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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
ERWIN JEROME BERNAT,)	of Du Page County.
)	
Petitioner-Appellant,)	
)	
and)	No. 08-D-2406
)	
JACQUELYN BERNAT,)	Honorable
)	Robert A. Miller,
Respondent-Appellee.)	Judge, Presiding.

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
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JACQUELYN BERNAT,)	Honorable
)	Robert A. Miller,
Respondent-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Burke and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not err in not reimbursing the husband's non-marital estate for interim attorney fees he paid his wife's attorneys; (2) the trial court did not err in not charging wife with an advance against the marital estate for her use of

marital funds to pay her attorney fees; (3) the trial court did not err in not reimbursing the marital estate for contributions it had purportedly made to the wife's non-marital property; (4) lack of express statement by the trial court that husband's failure to comply with two court orders was without compelling cause or justification did not preclude the award of attorney fees; (5) the trial court did not err in not awarding the wife permanent maintenance; (6) the trial court did not err in its classification of certain assets as the husband's non-marital property; (7) the trial court's valuation of the parties' coin collection was not against the manifest weight of the evidence; and (8) the trial court did not err in not charging husband with an advance against the marital estate for his use of one of the marital accounts to pay his attorney fees

¶ 2 Both the petitioner, Erwin Bernat, and the respondent, Jacquelyn Bernat, appeal from orders of the circuit court of Du Page County dissolving their marriage. On appeal, Erwin argues that the trial court erred in: (1) not reimbursing his non-marital estate for attorney fees he had paid on Jacquelyn's behalf; (2) not charging Jacquelyn with an advance against the marital estate for marital funds that she used to pay her attorneys; (3) not reimbursing the marital estate for contributions that it made to Jacquelyn's non-marital estate; and (4) ordering that he pay Jacquelyn her attorney fees in relation to two contempt proceedings even though the trial court did not find that his failure to comply with its orders was without cause or justification. Jacquelyn argues that the trial court erred in: (1) not awarding her permanent maintenance; (2) classifying certain assets as Erwin's non-marital property; (3) not including the entire value of the parties' coin collection as part of the marital estate; and (4) not charging Erwin with an advance against the marital estate for \$10,000 in marital funds that he used to pay his attorneys. We affirm.

¶ 3 The record in this case is substantial. A great deal of evidence and testimony was presented in the trial court, but only some of it is relevant to this appeal. Therefore, only those facts necessary to an understanding of this court's decision will be set forth below, and the relevant facts will be discussed in the analysis of the issues in which they are pertinent.

¶ 4

GENERAL BACKGROUND

¶ 5 The parties were married on August 24, 1979. They had no children together. Jacquelyn had three children from a prior marriage. In 2012, Erwin was 72 and retired. Jacquelyn was 70 and unemployed. Erwin had monthly income of \$3,832.45 through social security and other investments. Jacquelyn had monthly income of \$1,355.40 through social security and other investments.

¶ 6 On November 5, 2008, Erwin filed a petition for dissolution of marriage. Between February 8 and May 18, 2012, the trial court conducted a hearing on the petition for dissolution of marriage. On October 30, 2012, the trial court entered a judgment of dissolution. The trial court awarded Jacquelyn approximately \$271,152 in marital assets and Erwin \$159,446 in marital assets. Erwin also received over \$340,000 from a non-marital bank account. The trial court awarded neither party maintenance. The trial court further ordered that each party was responsible for their own attorney fees. Erwin appeals from that order. His appeal was docketed in this court as case number 2-12-1212.

¶ 7 Following the trial court's judgment of dissolution, Jacquelyn filed a motion to reconsider. On February 13, 2013, the trial court granted her motion in part and denied her motion in part. Jacquelyn appeals from that order. Her appeal was docketed in this court as case number 2-13-0278.

¶ 8 On May 10, 2013, this court consolidated both Erwin's and Jacquelyn's appeals for review.

¶ 9 ANALYSIS

¶ 10 Appeal No. 2-12-1212

¶ 11 In his appeal, Erwin's first contention is that the trial court erred in not reimbursing his non-marital estate for the interim attorney fees he paid to Jacquelyn's attorneys. Erwin insists

that the trial court's judgment was inconsistent with an earlier interim fee order which provided that those fees would be reimbursed.

¶ 12 On January 31, 2011, the trial court ordered that Erwin pay \$15,000 to Jacquelyn's attorneys "for interim and prospective attorney fees, without prejudice to further allocation at time marital residence is sold or at trial; *i.e.*, to be repaid from her proceeds from sale, subject to any contribution claim." On August 14, 2012, the trial court issued its memorandum of findings. As to the issue of attorney fees, the trial court stated:

"Each party is responsible for the payment of their attorney fees incurred in these proceedings and shall indemnify and hold the other harmless from any and all liabilities resulting therefrom. Past amounts advanced by Erwin to Jacqueline shall not be reimbursed, as a further liquidation of assets would result in a re-examination [of] her need for Maintenance, and was considered in the Denial of Maintenance."

The trial court incorporated this ruling into its final judgment for dissolution of marriage.

¶ 13 Section 501(c-1) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/501(c-1) (West 2012)) governs the awarding of attorney fees. That section provides in relevant part:

"Any assessment of an interim award (including one pursuant to an agreed order) shall be without prejudice to any final allocation and without prejudice as to any claim or right of either party or any counsel of record at the time of the award. Any such claim or right may be presented by the appropriate party or counsel at a hearing on contribution under subsection (j) of section 503 or a hearing on counsel's fees under subsection (c) of Section 508. Unless otherwise ordered by the court at the final hearing between the parties or in a hearing under subsection(j) of Section 503 or subsection(c) of Section 508,

interim awards, as well as the aggregate of all the other payments by each party to counsel and related payments to third parties, shall be deemed to have been advances from the marital estate.” 750 ILCS 5/501(c-1)(2) (West 2012).

The awarding of attorney fees and the proportion to be paid by each party are within the sound discretion of the trial court and will not be disturbed on appeal, absent an abuse of discretion. *In re Marriage of Holthaus*, 387 Ill. App. 3d 367, 379 (2008).

¶ 14 Erwin’s argument misconstrues the trial court’s interim fee order. The trial court’s order was consistent with section 501(c-1)(2) of the Act as it indicated that it was without prejudice to further allocation at trial, which meant that it was subject to modification. See *DeLuna v. Treister*, 185 Ill. 2d 565, 569-70 (1999) (orders that are entered without prejudice are not final). Nothing in the interim fee order or section 501(c-1)(2) of the Act obligated the trial court to reimburse Erwin for the interim attorney fees that he had paid Jacquelyn’s attorneys. Rather, the interim fee order provided the trial court with discretion to revisit the issue following trial. As the trial court provided a valid reason for not revisiting the issue—it had taken Erwin’s payment of interim fees into consideration when denying Jacquelyn maintenance—its decision does not demonstrate an abuse of discretion. See *Holthaus*, 387 Ill. App. 3d at 379.

¶ 15 In a related argument, Erwin’s second contention on appeal is that the trial court erred in not complying with section 501(c-1)(2) of the Act and charging Jacquelyn with an advance against the marital estate for her use of marital funds to pay her attorney fees. Erwin insists that section 501(c-1)(2)’s requirement that a party be charged with an advance against the marital estate for her use of attorney fees is mandatory. Erwin points to \$41,000 that Jacquelyn used that he believes should be treated as an advance against the marital assets that she received. He also

argues that it is unfair that the trial court charged him with an advance against the marital estate for monies he used to pay his attorneys, but it did not make a similar charge against Jacquelyn.

¶ 16 The plain language of section 501(c-1)(2) makes apparent that the trial court is required to treat the parties' attorney fees as advances, "[u]nless otherwise ordered." (Emphasis added). 750 ILCS 5/501(c-1)(2) (West 2012); see also *In re Marriage of Beyer*, 324 Ill. App. 3d 305, 314 (2001) (noting that section 501(c-1)(2) creates a presumption that attorney fees will be treated as advances, but that presumption does not apply where the court orders otherwise).

¶ 17 Here, the trial court ordered otherwise when, following trial, it ordered that each party would be responsible for their own attorney fees. The trial court explained that to order differently would cause a further liquidation of assets and result in a re-examination of Jacquelyn's need for maintenance. Accordingly, the trial court's decision falls squarely within the confines of the statute. *Cf. Holthaus*, 387 Ill. App. 3d at 378 (holding that section 501(c-1)(2) did not require trial court to treat attorney fees as advances on husband's and wife's respective shares of marital estate in dissolution action; rather, court could order division of marital estate in husband's favor to offset attorney fees he incurred as a result of wife's actions during dissolution proceedings).

¶ 18 Erwin's third contention on appeal is that the trial court erred in not reimbursing the marital estate for contributions it made to Jacquelyn's non-marital property that she owned in Villa Park.

¶ 19 At trial, Erwin testified that Jacquelyn owned a home prior to their marriage. During the course of the marriage, Erwin claimed that the parties had contributed thousands of dollars to maintain the house. Specifically, over a 33-year period, the parties had used \$59,136 in marital funds to pay association dues; from 1992 to 2006, the parties had used \$38,000 in marital funds

to pay real estate taxes; in 1992, \$5,988 had been used for furniture and remodeling; in 1993, \$1,668 was used for a new door; in 1997, \$775 was used for a new roof, and also in 1997, \$1,760 was used for new windows. Erwin produced evidence that in 2002 the house had a value of \$137,000. He did not produce any evidence as to the value of the house at the time that the parties were married or at the time of dissolution.

¶ 20 Section 503(c)(2) of the Act provides a right to contributions made by one estate that have enhanced the value of an item of property classified as belonging to another estate. 750 ILCS 5/503(c)(2) (West 2012). No reimbursement to the marital estate for improvements to non-marital property is required when there is no evidence of increased value to the non-marital estate. *In re Marriage of Siddens*, 225 Ill. App. 3d 496, 499 (1992). Further, mere maintenance of an asset during a marriage, standing alone, does not constitute a significant contribution. *Id.* A contribution to an estate must be traceable by clear and convincing evidence to establish a right to reimbursement. *In re Marriage of Albrecht*, 266 Ill. App. 3d 399, 401 (1994). The trial court's determination as to the right of reimbursement will not be disturbed unless it is against the manifest weight of the evidence. *In re Marriage of Nelson*, 297 Ill. App. 3d 651, 657 (1998).

¶ 21 Here, although Erwin presented evidence that the marital estate had made contributions to Jacquelyn's non-marital Villa Park property, he did not present any evidence that those contributions had actually increased the value of the Villa Park property. Erwin presented evidence that the property had a value of \$137,000 in 2002. However, he did not present any evidence as to the value of the property at the time of the parties' marriage in 1979 or the time of the dissolution in 2012. Absent such evidence, Erwin failed to carry his burden to show by clear and convincing evidence that the Villa Park home had increased in value due to contributions from the marital estate.

¶ 22 Erwin essentially acknowledges that he did not meet his burden, but complains that such a burden is unfair because “in the current volatile real estate market, wherein overall values have substantially decreased, an impossible burden was placed upon [him] to demonstrate an increased value in the subject property.” Erwin’s “fairness” argument is unpersuasive. First, as set forth above, it is contrary to existing law. Second, even if we were to consider this argument, we still could not overlook the fact that Erwin provided insufficient evidence as to the value of the Villa Park property. Although he implies in his argument that the value of the property has fallen, he did not actually present any evidence that it has. Absent such evidence, we have no basis to find that the trial court’s decision to deny the marital estate reimbursement for contributions to the Villa Park property was against the manifest weight of the evidence.

¶ 23 Erwin’s final contention on appeal is that the trial court erred in awarding Jacquelyn \$9,173.75 in attorney fees related to her pursuit of two contempt petitions.¹ Erwin argues that in order to impose fees pursuant to section 508(b) of the Act (750 ILCS 5/508(b) (West 2012)), the court was required to find that his failure to comply with the court order was without compelling cause or justification, which it did not do.

¶ 24 On July 31, 2009, the trial court ordered that neither party remove any property from the marital residence in the absence of an agreement or further order of court. On January 28, 2011, Jacquelyn filed a petition for indirect civil contempt alleging that Erwin had removed several

¹ In his appellate brief, Erwin indicated that he was also appealing from the trial court’s contempt findings. However, after Jacquelyn questioned in her appellee brief this court’s jurisdiction to consider the contempt findings, Erwin clarified in his reply brief that he was only seeking reversal of the trial court’s award of attorney fees. We therefore only address that issue.

gold and silver coins from the parties' marital residence. On August 16, 2011, the trial court found Erwin in contempt for his removal of the coins. Jacquelyn thereafter filed a petition for the attorney fees she incurred seeking to have Erwin comply with the trial court's prior order. On September 21, 2012, the trial court granted Jacquelyn's petition and awarded her \$7,500 in attorney fees. In that order, the trial court did not include a specific finding that Erwin's failure to comply with its original order was without cause or justification.

¶ 25 On June 30, 2010, the trial court ordered Erwin to pay certain expenses from the proceeds of marital stock. On November 3, 2010, Jacquelyn filed a petition for indirect civil contempt based on Erwin's failure to comply with that order. On December 15, 2010, the trial court found Erwin in indirect civil contempt. On December 22, 2010, the trial court found that Erwin had purged the prior contempt finding. On February 8, 2011, Jacquelyn filed a motion to reinstate the mittimus for contempt, asserting that Erwin had failed to comply with the purge conditions. Jacquelyn's motion was set for hearing on April 8, 2011. On that day, the trial court found that Erwin had tendered funds representing full compliance with its December 15, 2010, order. On September 21, 2012, following a hearing, the trial court awarded Jacquelyn \$1,673.75 in attorney fees for those fees she incurred in requiring Erwin to comply with the June 30, 2010, order. In so ruling, the trial court did not include a specific finding that Erwin's failure to comply with its original order was without cause or justification.

¶ 26 Section 508(b) of the Act provides that "[i]n every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court *shall* order the party against whom the proceeding is brought to pay promptly the costs and reasonable attorney's fees of the prevailing party." (Emphasis added.) 750 ILCS 5/508(b) (West 2008). Thus, the court has no discretion

under section 508(b) except to determine if the failure to comply was without compelling cause or justification; if it so finds, attorney fees must be imposed. *In re Marriage of Putzler*, 2013 IL App (2d) 120551, ¶ 37.

¶ 27 In *Putzler*, this court addressed the identical issue that Erwin raises herein. There, the husband argued that, even though he had been found in contempt for not complying with an order, the trial court's award of attorney fees pursuant to section 508(b) was improper because the trial court had not specifically found that his failure to comply with the underlying order was without compelling cause or justification. In rejecting the husband's argument, we explained:

“Although in its written order the court did not state that the failure to comply with the court orders was ‘without compelling cause or justification,’ such findings are implied by the contempt findings. Preliminarily (and as to *both* contempt findings), ‘finding a party in contempt for failing to comply with a court order implies a finding the failure to comply was without cause or justification,’ rendering mandatory the imposition of attorney fees per section 508(b). *In re Marriage of Deike*, 381 Ill. App. 3d 620, 634 (2008). Specifically, ‘[b]ecause the primary prerequisite to *any* contempt finding is willful, contumacious conduct, it follows that a finding that a party is in contempt of court for failing to comply with a court's orders carries with it an *implicit* finding that the failure to comply was without cause or justification.’ (Emphases added.) *In re Marriage of Cierny*, 187 Ill. App. 3d 334, 348 (1989).” *Putzler*, 2013 IL App (2d) 120551, ¶ 38.

¶ 28 Here, after the trial court found Erwin in contempt on two different occasions, it ordered that Erwin pay Jacquelyn \$9,173.75 for attorney fees she incurred seeking enforcement of the trial court's orders. Implicit with its contempt findings was the trial court's determination that

Erwin's failure to comply with its earlier orders was without cause or justification. See *id.* As such, the trial court's award of attorney fees to Jacquelyn pursuant to section 508(b) was proper.

¶ 29 In so ruling, we note that the trial court's award of attorney fees as to the second contempt finding (\$1673.75) was not improper even though that contempt finding was ultimately vacated. As Jacquelyn incurred attorney fees seeking enforcement of an order which ultimately led to Erwin being found in contempt, the award of section 508(b) attorney fees to her was warranted. See *In re Marriage of Wassom*, 165 Ill. App. 3d 1076, 1081(1988) (it does not matter that party purged herself of contempt at a later hearing because policy behind section 508(b) is to eliminate or lessen financial burden on other party who is seeking enforcement of trial court's earlier order).

¶ 30 Finally, we find Erwin's reliance on *In re Marriage of Young*, 200 Ill. App. 3d 226 (1990) and *Wassom* to be misplaced. Indeed, those cases are consistent with this court's decision in *Putzler*. In *Young*, the trial court ordered the husband to pay the wife's attorney fees incurred when she had filed a petition for rule to show cause. The trial court ordered the payment of fees even though it did not find the husband in contempt or that his failure to comply with an earlier order was "without cause or justification." The *Young* court reversed, holding that the award of attorney fees was improper under section 508(b) because the trial court had not made a finding that the husband's failure to comply with a court order was "without cause or justification." *Young*, 200 Ill. App. 3d at 230-31. In so ruling, the *Young* court noted that its decision was consistent with *Wassom*. *Id.* at 230. In *Wassom*, although the trial court did not find that the wife's failure to comply with an earlier order was "without cause or justification," it did find that she was in contempt. The *Wassom* court concluded that the contempt finding was sufficient to

warrant section 508(b) attorney fees because “contemptuous conduct implies conduct without cause or justification.” *Wassom*, 165 Ill. App. 3d at 1081.

¶ 31 Thus, pursuant to *Young* and *Wassom*, in order to impose attorney fees pursuant to section 508(b), the trial court must find that either a party’s failure to comply with an order was “without cause or justification,” or it must find that party in contempt. Here, the trial court found Erwin in contempt for his failure to comply with its earlier orders. Accordingly, the trial court’s imposition of attorney fees pursuant to section 508(b) was proper.

¶ 32 Appeal No. 2-13-0278

¶ 33 In her appeal, Jacquelyn’s first contention is that the trial court erred in not awarding her permanent maintenance. She acknowledges that the trial court awarded her a larger portion—62%—of the marital estate than Erwin. However, based on her needs and Erwin’s ability to pay maintenance due to his substantial non-marital assets, she insists that the trial court should have awarded her permanent maintenance.

¶ 34 Jacquelyn points to her February 1, 2012, comprehensive financial statement (CFS) in arguing that her needs greatly outweigh her income. That statement lists her financial needs as \$3,662.64 per month and her income as \$1,323.11. (The trial court found her monthly income was actually \$1,355.40). The expenses listed in her February CFS were increased dramatically from her CFS submitted just one month earlier. In her January 1, 2012, CFS, Jacquelyn listed her monthly expenses as 2,251.40. The primary difference between her January and February CFS is that she had sold her non-marital house to her daughter and subsequently paid over \$1,000 a month to rent a condominium. The trial court found that Jacquelyn’s sale of her house to her daughter was possibly a “complete sham” and a fraudulent conveyance made

“in an attempt to reduce the value of Jacquelyn[’s] assets for purposes of property division and maintenance.”

¶ 35 The record also indicates that Jacquelyn submitted a supplemental petition for attorney fees stating that she had incurred \$85,190.40 in attorney fees. Of that amount, Erwin argues that \$41,000 is traceable to marital assets. Further, \$15,000 of that amount was paid from Erwin’s non-marital assets that he was ordered to contribute to Jacquelyn’s attorneys fees.

¶ 36 In its memorandum of findings, the trial court specifically questioned Jacqueline’s credibility. It noted that she had made large withdrawals from her accounts and had difficulty explaining the purpose of those withdrawals. Additionally, the trial court found that she had not filed an income tax return since tax year 2007; therefore, she had never reported the sale of her non-marital house to the IRS.

¶ 37 At the close of the trial, the trial court denied Jacqueline maintenance. The trial court explained that that it had considered Erwin’s payment of some of Jacqueline’s attorney fees in denying her request for attorney fees. In denying Jacqueline’s motion to reconsider, the trial court expounded upon its findings, stating:

“When I rendered my decision on maintenance, I took the statutory factors into consideration; and of course, one of the things I’m supposed to do first is divide the marital property and then examine the needs, the present and future earning capacity of each party, the standard of living that was established, and any other statutory factors.

Clearly, in this case, the credibility of both parties was in question throughout the entire trial. I didn’t necessarily believe Jacqueline Bernat with regard to some of the cash loans that she made her brother and the cash payment she received back.

I'm not 100 percent convinced about the sale of [Jacqueline's non-marital house], but I was convinced enough that I found that it existed; but certainly, [Erwin's attorney] brought out a substantial amount of evidence to suggest that—that the [house] had never actually been sold. It was a fraud and a farce that was created for the purpose of trial. She made some pretty good points with regard to that.

Nonetheless, I took into consideration the fact that after the property division and the disparate division of the property, that Jacqueline had 60 percent and Erwin had 40 percent of the marital estate.

I also took into consideration the fact that I was not having Jacqueline reimburse Erwin for moneys advanced for the attorney[] fees in this case; and so that was one more reason that she would not need additional money to pay prior bills, as a result of the hearing.

With *** the division of the marital assets disproportionately divided, so that Jacqueline received 60 percent, I found that she was self-sufficient, self-supporting; and therefore, there was no need for maintenance, and I continue to have that opinion.”

¶ 38 The trial court has broad discretion under the Act to apportion marital property in “just proportions” and that discretion is abused only when no reasonable person would take the view adopted by the court. *In re Marriage of Durante*, 201 Ill. App. 3d 376, 383 (1990). When distributing property, courts should seek a high degree of finality so that parties can plan their future with certainty and need not return repeatedly to the courts. *Id.* A larger property division, as opposed to maintenance, is the preferred method of reimbursing a spouse for such things as nonmonetary contributions and contributions of capital. *Id.*

¶ 39 Section 504 of the Act provides that an award of maintenance is appropriate if the spouse lacks sufficient property to provide for reasonable needs, is unable to self-support through appropriate employment, or is otherwise without sufficient income. 750 ILCS 5/504(a) (West 2012). The value of a spouse's non-marital property must be considered in determining any maintenance award. *Durante*, 201 Ill. App. 3d at 383. A trial court's determination as to the awarding of maintenance is presumed to be correct and will not be disturbed absent an abuse of discretion. *In re Marriage of Schneider*, 214 Ill. 2d 152, 173 (2005).

¶ 40 We do not believe that the trial court abused its discretion in denying Jacqueline maintenance. As set forth above, it is preferable for the trial court to award a party a larger share of the marital estate than it is to award her maintenance. See *Durante*, 201 Ill. App. 3d at 383. That is exactly what the trial court did here. The trial court awarded Jacqueline 62% of the marital estate. Further, it allowed her to keep additional money by not ordering her to reimburse either the marital estate for marital funds that she had used to pay her attorney fees or Erwin's non-marital estate for \$15,000 that he had been ordered to contribute to her attorney fees. Under section 501(c-1) of the Act, the trial court had the power to order such reimbursement. See 750 ILCS 5/501(c-1) (West 2012).

¶ 41 Jacqueline insists that, even with the disparate division of assets, she did not have enough to meet her needs, unless she sells off her assets, which she should not be required to do. See *In re Marriage of Kerber*, 215 Ill. App. 3d 248, 252 (1991) (a spouse is not required to sell off assets or invade capital in order to maintain the standard of living established during the marriage). Jacqueline's argument presumes that all of the expenses she presented in her February 2012 CFS are legitimate. However, those expenses are based on her having recently sold her non-marital house to her daughter and thereafter incurring additional expenses to rent a

home. The trial court specifically found that this was possibly a “sham transaction” that had been made in order to affect how much Jacqueline would receive in maintenance. The trial court further found that Jacqueline’s credibility was undermined due to various cash transactions she had made with her brother and her inability to explain significant withdrawals from her accounts. Based on these circumstances, we believe that a reasonable person could indeed find that the trial court’s decision was appropriate. The trial court’s decision therefore did not constitute an abuse of discretion. See *In re Smith*, 2012 IL App (2d) 110522, ¶ 46.

¶ 42 Jacqueline’s second contention on appeal is that the trial court erred in classifying Erwin’s boat and some of his Walgreens stock as non-marital property. We will disturb a trial court’s classification of marital assets only if it is against the manifest weight of the evidence. *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 669 (2008). Property acquired during the course of a marriage is presumed to be marital unless proven otherwise by clear and convincing evidence. *In re Marriage of Werries*, 247 Ill. App. 3d 639, 642 (1993). However, property acquired during the marriage in exchange for non-marital property constitutes non-marital property. *In re Marriage of Henke*, 313 Ill. App. 3d 159, 169 (2000).

¶ 43 Erwin testified that he owned a boat prior to the marriage. That boat was subsequently destroyed by fire. In 1984, he used insurance proceeds from that boat to buy a 1975 Chris-Craft boat. He bought his new boat along with a person named Reggie. Thereafter, he used non-marital funds to buy Reggie’s interest in the boat. Erwin did not present any documentary evidence to corroborate his testimony. However, in her testimony, Jacquelyn acknowledged that Erwin did own a boat before the marriage that was destroyed in a fire.

¶ 44 At the close of the trial, the trial court classified the boat as Erwin’s non-marital property. Jacqueline filed a motion to reconsider. In denying her motion, the trial court explained that

Erwin's testimony that he owned a boat before the marriage that was destroyed by a fire was substantiated by Jacquelyn's testimony. Further, there was no evidence to contradict his claim that he had used insurance proceeds to buy a new boat. The trial court found that reasonable inferences could be drawn which rose to the level of clear and convincing evidence that the boat was indeed Erwin's non-marital property.

¶ 45 Jacquelyn argues on appeal that Erwin failed to provide clear and convincing evidence that the boat he purchased after the parties married was in fact his non-marital property. Jacquelyn insists that Erwin needed to present more than just his testimony to meet his evidentiary burden, he needed to present documentary evidence. We disagree. Testimony by itself may be sufficient to establish that property obtained after marriage was non-marital property if it was exchanged for non-marital property. See *In re Marriage of Didier*, 318 Ill. App. 3d 253, 262 (2000) (party's testimony may rise to the level of clear and convincing evidence on the issue of tracing); *Henke*, 313 Ill. App. 3d at 168 (wife's testimony was sufficiently clear and convincing to trace contribution of the marital estate, thereby entitling marital estate to reimbursement). Here, there is no dispute that Erwin owned a boat prior to the marriage that was destroyed by fire. The only dispute is whether he used non-marital assets (such as insurance proceeds from the loss of that original boat) or marital assets to buy the new boat. Erwin's testimony that he used non-marital assets to purchase the new boat was sufficient to establish that the boat remained a non-marital asset. See *Didier*, 318 Ill. App. 3d at 262; *Henke*, 313 Ill. App. 3d at 168. Although it would have been preferable for him to present documentary evidence regarding his purchase of the new boat, we do not believe that his failure to present such evidence from a transaction that occurred 28 years before the trial on the petition for dissolution undermines the evidence he did present. Accordingly, the trial court's

classification of the boat as a non-marital asset was not against the manifest weight of the evidence.

¶ 46 We next address Jacquelyn's claim that the trial court erred in not classifying all of Erwin's Walgreen's stock as marital property. The record reveals that Erwin inherited 400 shares of Walgreen's stock upon his father's death in 2005. In its judgment of dissolution, the trial court awarded that stock to Erwin as his non-marital property. Jacquelyn filed a motion to reconsider, arguing that the checking account record she introduced into evidence established that Erwin had been using marital funds to buy \$100 a month in additional Walgreen's stock. Thus, as he had commingled marital assets with his non-marital assets, Jacquelyn argued that all of the Walgreen's stock should be classified as non-marital. The trial court granted Jacquelyn's motion in part, ruling:

"I'm going to find the 400 shares of the stock that's in existence of Walgreen's [are] Erwin's. Half of the additional shares that have accumulated since the death of Erwin's father I'm going to find is marital property and should be divided 50/50. So it's about 85 or 87 shares apiece."

Relying on *In re Marriage of Davis*, 215 Ill. App. 3d 763, 770 (1991), Jacquelyn insists that the trial court should have classified all of the Walgreen's stock as marital.

¶ 47 In *Davis*, at issue was the classification of a cash management account for a money market known as the CMA Money Fund, held by the husband. *Id.* at 769. From an inheritance, the husband deposited stocks, bonds, and other securities and \$153,000 in cash to the CMA Money Fund. Afterwards, he deposited over \$340,000 in marital funds into the account. He subsequently sold shares of the CMA Money Fund to cover checks written against the account. As each inherited holding was sold, the cash received was used to purchase more shares in the

CMA Money Fund, and they in turn were sold to purchase new securities. *Id.* The appellate court concluded that the entire account became marital because, through the rolling purchases and sales of CMA Money Fund shares, marital and non-marital property were commingled into newly acquired property resulting in a loss of identity of the non-marital property. The court could find “no distinction *** between the CMA Money Fund shares bought with the proceeds from the sale of inherited securities and the shares bought with marital funds.” *Id.* The court explained that by the very nature of the account, “it is impossible to ascertain the source of the funds with which specific stocks and securities were purchased.” *Id.* at 770.

¶ 48 Here, by contrast, the 400 shares of Walgreen stock that Erwin inherited from his father never lost their identity, and they were traceable, as they still existed at the time of trial. Although Erwin purchased additional shares, the trial court properly considered that in dividing those shares among the parties. The fact that Erwin purchased additional Walgreen’s shares with marital funds after he received his inheritance in no way converted those original non-marital shares into marital property since they remained traceable. See *In re Marriage of Steel*, 2011 IL App (2d) 080974, ¶ 80 (non-marital funds that are traceable remain non-marital). Accordingly, the trial court’s classification of the Walgreen’s stock was not against the manifest weight of the evidence. *Heroy*, 385 Ill. App. 3d at 669.

¶ 49 Jacquelyn’s third contention on appeal is that the trial court erred in its division of the parties’ coin collection. The parties had a gold and silver coin collection worth several hundred thousand dollars. In 2002, Jacquelyn made a video inventory of the coin collection. In 2010, Jacquelyn filed a petition for indirect civil contempt alleging that Erwin had taken several of the coins from the parties’ residence in violation of a prior court order. On August 16, 2011, the trial court conducted a hearing on the petition. The trial court determined that, based on the 2002

inventory, \$334,998 worth of coins were missing from the collection. However, the trial court also found that the 2002 inventory was not accurate because it did not reflect that some coins had been given away to the parties' grandchildren and others. The trial court further found not credible Jacquelyn's testimony that she did not have access to the parties' safe. Based on these findings, the trial court reduced the value of the collection by one third. It ordered that Erwin would pay Jacquelyn \$111,666 for the missing coins upon the dissolution of the marriage and the division of the parties' assets.

¶ 50 At trial, Erwin testified that he continued to buy coins after 2002. He did not sell coins, and he did not give many away. He did his own inventory of the coin collection in 2009. (His inventory indicated that there were fewer coins in the collection than Jacquelyn's 2002 inventory). At the close of the trial, the trial court explained that, in dividing the parties' coin collection, it was using the same factors that it had considered at the August 2011 hearing. It therefore subtracted 30% from the value of the coin collection "for the reasons stated in the record on August 16, 2011."

¶ 51 Jacquelyn filed a motion to reconsider, arguing that based on the evidence presented at trial, the trial court should not have applied a 30% discount to the coin collection. Jacquelyn argued that (1) based on Erwin's testimony that he continued to buy coins after 2002 and that he gave very few away, there should have been more coins in the collection in 2010, not fewer; (2) when Erwin did his inventory in 2009, if he believed that Jacquelyn had taken any of the coins, he would have reported it; however, he did not; (3) in his written response to the underlying petition for contempt, he did not assert that Jacquelyn had taken any coins. In his response to the motion to reconsider, Erwin asserted that he did not accuse Jacquelyn of taking any of the coins prior to August 2011 because (1) he had not kept a good inventory of his coins prior to 2009 and

thus did not realize that any were missing and (2) he did not learn that Jacquelyn had access to the safe until the time of the hearing on the contempt petition and thus he had no reason to think that she was taking some of the coins.

¶ 52 Following a hearing, the trial court denied Jacquelyn's motion to reconsider. The trial court explained:

“I cannot say that Mrs. Bernat was so credible on the stand that I would take her at her word, and I felt that a third being reduced from the inventory was a fair and equitable amount to take into consideration the fact that Mrs. Bernat could have played a hand in the loss.”

¶ 53 On appeal, Jacquelyn raises the same argument that she did in her motion to reconsider, that being none of the evidence presented at trial suggested that she took any of the parties' coins. Thus, the trial court's finding regarding the value of the coin collection was against the manifest weight of the evidence. We reject Jacquelyn's argument. The trial court's decision was based in part on its determination that Jacquelyn was not credible in her testimony regarding her lack of access to the coins. Based on her lack of credibility, the trial court found that she could have played a role in the disappearance of some of the coins. Thus, to find that the trial court's decision was against the manifest weight of the evidence, we would also have to find that the trial court erred in its credibility determination of Jacquelyn. As we will not disturb the trial court's credibility determination, we cannot find that its decision was against the manifest weight of the evidence. See *In re Marriage of Pfeiffer*, 237 Ill. App. 3d 510, 513 (1992) (it is not the appellate court's function to assess witness credibility and set aside the trial court's determination merely because a different conclusion could have been drawn from the evidence).

¶ 54 Jacquelyn’s final contention on appeal is that the trial court erred in not charging Erwin with a \$10,000 advance against the marital estate for his use of a marital account—the Bruce Fund—to pay attorney fees. Since the trial court had charged Erwin with a \$37,287.10 advance against the marital estate for his use of a different marital account—the Fidelity Portfolio—to pay his attorney fees, Jacquelyn argues that the trial court should have treated Erwin’s use of both of those accounts the same way.

¶ 55 Jacquelyn raised this issue in her motion to reconsider. In rejecting her argument, the trial court explained:

“I considered the evidence at the time. I considered the withdrawals that both parties had taken and the fact that they were not very upfront half the time when they were talking about monies paid to their attorneys; the fact that some of their money was used for marital and non-marital purposes. The advances against the attorneys should have been placed back into the marital—marital estate prior to division, but, frankly, they were. I considered that when I divided the marital estate; who had spent what and what the remainder was, and it’s something that was considered when I split up the marital estate and decided not to award maintenance.”

¶ 56 We do not believe the trial court abused its discretion in not ordering that the funds that Erwin had used from the Bruce Fund be charged as an advance against his portion of the marital estate. The trial court gave a sound reason why it did not treat the use of such funds as an advance against the marital estate—it had already considered the amount of attorney fees that Erwin had paid with marital funds when it divided the marital estate. As discussed earlier when Erwin raised the identical argument that Jacquelyn should have been charged with an advance against the marital estate for her use of marital funds to pay her attorney fees, the trial court was

not obligated to treat the marital funds that a party spent on his or her attorney fees as an advance against the marital estate. See *Beyer*, 324 Ill. App. 3d at 314. Accordingly, we decline to disturb the trial court's judgment.

¶ 57

CONCLUSION

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

¶ 59 Affirmed.