



ILLINOIS FAMILY LAW REPORT

The monthly guide to what's new and important.

Volume XXXII, Number 6

June 2009

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► AGREEMENTS

Parties' Marital Settlement Agreement Vacated because of both Procedural and Substantive Unconscionability.

IN RE MARRIAGE OF DEBORAH DEWEY, Petitioner-Appellee, and BRYAN DEWEY, Respondent-Appellant. May 14, 2009, Ill.App.Ct. 3rd District, No. 3-07-0599, Daniel J. Bute, trial judge. Rule 23.

On December 18, 2006, the trial court entered a judgment, dissolving the marriage between Deborah and Bryan Dewey and incorporating the parties' marital settlement agreement. On January 10, 2007, Deborah filed a motion to vacate the judgment for dissolution of marriage, alleging that the judgment was unconscionable and procured by fraud, coercion, and intimidation. The trial court granted the motion to vacate, and Bryan appealed. The appellate court affirmed.

1.) Deborah testified that she was 53 years old and that she had a high school education. She stayed at home and raised the parties' son until about three years ago, when she began a part-time job at a factory. She worked four hours a day, five days a week and made \$8 per hour. She testified that she made \$5,813 in 2005. Deborah testified that Bryan was a union electrician for about 25 years, and the parties' 2005 tax return showed that he made about \$50,000.

Deborah testified that on November 20, 2006, Bryan told her that he wanted a divorce. She claimed that Bryan told her that she had to leave the marital

home and that he started to pack her belongings. She also claimed that Bryan told her that she did not need a lawyer. Deborah stated that she did not want a divorce and that she felt terrible about it. She claimed that she lost 25 pounds and that she could not think or concentrate during the divorce.

Deborah testified that on December 2, 2006, Bryan drove her to Gearhart's office to sign documents related to the divorce. Deborah testified that the documents were prepared before she arrived and that she had no input as to their content. She testified that Gearhart told her that she did not need an attorney because it would be a waste of money. Gearhart told Deborah that she could represent both Deborah and Bryan if Deborah did not get a lawyer. Deborah stated that the documents were explained to her, but she could not concentrate. She signed the documents because Bryan repeatedly told her to do so. She did not realize that she was the petitioner in the divorce proceedings.

Deborah testified that she and Bryan returned to Gearhart's office on December 12, 2006. She stated that she signed some more documents that were similar to the documents she signed on December 2. She still did not realize that she was the petitioner in the divorce proceedings. She testified that her "mind was just blank" when she signed the documents, because she was scared. She first realized that she would not be represented by an attorney when she came to court and Gearhart said she was representing Bryan.

Deborah testified that she had been living with her son since December 30, 2006, and that her son paid most of the bills. Contrary to the judgment for

dissolution of marriage, she testified that she did not make enough money to support herself. She testified that she saw a doctor in January 2007, and he prescribed antidepressants, which she had been taking ever since.

On cross-examination, Deborah testified that she called Gearhart prior to their meeting on December 2, 2006, and she told Gearhart that she was going to "seek an attorney." She also admitted that she signed a waiver at Gearhart's office on December 2. The waiver indicated that Gearhart represented Bryan, that Gearhart recommended that Deborah secure her own attorney, and that Deborah agreed to participate in the divorce and property settlement agreement by her own choice. Deborah admitted that she also signed the petition for dissolution of marriage and the judgment for dissolution of marriage. The petition indicated that Deborah had been given the opportunity to seek the aid of an attorney but had chosen not to do so. The judgment indicated that Deborah had been given the opportunity to seek an attorney but added that Gearhart was Bryan's attorney. Deborah testified that she did not read the documents because she was intimidated and threatened by Bryan into signing the documents. She stated that Bryan had poked her in the chest and told her to sign the documents when they were at home.

2.) Clifford Andersen, Deborah's brother-in-law, testified that Deborah came to his house a few days after December 18, 2006, and that was when he and his wife learned that Deborah and Bryan had divorced. Andersen testified that Deborah appeared to be emotional and not in control of herself.

3.) Bryan testified that he and Deborah had a meeting with Gearhart on December 2, 2006, and that, prior to the meeting, Deborah read and signed the waiver. Bryan testified that Gearhart prepared documents for that meeting according to his directions, which were to divide the parties' assets equally. At the meeting, the parties discussed maintenance and the division of assets and liabilities. Bryan testified that Gearhart told Deborah that she could receive \$1,000 per month in maintenance for 12 years because that time period equaled one-half of the marriage. Deborah did not accept the offer because she did not want to hurt Bryan anymore than she had. Instead, Deborah agreed to maintenance of \$500 per month for six months or until the marital home was sold because she could live off of the proceeds from the sale of the home. Bryan testified that Gearhart explained the documents to both Deborah and him and that each of them could have asked Gearhart questions

Illinois Family Law Report is published monthly from
200 North Dearborn Street, Suite 802,
Chicago, Illinois 60601-1617
Telephone: (312) 236-1336

Please fax changes of address to (312) 372-3217

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Publisher
Illinois Family Law Report, Inc.

Managing Editor
Gregory C. Armstrong

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Joseph N. DuCanto
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H. Joseph Gitlin
Elizabeth M. Wells

Subscription: \$165.00 per year.

about the documents. He noted that Deborah asked about the value of his truck as well as her dental work and that Deborah had no reaction when Gearhart told her that she would be the petitioner. Bryan testified that the documents were signed on December 12, 2006.

4.) Christine Novak, a licensed clinical professional counselor, testified as an expert over Bryan's objection. She testified that she began counseling Deborah on January 13, 2007, after Deborah received a referral from her doctor, who had prescribed antidepressants. The counseling related to Deborah's depression after the divorce. Symptoms of Deborah's depression included fatigue, feelings of worthlessness, and a diminished ability to concentrate. Novak, based on her counseling sessions with Deborah, opined that Deborah was overwhelmed and not processing information effectively after Bryan told her that he wanted a divorce. She further opined that a person in Deborah's mental state would not be able to negotiate.

5.) Gearhart believed that Deborah understood that Gearhart represented Bryan because Deborah read and signed the waiver.

After Deborah signed the waiver, Gearhart, Deborah, and Bryan discussed the parties' assets and the issue of maintenance. Gearhart testified that Deborah actively participated in the discussion. Deborah supplied most of the information about the parties' assets because she handled most of the parties' finances. Gearhart testified that Deborah raised the issue of maintenance and that Gearhart asked her what she needed. Deborah did not know, so she asked what Gearhart would offer. Gearhart testified:

"I said, well, here's the deal. Any attorney in town is going to tell you that you should be getting maintenance for at least half the life of your marriage. And it depends on how much he makes and how much you make and you've got to figure that out what you need to live. And she says, well, isn't he paying all the bills? It's like she was excited all of a sudden thinking that he wasn't going to pay all the bills. I said, no, he's already agreed. He's going to pay every marital debt there is. He's paying it out of his pocket every week. Every month. Not you. And she said, then fine. I need five hundred (\$500.) dollars. That, that's what I need. And I said, well how about a thousand (\$1,000.) dollars, think—, and, and, I'm sure I sounded like a lunatic, but, I'm, I'm thinking, what five hundred (\$500.) dollars. That, that didn't sound like quite enough to me. And she

says, no, I know what I got to pay and I don't want to hurt the man anymore."

Gearhart testified that after the December 2, 2006, meeting, she started to prepare legal documents. She stated that she prepared the petition for dissolution of marriage, naming Deborah as the petitioner because Deborah did not want to be accused of mental cruelty. She also prepared Bryan's response to the petition and the judgment for dissolution of marriage. Gearhart testified that the petition and the judgment explained that Deborah did not have an attorney.

Gearhart testified that Bryan and Deborah returned to her office on December 12, 2006, to sign the documents. Prior to signing the documents, Gearhart had to change the amount of money that Deborah would receive for Bryan's truck based on Deborah's valuation of the truck. Gearhart testified that Deborah was articulate and coherent during the meeting. She noted that Deborah read through the entire document each time a change was made. She testified that Bryan and Deborah signed the documents before leaving her office.

Gearhart testified that she, Deborah, and Bryan met at the courthouse for the prove-up hearing on December 18, 2006.

Gearhart called Deborah as a witness, and Deborah confirmed every part of the judgment of dissolution. Gearhart stated that Deborah seemed normal and calm and that it did not appear that Bryan had attempted to intimidate her.

On cross-examination and questioning by the trial court, Gearhart testified that she would not have recommended to Deborah to take \$500 per month as maintenance for six months because she would have sought the best deal for her client.

6.) The trial court found that the conditions under which the agreement was made raised serious questions about its validity. Specifically, the trial court did not understand why, based on Gearhart's testimony, Deborah refused maintenance of \$1,000 per month for 12 years to accept maintenance of \$500 per month for six months. The trial court explained Deborah's refusal from the evidence that she suffered from depression at the time of the divorce and Novak's testimony that Deborah would not be able to negotiate in her state. The trial court also found that the economic circumstances of the parties resulting from the agreement were unconscionable because the terms clearly favored Bryan.

7.) When a party seeks to vacate a property settlement incorporated into a judgment of dissolution of marriage, all presumptions are in favor of

the validity of the settlement.” *In re Marriage of Bielawski*, 328 Ill. App. 3d 243, 251, 764 N.E.2d 1254, 1261 (2002) 02 IFLR 76.

8.) A marital settlement agreement is unconscionable when there is an absence of meaningful choice for one of the parties together with contract terms that are unreasonably favorable to the other party. The fact that an agreement merely favors one party over another does not make it unconscionable. To be unconscionable, the agreement must be totally one-sided and oppressive.

9.) Courts consider two types of unconscionability: (1) procedural unconscionability; and (2) substantive unconscionability.

Procedural unconscionability refers to some impropriety during the formation of the contract that deprives a party of a meaningful choice. *Kinkel v. Cinquilar Wireless, LLC*, 223 Ill. 2d 1, 857 N.E.2d 250 (2006).

Factors to consider include the circumstances surrounding the formation of the contract, such as the manner the contract was entered into and the opportunity each party had to understand the terms of the contract, and the disparity in bargaining power between the drafter and the party claiming unconscionability.

Substantive unconscionability considers the relative fairness of the contract terms to determine whether they are so one-sided or oppressive.

10.) The trial court did not err in vacating the parties’ marital settlement agreement as unconscionable because of both procedural and substantive unconscionability.

11.) The circumstances surrounding the formation of this contract gave Deborah no meaningful choice. In less than a month, Bryan decided that he wanted a divorce, the parties reached a marital settlement agreement, and the parties were divorced. Although this short time frame alone did not deprive Deborah of a meaningful choice, the short time period, together with the fact that Deborah was not represented by counsel, gave Deborah less of an opportunity to understand the terms of the agreement while increasing Bryan’s bargaining power. See *In re Marriage of Steadman*, 283 Ill. App. 3d 703, 670 N.E.2d 1146 (1996) 96 IFLR 212 (declining to find per se unconscionability based on the number of hours spent negotiating while stressing the significance of arms length negotiation with the aid of counsel); see also *Gibson-Terry*, 325 Ill. App. 3d 317, 758 N.E.2d 459 (finding that a settlement agreement was not hastily arranged over a lunch break where the parties had been in the trial court for nearly two years and the parties had been

engaged in settlement negotiations during that time). The situation was further exacerbated by the evidence that Deborah suffered from depression during the divorce proceedings and that the depression impaired her ability to process information and negotiate effectively.

12.) In addition to the evidence of procedural unconscionability, the record shows that the marital settlement agreement was one sided in favor of Bryan. The maintenance provision of the agreement was unreasonably favorable to Bryan because it placed Deborah in a much worse economic position than she had during the marriage. The agreement stated that Bryan and Deborah were “employed and capable of providing for their own care and support” and provided that Deborah would receive \$500 for up to six months. However, the record showed that Deborah had only worked for three years after raising the parties’ only child and that she worked a part-time job, earning less than \$6,000 a year. Meanwhile, Bryan earned over \$50,000 and supplied most of the income during the parties’ marriage. The maintenance provision, as Gearhart apparently recognized in her testimony, was not fair to Deborah. The maintenance provision failed to take into account the discrepancy between Deborah’s future income and the amount of income that would provide the standard of living she enjoyed during the marriage. It also ignored the time Deborah spent raising the parties’ only child instead of pursuing a career. See 750 ILCS 5/504(a) (West 2006)

13.) The unreasonableness of the maintenance provision was not cured by the fact that the parties would split the proceeds from the sale of the marital home. Although Deborah would equally share in those proceeds, Bryan would receive more money from the sale of the marital home because the agreement provided that he would receive his share of the proceeds from the sale plus a credit for any payments he made on the home. Effectively, the agreement allowed Bryan to live in the marital home for free while he attempted to sell it and forced Deborah to move in with her son. The agreement was substantively unconscionable as it was one-sided in favor of Bryan and placed Deborah in a much worse economic position than she had during the marriage.

14.) Deborah moved to vacate the judgment within 30 days of its entry. Pursuant to section 2—1203 of the Code of Civil Procedure, a trial court, in its discretion, may set aside or modify a judgment within 30 days of its entry. 735 ILCS 5/2—1203 (West 2006). On review, an appellate court

must not merely review whether the trial court's decision pursuant to section 2—1203 represented an abuse of discretion but whether substantial justice is being done between the parties. *In re Marriage of Sutherland*, 251 Ill. App. 3d 411, 622 N.E.2d 105 (1993) 93 IFLR 274. Here, based on the procedural and substantive unconscionability of the marital settlement agreement, the trial court's decision to vacate the agreement resulted in justice being done between the parties.

► CRIMINAL ACT

Probation Revoked and Two Year Sentence Imposed After Defendant Wilfully Fails to Complete Domestic Violence Counseling.

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee v. LORENZO BASSETTE, Defendant-Appellant. April 28, 2009, Ill.App.Ct. 4th District, No. 4-07-0528, Scott Drazewski, trial judge.

In April 2006, defendant, Lorenzo Bassette, agreed to admit violating the terms of his probation by willfully failing to complete domestic-violence counseling. In exchange for Lorenzo's admission, the State agreed to forego prosecution on several other petitions to revoke his probation. Following the State's factual-basis presentation, the trial court accepted Lorenzo's admission and later resentenced him to two years in prison.

Lorenzo appealed, arguing that the trial court erred by revoking his probation because "the evidence showed that [his] failure to obtain the required domestic[-]violence assessment and counseling was due to his poverty, and not to any willful acts" on his part. The appellate court disagreed and affirmed.

1.) In December 2004, Lorenzo pleaded guilty to domestic battery (720 ILCS 5/12-3.2(a)(2) (West Supp. 2003)). The trial court thereafter sentenced him to 180 days in jail and 30 months' probation. Part of Lorenzo's plea agreement required him to "obtain [a domestic-violence] assessment and complete treatment by [the date of his] review hearing." The trial court ordered him to do so as a condition of his probation.

2.) In October 2003, the supreme court adopted Rule 402A (210 Ill. 2d R. 402A) governing admissions or stipulations in proceedings to revoke probation, conditional discharge, or supervision. Rule 402A is very similar to Supreme Court Rule 402, which governs pleas of guilty or stipulations

sufficient to convict. Of particular importance for this case, paragraph (c) of Rule 402A is essentially identical to paragraph (c) of Rule 402, in that both require that the trial court should not revoke probation or enter a final judgment on a plea of guilty "without first determining that there is a factual basis" for Lorenzo's admission or stipulation or guilty plea.

3.) The record was completely devoid of any basis for concluding that the trial court abused its discretion when it determined that the State presented a factual basis for Lorenzo's admission. The State fully complied with Rule 402A(c)'s requirement to provide a factual basis when it explained that (1) Lorenzo was on probation, (2) completing domestic-violence counseling was a requirement of Lorenzo's probation, and (3) Lorenzo did not complete domestic-violence counseling. The State was not somehow required to address how it would prove that Lorenzo's failure to comply with a condition of his probation was willful. As earlier stated, if Lorenzo thought he was getting a "bum deal" because his failure to comply was not willful, his remedy was to not admit the petition's allegations.

4.) Lorenzo contended that his testimony at the sentencing hearing—that he could not afford to pay for the domestic-violence treatment because he had lost his job—supported his claim that the State's representation regarding the factual basis was deficient.

5.) A proceeding that complies with Rule 402 or Rule 402A, specifically including representations concerning a factual basis, cannot be undone by representations or evidence presented in subsequent proceedings. Thus, Lorenzo's claims at his sentencing hearing were totally beside the point when assessing whether this trial court complied with Rule 402A. The court did so, and nothing Lorenzo could later say could change that fact.

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► DOMESTIC VIOLENCE

Affair Ends Badly but Appellate Court Reverses Order of Protection. Trial Court Failed to Make the Minimum Required Findings of Fact.

SCOTT A. BAUER, Petitioner-Appellee, v. LISA McCARTY, Respondent-Appellant. April 17, 2009, Ill.App.Ct. 5th District, No. 5-08-0134 Laninya A. Cason, trial judge. Rule 23.

Lisa appealed the order entered by the trial court granting Scott's petition for an order of protection against her. The appellate court reversed.

1.) The parties entered into an intimate relationship in September 2007, despite both parties being married. The affair ended on February 14, 2008. On February 19, 2008, Scott filed a petition for an emergency order of protection against Lisa and alleged that she was harassing him and his wife. The trial court granted the emergency order of protection.

2.) On March 11, 2008, a hearing was held on the petition for a plenary order of protection. During the hearing, Scott explained that the parties began an affair in September 2007. On November 17, 2007, Scott's wife overheard the parties during a telephone conversation and asked Scott to move out of their home. Scott then moved in with Lisa; however, around December 12, 2007, Scott broke up with Lisa. Scott alleged that Lisa then tried to commit suicide. He also testified that Lisa was arrested for disorderly conduct during an incident in which Lisa tried to beat in his door. The parties did not have contact for a few weeks but began talking again after Christmas. The affair finally ended on February 14, 2008. Scott testified that Lisa began placing harassing phone calls and that she had called him continuously for a period of 48 hours. He then proceeded to get the order of protection. Scott testified that the last time that Lisa had harassed him, she threatened to tell his wife "everything" if he did not "go back to her."

During cross-examination, Scott admitted that his wife had obtained an order of protection against him on November 25, 2007, after he had threatened her. He also admitted to going to Lisa's house on February 14, 2008, to retrieve his items. He admitted that he knocked on Lisa's window and door, but he denied that he had harassed her.

Scott's wife, Amy Lynn Bauer, testified that she had received from Lisa 10 phone calls at her place of employment at a local school. Amy told Lisa that she could not receive personal phone calls at work.

However, Lisa continued calling, claiming that it was an emergency. Amy testified that Lisa had also called their home phone until her husband obtained the order of protection. Amy also confirmed that she had obtained an order of protection against her husband in November 2007.

Lisa testified that Scott came over to her house on February 14, 2008, and harassed her by repeatedly knocking on the door, ringing the doorbell, knocking on the window, and calling her. She further testified that later that night Scott threatened her by saying: "I'm going to bring all you motherfuckers down. I'm going to kick your ass. I'm going to kick all your boys' ass." The following morning her friend observed that his tire had been slashed. Lisa went to the police department on February 15, 2008, and filed a police report for telephone harassment against Scott. However, she chose not to obtain an order of protection against Scott. Lisa admitted that she had called Scott and his wife, but she denied that she had harassed them.

Kevin Wesselman testified that at the time of his testimony he was dating Lisa and was present at her home on February 14, 2008. He testified that Scott had been calling her house and cell phone. He also testified that Scott came over to her house and beat on her front door and window and threatened to come back that evening with a baseball bat.

3.) At the conclusion of the hearing, the trial court granted the petition for the plenary order of protection and stated: "Why I am going to grant you this order of protection is because you beat her to the punch. If she would have come [sic] first[,] she would have gotten it because it's the same set of facts, the same set of facts. If she came in first[,] she would have gotten one against you. I mean it's not a thing where it's against you[:]; it's both of you. Okay? You've got to clean up your situation." The trial court's written order granting the plenary order of protection was entered March 11, 2008. Lisa filed a timely notice of appeal on March 19, 2008.

4.) The order of protection expired March 11, 2009, and thus the issue presented by Lisa was moot. However, moot issues may be reviewed under the public-interest exception. Orders of protection address problems of public interest, and their purposes can be achieved only when courts properly apply the statutory requirements.

5.) The trial court failed to set forth the specific factual findings as required by section 214(c) of the Act. The trial court failed to articulate any factual findings during the hearing. The trial court simply stated: "Why I am going to grant you this order of

protection is because you beat her to the punch. If she would have came [sic] first[,] she would have gotten it ***.” This perfunctory finding does not satisfy the statutory requirements of the Act. Furthermore, the trial court’s factual findings in the written order also violated section 214(c). The written order failed to indicate that the trial court considered whether the conduct or actions of Lisa, unless prohibited, would likely cause irreparable harm or continued abuse pursuant to section 214(c)(3)(ii) of the Act. The trial court also failed to consider whether it was necessary to grant the requested relief in order to protect Scott or other alleged abused persons pursuant to section 214(c)(3)(iii).

6.) The trial court should abide by its statutory obligation to make specific findings prior to entering protection under the Act. *In re Marriage of Healy*, 263 Ill. App. 3d 596, 602 (1994) 94 IFLR 149. In the instant case, the trial court failed to articulate orally or in writing the minimum statutorily required findings in violation of the Act.

► MAINTENANCE

Permanent Maintenance Award to Wife Employable as Registered Nurse, Affirmed.

IN RE MARRIAGE OF KEVIN DVORAK, Petitioner-Appellant, and CHERYL DVORAK, Respondent-Appellee. February 24, 2009, Ill.App.Ct. 2nd District, No. 2-07-0968, Diane E. Winter, trial judge. Rule 23.

The trial court awarded Cheryl \$1,000 per month in permanent maintenance. Kevin appealed, challenging the trial court’s maintenance award and its classification of certain property. The appellate court affirmed.

1.) Kevin, age 46, petitioned for dissolution of his 25-year marriage to Cheryl, age 52. The parties had two children, both emancipated. Kevin worked as director of strategic partnerships at American Digital, and Cheryl worked as a registered nurse.

In July 2005, Cheryl left the marital home in Mundelein. She resided in an apartment for seven months and then moved to Daytona, Florida.

2.) Kevin testified that he was a disabled veteran who has suffered kidney failure and has Type II diabetes. Kevin’s health issues impacted his ability to maintain employment. He began working for American Digital in 2005 with a \$70,000 base salary. In that year, he also received a \$20,000 sign-

ing bonus. Kevin’s 2006 W-2 form states that his gross earnings, which included commissions, were \$80,845.16. In 2007, his base salary remained at \$70,000.

Kevin received a graduate degree in 2000 and had outstanding student loans of \$2,494 to Citibank and about \$22,000 to Sallie Mae. In addition to his own, Kevin was making payments on their son Marshal’s student loans. The combined monthly payments to Sallie Mae were \$181.36. Kevin rented a two-bedroom town home. He drove a 2002 Jeep Liberty and did not make payments on it.

Kevin further testified that the parties purchased between 40 and 50 Lladro figurines over the course of the marriage. “Some” were gifts for Cheryl for birthdays and holidays, and others were purchased as investments. The parties did not come to any agreement as to their allocation.

3.) Cheryl testified that she suffers from depression and took Lexipro. She moved to Florida following the parties’ separation because she no longer had family in Illinois. Cheryl explained that she had a lot of emotional support in Florida. Cheryl’s mother, brother, and niece live in Florida. Her mother resided close to Cheryl.

In Florida, Cheryl lived in a four-bedroom apartment, paying \$1,000 per month in rent. Her daughter, Heather, and Heather’s three-week-old infant live with her, and Cheryl supported them. Heather had not contributed funds for Cheryl’s expenses at her Florida residence.

Addressing the time after she moved out of the marital home and while she lived in an apartment in Illinois, Cheryl testified that her depression became “significantly worse.” She spent about 15 hours per day in bed. After she moved to Florida, her depression was significantly reduced.

Cheryl further testified that she is licensed as a registered nurse in both Illinois and Florida. After she relocated to Florida, Cheryl worked was asked to resign due to downsizing, and, so, she did. At the time of trial, Cheryl did not have health insurance and she had not applied for unemployment benefits.

Addressing her automobile, Cheryl testified that it was “totaled” and that she did not currently own a working automobile. Addressing her credit cards, Cheryl testified that she stopped using the cards three years ago and that all of the charges reflected in the balances were incurred earlier than three years ago.

Cheryl earned \$24,505 in 2002 and \$21,654 in 2003. In 2005, Cheryl earned \$57,264 while working at Libertyville Manor, a nursing home.

Cheryl further testified that, when she returns to Florida, she intended to register for a 12-week program at a hospital that trains nurses who have been working outside of a hospital for a long time. She believed that she was eligible for the program. Currently, Cheryl was looking for work at hospitals, nursing homes, and doctors' offices.

Cheryl conceded that, in 2003 and 2004, she administered to herself prescription drugs in amounts in excess of what her doctors authorized her to take. She also conceded that, on three occasions, she had disciplinary issues with her nursing board concerning substance abuse.

As to the Lladro figurines, Cheryl testified that she and Kevin acquired about 40 during the marriage. She possessed all but two of them. She received "most" of the figurines as gifts. Cheryl estimated that 8 or 10 figurines were purchased either by herself or Kevin for something other than a special occasion.

4.) The trial court found that Kevin earned \$123,318.33 in 2004, \$101,715 in 2005, and \$83,149 in 2006. It also found that Kevin had a \$70,000 base salary in 2007 with the possibility of commissions. As to Cheryl, the court found that she earned \$28,965.98 in 2004, \$57,164 in 2005, and \$45,214 in 2006. The trial court also found that Cheryl became unemployed a few weeks before trial commenced.

As to Cheryl's employment, the trial court found that her history showed that she has always worked and had been able to secure employment in little time. The trial court found that she was expected to earn the same income she earned in 2006-\$45,000. As to Kevin's employment, the court found that Kevin had new employment in 2006 and that it was expected that he will continue to receive bonuses and otherwise increase his earnings.

The trial court noted that it had considered the parties' financial affidavits and awarded Cheryl permanent maintenance of \$1,000 per month beginning May 1, 2007. The trial court found that Cheryl would benefit from attaining additional education so she could secure work in a hospital rather than a nursing home; that this education was delayed during the marriage; that it would enable her to increase her earnings; and that the time needed to attain this education was relatively short. The trial court characterized the parties' standard of living during the marriage as modest, with some vacations and trips. It also noted that the parties were middle-aged and that, given Cheryl's depression and prescription drug abuse, Cheryl's current emotional condition was poor to fair.

The trial court found that the marital estate

was "relatively small" and that it should be equally divided.

Kevin shall be responsible for 55% of the marital debt and Cheryl for 45% of the marital debt because that mirrors their respective incomes after maintenance payments were taken into account.

The trial court found that Kevin was entitled to receive three additional figurines.

On August 27, 2007, the trial court denied Kevin's motion to reconsider, with the exception of awarding Cheryl an E*Trade account re-valued at \$8,400. Kevin appeals.

5.) Temporary maintenance "is appropriate only where the spouse is employable at an income that would provide the approximate standard of living enjoyed during the marriage. Permanent maintenance is necessary where a spouse is not employable or is employable only at a low income as compared to [his or] her previous standard of living." *Selinger*, 351 Ill. App. 3d at 615. With the enactment of the Act in 1977, the legislature sought to provide for the financial needs of the spouses through the disposition of property rather than through maintenance. The 1993 amendments to the Act "made it easier for maintenance to be awarded, but maintenance is not the absolute right of every party to a marriage and should be mainly reserved for circumstances of necessity." *Bratcher*, 383 Ill. App. 3d at 390.

6.) Kevin argued that the trial court erred in awarding Cheryl \$1,000 per month in permanent maintenance. Cheryl worked full time during most of the parties' marriage, was a registered nurse with a degree, and had an income that was lower but "not substantially disproportionate" to warrant the trial court's "extensive" permanent maintenance award.

Kevin argued that the trial court erred in finding that the standard of living during the parties' marriage was modest and in awarding Cheryl permanent maintenance without comparing Cheryl's current lifestyle and needs to her lifestyle during the parties' marriage. According to the Kevin, the evidence did not show that Cheryl's standard of living deteriorated or would deteriorate as a result of the divorce. Kevin further noted that Cheryl worked full time during most of their marriage and was a registered nurse, which provides her with the ability to earn sufficient income to maintain her standard of living. He further asserted that there was no testimony that Cheryl was a dependent spouse. Kevin contends that the parties' marriage was of a long duration, that they lived no more than a less-than-moderate lifestyle, and that they both worked full

time for most of the marriage. He argued that he was as dependent on Cheryl's income to maintain his standard of living as Cheryl was on his. Kevin emphasized that Cheryl presented no evidence that the marriage negatively impacted her career in terms of her earning capacity. He asserted that Cheryl was self-supporting and rented a four bedroom apartment (with \$1,000 monthly rental payments) without any additional funds from Kevin.

Alternatively, he asserted that, to the extent it was shown that Cheryl's standard of living diminished after their separation, Kevin's also diminished to the same extent. During their marriage, Kevin asserted, the parties pooled their assets to achieve a standard of living higher than they could individually achieve. Kevin contended that the trial court abused its discretion when it awarded Cheryl maintenance because the evidence showed that the parties' standard of living during the marriage was less than moderate and more similar to those who live paycheck to paycheck. He also noted that Cheryl was unemployed due to her voluntary move to Florida and her voluntary decision to terminate her employment there.

7.) The trial court did not err in assessing the parties' standard of living and earning power before and after their separation. As to their earnings, the trial court found that Kevin earned about \$83,149 per year, which was his most recent annual rate and his lowest salary in recent years. As to Cheryl's earnings, the trial court found that she is expected to earn the income she earned in 2006—about \$45,214; this figure was the second-highest salary she had earned in recent years: The trial court, thus, took a conservative approach in assessing the parties' salary differential. There was no error with its calculations. It was clear that Kevin's salary was nearly twice that of Cheryl's salary.

Although Cheryl was unemployed at trial, the trial court set her earning capacity at \$45,214, which incorporated Cheryl's most recent full-time employment (primarily in Florida) and her second highest recent salary.

8.) The parties accumulated debts during the marriage that they could not pay, Cheryl testified that they paid their bills as they came due. As to Cheryl's decision to move to Florida, the appellate court disagreed with Kevin that the trial court should have penalized Cheryl for it. Cheryl earned her second highest recent salary while working in Florida, and the trial court found that this salary was her future earning capacity. On her salary alone, Cheryl's standard of living would not be the same as during the parties' marriage. Indeed,

Cheryl testified that the parties paid their bills during the marriage as they came due; however, since their separation, Cheryl had been unable to pay for her expenses without borrowing funds. Furthermore, that Kevin would suffer a drop in his standard of living after the parties' separation did not necessarily preclude a permanent maintenance award to Cheryl, especially in light of the trial court's findings that her salary was nearly one-half of Kevin's salary. The trial court did not err in this respect, whether the parties' standard of living was characterized as modest or less than that.

Kevin argued next that the trial court failed to consider the parties' needs when it awarded Cheryl permanent maintenance. Specifically, Kevin contended that the maintenance award adversely affects his ability to meet his own needs and he did not have the ability to pay Cheryl maintenance. There existed a \$1,353.10 differential between his gross W-2 earnings and the gross wages he listed in his financial affidavit. In the appellate court's view, the trial court could have reasonably found that Kevin's financial affidavit understated his net available monthly income and further reasonably found that Kevin had the resources to pay Cheryl \$1,000 per month in maintenance.

9.) The trial court's award of permanent maintenance over limited maintenance was not erroneous based on the trial court's finding that Cheryl's income was overly disproportionate to Kevin's income. It was not unreasonable for the court to find that Cheryl's earning capacity after the parties' separation was not near an amount that would provide the standard of living she enjoyed while married to Kevin.

B. Property Classification

10.) Next, Kevin argued that the trial court erred in finding that 30 of the 40 Lladro figurines were Cheryl's non-marital property, where they both testified that "some" were given to Cheryl as gifts and where no further testimony was presented as to how many were gifts or the value of any gifts.

However, there was testimony at trial as to how many figurines were given as gifts. Cheryl testified that she received "most" of the figurines as gifts and estimated that 8 or 10 figurines were purchased either by herself or Kevin for something other than a special occasion. Kevin did not refute this testimony. The trial court found that 10 of the figurines were marital property and the remainder were gifts to Cheryl. Based on the testimony at trial, the appellate court could not conclude that the trial court's findings were against the manifest weight of the evidence.

► PROPERTY

The Allowance of Interest in Dissolution Matters is not Mandatory but Lies within the Sound Discretion of the Trial Judge.

IN RE MARRIAGE OF NANCY CALLAHAN f/k/a VANDER HOONING, Petitioner-Appellee, and ROBERT VANDER HOONING, Respondent-Appellant. May 13, 2009, Ill.App.Ct. 1st District, No. 1-08-1210, Grace G. Dickler, trial judge. Rule 23.

Robert was obligated by a marital settlement agreement to pay Nancy half of any income tax refunds for 1998. After granting Nancy's second motion to compel payment under that provision, the trial court ordered Robert to pay 3% interest from the filing of the motion to payment of Nancy's share of the refunds. Nancy appealed from an order denying reconsideration of the interest award, contending that she was entitled to statutory 9% post-judgment interest beginning when Robert received the refunds. See 735 ILCS 5/2-1303. The appellate court affirmed.

1.) Section 2-1303 of the Code governs the imposition of 9% interest on civil judgments.

2.) In *Finley v. Finley*, 81 Ill. 2d 317, 331-32 (1980) 80 IFLR 78 our supreme court determined that post-judgment interest on a child support judgment was not mandatory under the statutory predecessor to section 2-1303 but instead a matter of the trial court's discretion. "[A] divorce proceeding partakes so much of the nature of a chancery proceeding that it must be governed to a great extent by the rules that are applicable thereto," including that "the allowance of interest lies within the sound discretion of the trial judge and is allowed where warranted by equitable considerations and is disallowed if such an award would not comport with justice and equity."

3.) The appellate court has divided on the import of *Finley*. Many opinions construe *Finley* as rendering post-judgment interest discretionary for all dissolution matters. *In re Marriage of Polsky*, 387 Ill. App. 3d 126, 141 (1st Dist. 4th Div. 2008); *In re Marriage of Berto*, 344 Ill. App. 3d 705, 719-20 (2d Dist. 2003); *In re Marriage of Carrier*, 332 Ill. App. 3d 654, 659-60 (2d Dist. 2002); *In re Marriage of Kaufman*, 299 Ill. App. 3d 508, 509-11 (1st Dist. 2d Div. 1998); *In re Marriage of Ahlness*, 229 Ill. App. 3d 761, 763-64 (4th Dist. 1992); *In re Marriage of Stone*, 155 Ill. App. 3d 62, 71 (4th Dist. 1987); *Robinson v. Robinson*, 140 Ill. App. 3d 610, 612 (1st

Dist. 2d Div. 1986). Others have 'construed *Finley* to apply only to child support judgments, applying section 2-1303 mandatorily to other dissolution judgments such as maintenance payments and property settlements. *In re Marriage of Sunko*, 237 Ill. App. 3d 996, 1000-01 (1st Dist. 1st Div. 1992); *In re Marriage of Morris*, 190 Ill. App. 3d 293, 296-97 (1st Dist. 1st Div. 1989).

4.) Here, the appellate court found that the language of *Finley* and the weight of case law supported the application of *Finley* in all dissolution matters. The imposition of interest on a judgment in a dissolution case, other than for child support (see 735 ILCS 5/12-109(b) (West 2006)), is a matter of the trial court's discretion rather than a mandatory application of section 2-1303 as Nancy contended.

5.) It is axiomatic that an "award of interest on a money judgment requires that: (1) the amount of money to be paid was certain and (2) the judgment debtor enjoyed the improper use of the money during the period for which interest is to be awarded." *Robinson*, 140 Ill. App. 3d at 611.

It was arguably true that both factors existed from when Robert received his 1998 income tax refunds (Nancy's half-share thereof being easily computed) until he paid Nancy her share. However, the appellate court has also held that the circumstances, "including appellant's delay in bringing [her] claim," combined with the absence of hearing transcripts, rendered us "unable to conclude that the trial court's refusal to award interest *** was an abuse of discretion." *Robinson*, 140 Ill. App. 3d at 613.

The appellate court, here, noted the many months, even years, between motions and rulings in this case and the trial court's request that Nancy address the "reason for past continuances" before an award of interest. In that light, and in light of the fact that Nancy was not denied but awarded interest, the appellate court could not find an abuse of discretion.

BACK ISSUES

IFLR began publication in January, 1978. Single copies of back issues may be purchased at \$15.00 to current subscribers, \$30.00 to non-subscribers. Check for back issues must accompany order. Certain back issues are out of print and photostated copies will be furnished. Prices are good through March, 2009.

Appellate Court Reverses Trial Court's Classifications of Non-Marital Property. Retained Earnings are Considered Marital if the Spouse has Control over the Decision to Disburse the Retained Earnings.

IN RE MARRIAGE OF SANDRA L. SCHMITT, Petitioner-Appellant, and KIM A. SCHMITT, Respondent-Appellee. April 30, 2009, Ill.App.Ct. 2nd District, No. 2-07-0623, Robert B. Spence, trial judge.

Sandra appealed from the trial court's judgment of dissolution of her marriage to Kim. On appeal, Sandra argued that the trial court erred by classifying as non-marital certain parcels of real estate purchased during the marriage and also by classifying as non-marital Kim's business, Bricks, Inc. The appellate court reversed and remanded for further proceedings.

1.) Sandra and Kim were married on October 13, 1974. Both children were emancipated. The marriage broke down in 1995 when Kim told Sandra that he wanted a divorce. The grounds of irreconcilable differences were established.

2.) Kim, age 60, earned a college degree prior to the marriage. At the time of trial in February through June 2006 he was the president and sole shareholder of Bricks, Inc., a subchapter S corporation. Kim testified that he began working at Colonial Brick Company (Colonial), a subchapter S corporation, in 1969. In 1970 he was given partial ownership of Colonial. In 1972, he was given a 49% ownership interest in Colonial by Phillip Mumford, who owned the remaining 51% of the corporation. Before the parties were married, a Colonial balance sheet labeled "February 1974" showed that Kim had an accumulated earnings and savings account in the sum of \$5,661.82, which represented his share of the business.

Kim testified that in 1977, Kim and his partner, Mumford, bought two parcels of property on Kedzie Avenue in Chicago. The titles to the properties were not held in the name of Colonial, but individually, by Kim and Mumford. The down payments and mortgages for these properties, \$17,500 and \$100,000, respectively, were paid out of Colonial's retained earnings account.

Between 1974 and 1978 Kim and Mumford bought real estate in Kentucky and on Cermak Road in Chicago. They also formed the following companies or business interests: Aggressive Leasing, Emergency Demolition Contractors, Appalachian Hardwood Products, and a saw mill.

Kim testified that in 1976 Kim and Mumford formed a partnership, Aggressive Leasing, for the purpose of maintaining and leasing heavy equipment. In 1978 Kim and Mumford formed a Missouri corporation, CBC Bricks, Inc., for the purpose of reselling used brick, demolishing and developing real estate, and selling off the assets. Kim and Mumford owned CBC Bricks equally. In 1978 Kim and Mumford ended their business relationship, and as part of their separation agreement Kim received, among other things, 100% of the CBC Bricks stock.

The trial court admitted into evidence the June 1978 agreement that dissolved all business interests between Kim and Mumford.

Kim submitted a summary document, along with supporting documentation, showing that from 2000 through 2006 he paid a total of \$895,000 from the Bricks account for expenses for Sandra and the parties' children. The \$895,000 included \$191,000 in maintenance; \$220,016 distributed per court order; \$320,565 in mortgage interest; and \$95,553 in property taxes for the Batavia home.

3.) The trial court found that Kim's ownership interest in Colonial was acquired prior to the marriage and was nonmarital property. Because the Colonial funds were nonmarital, the trial court ruled that Kim sustained his burden of proving by clear and convincing evidence that all of the properties and businesses purchased with Colonial funds were nonmarital property. The trial court also found that Kim sustained his burden of proving by clear and convincing evidence that the properties and businesses purchased with Bricks' funds were nonmarital, because Bricks' was nonmarital. However, the trial court found that Kim's "personal efforts contributed significantly to the growth and value of Bricks, Inc." The trial court found that Kim's yearly salary was only approximately \$20,000 throughout the marriage. The trial court found that Kim did not need to reimburse the marital estate with his nonmarital assets because from 2000 through 2006 he adequately compensated the marital estate with his salary and "other payments made by Bricks, Inc., for the benefit of [Sandra] and the children [in the amount of \$895,000]."

However, because Kim deposited Bricks' funds into the parties' joint checking account to pay for part of the mortgages and real estate taxes for the Batavia residence and Schmitt Farms, Kim had to reimburse the marital estate \$121,794 and \$78,928, respectively.

The trial court found that the gross value of Kim's nonmarital property was \$11,591,000 and the

net value of Kim's nonmarital property was \$6,091,000. The trial court found that the value of the marital property was \$350,722. The trial court awarded Sandra 100% of the marital property minus \$150,000 for her dissipation of the marital assets, for a total award of \$200,722. The trial court ordered Kim to pay Sandra \$1 million in gross maintenance and arrearage. Each party was ordered to pay his or her own attorney fees.

4.) The appellate court granted Sandra's motion to strike portions of Kim's brief citing *In Re the Marriage of Mugnolo* 07 IFLR 116 as it was not cited for any of the proper bases listed in Rule 23. The appellate court denied Kim's motion to strike portions of Sandra's reply brief that referred to a CPA article and to a Federal Internal Revenue Service audit report regarding subchapter S corporation officer compensation. Sandra correctly argued that these references were not evidence, but citations to secondary authorities that have been properly cited by litigants and reviewing courts to support arguments and holdings, respectively.

5.) There is a rebuttable presumption that all property acquired by either spouse after the date of marriage but before the entry of judgment of dissolution is marital property, regardless of how title is held. 750 ILCS 5/503(b). A party can overcome this presumption only by a showing of clear and convincing evidence that the property falls within one of the exceptions listed in section 503(a). The party claiming that the property is nonmarital has the burden of proof, and any doubts as to the nature of the property are resolved in favor of finding that the property is marital.

6.) Kim worked for Colonial and that he was given distributions to make the down payments and mortgage payments for the Kedzie properties. Kim testified that the payments for the properties, made on behalf of himself and Mumford, were reflected on Colonial's books at the end of the year as distributions to Kim and Mumford in their respective ownership percentages. Thus, the distributions were income to Kim. Kim also testified that he purchased the Kedzie properties as an individual. Nothing sufficiently rebutted the presumption that the distributions were attributable to Kim's personal efforts. Therefore, the trial court's finding that the Kedzie properties were purchased with nonmarital funds, and were thus nonmarital, was against the manifest weight of the evidence.

7.) Regarding the remaining real properties (the property in Kentucky and the property on Cermak Road in Chicago) and businesses (Aggressive Leasing, Emergency Demolition

Contractors, Appalachian Hardwood Products, and the saw mill) purchased by Colonial, Kim testified that funds from Colonial were used to purchase them. Kim could not recall, specifically, what funds, if any, were charged against his retained earnings account for these real estate and business interests.

8.) A subchapter S corporation monitors its retained corporate earnings using an account which is then used to determine each shareholder's basis for taxed but undistributed corporate income. However, retained earnings and profits of a subchapter S corporation are a corporate asset and remain the corporation's property until severed from the other corporate assets and distributed as dividends.

9.) Kim failed to establish by clear and convincing evidence that the funds used to purchase these assets were not distributions and, thus, income attributable to his personal efforts. Therefore, the trial court's finding that they were purchased with nonmarital funds was against the manifest weight of the evidence.

Kim noted that both he and Mumford testified that the funds used to purchase the real properties and businesses were drawn from Colonial's operating account. However, this did not negate the fact that Kim could not recall whether these withdrawals were later charged against Kim's retained earnings account, thus constituting a distribution to Kim. Accordingly, Kim's and Mumford's testimony did not change the outcome here.

10.) The business interest of a spouse acquired subsequent to marriage constitutes 'marital property' subject to equitable distribution upon dissolution. Real property and business interests acquired after marriage are presumed to be marital property unless they were purchased with nonmarital funds.

11.) The trial court found that Bricks was nonmarital property because it was "formed with funds from [Kim's] non-marital interest in Colonial." It was undisputed that Bricks was acquired after the marriage and, therefore, is presumed to be marital property. Further, because Kim failed to show that the funds from his interest in Colonial were not attributable to his personal efforts, these funds were presumed to be marital property. 750 ILCS 5/503(a)(8)

12.) Although retained earnings in subchapter S corporations are generally considered nonmarital, they are considered marital if the spouse has control over the decision to disburse the retained earnings. Kim testified that he did not know whether the money from Bricks was credited to his retained earnings account. Kim, as sole shareholder of

Bricks, had complete control of and access to the retained earnings. Thus, the inference to be drawn from the evidence is that the funds were attributed to his personal efforts. Accordingly, the retained earnings of Bricks, and all assets Kim purchased with them, were presumed to be marital, and the record did not show that Kim rebutted with sufficient evidence either the inference or the presumption. Kim noted that he testified that the funds used to purchase the assets were drawn from Bricks' operating account. However, this did not negate the fact that Kim could not recall whether these withdrawals were later charged against his retained earnings account, thus constituting a distribution to Kim.

13.) The trial court also erroneously found that Kim's yearly salary of \$20,000 and expenses paid for Sandra and the parties' children for the years 2000 through 2006 from his nonmarital estate adequately compensated them so that he did not need to reimburse the marital estate. This finding was against the manifest weight of the evidence. Kim did not present evidence of his contributions for expenses for Sandra and the children for 1974 through 1999, which constituted most of the parties' marriage. The trial court's finding that \$895,000 was sufficient to reimburse the marital estate, from Bricks' gross value along with its purchases of approximately \$10,761,000 in real estate, was against the manifest weight of the evidence. Kim did not present evidence sufficient to show that Bricks and the properties purchased by Bricks were marital property.

LEGISLATIVE ACTION

Child-support enforcement

Senate Bill 100 (Martinez, D-Chicago; Mell, D-Chicago) amends the Income Withholding for Support Act. A payor (employer) who knowingly fails to withhold child support and forward it to the State Disbursement Unit within seven days from notice is subject to a \$100 fine per day. Under current law, the payor's nonperformance may be documented only by certified mail, return receipt requested. Senate Bill 100 simply expands the definition of notice to include personal service by the sheriff or private process server. It has passed both chambers.

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