

NOTICE
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2014 IL App (5th) 130117-U

NO. 5-13-0117

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
EVELINE GHATAN,)	St. Clair County.
)	
Petitioner-Appellee,)	
)	
and)	No. 08-D-366
)	
SINA GHATAN,)	Honorable
)	Randall W. Kelley,
Respondent-Appellant.)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice Welch and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's supplemental judgment of dissolution of marriage is vacated and the case remanded for clarification of the court's ruling on the parties' motions to reopen proofs and clarification of what evidence, if any, was relied on by the court at the posttrial hearing.

¶ 2 The respondent, Sina Ghatan, appeals portions of the circuit court's supplemental judgment of dissolution of marriage. Sina contends that the circuit court erred in determining the value of real estate owned by the parties and challenges the circuit court's classification of certain real estate as nonmarital property owned by the petitioner,

Eveline Ghatan. He also appeals the trial court's finding as to the value of his Principal 401(k) plan. Finally, Sina alleges the circuit court erred in failing to reopen proofs to allow him to present evidence that he claims his previous counsel failed to present at trial. For the reasons set forth below, we vacate the supplemental judgment and remand with directions.

¶ 3

BACKGROUND

¶ 4 We set forth those facts relevant to the issues on appeal. The parties were married on June 29, 1980. At the time of the dissolution of marriage, Eveline was 55 years old, and Sina was 64 years old. Two children, who were emancipated at the time of trial, were born of the marriage. Eveline separated from Sina in September 2006 and filed a petition for dissolution of marriage on May 7, 2008.

¶ 5 Eveline filed an initial financial statement with the court as well as two updated financial statements throughout the course of the divorce proceedings. Sina filed a financial statement with the court on August 7, 2008. We note that Sina failed to file an updated financial statement as required by St. Clair County local court rules.

¶ 6 The parties owned 10 parcels of real estate. Eveline maintained that two of the parcels were purchased with funds sent to her by her father and, therefore, were her nonmarital property. One of the 10 parcels was the marital home which Sina maintained as his residence after Eveline separated from him. The remaining parcels were rental properties purchased by the parties during the marriage. Eveline was a real estate agent, and Sina managed the rental properties, collected rents, and made the repairs himself or hired someone to make the repairs.

¶ 7 In December 2008 Eveline filed a notice of claim for dissipation of assets alleging that Sina had collected "thousands of dollars" in rental income from the parties' rental properties but failed to provide Eveline with her share. After a hearing in February 2009, the circuit court ordered each party to manage half of the rental properties until the final distribution of property.

¶ 8 On July 15, 2009, Eveline filed a motion to compel alleging that Sina had failed to produce documents pursuant to discovery requests, including an updated financial statement. On January 13, 2010, Eveline filed a second motion to compel alleging that Sina had failed to comply with discovery requests and that she could not proceed to trial without the documents without great prejudice to her case. On January 19, 2010, Eveline filed a motion for sanctions regarding Sina's failure to comply with discovery requests.

¶ 9 The trial was held on January 27 and 28, 2010. As a preliminary matter the circuit court took up Eveline's motion for sanctions. Ms. Wilson, Eveline's attorney, informed the court that on January 22, 2010, Sina had complied with most of her requests for production. She told the court that she had received a handwritten financial affidavit signed by Sina on January 21, 2010, indicating that the value of Sina's Principal 401(k) account was now \$103,000. Ms. Wilson indicated that Sina did not provide documentation that the 401(k) had decreased by \$68,000 other than the handwritten financial affidavit. Ms. Wilson asked that, as part of the sanction, Sina not be allowed to introduce any document that previously had not been produced.

¶ 10 The circuit court denied Eveline's motion for sanctions but informed the parties:

"I can tell you this, there won't be anything admitted that hasn't been produced back and forth at this point. So if anybody wants to testify to something in addition to or extraneous to documents that have been submitted, any objection in that regard is going to be sustained. Okay. I'm going to give everybody a chance to put in what they've got up to the point we're at."

¶ 11 Sina wanted to call his daughters to testify regarding an allegation of marital misconduct against Eveline. Eveline argued that because there had been no disclosure as to the content of their proposed testimony prior to the day of trial, the daughters should not be allowed to testify. The circuit court agreed with Eveline and did not allow the daughters to testify.

¶ 12 At trial both Sina and Eveline testified as to their respective opinions regarding the value of the marital real estate. The parties agreed to valuations on some of the parcels and disagreed on others. Eveline, a real estate agent for 20 years, described each house, including location, square footage, amenities, number of bedrooms and bathrooms, whether it had a garage, and the most recent purchase price. Eveline is not a licensed appraiser but rather arrived at the values based on her experience as a real estate agent without knowing which parcels of real estate the court would assign to each party. The circuit court admitted into evidence documents detailing what Eveline deemed to be comparable sales for the parcels.

¶ 13 Sina offered into evidence photographs showing the condition of the marital residence and argued that the current condition made it worth less than the value espoused by Eveline. The circuit court admitted the photographs over Eveline's

objections. Sina did not offer into evidence appraisals for the subject properties but provided his own opinion as to why he thought the values were lower. Sina testified that he believed the location and condition of some of the subject properties made them worth less than the values stated by Eveline.

¶ 14 Eveline testified that two of the parcels of real estate were her nonmarital property because they were purchased with funds given to her by her father. For our purposes, the parcels are identified as the Shiloh property and the Belleville property. Sina disputed Eveline's claim, insisting that at no time did Eveline have enough nonmarital funds to have been able to purchase the two properties and, therefore, they must be marital property. The parties stipulated that during the marriage Eveline received gifts of money from her father. These amounts were deposited into Eveline's bank account.

¶ 15 A bank statement from Eveline's account was admitted into evidence. The statement showed that a deposit of \$70,280 was made on October 25, 1999. Eveline testified that the money most likely came from her father although she could not recall the specifics surrounding the deposit. She expressly denied that the money was compensation from a real estate transaction. She testified that her family was the only source from which the money could have come. Eveline testified that her father might have written her a check instead of wiring the money as he had done in the past.

¶ 16 Sina contended that this money did not come from her father but rather came from her work as a real estate agent. He testified that although Eveline might not have earned such a large amount from one real estate transaction, he believed that she waited until she had a number of checks from smaller transactions and made one deposit of \$70,280.

¶ 17 A bank statement that was admitted into evidence showed a balance of \$112,861 in Eveline's account on April 18, 2001. Eveline purchased the Shiloh property for \$43,000 on June 20, 2002, and purchased the Belleville property for \$31,610 on April 23, 2003. The money for the purchase of the two parcels of real estate came from her bank account. Unlike the real estate the parties had purchased together during their marriage, the Shiloh and Belleville properties were purchased in Eveline's name only.

¶ 18 In October 2005 the water pipes burst in the house at the Shiloh property and the entire house flooded. Eveline testified that there was extensive damage to the house. The ceilings in the living room and dining room had collapsed, and all of the floors were damaged. The parties received two insurance checks totaling over \$10,000 for the property damage. Sina paid part of the cost to "dry out" the house and kept the remainder of the insurance money to reimburse himself for work he previously had done to the house. Eveline stated that Sina handed her the key to the house and said: "[H]ere's your home. Go and fix it." Sina did not deny making this statement and instead testified that he told Eveline that she should use her father's money to repair the house.

¶ 19 Sina was in charge of collecting rents and paying bills for the rental properties. Although Sina paid the property taxes on all of the other properties, he conceded that he did not pay property taxes on either the Belleville or Shiloh properties. When Eveline discovered this, she had to redeem two years of back taxes to avoid a tax sale of the Belleville property.

¶ 20 The parties had several investments and retirement accounts, including Sina's Principal 401(k) plan. Sina's financial statement filed with the court on August 7, 2008,

listed the value of the Principal 401(k) plan at \$171,000. At trial in January 2010, Sina testified that the value of his Principal 401(k) plan had dropped to \$103,000. Sina testified that he believed the difference in the amounts was due to how the stock market had performed, but offered no evidence to support the \$68,000 loss in value of the 401(k) plan.

¶ 21 Throughout the course of the trial Eveline repeatedly objected to Sina offering any documents into evidence due to his failure to provide them during the discovery process. On several occasions the circuit court admitted Sina's exhibits over Eveline's objections. However, at the end of the trial Sina attempted to offer into evidence a document he referred to as a "financial statement." It is not clear whether this document was the handwritten financial affidavit referred to by Ms. Wilson in her argument for sanctions. The court stated:

"I've allowed you to testify about everything, and we've heard the testimony of [Eveline] about everything. I've allowed all of that in, and so your explanations of everything, but the documents themselves don't get to come in because they weren't disclosed properly."

¶ 22 At the end of the trial, the circuit court took the matter under advisement. The circuit court gave both parties 30 days to submit their proposed judgments and to provide any additional documents to the court, including documentation of the value of Sina's Principal 401(k) plan.

¶ 23 Sina's trial counsel withdrew from representation on April 27, 2010.

¶ 24 In May 2010 Eveline moved to reopen proofs to submit evidence of previously undisclosed accounts. On May 21, 2010, Sina filed a *pro se* "request for proof of facts" which the circuit court construed in part as a motion to reopen proofs.

¶ 25 A hearing on the motions to reopen proofs was held on June 1, 2010. In response to her motion to reopen proofs, the court stated to Eveline's attorney, "I think I'm going to grant your motion[,] Ms. Wilson[,] to allow you to reopen the case at another date for these—to offer this additional evidence that you wish to offer." When Ms. Wilson argued that Sina's *pro se* "request for proof of facts" was in the nature of a discovery request, the following colloquy occurred:

"MS. WILSON: But I don't think it's a proper request in the first place, to now start discovery after the fact, after the trial is closed.

THE COURT: Well, obviously the trial isn't closed because you're wanting to put in new evidence. So I mean, we're at a point in time, we certainly know that [Sina] was not satisfied with the evidence that was presented and there is additional evidence that he wants to introduce."

¶ 26 At the June 1, 2010, hearing, Sina insisted that he had a tax document that would reveal that the \$70,280 that Eveline claimed was a gift from her father was actually proceeds from the sale of marital real estate and, therefore, marital property. The circuit court stated to Sina, "Everything you feel like you didn't get into evidence on that date you get to get in on the 22nd." The court also stated: "I'm going to consider everything. You'll be able to present what you want on the 22nd, we're going to have closing arguments and then I'm going to rule after that. Okay?" The circuit court ordered Sina to

produce any documents he intended to use at the final hearing within 14 days and ordered Eveline to respond to Sina's request for proof of facts. In its written order, the circuit court set the matter for oral arguments "after the motion to reopen proofs and request for proof of facts are heard and resolved."

¶ 27 On June 15, 2010, Sina filed a *pro se* motion seeking sanctions for what he called Eveline's "multiple violations of [the] court's discovery orders." There were numerous attachments to Sina's *pro se* motion.

¶ 28 At the June 22, 2010, hearing, the circuit court noted that although the matter originally had been set for closing arguments and summation, the parties had each filed various motions that would be addressed that day, including the motions to reopen proofs. Ms. Wilson informed the court that the purpose of Eveline's motion to reopen proofs was to add four previously undisclosed accounts into evidence to be considered by the court in the division of property. Two of the accounts belonged to Eveline. Ms. Wilson explained that the statements from these accounts continued to be sent to the marital residence after Eveline moved out. After trial when Eveline was searching to discover if there were other accounts she had not disclosed, she found two CDs previously not disclosed by Sina. The exhibits were marked for identification, but it is not clear whether they were admitted into evidence. They were not included in the record on appeal.

¶ 29 At the hearing, Sina complained that his former attorney possessed certain documents that he had failed to present to the court at trial. The following exchange occurred:

"THE COURT: Okay. But we're passed [*sic*] that now. You're getting it in now. Okay. Anything that he didn't produce—

WITNESS: Right.

THE COURT: —for me, you're—I'm letting you do—that's the purpose of this thing—"

¶ 30 At trial Sina had insisted that the \$70,280 deposit made into Eveline's bank account on October 25, 1999, was payment she received from her work as a real estate agent. However, at the hearing, Sina claimed to have a settlement statement establishing that the \$70,280 was actually proceeds from the sale of a house on Creston Drive in Belleville which he claimed was marital property. At trial Eveline had claimed that the \$70,280 was a gift from her father, although she could not recall the details. After reviewing the settlement statement provided by Sina, Eveline agreed that the \$70,280 deposit came from the sale of the house on Creston Drive on October 22, 1999. It is not clear whether the settlement statement was admitted into evidence, although it may have been among the documents attached to Sina's *pro se* motion for sanctions. Eveline disputed, however, that the house on Creston Drive was marital property. She claimed that the Creston house was purchased with money that she received from her family and, therefore, was nonmarital property. The Creston house was in her name only, and the proceeds from the sale were deposited into Eveline's account.

¶ 31 In support of his argument that the property was marital, Sina provided the court with a tax return showing the income from the sale of the Creston property. It is unclear whether the tax return was admitted into evidence, and it was not included in the record

on appeal.

¶ 32 Eveline's attorney made a number of objections to documents that Sina attempted to introduce during the hearing because they previously had not been disclosed. The following colloquy was held:

"THE COURT: Ms. Wilson, just so the record is clear, this information that [Sina] is presenting me, I'm not taking as evidentiary. I'm taking it as summation, so, therefore, your objection that you previously posed—or your posing of hearsay nature is probably more of a foundation nature.

And just so the record reflects that your objection is also based upon a—for a foundation basis as far as whether or not any of this evidence—any of this evidence that [Sina] is arguing was actually introduced during the trial proceeding.

MS. WILSON: Okay. Could I clarify then, is he on to the oral arguments of the closing arguments—

THE COURT: I—

MS. WILSON: —at this point?

THE COURT: The only way any of this stuff's ever going to get in front of me is if—if it's—if it's a summary of his position, and that's what—that's how this is—I'm accepting how this is being presented."

¶ 33 Ms. Wilson offered into evidence a document that she claimed had been provided to her by Sina's former attorney indicating that Sina had liquidated the \$171,000 Principal 401(k) account and had opened a new account into which he deposited \$103,000. When the court asked whether the document was being offered as a summation document, Ms.

Wilson responded that the document was one that the court had ordered Sina to produce. The document was marked for identification as Petitioner's Exhibit No. 6, but it is not clear whether it was admitted into evidence, and it was not included in the record on appeal.

¶ 34 Although the court took possession of all of the exhibits offered into evidence by the parties at the hearing on June 22, 2010, it is not clear from the record whether the exhibits were admitted into evidence. After the hearing, the circuit court granted a judgment of dissolution of marriage and took the property issues under advisement.

¶ 35 On December 21, 2010, the circuit court entered a supplemental judgment of dissolution of marriage on all pending issues. The circuit court determined the values of the marital real estate in its division of property. The circuit court noted that both Sina and Eveline testified as to their respective opinions as to the value of the marital real estate and that Eveline, a real estate agent for 20 years, had provided comparable sales on all of the subject properties. The circuit court, as the trier of fact, found Eveline's evidence as to the valuation of the real estate to be credible and reliable but found the opinion evidence provided by Sina to be speculative at best and not based on any objective criteria.

¶ 36 The circuit court next found that Eveline had met her burden to establish that the Belleville and Shiloh properties were her nonmarital property. As a basis for its finding, the circuit court noted that unlike all of the other real estate acquired by the parties during the marriage, the two parcels of nonmarital real estate were placed solely in Eveline's name. The circuit court determined that Eveline had enough nonmarital funds to allow

her to purchase the Shiloh and Belleville properties. The circuit court noted in its supplemental judgment that in the posttrial proceedings "wherein both parties moved to reopen proofs," Sina had produced a settlement statement from the sale of a house located at Creston Drive in Belleville. The court further noted that the house, which was solely in Eveline's name, was sold on October 22, 1999, for approximately \$70,280, and this amount corresponded to the deposit made into Eveline's sole account on October 25, 1999. Eveline had testified that the house was bought by her family and that the proceeds from the sale were returned to her solely. In making its finding, the circuit court referenced the settlement statement even though it is unclear whether it had been admitted into evidence.

¶ 37 The circuit court's finding regarding the nonmarital property also found support in the actions of Sina himself. The court concluded that Sina would not have felt that he needed to be reimbursed for the work he had done on the Shiloh property if he believed that he was an owner of the home. The circuit court pointed out that Sina did not deny Eveline's testimony that he had handed her the key to the Shiloh property and said, "It is yours." Finally, the circuit court concluded that Sina's failure to pay the taxes on either the Shiloh or Belleville properties, when he had paid the taxes on the marital real estate, reinforced the fact that Sina did not treat the disputed property as marital property.

¶ 38 In its supplemental judgment, the circuit court noted that the parties' investments and retirement accounts were listed in Petitioner's Exhibit 18 admitted at trial. The circuit court also noted that the list of accounts was modified in "posttrial proceedings" when four more accounts were added to the group of investments. It appears that the

circuit court relied on the documents offered by Eveline as part of her motion to reopen proofs even though it is unclear whether the referenced documents were admitted into evidence. They were not included in the record on appeal.

¶ 39 The circuit court found the value of Sina's Principal 401(k) plan to be \$171,000. Although at trial Sina testified that the value of his Principal 401(k) plan was \$103,000, the circuit court noted that Sina's financial statement filed on August 7, 2008, indicated that the value was \$171,000. Despite the fact that Sina was ordered to produce proof that he had not withdrawn the missing funds, he did not do so. As a result, the court assessed the value of the 401(k) based on the only credible evidence before it, which consisted of the 2008 financial statement filed by Sina.

¶ 40 Sina, who was once again represented by counsel, filed a motion to reconsider. Following a hearing on May 25, 2011, the circuit court denied Sina's motion to reconsider. This appeal followed.

¶ 41 ANALYSIS

¶ 42 At the outset we note that Eveline filed a motion to strike the use of certain documents referred to in Sina's appellate brief as well as a motion to strike those sections of the brief referencing the disputed documents contending that the documents were not admitted into evidence. These motions were taken with the case on appeal. A review of the record indicates that it is unclear whether some of the documents relied on by Sina in his brief were admitted into evidence at the June 22, 2010, posttrial hearing. Other documents may have been attachments to Sina's *pro se* motion for sanctions. However, what is also unclear is whether the circuit court admitted any of Eveline's exhibits into

evidence at the posttrial hearing. For the reasons set forth below, we decline to rule on Eveline's motions to strike.

¶ 43 On appeal Sina argues, among other things, that the circuit court erred in failing to reopen proofs to allow him to present evidence that his former attorney possessed but failed to present at trial. "The denial of a motion to reopen proofs is within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion." *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1120 (2004). Here, it is not clear that the circuit court denied the motions to reopen proofs. A careful review of the record reveals that the circuit court did not explicitly rule on the parties' motions to reopen proofs. Although the circuit court expressly indicated that the purpose of the June 22, 2010, posttrial hearing was to allow the parties to introduce evidence, it appears that the court treated the entire hearing as a summation of the trial evidence. This would indicate that the circuit court denied the parties' motions to reopen proofs. However, the record also reveals that the circuit court took possession of the offered exhibits, and even relied on some of the exhibits in its supplemental judgment. This would indicate that the circuit court granted the motions to reopen proofs. Given the conflict in the record as to what evidence was considered by the circuit court, this court is unable to decide the merits on appeal. Our only recourse is to require that the matter be remanded to the circuit court for clarification.

¶ 44 Accordingly, we vacate the circuit court's supplemental judgment of dissolution of marriage and remand this matter to the circuit court to (1) clarify its ruling on the parties' motions to reopen proofs; (2) clarify what exhibits, if any, were admitted into evidence

and relied on by the circuit court in its supplemental judgment; and (3) conduct such further proceedings as may be necessary to determine the issues in this case.

¶ 45

CONCLUSION

¶ 46 For the reasons stated, we vacate the supplemental judgment of the circuit court and remand with directions.

¶ 47 Supplemental judgment vacated; case remanded with directions.