

cross-appeals. We affirm in part, reverse in part, and remand for further proceedings.

¶ 3

BACKGROUND

¶ 4 James and Shannon Agee met when they were both working at Express Scripts. They were married on August 8, 2009. On September 9, 2009, their daughter Skylar Brooke Agee was born. James has two daughters from prior relationships, Jayme Redell born in 2001 and Katelyn Agee born in 2003.

¶ 5 On June 23, 2011, Shannon filed a petition for dissolution of marriage and a petition for temporary custody, child support, maintenance, and attorney fees. On January 30, 2012, James filed a counterpetition for dissolution of marriage. Since the filing of Shannon's petition, the parties have been involved in a protracted legal battle and have filed numerous pleadings including petitions for interim attorney fees and costs, petitions for a finding of indirect civil contempt, and petitions to compel compliance.

¶ 6 The court ordered Shannon and James to participate in mediation to resolve custody, guardianship, and visitation issues. The mediator filed a report stating that the parties were at an impasse and that further mediation would be unproductive. On February 6, 2012, the court entered an order requiring the parties to attend marriage/communication therapy.

¶ 7 On February 22, 2012, James filed a motion to remove Skylar from Illinois. He asserted that he had no family or employment in Illinois. He alleged that he anticipated obtaining employment in Missouri as there were more opportunities for employment in St. Louis County and St. Charles County, Missouri. He requested sole custody of Skylar and that he be allowed to move her to St. Louis or St. Charles Counties.

¶ 8 On April 12, 2012, the court appointed a guardian *ad litem*. James was ordered to bear the costs associated with the guardian *ad litem* and was ordered to forward \$5,000 to be applied toward the fees that would be incurred.

¶ 9 Shannon filed a financial statement. She listed her gross monthly income as \$3,375.97

and her net monthly income as \$2,764.60. Her total monthly expenses were listed as \$1,700.93 for herself and \$1,318.33 for Skylar. She listed marital property including the marital home, a Chevrolet HHR, a Toyota 4Runner, a Harley Davidson motorcycle, James's 401(k) plan, and part of her company 401(k) plan. She listed some items of nonmarital property. She showed a debt to her aunt and uncle Jane and Maley Grimes in the amount of \$35,000 and one to Capital One credit card in the amount of \$375. James filed an affidavit of assets and liabilities listing his monthly income as \$0 and his total monthly expenses as \$3,994.94.

¶ 10 The trial court heard the dissolution of marriage case on June 4, June 5, June 21, June 25, and October 11, 2012. On June 4, 2012, at the start of the contested hearing, the parties made the following stipulations. They agreed that the value of the marital home was \$87,750, that the mortgage is held completely in James's name, and that the outstanding debt on the house is \$87,391. The parties stipulated that the Chevrolet HHR with an outstanding debt of \$5,100 should be awarded to Shannon and the 2008 Harley Davidson motorcycle with an outstanding debt of \$8,051.86 should be awarded to James. The parties agreed that the nonmarital portion of Shannon's Express Scripts 401(k) is \$9,034.15 and that the marital portion is valued at \$11,497.92. The parties agreed that James cashed out his 401(k) valued at \$5,387.56 and that the property was marital. Shannon took a loan against her 401(k) that she is repaying. The balance on that is \$11,058.35 and she pays it back at a rate of \$50 every two weeks at no interest. The parties stipulated that Shannon owned 90 shares of stock valued at \$500 and that the stock is marital property. They agreed that each parent should pay one-half of Skylar's uninsured medical, dental, orthodontic, prescription drugs, counseling, or any other health-care related expenses. The parties worked out an agreement on payment of the Macy's bill, the Sears bill, and the balance at Cardinal Glennon Hospital. The parties stipulated that each should be barred from claiming maintenance from the other.

¶ 11 Shannon testified that her relationship with James changed once Skylar was born. She stated that once the baby was born, any time she needed help with anything, it was met with anger and resentment. Shannon testified that when she brought Skylar home from the hospital, she was responsible for all aspects of child care. James would come home from work, say hello to the baby, and play video games. Shannon returned to work six weeks after Skylar was born and her mother provided day care. Shannon, James, and Skylar lived in an apartment in Missouri. The couple decided to buy a house in Illinois to accommodate these day care arrangements.

¶ 12 When they were living in the apartment in Missouri, Shannon and James owned a juvenile Siberian Husky. During her pregnancy Shannon was on bedrest and could not walk the dog. Shannon testified that instead of walking the dog, James would allow the dog to use the bathroom on the balcony and he did not clean it up. The neighbors complained and the apartment management contacted James about it. He went to the neighbor and confronted him. Shannon stated that when he returned to their apartment he said, "If that fucking idiot thinks he is going to take my dog, I will kill him." The neighbors called the police. A police report was filed and the apartment complex management terminated their lease early. The parties moved in with Shannon's parents for a couple of months before moving to a house.

¶ 13 James testified that while he was at work the dog would poop on the deck and because it was summer, it smelled. He stated that the neighbors poured hot water on the dog when he was on the deck. James and the neighbors both complained to the apartment management. He said he went to the neighbors, knocked on their door, and they did not answer. Shortly after returning to his apartment, the police came and said the neighbors complained that he was banging on their door. No police report was filed. James denied that their lease was terminated early.

¶ 14 When they moved to their house, Shannon and James got another dog. Shannon

testified that the older dog would escape and run away. She said that when James caught the dog he would grab him and hit him with his hand and with the leash. He would punish the dog in front of Skylar and she would start crying. James denied hitting the dog.

¶ 15 Lisa Jordan, Shannon's mother, testified that she first became concerned about Shannon's relationship with James when she realized he was a controlling person. James made all the decisions about when he and Shannon did activities, where they went, and who they went with. She stated that when Shannon and James got married, James controlled all aspects of the wedding including selecting the dress.

¶ 16 Lisa described an incident at the hospital just after Skylar was born. She said that when she entered the hospital room, Shannon was holding Skylar and crying. She stated James was yelling, "Shannon, if you don't shut the F up and knock it off I'm going to F'en leave." When James realized she had entered the room, he left. James denied yelling at Shannon at the hospital.

¶ 17 Mark Jordan, Shannon's father, testified that when James, Shannon, and Skylar resided with him Shannon primarily cared for Skylar. James typically came home from work and would stay in the bedroom watching television or playing video games except when he came out to eat dinner. James did not help around the house, wash dishes, help prepare dinner, or go grocery shopping. Lisa stated that when James and Shannon resided with her, he would come home from work and go straight to the bedroom. He only came out to use the bathroom or eat. He never offered to help cook dinner or clean up after dinner. She stated that typically Shannon got up in the middle of the night to care for Skylar.

¶ 18 Shannon testified that once they moved in with her parents and she was back at work, she cared for Skylar when she was not working. James played video games, only coming out of the bedroom to eat. Shannon testified that once they moved to their own house, she continued to do all the childcare duties. Shannon stated that Skylar was heavy to carry and

when she asked James to carry her, he refused claiming he had bad knees and a bad back. Shannon admitted that James took Skylar to the doctor more than she did because he had more personal time off.

¶ 19 James testified that when they lived at Shannon's parents' house, he would take Skylar into the bedroom and, because of her young age, would just hang out with her. He also changed her diaper, fed her, and bathed her. He stated that when they moved to the marital residence, he was Skylar's primary caretaker. He woke up at 4 a.m., fed the dogs, took a shower, made their lunches for work, did laundry, woke Shannon, got Skylar up and dressed, and packed her backpack for day care at her grandmother's house. After work, he dropped Shannon off at home then went to pick Skylar up. He stated that he was the one who woke up during the night to care for Skylar. According to James, Shannon mainly dressed Skylar up when there was a family event, but that it was a constant fight to get her to do the normal day-to-day routine care.

¶ 20 Ellyn Agee, James's mother, testified that she moved to Texas in August 2009. She visited James and Shannon every few months and would stay one to two weeks. During these visits she stated that James fed, bathed, and changed Skylar. Shannon only dressed Skylar in a cute outfit with a headband in the mornings. She testified that James did the cleaning and laundry and got up with Skylar in the middle of the night. Ellyn stays with James when Skylar is at his house.

¶ 21 Daniel Agee, James's brother, testified that James was a great father and that he performed most of the childcare duties. Marilyn Page-Knutsen, James's grandmother, testified that when she stayed with James and Shannon before they separated, James took care of Skylar 96% of the time. James Michael Agee, James's father, testified that in the few instances he saw James, Shannon, and Skylar, James was the primary caretaker. He stated that when they would go out, Shannon would dress Skylar "in a nice outfit, put the little curly

thing in her hair and get ready to go."

¶ 22 Shannon testified that once Skylar was born, James became angrier, quick to set off, and a lot more threatening. If they had a disagreement, he would escalate it into a screaming match where he would call her names and take her car keys, take her cell phone, or block her exit from the door. She stated that these events happened on a regular basis until they became part of her everyday life. He called her abusive names such as "a bitch, a slut, a whore." Shannon testified that, in Skylar's presence, James would tell her that "[she] should contract an STD. That [She] should get in a head-on collision. He wishes [she] would die."

¶ 23 Shannon described a fight that happened in October 2009, when James came home from work and she asked him to watch Skylar so she could pack the dishes. The couple was in the process of packing their apartment to move to Illinois, and Shannon had been home all day packing and caring for Skylar. James wanted to play video games. The couple fought. James stormed into the kitchen, grabbed Shannon by the arm, picked her up, and told her that she needed to stop stressing him out. Shannon called her sister who came over. She stated that James left marks on her arm from grabbing her.

¶ 24 Erin Jordan, Shannon's sister, testified that in October 2009, she received a phone call from Shannon asking her to come to Shannon's apartment to pick Shannon and Skylar up. She drove to their apartment immediately. Erin stated that Shannon had red marks on her upper arm. James apologized for grabbing Shannon's arm out of anger and pushing her. Shannon opted not to leave with Erin at that time.

¶ 25 James testified that on that particular day, Shannon was yelling and screaming at him. She was slapping and hitting him so he grabbed her arms and hugged her from behind to stop the hitting. He did not hit her back.

¶ 26 Lisa described an occasion when Shannon and James resided with her in which the two of them were fighting in their bedroom. She peered into the room and James was calling

Shannon a "F'en bitch" and had grabbed her by the arm. They both noticed Lisa and James let go of Shannon.

¶ 27 Shannon testified about that argument. She stated that at about 10 or 11 p.m. Skylar woke up and Shannon was feeding her a bottle and talking to James about not helping around the house. She told James that her parents had said something to her about James not helping around the house or with Skylar. They started arguing. James took Skylar from Shannon and refused to give her back. When she reached to get the baby back, James grabbed her arm and started calling her names. He bruised her arm. Shannon testified that her mother overheard the argument. Shannon told James to go to his brother's house to calm down. He refused to leave. James testified that he did not recall the incident.

¶ 28 Erin stated that she witnessed numerous incidents when James verbally abused Shannon. Erin carpooled to work with Shannon and James from the end of April until the beginning of June 2011. Erin heard James call Shannon a bitch, call her family crazy, accuse Shannon of getting her family involved with everything, blame her family for their arguments, and threaten to move to Texas with Skylar. Erin stated that she and Shannon felt threatened by James. Erin also testified that on several occasions when she picked Shannon up to go somewhere, James would say to Skylar as they were leaving: "Mommy doesn't love you. She's leaving, she doesn't want to spend time with you. I hope mommy gets hit by a car. I hope mommy crashes."

¶ 29 Shannon testified that in December 2010, they got into a fight. She threatened to leave. James took her car keys and told her that if she was going to leave him, she was leaving with nothing. He told her that nothing belonged to her. He took Skylar and put her in the master bedroom and closed the door. Shannon attempted to open the door, but James pushed from the other side to prevent her from opening it. James suddenly opened the door, grabbed Shannon's arm, pushed her to the ground, and placed his knee on top of her while

he held her down and yelled at her. He yelled "that I wasn't leaving him. That I was a stupid bitch. That I was the cause of all of our issues. That everything was my fault." Skylar was present throughout the incident. Shannon stated that she left for 2½ days and took Skylar with her. The couple reconciled and Shannon told James that he needed to go to abuse counseling to deal with his anger and violence issues. He agreed to go, but would never follow through on his promise. Whenever she asked him to go and why he refused, he told her that he did not need it. He told her that it was not his issue, it was hers.

¶ 30 James testified that Shannon was loud and "swinging and punching." He grabbed her and told her he would let go when she stopped hitting him.

¶ 31 Shannon testified that in April 2011, James opened the refrigerator to get out his lunch and a Papa John's pizza box kept falling out. He started cussing and threw the pizza box above Skylar's head, sending pizza everywhere. James testified that he never threw a pizza box at Shannon or Skylar. He thought that maybe Shannon was referring to a time when he was making lunches and grabbed a pizza box, tossed it to the door to take out with the trash, and a little bit of sauce spilled.

¶ 32 Shannon described an argument in the spring of 2011 over a broken PlayStation. James wanted to purchase another one because he said he needed it for his stress condition. Shannon disagreed with taking on the cost of a \$300 game console. James was so angry he punched the bedroom door, leaving a big hole. When she asked him why he punched the door, he said it was so he would not punch her. James did not remember the incident and stated that Shannon gets upset very quickly.

¶ 33 Shannon testified that the final straw that caused her to leave James occurred in June 2011. On the way to work, James brought up a trip his family was taking to visit his grandmother. Shannon had been denied the day off so she was unable to make the trip. James complained that she did not care about his family, that all of their problems were her

fault, and that he was not going to go to marriage counseling. He told her to get out of his house and to take her stuff and leave. She stated that at this point they were in front of her work building. She opened the car door and James pushed her out and told her to "find [her] own fucking ride home." Shannon's sister drove her to the marital house so she could pack up and move.

¶ 34 James testified that Shannon had suggested that they take Skylar to meet his father's family. She told him that she was not going to take the time off and that he would have to drive Skylar himself. He said it would be impossible to drive that distance by himself with such a young child. She suggested he fly. James claimed he did not know that Shannon was moving out. He stated that when he came home from work he thought they had been robbed. Shannon later called and told him she was leaving him.

¶ 35 Fathers' Day was shortly after she left. Shannon testified that she called James to ask him if he would like her to drop Skylar off so she could spend Father's Day with him. He said he only wanted to do that if she stayed as well. She told him that was not an option, but she would come by with Skylar and his gift. She purchased a necklace for him that he was wearing at the hearing. She also bought him a card from Skylar. Shannon testified that she did not receive a Mother's Day gift or card.

¶ 36 Shannon testified that when she filed her petition for dissolution of marriage, James was angry and told her:

"[She] was a bitch. That he was going to bankrupt [her] in court. [She] would never see [her] daughter again. His family had more money than [she] did. He was going to win Skylar and take her to wherever he wanted. Mexico was one of his favorite places; Texas was another."

She stated that he threatened to take Skylar to a location she would not be able to find on two to three occasions.

¶ 37 Shannon testified that after she left James he offered to let her drive the HHR. She refused to drive it unless she had something from him stating that she had permission to drive the vehicle. He gave her such a document. At some point thereafter, James and his mother came to Shannon's house and yelled that they wanted the car back immediately. Skylar started crying and Shannon told her mother to take her into the kitchen so she would not hear James yelling, screaming, and cussing. Shannon refused to return the car. The police were called and they spoke to James and Ellyn outside. The police came inside and told her that it was a matter for the courts.

¶ 38 James testified that on June 24, 2011, he went to pick up the HHR. He knocked on the door and Shannon's family began screaming at him. Mark said he was calling the police to have him arrested for being on his property. James told him to go ahead. The police arrived and told James that there was nothing he could do about the car because Shannon had possession of it.

¶ 39 The parties described an incident on July 1, 2011, involving an Elmo video. Shannon testified that when the alternating week visitation order was entered, she was at work. Her attorney telephoned her at 4:15 p.m. to inform her that she was required to relinquish Skylar to James at 5 p.m. James called and told her that the court ordered her to give him one-half of Skylar's clothes and that he would pick them up when he came to get Skylar at 5 p.m. Shannon's sister packed up the clothes because Shannon was at work. Shannon raced home from work. When James arrived Shannon's brother-in-law handed the clothes and Skylar to James. He put Skylar in the car with Ellyn, then came to the door and demanded an Elmo movie. Shannon refused saying that she did not have many movies for Skylar. James said he wanted the video because it was her favorite movie. She told him to leave. He refused to leave without the video. He started "getting into [her] brother-in-law's face when [her] brother-in-law was telling him you need to leave this property." Shannon's father called the

police. The police told James he was not allowed back on the property. When he returned Skylar, he did not return the video. Shannon replaced it.

¶ 40 Mark testified that when James came to the door he was given the clothes. He then asked for an Elmo movie that Skylar watched when falling asleep. Shannon was reluctant to give him the movie. Mark convinced her to give James the video so he would leave. James was calling Shannon names and Mark told him to leave. He refused. Shannon's brother-in-law took James by the elbow and tried to walk him back to his car. James pulled away and started yelling "don't ever touch me." Mark telephoned the police. By the time the police arrived, James had gone.

¶ 41 James testified that he went to Shannon's house to get one-half of Skylar's clothes per the court order. He requested the return of the Elmo video which had belonged to Katelyn. He said that Shannon's whole family came out and her brother-in-law began poking him in the chest, threatening to beat him up. He stated that he did not yell at anyone.

¶ 42 Ellyn testified that she accompanied James to Shannon's house to pick up Skylar. James went to the door and knocked. Mark answered with Skylar in his arms. Mark handed Skylar to Ellyn and went inside. James asked Mark about some clothes. Mark came out with a big bag, then went inside and shut the door. James looked in the bag and said he needed the Elmo video because it was Skylar's favorite movie and it used to belong to Katelyn. He went to the door and knocked. Shannon's brother-in-law answered the door, came out onto the porch, pushed James, and told him to leave. James said he needed the video. Ellyn testified that all of Shannon's family exited the house yelling, cussing, calling James names, and telling him to leave. Shannon looked on from behind the screen door.

¶ 43 Shannon described another argument on July 4, 2011. At midday she received a telephone call from James stating that he wanted Skylar for the Fourth of July. He began to yell at her, telling her that she was a horrible mother for leaving him and "doing this to

Skylar." He told her she "did not have it that bad." Shannon asked to speak to Ellyn because James would not calm down. She told Ellyn that she could come pick Skylar up and return her at her bedtime between 8 and 8:30 p.m. Ellyn and James did not bring Skylar home at the agreed upon time. She called James and he told her that he planned to keep Skylar, take her to Mexico, and Shannon would never see her again. After three to five calls to James, he agreed to bring Skylar back if Shannon wrote him a note saying he could pick up Skylar whenever he wanted. At 11 p.m. he brought Skylar back to Shannon and demanded the note. Shannon gave him the note. She had written "written in distress" on the note, which angered James. He said he would not give Skylar back. Shannon ripped the portion of the note that said "written in distress" off, gave him the note, and asked for Skylar. Mark came out. Shannon walked over to the car to take Skylar out of her car seat where she was sleeping. Ellyn was sitting in the front seat. James told her "don't fucking touch that car, bitch. It is not your property." James took Skylar out of the car and Mark took her inside. Shannon attempted to get the car seat, which she had sent with Skylar. James told her she had to buy another car seat because he was not giving that one back.

¶ 44 One of the main causes of friction between the parties is an incident that took place on November 1, 2011. Shannon had taken Skylar to a Halloween party the weekend before the holiday, so she let James have visitation with Skylar on Halloween. She was to pick Skylar up after work the following day. Shannon left work at 4:30 p.m. and called James when she was about 10 minutes from his house. He told her he was doing something and would not be home for 30 to 40 minutes.

¶ 45 Shannon described the incident as follows. When James arrived home she pulled her car in next to his truck. James handed her Skylar and Shannon buckled her into her car seat. James told her she better have Skylar there promptly at 6 p.m. on Friday. Shannon responded, "we will see." She got into her car and James charged the car, swung open the

driver's side door, grabbed her wrist, and tried to take the car keys. When he failed to get the keys out of the car, he took Skylar out of the car and carried her into the garage. Shannon got out of the car and started walking toward the garage. She was about three feet from James and he told her that if she stepped foot in the garage, "You know what is going to happen to you." She asked for Skylar back. She stated that she was shaking and James was laughing at her. James eventually handed Skylar back and Shannon put her in the car and locked the car door. He started charging the passenger door when she was closing the driver's side door. James then went behind her car and leaned against the back to prevent her from leaving. He stood behind her car, and she held up her cell phone indicating that she was going to phone the police. After a minute or so, he walked toward the driver's door and yelled that she would hear from his attorney and to get off his property. She left and went straight to her mother's house.

¶ 46 James described the event as follows. He said that when he got home, Shannon was not there and Skylar had fallen asleep so he laid her on the couch. Shannon called and said she was outside and asked him to bring Skylar out. He told her Skylar was asleep. Shannon said she was in a hurry and James suggested she leave Skylar there while she ran her errand. A few seconds later Shannon was "beating on the door. You know, bring me my mf'in child, blah, blah, blah." He told her to wait. She was yelling, screaming, and cussing. James changed Skylar's diaper and brought her out through the garage. Shannon continued yelling, screaming, and cussing. He told her to calm down. He gave Skylar to Shannon and she told him that she was never giving Skylar back. He went to get Skylar out of the car, but the door was locked. He tried to turn the car off, but Shannon shoved him out of the way. He unlocked the car and took Skylar out. Shannon promised to calm down if he would give Skylar back. He agreed and put Skylar back in the car. As he was walking behind the car, Shannon threw the car in reverse. He tried to get out of the way and she "plowed into [him]

and took off." He went inside and telephoned his mother. Ellyn told him to call the police and he did.

¶ 47 Andrew Kuhnline testified that he lived next door to James and Shannon Agee. On November 1, 2011, he saw Shannon and James get into an argument. He stated that Shannon was yelling, but James was not. He stated that James stood behind the car and Shannon started to back up and bumped into him and he "noticed [James] had started to fall backwards." He said James started limping. He stated she stopped for about one minute, then left. He testified that his view of the incident was not obscured at all. He did not recall James reaching in to grab Shannon's keys or attempting to open any car door after Skylar was put in the car.

¶ 48 Mr. Kuhnline testified that he did not know Shannon and had never had a conversation with her, but he did not like her. When asked how he did not like Shannon if he did not know her, he stated, "You can know by the way they look and act, and I have a pretty good judge of character, and when I find a character I do not like, I do not like to be around that type of person." He also did not like the way Shannon treated James. He described her character as "out to hurt people." He stated that he did not base his opinion on conversations with James.

¶ 49 Officer Pickerell testified that on November 1, 2011, he was called to James's residence. He spoke to James first, then interviewed his neighbor Mr. Kuhnline. Officer Pickerell stated that he looked at James's knees and saw no sign of injury. Mr. Kuhnline told Officer Pickerell that he "could hear a disturbance, that he heard them arguing; that he saw her vehicle leave. However, in his position he couldn't see whether or not he was struck." Mr. Kuhnline did not tell him that James did not get hit, he just said he could not see it from his location. Officer Pickerell went to Shannon's residence and interviewed her. Officer Pickerell met with both sides, and after his investigation he concluded that he "couldn't

determine whether he was struck or not."

¶ 50 James stated that he had medical bills related to the injury to his knee sustained on November 1, 2011, and requested that the court order Shannon to pay them. He stated that the cost of the medical bills was approximately \$40,000. James testified that the medical bills for his knee surgery were submitted to both the health insurance coverage through Express Scripts and through Geico.

¶ 51 Shannon testified that she wants custody of Skylar because she felt "James will use Skylar as a tool to get what he wants or be vindictive." She believed that James put himself first when making decisions. She stated that Skylar is her first priority. Shannon testified that James was violent, was threatening, and had outbursts of anger. She stated that she was terrified of him. She further stated that he behaves in this manner in front of his children. She stated that she arranged for Skylar to get counseling because her attitude and disposition had changed. Skylar had started to say that she hated Shannon, that she does not want her mother, that Shannon does not want Skylar, and that nobody loved her.

¶ 52 James testified that before the custody exchanges, Skylar screams, cries, hides, kicks, strips off her clothes, and tells him she does not want to go with her mother. Ellyn stated that when James tells Skylar she needs to get dressed to go see Shannon, Skylar starts crying and screaming "no mommy." She also hides or rips off her clothes. James testified that he made between 80 to 100 audio recordings of these outbursts on his cell phone. James testified: "For the longest time I told her that her mommy loves her too. I still tell her mommy loves her. She tells me mommy does not love her, she doesn't want to go see mommy." He stated that he continues to try to encourage her to spend time with Shannon. James testified that he thought Skylar needed therapy to understand the changes and to find out why Skylar tells him she never wants to see Shannon.

¶ 53 Jennifer Redell testified that she and James attended college together and had a casual

relationship that produced a child, Jayme Redell. She stated that Jayme was born in 2001, but she did not contact James to tell him about his daughter until 2009. They discussed James getting to know the child first as a friend of the mother then introducing him as the child's father. She stated that James has never seen the child and has never asked to see her. She stated that he pays \$75 per month in child support and that he is current in his child support obligation. James was also ordered to provide health insurance for Jayme, but has failed to do so.

¶ 54 Jennifer described an incident between her and James that caused her concern. She stated: "The last time that me and him were together, he was extremely drunk, and we had proceeded to have sex; and after awhile I had said, okay, that is enough. No. He continued. I said no again and finally pushed him off."

¶ 55 James testified that he never tried to contact Jayme because her mother told her that he was dead and he thought that it would be detrimental to her to learn her mother had been lying to her for years.

¶ 56 Jodi Oerter testified that she dated James in 2003. In September 2003, they had a daughter together named Katelyn. The couple lived together in the basement of Jodi's stepmother's house for about seven months. She stated that prior to becoming pregnant she and James had a good relationship, but once she became pregnant, he became mean. He called her names such as "a bitch, a whore, tell me to go fuck myself, stuff like that." Once Katelyn was born he would push her and refuse to let her out of the basement. In one fight James stood in front of the basement door blocking her exit. He pushed her to the ground fracturing her wrist then pinned her to the floor. Eventually, he allowed her to stand up. She told him her wrist hurt and he let her out of the basement. James testified that Jodi was drunk during this incident.

¶ 57 Jodi testified that James also yelled at her in front of Katelyn. Once he moved out,

he would yell at her when he picked Katelyn up and would slam the car door. Because of the troubles at the visitation exchanges, Jodi obtained an order requiring James to pick Katelyn up from the police station.

¶ 58 Jodi stated that James never abided by the visitation schedule entered May 12, 2006. Pursuant to the schedule, he was to have Katelyn half of each summer, every other weekend, and some weekdays. Jodi testified that James had never taken Katelyn for one-half of the summer, for a full week in the summer, or even for a weekend. She stated that he sees Katelyn for a couple of hours three times per year at the most. James failed to comply with the court order to provide insurance for Katelyn and was approximately nine months behind on child support payments. James testified that he saw Katelyn once or twice per month. He stated he paid \$335 per month in child support and had not paid the prior month, but was otherwise current on his payments.

¶ 59 Jacqueline Oerter, Jodi's stepmother, testified that when they were a couple, James and Jodi lived with her. She stated that when James was out in public with Katelyn he was proud of her and would carry her around. However, at home, video games were more important to him than Katelyn's needs. Jacqueline described James as confrontational and very intimidating. She stated that a couple of times, Jodi received a phone call and James would not let her out of the basement to answer it. She had to go to the basement and insist that Jodi be allowed to leave to answer the phone. She testified that in the past year James had seen Katelyn at the most four times.

¶ 60 Shannon testified that if she had custody of Skylar she would attempt to facilitate a relationship between Skylar and her half-siblings because she felt it was important that she got to know them.

¶ 61 Mark testified that he has another granddaughter, Savannah, and that he "kind of adopted Shannon's ex-fiance's little boy, Austin, but he is no blood line." He characterized

the relationship between Skylar and Austin as "buddies" and her relationship with Savannah as "best buddies." Lisa described Skylar and Savannah's relationship as "like sisters."

¶ 62 Shannon stated that if she was awarded custody of Skylar she would consult James on major decisions because he was her father and should be aware of what was going on or what needed to be going on. She stated that she always tries to present visitation at James's house in a very positive light. If Skylar expresses a desire not to go to James's house, Shannon stated that she tries to redirect her by telling her she can play with the dogs and James, and if she knows his mother is in town tells her she will get to see her grandmother. Shannon testified that James lacks textbook parenting skills like changing diapers, buying clothes, making sure the child has appropriate toys, but that he is very good at loving, caring, and protecting Skylar.

¶ 63 Mark testified that he had never heard Shannon speak negatively about James to Skylar, nor had he observed Shannon discourage Skylar from her time with James. He testified that he would not lie on Shannon's behalf. Erin stated that she never heard Shannon say anything negative about James to Skylar.

¶ 64 Shannon testified that in almost every telephone conversation that she has had with James since they separated, he says something about his family having money and that she will be in debt for the rest of her life living with her parents. He repeatedly told her that if she was going to leave him, he was going to leave her with nothing and that she would be buried in debt.

¶ 65 James testified that he never said negative things about Shannon to Skylar. Ellyn testified that she never heard James call Shannon a name and she has never heard James speak negatively of Shannon in front of Skylar. Daniel testified that he never saw James act violent toward Shannon.

¶ 66 James testified that he had concerns about Shannon as a parent and that he did not

think she was a good mother. Shannon wanted to place Skylar on a diet at age one and he felt that she was too concerned about physical appearances. He expressed concern about Shannon smoking around Skylar. He stated that he used to smoke and when the doctor told him it was harmful to Skylar he quit. James claimed that Shannon did not get up with Skylar in the mornings and would sleep anywhere from four to seven hours past when Skylar woke up. He felt Shannon did not put Skylar first. James also stated that Shannon's family had gatherings two to three times per month and the family drank a lot. Because everyone is drinking, "they don't worry about what the children are doing." He said once Shannon and her mother were so drunk they took Skylar to change her in the back of the truck and almost let her roll out. He also worried about the types of television shows Shannon watched in Skylar's presence.

¶ 67 James described an incident where Shannon was watching television and Skylar was trying to get her attention. Shannon continued to watch television and ignore Skylar, so Skylar bopped her on the head. "Shannon turned around and smacked the hell out of Sky. She ran off crying." When James said she should check on Skylar, Shannon told him that Skylar should not have hit her and that she needed to learn. Shannon did not talk to Skylar for two days.

¶ 68 James testified that every time Skylar returns from Shannon's house, she is dirty. He said her hands are dirty, her hair is matted, and she is smelly. He said the last time she returned home, she had bruises on her. Ellyn stated that when Skylar has been returned to James, her hair is matted. She also returns wearing different clothes than what James sent her in and the clothes are too small. She stated that Skylar smells like smoke and usually has quite a few bruises on her legs.

¶ 69 James testified that throughout the entire divorce process Shannon told him that he would never see Skylar again. He stated that he never tried to alienate Skylar from Shannon

and that he never encouraged Skylar to be mad at her mother. He tells Skylar that everybody loves her and that everybody gets to share her.

¶ 70 Shannon stated that James had issues with his heart condition in 2008, 2009, 2010, and 2011. She described his heart episodes as James clutching his chest, lying down for an extensive period of time, and being unable to do anything physical. She stated that in the six months prior to her leaving, James had five to six episodes per month. She stated that it interfered with his ability to parent Skylar. She said that every day he told her he needed distress time so he would not have a heart episode. To distress he would play video games or watch television for a couple of hours per day. Shannon stated that he complained about his knees constantly throughout their time together. He was unable to do maintenance around the house, play on the floor with Skylar, or walk the dog at times because his knees hurt.

¶ 71 James testified that he had knee surgery on his left knee four times between the ages of 16 and 22. He stated that after the November 1, 2011, incident where Shannon hit him with the car, he had surgery on his right knee. James testified that in June 2011, he experienced pains in his chest. He went to the emergency room and was sent to a cardiologist. The cardiologist thought it was stress-related and related to lack of sleep. He prescribed sleep medication. He was also put on a heart monitor to make sure he did not have any heart issues. The cardiologist examined the results and stated that his heart was healthy. James testified that in the past year he has had three EKGs and all were normal.

¶ 72 Ellyn testified that prior to June 2011 she never witnessed a time when James was unable to care for Skylar due to a medical condition. In the first week or two after Shannon left, James was unable to care for Skylar due to a medical condition. She said he experienced anxiety stress attacks that caused his heart to beat quickly and left him feeling weak.

¶ 73 Lisa testified that James complained about his knees and "some type of attacks that

he said he had." She stated she saw them as anxiety attacks, but he said they were a heart condition. She stated that he laid down a couple of times per week because he "was having an attack."

¶ 74 Shannon testified that she smoked, but did not smoke around Skylar. She stated that she smoked in the breezeway of her parents' home and outside.

¶ 75 James testified that when he was working at Express Scripts he was earning \$38,000 per year pretax. On July 15, 2011, he received a performance correction notice citing that he established a trend of not being reliable. He was terminated from Express Scripts.

¶ 76 James testified that he has been hired to be a licensed insurance agent with Farmer's Insurance. Generally the agents work from the corporate office in Ballwin, Missouri, for the first two years. When they have enough assets the agents can open their own office. The salary is commission based and includes medical, dental, and vision benefits. He stated that he had not taken his licensing examination yet. He further testified that he had not signed any papers because it would signal the start date and he "was under the impression that if [he] started [his] own business being legally married to Shannon she'd be entitled to half."

¶ 77 Marilyn testified that in June 2011 she gave James a Toyota 4Runner for his birthday because she did not need it. She loaned James money for attorney fees, but she did not know the exact amount. The fees were charged on three credit cards. Marilyn also gave James money to purchase items and to pay down credit card debt. She testified that since the couple separated she had given James \$70,000 to \$80,000. She clarified that some of it may have been given prior to the separation. She claimed some of the money as a gift on her tax returns.

¶ 78 Ellyn testified that she gave James an interest-free loan and that "not counting attorney's fees we recently paid, but what we put in his account, [it was] about \$54,000." She said that this did not include the money his grandmother gave him. She said the money was

used to pay for two months of COBRA insurance, for attorney fees, and for guardian *ad litem* fees.

¶ 79 James testified that since he and Shannon separated, he had received about \$60,000 from his grandmother and mother. He stated that the money was loaned to him to help him through the divorce. He is to pay his family back when he returns to work. James stated that he used the money to pay attorney expenses, medical bills, credit cards, car insurance, household expenses, his mortgage, and for items for Skylar.

¶ 80 Shannon testified that James's family gave the couple the money for the down payment on their house, a Toyota Sequoia, a Toyota 4Runner, a privacy fence for the backyard, an oven, and money towards bills and items for Skylar. She stated that any time money was tight, money showed up.

¶ 81 Shannon testified that her aunt and uncle had loaned her \$35,000 for attorney fees plus an additional \$8,000 for a bill that was received since the last time they were in court. The loan is interest-free. Shannon testified that she had a verbal loan agreement with them. Pursuant to the agreement, Shannon pays them \$200 per month. She testified that she took a \$2,000 loan out against her 401(k) plan to pay attorney fees. She said she owed a balance of \$1,100.

¶ 82 The guardian *ad litem*, E. Nicole Carrion, filed a 14-page report that was admitted into evidence. In her report she wrote that she met individually with each parent, observed each parent in his or her residence with Skylar, spoke with family members of each party, and spoke with other identified witnesses. She stated she also reviewed extensive documentation presented to her by both parents. She wrote that each parent's home is clean and has appropriate living conditions for Skylar. Skylar has a strong attachment to each parent.

¶ 83 The guardian *ad litem* expressed concern that James had repeatedly informed her that Skylar did not want to return to Shannon's custody and often cried and resisted the transfer.

James played her audio recordings he made on his cell phone of some of the visitation exchanges when Skylar was crying at his house prior to the return to Shannon. The recordings were made without anyone else's knowledge. The guardian *ad litem* wrote that, on the recordings, Skylar did not say she did not want to return to Shannon but would cry when James told her to get dressed to go back to mommy or when she was being taken out of the car. The guardian *ad litem* stated that the recordings concerned her because they were made surreptitiously and Skylar was already crying. Additionally, James made statements on the recordings like "I'm sorry baby" when Skylar was crying about going back to her mother rather than encouraging her to see her mom by saying things such as "You get to see mommy!" The guardian *ad litem* felt that James was apologizing to Skylar for having to spend time with Shannon in an intentional or unintentional attempt to alienate Skylar from Shannon.

¶ 84 James also reported to the guardian *ad litem* that Skylar came to his house with bruises on her legs and she said "mommy did it" and "bad mommy." James claimed this has happened before, but he did not report it because of fear about how it would impact the custody case. The guardian *ad litem* stated that she had visited Skylar at Shannon's home the day before Skylar allegedly told James that her mother bruised her legs. She did not observe any abuse or interaction between Shannon and Skylar that made her concerned that Skylar was afraid of Shannon or that Shannon was abusing Skylar. She stated that during her visit Shannon and Skylar were very loving toward each other. She stated that Skylar was an active 2½-year-old who loved to run and play outside. The guardian *ad litem* noted that Skylar did fall a couple of times while she was there. Skylar played with her dollhouse a significant portion of the time. The guardian *ad litem* noted that Shannon was positive about the "daddy doll" and with Skylar including "daddy" with the "mommy" and "Skylar" dolls. The guardian *ad litem* made a surprise visit to Shannon's house a couple of hours after speaking to James

about the bruises. Shannon's parents were watching Skylar while Shannon was at work. Skylar was outside with her grandfather. The guardian *ad litem* and Skylar played with her dolls in Skylar's room. The guardian *ad litem* noticed "some small bruises" on her shins and asked if she had a "boo-boo." Skylar replied, "Yeah, I fall down at papa house." The guardian *ad litem* reported that Skylar never said anything about Shannon hurting her. The guardian *ad litem* opined that the bruises were consistent with a normal, active 2½-year-old who is apt to fall down while playing. She did not believe that Shannon is abusing Skylar and was concerned that James is making such allegations. She further stated that "it is [her] opinion that any statement made by Skylar or any resistance by Skylar towards Shannon have been instigated or encouraged by James in an attempt to gain custody of Skylar."

¶ 85 The guardian *ad litem* reported that Shannon smokes in the breezeway of her house. She opined that Shannon should not smoke around Skylar and should not smoke in the house or the breezeway. She advised Shannon of this.

¶ 86 Shannon told the guardian *ad litem* about various threats James has made including threatening to kill her and that he would take Skylar to Mexico. On Easter Sunday, 2012, while driving past a cemetery, Skylar pointed to the cemetery and said to Shannon "mommy lives there." Shannon also accused James of being violent with Katelyn's mother. James denied any violent behavior.

¶ 87 The guardian *ad litem* wrote that the November 2011 incident has been a major source of conflict between the parties. She wrote that she did not know if Shannon hit James with her car, but that as a result of the incident there has been conflict during the custody exchanges requiring intervention. She also admitted that she did not know whether James had been violent with Shannon or anyone else in the past. She expressed concern over the allegations of domestic violence and stated that it reinforced the need for supervised custody/visitation exchanges to reduce or minimize future conflict. She stated that Shannon never

alleged that James was violent with Skylar, and she did not believe that he would physically harm Skylar. The guardian *ad litem* wrote that she was concerned about James emotionally or psychologically harming Skylar in his attempts to gain custody or alienate her from her mother.

¶ 88 The guardian *ad litem* recommended that Shannon be awarded sole legal custody of Skylar. She stated that she did not believe that the parents had the ability to communicate or cooperate with each other to be able to make joint decisions about Skylar's life. She felt that it was important for Skylar to have a home base and structure in her life. She stated that she did not believe that James's request to remove Skylar to Missouri was in the child's best interest. She recommended that Shannon advise and consult with James regarding any major decisions affecting Skylar, and that James be allowed to participate fully. If the parties cannot agree, Shannon should have the authority to make the final decision. She stated that based on James's actions in the past, she believed that "James would use a joint custody arrangement to further attempt to alienate Skylar from Shannon, and that James would create conflicts in order to draw Shannon back in to court proceedings."

¶ 89 The guardian *ad litem* felt that if James were awarded primary custody of Skylar he would not encourage and foster a good relationship between Shannon and Skylar. She felt that James had exerted "a lot of energy and time trying to convince [her] that Skylar does not want to be with her mom, and that, in and of itself, is serious cause for concern." She felt that Shannon would do a better job fostering and encouraging a good relationship between Skylar and James than James would do if he were awarded custody. When Shannon's parents were interviewed without her present, they indicated that James is an important part of Skylar's life and that despite the conflict, they would do what they could to foster Skylar's relationship with her father. James's mother only had negative things to say about Shannon, and the feelings she expressed were "similar to James's almost verbatim."

¶ 90 The guardian *ad litem* recommended that James be required to attend counseling so that he could be educated on the impact that his alienating behavior has on Skylar while helping him separate his thoughts and feelings from Skylar's to establish more appropriate and healthier boundaries for a parent/child relationship and to help James with support and coping strategies on how to effectively navigate shared parenting of a child after a divorce. She stated that it was her understanding that Shannon attended counseling per court order and recommended that she continue to do so as recommended. The guardian *ad litem* recommended that the court build in clear and specific consequences should James continue to persist in his alienating behavior with Skylar after the case is concluded. The guardian *ad litem* testified that her report was "pretty conclusive." The court took the case under advisement.

¶ 91 On December 7, 2012, Shannon filed a motion to reopen evidence and to supplement the record. She alleged that James had received \$62,500 as a settlement of all claims arising from the November 1, 2011, incident from Geico Insurance Company. James had requested that Shannon be responsible for any bills resulting from the incident. The court had not heard evidence as to whether the settlement paid the medical bills in full and whether James received funds that exceeded the medical bills. Shannon further asserted in her motion to reopen the evidence that because the parties remained married, the settlement was a marital asset subject to division by the court. Shannon attached a copy of a letter to her from Geico Insurance Company informing her that "the claim of November 1, 2011 settled for a Release in Full in the amount of \$62,500."

¶ 92 On December 19, 2012, Shannon filed a motion for a directed verdict. She alleged that she had received insurance settlement documents from the insurer signed by James stating that he waived his right to any future claims in the motor vehicle incident occurring November 1, 2011, against the insurer and Shannon as a condition of his acceptance of the

settlement. Because he waived his right to all claims against her, Shannon alleges that there is no issue of material fact with regard to the motor vehicle accident. She asked the court for a directed verdict barring all claims by James in regard to the November 1, 2011, motor vehicle accident.

¶ 93 On December 26, 2012, Shannon filed a motion to reopen discovery. She alleged that James received \$62,500 as a settlement for all claims arising from the November 1, 2011, auto accident. She asserted that James had not provided sufficient documentation regarding whether medical bills had been paid by insurance and as to whether there was a surplus in payment for pain, suffering, and/or other reasons, after all bills were properly paid. She asked the court to reopen discovery so all documents regarding the settlement from the November 1, 2011, accident could be exchanged and to allow the parties to supplement the record with any additional information obtained from this limited discovery.

¶ 94 On May 3, 2013, Shannon filed a motion to enforce local rule and Supreme Court Rule 922 (eff. July 1, 2006). She alleged that on October 11, 2012, the trial court entered an order closing the evidence in the case. She further asserted that minute records show the case officially being under advisement at least as of November 14, 2012. She asserted that local rules state that no judge shall keep a matter under advisement for a period of greater than 90 days from the date it was taken under advisement. She further alleged that pursuant to Supreme Court Rule 922 all custody decisions are to be made within 18 months of the date of service and it had been 22 months since the date of service. She asked that the court enter a final order immediately or set the matter for hearing on the issue of reopening the proofs related to the insurance proceeds.

¶ 95 On May 31, 2013, the court entered a judgment of dissolution. The court considered all relevant factors including those set forth in section 602 of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/602 (West 2012)) and awarded Shannon

sole custody, care, and education of Skylar. The court found that joint custody would not work in this case because the 50/50 temporary time sharing did not work, and the transition from parent to parent was difficult for Skylar. The court also found that Shannon and James were incapable of communicating effectively with regard to Skylar's needs, and that the guardian *ad litem* recommended that Shannon be awarded sole legal custody.

¶ 96 The court found that when the parties did share custody, it was strife with conflict and litigation, and that it was difficult for Skylar to adjust to the arrangement. The court ordered Shannon to welcome input from James on any major medical or educational decisions affecting Skylar except in the case of emergency where input is not feasible. The court held that Shannon was to make the final determination if the parties cannot agree on major decisions. The court established a visitation schedule.

¶ 97 The court found that James did not supply the court with any credible information as to his earnings or benefits that he expected to earn from his anticipated employment in the insurance industry. James was ordered to pay \$500 per month in child support commencing June 15, 2013.

¶ 98 The trial court classified the parties' property as marital and nonmarital. It divided the property and the debt. James had a pending lawsuit arising from the November 1, 2011, incident in which he claimed Shannon hit him with her car. The court stated that normally it would reserve jurisdiction to determine how much, if any, of the lawsuit should be awarded to Shannon, but that the court noted that the parties had been separated since June 2011, the incident occurred in November 2011, and James claimed Shannon was the person responsible for the claim arising. The court awarded the proceeds to James. The court further held that James was to pay 20% of the net proceeds to Shannon as child support.

¶ 99 The court found that there were discovery abuses, particularly concerning the production of bank statements, that resulted in Shannon incurring fees that would not

ordinarily have been incurred. The court ordered James to pay the sum of \$1,250 toward Shannon's attorney fees. Shannon was ordered to pay the remainder of her attorney fees and costs herself. James was ordered to pay his own attorney fees and costs including fees owed to the Blake Law Group in the amount of \$4,334.03 as per an agreed order entered on December 14, 2011. James was ordered to pay 80% and Shannon 20% of any outstanding guardian *ad litem* fees.

¶ 100 James filed a timely notice of appeal. Shannon filed a notice of cross-appeal.

¶ 101 ANALYSIS

¶ 102 James argues that the trial court abused its discretion in awarding sole custody of Skylar to Shannon. He asserts that the court should have awarded him sole custody or awarded the parties joint custody. The primary consideration in determining custody is the best interest of the child. 750 ILCS 5/602 (West 2012). "In child-custody cases, there is a strong and compelling presumption in favor of the result reached by the trial court, because in determining the child's best interests the trial court is in a superior position to observe and evaluate the witnesses' demeanor." *Connor v. Velinda C.*, 356 Ill. App. 3d 315, 323 (2005). A custody determination will not be overturned unless it is against the manifest weight of the evidence. *In re Marriage of Karonis*, 296 Ill. App. 3d 86, 88 (1998). "A judgment is against the manifest weight of the evidence when the opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based upon the evidence." *Id.* "The trial court's custody determination is afforded 'great deference' because the trial court is in a superior position to judge the credibility of witnesses and determine the best interests of the child." *In re Marriage of Ricketts*, 329 Ill. App. 3d 173, 177 (2002).

¶ 103 After careful consideration of the record, we conclude that the trial court's custody determination was not against the manifest weight of the evidence. The trial court gave careful consideration to each of the factors enumerated in section 602(a) of the Act.

¶ 104 The Act requires that the court determine custody in accordance with the best interests of the child, considering all the relevant factors, including: (1) the parents' wishes regarding the child's custody; (2) the child's wishes, if appropriate; (3) the child's interaction and interrelationship with her parents, siblings, and any other person who might significantly affect the child's best interests; (4) the child's adjustment to her home, school, and community; (5) the mental and physical health of all individuals involved; (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed at the child or another person; (7) the occurrence of ongoing abuse; (8) each parent's willingness and ability to facilitate and encourage a close and continuing relationship between the other parent and child; (9) whether one of the parents is a sex offender; and (10) the terms of a parent's military family-care plan if a parent is a member of the United States Armed Forces who is being deployed. 750 ILCS 5/602(a) (West 2012).

¶ 105 The court found that both parents wanted sole custody, so factor 1 was neutral. Due to Skylar's young age, it opted not to interview her to determine if she had a preference about which parent was granted custody. Factor 2 was deemed neutral. The court further found that there were no facts that would cause factors 9 and 10 to be relevant.

¶ 106 In analyzing the relationship between Skylar and her parents, siblings, and others who may affect her best interests, the court found that this factor favored Shannon. The court found that while Skylar has a close relationship with James's family, they live out of state. Skylar lives with Shannon in her grandparents' home. Shannon's mother and sister provide day care for Skylar. Skylar is close to her cousin Savannah. Lisa described their relationship as "like sisters," and Mark described them as "best buddies." Skylar also has a close relationship with Austin.

¶ 107 The court found that James had no relationship with his daughter Jayme Redell, and that his relationship with Katelyn was sporadic at best. James admitted that he had never met

Jayme. Jodi testified that James visited with Katelyn only about three times per year. Shannon testified that she spoke with the mothers of James's other daughters about establishing a relationship with Skylar and that she anticipated that it would occur. The court found that given James's behavior toward the other mothers, it was more likely that Shannon could facilitate a relationship between Skylar and her half-sisters than James could. The court further found that Shannon had maintained a relationship with Austin, the son of her ex-boyfriend. It felt that this was further evidence of her ability to maintain a relationship between Skylar and her half-sisters.

¶ 108 The court found that factor 4, the child's adjustment to her home, school, and community, favored Shannon. Skylar's aunt and grandmother cared for her while Shannon was at work. Skylar had spent much of her life living in her grandparents' home. While his request was denied, James sought to remove Skylar to Missouri.

¶ 109 The court found that factor 5, the mental and physical health of all individuals involved, slightly favored Shannon. Shannon testified that James had issues with his heart in 2008, 2009, 2010, and 2011. She said that when he had a heart episode he would have to lie down for extended periods of time. She stated that in the six months prior to her leaving, James had five to six episodes per month. She testified that while they were married, James claimed that he needed to destress after work by watching television or playing video games for a couple of hours to prevent a heart episode.

¶ 110 Lisa testified that James had anxiety attacks and that he had to lie down a couple of times per week due to the attacks. Ellyn testified that after Shannon left, James was unable to care for Skylar because of anxiety stress attacks. Marilyn testified that James was off work for seven or eight months for his heart. She said his heart problems were related to stress and anxiety.

¶ 111 James also has knee problems. He testified that he had had four knee surgeries on his

left knee between the ages of 16 and 22. Shannon testified that during their marriage James complained constantly about his knees and because of his knee problems he was unable to perform home maintenance or play on the floor with Skylar. Mark testified that, at times, James would refuse to carry Skylar because his legs hurt.

¶ 112 On February 6, 2012, the parties were ordered to get counseling to facilitate communication and parenting. James did not follow the court order. The guardian *ad litem* recommended that James be required to attend counseling so that he could be educated on the impact his alienating behavior has on Skylar and to help him establish more appropriate and healthier boundaries for a parent/child relationship. James testified that he would not get counseling despite the court order.

¶ 113 The court expressed concern about Shannon's smoking habit. Shannon testified that she does not smoke in the house or around Skylar. The court ordered Shannon not to smoke or allow third parties to smoke in Skylar's presence.

¶ 114 The court found that factor 6, the threat of physical violence by the child's potential custodian directed against another person, and factor 7, the occurrence of repeated abuse directed against another person, favored Shannon. The court felt that the fact that Jennifer, Jodi, and Shannon all testified to James's abusive conduct and anger raised significant concerns. Jodi testified that James called her names, refused to let her out of the basement, and on one occasion pushed her to the ground fracturing her wrist. She stated that due to trouble at visitation exchanges, she obtained an order requiring James to pick Katelyn up from the police station. Jacqueline testified that James was confrontational and intimidating. Jennifer testified to an incident in which James was drunk and would not stop sexual conduct towards her even after she told him no. The court found the testimony of Jennifer to be credible.

¶ 115 The court found Shannon's testimony of James's anger toward her and the dogs to be

credible. Shannon testified that after neighbors complained about their dog, James went to their apartment and banged on the door. She said he told her that "if that fucking idiot thinks he is going to take my dog, I will kill him." The neighbors called the police and the apartment complex terminated their lease early causing the couple to move in with Shannon's parents.

¶ 116 Lisa testified as to instances of abuse. After Skylar was born she was at the hospital and heard James yell at Shannon threatening to leave if she did not "shut the F up and knock it off." Lisa also witnessed a fight when the couple was living at her house where James called Shannon a bitch and grabbed her arm. He let go when he realized Lisa was watching them.

¶ 117 Erin testified that in October 2009, she was called to the couple's apartment to help Shannon. James admitted grabbing Shannon and pushing her. Erin stated that Shannon had red marks on her upper arm. Erin testified that she carpooled to work with James and Shannon and witnessed numerous incidents where James called Shannon names. She also stated that when she and Shannon would go someplace, James would tell Skylar that he hoped Shannon would get hit by a car or get into a crash.

¶ 118 Shannon described a number of arguments in which James acted abusive toward her. In December 2010, he pushed her to the ground and placed his knee on her pinning her down. In April 2011 he threw a pizza box above Skylar's head. In the spring of 2011 he punched a hole in the bedroom door after they fought about a broken PlayStation. James also threatened to take Skylar to Mexico or Texas so Shannon could not find the child. Shannon testified that James called her abusive names in front of Skylar and stated that he hoped she would contract a sexually transmitted disease and that he wished she would die.

¶ 119 The court found that factor 8, the willingness and ability of each parent to facilitate a close and continuing relationship between the other parent and the child, clearly favored

Shannon. The guardian *ad litem* expressed concern about James's alienating Skylar from Shannon. She stated that on the recordings James played for her he would apologize to Skylar for having to spend time with her mother rather than encouraging her. She felt that James had spent "a lot of energy and time" trying to convince her that Skylar did not want to stay with Shannon.

¶ 120 Erin testified that when she and Shannon went someplace James would say to Skylar "mommy doesn't love you. She's leaving, she doesn't want to spend time with you. I hope mommy gets hit by a car." The court found Erin's testimony credible.

¶ 121 The court felt that Shannon recognized James's role as Skylar's father and was willing to facilitate a relationship with him. Shannon bought him a Father's Day card and gift from Skylar. James did not acknowledge Shannon on Mother's Day. Shannon testified that James is loving, caring, and protective of Skylar. James testified that Shannon was not a good mother and he did not have anything good to say about her.

¶ 122 The guardian *ad litem* wrote in her report that when she interviewed Shannon's parents out of her presence, they indicated that despite the conflict, they would try to foster Skylar's relationship with James because he was the child's father. The guardian *ad litem* noted that Ellyn only had negative things to say about Shannon.

¶ 123 The court found that "it was clear from the testimony and from observing the demeanor of the parties and their conduct, that Shannon is more capable of facilitating and encouraging a relationship between James and Skylar." The court also found that the guardian *ad litem*'s report was very thorough and credible.

¶ 124 The trial court's award of sole custody of Skylar to Shannon is not against the manifest weight of the evidence. There was more than sufficient evidence in the record to support the trial court's finding that it was in Skylar's best interests for Shannon to have custody.

¶ 125 Both parties argue that the trial court abused its discretion in distributing the property

and debt of the parties. They both argue that the court's distribution of property and debt obviated their ability to begin anew. Shannon asserts that the insurance settlement James received for the November 1, 2011, incident should be included as marital property. James argues that it should not be included because one cannot profit from one's own wrongdoing.

¶ 126 "Before a court may distribute property upon the dissolution of a marriage, the court must first classify the property as marital or nonmarital." *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 44. Under the Act there is a rebuttable presumption that all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage is marital property. 750 ILCS 5/503(b)(1) (West 2012). The party claiming that the property is nonmarital bears the burden of proving by clear and convincing evidence that the property acquired during the marriage is nonmarital because it falls within one of the exceptions listed in section 503(a) of the Act. *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 670 (2008).

¶ 127 In the instant case, the trial court took the case under advisement on October 11, 2012, and did not enter judgment until May 31, 2013. On November 13, 2012, James signed a release stating that in consideration of payment of \$62,500, he forever discharged Shannon and Geico Insurance Company from any claim or cause of action growing out of any personal injury resulting from the accident that occurred on November 1, 2011. He further agreed that it was a final settlement and disposition of the disputes as to the legal liability for the accident and as to the nature and extent of the injury or damage which James may have sustained. He agreed that he understood that Shannon and Geico denied liability and that the settlement was not to be construed as an admission of liability.

¶ 128 On December 7, 2012, Shannon filed a motion to reopen evidence and to supplement the record. She alleged that James had received a settlement and because the parties were still married it was a marital asset, and that he sought relief for medical bills and there was no evidence as to whether the settlement paid all the medical bills or whether the funds

received exceeded the medical bills. On December 26, 2012, Shannon filed another motion asking the trial court to reopen discovery so all documents regarding the settlement from the November 1, 2011, accident could be exchanged and to allow the parties to supplement the record with any additional information obtained from the limited discovery. The trial court did not reopen the evidence or allow the parties to supplement the record.

¶ 129 Both parties agree that the claim was settled for \$62,500, but there was no evidence of the net recovery by James. He asserted that he had \$40,000 in medical bills related to the accident. There is no evidence whether those bills were paid from the gross settlement amount received. Further, there is no evidence if attorney fees were deducted from the \$62,500.

¶ 130 The release is the only evidence in the record of James's claim. James did not introduce evidence of a lawsuit filed against Shannon or Geico Insurance. Shannon argues that the document evidences payment of an insurance claim, not the settlement from a pending tort lawsuit.

¶ 131 Shannon argues that because the settlement was received after their marriage and before the judgment of dissolution of marriage it is marital property. James asserts that the property is nonmarital because it falls under the exception of property obtained by judgment awarded to a spouse from the other spouse. 750 ILCS 5/503(a)(7) (West 2012).

¶ 132 In its judgment the court held:

"While normally the Court would reserve jurisdiction to determine how much, if any, of the lawsuit should be awarded to Shannon, the Court notes that the parties had already been separated since June 2011, and this incident occurred in November 2011, and further, James claims that Shannon is the person that is responsible for the claim arising. Therefore, the Court awards said proceeds to James except as provided herein. James shall pay twenty percent (20%) of the amount awarded to him of the

net proceeds as and for child support to Shannon."

From this language it is not clear whether the trial court considered the settlement marital or nonmarital property. The trial court should not have distributed the parties' property without classifying the settlement as marital or nonmarital property. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 44.

¶ 133 Section 503(d) of the Act requires the trial court to divide marital property in just proportions, considering 12 relevant factors set forth therein. 750 ILCS 5/503(d) (West 2012). Each case rests on its own facts, and the test of proper apportionment is whether it is equitable. *In re Marriage of Smith*, 2012 IL App (2d) 110522, ¶ 71. An equitable division does not necessarily mean an equal division, and, if circumstances warrant, a spouse may be awarded a larger share of the assets. *Id.* In order to divide the marital property in just proportions, the trial court must first establish the value of the assets. *In re Marriage of Schneider*, 214 Ill. 2d 152, 171 (2005). In reviewing the trial court's final property distribution, an abuse of discretion standard applies. *In re Marriage of Smith*, 2012 IL App (2d) 110522, ¶ 71.

¶ 134 In the instant case, the trial court abused its discretion in not classifying the settlement as marital or nonmarital property and in not reopening the proofs to determine how much money James actually received. James may have received the entire \$62,500 or may have received a small amount. Some of the factors the court considers in dividing marital property include the value of property assigned to each spouse and the relevant economic circumstances of each spouse when the division of property is to become effective. 750 ILCS 5/503(d) (West 2012). Without knowing how much money James received, the court could not determine the value of the property assigned to each spouse or what the economic circumstances of each spouse would be when the division of property became effective. The court did not have enough information to make an equitable distribution of the marital

property. We reverse the trial court's distribution of property and debts and remand to the trial court.

¶ 135 James argues that the trial court erred in setting his child support obligation at \$500 per month because he was unemployed and had no income at the time of the trial. James testified that at the time he was terminated his income was \$38,000. James was off work during part of 2011 for health reasons. He claims that just as he was about to go back to work Shannon hit him with her car in November 2011. He was terminated from his job on December 11, 2011. The trial court found that "James'[s] net income for child support purposes is \$2,500" and set child support at \$500 per month.

¶ 136 "The findings of the trial court as to net income and the award of child support are within its sound discretion and will not be disturbed on appeal absent an abuse of discretion." *In re Marriage of Boland*, 308 Ill. App. 3d 1063, 1066 (1999). Courts have the authority to compel parties to pay child support at a level commensurate with their earning potential. *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 1077 (2009). If present income is uncertain, a court may impute income to the payor. *Id.* To impute income to a noncustodial parent, the 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. *Id.* The appellate court reviews the determination of net income under the abuse of discretion standard. *Id.* In this case, James testified that he had employment in the insurance industry, but had not started work because he was afraid that Shannon would get one-half of his earnings if he was still married. The court could find that he was voluntarily unemployed. When last employed James had earned \$38,000 per year; therefore, net income of \$2,500 per month is commensurate with his earning potential. The court did not abuse its discretion in imputing income of \$2,500 per month to James.

¶ 137 Shannon argues that the trial court should have included gifts from James's family in determining the net income for child support purposes. She argues that from the time of separation until the date of trial, James received between \$60,000 and \$80,000 in gifts from his family and that this was not a departure from the usual course of affairs. James testified that he received \$60,000 to \$80,000 from his mother and grandmother as a loan to get through the divorce and that he was to pay it back when he went back to work and sold the house.

¶ 138 For purposes of determining child support, the General Assembly has adopted an expansive definition of what constitutes "net income." *In re Marriage of Rogers*, 213 Ill. 2d 129, 136 (2004). Annual gifts can be included as income. *Id.* at 137. Just because a gift may not be forthcoming in the future does not permit a gift that otherwise qualifies as income to be excluded from consideration. *Id.* at 138. The nonrecurring nature of the income stream is not irrelevant. *Id.* at 139. If the evidence shows that a parent is unlikely to continue receiving certain payments in the future, the court may consider that fact when determining net income for child support purposes. *Id.* James, Ellyn, and Marilyn all testified that the payments were loans. The trial court did not err in excluding the \$60,000 to \$80,000 that James received from his family in the year following the couple's separation from his net income.

¶ 139 James argues that the trial court abused its discretion in determining that the money he received as a settlement for the November 1, 2011, accident constituted income for child support purposes. He urges that including the settlement proceeds to be counted as income allows Shannon to profit from her own wrongdoing. The claim settled for \$62,500 gross. As discussed, the trial court failed to determine whether the settlement proceeds were marital or nonmarital property and failed to reopen discovery to establish how much of the money James received. The trial court also failed to determine whether any portion of the settlement

was for lost income. Because we remand the property division to the trial court to determine whether the proceeds from the settlement are marital property, we reverse the portion of the child support award ordering James to pay 20% of the net proceeds of the settlement to Shannon as child support. Upon remand the trial court should also determine whether any portion of the settlement should be treated as income for child support purposes.

¶ 140 Shannon argues that the trial court erred by failing to hear her interim attorney fee petition. She alleges that James paid his attorney \$54,458.94 and that his cumulative attorney fees totaled \$58,792.98. She argues that his affidavit of assets and liabilities showed no outstanding loans for attorney fees. James testified that his mother and grandmother loaned him the money to pay his legal fees. His mother and grandmother testified to this. Shannon argues that she borrowed \$43,725 from her aunt to pay legal fees and that she still owed \$3,378.90 in attorney fees. She argues that had the trial court heard her petition for interim fees at any time before trial, there is a strong likelihood that an interim fee order would have been entered.

¶ 141 The trial court will assess an interim fee award in an amount necessary to enable the petitioning party to participate adequately in litigation upon a finding that the party seeking the fees lacks access to assets or income to pay reasonable amounts and that the party from whom fees are sought has the financial ability to pay reasonable amounts. 750 ILCS 5/501(c-1)(3) (West 2012). When a party files a petition for interim attorney fees supported by one or more affidavits that delineate the relevant factors, the court shall assess an interim award after affording the opposing party a reasonable opportunity to file a responsive pleading. 750 ILCS 5/501(c-1)(1) (West 2012).

¶ 142 In the instant case, on July 1, 2011, Shannon filed a petition for attorney fees with supporting affidavits, requesting a nonevidentiary hearing. Shannon changed counsel and on August 3, 2011, her current counsel filed another petition for interim fees with supporting

affidavits. On September 1, 2011, James filed a response to the petition for interim fees along with an affidavit from his attorney setting forth the initial retainer and additional payments received. On December 2, 2011, James filed an additional affidavit of attorney fees providing updated information. Despite having the necessary information, the trial court took no action on the petition for attorney fees.

¶ 143 Section 501(c-1)(3) allows a court, after consideration of the relevant factors, to order a party to pay the petitioning party's interim attorney fees in an amount necessary to enable the petitioning party to participate adequately in the litigation. 750 ILCS 5/501(c-1)(3) (West 2012). Prior to ordering a party to pay, the court must find that the petitioning party lacks sufficient access to assets or income to pay reasonable attorney fees, and that the other party has the ability to pay the fees of the petitioning party. *Id.* One of the underlying principles of the Act is to make timely awards of interim fees to achieve substantial parity in the parties' access to funds for litigation. 750 ILCS 5/102(5) (West 2012). Because section 501(c-1)(1)(A) allows the court to consider nonmarital property within access to a party when making an award for interim fees, it is irrelevant whether the funds for attorney fees are derived from marital or nonmarital property. *In re Marriage of Earlywine*, 2013 IL 114779, ¶ 31. The trial court erred in failing to act on Shannon's petition for attorney fees. Section 501(c-1) was enacted to level the playing field by equalizing the parties' litigation resources. *Id.* ¶ 26. Section 501(c-1)(1) states that once the trial court has received a petition for interim fees with supporting affidavits and the opposing party has had an opportunity to file a responsive pleading, the court *shall* assess an interim award. 750 ILCS 5/501(c-1)(1) (West 2012). The trial court cannot just ignore a petition for interim attorney fees, but must act. In the instant case, there was testimony by Shannon, James, Ellyn, and Marilyn that Ellyn and Marilyn lent James money to pay his attorney fees. By not acting on Shannon's petition for interim attorney fees, the trial court may have failed to equalize the parties' litigation

resources. This, in turn, could have prejudiced Shannon by affecting how Shannon and her attorney handled the case.

¶ 144 The failure on the part of the trial court to reopen discovery to learn details of the settlement also affects the award for attorney fees. Shannon argues that the trial court erred by failing to order James to pay a greater contribution to her attorney fees. She asserts that James's behavior during the proceedings unnecessarily increased the cost of litigation. Shannon also argues that she has an inability to pay her attorney fees, that the property allocation favors James, and that there is a disparity in income and expenses because of the monetary gifts he receives from family. James asserts that the money he received was a loan not a gift.

¶ 145 A trial court's decision to award attorney fees in a dissolution case will not be overturned absent an abuse of discretion. *In re Marriage of Price*, 2013 IL App (4th) 120155, ¶ 39. Generally, it is the responsibility of the party who incurred the fees to pay them. *In re Marriage of Streur*, 2011 IL App (1st) 082326, ¶ 36. The court, after considering the financial resources of the parties, may order a party to pay a reasonable amount of the other party's attorney fees. 750 ILCS 5/508(a) (West 2012). When determining an award of attorney fees, the allocation of assets and liabilities, and the relative earning ability of each party should be considered. *In re Marriage of Streur*, 2011 IL App (1st) 082326, ¶ 36. The party seeking the award of attorney fees must establish an inability to pay and the other spouse's ability to pay. *Id.* Financial inability exists where requiring payment of fees would strip that party of his means of support or undermine his financial stability. *Id.*

¶ 146 In the instant case, the amount Shannon owes in attorney fees is greater than her annual salary. She does not have the ability to pay her attorney fees. An attorney fee award is interconnected with the overall allocations in the dissolution. *In re Marriage of Winne*,

239 Ill. App. 3d 273, 284 (1992). Because we are vacating the trial court's property distribution, we also vacate its award of attorney fees and remand for a reconsideration of that issue.

¶ 147 The trial court's order awarding sole custody of Skylar to Shannon was not against the manifest weight of the evidence where the trial court carefully considered the factors enumerated in section 602(a) of the Act and the custody award was in the child's best interest. The trial court abused its discretion in not classifying the settlement received for the November 1, 2011, incident as marital or nonmarital property and in not determining how much of the settlement James actually received. As a result, the trial court did not have adequate information to make an equitable distribution of the marital property. The trial court did not err in imputing net income of \$2,500 per month to James and setting child support at \$500 per month. However, because we remand the property settlement to the trial court to determine whether the proceeds from the settlement of the November 1, 2011, accident are marital property, we also vacate the portion of the child support award ordering James to pay 20% of the net proceeds of the settlement to Shannon as child support for further consideration of that issue. The trial court erred in failing to act on Shannon's petition for interim attorney fees. Because the trial court should consider the allocation of assets and liabilities when determining an award of attorney fees, we remand the issue of attorney fees to the trial court to consider in light of the new property and debt distribution.

¶ 148

CONCLUSION

¶ 149 For the foregoing reasons, the judgment of the circuit court of Madison County awarding child custody and setting child support at \$500 per month is affirmed. The property distribution, the attorney fee award, and the portion of the child support award ordering James to pay 20% of the net proceeds of the settlement to Shannon as child support are reversed and remanded.

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