2015 IL App (2d) 140872-U
No. 2-14-0872
Order filed July 22, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF DOUGLAS SPITLER, Petitioner-Appellant, and CAROLYN SPITLER, Respondent-Appellee.	))))))))))	Appeal from the Circuit Court of Kane County. No. 08-D-1268 Honorable David P. Kliment, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in setting child support, modifying college contributions, determining a child support arrearage, and ordering attorney fees. Affirmed.

¶ 2 In 2008, after 20 years of marriage, petitioner, Douglas Spitler, and respondent, Carolyn Spitler, divorced. Between 1990 and 2001, five children were born to the marriage. Accordingly, the dissolution judgment incorporated a marital settlement agreement (MSA) that provided for child support, educational and health care costs, as well as maintenance.

¶ 3 Beginning in November 2013, and over the course of 15 days, the court held a trial to resolve multiple post-decree motions. At issue on appeal are the court's rulings concerning various financial issues, specifically pertaining to child support, college contributions, and attorney fees.[1] Specifically, Douglas argues that the trial court erred where: (1) for child support purposes, it set net income based upon a payment Douglas received from a "Creating Greater Value" (CGV) plan; (2) it ordered an increase in child support, despite Carolyn not having established a substantial change in circumstances and where the increase constitutes a windfall; (3) it granted Carolyn's motion to modify college expense contributions; (4) it set a child support arrearage based on 2013 underpayments; and (5) it required Douglas to contribute $26,300 to Carolyn's attorney fees. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 A. Marital Settlement Agreement

¶ 6 The October 28, 2008, MSA provided, in relevant part, that, for two years (*i.e.*, until October 28, 2010), Douglas would pay 50% of his net take-home pay each month to Carolyn. The amount was to be divided, such that 25% was allocated as child support ($3,890) and the other 25% ($3,890) was allocated as maintenance. After two years had passed since entry of the judgment, the MSA provided that Douglas would, for another two years (*i.e.*, from October 28, 2010, until October 28, 2012), continue to pay to Carolyn 50% of his net take-home pay, but it

[1] The parties also litigated custody issues. Specifically, after the dissolution, the parties shared joint custody of the children, but Carolyn was designated as their physical custodian. In 2012, Douglas petitioned for custody of the child who was then living with him full time. Although those rulings are not directly at issue on appeal, that litigation is relevant to the extent the court considered it in assessing the reasonableness of attorney fees.

would be divided such that 32% ($4,979) went to child support and 18% ($2,800) went to maintenance. The MSA provided that maintenance to Carolyn would terminate four years after entry of the judgment. Further, at that time, "the parties agree based upon the age of their children to review Doug's finances and Doug agrees to an entry of an order that he will pay 28% of his net take home pay as in for child support."

¶ 7 According to Douglas's trial testimony, although the MSA did not state an exact number for his income, the percentage amounts specified in the MSA were calculated by considering his salary, average bonuses, and an average of his CGV income from preceding years. Douglas testified that CGV is "partially a retirement long-term plan and part of it is a payment plan that is paid on a yearly basis." He agreed with counsel that CGV was partially a tax-deferred retirement account, explaining that it was an executive account with deferred income, and certain executives, including Douglas, were chosen by the company's president to participate in the program. CGV was based on the valuation of the company, and executives received points based on their participation and a percentage of the company's valuation.

¶ 8 At the time of dissolution, three of the five children attended a private high school. The MSA provided that, as long as Douglas was paying 50% of his net pay to Carolyn, the children would continue to attend the private school and that the parties would split the cost of tuition. Four years after entry of the MSA, however, "once the child support and maintenance which equals 50% gets reduced to child support of 28%," the parties would then assess whether attendance should continue and who would pay for it. With respect to post-high school education, the MSA provided that both parties recognized a mutual obligation to educate their children and:

> "Doug and Carolyn agree to pay for the cost of post-high school education in accordance within their means, as agreed upon between them, or as ordered by the court pursuant to Section 513 of the Illinois Marriage and Dissolution of Marriage Act [(Act)], or the statute then in effect based upon the average tuition at University of Illinois Champaign/Urbana after student grants, scholarships, and gifts are considered."

Moreover, the MSA provided that, although the decision of which school to attend would involve the wishes of both the child and the parents, the parents' contribution to a child's higher education would be limited to the University of Illinois' average tuition and expenses. The child was obligated to apply for loans, grants, and scholarships that might be available, and "all other payments of college expenses are to be split one third to Doug, one third to Carolyn and one third to the minor child attending college."

¶ 9 B. Motions and Trial Evidence

¶ 10 In 2009, because of a mandatory salary reduction and because he did not anticipate receiving a CGV bonus that year, Douglas moved to modify child support and maintenance. His 2009 financial statement showed a net monthly income of $11,299 and monthly expenses of $7,312. Carolyn's 2009 financial statement showed a net monthly income of $8,243.24 and monthly expenses of $9,533.78. Douglas's motion was denied.

¶ 11 On August 15, 2012, Douglas again moved to modify child support, primarily on the basis that one of the children who had been living with Carolyn was now living full time with him. Douglas requested that child support be reduced to 20% of his net pay.

¶ 12 In response, Carolyn moved on August 21, 2012, for an increase in child support and continuation of maintenance, showing her net monthly income at $8,637.52 and expenses of $11,453.93. Carolyn argued that, since the time of the judgment, the youngest child had been

diagnosed with a medical disorder and, as a result of his special needs, the court should order Douglas to increase his support.

¶ 13 In addition, in August 2012, Carolyn moved to reduce her obligation to pay educational expenses. She noted that her maintenance would soon be ending and that, since the time of the judgment, another child had begun attending college.

¶ 14 On September 24, 2012, Douglas's child support was reduced to 20% of his net income, or $2,395 monthly. The order was entered *without* prejudice. The court set all other pending motions for hearing.

¶ 15 In February 2013, Carolyn petitioned to enforce the judgment, arguing that, in violation of the MSA, Douglas had not been paying her 50% of his net income for the years 2010, 2011, 2012.

¶ 16 In March 2014, Douglas again moved to modify child support and expenses. Specifically, he alleged that there had been a substantial change in circumstances since the trial court had, in September 2012, ordered him to pay 20% of his net pay in child support; namely, that, on December 7, 2013, Douglas was terminated from his employment. Douglas requested that the amount of child support he paid to Carolyn for the one child that remained living with her be reduced, that Carolyn be ordered to pay him child support for the child that now lived with him, and that Carolyn be required to continue paying half of high school expenses and one-third of college expenses.

¶ 17 On his March 2014 financial statement, Douglas listed his income from all sources as $553,157. More specifically, as a result of his termination, Douglas received the following: (1) severance payments of $9,059.75, semi-monthly through April 2014; (2) from January through June 2014, $2,096 in monthly unemployment benefits; (3) gross pay of $24,305.55 for unused

vacation time; and (4) in January 2014, a net payment of $325,000 from the CGV plan (gross amount of $489,445). According to Douglas, his company did not withhold sufficient taxes from the CGV check, and he had a $50,000 tax liability on the remaining $325,000, which would leave $275,000. Douglas testified that he received the January 2014 CGV check because he was terminated and, if he had remained employed, he would not have received a check for the CGV money: "it would have been held until the time [he] retire[d] at the age of 67." Douglas agreed that he received CGV payments in 2008, 2010, 2011, 2012, and 2013. Douglas testified that, when he received a CGV payment in June 2013, he paid Carolyn 20% of it.

¶ 18 After the divorce, Douglas had a 401(k) retirement plan balance of $220,000. That amount, at the time of trial, had increased to more than $700,000. Douglas donates $800 monthly to his church. He budgets $460 monthly as a vacation allowance for family trips. Douglas uses credit cards, but he pays them off in full every month. Douglas is re-married. At trial, he testified that his wife earns $105,000 annually, but that their finances are not co-mingled. Douglas testified that he recently underwent surgery for his foot, and he estimated that he was paying around $500 monthly in medical expenses. Douglas owed his attorneys around $25,000. At the time of trial, Douglas's attempts to gain employment had been unsuccessful.

¶ 19 Carolyn has a bachelor's degree in English literature from Wheaton College. She worked in publishing, but has been out of that field over the course of her 20 years of marriage and motherhood. The field has changed, and she has not been able to keep up with it. At the time of dissolution, she worked part time for a period at Starbucks. At the time of trial, Carolyn worked full time at Fifth Third Bank, earning $12.74 per hour. She is eligible for bonuses that, when received, have averaged $200. Carolyn testified at trial that she earns around $24,000 annually, and her April 3, 2014, financial affidavit reflects that she nets $4,104.45 monthly *including*

$2,395 in monthly child support (per the 2012 order). The affidavit shows her expenses, which includes three children in college and one in private high school, as well as $2,100 in monthly credit card payments (around $34,000 in credit card debt), totaled $11,143.07. Carolyn testified that she has, at times, charged college tuition, and that she has little available credit remaining. She received three cars pursuant to the divorce, which she has paid to maintain for the children to use to drive to school. She pays for gas and insurance for the vehicles, as well as one vehicle's car payment. Most of the expenses on her affidavit concerning clothing, entertainment, medical costs, etc., pertain to the youngest child who lives with Carolyn, but some pertain to the older children to whom she continues to contribute financially. Carolyn donates around $200 or $300 monthly to her church. She also pays for after-school child care for the youngest child, which had totaled by the time of trial $4,100. According to Carolyn, her household experiences a monthly shortfall exceeding $7,000.

¶ 20 Carolyn further testified that she has around $800 in a Starbucks investment account remaining from her part-time employment there. She also has an IRA account that, as of December 2012, had a $113,533.78 balance, but she testified that the account is such that she cannot make withdrawals from it. She testified that she is not sure what kind of account it is, such that it prohibits withdrawals. On cross-examination, Carolyn agreed that a statement from that account lists a "maximum annual withdrawal amount" of $6,651.71. She reiterated, however, that despite the statement's summary, she is not aware that she can withdraw from it. However, Carolyn testified that she has a second IRA account from which she *can* make withdrawals. The account started with a $100,000 balance, but Carolyn testified that she has made withdrawals to pay for tuition, credit cards, and other expenses, leaving a balance of $33,677.73.

¶ 21 Carolyn filed various petitions for interim and prospective attorney fees, including a third petition for fees on April 2, 2014. In that petition, she requested $58,346.18 in attorney fees and costs.

¶ 22 C. Trial Ruling

¶ 23 After 15 days of trial testimony, the court, on May 6, 2014, issued its written ruling on the approximately 10 motions that were pending before it.

¶ 24 As to child support, the court granted, in part, Douglas's August 15, 2012, petition to modify the judgment as to child support. It granted Douglas's request to set child support at 20% of his net income. However, it found that Carolyn had no obligation to pay Douglas any child support (with respect to the one child who was living with him). The court found that a downward deviation to $0 was appropriate due to the disparate earning capacity of the parties.

¶ 25 The court granted, in part, Carolyn's August 21, 2012, petition to increase child support and continue maintenance. (It denied her request for continued maintenance.) However, "to the extent that [Douglas] is not paying 20% of his net income as and for child support, that obligation is increased to 20%, effective January 1, 2014."

¶ 26 The court granted, in part, Douglas's March 3, 2014, petition to modify the judgment as to child support and expenses. The court ordered Douglas "to pay guideline child support for 2014 (20%) based on his net income of approximately $275,000, which is the amount remaining from his severance package after taxes. [Douglas's] support obligation is set at $4,583.00 for 2014, effective January 1, 2014." Further, the court granted, in part, Carolyn's February 21, 2013, petition to enforce the judgment. The court found that Douglas had underpaid his child support obligation in 2013 by $27,213.60, and it ordered Douglas to pay that amount within seven days.

¶ 27 As to educational expenses, the court granted Carolyn's August 21, 2012, motion for modification of college contributions. It held that future contributions would be determined pursuant to section 513 of the Act, and that, "at this time, [Carolyn] has no ability to contribute to the college expenses of the children, other than in a minimal amount." The court denied Carolyn's request for reimbursement for college expenses that she had already paid. (In doing so, however, it noted that the MSA had conflicting clauses regarding parental obligations toward college expenses). Further, the court denied Carolyn's September 18, 2013, motion to modify educational expenses for the minor child who continued to attend private high school. The court ordered Carolyn to continue to pay half of the high school expenses.

¶ 28 As to attorney fees, the court granted, in part, Carolyn's "second petition" for attorney fees filed August 5, 2013, and "supplemented from time to time." The court ordered Douglas to pay Carolyn $35,000 toward her attorney fees, an amount it found reasonable in light of the amount of litigation. Further, the court found that "[t]he majority of this litigation was driven by [Douglas]. The majority of time spent at all hearings was attributable to [Douglas]."

¶ 29 The court resolved other pending petitions, which included: (1) denying the parties' respective contempt petitions; and (2) ordering the guardian *ad litem*'s fees to be paid 80% by Douglas and 20% by Carolyn.

¶ 30 D. Motion to Reconsider Ruling

¶ 31 Douglas moved the court to reconsider its rulings, and the court considered briefing and oral argument thereon. On July 29, 2014, the court issued its ruling on the motion. The court rejected Douglas's argument that it erred where it considered his CGV distribution as income:

> "When I set the support number at $4,583, I was using [Douglas's] number that he gave me after what he believed the additional taxes would be on the distribution he

received from the retirement money, which is income. It fits the definition of income as defined by the statute.

I did not include any of his unemployment which he received through June. I could have. I did not include anything from his severance package which ended in April, which I could have. I took 20 percent of the $275,000 that he said in his testimony would be left after all the taxes were paid or withheld, and I divided that up over a period of 12 months. And that's where the $4,583 came from. And I just recalculated it, and it is a correct number."

¶ 32 Douglas's counsel asked the court whether, when it set the child support amount, it had considered that he would soon be paying for COBRA insurance and whether it considered that deduction. The court replied, "I considered all the testimony that I heard at trial." The court rejected Douglas's arguments challenging the court's findings that there was a disparity in income rendering a downward deviation appropriate with respect to Carolyn's support obligation. Further, the court rejected Douglas's argument that the court erred in calculating past-due child support, noting that it had performed extensive calculations before ruling.

¶ 33 With respect to attorney fees, the court clarified that it awarded fees based on Carolyn's *third* petition for fees, dated April 2, 2014 (as opposed to the original order, which mistakenly based the award on the second petition). However, the court granted, in part, Douglas's motion to reconsider the amount. The court noted that Douglas was unemployed, was paying a significant amount of money for child support, had to repay $27,000 in past due child support, and had his own attorney fees to pay. Accordingly, it reduced the fee award from $35,000 to $26,300. Douglas appeals.

¶ 34 II. ANALYSIS

¶ 35 A. CGV Distribution

¶ 36 Douglas argues first that the trial court erred in setting child support based on his CGV distribution. He argues that the court erred where it considered $275,000 of the CGV distribution (after taxes) as remaining from his "severance package," because it was not severance. Rather, Douglas notes, the CGV proceeds were separate from the approximately $9,000 he received semi-monthly as severance, or the approximately $2,000 he received in unemployment compensation. Instead, Douglas argues, the CGV was not income because he already owned it and he paid child support based on those CGV funds. Thus, Douglas argues, the CGV is akin to a savings account and, pursuant to *In re Marriage of McGrath*, 2012 IL 112792, ¶ 14, cannot be considered income. Finally, he argues that, because he paid child support based upon the CGV money, the court is effectively ordering him to pay "support on this *income* twice." We disagree.

¶ 37 A trial court's net income determination and child support award lie within its discretion. *In re Marriage of Marsh*, 2013 IL App (2d) 130423, ¶ 9. However, the question of whether the trial court properly considered the CGV disbursements as "income" for purposes of calculating net income under section 505 of the Act (750 ILCS 5/505(a) (West 2012)) is a question of law to be reviewed *de novo*. *In re Marriage of Lindman*, 356 Ill. App. 3d 462, 464-65 (2005). Section 505 of the Act broadly defines "net income" as the "total of all income from all sources." 750 ILCS 5/505(a)(3) (West 2012).

¶ 38 We find Douglas's reliance on *McGrath* misplaced. In *McGrath*, an unemployed father withdrew money from his savings account every month to meet his expenses. The court held that the savings account withdrawals did not, under section 505 of the Act, meet the definition of income, because the money already belonged to the account's owner and did not represent a gain

or benefit to him. *McGrath*, 2012 IL 112792, ¶ 14. We note that the court expressly declined to consider whether withdrawals from retirement accounts, such as IRAs, would constitute income under the Act. *Id*., ¶ 10, n.2.

¶ 39 Here, the trial court did not err in considering CGV as income. Although he now tries to cast CGV as money he owned akin to a savings account, at trial Douglas testified that CGV is "partially a retirement long-term plan and part of it is a payment plan that is paid [by the employer] on a yearly basis." Douglas testified that CGV is based on company performance. Therefore, according to Douglas's own testimony, CGV is awarded and takes the form of both retirement savings and payment distributions. As such, it is income. For example, a panel of this court has held that distributions from retirement accounts, such as IRAs, can be considered income for child support purposes. *Lindman*, 356 Ill. App. 3d at 468; see also *In re Marriage of Eberhardt*, 387 Ill. App. 3d 226, 232 (2008) (First District agreeing with *Lindman*), but see *In re Marriage of O'Daniel*, 382 Ill. App. 3d 845 (2008) (Fourth District disagreeing and holding that money withdrawn from IRA is not income). Other courts have found net income includes an employee's deferred compensation. See *Posey v. Tate*, 275 Ill. App. 3d 822, 826 (1995). A bonus is considered income for child support purposes. See *Einstein v. Nijim*, 358 Ill. App. 3d 263, 270-71 (2005). Accordingly, whether CGV is part retirement, part deferred compensation, or part bonus, it represents a gain to Douglas. Therefore, unlike the savings account in *McGrath*, Douglas received a benefit or gain from the lump sum CGV distribution and the court did not err in considering it income for purposes of the Act.

¶ 40 Critically, even if CGV did not constitute income as defined by the Act, we could uphold the trial court's decision on the basis that, according to Douglas, the parties agreed and incorporated into the MSA that CGV would be considered as income for child support purposes.

The MSA is a contract. See, *e.g.*, *In re Marriage of Coulter and Trinidad*, 2012 IL 113474, ¶ 19. Again, Douglas testified that the specific child support amounts detailed in the MSA were derived by calculating his income as: net pay, average bonuses, *and CGV*. Further, when Douglas received CGV distributions in 2008 and in the years 2010 through 2013, he apparently paid Carolyn a percentage thereof. Moreover, the basis of Douglas's 2009 motion to reduce child support was that he did not anticipate a CGV distribution that year. Accordingly, Douglas is now trying to have it both ways: he argues that the court erred because CGV is not income, but he testified that the parties considered it income for child support purposes and that the "income" is now being double counted.

¶ 41 Further, as to Douglas's assertion that the money is being double counted, we agree that, generally speaking, double counting (*i.e.*, counting earnings as income both when they are earned and again when the earnings are later withdrawn) is inappropriate. See *Lindman*, 356 Ill. App. 3d at 470. However, the record does not reflect that any double counting occurred here. Clearly, CGV was considered as part of Douglas's income in the years 2008-2013. The percentage of child support he paid, whether 25% from 2008-2010, 32% from 2010-2012, 28% after four years or 20% based on the court's 2012 order, all considered an average amount of CGV as part of the income from which the percentage was drawn. Douglas made those payments and, when he received CGV distributions, paid to Carolyn a percentage thereof (such as in June 2013). However, there is no evidence or developed record or even developed argument reflecting the specific amount, if any, of the distribution paid out upon his termination *in 2014* that had already been counted as income for paid child support. Further, even if some theoretical amount of the 2014 distribution had previously been counted as support, that would not eliminate the remainder of the distribution being considered as income. For example, in

Lindman, the court noted that if double counting was an issue, the court might have to determine what percentage of the earnings were considered income in the year it was earned and then, if funds were later withdrawn, discount the net income calculation accordingly. *Id.* Those calculations were not presented here, and we certainly have no basis or sufficient record to perform such calculations for the first time on appeal.

¶ 42 In any event, to allay any fears that there perhaps exists an injustice because Douglas might have double paid a theoretical amount, we think it helpful to look at the big picture of the trial court's decision, which explicitly set aside and did not consider additional income that Douglas had received. Specifically, the trial court granted Douglas's 2012 request to set child support at 20% of his net income; however, after considering all of the evidence, the court found that, despite his unemployment, Douglas's net income at the time of trial was higher than it had been when the 20% amount was temporarily set in 2012. As the court pointed out, in determining net income, it was presented evidence that Douglas received, in addition to the CGV, severance payments and unemployment compensation (and, we note, vacation pay). However, considering all of the evidence, the court decided to *ignore* those other sources of income and to consider an appropriate net income amount as $275,000, using the remaining CGV as the benchmark. Thus, although Douglas disagrees with the court's net income determination, we disagree with Douglas that the court erred in considering CGV as income. Further, as the evidence and argument concerning double counting is undeveloped, we cannot find that the court erred in determining that child support should be set based on $275,000 in net income.

¶ 43 B. Substantial Change in Circumstances

¶ 44 Douglas next argues that the trial court erred because the child support award for one child now totals more than he paid from 2008-2010 for three children.[2] Douglas notes that, in 2012, support was modified to $2,395 per month and that the court erred in increasing it to $4,583 monthly because Carolyn did not demonstrate a substantial change in circumstances warranting an increase. Douglas argues that the increase creates a windfall to Carolyn. For the following reasons, we disagree.

¶ 45 As noted above, a trial court's child support award lies within its discretion. *In re Marriage of Marsh*, 2013 IL App (2d) 130423, ¶ 9. We will not reverse the award unless it is an abuse of discretion, *i.e.*, when no reasonable person would adopt the trial court's view. *Posey*, 275 Ill. App. 3d at 822.

¶ 46 We disagree with Douglas's characterization of the court's decision for purposes of presenting this issue on appeal. The court's decision undoubtedly resulted in an increase in his monthly child support payments. However, Douglas asserts that the child support award is based essentially on Carolyn successfully moving for an increase in support. That is not exactly what happened. Rather, the collective decisions of the court reflect that it simply determined, per the Act's requirements (750 ILCS 5/505(a)(1) (West 2012)), that Douglas must pay the presumptive statutory amount of 20% of his net income to support one child. While Douglas seeks to focus on the resulting support amount as constituting an "increase in support," placing the burden on Carolyn to prove a substantial change in circumstances, he skirts around the fact that the award, whatever the amount, was set as 20% of his income, which, again: (1) he requested and was temporarily awarded in his 2012 petition; (2) reflects a departure and decrease from the MSA, which had set support at 28% after four years; and, most critically, (3) qualifies as the statutory

[2] But less, we note, than he paid under the MSA from 2010-2012 (which equaled $4,979).

guideline minimum amount of child support for one child (750 ILCS 5/505(a)(1) (West 2012)). The statute requires the court to apply the 20% guideline amount unless it finds, based on certain factors, that a deviation is appropriate. *Id.* As is evidenced from the court's decision here, it did not deviate from the guidelines. Accordingly, while the court granted in part Carolyn's motion to increase support, it explicitly did so only to the extent that Douglas was not paying support in an amount of 20% of his net income. Thus, we reject Douglas's attempt to frame the issue as Carolyn's failure to establish a substantial change in circumstances requiring an "increase in support," when, in reality, the court simply found that the statutory guidelines should be followed. That determination resulted in an increased support amount, but only because the court found that Douglas's 2014 net income was higher than in 2012.

¶ 47 In any event, we note that a court can modify a child support award without the necessity of showing a substantial change in circumstances. Specifically, a child support award may be modified without requiring such a showing where there exists an inconsistency of at least 20% between the amount of the existing order and the amount of child support that results from applying the guidelines. 750 ILCS 5/510(a)(2)(A) (West 2012). Such is the case here, where there exists at least a 20% inconsistency between the existing award from 2012 ($2,395) and application of the guidelines to Douglas's 2014 income ($4,583). Finally, even if a substantial change in circumstances is required, an increase in a payor's income *alone* can be sufficient to constitute a substantial change in circumstances warranting an increase in support. See, *e.g.*, *In re Marriage of Heil*, 233 Ill. App. 3d 888, 891 (1992).

¶ 48 Douglas argues that the court's award is a windfall to Carolyn. He notes that the award is a significant increase in support, that there is no evidence the child's needs have changed, and that the court erred in determining that he could afford the child support. Douglas agrees that the

Act provides that 20% of his income "shall" be applied as support, but he asserts that the court has discretion to adjust that amount based on enumerated statutory factors, such as the needs of the child, Carolyn's financial needs and resources, the standard of living the child would have enjoyed had the marriage not dissolved, the child's physical, emotional, and educational needs, and the noncustodial parent's financial needs and resources. 750 ILCS 5/505(a)(2) (West 2012).

¶ 49 The decision whether to deviate from the guidelines lies within the trial court's discretion. See *Einstein*, 358 Ill. App. 3d at 272-73 (a court's decision to apply the guidelines reviewed for an abuse of discretion). "Compelling reasons" must exist for a trial court to deviate from the presumptive guideline support amounts. See *id.* Douglas relies on *In re Marriage of Singletary*, 293 Ill. App. 3d 25 (1997), as reflecting that courts may find downward deviations appropriate where the payor is a high earner and ordering the percentage guideline support would result in windfalls to the custodial parent. However, the appellate court in *Singletary*, applying an abuse-of-discretion standard, *affirmed* the trial court's decision that deviation was appropriate. *Id.* at 38. We are asked to do the opposite here. After reviewing the record, we cannot find that the court abused its discretion by not deviating from the statutory guideline amount.

¶ 50 As explained above, the factors set forth in section 505(a)(2) reflect that the court does not consider only the needs of the child when assessing whether to deviate from the guidelines; it must also consider the relative financial resources of the parties in determining who will shoulder the burden of child care expenses. In sum, the court was presented with evidence reflecting that Carolyn experiences a significant monthly shortage in cash flow to meet expenses, has a limited earning capacity, limited assets as compared to Douglas, and significant credit card debt. She has a retirement account with a $113,000 balance, but she testified she cannot make withdrawals from that account. Further, Carolyn had another retirement account that exceeded $100,000, but,

so that she could pay her obligations, it has been depleted to around $30,000. As to Douglas's assertion that Carolyn did not establish that the minor child's needs have increased, we note that a custodial parent can establish that a child's needs have increased simply by virtue of the fact that he or she has grown older and, indeed, a court may *presume* that the expenses associated with child rearing increase each year. *Heil*, 233 Ill. App. 3d at 894.

¶ 51 In contrast to Carolyn's financial situation, Douglas earned not only the $275,000 CGV in 2014, but he received severance, vacation pay, and unemployment insurance. He holds significant assets, namely a retirement account with a balance exceeding $700,000 (we note that, to our knowledge and unlike Carolyn, Douglas did not testify he could not access those funds). Although unemployed at the time of trial, and responsible for several expenses, including his own recent medical expenses, Douglas nevertheless has high earning potential and he has been able to make voluntary monthly donations to his church, pay his credit card balances in full each month, and budget monthly for vacations. Douglas contends that, in setting the child support amount, the court did not account for his upcoming COBRA expenses, but the trial court explicitly denied that contention in ruling on the motion to reconsider.

¶ 52 We feel compelled to note that the significance of Douglas's employment status is not lost on this court. We understand that Douglas faces numerous expenses and obligations and, at the time of trial, was not employed or guaranteed a regular income. However, lack of regular or a guaranteed income is not the focus of the trial court's determination in setting child support. Rather, the court here appropriately looked at the resources at Douglas's disposal at the time it made its determination. Indeed, our supreme court has stressed that the trial court's determination of a noncustodial parent's net income must focus on that parent's income at the

time the court makes its determination. See *In re Marriage of Rogers*, 213 Ill. 2d 129, 138 (2004). The *Rogers* court stated:

> "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 might not be forthcoming in the future." *Rogers*, 213 Ill. 2d at 138.

¶ 53 Nevertheless, the "nonrecurring nature of an income stream is not irrelevant" (*Rogers*, 213 Ill. 2d at 139), and the trial court, when determining whether to deviate from the statutory support guidelines, may consider whether the noncustodial parent is likely to receive certain income in the future. *Einstein*, 358 Ill. App. 3d at 271. Here, the court here declined to include in its net-income calculation Douglas's severance pay and unemployment compensation, resulting in a reduced net income total and suggesting to this court that it likely considered that Douglas's future income is uncertain. Indeed, as Carolyn points out, an argument can even be made that, by not including all of Douglas's received compensation in its net-income determination, the court's decision operates to effectively, but implicitly, deviate downward from the guidelines. Moreover, we note that, if Douglas's period of unemployment continues and the resources he possessed in 2014 become inadequate to sustain his obligations in compliance with the court's decision, then he may again seek pursuant to section 510(a) of the Act (750 ILCS 5/510(a) (West 2012)) to modify the child-support order. See *Rogers*, 213 Ill. 2d at 139.

¶ 54 In short, to the extent that Douglas argues that the court's decision not to deviate downward from the guideline support constitutes an abuse of discretion, such that no reasonable person would adopt its view, we disagree.

¶ 55 C. College Expense Contributions

¶ 56 Douglas argues next that the court erred in finding that Carolyn could contribute only minimally to future college expenses. According to Douglas, Carolyn did not establish a substantial change in circumstances warranting the modification in her obligation to contribute one-third of college tuition and expenses. Douglas asserts that the only change in circumstances was that he lost his job, and now he alone must carry the education burden. He argues that the difference between what Carolyn was paying for educational expenses and what she now will be paying constitutes to her a windfall of around $1,665. Douglas contends that Carolyn should access the monies in her IRAs to meet her college expense obligations.

¶ 57 Educational expenses are a form of child support and can be modified upon a showing of a substantial change in circumstances. *In re Marriage of Saracco*, 2014 IL App (3d) 130741, ¶ 12. We review a court's decision to modify educational expense obligations for an abuse of discretion. *Id.*, 2014 IL App (3d) 130741, ¶ 16. The trial court has wide latitude in deciding whether to modify educational expenses, and it must consider all relevant facts, including the financial resources of the parties, the standard of living the child would have enjoyed if the marriage had not been dissolved, the financial resources of the child, and the child's academic performance. 750 ILCS 5/513(b) (West 2012). "[T]he question of whether certain facts establish a 'substantial change' involves the weighing and balancing of those facts. This is why trial courts are afforded 'wide latitude' when answering this question." *Saracco*, 2014 IL App (3d) 130741, ¶ 16.

¶ 58 With respect to the foregoing statutory factors, Douglas does not argue that the court failed to consider the financial resources of the children or their grades, nor does he raise an argument addressing standard of living. As Douglas notes, most of the trial evidence concerning college expenses pertained to college costs paid thus far and whether either parent over or underpaid based on the University of Illinois Champaign-Urbana's tuition and expenses, and his arguments, thus, concern the court's consideration of the parties' respective financial resources.

¶ 59 For many of the reasons we stated in our analysis of child support, we cannot find that the court abused its discretion in finding a modification of Carolyn's college expense obligations was warranted. Again, contrary to Douglas's assertion, Douglas's loss of employment was not the only change in circumstances before the court. The evidence reflected that, since the time the MSA was entered in 2008, numerous changes took place, including an increase in Douglas's net income, an increase in the children's needs as they aged (again, which the court could presume), a depletion in Carolyn's resources (even if Carolyn could make withdrawals from both IRA accounts (a point unclear from the record), she had *already* withdrawn at least $60,000 from a retirement account to pay her expenses), and Carolyn's other established monthly shortfalls and debt. Carolyn notes on appeal that she was previously paying more than 50% of her total yearly income to educational costs, which was not within her means. She further notes that, in contrast to Douglas's assertion that she will now experience a windfall, her financial statements reflect that she has been operating "woefully above her means." Nevertheless, the court did not grant Carolyn all of her requested relief. For example, after hearing all of the evidence, and despite Carolyn's request, the court *denied* any retroactive reimbursement to Carolyn for the college expenses that she had already paid. (Carolyn represents that she has not appealed that decision because she lacks the funds to do so). Further, it ordered Carolyn to continue paying half of the

tuition costs of one child's private high school education. Although it determined that, going forward, Carolyn could not afford to contribute more than a minimal amount to college tuition and expenses, the court clearly considered all of the evidence and balanced the relevant factors. We also note that the court did not hold that Douglas was now responsible for 100% of college expenses. It simply held that Carolyn could no longer contribute one-third of those obligations. Given the record evidence and the trial court's wide latitude to modify educational expense obligations, we simply cannot find that it abused its discretion in balancing all relevant factors here.

¶ 60 D. Child Support Arrearage

¶ 61 Douglas argues next that the court erred in setting the child support arrearage. Specifically, Douglas argues that the court erred because Carolyn's petition to enforce the judgment filed in February 2013, concerned disclosure of information and a request that Douglas pay 50% of his income per the MSA for years 2010, 2011, and 2012. Nevertheless, when the court's order granted Carolyn relief based on the petition, it found that Douglas had underpaid support in 2013, in the amount of $27,213.60. Douglas argues that such relief could not have been encompassed by the pending petition, because any underpayment in support in 2013 could not have been ascertained when the petition was filed. As such, Douglas argues that the court could not have awarded underpaid child support by virtue of "granting" the 2013 petition and the court exceeded the scope of the requested relief.

¶ 62 The parties sparsely brief this issue. Douglas is correct that Carolyn's February 2013 petition to enforce the judgment was based on his alleged failure to pay, pursuant to the MSA, 50% of his net income to Carolyn from 2010-2012. The sum and substance of Carolyn's 2013 petition, however, was that Douglas had been underpaying support. There was then a lag

between the filing of the petition and trial. Then, at trial, the court was essentially considering multiple petitions concerning the proper child support amount, *e.g.*, Douglas's 2012 and 2014 petitions to modify child support, Carolyn's 2012 petition to increase support, and Carolyn's 2013 petition to enforce the judgment. Therefore, based on the collective issues the court was being asked to consider, it is clear that encompassed therein was a request that the court determine what amount of child support was appropriate and whether Douglas had underpaid. As such, we do not agree that the court exceeded its authority by finding Douglas underpaid support in 2013.

¶ 63 E. Attorney Fees

¶ 64 Douglas's final argument on appeal is that the court erred by requiring him to pay $26,300 toward Carolyn's attorney fees. In sum, Douglas argues that the court's award constitutes an abuse of discretion because Carolyn also "drove" the litigation, the court did not consider his inability to pay, and the primary obligation to pay fees should be borne by the party that incurred them. We reject Douglas's arguments.

¶ 65 It is true that the primary obligation for payment of attorney fees generally rests upon the party for whom the services are rendered. See *In re Marriage of Adams*, 348 Ill. App. 3d 340, 344 (2004); *In re Marriage of Mantei*, 222 Ill. App. 3d 933, 941 (1991). However, the court may order one spouse to pay some or all of the attorney fees incurred by the other. 750 ILCS 5/508 (West 2000). In order to justify an award of attorney fees, the party seeking the award must demonstrate both financial inability to pay the fees and the ability of the other spouse to do so. *In re Marriage of Cotton*, 103 Ill. 2d 346, 361 (1984). We review an attorney fee award for an abuse of discretion. *Mantei*, 222 Ill. App. 3d at 941.

¶ 66 Here, we cannot say that the trial court abused its discretion. As to whether it considered Douglas's ability pay, the court clearly did so, even reducing the award upon Douglas's motion to reconsider. Specifically, although Carolyn's third petition for fees requested that Douglas be ordered to pay $58,346.18, the court initially ordered that he pay $35,000 and then, stating it had considered that Douglas had other obligations and expenses, reduced that amount upon reconsideration to $26,300. For the reasons discussed earlier in this decision, adequate evidence exists in the record to support the court's finding that Carolyn established that she could not pay the fees and that Douglas was in a superior position to do so.

¶ 67 Douglas takes issue with the court's finding that "[t]he majority of this litigation was driven by [Douglas]. The majority of time spent at all hearings was attributable to [Douglas]." However, the trial court was clearly in best position to make that assessment. Although Douglas argues that Carolyn filed baseless motions and subpoenas, the court's attorney fees award was based on its assessment of the amount of litigation as a whole (including, we note, custody litigation initiated by Douglas in 2012, but not directly at issue on appeal).

¶ 68 In sum, the court did not abuse its discretion in the attorney fees award.

¶ 69 III. CONCLUSION

¶ 70 For the reasons stated, the judgment of the circuit court of Kane County is affirmed.

¶ 71 Affirmed.