

NOTICE

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2016 IL App (5th) 150549-U

NO. 5-15-0549

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).

APRIL ANN ROY,)	Appeal from the
)	Circuit Court of
Petitioner-Appellant,)	St. Clair County.
)	
v.)	No. 12-D-1028
)	
JOSEPH FRANCIS ROY III,)	Honorable
)	Julia R. Gomric,
Respondent-Appellee.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* The order of the trial court regarding the dissolution of the parties' marriage and the custody and visitation of the parties' minor child is affirmed on all points with the exception of the decision requiring the petitioner to pay the entirety of the guardian *ad litem*'s fees.

¶ 2 Petitioner-appellant April Roy (April) filed a petition for dissolution of her marriage to respondent-appellee Joseph Francis Roy, III, (Joseph) in the circuit court of St. Clair County. Following a trial, the court entered a judgment relating to all issues. On appeal, April contests the trial court's determinations regarding custody and visitation of the parties' minor child, R.R.; she additionally disputes the trial court's calculation of the amount owed to her from Joseph's pension benefits, its order for her to pay the

entirety of the guardian *ad litem* (GAL) fee, its failure to award her retroactive child support and contribution to her attorney fees, and its failure to order Joseph to reimburse her for insurance proceeds to cover the loss of her wedding ring. For the following reasons, we affirm the order of the circuit court on all points with the exception of its decision requiring April to pay the entirety of the GAL's fees.

¶ 3 April and Joseph married on September 11, 2004. They have one daughter, R.R., born October 26, 2005. Joseph has a mother, Jacqueline; a sister, Jocelyn; and a nephew, A.J., who live together. The parties separated on April 29, 2012.

¶ 4 The following summary was adduced from the August 24, 2015, proceedings before the trial court. April testified that in January, 2010, she was tucking R.R. into bed when R.R. stuck her tongue in April's mouth. R.R. told her mother that A.J. did that to her all the time. April told R.R. to never let A.J. do that again, and if he did, R.R. should come and get somebody. April immediately discussed the incident with Joseph; she stated that they "knew A.J. had problems" because he had been on and off medication, in and out of counseling, and did not have stability in his family life. April told Joseph that she did not want A.J. around R.R. anymore, and Joseph told her that he would talk to his mother.

¶ 5 On June 9, 2010, April was getting ready for work when R.R. came into her bedroom. R.R. lifted up April's shirt and began to suck on her breast. April asked R.R. what she was doing, and R.R. stated that A.J. did this to her all the time. April testified that "Joseph flew out of the bathroom and yelled at [R.R.]" and told her not to lie. April testified that R.R. then "shut down" and was afraid that she was in trouble, but April

assured R.R. that she was not in trouble. Both parents agreed that R.R. should have no further contact with A.J. That same evening, Joseph, April, and R.R. went to a restaurant, and Jacqueline and A.J. came in and sat next to them. As they were getting ready to leave, A.J. came to R.R. and gave R.R. a "full body hug." April told Joseph that "it's got to end."

¶ 6 Later that same evening, April went to her job as a police dispatcher. She discussed the matter with a detective coworker, who told April that "you got to do something or you're just as guilty." On June 10, 2010, April got an emergency order of protection for R.R. against A.J. and filled out a police report at the sheriff's office, where it was recommended that she take R.R. to Children's Hospital. April stated that when she returned home, she told Joseph about the order of protection and about the recommendation that R.R. be taken to the hospital. April stated that she was unsure whether she wanted to subject R.R. to an invasive examination without having another conversation with her. On the way home from picking R.R. up from dance class, April asked R.R. about her interactions with her cousin. R.R. eventually disclosed that "[she and A.J.] were swimming in the pool" and "he put his fingers inside my pee-pee and it hurt." R.R. told April this occurred while April was at work and Joseph was in the garage.

¶ 7 April took R.R. to Children's Hospital, where R.R. spoke with a social worker. R.R. stated that: "A.J. touched my pee-pee" and pointed to her vaginal area, and that this occurred in the swimming pool; A.J. touched her "under my swimming suit" and indicated the vaginal area under a diaper on a doll; A.J. touched "on my butt" and pointed

to her buttocks; A.J. "was playing with my boobs and he was trying to kiss them, but I pushed him in the water" and pointed to her chest; and, A.J. "sticked his tongue inside my mouth." The social worker provided an assessment stating that the history provided by R.R. was concerning and consistent with abuse, noting also "that dad appeared to continue to allow this boy to have unsupervised contact with patient following her disclosure of abuse."

¶ 8 April testified that when she got home, Joseph told her that he had told his family about the order of protection. April told Joseph that A.J. is "bad news" and "they [need to] stay out of our life." She stated that Joseph agreed with this sentiment.

¶ 9 April testified that three weeks later, she appeared *pro se* at a hearing on an extension of the order of protection. R.R. did not attend the hearing; Joseph offered to attend, but April did not think that it was necessary. Jacqueline and Jocelyn attended with A.J., and A.J. was represented by a lawyer. When April began to testify as to the events between A.J. and R.R., A.J.'s lawyer objected on hearsay grounds. The court sustained the objections and the petition for a plenary order of protection was denied.

¶ 10 April stated that while Joseph was "totally on my side," he would minimize her concerns and tell her she was "blowing it out of proportion." April stated that they took R.R. to counseling. The Illinois Department of Children and Family Services (DCFS) investigated the matter, and on October 11, 2010, DCFS sent a letter to Joseph stating that he has been indicated for inadequate supervision and it had been determined that he abused or neglected a child.

¶ 11 The parties separated on April 29, 2012. April stated that except for the first few weeks, R.R. has primarily been in her custody, with Joseph getting her every other weekend.

¶ 12 April agreed that her concerns continued after she and Joseph separated, citing an incident on Veterans Day weekend in November, 2012. April testified that she was sick and asked Joseph to take R.R. for the weekend. She admitted that she made him "feel bad into it," but he agreed to take R.R. April found out later that Joseph had allowed Jocelyn to take R.R. for the day, and R.R. had gone back to Jocelyn's house and A.J. had hugged her while she was there. April testified that at first Joseph denied knowledge of this incident, but later stated that he did not want to tell her because he was afraid that she would blow it out of proportion. R.R. started biting herself and pulling her hair after this incident. April sent R.R. back to counseling.

¶ 13 A hearing on temporary issues was held on June 5, 2013. An agreed order was entered providing that Joseph's visitation with R.R. would occur every other weekend from Friday at 6 p.m. until Sunday at 6 p.m. beginning the weekend of May 31, 2013, and every Tuesday from 5 p.m. to 8 p.m. The order also provided that Joseph would not allow any contact between R.R. and his mother, his sister, or his nephew.

¶ 14 In September, 2013, Joseph violated the temporary order by allowing contact between R.R. and Jocelyn. April testified that Joseph told her "before [she could] blow things all out of proportion" that he had asked R.R. to call Jocelyn in order to thank her for a gift of Six Flags tickets. April stated that R.R. again, starting that evening, "shut down emotionally" and would get angry over nothing. April testified that in response to

this incident, on September 13, 2013, she filed a petition for rule to show cause, to suspend visitation, to appoint a GAL, and for other relief.

¶ 15 April stated that since the temporary order was entered, Joseph has supervised visitation with R.R. for three hours on Saturdays, with April's mother, Karen Powell, supervising the visits. April testified that beginning more recently, on one evening weekday per week, Joseph has unsupervised visitation with R.R.; however, she stated that shortly after the nonsupervised visitation began, R.R. would return home with a bad attitude and tell her that she did not have to listen to her. R.R. also would be upset that Joseph does not spend time with her when she is at his home.

¶ 16 On October 29, 2013, Elaine LeChien was appointed as the parties' GAL. She prepared reports dated February 18, 2014, and March 19, 2015. The GAL's February 18, 2014, report recounted the phone call incident and stated that R.R. knew that she was not supposed to be on the phone with her aunt, but Joseph "didn't care that this behavior was a violation of the court order" and stated that "it is important for [R.R.] 'to know her family.' " The GAL wrote that if Joseph "can truly understand that [R.R.'s] safety is important, [*sic*] agrees to strict guidelines, then I will recommend visitation." Her March 19, 2015, report stated that Joseph wanted his daughter to know his family, but agreed that he would not allow any contact between R.R. and his family. The GAL also reported an incident at one of R.R.'s basketball practices where April and Joseph got into a heated verbal argument in front of R.R.; R.R.'s attendance since that incident has been sporadic, though R.R. stated that she loves basketball. The GAL recommended that Joseph take her to basketball events, but noted that April did not want Joseph to attend. She reported

that she "has concerns" but "[i]f, and only if, [R.R.] is kept away from the family members listed in the previous order, I would recommend that supervised visitation be stopped."

¶ 17 At the August 24, 2015, proceedings, the GAL testified that she has met with R.R. three additional times since her last report and has spoken with the parties and with Karen. She noted that R.R.'s behavior was not good after the unsupervised visits, and that those visits have stopped because of R.R.'s poor behavior upon returning to her mother; though, she noted, the unsupervised visits continued up until the last few weeks because Karen got sick and could not supervise. She testified that the parties cannot get along and R.R. is in the middle; R.R. feels torn and "says what she thinks she's supposed to" because "she doesn't want to get somebody in trouble." The GAL recommended that April have sole custody and felt "very conflicted" about her recommendation for Joseph's visitation. She stated that at first, Joseph "didn't want to believe that [the sexual abuse] happened" and that he did not understand at that time how his thoughts were affecting R.R. However, she believed that Joseph has "gotten better" and noted that R.R. has not had any contact with Joseph's family since the phone call incident. The GAL also testified that she did not know why R.R. misbehaves after visits with her father, as she believes that R.R. enjoys the time she spends with him, though R.R. reports that she gets upset when Joseph does not spend all of his time with her for the few hours that he has with her on visits. The GAL stated that she thinks that Joseph needs to have a relationship with R.R. and that the last two years have been better, but did not know if unsupervised overnight visits would be good for R.R. at this point.

¶ 18 Joseph testified that he was outraged about the sexual abuse of his daughter, and he did not claim that R.R. made it up; however, he testified that he "still [has] that wonder" whether the abuse occurred since he did not witness it. He stated that he never accused R.R. of lying about the incident, but agreed he had accused April of blowing it out of proportion, though he understood that he was "in the wrong for that." Joseph also disagreed that, prior to that evening, he had knowledge that A.J. had been in contact with R.R. on Veterans Day of 2012.

¶ 19 Joseph agreed that in September of 2013, he violated the court's order prohibiting R.R.'s contact with her aunt. He testified that he thought the temporary court order had expired, and that he made a huge mistake that day when he realized the phone call was in violation of the order. He testified that this was the only contact between R.R. and the restricted family members. Joseph also agreed that up until September, 2013, he insisted that R.R. needs to know her family, but he has not insisted since then and agrees that R.R. should have no contact with A.J., Jocelyn, or Jacqueline. From the temporary order of June 5, 2013, until Joseph allowed contact between R.R. and her aunt in September of 2013, Joseph exercised parenting time every other weekend and every Tuesday without restrictions. After the contact, Joseph did not see his daughter until April of 2014. Until the court entered its November 20, 2015, judgment dissolving the marriage, Joseph had supervised visitation; he testified that his parenting time was sporadic at best.

¶ 20 Joseph also testified that April made unilateral decisions regarding R.R.'s health care and religion, and that he believes April will continue to make all the decisions, because it is apparent that she does not want to communicate with him about their child.

Joseph noted that April and Karen do not answer his phone calls, and he leaves voicemail messages that receive no response; he asserted that "it's like calling a fictitious person." Joseph stated that he is willing to work with April but that April does not appear willing to work with him. He believes he will probably not see his daughter again if he is not granted joint custody.

¶ 21 April testified that she was R.R.'s primary caretaker prior to the parties' separation, while Joseph testified that he was the primary caregiver for R.R. from 2010 to 2012. Both parties agree that they do not communicate with each other; Joseph testified that April does not respond to his texts and calls; April testified that Joseph gets angry and belittles her during conversations.

¶ 22 The parties also submitted evidence of their economic situations. The June 5, 2013, agreed order required Joseph to pay \$515 per month child support, taking into account Joseph's temporary reduction in income. In that order, the court stated that either party may argue for modification of the amount at the final hearing, and reserved the issue of retroactive child support.

¶ 23 The parties' testimony at trial revealed that the \$515 child support amount determined by the trial court for the temporary order was based on a reduction in income that Joseph was facing at the time due to decreased hours available at work. Joseph testified that he went to work for another company and had been back to full time work status since about five or six weeks following that order. In 2012, Joseph earned \$71,202 and April earned \$26,556. In 2013, Joseph earned \$64,928 and April earned \$21,186. In 2014, Joseph earned \$71,640 and April earned \$24,774. Joseph listed a monthly gross

income of \$5,843.60 and a monthly net income of \$3,704.29. He listed personal expenses of \$4,801.56 per month and child expenses of \$285 per month. April listed gross monthly income of \$2,064.48 and a monthly net income of \$1,070.10. April listed personal expenses of \$1,702.89 per month and child expenses of \$1,070.10 per month. Both parties were going through bankruptcy proceedings; April filed Chapter 7 bankruptcy proceedings and had been granted a discharge in her bankruptcy petition. Joseph filed Chapter 13 bankruptcy proceedings and was on a repayment plan.

¶ 24 April testified that from the separation until the June 5, 2013 order, Joseph provided no assistance for April or R.R., and April had to go on state aid and borrow from her mother's credit card to make ends meet. Joseph agreed that April had R.R. for most of that time period and that she was taking care of most of R.R.'s expenses, but testified that he did pay April some child support during that time. Joseph stated that April threatened to withhold visitation with R.R. unless he paid her child support, the amount of which would vary. He also testified that he was covering R.R.'s health insurance and intended to maintain that coverage.

¶ 25 April testified that her jewelry was stolen, and as it was insured, \$800 was issued to the parties for the loss. Joseph used the check to pay the property taxes on the marital residence after the parties separated.

¶ 26 Joseph had a 401(k) through his employment, which had a value of \$33,696.33 as of June 30, 2015. He also had two pensions through the Sheet Metal Workers Union, one through the national fund and one through the local fund. He agreed that April should be awarded the marital share of the 401(k) and the pensions.

¶ 27 The temporary order of the trial court also granted Joseph the exclusive possession of the marital home. The parties stipulated that the fair market value of the marital home was \$210,000. The residence had debt of \$192,954.08, resulting in equity of \$17,045.92. Joseph testified that he remains living in the marital home, and \$3,401.77 of his personal expenses relates to his housing and utilities. His girlfriend, Cassandra, also lives there and contributes approximately \$1,500 to \$2,000 per month for living expenses. April testified that immediately after the parties split, she moved to a friend's trailer and R.R. remained with Joseph in the marital home. In June, 2012, she and R.R. moved in with her mother; at this time, April was seeing a former high school boyfriend, Randy Lawhorn, romantically. In August, 2013, April and R.R. moved in with Randy, but April testified that they were no longer in a romantic relationship at that time. April testified that she recently moved back in with her mother and gives her \$400 per month in rent; she also spends \$400 per month paying down credit card debt.

¶ 28 At trial, the GAL submitted a bill for her services in the amount of \$5,090. April requested that Joseph be ordered to pay the fees. She felt this was justified because she requested the GAL in response to Joseph's violation of the court order. Joseph testified that he believed the fees should be split 50/50.

¶ 29 In the trial court's November 20, 2015, order, it noted that it had considered the serious issues raised in the case, as well as the violation of the June 5, 2013, agreed order prohibiting contact between R.R. and her aunt. The court found that it was in R.R.'s best interest that the parties share joint custody, stating:

"[t]hat at all times and until further Order of the Court, the Respondent shall not allow any contact whatsoever between the parties' minor child and the Respondent's nephew, A.J. Such contact includes, but is not limited to, in person, phone, skyping, text messaging, and/or email communication. The minor child may visit and/or spend time with her grandmother and/or her aunt but such visits may not take place if A.J. is present at any time. Any violation of the Order may result in a restriction on contact with the minor child's grandmother and/or her aunt and/or a return to supervised visitation with Respondent." (Emphasis in original.)

Beginning the first weekend after the judgment, the court granted Joseph unsupervised parenting time every other weekend on Saturdays and Sundays from 10 a.m. to 4 p.m. and Tuesdays from 5 p.m. until 8 p.m.; beginning after five weekend parenting times, Joseph would receive unsupervised parenting time every other weekend from Friday at 6 p.m. until Sunday at 6 p.m. and every Tuesday and Thursday from 5 p.m. until 8 p.m. The court also divided R.R.'s holidays and vacations between her parents. The court found it was in R.R.'s best interest to receive counseling pursuant to the GAL's recommendation.

¶ 30 The court granted child support to April in the amount of \$791.90 per month, "[b]ased upon [Joseph's] current net income and other factors applicable including other provisions of this Order." The court noted that this amount was intended to represent approximately 20% of Joseph's net income per month, taking into account the overage he withholds in taxes. April was not awarded retroactive support "based upon other rulings

in this Judgment." The court held that Joseph shall continue to provide the health, medical, prescription, and hospitalization insurance for R.R., and the parties were to evenly divide any additional medical costs not covered by insurance. The parties were to alternate claiming R.R. as an exemption for tax purposes, and to split equally any agreed upon extracurricular activities.

¶ 31 The court awarded Joseph the marital real estate, and awarded April \$5,214.69 as her share of equity in the residence. Joseph was also awarded the furniture and furnishings currently in his possession, his personal belongings, and bank accounts in his name. The court awarded April a list of nonmarital property, including a motorcycle, DVDs, electronics, items related to her work as a nail technician, and various household accoutrements. April was awarded marital property in the form of the Acura automobile, all household furniture currently in her possession, R.R.'s baby items, bank accounts in her name, and personal belongings currently in her possession. Joseph was awarded the furniture and furnishings currently in his possession, his personal belongings, and bank accounts in his name.

¶ 32 The court granted April all of her interest in her Illinois Municipal Retirement Fund and her 401(k) profit sharing plan through her place of employment, with a current value of \$2,323.50. The court noted that Joseph's 50% marital portion of this asset was offset by April's portion of Joseph's pension and retirement accounts. April was awarded 50% of the marital portions of Joseph's pensions; the court calculated this amount as follows:

number of years married while participating in the plan prior to filing for divorce (8)

of years participating in the plan (unknown) X 50%

The court also awarded April half of the value of Joseph's 401(k) plan as of the date of the judgment, less half of the value of her retirement accounts with her current employer, and then adding \$5,214.69 for her equity in the marital residence. The court ordered that Joseph name R.R. as the beneficiary on his life insurance policy.

¶ 33 Acknowledging the parties' bankruptcy proceedings, the court ordered that the parties assume responsibility for any indebtedness, including credit card debt, incurred in his and her own name since the parties' separation in April, 2012. The court ordered Joseph, in addition to his Chapter 13 bankruptcy repayment plan, the responsibility for all expenses and mortgage indebtedness pertaining to the marital real estate. The parties were to hold each other harmless with regard to the assumption of such debts and obligations. The court ordered that each party pay their own attorney fees, and that April pay all the remaining fees owed to the GAL. The court denied April's requests for reimbursement for the insurance checks. April appeals.

¶ 34 April first asserts that the trial court's decision to award the parties joint custody of R.R., rather than awarding her sole custody, was against the manifest weight of the evidence and/or an abuse of discretion. April points to her status as R.R.'s primary caretaker for the past two years, the GAL's testimony regarding the parties' inability to cooperate, R.R.'s bad attitude when she returns from unsupervised visits with her father, the detrimental effect of Joseph's attitude toward R.R.'s sexual abuse, and his repeated accusations that April was blowing the situation out of proportion as evidence that joint

custody is not in R.R.'s best interest. Based on the evidence in the record before us, we disagree with April's assertion.

¶ 35 In determining custody, the trial court should consider all relevant factors, including those listed in section 602 of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/602 (West 2014)), and decide what custodial order serves the best interest of the child. *In re Marriage of Dobey*, 258 Ill. App. 3d 874, 876 (1994). A court may enter an order of joint custody if it determines that joint custody would be in the best interests of the child, taking into consideration factors including the ability of the parents to cooperate effectively and consistently in matters that directly affect the joint parenting of the child. 750 ILCS 5/602.1(c) (West 2014).

¶ 36 In cases regarding custody, a strong presumption favors the result reached by the trial court, and the court is vested with great discretion due to its superior opportunity to observe and evaluate witnesses when determining the best interests of the child. *Dobey*, 258 Ill. App. 3d at 876. Therefore, the trial court's ruling will not be disturbed unless it is against the manifest weight of the evidence or is an abuse of discretion. *Id.* An abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *In re Marriage of Partney*, 212 Ill. App. 3d 586, 590 (1991).

¶ 37 We cannot say that the trial court's decision was unreasonable or not based on the evidence. While April cites an inability to communicate as justification for granting her sole custody, Joseph testified that he attempts to communicate with April, but believes April intentionally fails to communicate with him. Further, April's argument is belied by the parties' ability to agree to the temporary issues in the June 5, 2013, agreed order. In

regards to R.R.'s behavior when returning from unsupervised visits with her father, we note that the trial court accounted for R.R.'s mental health by ordering that R.R. return to counseling and by including a reintroduction period of parenting time for Joseph and R.R. before overnight visitation would begin on a permanent basis. In regards to Joseph's attitude towards R.R.'s sexual abuse, it is clear from his testimony and the reports of the GAL that he has made significant progress over the years since the sexual abuse in his understanding of its serious impact and the importance of protecting his daughter from his nephew. Joseph unequivocally expressed his understanding that the violation of the June 5, 2013, agreed order prohibiting contact between R.R. and her aunt was a mistake. Finally, in coming to its decision to award joint custody, the court specifically noted that it had considered the issues, including Joseph's violation of the order, and clearly outlined the consequences of Joseph ever again allowing contact between R.R. and A.J. For those reasons, we decline to disturb its judgment on the matter.

¶ 38 Next, April asserts that the decision to award Joseph unsupervised visitation of R.R. was against the manifest weight of the evidence. The Act provides that a trial court may restrict visitation if it feels unrestricted visitation would seriously endanger the child's physical, mental, moral or emotional health. 750 ILCS 5/607(a) (West 2014). The appellate court will not overturn the custodial and visitation arrangements ordered by the trial court unless they are against the manifest weight of the evidence, manifestly unjust, or resulted from a clear abuse of discretion. *Stockton v. Oldenburg*, 305 Ill. App. 3d 897, 906 (1999).

¶ 39 April cites R.R.'s poor behavior upon returning from unsupervised visits with her father in support of a finding that Joseph is engaging in conduct "which has a direct negative impact on the mental, moral and emotional health of his daughter." However, we cannot agree that R.R.'s outbursts, if indeed in response to occurrences during Joseph's unsupervised visitation of R.R., rise to the level of Joseph seriously endangering his daughter's health; furthermore, we reiterate that the trial court accounted for such concerns by ordering that R.R. return to counseling and by including a reintroduction period of parenting time. For substantially the same reasons that supported the trial court's decision to award joint custody, we find that the trial court did not abuse its discretion in this instance.

¶ 40 April contests the trial court's order that she pay the entirety of the GAL's fees. On this issue, we agree that this decision was against the manifest weight of the evidence. Any order approving the GAL's fees shall require payment by either or both parents, by any other party or source, or from the marital estate or the child's separate estate. 750 ILCS 5/506 (West 2014). When determining the proper allocation of the fees, the trial court is to consider the total circumstances of the mother as well as the father, which includes consideration of the parents' financial resources and relative ability to pay. *McClelland v. McClelland*, 231 Ill. App. 3d 214, 228 (1992). We first note that while we cannot say that Joseph is in a substantially better position to pay the GAL's fee, the evidence of the parties' financial situations reflects that April is certainly not in a better position than Joseph to pay the fee. Furthermore, as April notes, the need for the GAL's services did not arise until Joseph violated the no-contact court order. Regardless of

Joseph's intentions when the order was violated, we do not believe that April's request for a GAL's services was an unreasonable response to Joseph's actions; there is no evidence of improper motive on her part. Furthermore, neither party requested or expected that April would pay the entirety of the fee. April testified that Joseph should pay, while Joseph testified that the parties should split the fee. We find that the decision for April to pay the entire fee was against the manifest weight of the evidence, and therefore reverse this ruling in favor of the parties dividing the GAL's fees equally.

¶ 41 Next, April contests the trial court's division of Joseph's pension benefits, submitting that her share of the benefits should have been calculated using months of marriage¹ during which the benefits were accumulated divided by the total months that benefits were accumulated, rather than the trial court's method of calculating that time in years.

¶ 42 In a proceeding for dissolution of marriage, the court, in determining the value of the marital and nonmarital property for purposes of dividing the property, has the discretion to use the date of the trial or such other date as agreed upon by the parties, or ordered by the court within its discretion, for purposes of determining the value of assets or property. 750 ILCS 5/503(f) (West 2014). Section 503(d) of the Act requires the trial court to divide marital property in "just proportions," taking into account enumerated factors and any additional factors the court deems relevant in each case. 750 ILCS

¹April suggests 134 months, the approximate time between the parties' marriage and the date of the judgment of dissolution.

5/503(d) (West 2014); *In re Marriage of Dunlap*, 294 Ill. App. 3d 768, 778 (1998). Retirement benefits earned during the marriage in the form of pensions are designated as marital property. *In re Marriage of Davis*, 215 Ill. App. 3d 763, 773 (1991). The marital interest in each payment will be a fraction of that payment, the numerator of the fraction being the number of years (or months) of marriage during which the benefits were being accumulated, the denominator being the total number of years (or months) during which benefits were accumulated prior to divorce. *In re Marriage of Hunt*, 78 Ill. App. 3d 653, 663 (1979).

¶ 43 The parties were married on September 11, 2004. They separated on April 29, 2012. April filed her petition for dissolution of marriage on November 15, 2012. Judgment of dissolution was entered on November 20, 2015. The trial court used the number of years which Joseph participated in his pension plans prior to the date April filed her petition for dissolution of marriage. Thus, the trial court chose not to include the nearly three-year time period in which the parties were proceeding through their divorce in April's award; the trial court may do so in its discretion. The touchstone of proper and just apportionment of marital property is whether it is equitable in nature, and each case must rest upon its own facts; the requirement that the division of property be just and equitable does not mean that it must be mathematically equal. *In re Marriage of Dunlap*, 294 Ill. App. 3d 768, 778 (1998). We therefore cannot say that the trial court's decision was an abuse of discretion.

¶ 44 April next asserts that the trial court erred in denying retroactive child support. She argues that she agreed to the June 5, 2013, temporary order setting child support in a

lower amount on a temporary basis due to Joseph's reduction in income; however, Joseph's reduction in income lasted very few months, and Joseph returned to full time employment almost immediately after entry of the order. April argues that Joseph should be ordered to pay the difference between the trial court's calculation in its judgment and the reduced amount that he paid from July 18, 2013, until November 20, 2015, for the 28-month period between those two orders, as well as the child support owed from the approximately 6-month period between being served with April's petition and the June 5, 2013, order.

¶ 45 The decision to award retroactive child support rests within the sound discretion of the trial court. *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1119 (2004). Here, the trial court stated that April was not awarded retroactive support based on the other rulings in the judgment. Turning to those, we note that in addition to the \$791.90 per month that April was awarded in child support, April received physical marital property, including the 2003 Acura automobile, as well as her portion of the equity in the marital residence and of Joseph's retirement accounts. Further, the parties are to alternate claiming R.R. for tax purposes, they are to evenly split any uncovered medical expenses and any agreed upon extracurricular activities, and Joseph remains responsible for maintaining R.R.'s health insurance. Bearing these facts in mind, we do not agree that the trial court's declination to award April retroactive child support was an abuse of discretion.

¶ 46 April asserts that the trial court abused its discretion in denying her request for contribution towards her attorney fees. Attorney fees are the primary responsibility of the person for whom the services are rendered, and an award of attorney fees is a matter

within the sound discretion of the trial court; its decision will not be disturbed on appeal, absent an abuse of discretion. *In re Marriage of Ziemer*, 189 Ill. App. 3d 966, 969 (1989). A person seeking an award of fees must establish that he is unable to pay the fees and the other party is able to pay them. *Id.*

¶ 47 Here, April argues that the evidence reveals that she has a financial inability to pay attorney fees, as there is a great disparity in the actual earnings and the earning capacity of the parties, that Joseph's girlfriend contributes thousands of dollars per month to his living expenses while April has to borrow money to meet living expenses, that she was denied spousal maintenance, retroactive child support, insurance proceeds from the stolen jewelry, less than exactly half of the equity in the marital residence, and half of Joseph's life insurance policy. April also cites the appointment of a GAL in response to Joseph's violation of the court order as his unnecessarily increasing the cost of litigation. However, while April indeed earns less than Joseph and testified that she cannot pay her attorney fees, she presented no evidence that Joseph is any more able to pay them; simply having a greater net income per month does not establish an ability to pay. In her argument, April simply presents various ways in which she was denied additional financial support and/or a larger portion of the marital estate. We have already addressed Joseph's violation of the court order. Again, we decline to disturb the trial court's decision on this matter.

¶ 48 April argues that the trial court erred in not ordering Joseph to reimburse her for insurance proceeds to cover the loss of her wedding ring. With certain exceptions, "marital property" means all property, including debts and other obligations, acquired by

either spouse subsequent to the marriage. 750 ILCS 5/503(a) (West 2014). April argues that "whether it was acquired before marriage or as a gift," her wedding ring was nonmarital property, and therefore the insurance checks were nonmarital property as they constituted "property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift." 750 ILCS 5/503(a)(2) (West 2014).

¶ 49 However, the presumption of marital property can be overcome only by clear, convincing, and unmistakable evidence, and the party claiming that the property is nonmarital has the burden of proof. *In re Marriage of Weiler*, 258 Ill. App. 3d 454, 461-62 (1994). In other words, in order for April to prevail on this argument, she must prove by clear, convincing, and unmistakable evidence that the jewelry was nonmarital. As no testimony or evidence was presented in support of this contention, she cannot overcome this presumption. Furthermore, we note that the insurance proceeds were in fact used to pay the property taxes on the marital residence, of which she received her share of the equity in the final order. Therefore, the trial court did not abuse its discretion in not ordering Joseph to reimburse April.

¶ 50 For the foregoing reasons, we reverse the trial court's order for April to pay the entirety of the GAL's fees in favor of the parties dividing the cost evenly between them; we affirm the order of the trial court on all remaining issues.

¶ 51 Affirmed in part and reversed in part.