SECOND DIVISION
September 29, 2023

No. 1-21-0780

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF:	)	
	)	Appeal from the
KATHERINE BARCLAY,	)	Circuit Court of
	)	Cook County
Petitioner-Appellee,	)	
	)	17 D 5101
v.	)	
	)	Honorable
JOHN BARCLAY,	)	Mary Trew,
	)	Judge Presiding
Respondent-Appellant.	)	

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Howse and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed as modified. Court did not err in categorizing several assets as marital property and denying reimbursement. Court erred in charging appellant with dissipation of $10,000 used to buy motorcycle, as wife's notice of dissipation was untimely. As asset purchased was totaled, judgment modified to reflect wife is instead entitled to 50% of insurance proceeds. Respondent's other dissipation arguments are without merit. Court did not err in awarding attorney's fees.

¶ 2 This appeal stems from the circuit court's order distributing the marital estate of Katherine and John Barclay. Before this court, John claims the circuit court erred in several respects. For the following reasons, we affirm the judgment of the circuit court with one modification.

¶ 3 BACKGROUND

¶ 4 We take the following facts from the common-law record and bystander's report, as we lack a verbatim transcript. John and Katherine were married in 2006 and had no children together. (John had grown children from a prior marriage.) The couple agreed that John would be the primary wage-earner, while Katherine acted as the homemaker and social host for John's work associates and clients. While details are murky, the parties initially separated sometime in 2014. At that time, the couple signed a separation agreement, and Katherine moved to Texas. A month later, they reconciled (to some extent), and Katherine moved back to Illinois. After returning from Texas, Katherine decided to go back to school to study nursing.

¶ 5 While in school, in 2017, Katherine filed for divorce and again moved back to Texas. While there was significant pre-trial litigation, at one point the parties appeared to have settled. In February 2020, the court conducted a "prove-up" hearing with a purportedly agreed division of assets. After this prove-up, the court set a date in March to enter judgment. It appears, however, that John ultimately objected to the proposed distribution of assets and refused to sign an agreed judgment of dissolution. In June, Katherine filed a motion to "Enforce the Oral Prove-up on February 28, 2020." John responded that the proposed "agreed" distribution was wildly inequitable and requested the court split the marital estate.

¶ 6 The court did not enforce the prove-up, instead setting the matter for trial in December 2020. Based on the bystander's report, the trial testimony primarily consisted of the parties listing their assets and giving some cursory testimony about them. It is not necessary to go through every asset discussed, as John is not challenging much of the judgment. Very briefly, the primary assets relevant to this appeal are: (1) a $600,000 trust he set up for his children (Trust); (2) a $150,000 Charles Schwab account (Schwab Account); (3) $72,000 he gave to a friend, John

Foushi; (4) a Transamerica life insurance policy (Transamerica Policy); and (5) $10,000 he paid his son for a motorcycle.

¶ 7 The circuit court bifurcated its judgment. It immediately entered a judgment of dissolution of marriage, but it took the issue of distributing the marital estate under advisement. About a month later, in mid-January 2021, the court entered a written order dividing the parties' estates. The order first listed the assets that were either undisputed or the subject of stipulation. The court then found that John had failed to disclose several assets, particularly the Trust, the Schwab Account, and the $72,000 being held by Mr. Foushi. And the court found that these three items John had not disclosed—the Trust, the Schwab account, and the $72,000 held by Foushi—were marital property subject to division.

¶ 8 Though John testified that the Trust and Schwab account were funded from money he inherited—and thus were non-marital property—the court did not credit that testimony, as John had provided no documentary evidence to substantiate his claim. The court also noted that, even if those assets had once been considered non-marital property, "the evidence was clear that the funds were deposited into a joint account." And while that fact did not *automatically* render the funds marital property, John presented no evidence to overcome the presumption that they were, in fact, marital property.

¶ 9 The court found the cash value of the Transamerica Policy (approximately $35,000) to be marital property for two reasons. One, the policy documents showed a start date beginning during the marriage, not pre-dating it. And two, John paid the premiums for that policy with marital funds during the marriage.

¶ 10 As for the money John paid his son for the motorcycle, the court noted John's testimony that he paid $10,000 to his son for the motorcycle, but the motorcycle was later totaled. As a

result of the accident, John received $8,500 in insurance proceeds. The court determined that these insurance proceeds were marital property as well.

¶ 11 Having made these findings, the court awarded Katherine 50% of: the Schwab Account ($75,000), the funds transferred to Foushi ($36,000), the Transamerica Policy ($17,495), the Trust ($300,000), and the amount John transferred to his son for a motorcycle ($5,000). Finally, the court found that Katherine was entitled to an additional "$4,700 as and for John's payment to Katherine for attorney's fees pursuant to previous orders of the court."

¶ 12 John filed a motion to reconsider, which was denied. He now timely appeals.

¶ 13 ANALYSIS

¶ 14 Before this court, John makes several arguments: the court erred in determining certain assets were part of the marital estate; if those assets were marital, he was entitled to reimbursement for the non-marital portion; the court erred in charging him with dissipation of assets; and the court erred in assessing him attorney's fees.

¶ 15 Aside from the fee award, all of these are factual findings made by the court. We will reverse a court's finding of fact only if it is against the manifest weight of the evidence. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 44. A finding is against the manifest weight of the evidence if the "opposite conclusion is clearly apparent or [] the court's findings appear to be unreasonable, arbitrary, or not based upon the evidence." *Id.*

¶ 16 I. Bystander's Report

¶ 17 First, we must address the bystander's report filed here in lieu of a verbatim transcript. Generally speaking, to support a claim of error on appeal, a party must present a sufficiently complete record. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 91-92 (1984). "Where the issue on appeal relates to the conduct of a hearing or proceeding, this issue is not subject to review absent a

report or record of the proceeding." *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001) (citing *Foutch*, 99 Ill. 2d at 392). In the absence of a report of proceedings, we assume the trial court's order was founded in law and fact. *Foutch*, 99 Ill. 2d at 392.

¶ 18 Recognizing that a verbatim transcript may not always be available, either because it was not created or has been lost, our Supreme Court Rules allow an alternative—a bystander's report. Ill. S. Ct. R. 323(c) (eff. July 1, 2017). A bystander's report allows a party to create a substitute report of proceedings "from the best available sources, including recollection." *Id.*; see also *People v. Majka*, 365 Ill. App. 3d 362, 368 (2006). Under Rule 323, the party seeking the bystander's report must serve a proposed report on the other parties, who can propose amendments, or provide an alternative proposed report. Ill. S. Ct. R. 323(c) (eff. July 1, 2017). After receiving a response to the proposed bystander's report, the proposals are submitted to the court "for settlement and approval." *Id.*

¶ 19 Because these reports can be prepared exclusively from memory, they are often "significantly less detailed and precise" than a traditional transcript. *Majka*, 65 Ill. App. 3d at 369. That can make things tricky for the reviewing court when reviewing factual challenges. On the one hand, "for a report to have any value, we must assume that the court or an opposing party will correct any *misleading* omission in a proposed report." (Emphasis added.) *Id.*

¶ 20 But on the other hand, consider a situation where the trial court makes an explicit factual finding based on cited testimony. Ordinarily, with a verbatim transcript, we would review the testimony in the record to see if it squares up with the trial court's findings (under a deferential manifest-weight standard). But suppose instead that we have only a bystander's report that is vague on the topic, glossing over the entire subject in a sentence or two. We cannot match up the testimony with the court's finding.

¶ 21 In a perfect world, every bystander's report would contain a full and complete narration of every material fact on which a witness testified. But when we encounter a situation where the court makes detailed findings of fact, and the bystander's report is nothing but a summary gloss, we are hampered in our review. It would be simply wrong to hold that a trial court's finding of fact on a question is unsupported by the record when that "record"—the bystander's report, at least—condenses a topic that must have consumed a fair amount of time at trial into a single sentence. We strongly urge the parties and the trial court to avoid cursory bystander's reports and to be as inclusive as possible.

¶ 22 II. Classification / Reimbursement

¶ 23 John first claims the circuit court erred in classifying several assets as marital property. Specifically, he challenges the findings that the Trust, Schwab Account, and Transamerica Policy were marital property.

¶ 24 A. Trust and Schwab Account

¶ 25 Under section 503 of the Illinois Marriage and Dissolution of Marriage Act (the Act), 750 ILCS 5/503(b)(1) (West 2020), it is presumed that all property acquired by either spouse during the marriage is marital property. This presumption may be overcome by "clear and convincing evidence" that the property has a non-marital source. *Id.* Relevant to this appeal, "non-marital" property includes: "property acquired by gift, legacy or descent or property acquired in exchange for such property" and "property acquired before the marriage, except as it relates to retirement plans that may have both marital and non-marital characteristics." *Id.* § 503(a)(1, 6).

¶ 26 The court found that the Trust and Schwab Account were marital property because they were created during the marriage and funded from a joint account. While John acknowledges his

inherited funds were placed in a joint, marital banking account, he claims they were not transmuted to marital funds and retained their non-marital status.

¶ 27 Transmutation occurs "when marital and non-marital property are commingled by contributing one estate of property into another resulting, in a loss of identity of the contributed property." 750 ILCS 5/503(c)(1) (West 2012). The reason behind this rule is that the spouse's failure to properly segregate non-marital property, by commingling it with marital property, creates the presumption that the owner of the non-marital property intended to treat the non-marital property as part of the marital estate. *In re Marriage of Olson,* 96 Ill. 2d 432, 439 (1983); *In re Marriage of Foster*, 2014 IL App (1st) 123078, ¶ 74.

¶ 28 This presumption is not conclusive; the owner of the non-marital property may rebut it by clear and convincing evidence. *In re Marriage of Foster*, 2014 IL App (1st) 123078, ¶ 74. That is, by clear and convincing evidence, the donor spouse may prove his or her contribution of non-marital property either by an agreement of the spouses (not present here) or by other evidence tracing the source of the funds. *Id*.; see 750 ILCS 5/503(c)(2)(A) (West 2020). In cases, as here, where non-marital funds are placed into a joint account, those funds are traceable if the party has presented clear and convincing evidence of " 'the path of the funds from their origin, through the account in question, and to the ultimate recipient.' " *Foster*, 2014 IL App (1st) 123078, ¶ 74 (quoting *In re Marriage of Steel*, 2011 IL App (2d) 080974, ¶ 72).

¶ 29 John argues that both the Trust and the Schwab Account are non-marital property funded with money John inherited and thus should be deemed non-marital. He further argues that, even if they were initially determined to be marital, he is entitled to reimbursement because the funds trace back to John.

¶ 30 The circuit court found against John on each of these points. The court was reluctant to accept that John had, in fact, used inherited money to fund these assets, though the court acknowledged that John had so testified. And equally as important, the court found no documentary evidence that connected any of these allegedly inherited funds to the Schwab Account and the Trust in any way:

> "John failed to present any evidence, other than his testimony, that the source of any of the funds set forth above were non-marital property ***. He presented no documentation, no copy of any estate plan, nor any other witnesses to substantiate his assertion that any property was inherited. Even if this court had found from John's testimony that certain deposits were, in fact, inherited property, the evidence was clear that the funds were deposited into a joint account. John failed to overcome the presumption by clear and convincing evidence that the funds he received were traceable as nonmarital property. Therefore, the funds he received during the marriage are considered marital property."

¶ 31 We cannot say that the opposite conclusion is clearly evident. For one, given that John did not initially disclose these substantial assets to the court, combined with the lack of documentary evidence establishing the receipt of the inheritance and its placement in this account or that—which would have been quite simple for John to produce—the court would have been within its rights to express some skepticism about the credibility of John's testimony, as it did. We are reluctant to disturb credibility findings of the court. See *In re Marriage of Faber*, 2016 IL App (2d) 131083, ¶ 37 ("The trial court heard and saw the witnesses, and we must give great deference to the court's credibility determinations").

¶ 32 Just as important, if not more so, is that John did not provide any documentary proof, much less clear and convincing proof, that any money landing in the joint account came from that inheritance. All we know from the record, the stipulations, and the vague bystander's report is that the Schwab Account and Trust were opened during the marriage and were funded with money from a joint account. That leads to a presumption that they were marital property that John came nowhere close to rebutting. We are in no position to determine that the trial court's finding that the Trust and Schwab Account were marital property was against the manifest weight of the evidence.

¶ 33 B. Transamerica Policy

¶ 34 John's entire argument regarding the Transamerica Policy is that it "was opened before the marriage[,] so it is John's non-marital property subject to possible reimbursement." John testified that he initially obtained a policy prior to marrying Katherine in 2006. And it is true that the Act provides that "property acquired before the marriage, except as it relates to retirement plans that may have both marital and non-marital characteristics" is "non-marital." 750 ILCS 5/503(a)(6) (West 2020).

¶ 35 But as the trial court noted, the policy documents presented to the court contain a "Policy Date" of November 4, 2016 and an expiration date of November 4, 2021—dates *during their marriage*, not before. So while the policy may first have been issued before their marriage, it was obviously renewed during it. The record is not clear whether this renewal is technically a *new* policy or acts as continuation of the old one. Nor does John even address this fact in his briefing before this court. All we know is that the documents presented to the circuit court clearly show a policy dated *during* the marriage and, for that matter, one that was funded from the joint account during the marriage (as the trial court also noted). Thus, the court's finding that the Transamerica

Policy was marital property is not against the manifest weight of the evidence; we cannot say that the opposite conclusion from that of the trial court is clearly evident in the record. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 44.

¶ 36 III. Dissipation

¶ 37 We now turn to John's argument that the court effectively charged him with dissipating several assets. Dissipation refers to one spouse's use of marital property for his or her sole benefit. *In re Marriage of Berberet*, 2012 IL App (4th) 110749, ¶ 50. The spouse charged with dissipation must show by clear and convincing evidence how the funds were spent. *Id.* Once dissipation is established, the court may consider it as one of the factors in determining equitable distribution under the Act. *Id.* ¶ 51.

¶ 38 But the court may only consider dissipation if certain conditions are met. 750 ILCS 5/503(d)(2) (West 2020). One of those conditions is that "a notice of intent to claim dissipation shall be given no later than 60 days before trial or 30 days after discovery closes, whichever is later." *Id.* § 503(d)(2)(i). When a party does not comply with the notice requirements, the court cannot consider whether a certain asset has been dissipated. *In re Marriage of Hamilton*, 2019 IL App (5th) 170295, ¶ 90.

¶ 39 That is where John's argument comes in. He notes that the court made a finding that any claim of dissipation by Katherine was untimely. The bystander's report, approved by the court, reflects as much, so we must assume it is accurate. See *Majka*, 65 Ill. App. 3d at 369. While we have complained of the vagueness of the bystander's report, on this point it is not vague; the bystander's report would be meaningless if we did not accept this assertion as accurate.

¶ 40 And then, according to John, the court proceeded to find that John dissipated multiple assets, albeit without expressly saying so. The legal finding of untimeliness and the factual

finding of dissipation, in John's eyes, are contradictory and cannot both stand. Katherine, for her part, argues that the court did *not* find dissipation but, instead, was merely properly allocating marital property. This argument is relevant to several assets.

¶ 41 A. Motorcycle

¶ 42 We start with the $10,000 John used to buy a motorcycle from his son. Recall that this bike was later totaled in an accident, and John received $8,500 in insurance proceeds. The trial court awarded half of the $10,000 spent on the bike to Katherine, using the purchase price as the fair market value. The court also found that the $8,500 in insurance proceeds was marital property—though the court ultimately did *not* award half of those proceeds to Katherine.

¶ 43 John says that, in awarding half the $10,000 to Katherine, the court, though without saying so, was finding that John dissipated those funds, because the bike was now lost; it could no longer be an asset because it did not exist. Thus, the only way to credit Katherine that $5,000 was through a finding of dissipation.

¶ 44 He is correct. Had the motorcycle continued to exist, the court likely would have been correct to deem it marital property and, because a bike is incapable of division, award half its value to Katherine. But once it was totaled, it was no different than a bank account that had been depleted, money that had already been spent—there was no asset to divide. The only way to assign value to that "property" would be via dissipation. And John is likewise correct that the court could not make a finding that the claim for dissipation was untimely, on the one hand, and award money based on dissipation, on the other hand. It was error to award half of that $10,000 to Katherine.

¶ 45 But that argument only gets John a small windfall, for the court's finding that the insurance proceeds from the motorcycle's destruction were marital property was undoubtedly

correct. The money John received from insurance is no different than if John had re-sold the motorcycle after buying it—if the bike was marital property, then its sale proceeds would be as well. John does not argue otherwise. The insurance proceeds, the result of the totaled bike, were marital property to which Katherine was entitled a portion, as the trial court found.

¶ 46 It is not difficult to see what happened here. The court made a specific finding that the $8,500 in insurance proceeds was marital property; the court did *not* make that finding regarding the $10,000 used to purchase the bike initially. But when it came time to divide the marital property, the court made a simple error, mixing up the two motorcycle-related moneys. The court clearly meant to award Katherine half of the $8,500 in insurance proceeds that the court had found to be marital property, not half of the $10,000, which the court never determined to be so.

¶ 47 Rather than remand to fix this obvious, minor mistake and force the parties to spend even more money than they already have on this case, the better course is for this court to modify the judgment to correct what the trial court obviously intended all along. See Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967) (reviewing court may modify judgment from which appeal is taken).

¶ 48 We thus modify the judgment to reflect that Katherine is not entitled to half of the $10,000 as marital property, but she is entitled to and shall be awarded half of the $8,500 insurance proceeds as marital property.

¶ 49 B. John's Transfer of $72,000 to Foushi

¶ 50 We next consider John's transfer of $72,000 to Mr. Foushi. We say "transfer" because the court used that word; the bystander's report offers scant information on the subject. We know that John gave this money to his friend, Mr. Foushi, after Katherine filed for divorce. We know nothing about the surrounding facts—why he did so, what purpose it served, what agreement or

understanding John had with Mr. Foushi. If, for example, John paid Foushi money for something in return, we have nothing in the record to reflect as much, nor do the parties so claim on appeal.

¶ 51 In any event, in its order, the court's judgment was not that John had dissipated the funds, only that the funds were "being held by a third party, Foushi." That can only mean that those funds still exist. They are still under John's control, though in another's possession. Simply put, the money was not dissipated; it was moved but preserved. That, we presume, is why the trial court found it to be marital property.

¶ 52 We have no basis to overturn the trial court's judgment that this money was marital property. And more to the point raised here on appeal, we find absolutely no indication that the court awarded half of this money to Katherine on a theory of dissipation.

¶ 53 C. Other Claims of Dissipation

¶ 54 John also makes two, very brief mentions of other assets the court supposedly charged him with dissipating: a HELOC loan and a 401(k) from his employer, Creative Werks.

¶ 55 As to the HELOC loan, the evidence showed that John had opened a line of credit on the marital residence. As of trial, John had used about $8,500 for his sole benefit. In allocating the value of the marital residence, the court concluded that "the HELOC against the Marital Residence was used for John's sole purpose and benefit, after the breakdown of the marriage and therefore shall be solely his debt."

¶ 56 It is unclear how John can interpret this finding as a finding of dissipation. It was not. It was a finding that this debt belonged to John and only John. See 750 ILCS 5/503(a) (West 2020) (allocation of "marital property" includes allocation of debts). John does not complain that this finding of debt was against the manifest weight of the evidence, so we will not consider any such argument. His only claim is that it was a finding of dissipation masquerading as something else.

There is no merit to that claim.

¶ 57 Finally, John argues that the court charged him with dissipating his "Creative Werks 401(k)." But his argument is unclear. While the court *mentioned* that John had withdrawn money from that account, it does not appear that the court held this against him in any way. To the contrary, the court specifically found that the 401(k) was marital property but gave the entire balance of it to John. In no way can the trial court's allocation be deemed a finding of dissipation.

¶ 58 IV. Attorney Fees

¶ 59 We now turn to the final issue presented in this appeal. As part of the court's distribution judgment, it ordered John to pay "$4,700 as and for John's payment to Katherine for attorney's fees pursuant to previous orders of the court." John claims that there was no prior order and the court's judgment was inappropriately based on testimony from the prove-up. Katherine responds that the $4,700 award was based on an order granting 508(b) fees entered on December 16, 2019, following Katherine's petition for rule to show cause after John fell behind on the mortgage payments for the marital residence. See 750 ILCS 5/508(b) (West 2020). In his reply, John acknowledges this order but claims it did not require him to pay any specific amount of money.

¶ 60 Section 508(b) requires a court to enter a fee award if a party's "failure to comply with [an] order or judgment was without compelling cause or justification" or when "a hearing under this Act was precipitated or conducted for any improper purpose," meaning harassment, causing delay, or needlessly increasing the cost of litigation. *Id.*; see *Law Office of Brendan R. Appel, LLC v. Georgia's Restaurant and Pancake House, Inc.*, 2021 IL App (1st) 192523, ¶ 58 (court may grant fees where it finds party has failed to comply with prior order).

¶ 61 Based on our review of the record, the section 508(b) fee award was precipitated by Katherine's motion for civil contempt, alleging that John failed to make mortgage payments despite being ordered to do so. Specifically, in June 2019, the court ordered John to "become current with the mortgage payments with respect to the marital residence and stay current."

¶ 62 In August 2019, the court entered a Rule to Show cause against John based on Katherine's allegations that he had failed to comply with the June order. In the December 16 order, the court found that "John is current with the mortgage payment for the marital residence." Yet, it still granted Katherine 508(b) fees.

¶ 63 John claims that the court unambiguously found that he was current on the mortgage, and thus there was no finding of failure to comply with the order. But the court's December 16 finding does not mean that John was *never* in violation of the order, just that he was not in violation at the time of the hearing, some 6 months after the original order was entered. It seems overwhelmingly clear that the court found that John only became current after Katherine filed her petition for rule to show cause, and thus the court charged defendant with the fees Katherine incurred in the "preparation, presentation, and litigation" of that petition.

¶ 64 John further notes that the court's previous order did not require him to pay any specific amount of money. But there is nothing unusual about that; if fees are awarded, it is customary for the court to allow time for the moving party to submit a fee petition that can be adjudicated. That is precisely what the court did here: "[Katherine's] Petition for Rule to Show Cause is granted in so far as Petitioner is granted 508(b) attorney's fees, which shall be paid within 14 days of Petitioner's counsel tendering billing statement for Petitioner's reasonable and necessary fees for the preparation, presentation, and litigation of PRSC, to Respondent's counsel."

¶ 65 Nor are we persuaded by John's claim that the amount of the fees is improper. The bystander's report reflects that "Katherine further testified that, during the divorce, John was ordered to pay $5,000 towards her attorney's fees, which he did not pay. Her position was that his obligation to pay those fees remained outstanding." While Katherine testified that John owed $5,000, in closing argument her counsel proposed that the judgment should reflect "$4,700 as and for John's payment to Katherine for attorney's fees pursuant to previous orders of the court." We see nothing in the bystander's report where John challenged the accuracy of Katherine's statement or the propriety of her counsel's argument. And even if we did, we have no basis to overturn the award of fees or the amount of fees.

¶ 66 CONCLUSION

¶ 67 The judgment of the circuit court is modified as follows: Paragraph 7(c) of the judgment shall reflect that Katherine is not entitled to a share of the $10,000 related to the motorcycle John purchased, but Katherine is entitled to half of the $8,500 in insurance proceeds from the totaling of the motorcycle as marital property. We otherwise affirm the circuit court's judgment in full.

¶ 68 Affirmed as modified.