

No. 1-09-1057

**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).

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IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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<i>In re</i> MARRIAGE OF:	)	Appeal from the
	)	Circuit Court of
MARCIA O'HARA	)	Cook County, Domestic
	)	Relations Division
Petitioner-Appellee,	)	
	)	No. 01 D 017400
v.	)	
	)	Honorable
RICHARD O'HARA,	)	Barbara Meyer,
	)	Judge Presiding.
Respondent-Appellant.	)	

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JUSTICE STERBA delivered the judgment of the court.  
Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment.

**ORDER**

¶ 1       *Held:* The trial court's factual findings regarding the parties' ages, health, potential to earn future income and contribution of marital assets were not against the manifest weight of the evidence. The trial court's finding that respondent gifted three real estate properties to the marital estate was not against the manifest weight of the evidence. The trial court did not abuse its discretion when it divided the marital estate equally between petitioner and respondent.

¶ 2 The trial court dissolved respondent Richard O'Hara's (Richard) and petitioner Marcia O'Hara's (Marcia) 25 year marriage on November 10, 2008. Richard appeals the trial court's equal division of the marital property. On appeal, Richard contends that the trial court unfairly divided the marital estate because it failed to consider his age, health, financial contributions to the marriage and potential to earn future income. Richard also contends that the trial court erred in classifying three real estate properties (properties) as marital property because he purchased the properties prior to the marriage, and he did not intend to gift the properties to the marital estate when he transferred the properties' titles to a trust naming himself and Marcia as co-beneficiaries. For the reasons that follow, we affirm the trial court's judgment.

*Background*

¶ 3 Richard and Marcia were married on October 12, 1983. When Marcia filed her petition for dissolution of marriage, she was 49 years old and Richard was 59 years old. When the trial court dissolved the marriage Marcia was 56 years old and Richard was 67 years old. Marcia and Richard had two children during their marriage; Kathryn was born on June 15, 1984, and Shannon was born on February 10, 1988.

¶ 4 From 1974 to 2001, Richard operated an antique business. The business was named Connoisseur Antiques, Inc. until its involuntarily dissolution in 1992, and then Richard continued the business as an unincorporated entity named O'Hara Galleries (OG). Richard operated OG from 1992 through 2001. In 2001, Richard was convicted of conspiracy to possess stolen property with a value in excess of \$5,000.00, which traveled across a state or U.S. border after having been stolen, and of traveling from Illinois to Wisconsin to commit extortion. He was

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sentenced to two consecutive five year terms of imprisonment. While incarcerated, Richard had hip and knee surgery.

¶ 5 Marcia maintained the household and cared for the children. Marcia is a licensed real estate broker, and used her license mainly to purchase and sell marital investment property. After Richard's incarceration in 2001, Marcia incorporated and operated Marcia O'Hara Galleries, Inc. (MG), which was an antique business.

¶ 6 During Richard's incarceration, Marcia managed all of the properties that the parties owned. The parties stipulated to the classification of the following properties as marital property:

- (1) 1429 North Artesian, Chicago, Illinois;
- (2) 1431 North Artesian, Chicago, Illinois;
- (3) 1919 West North Avenue, Chicago, Illinois;
- (4) 1555-57 North Milwaukee Avenue, Chicago, Illinois; and
- (5) 950 Pinecroft, Lake Forest, Illinois.

The parties disputed the marital or non-marital classification of the following three properties:

- (1) 1530 Hudson, Chicago, Illinois;
- (2) 1580 North Wells, Chicago, Illinois; and
- (3) 705 to 707 Wells Street, Chicago, Illinois.

Richard purchased the three disputed properties before marrying Marcia. In 1986, three years after he married Marcia, Richard transferred title to these properties to a land trust naming him and Marcia as co-beneficiaries. Richard placed no restrictions on Marcia's ability to exercise control over the trust.

¶ 7 The trial court entered a judgment for dissolution of marriage (judgment) on November 10, 2008. Richard was still incarcerated when the trial court entered the judgment. After considering all of the relevant factors under section 503(d) of the Illinois Marriage and Dissolution of Marriage Act (Act) entitled "Disposition of Property," the trial court divided the marital estate equally between Richard and Marcia. 750 ILCS 5/503(d) (West 2008). According to the judgment, no party received maintenance payments, and both parties received their non-marital property.

¶ 8 Additionally, the trial court classified the three disputed properties as marital property. The judgment incorporated a summary of the evidence the parties presented to support their position regarding the properties' classification, which included the parties' testimony and written letters. Richard testified that he did not intend to gift the properties to the marital estate at the time of the transfer. Richard presented letters that he and Marcia wrote also demonstrating that he did not intend to gift the properties. Likewise, Marcia presented letters to establish that Richard did intend to gift the properties to the marital estate. In one letter, however, Marcia indicated that she did not believe Richard intended to gift the properties. Marcia testified that Richard intended to gift the properties to the marital estate, and she made any contrary statements in a letter because she feared Richard would hurt her. After considering the evidence, the trial court held that Richard failed to present clear and convincing evidence to rebut the presumption of a gift. Richard filed a post-trial motion and a supplement to the motion, which the trial court denied. Richard timely filed this appeal.

¶ 10 Section 503(d) of the Act governs the distribution of marital property, and it states, in relevant part:

“[The court] also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors, including:

- (1) the contribution of each party to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property, including (I) any such decrease attributable to a payment deemed to have been an advance from the parties' marital estate under subsection (c-1)(2) of Section 501 and (ii) the contribution of a spouse as a homemaker or to the family unit;
- (2) the dissipation by each party of the marital or non-marital property;
- (3) the value of the property assigned to each spouse;
- (4) the duration of the marriage;
- (5) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children;
- (6) any obligations and rights arising from a prior marriage of either party;
- (7) any antenuptial agreement of the parties;

- (8) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;
- (9) the custodial provisions for any children;
- (10) whether the apportionment is in lieu of or in addition to maintenance;
- (11) the reasonable opportunity of each spouse for future acquisition of capital assets and income; and
- (12) the tax consequences of the property division upon the respective economic circumstances of the parties.” 750 ILCS 5/503(d) (West 2008).

¶ 11 This court reviews the trial court's factual findings regarding each of the 503(d) factors adopting a manifest weight of the evidence standard of review. *In re Marriage of Vancura*, 356 Ill. App. 3d 200, 205 (2005). A trial court’s ruling is against the manifest weight of the evidence when the opposite conclusion is clearly evident, or when the findings are unreasonable, arbitrary, or not based on the evidence. *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992).

¶ 12 The trial court has broad discretion in its final distribution of marital property, and its property division will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Polsky*, 387 Ill. App. 3d 126, 135 (2008). A trial court abuses its discretion “when no reasonable person would take the view adopted by the trial court.” *Id.* The touchstone of a proper distribution of marital property is whether it is equitable in nature. *In re Marriage of Wolf*, 180 Ill. App. 3d 998, 1004 (1989).

¶ 13 Richard contends on appeal that the trial court's factual findings regarding the parties' ages and health, his significant contribution of marital assets, and his inability to earn future income were against the manifest weight of the evidence. Richard claims that the trial court's property division left him in a relatively poor economic condition considering his advanced age, knee and hip surgery, and incarceration, especially in comparison to Marcia's younger age, education and marketability of her real estate license. Richard contends that the trial court's factual findings were against the manifest weight of the evidence, and thus, the trial court abused its discretion in dividing the marital property equally between him and Marcia. We disagree.

¶ 14 First, the trial court considered the parties' ages and their health when deciding the property division. 750 ILCS 5/503(d)(8) (West 2008). The trial court noted that Marcia was 56 years old and Richard was 67 years old when it entered the judgment. The trial court also noted that Marcia did not offer any evidence apart from her own testimony concerning any health ailments. The trial court further noted that Richard underwent hip and knee surgery when he was incarcerated. Richard did not offer evidence that the surgery was debilitating, or that he was suffering from other ailments. Although about an 11 year age difference exists between Richard and Marcia, they are in comparable age brackets. The trial court's factual findings relating the parties' ages and health were not against the manifest weight of the evidence.

¶ 15 Next, the trial court considered each of the parties' ability to acquire capital assets and earn income in the future when it divided the marital estate. 750 ILCS 5/503(d)(11) (West 2008). Richard received one half of approximately \$6.3 million in marital property. Richard also received all of his non-marital property, which included \$440,000 of stock and the antique business's inventory. Richard operated an antique business from approximately 1974 to 2001,

and this prior experience in conjunction with the business's inventory will undoubtedly enable Richard to operate a financially successful business if he so chooses. As a business entrepreneur, Richard's prior incarceration would not likely impact his ability to be gainfully employed or earn income. Richard may also choose to expand his real estate investment portfolio and, based on the trial court's property distribution, he has the financial resources to acquire additional real estate to own and manage. Richard's potential to earn income in the future is comparable to Marcia's ability to earn income as a licensed real estate broker. The trial court's findings that the parties were capable of being self-supporting and possessed the potential to acquire assets and earn income in the future were not against the manifest weight of the evidence. Also, Richard's incarceration when the trial court entered the judgment and his inability to actively earn income at that time does not render the trial court's factual finding regarding his earning potential unreasonable, arbitrary or not based on the evidence.

¶ 16 Lastly, the trial court considered each parties' contributions to the marital estate when it allocated the marital property. 750 ILCS 5/503(d)(1) (West 2008). Even though Richard was the main financial contributor throughout most of the marriage, that fact alone does not entitle him to a greater percentage of the marital estate. *In re Marriage of Polsky*, 387 Ill. App. 3d at 136-37. Marcia did not work during most of the marriage, because, as the trial court noted, she stayed home to care for the couple's two children. See *Id.* (recognizing that in a long-term marriage, a spouse's role as a homemaker grows in importance and can be an offsetting factor to the other spouse's financial contributions). After Richard's incarceration, Marcia preserved the marital estate by operating the antique business, managing the investment properties the parties owned and running the domestic household. Based on these facts, it was not against the manifest weight



of the evidence for the trial court to find that the parties contributed equally to the marital estate.

¶ 17 After considering the evidence in the record in conjunction with all of the section 503(d) factors, the trial court's factual findings in the case at bar were not against the manifest weight of the evidence. Based, in part, on the parties' equal contribution to the marital estate whether through financial contributions or by providing homemaking and caregiver services, as well as the parties' equal ability to acquire assets and earn income in the future, the trial court's equal division of the marital estate was not an abuse of discretion. The record also supports the trial court's statement that it considered all of the evidence presented, the witnesses' credibility, stipulations, applicable case law and relevant portions of the Act.

¶ 18 Richard next contends that the trial court's classification of the three disputed properties as marital property was against the manifest weight of the evidence. Richard claims that the letters he presented along with his testimony establish that he did not intend to gift the properties to the marital estate.

¶ 19 In a dissolution of marriage proceeding, the trial court must classify all property owned by the parties as either marital or non-marital. *In re Marriage of Didier*, 318 Ill. App. 3d 253, 258 (2000). This court will reverse a trial court's property classification if it was against the manifest weight of the evidence. *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 649 (2008). As previously stated, a ruling is against the manifest weight of the evidence when the opposite conclusion is clearly evident, or when the trial court's findings are unreasonable, arbitrary, or not based on the evidence. *Id.* The party asserting that property is non-marital bears the burden of establishing that classification. *Didier*, 318 Ill. App. 3d at 258. Uncertainty regarding a

property's classification as either marital or non-marital should be resolved in favor of classifying it as marital. *Berger v. Berger*, 357 Ill. App. 3d 651, 660 (2005).

¶ 20 Section 503(b)(1) of the Act applies to Richard's property classification claim. Section 503(b)(1) states:

“(b)(1) For purposes of distribution of property pursuant to this Section, all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage, *including non-marital property transferred into some form of co-ownership between the spouses, is presumed to be marital property*, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (a) of this Section.” (Emphasis added.) 750 ILCS 5/503(b)(1) (West 2008).

¶ 21 Richard and Marcia agree that he acquired the three properties before their marriage. The dispute arises from Richard's transfer of the properties during the marriage into a trust naming him and Marcia as co-beneficiaries, and whether that act transmuted non-marital property into marital property. "A transmutation occurs when the contributing spouse evidences his intent to make a gift of the nonmarital property to the marriage by significantly changing the character of the property to marital." *In re Marriage of Nicks*, 177 Ill. App. 3d 76, 79 (1988). A spouse's affirmative act of changing the non-marital property's title to a joint tenancy or another form of co-ownership with the other spouse creates a presumption that the property was gifted to the

marital estate. *Id.* Clear and convincing evidence overcomes the presumption of a gift. *In re Marriage of Didier*, 318 Ill. App. 3d at 266. Clear and convincing evidence requires “a high level of certainty and is considered to be more than a preponderance while not quite approaching proof beyond a reasonable doubt.” *In re Marriage of Gordon*, 233 Ill. App. 3d 617, 647 (1992). Richard bears the burden of establishing by clear and convincing evidence that his transfer of the three properties to the trust naming Marcia as one beneficiary was not a gift.

¶ 22 Richard offered as evidence letters that he and Marcia wrote after the transfer.<sup>1</sup> In one letter, the trial court noted that Marcia wrote that she did not believe Richard intended to gift the properties to the marital estate. Marcia, however, testified<sup>2</sup> that she wrote the statement because

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<sup>1</sup> Richard fails to cite where in the 3,351 pages of the record and supplemental record the letters are located. Parties to an appeal are required to cite "evidence in support of their contention on appeal [and] 'to the pages of the record' where the evidence is found." *Engle v. Foley & Lardner, LLP*, 393 Ill. App. 3d 838, 854 (2009). The failure to provide proper citations to the record results in a waiver of the unsupported facts and arguments. *Id.* "This court is not a depository in which an appellant may dump its arguments without factual foundation in hopes that [the court] will sift through the entire record to find support for a determination favorable to appellant's position." *Mikrut v. First Bank of Oak Park*, 359 Ill. App. 3d 37, 51-52 (2005). Because Richard fails to cite where in the record we may find the actual letters addressing the intent issue, we must adopt the trial court's interpretation and analysis of those letters.

<sup>2</sup> Similar to the letters that the parties wrote, the parties fail to cite where in the record, supplemental record and videotaped testimony this court may find the relevant testimony. For the same reasons that we previously stated regarding review of the written letters, this court must

she feared what Richard would do to her otherwise. The trial court also noted that the letters Richard wrote were inconclusive regarding his intent. Regardless of the letters' content, the trial court held that the letters were not controlling because they were written after Richard transferred the properties and not when the transfer actually occurred. Even if the letters were controlling, the trial court stated that the content of Marcia's letters negated the content of Richard's letters.

¶ 23 Also, Richard testified that he did not intend to gift the properties to the marital estate when he made the transfer whereas Marcia testified that he had donative intent. We defer to the trial court's determination of a witness's credibility and the weight placed on the testimony. See *Stallings v. Stallings*, 75 Ill. App. 3d 96, 100 (1979). The record is devoid of evidence suggesting that the trial court abused its discretion in considering the parties' credibility and the weight that their testimony should carry. Based on the limited evidence presented, Richard failed to meet his burden of establishing with clear and convincing evidence that he did not intend to gift the three properties to the marital estate, and that he intended the properties to remain non-marital.

¶ 24 Contrary to Richard's claim, the trial court did, in fact, conduct an analysis of case and statutory law to determine the properties' classification. Richard contends that the trial court erred in not relying on *In re Marriage of Cook*, 117 Ill. App. 3d 844 (1983), and *Wencordic Enterprises, Inc. v. Berenson*, 158 Ill. App. 3d 913 (1987), which he cited for the general proposition that a gift requires the elements of donative intent, relinquishment of control and acceptance of the alleged gift. The trial court correctly found the cases Richard cited to distinguishable. *In re Marriage of Cook* is distinguishable because it addresses a different

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adopt the trial court's interpretation and recitation of the parties' testimony.

provision of section 503 and the gift in that case was between a father and daughter. 117 Ill.

App. 3d 844 (1983). *Wencordic Enterprises, Inc.* is also distinguishable because that case involved a gift to an attorney, who was not a spouse. 158 Ill. App. 3d 913 (1987)

¶ 25 Additionally, the trial court considered statutory law and did not err in relying on section 503(b)(1) of the Act to determine the properties' classification. Section 503(b)(1) provides that when non-marital property's title is changed to reflect co-ownership with a spouse, a gift of that property is presumed and only clear and convincing evidence overcomes that presumption. 750 ILCS 5/503(b)(1) (West 2008). Apart from the spouse's intent when he gave property to his spouse, the following factors are relevant considerations to determine if a gift was made: "(1) the size of the gift relative to the entire estate; (2) who paid the purchase price, made improvements, and paid taxes for the property with solely-acquired funds and exercised control and management over the property; (3) when the asset was purchased; and (4) how the parties handled their prior financial dealings with each other." (Internal citations omitted.) *In re Marriage of Guerra*, 153 Ill. App. 3d 550, 556 (1987).

¶ 26 Richard's act of transferring the three properties to a trust and naming Marcia as one of the two beneficiaries created a change in the properties' title from Richard's sole ownership to co-ownership with Marcia. Prior to the transfer, Marcia had no interest in the properties, but after the transfer, she had an interest in the properties equivalent to Richard's interest. Thus, based on section 503(b)(1), Richard presumably gifted the properties to the marital estate. Not only did the trial court consider Richard's intent when he transferred the properties, but it also considered the other factors that signify a gift. The trial court noted that the parties' marriage lasted over 20 years, they did not keep their finances separate and Marcia did not work during the marriage until

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Richard's incarceration. The marital estate exceeded \$6.3 million in worth and the parties only disagreed on the classification of the three properties that Richard transferred to a trust. The trial court also noted that Richard purposely transferred the properties into a trust naming him and Marcia as beneficiaries and placed no restrictions on Marcia and her ability to exercise control over the trust. The trial court recognized, however, that Richard had control over the properties prior to his incarceration. Richard's control over the properties prior to his incarceration, even in conjunction with his testimony and the letters indicating that he did not intend to gift the properties, were not clear and convincing evidence sufficient to overcome the presumption that the transferred properties were a gift to the marital estate. Accordingly, the trial court's classification of the three disputed properties as marital property was not against the manifest weight of the evidence.

¶ 27 Affirmed.