2019 IL App (2d) 180475-U
No. 2-18-0475
Order filed September 11, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF RACHELLE D. BURKHART, Petitioner-Appellee, and JOHN A. BURKHART III, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 16-D-2462 Honorable Robert E. Douglas, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Appellant did not show that trial court erred in its rulings on maintenance, marital property distribution, or dissipation.

¶ 2 After the circuit court of Du Page County entered a final judgment of dissolution of marriage, the respondent, John Burkhart III, filed this appeal. He challenges the trial court's rulings regarding maintenance, property distribution, and dissipation. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The parties were married in 1991 and have three children, none of whom are now minors. In 2016, the petitioner, Rachelle Burkhart, petitioned for dissolution of the marriage.

¶ 5 The seven-day trial took place in late 2017 and early 2018. On March 12, 2018, the trial court entered a judgment of dissolution. Both parties moved for reconsideration of various aspects of the judgment, and on May 23, 2018, the trial court entered an order granting in part and denying in part those motions.

¶ 6 As modified upon reconsideration, the judgment found the following facts. John was a senior vice president for QBE Americas, Inc. His annual income for 2016 was $779,275, which included a base salary of $425,000 plus bonuses and stock. This was the highest income he had earned during the marriage. Rachelle's 2016 income was $8,497. However, the trial court found that she was underemployed and that, based on her education and experience, she could reasonably be expected to earn $30,000 per year. It therefore imputed that amount of income to her. The parties "enjoyed an affluent lifestyle" during the marriage as reflected in trips, vehicles, the marital home, and gifts to each other and their children. The parties' financial affidavits indicated that they had similar needs.

¶ 7 On the issue of maintenance, the trial court listed the statutory factors to be considered and stated that it had considered them. It found that the parties had a greatly disparate income and a disparate capacity to earn future income. Rachelle had forgone a career in order to raise the parties' children, and she was 47 years old and had not worked full-time since before the children were born. The marital property awarded to Rachelle would have to be used to acquire a new home and was not so substantial as to provide significant income for her living expenses. Any maintenance awarded to Rachelle would incur taxes, while John would receive tax benefits from those payments. Further, the marriage was over 25 years long. Based on all of these factors, permanent maintenance was appropriate. However, maintenance would be subject to

review (a) after 36 months to consider Rachelle's rehabilitative efforts and (b) upon John turning 62 years old, when he could receive early retirement.

¶ 8 As to the amount of maintenance, the trial court set maintenance at 30% of John's base salary ($425,000) less 20% of Rachelle's imputed salary, amounting to $10,083 per month. In addition, John was to pay 30% of "all additional income that he receives from any sources, including but not limited to bonuses, restricted stock options that vest, [and] stock dividends" up to a total of $500,000 per year, and 25% of all additional income between $500,001 and $765,000 per year. John was not required to pay any maintenance on yearly income over $765,000.

¶ 9 The trial court then turned to distribution of marital property. After considering all of the statutory factors, the trial court concluded that an unequal distribution was appropriate, and it awarded 60% of the marital property to Rachelle and 40% to John.

¶ 10 Lastly, the trial court considered Rachelle's claim of dissipation. Rachelle had timely filed a claim alleging that John had dissipated over $173,000 in marital assets. The trial court disallowed most of this claim, but found that $12,432.53 of John's expenditures made during a time that the marriage was undergoing a breakdown, including for a motorcycle, motorcycle gear, and a motorcycle trip in the Alps, constituted dissipation. It therefore ordered John to pay Rachelle 60% of this amount, or $7,459.51.

¶ 11 II. ANALYSIS

¶ 12 On appeal, John attacks three aspects of the trial court's judgment: maintenance, property distribution, and the finding of dissipation.

¶ 13 A. Maintenance

¶ 14 John argues that the trial court committed three errors in setting maintenance. First, he charges that the trial court erred by improperly counting his vested stock units as both property and income. Second, he contends that the trial court impermissibly deviated from the statutory formula for maintenance without explanation. Third, he argues that the trial court abused its discretion in setting the cap on the amount of his income that was subject to maintenance.

¶ 15 1. Vested Stock Units

¶ 16 For the last few years, John received part of his compensation in the form of stock options. Those options vested over time, and he was notified once a year about the amount of his cash and stock bonus, and the amount of vested and unvested shares in his account. John testified that, whenever he received notice that stock options had vested, he could choose whether to retain some shares and sell others to pay the taxes on all of them, retain all the shares and pay the taxes from his personal funds, or sell all the shares.

¶ 17 The trial court treated John's vested stock units as marital property and divided them in accord with the rest of its property distribution. Separately, the trial court ordered John to pay a percentage of his income above his base salary of $425,000 and below $765,000 to Rachelle as maintenance. The trial court stated that "income" for this purpose included all additional income that John received "from any sources, including but not limited to bonuses, restricted stock options that vest, [and] stock dividends." John argues that, in doing so, the trial court improperly "double counted" the vested stock units, treating them both as marital property subject to distribution and as income subject to maintenance. Rachelle responds that there is no indication that the trial court actually ordered John to pay maintenance on the proceeds of any sales of vested stock units, and that even if it had done so that was not improper under the law.

¶ 18 We agree with Rachelle's first point—the language of the trial court's judgment and its modified order upon reconsideration do not show any double counting. The stock units distributed by the trial court as marital property were those that had already vested. By contrast, the stock units identified as potentially subject to maintenance were "stock options that vest"—in other words, options that had not yet vested when judgment was entered but that vest in the future. As the trial court did not count the same stock units as both property and income, we need not address the parties' arguments regarding whether such "double-counting" is legally permissible.

¶ 19 2. Application of Section 504

¶ 20 John next argues that the trial court incorrectly applied section 504 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/504 (West 2018)), because it treated the parties as if they had a combined joint income below $500,000 per year, applying the statutory formula to John's base income and Rachelle's income, but then impermissibly "deviated" from the formula without the required explanation by imposing a maintenance obligation on John's additional income. We find that John has again misread the trial court's judgment.

¶ 21 Section 504 provides for a two-step process in which a trial court first determines whether an award of maintenance is appropriate (by considering over a dozen statutory factors) and then determines the amount and duration of any such maintenance. *Id*. § 5/504(a), (b-1). In setting the amount of maintenance, a trial court must apply statutory guidelines to calculate that amount if the parties' combined gross annual income is below $500,000. *Id*. § 5/504(b-1)(1). In such a case, the calculation involves subtracting 20% of the payee's gross income from 30% of the payor's gross income. *Id*. § 5/504(b-1)(1)(A). If the trial court deviates from these

guidelines, it must expressly find that the application of the guidelines would not be appropriate. *Id*. § 5/504(b-2)(2). If the parties' combined gross annual income is more than $500,000, however, the trial court has discretion in setting the amount of maintenance, which is based on the same factors used to determine whether a maintenance award was appropriate. *Id*. § 5/504(b-1)(2).

¶ 22 In its judgment, the trial court first considered the statutory factors and determined that an award of maintenance was appropriate. It then considered those same factors and determined that the amount of maintenance should be $10,083 per month (an amount based on 30% of John's income minus 20% of Rachelle's imputed income) plus 25-30% of John's income above $425,000 per year, up to a cap of $765,000 per year.

¶ 23 It is crystal clear that the statutory guidelines do not apply in this case—the parties' combined gross annual income is well above $500,000. Thus, the trial court did not improperly "deviate" from those guidelines in setting maintenance, and it had no corresponding obligation to make a finding justifying a deviation. Further, the trial court's approach to structuring the award—using the statutory formula as a method of setting the maintenance on John's base salary and applying a percentage to John's income above that—was reasonable and appropriate given that the amount of John's base salary was known while the amount of his future yearly bonuses would likely fluctuate. John has not shown any error in the trial court's determination of the amount of maintenance.[1]

[1] In a one-sentence assertion devoid of reasoned argument or citation to legal authority, John states that, even if the guidelines for maintenance do not apply, the award still should be reversed because the trial court did not "properly consider[]" the statutory factors "within the proper context." This bare assertion is inadequate to present any issue and we therefore ignore it.

¶ 24 3. Cap on Income Subject to Maintenance

¶ 25 John's final argument regarding maintenance is that the trial court erred in capping the amount of his annual income subject to maintenance at $765,000. The setting of an appropriate amount of non-guidelines maintenance is within a trial court's discretion, and we will not overturn its judgment unless it is clear that there has been an abuse of that discretion. *In re Marriage of Schneider*, 214 Ill. 2d 152, 173 (2005). An abuse of discretion occurs where no reasonable person would take the view of the trial court. *Id*. The party challenging the award of maintenance bears the burden of showing such an abuse of discretion. *Id*.

¶ 26 The trial court initially set the cap at $779,275 in its judgment, finding that this sum—the total amount received by John in 2016—was the highest income earned by John during the marriage. John moved for reconsideration, arguing that this sum included a non-recurring, one-time payout of $161,485.75 in lieu of pension. In response, Rachelle argued that no cap was required at all, and the evidence showed that John routinely earned a similar amount even without such one-time payouts—he earned $764,617 in 2005, and was on track to earn at least $770,000 in 2017. The trial court ultimately lowered the cap to $765,000, noting that the 2005 income was the highest John had earned in the marriage prior to the disputed 2016 income.

¶ 27 John argues that the trial court abused its discretion in setting the cap at $765,000 because that 2005 figure was "simply outdated" and his income in the intervening years was often much lower. This argument ignores the trial court's statement that it wished to set the cap at John's highest income during the marriage. The trial court did not indicate that it wished to set the cap at John's average income during the marriage. John has not cited to any legal authority that

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Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); *People ex rel. Illinois Department of Labor v. E.R.H. Enterprises, Inc.*, 2013 IL 115106, ¶ 56.

using the highest income during a marriage to set a cap on the income subject to maintenance is error. Indeed, the highest income achieved during a marriage is one component establishing the standard of living during the marriage, which is an appropriate basis for maintenance. See *In re Marriage of Micheli*, 2014 IL App (2d) 121245, ¶ 26. Further, courts generally look to the payor's current income at the time of judgment when setting support (*In re Marriage of Rogers*, 213 Ill. 2d 129, 138 (2004)), and the evidence showed that John's annual income in 2017 was at least $770,000. We find no abuse of discretion in the trial court's selection of $765,000 as an appropriate amount for a cap on the income subject to maintenance.

¶ 28 Lastly, John argues that the trial court abused its discretion in setting the maintenance cap as high as it did for a host of reasons, including the evidence as to Rachelle's living expenses and reasonable needs, the standard of living during the marriage, and the fact that Rachelle received 60% of the marital estate.[2] On the first point, John notes that Rachelle listed $11,368.27 in monthly living expenses, but if his annual income is greater than $765,000 he will have to pay her $17,478 per month, a much higher sum. Rachelle responds that her financial affidavit actually listed monthly needs of $19,583.36, and that even if her monthly debt service were excluded, she would still require over $3,000 above her stated living expenses just to cover taxes. Given that Rachelle's total monthly needs exceed the highest possible amount of maintenance and that the trial court expressly noted, as a factor in its decision, that Rachelle would bear the tax burden on the maintenance she receives while John would receive a corresponding benefit, we find no abuse of discretion in the trial court's award.

[2] John also reprises his previous arguments that Rachelle should receive a smaller portion of his additional income above his base salary because it represents a "deviation" from the statutory guidelines, but as we have already rejected this argument we need not address it here.

¶ 29 Similarly, although John argues that the parties merely "lived a typical middle-class lifestyle" during the marriage, that characterization was amply refuted by the evidence that the parties were able to amass a $2.28 million estate while paying cash for a $346,000 yacht, a $70,000 Tesla, three motorcycles, and $40,000 in yearly college tuition for each of their three sons. John has not shown that the trial court's maintenance award is out of line with this marital standard of living. Finally, we must also reject John's argument that Rachelle's award of 60% of the marital property "obviates" her need to receive maintenance at the level set by the trial court. "A former spouse is not required to exhaust all of her assets in order to meet her basic needs" (*In re Marriage of Kuper*, 2019 IL App (3d) 180094, ¶ 19), especially where, as here, the payor spouse is fully able to meet his own needs as well as the needs of his former spouse (*In re Marriage of Bernay*, 2017 IL App (2d) 160583, ¶ 17). Further, the trial court found that Rachelle will never be able to match the marital standard of living through her own income. For all of these reasons, we find that John has failed to demonstrate any abuse of discretion in the trial court's award of maintenance.

¶ 30 B. Distribution of the Marital Estate

¶ 31 John next attacks the trial court's decision to award 60% of the marital estate to Rachelle. A trial court has broad discretion in the division of marital assets, and we will reverse its determinations only if it is clear that the trial court has abused that discretion. *In re Marriage of Wojcik*, 362 Ill. App. 3d 144, 161 (2005).

¶ 32 John argues that "it is not clear" that the trial court gave appropriate weight to two of the statutory factors: the relevant economic circumstances of each party when the division of property takes place and whether the apportionment is in lieu of or in addition to maintenance. 750 ILCS 5/503(d) (West 2016). John cites no case law or other relevant authority that would

establish any error, and his argument is essentially that, in his view, the trial court's weighing of the statutory factors should have resulted in an equal division of the marital property. However, John's opinion does not amount to a showing that the trial court abused its discretion. Moreover, although section 503(d) of the Act requires a trial court to divide marital property "in just proportions" (*id*.), it is well-settled that this command does not mandate an equal split but rather an equitable distribution in light of the statutory factors. See *In re Civil Union of Hamlin & Vasconcellos*, 2015 IL App (2d) 140231, ¶ 61 ("An equitable property division does not necessarily mean an equal distribution; a party may receive a greater share of the property if the relevant factors warrant the result."); *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 661 (2008) (an unequal division of marital property may be appropriate depending on the circumstances of each case). John has not shown any abuse of discretion by the trial court in its distribution of marital property.

¶ 33 C. Finding of Dissipation

¶ 34 John's final argument on appeal is that the trial court erred in finding that he dissipated marital assets. Dissipation is the use of marital funds for the sole benefit of one party for a purpose unrelated to the marriage at a time when the marriage is undergoing a breakdown. *In re Marriage of O'Neill*, 138 Ill. 26 487, 497 (1990). Whether a particular course of conduct is dissipation depends on the facts of the case. *In re Marriage of Drummond*, 156 Ill. App. 3d 672, 683 (1987). A trial court's determination regarding dissipation will not be reversed unless it is against the manifest weight of the evidence (*In re Marriage of Laroque*, 2018 IL App (2d) 160973, ¶ 87), that is, unless "the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence" (*Samour, Inc. v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 530, 544 (2007)).

¶ 35 John argues that Rachelle acquiesced to all of the expenses which the trial court found to be dissipation and argues that such acquiescence is a defense to a finding of dissipation. He notes that the majority of the expenses were related to his purchases of a motorcycle and riding gear, and to motorcycle trips he took. Other expenses related to a trip to see his alma mater play in the Cotton Bowl or to gifts or nights out with the parties' children. John argues that he spent money in similar ways during the marriage and that Rachelle did not object. Rachelle responds that expenditures that were acceptable during the marriage may nevertheless constitute dissipation if they are made while the marriage is undergoing a breakdown, and she did not consent to these expenses but had no power to stop them.

¶ 36 Rachelle is correct that expenditures are not exempted from consideration as dissipation simply because similar expenses were made during the marriage. "The issue is not whether the spending is consistent with that engaged in prior to the breakdown but, rather, whether such spending was for the sole benefit of one of the spouses for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown." *In re Marriage of Hagshenas*, 234 Ill. App. 3d 178, 195 (1992). John does not contest the finding that his expenditures were for his sole benefit for a purpose unrelated to the marriage,[3] or that the marriage was undergoing an irreconcilable breakdown when he made those expenditures. Accordingly, we reject his assertion that the trial court erred in finding them to be dissipation.

¶ 37 In his reply brief, John raised one new argument—that, because some of the expenditures were for assets such as the motorcycle and gear that were distributed to John as his marital

[3] Although John perhaps could have argued that expenses for gifts, dinners, and other time spent with the children were not "unrelated to the marriage," he has not made any such argument and thus has forfeited it. See Ill. S. Ct. R. 341(h)(7).

property, they could not constitute dissipation. It is well-settled, however, that arguments not raised in a party's opening brief are forfeited and may not be raised in the reply brief. Ill. S. Ct. R. 341(h)(7). Further, John's cursory argument in his reply brief fails to identify the expenditures he contends would fall into this category or relate them to the property he received as marital distribution, and we will not do his work for him. *People v. Chatman*, 357 Ill. App. 3d 695, 703 (2005) ("A reviewing court is entitled to have the issues before it clearly defined and is not simply a repository in which appellants may dump the burden of argument and research; an appellant's failure to properly present his own arguments can amount to waiver of those claims on appeal."). John has not shown that the trial court's finding of dissipation is against the manifest weight of the evidence.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 40 Affirmed.