No. 2—09—0860
Order filed January 18, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF SANJAY AGARWAL, Petitioner-Appellee, and MONIKA AGARWAL, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 07—D—2491 Honorable Terence M. Sheen, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Bowman and Birkett concurred in the judgment.

ORDER

Held: Trial court classification of certain property as nonmarital was not against the manifest weight of the evidence.

On May 22, 2009, the trial court entered a judgment for dissolution of marriage between the parties. Monika Agarwal appeals, contending that the trial court erred in classifying two assets, a piece of property in Indore, India, and a Porsche, as the nonmarital property of Sanjay Agarwal. For the reasons that follow, we affirm the judgment of the trial court.

The following facts were found by the trial court or admitted by the parties and are not disputed on appeal. The parties were married in a Hindu religious ceremony in India on August 10, 1996. Thereafter, Monika (who had previously lived in India) joined Sanjay in Illinois. On September 2, 1997, the parties underwent a civil marriage ceremony in Cook County. At trial, Sanjay argued that the date of the marriage was this later date. However, the trial court found that the marriage took place in August 1996, and Sanjay has not appealed that finding. The parties had three children together. On November 2, 2007, Sanjay filed a petition for dissolution. The matter went to trial on May 13, 2009.

Sanjay had had substantial assets prior to marriage, while Monika came into the marriage with no assets other than her clothing and jewelry. One of the principal areas of dispute between the parties was whether various assets that had been acquired during the marriage were marital or nonmarital. Sanjay retained an expert witness, Lee Gould, who was a certified public accountant and attorney specializing in forensic accounting. Gould produced a report in which he traced the sources of the funds used to acquire various assets. In listing the assumptions he had relied upon in the report, Gould stated that the marriage began in September 1997. Regarding the Indore property, Gould stated that it was acquired in May 1997 for $30,645.50. The largest portion of this money, $22,300, came from a First National Bank checking account opened by Sanjay before 1996 (the FNB checking account). The remaining $8,345.50 came from a savings account Sanjay had opened contemporaneously at the same bank (the FNB savings account). Gould also traced the funds used to acquire the Porsche (bought in June 2006) back to the same accounts, as follows. In June 1997, Sanjay withdrew $200,000 from his FNB checking account. The checks were made out to the State Bank of India and bore the notation that they were to be used to purchase 5-year certificates of

deposit. (It is not clear whether the money was actually used for certificates of deposit. Sanjay told Gould that this money was "invested in interest bearing accounts" during this time.) In 1998, Sanjay used this money to purchase $200,000 worth of 5-year Resurgent India bonds from the State Bank of India. In 2003, Sanjay redeemed the bonds for approximately $294,144 and deposited the money into a 12-month investment account. On February 20, 2004, Sanjay used the contents of this account (minus fees) to open an account with Mutual Bank. Six days later, Sanjay also transferred $270,000 from his FNB checking account into the Mutual Bank account. In June 2006, Sanjay bought the Porsche with $77,334 from the Mutual Bank account.

At trial, Monika challenged Gould's report on the grounds that the marriage actually occurred in August 1996, not September 1997 as Gould had supposed, and that Sanjay had deposited his paychecks (which, after the date of the marriage, would have been marital income) into the FNB checking account, thereby converting the account to a marital asset. In response, Sanjay introduced petitioner's exhibit 10, a document listing his assets on August 10, 1996. The exhibit showed that, at the time of the marriage in India, Sanjay's FNB checking account balance was $22,298 and the balance in his FNB savings account was $143,274.[1] The exhibit also listed Sanjay as owning various

[1]The exhibit stated that the source for this information was bank statements. The statements themselves are not in evidence. Moreover, we were unable to find any reference in the record to the author of this exhibit, or any authentication of it; thus, it is hearsay. However, there is no indication that Monika objected to the admission of this exhibit or disputed its assertions. Accordingly, any objection to it was forfeited, and the trial court was permitted to consider the exhibit. *Frank v. Hawkins,* 383 Ill. App. 3d 799, 813 (2008) ("The failure to object to hearsay testimony not only constitutes forfeiture of the issue on appeal, 'but allows the

investments, including $90,000 with "Neuberger" (again, per a "statement"). Gould testified that the approximately $30,000 used to purchase the Indore property was put into the FNB savings account in December 1996 (and later partly transferred into the FNB checking account) when Sanjay cashed out a preexisting 401(k) plan. Sanjay testified that he was working for A.C. Nielsen at the time, and that Dun & Bradstreet spun off of Nielsen in the summer of 1996, resulting in the split of his old 401(k) plan into two plans, one with Nielsen and one with Dun & Bradstreet. As of the time of trial, he still had the Nielsen 401(k) plan.

As to the source of the $200,000 that Sanjay transferred out of his FNB checking account to the State Bank of India in June 1997 (which eventually generated the funds in the Mutual Bank account from which Sanjay paid for the Porsche), Gould testified that it came from three sources: (1) the remainder of Sanjay's pre-August-1996 balance in his FNB savings account after purchasing the Indore property in May 1997 ($143,274 in savings minus approximately $30,000 spent on the property, leaving approximately $113,000); (2) bonuses from Nielsen for services rendered prior to the marriage, totaling $125,000; and (3) $75,000 from the sale of Neuberger Berman investment funds. Gould testified that Sanjay used $200,000 of this approximately $313,000 total to invest with the State Bank of India. Finally, Gould testified that, "starting from" September 1997, Sanjay deposited his paycheck into the FNB checking account. Although Gould also admitted generally that Sanjay deposited his paycheck into the FNB checking account "at times," there was no testimony or other evidence establishing that Sanjay deposited any paychecks into the FNB checking account before September 1997 but after the August 1996 date of the marriage.

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evidence to be considered by the trier of fact and to be given its natural probative effect'"), quoting *People v. Ramsey,* 205 Ill. 2d 287, 293 (2002).

On May 21, 2009, the trial court issued a letter containing its judgment for dissolution. (The judgment was entered the following day.) At the outset of the judgment, the trial court noted that it found that both parties were not credible in parts of their testimony at trial, as "each one of the parties would testify to facts which benefitted them, whether the facts were true or not." The judgment addressed all of the usual issues relating to a dissolution, including grounds, custody of the children, maintenance, and the classification and distribution of the marital estate. As relevant here, the judgment classified the FNB checking and savings accounts as marital assets. The total marital estate had a value of about $203,000. The trial court awarded 58% of these assets to Monika, and 42% to Sanjay. The Indore property (valued at $150,000) and the Porsche (valued at $35,610) were among the assets which the trial court found were the nonmarital property of Sanjay. The total value of Sanjay's nonmarital assets was approximately $466,000. Monika was also awarded 50% of the marital portion of Sanjay's 401(k) plan, and was granted maintenance of $5,800 per month ($69,600 per year) for a period of five years. Both sides filed motions (and supplemental motions) seeking reconsideration of various points. The trial court granted these in part and denied them in part, but did not alter its previous ruling regarding the Indore property and the Porsche.

Monika now appeals, contending that the trial court erred in its classification of the Indore property and the Porsche as Sanjay's nonmarital property. She notes that section 503(b) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/503(b) (West 2008)) establishes a presumption that all property acquired during the marriage is marital property. However, a party may rebut this presumption by showing, through clear and convincing evidence, that the property was acquired through one of the means listed in section 503(a). *In re Marriage of Didier*, 318 Ill. App. 3d 253, 258 (2000). As relevant here, the listed exceptions to the marital

presumption include "property acquired in exchange for property acquired before the marriage." 750 ILCS 5/503(a)(2) (West 2008). Monika argues that the evidence offered by Sanjay to prove that the Indore property and the Porsche were acquired in exchange for funds held by Sanjay before the marriage did not rise to the level of clear and convincing evidence, and that the trial court therefore erred in classifying these items as nonmarital.

In a bench trial such as the dissolution trial here, the trial court sits as the trier of fact, hearing the witnesses and reviewing the direct presentation of the evidence, and it is in the best position to make credibility determinations and factual findings. *In re Marriage of Matchen,* 372 Ill. App. 3d 937, 946 (2007). We therefore will not reverse the judgment in a bench trial unless it is against the manifest weight of the evidence; that is, unless "the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence." *Samour, Inc. v. Board of Election Comm'rs of the City of Chicago,* 224 Ill. 2d 530, 543 (2007). Similarly, the trial court's classification of property as marital or nonmarital will not be disturbed on appeal unless it is against the manifest weight of the evidence. *In re Marriage of Heroy,* 385 Ill. App. 3d 640, 663 (2008).

The thrust of Monika's argument on appeal is that Gould's report did not provide evidence that the funds used to acquire the Indore property and the Porsche were traceable to Sanjay's preexisting assets on the date of the marriage, because Gould's report incorrectly assumed that the date of the marriage was in September 1997, and accordingly the report relied on evidence of Sanjay's assets in May 1997 (when he bought the Indore property using money from his FNB accounts) and June 1997 (when he withdrew from the FNB checking account $200,000 that eventually provided the monies for the Porsche). Thus, Gould's and Sanjay's trial testimony was the only evidence that the funds for these assets could be traced back to assets belonging to Sanjay

before the August 1996 date of marriage accepted by the trial court. Monika contends that this testimony, unsupported by any documentary exhibits, could not meet the standard for "clear and convincing" evidence.

In essence, Monika is asking us to reweigh the evidence and find that it was insufficient, but this we will not do. It is not the province of this court to retry the cases that come before us. *People v. Collins,* 106 Ill. 2d 237, 261 (1985). The weight to be given to the witnesses' testimony, the determination of their credibility, and the reasonable inferences to be drawn from the evidence are all matters within the jurisdiction of the trier of fact (in this case, the trial court). *People v. Smith,* 185 Ill. 2d 532, 542 (1999); *Collins,* 106 Ill. 2d at 261-62. Likewise, the resolution of any conflicts or inconsistencies in the evidence is also within the province of the fact finder. *Collins,* 106 Ill. 2d at 261-62. Here, although the trial court found that both parties were not credible in parts of their testimony, it accepted Sanjay's and Gould's account of the source of the funds for these two assets. There is nothing in the record to suggest that the trial court's evaluation of this evidence was arbitrary or unsupported. The accounts of Sanjay and Gould were consistent with each other and also internally consistent, and Monika did not attempt to use any of the non-admitted documents relied upon by Gould to impeach his conclusions, although she could have done so under the law. *In re Michael D.,* 306 Ill. App. 3d 25, 28 (1999) (documents which an expert witness relied upon in preparing his testimony may be used to cross-examine the witness). The trial court was permitted to take this fact into account in concluding that Gould's tracing of the funds was correct.

Monika further argues that, because the trial court held that the FNB bank accounts (now held under the name of the current bank owner, Chase) were marital property, and the funds for these assets came from the FNB accounts, the assets must be considered marital property. This argument

overstates the facts, however. We agree that the trial court clearly held that the FNB accounts were marital property at the time of the dissolution. During the hearing on the various motions for reconsideration filed by the parties, the trial court stated that its finding that the FNB accounts were marital was based on years of Sanjay depositing his paychecks into the checking account and paying household bills from that account:

> "I think his [Sanjay's] depositing all the marital funds clearly transmuted those accounts in the [*sic*] marital funds. He continually used that."

However, it made no similar finding that, at the time the assets in question were purchased (in May and June 1997), the FNB accounts were marital accounts. Indeed, its use of the term "transmuted" is an acknowledgment that, at some point, the accounts (which predated the marriage) were Sanjay's nonmarital property. Moreover, the only evidence regarding Sanjay depositing his paychecks into the FNB checking account was that he was doing so as of September 1997. This date was after the time he used the accounts to purchase the assets at issue here. Accordingly, there was neither any finding that the FNB accounts were marital accounts at the time the assets were funded, nor evidence to support such a finding. Thus, we find no merit to Monika's argument that, because the trial court ruled that the accounts were marital property in 2009, the accounts were also marital property in May or June 1997, and thus the assets acquired in 1997 with funds from those accounts must be marital as well.

Finally, even if the FNB accounts had been marital accounts at the time the funds for the purchases of the assets were withdrawn, assets will not be held to be marital property where the funds used for them passed through marital accounts but came from a nonmarital source, and there is no other indication that the party originally owning the funds intended to make a gift to the

marriage. We first enunciated this "conduit theory" in *In re Marriage of Guerra*, 153 Ill. App. 3d 550, 554 (1987), in which we held that when a marital account is merely a conduit through which one party disburses nonmarital assets, and there is no other indication that the party intended to make a gift to the marriage, the assets do not become marital simply by virtue of their temporary deposit into the marital account. The principle was affirmed in *In re Marriage of Raad,* 301 Ill. App. 3d 683, 688 (1998), in which the wife deposited the nonmarital and marital portions of her retirement plan into the parties' joint checking account while she decided where to put it on a permanent basis. The court held that there was no transmutation of the nonmarital funds to marital property, because it was a hectic time (the parties were moving and the wife did not have time to find a suitable investment), and the wife completed the rollover into her IRA within the normal time period. "Although the placement of nonmarital funds into a joint checking account may transmute the nonmarital funds into marital property, nonmarital funds that are placed into a joint account merely as a conduit to transfer money will not be deemed to be transmuted into marital property." *In re Marriage of Heroy,* 385 Ill. App. 3d 640, 673 (2008).

Here, Gould and Sanjay testified that the funds in the FNB accounts that were used for the assets belonged to Sanjay alone, having either been in his possession at the time of the marriage (the FNB account balances as of August 10, 1996) or having come to him during the months immediately following the marriage as a result of the sale of previously-held nonmarital assets (the Neuberger investments) or his work prior to the marriage (the $125,000 bonus paid to him for work done prior to the marriage). Although Monika voiced doubt about the credibility of this testimony, she did not produce any legal argument (such as citations to cases in which a bonus paid during a marriage for work performed beforehand was held to be marital property) or evidence to the contrary (by, for

instance, calling a witness from Nielsen to dispute Sanjay's account that he performed all of the work for the bonus prior to August 1996, or producing records from the Neuberger investments showing that Sanjay had not sold the investments claimed during the time in question). The only items before the trial court was Sanjay's and Gould's testimony, and Monika's criticism of that testimony. Accordingly, the trial court did not err in holding that Sanjay met his burden of proving, by clear and convincing evidence, that the funds he used to acquire the Indore property and the Porsche were from his own nonmarital sources.

For all of the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

Affirmed.