2015 IL App (1st) 132828-U

THIRD DIVISION
November 4, 2015

Nos. 1-13-2828 & 1-14-2795, cons.

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

In re the Marriage of:	)	Appeal from the Circuit Court of Cook County, Illinois.
JEANNE MARIE WITHERSPOON,	)	
Petitioner-Appellee,	)	No. 06D8709
v.	)	The Honorable Andrea M. Schleifer, Judge Presiding.
HOWARD MICHAEL PEARL,	)	
Respondent-Appellant.	)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 Held: In marriage dissolution case, award of retroactive maintenance to wife, reviewable in four years and upon change of circumstances, is not an abuse of discretion; award of retroactive child support from wealthy father in an amount below the statutory guidelines is not an abuse of discretion; order requiring husband to contribute to wife's attorney fees, specific to maintenance and support issues, is not an abuse of discretion. Trial court affirmed.

¶ 2 Respondent-appellant Howard Michael Pearl (Howard) appeals from the circuit court's award of retroactive maintenance, retroactive child support, and attorney fees in his dissolution of marriage proceeding from petitioner Jeanne Marie Witherspoon (Jeanne).[1] On appeal, Howard contends the trial court erred in its award of maintenance, child support, and contribution to attorney fees. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The parties were married in 1989. Two children were born to the marriage, one in 1993 and the other in 1995. Both parties are Illinois attorneys. Jeanne filed a petition for dissolution of marriage in 2006. A judgment dissolving the marriage (judgment), providing for a joint parenting order, and incorporating the Marital Settlement Agreement (MSA) was entered in October 2007. At the time of the judgment, Howard was employed as a partner in the law firm of Winston & Strawn in Chicago, and Jeanne was a homemaker.

¶ 5 The MSA was over 50 pages long. It provided for an equal division of the marital property, with the value of each party's share of the marital property theoretically being $2,500,000,[2] as well as various other provisions including an interim monthly award of $6,400 to Jeanne for the support of the two minor children. This support was contingent upon Jeanne moving out of the marital home. Specifically, only $1,000 would be paid monthly so long as Jeanne and the children remained in the marital home; once they moved out, the award was to increase to the agreed-upon $6,400.

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[1] Howard brings these issues in two separate appeals, No. 1-13-2828 (the retroactive maintenance and retroactive child support issue) and No. 1-14-2795 (the attorney fee issue). We have consolidated the two appeals into the instant appeal.

[2] This amount included $275,000 in sale proceeds expected from the former marital residence where Howard continues to reside.

¶ 6 At the time of the agreement, Howard's monthly draw from his law firm was $35,000, plus periodic special distributions. The terms of the MSA, however, reflect that Howard was concerned his health might impede his ability to work in the future and, therefore, Jeanne agreed to the specific support provisions, stating:

> "ARTICLE II
>
> Maintenance and Children's Support, Reservation and Review
>
> First Year
>
> 2(a) *** Howard contends that he has serious medical problems that currently impede his ability to work full-time as a partner in the law firm of Winston & Strawn LLP. Howard contends that his future ability to work full-time at his current level of income remains uncertain, although he anticipates that he will have gross income over $1.7 million for the fiscal year 2008 (February 2007 through January 2008). Jeanne has agreed to the support provisions contained in this Agreement based, in part, on Howard's contentions concerning his past and present health issues."

¶ 7 The judgment reserved rights and claims of both parties to maintenance, additional child support, and other matters. Pursuant to the MSA, these rights and claims would be heard upon the filing of a petition within a certain precise time frame. Upon such a filing, the MSA provided that the court could consider whether or not any resulting order should be retroactive to the date that Jeanne vacated the marital home, pursuant to paragraph 5(g)(ii) of the MSA. Specifically, paragraph 2(d) of the MSA provides, in part:

> "Support Reservation and Review

> 2(d)(i). JEANNE and HOWARD agree that each party shall reserve his or her rights and claims to maintenance and regarding children's support, if any, and, accordingly, JEANNE hereby reserves her rights and claims to maintenance and children's support from HOWARD, and HOWARD hereby reserves his rights and claims to maintenance and children's support from JEANNE.
>
> 2(d)(ii). The parties further agree that they will request of the Court in the case between the parties that the Court reserve jurisdiction to adjudicate JEANNE's and HOWARD's rights and claims to maintenance and additional children's support, if any, upon appropriate petition and notice. Neither Jeanne's nor Howard's petition and notice shall be filed earlier than [365] days from the date that JEANNE vacates the marital home pursuant to paragraph 5(g)(ii), and upon the determination of such petition and notice, the Court may consider whether or not such order will be retroactive to the effective date of this Agreement pursuant to the reservation of jurisdiction set forth above. Each party hereby reserves his or her rights to argue why if maintenance or additional children's support is ordered, it should or should not be retroactive to the date that JEANNE vacates the marital home pursuant to paragraph 5(g)(ii). If an order is entered for retroactive maintenance for either party, the parties shall consider the possible tax consequences and recapture concerns. *** "

The parties agreed that the reservation and review set forth in paragraphs 2(d)(i) and (ii) "shall not be treated as a modification of a prior order *** but shall be a *de novo* determination" of Jeanne's and Howard's "claims to maintenance and children's support." They also agreed that this "review" was to be determined by the standard of living of the

parties during the marriage, but that the court could also consider the parties' standard of living after the agreement. Specifically:

> "In addition, the review shall not be determined by the standard of living between the effective date of this Agreement and the Court's review at which time the parties may be living a lifestyle different than that established during the marriage, (however, evidence of the standard of living between the effective date of this Agreement and the Court's review may be introduced by either party as a factor to be considered and is not barred) but shall be based on the standard of living established by the parties in the years prior to the effective date of this agreement [October 17, 2007] and the factors set forth in 750 ILCS 5/504 and 750 ILCS 5/505. It shall be unnecessary for Jeanne or Howard to show a substantial change in circumstances."

¶ 8 In addition to child support and maintenance, the parties' respective responsibilities to maintain major medical and hospitalization insurance for the children and payment of uninsured ordinary and extraordinary medical, dental, orthodontic and therapeutic expenses incurred on behalf of the children were to reviewed and ruled upon *de novo*. The issues of life insurance coverage to be maintained and the payment of premiums were also to be reviewed in light of the *de novo* determination of the other issues.

¶ 9 In the MSA, the parties acknowledged that the marital home in Glencoe, Illinois, was encumbered by a mortgage with an unpaid balance of approximately $1,450,700. The parties agreed that Howard should have the right of exclusive occupancy and that Jeanne would move out of the marital home within 60 days of the date of the agreement. Jeanne and Howard owned the marital home as tenants by the entireties. They agreed to place the house

on the market for sale on February 4, 2008, "unless otherwise agreed to by the parties." They agreed to equally split the gross proceeds from the sale.

¶ 10 In the MSA, the parties also agreed to sell a Wisconsin vacation home, with gross sale proceeds split equally between Howard and Jeanne.

¶ 11 By the terms of the MSA, the parties also agreed to share in specific proportions their acquired right to purchase season tickets to University of Michigan football games.

¶ 12 In April 2009, Jeanne timely filed a petition for maintenance, child support, and for other relief.[3] She then filed an amended petition, to which Howard filed a response. By the petition, Jeanne stated in part that the children were then 13 and 15 years of age; that Jeanne was 48 years of age and had not been employed outside the home for fourteen years; that a portion of the property settlement had not been distributed because the marital home had not yet been sold and Howard still resided in it; and that Howard, despite his health concerns, earned more than $1,500,000 per year.

¶ 13 In March 2010, the parties entered an agreed order for temporary maintenance by which Howard was to pay Jeanne $6,000 per month in temporary maintenance with no prejudice to either party. In July 2012, the matter was set for trial to begin on January 22, 2013. Shortly before trial, Howard filed an emergency motion to continue the trial. The motion was denied. Howard then brought a motion to reconsider, which was also denied.

¶ 14 The trial took place in late January 2013.[4] The only two witnesses at trial were Jeanne and Howard.

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[3] Howard did not file a petition for maintenance.

[4] Throughout this time, there was also considerable litigation taking place surrounding email communications between Jeanne and William Shapleigh, her alleged boyfriend. More will be discussed regarding this part of the litigation in our discussion of attorney fees.

¶ 15 According to her trial testimony, Jeanne was 45 years old at the time she filed for dissolution and 52 at the time of trial. Jeanne earned her law degree from DePaul University. At the time their first child was born in 1993, Jeanne worked full-time for the U.S. Attorney's Office. She continued working at the U.S. Attorney's Office until the birth of the parties' second child in 1995, at which time she opted to stay home to care for the parties' very young children. At the time she left the employ of the U.S. Attorney's Office, Jeanne was earning a salary of $75,000 to $85,000 annually. Howard initially supported Jeanne's decision to stay home with the children, although he testified he later urged Jeanne to reenter the workforce.

¶ 16 Jeanne testified that the year after the youngest child was born, the family moved from a condominium in Chicago to a home in Glencoe. Jeanne was responsible for the extensive upgrading the home. Howard worked long hours and often traveled. It was then that Jeanne opted to stay at home to care for the children. According to Jeanne, she provided most of the care for the children during the marriage, including scheduling children's activities, classes, transportation, and medical appointments. She assisted the children with homework, did laundry, and cooked meals. The family had full-time childcare for a number of years and then had part-time childcare thereafter. After the family purchased a vacation home in Wisconsin, Jeanne and the children spent a number of summers there. In Wisconsin, Jeanne had some childcare assistance, but not a full-time provider. Jeanne acknowledged that, as the children got older, they spent a decreasing amount of time at the Wisconsin home. Howard claims the children spent almost no time in the Wisconsin home in 2006 and 2007.

¶ 17 Jeanne testified she also contributed to the family by serving as a board member for the nursery school the children attended, being a room parent at different times for the children's schools, and volunteering at a synagogue. Jeanne claims to have had total household

responsibility, including paying bills, arranging proper home maintenance, decorating, and assisting in construction and design decisions.

¶ 18 Jeanne completed a yoga teacher training during the marriage. In addition to being a homemaker, Jeanne worked occasionally as a part-time yoga instructor from 2004 to 2005, earning a total of $2,000.

¶ 19 Jeanne testified that Howard did not express financial concerns during the marriage, telling her that he had disability policies that would, in the event he was unable to continue working due to his health, allow them to keep their homes in Glencoe and Wisconsin. Jeanne and Howard occasionally discussed her working outside the home. Jeanne explained that she suggested that, if Howard could not work, the family could move to Michigan to be closer to her family, where she would work as an attorney.

¶ 20 Jeanne testified that Howard attended the children's events whenever his schedule permitted. Additionally, Jeanne tried to make the children's doctor appointments on Saturdays to accommodate Howard's schedule.

¶ 21 Beginning in 1999, Howard developed a series of health issues, including diabetes, a diagnosis of Cushing's disease, and cancerous tumors. Howard reduced his hours at work and had a number of surgeries to address his medical issues. Eventually, Howard resumed his work schedule.

¶ 22 At the time of the judgment, Howard was 53 years old. He had been a partner at the law firm of Winston & Strawn in Chicago for many years. The job was "demanding" and "stressful." His adjusted gross income in 2007 (the year judgment was entered) for federal income tax purposes was $1,873,854. His income increased in 2008, 2009, 2010, and 2011.

At the time this issue went to trial, his 2012 income tax returns were not yet available, but it was estimated that his gross income would exceed $2 million.

¶ 23 Howard testified that the parties agreed to the provision for the delay in setting child support, maintenance and other issues until after the entry of the judgment was partly due to his inability to ascertain his anticipated income, as he was concerned that his health could affect his employment. The parties' agreement indicated that the interim provisions for child support were based on Howard's law firm draw of $35,000 per month, rather than on his total income.

¶ 24 Howard testified that he had been at Winston & Strawn since 1990. He was paid on a fiscal year basis and paid taxes on a calendar year basis. His total pay for the fiscal year ending in 2007 was between $1,820,000 and $1,852,000. His 2012 fiscal year distribution was $1,924,000. Howard's monthly draw was $41,167.

¶ 25 Howard testified that he is unable to continue to work as a trial lawyer due to his health. He explained that his health had been deteriorating since August 2011 with pulmonary issues. Howard testified with no corroboration that he had resigned from his firm in early January 2013, and anticipated going on disability. He started to testify about the firm partnership agreement and the disability policy, but was precluded from doing so because he failed to produce the appropriate documents.

¶ 26 Nonetheless, as of February 1, 2013, Howard was receiving his monthly base salary distributions from the law firm of $41,167 and anticipated continuing to receive these distributions for at least February, March, and April 2013. In February and April 2013 Howard was also scheduled to receive a profit distribution of approximately $1,000,000 for the fiscal year of February 1, 2012, to January 31, 2013. He testified that, after July 2013, he

did not anticipate receiving any more money from the law firm, although he did have disability insurance.

¶ 27 Howard acknowledged at trial that his income had increased. In 2011, when Howard's adjusted gross income was $1,737,812, Howard paid $76,800 in temporary maintenance. Howard also testified as to some of his investment income. At the time of trial, for instance, Howard had a Fidelity account worth $2,661,511, and a retirement account at Winston & Strawn worth over $3,139,000. Howard testified that his estate had increased since the dissolution because "I earned more, and I saved more." He explained he did this "[b]ecause I felt that there was a strong possibility that I would not be able to work until normal retirement age."

¶ 28 Howard explained at trial that, during the marriage, he saved for the children's college education, to pay off the family's house, and to acquire savings because he wanted to have money in the event that his career did not last long. They paid off the family house in 2002 and started building their next house on Crescent Drive in Glencoe that same year. Howard testified he did not want to move, but did so anyway. The family moved into the Crescent Drive house in 2004. The petition for dissolution of marriage was filed in 2006.

¶ 29 At the time of the judgment, the parties were living in a 6-bedroom house in Glencoe, Illinois. Howard continues to live there, although the judgment provides that it was to be put on the market in February 2008, with the proceeds from the sale split evenly between the parties. Howard testified that he remained in the residence because his children did not want to move, although the son is away at college and the daughter has overnights with Howard only every other weekend. In 2010, Jeanne filed a petition for rule to show cause regarding the house sale. Both parties then had separate appraisals completed on the house. Howard's

appraisal valued the house at $1.2 million, and Jeanne's appraisal valued the house at $1.4 million. At the time, the outstanding mortgage balance was $1,450,000.

¶ 30 Jeanne purchased a smaller home in Glencoe prior to the entry of the judgment. She and the children continue to reside in that home. Judgment was entered on October 17, 2007, and Jeanne and the children moved into the new home on November 26, 2007.

¶ 31 Howard testified that Jeanne paid the bills electronically and he had "had no knowledge" what the monthly expenses were. He testified to the family's frugal lifestyle, including purchasing cars only one time every eight or ten years. Howard testified the family vacationed in Mexico and Colorado. He and Jeanne also went to Europe, which he explained was a benefit of his representation of a particular client. Jeanne went to Germany in 2002 for a few days to visit friends. She later took periodic weekend trips for workshops during her yoga certification training. In 2005, she took a two-week yoga teacher training program, during which time her family in Michigan cared for the children.

¶ 32 Howard acknowledged at trial that Jeanne had not yet received some of her allocated assets from the judgment, including her division of the retirement plans. In addition, she had not received her share of the proceeds from the sale of the house because the house had not yet been sold.

¶ 33 Howard testified that his work-related travel consisted largely of day trips or overnight trips to Washington D.C., New York, Detroit, Cleveland, and Philadelphia. He testified he was often home in time to eat dinner with the children and put the children to bed. If he were home, he would often get up very early to spend time with the children and then take them to school. He said he was very involved in the children's lives, spending time with them, helping them with their homework, and attending school conferences.

¶ 34 Howard testified that he suffered from Cushing's disease from September 2001 to January 2007. He described the effects of the disease as being extreme exhaustion, both mentally and physically.

¶ 35 Jeanne and Howard disagree as to what part Jeanne played in Howard's healthcare. Jeanne testified that she participated in the care necessitated by Howard's various surgeries and illnesses until filing for divorce. Howard, on the other hand, testified that Jeanne gave virtually no care to him for his medical needs. He claims Jeanne refused to allow a caregiver to move into the house, while Jeanne claims she only objected to not having a say in the selection of the caregiver.

¶ 36 Jeanne sought employment after the entry of judgment by networking with friends and former colleagues. She attended events and workshops directed toward women re-entering the workforce. She also worked with a career counselor and applied for jobs with temporary placement companies. Jeanne also pursued non-legal employment. In July 2009, Jeanne began working full-time for the Illinois Attorney General. Her starting salary was $60,500 per year. She was promoted to a supervisory position in October 2012, and her salary increased at that time to $80,000.

¶ 37 Both parties submitted substantial financial documentation. Howard's showed that his marital allocation had increased in value since the entry of the judgment. His living expenses were more expensive for living in the marital home, as the monthly payment toward the mortgage, which was $5,900 in 2006, increased to over $8,000. Howard explained that the mortgage had been reset to a higher figure because now he was paying down the principal rather than just paying the interest.

¶ 38 Jeanne's 2006 financial disclosure statement while the parties were still married reflected a gross income of $1,486. It reflected, in part, monthly household expenses of $12,600 including $1,286 for the Wisconsin household expenses, $1,200 in monthly clothing expenses, $300 in grooming expenses, $300 in clubs/social obligations/entertainment, and $550 in clothing expenses for the children.

¶ 39 Jeanne's 2009 financial disclosure statement, post-dissolution and once being employed at the Attorney General's Office, reflected a gross income of $48,890, including $32,836 capital gains on sale of Wisconsin vacation home and $16,054 in interest income. The 2009 disclosure reflected a gross monthly income of $5,042 and a net monthly income of $3,611. Household expenses were $8,105, including a mortgage of $2,920. Jeanne's clothing expenses were $1,000, and grooming was $170, clubs/social obligations/entertainment were $450, and clothing expenses for the children were $500. Under the "statement of liabilities" section, it also shows a mortgage amount of $596,000.

¶ 40 Jeanne's 2011 financial disclosure statement reflected a gross income of $67,977. Her gross monthly income was $20,099, including salary of $5,042, child support of $6,400, and temporary maintenance of $6,000. Household expenses were reported as $7,142, including a mortgage of $1,697. The disclosure reflected $1,000 in clothing expenses, $170 in grooming expenses, and $500 in clothing expenses for the children. Under the "statement of liabilities" section, it shows a mortgage for $596,000, a line of credit for $87,100, and a law firm for divorce proceedings in the amount of $254,575. At trial, Jeanne explained that she opened the line of credit to access funds in order to pay her bills. She did this because her investment advisor told her it would cost less than liquidating assets. According to her trial testimony, at

by the time of trial, she owed $175,000 on the line of credit rather than the $87,100 indicated in her 2011 disclosure statement.

¶ 41 Jeanne testified that since the time of the judgment of dissolution, she had downsized her house, her car, her vacations, and her household help. She makes a small contribution from her paycheck to retirement savings. She testified, "I'm hemorrhaging money right now." Jeanne testified she had not received a number of the distributions she was supposed to receive under the MSA, including her share of the law firm retirement and pension plans. She received $255,000 from the sale of the Wisconsin vacation property. Jeanne testified she had to use her savings and her share of the joint marital assets in order to cover her bills.

¶ 42 Howard's 2006 financial disclosure statement reflects a gross annual income of $1,234,816, including a gross monthly income comprised of a monthly draw of $37,917. Howard notes that "In addition to my draw, it is the discretionary practice of the Firm to issue distributions in September and January to coincide with the due dates for making estimated tax liability payments. My compensation fluctuates and is not guaranteed." In this disclosure, Howard did not list any expenses, as "Jeanne has possession and control of our Quicken records and the underlying expense records." He noted a home mortgage under the "statement of liabilities" section, but did not list the amount. Under the "cash or cash equivalents" section, he listed "Merrill Lynch JT Cash Management Account" in the amount of $400,000. He also lists the following stocks, with notation:

> "Charles Schwab JT $568,113; Fidelity JT $11,741; Janus Funds JT $24,656; Fidelity H $985,000*
>
> *This account is funded by distributions from Winston & Strawn. It is from this account that I intend to pay our considerable deferred tax liabilities once they

> come due. Winston & Strawn's fiscal year ends on January 31. I have not yet filed tax returns for the Winston & Strawn income I received from February 1, 2005 to date. Therefore, this account balance may be lower."

The 2006 disclosure also showed a law firm capital investment of $312,000, with a notation that the funds are "only available if I depart the firm and paid without interest over three (3) years." The following pension plans were reported:

> "Winston & Strawn Pension Plan, 7/31/06 balance $671,704
>
> Winston & Strawn Retirement Plan, 7/31/06 balance $517,325
>
> Winston & Strawn Retirement Plan, 7/31/06 balance $141,397
>
> Jeanne's IRA $178,437"

¶ 43 Howard's 2010 financial disclosure statement reflects a gross annual income of $1,516,000, but notes: "Gross income from all sources this year through January 2010: $196,000 (Of this amount, $183,000 was used to pay my January 2010 estimated tax payments)". It includes a monthly draw of $38,000, interest income of $1,279, and dividend income of $1,750, for a total gross monthly income of $41,029, and a net monthly income of $16,083. Household expenses were reported as $14,079, including a mortgage payment of $8,063 and real estate taxes of $2,416. Personal expenses included $50 for clothing, $60 for grooming, $592 for medical, and $1,357 for insurance. Clubs/ social obligations/ entertainment were reported as $100, donations as $1,855, and nursing care for Howard's mother as $4,300. In the "statement of liabilities" section, the disclosure shows a mortgage in the amount of $1,445,000. The disclosure reflects "cash or liquid investments" as: Fidelity Savings/Investment Account at approximately $1,263,000, Schwab Investment Account at approximately $634,639, and Janus Fund at approximately $24,639, as well as a

Fidelity money market account at approximately $498,000. The disclosure also includes a Winston & Strawn capital investment account in the amount of $370,000, a Capital Partners' Pension Plan in the amount of $1,288,592, a Winston & Strawn employee savings plan in the amount of $200,000, and a Winston & Strawn retirement plan in the mount of $600,000, about which Howard notes "most of this account is being allocated to Jeanne."

¶ 44 Howard's 2012 financial disclosure statement reflects a gross income for fiscal year 2012 of $1,960,897, including a monthly draw of $41,166, interest/dividend income of $908, and a lump sum partner income payment of $1,430,000. Household expenses were reported as $12,851, including a mortgage payment of $8,063 and real estate taxes of $2,746. Personal expenses included clothing expenses of $244, grooming expenses of $78, medical expenses of $695, insurance (life, medical, disability, long-term care) of $3,307, clubs/social obligations and entertainment expenses of $200, and donations of $1,602. Under the "statement of liabilities" section, the disclosure shows a mortgage in the amount of $1,305,130, with a notation that "Howard owes one-half: $1,305,130.97 Jeanne owes one-half: $1,450,000). His "cash or cash equivalents" sections lists the following assets:

"1. Fidelity Savings/ Invest. Acct.	$1,262,255.64
2. Fidelity Brokerage Acct.	$5,793.66
3. Fidelity Savings/Checking Accts.	$1,545,347.37
4. Schwab Investment Acct.	$284,489.70
5. Janus Fund	$36,420.43
6. Chase Savings	$21,100.73
7. Merrill Lynch CMA	$9,799.68"

Howard's disclosure also reflects a Winston & Strawn Partnership Capital Account in the amount of $390,000, as well as the following insurance policies:

> "Minnesota Life Insurance Policy (term): Death Benefit $1,500,000; Protective Life Insurance Company Policy (term): Death Benefit $2,000,000; Protective Life Insurance Policy (term): Death Benefit $1,000,000; Long-term Care Metropolitan Life: covers up to $300/day; Long-term Disability Metropolitan Life: covers up to $30,000/month

¶ 45 The court issued its ruling on April 29, 2013. On May 29, 2013, Jeanne filed a motion after judgment which asked for "clarification or modification."[5] By that motion, Jeanne asked the court to correct particular mathematical and scrivener's errors. Additionally, the April 29 order included a provision that the maintenance award "shall not terminate upon cohabitation, remarriage or death of a party." In her motion, Jeanne noted she "assume[d] that the Court intended the maintenance to terminate upon the happening of one of those events." Jeanne also asked the court to rule that the past temporary maintenance payments be declared non-taxable.

¶ 46 Howard filed a response to Jeanne's motion on June 17, 2013. By that motion, he argued, in part, that the maintenance termination terminology should be changed to a statement that the maintenance award terminates upon cohabitation, remarriage, or the death of a party, and contended the maintenance was taxable and deductible.[6]

¶ 47 On June 19, 2013, the court granted Jeanne's motion in part and denied it in part. The court held a hearing in which it went through the motion paragraph by paragraph, analyzing

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[5] In a later hearing, Jeanne's counsel stated that the motion was, in fact, a motion for clarification rather than a motion for reconsideration.

[6] Howard also filed a motion for reconsideration and modification, which he later withdrew.

and answering the questions it raised. As to the maintenance termination events, the following transpired:

> "[JEANNE'S ATTORNEY MCNISH:] Moving on, I think we have agreed that No. E. of Paragraph - - or Item 1 that the word not would be taken out."
>
> [HOWARD'S ATTORNEY GORDON:] Your Honor, I don't think we can agree to that. I think that's your determination.
>
> MR. MCNISH: We are assuming you wanted it terminable upon the happening of one of those events. If we're wrong- -
>
> THE COURT: I did not.
>
> MR. MCNISH: Okay. Then not stays in."

¶ 48 The court also stated it would correct the number of months for which retroactive payments were due and denied Jeanne's request for the temporary maintenance payments prior to 2013 to be non-taxable, as the parties would be forced to file amended tax returns.

¶ 49 Following the court's rulings on Jeanne's motion after judgment, the trial court entered a corrected order in July 2013. By that order, the court set child support retroactive to December 2007 at "12% of Howard's average income during the period when there were two minors." This amount was calculated as:

> "The retroactive amount for two children for the period December, 2007 through August, 2011, when the older child became emancipated, is $10,000 per month, less the $6,400 monthly Howard has already paid for that time. This was for a period of three years and nine months (total 45 months), leaving a balance of $162,000.

The retroactive amount for one child is $90,000 per year, or $7,500 per month, less the $6,400 paid for the period September, 2011 through April 30, 2013. This is a period of twenty months, for an additional balance of $22,000.

Judgment in the amount of $184,000 is entered against Howard and in favor of Jeanne for retroactive child support."

The court also ordered Howard pay child support of $7,500 per month until June 2014 when the youngest child was to complete high school.

¶ 50 Howard was also ordered to pay retroactive and current maintenance:

"Howard shall pay as and for maintenance 17% of his net income, or $170,000 per year, ($14,166.67 per month), retroactive to December, 2007.

For the period prior to this Order, retroactive to December, 2007, 17% of his net, or One Hundred Seventy Thousand Dollars $170,000 per year for the two years after the entry of the Judgment (December, 2007 through November, 2009) and $14,166.67 per month for the months of December, 2009, and January and February, 2010. This totals Three Hundred Eighty Two Thousand Five Hundred Dollars ($382,500) for the 27 month period Jeanne received no maintenance, and $8,166.67 per month (the difference between the amount she did receive and the amount of this Order) for the period after she began to receive temporary maintenance in March, 2010, to the date of this Order ($310,333.46) for a total of $692,833.46. This amount shall not be taxable to Jeanne.

This award shall be reviewable upon motion of either party in 4 years. This award shall not terminate upon cohabitation, remarriage or death of a party.

> The monthly maintenance payments shall be due and payable on the 1st day of each month.
>
> Beginning January 1, 2013, maintenance payments, whether temporary pursuant to the Order entered March 3, 2010, the April 29, 2013 Order or this Order, are not taxable/includable by Jeanne nor deductible by Howard for federal or state income tax purposes."

¶ 51 The order also left the children on Jeanne's medical insurance, with Howard reimbursing Jeanne for the premiums and all other healthcare costs through each child's college education, but not longer than the child reaching age 23.

¶ 52 Howard appeals this corrected order

¶ 53 II. ANALYSIS

¶ 54 a. Maintenance

¶ 55 Howard first contends that the trial court erred in its award of maintenance to Jeanne. He argues that the trial court abused its discretion where it: (1) made the amount of the maintenance[7] award excessive; (2) ordered that the maintenance was not terminable, where maintenance in fact terminates upon cohabitation, remarriage, or the death of a party when there is no written agreement by the parties stating otherwise; and (3) ordered that the retroactive payments "should be made with no tax consequences to either party;" (3). We affirm.

[7] Although Howard refers to the award in question as the "retroactive payment," because he also challenges the nonterminabilty of the award, this court assumes "retroactive payment" refers to both the lump sum payment of the retroactive award and the current award of maintenance, both of which were folded into the same provision in the corrected order.

¶ 56 The Illinois Marriage and Dissolution of Marriage Act seeks to encourage the trial courts to provide for the financial needs of spouses by property disposition rather than by awards of maintenance. 750 ILCS 5/101 *et seq*. (the Act) (2012). The Act contains various provisions which govern the numerous issues that arise during divorce proceedings, such as: the distribution of marital property (750 ILCS 5/503 (West 2012)); spousal maintenance (750 ILCS 5/504 (West 2012)); child custody (750 ILCS 5/502 (West 2012)); and child support (750 ILCS 5/601 (West 2012)).

¶ 57 A trial court has wide discretion in awarding maintenance, taking into consideration such statutory factors as the parties' income and needs; their present and future earning capacity; and any impairment of that earning capacity due to time devoted to domestic duties or having delayed training or employment due to the marriage. 750 ILCS 5/504(a) (West 2012); see also *In re Marriage of Peterson*, 319 Ill. App. 3d 325, 341 (2001); *In re Marriage of Krane*, 288 Ill. App. 3d 608, 618 (1997). "The Act further provides that the maintenance order is to be for an amount and duration as the court deems just, after considering the following additional factors: the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; the standard of living established during the marriage; the duration of the marriage; the age and the physical and emotional condition of the parties; and the ability of the spouse from whom maintenance is sought to meet his or her own needs while meeting those of the spouse seeking maintenance." *Vendredi v. Vendredi*, 230 Ill. App. 3d 1061, 1066 (1992).

¶ 58 After the court has determined that a maintenance award is appropriate, no one factor is determinative of the amount and duration of the award. *Vendredi*, 230 Ill. App. 3d at 1066. In determining the amount of support where one party's current income is uncertain, the trial

court may take into account that party's past earnings. *In re Marriage of Benkendorf*, 252 Ill. App. 3d 429, 447 (1993).

¶ 59 "[T]he propriety of a maintenance award is within the discretion of the trial court and the court's decision will not be disturbed absent an abuse of discretion." *In re Marriage of Schneider*, 214 Ill. 2d 152, 173 (2005); *In re Marriage of Minear*, 181 Ill. 2d 552, 561 (1998). "A trial court abuses its discretion only where no reasonable person would take the view adopted by the trial court." *In re Marriage of Schneider*, 214 Ill. 2d at 173; *In re Marriage of Hughes*, 160 Ill. App. 3d 680, 684 (1987) (An abuse of discretion exists when the lower court "act[s] arbitrarily without the employment of conscientious judgment or, in view of all the circumstances, exceed[s] the bounds of reason and ignore[s] recognized principles of law so that substantial injustice result[s]."). This abuse of discretion standard applies to both the amount and the duration of maintenance (*In re Marriage of Samardzija*, 365 Ill. App. 3d 702, 707 (2005)), as well as the amount and duration of retroactive maintenance. *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 659 (2008) (affirming final judgment's retroactive increase in spouse's temporary maintenance). The burden is on the party seeking reversal concerning maintenance to show the trial court abused its discretion. *In re Marriage of Schneider*, 214 Ill. 2d at 173.

¶ 60 "The Act allows for both temporary and permanent maintenance awards. [Citation.] 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. [Citations.] Ultimately, maintenance award, whether it is temporary or permanent, must be reasonable [citation] and what is reasonable

depends upon the facts of each individual case [citation]." *In re Marriage of Heroy*, 385 Ill. App. 3d at 652. "[S]ections 504(a)(3) and (a)(4) of the Act *** require the trial court to take into consideration the present and future earning capacity of the parties and any impairment to the capacity of the party seeking maintenance due to that spouse's domestic contribution to the household or foregone career opportunities due to marriage." *In re Marriage of Drury*, 317 Ill. App. 3d 201, 205 (2000). Upon the dissolution of a marriage, it is inequitable to burden the petitioner with her reduced earning potential while the respondent continues to relish the advantageous position he reached through their joint efforts. *In re Marriage of Drury*, 317 Ill. App. 3d at 205.

> "There is no question but that Illinois courts give consideration to a more permanent award of maintenance to wives who have undertaken to have children, raise and support the family, and who have lost or been substantially impaired in maintaining their skills for continued employment during the years when the husband was getting his education and becoming established. *In re Marriage of Rubinstein*, 145 Ill. App. 3d 31, 40 (1986).

¶ 61 This court has held that "[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 Koberlein*, 281 Ill. App. 3d 880, 885 (1996). In addition, a spouse need not show that he or she is destitute in order to justify an award of attorney fees. *In re Marriage of Schneider*, 214 Ill. 2d at 174; *In re Marriage of Pond*, 379 Ill. App. 3d 982, 987 (2008).

¶ 62 Howard's argument on this issue is quite lengthy; we include portions of the argument here in order to further delineate its subparts.

¶ 63 As to Howard's argument that the maintenance award is excessive, Howard offers numerous grievances against the court's ruling, including that the order is "not based upon the parties' standard of living during the marriage or Jeanne's actual living expenses; nor is it based upon her 'needs'." In support of this argument, Howard contends that the monthly maintenance of $14,166 per month, retroactive to December 2007, set by the Order, "far exceeds" Jeanne's total monthly expenses, fails to take into account Jeanne's salary of $60,000 (raised to $80,000 in October 2012), or her "annual investment income of between $28,000 and $35,000." Additionally, Howard argues the court failed to consider that his health is "poor and that he is no longer able to earn a living as a lawyer." Howard also argues the child support he pays is a "direct benefit" to Jeanne, as the amount "so exceed[s] the children's direct needs that [the payments] provide Jeanne [with an] additional $6,500 to $8,000 per month in tax-free income." Howard contends the living expenses Jeanne submitted were, essentially, inflated to make her standard of living appear higher than it was. To do this, argues Howard, Jeanne moved the family into "the very expensive residence that she literally had created," thereby "creat[ing] a new and exclusive standard of living for the parties" at the penultimate chapter of the parties' marriage and then presented only those more costly expenses to the court.

¶ 64 Howard also takes issue with the trial court's conclusion that the family was not living as modestly as Howard presented, calling this conclusion "unfounded speculation." Specifically, Howard disagrees with the following conclusion in the Order:

> "At the time of the divorce, the parties had accumulated a marital estate with a value in excess of $5,000,000.00, excluding an interest in a Winston & Strawn, LLP retirement account. Given the amount of his income, if the family were living as modestly as Howard purports, it would at least suggest that the estate would have been significantly larger. Given his income, the total marital estate was modest, which would indicate substantial expenses were incurred while the family was intact."

We disagree with Howard on this point, and note that the court's conclusion was not "unfounded speculation" but, rather, came at the end of a long discussion and consideration of the testimony and evidence regarding the parties' incomes and lifestyle. Specifically, the court's corrected order states, in pertinent part:

> "Despite the significant disparity in their likely future earning capacity, the agreed marital settlement divided the parties' marital estate equally. As noted above, there was a temporary, without prejudice award of child support included, pending a later determination setting child support and maintenance from one party to the adherent other issues. Each party's share of the marital property theoretically had a value of approximately $2,500,000. However, this amount included $275,000 in sale proceeds expected from the former marital residence where Howard continues to reside, almost six years later.
>
> Howard's counsel argued that Jeanne's award of the property was sufficient, and that she is not entitled to any maintenance or child support, in that she has *not* been forced to consume the marital allocation she was awarded in order to meet her support needs and those of the parties' children, and thus has no entitlement to

maintenance. She presented detailed breakdowns of Jeanne's expenses since the Judgment to show that she was living within her income as it stands, without maintenance. She argued that therefore, Jeanne's insistence on maintenance, from what she characterized as Howard's post-judgment income; and argued that the interim child support award in the Judgment was too generous. In fact, she claimed that Jeanne did not demonstrate that she spent as much as $6,400 per month on the direct needs of the children, and her own expenses have not been great since the divorce. But the expenses Jeanne noted for the direct needs of the children did not include a share of the home and similar shared expenses, and was based on the standard of living she has had since the entry of the Judgment.

The financial disclosure statements of both parties reflect that Howard's marital allocation has increased in value substantially since the entry of the judgment. He is now incurring substantially increased costs for living in the marital home, because, among other things, the monthly payment toward the mortgage, which was $5,900 according to Jeanne's financial statement of 2006 has increased to more than $8,063 for the mortgage, an increase of more than $2,000 per month. Howard attributes this to the fact that previously the parties were paying interest only on the mortgage, and the mortgage has been reset to a higher figure now that it includes principal. In this economy, it is at least questionable as to whether or not Howard could have negotiated a reduced interest rate which could reduce the monthly payment to less than the parties were required to pay in 2006.

Jeanne reflects a monthly investment income of $2,657, while Howard acknowledges interest and dividend income in excess of $3,000. Howard's most recent statement of assets reflects a much greater increase in the value of his investments than does Jeanne's. While Jeanne has had to consume some of her property allocation, Howard has not.

In contrast to Jeanne, Howard has enjoyed a long and successful, financially and otherwise, professional career, despite his ailments. Howard's gross annual income for 2001 was approximately $977,500. That gross income has risen almost every year since to where his 2012 gross employment income was approximately $2,000,000.

Jeanne provided credible, complete and coherent testimony regarding her past, present and anticipated needs and expenses and introduced relevant 13.3.1 Financial Disclosure Statements setting forth the same.

The financial analysis done on Howard's behalf shows that the deficit between Jeanne's expenses and her net cash flow for the year 2008 was $36,660.00. The deficit in 2009 between Jeanne's expenses and her net cash flow was $49,028.00. In 2010, Jeanne's living expenses were $13,453.00 per month ($161,436.00 yearly) and her net cash flow was $203,032.00. Because of her investment income, and the temporary maintenance she began to receive, Jeanne's net cash flow from all sources exceeded her expenses during the years 2010 and 2011.

Credible, complete and coherent testimony and documentation were presented and introduced detailing the parties' past and current incomes and documenting Howard's ability to pay maintenance and child support.

Howard's income has steadily increased, with the greatest increase during the years between 2001 and 2007, during a period that Howard indicated he was debilitated by Cushing's disease and other medical problems.

Jeanne was, by agreement of the parties, a stay-at-home mother, essentially unemployed from 1996 to July, 2009, and is now employed as a lawyer in the Illinois Attorney General's office, where she is a supervisor now earning approximately $80,000 per year. When Jeanne began this employment, she was earning $60,000. In October 2012, she was promoted to a supervisory position and given a $20,000.00 raise. Howard's employment income has been continuous and uninterrupted since the Judgment's entry and for years prior thereto.

Jeanne's testimony was consistent and convincing. She did not undervalue Howard's participation in the children's lives, nor did she attempt to undermine him. She testified that, because of Howard's health concerns, in 2003 she had suggested that if finances became an issue, she could return to work full time, that he could stop working, and suggested that the family could move to Michigan near her extended family. Doing this would result in costs being reduced and having the support of her family. She testified that in about January of 2004, she was considering enrolling in a program at Northwestern to obtain a Masters' degree in education. Because of Howard's impending surgery, which she thought might resolve some of his most significant medical issues, she didn't pursue this.

She claimed she didn't have significant concerns about finances because Howard had conveyed to her that should his health deteriorate, requiring him to go on disability, his disability policies would enable the family to keep both the Glencoe and Green Lake [Wisconsin] homes.

Howard's testimony, on the contrary, was inconsistent, with an obvious attempt to undervalue Jeanne's contribution to the family.

As an example, in his attempt to show that Jeanne contributed little to the care of the family, Howard represented that he got up with the children every morning, often took them to school, and was home for the children before five p.m. every day; that they never ate a prepared breakfast or a cooked dinner at home, despite his demanding schedule which required tremendous amounts of travel, and apparently even during periods when disease made him totally exhausted, never feeling rested.

Howard was a high wage earner both before and after the entry of the Judgment. The Judgment states that his anticipated gross earnings for the fiscal year ending January, 2008, were to be over $1,700,000.000, and, in fact, they were.

At the time of the entry of the Judgment, the parties had a large and apparently luxurious home in Glencoe, and had recently sold their condominium in Green Lake, Wisconsin.

According to Howard, the parties did not maintain a high standard of living. His testimony painted a picture of a family living on an income of a fraction of what his earnings were; traveling little, entertaining rarely, having pizza or take-

> out foods for dinner. He testified that the cars the parties drove were not the latest models, and were not high-end vehicles. As an example, he noted that at the time of the Judgment, Jeanne was driving a 2001 automobile valued at $9,000. However, the spreadsheet of assets and liabilities *** shows that at that time, Howard was driving a 2006 Lexus valued at $33,000. Howard testified that during the marriage he purchased only one suit every four years. And his most recent financial disclosure showed no expenses for clothing. So perhaps he was more inclined to thrift, however, he at the very least acquiesced in and enjoyed the fruits of Jeanne's expenditures for the family.
>
> At the time of the divorce, the parties had accumulated a marital estate with a value in excess of $5,000,000.00, excluding an interest in a Winston & Strawn, LLP retirement account. Given the amount of his income, if the family were living as modestly as Howard purports, it would at least suggest that the estate would have been significantly larger. Given his income, the total marital estate was modest, which would indicate substantial expenses were incurred while the family was intact."

The trial court heard the testimony and thoroughly considered the evidence introduced at trial. We cannot agree with Howard that the trial court's determination in this regard was "unfounded speculation."

¶ 65 Howard also argues, as he did below, that the court was mistaken in its assumption that his success was enabled by Jeanne. In that regard, Howard argues that he had extensive legal experience by the time the couple was married, that both he and Jeanne worked as attorneys until the birth of the second child, at which time Jeanne left the workforce. However, by that

time, Howard was already making the salary of a large law firm partner and his compensation continued to increase during the marriage and after the dissolution. Additionally, the children spent 40% of their nights with him after the dissolution, yet his income continued to grow. This, he argues, proves that "his ability to earn such a large income was not dependent on Jeanne leaving the workforce." Again, the trial court thoroughly considered the evidence and testimony in this regard and found this argument lacking. We agree, as we are cognizant that a spouse's departure from the workforce to care for the family is not to be disregarded by the courts. See, *e.g.*, *In re Marriage of Drury*, 317 Ill. App. 3d at 205 (the trial court must "take into consideration the present and future earning capacity of the parties and nay impairment to the capacity of the party seeking maintenance due to that spouse's domestic contribution to the household or foregone career opportunities due to marriage").

¶ 66 i. Is the Maintenance Award Excessive?

¶ 67 We first address the amount of the maintenance award and find the amount was not an abuse of the court's discretion. Although we acknowledge Howard's point that the last two years of the marriage consisted of Howard and Jeanne essentially being housemates rather than spouses, the marriage lasted 18 years. The parties were married in 1989 and the marriage was dissolved in 2007. Howard earned nearly $1.9 million in 2007, the year of the judgment. Jeanne, on the other hand, had been unemployed for the previous 13 years since the birth of the couple's second child, save for working part-time as a yoga instructor from 2004 to 2005, where she earned a total of $2,000. Although Howard now complains that he urged Jeanne to go back to work at some point during the marriage, the parties agree that

Jeanne's leaving the workforce to care for the couple's children was a joint decision, made at a time when Howard was working long hours, often traveled, and made a very good living.

¶ 68 Howard consistently made a high salary throughout his employment and partnership at the law firm. Evidence at trial showed that Howard's salary grew consistently. For example, in fiscal year 2002, Howard earned $1,008,000, in 2005, he earned $1,254,000, in 2008 he earned $1,827,800, in 2011, he earned $2,000,000. Jeanne, on the other hand, earned $75,000 to $85,000 prior to leaving her job to care for the children in 1995. After that time, she was essentially unemployed until after the judgment. Then, beginning in July 2009, she reentered the workforce at an annual salary of $60,000. This salary was increased to $80,000 in October 2012.

¶ 69 Jeanne received no maintenance from Howard the time of the judgment in October 2007 until the March 2010 agreed order setting temporary maintenance at $6,000 per month. These payments were taxed. This was all the maintenance she received until the corrected order was entered in July 2013. Jeanne testified that since the time of the judgment of dissolution, she had downsized her house, her car, her vacations, and her household help. She makes a small contribution from her paycheck to retirement savings. She testified, "I'm hemorrhaging money right now." As of the time of trial, she had not received a number of the distributions she was supposed to receive under the MSA, including her share of the law firm retirement and pension plans. Jeanne testified she had to use her savings and her share of the joint marital assets in order to cover her bills. Additionally, by the time of trial, Jeanne had incurred a line of credit worth $175,000 to pay her expenses, including her ongoing legal expenses.

¶ 70 In contrast, both Howard's salary and the value of his assets have increased since the judgment. Howard acknowledged at trial that, since the dissolution, he worked more and saved more, explaining he did so because he was unsure how much longer he would be able to work.

¶ 71 This court notes that the reason given for the parties' agreement to reserve maintenance—and, thus, the reason this issue is being litigated at such a late date, considering the judgment was in 2007—was due to Howard's health concerns and the uncertainty of his future earning capacity. Specifically, the terms of the MSA provide:

> "ARTICLE II
>
> Maintenance and Children's Support, Reservation and Review
>
> First Year
>
> 2(a) *** Howard contends that he has serious medical problems that currently impede his ability to work full-time as a partner in the law firm of Winston & Strawn LLP. Howard contends that his future ability to work full-time at his current level of income remains uncertain, although he anticipates that he will have gross income over $1.7 million for the fiscal year 2008 (February 2007 through January 2008). Jeanne has agreed to the support provisions contained in this Agreement based, in part, on Howard's contentions concerning his past and present health issues."

Considering Howard's steady income increase and continuous employment during the period between the MSA and trial, it is clear that the parties were mistaken in their belief that Howard's work and income would be negatively affected by his health issues.[8]

¶ 72 As discussed above, the judgment also reserved the rights and claims of both parties to maintenance, additional child support, and other matters. Pursuant to the MSA, these rights and claims were to be heard upon the filing of a petition within a certain precise time frame. Upon such a filing, the MSA provided that the court could consider whether or not any resulting order should be retroactive to the date that Jeanne vacated the marital home, pursuant to paragraph 5(g)(ii) of the MSA. The parties agreed that the reservation and review "not be treated as a modification of a prior order *** but shall be a *de novo* determination" of Jeanne's and Howard's "claims to maintenance and children's support." They also agreed that this "review" was to be determined by the standard of living of the parties during the marriage, but that the court could also *consider the parties' standard of living after the agreement*. Specifically:

> "In addition, the review shall not be determined by the standard of living between the effective date of this Agreement and the Court's review at which time the parties may be living a lifestyle different than that established during the marriage, (however, evidence of the standard of living between the effective date of this Agreement and the Court's review may be introduced by either party as a

[8] Howard may well have retired by now, or may be collecting disability benefits, but that is not before this court. Our review here is limited to the evidence presented at trial, which showed that Howard was quite gainfully employed and expecting to make future draws of $41,000 per month, as well as receive a $1 million partner profit distribution for the fiscal year of February1, 2012, to January 31, 2013. His assertion to the trial court without corroboration that he had quit his job and anticipated a decrease in earnings were mere assertions and anticipations and do not merit weight in this court.

> factor to be considered and is not barred) but shall be based on the standard of living established by the parties in the years prior to the effective date of this agreement [October 17, 2007] and the factors set forth in 750 ILCS 5/504 and 750 ILCS 5/505. It shall be unnecessary for Jeanne or Howard to show a substantial change in circumstances."

¶ 73 Parties may agree to any maintenance terms they deem appropriate and those terms will be binding on the court. *Blum v. Koster*, 235 Ill. 2d 21, 32 (2009). A trial court has wide discretion in awarding maintenance, taking into consideration such statutory factors as the parties' income and needs; their present and future earning capacity; and any impairment of that earning capacity due to time devoted to domestic duties or having delayed training or employment due to the marriage. 750 ILCS 5/504(a) (West 2012); see also *In re Marriage of Peterson*, 319 Ill. App. 3d at 341; *In re Marriage of Krane*, 288 Ill. App. 3d at 618.

¶ 74 Here, the trial court did not abuse its discretion in awarding maintenance to Jeanne. Specifically, Jeanne's 2006 financial disclosure showed expenses of $21,903 per month, although she testified at trial that she had inadvertently neglected to include $900 worth of ATM withdrawals used for cash expenses. Howard, on the other hand, did not provide household expenses on his 2006 financial disclosure, explaining he did not know what the household expenditures were, as Jeanne was the bill-payer. Additionally, Howard testified about the family's practice of saving money, including paying off their first home in Glencoe, funding substantial college savings accounts for the children, and funding their retirement accounts. This part of their standard of living was continued by Howard after the judgment, but not by Jeanne after the judgment, who was only able to save a small amount. See *In re Marriage of Kusper*, 195 Ill. App. 3d 494, 499 (1990) ("Both of the parties testified that their

frugal standard of living had allowed them to save capital for the future. Inasmuch as the standard of living during the marriage is to be considered when the court makes an award of maintenance [citation], we believe *** that investing in future security can be considered an element of the marital lifestyle." We, too, consider the parties' ability or inability to save capital to be a part of their standard of living, which standard changed for Jeanne but not for Howard following the judgment.

¶ 75 We also find no error in the trial court's credibility findings regarding Jeanne and Howard. Specifically, the trial court found Jeanne "provided credible, complete and coherent testimony regarding her past, present and anticipated needs and expenses," while it found Howard's testimony "was inconsistent, with an obvious attempt to undervalue Jeanne's contribution to the family." Issues regarding the credibility of witnesses and the weight to be given their testimony are matters within the purview of the trier of fact, as it is in the best position to see the witnesses and to observe their demeanor. *Fritch v. Fritch*, 224 Ill. App. 3d 29, 40 (1991). A credibility determination will not be disturbed on appeal unless it is against the manifest weight of the evidence." *In re Marriage of Kaplan*, 149 Ill. App. 3d 23, 28 (1986).

¶ 76 Jeanne left work to care for the parties' children at a time when Howard was working long hours and travelling a lot. Both Jeanne and Howard agreed that Jeanne paid the household bills and managed the home. Howard, in fact, testified that he did not know anything about the household expenditures because Jeanne took care of those things. In addition, Jeanne testified that she managed the children's healthcare, transportation, and after school activities. Both parents, apparently, were involved in helping the children with their homework. While Howard argues that Jeanne did not actually help him in his career and did

not actually forego any career opportunities of her own, Jeanne's 13-year departure from of the workforce is not to be disregarded by the courts in setting a maintenance award. See, *e.g.*, *In re Marriage of Drury*, 317 Ill. App. 3d at 205 ("[S]ections 504(a)(3) and (a)(4) of the Act *** require the trial court to take into consideration the present and future earning capacity of the parties and any impairment to the capacity of the party seeking maintenance due to that spouse's domestic contribution to the household or foregone career opportunities due to marriage").

¶ 77 While it is true, as Howard argues, that Jeanne is gainfully employed at the Office of the Illinois Attorney General, her salary is likely never going to approach Howard's income and will not support her in any manner close to what she was accustomed to during the marriage. Under the circumstances of this case, where there is such a disparity in incomes and where the wife left the workforce for 13 years to care for the couple's children, the record reflects that the trial court considered appropriate factors, particularly the duration of the marriage, the standard of living enjoyed during the marriage, and the ability of the payor spouse to meet his own needs while also paying the maintenance (*In re Marriage of Vendredi*, 230 Ill. App. 3d at 1066), in determining Howard's maintenance obligation. It was neither unreasonable nor an abuse of discretion for the court to determine that Jeanne should receive 17% of Howard's net income in maintenance which, we remind the parties, is "reviewable upon motion of either party in 4 years." See *In re Marriage of Heroy*, 385 Ill. App. 3d at 652 (Ultimately, a maintenance award must be reasonable, and "what is reasonable depends upon the facts of each individual case").

¶ 78 In addition, this court is sympathetic to Howard's health issues, and certainly cognizant that the health of the parties is one of the section 504 factors we, as well as the trial court

before us, are bound to consider. We have done so, and still find no abuse of discretion where the health of the parties is but one factor to consider amongst several and, in the end, this award is reviewable in four years.

¶ 79 ii. The Statutory Termination Factors

¶ 80 Howard also complains of the inclusion of the following terminology in the corrected order regarding maintenance payments:

> "This award shall be renewable upon motion of either party in 4 years. This award shall not terminate upon cohabitation, remarriage or death of a party."

Howard argues that the inclusion of this non-termination language was an abuse of the trial court's discretion. We disagree. Section 510 of the Act provides, in relevant part:

> "(c) Unless otherwise agreed by the parties in a written agreement set forth in the judgment or otherwise approved by the court, the obligation to pay future maintenance is terminated upon the death of either party, or the remarriage of the party receiving maintenance, or if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis." 750 ILCS 5/510 (c) (2012).

¶ 81 There can be no doubt that the trial court intended to award maintenance without the termination language for which Howard argues. The issue was presented in a post trial motion and addressed at a hearing in which the following transpired:

> "[JEANNE'S ATTORNEY MCNISH:] Moving on, I think we have agreed that No. E. of Paragraph - - or item 1 that the word [']not['] would be taken out.
>
> [HOWARD'S ATTORNEY GORDON:] Your Honor, I don't think we can agree to that. I think that's your determination.

MR. MCNISH: We are assuming you wanted it terminable upon the happening of one of those events. If we're wrong- -

THE COURT: I did not.

MR. MCNISH: Okay. Then [']not[] stays in."

The court then entered its corrected order in which it specified: "This [maintenance] award shall not terminate upon cohabitation, remarriage or death of a party."

¶ 82 Having determined, then, that the language in question was not a scrivener's error but was intentionally added by the trial court, we must consider whether the trial court had the authority to include the language. To do so, we look to the plain language of the Act, as the plain and ordinary language of a statute offers the best indication of the legislature's intent. *Willis v. Khatkhate*, 373 Ill. App. 3d 495, 502 (2007) ("In construing a statute we must ascertain and give effect to the legislature's intent," the best indication of which is the "plain and ordinary language of the statute."). Here, the plain language of the statute makes it clear that the trial court properly had authority to include the questioned language. Specifically, the statute provides: "Unless otherwise agreed by the parties in a written agreement set forth in the judgment *or otherwise approved by the court*, the obligation to pay future maintenance is terminated upon" the various factors. [Emphasis added.] 750 ILCS 5/510(c) (West 2012). Under the statute, then, a maintenance award may be non-terminable by agreement of the parties *or* by being "otherwise approved by the court," which is what happened here. Accordingly, considering the plain and ordinary language of the statute, we find the court has the authority to not include the termination events.

¶ 83 Additionally, however, although we affirm the maintenance award herein, we note that while the judgment provides maintenance on a permanent basis, should there be a substantial

change in circumstances—such as an increase in Jeanne's earning capacity or a decrease in Howard's resources—the maintenance award would be reviewable in court. See 750 ILCS 5/510 (West 2010). Also, we remind the parties that, from the language of the corrected order itself, the parties may, by motioning the court, have this award reviewed again in four years.

¶ 84 iii. Taxation of the Retroactive Maintenance Award

¶ 85 Regarding Howard's argument about the tax consequences of the retroactive award, the relevant portion of the order reads:

> "Howard's counsel portrays Jeanne's request for maintenance (and additional child support) as an attempt to 'grab' some of Howard's post judgment income:
>
> > 'This case is a transparent attempt by Jeanne to "grab" a piece of the money which [Howard] acquired after the October 17, 2007 Judgment for Dissolution of Marriage *** under the guise of requesting child support and maintenance in amounts which far exceed any standard of living established during the marriage.'
>
> That characterization is contradicted by the contract of the parties' MSA, which specifically reserved these issues for later determination, with only an interim award of child support made, without prejudice.
>
> Howard's emphasis on his poor health during the marriage only gives credence to the claim that Jeanne contributed significantly to his ability to earn as much as he did during the marriage. Along with his representation of a demanding job, great weight is given to the suggestion that Jeanne took the great majority of responsibility for all aspects of raising the children and running one,

and sometimes two households. Although Howard claims he objected to Jeanne leaving the U.S. Attorney's Office, this was not credible. Were it not for the family decision to leave her paid employment, and devote her energies to the children and the family, Howard could not have garnered the success that he did during the marriage, and since. As a result of leaving the workforce when she did, Jeanne lost the opportunity to join a firm, as Howard did, and to advance substantially in her career.

Based on the evidence presented, and the application of the statutory and case law, and the time that she returned to the workforce, there is no conceivable way that, whether or not she remains employed in the public sector, Jeanne will ever have the ability to earn the kind of money that Howard is enjoying and will enjoy. Jeanne is entitled to maintenance, both retroactively and going forward.

The 2008 First District case of *In re the Marriage of Heroy*, 385 Ill. App. 3d 640 is instructive. In that case, too, both parties were lawyers at the time of the marriage, and the wife left her job to become a full-time homemaker. The facts of that case are of course, not identical to those in this case. In *Heroy* the marriage was longer, the wife stopped working for a longer period of time, and the case involved a greater marital estate and a much more luxurious standard of living. Nonetheless, it gives this Court guidance. In that case, the Appellate Court affirmed an award of 65% of the marital property to the wife, as well as an award of $35,000 per month as permanent maintenance, as well as retroactive maintenance, stating:

> ['']Donna stopped working to devote her time to raising three children and managing the Heroy household. Donna has been [out] of work for 20 years. As a result, her earning potential and employment opportunities are severely limited. It is unlikely that Donna [will] ever be able to support herself in any reasonable approximation of the standard of living established during the marriage.['']
>
> Due to the circumstances of this case, especially the length of time matters have been pending and the fact that no maintenance had been paid in any amount until March, 2010, the retroactive payments that are awarded should be made with no tax consequence to either party."

¶ 86 While Howard acknowledges that the judgment provides that if there is a retroactive award, "[t]he parties shall consider the possible tax consequences," he argues that the trial court erred in not allowing him to deduct the retroactive award payment of $692,833.46 he is required to pay Jeanne. Both parties rely on the United States Tax Court decision in *Okerson v. Commissioner*, 123 T.C. No. 14 (2004) to support their respective positions.

¶ 87 Both parties' arguments center around Section 71 of the Internal Revenue Code (26 U.S.C.A. Sec. 71(b) (West 2012)), which defines alimony payments in the context of the United States Tax Code. Alimony payments are deductible by the payor. 26 U.S.C.A. § 215 (West 2012). Payments that qualify as deductible are those defined as alimony in section 71(b) and thus includible in the income of the payee. 26 U.S.C.A. § 215(b) (West 2012). To qualify as alimony, the payments must be in cash and (1) be made pursuant to a written divorce or separation instrument; (2) not specifically designated in that instrument as a payment not includible in gross income or allowable as a deduction; (3) made at a time when

the payor and payee are not members of the same household; and (4) not made pursuant to a liability that would exist for any period after the death of the payee spouse. 26 U.S.C.A. Sec. 71(b)(1)(A)-(D) (West 2012). The mere terminology in dissolution documents does not affect the tax consequence of payments made to an ex-spouse. *Hoover v. C.I.R.*, 102 F.3d 842, 844 (1996) ("The mere use of the word 'alimony' does not affect the tax consequences of payments").

¶ 88 Additionally, if a payor's liability for a payment does not cease with the death of the payee, then the payment is not considered alimony. *Okerson v. C.I.R.*, 123 T.C. No. 14, 265 (2004) ("Although the parties to a divorce proceeding may intend that certain payments be considered alimony for Federal income tax purposes, and a court overseeing that proceeding may intend the same, Congress has mandated through section 71(b)(1)(D) that payments qualify as alimony for Federal income tax purposes only when the payor's liability for those payments, or for any payments which may be made in substitute thereof, terminates upon the payee spouse's death. *** The complete termination upon the death of the payee spouse of all payments made as alimony or in substitute thereof is an indispensable part of Congress's scheme for deducting a payment as alimony for Federal income tax purposes, and it is something that may not be overcome simply because the payor may establish an intent that the payments be deductible by the payor spouse as alimony.").

¶ 89 In this case, the trial court indicated in its corrected order that it did not intend the retroactive or current maintenance payments to be deductible by Howard and includible to Jeanne for income tax purposes. It also indicated that the payments were not terminable upon the death of a party. Accordingly, the payments fall outside the statutory definition of alimony under section 71(b)(1)(B), (D), and the court had authority to make the maintenance

payments not taxable to Jeanne and not deductible by Howard, and we cannot say that the court abused its discretion in making this decision. 26 U.S.C. Sec. 71(b)(1)(B), (D) (West 2012).

¶ 90 b. The Award of Retroactive Child Support

¶ 91 Next, Howard contends that the amount of the child support award was excessive. Specifically, Howard argues the trial court abused its discretion by setting child support at 12% of his income retroactive to December 2007, resulting in a retroactive payment due of $184,000, and in setting child support thereafter of $10,000 per month for two children and $7,500 per month for one child.

¶ 92 The standards governing court-awarded child support are set forth in section 505 of the Act. 750 ILCS 5/505 (West 2012). Pursuant to section 505(a)(1), the trial court, when ordering a supporting parent to pay child support, "shall determine the minimum amount of support by using the [statutory] guidelines," *i.e.*, a percentage of the supporting party's net income according to the number of children involved. 750 ILCS 5/505(a)(1) (West 2012). For two children, the statutory guideline is 28% of the supporting party's net income. 750 ILCS 5/505(a)(1) (West 2012). "Under this statutory scheme, a trial court's award of child support begins, in each case, with the statutory guidelines." *In re Marriage of Turk*, 2014 IL 116730, ¶ 44 (Theis, J., specially concurring). Section 505(a) of the Act creates "a rebuttable presumption that child support conforming to the guidelines is appropriate." *In re Marriage of Pratt*, 2014 IL App (1st) 130465, ¶ 28. "A trial court is justified in awarding child support below the guideline amount where the parties' incomes are more than sufficient to provide for the reasonable needs of the parties' children." *In re Marriage of Hill*, 2015 IL App. (2d) 140345, ¶ 30.

¶ 93 The parties recognize that the child support award—here, 12% of Howard's income—is in derogation of the support guidelines. The parties do not ask this court to raise the percentage to comply with the guidelines.

¶ 94 The relevant focus for determining income under section 505 of the Act "is the parent's economic situation at the time the child support calculations are made by the court." *In re Marriage of Rogers*, 213 Ill. 2d 129, 138 (2004). "[I]n determining income for child support purposes, the trial court has the authority to compel a party to pay at a level commensurate with his earning potential." *In re Marriage of Pratt*, 2014 IL App (1st) 130465, ¶ 26. "Although child support is the obligation of both parents, if one parent earns a disproportionately greater income than the other he or she should bear a larger share of the support." *In re Marriage of Pratt*, 2014 IL App (1st) 130465, ¶ 26; see also *In re Marriage of Garrett*, 336 Ill. App. 3d 1018, 1023 (2003).

¶ 95 The determination of the child support obligation of a high-income parent requires a trial court to balance competing concerns. *In re Keon C.*, 344 Ill. App. 3d 1137, 1142 (2003). "In light of the standard of living that the children would have enjoyed [had the marriage continued], child support is not to be based solely upon their shown needs." *In re Marriage of Hill*, 2015 IL App (2d) 14035, ¶ 30; *In re Marriage of Lee*, 246 Ill. App. 3d 628, 643 (1993) (The amount of child support should not be limited to the child's "shown needs," because the child is not expected to live at a minimal level of comfort while the noncustodial parent is living a life of luxury). Our supreme court has noted that it would not serve a child's best interests to have to " 'live a dual life in order to conform to the differing socio-economic classes of his or her parents.' " *In re Marriage of Turk*, 2014 IL 116730, ¶ 25 (quoting Laura Raatjes, *High-Income Child Support Guidelines: Harmonizing the Need for*

Limits With the Best Interests of the Child, 86 Chi.-Kent L.Rev. 317, 318-19 (2011)). On the other hand, a child support award is not designed to be a windfall (*In re Marriage of Singleteary*, 293 Ill. App. 3d 25, 36 (1997)), and the guidelines have less relevancy for the high-income parent. *In re Marriage of Scafuri*, 203 Ill. App. 3d 385, 392 (1990) (agreeing that the statutory support schedules have "less utility as the net income of the parties increases because the schedules are premised upon percentages related to average child-rearing expenses," and stating that "[w]hen dealing with above-average incomes, the specific facts of each case become more critical in determining whether the guidelines should be adhered to").

¶ 96 We review both a retroactive child support award and a child support award for an abuse of discretion. *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1119 (2004) ("The decision to award retroactive child support rests within the sound discretion of the trial court.").

¶ 97 Here, by the terms of the MSA, the parties specifically reserved the right to make child support retroactive to the date Jeanne vacated the former marital residence. The judgment reserved rights and claims of both parties to additional child support. Pursuant to the MSA, these rights and claims would be heard upon the filing of a petition within a certain precise time frame. Upon such a filing, the MSA provided that the court could consider whether or not any resulting order should be retroactive to the date that Jeanne vacated the marital home, pursuant to paragraph 5(g)(ii) of the MSA. Specifically, paragraph 2(d) of the MSA provides, in part:

"Support Reservation and Review

> 2(d)(i). JEANNE and HOWARD agree that each party shall reserve his or her rights and claims to maintenance and regarding children's support, if any, and, accordingly, JEANNE hereby reserves her rights and claims to maintenance and children's support from HOWARD, and HOWARD hereby reserves his rights and claims to maintenance and children's support from JEANNE.
>
> 2(d)(ii). The parties further agree that they will request of the Court in the case between the parties that the Court reserve jurisdiction to adjudicate JEANNE's and HOWARD's rights and claims to maintenance and additional children's support, if any, upon appropriate petition and notice. Neither Jeanne's nor Howard's petition and notice shall be filed earlier than [365] days from the date that JEANNE vacates the marital home pursuant to paragraph 5(g)(ii), and upon the determination of such petition and notice, the Court may consider whether or not such order will be retroactive to the effective date of this Agreement pursuant to the reservation of jurisdiction set forth above. Each party hereby reserves his or her rights to argue why if maintenance or additional children's support is ordered, it should or should not be retroactive to the date that JEANNE vacates the marital home pursuant to paragraph 5(g)(ii). If an order is entered for retroactive maintenance for either party, the parties shall consider the possible tax consequences and recapture concerns. *** "

The parties agreed that the reservation and review set forth in paragraphs 2(d)(i) and (ii) "shall not be treated as a modification of a prior order *** but shall be a *de novo* determination" of Jeanne's and Howard's "claims to maintenance and children's support." They also agreed that this "review" was to be determined by the standard of living of the

parties during the marriage, but that the court could also consider the parties' standard of living after the agreement. Specifically:

> "In addition, the review shall not be determined by the standard of living between the effective date of this Agreement and the Court's review at which time the parties may be living a lifestyle different than that established during the marriage, (however, evidence of the standard of living between the effective date of this Agreement and the Court's review may be introduced by either party as a factor to be considered and is not barred) but shall be based on the standard of living established by the parties in the years prior to the effective date of this agreement [October 17, 2007] and the factors set forth in 750 ILCS 5/504 and 750 ILCS 5/505. It shall be unnecessary for Jeanne or Howard to show a substantial change in circumstances."

¶ 98 The terms of the MSA, to which both parties agreed, expressly set forth that the $6,400 per month that would be paid until a court held a hearing was based only on Howard's draw and not on his additional law firm compensation. The court held that hearing. That the hearing took place so many years after the judgment—and therefore the award is so large—should not change the amount of the child support award to be paid retroactively; Howard was on notice by his agreement to reserve the issue that the payment could well come due. It did, and the trial court's order making the payment retroactive is not an abuse of discretion.

¶ 99 Nor do we find an abuse of discretion in the trial court's determination of child support in the amount of $10,000 per month for two children and $7,500 for one child. The record reveals that Howard continued to live in the expensive marital home and continued to have an income of nearly $2 million dollars per year. The trial court could reasonably determine

that, had the parties stayed married, the children would have enjoyed a high standard of living. The trial court, therefore, could have concluded that awarding 12% of Howard's income which, incidentally, is far below the statutory guidelines, was the best way to replicate the standard of living that the children would have enjoyed had the parties stayed married. See *In re Marriage of Hill*, 2015 IL App (2d) 14035, ¶ 30 (In light of the standard of living that the children would have enjoyed [had the marriage continued], child support is not to be based solely upon their shown needs."); *In re Marriage of Lee*, 246 Ill. App. 3d at 643 (The amount of child support should not be limited to the child's "shown needs," because the child is not expected to live at a minimal level of comfort while the noncustodial parent is living a life of luxury). We find no abuse of discretion in the trial court's award of child support, including the retroactive nature of the award, and, accordingly, decline to disturb the award.

¶ 100 c. The Award of Attorney Fees

¶ 101 Next, Howard contends the trial court abused its discretion by denying his fee petition and ordering him to pay $524,215 of Jeanne's attorney fees.[9] He contends the trial court erred where Jeanne is financially able to pay her own fees, particularly after the maintenance and child support award the court ordered in April 2013, and she works full-time, while he himself is ill and no longer working. We disagree.

¶ 102 Initially, we note that in his reply brief on appeal, Howard argues extensively that Jeanne's deletion of her emails was a "bad faith destruction of evidence." This issue is not germane to this appeal, which is limited to a review of the court's order for contribution to attorney fees as to the maintenance and support issues.

[9] This argument is the crux of the second, consolidated appeal, No. 1-14-2795.

¶ 103 i. Background

¶ 104 Because of the consolidated nature of this case, as well as the voluminous record on appeal, we recite the facts of this portion of the appeal, that is, those facts pertaining to No. 1-14-2795, here. The facts regarding the attorney fees dispute at issue are as follows: In March 2010, as part of pretrial discovery in this dissolution action, Howard served a document production request on Jeanne that included a request for her email and text messages to or from William Shapleigh, her yoga instructor and boyfriend. Howard also served a records subpoena for documents only on Shapleigh, which included the same request as well as a subpoena. In May 2010, Jeanne informed the courts that there were no emails available because she had deleted them, as she does on a routine basis. Eventually, the court ordered Jeanne and Shapleigh to produce the hard drives of their computers so that a computer expert could attempt to retrieve the deleted emails. The court termed this ordered production as both "supplemental discovery" and a "sanction," noting that "it was reasonable for the petition to expect that during the course of litigation, pursuant to her Petition for Dissolution of Marriage, that those documents [texts and emails between herself and Shapleigh] might be requested."

¶ 105 Jeanne filed her first petition for contribution to attorney fees in December 2009. By this petition, she set forth that the parties had been litigating various issues since the entry of the judgment, including the entry of two Qualified Domestic Relations Orders (QDRO), parenting time, maintenance and support, contempt petitions, and a defamation suit filed by Howard against Jeanne. This petition set forth that Howard had made over $5 million in the preceding three years while Jeanne was unemployed. By the petition, Jeanne asked the court

to order Howard to contribute $273,870 for Jeanne's attorney fees and costs incurred through November 19, 2009.

¶ 106 Howard filed a response in which he claimed Jeanne was litigious, that the fees were unreasonable, that Jeanne had "run up significant additional fees, which also remain unpaid," that Jeanne had sufficient assets and the ability to pay her own fees, and that Jeanne had been held in contempt of court for not approving a QDRO he had prepared. By his response, Howard asked the court to deny Jeanne's contribution petition and award Howard his attorney fees and costs incurred in taking Jeanne's attorneys' deposition.

¶ 107 Jeanne then filed a supplemental petition in July 2011, incorporating her initial petition and adding the time and expenses subsequently incurred. She identified fees and costs by issue, with a total billing of $240,532 for fees and costs incurred since November 19, 2009.

¶ 108 The trial court ordered that Jeanne's fee claims and "all other outstanding matters pertaining to each party's attorneys fees and costs" would be heard with the maintenance and support proceeding.

¶ 109 Jeanne filed a second supplemental fee petition in June 2012, stating that she had incurred an additional $93,384 in attorney fees. By that petition, Jeanne explained that much of these fees were related to Howard's litigation of his claim that Jeanne had "cohabitated with William Shapleigh following entry of the Judgment for Dissolution of Marriage despite the absence of any evidence supporting the claim."

¶ 110 Jeanne filed a third supplemental fee petition in June 2013, after the support and maintenance trial had concluded and while the post-judgment motions were pending. By this motion, Jeanne sought fees under both section 508(a) and 508(b) of the Act. She set forth the "factors that contributed to Jeanne's fees and costs," including: the reservation in the

judgment of "nearly all issues involving maintenance, child support and child-related expenses back to the entry of the Judgment on October 17, 2007" as well as what she considered Howard's delay tactics regarding the cohabitation and sanction contentions (*e.g.*, his allegations that Jeanne interfered with witnesses by improperly contacting two of Howard's witnesses, one of which was Jeanne's current treating physician and the other of which was Jeanne's former therapist as well as the parties' former marital therapist), various discovery tactics (*e.g.*, "demanding unlimited access to the computer hard drives of Jeanne and Mr. Shapleigh for the purposes of his cohabitation claim [which] resulted in over 32 court appearances, multiple court filings, the hiring of forensic computer experts, and a delay in the resolution of Jeanne's Amended Support Petition for over 17 months); as well as various continuances sought by Howard. By that petition, Jeanne sought contribution from Howard to her attorney fees in the amount of $431,332 and costs in the amount of $21,432 "incurred in connection with the support proceedings during the period from August 21, 2008 through May 22, 2013."

¶ 111 Howard filed a response to this petition in which he admitted the fees were specific to the maintenance and support litigation. By that response, he set forth the court proceedings related to the emails and hard drives of Jeanne and William Shapleigh; discussed his petition regarding alleged interference with witnesses; stated that Jeanne had been sanctioned by the court regarding the emails; and stated that costs had been reserved. He also argued that, pursuant to section 510(c) of the Act, whether or not the cohabitation information was later used at trial was not relevant to the fees for seeking it in discovery, as cohabitation could have resulted in a statutory maintenance termination.

¶ 112 Howard also filed a fee petition in June 2013 in which he described the email litigation concerning Jeanne and Shapleigh. By this petition, Howard asked the court to order Jeanne to pay $67,922 for his attorney fees and costs related to the email litigation. He also asked the court to order that, in the event Shapleigh were to obtain a judgment against Howard for attorney fees and costs, the judgment would be Jeanne's responsibility.[10]

¶ 113 The court held a multi-day fee hearing, beginning in July 2013. The parties and the court agreed that the fee hearing was limited to those fees related to the maintenance and support aspects of the litigation and not, for instance, to potential fees related to pension division.

¶ 114 At the hearing, Howard's counsel stipulated that the attorney fees charged by Jeanne's counsel and support staff were reasonable. The court clarified that Howard was stipulating to the reasonableness of the amount charged, not the necessity thereof. Attorney Friedman, who represented Jeanne, testified that all employees at his firm of Davis Friedman enter their time into a computer billing system. Friedman testified that, in compiling the fee exhibits for the hearing, he had segregated the billing related to the support and maintenance proceedings from other billings and prepared a summary of those entries, which Jeanne entered into evidence. Friedman submitted a record of all payments Jeanne had made, and denied having discussed waiving any fees with her. While Jeanne was often a part of the decision making process when the firm decided to use associates, sometimes Friedman made those decisions himself.

¶ 115 Regarding the time spent on the Shapleigh and Jeanne email dispute, Friedman testified that shortly after a protective order was entered in this cause, a mirror image of

[10] Shapleigh's fee hearing against Howard began in September 2013. Howard and Shapleigh settled the matter for an undisclosed sum per an order entered in December 2013.

Jeanne's hard drive was made by a technician, a privilege log was prepared, and the non-privileged emails were tendered to Howard's counsel.

¶ 116 Jeanne testified at the hearing that she understood she was responsible for the Davis Friedman fees the court did not order Howard to pay. She stated she had not entered into any agreement other than the retainer agreement regarding payment to Davis Friedman. She had been receiving bills from the firm on a monthly basis since executing the retainer agreement in 2005. She reviewed the bills upon receiving them.

¶ 117 Jeanne's counsel entered a memorandum from Winston & Strawn regarding Howard's 2013 compensation. Howard's counsel stipulated to this memorandum. Howard's total 2013 compensation was $1,950,000.

¶ 118 Jeanne rested her case.

¶ 119 Jeanne was then called as an adverse witness. In that context, Jeanne acknowledged telling Shapleigh via email that she would pay his attorney fees if Howard were to bring him into the litigation. Jeanne routinely deleted emails from her computers for computer efficiency, although she testified the deletion must not have been permanent after all, as the emails remained on her hard drive. Jeanne admitted that, at her previous deposition, she had explained she deleted her emails for two purposes: one, because Howard had read her emails in 2005 and she wanted to avoid him doing so again in the future; and two, because her computer was very slow and she was trying to improve its efficiency by deleting excess from it.

¶ 120 Between 2007 and 2010, Jeanne communicated with Shapleigh via email, texts, and telephone conversations. One of the expenses she sought in her contribution petition was the $3,900 she spent having her hard drive imaged by a technician. Howard's counsel presented

Jeanne with a series of emails between Jeanne and Shapleigh that had been procured from the hard drive of her computer but never used at trial.

¶ 121 The trial court asked the parties if there had ever been a cohabitation or termination petition filed, and both attorneys informed the court that there had never been a petition filed as to cohabitation. The court asked Howard's counsel if there had ever been a pleading other than discovery filed that mentioned William Shapleigh. Howard's counsel said there had not been.

¶ 122 Jeanne testified she believed the Davis Friedman bills associated with the maintenance and support litigation were for reasonable and necessary services. She testified that she paid some of the attorney bills by "liquidating assets." Specifically, she explained that the payments were made from either investment assets or by using an equity line of credit. At the time of the hearing, the total value of Jeanne's Merrill Lynch assets, including retirement funds, was $2,031,300, including the retroactive maintenance and support payments Howard had made pursuant to court order.[11]

¶ 123 Jeanne was asked about Howard's allegations that she had contacted two doctors he had planned to call as witnesses (one of whom was her current treating physician and the other of whom was her former therapist as well as the parties' former marital therapist). Jeanne's counsel objected to this questioning because Howard had withdrawn his motion regarding witness interference over three years prior. The court informed the parties that it merely needed to know if the work done by Friedman before the motion was withdrawn was reasonable and necessary. Howard later testified that he withdrew these physicians from the witness list because, as his current primary physician and current treating therapist, he felt

[11] As noted above, those payments totaled $876,833.

"those relationships were so critical to me that I didn't want to do anything to compel them to testify."

¶ 124 According to Jeanne, she has paid Davis Friedman $390,000 since 2007. She still owes the firm approximately $500,000. One of the reasons Jeanne had not paid more of the bill was because she did not want to have to liquidate her assets in order to do so.

¶ 125 Howard testified he was no longer a partner at Winston & Strawn, but that he had retired. Howard no longer expected to receive either his monthly draw or his partner distributions from the firm. He testified that he first left the firm on short-term disability between February 1, 2013, and July 30, 2013, and then on permanent disability from July 31, 2013, forward. He testified he expected to begin receiving disability payments from MetLife Insurance Company in August 2013. He testified he holds three disability policies. He believed he would begin receiving payments from one of the policies in the amount of $25,000 per month beginning at the end of August 2013, subject to deductions of his Social Security payments. He did not yet know what the other two policies would pay, but had submitted the requisite claims.

¶ 126 Howard had two Merrill Lynch accounts that still bore Jeanne's name that total approximately $53,000, as well as a Schwab account with Jeanne's name on it with a balance of $326,345 and a joint Fidelity account with a balance of $7,068. Howard had a solely held cash management account at Fidelity with a balance of $401,629, an account from which, immediately prior to the hearing, he had paid $580,000 in estimated tax, an amount that may have included an overpayment.

¶ 127 Howard also had two Fidelity retirement accounts totaling $1,494,859, and a Fidelity brokerage account containing $1,279,227. As of April 2013, his Winston & Strawn pension plan had a value of $2,073,196. He earned $1,950,000 from Winston & Strawn in 2013.

¶ 128 Howard testified he had paid his first attorney, Sandra Rice, in full.

¶ 129 Attorney Belle Gordon testified she began her representation of Howard in February 2011, when there were issues pending regarding allowances, pension, a QDRO, a protective order for Shapleigh, and various discovery issues. Gordon testified there were fees at issue billed both by herself and by Rice regarding only the email dispute and, thus, the bills she submitted as evidence had redacted all other information. Gordon testified she had no personal knowledge regarding how Rice prepared her bills.

¶ 130 To obtain the emails sought from Jeanne and Shapleigh, Gordon and Friedman developed a protocol for retrieving them technically. They retrieved many emails by examining the computer hard drives. Gordon thought there were still more emails they had not retrieved because Shapleigh's computer contained photographs sent between Jeanne and himself that Jeanne's computer did not contain. When asked if that could have been because the emails in question were sent from a computer other than Jeanne's personal computer, Gordon responded, "I'm not a computer expert." Nonetheless, Gordon testified she never filed a motion to compel against Jeanne for failure to produce anything, and she did not know whether Rice did.

¶ 131 Gordon acknowledged that, while the court had granted Howard the right in 2009 to pursue fees pursuant to the discovery litigation alleging the destruction of evidence, the court had not found any particular amount due. Howard's fee petition at the time was $106,122.

¶ 132 Howard never raised a cohabitation claim in the maintenance and support trial. Gordon could not recall whether he ever raised it in a supported related pleading. None of the emails that were produced during discovery were ever used at trial, and Shapleigh's name was not mentioned at trial.

¶ 133 Gordon testified that Howard incurred $62,322 in fees and costs between herself and Rice concerning email production.

¶ 134 The fee trial resumed on May 28, 2014, after a long break. Friedman presented updated billing records in the amount of $155,892 at that time from July 2013 to April 2014. Friedman testified that, although Howard's fee petition claimed to be seeking attorney fees after Jeanne was held in contempt of court for failing to comply with discovery, she never failed to comply with discovery and was never held in contempt of court. The court clarified that an order requiring her to comply is "different" than an order holding her in contempt for failure to comply.

¶ 135 Ultimately, in August 2014, the court denied Howard's petition for fees and granted Jeanne's petition for fees. It found the reasonable fees to be $584,215, of which Howard was ordered to pay $524,215. It specifically limited its order to the fees and costs associated with the maintenance and support claims. The court's order included a transcript of the court's oral pronouncements regarding the petition. It stated that both parties are attorneys, with Jeanne at home since the birth of the couple's first child, and Howard a "very successful" litigator at a "major law firm," and noted, in part:

> "THE COURT: Between 2009, when this petition was filed, to the time this Judge was assigned the case, this petition had been before approximately eight

Judges, several of whom heard bits or pieces of discovery disputes, but few, if any of them, had the opportunity to view the case as a whole.

There had been numerous continuances, and, in fact, the first time this Judge was introduced to the case was when Mr. Pearl's counsel came before the Court approximately a week before trial dates and, on his behalf, asked for a continuance on the multiday hearing that had been scheduled months earlier.

When that motion was denied, Mr. Pearl brought an emergency motion to reconsider the ruling. Each of those caused both parties to incur *** financial obligations.

* * *

This Court was able to review the voluminous file in this case. It is clear that, since the filing of the 2009 petition, an inordinate amount of time was expended. There were numerous motions for continuance, for the most part brought on behalf of the respondent, often on the eve of the set trial date or a set hearing date.

The Court heard testimony of the parties and the attorneys on the fee petitions between - - of the parties during several more days of trial, and the Court considered all evidence and the applicable law, had the opportunity to review the case history, observe the witnesses, and assess their credibility.

The fact that an item of evidence, testimony, or issue of law may not be addressed does not mean that the Court did not take it into consideration in this decision.

> The Court had the opportunity, also, to review the extensive and very detailed billing records of the petitioner's counsel, who was on the stand at least two days."

¶ 136 The court then reviewed the statutory framework behind a fee case. The court explained that Howard brought a petition for fees based on the fact that, during discovery, two orders were entered issuing sanctions against Jeanne, "[b]oth related to the fishing expedition Mr. Pearl took." The court noted Howard had sought not only communications between Jeanne and Shapleigh, but also required her to turn over the hard drive to her computer. The court stated:

> "THE COURT: It is critical to note that years of litigation was engaged in on the issue of communications between Mr. Shapleigh and Ms. Witherspoon; however, there was never an allegation in any pleading that Ms. Witherspoon had cohabitated with Mr. Shapleigh.
>
> It was not only a fishing expedition to demand the documents and take depositions of Mr. Shapleigh and Ms. Witherspoon and to incur fees for checking the hard drives of each of their computers, it was a wild-goose chase. No goose was ever found. And most critically, again, is the fact that never did Mr. Pearl formally or informally in any pleading make the allegation that Mr. Shapleigh had cohabitated with Ms. Witherspoon."

¶ 137 The court then considered the delays incurred during litigation:

"THE COURT: The inordinate delays in this case were more often than not caused by Mr. Pearl.[12] He changed lawyers approximately 8 to 10 times.[13] Each time he was given time to obtain new counsel. Every time new counsel appeared, duplicate efforts and communication about the case were required of Ms. Witherspoon's counsel. The education of each new attorney caused delay.

Also causing delay was the fact that, because the case took so long, many Judges heard fragments of this case; however, if one drags litigation out, it is inevitable that more than one Judge would hear the case and, in fact, there are approximately seven or eight Judges that had this matter before them. *** Every time the case came before a new Judge, that Judge was required to educate herself."

¶ 138 The court considered Howard's behavior during the case to be a purposeful tactic, noting:

"THE COURT: It is clear that Mr. Pearl, savvy after years of supervising litigation on behalf of a major corporation, pursued avenues of litigation which served absolutely no purpose except to be intentionally vexatious and harassing to Jeanne Witherspoon and to cause her to incur substantial time, effort, and cost of her attorneys' fees and the costs of those [] individuals who had to be paid to examine the hard drives.

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[12] The court also acknowledged that, on two occasions, there were "apparent medical reasons verified for his delays."

[13] We recognize here that the number of times the trial court thought Howard had changed attorneys is in error, as Howard changed attorneys fewer than eight to ten times. Nonetheless, this error does not change our determination here.

> In addition to the wild-goose chase of discovery, Mr. Pearl filed pleadings to which Ms. Witherspoon was required to prepare responses only to have Mr. Pearl decide, before hearing commenced, not to proceed."

The court provided two examples of this pleadings-response-decision not to proceed tactic. First, the court described the petition for fees Shapleigh filed against Howard, noting that Shapleigh was on the witness stand as a result of Howard's "behavior and demands" and, after spending time in court and providing substantial testimony, Howard settled the case. Next, the court described the motion to reconsider the child support and maintenance order filed by Howard, which Howard eventually withdrew. The court held:

> "THE COURT: As mentioned, there were two orders of sanctions entered against Ms. Witherspoon. Both were related to Mr. Pearl's fishing expedition, and he is asking now for attorneys' fees based on those orders. His petition for fees is denied."

¶ 139 The court acknowledged that Jeanne had obtained a "substantial" child support and maintenance award. However, a party is not required by law to deplete her capital assets or strip her means of support or to undermine her economic stability in order to pay her fees. The court found the sanctions that had been issued against Jeanne "were, in fact, issued only because of the improper purposes of the discovery that [Howard] pursued." In so finding, the court stated:

> "THE COURT: Ms. Witherspoon and Mr. Shapleigh had their privacy intruded upon, and each was caused to incur obscene expenses, not only for attorneys but also for computer experts, in order to comply with the respondent's discovery demands, which were, in the hindsight and overview afforded to this Court,

> vexatious and harassing. Nothing of value was ever produced for this litigation as a result of that pursuit."

¶ 140 In regard to the parties' ability to pay the fees, the court noted that Howard could afford to pay the fees while Jeanne could not. Specifically, the court noted that Jeanne incurred "the obscene amount" of total charges of $610,526 just "in order to obtain her order for child support and maintenance after the judgment was entered which had contemplated such a petition." Additionally, the court found that Howard intentionally delayed the proceedings:

> "THE COURT: Additionally, because the respondent caused numerous delays and violated Supreme Court Rule 137 and other Supreme Court rules by pursuing a course of discovery which took on a life of its own, continuing over a period of several years, and which accounted for almost half the total fees incurred in obtaining an order for support, the Court finds that that path was nothing more than an exercise in trying to intimidate and exhaust the petitioner emotionally and financially."

¶ 141 The court found the amount of attorney time entered in the case was reasonable and necessary, considering the course of the litigation. It also recalled that the parties had stipulated that the hourly rates were reasonable. The court found that the reasonable fees were $584,215. It ordered Howard to contribute $524,215 to Jeanne's fees and costs.

¶ 142 ii. Analysis

¶ 143 Attorney fees are generally the responsibility of the party who incurred the fees. *In re Marriage of McGuire*, 305 Ill. App. 3d 474, 479 (1999); *In re Marriage of Mantei*, 222 Ill. App. 3d 933, 941 (1991) (the primary obligation for the payment of attorney fees rests on the party on whose behalf the services were rendered). However, Section 508 of the Act permits

the trial court to order a party to contribute a reasonable amount of the opposing party's attorney fees where one party lacks the financial resources and the other party has the ability to pay. 705 ILCS 5/508 (West 2012). "Any award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under Section 504." 750 ILCS 5/503(j)(2) (West 2012). The criteria include the property awarded to each spouse, each spouse's incomes and present and future earning capacities, and "any other factor that the court expressly finds to be just and equitable." See 750 ILCS 5/503(d), 504(a) (West 2012). The amount of attorney fees awarded must be reasonable. *In re Marriage of Hasabnis*, 322 Ill. App. 3d 582, 596 (2001).

¶ 144 The party seeking payment of attorney fees by an ex-spouse must establish her inability to pay and the ex-spouse's ability to do so. *In re Marriage of Schneider*, 214 Ill. 2d at 173; *In re Marriage of Minear*, 181 Ill. 2d at 562 (quoting *In re Marriage of Bussey*, 108 Ill. 2d at 299-300) ("The propriety of an award of attorney fees is dependent upon a showing by the party seeking them of an inability to pay and a demonstration of the ability of the other spouse to do so."); but see *In re Marriage of Haken*, 394 Ill. App. 3d 155, 162 (2009) (disagreeing with *Schneider* that a contribution award requires a spouse to prove the inability to pay). "Financial inability exists where requiring payment of fees would strip the party [seeking the award] of her means of support or undermine her financial stability." *In re Marriage of Schneider*, 214 Ill. 2d at 174 (citing *In re Marriage of Puls*, 268 Ill. App. 3d 882, 889 (1994)). "When determining an award of attorney fees, the allocation of assets and liabilities, maintenance, and the relative earning abilities of the parties should be considered." *In re Marriage of McGuire*, 305 Ill. App. 3d at 479. This court has explained:

> "A court may consider a party's prospective as well as her or his current income in awarding attorney fees. [Citation.] The spouse seeking the award of attorney fees need not be destitute. [Citation.] It is sufficient that payment would exhaust the spouse's estate or strip the spouse's means of support or undermine the spouse's economic stability." *In re Marriage of Hasabnis*, 322 Ill. App. 3d at 598.

¶ 145 The court may also consider the conduct of a party as a factor in an attorney fees contribution case. *In re Marriage of Patel*, 2013 IL App (1st) 112571, ¶¶ 98-111 (courts may consider whether the amount of attorney fees was the result of the actions of one or both of the parties). Additionally, in considering an award of contribution, a trial court may use its own experience in determining the reasonableness of the fees, particularly when that court had lengthy involvement in the case and conducted extensive hearings on the attorney fee issue. *In re Marriage of Patel*, 2013 IL App (1st) 112571, ¶ 110 ("[I]n addition to all the factors a court considers in fashioning a fee award, when necessary, a court may use its own experience to determine the reasonableness of the fee amounts requested. [Citation.] Due to its lengthy involvement with this case and the extensive hearings on the attorney fees issue, the trial court had a detailed understanding of what work was performed by the attorneys and whether it was reasonable and necessary.").

¶ 146 The allowance of attorney fees in a dissolution case and the proportion to be paid by each party are within the trial court's discretion and will not be disturbed on appeal absent an abuse of that discretion or unless it is against the manifest weight of the evidence. *In re Marriage of Minear*, 181 Ill. 2d at 561. "An abuse of discretion can be shown in cases where the evidence reveals a gross disparity in income and earning capacity and the financial

inability of the spouse seeking relief to pay." *In re Marriage of McGuire*, 305 Ill. App. 3d at 479.

¶ 147 Here, the evidence established that Jeanne's reasonable fees as to only this issue were $584,215, the payment of which, even with her current residence and employment, would compel Jeanne to invade her financial assets, further exhaust her estate, and clearly undermine her economic stability. Evidence at trial showed that, during the years the attorney fees at issue were accruing, Jeanne was unemployed, then, once employed, initially earned $60,000 per year. Jeanne now earns $80,000 per year and has already taken out a line of credit in the amount of $175,000 to pay attorney fees in this dissolution matter. In contrast, evidence at trial showed that, during the years these attorney fees were accruing, Howard earned nearly $2 million per year. Even in 2013, at the time of the hearing, Howard earned nearly $2 million for that year. Although Howard now paints himself as a pauper with a meager estate, we note that, even now in retirement, Howard will make a far greater salary than will Jeanne. For example, Howard testified he has three disability policies from which he has made claims. He did not know how much two of the policies would pay him on a monthly basis, but knew that the MetLife policy would pay out $25,000 per month. This is a minimum income, then, of $300,000, far greater than Jeanne's income of $80,000.

¶ 148 Importantly, we note that the decision on review here is from a trial court that had been involved with the case over the course of a number of years, had opportunity to observe the parties, including their actions, filings and demeanor, and, ultimately, determined that Howard intentionally drove up Jeanne's litigation costs as part of his trial strategy. It is proper for a court to consider the conduct of a party as a factor in an attorney fees contribution case, particularly when it has had lengthy involvement in the case and has

conducted extensive hearings on the attorney fee issue. See, *e.g.*, *In re Marriage of Patel*, 2013 IL App (1st) 112571, ¶¶ 98-111. The trial court in the case at bar did just that: it considered all of the evidence before it, including the testimony it heard and the billing statements submitted in evidence, and used its own experience to determine that Howard should contribute to Jeanne's attorney fees.

¶ 149 On the specific facts of this case, then, we cannot say the trial court abused its discretion, that is, we cannot say that no reasonable person would have taken the view adopted by the trial court (*In re Marriage of Schneider*, 214 Ill. 2d at 173) or where the trial court acted "arbitrarily without the employment of conscientious judgment or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law so that substantial injustice resulted" (*In re Marriage of Hughes*, 160 Ill. App. 3d at 684), in ordering Howard to contribute to Jeanne's attorney fees, limited to those fees accrued as to the maintenance and support issue.

¶ 150 As a final matter, in the event these parties come before this court again, we admonish them to use pinpoint cites to the record, including volume numbers. This is particularly important in a case such as the one at bar in which the record is both lengthy and poorly catalogued.

¶ 151 III. CONCLUSION

¶ 152 For all of the foregoing reasons, we affirm the decision of the Circuit Court of Cook County.

¶ 153 Affirmed.