2014 IL App (2d) 130684-U
No. 2-13-0684
Order filed September 17, 2014

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF PATRICK H. DAVIDSON,	)	Appeal from the Circuit Court of Lake County.
Petitioner-Appellant,	)	
and	)	No. 10-D-1523
ZENA P. DAVIDSON,	)	Honorable Jay W. Ukena,
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justice Birkett concurred in the judgment.
Justice Hutchinson dissented.

ORDER

¶ 1 *Held*: The judgment of dissolution was affirmed in part where the trial court did not abuse its discretion in awarding permanent maintenance of $14,167 per month, or in ordering attorney fees to be paid out of the marital estate prior to division; the judgment was reversed in part where the trial court abused its discretion in awarding child support of $5,000 per month.

¶ 2 In its judgment dissolving the marriage of Patrick and Zena Davidson, the trial court ordered Patrick to pay permanent maintenance of $14,167 per month and child support of $5,000 per month. The court also ordered all outstanding attorney fees to be paid from the marital estate before it was divided between the parties. Patrick appeals, challenging the maintenance and

child support awards and the disposition of attorney fees. He also challenges the court's decision to alternate between the parties the annual tax exemption for the parties' dependent child. Because we agree with Patrick that the amount of child support was an abuse of discretion, we reverse the award and remand for recalculation of support; otherwise, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Patrick and Zena were married on March 28, 1987, in Texas. During the marriage, the parties had three children, two of whom are emancipated. The parties' third child, Faith, was born in May 2004.

¶ 5 At the time the parties were married, Zena had a Master of Science degree in clinical audiology and worked as a licensed clinical audiologist at an annual salary of $21,000. After their first child was born, Patrick and Zena decided that Zena would stay at home. Zena remained unemployed for the duration of the marriage.

¶ 6 Patrick had a Bachelor of Science degree in geology and worked at Grainger. During the marriage, he advanced from shipping clerk to a senior vice president of the company. In addition to promoting Patrick, Grainger paid for him to obtain his Master of Business Administration degree from Northwestern University.

¶ 7 After the parties' second child was born, Patrick and Zena moved to Illinois to take advantage of a job promotion at Grainger. Patrick's continued success at Grainger kept the parties in Illinois. In 2005, the parties purchased for $1.425 million a 6,500 square foot home in Libertyville, Illinois. They spent an additional $200,000 on landscaping and a swimming pool. According to Zena, the family was never on a specific budget. Occasionally, when large bills came due, the family would "back off on spending" for a month or two.

¶ 8 In late 2008, Patrick was one of two executives at Grainger in contention for the presidency of the company's domestic operations. The company did not select Patrick, however, and instead offered him a choice between two lesser positions. It also offered to maintain his salary level until the end of 2008, but made no guarantees about his salary beyond that date.

¶ 9 According to Patrick, faced with a lesser position and an uncertain future at Grainger, he discussed with Zena the idea of retiring. Patrick testified that he explained to Zena that he risked losing $5 million in long-term incentive pay, consisting of stock options and grants, if he did not retire. Patrick negotiated with Grainger a package under which he would cease working at the end of 2008 but continue receiving a salary until the end of 2010, at which point the $5 million in stock options and grants would vest. Patrick testified that Zena agreed that retiring was the "right thing to do" under the circumstances. Patrick accepted the package and left his employment at Grainger.

¶ 10 When asked if she "supported Pat in his retirement from Grainger," Zena testified that she did, based on what he told her. Zena testified that Patrick told her "the reasons why he was leaving the company, not retiring from work, but why he was voluntarily leaving Grainger."

¶ 11 Patrick testified that, after he left Grainger in 2008, he spent a year using the services of a transition firm that "helps you determine what your next step is in your career." With the firm's help, he drafted a "vision map" of what possible careers he could have. The map included three categories: (1) careers in the not-for-profit sector; (2) entrepreneurship opportunities, such as buying a company and running it; and (3) careers in large corporations. A career in the third category was "the last thing" Patrick wanted to do.

¶ 12 In 2008 or 2009, Patrick began serving on the boards of various not-for-profit organizations, including the Salvation Army. Even though a corporate career was "the last

thing" he wanted to do, in 2009 and 2010 Patrick interviewed for positions with at least two corporations. He had one interview for an officer position with a company called U-Line. He had three interviews with a corporation called Aggreko. After he became ill from food poisoning during a dinner with the company's president, however, the interview process stopped. Patrick described that experience as "probably a turning point" for him, and, in January 2011, he decided to stop interviewing for corporate positions. The position at Aggreko would have paid "in excess of $100,000 per year." Patrick also performed consulting work for one or two businesses after he left Grainger, but none of the work was paid.

¶ 13 When asked if he had any plans to return to work, Patrick testified that he did not. He emphasized that he enjoyed serving on the not-for-profit boards and testified that he "could envision [him]self working at a mission of some type *** but not even for pay." He testified that the most important thing to him was raising his daughter, Faith, and that he was not willing to sacrifice his time with her for a paid position.

¶ 14 Patrick's income tax returns revealed the following income from employment during his final four years at Grainger: $814,570 in 2005; $509,533 in 2006; $703,715 in 2007; and $921,043 in 2008. Patrick testified that these amounts included income from exercised stock options and grants. According to Patrick, his base salary in 2008 was $364,000 and he received performance bonuses of approximately $180,000. When asked what his salary range might be if he chose to return to work, Patrick testified that he could "only answer what [he] made at the end of 2008," which was the "peak of [his] marketability." He further testified that he had been out of the workforce for four years, which meant he had lost "a ton of marketability." He also testified that he was unlikely to return to the corporate world, because he wanted to do something that was "more meaningful and impactful."

¶ 15 When asked how he expected to fund his living expenses in the future, Patrick testified that his Schwab investment account, which held approximately $2.4 million at the time of trial, earned 6% in 2012 and 8% in 2011. He testified that, assuming he could continue earning 6% to 8% annually after the investment account was divided between the parties, he could fund a portion of his expenses with the earnings. Patrick further testified that, if he ran out of money, "so be it." His "number one concern" was raising Faith.

¶ 16 When Patrick's attorney asked Zena on cross-examination if she had considered what return she might make on any investments awarded to her, she testified that she had not consulted anyone about it. She testified that the money she currently had in an account earned "[v]ery little."

¶ 17 Regarding her employment prospects, Zena testified that she had no plans to return to work. According to Zena, before she could seek a position as a clinical audiologist, she would have to complete additional schooling and obtain licensure in Illinois. The parties stipulated that, in order to be licensed as a clinical audiologist in Illinois, a person must have earned a Doctor of Audiology degree, which Zena did not have. Zena testified that she was not opposed to becoming employed "at some point" in the future.

¶ 18 At the time of trial, Zena was living in the marital home. However, the parties had listed the home for sale, because neither Zena nor Patrick wished to live in it following the dissolution. Zena testified that, once the marital home sold, she hoped to find a smaller house in Faith's school district. She testified that a probable price range for her next home would be between $400,000 and $600,000.

¶ 19 Patrick was living in a home that he purchased in June 2012 for $1.28 million cash. He lived there with his fiancé, who was unemployed and did not contribute to household living expenses.

¶ 20 In addition to the marital home, the home that Patrick purchased in 2012, and the Schwab investment account containing $2.4 million, the marital assets included two timeshare units in Orlando, Florida; a cabin in Texas; retirement accounts totaling $1,326,723; various vehicles, boats, and motorcycles; and additional investment and checking accounts containing over $200,000. The entire marital estate was valued at $6,885,149.

¶ 21 On June 3, 2013, the trial court issued a judgment for dissolution of marriage. The court found that Patrick was 48 years old and in "excellent health," while Zena was 51 years old and in "generally good health," other than having a history of depression and anxiety. The court incorporated into the judgment the parties' joint parenting agreement, which awarded the parties joint custody and equal parenting time. The court divided the marital estate equally between the parties, including the proceeds from the sale of the marital home once it sold.

¶ 22 Relevant to maintenance, the court found that Zena's earning capacity would never rise to the level of Patrick's earning capacity, which was "greatly superior" to hers. It further found that Zena impaired her earning capacity and contributed to Patrick's success at Grainger by caring for the home and children while he worked. Zena's age and lack of work history would "work against her in reentering the job market." The court found that the parties' standard of living during the marriage was "a life of luxury." Considering these factors and the 25-year length of the marriage, the court concluded that Zena was entitled to permanent maintenance.

¶ 23 In determining the amount of maintenance, the court concluded that the evidence warranted imputing income to Patrick. The court found "disingenuous" Patrick's contention that

he "retired" from working at the age of 44 in 2008. In making this credibility determination, the court considered that Patrick continued interviewing for jobs after leaving Grainger, became engaged to a woman who did not work and had no plans to work, and purchased a new home for $1.28 million cash. The court found that he was "continuing to live the lifestyle he enjoyed during the marriage despite the fact his assets will not support this lifestyle for himself, his fiancée, and his daughter Faith, indefinitely." The court imputed income of $544,000 per year, which, according to the court, was the amount Patrick testified he could earn were he to return to work. The court found this amount to be "conservative" but noted that it was the only estimate that either party had provided. The court further found that Zena's monthly living expenses on her financial affidavit exceeded $13,996, which did not include any expense for a mortgage, as Zena currently was living in the unencumbered marital home. The court noted that Zena might have a mortgage once the marital home sold and she moved to a new residence. The court set maintenance at $14,167 per month.

¶ 24 Regarding child support, the court noted that the guideline amount of support would be $5,928 based on the income imputed to Patrick. However, taking into account "the shared time the parties have with the minor child," the court deviated from the guideline amount and awarded child support of $5,000 per month. The court ordered that Patrick and Zena would alternate years in claiming the child as a dependent for income tax purposes.

¶ 25 With respect to attorney fees, the court ordered that "[a]ny outstanding attorney fees shall be paid from the marital estate before division."

¶ 26 On July 2, 2013, Patrick timely filed a notice of appeal.

¶ 27 II. ANALYSIS

¶ 28 On appeal, Patrick challenges the court's maintenance award, its child support award, and its decision to order all outstanding attorney fees paid from the marital estate prior to division between the parties. He also challenges the court's decision to alternate between the parties the tax exemption for the parties' dependent child.

¶ 29 A. Maintenance

¶ 30 Patrick contends that the trial court abused its discretion in determining the amount of maintenance because it failed to consider the income Zena could earn from employment or from investing the assets awarded to her. He also contends that it erroneously imputed income to him. Finally, Patrick argues that the court abused its discretion in awarding permanent maintenance with no provision for review.

¶ 31 Section 504(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/504(a) (West 2012)) authorizes a trial court in dissolution proceedings to award to either spouse maintenance in amounts and for periods of time as the court deems just. "The benchmark for determination of maintenance is the reasonable needs of the spouse seeking maintenance in view of the standard of living established during the marriage, the duration of the marriage, the ability to become self-supporting, the income-producing property of a spouse, if any, and the value of the non[ ]marital property." (Internal quotation marks omitted.) *In re Marriage of Selinger*, 351 Ill. App. 3d 611, 615 (2004). "[C]ourts have wide latitude in considering what factors should be used in determining reasonable needs, and the trial court is not limited to the factors listed in the governing statute." (Internal quotation marks omitted.) *In re Marriage of Brankin*, 2012 IL App (2d) 110203, ¶ 10. We will not disturb a maintenance award absent an abuse of discretion. *In re Marriage of Smith*, 2012 IL App (2d) 110522, ¶ 46. A court abuses its

discretion when no reasonable person would take the view adopted by the trial court. *In re Marriage of Arjmand*, 2013 IL App (2d) 120639, ¶ 32.

¶ 32 *i. Zena's Earning Capacity*

¶ 33 Patrick argues that the trial court abused its discretion in failing to consider the income Zena could earn from employment. He contends that, even if Zena could not work in the audiology field without further education and training, she could work somewhere. At the very least, according to Patrick, she could work part-time in "a minimum wage job."

¶ 34 The trial court considered Zena's employment prospects. It found that Zena stopped working upon the birth of the parties' first child and remained unemployed for over 20 years. The court also found that Zena contributed to Patrick's success at Grainger by caring for the home and children while Patrick worked long hours, traveled for work, and returned to school to earn his Master of Business Administration degree. The court found that Zena's age and lack of work history would impair her ability to find employment sufficient to maintain the standard of living during the marriage. The court concluded that "Zena's earning capacity will never rise to the level of Patrick's earning capacity of [*sic*] as a corporate executive."

¶ 35 Because the record shows that the trial court reasonably considered Zena's employment prospects and earning capacity in fashioning the maintenance award, we cannot say that it abused its discretion on this basis. See *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 657 (2008) (holding that the trial court did not abuse its discretion where the record showed that it considered the wife's limited employment prospects). As Patrick recognizes in his brief, "the court had no evidence of the type of positions Zena might fill." The court considered the evidence before it and reasonably chose not to impute any income to Zena. We reject Patrick's contention that, at a minimum, the court was required to impute income to Zena from a part-

time, minimum-wage job. Although one of the policies underlying the Act's maintenance provisions is to enable dependent former spouses to become financially independent, that " 'goal is often not achievable in light of the dependent former spouse's entitlement to maintain the standard of living established during the marriage.' " *Selinger*, 351 Ill. App. 3d at 618 (quoting *In re Marriage of Lenkner*, 241 Ill. App. 3d 15, 25 (1993)). Given the wide disparity in the parties' earning capacities, and the high standard of living during the marriage, the court reasonably concluded that the goal of financial independence was not achievable.

¶ 36 *ii. Zena's Potential Investment Income*

¶ 37 Patrick next argues that the trial court abused its discretion in failing to consider the income Zena could earn from investing the marital assets awarded to her in the dissolution. He contends that Zena received over $2.2 million in liquid assets in the dissolution, not including nearly $640,000 in retirement accounts and the cash she will receive once the marital home sells. According to Patrick, Zena's $2.2 million would earn annual income of $110,321.75 if invested at a 5% return. Patrick further notes that he testified to earning an 8% return on his investments in 2011 and 6% in 2012, which he contends supports his position.

¶ 38 When fashioning a maintenance award, a trial court is to consider, among other factors, "the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance." 750 ILCS 5/505(a)(1) (West 2012). Although a court is required to consider this factor, it is not required to apply various rates of return and make specific findings regarding the amount of income a party's assets may produce. *In re Marriage of Nord*, 402 Ill. App. 3d 288, 295 (2010); *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 656 (2008).

¶ 39 We cannot say that the court abused its discretion in failing to consider the income-producing potential of the assets awarded to Zena. The parties presented the trial court with minimal evidence relevant to determining the income-producing potential of the assets. Although Patrick testified that he earned an 8% return on his investments in 2011 and 6% in 2012, the record contains only a single statement for his Schwab investment account for the period from June 1 to 30, 2012. Patrick produced no other statements for his investment account from 2012, and none from 2011 or earlier years. The record also contains one page of a nine-page statement for one of Patrick's retirement accounts. Based on this minimal evidence, the court had little from which it could determine the income-potential of the assets.

¶ 40 We further note that, because the trial court divided the marital assets equally, any failure to attribute to Zena income earned from investments was harmless. Absent from Patrick's brief is any recognition that the trial court also did not attribute to him any income from investments. Had the court decided to attribute income to Zena from her half of the assets, the income would have been offset by a similar increase to Patrick's income from his half of the assets.

¶ 41 Finally, it would have been speculative for the trial court to determine how much of the assets awarded to Zena will be available for investment. Although Zena testified that she plans to purchase a smaller home, she could, as Patrick did, invest a large portion of her assets into a more expensive home, which would earn no income. "A spouse seeking maintenance should not be required to sell assets or impair capital to maintain herself in a manner commensurate with the standard of living established in the marriage as long as the payor spouse has sufficient assets to meet both his needs and the needs of his former spouse." *In re Marriage of Drury*, 317 Ill. App. 3d 201, 207 (2000). Given that Patrick has chosen to use a large portion of his assets to maintain

a certain standard of living (*i.e.*, by purchasing a $1.28 million home for cash), it would be improper to require Zena to place all of her assets in income-producing investments.

¶ 42 *iii. Income Imputed to Patrick*

¶ 43 Patrick argues that the trial court abused its discretion in imputing income to him. He contends that Zena agreed to his early retirement from Grainger and that his retirement was in good faith, occurred more than two years before the marriage broke down, and was not an attempt to evade financial responsibility for Zena or Faith.

¶ 44 The problem with Patrick's argument is that the trial court did not find credible his testimony that he "retired" from work when he left Grainger in 2008. Instead, the court considered both Patrick's actions and his financial expenditures after leaving Grainger in concluding that his testimony lacked credibility. The court noted that, upon leaving Grainger, Patrick used the services of a transition firm, which helped him plan the next step in his career, and continued interviewing for corporate positions. The court further noted that, while dissolution proceedings were pending, Patrick purchased a $1.28 million home using cash, became engaged to a woman who was not employed and had no plans to be employed, and maintained the high standard of living of the marriage. The court reasoned that, if he truly were "retired," Patrick would be unable to support his lifestyle indefinitely.

¶ 45 A trial court is in the best position to determine a witness's credibility, and we will not overturn a credibility finding unless it is against the manifest weight of the evidence. *In re Marriage of Cerven*, 317 Ill. App. 3d 895, 903 (2000). A finding is against the manifest weight of the evidence if the opposite conclusion is clearly evident. *Arjmand*, 2013 IL App (2d) 120639, ¶ 32.

¶ 46 The trial court's credibility finding was not against the manifest weight of the evidence. Not only did Patrick continue to live at a standard of living that was not sustainable indefinitely, but also—and more importantly—he continued to interview for corporate positions as late as the end of 2010 or the beginning of 2011. Although Patrick testified that he had no desire to return to the corporate world, it was not until January 2011 that he decided to stop interviewing with corporations. Patrick described his food poisoning incident during the final interview with Aggreko's president as a "turning point," after which he knew he would not return to the corporate world. The obvious corollary to this testimony was that, prior to the food poisoning incident, he did not yet know that he would not return to the corporate world. This undermines his testimony that he and Zena agreed he would permanently stop working in 2008.

¶ 47 Although Zena testified that she agreed with Patrick's decision to retire from Grainger based on what he told her, she clarified that Patrick told her "the reasons why he was leaving the company, not retiring from work, but why he was voluntarily leaving Grainger." Zena's testimony further supports the court's finding that Patrick had not "retired" from work.

¶ 48 Patrick asserts that his "early retirement was part of a plan the parties had discussed for years." According to Patrick, the parties "met with a financial counselor as early as 2004 and projected that, if Pat remained employed, they would be able to retire back to Texas in 2011." Although Patrick's statements imply that he and Zena had agreed that he would retire in 2011 so that they could return to Texas, the record does not support this conclusion. Patrick's specific testimony was that, as early as 2004, the parties met with financial planners and had conversations about "when would be the time that technically I could retire financially to where if we wanted to we could leave the area." Nothing in his testimony indicated that, as a result of those conversations, the parties actually agreed that Patrick would retire early.

¶ 49 Given that the trial court justifiably doubted Patrick's testimony that he had retired from work, it was not improper to impute income to him. It is well established that courts have the authority to compel parties to pay support at a level commensurate with their earning potential. *In re Marriage of Adams*, 348 Ill. App. 3d 340, 344 (2004). A court may impute income to a spouse obligated to pay child support or maintenance where it finds that the spouse (1) is voluntarily unemployed, (2) is attempting to evade a support obligation, or (3) has unreasonably failed to take advantage of an employment opportunity. *In re Marriage of Lichtenauer*, 408 Ill. App. 3d 1075, 1089 (2011).

¶ 50 The parties focus their arguments on the first circumstance—whether Patrick is voluntarily unemployed. Patrick contends that he is not voluntarily unemployed "as that term is meant in the various relevant cases." However, Patrick distinguishes the cases he discusses by arguing that his retirement from Grainger was agreed upon by the parties prior to the breakdown of the marriage. As discussed above, the trial court reasonably found that Patrick's testimony in this respect lacked credibility. Thus, his attempt to distinguish other cases on the basis of any agreement with Zena is unavailing.

¶ 51 Patrick maintains that this case is most similar to *In re Marriage of Schuster*, 224 Ill. App. 3d 958 (1992). In *Schuster*, prior to the breakdown of the marriage, the husband left his job as an attorney to become a self-employed commodities trader. *Schuster*, 224 Ill. App. 3d at 962. He earned significantly less money as a trader than he earned as an attorney. *Schuster*, 224 Ill. App. 3d at 967. In calculating the husband's child support obligation, the trial court found that the husband's career change was made in bad faith and imputed income of $70,000 to him. *Schuster*, 224 Ill. App. 3d at 970. The appellate court reversed, holding that it was an abuse of discretion to impute income to the husband. *Schuster*, 224 Ill. App. 3d at 974. The court

reasoned that the evidence established that the husband changed careers in good faith, with the wife's consent, and prior to the breakdown of the marriage. *Schuster*, 224 Ill. App. 3d at 974.

¶ 52 *Schuster* is distinguishable because the evidence here did not establish that Patrick ceased working permanently with Zena's consent. Rather, as we have discussed, the court found that this aspect of Patrick's testimony lacked credibility, and its finding was not against the manifest weight of the evidence. Patrick testified that he did not decide until January 2011 to stop interviewing for corporate positions and that his number one concern was caring for Faith, which he would not "trade *** for anything right now." Patrick's testimony squarely placed him within the category of "voluntarily unemployed," and it was proper to impute income to him.

¶ 53 Although not directly on point, *In re Marriage of Smith*, 77 Ill. App. 3d 858 (1979), provides support for our conclusion. In *Smith*, the husband, who was 54 years old and in good health, retired during the dissolution proceedings from his position earning $50,000 per year. *Smith*, 77 Ill. App. 3d at 860. He had worked 60 to 80 hours per week and retired because he "no longer wanted to work at such a demanding job." *Smith*, 77 Ill. App. 3d at 860. The trial court awarded the wife only $100 per week in maintenance, and the appellate court reversed, holding that the maintenance obligation should have been based on the husband's previous $50,000 annual salary. *Smith*, 77 Ill. App. 3d at 862, 864. It reasoned that "the husband's use of the word 'retirement' to describe his voluntary leaving of his job and subsequent reduction of his income does not automatically confer some preferred status upon his actions." *Smith*, 77 Ill. App. 3d at 862. The court noted that whether a spouse who owes a maintenance obligation may voluntarily retire depends upon a variety of factors, including: the party's age, health, and motives in retiring; the timing of the retirement; and the ability of the spouse receiving maintenance to support himself or herself. *Smith*, 77 Ill. App. 3d at 863. Although the court questioned the

husband's motives in retiring, it also emphasized that the husband had not reached the "customary retirement age in our society" and was in good health. *Smith*, 77 Ill. App. 3d at 863.

¶ 54 Here, Patrick was only 48 years old when the judgment of dissolution was entered, and the trial court found that he was in "excellent" health. Even though the trial court did not question Patrick's motives in leaving his employment at Grainger, given Patrick's young age and good health, the trial court was not required to accept that he was retired for purposes of calculating maintenance. Patrick is free to choose his own lifestyle and not work if he so desires, but the trial court is not bound by his choices in determining his maintenance obligation. See *Smith*, 77 Ill. App. 3d at 862-63 (" '[The husband] is free to choose his own lifestyle and to cease [working] if he can afford such luxury. However, * * *, certain responsibilities assumed must be met within the confines of the law.' " (quoting *In re Marriage of McCarthy*, 533 P.2d 928, 930 (Colo. App. 1975))).

¶ 55 Patrick also argues that the trial court's $544,000 imputed income figure was "based on an erroneous interpretation of his testimony concerning possible income." Patrick challenges the court's finding that $544,000 was the amount he testified he could earn were he to return to work. He contends that the court misinterpreted his testimony.

¶ 56 We disagree with Patrick that the court misconstrued his testimony. The relevant testimony occurred during the guardian *ad litem*'s [GAL's] cross-examination of Patrick. The GAL asked him if his base salary at Grainger would "approximately" be what he would earn if he were to return to work. Patrick's attorney objected, arguing that it would be speculative to estimate how much Patrick could earn. The GAL responded that he "asked him based on his base rate." The court allowed Patrick to respond, and he testified: "That's the way I was going to answer the question. I can only answer what I made at the end of 2008, probably at the peak

of my marketability, which was 364,000 I think in a salary, and another hundred eighty in a bonus." Patrick further testified that he had been out of the workforce for four years and that his marketability had therefore declined, but he did not testify to a lower estimated salary.

¶ 57 Based on the evidence before it, the trial court reasonably imputed income to Patrick of $544,000, which was the only salary figure either party provided. Patrick gave that figure in response to the GAL questioning him whether his base salary at Grainger would be his expected salary were he to return to work. Although Patrick testified that his marketability had declined, he did not testify how or to what extent that would affect his future expected salary. The only other income figures the court had before it were the figures on Patrick's income tax returns, which showed total income from employment of $814,570 in 2005; $509,533 in 2006; $703,715 in 2007; and $921,043 in 2008. As the trial court noted, the imputed income figure was higher than Patrick's income in 2006, but was significantly lower than his income in 2005, 2007, and 2008. Based on the record before us, we cannot say that the court abused its discretion in imputing income to Patrick of $544,000.

¶ 58 The dissent concludes that the record does not support imputing this amount of income to Patrick, citing a California Court of Appeal decision for the principle that a spouse's ability to continue earning a specific salary in the future must be evidenced, not merely suspected. *Infra*, ¶ 97. The principle that a trial court's decision must be based on evidence is precisely why we must affirm on the record before us. At trial, Patrick adopted an all-or-nothing strategy with respect to maintenance. In his written closing argument, his position was that the trial court should not impute any income to him or award any maintenance to Zena. Patrick did not propose any alternative position. Perhaps because of this no-compromise strategy, Patrick presented no evidence that his earning capacity at the time of trial differed from his earning

capacity in 2008. Consequently, the trial court based its decision on the only evidence it had before it—specifically, the evidence of Patrick's earning history. Given Patrick's high earning history reflected in his tax returns, the court could have imputed income in a much greater amount. Instead, the court chose to use the $544,000 figure to which Patrick testified. In light of Patrick's failure to present any evidence of a reduced earning capacity, we cannot say that this was an abuse of discretion.

¶ 59 The dissent suggests that the court could have imputed income to Patrick based on the median salary of chief executives at not-for-profit charities in the Midwest. *Infra*, ¶ 98. Courts are not to act as advocates for the parties "but must take the case as the parties have presented it." *In re Marriage of Drewitch*, 263 Ill. App. 3d 1088, 1093 (1994). While a better strategy for Patrick may have been to present evidence that his earning capacity had declined, he did not do so. In fact, although he testified that he wanted to do something that was "more meaningful and impactful" than working in the corporate world, he testified that he "could envision [him]self working at a mission of some type *** but not even for pay." He did not testify that his current earning capacity was commensurate with the salary of a chief executive of a not-for-profit corporation. Far from "punishment by the trial court in the imputation of income in an amount unsupported by the record" (*infra*, ¶ 98), the court's decision was a result of taking the case as the parties presented it.

¶ 60 *iv. Decision to Award Non-Reviewable Permanent Maintenance*

¶ 61 Patrick's final argument with respect to maintenance is that the court abused its discretion in awarding permanent maintenance with no provision for review. He argues that the court should have made maintenance reviewable after a period of years because the evidence indicated that Zena's financial circumstances were likely to change in the near future.

¶ 62 Generally, unless the parties agree otherwise, all maintenance awards are reviewable. *Selinger*, 351 Ill. App. 3d at 617. The only difference between an award of permanent maintenance with no provision for review and a fixed award reviewable after a period of years is the placement of the burden of proof. *In re Marriage of Mayhall*, 311 Ill. App. 3d 765, 770 (2000). The party seeking to modify or terminate a permanent maintenance award has the burden of proving a substantial change in circumstances. 750 ILCS 5/510(a-5) (West 2012). Where a maintenance award is reviewable by its terms after a period of years, on the other hand, the party seeking a modification after the period has run has no such burden. *Blum v. Koster*, 235 Ill. 2d 21, 35-36 (2009). Instead, upon review, the court has the discretion to continue maintenance or to modify or terminate maintenance. *Blum*, 235 Ill. 2d at 36.

¶ 63 We disagree with Patrick that the court abused its discretion by failing to make maintenance reviewable. In arguing that maintenance should have been reviewable, Patrick focuses on Zena's testimony that, once the marital home is sold, she plans to move to a smaller residence with an estimated cost of between $400,000 and $600,000. According to Patrick, this establishes that her financial circumstances are likely to change and that maintenance should have been reviewable. However, in its judgment of dissolution, the court acknowledged that the marital residence was to be sold and that Zena would be moving into a new residence. The court noted that Zena's financial affidavit included no mortgage expense and that she might have a mortgage after she purchased a new residence. Given that the court was aware of Zena's plans to move to a new residence once the marital home sold, we cannot say that it overlooked this factor or failed to take it into account in deciding to award permanent maintenance without a provision for review. We further note that the only consequence of the court's decision is the placement of the burden of proof on Patrick to show a substantial change in circumstances, and he offers no

argument for why that was improper. In the event that Zena does move and incurs lower living expenses, this may form the basis for a petition to modify maintenance based on a substantial change in circumstances.

¶ 64 The dissent asserts that the trial court "disregard[ed]" Zena's testimony that she might return to work in the future (i*nfra*, ¶ 96), and concludes that Zena's "possible future income" made permanent maintenance with no provision for review an abuse of discretion (*Infra*, ¶ 100). However, Zena testified that she had no plans to return to work. Although she also testified that she was not opposed to becoming employed "at some point" in the future, it would be pure speculation to make maintenance reviewable based on Zena's "possible future income." As we discussed above, while one goal of maintenance is to enable former spouses to become financially independent, that " 'goal is often not achievable in light of the dependent former spouse's entitlement to maintain the standard of living established during the marriage.' " *Selinger*, 351 Ill. App. 3d at 618 (quoting *Lenkner*, 241 Ill. App. 3d at 25)). Here, there was no evidence that Zena would ever become employed at a salary that would enable her to support herself at the standard of living established during the marriage.

¶ 65 B. Child Support

¶ 66 Patrick argues that the trial court abused its discretion in awarding Zena child support of $5,000 per month. As he did when addressing maintenance, he argues that the amount of child support was an abuse of discretion because the court improperly imputed income to him, while failing to consider the income that Zena could earn from employment or investments. Because we resolved those arguments above, we need not address them again.

¶ 67 Patrick additionally argues that the trial court failed to calculate properly his net income for child support and that the amount of child support awarded was excessive in light of the

child-related expenses listed on Zena's financial affidavit. We review a child support award for an abuse of discretion. *In re Marriage of Sobieski*, 2013 IL App (2d) 111146, ¶ 53. A court abuses its discretion when no reasonable person would take the view adopted by the trial court. *Arjmand*, 2013 IL App (2d) 120639, ¶ 32.

¶ 68 *i. Net Income for Child Support*

¶ 69 Generally, in ordering a non-custodial parent to pay child support, a trial court is to determine a minimum amount of support based upon statutory guidelines. 750 ILCS 5/505(a)(2) (West 2012). For a single child, the statutory guideline is 20% of the supporting party's net income. 750 ILCS 5/505(a)(1). "Net income" for purposes of child support means the total of all income from all sources, minus federal and state income taxes, social security payments, and certain other deductions. 750 ILCS 5/505(a)(3) (West 2012).

¶ 70 Patrick contends that the trial court erred in setting child support because it failed to calculate properly his net income for child support. He points out that the income the court imputed to him was a gross amount—$544,000 per year, or $45,333.33 per month. He then contends that "there was no information concerning the specific amounts to be deducted" from the imputed income, "such as the various taxes, retirement contributions, [and] dependent and individual health and hospitalization insurance premiums." Thus, according to Patrick, "there was no reliable information" showing how the court calculated the guideline child support.

¶ 71 There are two problems with Patrick's argument. First, the statutory child support guidelines listed in section 505(a)(1) of the Act are not obligatory when physical custody of a child is shared, as it is here. *In re Marriage of Smith*, 2012 IL App (2d) 110522, ¶ 60. Thus, the court was not required to calculate Patrick's net income or the guideline amount of child support. Second, even though the court chose to calculate Patrick's net income, its calculation was

reasonable under the circumstances. The court calculated the guideline amount of support to be $5,928 per month. Given that the court imputed income to Patrick of $45,333.33 per month, this means that, in calculating guideline support, the court deducted $15,693.33, or 34.6%, from Patrick's gross imputed monthly income.[1] Based on the evidence before it, and given that the court was dealing with an imputed income figure, we cannot say that this was an abuse of discretion.

¶ 72 *ii. Zena's Child-Related Expenses*

¶ 73 Patrick next argues that a child support award of $5,000 was an abuse of discretion in light of Zena's financial affidavit, which listed child-related expenses of only $992 per month. Zena responds that absent from the $992 figure were any expenses relating to housing, food, or transportation, all of which fall within the cost of supporting a child.

¶ 74 When physical custody of a child is shared, a trial court ordering child support has two options. It can calculate the guideline amount of support and apportion the percentage between the parties, or it can disregard the statutory guidelines and instead consider the factors listed in section 505(a)(2) of the Act. *Smith*, 2012 IL App (2d) 110522, ¶ 59. Those factors include the financial resources and needs of the child and both parents; the standard of living the child would have enjoyed had the marriage not been dissolved; and the physical, mental, emotional, and educational needs of the child. 750 ILCS 5/505(a)(2) (West 2012). While child support in cases involving high-income parents should not be limited to a child's "shown needs," a child support

[1] Twenty percent of net income of $29,640 would produce a guideline child support of $5,928. Therefore, the trial court deducted $15,693.33 from Patrick's gross monthly income of $45,333.33 before calculating the guideline amount of support.

award is not intended to be a windfall. *In re Marriage of Lee*, 246 Ill. App. 3d 628, 643-44 (1993).

¶ 75 Here, the court calculated the guideline amount of child support to be $5,928 per month, then awarded child support of $5,000 per month after "tak[ing] into account the shared time the parties have with the minor child." In essence, the trial court calculated the guideline amount of support and then apportioned it between the parties, which it was entitled to do. *Smith*, 2012 IL App (2d) 110522, ¶ 9. Nevertheless, because the child support award so far exceeded Zena's child-related expenses, we agree with Patrick that it was an abuse of discretion.

¶ 76 Zena argues that the $992 per month in child-related expenses listed on her financial affidavit did not include any portion of her monthly housing, food, or transportation costs, all of which constitute part of the cost of supporting a child. We agree with her that all of these expenses constitute part of the cost of supporting Faith. However, the trial court's permanent maintenance award of $14,167 per month exceeded the sum of all of Zena's monthly expenses listed in her financial affidavit, including her housing, food, and transportation expenses, as well as her $992 in child-related expenses. Were we to affirm the child-support award by apportioning part of Zena's housing, food, and transportation expenses to Faith, we essentially would be counting the expenses twice—once in calculating maintenance and once in calculating child support. This would be a windfall to Zena.

¶ 77 Moreover, pursuant to parties' joint parenting agreement, which was incorporated into the judgment of dissolution, Patrick and Zena have joint physical custody of Faith, using an alternating week schedule. Thus, in addition to paying child support to Zena, Patrick will bear the cost of supporting Faith half of the time while she is in his physical custody. Conversely, Zena will incur lower child-related expenses than she would if she had physical custody of Faith

100% of the time. In addition, the judgment of dissolution made Patrick responsible for 100% of Faith's medical and dental insurance, which further lessens Zena's financial burden in supporting Faith.

¶ 78 Zena contends that the amount of child support was reasonable given the standard of living Faith would have enjoyed had the marriage not been dissolved. Although we agree with Zena that the trial court was not required to limit its child support award to Faith's "shown needs," no evidence at trial established that a child support award of $5,000 was necessary to maintain Faith's standard of living while she is in Zena's physical custody one-half of the time. As we discussed above, Zena's maintenance award exceeds the total of all of her monthly expenses, including housing, food, and transportation expenses. Thus, many of the basic expenses incurred in supporting a child are already accounted for. Furthermore, the $992 in child-related expenses listed on Zena's affidavit included $300 for vacations, $230 for entertainment, $197 for clothing, and $122 for summer camps, all of which relate to maintaining Faith's standard of living. Even assuming that Faith is entitled to a higher standard of living than these expenses reflect, it is difficult with the evidence presented to imagine any scenario in which a child support award of $5,000 would be necessary to support her previous standard of living while she is in Zena's physical custody one-half of the time.

¶ 79 Based on the foregoing, we reverse the child support award and remand to the trial court to determine a new child support award.

¶ 80 *iii. Dependent Child Exemption*

¶ 81 Patrick's final argument related to child support is that the trial court abused its discretion in ordering the parties to alternate claiming Faith as a dependent for tax purposes. Zena responds that, although she believes the trial court reasonably ordered the parties to alternate the

exemption, she "would not object to Patrick receiving the exemption every year, provided that he pays the amounts of maintenance and child support ordered by the trial court."

¶ 82 The allocation of the dependent child tax exemption is an element of child support. *In re Marriage of Moore*, 307 Ill. App. 3d 1041, 1043 (1999). A trial court should allocate the exemption based on which parent will be contributing the majority of the child's support. *Moore*, 307 Ill. App. 3d at 1043. We will not reverse a trial court's allocation of the exemption absent an abuse of discretion. *In re Marriage of DiFratta*, 306 Ill. App. 3d 656, 663 (1999). A court abuses its discretion when no reasonable person would take the view adopted by the trial court. *Arjmand*, 2013 IL App (2d) 120639, ¶ 32.

¶ 83 Given that we are reversing the child support award and remanding to the trial court to recalculate the amount of child support, it would be premature to conclude that Patrick is entitled to the tax exemption each year. On remand, after recalculating child support, if the trial court determines that Patrick will be contributing the majority of Faith's support, then it should award Patrick the tax exemption. See *Moore*, 307 Ill. App. 3d at 1043. If, however, it determines that the parties will be contributing approximately equal amounts of Faith's support, then it need not disturb its original order alternating the exemption between the parties.

¶ 84 C. Attorney Fees

¶ 85 Patrick's final argument is that the trial court's disposition of attorney fees was an abuse of discretion. He contends that, because Zena's attorney fees "were considerably higher" than his, the court's decision to order the fees paid out of the marital estate prior to division resulted in a division of property that was inconsistent with court's intent to divide the marital estate equally between the parties.

¶ 86 The record on appeal is insufficient for us to address Patrick's argument on the merits. Nothing in the record indicates the amount of either Patrick's or Zena's attorney fees. In his reply brief, Patrick contends that "given the multiple attorneys and paralegals that worked on Zena's case, it is more than likely that Zena's final fees were far larger than Pat's." Adopting Patrick's position would require this court to engage in impermissible speculation. Given that the record is insufficient to support Patrick's claim of error, we must presume that the court's order was in conformity with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 87 In his reply brief, Patrick acknowledges that nothing in the record identifies the parties' attorney fees. He notes that he filed a motion to compel Zena to turn over statements of her attorney fees, and that, on March 18, 2013, the trial court entered an order "memorializing Zena's counsel's promise that he would provide opposing counsel with a record of attorneys' fees paid and owed." According to Patrick, Zena never complied with the order and she cannot now "profit from her own refusal to obey court orders." However, the time for addressing Zena's failure to comply with the March 18 order was in the trial court, prior to this appeal.

¶ 88 III. CONCLUSION

¶ 89 For the reasons stated, we reverse the child support award and remand to the trial court to determine a new child support award. If after redetermining child support the trial court determines that Patrick will be contributing the majority of Faith's support, then it should award Patrick the tax exemption. Otherwise, we affirm the judgment of the circuit court of Lake County.

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

¶ 91 JUSTICE HUTCHINSON, dissenting.

¶ 92 I respectfully dissent. I acknowledge the ability of the trial court to impute income to petitioner. Furthermore, I do not necessarily quarrel with the finding of the trial court that it did not find petitioner credible as it related to his early retirement after leaving his employment at Grainger. However, I cannot agree with the method used and the conclusion drawn by the trial court in arriving at the amount of income to be imputed to petitioner, and accordingly I cannot agree with the majority's affirmance of that error.

¶ 93 The record is clear that the parties agreed that petitioner should leave the employment of Grainger after he was passed over for a promotion to presidency of the company's domestic operations in late 2008. The record is also undisputed that Petitioner was offered a lesser position at Grainger; his salary would be maintained until the end of 2008; and he negotiated a package with Grainger to preserve his stock options, grants and salary level until the end of 2010. The parties separated sometime in 2011, and in June 2013 when the judgment of dissolution was entered, petitioner was 48 years old, had been unemployed since 2008 and had not received a regular weekly or monthly salary for approximately two and one-half years. The judgment of dissolution ordered that the marital assets of the parties would be divided equally but that petitioner was responsible for dissipation in the amount of $150,000 and that he owed respondent $75,000. It appears that at the time of the appeal, the liquid assets had been divided between the parties and the marital residence was for sale.

¶ 94 While petitioner testified that he was earning 6% to 8% annually on his share of the liquid marital assets, respondent testified that her money was earning very little and that she had not consulted anyone concerning increasing her income from her assets. Petitioner had engaged in some not-for-profit board work, but he had ceased looking for employment in the corporate world so that he could spend quality time raising the youngest child of the parties. Respondent

was unemployed and had been unemployed outside of the home since mid-1990. Respondent had an advanced degree in clinical audiology but the evidence indicated that she would need to continue her education and complete a doctoral program before she could be licensed and employed in Illinois. She did testify that she might consider employment in the future.

¶ 95 Finally, this record does illuminate a very comfortable life for the parties before their separation and into 2013 when the judgment for dissolution was entered ending their 25 year marriage. Both million dollar plus homes owned by the parties were unencumbered, there were vacation and rental properties and the couple owned cars, watercraft and motorcycles. In fact, respondent testified that the family did not use a budget to manage expenses, but if a large bill was due, they would just cut back on other expenses, implying that there were many expenditures that were not required or necessary. Notwithstanding a lifestyle of this nature during marriage, life after divorce is rarely as generous. See, *e.g.*, *In re Marriage of Simmons*, 87 Ill. App. 3d 651, 661 (1980) (stating that,"[l]iving apart costs most couples more than living together. The court is unable to provide both parties with the standard of living they enjoyed during marriage; one or both have to take a cut.")

¶ 96 During his case in chief, petitioner testified during his last year of actual employment at Grainger, his base salary was $364,000. He also received a performance bonus of $180,000. Although his income from employment in two of the three years prior to 2008 was higher, he testified that during those years, he supplemented his earned income by exercising stock options and grants. Finally, he testified that he believed that 2008 was a banner year for him until he was passed over for the promotion, and even though he sought employment in the corporate world in 2009 and 2010, he testified that he lost marketability after four years of unemployment and not getting either of the two jobs for which he interviewed.

¶ 97 My concern with the trial court's decision relates to its disregard of respondent's testimony that she might return to work in the future, and the trial court's over emphasis on the standard of living during the marriage. Those issues take a back seat, however, to the trial court's imputation of income to petitioner in the amount of $544,000 annually. As I indicated above, I do not necessarily question the trial court's credibility determination, but without evidence presented that petitioner was still capable of earning first, a base salary of $364,000 and then, a performance bonus of $180,000, I cannot accept the trial court's decision to impute petitioner's final salary and bonus during his last year of employment at Grainger, a company that passed him over for promotion and would not guarantee that salary or bonus after 2008 absent a negotiated parachute agreement. See *In re Marriage of Berger*, 170 Cal. App. 4th 1070, 1079 (2009) (While it was probable that the husband's particular skills and experience would make it likely that he could earn similar income in the future, "that probability must be *evidenced*, not merely suspected" (Emphasis in original.)). The parties agreed that petitioner should resign after Grainger's decision to pass him over. Petitioner had the presence of mind and wallet to negotiate a parachute, but four years after that negotiation and two interviews in the corporate world, he has failed to secure a comparable salary. This record simply does not support the amount of income imputed to petitioner by the trial court.

¶ 98 Furthermore, while petitioner's testimony and apparent cavalier attitude about support for Faith and maintenance for respondent in the event that his resources ran out was inappropriate and unacceptable, it did not warrant what appears to be a punishment by the trial court in the imputation of income in an amount unsupported by the record. See *In re Marriage of Offer*, 275 Ill. App. 3d 986, 991 (1995) (modification of maintenance should not represent a punishment to the recipient for failure to maintain good mental and physical health protocol). Petitioner's

testimony that he would like to seek employment in the not-for-profit industry to have more time to spend with Faith was simply disregarded by the trial court. Employment in the not-for-profit industry is important in the overall scheme of things and those so employed can make a comfortable, though not extravagant, salary. A 2013 report by a reputable organization that studies not-for-profit charities found that the median chief executive salary was approximately $114,000 per year in the Midwest. See *2013 Charity CEO Compensation Study*, CHARITYNAVIGATOR (2013) http://www.charitynavigator.org/_asset_studies/2013_CEO_ Compensation_ Study_Final.pdf. These parties have adjusted their lifestyle in the past due to unexpected circumstances, such as a large bill due in a particular month; divorce after an agreed upon resignation from a well-paying job is just another unexpected circumstance that must be considered practically and realistically. There does not appear to be any evidence in this record that petitioner is not seeking further employment in the corporate world to evade paying child support or maintenance. See *In re Marriage of Gosney*, 394 Ill. App. 3d 1073 (2009).

¶ 99 The most troubling aspect of this imputation of income is the addition of the performance bonus that petitioner received in his last year of employment. A bonus, by its definition and application, is usually not specifically provided by contract, is not automatic and is granted "fully and explicitly at the discretion of the employer." *IRMO Shores*, 2014 IL App (2d) 130151, ¶ 34. There is no evidence in this record that petitioner would be eligible for a performance bonus even if he received new employment with a comparable base salary.

¶ 100 Finally, the award of permanent maintenance to respondent is suspect. Her current expenses as introduced at trial allegedly reflected her expenses in the marital residence. However, that residence was to be sold, and she testified that she was looking for a smaller home valued in the $400,000 to $600,000 range. The trial court acknowledged that respondent

intended to move, and then speculated that she was likely to have a mortgage in the new residence. Furthermore, respondent acknowledged that additional education was needed to become employed in the audiology field; she did not testify that future employment was out of the question. Therefore, with speculative future expenses and possible future income, permanent, non-reviewable maintenance is an abuse of discretion in my opinion. This becomes much clearer when reviewing the purpose of maintenance. "As a general rule, maintenance is intended to be rehabilitative in nature to allow a dependent spouse to become financially independent. Permanent maintenance is appropriate, however, where a spouse is unemployable or employable only at an income substantially lower than the previous standard of living." *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 652 (2008). Just because the trial court acknowledged that respondent was going to purchase a new house does not necessarily mean that she will incur a mortgage and additional expenses. In fact, this record establishes that these parties have lived in much larger, more expensive homes that have not been encumbered with mortgages.

¶ 101 It appears that the lifestyle of the parties before separation and a significant speculation in favor of respondent fueled the trial court's decision. Because this record fails to support the trial court's amount of imputed income to petitioner and permanent non-reviewable maintenance to respondent, I maintain that the trial court abused its discretion. Accordingly, I dissent.