

2015 IL App (1st) 140430-U

SIXTH DIVISION
September 30, 2015
Modified upon denial of rehearing
October 30, 2015

No. 1-14-0430

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
JENNIFER GETZ,)	Cook County.
)	
Petitioner-Appellee,)	No. 11 D 530226
)	
and)	
)	Honorable
HENRY GETZ,)	Patricia M. Logue,
)	Judge Presiding.
Respondent-Appellant.)	

JUSTICE HALL delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

¶ 6

II. Pretrial Proceedings

¶ 7

On March 22, 2011, Jennifer filed a Praecipe for Dissolution of Marriage. Temporary orders were entered in the case granting Jennifer exclusive possession of the Tinley Park condominium and custody of the children. Henry was granted visitation rights.

¶ 8

On August 4, 2011, Jennifer filed a petition for dissolution of marriage. Jennifer sought full custody of the children and child support. On that date, an agreed order was entered requiring Henry to pay Jennifer the amount of \$115.38 per week (equal to \$500 per month) in temporary child support and to reimburse Jennifer at the rate of \$17.25 per week for his car insurance. The order contained a stipulation by the parties that Henry was unemployed and had not produced the necessary information to determine his financial circumstances.

¶ 9

On August 17, 2011, Jennifer filed a motion to compel Henry to seek employment and maintain a job diary. In support of her motion, Jennifer alleged that Henry paid only the minimum amount of support because he was unemployed. She further alleged that while Henry was not licensed to practice medicine, he had a degree in biochemistry but refused to obtain employment. Instead, he chose to live on monetary gifts from his family. On August 31, 2011, pursuant to a motion filed by Henry, the trial court appointed Dr. Mary Gardner to perform a custody evaluation and ordered each party to pay \$2,500 to Dr. Gardner as a retainer.

¶ 10

On September 19, 2011, the trial court ordered Henry to seek employment and to report his efforts in a job diary, a copy of which he was to furnish to Jennifer every two weeks. The order set forth the information that Henry was to include in the job diary and required Henry to submit an application and/or a resume to a minimum of seven employers per week and to make a minimum of three personal contacts per week.

¶ 11 On November 30, 2011, Jennifer filed a petition for a rule to show cause why Henry should not be held in contempt for his failure to comply with the September 19, 2011 order. On December 21, 2011, Jennifer filed a second petition for a rule to show cause for Henry's failure to pay child support in accordance with the August 4, 2011 agreed order. On January 18, 2012, following a hearing on both petitions, the trial court ordered Henry to continue to comply with the September 19, 2011 order and to pay \$500 per month (rather than \$115.38 per week) in child support until December 1, 2012. Henry was ordered to pay \$2,000 to Jennifer's attorneys for the fees and costs incurred in bringing the petitions.

¶ 12 On March 26, 2012, Jennifer filed a third petition for rule to show cause for Henry's failure to comply with the August 4, 2011 and the January 18, 2012 orders relating to the payment of child support. Jennifer also filed a motion to modify the August 4, 2011 agreed order setting temporary child support, which was based on Henry's then-unemployed status. Jennifer alleged that a change in circumstances had occurred in that since December 2011, Henry had been employed as an insurance consultant. Jennifer further alleged that at the January 18, 2012 hearing, Henry had represented to the trial court that he had applied for and expected to be "matched" into a first-year residency program by March 2012. Jennifer believed that Henry had failed for the fourth time to obtain a first-year residency. Jennifer further alleged that Henry's expenses were being paid for by his family. Based on the amount of those payments, Jennifer maintained that Henry's net monthly income was \$8,362 and requested that the temporary child support order be increased to \$2,341 per month (or 28%) of Henry's net monthly income.

¶ 13 On May 4 2012, the attorneys representing Jennifer withdrew at her request. Jennifer filed her *pro se* appearance.¹

¶ 14 On May 7, 2012, Henry filed a response to Jennifer's motion to modify the temporary child support order. Henry admitted that he represented to the court and Jennifer that he applied for a residency match for March 2012, but he failed to obtain a residency. He further admitted that between January 1 and February 3, 2012, he earned \$1,598.43 and as of March 22, 2012, his total earnings were \$5,573.14 or over \$1,850 per month. Henry further admitted that he had received \$68,000 in financial support from his parents but that \$45,000 was in the form of loans he must repay as evidenced by the promissory notes attached to his response. Based on his net income, the \$500 per month temporary child support payment was more than the statutory 28% for two children. Henry asserted that his child support obligation should be reduced in accordance with his actual net income.

¶ 15 On July 16, 2012, the trial court ordered Henry to pay to Jennifer \$1,486.50 in attorney fees and costs related to the petition for rule to show cause. Beginning August 1, 2012, temporary child support was increased to \$620 per month, and Henry was required to provide proof of his income every 60 days. At Henry's request and his expense, the trial court appointed Dr. Richard Crane as Henry's expert, pursuant to section 604.5 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/604.5 (West 2010) (the Act)). The trial court further ordered the termination of Henry's obligation to maintain a job diary. Finally, Henry was ordered to enroll and participate in a basic parenting class.

¶ 16 On November 13, 2012, Henry filed a motion to compel Jennifer to return the funds she removed from the children's Uniform Gifts to Minors (UGTM) accounts. On December 3,

¹Jennifer represented herself at trial and on this appeal.

2012, Jennifer filed a motion seeking a contribution from Henry to her attorney fees. On January 30, 2013, the trial court set the case for trial on child custody, visitation and support, attorney fees, personal property and the UGTM accounts.²

¶ 17 III. The Trial

¶ 18 The pertinent testimony from the trial is set forth below.³

¶ 19 A. Jennifer's Case

¶ 20 1. *Jennifer*

¶ 21 a. Direct Examination By Jennifer, *Pro Se*

¶ 22 At the time of the parties' marriage in 2009, Jennifer was employed full-time as a mathematics teacher. She owned a two-year old Toyota Corolla and a condominium in Tinley Park. Henry had graduated from medical school but was unemployed. They lived in Jennifer's condominium and paid bills with Jennifer's salary.

¶ 23 Despite Henry's continued unemployment, the parties had no financial worries. Henry came from a wealthy family, and after the birth of S.G., Henry told her that he had a trust and in fact, he was a "trust fund baby." In addition, Henry told her that his grandparents would give them money throughout the year. Several times a year, Henry's grandfather gave gifts of \$10,000 to family members. In October 2009 and 2010, Jennifer attended the Getz family brunch at Starved Rock. At this annual brunch, his grandparents gave each family member a check for a \$1,000 as a birthday present. Between 2009 and 2011, Henry received \$63,000, Jennifer received \$44,000, S.G. received \$43,000, and M.G. received \$23,000, in gifts from Henry's grandparents. The gifts to the parties and the children totaled \$173,000. Jennifer opened UGTM accounts for the children and deposited their gifts in those accounts.

² Child custody and visitation were no longer at issue at the time of trial.

³ A prove-up as to grounds was conducted as part of the trial proceedings.

¶ 24 Jennifer and Henry used their gifts for nonessentials, such as a vacation, the down payment on a minivan and renovating their kitchen. Occasionally, Jennifer had to use some of the gift money to pay the family's bills. Once she filed for dissolution of marriage, neither Jennifer nor the children received any financial gifts from Henry's family.

¶ 25 Henry remained unemployed, but he assured Jennifer that he was seeking employment. In January 2010, Henry began volunteering two days per week at the Rehabilitation Institute of Chicago (RIC). On a day when Henry was scheduled to volunteer at RIC, Jennifer drove to the gym where Henry worked out and saw his car parked there. Henry later admitted to Jennifer that on numerous occasions, he lied to her when he told her that he was at the RIC.

¶ 26 At the time S.G. was born in October 2009, Jennifer and Henry discussed placing S.G. in the daycare facility located at the high school where she taught. Henry agreed it was a good idea because he would be applying for jobs. After M.G. was born in September 2010, Jennifer suffered severe postpartum depression and did not return to work until January 2011. She was not paid for the last two months, and her salary was prorated giving her a biweekly salary of \$1,200. Henry told her he was busy applying for jobs, though he did not get a residency match in 2010 or 2011. Henry never told her that he wanted to be a stay-at-home dad taking care of the children, and he agreed that both children should be in daycare.

¶ 27 A month after Henry moved from the condominium, Jennifer discovered that he had taken all the money from their joint checking account into which her employment checks were automatically deposited. Jennifer had no money to pay bills, and she withdrew \$500 from S.G.'s UGTM account. Jennifer continued to pay Henry's cell phone bill, which was \$1,000 for three months. Rather than take his phone off Jennifer's account, Henry cancelled the service leaving Jennifer with a \$200 cancellation fee to pay.

¶ 28 Jennifer initially retained an attorney from Oak Forest, but in April 2011, the attorney withdrew, and she hired a second law firm to represent her. To pay her legal fees, she depleted her online savings account, took a \$10,000 loan from her father, and after Henry totaled her car in an accident, used the \$10,000 settlement from the insurance company for the loss. Jennifer also used her 2011 income tax refund and \$40,000 from the children's UGTM accounts to pay her attorney fees.

¶ 29 At the time of the trial, Jennifer received \$620 per month in child support from Henry. She paid \$14,000 per year for daycare; for a year, Henry had been contributing \$100 per month for the daycare expense. She received no money for the children's uncovered medical expenses.

¶ 30 b. Cross-Examination By Henry's Attorney

¶ 31 Jennifer acknowledged that she paid her first attorney a retainer from the joint checking account. She did not recall the exact amount, but it may have been more than \$1,000. She also acknowledged that her online savings account was funded by gifts from Henry's grandparents.

¶ 32 2. Henry

¶ 33 a. Adverse Examination By Jennifer

¶ 34 At the time of the trial, Henry resided in an apartment in Orland Park, Illinois. He graduated from Miami of Ohio University with a Bachelor of Science degree in Biochemistry. His college tuition was paid by his parents. He then attended the University of Illinois Medical School and graduated in 2009. Henry incurred \$10,000 in student loans, and his parents paid the balance of his medical school education. He acknowledged that the Rural Illinois Medical Student Association Program (RIMSAP) provided assistance to him in

applying to medical school. In exchange, he had signed a contract with RIMSAP that he would practice medicine in a rural area, or pay \$12,000 to RIMSAP. The amount was past due, but he planned to pay the money back when he was financially able to do so.

¶ 35 Beginning in December 2011 or January 2012, Henry began work as a financial professional for Pruco Securities, LLC, a subsidiary of Prudential Life Insurance Company. He worked 40 hours per week and had earned \$5,000 total to date. Henry and his father had prepared his 2011 federal income tax return. He acknowledged that his address and telephone number were incorrect. His return showed \$19,477 as his gross income and \$19,425 for car and truck expenses. The return showed \$869 in dividends.

¶ 36 Reviewing the deposits listed on his bank statements from South Side Bank, Henry's June 6, 2012 statement showed a deposit of \$3,946 and a check to Golden Rule Insurance Company in the amount of \$589.57, which Henry explained was for health insurance. Henry's August 6, 2012 statement showed deposits and credits of \$25,335.35; the September 6, 2011 statement \$683.83; October 6, 2011, \$28,000; December 6, 2011, \$2,110.09; and January 6, 2013, \$23,500.

¶ 37 In his June 2013 financial disclosure statement, Henry listed \$6 in monthly dividend income, based on the \$80 dividend he received this year from a custodial account. He also listed \$1,600 per month in income from giving chess lessons. He acknowledged that his cell phone bill of \$300 was high. He spent \$200 a month furnishing and maintaining his apartment. His food bill for the children and him was \$900. His transportation and maintenance expenses for his car were \$675. He spent \$50 on his personal grooming and \$240 on grooming and clothes for the children. Henry also contributed \$100 toward the

daycare expense for the children and spent \$75 for babysitting and \$150 for activities with the children.

¶ 38 At the time of the trial, Henry was driving a 2012 Hyundai Santa Fe (the Hyundai). The Hyundai was owned by his father, and his father made the car payments. Henry had contributed \$1,000 toward the monthly payments for Hyundai, but his use of the Hyundai was not conditioned on contributing to the car payments.

¶ 39 b. Redirect Examination By Henry's Attorney

¶ 40 In 2011, Henry had an investment account with Scottrade. His dividends from that account were \$865 in 2011. The account had a balance of \$20,000, which Henry withdrew and gave to his parents to pay his attorney fees. Any deposits to his South Side Bank account over \$10,000 were from his parents and were used to pay attorney fees.

¶ 41 Henry used his parents' address in Peoria on his tax return because he had trouble receiving mail at his apartment. He listed his parents' telephone number on the tax form because he had recently switched cell phones, and his parents' telephone number was always available.

¶ 42 Henry acknowledged that while the 2012 tax return listed \$52 for health insurance, he had previously identified a check he had written for health insurance exceeding that amount. He had used a program to complete the tax form. The tax return showed a net profit from business income of \$52.

¶ 43 b. Adverse Re-examination By Jennifer

¶ 44 Henry paid \$750 per month for his apartment in Orland Park. When he had visitation with the children, the majority of the time was spent in Peoria with his parents. During visitation, Henry, and occasionally his mother, paid for the children's food.

¶ 45

B. Henry's Case

¶ 46

1. *Jennifer*

¶ 47

a. Adverse Examination By Henry's Attorney

¶ 48

Jennifer's May 12, 2013 Chase Freedom Visa statement reflected that she paid \$3,100 in charges, leaving the account with a balance of \$1.69. Jennifer's teacher's salary was \$70,000 per year. She contributed \$259.52 per month into her Teachers Retirement System Account and until September 2012, she contributed \$25 per month into her First Investors Retirement account. For the last four weeks of school in May 2011, Jennifer paid half-rates for daycare. At the present time she paid full rates for daycare for the children. She was aware that Henry's attorneys were holding the parties' 2010 tax refund in the amount of \$8,168.

¶ 49

Jennifer withdrew \$46,875 from the children's UGTM accounts. While she maintained in her deposition that the funds were used solely to pay attorney fees, she admitted that some of the funds were used for general expenses. When Henry removed the balance of the money from the joint checking account, she still had funds available to her in her online savings account. Henry was unemployed the entire time they lived together.

¶ 50

b. Redirect Examination By Jennifer

¶ 51

Jennifer withdrew \$500 from S.G.'s UGTM account because the funds from her online savings account were not accessible immediately, and she had to pay for food and daycare. The money was repaid in one or two months. She discontinued the \$25 contribution to her investment account because she was paying almost all of the daycare expenses.

¶ 52

2. *Henry*

¶ 53

a. Direct Examination By His Attorney

¶ 54 Upon receiving his medical degree in June 2009, Henry participated in the "match program" in order to obtain a residency. The process began with interviews from the fall to early spring. In March, the participants were notified of residency offers. Henry took part in the match program in 2009 through 2013. Other than a verbal offer in 2009, he was never offered a contract for a residency. The 2009 offer was for a residency in Washington, but he did not accept the offer because Jennifer was going through a high-risk pregnancy, and they agreed he should not go out of state. The longer the time between his graduation from medical school and his residency applications, the less Henry's chances were for obtaining a competitive residency. He considered psychiatry or general practice, less competitive residencies, but he still had not received any offers. He rated his present chances of obtaining a residency as slim to none.

¶ 55 Henry was unemployed at the time Jennifer and he were married and during their marriage. Prior to S.G.'s birth in October 2009, Henry sought employment in the research field where he would be compensated for having a medical degree. After S.G. was born, Henry continued looking for work and in addition, took care of S.G. and renovated the condominium. While Jennifer would sometimes take S.G. to daycare, most of the time Jennifer left S.G. with Henry. Henry provided all of the child care for S.G., including day and night feedings and changing diapers.

¶ 56 After M.G was born in September 2010, Jennifer suffered severe postpartum depression. She had thoughts of drowning M.G. and required constant watching. Since Jennifer was unable to assist with the childcare, Henry and his mother and Jennifer's mother provided all the childcare for S.G. and M.G. until Jennifer returned to work.

¶ 57 During their marriage, Henry cleaned the condominium, did the grocery shopping and cooked the majority of the meals. At Jennifer's request and with some professional help, he renovated the kitchen, bathroom and the nursery by replacing appliances, flooring and carpeting, and painting. The renovations were paid for with gifts from Henry's family.

¶ 58 Henry earned \$1,600 per month teaching chess. He was the Illinois State champion for two years in a row. Henry was ranked number one in three chess classes and had set a record for Illinois. He could not meet all of the monthly expenses listed on his disclosure form without help from his parents.

¶ 59 Henry borrowed a total of \$75,000 from his parents to pay his legal fees in this case. He executed three unsecured promissory notes to his parents for the loans. The notes had not yet come due. Henry was unsure what "unsecured" meant.

¶ 60 After Jennifer and he separated, Henry did not receive any cash gifts from his grandparents or parents. His parents assisted him with finding an apartment and paying his legal fees when the dissolution proceedings began. His parents helped with his rent payments when he was unable to pay them, but he had never received more than \$1,000.

¶ 61 Henry's RIMSAP obligation to practice four years in a rural community was based on his being licensed as a doctor. He was required to complete a two-year residency in order to be licensed to practice medicine in Illinois.

¶ 62 Henry paid \$100 per month toward daycare for the children. In addition to the child support, he contributed \$80 per month to the children's medical insurance premiums, which were \$160 per month. He began contributing to the daycare and the insurance expenses when Jennifer asked him.

¶ 63 b. Cross-Examination By Jennifer

¶ 64 While on direct examination, Henry testified that in 2009 he received a residency offer in the state of Washington, he agreed with his deposition testimony that he received an offer for a rehabilitation residency in New York, not Washington. On direct examination, Henry testified that he had applied for a residency match every year from 2009 through 2013. However, in his deposition testimony, he had admitted that he did not apply for the match program in 2010. Henry did not recall asking Jennifer to help him repaint the kitchen cabinets during her pregnancy.

¶ 65 Henry estimated that his attorney fees were close to \$90,000. Two of the promissory notes, evidencing the \$75,000 in loans from his parents, required a monthly payment of \$224 per month, one commencing in April 2015 and one in May 2016. The third note required a payment of \$325 per month beginning in April 2016. Henry admitted he had no idea how he would repay the loans. He did not recall that his contributions to the children's daycare and medical insurance expenses were required by court orders.

¶ 66 Henry identified his exhibit 16, as a chart of his expenses from April 28, 2011 to January 12, 2012. While the chart did not identify the party who paid the expenses, Henry acknowledged that between June 2011 and November 2011, his parents paid his expenses and helped him with bills in December 2011. In January 2012, his parents paid for his rent and the children's court-appointed evaluator. He acknowledged that with his parents' help, he was able to pay his car insurance and medical insurance. Once he began working, Henry gave his paycheck to his parents, since he could not meet his legal expenses and his living expenses. Henry liquidated a stock account his parents had been holding for him and gave the \$20,000 proceeds to his parents to pay his expenses.

¶ 67 Henry was impeached by his deposition testimony that there was only one loan of \$30,000 from his parents. He was further impeached by his deposition testimony that, other than the loan, his only source of income was from working.

¶ 68 c. Redirect Examination By His Attorney

¶ 69 In April 2011, Henry owned a stock account with Scottrade. When he cashed out the account, he took the proceeds check and left it at his parents' house.

¶ 70 IV. The Judgment

¶ 71 We will set forth only those parts of the judgment that are pertinent to the issues raised on appeal.

¶ 72 On October 19, 2013, the trial court issued a judgment dissolving the parties' marriage and resolving the remaining issues of property, debts, child support, maintenance and attorney fees.⁴ The trial court found Henry to be a less than credible witness. Henry's trial testimony regarding his efforts to obtain residency matches and other efforts to obtain employment during the marriage was frequently impeached by his deposition testimony. The court further found Henry's recollection of past events unreliable and noted his tendency toward "spinning events to make himself look better, but this habit instead revealed a fundamental dishonesty."

¶ 73 The court further found that Henry was accustomed to receiving large cash gifts from his grandparents and financial assistance from his parents. While Jennifer and the children had received gifts from Henry's grandparents, the gifts to them stopped when she began dissolution proceedings.

¶ 74 A. Henry's Child Support Obligation

⁴ Neither party was awarded maintenance.

¶ 75 Reviewing Henry's financial disclosure statements, the trial court noted that Henry's income for 2010 was \$200 and his gross income for 2011 was \$200. For 2012, through July, his 2012 income was \$22,000. In his June 15, 2013 disclosure statement, his 2013 income was \$15,606 as of that date. Henry did not provide a total income figure for 2012. The court found that Henry had vastly understated his income in his disclosure statements.

¶ 76 The trial court noted that the August 4, 2011, agreed order for temporary child support was based on Henry's unemployed status and his failure to produce the necessary financial information. In July 2012, the monthly child support was raised to an agreed amount of \$620 per month, though Henry maintained it was above the statutory guideline amount. Henry's payment of child support was sporadic. The trial court found that Henry's failure to admit as true Jennifer's allegation that he was receiving financial support from his parents was a deliberate falsehood.

¶ 77 The trial court found Henry's actual income for 2011 to be at least \$110,847, consisting of cash gifts from his family, income and living expenses from his parents, and loans from his parents. The court pointed out that this was more than the \$200 Henry listed on the disclosure form and more than the \$7,877 he reported on his federal income tax return. The court noted that Henry gave the \$20,000 from his Scottrade account to his parents, rather than contribute to his children's support. Henry's 2012 total income was \$143,035, less paid expenses of \$64,535, which left him with disposable income of \$72,500. Henry's 2013 gross income through June 15, 2013, based on employment, a loan from his parents and a January 2013 deposit of \$19,000 to his bank account, was at least \$64,606. After deductions, Henry had a net income of \$59,879 for 6.5 months of 2013. In light of the financial support he

received from his family and applying the statutory rate of 28% for two children, Henry should have and could have paid \$2,579 per month.

¶ 78 In calculating the child support award, the trial court noted that Henry had not requested a downward deviation from 28% of his net income under the statutory guidelines. Even if Henry had requested a downward adjustment of the guideline percentage, in light of Jennifer's decent but not large income, the special medical needs of the children (S.G. was born with one kidney and M.G. had an undeveloped ear requiring plastic surgery), and the financial benefits the children would have received from Henry's family, the court found that it was not in the children's best interest for a downward adjustment.

¶ 79 Relying on *In re Marriage of Rogers*, 213 Ill. 2d 129 (2004), the trial court found that the proceeds from the loans from his parents and their payment of his expenses were income to Henry. The trial court further found that even if the payments were not forthcoming in the future, under *Rogers*, the support calculation was to be based on the noncustodial parent's income at the time the calculation was made. Based on an average of Henry's income for the past three years, the court ordered him to pay \$2,800 per month to Jennifer as child support.

¶ 80 B. Modification of the Temporary Support Award

¶ 81 The trial court noted that it was not bound by the parties' agreement as to the amount of child support and that the temporary child support orders were based on false income information. The court pointed out that Henry had received ample cash from his family but chose to conceal the truth of his financial situation. Relying on sections 501(d)(2) and 510 of the Act (750 ILCS 5/501(d)(2), 510 (West 2012)) and based on an average of Henry's income for the past three years, the trial court modified the temporary support order to \$2,800 per month retroactive to April 4, 2011, and awarded Jennifer \$67,309. The court entered

judgment against Henry for the amount and ordered Henry to pay Jennifer a minimum of \$673 per month on the judgment.

¶ 82 C. Henry's Contribution to Jennifer's Attorney fees

¶ 83 Jennifer petitioned for a contribution to her attorney fees from Henry in the amount of \$89,000. The trial court found that Henry and Jennifer had incurred comparable amounts of attorney fees. The court further found that Henry did not pay any of his own attorney fees. Based on the factors in section 503(d) of the Act (750 ILCS 5/503(d) (West 2012)), the court ordered Henry to contribute \$45,000 to Jennifer's attorney fees.

¶ 84 D. Indirect Civil Contempt Finding Against Henry

¶ 85 The trial court found that Henry's conduct in filing false financial disclosures, making false entries on his job diary, his frequent failures to comply with child support orders and to pay timely the sanctions imposed and denying under oath that he was receiving financial support from his family was willful and contumacious. The court found that by such conduct, Henry flagrantly mocked the court's rules and burdened both the court and Jennifer in proceeding with the case. The court held Henry in indirect civil contempt and ordered him to pay \$7,500 to Jennifer for attorney fees and costs within 21 days in order to purge the contempt finding.

¶ 86 V. Motion for Reconsideration

¶ 87 Through his new attorneys, Henry filed a motion for reconsideration of the judgment. Henry maintained that the trial court erred in considering the financial support that he received from his family, rather than his own income and assets, in calculating his child support obligation. He maintained that the trial court erred in retroactively modifying the

agreed order for temporary child support and in ordering him to contribute to Jennifer's attorney fees.

¶ 88 Henry further maintained that the trial court erred when it held him in indirect civil contempt of court. He argued that the basis for the court's finding was punitive rather than coercive, and therefore, the finding should have been indirect criminal contempt entitling him to due process, which was not afforded to him by the trial court.

¶ 89 On January 30, 2014, the trial court heard arguments on Henry's motion for reconsideration and denied the motion. This appeal followed.

¶ 90

ANALYSIS

¶ 91

I. Calculation of Child Support

¶ 92

Henry contends that in determining his child support obligations, the trial court erred when it failed to deviate downward from the statutory guidelines, by including gifts and loans from his parents in his income, and in miscalculating his net income.

¶ 93

A. Standard of Review

¶ 94

A trial court's findings as to income and the awarding of child support are within the discretion of the trial court. *In re Marriage of DiFatta*, 306 Ill. App. 3d 656, 662 (1999). Under the abuse of discretion standard, the question is not whether the reviewing court might have decided the issue differently but whether any reasonable person would have taken the position adopted by the trial court. *In re Marriage of Patel*, 2013 IL App (1st) 112571, ¶ 95.

¶ 95

B. Discussion

¶ 96

Under the Act, either or both parents may be ordered to pay " 'an amount reasonable and necessary' for the support of the children." *In re Marriage of Mayfield*, 2013 IL 114655, ¶ 16; see 750 ILCS 5/505(a) (West 2012). The calculation of child support is a two-step

process; the trial court first determines the parents' income and then apportions that income, setting an amount of child support for the noncustodial parent. *Mayfield*, 2013 IL 114655, ¶ 16. In this case, we are concerned with the first step, which is governed by section 505(a)(3) of the Act (750 ILCS 5/505(a)(3) (West 2012)). Specifically, whether the gifts and loans Henry received from his parents were properly considered as net income to him for the purpose of calculating his child support obligation. See 750 ILCS 5/505(a)(3) (2010) (defining net income as the "total of all income from all sources" minus various deductions).

¶ 97 The definition of net income is broad and includes "gains and benefits which enhance a noncustodial parent's wealth and facilitate that parent's ability to support a child or children." *Mayfield*, 2013 IL 114655, ¶ 16. "Such gains and benefits are normally linked to employment or self-employment, investments, royalties, and gifts." *Mayfield*, 2013 IL 114655, ¶ 16 (citing *In re Marriage of Rogers*, 213 Ill. 2d 129, 137 (2004) quoting Black's Law Dictionary 778 (8th ed. 2004)).⁵

¶ 98 1. *Downward Deviation from Statutory Guidelines*

¶ 99 The statutory guidelines for setting child support create a rebuttable presumption that child support in the guideline amount is appropriate. *Roper v. Johns*, 345 Ill. App. 3d 1127, 1130 (2004). In this case, the trial court ordered Henry to pay 28%, the statutory percentage for two children, of his net income as child support. 750 ILCS 5/505(a)(1) (West 2012). As the proponent of the deviation, Henry had the burden of producing evidence that compelling reasons existed to justify the deviation. *Roper*, 345 Ill. App. 3d at 1130.

¶ 100 Henry maintains that he was entitled to a downward deviation because the trial court included in his income gifts and loans, which but for the dissolution proceedings, he would

⁵ The supreme court's opinion in *Rogers* is also referred to as "*Rogers II*."

not be receiving. However, Henry failed to request a downward deviation. "A trial court does not abuse its discretion by failing to deviate *sua sponte* from the presumptively appropriate guidelines." *Roper*, 345 Ill. App. 3d at 1130 (the reviewing court would not address whether evidence of the respondent's debt burden was sufficient to overcome the presumption that the statutory guideline was appropriate where he failed to request a deviation).

¶ 101 We now turn to Henry's argument that the trial court erred in calculating his net income.

¶ 102 *2. Gifts*

¶ 103 Henry maintains that the inclusion of gifts, in the form of financial assistance from his parents during the dissolution proceedings, in his net income was error. He argues that the gifts were necessitated by the dissolution proceedings and were not a definite and recurring source of income to him. We disagree.

¶ 104 In *Rogers*, the supreme court held that the inclusion of gifts as income was proper under the plain and ordinary language of section 505(a)(3). *Rogers*, 213 Ill. 2d at 138. The court agreed with the appellate court's determination that the trial court was correct to include as part of the father's income, the annual gifts he received from his parents, finding that they "represented a valuable benefit to the father that enhanced his wealth and facilitated his ability to support [his child]" and therefore, qualified as income. *Rogers*, 213 Ill. 2d at 137.

¶ 105 The evidence at trial established that Henry was accustomed to receiving monetary gifts from his grandparents. Henry's college and all but \$10,000 of his medical school tuition were paid for by his parents. Prior to the commencement of the dissolution proceedings, Henry was unemployed and relied on his family's continued financial support in addition to Jennifer's income. During the dissolution proceedings, he continued to be supported by his parents, even after he secured employment. The argument that such gifts should not be

considered income since Henry might not continue to receive financial assistance from his parents in the future was rejected in *Rogers*. The court explained as follows:

"Few, if any, sources of income are certain to continue unchanged year in and year out. People can lose their jobs, interest rates can fall, business conditions can wipe out profits and dividends. Accordingly, the relevant focus under section 505 is the parent's economic situation at the time the child support calculations are made by the court. If a parent has received payments that would otherwise qualify as 'income' under the statute, nothing in the law permits those payments to be excluded from consideration merely because like payments may not be forthcoming in the future." *Rogers*, 213 Ill. 2d at 138.

The court acknowledged that the nonrecurring nature of the income was not irrelevant but "[r]ecurring or not, the income must be included by the circuit court in the first instance when it computes a parent's 'net income' and applies the statutory guidelines for determining the minimum amount of support due under section 505(a)(1) of the Act." *Rogers*, 213 Ill. 2d at 139 (citing 750 ILCS 5/505(a)(1) (West 2002)). If it is established that the income is nonrecurring, the trial court may consider that fact in determining whether a deviation from the statutory support guidelines is warranted, or if the payments stop earlier than anticipated by the court. A parent obligated to pay the support may seek a modification of the support order. *Rogers*, 213 Ill. 2d at 139 (citing 750 ILCS 5/505(a)(2), 510 (West 2002)).

¶ 106

Henry's contention that the financial support provided by his parents was necessitated solely by the dissolution proceedings was belied by evidence of the financial support he received both prior to and during his marriage to Jennifer. In calculating Henry's actual income, the trial court found that "[t]he reality of the Getz family history is one of

consistently underwriting Henry over the years (and both parties when they were living together as a married couple). The ongoing pattern of substantial financial support regularly approximated \$10,000/month or more. It has been so consistent that the court finds it is likely to continue into the future, rather than being situational to a particular life event. *** Henry has been generously supported at least through college and medical school, his marriage, his separation and beyond."

¶ 107 We conclude that the trial court did not err when it included the gifts in the form of financial support Henry received from his parents in calculating his net income.

¶ 108 *2. Loans*

¶ 109 Henry received \$75,000 from his parents in the form of three loans: \$20,000 in 2011, \$25,000 in 2012 and \$30,000 in 2013. The loans were evidenced by three unsecured promissory notes. Henry's parents were the promisees and the notes were signed by Henry and one of his parents. Each note provided the date for the repayment by installments of the loan. Under the terms of the notes, none of the payments were due as of the date of the trial.

¶ 110 In *In re Marriage of Baumgartner*, 384 Ill. App. 3d 39 (2008), this court refused to find that loan proceeds could never constitute income but determined that a residential mortgage loan, "made by a *bona fide* lender," did not meet the definition of income as illustrated in *Rogers. Baumgartner*, 384 Ill. App. 3d at 52. We noted that "a determining factor" in the cases dealing with loans as income was "whether repayment of the money received was required and where repayment was required, the loan was not considered income."

Baumgartner, 384 Ill. App. 3d at 52.

¶ 111 In *In re Marriage of Tegeler*, 365 Ill. App. 3d 448 (2006), the appellate court determined that the trial court did not abuse its discretion by not considering the respondent's line of credit as a source of income for child support purposes. The court explained as follows:

"We believe that, *in general*, loans should not be considered income. We note that the Black's Law Dictionary definition of 'income' quoted by the supreme court in *Rogers II*, *** specifically includes gifts as income but does not mention loans. [Citation.] More significantly, loans typically should not be counted as income because they usually do not directly increase an individual's wealth. [Citations.] In this case, for example, there is no evidence that respondent used his loans for anything other than farming purposes. To the extent that the loans allowed him to earn a living or enhance his production, his farming income has already been included in his income calculation." *Tegeler*, 365 Ill. App. 3d at 458.

As did this court in *Baumgartner*, the court in *Tegeler* recognized that there could be situations in which a loan could be considered income, but in general, loans should not be considered income under section 505(a)(3) of the Act. *Tegeler*, 365 Ill. App. 3d at 459.

¶ 112 As the basis for including the \$75,000 in loan proceeds in its calculation of Henry's net income for the child support purposes, the trial court relied on Henry's family's history, the structure of the notes, *i.e.*, no payments were due for over two years, the fact that there were no limits on the use of the money, and the decision in *Rogers*.

¶ 113 The trial court found that Henry was not a credible witness. Yet the inclusion of the loan proceeds from the three promissory notes in its calculation of his income was not based on the trial court's failure to believe his testimony that he was required to repay the loans. The three promissory notes were entered into evidence, and each required repayment

commencing on a specific date. None of the notes had come due at the time of trial. The evidence established that, historically, Henry received gifts from his family that did not require repayment. There was no comparable history of "loans" to Henry since these were the only loans Henry received from his parents, and unlike the gifts, the terms of the notes required him to repay the loans. While the trial court questioned the structure of the repayment and the purpose of the loans, there was no evidence that the notes were fraudulent, and Henry candidly acknowledged he used the proceeds for attorney fees and his expenses.

¶ 114 Moreover, the trial court's reliance on *Rogers* is misplaced. The court in *Rogers* declined to address under what circumstances loan proceeds would be considered income for child support purposes. *Rogers*, 213 Ill. 2d at 140. Instead, the court held that the loans to the father from his parents were loans in name only based on the credible testimony that the father was given the loans each year and had never been required to repay them. *Rogers*, 213 Ill. 2d at 140. There is no such history of loan forgiveness in the present case.

¶ 115 We are just as competent as the trial court to review the documentary evidence. *JPMorgan Chase Bank, N.A. v. Ivanov*, 2014 IL App (1st) 133553, ¶ 64. The validity of the promissory notes has not been challenged, and therefore, Henry's parents qualify as "*bona fide*" lenders. As we noted in *Baumgartner*, the determining factor is whether the loan must be repaid. *Baumgartner*, 384 Ill. App. 3d at 52. In light of the repayment requirement of the loans, we conclude that the trial court abused its discretion when it included the loan proceeds Henry received from his parents in his income for child support purposes.

¶ 116 *3. Mistakes in the Calculation of Net Income*

¶ 117 Henry contends that in calculating Henry's income for child support purposes, the trial court overstated his income for the years 2011, 2012 and 2013. Jennifer responds that the

trial court made some computational errors but maintains that its calculation of Henry's net income was largely correct.

¶ 118 a. Henry's 2011 Net Income

¶ 119 The trial court found Henry's 2011 income to be at least \$110,847. The court determined that Henry had received \$40,000 in cash and more than \$70,000 in payments. Initially, Henry and Jennifer agree that this figure is incorrect because it includes income Henry actually received in 2012. Exhibit 16 listed Henry's expenses paid for by his parents and imputed as income to him between April 2011 and January 12, 2012, a total of \$66,428.40. \$13,890 of that amount was received in 2012. Therefore, Henry maintains that his income for 2011 should be reduced to \$96,958 (\$110,847 minus \$13,890).

¶ 120 Jennifer responds that Henry's income for 2011 even with the deduction of the \$13,891 was \$140,045. Her figure includes the \$29,631, the amount of the vehicle which Henry's father purchased, and crediting Henry for \$1,000 of the payments. Jennifer argues that the purchase price of the vehicle should be included because it was purchased for Henry's use. However, the testimony at trial established only that Henry's father owned the vehicle and allowed Henry to use it regardless of whether he contributed to the payments.

¶ 121 We agree with Henry that the \$110,847 arrived at by the trial court must be reduced by \$13,891. In light of our determination that the loan proceeds were not income, the 2011 loan of \$20,000 must also be deducted from Henry's 2011 income. Therefore we conclude that Henry's net income for 2011 was \$76,956.

¶ 122 b. Henry's 2012 Net Income

¶ 123 The trial court determined that Henry's net income for 2012 was \$143,035. Henry argues and Jennifer agrees that the court mistakenly added \$45,535 to his actual bank deposits of

\$84,305 in 2012. Even including the \$13,891 and the \$25,000 loan from his parents, Henry maintains that his 2012 net income was no more than \$123,194. In response, Jennifer maintains that the correct amount is \$143,539 (\$504 more than the trial court's figure) because Henry's income figures for 2012 do not include the \$19,477 in commissions he earned and \$865 in dividends.

¶ 124 Henry argues that Jennifer has double-counted his salary in her calculations. He relies on his testimony that once he began working he gave his earnings to his parents to pay his expenses. Unlike the promissory notes, Henry presented no evidence in the form of receipts or other documentation confirming his parents' receipt of these earnings and how they were used. Also bearing on this point, is the trial court's findings that Henry was not a credible witness and that his disclosure statements "vastly understated his income." Therefore, Henry failed to establish that his salary was double-counted in the calculation of his 2012 net income.

¶ 125 Henry's only disagreement with Jennifer's calculation of his net income at \$143,539 is the inclusion of his \$19,477 in commission earnings and the \$25,000 in loan proceeds from his parents in 2012. We conclude that the \$19,477 was properly included in Henry's income for 2012. We note that Henry does not dispute the inclusion of the \$865 in dividends in his 2012 income. Based on our determination that the loan proceeds were not income to Henry, Henry's 2012 net income was \$118,539 (\$143,539 minus \$25,000).

¶ 126 c. Henry's 2013 Net Income

¶ 127 The trial court determined Henry's 2013 net income was \$110,545. Henry and Jennifer agree that the trial court overstated his 2013 income, but they differ as to the correct amount.

Henry maintains that the correct amount of his net income for 2013 is \$50,085 while Jennifer maintains the correct amount is \$80,931.

¶ 128 The difference stems from Jennifer's attempt to account for Henry's income for all of 2013, based on the first six months of the year by "extrapolation." Using extrapolation, Jennifer calculated that Henry would receive \$55,384 in loan proceeds from his parents rather than the \$30,000 he actually received in 2013. "Extrapolation" is defined as "[t]he process of estimating an unknown value or quantity on the basis of the known range of variables" or "[t]he process of speculating about possible results, based on known facts." Black's Law Dictionary 625 (8th ed. 2004).

¶ 129 The evidence at trial established that, just as in 2011 and 2012, in 2013, Henry received a loan from his parents of \$30,000. There was no evidence that Henry would be receiving additional loan proceeds in 2013, and there was no history of more than one loan from his parents in each of the previous two years. Jennifer's use of extrapolation was not proper in this case. Therefore, her loan proceeds figure of \$55,384 must be reduced to \$30,000, the actual amount of the loan. Since the \$30,000 in loan proceeds must be deducted, Henry's 2013 net income was \$25,547.

¶ 130 d. Recalculation of Support

¶ 131 After determining Henry's actual income for the years 2011 through June 2013, the trial court took an average of the income for those years and applied the statutory 28% for the support for two children. It is proper to take an income-averaging approach in determining child support where the noncustodial parent's income varies significantly from year to year. *DiFatta*, 306 Ill. App. 3d at 662. Applying the same income-averaging approach as did the trial court, albeit with different figures, we calculate Henry's average net income for those

years to be \$73,681 (\$76,956 plus \$118,539 plus \$25,547 equals \$221,042 divided by 3). Applying the statutory 28%, Henry's monthly child support obligation should be set at \$1,719.

¶ 132 To summarize, we reject Henry's contention that he was entitled to a downward deviation from the statutory guideline figure of 28% for two children. The trial court properly included gifts in the form of financial assistance from his parents in calculating Henry's income, but the proceeds of the three loans Henry received from his parents were not income to Henry and should not have been included in the trial court's calculation.

¶ 133 We determine that the trial court abused its discretion in setting Henry's child support obligation at \$2,800 as it is against the manifest weight of the evidence. We further determine that, based on the evidence, Henry's support obligation must be modified to \$1,719 per month.

¶ 134 II. Modification of Temporary Support Order

¶ 135 Henry contends that the trial court did not have the authority to order a retroactive modification of the agreed temporary child support orders under section 501(d) of the Act (750 ILCS 5/505 (d)(2) (West 2012)), and therefore, the modification constitutes reversible error. Even if the trial court had the authority to award retroactive temporary support, Henry contends that the increase to \$2,800 per month had no legal basis and constituted an abuse of discretion since it was against the manifest weight of the evidence.

¶ 136 A. Section 501(d) of the Act

¶ 137 1. *Standard of Review*

¶ 138 The court applies *de novo* review to the construction of a statute. *Baumgartner*, 384 Ill. App. 3d at 48.

¶ 139

2. Discussion

¶ 140

In accordance with section 501 of the Act, a motion for temporary support of a child of the marriage, accompanied by an affidavit as to the factual basis for the support requested, may be filed by either parent. 750 ILCS 5/501(a)(1) (West 2012). Section 501(d) provides in pertinent part as follows:

(d) A temporary order entered under this Section:

(1) does not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding;

(2) may be revoked or modified before final judgment, on a showing by affidavit and upon hearing; and

(3) terminates when the final judgment is entered or when the petition for dissolution of marriage *** is dismissed." 750 ILCS 5/501(d) (2012).

¶ 141

Henry acknowledges that under 501(d)(2), the trial court had the authority to modify the temporary child support order. He argues that the trial court lacked the authority to modify the temporary order in the absence of an affidavit from Jennifer to support the modification and where he was not afforded a hearing. Henry further argues that the statute does not authorize the court to modify the temporary order as part of the final judgment.

¶ 142

As did the trial court, in response, Jennifer relies on *People ex rel. Greene v. Young*, 367 Ill. App. 3d 211 (2006), and *People ex rel. Williams v. Williams*, 191 Ill. App. 3d 311 (1989). Neither case supports the trial court's retroactive modification of the temporary child support order in this case. Both cases involved modifications under section 510(a) of the Act, which applies to the modification of judgments. See 750 ILCS 5/510(a) (West 2012) ("the provisions of any judgment respecting maintenance or support may be modified").

¶ 143 "The cardinal rule of statutory construction is that the court must ascertain and give effect to the intent of the legislature." *In re Marriage of King*, 208 Ill. 2d 332, 340 (2003). The court examines the language of the statute, giving the terms their plain and ordinary meaning. *King*, 208 Ill. 2d at 340. Where the language is clear and unambiguous, the court must apply the statute without resort to further aids of construction. *King*, 208 Ill. 2d at 340.

¶ 144 An affidavit is defined as "[a] voluntary declaration of the facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public." Black's Law Dictionary 62 (8th ed. 2004). In this case, Jennifer's testimony at the hearing was under oath and transcribed by the court reporter and fulfilled the requirement of an affidavit. A hearing is defined as "[a] judicial session [usually] open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying ***." Black's Law Dictionary 737 (8th ed. 2004). The trial court conducted a hearing on the dissolution petition in which the evidence revealed Henry's deliberate concealment of his sources of income which impacted the amount of agreed-to temporary support previously ordered by the trial court. Section 501(d)(2) does not require that the court conduct a separate hearing in order to modify a temporary support order. Henry did receive a hearing required by section 501(d)(2).

¶ 145 The term "judgment" is defined as "[a] court's final determination of the rights and obligations of the parties in the case." Black's Law Dictionary 858 (8th ed. 2004). In *King*, the issue was the finality of an award of attorney fees for appeal purposes, but it is instructive on the trial court's authority to modify its previous orders. In *King*, on January 5, 1999, the trial court entered an order awarding attorney fees which were to be paid from certain bank accounts owned by the husband who was restrained from accessing the accounts. On

February 5, 1999, the court was advised that the husband had withdrawn the funds from the accounts. On the same day, the trial court entered the final judgment of dissolution and in it modified the January 5, 1999 order to provide that the attorney fees be paid from the husband's assets. *King*, 208 Ill. 2d at 345-46. The supreme court noted that under section 501(d) "orders entered during the course of a dissolution proceeding are expressly modifiable before final judgment and such orders terminate when final judgment is entered." *King*, 208 Ill. 2d at 345. While section 501 of the Act referred to temporary orders, the court recognized that "the instant case illustrates the need for a trial court to maintain the ability to modify any prior orders entered during the course of dissolution proceedings." *King*, 208 Ill. 2d at 345.

¶ 146 Contrary to Henry's argument, unlike section 510 of the Act, section 501(d)(2) does not require a motion in order for relief to be granted, and unlike section 510, section 501 does not specifically bar retroactive support. See 750 ILCS 5/510(a) (West 2012) (the "provisions of any judgment respecting maintenance or support may be modified only as to installments accruing subsequent to due notice by the moving party of the filing of the motion for modification").

¶ 147 We find additional support for the trial court's award of retroactive support in *In re Marriage of Rogliano*, 198 Ill. App. 3d 404 (1990). In that case, the respondent was unemployed when the petitioner filed her motion for temporary child support on November 30, 1988. Based on the income the respondent generated through the liquidation of assets, the court awarded the petitioner \$700 per month in temporary support. In the judgment for dissolution, the trial court awarded the petitioner retroactive child support for all of November 1988. The reviewing court found no abuse of discretion in the award of

retroactive child support since "[r]etroactive allowance of support in a dissolution proceeding is within the discretionary power of the trial court if such allowance is deemed fit, reasonable and just." *Rogliano*, 198 Ill. App. 3d at 410.

¶ 148 B. Amount of Retroactive Child Support

¶ 149 1. *Standard of Review*

¶ 150 "Determination of the proper amount of child support lies within the sound discretion of the trial court and will not be set aside unless contrary to the manifest weight of the evidence." *In re Marriage of Duly*, 89 Ill. App. 3d 304, 308 (1980).

¶ 151 2. *Discussion*

¶ 152 Henry maintains that the trial court's strict application of the 28% statutory guideline for child support was error as a matter of law and an abuse of discretion. He argues that the child support guidelines should not be applied where to do so would be unjust and that the court should deviate from the guidelines where the circumstances require the deviation. See *In re Marriage of Maczko*, 263 Ill. App. 3d 991, 994 (1992) (the statute should not be mechanically applied in each and every case).

¶ 153 In *Maczko*, the trial court set child support above the statutory guideline based on the husband's voluntary change of employment, which resulted in a substantial salary reduction. On review, this court vacated the child support order, finding that the husband's evidence that his employment change was due to his health condition was not refuted, and there was no evidence that the change was motivated by the husband's desire to evade his support responsibilities. *Maczko*, 263 Ill. App. 3d at 994.

¶ 154 The party seeking a deviation from the specified percentages bears the burden of presenting evidence justifying the deviation. *Maczko*, 263 Ill. App. 3d at 994. In this case,

Henry did not carry his burden of proof. As the trial court noted in the judgment of dissolution, Henry did not request a downward deviation from the guideline support percentages. While Henry points out that the children's expenses are less than the amount of his child support obligation, he fails to recognize that the children no longer benefit from the financial generosity of the Getz family. See 750 ILCS 5/505(2)(c) (West 2012) (the standard of living the children would have enjoyed is a factor in setting child support).

¶ 155 Henry claims that the money he received from his parents enabled him to pay his child support. Therefore, the court's retroactive increase in the child support amount "double counted" the money received from his parents. Again we note the trial court's findings that Henry was not a credible witness, that his tendency toward interpreting events to make himself look better revealed a "fundamental dishonesty," and that his disclosure statements "vastly understated his income." In addition, the record reflects that Henry consistently failed to make his temporary child support payments on time. If in fact his parents were supplying the funds to enable him to pay his temporary child support obligation, Henry's tardiness strongly suggests that he placed his own needs above those of his children.

¶ 156 We agree with the trial court that Henry did not overcome the presumption that the statutory guideline should apply. Nonetheless, since the loan amounts were included in the trial court's calculation of the award of retroactive temporary support, the amount of the award must be recalculated.

¶ 157 The trial court found that the temporary child support order should have been \$2,800 per month for a period of 27 months. After recalculating Henry's income for 2011 through June 2013 and deducting the loan proceeds from Henry's income, we determined that the correct amount was \$1,719 per month, resulting in a total amount of support of \$46,413. By

subtracting \$13,590, the amount of child support Henry actually paid during the 27 months, Henry owed \$32,823 in retroactive support.

¶ 158 In sum, we conclude that the trial court had the authority to order a retroactive modification of a temporary support order as part of the final judgment. The application of the statutory guideline percentage was proper as a matter of law and was not an abuse of the court's discretion. The retroactive award of temporary child support should be reduced to \$32,823 and judgment entered on that amount.

¶ 159 III. Indirect Civil Contempt Finding

¶ 160 The test for determining whether the contempt is civil or criminal in nature is the dominant purpose for which the sanctions were imposed. *In re Marriage of Depew*, 246 Ill. App. 3d 960, 966-67 (1993). The parties agree that the trial court erred when it found Henry in indirect civil contempt rather than indirect criminal contempt. They acknowledge that the trial court did not afford Henry the procedural rights he was entitled to based on indirect criminal contempt. The contempt finding was based on Henry's misconduct thorough out the dissolution proceedings and sought to punish him rather than coerce him to obey an order entered for Jennifer's benefit. *Depew*, 246 Ill. App. 3d at 966. Therefore, the contempt was criminal in nature and required that the trial court afford to Henry the procedural rights applicable to other criminal proceedings. *In re Marriage of Betts*, 200 Ill. App. 3d 26, 58 (1990).

¶ 161 We conclude that the portion of the judgment finding Henry in indirect civil contempt and ordering him to pay \$7,500 to Jennifer for attorney fees and costs within 21 days must be vacated.

¶ 162 IV. Contribution to Jennifer's Attorney Fees

¶ 163 Henry contends that the trial court erred in ordering him to contribute \$45,000 to Jennifer's attorney fees based on its finding that Henry did not have to pay any of his own attorney fees.

¶ 164 A. Standard of Review

¶ 165 A trial court's determination to allow or deny attorney fees is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005). Under the abuse of discretion standard, the question is not whether the reviewing court might have decided the issue differently but whether any reasonable person would have taken the position adopted by the trial court. *Patel*, 2013 IL App (1st) 112571, ¶ 95.

¶ 166 B. Discussion

¶ 167 "The primary obligation for the payment of attorney fees rests on the party on whose behalf the services were rendered." *Patel*, 2013 IL App (1st) 112571, ¶ 113. Under section 508(a) of the Act, the trial court may order a party to contribute a reasonable amount of the opposing party's attorney fees. 750 ILCS 5/508(a) (West 2012). As in this case, where no maintenance is awarded, the Act provides that a contribution to attorney fees is awarded based on the criteria for the division of marital property. 750 ILCS 5/503(j)(2) (West 2012).

¶ 168 Section 503(d) sets forth the criteria for the division of the marital property. 750 ILCS 5/503(d) (West 2012). The criteria relevant to this case are as follows: the duration of the marriage, the relevant economic circumstances of each spouse when the division of property is to become effective, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and the needs of each party, the custodial

provisions for the children, and the reasonable opportunity of each spouse for future acquisition of capital assets and income. 750 ILCS 5/503(d) (West 2012).

¶ 169 In the judgment, the trial court found that Henry and Jennifer's attorney fees were comparable – Jennifer's attorney fees were \$89,000 and Henry's were \$90,000. In considering Jennifer's contribution request in light of the statutory criteria, the trial court stated as follows:

"This is a short-term marriage during which the parties accumulated little marital property. *** Henry, unable to secure a medical residency, has had very modest income from employment but has been heavily subsidized with income from his parents and other relatives. They have paid virtually all of his attorney fees and costs for him, as well as his personal expenses. He has had the burden of his own fees lifted from his shoulders."

The court further found that while Jennifer had a "decent but not generous income," she had exhausted her income and savings in providing the financial support for the children and the household. In order to pay her attorneys, she had borrowed money from her father, used an insurance check and her 2011 tax refund as well as an improper withdrawal from the UGTM accounts, which she must repay with interest. The court concluded that, based on the statutory factors, Henry should contribute \$45,000 to Jennifer's attorney fees.

¶ 170 The spouse seeking the contribution to attorney fees must establish his or her inability to pay and the other spouse's ability to pay. *Schneider*, 214 Ill. 2d at 174. "The statutory factors are the means by which a trial court can determine whether a spouse has an inability to pay or whether the parties' financial situations are so similar that a contribution to attorney fees would be improper." *In re Marriage of Sobieski*, 2013 IL App (2d) 111146, ¶ 49. "[T]he

conclusory phrase 'inability to pay' was not meant to be interpreted definitively, whereas the plain language of the statutory factors provides a framework within which to compare the relative means of the parties to pay their attorney fees." *Sobieski*, 2013 IL App (2d) 111146, ¶ 49.

¶ 171 A party lacks the financial ability to pay attorney fees if the payment of the fees would strip that party of his or her means of support or undermine the party's financial stability. *Schneider*, 214 Ill. 2d at 174. The evidence reflects that Henry's failure to secure a residency, which led to his diminished earning capacity, was largely by his own choosing and his long-standing financial dependence on his parents. The record supports the trial court's finding that he will continue to receive financial support from his family. Jennifer does not have a similar source of income. Though employed, Jennifer exhausted her savings, incurred a loan and must repay over \$40,000 in money she took from the children's UGTM accounts.

¶ 172 While requiring repayment, the loan proceeds allowed Henry to have the benefit of legal counsel in this highly contested dissolution suit. On the other hand, in her motion for contribution, Jennifer alleged that she exhausted her resources in paying her attorney fees and costs, and when her second set of attorneys withdrew, she was forced to represent herself. Clearly, the parties' financial situations are not so similar as to render a contribution award an abuse of discretion. There was sufficient evidence from which the trial court could find that Jennifer lacked the ability to pay all of her attorney fees without significantly depleting her already limited assets and that Henry possessed the ability to contribute to Jennifer's attorney fees.

¶ 173 Considering the totality of the circumstances, we conclude that the trial court did not abuse its discretion in ordering Henry to contribute \$45,000 toward Jennifer's attorney fees.

¶ 174

CONCLUSION

¶ 175

Pursuant to our authority under Rule 366(a) (Ill. S. Ct. R. 366(a) (eff. Feb. 1, 1994)), the award of child support is modified to \$1,719 per month. The judgment entered against Henry for \$67,309 in retroactive temporary child support is vacated. We modify the amount of the award of retroactive temporary child support to \$32,823, and enter judgment against Henry for that amount. In keeping with the trial court's payment by installments provision in the judgment, the award is payable at the rate of no less than \$328 per month with interest on missed or late payments. The award of \$45,000 to Jennifer as a contribution to her attorney fees is affirmed. The order finding Henry in indirect civil contempt of court and imposing the \$7,500 penalty is vacated. As modified, and in all other respects, the judgment of dissolution of marriage is affirmed.

¶ 176

Vacated in part and affirmed as modified.