NO. 4-10-0903 Filed 6/23/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Marriage of	)	Appeal from
DIANE CAROL GUGANIG-MOSER,	)	Circuit Court of
Petitioner-Appellee,	)	McLean County
and	)	No. 09D71
ANDREAS WILHELM MOSER,	)	
Respondent-Appellant.	)	Honorable
	)	James E. Souk,
	)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Presiding Justice Knecht and Justice Steigmann concurred in the judgment.

ORDER

Held: In a dissolution proceeding, as the trial court did not abuse its discretion, the court's order denying the father's request for joint custody of the minor children, dividing the marital property, and denying the father's request for maintenance is affirmed.

Respondent Andreas Wilhelm Moser appeals an order granting petitioner Diane Carol Guganig-Moser sole custody of the parties' minor children, dividing the parties' property, and denying Andreas's claim for maintenance. Specifically, Andreas contends the trial court abused its discretion in (1) denying his request for joint custody of the children as, he claims, the parties are able to cooperate in reaching parenting decisions; (2) improperly valuing the parties' debts and assets by reference to Diane's proposed inventory rather than the evidence; and (3) failing to consider the disparity between the parties' earning capacities in deciding whether to grant a maintenance award. Further, as part of the division of property, Andreas claims the court abused its discretion with respect to its disposition of the marital residence. We affirm.

I. BACKGROUND

Andreas and Diane were married in Germany in February 2000. Later that year, the parties moved to Denver, Colorado. In December 2006, the parties moved to Bloomington, Illinois. In September 2008, the parties separated. Diane purchased a house and moved out of the marital residence where Andreas remained.

The instant legal proceedings began when Diane filed a petition for legal separation in February 2009. In May 2009, Diane filed a petition for dissolution of marriage. In April 2010, the trial court found grounds existed for dissolution under the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/101-5/802 (West 2008)) in that Andreas was guilty of mental cruelty toward Diane (see 750 ILCS 5/401(a)(1) (West 2008) (listing grounds for dissolution)). The court reserved the issues of custody, property division, and maintenance for a trial on all remaining issues.

In June and July 2010, the trial court held the trial on remaining issues. Diane's case consisted of her own testimony, some exhibits, and an inventory of the parties' property with a proposal for dividing and equalizing it. Andreas's case consisted of his own testimony, the testimony of Diane as an adverse witness, and some exhibits.

A. The Trial Court's Custody Determination

Andreas and Diane have three minor children. Lukas Moser was born to the parties on February 15, 2001. Sergei Moser, born September 22, 2002, and Maria "Masha" Moser, born August 30, 2004, were adopted during the marriage.

At the trial on remaining issues, Diane sought sole custody of the three children. Andreas sought joint custody with equal sharing of physical custody.

Two problems in particular led to the parties' separation and eventual divorce. First, Diane was concerned about Andreas's ability to supervise and care for their children when he was under the influence of alcohol. At the trial on remaining issues, Diane testified that Andreas drank every day during their marriage from the time he got home from work until he went to bed at 1 or 2 a.m. He had minimal interaction with their children when he was drinking. At one point, Andreas stated he could still take care of their children after consuming 10 beers. Diane disputed his ability to do so.

Second, from late 2007 through 2008, Andreas became alternately withdrawn and physically and verbally abusive. On Thanksgiving 2007, Andreas stayed in bed until 3 p.m., disrupting the family's holiday. Later in 2007, Andreas stayed in bed for three straight days spanning Christmas Eve and Christmas Day, leaving the bed only while Diane was in it. Later, in 2008, Andreas "completely flipped." He hit Diane. He sometimes refused to speak; other times, he accused Diane of forcing the marriage and the children upon him against his will. In April or May 2008, Andreas kicked a hole in the door to the parties' bedroom, believing Diane had locked it to prevent him from entering. In July 2008, Andreas threw a beer glass against the wall, damaging the wall, and then smashed the glass on the bathroom floor, leaving the mess for Diane to clean it. Through 2008, he became sexually aggressive and occasionally engaged Diane in nonconsensual sex.

After Diane moved out of the marital residence, Andreas obtained a diagnosis that he was depressed. He subsequently began taking antidepressant medication. In May 2009, he stopped drinking. Diane believed these measures would alleviate some of her concerns about Andreas's behavior and ability to parent.

When Diane moved out of the marital residence in 2008, the parties established a parenting arrangement whereby the children resided with Diane from Saturday evenings until Thursday evenings and with Andreas the rest of the week. The parties settled on this schedule partly because Andreas was uncomfortable with the possibility of having the children for more than two days consecutively and partly because Diane was responsible for taking the children to church on Sundays.

In the fall of 2009, the parties had a "large disagreement" over the time each Thursday when Andreas was to receive custody of the children. The parties disputed whether Andreas should get the children at about 3 p.m., when the children's school day ended, or about 5 p.m., when the children's after-school program ended. This disagreement was eventually resolved in Andreas's favor, and Andreas began taking the children immediately after school.

This arrangement persisted until February 2010. On February 18, 2010, Diane filed a verified petition for order of protection. In her petition, she alleged the Department of Children and Family Services (DCFS) was investigating Andreas. On February 12, 2010, Andreas had left Sergei unsupervised in the car in a Meijer store parking lot for at least an hour in 19-degree weather with no shoes and no coat while Andreas took Lukas to a nursing facility inside the store. DCFS began its investigation of the incident later that day.

Diane's petition alleged the February 12, 2010, incident was part of a pattern of neglect on Andreas's part. She alleged that, on May 30, 2009, Andreas left the children at the starting line of a 5k race in which he participated. The children were unsupervised for the duration of the race. Diane later confronted Andreas about the incident and requested that he leave the children with her when he intended to participate in future races.

Diane further alleged that, in June 2009, the children went to a friend's house on their bicycles. There, they told their friend's mother that their father was not aware where they were but knew they were out riding bikes. Diane was concerned with Andreas's failure to supervise the children and his unawareness of their location during this incident.

On June 13 and June 27, 2009, according to the petition, Andreas ran in two more foot races and left the children at the starting line. When Diane confronted him about it, Andreas claimed the children were safe because there were paramedics and police officers nearby and dismissed their disagreement as a "parenting difference."

Diane further alleged that, on November 6, 2009, Andreas left Masha unattended at Sergei's hockey practice. A parent of another player found Masha, distraught, wandering around the parking garage at the hockey arena. Masha said she thought her father had left her behind. The parent found Andreas in the arena with Sergei. According to the petition, Andreas did not know where Masha was, and he was not looking for her.

At the trial on remaining issues, Diane testified to each of the incidents alleged in her petition except for Andreas's leaving Masha unattended at the hockey arena. Her testimony with respect to the occurrences was undisputed. However, Andreas sought to justify each event and establish that it was not negligent.

With respect to the incident at Meijer in which Sergei was left in the car unattended, Andreas claimed Sergei had been throwing a fit and could not be controlled sufficiently to take him into the store. Diane testified Andreas had told her he was concerned about Sergei while he was in the store. Diane also testified that, since the nursing station in Meijer did not schedule appointments with patients, Andreas could have waited for Sergei's

temper to pass before taking him and Lukas into the store.

With respect to leaving the children at the starting line of the foot races, Andreas testified he had taken precautions regarding the children's safety. He made the children aware of the location of paramedics and event volunteers who could help if the children needed assistance. He gave Lukas, the eldest child, a cell phone and instructed him on which numbers in the phone's directory to dial if there were an emergency. Although he did not tell any medical or police personnel he was leaving his children unattended or ask them to supervise the children, Andreas testified these people were aware of the situation with the children.

With respect to the unsupervised bicycle ride, Andreas testified he had made a map of his neighborhood with the children's friends' houses indicated using different colors. Lukas had seen the map and was interested in trying to use it to get to a particular friend's house. Sergei and Masha insisted on tagging along as they were friends with Lukas's friend's siblings. The children considered it an adventure. Andreas knew where they planned to go. He thought it was a safe trip for them to make and instructed Lukas to supervise Sergei and Masha.

Further, toward showing Diane was at least as negligent in her parenting, Andreas presented evidence of physical injuries and incidents of neglect the children had sustained while under Diane's care. Andreas emphasized none of the incidents alleged in Diane's petition resulted in physical injury. In contrast, Lukas had suffered a broken arm playing soccer when Diane's au pair was supervising, and Sergei had been hit by a car on a bicycle ride with Diane, Lukas, and Masha. Diane clarified Sergei was hit by the car when he jumped the curb into the street despite having been told he was not allowed to ride in the street. Further, Andreas testified he observed Sergei riding his bicycle unsupervised on the day before the last day of the trial on

remaining issues. Andreas picked Sergei up and returned him to Diane's house. Sergei had escaped Diane's au pair and was traveling toward Andreas's house when Andreas found him. Also, on cross-examination, Diane testified she left the children unattended at her house on three separate days one week while she went to the gym. She admitted she exercised poor judgment on those occasions and stated she had not left the children unattended since.

In her petition for order of protection, Diane sought sole custody of the children subject to supervised visitation until the DCFS action was resolved. On February 25, 2010, the trial court entered an order of indefinite duration granting Andreas supervised visitation on Friday evenings from 4:30 to 8:30 and Saturdays from 10 a.m. to 6 p.m. Diane was given authority to supervise the visitation at her discretion. The DCFS investigation later concluded with the entry of an indicated report.

For the most part, the parties adhered to this court-ordered arrangement through the trial on all remaining issues. Diane rarely supervised the visitation as she found it uncomfortable. The parties deviated from the schedule once when Andreas kept the children overnight while Diane was out of town on business. Also, Andreas occasionally forwent some of his visitation time to run in races.

At the trial on remaining issues, Diane testified she was seeking sole custody of the children. Four specific reasons informed her conclusion sole custody would serve the children's best interests. First, she thought the children had more consistency and structure in her house--Diane had rules that the children understood, to which they were accustomed. Limiting Andreas's visitation to Thursday evening through Saturday evening every other week pursuant to her custody proposal would provide more stability than the parties' original parenting schedule of

shared custody or the joint-custody arrangement that Andreas proposed.

Second, Diane was concerned Andreas inadequately supervised the children when they were in his care, as evidenced by the incidents listed in her petition for order of protection. She worried about the children's safety when they were with Andreas and worried she would not be informed in an emergency.

Third, Diane testified she and Andreas were unable to communicate and make joint decisions in the best interests of the children. She testified, "I believe that it's not possible for us to be able to talk together and have the focus be the well-being of the kids." When they tried to talk about a decision relating to the upbringing of their children, she testified, "[i]t's more about us than the kids." Early in their separation, when Diane asked Andreas to accommodate her schedule by adjusting his visitation, Andreas responded, "I don't do these things for free." He told her on more than one occasion he was not her babysitter.

As a further example of the parties' inability to cooperate with each other for the benefit of their children, Diane testified about an incident after the separation in which Sergei found a lighter on the ground at a baseball park. Diane tried to retrieve the lighter from Sergei, and they had a "strong-willed disagreement" about it. Andreas intervened; he took the lighter from Sergei and told Sergei he would show him how to use the lighter another time. Diane was concerned because she felt it was inappropriate for Sergei, who was six years old, to know how to use a lighter. She felt, on that occasion, Andreas's attempt to establish power over her interfered with her attempt to discipline Sergei by having him dispose of the lighter.

Fourth, Diane was concerned Andreas would "use the kids" to control the dynamic between her and himself. Diane testified Andreas once sent her an e-mail suggesting he

was going to take the children to Germany. She testified the e-mail stated, "What do you think I'm going to do, kill the kids and myself ***[?]". Diane would allow Andreas to take the children to visit his family in Europe, but she wanted sole custody and possession of the children's passports as a protection against Andreas when he was in a destructive mood.

Andreas sought joint custody with equal physical custody for each parent. He thought this would maximize each parent's involvement in the children's lives and daily routines. He requested more time with the children than under the court-ordered visitation schedule in response to the children's requests to spend more time with him and his desire to spend more time with the children. Andreas remarked he and Diane were able to coordinate visitation flexibly--he "was amazed how well" their schedule had worked. He preferred the idea of spending an entire weekend with the children rather than his having the children on Saturdays and Diane's having them on Sundays. He believed alternating weeks with the children would work better and proposed a custody schedule to that end.

The trial court awarded sole custody to Diane. The court stated a joint-custody award would be unusual in a case where the parties disagreed as to the feasibility of joint custody. The court distinguished this case from one in which the court perceived in both parties "the ability and the willingness and the character that would be required to obey the court's joint parenting order even if they weren't happy about it." The court characterized DCFS's indicated report on Andreas during the course of custody litigation as "a most unusual occurrence." It considered Andreas's statements that he was too depressed to seek employment inconsistent with his request for "greatly increased parenting responsibilities." It noted the "significant differences" between Diane and Andreas, Andreas's confessed "anger control issues," and the

incidents of domestic violence during the marriage. The court was encouraged going forward by the parties' flexibility in addressing scheduling matters and their involvement in their children's counseling. However, it ultimately determined Diane's sole custody served the children's best interests.

The trial court encouraged the parties to negotiate agreed terms of visitation and gave them one week to do so before it would enter a visitation order. The parties agreed to, *inter alia*, a visitation schedule, including holidays and vacations, a plan for maintaining health insurance coverage and life insurance policies for the children, Diane's claiming the children as dependents for tax purposes during Andreas's unemployment, and Diane's abstention from seeking child support while Andreas remained unemployed.

B. The Trial Court's Division of
the Parties' Property

At the trial on remaining issues, Diane proposed the division of property pursuant to an inventory. The inventory either provided an exhibit number associated with an evidentiary exhibit setting forth the item and its value or indicated the item was to be substantiated by trial testimony. At the close of her case, Diane moved to admit exhibits. The trial court asked whether Andreas had any objections, and the following colloquy occurred:

> "MR. MOORE [(counsel for Andreas)]: I don't know if it's an exhibit, but the matrix or Inventory, I guess, but other than that, no.
>
> THE COURT: *** The Inventory is not an exhibit. I guess you would say it's part of the proposal."

The court then admitted all exhibits.

Diane's inventory reported the parties' debts and assets as follows. The parties' marital property consisted of the marital residence, Diane's house, four motor vehicles, term life insurance policies, various bank accounts, each party's 401(k) plan, personal property in the residences, and a stock portfolio. The parties' marital debts consisted of mortgages on the marital residence and Diane's house and several credit card accounts. Andreas's nonmarital property consisted of an apartment in Germany, two German life insurance policies, two German bank accounts, and a pension. Diane's nonmarital property consisted of an individual retirement account (IRA), a pension, and an investment portfolio obtained prior to the marriage. The parties agreed to the assignment of property as in the inventory. Under Diane's proposal and inventory, Andreas owed Diane $28,768.92 to equalize the property division.

At trial, Andreas testified to the existence of debts in his name that were not reflected in Diane's inventory. According to Andreas, he had accrued $14,500 on a "City American Express" card and "about 24 and something" on a "City Master Card." This debt was incurred in paying living expenses and property taxes on the marital residence. In a response to interrogatories, Andreas indicated he had an outstanding mortgage of 115,041€ on his apartment in Germany that was not accounted for in the value listed on Diane's inventory.

Further, Andreas disputed the values of the motor vehicles and Diane's house reported in the inventory. On cross-examination, Diane testified she used the Kelly Blue Book values for the vehicles based on their being in "excellent" condition. She conceded their condition was not excellent. Diane testified the value of the house she purchased when she and Andreas separated was $197,856. She explained this value was based on the tax assessment. On

cross-examination, Diane testified the purchase price of the house was $206,000.

The parties both testified to the financial status of the marital residence. Diane testified she had continued paying toward the mortgage and property taxes after she moved out. Initially, she was paying more than half the mortgage payments. At some point, she began paying half. She also paid half the 2008 property taxes. At trial, she requested not to be held liable for the 2009 property taxes as she could not afford to pay them since her salary had been cut in 2009. Further, due to her concerns with Andreas's ability to pay the mortgage and taxes, Diane requested that Andreas either be required to sell the marital residence or refinance it in his name so a potential default or foreclosure would not affect her credit.

Andreas testified he was able to continue paying half the mortgage with his unemployment benefits and savings. He could continue to make these payments even after his unemployment benefits expired by relying more on savings and credit. However, he was unable to make the mortgage and property-tax payments in full. Between the first and second trial dates, Andreas paid the 2009 property taxes on the marital residence. However, he requested that the parties share the property-tax liability until the trial court divided the property, prorating the 2010 taxes which accrued before the trial and holding Diane responsible for half the 2009 taxes that Andreas had paid.

The trial court reserved this issue following the trial on remaining issues. In August 2010, the court entered an order dividing the parties' property. It divided and assigned the assets and liabilities in accordance with Diane's proposal and inventory, using the values contained therein. It divided the parties' 401(k) plans without entering a qualified domestic relations order (QDRO) although Andreas had requested one.

With respect to the marital residence, the trial court ordered Andreas to sell or refinance the house. The court found Andreas's "employment situation makes it highly unlikely that he will be able to re-finance the mortgage on the marital home in his name alone." Accordingly, the court ordered the residence to be listed with a real-estate agent within 14 days of the order, setting a list price agreed upon by the parties. The court awarded Andreas possession of the marital home until its sale and ordered him responsible for all expenses, including the mortgage, utilities, taxes for 2009 and subsequent years, insurance, and repairs. Upon the house's sale, the court ordered the parties to divide the net equity remaining equally "except that any overdue taxes, mortgage payments or other expenses related to the house will be deducted from [Andreas's] share of the equity." The court allowed Andreas "the option of gaining sole ownership of the home by re-financing in his name alone and paying [Diane] $30,000 whereupon she shall execute an appropriate quit claim deed."

C. The Trial Court's Denial of Maintenance

Diane works for Electronic Data Systems, LLC, a subsidiary of Hewlett-Packard, as a client business manager. In 2010, Diane earned $112,000; in 2009, $115,065; and in 2008, $160,746.64, which included a bonus. During the recession, in 2009, Diane's annual base salary was cut by 5 or 10% and her monthly salary for April 2009 was cut by an additional 5%.

Andreas worked for the same subsidiary of Hewlett-Packard until he was laid off in December 2008. At that time, he was earning $61,823.57 per year. As of the trial on remaining issues, Andreas was unemployed. Although he planned to seek employment, he had not made any efforts toward that end. He attributed this inactivity to his depression, which he said caused him to lack motivation and "positive energy." He received weekly unemployment

benefits in the amount of $539, but these were scheduled to expire approximately six weeks after the trial. When his unemployment benefits expired, Andreas planned to pay living expenses from his savings while he sought employment. When his counsel asked what salary Andreas could expect to earn if he were hired, Andreas testified, "Probably not more than I made last, which was probably about [$]70[,000]."

At trial, Andreas sought maintenance from Diane. Andreas testified he supported Diane's career in two ways. First, he moved with Diane from Germany to the United States and then from Colorado to Illinois for the benefit of her career. These moves were "probably to the disadvantage of" his career. Second, for awhile when they lived in Colorado, Diane had an hour commute to work and was required to travel for business, and Andreas "had to step up" during these times by transporting the children to and from daycare.

Diane disputed Andreas's claim that the parties' moves were to Andreas's disadvantage. First, when they moved to the United States, Andreas took a similar position to the one he had had in Germany. Second, when they moved to Illinois, Diane and Andreas considered the benefits and disadvantages of the move. They determined Andreas's position in Colorado was no more stable than the one available to him in Illinois. Thus, according to Diane, the benefit of moving for Diane came at no disadvantage to Andreas. She testified Andreas did not delay or forgo any educational or employment opportunities on account of the marriage.

Andreas testified an award of maintenance was necessary to his maintaining the standard of living he enjoyed during the marriage. He could not afford to live in the marital residence without maintenance. Staying in the house would provide stability to himself in his job search and to his children when they visited or resided there.

In its August 2010 order, the trial court denied Andreas's request for maintenance. The court noted Andreas's inactivity toward finding employment despite providing the court with no medical evidence that he was unable to work. Further, it found Andreas received "substantial" unemployment income and marital and nonmarital assets "which will enable him to support himself until he is gainfully employed." "Moreover," the court noted, "his expenses are greatly reduced as the parties[']agreement does not require him to pay child support until he finds new employment."

D. Motion to Reconsider

In September 2010, Andreas filed a motion to reconsider. Andreas asked the court to reconsider its order with respect to awarding sole custody to Diane, dividing the property using values reported in Diane's inventory rather than by referring to the evidence, and denying Andreas's request for maintenance. He also sought the court's reconsideration of its disposition of the marital residence.

In October 2010, the trial court denied Andreas's motion to reconsider. It found its dispositions with respect to the custody determination and the denial of maintenance were appropriate in light of the evidence. With respect to the division of property, the court found Andreas's dispute with Diane's values for the property could not be substantiated. "All documentation is in German," the court noted with respect to Andreas's nonmarital life insurance policies, "and the only indication of a large mortgage on the [German] real estate is in an interrogatory response." The court noted Andreas "did not file his own inventory or exhibits or raise any objections to the values set forth in [Diane's] inventory at the time of trial." The court noted the change in value of any nonmarital property would not have affected its ultimate

property division. Referring to the parties' 401(k) plans, the court again noted Andreas did not submit an inventory or evidence of alternative values and did not object to Diane's figures at trial.

With respect to the disposition of the marital residence, the trial court considered its order reasonable. The court found "its disposition of the marital home was a reasonable and proper solution to a situation which clearly will require [Andreas] to modify his living situation."

This appeal followed.

II. ANALYSIS

A. Custody of the Parties' Children

Andreas first argues the trial court erred by awarding Diane sole custody. He contends the court should have awarded the parties joint custody. We disagree.

"In determining custody, the trial court should consider all relevant factors, including those listed in section 602 of the Act [(750 ILCS 5/602 (West 2008))], and decide what custodial order serves the best interest of the child." *In re Marriage of Dobey*, 258 Ill. App. 3d 874, 876, 629 N.E.2d 812, 814 (1994). "In cases regarding custody, a strong presumption favors the result reached by the trial court and the court is vested with great discretion due to its superior opportunity to observe and evaluate witnesses when determining the best interests of the child." *In re Marriage of Seitzinger*, 333 Ill. App. 3d 103, 108, 775 N.E.2d 282, 286 (2002). Thus, we will not disturb the trial court's ruling on custody "unless it is against the manifest weight of the evidence or is an abuse of discretion." *Id.*

Section 602.1 of the Act (750 ILCS 5/602.1 (West 2008)) provides for joint-custody awards. Under section 602.1(b), a court shall consider an award of joint custody upon the application of either parent or upon its own motion. 750 ILCS 5/602.1(b) (West 2008).

"Joint custody" is defined as "custody determined pursuant to a Joint Parenting Agreement or a Joint Parenting Order." *Id.* In this case, no joint-parenting agreement was submitted.

Section 602.1(c) of the Act lists criteria for a joint-custody award:

> "(c) The court may enter an order of joint custody if it determines that joint custody would be in the best interests of the child, taking into account the following:
>
> (1) the ability of the parents to cooperate effectively and consistently in matters that directly affect the joint parenting of the child. ***;
>
> (2) [t]he residential circumstances of each parent; and
>
> (3) all other factors which may be relevant to the best interest of the child." 750 ILCS 5/602.1(c) (West 2008).

This court has elaborated, "[T]he standards for an award of joint custody are the best interests of the child, the agreement of the parents and their mutual ability to cooperate, the geographic distance between parents, the desires of the child if he/she is of suitable age, and the relationships previously established between child and parents." *Seitzinger*, 333 Ill. App. 3d at 108, 775 N.E.2d at 286-87.

"Since joint custody requires extensive contact and intensive communication, it cannot work between belligerent parents." *In re Marriage of Drummond*, 156 Ill. App. 3d 672, 679, 509 N.E.2d 707, 712-13 (1987); see also *In re Marriage of Manuele*, 107 Ill. App. 3d 1090,

1091, 438 N.E.2d 691, 692 (1982) ("We conclude that an award of joint or divided custody *** is usually an unworkable arrangement. Such an order should rarely be entered, and its use should be discouraged."). "This court has set aside joint custody orders where the evidence showed the parents had too much animosity toward each other to be able to cooperate." *Seitzinger*, 333 Ill. App. 3d at 108, 775 N.E.2d at 287 (citing *In re Marriage of Bush*, 191 Ill. App. 3d 249, 263, 547 N.E.2d 590, 598 (1989); *Drummond*, 156 Ill. App. 3d at 680-82, 509 N.E.2d at 713-14). However, this court has affirmed a joint-custody award where the evidence demonstrated the parties' ability to cooperate and each party's desire to maintain involvement with their child. *Seitzinger*, 333 Ill. App. 3d at 108-09, 775 N.E.2d at 287; see also *In re Marriage of Hacker*, 239 Ill. App. 3d 658, 661, 606 N.E.2d 648, 650-51 (1992) (finding a joint-custody award may be affirmed even though neither party requested it where the evidence showed the parents were loving and capable and were sufficiently able to cooperate).

Here, the trial court did not abuse its discretion in denying joint custody. Andreas presented testimony that he and Diane could cooperate regarding parenting decisions, particularly in accommodating each other's schedules and communicating about the children's schoolwork and extracurricular activities. However, Diane contradicted this testimony. She testified to specific occasions when the parties failed to cooperate such as when Andreas refused to take the children, stating he was not Diane's babysitter and when he interfered with Diane's attempt to take a cigarette lighter away from Sergei. *Cf. Seitzinger*, 333 Ill. App. 3d at 109, 775 N.E.2d at 287 (noting "no evidence in the record shows any specific instances of lack of cooperation"). She testified the marital problems between the parties often overwhelmed discussions intended to further joint decision making about their children.

Further, Diane presented evidence that Andreas was depressive, neglectful, and occasionally violent. By the time of the trial on remaining issues, Andreas had been the subject of a DCFS investigation and indicated report as the result of his leaving Sergei alone in the car for an extended period. The trial court found this to be an extraordinary circumstance, considering Andreas's request for joint custody was pending at the time of the incident. The court also found Andreas's lack of motivation and initiative to search for employment due to his depression was inconsistent with his request for increased parenting responsibilities.

Andreas asserts the trial court should not have considered evidence of Andreas's violence toward Diane. Section 602 of the Act (750 ILCS 5/602 (West 2008)) lists factors relevant to a court's custody determination. Section 602(b) states, "The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child." 750 ILCS 5/602(b) (West 2008). Andreas asserts there is no evidence that any incidents of violence between the parties affected his relationship with their children. However, Andreas overlooks section 602(a)(6), which states:

> "(a) *** The court shall consider all relevant factors including:
>
> * * *
>
> (6) 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 2008).

Under section 602(a)(6), violence or the threat of violence by a potential custodian is deemed relevant to the best interests of the child regardless of its having an actual effect on the relationship between the custodian and the child. Accordingly, in this case, Andreas's violence toward Diane was relevant to the court's custody determination notwithstanding section 602(b).

In this case, the trial court considered the relevant factors in concluding joint custody was against the best interests of the children. The court was in the best position to hear and evaluate the evidence. Accordingly, we conclude the court did not abuse its discretion in denying Andreas's request for joint custody and awarding sole custody to Diane.

B. Distribution of the Marital Property

Andreas next argues the trial court abused its discretion in dividing the parties' property. He does not dispute the assignment of particular items to either party. Rather, he claims the court erred in valuing the parties' property by referring to Diane's inventory and proposal rather than the evidence. Andreas disputes the values assigned to (1) Diane's house, (2) Diane's 401(k), and (3) Andreas's nonmarital life insurance policies. He claims the court ignored testimony that he had a credit card debt of $14,500 and evidence of a mortgage on his German real estate not shown in Diane's inventory. He also argues the court abused its discretion in requiring him to sell or refinance the marital residence. We conclude the court did not err in valuing and dividing the parties' property.

We review the trial court's division of property for an abuse of discretion. *In re Marriage of Mullins*, 121 Ill. App. 3d 86, 88-89, 458 N.E.2d 1360, 1362 (1984). An abuse of discretion is shown where no reasonable person could adopt the trial court's position. *Id.*

Section 503(d) of the Act directs courts to distribute marital property upon

dissolution "in just proportions considering all relevant factors." 750 ILCS 5/503(d) (West 2008). In dividing property, a court need not provide a precise value of each item of marital property. *Mullins*, 121 Ill. App. 3d at 89, 458 N.E.2d at 1362. Rather, there must be competent evidence of the property's value and the court's distribution must be supported by that evidence. *Id.*

In *Mullins*, this court refused to reverse and remand a wife's appeal of the property division in her dissolution case as she presented no evidence on the value of the parties' assets despite the presentation of such evidence by the husband. *Id.* at 90, 458 N.E.2d at 1363. In that case, the court relied on *In re Marriage of Smith*, 114 Ill. App. 3d 47, 54-55, 448 N.E.2d 545, 550 (1983), quoting it as follows:

> "'We again emphasize that it is the parties' obligation to present the court with sufficient evidence of the value of the property. Reviewing courts cannot continue to reverse and remand dissolution cases where the parties have had an adequate opportunity to introduce evidence but have failed to do so. Parties should not be allowed to benefit on review from their failure to introduce evidence at trial. [Citations.] Remanding cases such as the one before us would only protract the litigation and clog the trial courts with issues which should have been disposed of at the initial hearing.'" *Mullins*, 121 Ill. App. 3d at 90, 458 N.E.2d at 1363.

In this case, Diane employed an inventory to assist the trial court in synthesizing

the exhibits and testimony about the parties' property toward achieving an equitable distribution. The inventory was not admitted as evidence but was used as a demonstrative aid. Each item on the inventory related to testimony or an exhibit. The inventory appears to have been provided to Andreas in advance of the trial on remaining issues. Thus, the court should have been alerted at the trial stage to any discrepancies Andreas noticed between the evidence and the values reported on Diane's inventory. Alternatively, Andreas could have submitted an inventory of his own. As he did not bring the allegations of erroneous valuations to the court's attention at trial, we conclude the values employed by the court in dividing the marital property were within the range allowed by the evidence.

Further, each of Andreas's specific claims of erroneous valuation lacks merit. With respect to the valuation of the house Diane purchased when the parties separated, the court was presented with testimony of two possible values: the tax assessment and the purchase price. Andreas cites to no authority suggesting the court's valuation according to the tax assessment constituted error.

With respect to Diane's 401(k) plan, the trial court was presented with evidence of the asset's value as of July 1, 2009, and as of September 30, 2009. The court employed the July 1, 2009, balance. While property is to be valued on the date of trial or as close to the date of trial as is practicable (750 ILCS 5/503(f) (West 2008)), this consideration should be weighed against the ultimate aim of achieving a just distribution of the assets (750 ILCS 5/503(d) (West 2008)). As the most recent available statement of Andreas's 401(k) plan showed an ending balance as of June 30, 2009, the court did not err by valuing the parties' 401(k) plans as close in time to each other as possible regardless of any later increase in the value of Diane's. Alternatively, in his

reply brief, Andreas suggests the trial court should have entered a QDRO. However, this argument is waived as it was not included in his opening brief. See Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006) ("Points not argued [in the appellant's opening brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

With respect to Andreas's German life insurance policies, Diane testified the policies had a cash value. She provided a German-language financial statement and an exchange-rate table. Andreas now asserts the values provided in Diane's testimony and her inventory are the policies' death benefits; he claims the policies have no cash value. As they likely required translation, the documents provided by Diane did not speak for themselves. If evidence existed showing that Diane was conflating the policies' death benefits with their cash value, Andreas had the burden of going forward with it at trial as Diane's inventory put him on notice that she planned to establish a cash value for the policies.

Andreas further claims the trial court ignored evidence of his debts--namely, a credit card debt and a mortgage on his German apartment. These debts were not reported in Diane's inventory. Andreas himself testified to the credit card debt but did not substantiate it with account statements. The evidence of the mortgage was in a response to an interrogatory and was, likewise, unsubstantiated by any documentary evidence. These debts were not discussed by Andreas during closing arguments. The court would have needed to read every trial transcript and evidentiary exhibit to find the evidence of these debts. This would not have been necessary if Andreas had clearly presented the evidence in arguments or a counter proposal and inventory. Accordingly, the court did not abuse its discretion in not accounting for these debts in its order dividing the marital property.

Finally, Andreas claims the trial court abused its discretion in its disposition of the marital residence. He cites no authority that the court's plan, by which Andreas could either sell the house and share the equity with Diane or refinance it in his own name and pay Diane $30,000, is erroneous in itself. Rather, he claims the disposition of the home was based on the trial court's allegedly erroneous premise that its distribution of the other assets was just. As we have rejected Andreas's arguments that the court erred in dividing the other marital assets, we reject this argument as well.

C. Denial of Andreas's Request for Maintenance

Finally, Andreas argues the trial court erred by denying his request for maintenance. We disagree.

"[T]he propriety of a maintenance award is within the discretion of the trial court and the court's decision will not be disturbed absent an abuse of discretion." *In re Marriage of Schneider*, 214 Ill. 2d 152, 173, 824 N.E.2d 177, 189 (2005). An abuse of discretion occurs "only where no reasonable person would take the view adopted by the trial court." *Id.*

"Under section 504(a) of the Act, the court may grant maintenance when it finds the spouse seeking maintenance lacks sufficient property, including marital property, to provide for her reasonable needs and is unable to support herself through employment or is otherwise without sufficient income." *In re Marriage of Harlow*, 251 Ill. App. 3d 152, 157, 621 N.E.2d 929, 933 (1993). The factors relevant to determining whether maintenance is justified are listed in that section. See 750 ILCS 5/504(a)(1) through 504(a)(12) (West 2008). No single factor is determinative of awarding or denying maintenance. *Harlow*, 251 Ill. App. 3d at 157, 621 N.E.2d at 934.

"The policy underlying maintenance awards is that a spouse who is disadvantaged through marriage be enabled to enjoy a standard of living commensurate with that during the marriage." *In re Marriage of Schuster*, 224 Ill. App. 3d 958, 970, 586 N.E.2d 1345, 1354 (1992). "A spouse cannot use self-imposed poverty as a basis for claiming maintenance when he has the means of earning more income." *Id.* Accordingly, the Act imposes an affirmative duty on the spouse requesting maintenance "to seek and accept appropriate employment." *Id.* In *Schuster*, 224 Ill. App. 3d at 970-71, 586 N.E.2d at 1354, the court held an award of maintenance would not have been justified for a spouse who was diagnosed with depression and who possessed degrees in engineering and law but disliked working in those fields and chose to pursue less lucrative employment.

In this case, as of the trial on remaining issues in June 2010, Andreas had not worked since late 2008. He had made no effort to regain employment, and he remained unemployed. No medical justification for Andreas's inactivity was provided. Andreas possessed the equivalent of a bachelor's degree. By all accounts, he was employable and physically and mentally capable of maintaining employment. Thus, Andreas failed to satisfy his duty to seek appropriate employment before claiming maintenance, depriving the trial court of an opportunity to evaluate his needs in relation to his earning capacity. Further, the court specifically found Andreas's share of the marital assets, the nonmarital assets assigned to him, and his unemployment benefits were sufficient to support him until he could find employment.

Andreas contends the trial court erred in finding that his expenses were reduced by Diane's agreement not to seek child support during Andreas's unemployment and that he received substantial income from unemployment benefits and held substantial marital and

nonmarital assets. However, the court was correct in finding Andreas was free from a court-ordered support liability as a result of the parties' agreement on visitation and other matters. Whether Andreas incurred expenses in caring for the children when they were in Diane's custody was his decision, and he was under no obligation to do so. Further, we have rejected Andreas's argument that the court erroneously valued Andreas's nonmarital property. He claims the assets assigned to him by the court do not provide him with a means of support as the bulk of them are not liquid. To the contrary, the court specifically found his nonmarital life insurance policies had a substantial cash value. Under these circumstances, the court's determination that an award of maintenance was not justified does not constitute an abuse of discretion.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment.

Affirmed.