

NOTICE
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2016 IL App (5th) 150141-U

NO. 5-15-0141

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
SUSAN S. WEGER,)	Crawford County.
)	
Petitioner-Appellee,)	
and)	No. 13-D-78
)	
RICKY L. WEGER,)	Honorable
)	David K. Frankland,
Respondent-Appellant.)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Chapman and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court's judgment regarding child support affirmed, where the award was not an abuse of discretion. Judgment regarding respondent's 401(k) account and its valuation, classification as marital or nonmarital, and allocation between the parties vacated and remanded with directions to value, classify, and allocate the property according to evidence in the record. Judgment regarding valuation of defined benefit plans affirmed, where the valuation method was not an abuse of discretion. Judgment regarding adjudication and distribution of "certain other items of property" affirmed, where judgment was not an abuse of discretion. Judgment regarding maintenance vacated and remanded with directions to reconsider the award, if necessary, pursuant to the ultimate valuation, classification, and allocation of property.

¶ 2 The respondent, Ricky L. Weger, appeals the January 14, 2015, judgment of dissolution of the circuit court of Crawford County. He contends that the circuit court erred in its decisions regarding child support, maintenance, and division of certain property between himself and the petitioner, Susan S. Weger. For the following reasons, we affirm in part, vacate in part, and remand with directions.

¶ 3 **FACTS**

¶ 4 The parties were married on January 30, 1998. One child was born to the parties on August 26, 1999. On September 27, 2013, Susan filed a petition for dissolution of marriage in the circuit court. Ricky filed a counterpetition for dissolution on October 24, 2013. A temporary hearing was conducted on January 2, 2014, after which the circuit court ordered Ricky to pay Susan \$208 per week in child support. A final hearing on the remaining issues was conducted on September 17-18, 2014.

¶ 5 The circuit court entered a judgment of dissolution of marriage on January 14, 2015. In the judgment, the circuit court, *inter alia*, ordered Ricky to continue paying child support in the amount of \$208 per week, denied Ricky's request for maintenance, made various valuations of property, classified the property as marital or nonmarital, and allocated the property between the parties. Ricky filed a timely notice of appeal. Additional specific facts are discussed as necessary in our analysis of the issues on appeal.

¶ 6

ANALYSIS

¶ 7

I. Property Division

¶ 8 The first issue on appeal is whether the circuit court erred in its method of valuation of certain retirement benefits of the parties, the classification of those benefits as marital or nonmarital, and the allocation of those benefits between the parties. The distribution of marital property lies within the sound discretion of the circuit court, and we will not disturb its judgment on review absent an abuse of discretion. *In re Marriage of Eidson*, 235 Ill. App. 3d 907, 911 (1992). "If the method of pension apportionment has not been determined earlier, the court has 'discretion to *consider the evidence before it* and devise a method of its own.'" (Emphasis added.) *In re Marriage of Richardson*, 381 Ill. App. 3d 47, 53 (2008) (quoting *In re Marriage of Wisniewski*, 286 Ill. App. 3d 236, 243 (1997)). "We will not reverse the court's choice of an apportionment method unless the court abused its discretion in selecting that method." *Id.* An abuse of discretion occurs when the decision was " 'clearly against logic.' " *In re Marriage of Munger*, 339 Ill. App. 3d 1104, 1107 (2003) (quoting *State Farm Fire & Casualty Co. v. Leverton*, 314 Ill. App. 3d 1080, 1083 (2000)). "[T]he question is whether the trial court made an arbitrary decision, without using conscientious judgment, or whether, in view of all of the circumstances, the trial court overstepped the bounds of reason, ignored the law, and thereby caused substantial prejudice to the appellant." *Id.*

¶ 9

A. Ricky's 401(k) Plan

¶ 10 Here, the method of apportionment of the parties' retirement accounts had not been earlier determined. Accordingly, the circuit court had discretion to select a method of its

own, based on the evidence. See *In re Marriage of Richardson*, 381 Ill. App. 3d at 53. Ricky was enrolled in a 401(k) plan for 294 months prior to the parties' marriage, and 199 months during the marriage. The circuit court valued Ricky's 401(k) plan at \$658,960 as of September 5, 2014, and at \$86,460 (the amount Susan provided in her closing summation as the value of the plan) as of June 30, 1997, which the circuit court described as the "closest to date of marriage." The circuit court further adopted Susan's worksheet to value the nonmarital portion of the account as \$159,951 and the marital portion as \$499,009. These values were derived from Susan's suggestion in her closing summation to use "an estimated rate of return of 5% annually on the non-marital portion of the 401(k)[,] which is a *reasonable estimate* of the rate of return on the non-marital portion during the marriage." (Emphasis added.)

¶ 11 On appeal, Ricky contends that the circuit court erred in the method of valuation and allocation of this account, as well as its marital and nonmarital classifications of the account. We agree. The circuit court chose to apply \$86,460—the value of the account seven months prior to the marriage—to determine the marital and nonmarital portions of the 401(k) plan. Moreover, the circuit court applied 5% as the rate of return on the nonmarital portion, which Susan described in her closing summation as a "reasonable estimate." Susan's counsel conceded at oral argument that there is no evidence in the record to substantiate the use of this percentage. As such, this figure was presented by Susan's counsel as a mere suggestion and was arbitrarily espoused by the circuit court in valuing and apportioning the property. Because the circuit court made this arbitrary decision, without using conscientious judgment, thereby causing substantial prejudice to

Ricky, it was an abuse of discretion to adjudicate the 401(k) account as it did. See *In re Marriage of Munger*, 339 Ill. App. 3d at 1107.

¶ 12 As noted by Susan, Ricky did not offer any evidence as to the actual value of the 401(k) account on the date of the marriage. Ricky does not dispute this. He emphasizes, however, that he did present all of the evidence necessary for the circuit court to utilize the coverture formula fractional share, with the marital and nonmarital interest to be established at the time that the monthly benefits commence. On remand, we stress that although the circuit court has discretion to choose a method of pension apportionment, it is essential for the circuit court to first review the record and ensure that there is sufficient evidence to substantiate the use of whatever method of apportionment it so chooses. Accordingly, we vacate this portion of the judgment of dissolution and remand with directions for the circuit court to choose a method of valuation based on the evidence, classify the amounts as marital or nonmarital based on the valuation, and allocate the property between the parties in light of these principles.

¶ 13 *B. Defined Benefit Plans*

¶ 14 Ricky claims on appeal that the circuit court's adjudication and distribution of the parties' defined benefit plans was an abuse of discretion. Susan presented evidence of the present day value and the circuit court based its judgment on that evidence. Ricky argues that the circuit court should have used the coverture formula rather than the present day value. The bulk of Ricky's argument regarding this issue is devoted to the presentation of authority regarding defined benefit plans, what they are, and how the values of such plans may be established. His overall contention is that the circuit court should have applied

the coverture formula to establish the value of these plans, rather than using the present day valuation method. In his attempt to apply the authority to the facts and evidence of this case, Ricky fails to cite to the record in support of his argument that the material submitted to the circuit court by Susan's counsel was erroneous or insufficient. Moreover, although he emphatically points out that "Susan presented no expert testimony regarding the 'present day value' of [the parties'] defined benefit plans," our review of the record reveals that Ricky himself failed to present any expert testimony regarding the acceptable methods of the valuation of defined benefit plans and why his proposed method is superior to that used by the circuit court. "Where parties have had the opportunity to present evidence at trial, they should not be allowed on appeal to take advantage of their failure to do so." *In re Marriage of Wisniewski*, 286 Ill. App. 3d 236, 246 (1997).

¶ 15 To further complicate the issue, in the statement of facts in his brief, Ricky identifies two of Susan's retirement accounts as defined benefit plans, and subsequently identifies those same two accounts as defined contribution plans. There are multiple retirement accounts between the parties and no expert testimony was offered to assist the circuit court. That being said, we emphasize that the burden is on the appellant to show why the circuit court's judgment was an abuse of discretion. See *Smith v. Smith*, 36 Ill. App. 2d 55, 59 (1962). Ricky failed to meet this burden and he cannot expect this court to step in and assume the duty. "A reviewing court is entitled to have the issues clearly defined and supported by pertinent authority and cohesive arguments; it is not merely a repository into which an appellant may 'dump the burden of argument and research,' nor

is it the obligation of this court to act as an advocate or seek error in the record." *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 459 (2009) (quoting *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993)).

¶ 16 As aforementioned, Susan presented evidence of the present day value and the circuit court based its judgment on that evidence. Unless the record on appeal provides an affirmative conclusion to the contrary, the circuit court is presumed to know the law and to have properly applied it. See *Webster v. Hartman*, 309 Ill. App. 3d 459, 461 (1999). For these reasons, we reject Ricky's argument that the circuit court abused its discretion in its valuation and classification of the parties' defined benefit plans and affirm the judgment in that regard. However, on remand we instruct the circuit court to include this property in its analysis when it revisits the overall allocation of marital property between the parties.

¶ 17 *C. Additional Property*

¶ 18 Ricky raises an additional argument regarding the classification and division of "certain other items of property." In the summary of the allocation of property which is attached to the judgment of dissolution, the circuit court awarded to Ricky as marital property, \$17,823 that he had previously received as a cashed check from his Hershey Stock Option Plan, and \$9,500 he had previously received from a withdrawal from his Hershey Credit Union account. On appeal, Ricky argues that he did not use all of this money for his own benefit, but that it was also used for Susan's benefit. Ricky points out that he testified that he applied \$7,500 of these funds to the balance of a marital credit card account, and that he gave Susan \$5,000 from these funds to apply to a credit card.

Ricky contends that the circuit court was silent regarding whether it accepted or rejected his testimony. A review of the judgment of dissolution reveals otherwise.

¶ 19 The circuit court specifically referenced the disputed amounts, and stated in the judgment that "Ricky has failed to properly account or trace the use of these funds with clear and specific evidence. He has also failed to prove he gave Susan \$5,000 cash from these funds." In further support of the circuit court's findings, we note that there was conflicting testimony between the parties regarding these funds. "The trial court is in the best position to judge the credibility of the witnesses and resolve conflicts in the evidence." *In re Marriage of Arjmand*, 2013 IL App (2d) 120639, ¶ 35. Accordingly, we will not disturb the circuit court's determinations. See *id.* Because the circuit court did address these funds in the judgment of dissolution and allocated them all to Ricky as marital property, and because there is evidence in the record to support the findings regarding the funds, we find no abuse of discretion and affirm the circuit court's decision in this regard. We specifically note that, on remand, the circuit court need not disturb this allocation. However, it should consider the value when it revisits the overall allocation of marital property between the parties.

¶ 20

II. Maintenance

¶ 21 The second issue on appeal is whether the circuit court erred by denying Ricky's request for maintenance. "As a general rule, 'a trial court's determination as to the awarding of maintenance is presumed to be correct.'" *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 650 (2008) (quoting *In re Marriage of Donovan*, 361 Ill. App. 3d 1059, 1063 (2005)). "Because maintenance awards are within the sound discretion of the trial

court, we will not disturb a maintenance award absent an abuse of discretion." *Id.* "An abuse of discretion exists only where we can conclude that no reasonable person would take the view adopted by the trial court." *Id.* at 651.

¶ 22 Section 504(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) enumerates various factors the circuit court should utilize when considering a maintenance award. 750 ILCS 5/504(a) (West 2014). Two of these factors are "the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance[,] [and] *** the tax consequences of the property division upon the respective economic circumstances of the parties[.]" 750 ILCS 5/504(a)(1), (9) (West 2014).

¶ 23 In light of the fact that we are vacating and remanding the portion of the judgment regarding the adjudication of Ricky's 401(k) plan, we are unable to review the issue of maintenance at this time, given the above relevant factors regarding maintenance. Accordingly, we vacate the portion of the judgment regarding maintenance and remand with directions for the circuit court to reconsider the award, if necessary, pursuant to the ultimate decision regarding the adjudication of property.

¶ 24 **III. Child Support**

¶ 25 The final issue on appeal is whether the circuit court erred in the amount of the child support award. "The amount of a child support award is within the discretion of the trial court and will not be disturbed absent an abuse of discretion." *In re Marriage of Scafuri*, 203 Ill. App. 3d 385, 391 (1990). "An abuse of discretion exists only where we

can conclude that no reasonable person would take the view adopted by the trial court." *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 651 (2008).

¶ 26 "Calculating [child support] is a two-step process." *In re Marriage of Mayfield*, 2013 IL 114655, ¶ 16. "The trial court must determine the parties' income, then apportion that income, setting an amount of child support for the noncustodial parent." *Id.* "Section 505(a)(3) of the *** Act governs the first step. It provides a definition of net income, which is the 'total of all income from all sources,' minus various deductions." *Id.* (quoting 750 ILCS 5/505(a)(3) (West 2010)).

¶ 27 "Section 505(a)(1) and (a)(2) of the *** Act governs the second step." *Id.* ¶ 17. "[That section] provides guidelines to help the trial court determine the minimum amount of child support." *Id.* "The guidelines state that the minimum amount for one child is 20% of the supporting party's net income." *Id.* "Section 505(a)(2) provides that the court should apply the guidelines, unless it finds that a deviation from them is appropriate after considering the best interests of the child in light of the evidence presented on several relevant factors." *Id.*

¶ 28 Here, at the temporary hearing, Ricky's counsel stipulated that "[t]he \$208 a week figure, it is what it is on the paycheck and so we really don't have any dispute over the math." Ricky argued, however, that "[s]pecifically with regard to the statute, the Court has ample opportunity to deviate from that amount or provide offsets as well." Accordingly, although Ricky stipulated that \$208 a week equated 20% of his net income, he argued that the circuit court should deviate from that amount. In its discretion, the

circuit court opted not to deviate from the statutory 20%, and ordered Ricky to pay Susan \$208 per week in child support.

¶ 29 At the final hearing, Ricky testified that there had been no changes in his income since the temporary hearing, other than his capital gains, which tend to fluctuate. Ricky's financial affidavit, dated September 16, 2014—the day before the hearing—was presented as Plaintiff's Exhibit 1, which reflects that Ricky's gross monthly income is \$6,335.81, or \$76,029.72 per year, to which Ricky stipulated at the hearing. Susan applied this stipulated amount to her child support worksheet in her closing summation, to show that the amount of \$208 per week that was awarded at the temporary hearing should continue as a permanent child support award. Despite the fact that Ricky's own financial affidavit reflects gross annual earnings of \$76,029.72,¹ that Ricky stipulated to that amount during his testimony at the final hearing, and that he testified that his income had not changed since the temporary hearing, he appended Respondent's Demonstrative Aids 1 and 4 to his closing summation, both of which reflect that his gross annual income is \$74,567.52. In his closing summation, Ricky argued that the permanent child support award should be \$183.63 per week, based in part on this reduced gross annual income figure. In the judgment of dissolution, the circuit court ordered child support to continue at the rate of \$208 per week.

¹This figure is calculated using Ricky's reported monthly gross earnings of \$6,335.81 and multiplying that amount by 12.

¶ 30 On appeal, Ricky argues that the circuit court erred by ordering him to pay \$208 per week in child support and that the amount should be reduced to \$183.63 per week. He turns this court's attention to Respondent's Demonstrative Aid 4, which is appended to his closing summation. As aforementioned, this document alleges that Ricky's gross earnings are \$74,567.52 per year, notwithstanding both his testimony and his financial affidavit which reflect a gross annual income of \$76,029.72. Besides these inconsistencies regarding Ricky's gross income, a further problem is that Respondent's Demonstrative Aid 4 calculates income tax withholdings by applying a filing status of single plus 1/2 child, which Ricky explains is determined by each party claiming their child as a tax dependent on alternating years. That is not applicable to this case. Here, the circuit court awarded the child to Susan and only Susan as a tax dependent each year. Accordingly, the tax withholdings proposed in Respondent's Demonstrative Aid 4 are incorrect.

¶ 31 Besides the inconsistencies in gross income and the incorrect amount of tax withholdings, Ricky also deducts long term disability and child life insurance from his gross earnings, as also reflected in Respondent's Demonstrative Aid 4. This too is incorrect, as section 505(a)(3) of the Act provides a list of specific deductions which are allowed in determining net income. See 750 ILCS 5/505(a)(3) (West 2014). Long term disability and child life insurance are not included on this list. We further note that in arguing the issue of child support in his appellant's brief, Ricky places great emphasis on Petitioner's Exhibit 1—which was offered by Susan at the temporary hearing—and alleges several mistakes therein. We reiterate that Ricky subsequently, at the final hearing,

stipulated to his gross income—which was a higher amount than that reflected in Petitioner's Exhibit 1. Ricky further argues that the calculations set forth in Petitioner's Exhibit 1 are incorrect, partly because the federal and state withholdings reflected therein do not include deductions withheld for Ricky's 401(k) plan. Referring back to the Act, section 505(a)(3) allows deductions for "[m]andatory retirement contributions required by law or as a condition of employment[.]" (Emphasis added.) 750 ILCS 5/505(a)(3) (West 2014). Because Ricky's 401(k) contributions are voluntary and not mandatory as required by the Act, Susan did not err by not applying any such contributions as deductions in determining Ricky's net income. We reiterate that, after the temporary hearing, Ricky stipulated to a higher amount of gross income at the final hearing—namely \$76,029.72—which his financial affidavit also reflects.

¶ 32 Upon review of these facts and the evidence in the record to support the circuit court's conclusion, we cannot say that no reasonable person would have ruled as the circuit court did. Accordingly, the circuit court did not abuse its discretion by ordering Ricky to continue paying child support in the amount of \$208 per week.

¶ 33 **CONCLUSION**

¶ 34 For the foregoing reasons, the January 14, 2015, judgment of the circuit court of Crawford County is affirmed regarding child support, affirmed regarding the valuation of the defined benefit plans of the parties, and affirmed regarding the adjudication and distribution of "certain other items of property." The judgment regarding Ricky's 401(k) account is vacated and remanded with directions for the circuit court to value, classify, and allocate the property according to evidence in the record. In light of any adjustments

made by the circuit court to the 401(k) account, we further instruct the circuit court to adjust the overall allocation of marital property between the parties as necessary, with the exception of the aforementioned "certain other items of property," which need not be disturbed. The judgment regarding maintenance is vacated and remanded with directions to reconsider the award, if necessary, pursuant to the ultimate valuation, classification, and allocation of property.

¶ 35 Affirmed in part and vacated in part; cause remanded with directions.