyah filed a petition for contribution to attorney fees. In her petition, she stated that she incurred attorney fees of \$31,131.36 and, of that amount, \$9,760.16 remained due. She also expected additional fees to be incurred through the conclusion of trial.

¶ 12 Levi testified that he worked for Clorox and was a director of manufacturing. His annual salary was \$167,450 and he could earn a bonus of up to 15%. In 2014, he earned a bonus of \$7,600 and in 2013 he earned a bonus of \$6,100. His net monthly income, after child support is deducted, is about \$9,000 per month. In August 2002, the parties purchased a townhouse for \$162,000. It was presently worth \$165,000, but the mortgage balance was about \$185,000. He always made the mortgage payments on the property. He intended to keep the marital residence

following the divorce. He did not have any other means of obtaining housing due to his credit situation. He had always paid the mortgage until he started paying child support. Toyah was not on the mortgage and had not paid the mortgage, even after she started to receive child support. Toyah had never asked about the account information so that she could pay the mortgage. The mortgage was very close to foreclosure. Levi acknowledged that the parties owned a Disney timeshare but he had not been making the payments so he was not sure what status it was in.

¶ 13 Levi further testified that, in November 2007, the parties purchased a rental property in Chicago for \$375,000. It was currently worth about \$250,000. It was a two-flat with four units. The total monthly rents collected were \$3,200. There were first (\$280,000) and second (\$69,000) mortgages on the rental property. The property was in need of substantial repairs in order to meet city code ordinances. The City had initiated litigation against him but he did not have the money to make the repairs. The repairs that were the subject of the litigation would cost \$15,000. In addition, there were other needed repairs that would cost between \$25,000 and \$40,000. Toyah did not contribute to the maintenance of or for the payment of the rental property. On a rare occasion he had taken money from Toyah to cover expenses for the rental property.

¶ 14 Levi identified Exhibit No. 23 as his financial disclosure statement. Levi testified that he could not afford to pay maintenance. After all the rental property expenses, child support, and other children's expenses, he barely had enough money to support himself. He had currently paid about \$9,800 in attorney fees and owed his attorney another \$8,500. The first mortgage on the rental property was \$2,226 per month and the second mortgage was \$325 per month. He also paid about \$380 per month in rental property insurance and \$300 per month for water. He paid \$1,000 per month to the rental property manager and the maintenance manager. He had credit card debt of about \$30,000.

¶ 15 On July 21, 2015, the trial court issued an oral ruling and ordered that a written judgment be prepared. On August 20, 2015, the final written judgment was entered. The trial court stated that it considered the credibility of the witnesses, the exhibits received in evidence, and the appropriate statutory factors. The trial court found that the marital residence had a fair market value of \$165,000 and a mortgage loan balance of \$180,000. The rental property had a fair market value of \$250,000, with a mortgage balance of \$350,000. Levi had personal credit card debt of \$30,000 and Toyah had personal credit card debt of \$25,000. Levi had student loans of approximately \$32,000 and Toyah had student loans totaling \$230,000. The trial court also found that Levi's annual base pay was \$167,000 and that Toyah had the ability to earn between \$60,000 and \$90,000. Levi had a 401(k) valued at \$2,000.

¶ 16 The trial court awarded the marital residence to Levi. Toyah had 60 days from the date of judgment to quitclaim any interest to Levi. The trial court also awarded the rental property to Levi and gave Toyah 30 days to quitclaim any interest to Levi. Levi was responsible for the debts and liabilities associated with the properties. Toyah was awarded the Disney time share and any debts associated therewith. Each party was awarded the vehicle in their possession and the credit card debt in their own name. The 401(k) was to be split evenly between the parties. Each party was to be responsible for their own attorney fees. The trial court ordered that Levi pay \$2,450 per month in child support.

¶ 17 As to maintenance, the trial court found that, based on Toyah's lower amount of income, statutory guidelines would normally apply. However, a deviation was appropriate given the significant debt associated with the real estate awarded to Levi. The trial court stated that, if guidelines were applied using \$75,000 as Toyah's annual income and \$167,000 as Levi's annual income, maintenance would be \$1,816.66 per month. However, after considering all the statutory factors, including the length of the marriage, the needs of the parties and their future

income earning ability, the trial court awarded maintenance in the amount of \$1,000 per month, subject to review in a period of three years. Toyah filed a timely notice of appeal from the trial court's order.

¶ 18

#### ANALYSIS

¶ 19 Toyah's first contention on appeal is that the trial court erred in setting maintenance below the statutory guidelines. Toyah argues that the trial court failed to consider the substantial debt she incurred, including student debt (\$230,000), credit card debt (\$25,000), money owed on her Lexus (\$6,400), and money owed to the IRS (\$11,700). Levi had less student debt and comparable credit card debt. Additionally, the debt associated with the real estate was only potential debt. Levi intended to continue to live in the marital residence and the investment property was fully rented. In fact, due to the write-offs associated with the investment property, Levi received a 2014 tax refund of \$15,000. Toyah also argues that the trial court failed to consider the standard of living established during the marriage and that Levi's future earning capacity was much higher than hers. Finally, she argues that the trial court failed to explain why it deviated from the statutory guidelines in terms of the length of the maintenance award.

¶ 20 The trial court's decision to award maintenance is reviewed for an abuse of discretion. *In re Marriage of Schneider*, 214 Ill. 2d 152, 173 (2005). "An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court." *In re Marriage of Nord*, 402 Ill. App. 3d 288, 292 (2010). "Under the abuse of discretion standard, the question is not whether this court might have decided the issue differently, but whether any reasonable person could have taken the position adopted by the trial court." *In re Marriage of Samardzija*, 365 Ill. App. 3d 702, 708 (2006). The party seeking reversal of the trial court's maintenance order has the burden of showing that the trial court abused its discretion. *Schneider*, 214 Ill. 2d at 173.

¶ 21 In the present case, we cannot say that the trial court abused its discretion in setting maintenance at \$1,000 per month subject to review in three years. The trial court noted that this was a downward deviation from statutory guidelines and that the deviation was due to the fact that the marital real estate debt was assigned entirely to Levi. This is a proper basis for a downward deviation. *In re Marriage of Underwood*, 314 Ill. App. 3d 325, 328 (2000) (maintenance and property distribution are interrelated and should be considered together). In addition to the mortgages on the marital residence and the rental property exceeding the present market values, the record indicates that the mortgage on the marital residence had not been paid in about a year. Levi would have to pay the arrearage in order to avoid foreclosure. Additionally, while Toyah had extensive student loan debt, she testified that it was currently in deferment. As such, in light of the extensive marital debt assigned to Levi, we cannot say that the trial court abused its discretion in entering a downward deviation in maintenance at this time. Although we are concerned that Levi's present earnings are double that of Toyah, in three years the maintenance award is reviewable. Upon review, there may be changes in the real estate market and changes in the financial positions of the parties such that a deviation at that time may no longer be appropriate.

¶ 22 Toyah points out that the statute (750 ILCS 5/504 (b-2)(2) (West Supp 2015)) required the trial court to state the duration of the statutorily required maintenance award and the trial court failed to do so. While this is true, the statutory requirement is directory, not mandatory, and is not a basis to reverse the trial court's determination. *In re Marriage of Tumminaro and Warlick*, 2013 IL App (2d) 120287, ¶ 21 (noting that the word "shall," as used in a statute, is directory unless there is a penalty for noncompliance; only a penalty makes the statutory provision mandatory). Moreover, maintenance is reviewable in three years and may continue beyond that time. Accordingly, it is unclear at this moment whether the duration of the



maintenance award will in fact deviate from the statutory guideline, under which the duration would be about six and a half years.

¶ 23 Toyah argues that the trial court failed to consider that she was also saddled with significant debt. The record indicates that she had student loan debt in the amount of \$230,000. While this debt is significant, the record also shows that the majority of this debt, all except \$37,000, was premarital debt. Additionally, Toyah's student loan debt was in deferment. As such, we cannot say that the trial court abused its discretion in not attributing the same significance to this debt as compared to the marital debt. Toyah argues that the marital real estate debt will result in significant tax savings to Levi because the debt can be written off. She notes that in 2014 Levi had federal and state tax refunds totaling \$15,000. However, Levi testified that the rental property was very old and was in need of extensive remodeling and repairs. He estimated the necessary repairs to be in the range of \$25,000 to \$40,000. Additionally, Levi's testimony and financial disclosure statement indicated that monthly costs of maintaining the investment property exceeded the monthly rental income.

¶ 24 Toyah also argues that the trial court failed to consider the standard of living established during the marriage. However, because 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 and balance the parties' claims to their remaining incomes. See *In re Marriage of Simmons*, 87 Ill. App. 3d 658, 661 (1980). Toyah argues that the trial court failed to consider that Levi has a much higher future earning potential. However, we cannot say that the trial court failed to consider the present and future earning capacity of each party. In addition to maintenance, Levi is also paying child support and burdened with the majority of the parties' marital debt.

¶ 25 Finally, Toyah argues that the trial court erred in finding that she could earn between \$60,000 and \$90,000 per year and then using an annual income of \$75,000 in determining the statutory amount of maintenance. First, we cannot say that the trial court erred in stating that she could earn between \$60,000 and \$90,000 per year. Toyah testified that her normal gross business earnings were within this range and the trial court did not state, in its finding, whether the \$90,000 it referred to was business income or personal income. As such, if the trial court was referring to Toyah's business income, its determination was not erroneous. In terms of using \$75,000 as her annual income, the trial court was clearly referring to Toyah's personal income as this amount was being compared to Levi's personal income. The evidence indicated that Toyah's personal income was between \$60,000 and \$70,000. However, we cannot say that it was reversible error for the trial court to use \$75,000 as the basis for determining statutory maintenance. See *In re Marriage of Wilder*, 122 Ill. App. 3d 338, 344-45 (1983) (noting that a trial court's error warrants reversal only where a party has been prejudiced or it appears that the outcome might have been different had the error not occurred). If the trial court had used \$70,000, a number supported by the evidence, the statutory amount of maintenance would have been \$2,066.66 per month as opposed to the amount of \$1,816.66 per month as calculated by the trial court. Any error by the trial court was harmless as it would not have changed the outcome. *Id.* There is no indication in the record that the higher guideline amount would have affected the trial court's decision to award her \$1,000 per month. Moreover, in setting maintenance the trial court may consider the realistic present and future earning capacity of each party. 750 ILCS 5/504 (West 2014). Based on the evidence that she was presently capable of earning \$70,000 per year, it was not too speculative for the trial court to consider that she could potentially earn \$75,000 per year in the future.

¶ 26 Toyah's second contention on appeal is that the trial court erred in denying her petition for contribution to attorney fees. At the outset, we note that Levi argues that Toyah has forfeited her argument on attorney fees. He acknowledges that Toyah filed a petition for contribution to attorney fees on May 1, 2015. However, he notes that on May 5, 2015, at the close of evidence, the trial court informed the parties that it would set a date for closing argument, then it would rule, and then each party could present motions for contribution. On July 21, 2015, the trial court issued its oral ruling which, in part, ordered that the parties were each responsible for their own attorney fees. Toyah did not renew her petition for contribution following the trial court's ruling. Levi argues, therefore, the Toyah essentially abandoned her petition and cannot argue on appeal that she was entitled to contribution on her attorney fees.

¶ 27 We find Levi's argument unpersuasive. Toyah timely filed her petition for contribution to attorney fees. See 750 ILCS 5/503(j) (West 2014). Section 503(j) provides that "[a]fter proofs have closed in the final hearing on all other issues between the parties (or in conjunction with the final hearing, if all parties so stipulate) and before judgment is entered, a party's petition for contribution to fees and costs incurred in the proceeding shall be heard and decided." 750 ILCS 5/503(j) (West 2014). In *In re Marriage of Brackett*, 309 Ill. App. 3d 329, 345 (1999), this court interpreted section 503(j) as not "requiring an additional hearing, which would further burden already overburdened trial courts, but, rather, as requiring the trial court to hear, through testimony or otherwise, additional proofs \* \* \* in the context of preexisting proceedings." In *In re Marriage of Hasabnis*, 322 Ill. App. 3d 582, 596 (2001), the court recognized the practical reality that, "[i]n most cases, once the trial court has weighed marital property criteria and, if awarded, maintenance criteria, it will have enough of a record to determine the contribution amount." In this case, the parties testified as to the amount of attorney fees that they had incurred or were expecting to incur following trial. Accordingly, there was sufficient evidence

before the trial court to rule on Toyah's petition for contribution. Although the trial court did not make direct reference to the petition for contribution, by requiring each party to be responsible for his or her own attorney fees, the trial court implicitly denied Toyah's petition. We hold that Toyah did not forfeit her argument as to attorney fees.

¶ 28 Ordinarily, attorney fees are the responsibility of the person for whom legal services were rendered. *In re Marriage of Ziemer*, 189 Ill. App. 3d 966, 969 (1989). However, section 503(j) of the Act permits a trial court to order one party to contribute to the other party's attorney fees. 750 ILCS 5/503(j) (West 2014). The court is to look at the same factors it considered in dividing the marital property and in awarding maintenance. 750 ILCS 5/503(j)(2) (West 2014); *In re Marriage of Patel and Sines-Patel*, 2013 IL App (1st) 112571, ¶ 113. The spouse seeking a contribution to fees must establish his or her inability to pay the fees and the other spouse's ability to pay. *Id.* "A party has the financial inability to pay attorney fees if the payment of the fees would strip that party of his or her means of support or undermine the party's financial stability." *Id.* The decision to award or deny attorney fees is within the trial court's discretion and will not be reversed absent an abuse of that discretion. *Schneider*, 214 Ill. 2d at 174.

¶ 29 In the present case, Toyah has failed to show that she is unable to pay her attorney fees or that Levi is able to pay her attorney fees. In her petition for contribution, Toyah essentially argued that Levi was in a superior position to pay her attorney fees because he earned twice as much as her. However, neither Toyah nor Levi appears to be in a strong financial position subsequent to this divorce, and each will probably struggle to pay their attorneys. Further, after Levi pays child support and maintenance, his income is only about \$17,000 more per year than Toyah. Additionally, he was burdened with almost all of the marital debt. The evidence indicated that he was losing money every month on the rental property. Accordingly, we find no

abuse of discretion in the trial court's decision denying Toyah's petition for contribution to attorney fees.

¶ 30 Toyah's final contention on appeal is that the trial court erred in awarding the marital residence and the rental property to Levi. Section 503 of the Act provides that a trial court is to divide the marital property in just proportions taking into account all relevant factors, including: the value of the marital property; the economic circumstances of each spouse; the income of each spouse; and each spouse's age, health and employability. 750 ILCS 5/503(d) (West 2014). Just proportions does not mean strict equality, but only an equitable division based on the surrounding circumstances. *In re Marriage of Albrecht*, 266 Ill. App. 3d 399, 402 (1994). A trial court's division of marital property will not be reversed absent an abuse of discretion. *In re Marriage of Eidson*, 235 Ill. App. 3d 907, 911 (1992). An abuse occurs when no reasonable person would take the view adopted by the trial court. *In re Marriage of Cheger*, 213 Ill. App. 3d 371, 378 (1991).

¶ 31 As to the marital residence, Toyah argues that the trial court failed to consider the importance of allowing the parties' children to remain in the family home; failed to consider the tax advantages to Levi, such as writing off the mortgage interest and property taxes on the property; and deprived her of the proper means of obtaining new housing by awarding maintenance below statutory guidelines. Nonetheless, we cannot say that the trial court abused its discretion in awarding the marital residence to Levi. Toyah testified that the mortgage was in Levi's name and that it would be about two years before she would be able to refinance in her own name. Additionally, there was no equity in the home so there was no advantage to ordering that it be sold. Toyah had never made a mortgage payment on the marital residence even after she started receiving child support and the mortgage was in arrears. Accordingly, because Toyah

could not afford to refinance the mortgage in her own name and the mortgage was already in arrears, it was reasonable for the trial court to award the marital residence to Levi.

¶ 32 As to the investment property, Toyah testified at trial that she did not want the investment property to be awarded to her. Accordingly, she cannot now claim on appeal that the trial court erred in not doing so. *Commercial Discount Corp. v. Bayer*, 57 Ill. App. 3d 295, 299 (1978) (noting that “a theory inconsistent with that which is espoused in the trial court may not be considered on review”).

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 35 Affirmed.