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2013 IL App (3d) 3120725-U

Order filed August 7, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
KRISTIN BELL,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois,
Petitioner-Appellee,)	
)	Appeal No. 3-12-0725
v.)	Circuit No. 08-D-397
)	
WAYNE BELL,)	Honorable
)	Michael Risinger,
Respondent-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Lytton and Schmidt concurred in the judgment.

ORDER

- ¶ 1 Held: Where husband appeals from judgment resolving all outstanding issues in dissolution of marriage proceeding, appellate court has jurisdiction over the appeal from a final judgment. The trial court's decision to award wife 58% of net marital assets was not inequitable; however, it was error to consider the attorney fees incurred by the parties in the dissolution of marriage proceeding as marital debt. The trial court's ruling that husband dissipated marital assets was not an abuse of discretion. The trial court's valuation of marital property was not against the manifest weight of the evidence.
- ¶ 2 After the trial court entered a judgment of dissolution of marriage dividing the marital

assets and debts, respondent Wayne Bell appeals, arguing: (1) that the court's award of 58% of the net marital assets to petitioner Kristin Bell was unjust; (2) that the court erred by including attorney fees as marital debt; (3) that the court erred in finding he dissipated over \$49,000 in marital assets; and (4) that the court erred by valuing a trailer awarded to him at \$6,500. Because it was improper to consider the attorney fees incurred by the parties in the dissolution of marriage proceeding as marital debt, we reverse the court's distribution of assets and remand for further proceedings.

¶ 3

FACTS

¶ 4 Petitioner Kristin Bell and respondent Wayne Bell were married on September 28, 2002, and had three children together. In June of 2008, Kristin filed a petition for dissolution of marriage in the circuit court of Peoria County. In a series of orders, the court resolved the issues pertaining to the children: Kristin was granted sole custody of the three children and Wayne was granted reasonable visitation. On March 18, 2011, the court dissolved the marriage between Wayne and Kristin on the basis of irreconcilable differences. In that order, the court reserved ruling on the property and child support issues which are the subject of this appeal, allowing the parties to file briefs and setting the matter for a hearing.

¶ 5 Prior to the marriage, Wayne had started his own insurance agency as a sole proprietorship, which he later incorporated as a co-owner with his brother Tom. After the two had a falling out, Wayne dissolved the business and started Carson Clayton, Inc. as sole director and shareholder. Tom sued Wayne, and the parties eventually settled in 2008, with Wayne giving Tom ownership of the business in consideration for dismissing the lawsuit. Wayne, however, still had an interest in a trust called Carson Clayton Trust, and following the transfer he

also was an employee for Carson Clayton, Inc. The company made a profit of at least \$219,000 per year from 2006 to 2009. In 2008 and 2009, Wayne received \$36,000 per year in wages from Carson Clayton, Inc. On August 3, 2011, the trial court in the dissolution of marriage proceeding entered an order characterizing the insurance agency and Wayne's interest in it as non-marital property.

¶ 6 Prior to the hearing on the division of marital property, both Wayne and Kristin filed financial affidavits, a joint statement of stipulated facts, and trial memoranda in which each party proposed a distribution of marital assets and debts. In her proposed distribution, Kristin requested that the trial court award her 60% of the marital estate and 40% to Wayne, while in his proposed distribution, Wayne proposed that each party receive 50%.

¶ 7 In the joint statement of stipulated facts, the parties stipulated to the ownership of much of the marital and non-marital property. Both stipulated that Wayne had withdrawn a total of \$30,000 from a Central Illinois Bank Home Equity Line of Credit (CIB account) in 2008, and that Wayne had used \$9,650 of the money to pay for remodeling on his non-marital condominium. Furthermore, the parties stipulated that they established a College Illinois Fund account for their children during the marriage and that this account was terminated when the parties separated; Wayne deposited a \$19,179 refund from the account into his Carson Clayton Trust Account.

¶ 8 After the hearing on the marital property and debt, the court made an oral ruling concerning the division of the marital estate. The court ordered that Kristin would receive 58% of the net marital assets, while Wayne would receive 42%, finding that such a division was equitable and in just proportions. The court also divided and assigned specific property and

debts. On May 4, 2012, the court entered a written "Second Bifurcated Judgment of Dissolution," conforming to its earlier oral order.

¶ 9 In the written judgment, the court made numerous findings relevant to its distribution of marital and non-marital assets. The court made findings as to which assets and debts were non-marital and which were marital. The court found that the marital home, savings and checking accounts, several IRAs, portions of Kristin's pension, and various vehicles and personal property were all marital assets. The court found that the mortgage on the marital home, loans for vehicles, and various credit card debts were marital debts. The court also included the outstanding attorney fees incurred by the parties (\$75,000 for Kristin and \$29,500 for Wayne) as marital debts.

¶ 10 The court then allocated the marital property and debt to each party, and consistent with its 58%-42% division, awarded \$137,110 of the net marital assets to Kristin and \$100,462 to Wayne. Kristen was awarded the marital home and the corresponding mortgage debt. In addition, she was allocated various credit card debts, the debt from the loan on her car as well as the \$75,000 in outstanding attorney fees she had incurred during the dissolution proceedings. The court awarded \$17,000 of the marital portion of Kristin's TSP retirement account to Wayne, as well as various vehicles and personal property. Wayne was also made solely responsible for various credit card debts and the \$29,500 in his unpaid attorney fees.

¶ 11 In making its allocation, the court stated that it considered the factors of section 503(d) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/503(d) (West 2012)), and that it found the following facts relevant: (1) Wayne dissipated \$19,179 in marital assets from the College Illinois account by depositing the refund with the Carson Clayton Trust, and also

dissipated another \$30,000 from the CIB account secured by the marital residence; (2) the allocation of non-marital property to each party, including the fact that Carson Clayton, Inc., was Wayne's non-marital asset, which the court valued at \$265,000; (3) Kristin had sole custody of the three children and resided with them in the marital home; (4) that Wayne was to pay child support of \$124 per week, and that there was a current arrearage in child support due; (5) that the two largest remaining assets of the marriage—Kristin's pension and retirement TSP account—were from Kristin's contributions; (6) while Kristin had stable employment with the Bureau of Prisons earning \$65,000 per year, Wayne had a much higher ability to acquire income and assets in the future due to his history operating the insurance business; and (7) that Kristin would be responsible for unreimbursed medical expenses for the children in the future, as well as the cost of providing insurance for them. The court also stated that in arriving at its order, it considered the stipulated facts and the proposed allocation of assets submitted by the parties.

¶ 12 Furthermore, the court ordered that each party be responsible for paying his or her own attorney fees. Finally, the court noted that there was a "history of extreme conflict and acrimony between the parties, and finds as little future interaction between the parties to be in the best interests of the minor children." Accordingly, the court ordered that the parties were to communicate through the website talkingparents.com as much as practical.

¶ 13 Wayne filed a motion for rehearing on June 4, 2012, arguing that the court's division of the net marital assets was error, that the court's findings Wayne had dissipated marital assets was error, and that the court erred in its valuation of certain items of marital property. The court denied this motion on July 26, 2012, and Wayne filed a notice of appeal.

¶ 14 Any additional facts necessary for an understanding of the issues raised on appeal will be

included below.

¶ 15

ANALYSIS

¶ 16 I. Jurisdiction

¶ 17 As an initial matter, Kristin has raised the issue of appellate jurisdiction, arguing that Wayne has not adequately stated this court's jurisdiction and that we "may" not possess jurisdiction. The trial court entered the its written judgment on May 4, 2012, and the order stated it was a final judgment for the purposes of Supreme Court Rule 304. The court denied Wayne's motion for a rehearing on July 26, 2012. Wayne filed his notice of appeal on August 24, 2012. In his statement of jurisdiction, Wayne has invoked both Supreme Court Rule 301 (Ill. Sup. Ct. R. 301 (eff. Feb. 1, 1994)), which provides that final judgments are appealable as of right, and Rule 304(a) (Ill. Sup. Ct. R. 304(a) (eff. Feb. 26, 2010)), which authorizes appeals from orders that do not dispose of the entire controversy if the trial court makes a special finding. We conclude that the trial court's judgment of dissolution on May 4 was a final order because it fixed the rights of the parties absolutely and finally, terminating the litigation on the merits. See *In re Marriage of Schwieger*, 379 Ill. App. 3d 687, 689 (2008) (defining final judgment for purposes of Rule 301). With the entry of the trial court's May 4 judgment, it appears all issues pertaining to the dissolution were resolved. Therefore, we may treat the appeal as an appeal from a final judgment under Rule 301.

¶ 18 Kristin notes that she made a motion to correct the trial court's May 4 judgment nunc pro tunc because the judgment erroneously listed child support at \$124 per month instead of \$124 per week. Kristin states that the motion is still pending because the record does not indicate whether the court ruled on the motion. Even if this nunc pro tunc motion is still pending, however, it

does not affect the finality of the court's May 4 judgment. The purpose of a nunc pro tunc order is to address a clerical error in the record of the judgment, not to alter the actual judgment of the court. *Krilich v. Plencer*, 305 Ill. App. 3d 709, 712 (1999). A court has authority to enter a nunc pro tunc order at any time to amend a written record of judgment to conform with the judgment in fact rendered by the court, and the amendment relates back to the date of the judgment itself. *First Bank of Oak Park v. Rezek*, 179 Ill. App. 3d 956, 959 (1989). We find no authority suggesting that the motion to correct the judgment nunc pro tunc would affect the finality of an otherwise final judgment. See *In re Marriage of Breslow*, 306 Ill. App. 3d 41, 51 (1999). Because the nunc pro tunc correction would not alter the trial court's actual judgment, it would not affect its finality. Therefore we hold that we have jurisdiction over an appeal from the final judgment entered by the circuit court on May 4.

¶ 19 II. Division of Marital Assets in Just Proportions

¶ 20 As his first point of contention on appeal, Wayne claims that the trial court failed to divide the marital assets and debts in just proportion, and he cites a number of alleged errors in the trial court's judgment. First, he notes that the trial court awarded Kristin 58% of the net marital assets while only awarding him 42%, and argues that such a disparate division cannot be upheld absent "extraordinary circumstances." He also argues that (1) the marriage was of a short duration; (2) Kristin has a better capacity to earn income than he does, (3) it was unfair to award the entire mortgage debt to Kristin because mortgage debt has tax benefits, and (4) that the trial court improperly considered Wayne's child support arrearage of \$6,298 when distributing marital assets. In her brief, Kristin disputes some of Wayne's characterizations of the record, and also argues that the distribution was not an abuse of discretion.

¶ 21 It is well settled that marital assets and debts must be equitably distributed. In re Marriage of Underwood, 314 Ill. App. 3d 325, 328 (2000). Section 503(d) of the Illinois Marriage and Dissolution of Marriage Act (Act) directs the trial court to divide marital property in just proportions considering all relevant factors, including:

- "(1) the contribution of each party to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property ***
- (2) the dissipation by each party of the marital or non-marital property ***
- (3) the value of the property assigned to each spouse;
- (4) the duration of the marriage;
- (5) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children;
- ***
- (8) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;
- (9) the custodial provisions for any children;
- (10) whether the apportionment is in lieu of or in addition to maintenance;

(11) the reasonable opportunity of each spouse for future acquisition of capital assets and income; and

(12) the tax consequences of the property division upon the respective economic circumstances of the parties." 750 ILCS 5/503(d) (West 2012).

¶ 22 The trial court has broad discretion in the valuation and subsequent distribution of marital assets. In re Marriage of Sawicki, 346 Ill. App. 3d 1107, 1113(2004). The trial court is not required to make an equal division of marital assets, and one spouse may be awarded a larger share of the assets if the relevant factors warrant such a result. In re Marriage of Henke, 313 Ill. App. 3d 159, 175 (2000). On appeal, a trial court's division and distribution of marital assets will not be reversed unless the trial court clearly abused its discretion. In re Marriage of Awan, 388 Ill. App. 3d 204, 213 (2009). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. Awan, 388 Ill. App. 3d at 213.

¶ 23 Turning to the case at hand, we reject Wayne's argument that we must find "extraordinary circumstances" to uphold the trial court's distribution of assets. The trial court has discretion to weigh the relevant factors of section 503(d) and determine an equitable distribution, and it is not required to make an equal division. See Henke, 313 Ill. App. 3d at 175.

¶ 24 Moreover, after reviewing the record and the relevant statutory factors, we conclude that the trial court's decision to award Kristin 58% of the net marital assets was not unreasonable, for the following reasons. Looking at the ability of the parties to acquire income and assets, while Kristin earned more in W-2 wages than Wayne (\$65,000 for Kristin versus \$33,000 for Wayne), because of Wayne's entrepreneurial experience with the insurance businesses, Wayne had a far

greater ability to earn substantial income. The court factored in its finding that Wayne dissipated over \$49,000 in marital assets. The trial court may account for the custodial provisions for the children in its division of assets, and Kristin was awarded sole custody of the children and resided with them in the marital residence, which supports a division in her favor. Regarding the contributions made by the parties, the court found the largest remaining marital assets were contributed by Kristin. Finally, while Wayne argues that it was unfair for Kristin to be assigned the mortgage debt, in his proposed allocation of assets submitted to the trial court, Wayne conceded that Kristin should receive the marital residence and be assigned the mortgage debt on the property.

¶ 25 Finally, we reject Wayne's argument that the trial court erred by considering he owed over \$6,298 in overdue child support. Although child support obligations are not specifically mentioned in the list of factors in section 503(d), that list is not exclusive and the court may consider "statutory factors[] together with other factors deemed relevant in any particular case." *In re Marriage of Moll*, 232 Ill. App. 3d 746, 754 (1992). Also, the court's consideration of Wayne's child support obligation did not improperly consider marital misconduct, because marital misconduct refers to conduct that occurred in the course of the marriage leading to its dissolution. See *In re Marriage of Cihak*, 92 Ill. App. 3d 1123, 1125 (1981). Given the foregoing, it was not an abuse of discretion to award Kristin 58% of the net marital assets.

¶ 26 III. Inclusion of Attorney Fees in Division of Marital Debt

Next, Wayne argues that the trial court erred by including the parties' attorney fees as marital debt when it divided the assets and debts.¹ The trial court found it was equitable to award

¹Kristin argues that Wayne has waived this issue because he did not object to the

58% of the net marital assets to Kristin and 42% to Wayne. The court awarded Kristin assets totaling approximately \$388,000 and assigned her approximately \$251,800 in debt, which included \$75,000 of debt for her attorney fees. This left a net award to Kristin of \$137,110. The court awarded Wayne approximately \$178,000 in marital assets and assigned him approximately \$77,500 in debt, which included \$29,500 of debt on his unpaid attorney fees. This resulted in a net award to Wayne of \$100,462. Wayne's contention on appeal is that it was improper to consider the parties' attorney fees when dividing the marital assets, and because the court did so, it skewed the division of assets in Kristin's favor. Citing *In re Marriage of Heroy*, 385 Ill. App. 3d 640 (2008), Wayne also argues that the inclusion of attorney fees as marital debt forced him to subsidize Kristin's attorney's fees out of his share of the marital assets, despite the trial court's express order that each party be responsible for his or her own attorney fees.

¶ 27 We agree with Wayne that the trial court abused its discretion by treating attorney fees incurred in a dissolution of marriage action as a marital debt, because the Act contains specific provisions for assigning and dividing attorney fees. In general, debts incurred by one party following separation but before the legal dissolution of marriage may be considered marital, and it is within the trial court's discretion to order that the debts be paid by the other party. In re _____ inclusion of the attorney fees at the trial level. However, we note that Wayne objected to the inclusion of attorney's fees in the proposed allocation of assets he submitted to the trial court, and he also raised the issue during the argument on his motion for rehearing. This was sufficient to preserve appellate review of this issue. Compare *Limanowski v. Ashland Oil Co., Inc.*, 275 Ill. App. 3d 115, 118 (1995) (failure to raise objection at trial or during post-trial proceedings results in waiver).

Marriage of Stufflebeam, 283 Ill. App. 3d 923, 929 (1996). However, when dealing with attorney fees, section 508 of the Act allows for award of attorney fees in circumstances where one party lacks financial resources and the other has the ability to pay. In re Marriage of Streur, 2011 IL App (1st) 082326, ¶36; 750 ILCS 5/508 (West 2010). See also 750 ILCS 5/503(j) (West 2012) (allowing for petitions for contribution to attorney fees). To receive contribution towards his attorney's fees, the party seeking an award of attorney fees must establish his inability to pay and the other spouse's ability to do so. In re Marriage of Schneider, 214 Ill. 2d 152, 174 (2005). Because the Act contains specific statutory provisions addressing attorney fees, any division of debt relating to a party's attorney fees should be dealt with according to these provisions and not under the trial court's power to divide the marital assets and debts under section 503(d). If it were otherwise, the court could assign debt associated with a party's attorney fees to the other party without a showing that the spouse incurring the fees could not pay them. See Heroy, 385 Ill. at 667 (holding that it was error for court to assign debt associated with wife's attorney fees to husband under court's division of marital assets and debts because there was no indication wife was unable to pay her fees).

¶ 28 Because it was error for the trial court to include the parties' attorney fees in the division of marital debt, we reverse the trial court's division of the marital assets and remand for further proceedings. On remand, the court should divide the net marital assets without including the attorney fees incurred by the parties as a marital debt. Although we found it was not inequitable to allocate 58% of the net marital assets to Kristin and 42% to Wayne, on remand the court is not bound by that figure and may reconsider the entire division of assets and debts and exercise its discretion to allocate the marital property in just proportions. See 750 ILCS 5/503(d) (West

2010).

¶ 29 IV. Dissipation of Marital Assets

¶ 30 Although we remand for reconsideration on the division of marital assets, in the interest of judicial economy we will consider the other issues raised by Wayne on appeal. Wayne has claimed error with the trial court's ruling that Wayne dissipated marital assets. The court found that Wayne dissipated \$19,179 from the College Illinois funds established by the parties for the benefit of their children, and also found that Wayne dissipated a total of \$30,000 from a line of credit secured by the marital property. The court charged Wayne for the dissipation in its distribution of the net marital property by including the \$49,179 in dissipated assets as part of the \$100,462 in net marital property awarded to Wayne. On appeal, Wayne argues that the trial court abused its discretion by rejecting his argument that he spent \$20,350 on family expenses. He also argues that the court should have credited him for spending some of the dissipated assets on his attorney fees.

¶ 31 Dissipation occurs when one spouse uses a marital asset for his or her sole benefit and for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown. In re Marriage of O'Neill, 138 Ill. 2d 487, 497 (1990). Whether dissipation has occurred is dependent upon the unique facts and circumstances of each particular case. In re Marriage of Schmidt, 242 Ill. App. 3d 961, 972 (1993). The spouse charged with dissipation (the charged spouse) has the burden to show by clear and specific evidence how the marital funds were spent, and general and vague statements as to the use of the funds are not sufficient to counter a charge of dissipation. In re Marriage of Tietz, 238 Ill. App. 3d 965, 983 (1992). If the charged spouse fails to show that the funds in question were used for marital purposes, the trial

court must make a finding of dissipation. In re Marriage of Hubbs, 363 Ill. App. 3d 696, 701-02 (2006). However, if the charged spouse can show that the funds were spent on a legitimate family expense that was necessary and appropriate, there is no dissipation. Tietz, 238 Ill. App. 3d at 983.

¶ 32 The issue of dissipation is generally a fact-intensive inquiry that calls for the trial court to determine the credibility of the charged spouse's explanation as to how the funds were used. See Tietz, 238 Ill. App. 3d at 983-84. A trial court's ruling on the issue of dissipation will not be reversed on appeal unless it is against the manifest weight of the evidence. In re Marriage of Vancura, 356 Ill. App. 3d 200, 205 (2005).

¶ 33 First, we find Wayne has waived his argument that the court abused its discretion by disregarding his testimony that he spent \$20,350 of the assets in question reimbursing his former business for family expenses. The trial court considered Wayne's testimony that he spent these funds on family expenses and rejected it, and Wayne has not made a cogent argument as to why the trial court's finding was against the manifest weight of the evidence. Although Wayne has cited to the relevant pages of the record, his "argument" on this issue is one conclusory sentence that the court abused its discretion, and is unsupported by any reasoning or analysis. Mere contentions, unsupported by any argument or authority, do not merit consideration on appeal and are considered waived. See *Vilardo v. Barrington Community School District* 220, 406 Ill. App. 3d 713, 720 (2010) (citing Ill. Sup. Ct. R. 341(h)(7)). Therefore, we do not consider this argument further.

¶ 34 Next, Wayne argues that he used as much as \$20,350 of the dissipated assets to pay his attorney's fees, and that the trial court should have accounted for these payments and credited

Wayne for these payments when it divided the marital assets and debts. Ordinarily, expenditures for attorney fees out of marital assets constitutes a dissipation of marital assets. See *In re Marriage of Weiler*, 258 Ill. App. 3d 454, 464 (1994). Once there is a finding of dissipation, the court may charge the amount dissipated against the charged spouse's share of the marital property so as to compensate the other party. *Awan*, 388 Ill. App. 3d at 217. Here, the court charged Wayne for the dissipated assets, and the court was not required to give Wayne a corresponding benefit for using marital assets to pay his attorney fees. Crediting the payment of his attorney fees would in essence add that amount back to the marital debt, which is precisely what Wayne argued against previously when he objected to the inclusion of attorney fees as marital debt. Therefore, because we concluded that it was improper to include attorney fees as marital debt, we affirm the trial court's rulings as to dissipation.

¶ 35 V. Valuation of Marital Assets

¶ 36 Finally, Wayne contends that the trial court erred by valuing at \$6,500 a cargo trailer assigned to Wayne in the distribution of marital property. A trial court's valuation of a marital asset will not be disturbed on appeal unless it is against the manifest weight of the evidence. In *re Marriage of Wojcik*, 362 Ill. App. 3d 144, 151-52 (2005).

¶ 37 In his financial affidavit filed with the trial court, Wayne valued the trailer at \$2,000, while Kristin valued the trailer at \$6,500 in her affidavit. Now on appeal, Wayne argues that because neither party presented any evidence of the trailer's value at the time of trial, the trial court's assigned value of \$6,500 was unsupported by the evidence. Furthermore, Wayne requests that we assign his proposed value of \$2,000 to the trailer. We decline to do so. It is well established that it is the burden of the parties to provide sufficient information to the trial court in

marital property valuation matters, and a reviewing court will not reverse and remand for further proceedings where a party had ample opportunity to present evidence but failed to do so. In re Marriage of Benz, 165 Ill. App. 3d 273, 285 (1988). As Wayne acknowledges, he did not present any evidence supporting his proposed value of \$2,000 to the trial court. Wayne cannot now claim error based on lack of evidence when he failed to present any below, merely because the trial court's determination was against his interest; he should not be allowed to benefit on review from his failure to introduce evidence of the trailer's value at the trial level. See Benz, 165 Ill. App. 3d at 285; In re Marriage of Smith, 114 Ill. App. 3d 47, 54-55 (1983).

¶ 38 In addition, the trial court's assigned value of \$6,500 for the trailer was within the range of values indicated, meaning the court's determination will not be disturbed on appeal. See In re Marriage of Blackstone, 288 Ill. App. 3d 905, 910 (1997). Accordingly, we affirm the trial court's valuation of \$6,500 for the trailer.

¶ 39 CONCLUSION

¶ 40 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

¶ 41 Affirmed in part, reversed in part, and remanded.