2016 IL App (2d) 160264-U
No. 2-16-0264
Order filed October 24, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF HAROLD C. LEMKE, III, Petitioner-Appellee, and KAYLIE L. LEMKE, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 13-DV-941 Honorable Kevin G. Costello, Judge, Presiding.

KAYLIE L. LEMKE, Third-Party Plaintiff-Appellant, v. HAROLD LEMKE, JR, Third-Party Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 13-DV-941 Honorable Kevin G. Costello, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justice Jorgensen concurred in the judgment.
Justice Hutchinson concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The judgment dissolving the petitioner's marriage to respondent was affirmed in part and reversed in part, and the cause was remanded to the trial court for further

> proceedings. (1) The award of sole custody of the minor child to the petitioner was not against the manifest weight of the evidence. (2) The trial court's finding that the petitioner's interest in certain real estate was his nonmarital property was against the manifest weight of the evidence. (3) The portion of the judgment requiring the respondent to pay child support in a percentage amount in addition to her base support obligation was reversed, because the trial court did not make the necessary findings.

¶ 2 Petitioner, Harold C. Lemke, III (Hal), and respondent, Kaylie L. Lemke, were married in October 2010. They have one minor child, Charlie, who was born in June 2012. In November 2013, Hal filed a petition for dissolution of marriage. One of the contested issues was whether certain real estate in Richmond, Illinois, that was apparently titled to Hal and Harold Lemke, Jr. (Hal's father) was marital property; accordingly, Kaylie filed a third-party complaint against Hal's father. Kaylie appeals from the final judgment dissolving the marriage. For the reasons that follow, we affirm in part and reverse in part, and the matter is remanded to the trial court for further proceedings consistent with this order.[1]

¶ 3 I. BACKGROUND

¶ 4 The primary dispute between Hal and Kaylie is whether the trial court erred in granting sole custody of Charlie to Hal. We therefore focus on the facts that are relevant to that issue. We will recite additional facts in the analysis section as needed to address the parties' arguments regarding the issues of characterization of property and child support.

[1] Because this appeal involves the custody of a child, pursuant to Illinois Supreme Court Rule 311(a)(5) (eff. Mar. 8, 2016), the deadline for our decision was September 2, 2016. We granted extensions of time for filing briefs to both sides, and Kaylie's reply brief was not filed until August 24, 2016. The record on appeal is fairly lengthy, and the parties raise two issues in addition to the issue of custody. Under these circumstances, we believe there is good cause for not issuing our disposition within 150 days of the filing of the notice of appeal.

¶ 5 After Charlie was born, Kaylie took six-to-eight weeks of maternity leave. When Kaylie returned to work, her mother cared for Charlie on weekdays. The evidence was disputed as to what extent Hal assisted in taking care of Charlie before the parties separated.

¶ 6 The parties separated in early November 2013 following Kaylie's arrest and conviction for domestic battery. The battery was precipitated by an argument with Hal over a program on Netflix. It appears that Hal wanted to go to bed rather than watch the program that Kaylie was watching, so he used an application on his cell phone to turn off the program. The parties exchanged words, and Kaylie threw a remote control at Hal and hit him a number of times. Hal obtained an emergency order of protection against Kaylie, initially listing both himself and Charlie as protected parties. Hal and Kaylie subsequently agreed to the terms of interim and plenary orders of protection, pursuant to which Kaylie was barred from the marital residence and Hal received temporary custody of Charlie, subject to Kaylie's visitation time. Hal has been Charlie's primary caretaker since the separation, and he continued to live in the former marital residence in Richmond. Kaylie moved into her mother's home in Arlington Heights, Illinois. Hal was unemployed during these proceedings, and Kaylie worked as an animal products investigator with the Illinois Department of Agriculture.

¶ 7 The matter proceeded to trial between October 19 and 26, 2015. A significant portion of the evidence was devoted to documenting the myriad ways that Hal and Kaylie have mistreated each other. It is unnecessary and impractical to recount all of the evidence presented. It will suffice to highlight some of the points that the parties raised in support of their respective positions regarding Charlie's best interests.

¶ 8 Hal presented evidence that Kaylie was physically and verbally abusive to him during their relationship. For example, he introduced printouts of numerous text messages that reflect

conversations the parties had both before and during the marriage. The text messages had been stored on Hal's computer after he synced his phone to his computer. Hal testified that the messages were accurate and that he did not delete his own responses to the texts. However, he acknowledged that he did not submit into evidence all of the messages that were saved on his computer. In these text conversations, Kaylie repeatedly used foul language and at times said things that were belittling to Hal. Hal particularly emphasized that Kaylie would send him repetitive text messages, sometimes in excess of 100 within the course of a few hours. Moreover, according to Hal, Kaylie physically attacked him on four occasions. There was also evidence that, following the separation, Kaylie had been verbally abusive to the staff at Charlie's pediatrician's office. Hal introduced evidence that Kaylie was unwilling to accommodate his requests to switch parenting time.

¶ 9 Kaylie's primary complaints about Hal were that he was controlling, he wanted to limit her contact with Charlie, and he did not participate in caring for Charlie until the parties separated. As examples of Hal's controlling nature, there was evidence that he had taken Kaylie's car keys to prevent her from leaving the residence, that he had forcibly removed a shovel from her hand, and that he called her derogatory names. Kaylie also believed that Hal used the order of protection as a means of obtaining a tactical advantage in the custody battle. Of particular concern to her was that Hal unnecessarily included Charlie as a protected party in the emergency order of protection.

¶ 10 Dr. David Finn was appointed as a custody evaluator pursuant to section 604(b) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/604(b) (West 2014)).[2] He recommended that Kaylie be given sole custody of Charlie. At the time of trial,

[2] Section 604 was repealed by Public Act 99-90, which went into effect on January 1,

there were 10 factors listed in section 602(a) of the Dissolution Act (750 ILCS 5/602(a) (West 2014)) for a court to consider when determining custody. In her reply brief on appeal, Kaylie acknowledges that "factors 1, 2, 4, 9, and 10, are either not indicated in this case or do not favor either party." Accordingly, we focus on statutory factors 3 and 5-8.

¶ 11 Dr. Finn believed that the factor regarding "the interaction and interrelationship of the child with his parent or parents ***" (750 ILCS 5/602(a)(3) (West 2014)) favored Kaylie. Specifically, he observed that Kaylie's interactions with Charlie were "very positive" and that "Charlie did not demonstrate the same level of interest in interacting with Hal as he did with Kaylie."

¶ 12 Dr. Finn determined that the factor pertaining to "the mental and physical health of all individuals involved" (750 ILCS 5/602(a)(5) (West 2014)) favored Kaylie. He noted that Kaylie was currently being treated for "an adjustment disorder with anxiety and mood features," but he believed that the more significant issue was "her inability to control her anger and frustration." Nevertheless, Dr. Finn was of the opinion that this "challenge" was "limited in scope," that Kaylie "has worked on strategies for managing her anger and frustration," and that "[a]part from the documentation from the pediatrician's office, there is no other data to indicate that Kaylie has experienced problems due to reduced ability to control her anger in other arenas." Dr. Finn further noted that Hal's statements to certain domestic violence counselors were different from what Hal had described to him, inaccurately tending to portray Hal as a victim of an unprovoked assault. Moreover, Dr. Finn found it significant that Hal had been arrested a number of times

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2016. Public Act 99-90 also amended or repealed numerous other provisions of the Dissolution Act. We apply the version of the statutes that were in effect at the time of trial. *In re Marriage of Asta*, 2016 IL App (2d) 150160, ¶ 16 n.1.

and had been inconsistent with his reports of how many times he had been arrested. It appears from Dr. Finn's report that he may have been concerned that Hal had a substance abuse problem.

¶ 13 Dr. Finn opined that the factor relating to "the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person" (750 ILCS 5/602(a)(6) (West 2014)), was neutral. According to Dr. Finn, although Kaylie was arrested for and convicted of domestic battery against Hal, there was no basis to conclude that she was at risk of perpetrating further violence. Dr. Finn explained that "[t]he results of Hal's psychological testing suggest risk indicators may be present," although the results in and of themselves were "not predictive of violence per se."

¶ 14 Another statutory factor to consider is "the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986 [Domestic Violence Act], whether directed against the child or directed against another person." 750 ILCS 5/602(a)(7) (West 2014). Dr. Finn opined that this factor weighed in favor of Kaylie. He found it significant that Hal was "not physically afraid of Kaylie." Moreover, Dr. Finn emphasized that Hal had attempted to exercise control over Kaylie by yelling at her, pursuing her during arguments, calling her names, and preventing her from leaving the house. In his testimony at trial, Dr. Finn drew a distinction between domestic battery and domestic violence, proposing that it was Hal, not Kaylie, who had perpetrated domestic violence. According to Dr. Finn, domestic battery is a physical act, while domestic violence is "a dynamic in a relationship." Although Dr. Finn was aware that Kaylie had been convicted of domestic battery, he did not consider that to be domestic violence, because Kaylie's actions were not done "in an effort to exercise control over" Hal.

¶ 15 Another statutory factor is "the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child." 750 ILCS

5/602(a)(8) (West 2014). Dr. Finn acknowledged that "[i]t is difficult to imagine either parent being willing to facilitate a relationship between Charlie and the other parent at this time." Nevertheless, he concluded that this factor weighed in Kaylie's favor. Dr. Finn found it telling that Hal had at one point sought to have Kaylie held in contempt of court. (Dr. Finn did not mention that Kaylie had similarly filed a contempt petition against Hal.) Dr. Finn also noted that Hal had difficulty answering questions about the role that Kaylie should have in Charlie's life. According to Dr. Finn, Kaylie "has not demonstrated the same type of suspiciousness of Charlie's future interactions with Hal as Hal does of her." On the other hand, Dr. Finn recognized that Kaylie had likely increased Charlie's anxiety and distress during transitions of parenting time by saying things to Charlie such as "Mama's going to come for you. Mama always comes for you."

¶ 16 J. Kevin McBride, the guardian ad litem, reached very different conclusions. With respect to the interaction and interrelationship between Charlie and his parents, McBride concluded that this factor did not favor either party. According to McBride, Charlie was comfortable with both parents and did not seem to favor one over the other. McBride determined that the mental and physical health of the parties factor similarly did not favor either party, because he was not made aware of any mental or physical health issues. However, McBride believed that the physical violence/threat of physical violence factor clearly weighed in Hal's favor. He noted that Kaylie complained that Hal had been mentally abusive in the past but that she did not cite any examples. In contrast, Kaylie had been sentenced to conditional discharge for domestic battery.

¶ 17 McBride determined that the factor concerning the occurrence of ongoing or repeated abuse did not weigh in favor of either party, because they were separated and there was a plenary

order of protection in place. Finally, he concluded that Hal was more willing than Kaylie to facilitate a close relationship between Charlie and the other parent. According to McBride, Kaylie could not conceive that Hal could be the custodian, and she had nothing good to say about him. Hal, on the other hand, was able to point out many positive things about Kaylie, and he even acknowledged his own perceived weaknesses.

¶ 18 In his original report, McBride recommended joint custody with primary residential custody to Hal. However, after witnessing the animosity between the parties at trial, he said that he did not know whether joint custody would be a possibility. McBride testified that joint custody might be appropriate if the parties could "grow up" and do what was best for Charlie. In their written closing arguments, Hal and Kaylie each requested sole custody.

¶ 19 On December 29, 2015, the court issued both a judgment for dissolution of marriage and a memorandum decision detailing its findings. The court explained in its memorandum decision that "several of Dr. Finn's conclusions strike the Court as inherently flawed, most notably his conclusions as to factors 6 and 7" (physical violence/threat of physical violence and the occurrence of ongoing or repeated abuse). According to the court, Dr. Finn's opinion that Kaylie did not commit domestic violence when she battered Hal "suggests a lack of fundamental understanding of the Illinois Domestic Violence Act and the definitions therein." Specifically, the court emphasized, there was no requirement in the Domestic Violence Act for a perpetrator's behavior to be "controlling" or for abuse to be "ongoing." Instead, the "ongoing" element comes from section 602(a)(7) of the Dissolution Act. Thus, even a single instance of domestic violence may be considered under section 602(a)(6) of the Dissolution Act, although 602(a)(7) takes into consideration "ongoing or repeated abuse." 750 ILCS 5/602(a)(7) (West 2014). The court found that "Kaylie's criminal battery upon Hal is by any reasonable definition domestic violence," and

Dr. Finn's conclusion regarding factor 6 was "completely unsupportable."

¶ 20 Dr. Finn's opinions regarding factor 7 were "equally troublesome" to the court, because he downplayed Kaylie's domestic battery conviction and "ignore[d] a wealth of evidence that demonstrated that her abuse of Hal was ongoing." Additionally, although Dr. Finn believed that Hal had abused Kaylie on an ongoing basis, the court noted that Kaylie never sought an order of protection against Hal. Furthermore, the court rejected Dr. Finn's suggestion that Kaylie's domestic battery was an isolated incident, emphasizing both Hal's reports of other incidents of physical abuse and the "plethora of texts, phone calls, voicemails, etc." that demonstrated that Kaylie had harassed Hal on an ongoing basis. The court indicated that Dr. Finn's unsupported conclusion regarding factor 7 "calls into question all of Dr. Finn's opinions."

¶ 21 With respect to statutory factor 5 (the mental and physical health of the parties), the court found it troubling that Dr. Finn "hyper-focus[ed] on Hal's distant past involvement with alcohol and marijuana" while "minimizing *** Kaylie's psychological issues." Furthermore, the court explained, Dr. Finn glossed over Kaylie's "alarming anger management issues," which were demonstrated not only by the pediatrician's records but by "the hundreds of texts Kaylie sent to Hal which displayed a level of vitriol remarkable even in the arena of contested divorces."

¶ 22 The court then weighed the statutory custody factors. As is relevant to this appeal, the court found that the interaction and interrelationship factor outlined in section 602(a)(3) did not favor either party, because Charlie "interacts with both parents and enjoys a loving relationship with both of them." With respect to the mental and physical health of all individuals involved, the court found that this factor favored Hal. Specifically, the court noted that Kaylie was being treated by a psychologist for an adjustment disorder with anxiety and mood features and that she had major unresolved anger management issues. In contrast, Hal did not have significant mental

health issues. The court noted that Hal's last DUI conviction was 17 years ago and that there was no competent evidence presented that he currently had drug problems.

¶ 23 Furthermore, the court found that the factor regarding physical violence/threat of physical violence weighed in Hal's favor, because Kaylie committed domestic battery, which resulted in an order of protection. According to the court, there was no competent evidence that Hal threatened violence toward anyone. Similarly, the factor regarding ongoing abuse weighed in Hal's favor, because Kaylie had harassed Hal on an ongoing basis, and there was no competent evidence that Hal had abused anyone.

¶ 24 Finally, with respect to the willingness of the parents to facilitate relationships, the court found that this factor favored Hal. Although the court acknowledged that Hal had "demonstrated hostility toward Kaylie at times and has not displayed a significant degree of willingness to facilitate a relationship between Kaylie and [Charlie]," Hal was the parent who was far more likely to do so. The court found that it was "unfathomable" that Kaylie would make efforts to facilitate Charlie's relationship with Hal, given her "extreme level of hostility" toward Hal. Moreover, the court noted that Dr. Finn had criticized Hal both for listing Charlie as a protected party on the emergency order of protection and for filing a petition to hold Kaylie in criminal contempt. However, the court explained, there was a reasonable basis for Charlie to be included as a protected party, because he was at home when the battery occurred. The court further emphasized that Hal agreed to remove Charlie as a protected party shortly after the emergency order of protection was entered. According to the court, Hal also had every right to pursue a contempt petition against Kaylie if she had indeed violated the order of protection, as Hal had alleged. The court mentioned that Kaylie had at one point during these proceedings similarly sought to hold Hal in contempt.

¶ 25 After concluding that joint custody was not appropriate, the court awarded Hal sole custody. Kaylie timely appeals.

¶ 26 II. ANALYSIS

¶ 27 (1) Custody

¶ 28 Kaylie first argues that the trial court erred in granting sole custody to Hal. The trial court is in the superior position to evaluate the witnesses and ascertain the best interests of the child. *In re Marriage of Seitzinger*, 333 Ill. App. 3d 103, 108 (2002). Accordingly, there is a strong presumption in favor of the court's judgment. *Seitzinger*, 333 Ill. App. 3d at 108. We will not reverse a custody determination unless a manifest injustice occurred and the decision is clearly against the manifest weight of the evidence. *In re Marriage of Iqbal*, 2014 IL App (2d) 131306, ¶ 55. "A judgment is against the manifest weight of the evidence only when the opposite conclusion is clearly apparent." *Iqbal*, 2014 IL App (2d) 131306, ¶ 55 (quoting *In re Parentage of J.W.*, 2013 IL 114817, ¶ 55).

¶ 29 The award of sole custody to Hal is not against the manifest weight of the evidence. It is clear that Hal and Kaylie both love Charlie very much and are willing and able to care for him. Unfortunately, because the parents cannot get along with each other, the inevitable consequence is that one of them must have custody while the other gets visitation. The evidence at trial was overwhelmingly focused on how Kaylie and Hal treat other, not on how Charlie is being treated. Additionally, many of the accusations were disputed by the other parent. The record is replete with examples of Hal and Kaylie treating each other with disdain and disrespect.

¶ 30 Reasonable minds could reach different conclusions about which parent should have custody. Indeed, the guardian ad litem and the custody evaluator had very different impressions about the dynamics of the parties' relationship. The trial court appropriately explained its

reasons for rejecting Dr. Finn's recommendations. After having thoroughly reviewed the record, we cannot say that such ruling was against the manifest weight of the evidence.

¶ 31 Kaylie nevertheless insists that she was Charlie's caregiver before the parties separated, generally relying heavily on the testimony of her own witnesses. However, even Dr. Finn testified that it would be splitting hairs to determine which party was the primary caregiver before the separation. McBride similarly testified that he could not form an opinion on this point. The trial court's conclusion that statutory factor 3 did not favor either party was not against the manifest weight of the evidence.

¶ 32 The record also supports the court's conclusion that Kaylie was the perpetrator of domestic violence. Although the evidence was disputed, there was testimony that Kaylie had physically attacked Hal on four occasions and that she had harassed him via text messages, sometimes while he was at work. Irrespective of whether Hal had a tendency to provoke Kaylie, she was the one who was convicted of domestic battery. Moreover, although Kaylie accuses Hal in her brief of tampering with the text messages that were introduced into evidence by deleting his own messages, Hal testified unequivocally that he did not do so. Once again, the trial court was responsible for making credibility determinations and weighing the evidence.

¶ 33 Kaylie discusses *Tamraz v. Tamraz*, 2016 IL App (1st) 151854, at length in her brief. In that case, the respondent's father died, and her cousin (the petitioner) went to the memorial service with the deceased's mistress. *Tamraz*, 2016 IL App (1st) 151854, ¶ 4. Enraged, the respondent left an angry voicemail for the petitioner and texted him 26 times over the period of an hour. *Tamraz*, 2016 IL App (1st) 151854, ¶¶ 4-5. The messages stopped once the petitioner's sister told the respondent that they were going to show the messages to their attorney, and the respondent had no further contact with the petitioner. *Tamraz*, 2016 IL App (1st) 151854, ¶ 6.

The trial court declined to enter a plenary order of protection, finding that most of the messages at issue were not specifically directed against the petitioner, the respondent did not make any specific threats, the petitioner was not afraid of the respondent, and the comments at issue would not make a reasonable person fear for his or her safety. *Tamraz*, 2016 IL App (1st) 151854, ¶ 12. The appellate court affirmed, holding that the trial court's ruling was not against the manifest weight of the evidence. *Tamraz*, 2016 IL App (1st) 151854, ¶ 24.

¶ 34 *Tamraz* does not support Kaylie's argument that the custody determination in the present case is against the manifest weight of the evidence. We must keep in mind the deferential standard of review that was applied in *Tamraz*; the trial court made certain factual findings in that case, and the appellate court did not disturb those findings. We accord the trial court the same deference in the present case. Moreover, the trial court reasonably concluded that the sheer number of text messages that Kaylie sent Hal, sometimes while he was at work, was harassing and abusive. In contrast to *Tamraz*, this was not an isolated incident.

¶ 35 Kaylie also criticizes the trial court's conclusion that Hal would be more likely to facilitate Charlie's relationship with the other parent. The animosity between the parties is certainly a two-way street. The trial court recognized that Hal was not particularly willing to facilitate Charlie's relationship with Kaylie. However, presented with conflicting evidence at every turn, the court reasonably concluded that Kaylie was less likely than Hal, even if only marginally so, to promote Charlie's relationship with the other parent.

¶ 36 (2) Characterization of the Richmond Property

¶ 37 Kaylie next argues that the court's determination that the marital residence is Hal's nonmarital property is against the manifest weight of the evidence.

¶ 38 Prior to trial, Kaylie filed a third-party complaint against Hal's father alleging as follows. Hal holds title to the real estate commonly known as 10314 East Street in Richmond, Illinois (the Richmond property) with his father. The Richmond property was purchased during the marriage, and Hal and Kaylie resided there until Kaylie was removed from the property. Hal and Kaylie have paid all mortgage payments and other expenses related to the real estate. Hal's father is on title for the sole reason that he co-signed the mortgage for Hal when the property was purchased. It was never intended that Hal's father would have a continued ownership interest. Upon information and belief, Hal, his father, or both of them directed their real estate attorney to prepare a quit claim deed transferring title to Hal and Kaylie. However, such deed was never executed. Kaylie prayed for a finding that Hal's father has "no equitable interest" in the Richmond property. She also requested an order for Hal's father to quit claim his interest to Hal and Kaylie.

¶ 39 Exhibits introduced at trial showed that Hal and his father closed on the Richmond property on December 23, 2011, during the parties' marriage. However, the parties did not introduce into evidence the deed conveying the property to Hal and his father. Both Hal and his father were borrowers on a note in the amount of $233,916. They were also listed as borrowers on the mortgage. Kaylie was not listed on the note or the mortgage. Another exhibit was an e-mail from an attorney dated January 2, 2012. Attached to that e-mail was an unsigned draft of a quit claim deed that would have transferred title to the Richmond property from Hal and his father to Hal and Kaylie, as tenants by the entirety. Also included as exhibits were copies of various checks that Kaylie wrote to Hal between October 2012 and October 2013. Each check was for an amount between $1,700 and $2,200, and from the memo lines it appears that Kaylie

was contributing to the mortgage and other bills. The 2013 real estate tax bill was issued to Hal and his father.

¶ 40 Kaylie and Hal resided together at the Richmond property from the time of the closing in December 2011 until they separated in November 2013. Kaylie also operated an animal rescue business out of the premises.

¶ 41 Kaylie initially testified that she was not aware whether she was on title to the Richmond property. She later acknowledged that the property was titled to Hal and his father. However, she said that she was involved in choosing the house at the time of the purchase. She believed that Hal's dad had signed a quit claim deed, but she was not aware whether Hal "filed" that deed. She testified that the signed copy of the quit claim deed was in the marital residence, but she added that Hal told her that no signed copy of the deed existed. She did not request the deed from Hal subsequent to the parties' separation.

¶ 42 According to Kaylie, the reason that she was not included on the mortgage was that at the time of the purchase she had a mortgage on her own home in Wonder Lake, Illinois. She did not believe that she contributed money from her personal bank account toward the down payment on the Richmond property. However, she did not recall whether Hal and his father purchased the property. She had not contributed toward the mortgage since she vacated the premises.

¶ 43 Hal testified that the Richmond property was titled in his and his father's names. According to Hal, because Kaylie had bad credit and they could not get a loan in her name, she had never been on the mortgage or title. The down payment came from Hal and his father. Specifically, Hal said that his parents gave him $30,000 as a gift, and he used around $12,000 of that for the down payment. He testified that his father brought a check to the closing, but he acknowledged that he did not have proof of that at the time of trial. He agreed that one of the

aspects that he and Kaylie looked for in buying the house was that it could be used for Kaylie's animal rescue operation.

¶ 44 Hal further testified that he and Kaylie had separate bank accounts. During the time the parties lived together, he made the mortgage payments using both his own paycheck and the rent check that Kaylie gave him. He initially denied that Kaylie's paycheck contributed to the mortgage. However, later in his testimony, he said that Kaylie gave him $2,000 per month for "everything," which included household expenses and the mortgage. Up until the time he and Kaylie separated, his father did not make any mortgage payments. With respect to the unsigned quit claim deed that is included in the record, Hal explained that Kaylie solicited the services of an attorney to draft the deed, but that it was never his intention to sign it. Nor, to his knowledge, was it his father's intention to sign that deed. Hal's attorney stipulated at trial that Hal had listed the Richmond property as marital property in his answers to interrogatories.

¶ 45 Hal's father testified that he is one of the owners of the Richmond property. Hal and Kaylie told him that they liked the home and asked if he would be willing to co-sign so that they could buy it. He and Hal signed the mortgage and the promissory note. Kaylie was not included on the title. The $12,000 down payment came from $30,000 that he gifted to Hal sometime before the closing. Hal at one point asked him to execute a quit claim deed conveying his interest in the home to Kaylie, but he refused because it was not a good deal for him, as he would still be on the mortgage. There was never any intention to give Kaylie an interest in the home. Hal's father has paid for certain repairs to the home, which is included in the amount that his son owes him.

¶ 46 In his written closing argument, Hal contended that he and his father each had one-half interests in the Richmond property. Hal argued that his interest was nonmarital pursuant to 750

ILCS 5/503(a)(1) (West 2014), because he acquired it by gift from his father or his parents. According to Hal, there was $54,298 of equity in the Richmond property. If the court found the home to be marital property, Kaylie's share would be 25%, or $13,575, which represented half of Hal's interest.

¶ 47 In her written closing argument, Kaylie contended that the Richmond property was marital, noting that Hal admitted as much in his answers to interrogatories. She argued that the home should be sold and the proceeds divided equally. She also argued that Hal's father should be ordered to quit claim his interest in the property to Hal and Kaylie as tenants in common.

¶ 48 In its memorandum decision, the trial court found that "Hal has proven by clear and convincing evidence that the [Richmond property] is his non-marital property and he is awarded same." However, the judgment for dissolution of marriage indicates that "*Hal's share* of the [Richmond property] is his non-marital property by way of gift." (Emphasis added.) According to the judgment for dissolution of marriage, Hal and his father were to be responsible for the mortgage and the costs of ownership and occupancy. They were also required to hold Kaylie harmless and indemnify her regarding any liabilities incurred in connection with the property. In the judgment for dissolution of marriage, Hal and his father were each awarded half shares of the Richmond property, free from any claims by Kaylie.

¶ 49 On appeal, Kaylie argues that Hal made a judicial admission in his answers to interrogatories that the Richmond property is marital, and he is bound by that admission. She also insists that the evidence showed that it was never intended that Hal's father would have an ownership interest in the property. According to Kaylie, Hal's father's involvement was only to help Hal and Kaylie purchase the home by lending his credit-worthiness. Furthermore, Hal

cannot show that he used only nonmarital funds to pay for the home, because Kaylie made substantial contributions from her checking account.

¶ 50 Hal and his father contend that the trial court's determination that the Richmond property is Hal's nonmarital property is supported by the evidence. They also argue that Hal's answers to interrogatories constituted merely evidentiary admissions, not binding judicial admissions. Moreover, even if we accept Kaylie's contention that the Richmond property is marital, they say that this affects only Hal's one-half interest in the property.

¶ 51 In a divorce action, the trial court must characterize as either marital or nonmarital all property interests that the spouses have. See 750 ILCS 5/503(a) (West 2014). If the parents of one of the litigants have a legal interest in real estate that is claimed to be marital, it is appropriate for the parties to file a third-party complaint against the parents, and the trial court may determine the respective rights of the parties. See *In re Marriage of Olbrecht*, 232 Ill. App. 3d 358, 365 (1992); *In re Marriage of Peshek*, 89 Ill. App. 3d 959, 965 (1980). As an initial matter, we note that the record does not reflect the precise legal interests that Hal and his father have in the Richmond property. Specifically, we do not know whether they are joint tenants or tenants in common. We further observe that the trial court's findings with respect to the Richmond property appear to be conflicting. In its memorandum decision, the court found that the Richmond property (the marital residence) is Hal's nonmarital property, purportedly awarding the entire home to him. In doing so, the court did not cite any particular provision of the Dissolution Act, nor did the court mention any interest that Hal's father might have in the property. In contrast, in the judgment for dissolution, the court found that *Hal's share* of the property is nonmarital by way of gift. The court then awarded Hal and his father each 1/2 interests in the property, free from Kaylie's claims.

¶ 52 Nevertheless, it appears to be undisputed that Hal and his father both have certain legal interests in the Richmond property. In her brief on appeal, Kaylie does not specifically reiterate her request for Hal's father to quit claim his interest in the Richmond property to Hal and her. Nor does she present any specific legal theory or cite case law that would support stripping Hal's father of his legal or equitable interests. The only case that Kaylie cites where a third-party title owner was joined in a divorce action is *Hofmann v. Hofmann*, 94 Ill. 2d 205 (1983). However, she cites that case only for the oft-repeated proposition that property acquired during the marriage is presumptively marital. Additionally, that case bears no factual resemblance to the case at bar. In *Hofmann*, the husband and his parents engaged in a course of conduct that was calculated to eliminate the husband's equity in certain property to prevent the wife from sharing in that equity. *Hofmann*, 94 Ill. 2d at 214. Furthermore, in *Hoffman*, the proper remedy was not to divest the husband's parents of their title to the land at issue, but to grant the wife a lien against the title. *Hoffman*, 94 Ill. 2d at 214. Kaylie has failed to present a cogent legal theory or cite authority to justify stripping Hal's father of his interest in the Richmond property, and any such arguments are forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (arguments must be supported by citations to authority); *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 13 (" 'The appellate court is not a depository into which a party may dump the burden of research.' " (quoting *People v. O'Malley*, 356 Ill. App. 3d 1038, 1046 (2005))).

¶ 53 What we are left with is Hal's interest in the Richmond property. It is undisputed that Hal acquired his interest during the parties' marriage. Accordingly, such interest is presumptively marital. *In re Marriage of Dann*, 2012 IL App (2d) 100343, ¶ 74. To overcome that presumption, it was incumbent upon Hal to produce clear and convincing evidence that he acquired the interest by one of the means specified in section 503(a) of the Dissolution Act.

Dann, 2012 IL App (2d) 100343, ¶ 74. At trial, Hal relied exclusively on section 503(a)(1), which provides that nonmarital property includes "property acquired by gift, legacy or descent." 750 ILCS 5/503(a)(1) (West 2014). We will not disturb the trial court's classification of property unless the decision is against the manifest weight of the evidence. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 44.

¶ 54 The evidence showed that Hal and Kaylie used the Richmond property as their marital residence. Hal purportedly obtained the $12,000 down payment for the property as a gift from his father or his parents. Hal and his father are the only ones listed on the mortgage and apparently the only ones on title. Prior to the parties' separation, Hal paid the mortgage and real estate taxes using marital funds—specifically, the parties' incomes. Indeed, the record reflects that Kaylie contributed approximately $2,000 per month toward the parties' expenses, including the mortgage. Apart from the gift of the down payment, it appears that Hal's father expects to be reimbursed for his contributions toward maintaining the property following the separation.

¶ 55 Under these circumstances, any interest that Hal has in the Richmond property is unquestionably marital. As an initial matter, Hal offered no documents to substantiate that the down payment for the Richmond property actually came from a nonmarital source. See *In re Marriage of Didier*, 318 Ill. App. 3d 253, 262 (2000) ("We do not hold that a party's testimony may never rise to the level of clear and convincing evidence on the issue of tracing. (Citation.) We determine only that under the circumstances before us, the bare assertion of a nonmarital *source* of a particular sum of money, without supporting documentary evidence such as account records, deposit slips, canceled checks, *etc.*, cannot be deemed clear and convincing." (emphasis in original)). We note that Hal's testimony conflicted with his father's testimony as to whether the cash gift was received before or during the closing on the Richmond property. Specifically,

Hal's father testified that the $12,000 down payment came from $30,000 that he gave to Hal at some unspecified time before the closing. We thus have no idea whether Hal's father gave his son this gift two days or two years before the closing. Nor do we know into which account Hal deposited these funds.

¶ 56 Hal fares no better even if we accept his testimony that he received the cash gift at closing and used the money for the down payment on the Richmond property. Hal did not acquire his interest in the property as a gift; he merely acquired the funds used for the down payment as a gift. The fact that a party purchases real estate during the marriage using a down payment from a nonmarital source does not, in itself, make the property nonmarital. See *In re Marriage of Hegge*, 285 Ill. App. 3d 138, 143 (1996) (although the wife used non-marital funds for the down payment, she failed to trace the entire purchase price of the property to a nonmarital source where her husband was included as a mortgagor and the parties paid the mortgage out of their joint checking account). Nor is it relevant that Hal is on title and Kaylie is not. *Hegge*, 285 Ill. App 3d at 143; 750 ILCS 5/503(b)(1) (West 2014) (property acquired by either spouse during the marriage is presumed to be marital, irrespective of title). Hal and Kaylie used their marital funds to pay the mortgage on the Richmond property, and the result is that whatever interest Hal has in the property is marital. See *In re Marriage of Weisman*, 2011 IL App (1st) 101856 ¶ 24 (where the husband purchased real estate in contemplation of marriage using primarily nonmarital funds, the property was nevertheless marital, because he subsequently used marital funds to pay the mortgage).

¶ 57 The dissent frames the relevant issues as "whether Hal intended to make a gift of his non-marital property to the marital estate, and whether he commingled his non-marital property with marital property to the extent that the non-marital property lost its identity." *Infra* ¶ 85. To that

end, the dissent submits that the evidence does not establish that "Hal intended to donate his non-marital property to the marital estate" (*infra* ¶ 76) or that the gift (the $30,000) lost its identity (*infra* ¶ 77). Respectfully, these are not the issues presented by the parties. A transmutation analysis such as the one that the dissent proposes might be more appropriate if Hal were indeed seeking to recover the nonmarital funds that he contributed to the marital estate. See, *e.g.*, *infra* ¶ 76 (opining that Hal's interest in the home was meant to "act as a conduit for the placement of his gift from his parents"). However, that is not what Hal is arguing. Instead, Hal contends that his interest in the Richmond property is nonmarital simply because he used a nonmarital source to make the down payment and Kaylie is not on the title or the mortgage. That argument runs contrary to *Weisman*. Although the dissent proposes that *Weisman* is factually distinguishable, this statement ignores that there were two separate issues involved in *Weisman*: (1) the use of marital funds to pay off mortgages in the husband's name that were taken out during the marriage and (2) the acquisition of property in contemplation of marriage. *Weisman's* discussion of whether the property at issue was acquired in contemplation of marriage is obviously not pertinent to the present case. However, *Weisman's* analysis of the use of marital funds to pay off the mortgages is instructive. Furthermore, in light of *Weisman*, the dissent's suggestion that "the entire purchase price of the Richmond property can be traced to non-marital assets" (*infra* ¶ 80) is incorrect. Contrary to what the dissent suggests, we are not holding that "Hal effectively transmuted his non-marital interest into marital property." *Infra* ¶ 85. We have said nothing about transmutation precisely because this is not an issue raised by the parties.

¶ 58 Finally, the dissent argues that we have ignored section 503(a)(2) of the Dissolution Act, which provides that nonmarital property includes property acquired "in exchange for property

acquired by gift, legacy or descent" (750 ILCS 5/503(a)(2) (West 2014)). *Infra* ¶ 83. Hal has never argued that the exchange provision of section 503(a)(2) applies. Nor does the evidence support a conclusion that Hal exchanged his $30,000 cash gift for the Richmond property. Instead, Hal apparently used his nonmarital cash as a down payment for the house and then used marital funds to pay the mortgage. That is precisely the situation that the court addressed in *Weisman*, and its holding on this point is controlling.

¶ 59 Accordingly, the trial court's finding in the judgment for dissolution of marriage that Hal's interest in the Richmond property is his nonmarital property is against the manifest weight of the evidence. However, as explained above, Kaylie has forfeited any arguments that she has made or that she could have made to support stripping Hal's father of his interest in the property. The matter is remanded to the trial court with the following directions. The court shall determine the value of the Richmond property as well as the legal interests that Hal and his father have in the property. Kaylie shall have no claim against Hal's father's interest in the property. The court shall then redistribute all marital property, including Hal's interest in the Richmond property, between Hal and Kaylie. In its discretion, the trial court may request additional evidence, argument, or both.

¶ 60 (3) Percentage Support Order

¶ 61 Finally, Kaylie argues that the court improperly imposed a percentage child support order without a factual justification.

¶ 62 Kaylie works as an animal products investigator and earns approximately $62,000 per year. She had a second job as a waitress until May 2015 when the restaurant went out of business. She testified that she was not sure how much she earned while working her second

job, because it was not a regular amount. She estimated that she earned $50-$100 per week on average.

¶ 63 In his closing argument, on the topic of child support, Hal asserted that Kaylie "*has* a part time job at a restaurant earning approximately $200 per month." (Emphasis added.) He requested "provisions for payment of child support on such additional income for her part time or other employment."

¶ 64 In its memorandum decision, the court ruled as follows:

> "The court finds no basis to deviate from the statutory guideline set out in 750 ILCS 5/505, and therefore Kaylie should pay as and for child support twenty (20%) percent of her net income. The court finds that Kaylie's monthly net income for child support is $3,477.83. Therefore, Kaylie shall pay as and for child support the sum of $696.00 per month. In addition, Kaylie shall pay twenty (20%) percent of all net income earned per year in excess of $41,734.00."

The judgment for dissolution of marriage contained similar provisions regarding "payment of child support on such additional income for Kaylie's part-time or other employment."

¶ 65 In her posttrial motion, Kaylie noted that she is no longer employed as a waitress. She directed the court's attention to 750 ILCS 5/505(a)(5) (West 2014), which provides, in relevant portion:

> "The final order in all cases shall state the support level in dollar amounts. However, if the court finds that the child support amount cannot be expressed exclusively as a dollar amount because all or a portion of the payor's net income is uncertain as to source, time of payment, or amount, the court may order a percentage amount of support in addition to

> a specific dollar amount and enter such other orders as may be necessary to determine and enforce, on a timely basis, the applicable support ordered."

According to Kaylie, the trial court did not make a finding in accordance with section 505(a)(5) before entering a percentage order, and the evidence did not support such finding.

¶ 66 At the hearing on the posttrial motion, the court questioned whether section 505(a)(5) applies only to "orders where it's just put as a percentage versus in this case where it's a dollar amount plus a percentage." Hal's attorney suggested that Kaylie may indeed be currently working a second job. He also argued that Kaylie had "been known to have second jobs," proposing that it would be an unnecessary burden on the parties, counsel, and the court to have to track this and keep coming back to court. In its written ruling on the posttrial motion, the court declined to remove the percentage of income portion of the support order. The court did not explain its reasoning for this ruling.

¶ 67 We agree that the trial court did not make the necessary findings to impose a percentage child support obligation on Kaylie in addition to her base child support amount. Section 505(a)(5) is clear that it is only appropriate to impose a percentage obligation on top of a base obligation in cases where "the child support amount cannot be expressed exclusively as a dollar amount because all or a portion of the payor's net income is uncertain as to source, time of payment, or amount." 750 ILCS 5/505(a)(5) (West 2014). Accordingly, we reverse the portion of the trial court's judgment requiring Kaylie to pay 20% of her net income in excess of her base obligation. If on remand the trial court deems it appropriate to re-impose the original support order, the court is directed to clearly articulate its reasons for doing so.

¶ 68 III. CONCLUSION

¶ 69 To summarize, the trial court's order granting sole custody of Charlie to Hal is not against the manifest weight of the evidence. The trial court's conclusion that Hal's interest in the Richmond property is nonmarital is against the manifest weight of the evidence; however, Kaylie has forfeited any arguments that she has made or that she could have made to support stripping Hal's father of his interest in that property. The matter is remanded to the trial court with the directions outlined in paragraph 59 *supra*. The portion of the trial court's judgment requiring Kaylie to pay a percentage of her income on top of her base child support obligation is reversed. If on remand the trial court deems it appropriate to re-impose the original support order, the court is directed to clearly articulate its reasons for doing so.

¶ 70 Affirmed in part, reversed in part, and remanded with directions.

Justice Jorgensen concurred in the judgment.

Justice HUTCHINSON concurred in part and dissented in part.

¶ 71 Justice HUTCHINSON, concurring in part and dissenting in part:

¶ 72 I concur with the majority's holdings on the issues of custody of the minor child and child support payments. However, I must respectfully dissent from the majority's characterization of the Richmond property. The trial court found that Hal proved by clear and convincing evidence that his interest in the Richmond property was his non-marital property by way of gift. As I will explain, the majority's holding that this finding is against the manifest weight of the evidence is based on two flawed conclusions: (1) that there is insufficient evidence to show that Hal obtained the $12,000 down payment for the Richmond property as a gift from

his parents; and (2) that the use of marital funds to pay the mortgage was, by itself, enough evidence to establish that Hal's interest in the Richmond property was marital.

¶ 73 The fact that Hal obtained the $12,000 down payment for the Richmond property by way of a gift is not in dispute. Hal and Harold consistently testified that the down payment came out of a $30,000 gift to Hal from his parents. Harold added that he gifted his daughter $30,000 "to equalize things" because she was also trying to buy a house. Kaylie makes no effort to challenge the origin of the down payment on appeal—she even acknowledges in the argument portion of her brief that "Harold gifted Hal $30,000 and Hal used about $12,000 of it for the down payment on the house." And yet, in paragraph 55, the majority inexplicably strains to reason that the evidence on this issue is insufficient, suggesting that the timing of the "purported gift" is somehow dubious. I am left to speculate that the majority has doubts regarding the credibility of Hal's and Harold's testimony; however, we are in no position to question any of the trial court's implicit credibility determinations. Nonetheless, I find nothing to suggest that Kaylie's testimony on this issue was more credible than that of Hal and Harold. Kaylie testified that she "[did not] remember" whether she used any of her own money for the down payment, that she "[did not] recall" how Hal came up with the money to purchase the home, and that she "[did not] know any of the details" as to whether it was Hal and Harold who had actually purchased the home. She further claimed that Hal had signed the quit claim deed, but that she could not produce it because it was in the Richmond home, and that she was uncertain as to whether Hal had ever actually "filed" it. Given Kaylie's foggy memory on these crucial details, I find no reason to doubt that Hal obtained the $12,000 down payment for the Richmond property as a gift from his parents, and I similarly find no reason to doubt any of the trial court's implicit credibility determinations.

¶ 74 That being said, I acknowledge that Hal's gift could have lost its identity when it was invested in the marital home, as the commingling could have resulted in a transmutation of the non-marital funds into the classification of marital property. See, *e.g.*, *In re Marriage of Schmidt*, 242 Ill. App. 3d 961, 970-71 (1993). The majority responds in paragraph 57 that the concept of transmutation plays no role in its analysis because the issue has not been raised by the parties. Respectfully, that the parties have not specifically referenced the term "transmutation" in their briefs should not inhibit our identification and consideration of the issue that is clearly before us. Section 503(c)(1) of the Dissolution Act provides that non-marital property shall be deemed transmuted to marital property where it has been commingled by contributing one estate of property into another, resulting in a loss of identity of the contributed property. 750 ILCS 5/503(c)(1) (West 2014). Transmutation is based on the presumption that the contributing spouse intended to make a gift of the non-marital property to the marital estate. *In re Marriage of Vondra*, 2016 IL App (1st) 150793, ¶ 14. The presumption that non-marital property has been transmuted to the marital estate can be overcome with clear and convincing evidence that the path of the funds can be traced from its origin. *In re Marriage of Foster*, 2014 IL App (1st) 123078, ¶ 74.

¶ 75 Here, the majority offers little to show how Hal's non-marital property lost its identity beyond its conclusion in paragraph 56 that "Hal and Kaylie used their marital funds to pay the mortgage on the Richmond property, and the result is that whatever interest Hal has in the property is marital." I am aware that the parties lived together in the home for nearly two years, and I agree that the marital estate should be reimbursed for its share of any marital funds that were used to maintain the property. However, I do not believe the evidence here establishes that Hal's non-marital property was transmuted into marital property.

¶ 76 First, the evidence does not support a conclusion that Hal intended to donate his non-marital property to the marital estate. Although the parties did not present the deed conveying ownership of the property, it is undisputed that Harold and Hal were the only borrowers listed on the mortgage and the note, and the 2013 real estate tax bill was issued to Harold and Hal. And although the parties disagree as to who ordered the preparation of the quit claim deed that would have transferred Harold's ownership to Kaylie, there is no evidence that Harold ever signed the quit claim deed, which is consistent with his testimony that he never had any intention to give Kaylie an interest in the home. Furthermore, there is no evidence that Hal took any steps to convey any of his interest in the home to Kaylie or that he otherwise manifested any donative intent to accomplish the same. All of this establishes that ownership of the home was intended to remain exclusively with Harold and Hal, and that Hal's interest in the home would act as a conduit for the placement of his gift from his parents. See *In re Marriage of Steel*, 2011 IL App (2d) 080974, ¶ 86 (noting that the deposit of non-marital funds into a marital account did not establish beyond question that the funds were transmuted into marital property, as the non-marital funds could have been placed in the marital account merely as a conduit to transfer money).

¶ 77 Second, to the extent that Hal may have commingled the gift with the marital estate, it did not lose its identity and it can be traced to its origin. Hal used $12,000 of his $30,000 gift for the down payment on the house. Hal testified that he used the remaining $18,000 to build a fence around the house. Harold also testified that he had paid for extensive repairs and upgrades on the house since Kaylie moved out. Harold was not certain exactly how much was spent, but he testified that his wife kept a record of everything. These expenditures were included in Hal's $141,000 debt to his parents (which also consisted of money lent for legal fees and upkeep of the

house during the dissolution proceedings). There is evidence that Kaylie paid Hal around $2,000 per month from her personal bank account. The record reflects that Kaylie's payments were intended to cover the rent for her animal rescue business, as well as her contributions to the mortgage payments and household expenses. Thus, both the marital and non-marital funds included in Hal's share of the Richmond property can be traced to their respective sources of origin.

¶ 78 The majority relies on *In re Marriage of Hegge*, 285 Ill. App. 3d 138 (1996), and *In re Marriage of Weisman*, 2011 IL App (1st) 101856, neither of which are persuasive.

¶ 79 *Hegge* involved a dispute between two former spouses, Marilyn and Alfred, involving two former marital residences, the Merrill home and the Petunia home. Marilyn purchased the Merrill home before she married Alfred, using non-marital assets for the down payment. After the marriage, Alfred moved into the Merrill home and the couple began paying the mortgage out of their joint checking account. The couple later sold the Merrill home and purchased the Petunia home. They used the proceeds from the sale of the Merrill home and a $27,000 mortgage loan for the balance of the purchase price on the Petunia home. Although the title to the Petunia home was placed only in Marilyn's name, Alfred and Marilyn both signed on the mortgage note. However, the trial court classified the Petunia home as Marilyn's non-marital property on the basis of its finding that Marilyn acquired the Petunia home in exchange for the Merrill home, which the trial court deemed a non-marital asset. *Hegge*, 285 Ill. App. 3d at 139-40. We reversed the trial court's ruling on appeal, pointing out that Marilyn and Alfred were both liable for the $27,000 mortgage that was used for the balance of the purchase price on the Petunia home, and further concluding that Marilyn had failed trace the entire purchase price of the Petunia home to a non-marital source. *Hegge*, 285 Ill. App. 3d at 143. We next concluded

that, by comingling the marital and non-marital assets, Marilyn had transmuted her non-marital portion of the proceeds from the sale of the Merrill home to marital property. *Id*. at 144.

¶ 80 The facts in this case are nothing like the facts in *Hegge*, where the purchase price for the Petunia home originated from two comingled assets: the Merrill home and the $27,000 mortgage. Here, it is undisputed that the purchase price for the Richmond property consisted solely of non-marital assets: the $12,000 down payment from Hal's gift and the $233,916 mortgage loan obtained by Harold and Hal. Thus, unlike in *Hegge*, the entire purchase price of the Richmond property can be traced to non-marital assets. The only similarity between the cases is that Marilyn and Alfred used marital funds to pay the mortgage on the Petunia home in *Hegge*, much the same way that Hal and Kaylie used marital funds to pay the mortgage on the Richmond property here. However, these payments occurred over the course of nearly eight years in *Hegge* (285 Ill. App. 3d at 139-140), whereas the payments here took place for only two years. Therefore, the funds in his case were not comingled to nearly the extent of the comingled funds in *Hegge*.

¶ 81 In *Weisman*, the husband used a series of mortgages obtained prior to his marriage to finance three down payments totaling $1.272 million on his future marital home. *Weisman*, 2011 IL App (1st) 101856, ¶ 23. Property purchased "in contemplation of marriage" is considered marital property. *In re Marriage of Olbrecht*, 232 Ill. App. 3d 358, 363 (1992); *In re Marriage of Sanfratello*, 393 Ill. App. 3d 641, 651 (2009). The husband in *Weisman* argued that the "in contemplation of marriage" doctrine did not apply where the property at issue was purchased entirely with one spouse's non-marital funds. *Weisman*, 2011 IL App (1st) 101856, ¶ 24. The appellate court noted, however, that the husband had used $530,000 from a mortgage he obtained after the marriage to complete the purchase of the marital home. He then obtained two more

mortgages to pay off the mortgages that he had obtained prior to the marriage. Finally, he made monthly interest payments on the mortgages obtained after the marriage with marital funds. Thus, the appellate court held, the husband could not establish that the marital home was purchased entirely with his pre-marital funds. *Id*. The appellate court went on to hold that the marital home was purchased in contemplation of marriage, and that it was therefore marital property. *Id*. ¶ 30.

¶ 82 Suffice it to say, the facts in *Weisman* are even more distinguishable from the facts here than are the facts in *Hegge*, and I will therefore refrain from detailing the flaws of any potential comparison. I would, however, make one final note before concluding.

¶ 83 The majority notes in paragraph 53 that the Richmond property is presumptively marital, because Hal acquired his interest in the Richmond property after the marriage. See *Foster*, 2014 IL App (1st) 123078, ¶ 69. The majority further notes that Hal attempted to overcome this presumption by producing clear and convincing evidence that his interest in the Richmond property was "acquired by gift, legacy or descent." See 750 ILCS 5/503(a)(1) (West 2014). I would point out, however, that Hal could also have overcome the presumption by showing that the property was "acquired * * * in exchange for property acquired by gift, legacy or descent." See 750 ILCS 5/503(a)(2) (West 2014). The majority ignores the latter provision, simply concluding in paragraph 56 that "Hal did not acquire his interest in the property as a gift; he merely acquired the funds used for the down payment as a gift." But regardless of which provision is applicable, I do not believe the trial court's classification of the Richmond property as non-marital was against the manifest weight of the evidence. As I discussed above, the record reflects the following evidence in Hal's favor: Hal used the entire amount of his $30,000 gift toward the purchase and improvement of the Richmond property; Hal's parents gifted their

daughter $30,000 "to equalize things" because she was also trying to buy a house; Harold and Hal were the only borrowers on the mortgage and the note; the real estate tax bills were issued to Harold and Hal; and neither Harold nor Hal ever took any steps to convey any interest in the property to Kaylie. I believe this was clear and convincing evidence that Hal acquired his interest in the Richmond property either by gift or in exchange for property acquired by gift.

¶ 84 Furthermore, in addition to the presumption that property acquired during the marriage is marital, a transfer from a parent to a child is also presumed to be a gift. *In re Marriage of Wanstreet*, 364 Ill. App. 3d 729, 735 (2006). When the nature of the property at issue is subject to these conflicting presumptions, the presumptions cancel each other out, and the trial court is free to determine the issue of whether the property was marital or non-marital without resort to either presumption. *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 88. Under these circumstances, the trial court's classification of the property will not be disturbed unless it is contrary to the manifest weight of the evidence. *Id*. Although his distinction may be of little consequence insofar as our standard of review is concerned, I believe this aspect of Hal's gift is another factor distinguishing this case from the cases cited by the majority.

¶ 85 In sum, the issue here is whether the trial court's classification of Hal's interest in the Richmond property as non-marital was against the manifest weight of the evidence. In holding that the trial court's classification was against the manifest weight of the evidence, the majority reasons that, by using marital funds to pay the mortgage, Hal effectively transmuted his non-marital interest into marital property. While I agree that the marital estate should be reimbursed for the marital funds that were used to pay the mortgage, I do not believe our analysis should turn on whether Hal's interest in the Richmond property included equity derived from the marital estate. Rather, in light of the principles discussed above, our focus should be on whether Hal

intended to make a gift of his non-marital property to the marital estate, and whether he commingled his non-marital property with marital property to the extent that the non-marital property lost its identity. I do not believe the manifest weight of the evidence in this case establishes that Hal intended to donate his non-marital property to this marriage, or that Hal's non-marital property lost its identity. I would affirm the trial court's finding that Hal's share in the Richmond home is his non-marital property. I would, however, remand the cause for a hearing to determine the amount of reimbursement to the marital estate of marital funds used to pay the mortgage and maintain the property, and to accomplish a just distribution of the marital estate.