2015 IL App (2d) 130757-U
Nos. 2-13-0757 & 2-13-1110 cons.
Order filed July 17, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re Marriage of MICHAEL GITS, Petitioner-Appellant, and VICTORIA GITS, Respondent-Appellee.	)))))))))	Appeal from the Circuit Court of Du Page County. No. 10-D-1733 Honorable Brian R. McKillip, Judge, Presiding.

In re Marriage of MICHAEL GITS, Petitioner-Appellant, and VICTORIA GITS, Respondent-Appellee (Cisco Systems, Inc., Third Party).	))))))))))	Appeal from the Circuit Court of Du Page County. No. 10-D-1733 Honorable Brian R. McKillip, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justice Zenoff concurred in the judgment.
Justice Hutchinson dissented.

ORDER

¶ 1 *Held*: Husband's increased ability to pay constituted a substantial change in circumstances justifying an increase, albeit still a downward departure, in child support.

¶ 2 Petitioner, Michael Gits, appeals the judgment of the circuit court of Du Page County, granting the motion of respondent, Victoria Gits, n/k/a Kegebein, to modify and increase child support. On appeal, petitioner argues that respondent failed to make the requisite showing of a substantial change in circumstances to justify an increase to child support, so the trial court abused its discretion in granting respondent's motion. We affirm.

¶ 3 I. BACKGROUND

¶ 4 We summarize the pertinent facts of record. On July 29, 2011, the parties received a judgment of dissolution of marriage. Included in the judgment of dissolution were a marital settlement agreement (MSA) and an agreed child custody and joint parenting agreement. The judgment and the agreements made provisions for the parties' three children, aged 13, 12, and 9 at the time of the dissolution. The provisions allowed respondent, who was designated as the primary residential parent, to remove the children to LaPorte, Indiana.[1] The parties agreed to joint custody of the children. Respondent was to receive $2,000 per month for three years as maintenance; the amount was to decrease to $1,000 per month if respondent married again.

¶ 5 The child support provision was somewhat convoluted. At the time of the dissolution, petition earned a base salary of $120,000 per year with further income accrued from commission.

[1] We note that, during the dissolution proceedings, respondent apparently planned to remove the children to Indiana and petitioner filed a motion to enjoin the removal. The issue was apparently resolved during the parties' settlement negotiations culminating in the MSA and joint parenting agreement which allowed the removal of the children and set the child support obligation.

In 2010, petitioner had earned approximately $347,000. The child support provision set out that petitioner was to pay at least $3,330 per month in child support, representing 32% of a gross annual income of $180,000. Petitioner's child support obligation was capped at $275,000. For which he would still pay 32% of his gross income. Any income exceeding $275,000 per year would not be subject to child support obligations. The parties expressly recognized, in the text of the MSA, that the $275,000 income cap for child support "would be a deviation from guideline support is [petitioner's] income exceed[ed] $275,000 in any given year."

¶ 6 At some point approximately six or seven months after the judgment of dissolution, respondent filed a petition to modify child support.[2] Respondent sought an increase in child support by removing the salary cap from petitioner's child support obligation. Petitioner responded, admitting that his earnings had increased in the few months between the judgment of dissolution and the petition for modification, but averring that his income fluctuated, which was why his child support obligation had a "floor" of $180,000 and a "ceiling" of $275,000. Petitioner also alleged that his expenses had increased and requested that the petition be denied. On January 15, 2013, the petition advanced to a hearing.

¶ 7 Petitioner testified that, at the time of the hearing, he was living in a two-bedroom apartment on Columbus Drive in Chicago. He also owned a one-half interest in a home in Union Pier, Michigan; his sister owned the other one-half interest in the Michigan property. Petitioner testified that he purchased that home because it was roughly 20 minutes from where the children were living in LaPorte, Indiana. When the Michigan property was purchased, petitioner paid

[2] There is no date-stamped copy of respondent's petition in the record. It was obviously filed and was the basis for the hearing that was held on it as well as for this appeal.

about 60% of the down payment, the property was purchased for $525,000, and it carried a $380,000 mortgage. Petitioner estimated that his real estate taxes for the Michigan property were about $1,000 per month, of which he pays half, with his sister paying the other half. Likewise, the mortgage payments are evenly split between petitioner and his sister. Petitioner explained that he bought into the Michigan property to be closer to his children and to avoid disruption to his children's summer activities.

¶ 8 Petitioner testified that he works for Cisco Systems as a sales representative. He is compensated with a base salary plus commissions. Petitioner noted that, in June 2011, his base annual salary was $120,000, in November 2011, it was reduced to $100,000. He receives commission based on his sales goal. As of the hearing, petitioner's sales goal was $4.9 million, which was a large increase over his previous sales goal. Petitioner testified that, if he exactly met his $4.9 million sales goal, he would receive $140,000 in commission, resulting in a $240,000 annual compensation.

¶ 9 Petitioner testified that, in 2010, he earned a total income of $347,000. Through July 2011, he earned approximately $171,000, but by the end of the year in 2011, he earned a total of approximately $539,000. In 2012, respondent earned about $360,000. Petitioner portrayed his 2011 income as unusual and noted that he had managed to close two very large deals for his employer with United Health Group and with Discover Financial Systems.

¶ 10 Petitioner testified that he spent more on the children after the divorce because he wanted them to go to Catholic schools. Petitioner paid approximately $9,000 to $10,000 for the younger two children to attend Catholic school, but he had neither unilaterally reduced his child support obligation nor sought to reduce it. Petitioner reported that, from January through December 2012, he thought that he had paid approximately $67,000 to respondent in child support.

¶ 11 After the parties' divorce, petitioner had not married again. He testified that his oldest child is in soccer, track, and performs in the high school band. His middle child plays volleyball, and his youngest child participates in cross country and basketball. Petitioner funds the children for their sports uniforms and equipment. Petitioner further pays the children's insurance premiums and the other expenses required by the MSA.

¶ 12 Respondent testified that, at the time of the hearing, she lived in LaPorte with the three children and her new husband. Respondent moved to LaPorte after her divorce, initially living in a house on the lake, but moving to her current residence after she married again. Respondent testified that the current residence is a rental property and the she and her husband both were on the lease.

¶ 13 Respondent testified that she was not employed. The two younger children attend a Catholic school in Michigan City. She spends about two hours a day driving them to and from school; she may spend more time driving them to their extracurricular events. The youngest child was diagnosed with type I diabetes. This diagnosis was known to the parties before the dissolution of marriage was initiated.

¶ 14 Respondent testified that her husband is employed as a UPS driver and has three children from a previous marriage. Her husband's children live with their mother in LaPorte. Her husband has weekend visitation with his children, and they stay with her and her children in the rental home. When questioned on cross-examination about what her husband's children ate when they were residing with them, respondent replied that she did not know; likewise, she did not know if they ate groceries she purchased. Respondent testified that she rarely cooked.

¶ 15 Respondent testified on cross-examination that she and her new husband maintain separate finances and checking accounts. She testified that she did not know what her new

husband did with his paycheck, but he did not give her any money. According to respondent, her new husband did not reimburse her for any portion of the monthly rent on their home, and he did not contribute any money to the monthly bills.

¶ 16 On cross-examination, respondent was questioned in detail about her finances and about the financial disclosure she filed with the trial court. To virtually every question, respondent either did not know the answer or could not recall. Thus, for example, respondent was unable to recall what petitioner's monthly child support payments were before they were adjusted to reflect any income greater than $15,000 per month or how she arrived at the expenses appearing on her financial disclosure. Respondent's uncertainty encompassed her debts, including a loan from her father which she could not recall if she had made any payments on, as well as topics like her new husband's working schedule, overtime, salary, or even spending habits.

¶ 17 Following the hearing and arguments of counsel, the trial court took the matter under advisement. On February 26, 2013, the trial court issued its letter opinion to the parties. The trial court held, pertinently:

> "[Respondent] has filed her petition alleging that there has been a substantial change in circumstances that would warrant a modification of the child-support provisions of the Judgment. The substantial change in circumstances[,] alleged by [respondent] and established by the evidence, was the receipt by [petitioner] of income substantially in excess of $275,000 on an annual basis following entry of the Judgment. [Petitioner] acknowledged that during the 5 months following the Judgment until the end of 2011, he received substantial bonuses for some transactions that were finalized during that period of time. As a result, [petitioner's] gross income for 2011 exceeded $530,000.
>
> One of the principles applicable in any consideration of child-support for

purposes of determining whether or not a substantial change in circumstances has occurred and whether or not a deviation from guideline support is warranted is found in [section 505(a)(2) of the Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/505(a)(2) (West 2012))]. That section sets forth factors to be considered by the court in determining whether or not to deviate from the guidelines. One of those factors is 'the standard of living the child would have enjoyed had the marriage not been dissolved.'

Each of the parties testified and there were no other witnesses called. The testimony primarily concerned the parties' incomes and expenses. There was some, but little, testimony as to the assets owned by the parties since there is very little in the way of assets.

[Petitioner] testified that he was employed by Cisco Systems Inc. He also testified as to his compensation structure. He receives a base salary together with commissions. The commission structure continues to be modified by his employer. His base salary has been reduced since the entry of the judgment. Nevertheless, as noted above, his gross income for 2011 was almost twice the 'cap' of $275,000 for purpose of child support. And although the compensation structure was modified, his compensation for 2012 was $336,000, more than $60,000 in excess of the 'cap'. Under these circumstances, the children are entitled to support in addition to that provided for by the Judgment. The income figures established for 2011 [and] 2012 justify a modification of support.

[Respondent] testified as to her expenses in an effort to 'justify' additional child support. In this regard, her testimony and her comprehensive financial statement (PX#8) were not very compelling. Although she has remarried, and her husband is employed, no

portion of the household expenses was attributed to him. Her statement that $1,200 is spent every month on food, liquor, household supplies, *etc.* without regard to her husband or his children strains credulity. Her failure to allocate expenses to her husband is inconsistent with a fair allocation of the household expenses.

Nevertheless, the children are entitled to a level of support commensurate with their father's income. [Petitioner] has argued that [respondent] has failed to show the need for additional child support. Shown need, however, is not the sole basis upon which child support is based. As noted, the standard of living that the children would have enjoyed had the marriage not been terminated is the level of support to which they are entitled. The support should not, however, constitute a windfall to the custodial parent.

There is an additional factor to be considered. In this case, less than two years ago (indeed less than 7 months prior to the filing of the petition by [respondent]), the parties agreed upon the amount of child support to be paid, the method upon which it would be calculated and to 'cap' the amount to be paid. The parties anticipated that [petitioner] could, in fact, earn in excess of $275,000 per year. They specifically agreed that if he did so, the child support amount represented a deviation from the guidelines that the parties agreed was warranted by the 'current circumstances'. The 'current circumstances' that warranted the deviation certainly did not refer to [petitioner's] compensation, but rather the living circumstances of the children, their expenses, their activities, and [respondent's] circumstances.

It would appear, although neither party testified concerning it, that at the time of the entry of the judgment[,] [respondent] desired to relocate to Indiana to be with her now husband. [Petitioner] was opposed to the relocation of the children. [Petitioner] allowed

the relocation in exchange for limiting his child support obligation. [Respondent] negotiated for and received unimpeded removal, giving away additional support to which her children were entitled. It seems that the children's welfare was a pawn surrendered by each of these parties for their own purposes.

A recent Illinois Supreme Court [case] addressed this issue in a slightly different context. In [*Coulter v. Trinidad*, 2012 IL 113474, ¶¶ 31-32], the issue was addressed in the context of removal provided for in an agreement between the parties. [The court quoted paragraphs 31 and 32 of the opinion, which noted that, when divorcing spouses present a negotiated and signed MSA or joint parenting agreement, the parties have engaged in horsetrading of property, custody, support obligations and the like. *Id.* If the reviewing court changed the agreement it would effectively set aside the agreement, which could have repercussions affecting how the parties might have divided their property. *Id.* The supreme court noted that, to change the parties' agreement, simply because one party had a change of heart, would undermine the Act and its effectiveness at encouraging settlement. *Id.*] In spite of the apparent holding in *Coulter*, it is clear that Illinois courts have always retained the authority to ensure the child support is proper and that it may not be negotiated away by a parent.

Accordingly, the Judgment of Dissolution will be modified in its provisions as follows:

1. All gross income up to $275,000 will be treated as provided for in [the MSA].

2. On all gross income in excess of $275,000 up to $350,000, [petitioner] shall pay child support at the rate of 25% of the net of that income.

3. On all gross income in excess of $350,000 up to $500,000, [petitioner] shall pay child support at the rate of 18% of the net of that income.

4. [Petitioner shall pay as child support 10% of the net of any gross income in excess of $500,000.

The procedure set forth in Article V [of the MSA] for reconciliation at the end of each calendar/tax year will continue in its application to any gross income in excess of the $275,000.

I recognize the foregoing formula represents a deviation from guideline support if [petitioner's] annual income exceeds $275,000 in any year. At the present time, however, I believe that such deviation is warranted based upon the financial resources and needs of the children, the resources and needs of [respondent], the resources and needs of [petitioner], and the standard of living the children would have enjoyed had the marriage not been dissolved. I am aware that one of the children is severely diabetic. I have not been made aware of any other extraordinary emotional or physical needs of the children.

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The modification shall be effective March 1, 2012. This ruling will create an arrearage. The order should calculate the amount of the arrearage and, if the parties are able to agree, the means by which that arrearage will be liquidated. If the parties are unable to agree, the matter will be set for hearing and argument, at which time the court will determine the method of liquidating the arrearage.

I direct [respondent's counsel] to prepare an order consistent with the findings and directions set forth in this letter and [to] present it for entry on March 20."

¶ 18 On March 20, 2013, the order embodying the trial court's conclusions in the letter of opinion was entered. On April 19, 2013, petitioner filed a motion to reconsider judgment. Petitioner focused on respondent's failure to prove that either her financial needs or those of the children had much changed after the entry of the judgment of dissolution. Petitioner pointed out that the trial court had seemingly completely discounted respondent's testimony about her expenses, yet the trial court granted the petition to modify and increased his child-support obligation. In addition, petitioner challenged the trial court's determination that he and respondent had "surrendered the children's welfare for their own purposes" in negotiating the removal terms and child support terms in the MSA as not supported by evidence taken at the hearing. Petitioner also challenged the trial court's modification of the child support obligation as arbitrary.

¶ 19 On June 27, 2013, the trial court denied the motion to reconsider. On July 25, 2013, petitioner timely filed a notice of appeal (case No. 2-13-0757). At the time of this notice of appeal, however, a third-party action between respondent and Cisco Systems[3] remained pending. On October 3, 2013, the third-party action was terminated by the entry of an agreed order of dismissal with prejudice. On October 22, 2013, petitioner again timely filed a notice of appeal (case No. 2-13-1110). The second notice of appeal encompassed both the June 27, 2013, order as well as the October 3, 2013, order.[4] In November 2013, petitioner moved to consolidate the

[3] Cisco Systems is not a party to this appeal.

[4] The notice of appeal in case No. 2-13-0757 appears to be premature because of the pending third-party claim. However, under Illinois Supreme Court Rule 303(a)(2) (eff. June 4, 2008), the October 3, 2013, dismissal of the third-party claim terminating the remaining open

two appeals, and on November 13, 2013, we granted the motion to consolidate.

¶ 20 II. ANALYSIS

¶ 21 On appeal, petitioner argues that the trial court erred in granting respondent's petition for modification. Petitioner's central challenge to the judgment concerns what constitutes a substantial change in circumstances sufficient to justify a modification of child support. The trial court held that the increase in petitioner's income, standing alone, constituted a substantial change in circumstances; petitioner argues that respondent also needed to demonstrate more: such as an increase to her expenses or the children's needs in order to justify a modification. In support of his overall contention that the trial court erred, petitioner makes a number of specific arguments, and we will address them in turn, as necessary.

¶ 22 A. Standards for Modification of Child Support and Review

¶ 23 Modification of child support is provided for in the Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/101 *et seq.* (West 2012)). Section 510(a)(1) provides that "the provisions of any judgment respecting *** support may be modified ***. An order for child support may be modified *** upon a showing of a substantial change in circumstances." 750 ILCS 5/510(a)(1) (West 2012). The party seeking a child support modification bears the burden of demonstrating a substantial change in circumstances. *In re Marriage of Saracco*, 2014 IL App

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claim in the case serves to make the premature notice of appeal effective. Thus, we hold that the notice of appeal in case No. 2-13-0757, although premature, was effective to confer jurisdiction under Supreme Court Rule 303(a)(2). In any event, the notice of appeal in case No. 2-13-1110 was timely and effective, and the two cases, involving exactly the same substantive issues, were thereafter consolidated.

(3d) 130741, ¶ 13. Once the court has determined that there has been a substantial change in circumstances, it may proceed to consider a modification of child support pursuant to the factors listed in section 505(a)(2) of the Act (750 ILCS 5/505(a)(2) (West 2012)). *In re Marriage of Rash & King*, 406 Ill. App. 3d 381, 388 (2010).

¶ 24 Section 505(a)(2) provides that the court can consider factors including, but not limited to, one or more of the following: the financial resources and needs of the child, the financial resources and needs of the custodial parent, the standard of living the child would have experienced had the parties remained married, the physical, mental, and emotional needs of the child, the educational needs of the child, and the financial resources and needs of the noncustodial parent. 750 ILCS 5/505(a)(2) (West 2012). A trial court is given wide latitude in determining whether a substantial change in circumstances has occurred. *Saracco*, 2014 IL App (3d) 130741, ¶ 13. A trial court's factual findings will not be disturbed unless they are against the manifest weight of the evidence. *Id.* ¶ 16. The court's judgment regarding substantial change and whether to allow a modification is reviewed for an abuse of discretion, meaning that its judgment will not be disturbed unless no reasonable person would agree with the decision. *Id.*

¶ 25 B. The Trial Court's Judgment to Modify Child Support

¶ 26 The trial court held that there was a substantial change in circumstances that justified modifying petitioner's child support obligation. When we review a trial court's judgment, we are determining whether the judgment was correct, not whether the trial court employed the correct reasoning to reach its result, and we may affirm the trial court's judgment on any basis appearing in the record, even if the trial court did not rely upon it. *Bruel & Kjaer v. Village of Bensenville*, 2012 IL App (2d) 110500, ¶ 22. The trial court expressed two grounds justifying a

modification: (1) petitioner's income in 2011 and 2012 far exceeding the MSA's limitations on income, and (2) the children's standard of living had the marriage not been dissolved.

¶ 27 As a general and longstanding principal, an increase in the supporting parent's ability to pay, standing alone, may constitute a substantial change in circumstances justifying a modification increasing his or her child support obligation. *In re Marriage of Putzler*, 2013 IL App (2d) 120551, ¶ 29; *In re Marriage of Garrett*, 336 Ill. App. 3d 1018, 1021 (2003); *Wilson v. Wilson*, 166 Ill. App. 3d 1035, 1038 (1988). Accordingly, we must first ascertain whether the trial court's factual conclusion regarding petitioner's increase to income was against the manifest weight of the evidence. *Saracco*, 2014 IL App (3d) 130741, ¶ 16.

¶ 28 At the hearing on the petition to modify, petitioner testified that, in 2010, he earned a total gross income of $347,000; in 2011, he earned roughly $539,000; and in 2012, he earned about $360,000. Indeed, in the final five months of 2011, petitioner earned $368,000, or about what he earned in each of 2010 and 2012. Of course, the issue here is whether petitioner's income increased after the judgment of dissolution was entered. His 2011 income was nearly twice the child-support income cap; in 2012, it was about $85,000, or 31%, greater than the child-support income cap. These sums are not trivial; petitioner testified about them, and the trial court based its conclusion that petitioner's income increased between the judgment of dissolution and the filing of the petition to modify on petitioner's testimony. We cannot say that the trial court's factual determination regarding petitioner's increased income was against the manifest weight of the evidence.

¶ 29 With the factual basis in place, we now consider whether the trial court abused its discretion in holding that the increase to petitioner's income constituted a substantial change in circumstances justifying an increase in petitioner's child-support obligation. As noted, petitioner

earned roughly a year's income in the five months following the dissolution judgment in 2011, ending with a total income of nearly twice the $275,000 cap. In 2012, petitioner earned about $360,000, again exceeding the cap by over 30%. These are substantial increases to petitioner's earnings.

¶ 30 Moreover, petitioner testified that, in 2012, if he only met his sales targets, his total income (base salary plus commission) would be $240,000. Petitioner's testimony indicated that his commission for meeting his sales goals had been around $140,000; at the time of the dissolution, his base salary was $120,000, meaning that, if petitioner just managed to reach his sales goals, his total income would be $260,000, which is roughly the level of child-support income cap. There was no testimony concerning the effect of fractionally meeting his sales goal, such as generating sales equaling 50% of his goal. In other words, it appears that the child support provision in the MSA contemplated that petitioner would meet some fraction of his sales goal up to about 100% of his sales goal. In fact, in 2011, petitioner more than doubled his 100% sales goal income ($120,000 base plus $140,000 commission), and in 2012, he achieved 150% of his 100% sales goal income ($100,000 base plus $140,000 commission). Whether in dollars, percentages of the income cap, or percentages of the expected income if petitioner reached 100% of his sales goal, the incomes received in 2011 (after the dissolution and in total) and in 2012 were substantially greater than what the MSA appears to have contemplated. Petitioner's income did not exceed the income cap by a few thousand dollars, or even a few tens of thousands of dollars, but by a significant amount. Based on these figures, we cannot say that the trial court abused its discretion in holding that respondent demonstrated that a substantial change in circumstances occurred which justified an increase in petitioner's child support obligation.

¶ 31 The trial court also noted that petitioner's substantially increased income meant that, had the parties not divorced, the children would have experienced significant and tangible benefits from that increased income. According to the trial court:

> "the children are entitled to a level of support commensurate with their father's income. [Petitioner] has argued that [respondent] has failed to show the need for additional child support. Shown need, however, is not the sole basis upon which child support is based. As noted, the standard of living that the children would have enjoyed had the marriage not been terminated is the level of support to which they are entitled."

In addition, the trial court noted that section 505(a)(2) governs the determination of whether a substantial change in circumstances occurred, and the trial court focused on " 'the standard of living the child[ren] would have enjoyed had the marriage not been dissolved.' " 750 ILCS 5/505(a)(2) (West 2012).

¶ 32 Thus, it is clear that, in addition to an increase in the income of the parent paying support, the trial court also relied on the children's standard of living had the divorce not taken place in determining that a substantial change in circumstances occurred, but it seems that the trial court looked to the standard of living more as a guidepost for setting petitioner's new child support obligation. We note that the children's standard of living is a proper factor to consider when determining whether a substantial change in circumstances has occurred. *E.g.*, *In re Marriage of Breitenfeldt*, 362 Ill. App. 3d 668, 673-74 (2005). Indeed, it appears that the standard-of-living factor may not, alone, demonstrate a substantial change in circumstances, and this would seem to be because it is the flip-side of the parent's ability to pay child support. If the parent's ability to pay increases, then, necessarily, so will the standard of living the child would have experienced also increase (although we can conceive of a situation in which the supporting parent has

artificially suppressed his income to avoid fully paying his or her child support obligation, so that the standard-of-living factor could be a standalone factor demonstrating a substantial change in circumstances, but this would likely be a rare occurrence). Thus, we should expect to see a linkage between the increased ability to provide support (*i.e.*, a drastic increase in the supporting parent's income) and the standard of living the children would have experienced absent the divorce. Here, the trial court determined that petitioner's substantial income gains beyond the child support income cap translated into an increase in the standard of living the children would have experienced and justified an increase to petitioner's child-support obligation. While the holding is perhaps somewhat redundant, we cannot say that the increase in the standard of living the children would have enjoyed is anything other than a reasonable inference. Moreover, the trial court did not appear to base its holding solely upon the inference that the children would have experienced an increased standard of living; rather, the court's comments on the standard of living were focused on determining the proper level of child support needed to help the children attain that increased standard of living. Accordingly, we cannot say that this holding constituted an abuse of discretion.

¶ 33 In addition, the trial court expressly held that, during the parties' negotiations over the MSA, "[i]t seems that the children's welfare was a pawn surrendered by each of these parties for their own purposes." The trial court thus believed that the parties' MSA sacrificed the children's interests in maintaining a standard of living equal to that had the parties not divorced for the parties' individual purposes, namely, a smaller child support obligation for petitioner and agreement to allow respondent to remove the children from the state. Petitioner contends that there is no support in the record for the factual conclusion that the parties engaged in horse trading over removal and child support, thereby sacrificing the best interests of the children.

¶ 34 As noted above, when considering a factual finding, we review whether the trial court's factual determination is against the manifest weight of the evidence. *Saracco*, 2014 IL App (3d) 130741, ¶ 16. Here, there is evidence in the record to support the trial court's inference despite the lack of express testimony on the issue. Respondent apparently planned to remove the children to Indiana; petitioner filed a motion to enjoin the removal. Later, when the parties presented the MSA to the court, they had agreed that respondent would be able to remove the children and petitioner's child support obligation represented, especially in light of his 2010 income, as well as his income in the following years, a significant downward departure from the guideline levels of child support. Based on these circumstances, we believe that the trial court's inference that the parties sacrificed the children's interests in favor of their own individual purposes was entirely reasonable and justified. Accordingly, we cannot say that this factual determination was against the manifest weight of the evidence. Further, we cannot say that the trial court's reliance on this factual determination to help it conclude that, because petitioner's capability to support his children had increased and because the children were not currently receiving sufficient support to allow them to maintain their standard of living had the parties not divorced, constituted an abuse of discretion.

¶ 35 Petitioner challenges the trial court's judgment in several ways. First, petitioner argues that the MSA contemplated that he might earn in excess of the child-support income cap of $275,000. In support of this contention, petitioner cites to *In re Marriage of Hughes*, 322 Ill. App. 3d 815, 819 (2001), for the proposition that, where the possibility of a particular event or series of events is contemplated and provided for in a marital settlement agreement, the occurrence of the event will not constitute a substantial change in circumstances. According to petitioner, the fact that the MSA set a floor above his base salary without commission and set a

cap of slightly more than his base salary plus commission on sales equaling 100% of his sales goal means that the MSA contemplated that these events (income less than the floor or greater than the cap) were both contemplated and provided for, and so his increased income in 2011 and 2012 cannot constitute a substantial change in circumstances.

¶ 36 While we do not quarrel with the legal principle animating petitioner's proposition, we note that, in *Hughes*, the events that were argued to constitute in an increase in income sufficient to constitute a substantial change in circumstances were the termination of maintenance and the termination of the husband's car payments on behalf of the wife, both of which were scheduled in the parties' marital settlement agreement. *Id.* The wife argued that the termination of the maintenance and car payments meant that the husband had more money in his pocket to give to the children as child support. *Id.* In other words, the wife was seeking to shift the maintenance into child support. We believe this presents a different, and distinguishing, circumstance than here, where petitioner's income increased significantly above the income restrictions set out in the MSA. Further, petitioner's income gain was as a result of higher compensation from his employment, and not the abatement of fixed expenses due to the termination of an obligation in the MSA. Thus, respondent here was not trying to convert maintenance payment into child support as in *Hughes*. Finally, while we are willing to accept that some income fluctuation was contemplated in the MSA, we cannot accept that the MSA contemplated that petitioner would earn more than twice and one-and-a-half times the 100% sales goal income levels in the two calendar years following the dissolution, especially where the income cap was already set at slightly above the 100% sales goal income level. Accordingly, we reject petitioner's contention.

¶ 37 Next, petitioner contends that respondent failed to show that the children's needs had increased. As noted above, one of the factors a court may consider is the needs of the children in

determining whether there has been a substantial change in circumstances. 750 ILCS 5/505(a)(2) (West 2012). Respondent purported to present evidence of the increase of the children's needs, but the trial court wholly discounted her testimony. Even so, the trial court determined, based on petitioner's significant increase in income and on the increase in the standard of living the children would have experienced had the parties not divorced, that there had been a substantial change in the circumstances. Even fully granting a complete absence in the record of any evidence that the needs of the children increased between the entry of the judgment of dissolution and respondent's petition to modify child support, the trial court's determination that there had been a substantial change in circumstances was based on other factors and, as we note above, was not against the manifest weight of the evidence factually and did not constitute an abuse of discretion. Thus, petitioner's argument regarding the children's needs is essentially irrelevant, because it was not legally necessary that there be a change in the children's needs to justify the trial court's finding (see, *e.g.*, *Putzler*, 2013 IL App (2d) 120551, ¶ 29 (an increase in the supporting parent's ability to pay is, by itself, sufficient to support a determination that there had been a significant change in circumstances justifying a modification increasing child support); *Garrett*, 336 Ill. App. 3d at 1021 (same); *Wilson*, 166 Ill. App. 3d at 1038 (same)), and the issue of the children's needs does not otherwise address or undermine the trial court's reasoning and judgment. Accordingly, we reject petitioner's argument on this issue.

¶ 38 Petitioner next challenges the trial court's statement: "Shown need, however, is not the sole basis upon which child support is based. As noted, the standard of living that the children would have enjoyed had the marriage not been terminated is the level of support to which they are entitled." Petitioner argues that the trial court twisted his argument about the failure to show a change in the children's needs into a purported claim that child support should be limited to the

children's shown needs. Whether the trial court misinterpreted petitioner's actual argument is immaterial, because the trial court's point, that the children were entitled to be supported at the standard of living they would have experienced had the parties not divorced, is, as petitioner concedes, "one of the factors [750 ILCS 5/505(a)(2(c) [(West 2012)]] the trial court would have had to consider." (Outer brackets in original.) Because the trial court determined that a substantial change in the circumstances occurred (and we have held above that we cannot say that the factual underpinnings were against the manifest weight of the evidence or that the holding constituted an abuse of discretion), it was manifestly entitled to consider the standard of living the children would have experienced had the parties not divorced.

¶ 39 Petitioner also contends that there was no evidence to support a factual determination that a substantial change in the circumstances occurred in the roughly six months between the entry of the judgment of dissolution and respondent's petition to modify. We have rejected this argument above and need not consider it further. However, petitioner incorporates this premise into an argument that the court already considered the standard-of-living factor by incorporating the MSA in its judgment of dissolution, so the MSA was *res judicata* "in the absence of a substantial change in circumstances." Nevertheless, we have held that the factual determination was not against the manifest weight of the evidence, so there was a substantial change in circumstances, and the trial court could properly consider the children's standard of living in deciding whether to modify petitioner's child support obligation. Petitioner cites to *In re Marriage of Heldebrandt*, 301 Ill. App. 3d 265 (1998), to support his *res judicata* argument, but the case is inapposite because here, there was a substantial change in circumstances. Likewise, *In re Marriage of Florence*, 260 Ill. App. 3d 116 (1994), which is cited by the petitioner for the proposition that an error in setting child support should have been attacked on direct appeal, is

inapposite because respondent alleged, and the trial court held, that there was a substantial change in circumstances justifying an increase in child support. Thus, while respondent's challenge to the level of child support may be a collateral attack, it is permissible because there has been a substantial change in circumstances to justify the increase in child support. Accordingly, we reject petitioner's contentions on this point.

¶ 40 C. Respondent's "Not Very Compelling" Testimony

¶ 41 Next, petitioner appears to argue that respondent's "not very compelling" testimony and her financial statement do not support the trial court's determination that there was a substantial change in circumstances. While we agree that respondent's testimony on cross-examination consisted largely of being unable to recall whenever she was asked a question, this "not very compelling" testimony was not essential to the trial court's ruling. The trial court noted that respondent's direct testimony (as well as her testimony on cross-examination) was directed toward " 'justify[ing]' additional child support," but it completely discounted that testimony in rendering its decision. In effect, the trial court's ruling mirrors petitioner's argument: the trial court did not rely on respondent's testimony, so respondent's testimony does not support the trial court's ruling. However, as we have held above, there was ample evidence to support the trial court's factual determination that there was a substantial change in circumstances, and its decision to increase the child support did not constitute an abuse of discretion.

¶ 42 Petitioner also cites *In re Marriage of Stadheim*, 170 Ill. App. 3d 19 (1988), for the proposition that, where the testimony largely consisted of "guesstimates," it would not support a determination of a substantial change in circumstances. While there may be parallels between respondent's testimony here and the custodial parent's testimony in *Stadheim*, we nevertheless find *Stadheim* to be distinguishable because there, the factors relied upon by the custodial parent

to show a change in circumstance were only the aging of the children and the increase of the cost of living, both of which, the court in *Stadheim* held, were both contemplated by and provided for by the parties in their marital settlement agreement. Here, by contrast, the trial court relied not upon the aging of the children or an increase in their cost of living; rather, it relied on the substantial and significant increase in petitioner's income and the effect that had on the standard of living the children would have experienced had the parties not divorced. Thus, *Stadheim* offers little support to petitioner's challenge to the trial court's ruling.

¶ 43 D. Remaining Issues

¶ 44 Petitioner last argues that the trial court abused its discretion in three more ways: (1) by failing to consider respondent's own duty to support the children; (2) by failing to consider the financial resources of respondent's husband in determining respondent's ability to contribute to the support of the children; and (3) by allowing respondent to use child support moneys to contribute to the support of her husband and his children. We consider each contention in turn.

¶ 45 Petitioner contends that the trial court did not properly factor into its judgment respondent's duty to contribute to the support of the children. We disagree. Although the trial court's letter if decision on respondent's petition is fairly terse, our review of the letter indicates that the trial court did, in fact consider the proper statutory factors regarding modification and setting the new levels of child support. We believe that this includes a consideration of respondent's duties and obligations under the Act, including respondent's own duty to support the children. Accordingly, we cannot say the trial court abused its discretion because it did not ignore respondent's duty to support the children.

¶ 46 Petitioner contends that the resources of respondent's husband should be considered in determining her ability to contribute to the support of her children. This contention appears for

the first time in petitioner's motion to reconsider. It is well established that issues raised for the first time in a motion to reconsider may not be raised on appeal. *American Chartered Bank v. USMDS, Inc.*, 2013 IL App (3d) 120397, ¶ 13.

¶ 47 Procedural default aside, as with the first argument in this section we believe that the trial court sufficiently considered respondent's resources in its decision. We note that respondent's husband is a driver for UPS, is divorced, and is not the custodial parent of his children from a previous marriage, but has regular weekend visitation. The record thus suggests that he has a steady and reliable income along with certain obligations, but no evidence was presented regarding respondent's husband's financial resources. In fact, petitioner has specifically identified only the monthly rent of $1,600 as expenses which respondent's husband should be providing assistance with. Presumably, petitioner is suggesting that respondent's husband should be responsible for half of the monthly rent, or $800 per month and $9,600 annually. Petitioner's recent annual income is such that the sum of $9,600 is less than 3% of his annual income. In other words, the sum that respondent's husband should be contributing to respondent's financial resources is effectively *de minimis*, so it would have little to no effect on the trial court's calculations. Additionally and importantly, petitioner made no counterclaims in the proceedings below seeking to change his support obligation. In its judgment, the trial court preserved the initial band of child support exactly as petitioner and respondent agreed in the MSA, adding new bands to account for more income, but departing significantly downward from the guideline amounts in those bands. The modified child support avoids giving respondent a windfall while still providing the children the same standard of living they would have experienced had the parties not divorced. For all of these reasons, then, and especially noting the relatively small amount of resources that petitioner claims respondent's husband should be

providing compared with petitioner's greatly increased ability to provide support due to the increase in his income, we cannot say that the trial court abused its discretion.[5]

¶ 48 Petitioner argues that the "[d]ecisional law supports the conclusion that a new spouse's income and assets are relevant to a determination of the amount of child support the non-custodial parent shall pay," citing *Street v. Street*, 325 Ill. App. 3d 108 (2001), and *In re Marriage of Drysch*, 314 Ill. App. 3d 640 (2000). Setting aside, for the moment, the fact that both *Street* and *Drysch* are concerned with the noncustodial parent's contribution to educational expenses under section 513 of the Act (750 ILCS 5/513 (West 2012)), petitioner has not expressly argued that his child support obligation should be reduced because of the financial resources available to respondent.

¶ 49 We further note that *Street*'s holding was based on the fact that the trial court prohibited any investigation into the wife's new spouse's financial resources. *Street*, 325 Ill. App. 3d at 113. Here, by contrast, there is no claim that petitioner was prohibited from investigating respondent's husband's financial status and resources. Likewise, in *Drysch*, the court held that a consideration of the wife's husband's financial resources was necessary because the wife had testified that she pooled her financial resources with her husband yet tried to avoid any

[5] We do agree with petitioner's implied point that the trial court would have offered a cleaner judgment had it expressly discussed the impact of respondent's husband's resources on respondent's ability and obligation to provide support for the children. That said, however, we cannot say that the omission of such a discussion was error under the circumstances of this case, especially where the trial court was clear that it considered the applicable factors in rendering its judgment.

consideration of the husband's contributions to her financial picture, raising the fear that the wife was shielding some of her financial resources from the court's consideration. *Drysch*, 314 Ill. App. 3d at 645. Here, by contrast, respondent testified that she and her husband kept their finances completely separate. Thus, *Street* and *Drysch* are factually distinct. Moreover, and more importantly, the trial court considered the appropriate factors, and this includes respondent's financial resources, including, to the extent possible, her husband's contributions to the household.

¶ 50 Petitioner also cites *Breitenfeldt*, 362 Ill. App. 3d 668, purportedly to reinforce the point that the court must consider the contribution of the spouse to the wife's financial resources. *Breitenfeldt*, however, is inapposite because it was concerned with the determination of a substantial change in circumstances (*id.* at 674), while here, petitioner's contention is about the actual modification of the child support obligation.

¶ 51 Last, petitioner argues that respondent is using his child support payments to benefit respondent's husband and his children. We do not dispute the principle that the purpose of child support is to provide for the child's reasonable and necessary physical, mental, and emotional health needs, not to provide money for unrelated parties to the current marriage. See *In re Marriage of Edwards*, 369 Ill. App. 3d 1035, 1039 (2006) (expressing the principle in the context of dividing marital property including a child support arrearage from a previous marriage). Petitioner argues that it is inferable that respondent is improperly using his child support payments to support her husband and his children, pointing to the trial court's conclusion that respondent's testimony "strain[ed] credulity" where respondent attributed no portion of the $1,200 in monthly household expenses to her husband or his children. There are a number of problems with petitioner's contention on this point.

¶ 52 First and foremost, setting aside whether this argument may be preserved for purposes of appeal, our review of the record shows that this argument was not particularly pressed or developed below. Further, petitioner did not file a petition or cross-petition seeking to reduce his child support obligation because respondent was improperly using those funds to support her husband and his children. In other words, we find that petitioner's argument is poorly drawn (in part because petitioner does not set forth the consequences of violating the principle that child support cannot be used to benefit others unrelated to the child) and weakly argued both below and in this court. Thus, whether petitioner has forfeited our consideration of this argument is less important, because he has flatly failed to carry his burden of persuasion.

¶ 53 Next, petitioner seeks to draw an inference from the evidence that is at odds with the trial court's ultimate judgment. That an inference *may* be drawn is much different that demonstrating that an inference *must* be drawn. Here, petitioner argues (if we view it charitably) that not drawing the inference is against the manifest weight of the evidence. We disagree. Even though the trial court held that respondent's testimony was not credible on the issue of household expenses, this does not mean that it could not still accept respondent's testimony that she and her husband kept their finances separate, especially where that testimony was unchallenged and unrebutted.[6] The separation of their finances leads to the inference that petitioner *was not* using petitioner's child support funds to support her husband. The incredibility of her testimony about household finances leads to the inference that her husband *was* contributing to household

[6] Unlike the testimony the trial court found to be "not very convincing," respondent never testified that she did not know or could not recall if she and her husband kept their finances separate.

expenses, and this goes to respondent's financial resources, not to her disposition of the child support funds. Thus, we see nothing in the record or petitioner's argument compelling a different result than that reached by the trial court.

¶ 54 Finally, petitioner cites *Department of Public Aid ex rel. Nale v. Nale,* 294 Ill. App. 3d 747 (1998), for the proposition that a trial court may ensure that child support is being used for the benefit of the children, and where it is benefitting others, a downward departure from the statutory child support levels may be justified. While this principle may be unexceptionable, petitioner overlooks that *Nale* actually held that, while the wife's cohabitant "apparently received a windfall by living in the home without paying rent or utilities, there was no showing [the wife] conferred this benefit on him by using child support or resources that would have otherwise been available for the children." *Id.* at 753. Further, this holding arose in the context of an examination of the noncustodial parent's burden to prove his entitlement to a downward departure from the statutory child support guidelines. *Id.* at 752 ("the party seeking a deviation from child support guidelines has the burden of producing evidence justifying the deviation"). Here, in the absence of a specific pleading or even noticeable argument below or even on appeal, we cannot say that petitioner has carried his burden of justifying a deviation from the child support guidelines. Moreover, we note that, in any event, the trial court's judgment gives petitioner a significant downward departure from the statutory guidelines and petitioner fails to offer any suggestion of how much more of a departure the trial court should have ordered.

¶ 55 Thus, while we accept that there is a possible construction of the evidence to *infer* that respondent may be benefitting her husband with the child support funds, the evidence on the issue is meager and certainly does not *establish* that fact. Most importantly, even if respondent's husband "apparently received a windfall by living in the [LaPorte] home without paying rent or

utilities, there was no showing [respondent] conferred this benefit on him by using child support or resources that would have otherwise been available for the children." *Id.* at 753.[7] Accordingly, we cannot say that the trial court's apparent rejection of the inference is against the manifest weight of the evidence or that it constitutes an abuse of discretion.

¶ 56 We acknowledge the dissent's points, and agree that we are troubled by the weaknesses that the trial court, we, and the dissent have identified in respondent's case. Further, we believe that this is a close case. With that said, however, we cannot say that the trial court's determinations on the factual predicates were against the manifest weight of the evidence, and we also cannot say that, overall, the trial court's judgment was an abuse of discretion. We believe that the trial court adequately based its judgment on the evidence and the appropriate legal principles under the abuse-of-discretion standard. Would we have ruled exactly as the trial court did in the first instance? We do not say because that is not our task on this appeal, and we limit ourselves to the question of whether the trial court abused its discretion, which we have answered.

¶ 57 III. CONCLUSION

¶ 58 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

[7] In fact, the trial court doubted that respondent's husband was living in the LaPorte home "without paying rent or utilities," so petitioner's argument on this point actually conflicts with his argument that the trial court failed to consider respondent's husband's contribution to respondent's financial resources. Nevertheless, being an argument in the alternative, we can address its merits.

¶ 59 Affirmed.

¶ 60 JUSTICE HUTCHINSON, dissenting,

¶ 61 I write this dissent because I do not believe that a substantial change in circumstances occurred or was proven below. I also have serious concerns that Michael's child support payments are not being used for the benefit of Michael's and Victoria's three children.

¶ 62 Nearly all of the circumstances Victoria now claims have been substantially changed were present at the time the parties negotiated their marital settlement agreement, child support and child custody orders, which were incorporated into the dissolution judgment on July 29, 2011. Michael works in sales. The agreement indicates that the parties recognized Michael's income would fluctuate depending upon his sales production and market opportunities. The parties memorialized their understanding in a formula that set a floor and ceiling gross income annual figure, $180,000 and $275,000 respectively, which would determine the lower and upper limits on the amount of child support to be paid. They also contemplated a monthly recalculation of this support based upon commissions paid as a result Michael's ability to score new contracts and new business. At the time the dissolution judgment was entered, however, Michael's gross income had exceeded the ceiling of $275,000 by approximately $60,000. That figure was documented in the marital settlement agreement and was known to the parties and the trial court at the time of the dissolution judgment. I must assume that the trial court agreed that these orders were in the best interests of the three children of this marriage.

¶ 63 Yet approximately seven months after the dissolution judgment was entered, Victoria filed a motion to modify the child support based upon an increase in Michael's income. The fact that Michael earns a substantial income while Victoria's only reported income or support was the maintenance that Michael was obligated to pay has not changed since the parties separated

before their divorce. What did change, however, is that Victoria married a man who is gainfully employed and who has three children of his own that he is obligated to support.

¶ 64 Another change is that Michael's obligation to pay maintenance has ended, not with Victoria's marriage but with the final payment of 36 monthly payments mandated by the dissolution judgment. Although Victoria's new husband does not have an obligation to support the Gits children, Victoria testified that she does not know what her husband's income is, that they keep their financial matters separate, and that he does not contribute to household expenses. She also testified that her husband's children visit with him on weekends, and that they stay in the home that she pays the rent for during their visits.

¶ 65 Finally, even though the parties experienced some problems with Michael's employer withholding the child support payments, by all accounts Michael has paid child support on a monthly basis that exceeded the reported expenses and needs of the children. Michael testified that he had paid about $60,000 for support in 2011, and an affidavit submitted by Victoria set the children's expenses at about $2,700 per month. Even allowing a portion of the monthly support paid to be applied to rent, utilities, car expenses, and common family expenses, the expenses of the Gits children could not have consumed the balance of the support paid. In addition, Victoria has not created any savings for the children, or taken the children on vacation, or purchased anything special for the children that was not contemplated by the dissolution judgment.

¶ 66 I note that Michael's child support obligations did not end with his monthly support payments. He was also responsible for additional child-related matters including all of the orthodontic charges for at least one of the children, medical insurance and life insurance for the children, and 60% of the children's uninsured medical costs. Furthermore, the evidence presented proved, consistent with the terms of the marital settlement agreement, that Michael

paid for all of the younger two children's parochial education, which amounted to approximately $10,000 per year. He was also paying for the uniforms and equipment required for their sports activities, and he purchased a residence (with his sister) in the general area of the children's residence so that their extracurricular and school activities would not be disrupted during visitations.

¶ 67 Michael also had joint custody of the children, and that fact meant that he would have the children for substantial periods of time, especially during school holidays and the summer, when Victoria would not compensate him for any expenses on behalf of the children. While the dissolution judgment reserved the issue of post-high-school education expenses, the family had already started to save money in the children's names before the divorce for that purpose, and based upon history and performance, it is likely that Michael will be responsible for the majority of those expenses for which he must plan accordingly. Finally, Michael assumed the lion's share of the debts of the parties, including the home in California, which had no equity, and all remaining obligations of the parties' home in DuPage County.

¶ 68 Bearing the foregoing in mind, the petition for modification of child support was brought exclusively on the basis that Michael's income had increased substantially over the agreed-upon ceiling of $275,000. Nothing further was alleged.

¶ 69 A petition for a post-decree increase in child support raises two basic questions. The threshold question is whether the party seeking the increase has shown that a "substantial change in circumstances" (750 ILCS5/510(a)(1) (West 2012)) has occurred. *In re Marriage of Singleteary*, 293 Ill. App. 3d 25, 35 (1997). If the party seeking an increase establishes a substantial change of circumstances, then the trial court proceeds to address the question of what amount, if any, should be paid in increased child support. *Id.*

¶ 70 The issue before us then is whether Victoria presented sufficient evidence of a substantial change of circumstance to justify an increase in Michael's child support obligation. In my opinion, Victoria presented no evidence of a substantial change in circumstance to justify an increase in Michael's child support obligation. She did present evidence that Michael's income continued to fluctuate, and in the year of their divorce he earned significantly more money than the amount reported at the time of the dissolution judgment. But Victoria presented no evidence related to an increase in the children's expenses that was not already being covered by Michael. Victoria's only evidence of note was that even though she is married, her husband contributes no money for the rent or the household expenses, despite the fact that visitation for his three children occurs at their residence. The trial court stated that Victoria's testimony "strained credulity," but nonetheless, granted the modification and restructured the entire child support formula. Why?

¶ 71 Given these circumstances, I would find that the trial court's decision to award an increase in child support constituted an abuse of discretion. See *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009) (stating that the trial court abuses its discretion when its ruling is arbitrary, fanciful, unreasonable or where no reasonable person would take the view adopted by the trial court). In my view, the trial court should have required Victoria to provide a clear picture of the children's finances before it could reasonably conclude that Michael's increase in income constituted a substantial change in circumstances.

¶ 72 In addition, I would find that the trial court abused its discretion in deviating from the statutory child support guidelines (750 ILCS 5/505(a)(1) (West 2012)). In its modified support order, the trial court ordered below-guideline percentages of support based on Michael's income. Yet the trial court gave no indication, either in its written order or in its oral ruling on Michael's

motion to reconsider, how it arrived at those reduced percentages and why. See *In re Marriage of Morgan*, 219 Ill. App. 3d 973, 974 (1991) (holding that the trial court's failure to set forth specific reasons for deviating from child support guidelines required remand).

¶ 73 While I recognize that "an increase in the supporting parent's ability to pay alone may constitute a substantial change in circumstances" (supra, ¶ 27 (citing *In re Marriage of Putzler*, 2013 IL App (2d) 120551)), the change in Michael's income under the facts of this case does not automatically establish a substantial change in circumstances. In fact, in *Putzler*, we noted two lines of authority on this issue. One line of cases recognizes that the "increased ability of the obligor parent alone can justify an increase in child support." *Putzler*, 2013 IL App (2d) 120551, ¶ 29) (quoting *In re Marriage of Heil*, 233 Ill. App. 3d 888, 891 (1992). The other line of cases recognizes that "the party seeking increase must establish both an increased ability to pay and [the children's] increased needs." *Putzler*, 2013 IL App (2d) 120551, ¶ 30 (citing *In re Marriage of Sweet*, 316 Ill. App. 3d 101, 105 (2000). As in *Putzler*, parties typically present evidence that gives us a complete view of the family's finances, which includes both evidence of one of the parent's change in income as well as evidence of the children's increased need for support. *Putzler*, 2013 IL App (2d) 120551, ¶¶ 29-30; see also *In re Marriage of Bussey*, 108 Ill. 2d 286, 297 (1985). As I have already noted, the only evidence presented here was about Michael's increased income, which was clearly contemplated by the dissolution judgment. That evidence did not constitute a substantial change in circumstances. See *In re Marriage of Hughes*, 322 Ill. App. 3d 815, 819 (2001) (stating "[t]he change in circumstances must occur after the date of the decree").

¶ 74 That said, I might even agree with the majority's apparent decision to follow the first line of cases holding that a parent's increased earnings may constitute a substantial change in

circumstances. After all, child support awards may be in excess of the children's needs (*Bussey*, 108 Ill. 2d at 297) and should if possible provide the children with the standard of living they "would have enjoyed had the marriage not been dissolved" (750 ILCS 5/505(a)(2)(c) (West 2012)). But whatever commitment I have to the principle that a parent's increased earnings are sufficient to warrant a child support increase is stretched past its breaking point in this case due to the quality of the evidence presented by Victoria.

¶ 75 It is axiomatic that child support funds are to be used for the children and not as ersatz spousal support. *In re Marriage of Scafuri*, 203 Ill. App. 3d 385, 392 (1990). Courts have an independent duty to ensure that child support funds serve the children's best interests. *In re Marriage of Iqbal & Khan*, 2014 IL App (2d) 131306, ¶ 35. In this case, the trial court clearly recognized that there was a problem with the financial picture painted by Victoria's testimony, but elected to award an increase in child support based solely on Michael's testimony concerning his increased earnings for a single tax year. We have said that when it comes to child support, "[n]o judge should, or properly could, surrender the responsibilities of considering all relevant factors dictated by Illinois law in reaching an appropriate result." *Scafuri*, 203 Ill. App. 3d at 391 (quoting *In re Marriage of Blaisdell*, 142 Ill. App. 3d 1034, 1040 (1986)).

¶ 76 I am seriously troubled that Michael's child support payments are being used as de facto maintenance and not for the benefit of the Gits children. Victoria's testimony about her husband's failure to contribute to family expenses and the fact that Victoria is now without maintenance clearly point to this conclusion. However, the icing on the cake came during the closing remarks of Victoria's counsel when he said, "[s]he didn't get any of the benefit" from Michael's increased earnings in excess of the support cap; "she got none of it. [W]e're asking that if it happens again, that she receive some benefit." I am hard-pressed to believe that

counsel's use of the pronoun "she" was simply a misstatement and that he meant to say "the children." In fact, I think counsel's statement was pure candor.

¶ 77 One final thought. Although we have commented unfavorably on caps on income for purposes of child support (see *Iqbal & Khan*, 2014 IL App (2d) 131306, *n. 1), I express no opinion on the validity of the child-support cap on Michael's income in this case. On Michael's motion to reconsider, the trial court noted its misgivings about the cap. I respectfully suggest that the better course would have been for the trial court not to approve of the cap during the dissolution proceedings in the first place, especially when the parties' marital settlement agreement acknowledged that that Michael had already made $60,000 over the cap by mid-year 2011. However, because I do not believe that Victoria proved a substantial change in circumstances to warrant a new child support formula, I would have reversed without reaching this issue.