

**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).

2016 IL App (3d) 140425-U

Order filed August 17, 2016

---

IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2016

<i>In re</i> MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
AGNES A. SORCE,	)	Peoria County, Illinois.
	)	
Petitioner-Appellant and	)	
Cross-Appellee,	)	
	)	
and	)	
	)	
ROY A. SORCE,	)	
	)	
Respondent-Appellee and	)	
Cross-Appellant.	)	
	)	Appeal No. 3-14-0425
	)	Circuit No. 05-D-586
AGNES A. SORCE,	)	
	)	
Third-Party Plaintiff-Appellant,	)	
	)	
v.	)	The Honorable
	)	Katherine S. Gorman,
SORCE ENTERPRISES, INC.,	)	Judge, presiding.
	)	
Third-Party Defendant-Appellee.	)	

---

JUSTICE CARTER delivered the judgment of the court.  
Justices Lytton and McDade concurred in the judgment.

---



informed Roy that she wanted to divorce him. On September 29, 2005, Agnes filed a petition for dissolution of marriage. A final judgment in this matter was entered on April 28, 2014.

¶ 5

#### A. Income, Employment, & Education

¶ 6

Since the beginning of the party's marriage, Roy had worked at Sorce Enterprises, which was owned by Roy's father, Allen Sorce. For many years, Roy earned a base salary of approximately \$1600 per week (\$83,200 per year). In 1995, Roy became president and Chief Operating Officer (COO), with Allen remaining as the majority shareholder and the board chairman. In 1998, Allen gifted Roy and Roy's brother, James, each a 20% interest in Sorce Enterprises and each a 30% interest in a land partnership that owned the land on which Sorce Enterprise was located. Sorce Enterprises paid rent to the land partnership. From 1999 to 2003, Roy earned substantial bonuses and rental income, resulting in earnings of over \$500,000 per year. Since 2004, at the time the marriage began deteriorating, Roy has not been paid a bonus and his yearly income decreased to an average of \$95,000 per year. Roy and Allen testified that the large bonuses that Roy had previously earned were only temporary and were given to support Roy and Agnes in the construction of their \$1.4 million dream home. The home was built from 2000 to 2004. In 2004 large bonuses to Roy ceased.

¶ 7

In 2002, Roy and Agnes had secured a \$300,000 mortgage on the home. On the loan application, Roy indicated his stock in Sorce Enterprises was worth \$2 million, which Roy testified was a typographical error because the stock was actually only worth \$200,000 at that time. Agnes testified that she had also signed the document, but she did not know the value of the stock and had never discussed the value of the stock with Roy or Allen, and neither she nor Roy had typed the document indicating the stock was worth \$2,000,000. Agnes testified that Roy had informed her that they were going to use money from Sorce Enterprises to build the

home. She also testified Roy and her kids lived an extravagant lifestyle from 1998 through 2003. Roy never limited her spending. They belonged to a country club and had hired help to assist with household duties and errands. Roy, Agnes, and their eldest daughter all drove company vehicles without having to make payments on those vehicles, and they used Sorce Enterprise's company gasoline card.

¶ 8 In 2005, Roy transferred \$39,000 to Sorce Enterprises to reimburse the company for personal expenses. Agnes testified that she did not recall Roy reimbursing the company for those types of expenses in the past, but she did not know if Roy reimbursed Sorce Enterprises for the family's personal expenses. Agnes indicated that she did not know that Roy's bonuses would cease. She also did not know how much money Roy earned in 1990, 1991, 1992, 1995, 1998, 2000, or 2004. She and Roy did not discuss finances and she never saw financial statements. Roy's income would be deposited in their joint account, and she would write checks to pay bills from that account.

¶ 9 On April 20, 2007, Sorce Enterprises effectuated a reverse stock split and bought back Roy's share of his non-marital stock. Roy was no longer partial owner of the company. Roy sold his stock for \$166,400 and did not question the value Sorce Enterprises paid to buy the stock from him. Agnes's expert witness at trial, Neil Gerber, a certified public account, testified Roy received fair market value for his shares of the stock. Gerber also testified that Roy could have dissented to the reverse stock split, hired an attorney, and conducted a valuation of the corporation in order to ensure he was receiving his 20% of the value of Sorce Enterprises.

¶ 10 Gerber also testified that the when the company paid out bonuses to Roy, it paid half of all of the company's profits to Roy in bonuses and the other half to Allen. In 2004, the company paid all the profits to Allen. Gerber testified that if Roy had continued to earn bonuses under the

same compensation policy as he did from 1999 to 2003, Roy would have received an additional net income of \$2,148,000, assuming the company continued to pay Roy 50% of its net profits from 2004 through 2011.

¶ 11 Agnes did not work outside the home during the marriage. Since the dissolution proceedings began, Agnes began taking college classes and has earned an associate's degree. She will be graduating with a bachelor degree in psychology and thereafter, within the next four years, intends to obtain a master's degree in psychology. She plans on becoming a counselor for terminally ill patients. Agnes paid for school with grants and loans.

¶ 12 B. Temporary Relief and Proceedings

¶ 13 On December 16, 2005, after the dissolution action was initiated by Agnes, the trial court entered an order for temporary relief. Agnes was given temporary sole custody of the minors and given exclusive possession of the marital home and marital car. Roy was ordered to directly pay the mortgage, property taxes<sup>1</sup>, home insurance, utilities, garbage, sewer, cable, household help and Orkin. Roy was also ordered to pay Agnes's attorneys \$3666.75. He was further ordered to continue to pay the college expenses for the parties' eldest daughter, \$2300 in child support, and up to \$200 toward the telephone bill. After the current car insurance expired in March of 2006, Agnes would be responsible for paying her own car insurance. Roy was ordered to maintain Agnes and the four children on his health insurance and pay the children's out-of-pocket medical expenses. Agnes was required to pay for her own out-of-pocket medical expenses.

---

<sup>1</sup> The property taxes for 2004 were \$11,252.86.

¶ 14 On April 7, 2006, Roy filed a motion to compel Agnes to transfer the title of the marital vehicle into her name, which he had endorsed to her, and to obtain automobile insurance. On April 28, 2006, the trial court granted Roy's motion to compel.

¶ 15 On April 28, 2006, the trial court also ordered Agnes to allow Roy periodic access to the marital residence for Roy to perform maintenance tasks within the home. Thereafter, Roy filed a rule to show cause why Agnes should not be held in contempt for refusing him access to the home. The trial court entered an order directing Agnes to fully comply with its order.

¶ 16 On November 17, 2006, Roy filed an emergency motion to compel for Agnes to apply for a home equity loan because he could no longer afford his court-ordered obligations for Agnes and the children and his own living expenses. Roy claimed that he had been ordered to pay in excess of 100% of his net earnings and that he had been using his 401(k) funds to pay for the expenses but was no longer financially able to do so. Roy indicated that his financial condition had deteriorated to the point that he was unable to make the mortgage payments, property tax payments, and tuition payments. On December 14, 2006, the trial court ordered Agnes to "encumber the residence in the form of loan solely in [her] name" and use the loan proceeds to pay "on an ongoing basis" the mortgage payment, property taxes, and college expenses of the parties' eldest daughter.

¶ 17 On June 18, 2007, the trial court ordered the parties to sign a hardship withdrawal from Roy's 401(k) plan, with the net amount to be held in a trust account by Roy's attorney to be used to pay the parties' attorney fees as ordered by the court. On December 20, 2007, by agreement of the parties, the trial court ordered the parties "to cooperate to borrow and/or distribute the maximum amount of funds possible from Roy Sorce's 401(k) plan" to be used for payment of current college expenses, the minor children's private school tuition, and the delinquent

mortgage payments. The remaining funds were to be held in the trust account of Roy's attorney for future college payments.

¶ 18 On January 3, 2008, the trial court entered a superseding order for Roy to continue to pay \$2300 for temporary child support, health insurance for Agnes and the children, and uncovered medical expenses for the children. Roy was ordered to additionally pay Agnes \$3500 per month (\$2000 contribution toward house expenses and \$1500 for temporary maintenance). Agnes was required to make the mortgage and utility payments. The trial court ordered Agnes to cut her spending, "clean her own house," and "freeze the credit card usage." The trial court also indicated Roy had no obligation to pay for private school tuition for the minor children after the current school year (2007-2008) was paid from 401(k) funds but was responsible for the college tuition of the parties' eldest daughter after the current semester was paid from the 401(k) fund. On January 16, 2008, the trial court ordered Agnes to immediately list the marital home for sale (the deed and loan were in her name).

¶ 19 On April 17, 2008, Roy filed a petition for rule to show cause why Agnes should not be held in civil contempt of court for failing to make mortgage and property tax payments as ordered by the trial court. Roy claimed that Agnes had refinanced the marital home and received approximately \$140,000 in loan proceeds but failed to make the mortgage payment, failed to pay the property taxes, and failed to pay the children's college and private school tuition, resulting in the bank initiating a mortgage foreclosure action. Roy indicated that the parties had taken the maximum hardship withdrawal allowed from his 401(k) plan, which was \$9,410.44, and those funds were used to pay college expenses.

¶ 20 On June 9, 2008, the trial court ordered the parties to withdraw the entire vested balance of the 401(k) fund, pursuant to a Qualified Domestic Relations Order, and distribute the balance

to Agnes for her to bring the mortgage and property taxes on the marital home current and for payment of any outstanding educational tuition and expenses for the children's schooling. The remainder of the 401(k) fund was to be held in a trust account of Roy's attorney to be used for the fourth year of college for the parties' daughter.

¶ 21 On June 27, 2008, Agnes motioned the trial court for a release of marital funds in the amount of \$7500 to be disbursed to the parties' realtor for necessary home repairs and \$15,000 to be disbursed to her accountant, who she had hired to provide a written analysis of Sorce Enterprises' earning trends, the sale of Roy's stock, Roy's income, and Roy's compensation from Sorce Enterprises. Roy objected, arguing that granting Agnes's request would exhaust their marital funds. The trial court ordered Agnes to provide Roy with a sworn written accounting for the \$140,000 of the home loan proceeds. Agnes failed to do so, and Roy filed a motion to compel. He also filed a petition for rule to show cause for Agnes's failure to list their marital home for sale in violation of the court's order to do so, adequately maintain the home, provide an accounting for the \$140,000 of the home loan proceeds, make mortgage and property tax payments, and pay the children's educational expenses. In response, Agnes claimed that her expenses for running the home exceeded her level of income and support.

¶ 22 On August 19, 2008, Agnes provided an accounting of the \$140,000 home loan proceeds, indicating that she paid off missed mortgage payments from November and December of 2006 and the 2006 property taxes, leaving \$121,243.62. In accounting for the remaining \$121,243.62 of loan proceeds, Agnes indicated that she paid \$26,531.44 toward college tuition and expenses, \$12,500 to her accountants, \$15,000 to her attorney, \$2098.38 for her half of the guardian *ad litem's* fee, \$1037.30 for automobile insurance, \$818.90 for heating and cooling maintenance costs, \$45,000 in credit card payments, and \$18,116.40 toward the home loan. Agnes failed to



make at least 10 mortgage payments and failed to pay the property taxes, causing an arrearage of \$52,615.07.

¶ 23 On August 27, 2008, the parties entered an agreed order stipulating that there was \$92,569.20 remaining in a trust account held by Roy's attorney from Roy's 401(k) and one-half (\$46,284.60) was to be used for the children's educational expenses. The other half of the remaining funds in the trust account (\$46,284.60) was to be applied toward the arrearage on the marital home. The parties acknowledged that pursuant to the terms of the agreed order, the 401(k) funds were exhausted. The trial court also ordered Agnes to produce her bank statements, check registers, cancelled checks, and credit card statements for the period of July 1, 2007, to August 27, 2008, to account for the \$45,000 of the loan proceeds spent on her credit card bills, which she had claimed she incurred as a result of household expenses.

¶ 24 On September 25, 2008, the trial court found that Agnes had been in willful indirect civil contempt of court for failing to make the mortgage payments as directed by trial court's orders. The trial court found that Agnes had not provided a credible excuse for failing to make the mortgage payments and, instead, "ha[d] given her priority to paying legal fees, expert witness fees, and credit card payments, rather than making court-ordered payments on the mortgage debt." The trial court subsequently awarded Roy \$11,000 in attorney fees related to the contempt proceedings to be paid by Agnes. The trial court also ordered Agnes to destroy all of her credit cards, except for one credit card to be used for emergencies, and confirmed its order of January 16, 2008, which directed the freezing of credit card usage. The trial court directed Agnes to cooperate in facilitating the sale of the home. The trial court indicated that Roy would be allowed to directly make the mortgage payments on Agnes's behalf and receive a \$2594.41 credit against his monthly support obligations.

¶ 25 On December 19, 2008, the trial court granted Roy's petition to reduce his support obligation to Agnes from \$5800 to \$4200 per month (\$2300 in child support and \$1900 for temporary maintenance) because Agnes was moving and her housing and utility expenses were decreasing by \$1600. The trial court granted Roy's request for him to be allowed to purchase the marital home from the upcoming foreclosure sale and, in addition, paying \$263,969.98 into the marital trust account to compensate the marital estate for the equity that the parties would have earned had the home been sold to a third-party.

¶ 26 On March 19, 2009, Roy filed a petition for rule to show cause for Agnes's previous failure to make court-ordered payments for college expenses pursuant to the court's order of December 14, 2006. Pursuant to the court's order of December 20, 2007, Roy withdrew approximately \$9,410.44 from the 401(k) fund for Agnes to pay the overdue college expenses, after which there was a remaining outstanding balance. Roy indicated that in November 2008, the parties' daughter was in danger of being expelled due to Agnes's failure to pay the outstanding tuition, so he made a payment of \$2935, which he argued was Agnes's responsibility. Roy also requested a rule to show cause for Agnes's failure to pay certain utility bills when she lived in the home and for the trial court to hold Agnes in contempt for failing to provide her credit card statements. On November 12, 2009, by agreement of the parties, the trial court entered an order for Agnes to sign authorizations for Roy to obtain her credit card statements within seven days. On March 12, 2010, Agnes filed a petition for rule to show cause for Roy's failure to pay her \$840 bill for maid services from January 2, 2007. On March 30,

2010, the trial court heard various pending petitions and motions and awarded Roy \$4106.75 from the marital assets.<sup>2</sup>

¶ 27 On May 19, 2010, Roy filed a motion to reduce maintenance because over half his net income was paid to Agnes and, in addition, he paid health insurance and medical expenses for the children and health insurance for Agnes. Roy also argued for his child support to be reduced because one of the children had turned 18 years old and graduated high school. On October 26, 2010, Roy's child support obligation was modified downward to \$1960 (28% of Roy's income) because one of the children had graduated high school and turned 18 years old, leaving only two minor children in Agnes's care. Roy's motion to reduce temporary maintenance was denied.

¶ 28 C. Financial Affidavits

¶ 29 Throughout the proceedings, the parties submitted multiple financial affidavits to the trial court. In May 2010, Roy filed a financial affidavit indicating that he earned a gross salary of \$6933.33 per month, plus rent income of \$2039.11 per month (from his ownership interest in the land partnership that rented the land to Sorce Enterprises), and after paying taxes, social security, Medicare and his monthly support obligations to Agnes of \$4200, his monthly income was \$2798.39. On October 22, 2010, Roy filed an affidavit, indicating the same earned income. In September 2013, Roy filed his final updated financial affidavit indicating that he earned a gross salary of \$6933.33 per month, plus rent income of \$3040 per month, and after paying taxes, social security, Medicare and his monthly support obligations to Agnes of \$3860, his monthly net monthly income was \$4139.28. The affidavit, filed after Roy sold the marital home to James, indicated that Roy paid \$1550 in rent to reside in the former marital home.

---

<sup>2</sup> There is no transcript of the hearing from March 30, 2010. The record is not clear as to the reason for the \$4106.75 payment to Roy from the marital assets.

¶ 30 On August 9, 2010, Agnes filed a financial affidavit indicating that she was employed by Kay Jewelers and earned a monthly net income of \$1230.67, in addition to \$4200 in child support and \$1900 in temporary maintenance, for a total income of \$5430.67. On October 22, 2010, Agnes filed an amended financial affidavit indicating she worked less than 40 hours per week for a net monthly income of \$357.97, plus the \$4200 in support, for a total income of approximately \$4500. On October 2, 2013, Agnes filed a financial affidavit indicating that she worked 69 hours per month at a law firm for \$9 per hour, earning \$618.81 per month, and she received \$3860 per month in support from Roy, for a monthly income of \$4478.81. She rented a home for \$1500.

¶ 31 D. Marital Home

¶ 32 The parties stipulated that their home was marital property. As noted above, as part of the initial temporary relief order in December 2005, Agnes was given temporary possession of the marital home and Roy was ordered to pay the mortgage payments, property taxes, utilities, and household help. On February 3, 2006, Roy filed a motion for the court to allow him to sell the marital home to his brother James for \$800,000 because the parties did not have sufficient income to maintain the marital residence. The trial court denied Roy's request to sell the marital residence and, instead, ordered Agnes to take a loan out against the home and use the loan proceeds to pay "on an ongoing basis" the mortgage payment, property taxes, and college expenses of the parties' eldest daughter. Agnes refinanced the home and took out \$140,000 from the equity in the home, but failed to consistently pay the mortgage and property taxes, leading to the bank filing a mortgage foreclosure action.

¶ 33 The trial court ordered Agnes to list the home for sale (the deed and loan were in her name). Roy subsequently filed a petition for rule to show cause for her failure to list the home

for sale, maintain the home, provide an accounting for the home loan, and make mortgage and property tax payments. Agnes claimed that her expenses for running the home exceeded her income and support and the needed repairs were long-standing issues regarding the pond, electrical issues, and seepage from the pool. She noted that the home was a "small estate" located on a lake with a pond, indoor pool, hot tub, aquarium, courtyard, five bedrooms, seven bathrooms, two kitchens, two playrooms, and multiple other rooms. Agnes argued that the size of the house and the grounds resulted in large utility and maintenance costs and that during the marriage the parties' had hired help to maintain the premises. Agnes indicated that during the marriage the parties had paid \$400 to over \$1000 per week to maintain the home but she did not have the funds to keep up with the required maintenance. On August 27, 2008, the parties entered an agreed order stipulating that half the money in the marital trust account—\$46,284.60—would be applied toward the mortgage arrearages.

¶ 34 On December 19, 2008, the trial court entered an order allowing Roy to immediately purchase the marital home from the upcoming foreclosure sale. Roy purchased the home by borrowing the \$263,969 from his brother James to deposit in the parties' trust account to pay the marital estate for the equity in the home as ordered by the trial court. Roy additionally took out a loan on the home to get the home out of foreclosure for \$517,000. Roy attempted to fix up and sell the home instead of moving into the home but received no offers on the home. In 2010, Roy could no longer afford to pay the mortgage on the home, so his brother James purchased the home from Roy. Roy moved into the home at the end of 2010 and, as per Roy's financial affidavit, he paid James \$1550 per month in rent.

¶ 35 C. Third-Party Proceedings Against Sorce Enterprises

¶ 36 On December 14, 2006, during the pendency of this dissolution case, Agnes indicated her intention to file a third-party complaint against Sorce Enterprises based upon her belief that Roy was using his family's business to divert marital property. Agnes indicated her accountants had "undertaken review of numerous financial documents" to tender a preliminary opinion of Roy's true income and the marital assets held by third-parties. On June 4, 2007, Agnes filed the third-party petition against Sorce Enterprises, which she subsequently amended and in which she requested a constructive trust based on her allegations that Sorce Enterprises or Allen committed fraud on the marital estate by agreeing with Roy to divert Roy's bonuses for 2004 and 2005 into Certificates of Deposit (CDs). Agnes alleged Sorce Enterprises had placed \$807,440 into a CD as a result of colluding with Roy to divert Roy's salary in an effort to defraud the marital estate. Agnes requested, *inter alia*, that the trial court order Sorce Enterprises to "cooperate in the transfer of \$161,400.00 [Roy's 20% interest of the CDs] from the CDs purchased in the company name" into a constructive trust. In response, Sorce Enterprises argued that Roy was an at-will employee to whom it was not obligated to give bonuses and Roy's large bonuses had previously been given temporarily for Roy and Agnes to complete their dream home. The last bonus that Roy received was in 2003 so that Roy could pay off a promissory note for \$200,000 to Sorce Enterprises that he was required to repay in an amount of \$375,000 by December of 2004. Allen indicated he did not take bonuses for himself during the years that Roy was earning the large bonuses and resumed taking a bonus for himself in 2004 when Roy's bonuses ceased.

¶ 37 At the trial on the third-party petition, Roy testified that he had been the COO of Sorce Enterprises, but in 2005 his father demoted him because he was not doing his job properly after Roy lost his drive to work as a result of the divorce. Also in 2005, Allen eliminated rent payments that were being given to Roy from the land partnership, which had previously totaled

over \$100,000 per year. In 2007, Sorce Enterprises had effectuated a reverse stock split, divesting Roy of his 20% share in the company, and Roy received \$166,000 for those shares. (The parties agreed that Roy's stocks were non-marital property). On the second day of trial on the third-party petition, Agnes filed a motion for leave to amend the third-party complaint to increase the amount of her request for relief. Agnes alleged that Roy's income continued to remain at "artificial levels" in 2006, 2007, and 2008, in addition to the originally pled years of 2004 and 2005, and requested to amend her third-party complaint to include those years and increase the amount to be placed in a constructive trust to \$807,440 (the total of the CDs).

¶ 38 The trial court found that Roy acquiesced and had been complicit with Sorce Enterprises in the reduction of his income and bonuses were not paid in 2004 and 2005 because Roy and Allen did not want the money to be included in the "marital pot" due to significant problems in Roy and Agnes's marriage. However, the trial court also found that Agnes did not prove Roy's bonus money had been set aside into the CDs and denied Agnes' request for a constructive trust. The trial court further found that Allen, as the major shareholder, could decide to decrease Roy's salary. The trial court did not reach the issue of Agnes's request to amend to increase her request for relief. On April 29, 2009, the trial court denied Agnes's request for a constructive trust, found that Agnes's request to amend was moot and, pursuant to Supreme Court Rule 304(a), found there was no just reason for delaying enforcement or appeal of its judgment.

¶ 39 On appeal, this court reversed the trial court's judgment denying Agnes's request for a constructive trust. *In re Marriage Sorce I*, No. 3-09-0416 (May 11, 2010) (unpublished order under Supreme Court Rule 23). This court found the evidence showed that Roy and Allen, acting through Sorce Enterprises, "intentionally determined to defraud the marital estate to prevent Agnes from sharing in the generosity of Sorce Enterprises." *Id.* ¶ 19. This court noted

that while Allen had the right to demote Roy and reduce Roy's salary, the evidence indicated that the sole motivation to do so was to prevent Agnes and the children from sharing in funds that would have been available if the dissolution proceedings had not been initiated. *Id.* This court found that "Agnes established actual fraud as evidenced in the trial court's factual findings" and Roy's at-will employee status did not preclude the imposition of a constructive trust in this case. *Id.* ¶ 20. This court reversed the trial court's denial of the imposition of the constructive trust and remanded the case to the trial court to determine the amount of the constructive trust after it ruled upon Agnes's motion to amend. *Id.*

¶ 40 On April 5, 2011, on remand, Agnes indicated she had originally requested that \$161,400 of the CDs be placed into a constructive trust but, 1½ years later, sought to amend her request for relief to the total amount of the CDs—\$807,440. Roy argued that Agnes failed to trace the proceeds of the alleged wrongdoing (the unpaid bonus money) to the CDs, failed to introduce the CDs into evidence, and failed to provide any evidence of the dates that the CDs were purchased or the amounts in the CDs. On September 8, 2011, the trial court denied Agnes's motion to amend, finding: (1) the request to amend was untimely being made 1½ years after the first-amended third-party complaint was filed and near the end of the trial, when previous opportunities to amend had been available; (2) Sorce Enterprises would be prejudiced and surprised by the late amendment, which increased the prayer for relief "fivefold"; (3) the proposed amendment was based upon Roy's salary history which was known to Agnes long before trial; and (4) the proposed amendment went beyond the only alleged *res* (the CDs) and Agnes failed to show Roy had more than a 20% interest in the CDs. The trial court further found that even if the motion to amend was granted, it would not award more than Roy's 20% interest in the CDs. Based upon its reading of the appellate court's mandate that the CDs constituted the



res for the constructive trust, the trial court ordered \$161,400 to be placed into a constructive trust and found there was no just reason to delay enforcement or appeal pursuant to Supreme Court Rule 304(a) (eff. Feb. 26, 2010). Agnes appealed, and Sorce Enterprises filed a cross-appeal. This court affirmed the trial court's denial of Agnes's motion to amend. *In re Marriage of Sorce II*, 2012 IL App (3d) 110742-U (holding the trial court did not abuse its discretion in denying the motion to amend where the motion to amend was untimely, prejudiced defendant, and could have been brought earlier).

¶ 41 E. Interim Attorney Fees and Advancements from the Marital Estate

¶ 42 Over the course of the nine years of the dissolution proceedings, the trial court issued multiple orders pertaining to parties' attorney fees. On December 16, 2005, Roy was ordered to pay \$3666.75 of Agnes's attorneys' fees. On December 22, 2005, Roy was ordered to give his checking account funds of \$11,000 to Agnes for her attorney fees "immediately."

¶ 43 On February 10, 2006, Agnes filed petition for interim attorney fees. On March 15, 2006, the trial court ordered Roy to pay 50% of Agnes's attorney fees on a monthly basis upon receipt of a monthly bill from Agnes's attorney. On April 7, 2006, Roy filed a motion for the court to determine the amount of attorney fees he should pay because Agnes's attorney failed to provide an accurate statement of her services. On June 12, 2006, the trial court again ordered Agnes's attorney to provide "a single comprehensive statement for services and costs rendered."

¶ 44 On June 18, 2007, the trial court indicated that its prior orders regarding the payment of attorney fees were "hereby modified and superseded" and ordered Roy to pay \$2000 per month to Agnes's attorney. The trial court subsequently terminated Roy's \$2000 per month obligation on October 16, 2007.

¶ 45 On December 9, 2008, Agnes filed another petition for interim attorney fees, indicating she had paid \$21,309.50 in attorney fees but could not afford further payments. On December 23, 2008, the trial court indicated that each party was separately liable for the attorney fees that resulted from that party's own violation of court orders or waste of assets. Each party's attorney was to be paid his or her fees to date from the marital funds, with Agnes's attorney to be paid \$72,539.31 and Roy's attorney to be paid \$25,000. The parties agreed that an \$11,000 offset for attorney fees would be implemented against Agnes for Roy's attorney fees due to Agnes's contempt of court, as discussed above. The order also indicated when the court apportioned marital assets at the final hearing it would consider the amounts paid in fees to each party during the interim fees hearings as being held against each party's equitable share of the marital assets.

¶ 46 On November 24, 2009, the trial court approved interim attorney fees requested by Roy's attorney for \$24,403 and \$6024.15 for Agnes's attorney to be paid as advances from their marital funds held in trust. On March 2, 2010, Agnes filed a petition for interim attorney fees and costs in the amount of \$49,733.78. On March 26, 2010, Roy objected, arguing that Agnes's attorneys had been paid \$147,057.89, including approximately \$47,184.92 paid from Roy, \$21,309.50 paid from Agnes, and at least \$72,539.31 from Agnes's share the marital funds. Roy argued his attorneys had only been paid \$60,403, of which \$11,000 was from Agnes's share of the marital funds due to her contempt and \$49,403 was from Roy's share of the marital funds. On July 26, 2010, the trial court ordered that each party be paid \$10,000 of interim attorney fees as advances from the marital funds.

¶ 47 In November 2010, the parties both filed petitions for additional interim attorney fees. On December 17, 2010, the trial court ordered that Agnes's attorney be paid \$15,000 and Roy's attorney be paid \$10,000 of interim attorney fees as advances from the marital funds.

¶ 48 On July 11, 2012, beyond 30 days from the final order regarding the third-party petition, Agnes filed a petition, pursuant to section 508(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/508(a) (West 2012)), requesting that Roy and/or Sorce Enterprises be ordered to pay the \$81,629.55 in attorney fees and costs that she incurred in the third-party action. She argued that the third-party claim was necessary only due to Roy and Sorce Enterprises' fraud upon the marital estate. Agnes also requested that Roy be ordered to reimburse the marital estate the \$19,700 he paid in attorney's fees for litigating the third-party claim, which had been advanced to him from his portion of the marital funds. Agnes argued that she was unable to pay her attorney fees and costs, whereas Sorce Enterprises and Roy were "well able" to pay said sums.

¶ 49 Sorce Enterprises responded that Agnes's petition for attorney fees in the third-party case was untimely because the trial court had entered its final order in the third-party action on September 8, 2011, and no longer had jurisdiction to enter further relief to Agnes from Sorce Enterprises. Sorce Enterprises further argued it was not a "party" that could be ordered to contribute to attorney fees under section 508(a) of the Act. Roy responded that his defense in the third-party action was not improper conduct that would support an order directing him to pay Agnes's attorney fees.

¶ 50 On November 16, 2012, the trial court approved interim attorney fees for Agnes in the amount of \$15,000 and attorney fees for Roy in the amount of \$10,000. The trial court also granted Agnes an advancement of marital funds for moving expenses. The trial court denied Agnes's request for attorney fees from Sorce Enterprises and passed on her request for Roy to reimburse her attorney fees incurred in the third-party proceedings.

¶ 51 On April 28, 2014, the trial court entered a judgment of dissolution, part of which ordered defendant to contribute \$15,000 toward Agnes's attorney fees.

¶ 52 F. Allegations of Dissipation

¶ 53 On May 12, 2012, Agnes filed a declaration of dissipation of assets, indicating Roy transferred large sums of money to his father and/or Sorce Enterprises in January 2005—\$375,346—to repay a nonexistent corporate debt. She also claimed that Roy dissipated \$6141.65, \$3411.69, \$10,600, \$2679.03, \$1296, and \$10,517.31 in September 2005 (a total of \$42,645.69) by transferring those sums to Sorce Enterprises for personal expenses for which the family normally did not reimburse the company. She also argued that Roy sold his non-marital stock in Sorce Enterprises at less than fair market value and was using marital income to better his non-marital property (the former marital home).

¶ 54 On October 17, 2008, Roy had filed a claim of dissipation of marital assets by Agnes, alleging that her failure to pay the mortgage after taking out a loan against the home resulted in the dissipation of marital assets. Roy argued that as a result of Agnes's nonpayment of the mortgage, the bank filed a mortgage foreclosure action and, on September 29, 2008, a judgment of foreclosure and sale was entered against Agnes for \$428,464.20. Roy also alleged that, on December 14, 2006, and June 18, 2007, the trial court had ordered Agnes to pay the college expenses for the parties' eldest daughter, but Agnes failed to pay for the 2007 winter term and the 2008 spring term, necessitating \$9,410.44 to be spent from the 401(k) proceeds for the delinquent tuition. Roy also alleged that Agnes had failed to pay the tuition for the minor children's parochial school for the 2007-2008 school year, necessitating the delinquent amount to be paid from the 401(k). Roy further alleged that Agnes had received \$121,140.99 in net proceeds from the home loan but used less than \$60,000 toward marital expenses. Roy indicated

Agnes spent \$45,000 on credit card purchases and \$29,598.38 in attorney and expert witness fees, while failing to pay the mortgage and property taxes. Roy requested a judgment be entered against Agnes for the amount of the dissipated marital assets and an order for Agnes to pay his attorney fees and expenses incurred to prove the dissipation.

¶ 55 Roy testified that in January of 2005, he transferred \$375,000 to Sorce Enterprises to repay a 10-year \$200,000 promissory note that he agreed to pay at 5.5% interest, which had matured for the repayment of \$375,000 on December 31, 2004. A vice-president of Sorce Enterprises testified that he had signed the promissory note as witness. Roy testified that the \$200,000 loan was used to buy the property next to Roy and Agnes's home for their future dream home, make home repairs, and pay off the debts of Agnes's mother in an amount over \$30,000, and gift Agnes's brother over \$10,000 to start his law practice.

¶ 56 E. Trial Court's Judgment

¶ 57 On February 11, 2014, the trial court rendered an oral pronouncement of its findings and final ruling, which it incorporated into a written judgment for dissolution of marriage issued on April 28, 2014. The trial court found that the parties were married for 20 years and had four children, two of which were still under the age of 18. During the marriage, Roy worked at his father's successful company, Sorce Enterprises, which allowed the family to enjoy "a fluent [sic] life-style, big house, fancy car, private schools and expensive vacations." Roy had obtained an ownership interest in both Sorce Enterprises and a land partnership that received rent from Sorce Enterprises. When the marriage became strained, "Roy's assets from those two entities were significantly reduced." The trial court found that Roy "has seen a significant reduction in his income in the years since the marital relationship deteriorated." The trial court noted that Roy no

longer owned an interest in Sorce Enterprises, which was his non-marital asset, and Roy had divested himself of his ownership interest in April 2007 at the fair market value for those shares.

¶ 58 The trial court discussed the third-party proceedings because those findings had an impact on the parties' dissolution case. The trial court noted that the trial judge on remand had ordered \$161,400 be placed in the constructive trust for 2004 and 2005 and had refused to impute any more income to Roy, noting that the further away from 2003 (the last bonus year), the harder it was to determine the amount Roy might have received. The trial court stated, "And here we sit nine years later." The trial court found that the testimony of Neil Gerber, Agnes's expert witness, was "speculative" and that nine years had passed since Roy's income decreased, "making next to impossible" to determine what Roy would have received in bonuses "all these years later."

¶ 59 As to allegations from each party that the other party had dissipated the marital estate, the trial court found that both parties dissipated marital assets in equal amounts. The trial court found that Agnes failed to prove Roy's alleged dissipation and Roy failed to prove Agnes's alleged dissipation. The trial court noted that neither Roy nor Agnes "acted particularly frugally at the commencement of this matter and fair is fair." The trial court found that Agnes failed to prove Roy's alleged dissipation regarding his repayment of the promissory note in the amount of \$375,346 and the withdrawals from his 401(k) plan and insurance policy. Specific to Agnes's allegation that the Roy dissipated marital assets by giving Sorce Enterprises approximately \$375,000 by repaying a nonexistent debt, the trial court found Roy had shown that he was obligated to pay Sorce Enterprises the money under a legal promissory note. The trial court found that the testimony of the Sorce Enterprise vice-president was un rebutted, the note was a legal note that Roy was obligated to pay, and Agnes failed to prove the repayment was a

dissipation of marital assets. The trial court also found that Roy failed to prove Agnes's dissipation. The trial court noted, "[i]t was expensive raising kids" and the parties used marital funds for the expense of taking care of the kids.

¶ 60 As for the parties' marital home, the trial court noted that during the course of the proceedings Agnes was residing in the home but fell so far behind in making mortgage payments that the house was foreclosed upon. Roy's brother, James Sorce, assisted in getting the home out of foreclosure. James gave a deposition in his own dissolution proceeding in California, in which James referred to his purchase of the parties' home and which Agnes attempted to introduce as evidence in this case. The trial court found that James's deposition testimony was hearsay and did not consider it.

¶ 61 The trial court stated, "And where I'm going to consider all of this is on the use of maintenance." The trial court found that Roy resided in the former marital home, which was worth \$965,000, and he earned a monthly income of \$9973.33, as was indicated in Roy's financial affidavit. The trial court found Agnes earned \$759 per month and resided in "far more modest accommodations" with the parties' two minor children. The trial court found that Roy was living in an extravagant home with some money to spare and, in contrast, Agnes's needs were not being met without assistance from Roy. The trial court indicated that Agnes's earning capacity was compromised due to her domestic efforts, and she did not have a college education but "has taken some classes along the way." The trial court also found that during the marriage the parties enjoyed an upper, middle-class, comfortable life-style and the protracted divorce had diminished the marital estate to a point where Agnes could not maintain that lifestyle while Roy "continues to basically live that same life-style, evidenced by his living accommodations." The trial court ordered Roy to pay Agnes \$3200 per month (30% of his income) in permanent

maintenance, approximately 28% of his income for child support for the two minor children, and additionally ordered Roy to pay 30% in maintenance and 28% in child support on any additional bonus money or income-generating endeavor. Roy was also ordered to pay Agnes's COBRA health insurance payments.

¶ 62 The trial court evenly split the remaining marital assets between Roy and Agnes. Those assets essentially consisted of the remaining money from the sale of the marital home and the constructive trust that resulted from third-party action. (Roy's 401k plan was exhausted during the proceedings). Each party received \$36,362.38 in marital assets. The trial court also ordered Roy to contribute \$15,000 toward Agnes's attorney fees in light of the disparity of income between the parties. Each party was to keep the personal property in their own possession.

¶ 63 Both parties appealed.

¶ 64 ANALYSIS

¶ 65 On appeal, Agnes and Roy each raise multiple issues.

¶ 66 I. Attorney Fees

¶ 67 Agnes argues that this court should reverse the portion of the trial court's final judgment ordering Roy to contribute \$15,000 to her attorney fees and instead order him to pay \$175,000 of her attorney fees because Roy has a greater earning capacity. Roy argues that the trial court abused its discretion in ordering him to pay \$15,000 of Agnes's attorney fees and that this court should order each party to pay their own attorney fees.

¶ 68 Agnes also requests this court reverse the trial court's order of November 16, 2012, in which the trial court denied her petition for Sorce Enterprises to pay her for \$81,629.55 in attorney fees and costs that she incurred in the third-party proceedings. Agnes argues those attorney fees should have been paid because: the great disparity of income and earning capacity



amongst the parties, section 508(a) of Act allows for the trial court to order any “party” to pay a reasonable amount of attorney fees, and the fraud by Roy and Sorce Enterprises on the marital estate necessitated the third-party proceedings. Sorce Enterprises argues: (1) Agnes's petition for attorney fees in the third-party case was untimely and the trial court did not have jurisdiction because the petition was brought more than 30 days beyond the final order entered in the third-party action; and (2) Sorce Enterprises was not a “party” to the dissolution action that could be ordered to pay attorney fees under section 508 of the Act. Roy argues that the trial court correctly denied Agnes's request for the attorney fees and costs for the third-party case because fees were excessive and Agnes's attorneys had already been paid \$128,563.46 from the parties' joint marital assets and \$47,000 directly from Roy.

¶ 69 Generally, each party is obligated to pay his or her own attorney fees. *In re Marriage of Streur*, 2011 IL App (1st) 082326, ¶ 36. A trial court has broad discretion in awarding attorney fees, and its decision will not be reversed absent an abuse of that discretion. *In re Marriage of Patel*, 2013 IL App (1st) 112571, ¶ 67. However, the Act authorizes the trial court to award attorney fees. See 750 ILCS 5/501(c-1) (West 2014) (interim awards of attorney fees); 750 ILCS 5/503(j) (West 2014) (contribution to fees and costs incurred in proceedings prior to the final order of dissolution of marriage); 750 ILCS 5/508(a) (West 2014) (fees for proceedings under the Act, including enforcement or modification of any order or judgment under the Act, defense of appeal of any order or judgment under the Act, prosecution of any claim on appeal if the appellant has substantially prevailed, proceedings regarding a petition seeking relief from a final order or judgment under the Act, attorney fees and costs for legal services rendered in preparation of commencement of the proceeding brought under the Act, and ancillary litigation incident to, or reasonably connected with, a proceeding under this Act).

Section 501(c-1) of the Act allows for interim attorney's fees and costs to be assessed from time to time during the pendency of a case in favor of the petitioning party's current counsel, for reasonable fees and costs either already incurred or to be incurred. 750 ILCS 5/501(c-1) (West 2014). Unless otherwise ordered, interim awards and the aggregate of all other payments by each party to counsel and related payments to third parties "shall be deemed to have been advances from the parties' marital estate." 750 ILCS 5/501(c-1)(2) (West 2014); *In re Marriage of Rosenbaum-Golden and Golden*, 381 Ill. App. 3d 65, 69, 73 (2008). An interim award of attorney fees against an opposing party should be "an amount necessary to enable the petitioning party to participate adequately in the litigation." 750 ILCS 5/501(c-1)(3) (West 2014). The purpose of interim fee awards is to "level the playing field" by providing both parties with litigation resources where one party can pay and the other cannot pay. *In re Marriage of Beyer*, 324 Ill. App. 3d 305, 315 (2001). Except where there is good cause shown, interim attorney fees in a prejudgment dissolution proceeding "shall be nonevidentiary and summary in nature." 750 ILCS 5/501(c-1) (West 2014); *Beyer*, 324 Ill. App. 3d at 316 (by eliminating the hurdle of an evidentiary hearing, the ability of the financial advantaged party to use the other party's lack of funds is limited). In deciding an interim award of attorney fees, the trial court shall consider all relevant factors, including: the income, property, earning capacity and needs of each party, any impairment to the present earning capacity of either party (*e.g.*, age and physical and emotional health), the standard of living established during the marriage, complexity of the issues, each party's access to relevant information, the amount paid or to be paid to the attorney for the other party, and any other factor that is just and equitable. 750 ILCS 5/501(c-1)(1) (West 2014).

¶ 71 Section 508 governs attorney fees generally, including petitions for contribution of attorney fees incurred in both post decree and in initial dissolution proceedings. 750 ILCS 5/508(a) (West 2014); *Blum v. Koster*, 235 Ill. 2d 21, 46 (2009). Section 508(a) provides:

“The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order any party to pay a reasonable amount for his own or the other party’s costs and attorney’s fees. Interim attorney’s fees and costs may be awarded from the opposing party, in a pre-judgment dissolution proceeding in accordance with subsection (c-1) of Section 501 and in any other proceeding under this subsection. At the conclusion of any pre-judgment dissolution proceeding under this subsection, contribution to attorney’s fees and costs may be awarded from the opposing party in accordance with subsection (j) of Section 503 and in any other proceeding under this subsection.” 750 ILCS 5/508(a) (West 2014).

Section 508(a) of the Act specifically indicates that interim attorney fees and contribution for attorney fees may be awarded from the “opposing party.” Spouses are the “opposing party.” *Pal v. Gudgel*, 397 Ill. App. 3d 903, 911 (2010) (holding that an intervenor in a dissolution of marriage action was not eligible to seek fees under section 508(a) of the Act). The primary purpose of section 508 is to provide the court the authority to equalize the positions of the parties in order to diminish any advantage one spouse may have over the other in presenting a case due to a disparity in their respective financial resources. *In re Marriage of Pagano*, 154 Ill. 2d 174, 183 (1992).

¶ 72 Section 503 of the Act is titled “Disposition of property and debts” and generally addresses the distribution of property in the original dissolution judgment. 750 ILCS 5/503

(West 2014). Subsection (j) of section 503 of the Act specifically addresses contributions toward attorney fees and costs that were incurred prior to the entry of the final order for dissolution of marriage. 750 ILCS 5/503(j) (West 2014); *Blum*, 235 Ill. 2d at 47. Section 503(j) provides, in relevant part:

“(j) After proofs have closed in the final hearing on all other issues between the parties \*\*\* and before judgment is entered, a party’s petition for contribution to fees and costs incurred in the proceeding shall be heard and decided, in accordance with the following provisions:

(1) A petition for contribution, if not filed before the final hearing on other issues between the parties, shall be filed no later than 30 days after the closing of proofs in the final hearing or within such other period as the court orders.<sup>3</sup>

(2) Any award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance had been awarded, on the criteria for an award of maintenance under Section 504.” 750 ILCS 5/503(j) (West 2014).

¶ 73 Section 503(j) requires that contribution petitions be decided before judgment is entered so that the final amount of fees can be calculated and the trial court can consider the fees in its decision regarding all the financial matters presented. 750 ILCS 5/503 (West 2014); *In re Marriage of Cozzi-DiGiovanni*, 2014 Ill App (1st) 130109, ¶ 8. “In the section 503 context,

---

<sup>3</sup> Section 503(j)(1) has since been amended to require that a petition for contribution to attorney fees be filed no later than 14 days after the closing of proofs in the final hearing or within such other period as the court orders. See P.A. 99-90, § 5-15, eff. Jan. 1, 2016 (amending 750 ILCS 5/503(j)(1)).

attorney fees are awarded in view of the total disposition of property and assets, thus justifying the 30-day requirement for filing a petition for contribution of attorney fees.” *Blum*, 235 Ill. 2d at 47.<sup>4</sup> The allocation of attorney fees is integral to decisions regarding the financial resources of the parties and should be made before a reviewing court can properly assess the propriety of the trial court’s awards of maintenance, child support, or property division. *In re Marriage of Tomei*, 253 Ill. App. 3d 663, 666 (1993).

¶ 74 In this case, the issue of attorney fees was one of the most litigated issues, with the trial court having been presented with at least 10 different petitions and supplemental petitions regarding attorney fees over the course of the proceedings. The trial court conducted multiple hearings and issued at least 10 orders related to attorney fees. Agnes's culminating attorney fees, including those incurred as a result of the third-party proceeding, were presented to the court on an ongoing basis and were paid either as advances from the marital estate or directly from Roy. While the trial court did not specifically address Agnes's claim that Roy be responsible for her attorney fees incurred for the third-party action, we find it did so inherently within its rulings.

¶ 75 As a preliminary matter, we conclude that the trial court did not abuse its discretion by deciding not to order Sorce Enterprises to pay a portion of Agnes’s attorney fees pursuant to

---

<sup>4</sup> The timing of the petition set forth in section 503(j) is not jurisdictional and may be waived where there is no objection to the petition. *In re Marriage of Lindsey-Robinson*, 331 Ill. App. 3d 261 (2002) (allowing a petition for contribution to attorney's fees under section 503(j) where the petition was made 2½ months after the entry of the divorce judgment); *Cozzi-DiGiovanni*, 2014 IL App (1st) 130109 (holding the trial court had subject matter jurisdiction to hear a petition for contribution for attorney fees where the petition was filed prior to the judgment but not heard until after the judgment).

section 508 of the Act. We agree with Agnes’s contention that, under subsection (6) of section 508(a) of the Act, awards of attorney fees and costs may be ordered in connection with “[a]ncillary litigation incident to, or reasonably connected with, a proceeding under this Act” such as the third-party proceedings in this case. See 750 ILCS 508(a)(6) (West 2014). However, while Agnes could seek a contribution for attorney fees from Roy as the “opposing party” in the dissolution action, she cannot recover contribution for attorney fees from Sorce Enterprises under section 508(a) of the Act because Sorce Enterprises is not an “opposing party.” See 750 ILCS 5/508(a) (West 2014); *Pal*, 397 Ill. App. 3d at 911 (holding an intervenor is not an “opposing” party in a dissolution action; spouses are the “opposing” parties). Thus, the trial court did not err in declining Agnes’s request for attorney fees from Sorce Enterprises where her only argument for recovery of attorney fees from Sorce Enterprises was pursuant to section 508 of the Act.

¶ 76 As for Agnes’s request for attorney fees from Roy, the record shows that throughout the nine years of proceedings a large portion of each party's attorney fees were paid as advances from the marital estate, with Agnes being given substantially more advances from the marital estate than Roy. Specifically, Agnes received advances from the marital estate in the amount of \$129,563.46 for attorney fees, \$8,800 for moving costs, and \$11,000 for her obligation toward Roy's attorney fees as a result of her contempt of court in failing to make the mortgage payments as ordered by the trial court. Roy received \$79,403 in advances from the marital estate. In the final judgment, the marital estate was divided evenly, with neither party required to repay the marital estate for their advances, and Roy was ordered to pay an additional \$15,000 of Agnes’s attorney fees.

¶ 77 Agnes claims that Roy should be responsible for the totality of her attorney fees and costs related to the third-party proceedings—\$81,629.55—because the proceedings were necessitated by his fraud on the marital estate.<sup>5</sup> However, Roy has paid \$47,184.92 directly to Agnes's attorney fees, was ordered to pay an additional \$15,000 toward Agnes's attorney fees, which totals \$62,184.92 in direct payments, and Agnes received approximately \$70,000 more than Roy in advances from the marital estate (Roy's portion of those marital funds being \$35,000), which in total exceeds the amount of fees and costs Agnes claims is related to the third-party proceedings.

¶ 78 Agnes additionally argues that Roy should have been ordered to contribute \$175,000 toward her attorney fees for the dissolution proceedings. It is not clear whether the \$175,000 includes the \$81,629.55 in attorney fees and costs that Agnes claims Roy should have paid related to the third-party proceedings. Although Agnes filed many petitions for interim attorney fees and requested that Roy pay her attorney fees for the third-party proceedings, she did not file a petition for Roy to contribute to the attorney fees that she incurred throughout the dissolution

---

<sup>5</sup> Agnes claims \$81,629.55 of her attorney fees and costs are related to the third-party action, but it is not clear whether she includes in that figure the attorney fees related to her unsuccessful attempts to increase her request for relief and her unsuccessful appeal related to that issue in the third-party proceedings. 750 ILCS 5/508(a)(3.1) (West 2014) (awards for attorney fees and costs may be ordered in connection with the prosecution of any claim on appeal if the prosecuting party has substantially prevailed); *In re Marriage of Murphy*, 203 Ill. 2d 212, 221-22 (2003) (in the context of petitions for fees for the prosecution of an appeal, the circuit court may only award fees incurred for individual claims on which the appellant substantially prevailed).

proceedings pursuant to section 508 of the Act. Instead, Agnes merely listed her estimated attorney fees of \$175,000 as marital debt in her financial affidavit. Regardless of the record indicating that a substantial portion of Agnes's attorney fees have been paid, Agnes argues on appeal that she "established total attorney fees and costs of \$175,000" in the trial court and this court should revise the trial court's \$15,000 award of attorney fees from Roy and to an award of \$175,000. Agnes claims that the trial court's "conclusory explanation" for the \$15,000 award, without having a hearing, was an abuse of discretion.

¶ 79 Attorney fees are the primary responsibility of the party for whom the services were rendered. *Streur*, 2011 IL App (1st) 082326, ¶ 36. The propriety of an award of attorney's fees is dependent upon the spouse seeking the award of attorney fees showing that he or she has an inability to pay the fees and that other party has an ability to pay. *In re Marriage of Hasabnis*, 322 Ill. App. 3d 582, 598 (2001); *In re Parentage of Rocca*, 2013 IL App (2d) 121147 (affirming denial of request for fees where no evidence was presented of the petitioner's financial circumstances). Financial inability exists where requiring payment of fees would strip that spouse of his or her means of support or undermine his or her financial stability. *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005). The "inability to pay" must be determined relative to the party's standard of living, employment abilities, and income from investments and maintenance. *Streur*, 2011 IL App (1st) 082326, ¶ 36.

¶ 80 The conduct of a party during the proceedings is also a proper factor to consider in determining whether to award attorney fees to be paid by the other party. See *Patel*, 2013 IL App (1st) 112571, ¶¶ 98-111 (awarding attorney's fees to be paid by the party who lacked cooperation and communication, failed to comply with discovery, violated court orders, unnecessarily increased the cost of litigation, and whose conduct increased the amount of



attorney fees). "Unnecessarily increasing the cost of litigation is a relevant factor in the division of property as well as in allocating attorney fees." *In re Marriage of Haken*, 394 Ill. App. 3d 155, 161 (2009).

¶ 81 The proportion of attorney fees that each spouse will pay lies within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Hasabnis*, 322 Ill. App. 3d at 598. An abuse of discretion in an award of attorney fees is shown where the evidence shows a gross disparity in income and earning capacity of the parties and there is an inability of the petitioning party to pay. *In re Marriage of Suriano*, 324 Ill. App. 3d 839, 852 (2001). A reviewing court cannot substitute its discretion for that of the trial court but rather must analyze whether the trial court, in the exercise of its discretion, acted arbitrarily without conscientious judgment or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law so that substantial injustice resulted. *Id* at 846.

¶ 82 As for determining the parties' ability to pay in this case, the trial court found Roy earned \$9973 per month in gross income and was ordered to pay \$3200 per month for maintenance. Agnes earned \$759 per month in gross income and received \$3200 for maintenance per month. Therefore, Agnes's approximate gross income was \$3959 per month and Roy's was \$6773.<sup>6</sup>

¶ 83 As discussed above, Agnes received almost \$70,000 more in advances from the marital estate than Roy and a substantial amount of Agnes's attorney fees and costs have already been paid either by the parties directly or from the marital estate. We also note that the trial court indicated that each party would be responsible for attorney fees for their own wrongdoing and

---

<sup>6</sup> We reject Roy's indication that child support should be deducted from his income and added to Agnes's income in determining the party's respective ability to pay attorney fees. See *In re Marriage of Blume*, 2016 IL App (3d) 140276, ¶ 36.

violations of court orders, and Roy had to bring multiple motions to compel and petitions for rule to show cause as a result of Agnes's conduct and failure to adhere to court orders. Despite the fact that Roy has a greater ability to pay fees, in view of all the circumstances in this case, we cannot say the trial court abused its discretion in awarding Agnes \$15,000 in attorney fees from Roy in its final judgment.

¶ 84 Agnes cites *In re Marriage of Gardner*, 85 Ill. App. 3d 1004 (1980), in support of her contention that the trial court abused its discretion by making the attorney fees determination without a hearing on the matter or providing an explanation in the record. In *Gardner*, in a postdecree proceeding on the issue of payment of college expenses for the parties' child (15 years after the divorce decree was entered), both parties requested the trial court hear their arguments for attorney fees that were incurred as a result of that proceeding. *Id.* at 1008-09. The trial court indicated, "I am not going into that." *Id.* at 1009. The trial court also stated, "It's 5:30, I have other matters" and "I am sorry I have ruled." *Id.* The appellate court reversed and remanded the denial of attorney fees, finding that without proper consideration of matters traditionally considered in an attorney fee award or some record-based explanation for the denial of the requested attorney fees, the denial constituted a clear abuse of discretion. *Id.*

¶ 85 The *Gardner* case is distinguishable from the present case because the attorney fees in this case were related to predecree proceedings and were part of the parties' overall financial picture. The record shows in this case that there were multiple hearings on the issue of attorney fees, with the parties' attorneys submitting affidavits of their fees and costs. The record also shows that the trial considered the financial resources of the parties and the parties had submitted updated financial affidavits prior to the trial court ruling on the parties' financial allocations, which included child support, maintenance, and property distribution. See *Hasabnis*, 322 Ill.

App. 3d at 596 (providing that 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). Based on this record, the trial court did not abuse its discretion by awarding \$15,000 of attorney fees to Agnes from Roy.

¶ 86 II. Deposition Transcript of James Sorce

¶ 87 On appeal, Agnes also argues that the trial court erred in excluding from evidence as hearsay the deposition testimony of Roy’s brother, James. Roy contends that the evidence of the deposition testimony was properly excluded.

¶ 88 On January 6, 2011, James gave a deposition in his own dissolution of marriage proceeding pending in California. On October 7, 2013, Agnes filed a memorandum of law regarding the admissibility of James Sorce's deposition transcript in this case, arguing that James’s deposition transcript was admissible, as a statement of intent of Roy and/or Sorce Enterprises motive, design, or plan regarding the purchase of the marital home, pursuant to Illinois Rule of Evidence 803(3) (eff. April 26, 2012). Agnes claimed that James's deposition transcript showed that Allen gave James money to purchase Roy and Agnes's marital home with the intent of Roy living in the home rent free.<sup>7</sup> Roy argued that the deposition should not be admitted into evidence because it was not an evidence deposition and did not take place in the context of this case, but instead was from James's unrelated divorce case and neither he or his counsel was present at the deposition. Roy also argued that James's deposition was inadmissible hearsay and did not fit within the hearsay exception of Rule 803(3) to be used as proof of his and Allen's motives regarding the marital home.

---

<sup>7</sup> James testified that Roy asked him to buy the house because it was in foreclosure. James paid off the home loan of \$585,000, and “was in the process of renting out to [Roy].”

¶ 89 Rule 803(3) includes the codification of the state-of-mind exception to the hearsay rule. *People v. Hill*, 2014 IL App (2d) 120506, ¶¶ 51-52. Rule 803(3) provides that the following is not excluded by the hearsay rule, even though the declarant is available as a witness:

“A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including:

(A) a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will; or

(B) a statement of declarant’s then existing state of mind, emotion, sensation, or physical condition to prove the state of mind, emotion, sensation, or physical condition of another declarant at that time or at any other time when such state of the other declarant is an issue in the action.”

¶ 90 Pursuant to Rule 803(3)(B), the state-of-mind exception to the hearsay rule may not be used to show the state-of-mind of a person other than the declarant. See also *People v. Cloutier*, 178 Ill. 2d 141, 155 (1997) (out-of-court statements admitted under the state-of-mind exception may be used to show only the state of mind of the declarant, and not of any other person). In this case, Agnes is attempting to use the statements that James made in his deposition to prove the state-of-mind of Sorce Enterprises, Allen and/or Roy—not to prove James’s state of mind. Therefore, James deposition testimony was not admissible under Rule 803(3), and the trial court did not err in excluding his deposition testimony.

¶ 91

### III. Imputed Income

¶ 92 On appeal, Agnes contends that this court should reverse the trial court’s decision not to impute additional income to Roy. The trial court found that the testimony of Neil Gerber, Agnes's expert witness, was “speculative” and that nine years had passed since Roy’s income decreased, "making next to impossible” to determine what Roy would have received in bonuses "all these years later." In denying Agnes’s request that income be imputed to Roy in the final dissolution judgment, the trial court stated, “And here we sit nine years later.”

¶ 93 Agnes argues that the trial court found that Roy’s standard of living had not changed and he “continue[d] to basically live that same lifestyle [as during the marriage], evidenced by his living accommodations.” She also argues that the trial court’s finding from the third-party case that Roy’s bonuses were not paid in 2004 and 2005 as result of fraud on the marital estate justified also imputing bonus income to Roy since 2006 in the amount of \$2,148,000. Roy argues that the trial court correctly refused to impute additional income to him.

¶ 94 The ability of the maintenance-paying spouse to contribute to the other spouse's support is determined by considering both the paying spouse’s current and future ability to pay ongoing maintenance. *In re Marriage of Lichtenauer*, 408 Ill. App. 3d 1075, 1089 (2011). For the purpose of imputing income to the paying spouse, a court must find one of the following: (1) the payor has become voluntarily unemployed; (2) the payor is attempting to evade a support obligation; or (3) the payor has unreasonably failed to take advantage of an employment opportunity. *Id.* We will not disturb a trial court's finding of a party's income for the purpose of setting a support award absent an abuse of discretion. *Blume*, 2016 IL App (3d) 140276, ¶ 30.

¶ 95 Here, the essential issue is whether additional bonus income should have been imputed to Roy. Roy earned bonuses for 4 of the almost 30 years he worked at Sorce Enterprises. Specifically, Roy earned bonuses for the years of 1999 through 2003, but not before or after

those years. In the third-party action a constructive trust was ordered, imputing bonus money to Roy for the years 2004 and 2005, which were the years the marriage was in the process of deteriorating and there was some evidence that Roy possibly would have earned a bonus for those years but the money was likely diverted into CDs. There is no evidence that Roy earned a bonus in 2006 or any year thereafter. Roy testified and filed multiple financial affidavits indicating his average yearly income was \$95,000, with no bonus income. The trial court made no finding that Roy was manipulating his income or that his spending far exceeded his income. While the trial court noted that Roy lived in the former marital home worth \$965,000 and Agnes lived a more modest home, the evidence showed that both parties paid approximately the same amount to rent their respective homes—about \$1500 per month.

¶ 96 Based on the evidence presented, the trial court found that it would be too speculative to impute income to Roy. However, the child support and maintenance awarded by the trial court obligates Roy to pay 28% for child support and 30% for maintenance of any additional money he receives from bonuses or income-generating endeavors, so that if he actually does receive additional income then Agnes will be given her fair portion of it. Under the circumstances of this case, the trial court did not abuse its discretion by not imputing additional income to Roy.

¶ 97 **IV. Maintenance Award**

¶ 98 Roy argues the trial court erred in awarding Agnes permanent maintenance of \$3200 per month plus 30% of his bonuses from employment or income-producing endeavors. Roy argues that rehabilitative maintenance was more appropriate given Agnes's testimony that she intended to obtain a master's degree in psychology within the next four years and that she intended to work as a counselor. Roy also argues the amount of the maintenance is excessive. Agnes argues

this court should affirm the trial court's award of permanent maintenance and increase Roy's maintenance obligation to 32% of his income.

¶ 99 Pursuant to section 504(a) of the Act, a trial court may grant maintenance to either spouse in an amount and for a duration of time that the court deems just after considering all relevant factors. 750 ILCS 5/504(a) (West 2012). Section 504(a) of the Act lists the following 12 factors to be considered by a court when ordering maintenance: (1) income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance; (2) the needs of each party; (3) earning capacity of each party; (4) impairment of present and future earning capacity of the party seeking maintenance as a result of a devotion of time to domestic duties or forgoing or delaying education, training, employment, or career opportunities due to the marriage; (5) time needed for the party seeking maintenance to acquire appropriate education, training, and employment and whether that party is able to support himself or whether that party has custody of a child making it appropriate for the custodian not to seek employment; (6) standard of living established during the marriage; (7) duration of the marriage; (8) age and physical and emotional condition of both parties; (9) tax consequences of the property division; (10) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse; (11) any valid agreement of the parties; and (12) any other factor that the court expressly finds to be just and equitable. 750 ILCS 5/504(a) (West 2012).

¶ 100 Permanent maintenance for an indefinite term is appropriate if the receiving spouse is unemployable or employable at an income considerably lower than the standard of living established in the marriage, although the receiving party still has a good-faith obligation to work toward becoming self-sufficient. *In re Marriage of Dunseth*, 260 Ill. App. 3d 816, 833-35

(1994). Rehabilitative maintenance, rather than permanent maintenance, may be appropriate when a spouse's future employability would provide a similar standard of living as enjoyed during the marriage. *In re Marriage of Harlow*, 251 Ill. App. 3d 152, 159 (1993). Rehabilitative maintenance is designed to enable a spouse to develop the skills necessary to support themselves so that the former spouses may become independent from one another as soon as is practicable. *In re Marriage of Johnson*, 2016 IL App (5th) 140479, ¶ 93; *In re Marriage of Hucker*, 259 Ill. App. 3d 551, 555 (1994).

¶ 101 In determining the amount of maintenance, the court will look to the reasonable needs of the party seeking maintenance, as measured by the standard of living the parties enjoyed during their marriage. *In re Marriage of Keip*, 332 Ill. App. 3d 876, 878-79 (2002). A trial court's determination of maintenance will not be altered absent an abuse of discretion or finding that the award is against the manifest weight of the evidence. *Schneider*, 214 Ill. 2d at 173; *Lichtenauer*, 408 Ill. App. 3d at 1087.

¶ 102 In reviewing the maintenance award, we reject Roy's indication that child support should be deducted from his income and added to Agnes's income when determining his maintenance obligation. See *Blume*, 2016 IL App (3d) 140276, ¶ 36 (providing there is no legal basis for the contention that child support should be added to the receiving spouse's income or deducted from the supporting spouse's income to calculate an award of maintenance in the same proceeding). Similar to this case, this court in *Blume* noted that although the recently added section 505(a)(3)(g-5) of the Act was not in effect at the time of the judgment, it supports a rejection of the contention that a trial court should deduct child support payments from the income of the supporting spouse when determining maintenance in the same proceeding. *Id.* (citing Pub. Act 98-961 (eff. Jan. 1, 2015) (adding 750 ILCS 5/505(a)(3)(g-5)) and noting that section



505(a)(3)(g-5) provides for maintenance to be deducted from the supporting spouse's net income to determine child support but there is no provision in the Act that provides for child support awarded in the same proceeding to be deducted from the supporting spouse's income when determining the supporting spouse's maintenance obligation).

¶ 103 Here, the basis for the trial court's award of permanent maintenance was established by evidence that shows that Agnes is working toward a master's degree but she will not be employed for at least four years as a psychologist and likely will not enjoy the standard of living the parties enjoyed during the marriage for many years to come, if ever. We acknowledge that Roy may also never again enjoy the standard of living enjoyed during the marriage based on his current income, but we also note the maintenance awarded in this case is modifiable should Agnes fail to make reasonable efforts to become self-supported or the employment or income status of either party change. See 750 ILCS 5/510 (West 2014). The trial court's award of maintenance in the amount of \$3200 per month plus an additional 30% of any bonuses and income-generating endeavors was not against the manifest weight of the evidence given the length of the marriage, Agnes's age, Agnes's current income, Agnes's earning capacity, the minimum of four years needed for Agnes to obtain her master's degree, the student loans Agnes will have to incur to obtain her master's degree, the marital property awarded in this case, and the fact that Agnes devoted 20 years of her life to domestic duties and the family, thereby delaying her education, training, employment, or career opportunities, while Roy pursued a career at Sorce Enterprises.

¶ 104 V. Dissipation of Marital Assets

¶ 105 On appeal, Agnes argues that the trial court's finding that the parties dissipated the marital funds in equal amounts was against the manifest weight of the evidence. Specifically,

she argues that the trial court erred in finding that Roy had not dissipated assets when he: gave Sorce Enterprises \$375,566.27 to allegedly repay a promissory note, gave Sorce Enterprises \$34,000 to allegedly reimburse the company for personal expenses, and sold his stock in Sorce Enterprises for \$166,000 when, as she alleged, it was valued at \$2 million.

¶ 106 In his cross-appeal, Roy argues that the trial court's finding that the parties dissipated marital assets in equal amounts was against the manifest weight of the evidence. He argues Agnes's dissipation was clearly proven in the amount of \$158,179.37 where she used \$75,674.25 from the home loan to pay legal fees, expert witness, and credit card bills, she caused an arrearage on the home loan in the amount of \$52,615.07, and she failed to make college and parochial school payments necessitating \$29,890.05 to be paid from the marital funds.

¶ 107 Section 503(d) of the Act sets forth relevant factors a trial court should consider in determining how to distribute marital property, which includes "the dissipation by each party of the marital or non-marital property." 750 ILCS 5/503(d) (West 2014). Dissipation has been defined as the use of marital property by one spouse for his or her sole benefit for a purpose unrelated to the marriage at the time that the marriage is undergoing an irreconcilable breakdown. *In re Marriage of O'Neill*, 138 Ill. 2d 487, 497 (1990); *In re Marriage of Holthaus*, 387 Ill. App. 3d 367, 374 (2008). Whether dissipation has occurred is a question of fact determined by the trial court, which will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Holthaus*, 387 Ill. App. 3d at 374. A factual finding is against the manifest weight of the evidence if an opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence. *Id.*

¶ 108 Here, the trial court found that Roy sold his non-marital stock in Sorce Enterprises for fair and reasonable compensation that constituted the fair market value of those shares at the

time of the sale. The trial court also found that the evidence showed the promissory note was a valid legal note, which Roy was obligated to repay. The trial court further found that Agnes failed to show that Roy's repayment of the \$34,000 for personal expenses to Sorce Enterprises constituted a dissipation of marital assets. There was evidence to indicate the promissory note that Roy repaid was a valid legal obligation, Roy sold his stocks at fair market value, and the \$34,000 Roy used to repay Sorce Enterprises for the family's personal expenses came from a personal loan he took out and repaid with nonmarital property (money from selling his stock under the reverse stock split). Therefore, the trial court's ruling that Agnes did not prove Roy's dissipation was not against the manifest weight of the evidence.

¶ 109 As for Roy's allegation of Agnes's alleged dissipation, the evidence shows that Agnes caused an arrearage on the home and a delinquency in the payment of educational expenses by not paying those court-ordered obligations from her temporary support from Roy and the home loan proceeds. Agnes testified that she had obtained a home loan in the amount of only \$140,000 (when there was at least \$500,000 of equity in the home) so that she could pay college tuition and expenses for one year because she anticipated the divorce would only take one year. The divorce was finalized approximately seven years later. Other than paying her attorney fees and expert witness, the home loan proceeds were used for household and family expenses. The fact that Agnes depleted the home loan proceeds on family expenses and could not afford the mortgage payments does not constitute a dissipation of assets in this case considering the prolonged dissolution proceeding and the expenses that needed to be paid. Agnes produced evidence indicating that she had used her credit cards for family expenses as opposed to her own sole benefit, which was paid off by a portion of the home loan proceeds. Also, as discussed above, the matter of payments for fees is a portion of the trial court's overall property

distribution in this case and was properly not considered to be dissipation of assets based on the circumstances of this case. Based on this record, the trial court's finding that the parties' failed to prove the other's dissipation was not against the manifest weight of the evidence.

¶ 110

## VI. Property Distribution

¶ 111

Agnes argues that this court should reverse the trial court's equal distribution of marital property and award her 100% of the marital assets because she claims that Roy dissipated marital assets in far greater amounts than she did and Roy is employed within his family-owned company that had paid him in excess of \$600,000 per year prior to the dissolution. Roy agrees with Agnes that the trial court erred in equally dividing that marital estate but argues that the trial court should have awarded him 100% of the marital estate in light of Agnes's dissipation of assets, which Roy alleges totaled \$158,179.37, and her greater advances from the marital estate for attorney fees and moving expenses, which Roy claims was \$57,960.46 more in advancements than he took from the marital estate.

¶ 112

Pursuant to section 503(d) of the Act, "the court shall assign each spouse's non-marital property to that spouse." 750 ILCS 5/503(d) (West 2014). Roy was divested of his 20% ownership interest in Sorce Enterprises as the result of a reverse stock split in which his nonmarital stocks were sold back to Sorce Enterprises at the fair market value of the stock. He is no longer a corporate officer or a partial owner of the corporation. The money he earned from the sale of his stock was non-marital property.

¶ 113

As for marital property, section 503(d) of the Act provides for marital property to be divided in just proportions with the following factors to be considered: (1) the contribution of each party to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property, including advances from the marital estate and the contribution as a home

maker or to the family; (2) dissipation by each party of the marital or non-marital property; (3) the value of the property assigned to each spouse; (4) the duration of the marriage; (5) relevant economic circumstances of each spouse when the division of property is to become effective; (6) any obligations and rights arising from a prior marriage; (7) any antenuptial agreement of the parties; (8) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each party; (9) the custodial provisions for any children; (10) whether the apportionment is in lieu of or in addition to maintenance; (11) the reasonable opportunity of each spouse for the future acquisition of capital assets and income; and (12) the tax consequences of the property division upon the respective economic circumstances of the parties. 750 ILCS 503(d) (West 2014). A trial court's distribution of marital property is reviewed for an abuse of discretion. *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107 (2004).

¶ 114 As discussed above, neither party proved the other party's dissipation of marital assets. Also as discussed above, Agnes was given a greater amount of advancements from the marital estate and Roy paid a substantial amount of her attorney fees. Agnes worked in the home and Roy pursued employment outside the home during the parties' 20-year marriage, resulting in a significant disparity in the parties' income. While Roy's employability within his family's company greatly outweighs Agnes's current employability, Agnes was awarded permanent maintenance that would increase should Roy's income increase. Additionally, Agnes did not have to reimburse the marital estate for the \$70,000 of advancements that she received in excess of Roy's advancements from the marital estate. In essence, Agnes received a greater portion of the marital estate by not having to repay her greater portion of advancements from the marital estate. When we consider that Agnes received approximately \$70,000 more in advancements from the marital and she received \$36,362 of the \$72,724.76 of the final remaining marital

assets, it appears Agnes was actually given 75% of the martial assets. Therefore, based on the circumstances of this case, we cannot say the 50/50 division of final remaining marital property was an abuse of discretion.

¶ 115

#### CONCLUSION

¶ 116

The judgment of the circuit court of Peoria County is affirmed.

¶ 117

Affirmed.