

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 (4th) 150311-U
NO. 4-15-0311
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
March 29, 2016
Carla Bender
4th District Appellate
Court, IL

In re: the MARRIAGE OF JESSE A. KELLER,)	Appeal from
Petitioner-Appellee,)	Circuit Court of
and)	Coles County
MARY E. KELLER,)	No. 13D126
Respondent-Appellant.)	
)	Honorable
)	Brien J. O'Brien,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* In this action for dissolution of marriage, the division of marital property was not an abuse of discretion; nor were the factual findings underlying the division against the manifest weight of the evidence.

¶ 2 Petitioner, Jesse A. Keller, brought this action to dissolve his marriage to respondent, Mary E. Keller. Respondent appeals the division of marital property. Because we are unable to say the division of marital property was an abuse of discretion or that the factual findings underlying the division were against the manifest weight of the evidence, we affirm the trial court's judgment. See *In re Marriage of McBride*, 2013 IL App (1st) 112255, ¶ 24; *In re Marriage of Hubbs*, 363 Ill. App. 3d 696, 699-700 (2006).

¶ 3 I. BACKGROUND

¶ 4 A. The Death of Petitioner's Mother
and the Appointment of Executors

¶ 5

On cross-examination, respondent's attorney asked petitioner:

"Q. Since the time of this proceeding, [your mother] has passed?

A. That's correct.

Q. Did she have a will?

A. I suppose.

Q. Well, you know if she has a will; don't you?

A. I do not know.

Q. The will hasn't happen [*sic*] filed for probate?

A. My older brother and sister are the executors. That's all I know.

Q. And who are they using as the attorney to handle the will?

A. I think that's none of your business.

MR. HELLER: Your Honor, I would ask that the witness be directed to answer.

THE COURT: Answer the question, Mr. Keller.

A. David Eberspacher.

MR. HELLER: Q. Okay. And has an inventory been filed?

A. I don't know.

Q. And you stand to inherit, roughly, 1/3 of that estate; isn't that true?

A. No.

Q. It's not true?

A. That's not true.

Q. Then how much do you say you stand to inherit?

A. I did not know.

Q. You do expect an inheritance; don't you?

A. I don't know."

¶ 6

B. Six Acres

¶ 7

On direct examination, petitioner testified he had no interest in any real estate other than the marital residence, 2859 East County Road 1300 North, Mattoon, Illinois, which sat on several acres of land, 10 acres of which his brother custom-farmed and the remaining 4 acres of which petitioner used to grow hay.

¶ 8

After petitioner testified, respondent took the stand, and her attorney asked her about additional real estate:

"Q. Other than the property which [petitioner] testified to, are you aware of any other property that you and he owned during the course of the marriage?

A. Yes. There was a 6-acre patch of ground over by the river that he and I and another couple had talked about buying together, and signed papers for that.

Q. You did sign papers to buy it?

A. Yes, sir. We signed papers. But I don't know exactly, we were supposed to pay, like at the end of the year farming or something like that, of one payment a year or something like that.

Q. And how much did you pay for the six acres?

A. I think it was around \$20,000.

Q. And you were only going to have a, you and [petitioner] were only going to have a 1/2 interest [in] this six acres?

A. Correct.

Q. And have you received any further paperwork about that six acres?

A. No. Not since that day."

¶ 9

On cross-examination, petitioner's attorney asked respondent:

"Q. You made reference under Mr. Heller's questions to this 6-acre patch of ground that was supposed to be purchased with another couple. Who was that other couple?

A. Freddy and Carolyn Helmuth.

Q. And have you seen any deeds of any kind that would suggest that there was an actual transfer of property?

A. No, I haven't seen anything.

Q. Have you undertaken a search for those records from the courthouse here as to whether there is, in fact, a deed that would show the transfer of land to the two of you and to Mr. Helmuth and his wife?

A. No, I have not done any search."

¶ 10

C. Petitioner's Two Retirement Plans:
the Associate Retirement Plan and the Associate Savings Plan

¶ 11

Respondent's attorney asked petitioner:

"Q. You have what's called an [']Associate's Retirement
Plan[']?

A. Yes.

Q. And the current balance in the Associate's Retirement
Plan is \$157,215.56; isn't it?

A. I don't know where you got that. I don't have that in
front of me.

Q. You also are in an Associate Savings Plan; aren't you?

A. That savings plan in a Vanguard, yes.

Q. The current balance in that is \$125,365.52?

A. Last week it was [']\$130,910.53.

* * *

Q. And to the best of your knowledge, those are the only
two plans that provide you any type of retirement benefit
whatsoever?

A. Yes.

Q. There is no other pension. There is no other profit
sharing. There is no other 401(k).

A. Right here it says retirement, Associate Retirement Plan. That is the pension. And then the other one is an associate savings plan. That is the 401(k)."

¶ 12 D. A Contribution of Equity From Respondent's Premarital Residence

¶ 13 On cross-examination, respondent's attorney asked petitioner:

"Q. Now, prior to [the] time that you and [respondent] got married, she had a home; did she not?

A. Yes.

Q. And you sold that house and used the proceeds as part of the down payment on the current residence; isn't that true?

A. No.

Q. Well, do you recall the following questions being asked and the following answers being given at your deposition?

* * *

Question: Did you sell [respondent's] house?

Answer: I didn't sell it. She did.

[Question:] Okay. What happened to the proceeds from that sale?

[Answer:] She put it in her account, I guess. Paid off her loan.

[Question:] In her own account?

[Answer:] I don't recall what did with it [*sic*].

Question: Was any part of that used for the down payment for the house that you and she ultimately bought?

Answer: Yes.

[Question:] And how much of her equity was used for the down payment?

[Answer:] It was in '98. Probably around \$15,000, maybe.

[Q.] Do you recall those questions being asked and that answer being given?

A. That was in the prior house. That's not this house we're talking about.

Q. But you rolled that house into the current house; didn't you?

A. No, I paid it for the some months, too [*sic*].

Q. So that the equity in that other house just disappeared?

A. She's got it somewhere."

¶ 14 After petitioner testified, respondent took the stand, and her attorney asked her:

"Q. And did you contribute in any way in the construction of the [marital residence]?"

A. Yes, I did.

Q. How is that?

A. I did, I did, I helped him with everything. Maybe, at times, it wasn't money. But it was planting grass, baling hay,

scooping manure, taking care of the horses, watering the horses. Planting the, planting the hay when we first got the property. I helped him plant the hay. I've even helped him bale hay. And us, on and on.

Anytime, and anytime I ever tried to contribute or tell him, look, I have got this check here. Just take this check and make a house payment. And he wouldn't do it. I had given him numerous checks before and he tore them up. Even when we lived in the other house, he tore them up.

Q. Did \$15,000 of equity from your first house go into the first marital residence?

A. My house in Windsor, yes.

Q. And then did you roll the equity in that house into this house to get it built?

A. The gray house?

Q. Yes.

A. It, or the Ireland house? Yes. We used everything that we had to get. And then, at that time, we have both properties; and so I was paying all the utilities on the property that we now reside at. And he was paying the utilities at the other house. It was tough. We both had to work and pay both places. It was for over a year we had two places to pay on. It was tough."

The record does not appear to clarify what the "gray house" and the "Ireland house" were.

¶ 15 E. The Award of the Marital Residence to Petitioner,
the Division of Petitioner's Two Retirement Plans,
and an Additional Award of Cash to Respondent

¶ 16 In its judgment of dissolution of marriage, entered on March 5, 2015, the trial court awarded the marital residence to petitioner. But the court allocated a portion of his two retirement accounts to respondent and, additionally, ordered him to pay her \$80,000. The relevant paragraphs of the judgment of dissolution provide as follows:

"1. *** Petitioner is awarded exclusive possession of the former marital residence with a stipulated value of \$317,500.00. Petitioner is awarded the equity in said residence, and shall be responsible for the mortgage on said residence being financed through Scott State Bank, and the loan against the Petitioner's 401(k) account through his current employer, said loan being associated with the construction of the former marital residence, taxes on said residence as well as maintenance and upkeep. ***

3. Relative to Petitioner's pension through MARS [Petcare], the Court orders the entry of a Qualified Domestic Relations Order awarding to Respondent one half of the 'marital portion' of said account.

* * *

8. Relative to Petitioner's 401(k) account, so as to effectuate the property distribution identified herein, the Court orders the award to the Respondent from said account a total of \$65,805.00, said award to be distributed to Respondent through a Qualified Domestic Relations Order in order to effectuate this distribution.

9. So as to balance the equities between the parties, and given the property assignments made herein, it is ordered that Petitioner pay to the Respondent the sum of \$80,000 in full by May 1, 2015."

Petitioner testified he had taken out a loan from his 401(k) account to finance the construction of the marital residence and that the amount he owed on that loan was \$18,201.73. The mortgage on the marital residence, in favor of Scott State Bank, stood at \$114,144.84.

¶ 17

II. ANALYSIS

¶ 18

A. An Expected Bequest

¶ 19

Respondent argues that when dividing the marital property, the trial court should have taken into consideration that petitioner was about to receive "substantial non-marital property" from his mother's estate. See 750 ILCS 5/503(d)(5), (d)(8), (d)(11) (West 2014) (when dividing the marital property, the trial court shall consider, among other factors, "the relevant economic circumstances of each spouse when the division of property is to become effective"; "the *** amount and sources of income, *** estate, *** and needs of each of the parties"; and "the reasonable opportunity of each spouse for future acquisition of capital assets and income");

In re Marriage of Benz, 165 Ill. App. 3d 273, 287 (1988); *In re Marriage of Smith*, 100 Ill. App. 3d 1126, 1131 (1981). Respondent makes the following representations in her brief:

"As pointed out at the motion to reconsider, (C210), examination of the court file (2014-P-79) revealed that the Will had been filed on October 1, 2014[,] with notice to the heirs and legatees having been filed along with a certificate of service on October 3, 2014[,] some six weeks prior to the hearing. Based upon the petition that was filed the Petitioner was to receive approximately 1/4 of 5.2 Million Dollars or 1.3 Million. (See Volume 3[,] Page[s] 2 and 3)."

¶ 20 The quotation above contains two citations to the record, but neither citation is to a probate document actually existing within the record of this case. Instead, one citation is to respondent's motion for reconsideration—which has no supporting documentation attached to it—and the other citation is to the oral argument of respondent's attorney on his motion for reconsideration. These citations are circular and therefore useless: respondent's attorney cites himself in support of his own representations.

¶ 21 The following representations in respondent's brief are unaccompanied by any citation whatsoever: "As a matter of fact, the Petitioner failed to identify, at the time of the hearing of the motion to reconsider, that the estate had already been resolved, that he had received his settlement and that a *petition to approve the family settlement agreement and grant family members possession of the real estate*, had already been filed an approved." (Emphasis in original.) Under Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013), the argument of a brief must cite "the pages of the record relied on." The consequence of violating that rule is to

have the asserted fact disregarded. *Sider v. Outboard Marine Corp.*, 160 Ill. App. 3d 290, 302 (1987).

¶ 22 It is true that we "may take judicial notice of public documents which are included in the records of other courts" (*Seymour v. Collins*, 2015 IL 118432, ¶ 6 n.1), even if those documents are not in the record of the present case (see *May Department Stores v. Teamsters Union Local No. 743*, 64 Ill. 2d 153, 159 (1976)). As a practical matter, however, "no court can take judicial notice of a document *** which it does not have before it or to which it does not have access." *Carrillo v. Hamling*, 198 Ill. App. 3d 758, 763 (1990). Obviously, *the Coles County circuit court* had access to its own records, including those in Coles County case No. 14-P-79. But *we* do not have before us any documents from Coles County case No. 14-P-79; nor do *we* have access to them. See *id.* It may be that someday we will be able to find, online, every document filed in the circuit courts of this state. That day has not yet arrived, and therefore it might be necessary for a party to actually go to the circuit clerk's office, request the relevant court file, and have photocopies made of the documents to which the party intends to make reference. Respondent has presented us with no probate documents. *Cf. May*, 64 Ill. 2d at 159 (taking judicial notice of decisions by the National Labor Relations Board "appended to [the] plaintiffs' brief"). The only evidence we have is petitioner's testimony that two executors, his brother and his sister, were appointed after his mother died. That his mother, at her death, owned real estate worth \$5.2 million; that, under her will, he is entitled to one-fourth of the real estate; and that he has received his share of the real estate are nothing but unsubstantiated assertions by respondent's attorney—which we are obliged to disregard. See *Metropolitan Water Reclamation District of Greater Chicago v. Civil Service Board of Metropolitan Water*

Reclamation District of Greater Chicago, 358 Ill. App. 3d 347, 352 (2005); *County of McHenry v. Thoma*, 317 Ill. App. 3d 892, 894 (2000).

¶ 23 Respondent argues it would be unjust to fault her for failing to "present more information about this [expected bequest] at the time of the original hearing," considering that petitioner himself feigned ignorance on cross-examination and considering that he "received that information [six] weeks prior to trial (by the docket of cause number 2014-P-75) and could have easily supplied it, as required by the rules compelling updated discovery, within that time period." Again, we note the lack of any citation to the record: respondent cites no discovery request; nor does she cite—or provide—any document substantiating her assertion that petitioner knew, six weeks before the trial, that he was a beneficiary under his mother's will. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). The issue is forfeited because of the lack of substantiation. See *Metropolitan Water*, 358 Ill. App. 3d at 352; *Carrillo*, 198 Ill. App. 3d at 763.

¶ 24 B. The Six Acres

¶ 25 Respondent argues: "The court erred in failing to divide the [six] acres purchased jointly with another couple. Respondent testified about the purchase, but the court failed to allocate this property."

¶ 26 Actually, it is unclear, from respondent's testimony that payment ever was made for the six acres, wherever they are. She testified that she, petitioner, and "another couple" (the Helmuths, as she clarified on cross-examination) had "signed papers" for the purchase of six acres of river land. But she was unsure whether the purchase price for the six acres ever was paid. She testified: "But I don't know exactly, we were supposed to pay, like at the end of the year farming or something like that, of one payment a year or something like that." Respondent's attorney tried to dispel the uncertainty by asking a question that assumed the payment of the

is no requirement that the trial court recite the specific factors the court relied upon in reaching its distribution decision." *Schlosser v. Schlosser*, 241 Ill. App. 3d 49, 51 (1993).

¶ 30 Respondent represents to us: "The [trial] court stated that there were no ramifications of tax which needed to be considered[,] but this is not the case." We reject this representation because it is followed by no citation to the record. See *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 875 (2010). We might add that nowhere in the judgment of dissolution do we see where the court said that.

¶ 31 D. Petitioner's Retirement Plans

¶ 32 Respondent argues:

"The [trial] court erred in failing to award a portion of the associates *retirement* plan (Vanguard) to Petitioner. Petitioner testified in cross-examination about the \$157,000.00 associate *savings* plan in his name, but the court failed to allocate that to either party. (T34-T35)[.]

As it relates to *** the associates *savings* plan (Vanguard), the court clearly erred in failing to award any portion of those properties to either party." (Emphases added.)

Each of those three sentences appears to contain a factual inaccuracy (although, possibly, in the first sentence, respondent means the associate savings plan rather than the associate retirement plan). Let us take those sentences one at a time.

¶ 33 The first sentence is incorrect in that the trial court did award to respondent a portion of petitioner's associate retirement plan. He testified he had two retirement plans: an *associate retirement plan*, which was a pension from his employer, MARS Petcare (to be paid

upon his retirement, in amounts he did not know); and an *associate savings plan*, which was his 401(k) account, managed by "Vanguard." Paragraph 3 of the judgment of dissolution states as follows: "Relative to the Petitioner's pension plan through MARS, the Court orders the entry of a Qualified Domestic Relations Order awarding to Respondent one half of the 'marital portion' of said account." This was the associate retirement plan, or the pension.

¶ 34 The second sentence is incorrect in that, in the pages of the transcript that respondent cites, petitioner never testified there was \$157,000 in his associate retirement plan. Instead, respondent's attorney asked petitioner: "And the current balance in the Associate's Retirement Plan is \$157,215.56; isn't it?" and petitioner answered: "I don't know where you got that. I don't have that in front of me."

¶ 35 The third sentence is incorrect in that the trial court awarded respondent a share of petitioner's associate savings plan, just as it awarded her a share of his associate retirement plan. Paragraph 8 of the judgment of dissolution states as follows: "Relative to Petitioner's 401(k) account, so as to effectuate the property distribution identified herein, the Court orders the award to the Respondent from said account a total of \$65,805.00, said award to be distributed to the Respondent through a Qualified Domestic Relations Order in order to effectuate this distribution." This is the associate savings plan, or 401(k) account.

¶ 36 E. A Contribution of \$15,000 in Nonmarital Property

¶ 37 Respondent argues she is entitled to reimbursement for the \$15,000 in nonmarital funds that she contributed "for the purchase of the first and then ultimately the second residence." The only authority she cites in support of that argument is "*In Re The Marriage of Dillon*, 214 Ill. App. 3d 130653"—which is not a recognizable citation. We have been unable to find any published Illinois decision known as "*In re Marriage of Dillon*." (Incidentally, we also

note that, throughout her brief, respondent cites cases without providing any pinpoint citations. See Ill. S. Ct. R. 6 (eff. July 1, 2011.) There is a statute pertaining to the commingling of marital and nonmarital property, section 503(c) of the Marriage Act (750 ILCS 5/503(c) (West 2014)). Respondent fails to discuss or even cite this important statute. We hold this issue to be forfeited because of the failure to cite and discuss relevant authority. See *Gandy*, 406 Ill. App. 3d at 875.

¶ 38

III. CONCLUSION

¶ 39

For the reasons stated, we affirm the trial court's judgment.

¶ 40

Affirmed.