2013 IL App (2d) 120683-U
No. 02-12-0683
Order filed May 8, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF KENNETH JACOBSON,	)	Appeal from the Circuit Court of Du Page County.
Petitioner-Appellee,	)	
and	)	No. 10-D-955
FRANCES JACOBSON,	)	Honorable Neal W. Cerne,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* Respondent's challenges to various findings of fact were waived and unpersuasive; trial court did not err in denying counsel's motion to withdraw; trial court properly classified as marital the real property upon which parties built their home; denying respondent maintenance was not error; and trial court's finding that respondent dissipated funds generated by sale of certain marital property was not contrary to the manifest weight of the evidence.

¶ 2 I. INTRODUCTION

¶ 3 Respondent, Frances Jacobson, appeals an order of the circuit court of Du Page County dissolving her marriage to petitioner, Kenneth Jacobson. On appeal, she raises the following issues.

First, she contends several of the trial court's findings are contrary to the manifest weight of the evidence. Second, she argues that the trial court should have granted the request of her attorney to withdraw. Third, she contests the trial court's treatment of certain real property, which she claims was her nonmarital property. Fourth, she alleges error in the trial court's decision to deny her request for maintenance. Fifth, respondent asserts that the trial court erred in finding she dissipated certain marital funds. For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 The parties were married for approximately 18 years. Petitioner retired in 2008, and respondent retired in 1998. During the marriage, respondent was primarily a homemaker, though she did work part-time on sporadic occasions. Petitioner paid all of the parties' bills. He has a substantial nonmarital estate valued at about $1,500,000. Prior to the marriage, respondent owned a two-acre parcel of land in Downers Grove which, she testified, was worth $300,000. The parties constructed a home on the land in which they lived during the marriage (the trial court found that the land was "gifted to the marriage" and "transmuted into marital property"). The parties also had a sizable marital estate, which the trial court divided by awarding approximately $936,000 to respondent and $576,000 to petitioner. The trial court held that petitioner was to be reimbursed for a $100,000 contribution he made from his nonmarital estate, which the parties used to acquire property in Texas. The trial court also found that both parties had dissipated marital funds and that respondent was not entitled to maintenance. This appeal followed. Additional facts will be set forth as we resolve the various issues raised by respondent.

¶ 6 III. ANALYSIS

¶ 7 Respondent raises five main issues on appeal. The following standards of review guide our analysis of those issues. Factual questions are reviewed using the manifest-weight standard, so we

will reverse only if an opposite conclusion to the trial court's is clearly apparent. *Kupkowski v. Board of Fire & Police Commissioners of the Village of Downers Grove*, 71 Ill. App. 3d 316, 323 (1979). Discretionary decisions of the trial court's will be disturbed only where that discretion is abused, that is, where no reasonable person could agree with the trial court. *Shaw v. St. John's Hospital*, 2012 IL App (5th) 110088, ¶ 18. Questions of law are reviewed *de novo*. *Cook County Board of Review v. Property Tax Appeal Board*, 395 Ill. App. 3d 776, 784-85 (2009). Pursuant to the *de novo* standard, we owe no deference to the trial court and we may freely substitute our judgment for that of the trial court. *Bank of America National Association v. Bassman FBT, L.L.C.*, 2012 IL App (2d) 110729, ¶ 3. With these standards in mind, we now turn to the particular issues presented in this appeal.

¶ 8 A. Manifest Weight

¶ 9 Respondent first contends that three of the trial's court factual determinations are contrary to the manifest weight of the evidence. Specifically, she contests the trial court's decisions that (1) she dissipated $20,000; (2) a 1976 Triumph Spitfire was marital property; and (3) a membership to the Walden Country Club that was awarded to respondent was worth $1,500. Except for setting forth the standard of review, respondent cites no legal authority in support of her arguments. She does not identify any of the legal principles that govern dissipation or acknowledge that she had the burden of proof on the issue (see *In re Marriage of D'Attomo*, 2012 IL App (1st) 111670, ¶ 36 ("The person charged with dissipation bears the burden of establishing by clear and convincing evidence how the funds were spent.")). Indeed, that she bore the burden is a significant consideration given the trial court's findings regarding respondent's credibility. Quite simply, respondent's argument on this point rests on her testimony that she only used $3,000 to $4,000 of a home equity line of credit. However, the trial court could reasonably reject her testimony based on its assessment of her

credibility (respondent does not argue that the trial court's evaluation of her credibility is contrary to the manifest weight of the evidence).

¶ 10 Similarly, respondent cites no law governing the classification of marital property in her argument about the 1976 Triumph Spitfire or about how to value an intangible asset like a country club membership. We note that respondent's testimony regarding the Spitfire was equivocal, as she stated that it was "[b]asically" nonmarital, and petitioner testified that he did not know whether it was. Respondent does not acknowledge the presumption that property acquired during a marriage is marital. *In re Marriage of Hagshenas*, 234 Ill. App. 3d 178, 186 (1992). Given the lack of compelling evidence on this issue, we could find no error in the trial court's decision, as the presumption would control. Finally, respondent's contention that the country club membership is valueless is wholly unpersuasive and supported by no pertinent authority.

¶ 11 In short, in addition to finding these arguments unpersuasive, we also find that they have been forfeited. It is well-established that "[a] reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented [citation], and it is not a repository into which an appellant may foist the burden of argument and research [citation]; it is neither the function nor the obligation of this court to act as an advocate or search the record for error [citation]." *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993). None of these arguments are adequately developed or supported. Hence, we reject these arguments in their entirety.

¶ 12 B. Counsel's Motion to Withdraw

¶ 13 Respondent next contends that the trial court should have granted her trial attorney's motion to withdraw. This is an issue we review using the abuse-of-discretion standard. *People ex rel. Burris v. Maraviglia*, 264 Ill. App. 3d 392, 398 (1993). Respondent was initially represented by Scott Marsik. Later, Dawn Maxwell entered an appearance as "additional counsel." Prior to trial,

Marsik informed the trial court that he would be out of town during the trial and Maxwell would conduct the trial. On the first day of the trial (March 12, 2012), Maxwell made an opening statement, presented motions *in limine*, and made several objections during petitioner's opening testimony. At the end of the day, the court and the attorneys discussed future trial dates. Maxwell informed the trial court that she was available any day over the next two weeks except for Friday, March 16, as she had airline tickets that day. She later stated that she had been "worried" and "a little tense" about Friday. The parties agreed to reconvene on Wednesday, March 14. She also asked "if we need to go into next week, then we'll deal with that; right?" The trial court replied, "We'll deal with that on Thursday."

¶ 14 When the parties returned on Wednesday, they indicated that they had reached a settlement. However, the proposed judgment had not been signed by respondent. The trial court asked whether they needed a few minutes to sign the document. Maxwell then stated, "it's up to my client," and she then made an oral motion to withdraw. The trial court stated that it could not grant the motion in the middle of the trial. The parties and the court then had a discussion off the record. When they returned, Maxwell renewed her motion to withdraw. The court stated that it was possible that Marsik could take over for Maxwell; however, since there was a chance that a settlement could be reached, the trial court reserved ruling on Maxwell's motion. Respondent reminded the trial court that Marsik was out of town, and the trial court stated that she "would be unrepresented" if it granted the motion. The parties then attempted to settle the case. When they returned before the trial court, the trial court stated that it would not grant the motion to withdraw (though it continued to reserve ruling) because they were in the middle of a trial. The trial was then continued to Thursday at 10:30.

¶ 15 On Thursday morning, Maxwell presented a written motion to withdraw. Petitioner's attorney stated he did not object to the motion. The trial court acknowledged that respondent had

filed a *pro se* appearance. Respondent explained, "Well, if she bails on me, what choice do I have?" She added, "I don't see the foundation for her not continuing since we've been dealing with this for months." Petitioner's attorney then stated that if granting the motion to withdraw would result in a continuance to allow Marsik to return, he would object to the motion. The court explained that it could not allow respondent to be unrepresented. It noted that granting the motion would result in a delay. Therefore, it denied Maxwell's motion. Maxwell then affirmed that she was "fully prepared for trial and ready to proceed even though [she did] not have the cooperation of her client." Respondent points to what she asserts is evidence of friction between Maxwell and her. For example, Maxwell chose not to cross-examine petitioner–who was the only witness in his case-in-chief. After finishing her direct examination of respondent, Maxwell stated, "I have nothing further of this witness." Respondent replied, "Obviously." Further, at one point during closing argument, Maxwell said, "I'm trying to do a closing argument here but I'm being interrupted by my own client."

¶ 16 On these facts, we could find no abuse of discretion by the trial court because respondent invited any error that may have occurred. The doctrine of invited error holds that "a ' "party may not request to proceed in one manner and then later contend on appeal that the course of action was in error." ' " *LaSalle National Bank, N.A. v. C/HCA Development Corp.*, 384 Ill. App. 3d 806, 820 (2008), quoting *People v. Harvey*, 211 Ill. 2d 368, 385 (2004) (quoting *People v. Carter*, 208 Ill. 2d 309, 319 (2003)). Here, when Maxwell sought to withdraw, respondent strenuously objected. Respondent characterized her attorney's proposed withdrawal as Maxwell "bail[ing]" on her and stated, "I don't see the foundation for her not continuing since we've been dealing with this for months." Having strongly advocated for Maxwell's continuing representation, respondent cannot now claim that it was error.

¶ 17 C. Marital Property

¶ 18 Respondent next takes issue with the trial court's handling of a parcel of land she owned in Downers Grove prior to the marriage. The division of marital property is a matter committed to the discretion of the trial court. *In re Marriage of Parker*, 252 Ill. App. 3d 1015, 1018 (1993). Generally, property acquired before a marriage is considered nonmarital property. 750 ILCS 5/503(a)(6) (West 2010). However, where the contribution from a spouse's nonmarital estate to the marital estate is intended to be a gift, it becomes part of the marital estate. See 750 ILCS 5/503(c)(2) (West 2010). Transfers between spouses are presumed to be gifts. *In re Marriage of Marx*, 281 Ill. App. 3d 897, 902 (1996). Similarly, "[t]he placing of the title to nonmarital property in joint tenancy with a spouse raises a presumption that a gift was made to the marital estate and that the property has become marital property." *In re Marriage of Johns*, 311 Ill. App. 3d 699, 703 (2000).

¶ 19 Respondent acknowledges that "she owned that property [in Downers Grove] in her name alone" and she "transferred the property to both her name and Kenneth's name so they could obtain the loan necessary for the construction costs of the marital residence." As this was both a transfer between spouses and a transfer to joint ownership, this created a strong presumption that the land was a gift to the marital estate. Respondent relies heavily on the fact that she owned the land prior to the marriage in arguing that it is her non-marital property. This fact does nothing to rebut the presumption that she subsequently intended to gift it to the marital estate; indeed, she could not have gifted it had she not previously owned it. In her reply brief, respondent notes that the parties were "extremely sensitive to the non-marital versus marital nature of property." She points out that petitioner closely catalogued his non-marital property. While this may provide some evidence to support respondent's position, it is certainly not sufficiently compelling that we could find that no

reasonable person could agree with the trial court's conclusion that the land had been gifted to the marital estate, which is consistent with the presumption.

¶ 20 Respondent argues that the trial court should have treated the land and the residence that the parties built upon it separately. Even if this were the proper course, the presumption applies to the land. Thus, respondent's argument is misplaced. Similarly, respondent's contention that she should be reimbursed for this contribution must fail, as a party is not entitled to reimbursement for a gift. 750 ILCS 5/503(c)(2) (West 2010) ("[N]o such reimbursement shall be made with respect to a contribution which *** was a gift."). Finally, we reject respondent's assertion that, if we find that the trial court did not err in denying her reimbursement, that we reverse that portion of its judgment granting petitioner $100,000 as reimbursement for a contribution he made to the marital estate. Respondent makes no attempt to explain why petitioner's contribution was a gift or was untraceable such that reimbursement was not appropriate. See 750 ILCS 5/503(c)(2) (West 2010). Rather, she contends that the trial court's ruling is unfair. We see nothing unfair about treating different transactions in a different manner. That is, regarding the land, there is evidence raising a presumption that it was intended as a gift. Respondent points to no similar evidence regarding petitioner's $100,000 contribution. As such, there is no reason apparent as to why these transactions should be treated identically. In sum, we find no error here.

¶ 21 D. Maintenance

¶ 22 Respondent next contends that she is entitled to maintenance. We apply the abuse-of-discretion standard to this issue as well. *In re Marriage of Shinn*, 313 Ill. App. 3d at 321-22 (2000). In deciding whether to award a spouse maintenance, the trial court must consider the ability of the spouses to support themselves in some reasonable approximation of the standard of living enjoyed during the marriage. *Shinn*, 313 Ill. App. 3d 317, 322. Essentially, the trial court must determine

whether one spouse needs maintenance and, if so, whether the other spouse has the ability to pay it. *In re Marriage of Werries*, 247 Ill. App. 3d 639, 651 (1993).

¶ 23 To aid in this inquiry, the legislature has set forth the following, non-exclusive list of factors to consider:

> "(1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance;
>
> (2) the needs of each party;
>
> (3) the present and future earning capacity of each party;
>
> (4) any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage;
>
> (5) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment or is the custodian of a child making it appropriate that the custodian not seek employment;
>
> (6) the standard of living established during the marriage;
>
> (7) the duration of the marriage;
>
> (8) the age and the physical and emotional condition of both parties;
>
> (9) the tax consequences of the property division upon the respective economic circumstances of the parties;
>
> (10) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;
>
> (11) any valid agreement of the parties; and

(12) any other factor that the court expressly finds to be just and equitable." 750 ILCS 5/504(a) (West 2010).

A trial court need not give these factors equal weight. *In re Marriage of Bradley*, 2011 IL App (4th) 110392, ¶ 36. Moreover, there is no requirement that a maintenance award equalize the parties' incomes. *In re Marriage of Reynard*, 378 Ill. App. 3d 997, 1003 (2008).

¶ 24 The trial court found maintenance unwarranted. It noted that respondent received a larger share of the marital estate and that she would be able to use these assets to support herself. Furthermore, the trial court noted that there was no evidence presented regarding the parties' standard of living during the marriage.

¶ 25 Respondent argues, nevertheless, that a number of the factors set forth by the legislature in section 504(a) (750 ILCS 5/504(a) (West 2010)) militate in favor of a maintenance award. Regarding the first factor, she points out that petitioner will have substantially greater assets than she does, largely due to his substantial nonmarital estate. While this is relevant to petitioner's ability to pay maintenance, it says nothing regarding whether respondent needs it, so its relevance is limited. As noted above, a court must first determine whether a spouse needs maintenance before assessing whether the other spouse can afford to pay it. *Werries*, 247 Ill. App. 3d at 651. Respondent claims the second factor favors her because she has a negative monthly cash flow. This assertion is problematic for two reasons: (1) it is based on her testimony and the trial court found her to lack credibility and (2) the trial court envisioned respondent using assets from the marital estate to supplement her income.

¶ 26 The third factor concerns the parties' earning capacities. 750 ILCS 5/504(a) (West 2010). The parties are retired, and there is little prospect for their earning capacities to change. We do not view this factor as weighing heavily in favor of either party. Next is the standard of living enjoyed

during the marriage. As noted above, the trial court found that no evidence was presented on this issue (it is unclear to us why no evidence was presented on this issue; nevertheless, both this court and the trial court are limited to the evidence presented below). In any event, it seems inferable that their lifestyle was at least somewhat affluent. That said, we see no indication that respondent cannot maintain such a lifestyle in light of the substantial amount of marital property that was awarded to her. We agree with respondent that the lengthy duration of the marriage weighs in her favor on this issue.

¶ 27 Respondent claims that the remaining factors are either undisputed or irrelevant. However the eighth factor (the parties' physical and emotional condition (750 ILCS 5/504(a) (West 2010)) is relevant. Petitioner is in ill health, and this weighs against respondent.

¶ 28 In short, going through the relevant factors in section 504(a), we cannot say that no reasonable person could agree with the trial court that the respondent's assets and income are adequate to meet her needs. This is particularly true given the substantially greater share of marital property awarded to respondent. As such, we find no abuse of discretion in the trial court's denial of maintenance to respondent.

¶ 29 E. Dissipation

¶ 30 Respondent again addresses the issue of dissipation (respondent here challenges a different finding of dissipation than the one she contested in her earlier, waived argument concerning the proceeds of a home equity loan). At issue here are the proceeds from the sale of a parcel of real property in Texas in the amount of $22,000. Respondent asserts that she presented undisputed evidence that the proceeds from this sale were deposited into a joint account held by the parties. As noted previously, the burden on this issue is on respondent to show, by clear and convincing evidence, that the funds were not dissipated. *In re Marriage of Zweig*, 343 Ill. App. 3d 590, 596

(2003). We conduct review using the manifest-weight standard. *In re Marriage of Berberet*, 2012 IL App (4th) 110749, ¶ 50.

¶ 31 Petitioner testified that respondent sold the land with his consent. Respondent told petitioner that she deposited the proceeds of the sale into a joint account held by the parties. However, petitioner never saw any documentation verifying the deposit. Respondent testified that she deposited the funds from the sale into the joint account. Further, she attached to her motion to reconsider a check register from the account reflecting the deposit. The trial court, citing respondent's actions throughout the course of the divorce, noted that respondent's credibility was dubious. Therefore, it did not believe her explanation. Of course, it is primarily for the trial court to assess the parties' respective credibility. *In re Marriage of Manker*, 375 Ill. App. 3d 465, 477 (2007).

¶ 32 We note that the trial court also stated that petitioner was not aware of the sale; however, that finding is belied by petitioner's own testimony. In her reply brief, respondent makes much of this apparently erroneous factual finding by the trial court. She asserts that since the trial court erred in making this finding, "the trial court's finding that [she] dissipated funds was erroneous." Later, she contends that her "credibility is irrelevant where [petitioner] testified he was aware of and agreed with the sale." It is not apparent to us how the fact that petitioner knew of or agreed to the sale has any bearing on whether respondent deposited the proceeds into the parties' joint account. Indeed, this assertion is a *non sequitur*.

¶ 33 Returning to relevant evidence, aside from the check register, which we will address below, the only evidence presented by respondent was her own testimony. However, the trial court had well-founded questions about her credibility. We cannot say that the trial court's assessment of respondent's credibility is contrary to the manifest weight of the evidence.

¶ 34 As for the check register, we note that it is a hand-written, self-generated record of banking activity. In ruling on this issue, the trial court specifically noted respondent's conduct with respect to other transactions. It observed that respondent had signed petitioner's name to a power of attorney and used it to obtain a $25,000 loan. The court further noted that it was "curious" that the power of attorney had been notarized by Marsik. Thus, there was evidence in the record from which the trial court could question the veracity of the register. Keeping in mind that the burden was on respondent to prove by clear and convincing evidence that these funds were not dissipated (*Zweig*, 343 Ill. App. 3d at 596), we could not say the register and respondent's testimony are entitled to such great weight that an opposite decision to the trial court's is clearly apparent. Quite simply, respondent's credibility problems permeate the register issue as well.

¶ 35 IV. CONCLUSION

¶ 36 In light of the foregoing, the judgment of the circuit court of Du Page County is affirmed.

¶ 37 Affirmed.