2013 IL App (2d) 121090-U
No. 2-12-1090
Order filed July 10, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF DIANNE H. AKERS,	)	Appeal from the Circuit Court
	)	of Kane County.
Petitioner-Appellee,	)	
	)	
and	)	No. 11-D-817
	)	
WILLIAM T. AKERS,	)	Honorable
	)	Kevin T. Busch,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice Spence concurred in the judgment.

ORDER

Held: The trial court, by not awarding respondent husband temporary, reviewable maintenance, abused its discretion and the issue is remanded. In all other respects, the judgment is affirmed.

¶ 1 In 2011, petitioner, Dianne H. Akers, and respondent, William T. Akers, filed counter-petitions for dissolution of their marriage. After a bench trial, on September 14, 2012, the court entered a dissolution judgment. Respondent appeals, challenging the court's decisions: (1) denying him maintenance; (2) imputing upon him, for purposes of child support, an income and failing to deviate from the statutory guidelines; (3) finding certain property was petitioner's non-marital

property; (4) failing to conduct a hearing on his petition for contribution to attorney fees and finding that respondent's expenditures for attorney fees constituted dissipation; and (5) distributing the marital estate. We reverse the trial court's maintenance decision; however, we affirm the remaining issues.

¶ 2 I. BACKGROUND

¶ 3 The parties were married on November 12, 1993, and two children were born to the couple: Thomas (born February 5, 1995) and Veronika (August 3, 1997). After 18 years of marriage, on June 8, 2011, petitioner filed a petition for dissolution; on July 19, 2011, respondent filed a counter-petition for dissolution. Subsequently, pursuant to a joint parenting agreement, the court ordered joint custody of the children, designating petitioner as the primary residential parent and granting respondent reasonable and liberal visitation. Thus, no custody issue remained at the time of trial.

¶ 4 A. Trial

¶ 5 Trial commenced on July 9, 2012, and proceeded over five subsequent hearing dates. Petitioner, age 53, testified that, prior to the marriage, she received a bachelor's degree from California State and a master's degree in business administration from the University of Southern California (USC). At the time of the marriage, petitioner was working for Unocal Corporation (a corporation in the oil industry) and earned $62,000 annually.

¶ 6 Respondent, age 52, testified that, in 1988 and prior to the marriage, he received his bachelor's degree in language, writing, and rhetoric from Tulane University. At the time of the marriage in 1993, respondent was working in California as a part-time high school English teacher and was working toward a master's degree in English. Thereafter, the parties' respective employment statuses and childcare arrangements were roughly as follows:

Year	Petitioner	Respondent	Childcare
1994	Worked for Unocal as a retail business manager, earning $78,000.	Obtained his master's degree and became employed full time as a high school English teacher for an annual salary of $34,212.	N/A
1995-96	Continued at Unocal and promoted to manager of financial planning and marketing.	Continued as full-time high school English teacher.	Son is born. Parties moved to Seal Beach, California, approximately 26 miles from their jobs in Los Angeles. Before the move, petitioner dropped off their son at childcare in the morning and respondent picked him up after teaching. Respondent claims he cared for their son 65-70% of the time before the move, and 70-80% of the time afterward (due to petitioner's increased commuting time). Petitioner claims she cared for their son 85-90% of the time.
1997-99	New job at Arco (another company in oil industry). Started at $100,000, and salary increased in November to $110,000. Increased travel.	Continued as full-time high school English teacher, earning around $39,201. Decided to pursue a Ph.D.	Daughter was born. Respondent was home with her during the summer. To continue in their jobs and to allow respondent to pursue his Ph.D., the parties hired a series of live-in nannies.

2000-03	Arco was purchased by British Petroleum (BP), and petitioner retained her position. Salary increased to $125,000; occasionally traveled internationally.	Continued as full-time high school English teacher and working toward Ph.D. Took one leave of absence from teaching from January to September 2001.	Parties continued to employ live-in nannies, who continued their care in the summers, when respondent was home.
2003-04	Continued in position with BP, earning $144,510. Position included travel.	Stayed home with children and pursued Ph.D.	The parties had numerous problems with the nannies and determined that, to improve the situation at home, one parent had to quit his or her job. They determined that respondent would quit his job, stay home with the kids (ages 7 and 5), and continue working on his Ph.D. The decision eliminated $25,000 per year in nanny costs (which was most of respondent's salary).
January 2005	Same	Obtained his Ph.D. from USC in educational psychology. He was hired by USC as an adjunct assistant professor and taught a night class.	Respondent was home during the day and taught at night. When not traveling, petitioner was home at night.
February to March 2005	Approached by BP about moving to Chicago. Traveled to Illinois and bought a house in Geneva.	Same	Same

August 2005	Moved to Geneva and commuted to Chicago daily for her position with BP. Base salary increased to $168,000.	Did not work for the fall school semester.	Respondent testified that he had no job contacts in Illinois, and the children did not have after-school care similar to that in California. Respondent stayed home with them when they were not in school and he maintained and fixed up the home.
Spring 2006-07	Same	Employed as a full-time professor at Aurora University in the spring and fall 2006 for $51,550.	Respondent testified that, instead of a 12-month contract with Aurora University, he accepted a 9-month contract to allow him to be available for the children when school was out in the summer. In addition, the parties hired tutors, who assisted with both academics and caregiver responsibilities.
2008	Same	Same through August 2008, when he rejected another contract from Aurora University.	Continued to employ after school tutors but, according to respondent, petitioner's increased travel and long work hours made it increasingly difficult for him to work full time and care for the children without her help. He testified that he did not accept another contract so that he could care for the children full time. He conceded, however, that he was frustrated by Aurora University's desire to classify him as an undergraduate, as opposed to graduate, professor. According to respondent, petitioner agreed with his decision.

2009-10	Senior Level Leader who performed financial analysis and control for BP. Salary in 2010 was $226,000 and bonus was $108,000.	Employed as a part-time adjunct professor with Northern Illinois University (NIU).	Respondent testified that he taught one class at a time on a semester-by-semester basis to permit him to continue caring for the children.
2011-12	Same. Total compensation in 2011 (salary, stock, deferred compensation, health insurance, bonus) totaled $375,339.44.	Testified that he was not offered a class at NIU in the summer of 2011. Remained unemployed from the summer of 2010 through trial in 2012.	N/A

¶ 7 At trial, respondent argued that the foregoing information reflects that he contributed greatly to the marriage by providing childcare and that petitioner's career took precedence over his own. Specifically, respondent testified that childcare duties fell primarily to him, since petitioner's career did not permit her to be present, particularly when she was traveling. Respondent noted that, although the parties employed childcare, the nannies did not work all day and night every day of the week; thus, when petitioner was absent, the childcare responsibilities fell to him. Respondent testified that petitioner did not, as she claimed, cook 85% of the meals or care for the children 90% of the time, because she often arrived home late in the evening, left for work early in the morning, and traveled. Respondent testified that, when the children were older and in all-day school, he remained responsible, 90% of the time, for such things as their before-school care, taking them to doctor's appointments, bringing forgotten items to them at school, or picking them up from school. Although tutors would sometimes pick up the children from the bus at 3 p.m., respondent would arrive by 5 p.m. to care for them until dinner.

¶ 8 At the time of dissolution, respondent was unemployed. Respondent testified that his last teaching position was in 2010 at NIU. At that time, he discussed with his department head whether he was needed to teach another class in summer 2011, but no position was offered. Respondent testified that he: (1) was not offered a continuing position at NIU; (2) never turned down a position; and (3) did not, as petitioner claims, turn down a teaching position because it would conflict with a scheduled bike ride. Respondent has sought re-employment with Aurora University and NIU; Aurora University told him that it is laying off people, and his chair at NIU said there is currently no adjunct work available. In addition, respondent has sought employment with Kishwaukee College, Elgin Community College, and Waubonsee Community College; however, respondent testified that the community college positions are "simply not available. *** [I]t is very, very difficult to find work in education right now." Respondent testified that he had not applied for positions at universities in downtown Chicago, although he testified that he met with some people on Northwestern University's campus. Respondent also attempted to return to high school teaching, seeking employment with Aurora West and St. Charles East high schools. Respondent estimated that it could take one or two years to find employment in his field and, if hired, he anticipated that his salary would be around $40,000 or $50,000 per year.

¶ 9 As to other employment avenues, respondent agreed that, after college and prior to the marriage (*i.e.*, from approximately1986-1992), he had worked in marketing. He has evaluated his professional options for re-employment, including working as a consultant, obtaining certification to become a school principal, and going back into business. He had not, however, attempted to find work in marketing and business, nor had he hired a headhunter. Respondent testified that he believed that he could earn $120 per hour as a "consultant" (applying educational psychology

principles to other areas), but he testified at trial that this was "speculative." Respondent stated in his deposition that he had engaged in "concrete" conversations with one company about performing consulting work for it, and that obtaining that work was a matter "of [him] pulling the trigger." At trial, however, respondent testified that, although the conversations with that company were "concrete" in nature, being hired was a matter of the company, not him, "pulling the trigger." Prior to February 2012, respondent mailed three letters seeking consulting work; he had not been offered any contracts.

¶ 10 Petitioner disagreed with respondent's characterizations of both his contributions to childcare and his career path. Instead, petitioner testified that, despite her work, the majority of the housework and childcare fell to her and the nannies. She testified that respondent's career choices were his own, and that she did not force the move to Chicago (where respondent did not, initially, have any job contacts), but, rather, that she was hesitant to move and *respondent* encouraged it because he had fond memories of time spent in Illinois as a child. In sum, petitioner characterized respondent as perpetually dissatisfied with career options, and she argued that respondent's present state of unemployment and his pattern of underemployment was by choice.

¶ 11 As to assets, the parties formerly owned two homes in California (one in Seal Beach, which sold for around $900,000, and one in Wrightwood near a ski resort) and, at the time of dissolution proceedings, jointly owned two Illinois residences. Petitioner resided with the children at 739 Dow Avenue in the historic district of Geneva (formerly the marital residence).[1] Three appraisers testified

[1]Petitioner petitioned under section 701 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/701 (West 2010)) for exclusive possession of the marital residence. On May 3, 2012, the trial court granted the petition, ordering respondent to vacate the marital residence

to various values of the home, and the trial court ultimately found its value to be $420,000. The second home at 7N104 Blackhawk Drive in South Elgin was purchased by the parties in May 2011, as a residence for respondent. The court found its value to be $275,000.

¶ 12 In a joint exhibit, the parties stipulated to the value of their other marital assets and liabilities. Further, the parties own four cars free of any debts or obligations. The family took two or three vacations per year and traveled to Alaska, Barbados, Florida, Germany, Hawaii, Hungary, London, Louisiana, New York, San Francisco, Sedona, and Washington D.C., staying in four- and five-star hotels. The family also took several summer trips to a lake cabin in Wisconsin, went to DisneyWorld, and took a 10-day Royal Caribbean cruise. The parties have saved over $1 million in retirement funds. Further, they have contributed around $107,000 to college savings accounts.

¶ 13 B. Dissolution Judgment

¶ 14 On September 14, 2012, the trial court entered the dissolution judgment. The court found that petitioner made substantial contributions to the marital estate, but that respondent did not equally contribute to the acquisition of, preservation of, or increase in value of the marital property.

¶ 15 The court found that respondent did not meet the requirements necessary for a maintenance award, as he is highly educated and able to work in a variety of fields. Specifically, the court found:

> "[a]lthough [respondent] has the capacity to earn a substantial salary as a consultant and has testified that he only need pull the 'trigger' to attain those positions, he has chosen to be

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within 24 hours. Respondent filed an interlocutory appeal, and this court affirmed the trial court's decision. *In re Marriage of Akers*, No. 2-12-0526 (Aug. 22, 2012) (unpublished order under Sup. Ct. R. 23)).

> underemployed. Further, the court finds that [respondent] is lacking credibility as it relates to his employment decisions. Nor can it be said that the parties intended [respondent] to obtain his Ph.D. only to become a man of leisure."

¶ 16 The court found that, given respondent's employment status (*i.e.*, unemployment), his child support obligation would be abated for six months following the dissolution judgment. Thereafter, assuming respondent was employed, child support would be set according to the existing guidelines. In the event that respondent had not yet found full-time employment, the court would impute upon him "a minimum of $40,000 in earnings."

¶ 17 Further, the court found that respondent dissipated marital funds. Specifically, it found that respondent spent large sums of marital assets on attorney fees, owing his attorneys, at the time of trial, $192,000. The court noted that respondent: (1) paid a certified public accountant $1,800 to assist him on his income and expense affidavit; (2) paid close to $3,000 to appraise the parties' homes; and (3) filed unnecessary, overly-litigious pleadings and subpoenaed five airlines to retrieve information petitioner had already provided. The court concluded that respondent dissipated marital assets on unnecessary legal fees and noted that its division of property took into account respondent's dissipation of the estate.

¶ 18 In non-retirement assets (consisting of the homes, vehicles, bank accounts, and stock), the court awarded petitioner about $288,715.30. The court awarded respondent about $221,398.52 in non-retirement assets. The court ordered that petitioner's 9,000 shares of BP stock be split equally between the parties.

¶ 19 To distribute retirement assets, the court awarded respondent: (1) about $717,437.61 in retirement assets; (2) 50% of one monthly annuity; and (3) 100% of the monthly annuities derived

from two teaching retirement accounts. The court split most retirement accounts equally; however, two of the accounts (valued at $40,812.72 and $220,203.77) were split 60/40 in *respondent's* favor. The court found that a Fidelity retirement account and a pension were partially non-marital and were commenced by petitioner prior to the date of the marriage. Thus, as there was no testimony as to the degree to which the accounts were non-marital, the court divided the Fidelity retirement account (valued at $81,727.78) and the value of one monthly annuity from a Unocal pension (valued at $88,362.52) 60/40 in *petitioner's* favor.

¶ 20 As to attorney fees, the court ruled as follows:

> "After having otherwise taken into account [respondent's] dissipation in the allocation of property, the total of all attorney's fees and costs paid by each party to date from the marital estate, shall be treated as if it were a contribution by each party equally, such that neither party will be required to reimburse the marital estate for their respective attorney's fees and costs paid to date."

Accordingly, each party was ordered responsible for paying the balance of his or her own attorney fees. Respondent appeals.

¶ 21 II. ANALYSIS

¶ 22 A. Standards of Review

¶ 23 On appeal, respondent challenges the trial court's orders: (1) denying him maintenance; (2) imputing upon him, for purposes of child support, an income and failing to deviate from the guidelines; (3) finding certain property was petitioner's non-marital property; (4) failing to conduct a hearing on his petition for contribution to attorney fees and finding that respondent's expenditures for attorney fees constituted dissipation; and (5) distributing the marital estate. We review the

maintenance, child support, property distribution, and contribution issues for an abuse of the trial court's discretion. See *In re Marriage of Nord*, 402 Ill. App. 3d 288, 292 (2010) (maintenance); *In re Marriage of Berberet*, 2012 IL App (4th) 110749, ¶ 37 (child support); *In re Marriage of Vancura*, 356 Ill. App. 3d 200, 205 (2005) (property distribution); *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005) (contribution to attorney fees). While the abuse-of-discretion standard is the most deferential standard of review next to no review at all (*In re D.T.*, 212 Ill. 2d 347, 356 (2004)), it does not equate to no review at all. A court abuses its discretion when: (1) its findings are arbitrary or fanciful (*Blum v. Koster*, 235 Ill. 2d 21, 36 (2009)); or where (2) no reasonable person would agree with its position (*In re Marriage of Sanfratello*, 393 Ill. App. 3d 641, 646 (2009)).

¶ 24 The court's findings regarding dissipation and its classification of property as non-marital require factual findings that will not be reversed unless contrary to the manifest weight of the evidence, *i.e.*, where they are unreasonable or not based on the evidence. *Vancura*, 356 Ill. App. 3d at 205; *In re Marriage of Eberhardt*, 387 Ill. App. 3d 226, 233 (2008). To the extent our review of the aforementioned issues requires us to consider an issue of law, our review is *de novo*. *In re Marriage of Crook*, 211 Ill. 2d 437, 442 (2004).

¶ 25 B. Maintenance

¶ 26 Respondent argues first that the trial court abused its discretion where it failed to award him any maintenance. Respondent's arguments in this regard may be distilled to the following three: (1) the court failed to properly consider respondent's income, needs, and present and future earning capacity, and it lacked a basis in the record to find that respondent was capable of earning a "substantial income" as a consultant; (2) the court failed to consider that the parties enjoyed a high standard of living during the marriage and that respondent lacks the ability to attain that standard of

living on his own; and (3) the court did not consider that, due to his contributions to domestic duties and his contributions to petitioner's career, respondent's present and future earning capacity was impaired. For the following reasons, we essentially agree with respondent's first argument and conclude that, where it failed to award him *any* maintenance, the court abused its discretion.

¶ 27 Section 504(a) of the Act provides that a trial court may grant temporary or permanent maintenance for either spouse in amounts and for periods of time as the court deems just. 750 ILCS 5/504(a) (West 2010). The court has "wide latitude to consider the needs of the parties and is not limited to the factors enumerated in section 504." *In re Marriage of Schlitz*, 358 Ill. App. 3d 1079, 1084 (2005). However, section 504(a) enumerates 12 factors a court must consider:

> "(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)(1)-(12) (West 2010).

No one factor from section 504(a) is dispositive of whether the trial court should order maintenance. *In re Marriage of Brankin*, 2012 IL App (2d) 110203, ¶ 10.

¶ 28 Here, the trial court denied respondent maintenance on the bases that he: is highly-educated, able to earn a "substantial" salary as a consultant, has chosen to be underemployed, lacks credibility relating to his employment decisions, and, despite his Ph.D., has become a "man of leisure." The trial court is not required, when making a maintenance decision, to make explicit findings as to which statutory factors it considered. *Blum*, 235 Ill. 2d at 37. However, here, the *only* section 504(a) factor the court implicitly referenced in its order denying respondent maintenance is subsection (a)(3) (present and future earning capacity).[2] Because the court's subsection (a)(3) findings lack support in the record and *other* section 504(a) factors weigh in favor of temporary maintenance, we conclude the court abused its discretion.

¶ 29 The court did not, apparently, consider, per subsections (a)(1) and (2), respondent's income and needs. Here, respondent's affidavit of expenses listed $8,973 in monthly expenses. Even if

[2]Or, possibly, the catchall provision in (a)(12).

inflated (and we note that the trial court made no express finding in that regard), respondent, at the time of dissolution, was *unemployed*. Accordingly, regardless of his actual monthly expenses, respondent will likely not meet them without an income. See, *e.g.*, *In re Marriage of Shinn*, 313 Ill. App. 3d 317, 323 (2000) (noting that even where, unlike here, a spouse is *employed*, "[m]aintenance may be appropriate where a spouse is not able to earn enough money to meet his needs ***"). In contrast, at the time of dissolution, petitioner was earning more than $225,000 per year in base salary alone. While one goal of maintenance is to terminate the financial interdependence of spouses, another is to allow an ex-spouse *time and resources* to achieve self-sufficiency. *In re Marriage of Keip*, 332 Ill. App. 3d 876, 879-80 (2002). Here, where (regardless of the reasons), one spouse was unemployed and one spouse was earning a high salary, the rehabilitative goal of maintenance mandated a temporary award. See also *Brankin*, 2012 IL App (2d) 110203 at ¶ 9 (maintenance is designed to be rehabilitative).[3]

¶ 30 Further, in our view, the court's analysis per subsection (a)(3) of respondent's *present* earning potential was flawed and unreasonable. Again, the court viewed respondent's present state of unemployment (and, prior thereto, of underemployment) as being of his own making, noting further that it could not be said that the parties intended for respondent to obtain his Ph.D. only to become "a man of leisure." In so doing, the court rejected respondent's explanation that he reduced his workload to be available to the children as petitioner's workload and travel increased. Preliminarily, we note that section 504(a) does not explicitly list the motivations for or wisdom of employment

[3]The court also did not apparently consider the fact that the parties were married a moderately long time (almost 19 years) (section 504(a)(7)), are in their 50's (section 504(a)(8)), and enjoyed a lifestyle commensurate with a high income (section 504(a)(6)).

decisions (particularly ones, as here, that preceded the petitions for dissolution) as relevant to determining whether to award maintenance. There was no evidence presented, for example, that respondent's workload decreased over the years and that he chose unemployment with the hopes of one day receiving maintenance.

¶ 31 However, to the extent the reasons for employment decisions are relevant, the court, at least to some degree, improperly penalized respondent for decisions that were made by, and were beneficial to, the family. For example, the court's finding that petitioner chose to be *under*employed is an implicit reference to his employment over the course of the marriage (as, at the time of dissolution, respondent was not merely underemployed, he was completely unemployed). It is true that, in 2008, after working full time at Aurora University, respondent rejected another contract and instead worked part time as an adjunct professor at NIU. However, we think, for maintenance purposes, it is relevant that, for the vast *majority* of the marriage, respondent *was* employed, full time, in the education field. Respondent's increased availability to the family, on the occasions where he was not employed full time, remained, even with the assistance of tutors or nannies, well-suited to the family's needs and petitioner's career. Further, whether or not respondent *enjoyed* working part-time and took advantage of the fact that, over the course of the marriage, his wife was the primary breadwinner, the evidence also reflected a family choice to embrace the flexibility of respondent's career. See *In re Marriage of Keip*, 332 Ill. App. 3d 876, 881 (2002) (denial of or an insufficient award of maintenance may be an abuse of discretion where the work schedule of the spouse seeking maintenance was well-suited and appropriate to the family's schedule and reflected a family choice). In other words, when respondent was not employed full time, it worked to the family's overall benefit. For example, in 2003, after problems with live-in nannies, the parties

agreed that one of them must quit his or her job; they agreed, based upon salary and career goals, that respondent would quit. That respondent might have been willing or happy to do so, or whether he agreed that it made the most sense for their family, does not detract from the fact that it was a joint decision, which worked in the family's favor.[4]

¶ 32 Finally, regarding the court's reference to the parties' intentions for respondent's employment after he obtained his Ph.D., we note that the parties moved to Illinois only six months after that degree was acquired. Before the move, respondent used his Ph.D. as an adjunct assistant professor at USC and then, after the move, he worked full time as a professor at Aurora University. Although the court could have found respondent chose to be unemployed by rejecting a contract at Aurora University and possibly rejecting an opportunity to teach a class at NIU, we again note that those choices were made prior to the dissolution proceedings and should not, for maintenance purposes, be isolated from respondent's employment history over the course of the nearly 19-year marriage.

¶ 33 The court's analysis pursuant to section 504(a)(3) of respondent's *future* earning capacity was also flawed and unreasonable. The court's finding that respondent is capable of earning a "substantial salary" as a consultant is speculative at best. Even if respondent is correct in his

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[4]At trial and on appeal, the parties dispute the extent to which respondent sacrificed his career for petitioner's career and the extent to which his earning capacity was forgone or delayed due to devoting time to domestic duties. See 750 ILCS 5/504(a)(4), (10) (West 2010). We need not engage in this analysis because we find, for other reasons, that the denial of maintenance was improper. We do note, however, that, despite his devotion to domestic duties, and even if petitioner's ability to prosper at work was partially possible by respondent's availability at home, respondent was clearly able to further his education and career by virtue of obtaining a Ph.D. and becoming a professor.

assessment that, as a consultant, he could earn $120 per hour (which he testified was "speculative"), he has spent more than 15 years as an educator and has no experience as a consultant. As he has never worked as a consultant and no other testimony regarding such income potential was received, any salary potential as a consultant is purely speculative. See *In re Marriage of Harlow*, 251 Ill. App. 3d 152, 159 (1993) (when considering the receiving spouse's present or future ability to become self-sufficient, the court "should only consider the evidence presented, not mere speculation"). Further, other than his own testimony and estimation that a future position in education would earn him around $40,000 or $50,000, there was no evidence presented regarding respondent's earnings potential if re-employed in the education field. If past earnings are any indication of future earnings, respondent's most recent full-time salary as a professor with a Ph.D., was $50,000 annually—his highest salary over the course of the marriage—which is consistent with his estimation at trial. Thus, to the extent that the court found evidence in the record supporting a finding of an income significantly higher than that, its finding was contrary to the manifest weight of the evidence.

¶ 34 We suspect that the trial court may have denied maintenance, in part, to motivate respondent to find a job commensurate with his education. However, when making a maintenance decision, the court must strike a *balance* between an incentive to achieve self-sufficiency and a realistic appraisal of whether self-sufficiency is even possible. *Keip*, 332 Ill. App. 3d at 833; *Harlow*, 251 Ill. App. 3d at158 ("the trial court must balance the realistic ability of the spouse to support [himself] in some approximation of the standard of living enjoyed during their marriage against a goal of financial independence."). Here, the only evidence received regarding the *availability* of positions in the education field came from respondent, who testified that obtaining such positions was currently very

difficult and he estimated that it could take at least one year to do so.[5] Accordingly, there was almost no evidence received regarding respondent's realistic employment and income prospects.

¶ 35 Petitioner argues that the trial court awarded respondent substantial assets, which it considered, pursuant to section 504(a)(1), in its decision to deny maintenance. She asserts that respondent was awarded over $143,000 in cash, along with restricted stock and 60% of petitioner's deferred compensation "that will be distributed over the next couple of years." Respondent disputes that the aforementioned award is income-producing, and notes that the cash award, as his only income, will be depleted quickly, particularly once child-support payments begin.

¶ 36 We reject petitioner's argument. It appears that most of respondent's award consists of retirement accounts and other non-income producing assets. Petitioner cites no support for her assertion that the deferred compensation will actually be distributed "over the next couple of years" and, in any event, that does not presently help respondent. Again, at the time of dissolution, respondent was *unemployed*. The non-retirement assets are not income-producing and, where the assets awarded are generally not income-producing, Illinois law is clear that one is not required to liquidate assets in order to generate income upon which to live. *Id.* at 882; see also *Brankin*, 2012 IL App (2d) at ¶¶ 14, 21-22. "[A] spouse need not be reduced to poverty before maintenance is appropriate nor is [he] required to sell or impair [his] assets in order to support [himself] in a manner commensurate with the standard of living established during the marriage; these factors are particularly significant when, as here, the former spouse has sufficient income to pay some

[5]We note that the suggestion that respondent, age 52, with a Ph.D. in educational psychology, should now pursue a marketing career because he did marketing work more than 20 years ago is, frankly, unrealistic.

maintenance while meeting [her] own needs." *In re Marriage of Harlow*, 251 Ill. App. 3d 152, 157-58 (1993).

¶ 37 Further, we reject petitioner's assertion that *In re Marriage of Schuster* (224 Ill. App. 3d 958 (1992)) stands for the proposition that awarding maintenance to a highly-educated spouse, such as respondent here, is an abuse of discretion. There, the respondent husband switched from a full-time law career to a career in commodities trading; however, while trading (unsuccessfully), he continued practicing law part time in the evenings. The court found, therefore, that rehabilitative maintenance was unnecessary where the respondent had proved capable of providing for himself without assistance from his ex-spouse. *Schuster*, 224 Ill. App. 3d at 971-72. Here, respondent was *unemployed* at the time of dissolution. As such, there was no proof that he was capable of providing for himself without petitioner's assistance.

¶ 38 In sum, the trial court abused its discretion in declining to award respondent temporary, rehabilitative maintenance.[6] Consideration of the section 504(a) factors, particularly given

[6]For the sake of judicial efficiency, we note that the court's decision not to award permanent maintenance did not constitute an abuse of discretion. A denial of permanent maintenance is not an abuse of discretion where the ex-spouse was employed during the marriage and seemingly has the potential to become self sufficient. *Brankin*, 2012 IL App (2d) 110203 at ¶ 23. Examples of evidence that would affect whether an award should be permanent or temporary and, if temporary, for what duration, include educational background, educational pursuits, and income at the time of the dissolution. *Keip*, 332 Ill. App. 3d at 882. Here, respondent's non-existent income at the time of dissolution warranted a temporary, rehabilitative maintenance award. Given the property distribution and respondent's educational background and employment history as a professor,

respondent's unemployment status at the time of dissolution, reflects that a rehabilitative maintenance award was appropriate. The court's goal of providing respondent an incentive to become fully employed and self-sufficient could have been easily achieved through a temporary, reviewable maintenance award. We note that the court recognized that, without a six-month deferment, respondent would be unable to pay child support. Consistent therewith, a temporary, reviewable maintenance award contingent on respondent finding suitable employment is warranted. We remand for the court to assess respondent's current employment status and financial situation and to impose, if appropriate, maintenance consistent with this court's opinion.

¶ 39 C. Child Support: Deviation and Obligation

¶ 40 Respondent argues next that the trial court erred where it ordered that, upon expiration of a six-month period, respondent would, if employed, pay child support pursuant to the guidelines established by section 505(a) of the Act (750 ILCS 5/505(a) (West 2010)). If respondent is not employed at the end of six months, however, he will be required to pay guideline child support based upon the imputed income of $40,000. Respondent asserts that the court's order constitutes an abuse of discretion because, by mandating that respondent deduct from his imputed earnings and add to petitioner's substantial income, the finding reaches an inequitable result (*i.e.*, respondent already has insufficient funds from which to meet his monthly expenses, let alone maintain the standard of living enjoyed during the marriage) and ignores the best interests of the children (*i.e.*, respondent will lack

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however, we cannot say that the court abused its discretion in determining that, given the property distribution, were respondent to obtain a full-time teaching position, he would be able to meet his needs, approximate the lifestyle enjoyed during the marriage, and be self-sufficient without assistance from petitioner.

sufficient funds to care for the children while in his possession and his involvement with them will be adversely affected in that he will be substantially unable to participate with them in various activities (citing *Berberet*, 2012 IL App (4th) 110749 at ¶ 39)). We disagree.

¶ 41 First, the court did not err in imputing an income, should respondent be unemployed at the expiration of a six-month period. In order to impute income, a court must find that one of the following factors applies: (1) the payor is voluntarily unemployed; (2) the payor is attempting to evade a support obligation; or (3) the payor has unreasonably failed to take advantage of an employment opportunity. *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 1077 (2009). Here, the second factor is inapplicable; however, the court could have imputed income based upon either the first or third factors.

¶ 42 Specifically, the evidence reflected that, in 2008, after working full time at Aurora University, respondent rejected another contract. Thereafter, he worked part time as an adjunct professor at NIU. Respondent testified that he was not offered a continuing teaching position at NIU after the summer of 2010. However, petitioner challenged that account, asserting that respondent rejected an opportunity to work in the summer of 2011 because he would miss a scheduled bike ride. The court, upon hearing the evidence, found that respondent's explanations for his employment decisions were not credible. Indeed, on September 14, 2012, when discussing its judgment with the parties, the court stated "[Respondent] has chosen to be underemployed for a significant period of time. And I do not believe that he can continue to do so. He has turned down work opportunities the court has found and walked away from work opportunities the court has found." Thus, where the court rejected respondent's explanations and there existed evidence that he rejected employment opportunities, we cannot find the court abused its discretion in concluding, for child support

purposes, that respondent was voluntarily unemployed or rejected an employment opportunity and, thus, in imputing upon him an income.

¶ 43 Respondent argues that, instead of ordering that he pay the guideline support amount applicable to his salary and/or the imputed income, the court should have applied a downward deviation from the guidelines. We disagree. At some point (possibly already) respondent will be employed and, if necessary, he may at that time need to move to modify his support obligations or for a downward deviation from the support guidelines. However, at the time of dissolution (and unlike in *Berberet*), respondent's future employment and salary remained speculative; thus, whether a downward deviation is necessary remains uncertain. Further, we note that, given respondent's former salaries, the court did not abuse its discretion in determining that imputing a $40,000 income after six months would be appropriate.

¶ 44 Finally, it appears that respondent also asserts, essentially, that the court should not have imposed upon him *any* child support obligations, in part arguing that requiring him to pay child support of any amount is not in the children's best interest because he will be unable to afford to participate in activities with them. We reject this notion. The court did not abuse its discretion in declining to completely absolve respondent from contributing to the support of his children, which is not contingent on the fact that petitioner can meet their needs. See *In re Marriage of Rai*, 189 Ill. App. 3d 559, 571 (1989) ("We do not believe that because children receive adequate support as a result of one parent's efforts the other parent is excused from all obligations of support"). Indeed, the court in *Schuster*, 224 Ill. App. 3d at 974, rejected the respondent-husband's argument that, due to the petitioner-wife's income and economic self-sufficiency, he should be relieved from paying child support altogether. There, the court reiterated that the support of children is "the joint and

several obligation of both the husband and the wife," and noted that the respondent was neither unemployed nor unemployable. *Id.* at 974-75. Here, respondent is not unemployable and the support of his children remains his joint obligation.

¶ 45 D. Classification of Non-Marital Property

¶ 46 Next, respondent argues that the court erred where it found that certain property was petitioner's non-marital property. We disagree.

¶ 47 First, respondent argues the court erred where it determined that petitioner's BP restricted stock options, acquired during the marriage, were anything other than marital assets. However, respondent misconstrues the judgment. The judgment states that "The parties have restricted stock options with [petitioner's] work. The options are partially vested and the values are listed on Joint Exhibit A. *Any other stock options [petitioner] has through [BP] are unvested and currently valued at $0.00; and, shall be her non-marital property*."

¶ 48 In accordance with the first two sentences of the quoted section, the court split the stock options specified in the joint exhibit equally between the parties. As to the last sentence, the court, when it announced its judgment, made clear to the parties that the sentence was meant to reference any stocks petitioner receives *after* the marriage. Specifically, respondent's counsel asked the court to clarify what it meant by the last sentence, where it claimed that any other stock options through BP are unvested and valued at zero dollars and are petitioner's property. The court stated: "I don't believe there are any unvested. *** There's also some suggestion that she *may* have the right to receive other grants. *But those had not yet been earmarked, granted or valued.* And there was no testimony. So I was just making clear that[,] other than the stock that was identified[,] any other

stock is non-marital." (Emphases added.) After further clarification, respondent's counsel represented that the court had answered his question.[7]

¶ 49 Thus, section 503(b)(3) of the Act (750 ILCS 503(b)(3) (West 2010)), upon which respondent relies and which contains a presumption that stock options granted to a spouse after the marriage and before the judgment of dissolution are marital property, does not apply to stocks petitioner may acquire *after* the dissolution judgment is entered. Further, as the court explained that there was no evidence regarding the existence of any stocks other than those listed in the joint exhibit, which it split equally, its decision to foreclose respondent from claiming entitlement to any unidentified and/or not-yet-awarded stocks was not contrary to the manifest weight of the evidence.

¶ 50 Second, respondent argues that the trial court erred where it found that a Fidelity rollover retirement account and a Unocal pension listed in the joint exhibit were partially non-marital and were commenced prior to the date of the marriage. As there was no testimony as to the degree to which the accounts were non-marital, the court divided them 60/40 in petitioner's favor. Respondent argues that there was no clear and convincing evidence, per section 503(c)(2) of the Act (750 ILCS 5/503(c)(2) (West 2010) (no reimbursement to contributing estate shall be made with respect to a contribution which is not retraceable by clear and convincing evidence)), of the amount contributed to the Fidelity account and Unocal pensions, and that petitioner's blanket claim of a non-marital portion, without any substantiating documentation, was insufficient. Thus, he argues, the court erred in dividing the accounts 60/40, instead of equally. We disagree.

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[7]It is unclear to this court why respondent does not include any of the foregoing in his brief. Petitioner, in turn, does not even address respondent's argument regarding the BP stock.

¶ 51 Petitioner testified that she began working for Unocal prior to the marriage and continued to do so after the marriage (until 1997). She testified that the Fidelity account "came from Unocal," that a portion of it was acquired during the marriage, and that she was unable to obtain any records relative to what that amount would be because "that company has been sold numerous times." Petitioner further testified that she estimated that 28% of the Unocal pension was acquired prior to the marriage.

¶ 52 Although it acknowledged that there was no testimony as to the degree to which the accounts were non-marital, the court found credible petitioner's testimony that a portion of those accounts was non-marital. Again, given that petitioner worked for Unocal for a period prior to the marriage, and because the trial court is in the superior position to determine witness credibility and weigh the evidence, the court's ruling, crediting petitioner *slightly* for the claimed non-marital portions of the Fidelity account and Unocal pension,[8] was not contrary to the manifest weight of the evidence.

¶ 53 E. Attorney Fees: Contribution and Dissipation

¶ 54 Respondent argues next that the court erred where it failed to conduct a hearing on his petition for contribution and where it found, without providing him an opportunity to explain why various expenditures were reasonable, that he dissipated marital assets. We disagree.

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[8]We note that petitioner estimated that 28% of the Unocal pension was non-marital, a figure totaling $24,741 ($88,362.52 x .28). However, by awarding petitioner 60% of the pension, petitioner received only $8,836.25 more than if the court had split the pension equally ($88,362.52 x .6 = $53,017.5 but $88,362.52 x .5 = $44,181.26). As such, by awarding petitioner less than the amount she claimed was non-marital, it appears the court did, as it stated, take into account the lack of documents or testimony specifying the exact non-marital contribution.

¶ 55 First, the trial court did not err in failing to conduct a hearing on respondent's petition for contribution. At the close of trial, the trial court entered an order permitting the parties to file contribution petitions. After respondent did so, the court entered an order stating that petitioner need not answer respondent's contribution petition, as it was entering and continuing the matter to September 14, 2012. On that day, (the same day it entered the dissolution judgment), respondent's counsel reminded the court that it had continued the contribution petition, but he *did not* request a hearing on the contribution petition. In fact, counsel represented that: "I understand that the court may elect to enter its judgment *without having a supplemental hearing on that particular issue* given that there's been perhaps some evidence with regard to attorney's fees presented at the time of trial." (Emphasis added.) Thus, respondent has waived an argument that the court should have held a hearing on the contribution petition. See *People v. Bowens*, 407 Ill. App. 3d 1094, 1098 (2011) (explaining that waiver, *i.e.*, the intentional relinquishment of a known right, occurs when attorneys choose not to object to something otherwise objectionable); see also, *Suriano v. LaFeber*, 324 Ill. App. 3d 839, 849 (2001) (section 503(j) does not require a separate hearing).

¶ 56 Second, respondent also seemingly argues that the court erred in declining to award him contribution to his fees under sections 508(a) and 503(j) of the Act. 750 ILCS 5/508(a), 503(j) (West 2010). Respondent notes that his counsel brought to the court's attention the amount of attorney's fees petitioner had paid was not in the record, and stated that he did not know how the court could resolve the contribution issue without having that evidence. The court, however, disagreed, finding that it had heard sufficient testimony to consider the issue of contribution. Moreover, and apparently regardless of the specific fees petitioner had paid, the court's decision to not order petitioner to

contribute to respondent's fees was primarily based upon its finding that respondent's fees constituted dissipation. Specifically, the court announced at the September 14, 2012, hearing that:

> "the [contribution] issue also turned *heavily* on the fact that the court found [respondent] had—was guilty of extreme dissipation in the manner in which he prosecuted this matter, prosecuted his appeal and conducted discovery, especially in light of the fact that the joint parenting agreement had been entered and [respondent] continued to press discovery issues that really were not germane to his case.
>
> And *it was based on all of those factors* and all of the factors in evidence the court heard that it believed that any further contribution by either party was not appropriate. And so the court had made findings in the judgment that essentially dealt with attorney's fees and found that neither party would be required to contribute to the other's attorney's fees other than as had already occurred through the contributions from the estate as a whole." (Emphases added.)

¶ 57 Respondent argues that the court's findings were contradictory. Specifically, the court ordered that "the total of all attorney's fees and costs paid by each party to date from the marital estate, shall be treated as if it were a contribution by each party equally." According to respondent, this means that each party was deemed to have contributed an equal share. As he paid $192,000 in attorney fees and he understands petitioner to have paid at least $110,936, and equal share would total $151,468 each. Accordingly, respondent notes, he received from petitioner a *de facto* contribution of $40,531. Respondent concludes that this means the court found his attorney fees were reasonable and necessary and contradicted its own finding that respondent's fees constituted dissipation.

¶ 58 Actually, it means nothing of the sort. Indeed, respondent's calculations reflect that the trial court essentially found that, to the extent petitioner already contributed (according to respondent, around $40,531) to respondent's fees, it would not, due to respondent's dissipation, order her to contribute any more. Rather, "*[a]fter having otherwise taken into account [respondent's] dissipation in the allocation of property*, ***neither party will be required to reimburse the marital estate for their respective attorney's fees and costs paid to date." (Emphasis added.) Section 501(c-1)(2) of the Act provides that the trial court is required to treat the parties' attorney fees as advances "unless otherwise ordered[.]" (750 ILCS 5/501(c-1)(2) (West 2010). Thus, here, it is apparent that, instead of treating the fees solely as advances, the court "otherwise ordered" that, in light of the dissipation, respondent would receive no additional contribution and that each party would be responsible for paying the balance of his or her own attorney fees.

¶ 59 As respondent notes, the court's contribution order is largely premised on its finding that an unspecified amount of attorney and other fees constituted dissipation. Dissipation occurs when a spouse uses marital property for his or her sole benefit for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown. *Berberet*, 2012 IL App (4th) 110749 at ¶ 50. "In making its decision as to dissipation, the trial court must determine the credibility of the spouse charged with dissipation." *Id.* Further, the use of marital assets to pay one's attorney fees for the costs of the dissolution action constitutes dissipation of the marital assets. *Id.* at ¶ 57.

¶ 60 No hearing was held on the issue of dissipation; however, we do not think the failure to hold such a hearing was error. The court noted as examples of dissipation respondent's overly-litigious conduct and the amounts he paid to an appraiser and a certified public accountant. At trial,

respondent noted that he needed an accountant's help to prepare his financial affidavit because petitioner was always in charge of the family's bank accounts and paying the bills, and that finances are not one of his strengths. However, the trial court, which was in a superior position to assess the parties' credibility (*id.* at ¶ 56), did not find respondent credible. Further, as to whether respondent's attorney fees for filings and other services were excessive, the court, with its knowledge of the issues and the court file, was in the best position to know whether respondent's filings, discovery actions, and his appeal were, given the issues remaining in the case, unnecessary and improper. As such, we cannot conclude that the court's general finding of dissipation was contrary to the manifest weight of the evidence.

¶ 61 F. Overall Distribution of Marital Estate

¶ 62 Respondent's final challenge on appeal is to the court's overall distribution of the marital estate. He notes that section 503(d) of the Act, which governs distribution, requires the court to consider specific factors to divide the property in "just proportions." 750 ILCS 5/503(d) (West 2010). Here, respondent argues that, based on the court's incorrect classification of the non-vested stock options, its arbitrary allocation of the Fidelity account and Unocal pension in petitioner's favor, and its "contradictory findings of contribution and dissipation," the court's division of the marital estate was unreasonable and an abuse of discretion. We disagree.

¶ 63 We have already rejected the aforementioned claims of error that underlie respondent's argument that the court's division of the estate was improper. As such, the court's consideration of those 503(d) factors when apportioning the marital estate and in deciding *not* to award respondent a disproportionate share of the estate was proper.

¶ 64 Further, a trial court is not bound to make an equal division of marital property and may, after considering all relevant facts, distribute the property in whatever proportion it deems equitable. *Head v. Head*, 168 Ill. App. 3d 697, 704 (1988). In the context of asset distribution, "[t]he determination of an abuse of discretion does not turn upon whether the reviewing court agrees with the trial court's distribution of assets, but whether the trial court acted arbitrarily without the employment of conscientious judgment." *Id.* Here, the judgment reflects, overall, a relatively equal distribution of the marital estate. For example, the court awarded petitioner about $288,715.30 in non-retirement assets; it awarded respondent about $221,398.52 in non-retirement assets. Although respondent's value was lower, we note that difference is partially attributable to the court's finding of dissipation and the fact that petitioner was awarded the marital home, where she resides with the two children, which had a higher value. The court ordered that petitioner's 9,000 shares of BP stock be split *equally* between the parties. As to retirement accounts, the court equally split most of them, with respondent's share valued at approximately $717,437.61 *plus* half of one monthly annuity (of indeterminate amount) and 100% of the monthly annuities derived from two teaching retirement accounts (one value undetermined and one valued at $35,800). While the court split the Fidelity account (valued at $81,727.78) and Unocal pension (valued at $88,362.52) 60/40 in *petitioner's* favor, it split two other accounts, (valued at $40,812.72 and $220,203.77) 60/40 in *respondent's* favor. Accordingly, we cannot find the court abused its discretion in its consideration of all factors relevant to distribution.

¶ 65 Finally, we note that, to the extent the court did not give due consideration to respondent's lack of income and maintenance (750 ILCS 5/503(d)(8), (10) (West 2010)), we have herein ordered

that, depending on respondent's current circumstances, he should, on remand, be awarded temporary, reviewable maintenance.

¶ 66 III. CONCLUSION

¶ 67 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed in part, reversed in part, and remanded.

¶ 68 Affirmed in part and reversed in part; cause remanded.