2013 IL App (1st) 110638-U

FIFTH DIVISION
March 1, 2013

Nos. 1-11-0638 and 1-11-2319, Consolidated

In re MARRIAGE OF:	)	Appeal from the Circuit
	)	Court of Cook County
SUSAN KUROTSUCHI,	)	
	)	
Petitioner-Appellee and Cross-Appellant,	)	
	)	No. 07 D 10206
and	)	
	)	
JAMES KUROTSUCHI,	)	Honorable
	)	Kathleen Kennedy,
Respondent-Appellant and Cross-Appellee.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

ORDER

¶ 1 Held: A genuine issue of material fact exists regarding the existence of an attorney-client relationship between respondent and petitioner. Partial summary judgment to petitioner classifying her pre-marital residence as her non-marital property is, therefore, reversed and remanded for further proceedings. Court's finding that petitioner's e-mail communications with her attorney were protected by the attorney-client privilege is affirmed. Court's failure to enforce its temporary maintenance order and to sanction petitioner for her failure to comply with the order is affirmed. Given reversal of the finding that petitioner's pre-marital home is her non-marital property, the allocation of the parties' marital assets is necessarily reversed and remanded for further proceedings.

¶ 2 This appeal arises from orders of the circuit court dissolving the marriage of petitioner Susan Kurotsuchi and respondent James Kurotsuchi and distributing their

assets pursuant to the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/101 *et seq.* (West 2010)). James appeals, arguing the court erred in (1) granting partial summary judgment to Susan and declaring the marital residence to be Susan's non-marital property; (2) refusing to consider e-mail correspondence between Susan and her attorney; and (3) failing to enforce a temporary maintenance order. Susan cross-appeals, arguing the court erred in its allocation of the marital estate. We affirm in part, reverse in part and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 Susan is a licensed real estate broker and James is an attorney. Certified as a Professional Golfers' Association professional, James works in the golfing industry and has reduced his law practice to part-time. The parties married in 1994. Susan filed a petition for dissolution of marriage in 2007. James filed a counter petition. The parties have no children.

¶ 5 Susan filed a motion for partial summary judgment, seeking a finding from the court that the parties' marital home at 1723 W. Rascher Avenue in Chicago, Illinois (the Rascher property) was her non-marital property.[1] Susan had owned the property before the marriage and during the marriage executed a deed conveying the property from Susan to James and Susan as tenants by the entirety. Susan argued James was

[1] Pursuant to section 503(b)(1) of the Act, non-marital property transferred into some form of co-ownership between the spouses during a marriage, such as into a tenancy by the entirety, is presumed to be marital property. 750 ILCS 5/503(b)(1) (West 2010).

her attorney and, because he received a benefit from the Rascher transfer, a presumption of undue influence by James arose with regard to the transfer and the transfer deed should be invalidated.[2]

¶ 6 Attachments to Susan's motion for partial summary judgment show Susan purchased the Rascher property in 1991, three years prior to the marriage. She lived there alone until James moved in. James had not contributed to the purchase of the property. On September 4, 1998, Susan executed a warranty deed conveying the Rascher property to herself and James as tenants by the entirety in consideration of $10.00. The deed stated that it was "prepared by James A. Kurotsuchi, Attorney at law" at the Rascher address.

¶ 7 The same day, Susan and two partners, Andra Boliker and Kenneth Matykiewicz, purchased a property at 1039 North Wolcott Avenue in Chicago (the Wolcott property) as an investment. The seller was Richard Reingold. James represented Reingold in the transaction and executed the warranty deed for the conveyance on behalf of Reingold, writing "Richard Reingold by James Kurotsuchi, attorney in fact" on the signature line. The deed states the instrument was "prepared by James A. Kurotsuchi, Attorney at law, 1723 West Rascher Avenue, Chicago."

¶ 8 The title insurance policy on the Wolcott property was issued through American Title Insurance Fund and stated it was "issued by James Kurotsuchi" to Susan, Boliker

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[2] A presumption of undue influence arises when an attorney enters into a transaction with a client after the attorney-client relationship exists and the attorney benefits from the transaction. *Bruzas v. Richardson*, 408 Ill.App.3d 98, 103 (2011).

and Matykiewicz. In January 1999, Boliker and Matykiewicz each executed a quit claim deed conveying their respective interests in the Wolcott property to Three Big Names L.L.C. The quit claim deeds listed Susan as the managing partner of the LLC and stated the deeds were "prepared by James A. Kurotsuchi Attorney at Law" at the Rascher Avenue address.

¶ 9 In her motion and a verified affidavit attached to her motion, Susan averred, in relevant part, that James, "in his capacity as an attorney," represented her and her partners in their purchase of the Wolcott property, prepared and reviewed the documents for the transaction, held the earnest money and prepared the title. She stated James again acted as the partners' attorney in connection with the subsequent transfer of the Wolcott title from the individual partners to the LLC, an entity the partners had formed for the purpose of renovating and reselling the Wolcott property.

¶ 10 Susan stated that, during James' representation of the partners in the Wolcott purchase, he advised her that she risked personal liability to creditors in connection with the Wolcott property and advised her to protect her interest in the Rascher property by transferring title to James and Susan jointly as tenants by the entirety. Susan asserted she signed the Rascher deed transferring title to James and Susan jointly as tenants by the entirety on the same day that Wolcott closed. She further asserted that she signed the deed at James' urging, in the belief that the Rascher property would remain her separate non-marital property. Susan stated James gave her no consideration for the transfer and did not explain that transferring the Rascher property into a tenancy by

entirety would result, upon dissolution of the parties' marriage, in conversion of her non-marital property to marital property. Susan also claimed that, a week after she filed for dissolution, James told her he had manipulated her and had made sure to get his name on "everything."

¶ 11 James filed a response and then an amended response. In his amended response, he argued summary judgment was precluded because numerous questions of material fact existed regarding whether an attorney-client or fiduciary relationship existed between the parties and whether he breached a duty to Susan. He also argued questions of material fact existed regarding whether Susan gave the Rascher property as a gift to the marriage. In support, James attached two e-mails from Susan to her attorney in which she discussed the dissolution of marriage.

¶ 12 James further asserted that Susan and her partners negotiated with Reingold, the seller, directly and that Boliker, an attorney, represented the partners in the Wolcott purchase. James stated that he had Reingold's power of attorney and had prepared and signed the warranty deed. He also stated that he had prepared all the closing documents as was customary for a seller's attorney and that he was paid by Reingold. James asserted Susan had always done his typing prior to the marriage and up until the time that she filed for divorce. He claimed Susan had prepared all of James' legal documents for any real estate transaction for his law firm, had prepared quit claim deeds in the past and had prepared "these deeds as well." He claimed Boliker prepared various legal documents regarding the LLC, including the transfer deeds.

¶ 13 James denied that he advised Susan during the Wolcott transaction or that he recommended the Rascher transfer. He asserted he did nothing to pressure or entice Susan to transfer the Rascher property into tenancy by the entirety. James stated Susan had repeatedly told him that she did not need his advice, had done just fine before she met him and did not need his advice for any transaction related to the Wolcott property. James maintained that he did not prepare the deed, Susan did. He claimed that Susan typed the Rascher deed, "placing in the specific language, 'tenancy by the entirety.' " James asserted Susan had a vast knowledge of real estate law and a specific knowledge of tenancy by the entirety as a result of her training and study for her biannual licensing exam.

¶ 14 In a verified amended affidavit, James stated he "did not have an attorney/client relationship concerning the Rascher property with my wife, [Susan], and[,] therefore, no fiduciary duty existed." He asserted the Wolcott transaction and the Rascher transaction were two completely independent transactions regarding two completely different properties. He stated the only connection between the two transactions, if any, was for the convenience in recording the deeds since he was going to the office of the recorder of deeds concerning the Wolcott transaction. James claimed conveyance of the property into tenancy by the entirety was a gift to the marriage by Susan and he believed it was Susan's intention that the Rascher property become a marital asset. He further stated he discovered the e-mails from Susan to her attorney "on our computer at home."

¶ 15 Susan replied, submitting affidavits from Matykiewicz and Boliker in which each asserted that James represented the partners as an attorney for the Wolcott purchase. Each stated their understanding throughout the course of the Wolcott transaction that James was representing the partners in their purchase of the property. They asserted James never advised any of the partners that his relationship with Reingold might constitute a conflict of interest in his representation of the partners. Matykiewicz and Boliker claimed that, to the best of their knowledge, James prepared and reviewed the documents necessary for the partners to purchase the property and caused the deed to be recorded. Matykiewicz further stated James had represented him on other matters and Matykiewicz had paid him for his legal services. Boliker stated she was a corporate attorney specializing in Federal Trade commission regulatory issues, had never practiced real estate law, had no experience in real estate law and she had prepared the documents necessary to create the LLC.

¶ 16 In August 2008, the court issued an order awarding James $1,000 per month in temporary maintenance from Susan and ordering Susan to continue paying the household bills as she always had. The court ordered "James shall use his best efforts to increase his earnings from his law practice or golf career." Two months later, Susan filed a motion requesting the court to modify the order to require James to keep a diary of his job search efforts and provide Susan's counsel with weekly updates regarding those efforts or to terminate temporary maintenance. Susan stopped paying the maintenance in February 2009. She later testified she could not afford to pay and "I did

not think I should have to pay." She continued paying the household expenses. James did not move out of the marital residence until September 2010 and did not contribute to the expenses. The court continued Susan's motion to modify until the hearing on the petition for dissolution.

¶ 17 Susan filed two motions for sanctions in connection with James' failure to respond to discovery and his allegations in his response to the motion for partial summary judgment. On August 20, 2009, following argument on Susan's motion for partial summary judgment, the trial court held that James's use of the e-mails was a violation of the attorney-client privilege and the court would not consider the e-mails in deciding the motion for partial summary judgment.

¶ 18 On September 24, 2009, the court granted partial summary judgment to Susan, holding the Rascher property was non-marital. It considered neither the e-mails between Susan and her attorney nor James' initial response, finding the response superceded by his amended response and Susan's reply thereto. The court found no genuine issue of material fact as to the attorney-client relationship between Susan and James. It stated James did not contest the existence of such a relationship regarding the Wolcott transaction and the attorney-client relationship "doesn't end because a different property is involved, and a connection [between the Wolcott purchase and Rascher transfer] is not necessary."

¶ 19 The court held that, regardless of James' assertion that Susan actually prepared the Rascher deed, the deed itself reflects that James, as the attorney, prepared it and

"saying you're not the attorney does not make that true." The court then found James' fiduciary duty to Susan and the presumption of undue influence in the transaction arose as a matter of law and James' amended response and filings were insufficient to raise a genuine issue of material fact to overcome the presumption. The court held, as a matter of law, that Susan was entitled to partial summary judgment on the status of the Rascher property and the property was non-marital. The court denied James' motion to reconsider.

¶ 20 On January 28, 2011, the court entered a judgment dissolving the parties' marriage, determining marital and non-marital assets and allocating the marital estate. It reiterated its earlier finding that the Rascher property was Susan's non-marital property. Finding Susan's non-marital assets ($394,293.62) exceeded James' non-marital assets ($65,159.80) by a disproportionate $329,123.82, the court found it equitable to award James a disproportionate share of the marital assets. It held:

> "Although the [Act] does not require the court to divide marital assets in a way that equalizes total assets in a case in which the parties have disproportionate non-marital assets, this factor weighs in favor of [James] receiving a disproportionate share of the marital assets. Considering all the factors together[,] it is equitable to do so."

¶ 21 The court allocated $249,999 outstanding on a home equity line of credit (HELOC) executed by both parties and secured by the Rascher property to Susan. The court noted that, although the HELOC was a marital debt, it was equitable to order

Susan to be solely responsible for it because (a) the HELOC was secured by Susan's non-marital property which had substantial equity and (b) to hold the parties jointly responsible for the large debt would be contrary to the IMDMA's policy of severing the parties' economic ties and promoting the finality of judgments.

¶ 22 Although "troubled by [Susan's] use of self-help," the court granted her motion to modify the temporary maintenance order, terminating the temporary maintenance award to James effective February 1, 2009. It found James failed to present credible evidence that he used his best efforts to increase his earnings from his law practice or golf career as provided by the temporary maintenance order. The court stated "[t]emporary maintenance is equitable in nature, and [James] does not come with clean hands" and noted that James' trial testimony contradicted his allegations in his request for temporary maintenance. The court denied James' request for a maintenance award and for retroactive or past due temporary maintenance and barred Susan from receiving maintenance. It granted Susan's motions for sanctions and ordered a hearing on her attorney fees.

¶ 23 The court denied Susan's motion to reconsider and, on August 15, 2011, granted Susan's petition for attorney fees. James filed a timely notice of appeal on August 17, 2011, and Susan timely filed notice of her cross-appeal on August 24, 2011.

¶ 24 ANALYSIS

¶ 25 There are four issues before us. James argues the court erred in (1) granting partial summary judgment to Susan and declaring the Rascher property to be Susan's

non-marital property; (2) refusing to consider e-mail correspondence between Susan and her attorney; and (3) failing to enforce an order awarding James temporary maintenance. Susan argues the court erred in allocating the marital estate.

¶ 26 1. Partial Summary Judgment

¶ 27 James first argues the court erred when it granted partial summary judgment to Susan, holding the Rascher property was Susan's non-marital property.

¶ 28 Pursuant to section 503(b)(1) of the Act, it is presumed that property acquired by a spouse after marriage and before a judgment of dissolution of marriage, including non-marital property transferred into some form of co-ownership between the spouses, is marital property. 750 ILCS 5/503(b)(1) (West 2010). Where a spouse places title to non-marital property into tenancy by the entirety with a spouse during marriage, a presumption arises that a gift of the property was made to the marital estate and the property becomes marital property. 750 ILCS 5/503(b)(1) (West 2010); *In re Marriage of Orlando*, 218 Ill.App.3d 312, 318 (1991). A spouse may overcome this presumption by showing by clear and convincing evidence that the property falls into one of the categories listed in section 503(a) of the Act, none of which are applicable here. 750 ILCS 5/503(a), (b)(1) (West 2010); *In re Marriage of Gattone,* 317 Ill.App.3d 346, 352 (2000). Susan transferred her non-marital Rascher property into a tenancy by the entirety with James, her spouse, during the marriage. Therefore, a presumption arose that she made a gift of the property to the marital estate and the property became marital property.

¶ 29 The court, however, held, as a matter of law, that the Rascher property was Susan's non-marital property. It did so on the basis of another presumption: where an attorney-client relationship exists and the attorney benefits from an agreement or transaction he entered into with the client, a presumption of undue influence arises. *Bruzas v. Richardson*, 408 Ill.App.3d 98, 103 (2011). Attorney-client transactions, although not void, are presumptively fraudulent, owing to a public policy against an attorney using his position of trust and power to take unfair advantage of a client in a transaction. *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill.App.3d 1019, 1035 (2007). A presumption of undue influence is not conclusive, and the attorney may rebut it with clear and convincing evidence that the transaction or agreement was fair, equitable and just. *Bruzas*, 408 Ill.App.3d at 103; *In re Marriage of Pagano*, 154 Ill.2d 174, 185 (1992).

¶ 30 James argues the court erred in granting partial summary judgment to Susan because a question of fact existed about whether he had an attorney-client relationship with Susan regarding the transaction. He argues, in the alternative, that we must decide, as a matter of first impression, whether the presumption of undue influence overrides the presumption of a gift. He asserts that where there are conflicting presumptions, the presumptions cancel each other out and the court can consider neither presumption in deciding a disputed issue.

¶ 31 A drastic means of disposing of litigation, summary judgment should be granted only when the right of the moving party is clear and free from doubt. *Mashal v. City of*

Chicago, 2012 IL 112341, ¶ 49. The movant has the burden of production on a summary judgment motion, and the movant's affidavits may be contradicted by deposition testimony or other evidence. *Mashal*, 2012 IL 112341, ¶ 49. When ruling on a motion for summary judgment, we construe the pleadings, depositions, admissions and affidavits strictly against the movant and liberally in favor of the respondent. *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219 (1994). Summary judgment is granted only when " 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Axen v. Ockerlund Construction Co.*, 281 Ill. App. 3d 224, 229 (1996) (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)). We review the trial court's entry of summary judgment *de novo*. *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 462 (2003).

¶ 32 Before we address the main issue regarding whether the court erred in finding an attorney-client relationship existed as a matter of law, we briefly address James' alternative argument. As James asserts, courts have held that, where a case involving the determination of the marital or non-marital nature of property is "subject to *these conflicting presumptions,* the presumptions are considered to cancel each other out" and the trial court can then determine classification of the property without resort to the presumption. *(*Emphasis added.) *In re Marriage of Didier*, 318 Ill.App.3d 253, 258-59 (2000) (quoting *In re Marriage of Hagshenas*, 234 Ill.App.3d 178, 186-87 (1992)); see also *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 88; *In re Marriage of*

Romano, 2012 IL App (2nd) 091339, ¶ 73. Unlike in the cited cases, however, there are no conflicting presumptions here.

¶ 33 In each of the cited cases, the same two presumptions were at issue: the presumption that any property acquired by a spouse during marriage is marital property (750 ILCS 5/503(b) (West 2010)) and the presumption that property transferred from a parent to a child is presumed to be a gift to the receiving spouse and non-marital property (*In re Marriage of Didier*, 318 Ill.App.3d at 258). These presumptions arose simultaneously from the same area of law (classification of property under the Act) and directly conflicted. In the case at bar, the presumptions neither arise from the same area of law nor conflict. The presumption of undue influence arises in the context of an attorney-client relationship and involves the determination of the validity of a transaction between attorney and client. The presumption of gift to the marriage arises under the Act and involves the classification of property as marital or non-marital. The presumptions do not conflict and James' argument is without merit.

¶ 34 We now turn to whether Susan, as the movant for partial summary judgment, met her burden to show that the existence of an attorney-client relationship between James and her was clear and free from doubt. "The attorney-client relationship is a voluntary, contractual relationship, only created by a retainer, an offer to retain or a fee paid. *People v. Simms*, 192 Ill.2d 348, 382 (2000). The contract of retainer may be made like any other contract: it may be express or implied, written or oral. *Zych v. Jones*, 84 Ill. App. 3d 647, 651 (1980). It cannot be created by the attorney alone or by

the attorney and a third party without authority to act. *Simms*, 192 Ill.2d at 382. "The attorney-client relationship is consensual and arises only when both the attorney and the client have consented to its formation." *Torres v. Divis*, 144 Ill. App. 3d 958, 963 (1986). The client must manifest her authorization that the attorney act on her behalf, and the attorney must indicate his acceptance of the power to act on the client's account. *Torres,* 144 Ill. App. 3d at 963.

¶ 35 There is a genuine issue of material fact regarding whether James had an attorney-client relationship with Susan. The basis for Susan's assertion that she had an attorney-client relationship with James regarding the Rascher transfer is her assertion, supported by affidavit, that James advised her, during his representation of the partners during the Wolcott transaction, to transfer the Rascher property into a tenancy by the entirety in order to protect it from Wolcott-related creditors. Susan asserted James represented her and her partners in the Wolcott transaction "in his capacity as an attorney," prepared and reviewed necessary documents, held the earnest money for the purchase in his client fund account and wrote the title for the purchase. She claimed James told her during his representation of the partners that a tenancy by the entirety was the only way to insulate the Rascher property, "assured" her the transfer into both of their names would not diminish her interest in any way and never explained the ramifications.

¶ 36 Susan also presented the warranty deed for the Wolcott purchase and the subsequent deeds transferring the partners' interests to the LLC, all of which identify

"James A. Kurotsuchi attorney at law" as the preparer of the documents. She also presented the affidavits by Matykiewicz and Boliker in which each avers his or her understanding throughout the course of the Wolcott transaction that James was representing the three partners in their purchase of the property and James prepared and reviewed the documents necessary for the partners to purchase the property and caused the deed to be recorded.

¶ 37 In direct rebuttal of Susan's assertions, James filed an amended response denying that he represented the partners in the Wolcott purchase and that he had an attorney-client relationship with Susan. James' amended response contains his certification pursuant to section 1-109 of the Illinois Code of Civil Procedure (735 ILCS 5/1-109 (West 2010)) that his statements in the response are true and correct. This certification is the equivalent of an affidavit under Supreme Court Rule 191 and the statements are admissible as evidence. See *US Bank National Ass'n V. Villasenor*, 2012 IL App (1st) 120061, ¶ 33; *Hoxha v. LaSalle National Bank*, 365 Ill. App. 3d 80, 85 (2006).

¶ 38 In James' amended response, he admitted that he prepared the closing documents and title insurance for the Wolcott transaction but asserted he did so as Reingold's attorney and he was paid by Reingold. He asserted Boliker, not he, represented the parties in the Wolcott transaction and drafted the LLC transfer deeds. James denied Susan's assertion that he advised her to make the Rascher transfer during his representation of the partners in the Wolcott transaction. He asserted Susan

never asked for his legal advice, consistently told him she did not need his advice and never listened to his advice. James denied preparing the Rascher deed. He maintained Susan had done all of his typing and she had prepared the Rascher deed, as well as the LLC quitclaim deeds.

¶ 39 In James' amended affidavit, he averred he did not have an attorney-client relationship with Susan concerning the Rascher property. He stated that the Wolcott and Rascher transactions were two completely independent transactions and the only connection between them was for the convenience in recording the deeds. James asserted he "did nothing to entice, pressure, force or coerce Susan into executing the Rascher Deed." He stated Susan knew the consequences of the transfer as a result of her licensing studies and she intended the Rascher property to become a marital asset.

¶ 40 James amended response and affidavit raise genuine issues of material fact regarding Susan's assertion in her motion for partial summary judgment that James and Susan had an attorney-client relationship. Susan's claims are based on her declaration that James represented the partners during the Wolcott purchase. She supported her assertion with her affidavit and those of Boliker and Matykiewicz. However, Susan made no assertion that James had an agreement to represent the partners or Susan, whether verbal or written, express or implied. Further, James denied representing the partners and Susan. He asserted that Boliker represented the partners for the Wolcott purchase, he represented Reingold and he prepared the closing documents as Reingold's attorney. He also asserted Susan prepared the Rascher deed, never asked

for nor heeded his advice and she was well-aware of the consequences of the Rascher transfer. Susan's right to partial summary judgment is not clear and free from doubt. Her motion was ruled on before depositions of either party were taken and inquiry into these issues was barred during trial. The trial court erred in granting partial summary judgment to Susan on the classification of the Rascher property as her non-marital property. We, therefore, reverse the court's grant of partial summary judgment to Susan.

¶ 41 2. E-Mails Between Susan and Her Attorney

¶ 42 James argues the trial court erred in refusing to consider the e-mails from Susan to her attorney in its ruling on Susan's claim that the Rascher residence was her non-marital property. The court had held that James's use of the e-mails between Susan and her attorney was a violation of the attorney-client privilege between Susan and her attorney and refused to consider them in deciding Susan's motion for partial summary judgment. The trial court's determination of the admissibility of evidence lies within the court's sound discretion and we will not reverse the court's determination absent an abuse of that discretion. *People v. Manning*, 182 Ill.2d 193, 219 (1998). A court abuses its discretion where its decision is arbitrary or fanciful or one that no reasonable person would make. *Manning*, 182 Ill.2d at 219-220.

¶ 43 Pursuant to Supreme Court Rule 201(b)(2), communications made in confidence by a client to her attorney are protected from disclosure by the attorney-client privilege. 134 Ill. 2d R. 201(b)(2) (West 2010); *People v. McRae*, 2011 IL App (2d) 090798, ¶ 29.

The attorney-client privilege is an exception to the duty to disclose. *Pietro v. Marriott Senior Living Services, Inc.*, 348 Ill.App.3d 541, 551 (2004). Whether the privilege protects a communication from discovery requires an examination of the circumstances surrounding the communication. *McRae*, 2011 IL App (2d) 090798, ¶ 29. The party claiming protection of the privilege has the burden to show: "(1) the statement originated in confidence that it would not be disclosed; (2) it was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services; and (3) it remained confidential." *Pietro,* 348 Ill.App.3d at 551. "The privilege is to be strictly confined within its narrowest limits and limited solely to those communications which the claimant either expressly made confidential or which he could reasonably believe under the circumstances would be understood by the attorney as such." *Center Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 32.

¶ 44 It is uncontested that Susan sent the two e-mails to the attorney she had retained to represent her in the dissolution action and that the contents of the e-mails concerned the dissolution. Susan could reasonably believe the e-mails would be understood by her attorney to be confidential and remained so. The e-mails are, therefore, presumptively protected by the attorney-client privilege.

¶ 45 James argues, however, that Susan waived any attorney-client privilege attached to the e-mails. Waiver is an exception to the attorney-client privilege. *Center Partners, Ltd.*, 2012 IL 113107, ¶ 35. The attorney-client privilege belongs to and can only be waived by the client. *Center Partners, Ltd.*, 2012 IL 113107, ¶ 35. Waiver can be

express or implied. *Center Partners, Ltd.*, 2012 IL 113107, ¶ 66. The determination of whether a client waived the privilege must be made on a case-by-case basis. *Center Partners, Ltd.*, 2012 IL 113107, ¶ 66. If waiver is found, then we turn to the scope of the waiver and whether waiver applies to all communications relating to the subject matter. *Center Partners, Ltd.*, 2012 IL 113107, ¶ 67.

¶ 46 James asserts Susan waived the privilege when she used the parties' shared computer to send the e-mails and sent the first e-mail from the parties' shared e-mail account. He asserts Susan's failure to delete the first e-mail to her attorney, sent from a shared computer with at least one shared e-mail account and with shared computer and e-mail passwords, forfeited any expectation of confidentiality because she knew the e-mail was available to a third person. He further asserts that, although it is not clear from which computer Susan sent the second e-mail, once the attorney-client privilege has been waived by one disclosure, all other disclosures on the same subject matter are also waived.

¶ 47 The question of whether Susan waived any expectation of confidentiality regarding the e-mails is one of fact and the facts are singularly lacking here. In his amended affidavit, James claimed he discovered the e-mails from Susan to her attorney "on our computer at home." But he does not explain how he came to have access to the e-mails. There is some argument to be made that, had Susan left a printed copy of the e-mail where James could find it or had left it showing on the shared computer screen where James could read it, then she waived the confidentiality

attached to the e-mails. See *Parnes v. Parnes*, 80 A.D. 3d 948, 915 N.Y.S. 2d 345 (2011) (husband sent e-mails to his attorney from home computer; wife found printout of one e-mail on husband's desk and used it to discover husband's passwords and access his other e-mails; court held husband waived the attorney-client privilege for the e-mail he left on his desk but the other e-mails remained protected). But James does not assert that he came to see the e-mails in this way. He does not explain how he came to see the e-mails at all other than to claim that they were stored on a shared computer.

¶ 48 It is unrebutted that the parties shared a computer and an e-mail account during their marriage. But James presents no actual evidence that either of the e-mail accounts used by Susan to communicate with her attorney was an account she shared with James. Susan sent the first e-mail on October 8, 2007, two days before she filed for dissolution, from an e-mail account named "sj.enteract@rcn.com." Although James claims the "sj" refers to the parties' first initials and shows this was a shared account, this is an inference without support. Importantly, James does not state that he had the password to this account and, if he did, how he came to have that password.

¶ 49 Susan sent the second e-mail sometime after October 16, 2007, from an account named "rascher17@gmail.com." There is nothing to show this e-mail account was shared. Further, prior to the court's decision that it would not consider the two e-mails, James filed a "motion for access to computer to retrieve computer files." In the motion, James claimed Susan "confiscated" the parties' joint computer at or around the

time she filed her petition for dissolution on October 10, 2007, and denied him access thereto. He claimed Susan changed the passwords to the computer and joint e-mail account and requested the court to order Susan to grant him access to his computer work files. Susan sent the second e-mail more than six days after she had filed for dissolution, *i.e.,* more than six days after James claimed she had confiscated the computer, changed the passwords and denied him access thereto. James does not explain how he came to have access to an e-mail sent from a computer and an e-mail account to which he did not have passwords. This leads to the conclusion that he misappropriated the second e-mail.

¶ 50 When Susan changed the passwords shortly after she filed her petition for dissolution, she had every expectation that any communications she sent to her attorney from that computer would remain confidential and protected from disclosure to anyone. James does not assert that Susan left either e-mail where he could see it. In fact, he provided no evidence as to how he accessed either of the e-mails.

¶ 51 The court made its decision to exclude the e-mails after hearing argument on Susan's motion for partial summary judgment. There is no transcript of this hearing in the record. James, as the appellant, has the burden to present a sufficiently complete record of the proceedings at trial to support his claim of error. *Foutch v. O'Bryant*, 99 Ill.2d 389, 391 (1984). In the absence of such a record on appeal, we must presume that the order entered by the trial court was in conformity with law and had a sufficient factual basis. *Foutch*, 99 Ill.2d at 392. Any doubts arising from the incompleteness of

the record will be resolved against the appellant. *Foutch*, 99 Ill.2d at 392. As there is no transcript of the hearing, all we have are James' unsupported assertions that Susan sent the first e-mail from a shared computer and that "sj.enteract@rcn.com" was a shared e-mail account and she thereby waived the attorney-client privilege protecting both e-mails. Given this absence of evidence, we presume the court followed the law and had a sufficient basis for its decision to exclude the e-mails. We, therefore, find that the court did not abuse its discretion when it refused to consider the e-mails in deciding Susan's motion for partial summary judgment.

¶ 52 James argues, in the alternative that, if we did find the e-mails to be protected by the attorney-client privilege, we should still order the court to consider the e-mails on the basis that "fundamental fairness requires evidence to be admitted over a claim of privilege where the privilege is being used to manipulate the litigation." He asserts the contents of the e-mails directly contradict Susan's assertions at trial that James manipulated her into transferring the Rascher property into joint ownership and that she had no idea of the consequences of the transfer. Putting aside the question of whether "fundamental fairness" can override the attorney-client privilege, we merely note that the contents of the e-mails do not show, as James is inferring, that Susan lied to the trial court at trial and was using the privilege as a sword rather than a shield.

¶ 53 In the first e-mail, Susan told her attorney, "I still absolutely do not remember feeling manipulated in anyway [*sic*] in terms of putting the house in joint tenancy. I don't remember even doing it. Nonetheless, clearly I was an idiot and he was thinking,

planning to protect his financial interests." In the second e-mail, she told her attorney, ""I absolutely do not remember why/when I transferred the deed to the house into joint tenancy. Sorry. I'm sure I just thought that's what married people do. Live and learn." We are hard-pressed to see how these e-mails contradict Susan's position at trial that she was unaware of the consequences of transferring the property into a tenancy by the entirety.

¶ 54 3. Enforcement of Temporary Maintenance Order

¶ 55 James argues the court erred in failing to enforce the August 20, 2008, order requiring Susan to pay James $1000.00 per month as temporary maintenance. Susan had filed a motion to modify the order and, in February 2009, stopped paying the temporary maintenance. Two years later, the court granted Susan's motion and terminated the temporary maintenance effective February 2009. It denied James retroactive temporary maintenance and did not sanction Susan for her failure to pay. James asserts Susan's failure to pay the court ordered temporary maintenance is *prima facie* evidence of contempt and the court should have found Susan in contempt of court, required her to pay James $22,000 in temporary maintenance and sanctioned her.

¶ 56 Wilful disobedience of an order of the court to the detriment of another party can lead to a determination of indirect civil contempt. *Bank of America, N.A. v. Freed*, 2012 IL App (1st) 113178, ¶ 20. It is for the trial court to decide, as a question of fact, whether a party is guilty of contempt and we will not reverse the court's decision unless

it is against the manifest weight of the evidence. *Bank of America, N.A.*, 2012 IL App (1st) 113178, ¶ 20. " 'The burden initially falls on the petitioner to prove by a preponderance of the evidence that the alleged contemnor has violated a court order.' " *Bank of America, N.A.*, 2012 IL App (1st) 113178, ¶ 20 (quoting *In re Marriage of Charous*, 368 Ill.App.3d 99, 107-08 (2006)). It then shifts to the alleged contemnor to show that noncompliance was not willful or contumacious and valid excuse existed for failure to follow the order." *Bank of America, N.A.*, 2012 IL App (1st) 113178, ¶ 20 (quoting *In re Marriage of Charous*, 368 Ill.App.3d 99, 107-08 (2006)).

¶ 57 The problem with James' argument is, as Susan points out, that James never moved to enforce the August 20, 2008, order. He did not move for an order requiring Susan to comply with the order, let alone file a petition seeking a finding of contempt for her failure to comply. The court addressed enforcement of the order solely on the basis of Susan's motion to modify, not because James requested it. Courts have inherent authority to punish a party for contempt for failure to comply with a valid court order (*Circle Management, LLC v. Olivier*, 378 Ill.App.3d 601, 612-13 (2007)) but are not required to do so *sua sponte*.

¶ 58 Further, the temporary maintenance order required James to "use his best efforts to increase his earnings from his law practice or golf career." After hearing extensive testimony from both parties regarding their financial situations, job prospects and contributions to living expenses, the court terminated James' temporary maintenance effective February 2009. It found James failed to present "credible

evidence" that he used his best efforts to increase his earnings as required by the order. It noted that James' trial testimony regarding his payment of expenses during the marriage contradicted his allegations in his request for temporary maintenance and James did not "come with clean hands."

¶ 59 The propriety, amount and duration of maintenance lie within the trial court's discretion. *In re Marriage of Hasabnis*, 322 Ill. App. 3d 582, 592 (2001). We will not reverse the court's decision regarding termination of maintenance unless the court's decision was arbitrary, fanciful or unreasonable or no reasonable person would take the same view. *In re Marriage of Hasabnis*, 322 Ill. App. 3d 582, 592 (2001). The present and future earning capacity of each party is a factor to be considered in awarding maintenance. 750 ILCS 5/504(a)(3) (West 2010).

¶ 60 Here, the court found James's testimony regarding his earning capacity and his efforts to increase his income as required by the order so unpersuasive that complete retroactive termination of the maintenance was warranted. The credibility of the witnesses and weight to be given to their testimony is for the trier of fact, here the trial court, to decide. *In re Marriage of Anderson*, 409 Ill.App.3d 191, 199 (2011). We will not substitute our judgment for that of the trial court regarding James' credibility. Given that James did not comply with the court's requirement that he use his best efforts to increase his income, the court did not abuse its discretion when it terminated the temporary maintenance and denied James retroactive maintenance.

¶ 61 The trial court has the discretion to modify maintenance retroactive to " 'the date

on which the nonmoving party receives "due notice" from the moving party of the filing of the modification petition.' " *In re Marriage of D.*, 2012 IL App (1st) 101876, ¶ 46 (quoting *In re Marriage of Hawking*, 240 Ill.App.3d 419, 426 (1992)). James received such due notice on October 27, 2008, the date on which Susan filed her petition to modify his temporary maintenance. *In re Marriage of D.*, 2012 IL App (1st) 101876, ¶ 46. The court's termination of temporary maintenance effective February 1, 2009, more than three months after James received due notice of Susan's petition to modify, was not an abuse of its discretion. *In re Marriage of D.*, 2012 IL App (1st) 101876, ¶ 46. Accordingly, the court did not err in failing to sanction Susan or to order her to pay retroactive temporary maintenance.

¶ 62 4. Allocation of Marital Estate

¶ 63 Susan argues the court abused its discretion in its allocation of the entire HELOC debt to Susan's marital estate. The HELOC was secured by the Rascher property and, at dissolution, had a $249,999 balance due. The trial court found the HELOC was a marital debt but allocated the entire $249,999 balance to Susan. Susan argues the court abused its discretion in awarding the debt solely to her because it resulted in an inequitable distribution of $114,753.30 in net marital assets to Susan (22%) and $418,694.24 to James (78%). She also argues the court erred in failing to reimburse her non-marital estate for advances made from the HELOC to pay off marital debt. Susan's arguments have been rendered moot by our holding that the court erred in granting partial summary judgment to Susan on the classification of the Rascher

property.

¶ 64 Under section 503(d) of the Act, the court must divide marital property, both assets and debts, in "just proportions." *In re Marriage of Orlando*, 218 Ill. App. 3d 312, 319 (1991). "Just proportions" mandates an equitable, rather than an equal, division of marital property. *In re Marriage of Orlando*, 218 Ill. App. 3d at 319. We will not reverse a court's distribution of the marital estate unless it is against the manifest weight of the evidence and, therefore, an abuse of the court's discretion. *In re Marriage of Abma*, 308 Ill. App. 3d 605, 614 (1999).

¶ 65 As the court found, the HELOC is a marital debt. The parties executed the HELOC during the marriage, were jointly and severally liable on the HELOC and used advances from the HELOC almost exclusively to benefit the marriage by funding the acquisition of marital assets and payment of marital expenses renovation of the Wolcott property.

¶ 66 As a marital debt, the HELOC must be divided in just proportions. *In re Marriage of Orlando*, 218 Ill. App. 3d at 319. In determining such just proportions, the court must take into consideration all relevant factors, including "the value of the property assigned to each spouse" and the economic circumstances of each spouse upon division of the property. 750 ILCS 5/503(d)(3), (5) (West 2010); *In re Marriage of Orlando*, 218 Ill. App. 3d at 319. In deciding the allocation of marital property, the court must consider the value of the non-marital property assigned to each spouse. *In re Marriage of Hapaniewski*, 107 Ill. App. 3d 848, 853 (1982); 750 ILCS 5/503(d)(3) (West 2010).

¶ 67 As we reverse the trial court's finding that the Rascher property was Susan's non-marital property as a matter of law, we necessarily vacate its findings regarding the economic circumstances of each spouse upon division of the property and its allocation of the marital estate. The court will decide such on remand, after a full evidentiary hearing regarding the classification of the Rascher property as marital or non-marital property. The allocation of assets challenged by Susan is vacated and her arguments regarding that allocation are moot. The appropriate allocation of assets will necessarily be revisited by the trial court upon a determination of the appropriate classification of the Rascher property.

¶ 68 Conclusion

¶ 69 For the reasons stated above, we reverse the court's grant of partial summary judgment to Susan; affirm the court's finding that the e-mails from Susan to her attorney are protected by the attorney-client privilege; affirm the court's decision to retroactively modify the temporary maintenance order; and vacate the court's allocation of assets contained in the judgment for dissolution.

¶ 70 Affirmed in part; reversed in part; remanded.