

2013 IL App (2d) 120720-U  
No. 2-12-0720  
Order filed March 28, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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<i>In re</i> MARRIAGE OF	)	Appeal from the Circuit Court
RICHARD A. WHITE,	)	of Kane County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 07-D-144
	)	
JUDY L. WHITE,	)	Honorable
	)	Kevin T. Busch,
Respondent-Appellee.	)	Judge, Presiding.

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JUSTICE SPENCE delivered the judgment of the court.  
Justices Hutchinson and Birkett concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* We affirmed the judgment because the trial court properly: determined Richard's net income; divided the marital state; awarded child support, permanent maintenance, and attorney fees; and ordered Richard to obtain a life insurance policy.
- ¶ 2 Petitioner, Richard A. White, appeals the trial court's June 25, 2012, order dividing the marital estate and awarding to respondent, Judy L. White, child support, permanent maintenance, and attorney fees. On appeal, Richard argues that the trial court erred in: (1) calculating his income; (2) dividing the estate; (3) calculating the amount of child support; (4) directing him to obtain a \$1

million life insurance policy; (5) awarding Judy permanent maintenance; and (6) awarding Judy attorney fees. We affirm.

¶ 3

## I. BACKGROUND

¶ 4 Richard and Judy were married on June 7, 1986, and had two children: Spencer, born March 17, 1998; and Mitchell, born July 5, 2000. In 1995, Richard began working for Richards-Wilcox, a manufacturer of file cabinets and office shelving, where he ultimately became Chief Operating Officer (COO). In 2003, Richard purchased a 1/3 ownership interest in Richards-Wilcox by purchasing 500 shares of the company. In the meantime, Judy, a nurse, had stopped working to raise the children. After 20 years of marriage, Richard filed a petition for dissolution of marriage pursuant to section 401 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/401 *et seq.* (West 2006)) on January 31, 2007. Judy filed a counter-petition on December 4, 2007.

¶ 5

### A. Original Proceedings

¶ 6 On November 9, 2009, the trial court issued a written “Judgment for Dissolution of Marriage,” in which it made the following findings. The marital residence was valued at \$675,000, subject to a \$388,242 mortgage. The court ordered the parties to list the residence for sale, with 60% of the proceeds going to Judy and 40% going to Richard. Richard’s net monthly income, according to the court, was \$17,097.67. Regarding child support and maintenance, Richard was to pay \$8,816 per month prior to the sale of the home. After the residence was sold, Richard was to pay Judy \$3,461.49 in maintenance and \$4,787.35 in child support, totaling \$8,248.84 per month. This award was reviewable in three years. Noting that Richard had already paid the fees for both evaluators, both law firms, Dr. Hatcher, and the guardian *ad litem* (GAL), the court ordered Richard to pay the balance of any legal fees. Finally, Richard was to retain ownership of his 500 shares of stock in

Richards-Wilcox, which had a value of \$1,976,300. The court entered a judgment in favor of Judy for \$988,150, which represented 50% of the value of the 500 shares. Though no payment schedule was set forth, Richard was required to pay Judy \$8,890.64 per month over 20 years in order to satisfy the \$988,150 judgment.

¶ 7 On November 18, 2009, Richard filed a motion for reconsideration, arguing that the terms of the judgment were inequitable because he was required to pay Judy more than his net income. Richard argued that the amount of the monthly installments for Judy's value of her share in Richards-Wilcox, plus child support and maintenance, required Richard to pay \$17,655 per month, which was more than his net monthly income of \$17,138. The trial court denied Richard's motion for reconsideration on March 4, 2010. The next day, Judy filed a petition for attorney fees, and the trial court ordered Richard to pay Judy's counsel \$11,214.63 for the dissolution and \$10,848 for posttrial motion fees.

¶ 8 B. First Appeal

¶ 9 Richard appealed, arguing that the trial court erred by: (1) relying on the erroneous financial valuation methods of Judy's expert, John Coffey, in valuing his interest in Richards-Wilcox, which resulted in an improper division of the marital estate; (2) ordering him to pay Judy the value of half of his Richards-Wilcox interest rather than granting her non-voting shares of the company; (3) awarding Judy reviewable spousal maintenance; (4) awarding Judy attorney fees; and (5) ordering him to pay certain household expenses. In an unpublished decision, this court affirmed part of the dissolution judgment, reversed part of it, and remanded the case with instructions. *In re Marriage of White*, No. 2-10-0356 (2011) (unpublished order under Supreme Court Rule 23).

¶ 10 In our decision, this court affirmed the trial court's valuation of Richards-Wilcox at \$1,976,300, which was based on Coffey's figure. *Id.* at 21. However, this court agreed with Richard that the trial court abused its discretion in dividing the marital property. *Id.* at 24. Accepting the trial court's determination that Richard's net monthly income was \$17,097.67, this court found that there were insufficient assets in the marital estate to satisfy the court's monetary judgment of \$988,150 (50% of the company's stock value) to Judy, especially in light of the fact that the trial court ordered Richard to pay 50% of his net income to Judy for child support and maintenance. *Id.* at 25.

¶ 11 In reaching this conclusion, this court rejected Judy's argument that Richard made significantly more than his net income through additional income from the company. *Id.* at 24. This court stated:

“Judy also argues that Richard made significantly more than his net income through additional income from the company. However, the trial court determined that Richard's net income was roughly \$17,000 per month; it made no mention of additional income. The exhibits that Judy refers to in support do not establish that Richard took home any profits that the company made. Because Richards-Wilcox is an S-Corporation, its profits are taxed through the three shareholders. There was no testimony that established that Richard took home any profits. Richard only testified that the company would make distributions to the partners to cover tax liabilities. Beyond that, there is nothing in the record to support that Richard enjoys higher income than his salary.” *Id.*

¶ 12 This court went on to say that it appeared that the trial court did not adequately consider the factors contained in section 503(d) of the Act, including the economic circumstances that the court's order would leave Richard in following the division and whether the apportionment of the property

would be in addition to or in lieu of maintenance. *Id.* at 27. As a result, this court reversed the trial court's order regarding the division of the marital property and remanded the cause for division and distribution after adequate consideration of the relevant factors set forth in section 503(d). *Id.* Noting that Richard's other contentions on appeal could not be resolved until a final property disposition was reached, this court necessarily reversed and remanded the remaining issues of child support, maintenance, and attorney fees. *Id.* at 28.

¶ 13 After this court rendered its decision, but before the trial on remand, Judy filed a motion to modify support and maintenance. Judy argued that there had been substantial change in circumstances because Richard's ability to pay support had increased, and the needs of Judy and the children had increased. In particular, Judy had increased medical expenses. In addition, Richard had been taking maintenance tax deductions on all of the expenses he paid on the marital residence, which made the payments taxable income to Judy, a tax consequence she could not afford. On the other hand, Richard had made a substantial cash payment toward the purchase of his own home. On March 8, 2012, the court entered a temporary order requiring Richard to pay \$9,900 per month in child support and \$2,500 per month in maintenance.

¶ 14 C. Trial on Remand

¶ 15 Retrial commenced on May 7, 2012, and lasted two days. During a brief opening statement, Richard argued that the trial court on remand was to divide the marital property and determine his payment to Judy on the \$988,150 judgment. After the division of property, the court was to consider child support, maintenance, and attorney fees. Richard pointed out that in our decision, this court had affirmed that Richard's net monthly income was \$17,097.67. According to Richard, the testimony would show that his income had not changed but remained at that amount.

¶ 16 In Judy's opening statement, she countered that the evidence, based on a five-year average, would show that Richard had an annual net income of \$398,000 per year, or \$33,000 per month. Judy argued that since the original trial, Richard had received tax refunds of \$141,000 and \$21,000; a company distribution of \$23,000; and sale proceeds from a company car of \$21,000, totaling over \$200,000. None of that money, however, had been used to pay down the \$988,150 judgment. Judy argued that based on Richard's income, the temporary order that the court had recently entered was a fair amount of support and maintenance.

¶ 17 Richard Thompson, a CPA and tax partner at Sikich, LLP, testified first on behalf of Richard. Thompson's firm handled Richards-Wilcox's taxes for the past eight or nine years. Richards-Wilcox had become an S-Corporation in 2005. Recently, Richards-Wilcox became RWI Holdings (RWI), also an S-Corporation. RWI had three shareholders, with Richard sharing a one-third interest.

¶ 18 Exhibit B was a chart of Richard's gross wages as reflected on his W-2 forms over a six-year period (2011 to 2006). In 2011, Richard's gross wages were \$369,987. From this figure, Thompson deducted \$11,294 for medical insurance premiums and \$43,693 for other fringe benefits, including automobile benefits, that Richard received from the company, which resulted in a salary of \$315,000. Thompson explained that medical insurance premiums that were paid by the company were required to be included as taxable income. When asked about the \$43,000 in fringe benefits, Thompson replied that other than the automobile benefits, he did not know the details of the "\$43,000 item in 2011." In 2010, Richard's gross wages were \$369,501, minus medical insurance premiums of \$8,828 and other fringe benefits of \$45,673, amounting to a salary of \$315,000. In 2009, Richard's gross wages were \$329,240, minus \$8,888 in medical insurance and \$7,481 in fringe benefits, amounting to a salary of \$312,871. In 2008, Richard's gross wages were \$376,378, minus \$9,824

in medical insurance and \$31,514 in fringe benefits, amounting to a salary of \$335,040. In 2007, Richard's gross wages were \$475,696, minus \$9,908 in medical insurance and \$30,928 in fringe benefits, amounting to a salary of \$434,860. Finally, in 2006, Richard's gross wages were \$371,793, minus \$9,115 in medical insurance and \$27,319 in fringe benefits, amounting to a salary of \$335,360.

¶ 19 Thompson also discussed Richard's U.S. individual tax return form 1040. In 2008, Richard's gross wages were \$376,378; his one-third share of the company's taxable income was \$457,311; the total tax liability was \$222,695; and the taxes paid were \$221,985, leaving a small amount due of about \$700. In 2009, Richard's wages were \$329,240; his one-third share of the company's taxable income was \$382,900; and Richard overpaid his tax liability by approximately \$47,000. Richard received a \$20,000 refund, and \$27,000 was applied as an overpayment credit to the following year. In 2010, Richard had a one-third share of a loss of about \$63,000, and a tax refund of about \$142,000. Thompson explained that estimated tax payments were made early in the year but later, it became obvious that the company was not doing well financially, and it eventually reported a loss. In 2011, Richard's one-third share of taxable income was \$36,000; there was a total tax liability of \$80,000; and he received a tax refund of \$30,000.

¶ 20 On cross-examination, Thompson agreed that funds were withheld from Richard's paychecks for federal taxes. If there was a refund at the end of the year, there was no obligation for Richard to pay it back to the company. In his eight years of doing Richard's taxes, Thompson was not aware of Richard ever paying money back to the company as reimbursement for the overpayment of taxes. If company profits were not distributed, they would increase the retained earnings of the company, of which Richard shared a one-third interest.

¶ 21 Richard testified next as follows. Perquisites of the company included a car and a membership to a country club or health club. The three members agreed that the value of these benefits over a four-year period would never exceed \$150,000. If one member spent more than the other two members on a car or membership, a “true-up” would occur in which the other two members would receive cash distributions. Richard received cash distributions in 2010 and 2011; it was roughly \$30,000 in 2011.

¶ 22 Richard testified that in 2008, the company “got in trouble” and the three members took a 10% cut in pay. Since 2008, Richard’s annual wages had remained the same, \$315,000. Richard got paid every two weeks or 26 times per year. Exhibit H was his most recent pay stub for \$12,133.73, which amounted to “\$315,000 divided by 26.” Deductions from that amount included federal and state tax withholdings, social security, dental and health insurance, and a 401(k) loan, resulting in a net deposit of \$7,224.69 every pay period.

¶ 23 Richard explained other exhibits. Exhibit I was an income and expense affidavit by Richard dated April 5, 2012, listing his monthly income at \$14,448 and his monthly expenses at \$24,747, which included \$9,900 in child support and \$2,500 in maintenance. Exhibit J explained how he spent the \$198,000 balance in their bank accounts: from July 24 to August 18, 2009, \$144,616 went to GAL fees, both parties’ attorney fees and living expenses; and from August 18, 2009, to November 5, 2009, \$51,406 went to both parties’ attorney fees, expert fees, and GAL fees. Richard testified that during the original trial, he “got a bill” and “paid it.” In the spring of 2010, he also paid \$22,000 to Judy’s attorney, which he paid by taking out a loan against his 401(k). At the time the initial judgment was entered, there was no money left in the bank accounts. Another exhibit showed that Richard had paid \$80,000 for his own attorney fees that year (2012).

¶ 24 Richard also testified regarding tax refunds. Richard overpaid his taxes in 2009 by \$47,087. In 2010, he received a tax refund of \$20,587 and then applied the balance of approximately \$26,500 towards his next year of tax liability. In a deposition, Richard admitted not cashing the \$20,587 refund check until two years later, in January 2012, to pay attorney fees. Richard admitted that he did not use the tax return money to pay down the \$988,150 judgment owed to Judy. In 2011, Richard received a tax refund of \$141,819 for 2010. None of that refund was used to pay down the \$988,150 judgment owed to Judy. Instead, he used \$120,000 for a down payment for a house priced at \$243,000, which he currently lived in. Richard testified that he put that amount down on a house because he was trying to keep his mortgage payments close to what he had paid in rent the past two years.

¶ 25 Richard also testified regarding company perks. The company paid him perquisites of \$150,000 every four years. The company also paid the lease and maintenance on three cars and a portion of his health insurance (\$11,000). Richard used two of the cars and Judy drove the third car. In 2011, the company paid \$4,400 of his legal fees, which was taken out of his true-up at the end of the year. That year, Richard received a true-up perk in the amount of \$23,000, none of which went towards paying down the \$988,150 judgment. In the summer of 2010, Richard sold a BMW for \$21,000 that the company had given him at the conclusion of a lease. Richard used this money to pay his attorney fees. Adding the tax refunds, the sale proceeds from the car, and the true-up perk, Richard admitted that he received over \$200,000, in addition to his regular salary, from the summer of 2010 to the end of 2011.

¶ 26 According to Richard, his wages had stayed the same, but his distributions changed every year as a function of the prior and current year's tax liability. Richard admitted that when the

company paid distributions for taxes but those taxes were not fully owed, he then received that money individually. Finally, Richard admitted that since 2011, he had taken four skiing trips to Utah.

¶ 27 John Coffey, a CPA since 1990, testified on behalf of Judy as follows. Coffey was retained to determine Richard’s income for purposes of support. Coffey reviewed the company’s tax returns and supporting documents and issued a “Summary of Income” for 2007 to 2011 (exhibit 15). When asked why he analyzed a period of five years, Coffey said that it made sense to use a longer period of time because there could be years where the income tax liability was grossly unfair when compared with cash flow. Coffey attempted “to take a smoothing affect of those years so that [he] could look at how much cash flow [was] actually being spent, for example, for taxes in comparison to what [was] being distributed.” Coffey’s chart provided:

	<b>2011</b>	<b>2010</b>	<b>2009</b>	<b>2008</b>	<b>2007</b>	<b>Average</b>
Medicare Wages	\$359,170	\$360,672	\$331,054	\$382,069	\$481,310	\$382,855
Interest Income	\$19	\$314	\$1,243	\$1,990	\$2,846	\$1,282
Distributions	\$ -	\$160,836	\$168,000	\$239,047	\$179,244	\$149,425
Perks	\$37,500	\$37,500	\$37,500	\$37,500	\$37,500	\$37,500
<b>Gross Income</b>	<b>\$396,689</b>	<b>\$559,322</b>	<b>\$537,797</b>	<b>\$660,606</b>	<b>\$700,900</b>	<b>\$571,063</b>
Less:						
Federal Tax	\$80,594	\$50,632	\$190,411	\$222,695	\$227,735	\$154,413
State Tax	\$15,674	\$4,781	\$24,893	\$23,483	\$22,618	\$18,290
Total Taxes	\$96,268	\$55,413	\$215,304	\$246,178	\$250,353	\$172,703
<b>Net Income</b>	<b>\$300,421</b>	<b>\$503,909</b>	<b>\$322,493</b>	<b>\$414,428</b>	<b>\$450,547</b>	<b>\$398,360</b>

¶ 28 Coffey explained that the line item “Medicare Wages” and the line item “Interest Income” was obtained from Richard’s W-2 forms. The line item “Distributions” reflected the “actual cash distributions” that Richard received from company profits, as reflected on his tax return. The line item “Perks” was the \$150,000 in perks that each shareholder received over a four-year period ( $\$150,000 \div 4 = \$37,500$ ). Coffey used a K-1 schedule that was attached to the corporate tax returns

to ascertain the specific distributions made to Richard. The federal and state tax figures came from Richard's individual tax returns. Coffey then averaged the five years for each line item.

¶ 29 On cross-examination, Coffey did not believe that the company's true-up of perks (\$37,500 per year) was included in Richard's wages on the W-2 form. When asked if the perks were a distribution hidden from the IRS, Coffey said "[p]otentially." However, Coffey admitted that his \$988,150 valuation of the stock included Richard's perquisites.

¶ 30 Judy was the final witness to testify. She lived with Spencer, age 14, and Mitchell, age 11, in what was formerly the marital residence. It was listed for sale at \$569,000, and had a remaining mortgage of \$370,966. The house had been on the market for over one year, and Judy could not afford to remain there. Also, the house was empty except for a bedroom set and a couple of TV's. Richard had removed all of the furnishings from the home and put some items in a storage facility to which she did not have access. Though the Parenting Agreement allowed Richard four, 12-hour shifts to remove his belongings from the home, he took everything he wanted and did not consider whether certain items belonged to her. As a result, Judy was now requesting copies of the children's personal items, such as family videos, pictures, ultrasounds, birth certificates, and social security cards.

¶ 31 Judy testified regarding her employment. After the divorce in 2009, she began working in December 2010 as a triage nurse at Tri Cities Surgery Center. Judy was trained as a registered nurse but did not work for about five years in order to stay home with the children. Her current income was \$30 per hour, and she was hired to work two days per week. However, Judy requested more hours and was currently working three days per week (24 hours per week). She picked up more hours when she could, but her schedule depended on how busy the center was. On cross-

examination, Judy testified that she had sought full-time employment at Tri Cities but nowhere else. On redirect, Judy explained that as the children's residential parent, her day-to-day responsibilities caring for the children required "a lot." She helped them with homework and drove them to medical appointments and whatever activities they were involved in. Judy had not looked for full-time work because the children were "unraveling in a horrible Parenting Agreement, and [she was] just trying to hold it altogether for them."

¶ 32 Judy had some health issues such as Barrett's Esophagus, gastrointestinal disorder (GI), and a kidney stone. In addition, all of the lumbar disks in her back were herniated to some degree. Because physical therapy was unsuccessful in treating her back, she was scheduled to receive a series of three steroid injections. If the injections were unsuccessful, Judy would be sent to a neurosurgeon. A few years back, in 2007, Judy had had a hysterectomy and two urology surgeries. For past bills and future back treatments, she would owe \$5,500 in medical bills.

¶ 33 Exhibit 12 was a monthly income and expense affidavit that Judy had prepared. Judy listed her monthly income as \$13,800, and her monthly expenses as \$12,188.25, with a difference of \$1,611.75. Richard was not current in paying for half of the children's medications, which were \$780 per child per year. He paid nothing from April 2011 to February 2012, but did pay for March 2012.

¶ 34 When Judy filed her taxes, she discovered that Richard was charging "everything as alimony," including the house payment, the gas, the electricity, all of the children's expenses, and the storage facility, and that she had to pay taxes on it. Judy received \$81,000 through a qualified domestic relations order (QDRO) from Richard's 401(k), even though she was ordered to receive

about \$165,000. Out of that sum, she paid \$60,000 for attorney fees and \$16,000 for medical expenses and quarterly taxes, leaving her with about \$4,000 of savings.

¶ 35 Judy had several conversations with Richard about paying the full amount of support he owed. He was now current with child support. Judy also mentioned that Richard owed her a million dollars (the \$988,150 judgment), plus interest. Judy asked Richard to “pay something” on the judgment because she could not make ends meet. As part of the maintenance award, Judy was asking the court for some allowance for vacations since she and the children had not been on a vacation in six years.

¶ 36 At the close of the evidence, the court inquired about the storage facility, which Richard said he had emptied. Richard admitted taking bicycles, a porch chair that Judy’s parents had given them as a wedding gift, shovels, a weight bench, and some other items. Richard also admitted having videos of the children but said he had offered to make copies of them. He denied taking the ultrasound pictures, the birth certificates, or the social security cards. When the court asked Judy why she believed he had them, she replied that Richard had been stashing things and removing things from the house, even before he was granted the four, 12-hour shifts. Judy was previously told that she would be allowed to dispute the items taken, and that her list would be considered, but it never was.

¶ 37 The court stated:

“I am concerned because I believe Mrs. White. I have no reason to not believe her. Quite frankly, given the history of the way in which your client conducts himself throughout the marriage and this divorce, I have every reason to believe that he had the ultrasounds, the

birth certificates and the social security cards. And I'm going to Court Order him to produce them in 72 hours to Mrs. White, because I don't believe his denial. ”

The court further ordered Richard to return the children's videos and pictures within 72 hours.

¶ 38 D. Trial Court's Decision Upon Remand

¶ 39 The trial court issued an eight-page written opinion on June 25, 2012. Regarding Richard's income, the trial court noted that the original trial court had found his monthly income to be \$17,097.67. However, the primary focus at the original trial was determining the value of the Richards-Wilcox stock, not his income.

¶ 40 At the instant trial, the court noted that each party presented expert testimony as to Richard's income. According to the court, Thompson, a CPA who handled the accounting for Richard's company, “merely parroted the corporate accounting practices, which clearly took advantage of existing tax laws, to mischaracterize and under report the partner's actual net income.” Conversely, Judy's expert Coffey, also a CPA, “utilized a tried and true methodology to calculate Richard's income, one the court [found] unimpeachable.” Because Coffey counted only the money Richard “actually received” after deducting the taxes “actually paid,” Coffey identified Richard's true net income. Coffey then averaged Richard's income “over the last several years” to calculate his average net income. The court specifically found that an averaging approach was “both appropriate and necessary” to accurately determine Richard's “current actual net income,” given Richard's ability to manipulate it, the complexity of determining it, and the way it fluctuated. The court clarified that it was not attempting to determine what Richard earned in 2009 but what he currently earned, because his current earnings were relevant in determining what he could pay toward child support, maintenance, and the property division.

¶ 41 While Richard claimed that his gross income was \$315,000 annually, his credibility was “severely lacking.” The court said that Richard’s “demeanor and manner while testifying, as well as his attitude toward Judy, reveal[ed] his deep seated resentment and animosity for her” and demonstrated a “desire to defraud Judy of her share of the marital estate.” In particular, Richard’s testimony that his income was fixed and could not be affected was “highly suspect and not believable” by the court. The court stated that it was “not just coincidental” that Richard’s alleged income was lowest on the eve of both trials. Moreover, after the original trial, Richard received several “large cash tax refunds.” “Instead of buying down the stock buy-out, he purchased a home with cash.” Since the divorce, Richard continued to live a “very lavish life style,” taking many vacations per year, whereas Judy was forced to live “very frugally.”

¶ 42 The court further stated that none of Richard’s objections to Coffey’s report had merit except the one regarding the inclusion of perks into his equation. Because it was unclear to the court whether the perks were double-counted, the court deducted them (\$37,500 per year). The calculation “was simple for the court since Mr. Coffey ultimately reduced his opinion and report to a simple math calculation.” The court adopted “this adjusted average” to determine Richard’s net income. According to the court, Richard’s current annual net income was \$361,260, which resulted in a monthly net income of \$30,105.

¶ 43 In dividing the property, the court awarded 55% of the estate to Judy and 45% to Richard. The court based this percentage on the health, education, and welfare of the parties, as well as their disparate earning potential. The division gave Judy the equity in the marital residence (\$286,758), a 401k (\$171,157), an advocate health retirement account (\$75,750), and the “Stock buy-out” (\$988,150), which totaled \$1,521,815. Richard received his ½ value of the stock (\$988,150), bank

accounts (\$198,009), a 401k (\$57,052), and an advocate health retirement account (\$25,250), which totaled \$1,268,461.

¶ 44 The court stated that given Richard's current net income, he should be able to "easily pay off the stock buy-out to Judy and pay child support." The court entered a judgment in favor of Judy for \$988,150 and ordered Richard to immediately begin paying her monthly installments of \$10,000. In addition, Richard was ordered to obtain a \$1 million life insurance policy naming Judy as an irrevocable beneficiary. Richard's obligation to maintain the policy would "terminate upon full payment of the stock buy-out judgment, and the emancipation of both children, whichever occurs last."

¶ 45 Regarding child support, the court found guideline support appropriate. Support was set at \$8,429 per month, which was 28% of Richard's monthly net income of \$30,105. The court noted that this amount did not provide a windfall for Judy or their children "as they [had] considerable needs, and the remainder of the marital estate [was] non-liquid and being paid in relatively small increments, considering its size."

¶ 46 The court next considered the issue of maintenance. After setting forth the factors in section 504 as they applied in this case, which we discuss in the analysis portion of this decision, the court determined that Judy was entitled to permanent maintenance of \$1,525 per month.

¶ 47 Finally, the court ordered Richard to pay \$50,000 of Judy's attorney fees based on his lack of credibility, his mission to deprive Judy of her fair share of the estate, and his lengthening of the proceedings in bad faith. The court also recognized that in 2009, Richard was ordered to pay all the attorney fees, and that he appropriated almost \$200,000 of marital funds to do so, thereby dissipating the estate.

¶ 48 Richard timely appealed.

¶ 49 II. ANALYSIS

¶ 50 A. Net Income

¶ 51 Richard's first argument on appeal is that the trial court erred in its calculation of his net income. According to Richard, Judy continues to make the same unfounded arguments regarding his income that were rejected by the original trial court and by this court in the first appeal. He also argues that Coffey's report is faulty and misleading in several ways.

¶ 52 Richard is correct that the original trial court determined that Richard's net monthly income was \$17,097, which this court accepted on appeal. We stated that our acceptance of the \$17,097 figure was based on a lack of evidence to the contrary; there was "nothing in the record to support that Richard enjoys higher income than his salary." *In re Marriage of White*, No. 2-10-0356, at 24. However, as the court on remand recognized, the main issue in the first appeal was not Richard's net monthly income, it was the propriety of the \$1,976,300 valuation of Richard's interest in Richards-Wilcox. While this court affirmed that valuation in the first appeal, we reversed the remainder of the original trial court's judgment. In particular, we reversed the trial court's division of property, which in turn required us to also reverse the awards of child support, maintenance, and attorney fees. Based on this court's reversal of the judgment, the trial court on remand started with a clean slate as to all portions of the case (other than the valuation of the stock), including Richard's net income. See *Graham v. Mimms*, 111 Ill. App. 3d 751, 770 (1982) (by reversing the judgment, the trial court started with a clean slate as to that portion of the case). In other words, this court did not direct the court on remand to accept the \$17,097 figure as Richard's net monthly income.

¶ 53 A prerequisite to determining a noncustodial parent's child support obligation is determining the parent's net income. *In re Marriage of Kincaid*, 2012 IL App (3d) 110511, ¶ 26. Given that this court did not direct the court on remand to accept the \$17,097 figure as Richard's net monthly income, and that the original trial court order was entered in 2009, it made sense for the trial court to hear evidence regarding Richard's current net monthly income. See *People ex rel. DOT v. Firststar Illinois*, 365 Ill. App. 3d 936, 939 (2006) (if the appellate court decision fails to give specific instructions, the trial court has the same control over the record that it had before entering its judgment, and, as such, may allow the introduction of further evidence as long as such a step is not inconsistent with the appellate court's decision). As the court on remand stated in its decision, it was not attempting to determine what Richard earned in 2009 but what he *currently* earned for the purposes of child support and maintenance. See *In re Marriage of Anderson & Murphy*, 405 Ill. App. 3d 1129, 1137 (2010) (the relevant focus for "net income" under section 505(a)(3) is the noncustodial spouse's economic situation *at the time* the child support calculations are made).

¶ 54 On remand, the trial court was presented with a classic battle of the experts regarding the proper calculation of Richard's net income. After hearing the evidence, the trial court determined that Richard's annual net income was \$361,260, with a monthly net income of \$30,105. The court based its decision on Coffey's report, stating that the original court would have reached a similar conclusion had it been presented with the same evidence. We will not disturb a trial court's finding of net income absent an abuse of discretion. *In re Marriage of Garrett*, 336 Ill. App. 3d 1018, 1024-25 (2003).

¶ 55 While Richard does not argue that the court on remand was bound to accept that his net monthly income was \$17,097, he argues that his income has not changed, and that there was no

reason to disturb the \$17,097 figure. In making this argument, Richard discredits Coffey's report, arguing that it was flawed in three respects.

¶ 56 First, Richard argues that Coffey "improperly determined that distributions reported" by the company for tax purposes were "actual cash distributions" that should be considered as income. Richard argues that such reasoning was faulty because the company made distributions to the IRS to cover his tax liability as a shareholder in the S-Corporation, and the distributions were based on the company's ever-changing performance and tax liability for the previous year.

¶ 57 "Net income" is defined as the total of all income from all sources, minus certain deductions, including federal and state income tax and health insurance premiums. 750 ILCS 5/505(a)(3) (West 2010); *In re Marriage of Kincaid*, 2012 IL App (3d) 110511, ¶ 26. One critical difference in Thompson's and Coffey's calculations was whether "distributions" from the company could be considered income. Richard and his expert Thompson testified that the company's distributions were made to cover tax liabilities. However, the distributions consistently exceeded the tax liability for each respective year. Coffey's report showed that Richard received several large tax refunds from overwithholding. Coffey testified that the "Distributions" line item in his report reflected the "actual cash distributions" that Richard received from company profits, as reflected on his tax return. As the court stated, Coffey "only counted dollars Richard actually received after deducting taxes actually paid."

¶ 58 On the other hand, the court found Richard's testimony that his gross income was fixed at \$315,000 per year, to be highly suspect and not believable. According to the court, the company overpaid estimated tax payments as a means to under report the personal income of the partners. Because Thompson merely parroted the company's accounting practices, which mischaracterized

and under reported the partner's actual net income, the court discounted his testimony. We note that during Richard's testimony, he admitted overwithholding money for taxes, receiving large tax refunds, and then using the refunds for personal purposes such as a down payment on a house and to pay his attorney. Thompson likewise testified that if there was a tax refund at the end of the year, Richard was not obligated to reimburse the company and had never done so.

¶ 59 The trial court is in the best position to resolve the conflicts between the experts' testimony and determine their credibility. *Flynn v. Cohn*, 154 Ill. 2d 160, 169 (1992); see also *In re Marriage of Claydon*, 306 Ill. App. 3d 895, 901-02 (1999) (the trial court did not abuse its discretion by rejecting the calculations rendered by one party's expert where it considered the testimony of both parties' experts in arriving at its award). It was up to the trial court to decide which expert was credible, and as we discuss, rejecting Thompson's calculations in favor of Coffey's calculations was consistent with the Act's definition of net income.

¶ 60 According to sections 505(a)(3)(a) and (b) of the Act, net income is to be determined by subtracting "properly calculated withholding" from federal and state income taxes. 750 ILCS 5/505(a)(3)(a), (b) (West 2010); *In re Marriage of Davis*, 237 Ill. App. 3d 846, 855 (1997). As one court stated:

¶ 61 "In order to determine the proper method of computing net income, one must calculate the amount of federal and state income tax that a person actually pays by taking into consideration the disparity that exists between the amount of tax actually withheld and the tax eventually paid. If a noncustodial parent overwithholds, thereby overpaying income tax, that amount should be added back to his net income for the purpose of determining his support obligation pursuant to section 505(a) of the Act." *Id.* at 855-56.

Assuming that the company's tax liability fluctuated year to year, and that the company made distributions to cover potential tax liability, this does not change the fact that Richard received large tax refunds that he used for personal benefit. For all of these reasons, the trial court did not abuse its discretion by relying on Coffey's report, which included as income the actual cash distributions that Richard received from the company.

¶ 62 Second, Richard argues that Coffey impermissibly double counted the value of the "Perks" because they were already included in the value of the company. Pointing out that Judy was already being compensated for the value of these perks through the \$988,150 judgment, which is 50% of the \$1,976,300 value of Richard's 500 shares (one-third interest) in the company, Richard argues that "permitting the value of the perks to be considered again as part of a present determination of Richard' income results in a 'double counting' of the value of the perks" against him.

¶ 63 At trial, Richard testified that perquisites or perks of the company included a car and a club membership. The three partners agreed that the value of these benefits over a four-year period would never exceed \$150,000, and that if one member spent more than the other two members on a car or membership, a true-up would occur in which the other two members would receive cash distributions. Coffey admitted that his \$1,976,300 valuation of Richard's interest in the company included Richard's perquisites or perks. However, he also testified that he did not believe that the company's true-up of perks ( $\$150,000 \div 4 = \$37,500$  per year) was included in Richard's wages on the W-2 form. For his reason, he added \$37,500 per year to his calculation of Richard's wages in his report.

¶ 64 Despite Coffey's report, the trial court gave credence to Richard's double-counting argument and deducted the perks (\$37,500 per year) from its calculation of his net income. The court stated

that because it was “unclear whether or not the perks were double counted,” it deducted the perks from Coffey’s report before determining Richard’s net income. Though Richard acknowledges that the trial court deducted the perks, he nevertheless argues that the court did not “go far enough.” It is unclear what Richard means, given that the court, by deducting the perks from the calculation, alleviated any risk of double counting. Therefore, we reject Richard’s argument.

¶ 65 Third, Richard argues that the trial court improperly averaged his income over a five-year period. According to Richard, his salary has not fluctuated significantly since the date of the original trial in 2009; the original court rejected Coffey’s prior report, which also used income averaging, and his tax refunds cannot be considered additional income.

¶ 66 We have already rejected Richard’s argument that his tax refunds cannot be considered additional income. In addition, we have already explained why we are not bound by the original court’s determination of Richard’s monthly net income at \$17,097 in 2009, or its opinion of Coffey’s report. Therefore, we are left only with Richard’s argument that the court should not have accepted Coffey’s approach of income averaging over a five-year period.

¶ 67 For this argument, Richard relies on *In re Marriage of Schroeder*, 215 Ill. App. 3d 156 (1991). In *Schroeder*, the trial court, in determining the father’s net income for purposes of his child support obligation, averaged business earnings over a six-year period. *Id.* at 158. The Appellate Court, Fourth District, found the trial court’s methodology of calculating net income by a formula of averaging six years’ business profit was an abuse of discretion. *Id.* at 162. Stating that it was appropriate to consider prior years’ documentation to ascertain income trends when future income was uncertain, the court held that “deviations from reliable current income data require a compelling

showing of a definitive pattern of economic reversals.” *Id.* at 161. Essentially, the court determined that the data over the years was too old and that the projected income was unreliable. *Id.* at 161-62.

¶ 68 Setting aside the issue of whether the data was reliable, cases decided after *Schroeder* have declined to strictly follow it. For example, in *In re Marriage of Elies*, 248 Ill. App. 3d 1052, 1061 (1993), the court stated that under the circumstances in that case, in which the father’s income fluctuated and the data was reliable, a three-year averaging method was a reasonable means of determining the father’s current income. *Id.* at 1060-61. In so concluding, the court specifically declined to follow the rigid approach to income averaging expressed by the *Schroeder* court, which permitted income averaging only when a definitive pattern of economic reversals over several years was shown. *Id.* at 1061; see also *In re Marriage of D.*, 2012 IL App (1st) 101876, ¶ 43 (adopting flexible approach of *Elies* as opposed to *Schroeder*). In situations where income fluctuates from year to year, income averaging is an approved method to apply in determining current net income for the purpose of establishing child support. *In re Marriage of Garrett*, 336 Ill. App. 3d at 1025. In fact, income averaging may be applied in any case where it is appropriate, and there does not need to be wild fluctuation before averaging may be applied. *Id.*

¶ 69 With these principles in mind, we determine that the trial court did not abuse its discretion by accepting Coffey’s income averaging over a five-year period. While Richard argues that his income has not fluctuated since the date of the original trial in 2009, Coffey’s report illustrates the opposite to be true. After deducting the \$37,500 figure in perks, Coffey’s report indicates a wide disparity in Richard’s income over the past five years: 2007 (\$413,047); 2008 (\$376,928); 2009 (\$284,933); 2010 (\$466,409); 2011 (\$262,921). As the court stated, an averaging approach was “both appropriate and necessary” to accurately determine Richard’s “current” actual net income,

given Richard's ability to manipulate it, the complexity of determining it, and the way it fluctuated. Moreover, the use of a five-year period instead of a three-year period is within the discretion of the court. See *In re Marriage of Freesen*, 275 Ill. App. 3d 97, 103 (1995) (there is no iron-clad rule requiring a trial court to consider only the last three years of income in arriving at net income for child support purposes; anything beyond the prior three years must be left to the discretion of the trial court). Accordingly, Richard's challenge to Coffey's report based on income averaging fails.

¶ 70 Having rejected all of Richard's arguments regarding the court's calculation of his net income, we turn to his next argument, which is that the court erred in its award of child support.

¶ 71 **B. Child Support**

¶ 72 In particular, Richard argues that Judy failed to show a substantial change in circumstances that would entitle her to a modification of child support. Again, Richard argues that his income has not changed since the original judgment in 2009, meaning his ability to pay has not increased. Richard requests this court to reverse the child support award.

¶ 73 Prior to the trial on remand, Judy filed a motion to modify support and maintenance based on Richard's increased ability to pay, the increased needs of the children and Judy, and the tax consequences of Richard's claiming of maintenance tax deductions. In response to the motion, the court entered a temporary order requiring Richard to pay \$9,900 per month in child support and \$2,500 in maintenance. Later, at trial, Judy urged the court to set child support and maintenance at the same amounts as in the temporary order. After the trial, the court did not adopt the amounts in the temporary order, but instead followed the child support guidelines set forth in section 505(a)(1) (750 ILCS 5/505(a)(1) (West 2010)) of the Act.

¶ 74 Section 505(a)(1) creates a rebuttable presumption that a specified percentage of a noncustodial parent's income represents an appropriate child-support award. *In re Marriage of Berberet*, 2012 Ill. App (4th) 110749, ¶ 37. In the case of two children, the minimum amount of support is 28% of the supporting parent's net income. See 750 ILCS 5/505(a)(1) (West 2010). Here, 28% of Richard's net monthly income of \$30,105 amounts to \$8,429, which is the amount the court set as monthly child support in this case. The court stated that this amount did not provide a windfall given the family's needs, and given that the remainder of the marital estate was non-liquid and being paid out in relatively small increments, considering its size. Child support is a matter within the sound discretion of the trial court, and this court will not disturb the trial court's determination absent an abuse of discretion. *Id.*

¶ 75 While Richard argues that Judy failed to show a substantial change in circumstances warranting a change in the previous support order, it is more accurate to say that we are reviewing an initial support order, rather than a modified support order. In any event, the standard of review is the same. See *In re Marriage of Putzler*, 2013 Il App (2d) 20551, ¶ 28 (the Act provides that a child support order may be modified upon a substantial change in circumstances, which may be based solely upon an increase in the supporting parent's ability to pay, and the standard of review is whether the trial court abused its discretion).

¶ 76 The trial court did not abuse its discretion in applying the guideline amount of support. As Richard concedes, his challenge to the amount of child support is really a challenge to the court's calculation of his net income, which we have already affirmed. Given the rebuttable presumption created by following the child support guidelines, coupled with our deferential standard of review, the court did not abuse its discretion in ordering child support of \$8,429 per month.

¶ 77

C. Maintenance

¶ 78 Richard's next argument is that the court erred by awarding permanent maintenance. First, he argues that it was improper to award permanent maintenance when Judy did not request it in her motion to modify support and maintenance. Second, he argues that there was no evidentiary support for an award of permanent maintenance, in that Judy presented no evidence that her health issues impaired her ability to work full-time.

¶ 79 Section 504(a) of the Act provides that the court may grant a temporary or permanent maintenance award in amounts and for periods of time that the court deems just, after consideration of all relevant factors, including 12 enumerated factors:

“(1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance;

(2) the needs of each party;

(3) the present and future earning capacity of each party;

(4) any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage;

(5) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment or is the custodian of a child making it appropriate that the custodian not seek employment;

(6) the standard of living established during the marriage;

(7) the duration of the marriage;

(8) the age and the physical and emotional condition of both parties;

(9) the tax consequences of the property division upon the respective economic circumstances of the parties;

(10) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;

(11) any valid agreement of the parties; and

(12) any other factor that the court expressly finds to be just and equitable.”

750 ILCS 5/504(a) (West 2010).

¶ 80 In this case, the trial court found that after “a thorough review,” Judy was entitled to permanent maintenance of \$1,525 per month. In reaching this conclusion, the court discussed the relevant factors, stating:

“a) The distribution of the marital estate consists of mostly non-liquid assets or retirement accounts. The largest asset, the stock, will most likely be paid over a considerable time in monthly installments. These installments are property distributions which Judy should not be forced to liquidate to survive.

b) Judy’s immediate need is significant. She has two relatively young boys to raise; and, a nearly empty house to maintain. Given her health, her future needs are only going to increase.

c) The income earning capacity of the parties is vastly different. Judy will never, even remotely, approach the earnings of Richard without his support.

d) The fact that Judy spent the last 14 years either unemployed, or part-time employed, has limited her ability to advance in the nursing field. Judy left the field initially

to raise the parties' children. Had she remained in the workplace, she may have eventually worked her way into a better position.

e) Judy's current employer is a good fit for her, considering her health and her obligations toward raising her two sons. It is not appropriate at this time to expect Judy to obtain greater or different employment. Furthermore, given Judy's age, it is unlikely she will be in a position to substantially improve her earning ability once the children have emancipated.

f) Judy's current standard of living has been drastically reduced from that of the marriage or that of Richard for that matter. She will require permanent maintenance to remotely continue the standard of living the parties enjoyed during the marriage, and which Richard continues to enjoy to this day.

g) The parties had been married for 23 years prior to the divorce. The first 12 years of which they were without children. The last 11 years of which Judy was mostly at home caring for the couple's home and children. This lengthy marriage, coupled with the relative young age of the children favors maintenance.

h) Both parties are now approaching their fifties in age. While Richard's health remains good, Judy's emotional and physical health limit her future earning capacity. Richard has no apparent limitations on earnings, and history would suggest he has the potential to earn more.

i) Taxable maintenance would not burden Judy, as her income is otherwise modest. Richard would benefit from the tax deduction since he is already in a higher tax bracket. Otherwise the property division is a non-taxable event for either party.

j) Richard was able to work his way up the corporate ladder ultimately purchasing an interest in the business, partly due to the fact that Judy was at home tacking [*sic*] care of the party's children and home.”

¶ 81 As a general rule, the court's determination of a maintenance award is presumed to be correct. *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 650 (2008). Because a maintenance award is within the sound discretion of the trial court, we will not disturb such an award absent an abuse of discretion. *Id.* at 650-51. The party challenging the maintenance award bears the burden of showing an abuse of discretion. *Id.* at 651. No one factor is determinative when considering the duration and amount of a maintenance award. *Id.*

¶ 82 Turning to Richard's first argument, he cites *In re Marriage of Cantrell*, 314 Ill. App. 3d 623 (2000), for the proposition that the court may not award permanent maintenance where the party has not requested it. We reject this argument for two reasons. First, as previously stated, after we reversed the original court's judgment regarding maintenance (as well as child support and attorney fees), the court on remand began with a clean slate as to all issues, including maintenance, meaning that it had the discretion to award either rehabilitative or permanent maintenance. See *In re Marriage of Nord*, 402 Ill. App. 3d 288, 305 (2010) (the trial court is in a better position to determine whether permanent or rehabilitative maintenance is more appropriate, and the decision to award permanent or rehabilitative maintenance will not be overturned unless the court abused its discretion). Accordingly, the fact that Judy did not request permanent maintenance in her motion to modify maintenance is irrelevant. Following the trial on remand, it was up to the court to determine anew the type and amount of maintenance that was appropriate.

¶ 83 Second, *In re Marriage of Cantrell* is distinguishable on this basis. In *In re Marriage of Cantrell*, the trial court *sua sponte* awarded permanent maintenance even though the nature of the hearing was limited to the review and termination of the respondent husband's maintenance obligation. *In re Marriage of Cantrell*, 314 Ill. App. 3d at 628. Noting that the petitioner wife had not requested permanent maintenance, and that the only mention of permanent maintenance was when counsel for the respondent husband reminded the trial court that the original maintenance award was that of a rehabilitative and reviewable (as opposed to a permanent) nature, this court held that the court abused its discretion by *sua sponte* awarding permanent maintenance. *Id.* Again, the case at bar is distinguishable from *In re Marriage of Cantrell* because the hearing in this case was not of a limited nature but rather a full-blown trial on the issues of property division, child support, maintenance, and attorney fees. Therefore, Judy was not required to specifically request permanent maintenance in order for the trial court to award it.

¶ 84 A second distinguishing factor in *In re Marriage of Cantrell* was this court's determination that the petitioner wife had achieved the statutory goal of rehabilitative maintenance, meaning that the trial court further abused its discretion when it failed to grant the respondent husband's motion to terminate maintenance. *Id.* at 630. Following our decision in *In re Marriage of Cantrell*, the Fourth District in *In re Marriage of Culp*, 341 Ill. App. 3d 390, 395 (2003), clarified that this court did not hold that a trial court may never exceed the relief requested by parties in their pleadings; this court merely held that the record in that case lacked circumstances to justify an award of permanent maintenance absent a request in the pleadings for such relief. Therefore, Richard's reliance on *In re Marriage of Cantrell* to challenge the award of permanent maintenance is misplaced.

¶ 85 Richard's other challenge to the permanent maintenance award is that Judy presented no evidence that her health issues impaired her ability to work full-time. According to Richard, Judy earns \$35,000 part-time and could presumably earn \$70,000 full-time, and she has the benefit of a money judgment in the amount of \$10,000 per month. Richard argues that both the money judgment and child support give Judy ample financial resources to enjoy a lifestyle similar to that enjoyed during the marriage.

¶ 86 A trial court should award permanent maintenance in cases where a spouse is not employable or is employable only at a low income as compared to her previous standard of living. *In re Marriage of Schlitz*, 358 Ill. App. 3d 1079, 1084 (2005). "There is a trend in Illinois toward awarding permanent maintenance to a spouse who has raised children and has supported the family, and who has lost or has been substantially impaired in maintaining skills for continued employment while the other spouse was obtaining an education and becoming established in a profession." *Id.* at 1084. On the other hand, rehabilitative maintenance is appropriate where the spouse is employable at an income that would provide the spouse the appropriate standard of living enjoyed during the marriage. *In re Marriage of Nord*, 402 Ill. App. 3d at 305. Ultimately, a maintenance award, whether it is temporary or permanent, must be reasonable, and what is reasonable depends upon the particular facts of the case. *In re Marriage of Heroy*, 385 Ill. App. 3d at 652.

¶ 87 The trial court's decision to award permanent maintenance in this case was not an abuse of discretion. At trial, Judy testified that during her 20-year marriage to Richard, she stayed home for about five years in order to raise the children, who are now ages 11 and 14. After the divorce, she began working as a triage nurse at Tri Cities Surgery Center two days a week and was currently up to three days a week. Judy explained that she had not applied for full-time positions to employers

other than Tri Cities Surgery Center because as the children's residential parent, she was responsible for the children's homework, activities, and other day-to-day responsibilities. For this reason, the trial court found that Tri Cities Surgery Center was a good fit for her, and that it was not appropriate at that time to expect her to obtain greater or different employment. In particular, the trial court found that Judy's current standard of living had been drastically reduced from that of the marriage, and that permanent maintenance was required to even remotely continue her previous standard of living.

¶ 88 While Richard argues that Judy failed to show that her health issues impaired her ability to work full-time, health was only one of the issues focused on by the court. Aside from Judy's health issues of Barrett's Esophagus, GI, a kidney stone, and herniated disks, the court's decision was also based on her contribution to the children and home at the expense of her career during the parties' lengthy marriage; the different earning capacities of the parties based on her staying home and Richard climbing the corporate ladder; her age; and her parental responsibilities. It is clear that Judy is unable to support herself in the manner in which she lived during the marriage. Accordingly, the award of permanent maintenance was not an abuse of discretion in this case. See *In re Marriage of Nord*, 402 Ill. App. 3d at 306 (when the facts make it clear that one spouse is unable to support herself in the manner in which they lived during the marriage, then it is an abuse of discretion to award only rehabilitative maintenance).

¶ 89 D. Life Insurance Policy

¶ 90 Richard next challenges the life insurance policy that the trial court required him to obtain. The court ordered Richard to obtain a \$1 million life insurance policy naming Judy as an irrevocable beneficiary. According to the court:

“Richard shall keep the policy in good standing, and shall not diminish, dilute, or borrow against Judy’s interest in any way. The beneficial amount shall not be reviewed any earlier than the emancipation of both children. Richard’s obligation to maintain life insurance shall terminate upon full payment of the stock buy-out judgment, and the emancipation of the children, whichever occurs last.”

¶ 91 Richard does not argue that the trial court lacked authority to secure his child support obligation and the \$988,150 judgment with life insurance. As this court recognized, on January 1, 2012, the legislature modified the Act to specifically allow the trial court discretion to secure a maintenance award through life insurance. *Brankin*, 2012 IL App (2d) 110203, ¶ 33. Section 504(b-7)(f) now states “An award ordered by a court upon entry of a dissolution judgment or upon entry of an award of maintenance following a reservation of maintenance in a dissolution judgment may be reasonably secured, in whole or in part, by life insurance on the payor’s life on terms as to which the parties agree, or if they do not agree, on such terms determined by the court \*\*\*.” Pub. Act 96-608, § 5 (eff. Jan. 1, 2012); *Brankin*, 2012 IL App (2d) 110203, ¶ 33. Section 505(a)(3)(f) of the Act pertaining to child support awards was similarly amended. Pub. Act 96-608, § 5 (eff. Jan. 1, 2012).

¶ 92 Conceding that the trial court had the authority to require him to obtain a life insurance policy to secure the \$988,150 judgment and the child support award, Richard argues that the policy is both unnecessary and unreasonable, in that it does not take into account the extent to which he has already paid down the \$988,150 judgment. Richard points out that the youngest child is currently 12 years old, meaning his child support obligation will end in the near future. However, in the event he dies, Richard further points out that Judy will receive the entire \$1 million life insurance policy regardless

of how much he still owes on the \$988,150 judgment. According to Richard, such a result seems inequitable and unreasonable. We disagree.

¶ 93 The Act affords the court discretion to order Richard to obtain a life insurance policy to secure the property and child support awards on “such terms determined by the court.” Under the terms set by the court, Richard’s obligation to maintain life insurance will terminate upon full payment of the stock buy-out judgment or the emancipation of the children, whichever occurs last. Presumably, the emancipation of both children will occur first if Richard makes \$10,000 monthly payments to Judy on the \$988,150 judgment. Indeed, Richard agrees that his child support obligation will end in the near future (approximately six years). Another term set by the court regarding the life insurance policy is that “[t]he beneficial amount shall not be reviewed any earlier than the emancipation of both children.” Therefore, in about six years, the beneficial amount of the life policy is subject to review. This term of the life insurance policy is reasonable and safeguards against the inequitable or unreasonable result Richard seeks to avoid.

¶ 94 In addition, the amount of the life insurance policy is reasonable given the value of the money judgment (\$988,150) and the amount of child support (\$8,429 per month). As Judy points out, paying down the money judgment does not decrease the needs and expenses of the children that continue to accrue.

¶ 95 **E. Property Distribution**

¶ 96 Richard next argues that the trial court improperly distributed the property by allocating bank accounts of roughly \$198,000 to him, despite the fact that the accounts had no current value. Richard argues that these accounts should not have been part of the original court’s or the remand court’s property distribution.

¶ 97 At the original trial, the evidence showed that the parties had bank accounts of about \$198,000. The original court found the accounts to be marital and divided them by giving 60% to Judy and 40% to Richard. From the time of the original trial (July 28 to July 31, 2009, August 4) to the date of the original court's judgment, November 9, 2009, however, Richard spent the money in the bank accounts. According to Richard, he used the money for his attorney fees (\$83,120), his expert fees (\$7,900), Judy's attorney fees (\$67,511), Judy's expert fees (\$11,813), GAL fees (\$14,445), and ordinary living expenses (\$11,223), per court order. Because these payments were made prior to the entry of the November 9, 2009, original judgment, Richard argues that the money was used for marital debts and should not have been part of any property distribution. Judy points out that Richard never advised the original trial that he "raided" the accounts until he filed a posttrial motion. Judy argues that this was "a transparent attempt" to deny her any of the funds in the accounts and effectively make her pay 60% of the expert and attorney fees. Judy further argues that Richard's "self-help" divested the original trial court's ability to use the bank accounts in the fashion it saw fit.

¶ 98 The court on remand did not abuse its discretion by allocating the \$198,000 bank accounts to Richard's share of the estate. See *In re Marriage of Steel*, 2011 IL App (2d) 080794, ¶ 97 (the trial court's ultimate division of the marital estate is reviewed for an abuse of discretion). The balance of the bank accounts at the time of the original trial was \$198,000. The remand court noted that in 2009, the original court ordered Richard to pay all the attorney fees. However, by using \$198,000 of marital bank accounts to pay both parties' attorney fees, the court on remand stated Richard "appropriated almost \$200,000 to do so, thereby dissipating the estate." Essentially, the remand court found that Richard should not have used the marital bank accounts to pay attorney fees

and expenses, even on Judy's behalf. Therefore, it allocated the \$198,000 to Richard as a way for him to "credit the marital estate back." See *In re Marriage of Berberet*, 2012 IL App (4th) 110749, ¶ 51 (where dissipation is established, the court may or may not charge against a party the amounts found to have been dissipated).

¶ 99

#### F. Attorney Fees

¶ 100 Finally, Richard challenges the court's award of \$50,000 of attorney fees to Judy. According to Richard, the court did not state the basis under which it awarded attorney fees; there was no evidence that the court considered any factors in calculating attorney fees; Judy did not file a fee petition specifying the fees requested; and there was no finding as to the reasonableness of the attorney fees awarded. For all of these reasons, Richard concludes that the \$50,000 award of attorney fees was arbitrary and reversible error.

¶ 101 In its decision, the court stated the following regarding its award of attorney fees:

"Lastly, the court must now assess attorney's fees. Given the findings of this court today as it relates to Richard's lack of credibility and his mission to deprive Judy of her fair share of the estate, this court further finds that Richard unduly lengthened these proceedings, and did so in bad faith. Accordingly he should bear the lion's share of the total costs. Further, while Richard was originally ordered to pay all the attorney fees in 2009, he appropriated almost \$200,000 to do so, thereby dissipating the estate. Accordingly Richard shall pay \$50,000 of Judy's fees directly attorney Peskind within 45 days."

A trial court's decision to award or deny attorney fees will be reversed only if the trial court abused its discretion. *In re Marriage of Haken*, 394 Ill. App. 3d 155, 160 (2009).

¶ 102 Richard is correct that the trial court did not specify the statutory basis for its award of attorney fees. While Judy treats the award as one under section 508(a) of the Act, it appears that it was made under section 508(b). As stated, the court’s basis for awarding fees was Richard’s lack of credibility, his mission to deprive Judy of her fair share of the estate, the fact that he unduly lengthened the proceedings, and that he did so in bad faith. This language tracks the language in section 508(b), which provides:

“In every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against whom the proceeding is brought to pay promptly the costs and reasonable attorney’s fees of the prevailing party. \*\*\* *If at any time a court finds that a hearing under this Act was precipitated or conducted for any improper purpose, the court shall allocate fees and costs of all parties for the hearing to the party or counsel found to have acted improperly. Improper purposes include, but are not limited to, harassment, unnecessary delay, or other acts needlessly increasing the cost of litigation.*” (Emphasis added.) 750 ILCS 5/508(b) (2010).<sup>1</sup>

¶ 103 Cases analyzing section 508(b) seem to focus mainly on the first part of that section; namely a party’s failure to comply (without cause or justification) with an order or judgment. Such courts have held that section 508(b) of the Act is mandatory, not discretionary, and does not allow for the court to exercise its discretion as to payment if the defaulting party’s conduct was without cause or justification. *In re Marriage of Walters*, 238 Ill. App. 3d 1086, 1098 (1992); *In re Marriage of Clay*,

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<sup>1</sup>Public Act 96-583 (eff. Jan. 1, 2010) amended section 508(b) of the Act by substituting the word “Act” for the word “Section.”

210 Ill. App. 3d 778, 782 (1991). Furthermore, an award under section 508(b) does not depend on a party's inability to pay the fees or the other party's ability to pay. *In re Marriage of Walters*, 238 Ill. App. 3d at 1098. Instead, the award of attorney fees is subject to a determination of reasonableness based on, among other things, the time spent, the ability of the lawyers, and the complexity of the work. *Id.*

¶ 104 The other basis for awarding attorney fees under section 508(b) is if the court finds that a hearing under the Act was precipitated or conducted for any improper purpose, including, but not limited to, unnecessary delay. It is this latter part of section 508(b) that the court apparently applied here. Similar to the mandatory language regarding a party's failure to comply with an order, once a court finds that a hearing under the Act was precipitated or conducted for any improper purpose, section 508(b) states that the court shall allocate fees and costs to the party that acted improperly.

¶ 105 We note that in Judy's written closing argument, she pointed out that Richard admitted paying his lawyers \$80,000 in 2012, although he tried to "keep this a secret from the court." Judy urged the court to review the file, arguing that Richard "continuously violated court orders with impunity"; failed to do his discovery; and had "impeded this process every step of the way." Judy argued that she had paid "monumental fees just trying to get her fair share," and that Richard "should be required" to pay \$50,000 of her attorney fees.

¶ 106 While Richard argues that it cannot be said that he "unduly lengthened these proceedings" by taking a successful appeal, the court specifically found that Richard lacked credibility, intended to deprive Judy of her share of the estate, and unduly lengthened the proceedings in bad faith. The court's finding was likely based on its calculation of Richard's net income at a much higher rate than what the original court found, as well as its finding that Richard's overall intent at the hearing on

remand was to defraud Judy of her share of the marital estate. Once the trial court made this finding, it was mandatory that it award Judy attorney fees.

¶ 107 Regarding the amount of attorney fees, the court granted the amount Judy requested, \$50,000. Richard's final argument disputes the reasonableness of this amount, and he points out that Judy never submitted a petition specifying the fees requested. On this point, we note that the record includes exhibit 17, which is a detailed time records of Judy's attorney fees dating back from the original proceedings (June 2009) to May 3, 2012 (the court's decision was rendered on June 25, 2012). The total fees for that amount of time was approximately \$165,000, with a balance of about \$30,000 as of May 7, 2012. Though Richard is correct that Judy did not submit a specific fee petition, he was aware that one of the issues at the trial on remand was attorney fees, yet he chose not to make an argument on this point in his written closing argument. While more specific findings by the trial court would have been helpful in establishing a record on this particular issue, given the trial court's experience, its personal knowledge of the case, its review of the history of the case, and the detailed time sheets of Judy's attorney over a three-year period, we find no merit to Richard's argument that the award was unreasonable. See *Kaufman v. Kaufman*, 22 Ill. App. 3d 1045, 1051 (1974) (a trial court can award attorney fees in a divorce case without hearing evidence as to reasonableness of the fee, especially where the question is considered by an experienced trial judge who has personal knowledge of the case and the time required of the lawyers).

¶ 108

### III. CONCLUSION

¶ 109 For the above reasons, the judgment of the Kane County circuit court is affirmed.

¶ 110 Affirmed.

