2015 IL App (4th) 140702-U

NO. 4-14-0702

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 23, 2015
Carla Bender
4th District Appellate
Court, IL

In re: MARRIAGE OF CAROL S. WELLS,	)	Appeal from
Petitioner-Appellee,	)	Circuit Court of
and	)	McLean County
JEFF B. WELLS,	)	No. 06D141
Respondent-Appellant.	)	
	)	Honorable
	)	Charles G. Reynard,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: In this proceeding to modify a judgment of dissolution, the trial court abused its discretion by failing to deviate downward in the amount of child support payable out of respondent's regular income, but otherwise the modifications of the judgment of dissolution are neither against the manifest weight of the evidence nor an abuse of discretion.

¶ 2 Respondent, Jeff B. Wells, appeals from modifications a trial court made to the judgment dissolving his marriage with petitioner, Carol S. Wells, specifically, modifications to child support and visitation. Because petitioner's earnings are typically several times greater than respondent's earnings and because the children appear to have no extraordinary expenses or unmet needs, we conclude the court abused its discretion by setting child support at the statutory percentage of 32% of respondent's net income. A downward deviation is warranted. Although we uphold the award of $15,000 in child support out of respondent's inheritance of $75,000 (an award that was a downward deviation), we reverse the child support payable out of his regular

net income (the child support in the amount of 32%), and we remand this case for a redetermination of that child support. Otherwise, we affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 A. Marriage and Children

¶ 5 The parties married on April 30, 1994. Three children were born to them during the marriage: A.W., born July 16, 1999; M.W., born March 5, 2001; and J.W., born August 21, 2003.

¶ 6 B. The Judgment of Dissolution

¶ 7 1. *Custody and Visitation*

¶ 8 The marriage was dissolved on September 13, 2007. The judgment of dissolution, entered on that date, bears the signatures of petitioner's attorney and respondent's attorney under the words "APPROVED AS TO FORM & SUBSTANCE."

¶ 9 The judgment of dissolution provided that petitioner was to be the primary custodial parent of the children, subject to reasonable visitation by respondent. The visitation schedule was as follows:

> "1. Alternating weekends from Friday at 4:30 p.m. until Sunday at 5:00 p.m. during the school year and from Friday at 12:30 p.m. until Monday at 7:30 a.m. in the summer months when the children are not attending school.
>
> 2. Tuesday evenings from 4:00 p.m. until 7:00 p.m. during the school year and from Tuesday evening 4:00 p.m. until Wednesday at 7:30 a.m. during the summer months when the children are not attending school.

3. One day per week for lunch with each child during the school year.

4. Alternating major holidays ***.

5. Respondent's birthday *** and Father's day ***.

6. Each parent shall have three (3) non-consecutive weeks of continuous visitation with the minor children which shall be taken in three (3) seven (7) day segments which shall include the parent's alternate weekend as part of the seven (7) days of allotment."

¶ 10 Also, the judgment of dissolution gave respondent a right of first refusal if petitioner was unavailable to take care of the children for a period of two nights or longer. Respondent, however, had to alternate with the maternal grandparents in the right of first refusal:

"[T]he Court finds that it is in the children's best interests that Respondent have a 'First Right of Refusal' in instances when Petitioner is unavailable to care for the children for periods of two (2) nights or more for up to three (3) instances a year during the school year and not to include summers with said 'Right of Refusal' subject to alternating with Petitioner's parents (maternal grandparents) having right to likewise care for the children up to seven (7) nights per year with Petitioner communicating to Respondent not less than seven (7) days in advance of when such an instance may occur. Respondent shall have the right of first refusal followed by the Petitioner's parents."

¶ 11 2. *The Right To Claim Children as Dependents*

¶ 12 The judgment of dissolution allowed petitioner to claim A.W. and J.W. as dependents and allowed respondent to claim M.W. as a dependent.

¶ 13 3. *Child Support and Maintenance*

¶ 14 The judgment of dissolution provides:

> "C. The Respondent's child support shall be set in the amount of $400.00 per month commencing with the first payment due September 1, 2007 ***. *** Said child support represents a downward deviation on the Respondent's statutory child support by the amount of $900.00 per month in exchange for any claims for maintenance by Respondent from Petitioner or in lieu of claims of offset raised herein. Said offset of $900.00 per month shall continue for a period of five years, shall be considered in future instances of modification of child support (ie. if Respondent's statutory child support would be $1600.00 per month, his child support will be set at $700.00 per month after said offset) and shall terminate in the event the Respondent remarries, dies or cohabits with another individual on a continuing conjugal basis as contemplated within [section 510 of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/510 (West 2006))]."

¶ 15 C. Petitions To Modify Visitation

¶ 16 On October 29, 2009, respondent filed a petition to modify visitation, and on March 1, 2010, petitioner filed a cross-petition to modify visitation.

¶ 17 In an order entered on October 28, 2011, the trial court denied the competing motions to modify visitation, except that the court "interpret[ed]" and "clarifie[d]" the right of first refusal as follows:

> "a. The Respondent and the Petitioner's parents (maternal grandparents) shall have alternating rights of first refusal with respect to caring for the boys when the Petitioner is unavailable to care for the children for periods of two (2) nights or more.
>
> b. The Respondent shall be given seven (7) days['] notice of this opportunity. If he declines, then the Petitioner's parents may be given the opportunity. If he accepts, then on the next occasion of Petitioner's unavailability, her parents may be given the first opportunity. If they decline, then the Respondent shall be given the opportunity.
>
> c. If both Respondent and Petitioner's parents are unavailable or decline the opportunity, Petitioner may then engage alternate care arrangements including her significant other.
>
> d. The only limit on Respondent's exercise of his first right of refusal is the limit of three (3) instances, on which he may exercise the right. The duration of each instance is not limited. However, the Petitioner's parents shall be limited to the exercise of their right to no more than seven (7) days per year. Thus, in the

event the Petitioner's parents accept such an opportunity which uses the entire seven (7) days, the requirement of alternation is eliminated. In such an event, Respondent shall have the first right of refusal on every such occasion of Petitioner's unavailability."

¶ 18 D. Petitioner's Petition To Modify Child Support

¶ 19 On March 22, 2011, petitioner filed her second petition to modify the judgment of dissolution. In count I of her petition, she requested the trial court to clarify that the downward deviation of $900 from the statutory guideline for child support actually "represented Petitioner's maintenance payment to Respondent." She alleged that she needed this clarification so that the Internal Revenue Service would allow her to deduct the $900 a month from her income taxes.

¶ 20 In count II of her petition, petitioner alleged that a substantial change in circumstances had occurred in that (1) respondent's ability to support the children had increased and (2) the children's expenses had increased. Therefore, petitioner requested that "[respondent's] child support obligation be increased to a minimum of thirty-two (32%) of his net income."

¶ 21 On June 8, 2012, the trial court held a hearing on the petition. The evidence tended to show the following regarding the parties' incomes. In September 2007, at the time of the entry of the judgment of dissolution, the parties stipulated that respondent's annual salary was $60,000. In the hearing of June 8, 2012, respondent testified his salary was now $70,000.

¶ 22 In 2010—which, petitioner testified, was "an extremely low year" for her—she earned $136,772, almost twice respondent's present earnings of $70,000 a year. More typically, petitioner's earnings were three to four times his earnings. According to documentation from the Social Security Administration, her Medicare wages were $245,886 in 2006, $233,614 in 2007,

$225,662 in 2008, and $280,707 in 2009. According to a pay statement in petitioner's exhibit No. 24, her total gross earnings for the year were $322,706 as of May 15, 2011. According to another pay statement in the same exhibit, her total gross earnings for the year thus far were $279,425 as of May 31, 2012. In addition, a domestic partner paid half her household expenses. No one testified that the children had any unmet needs or any unusual, extraordinary expenses, such as uncovered medical bills or private-school tuition.

¶ 23 On August 10, 2012, the trial court issued a decision. First, for purposes of count I of the petition, the court decided that the $900 a month was actually a downward deviation in child support rather than maintenance:

> "Candidly, the Court had preliminarily concluded that the offset was maintenance and that the agreement merely provided a convenience to avoid the unnecessary exchange of checks for maintenance and child support. Yet the plain language of the agreement has persuaded the Court otherwise: 'Said child support represents a downward deviation on the Respondent's statutory child support for the amount of $900.00 per month *in exchange for any claims for maintenance* by Respondent from Petitioner or in lieu of claims of offset herein.' (Emphasis added) The plain meaning of this language is that no claim of maintenance was presented to the Court in consideration of which the Respondent's child support obligation was lowered. No maintenance was ordered; a downward deviation in child support was ordered."

Therefore, the court denied count I, in which petitioner had sought a clarification that the $900 a month was maintenance.

¶ 24 As for count II, the trial court found that "Respondent's income ha[d] increased to a sufficiently substantial extent to support a modification of child support" to "the statutory guideline of 32% [of] his current income." The court made the modification retroactive to March 22, 2011, the date when petitioner filed her petition to modify the judgment of dissolution.

¶ 25 Subsequently, in an order of July 3, 2014, the trial court calculated the exact dollar amounts of the retroactive and prospective child support:

> "1. Respondent's child support obligations are retroactively set for the following years in the following amounts:
>
> (a) March 22, 2011 - December 2011 =
>
> $6,995.88 Annual Child Support
>
> ($4,800.00) Paid Child Support
>
> $2,195.88 Unpaid Child Support Annually
>
> (b) January 1, 2012 - December 31, 2012 =
>
> $12,688.57 Annual Child Support
>
> ($4,800.00) Paid Child Support
>
> $7,888.57 Unpaid Child Support
>
> (c) January 1, 2013 - December 31, 2013 =
>
> $18,459.48 Annual Child Support
>
> ($4,800.00) Paid Child Support
>
> $13,659.48 Unpaid Child Support

2. Respondent's current child support obligation is set at $709.98 biweekly beginning January 1, 2014."

The trial court took under advisement whether respondent should pay child support out of an inheritance of $75,000, which he received in May 2011.

¶ 26 Later, in an order entered on July 17, 2014, the trial court decided that because the inheritance "was a one-time receipt as well as the other circumstances disclosed by the evidence, a downward deviation with respect to this single receipt [was] warranted." The court ordered respondent to pay $15,000 in child support out of the inheritance of $75,000.

¶ 27 II. ANALYSIS

¶ 28 A. The Sufficiency of the Record

¶ 29 Petitioner argues we should presume the trial court's order is correct because respondent has "provided this Court with an insufficient record/transcript of the trial testimony relevant to the issues raised in the brief." See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 30 What are the issues raised in respondent's brief? The first issue is whether the trial court abused its discretion by finding there had been a substantial change in circumstances that warranted increasing respondent's child-support obligation to the statutory minimum of 32% of his net income. See 750 ILCS 5/505(a)(1) (West 2012). The procedural vehicle that petitioner used to obtain this increase in child support was her "Petition for Modification of Judgment of Dissolution" (or, more precisely, count II of that petition), a petition she filed on March 22, 2011. As far as we can see from the record sheet, the only scheduled hearing on that petition was on June 8, 2012. A docket entry for April 24, 2012, says: "Cause continued for hearing on the financial issues related to [petitioner's] Petition to Modify on 6-8-12 at 1:30 PM." The record includes a transcript of the hearing the court held on June 8, 2012. At the beginning

of the hearing, petitioner's attorney, Helen E. Ogar—who happens to be the same attorney representing her in this appeal—told the court: "[O]n March 22nd, 2011, I filed a Petition for Modification of Judgment of Dissolution of Marriage on Financial Issues. So it's—we are looking at the March 22nd, 2011, Petition for Modification of Judgment." The transcript appears to contain no indication that the hearing on this petition began on a previous date and that this was a successive day of the hearing. Nor does the transcript appear to contain any indication that the court took judicial notice of any evidence adduced in a previous hearing. See 3A Nichols Ill. Civ. Prac. § 57:13 ("In rare instances, a trial court may *sua sponte* take judicial notice of facts as long as the trial court makes clear during the course of the trial what facts and sources are included in the court's *sua sponte* judicial notice."). The hearing ended with the court's "tak[ing] the matter under advisement," according to both the transcript and the docket entry of June 8, 2012. The next docket entry is dated August 10, 2012, and it says: "[Petitioner's] Petition for Modification of Judgment filed March 22, 2011[,] is allowed in part and denied in part. *** See Order." The record sheet contains no indication of any further evidentiary hearing between June 8 and August 10, 2012. Thus, the record enables us to address the first issue.

¶ 31 The second issue is whether the trial court abused its discretion by ordering respondent to pay child support in the amount of $15,000 out of his one-time inheritance of $75,000. The docket entry for July 17, 2014, states: "Child support ordered in regard to inheritance." The record sheet appears to contain no indication that between June 8, 2012, and July 17, 2014, the trial court held any further evidentiary hearing on financial issues. Evidently, the court relied on the evidence adduced in the hearing of June 8, 2012—of which the record contains a transcript. Thus, the record enables us to address the second issue.

¶ 32 The third issue is whether the trial court abused its discretion by finding that respondent had relinquished his right to an award of maintenance in return for the downward deviation in his child-support obligation as set forth in the judgment of dissolution. All we need to decide that issue is the judgment of dissolution, which is in the record.

¶ 33 The fourth issue is whether the trial court abused its discretion and violated respondent's right to substantive due process by refusing to strike the right of first refusal from the judgment of dissolution. That issue is purely legal, and therefore the lack of a complete record would not hinder us from addressing it. See *Midstate Siding & Window Co., Inc. v. Rogers*, 204 Ill. 2d 314, 319 (2003).

¶ 34 It is true, as petitioner says, that many hearings were held in this case and that respondent has provided us a transcript of only one of the hearings, the hearing of June 8, 2012. But it is unnecessary, and it would be wasteful, to transcribe each and every hearing just for the sake of transcribing hearings. Instead, "[t]he report of proceedings shall include all the evidence pertinent to the issues on appeal." Ill. S. Ct. 323(a) (eff. Dec. 13, 2005). It appears that all the evidence pertinent to the issues on appeal was adduced in the hearing of June 8, 2012, of which the record includes a transcript.

¶ 35 The other hearings that petitioner identifies in the record sheet appear to be irrelevant. For example, the hearing of June 17, 2010, was on petitioner's motion to disqualify respondent's attorney. The hearing on October 14, 2010, was on respondent's motion for visitation and to temporarily remove a child from Illinois. The hearing on July 6, 2011, was on respondent's motion, pursuant to sections 2-619(a)(4) and (a)(9) (735 ILCS 5/2-619(a)(4), (a)(9) (West 2010)), to dismiss count I of petitioner's petition to modify the judgment of dissolution. The docket entries for October 28, 2011, and June 6, 2012, contain no indication that evidence

was heard on those dates. The hearing on October 18, 2012, was on another motion by respondent for visitation and to temporarily remove a child from Illinois. It is unclear why petitioner thinks these hearings must be transcribed. We find the record to be adequate for purposes of the issues that respondent raises in this appeal.

¶ 36 B. The Modification of Child Support

¶ 37 1. *The Question of Forfeiture*

¶ 38 Respondent argues that because petitioner earned a salary three to six times greater than his and because petitioner's domestic partner paid for half of her household expenses and because the children's needs were being met, petitioner failed to prove a substantial change of circumstances justifying an increase of respondent's child-support obligation to 32% of his net income. See 750 ILCS 5/505(a)(1), 510(a)(1) (West 2012). He argues the downward deviation should be reinstated retroactively to September 7, 2013. (Perhaps respondent means September 7, 2012. In its order of August 10, 2012, the trial court found that the offset or downward deviation "shall terminate September 7, 2012." Perhaps this, too, was a mistake. Five years after the entry of the judgment of dissolution was September 13, 2012.)

¶ 39 Petitioner claims, in effect, that respondent has forfeited this argument by failing to raise this argument in a pleading. She says:

> "Appellant never requested such a deviation[,] nor did he request an 'extension' of the deviation/offset. [Citation to record.] The only pending request to modify was Appellee's Petition for Modification of Judgment filed March 22, 2011. A party should plead a deviation when a deviation is requested. A trial court does not abuse its discretion by failing to deviate *sua sponte* from the

presumptively appropriate guidelines. *Roper v. Johns*, 345 Ill. App. 3d 1127, 281 Ill. Dec. 655, 804 N.E.2d 620 (5th Dist. 2004)."

¶ 40 Actually, the appellate court never said in *Roper* that if a noncustodial parent wished a downward deviation in the amount of child support (that is, a deviation downward from the guidelines in section 505(a)(1) (750 ILCS 5/505(a)(1) (West 2002)), the noncustodial parent had to *file a pleading* to that effect. Instead, the appellate court merely said: "[The noncustodial parent] did not *request* that the trial court deviate from the guidelines in setting support. A trial court does not abuse its discretion by failing to deviate *sua sponte* from the presumptively appropriate guidelines." (Emphasis added.) *Roper*, 345 Ill. App. 3d at 1130. In the present case, by contrast, respondent requested a downward deviation. During closing arguments in the hearing of June 8, 2012, his attorney, Dawn L. Wall, told the trial court: "I would assert that the [$400] that is set forth in the [2007] decision with the downward deviation is the appropriate amount." So, *Roper* is distinguishable.

¶ 41 A better question—a question petitioner does not raise—is whether respondent has forfeited his argument by failing to substantiate many of his factual representations with citations to the relevant pages of the record. In his argument that the trial court abused its discretion by discontinuing the downward deviation, respondent makes a number of naked representations. He represents that petitioner "typically earned an annual salary that was four[] to six[] times greater than [his salary]" and that, even "in a year [when she] earned an uncharacteristically low income, her annual earnings exceeded those of [his] by slightly more than [50%]." He represents that "[petitioner] and her significant live-in other were sharing the household expenses 50/50." He represents that "all of the needs of the parties' minor children

were being met." In the course of making these representations, he cites only his motion for reconsideration (pages 447-48 of the common-law record)—which is not evidence.

¶ 42 Illinois Supreme Court Rule 341(h)(6) (eff. Feb. 6, 2013) says that the statement of facts in a brief must "contain the facts necessary to an understanding of the case, *** *with appropriate reference to the pages of the record on appeal*." (Emphasis added.) Likewise, Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) requires that the argument of the brief "contain the contentions of the appellant and the reasons therefor, with citation of the authorities *and the pages of the record relied on*." (Emphasis added.) The appellate court has held that failing to provide citations to the relevant pages of the record is a violation of Rule 341(h)(6) or (h)(7), the consequence of which is a forfeiture of the unsubstantiated factual representation or argument. *Kreutzer v. Illinois Commerce Comm'n*, 2012 IL App (2d) 110619, ¶ 40; *Engle v. Foley & Lardner, LLP*, 393 Ill. App. 3d 838, 854 (2009).

¶ 43 The trouble, though, with finding respondent's factual representations to be forfeited is that we would be finding a forfeiture *sua sponte*. In her own brief, petitioner says nothing about respondent's failure to cite the record, and thus we can only assume she agrees with his representations regarding her income. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are [forfeited] ***."); Ill. S. Ct. R. 341(i) (eff. Feb. 6, 2013) (requiring that the appellee's brief conform to the requirements of subparagraph (h)(7) and providing that a statement of facts pursuant to Rule 341(h)(6) "need not be included [in the appellee's brief] except to the extent that the presentation by the appellant is deemed unsatisfactory"); *Garland v. Sybaris Club International, Inc.*, 2014 IL App (1st) 112615, ¶ 64 (the clause in Rule 341(h)(7), " 'Points not argued are [forfeited],' " "applies to appellees as well as appellants"); *People v. McCoy*, 2014 IL App (2d) 130632, ¶ 28 (same). Therefore, we will find no forfeiture—this time.

¶ 44 Before we leave the subject of noncompliance with supreme court rules, we note that the "Nature of the Case," in respondent's brief, is three pages long. Illinois Supreme Court Rule 341(h)(2) (eff. Feb. 6, 2013) says that the "Nature of the Case" shall consist of a single "introductory paragraph stating (i) the nature of the action and of the judgment appealed from and whether the judgment is based upon the verdict of a jury, and (ii) whether any question is raised on the pleadings and, if so, the nature of the question." A single introductory paragraph is not a multipage, blow-by-blow description of everything that happened in the case.

¶ 45 2. *The Expiration of the Offset*

¶ 46 When the judgment of dissolution says that the offset "shall be considered in future instances of modification of child support," it means the "future" relative to the entry of the judgment of dissolution, not the "future" relative to the expiration of the five-year period. Again, to quote the judgment of dissolution: "Said offset of $900.00 per month shall continue for a period of five years, shall be considered in future instances of modification of child support (ie. if Respondent's statutory child support would be $1600.00 per month, his child support will be set at $700.00 per month after said offset) and shall terminate in the event the Respondent remarries, dies or cohabits with another individual on a continuing conjugal basis as contemplated within 750 ILCS 5/510." Actually, "consider[]" is an inapt word. As the parenthetical example makes clear, the offset will be automatically *applied* or *given effect* in future modifications of child support: if a modification would have set respondent's statutory child support at $1,600 per month, it will be set at $700 per month after the offset. Remarriage, death, or cohabitation will terminate the offset prematurely, before the expiration of the five-year period. Under section 510(c)(750 ILCS 5/510(c) (West 2012)), remarriage, death, or cohabitation terminates maintenance. To interpret the judgment as providing that the offset

would be "considered" in the "future" *after the expiration of the five-year period* would make superfluous the clause "Said offset of $900.00 per month shall continue for a period of five years." Again, judgments are interpreted as other instruments are interpreted (In re Marriage of *Schinelli*, 406 Ill. App. 3d 991, 1002 (2011)), and if possible, an instrument should be interpreted in such a way that no provision is rendered superfluous (*In re Marriage of Arvin*, 184 Ill. App. 3d 644, 648 (1989)). Unless the offset ended in five years, the clause "Said offset of $900.00 per month shall continue for a period of five years" would be superfluous.

¶ 47 3. *The Redetermination of Child Support*

¶ 48 Of course, the expiration of the offset does not preclude a subsequent downward deviation in child support. In count II of the petition that she filed on March 22, 2011, petitioner invited a redetermination of child support in the context of present circumstances. Redetermining child support would pose the question of whether the child support should be in the amount of the statutory guideline or whether, given the factors in section 505(a)(2) (750 ILCS 5/505(a)(2) (West 2012)), it should be higher or lower than the guideline.

¶ 49 The trial court found that the increase in respondent's income was a "substantial change in circumstances" within the meaning of section 510(a)(1) of the Dissolution Act (750 ILCS 5/510(a)(1) (West 2012)). In September 2007, at the time of the entry of the judgment of dissolution, the parties stipulated that respondent's annual salary was $60,000. In the hearing of June 8, 2012, respondent testified his salary was now $70,000. The court did not make a finding that was against the manifest weight of the evidence when it found that this increase of $10,000 in respondent's salary was a substantial change in circumstances. See *In re Marriage of Barnard*, 283 Ill. App. 3d 366, 370 (1996).

¶ 50 After finding a substantial change in circumstances, the trial court had to decide "whether and by how much to modify the support ordered." *Id.* See also *In re Marriage of Bussey*, 108 Ill. 2d 286, 296 (1985); *In re Marriage of Rash*, 406 Ill. App. 3d 381, 388 (2010); *In re Marriage of Mitteer*, 241 Ill. App. 3d 217, 227 (1993). In making that decision, the court was to "consider[] the best interest of the child in light of the evidence, including, but not limited to, one or more of the following relevant factors:

> (a) the financial resources and needs of the child;
>
> (b) the financial resources and needs of the custodial parent;
>
> (c) the standard of living the child would have enjoyed had the marriage not been dissolved;
>
> (d) the physical, mental, and emotional needs of the child;
>
> (d-5) the educational needs of the child; and
>
> (e) the financial resources and needs of the non-custodial parent." 750 ILCS 5/505(a)(2) (West 2012).

We ask whether the court abused its discretion in the amount by which it modified child support. See *Barnard*, 283 Ill. App. 3d at 370.

¶ 51 Respondent relies on two cases in which the appellate court found such an abuse of discretion. In the first case, *In re Marriage of Cornale*, 199 Ill. App. 3d 134, 137 (1990), the custodial parent, the father, earned approximately 50% more than the mother and had "far greater" assets than she. He was depositing into a savings account for the child the entire $90 per week the mother was paying in child support, because he did not need it for the child's living expenses. *Id.* at 137-38. The amount of $90 already was a downward deviation from the

statutory guideline of $100, but we held there should be a greater downward deviation, considering that the earnings and financial resources of the father were so much greater than those of the mother (*id.* at 137) and considering that the $90 a week was unnecessary to meet the child's needs (*id.* at 137-38). We reversed the child-support obligation of $90 a week, deeming it to be excessive, and remanded the case for the determination of a lower amount of child support. *Id.* at 138.

¶ 52 In the second case, *In re Marriage of Cook*, 147 Ill. App. 3d 134 (1986), on which we relied in *Cornale*, 199 Ill. App. 3d at 137, the noncustodial parent, the mother, argued that the trial court had abused its discretion by increasing her child-support obligation from $17.50 per week to $55 per week (*Cook*, 147 Ill. App. 3d at 136). The appellate court agreed. *Id.* at 137. Not only were the father's earnings approximately 60% higher than the mother's earnings, but just prior to the custody change from the mother to the father, the trial court ordered the father, who had the higher income, to pay only $35 a week in child support. *Id.* at 136. Therefore, the appellate court reversed the trial court's judgment and remanded the case "for reconsideration." *Id.* at 137.

¶ 53 Similarly, in the present case, petitioner earns substantially more than respondent. Even in "an extremely low year" for her, petitioner's earnings were almost twice respondent's present earnings. More typically, her earnings were three to four times his earnings. In addition, she got to claim two of the children as deductions, and her domestic partner paid for half of her household expenses. No one testified, in the hearing of June 8, 2012, that the children had any unmet needs or any unusual, extraordinary expenses. We conclude, therefore, that the trial court abused its discretion by setting child support at 32% of respondent's net income, with no downward deviation, from September 7, 2012, onward. "The custodial parent's ability to

contribute to the child's welfare is an important factor to be considered in determining a child support award." *Cornale*, 199 Ill. App. 3d at 137. The vast disparity between the parties' financial resources calls for a downward deviation in some amount. See 750 ILCS 5/505(a)(2)(b), (a)(2)(e) (West 2012). Therefore, we reverse the trial court's decision on count II of the March 22, 2011, petition to modify the judgment of dissolution, and we remand this case for a redetermination of child support.

¶ 54 C. The Inheritance

¶ 55 1. *Is the Inheritance Income?*

¶ 56 Respondent disputes that his "one-time inheritance" of $75,000 "ought to be considered income for purposes of determining [his] child-support obligation." We hold, however, that the inheritance was income and that it therefore had to be counted when determining child support.

¶ 57 The statutory guidelines set the amount of child support at a certain percentage of the supporting party's "net income," and the percentage depends on the number of children. 750 ILCS 5/505(a)(1) (West 2012). Section 505(a)(3) defines "net income" as "the total of all income from all sources," minus specified deductions. 750 ILCS 5/505(a)(3) (West 2012). Because the Dissolution Act does not define "income," we give the word its plain and ordinary meaning. *In re Marriage of Rogers*, 213 Ill. 2d 129, 136 (2004). "Income" is any payment the supporting parent receives: typically, a recurring payment, but it does not have to be recurring. *Id.* The supreme court has held:

> "*Recurring or not*, the income must be included by the circuit court in the first instance when it computes a parent's 'net income' and applies the statutory guidelines for determining the minimum

> amount of support due under section 505(a)(1) of the Act. If, however, the evidence shows that a parent is unlikely to continue receiving certain payments in the future, the circuit court may consider that fact when determining, under section 505(a)(2) of the Act (750 ILCS 5/505(a)(2) (West 2002)), whether, and to what extent, deviation from the statutory support guidelines is warranted." (Emphasis added.) *Id.* at 139.

Thus, we conclude that although it is a one-time, nonrecurring payment, respondent's inheritance of $75,000 is "income" for purposes of determining his child-support obligation. See Erica Bertini, *Inheritance Is Income for Purposes of Calculating Child Support Under the Marriage and Dissolution of Marriage Act*, 25 DCBA Brief 26, 29 (2013).

¶ 58 2. *Is $15,000 in Child Support, Out of the $75,000, a "Windfall" to the Three Children?*

¶ 59 The trial court held that respondent should pay $15,000 in child support out of his inheritance of $75,000. Respondent argues this $15,000 is a "windfall" to the children, like the excessive child support in *In re Marriage of Bush*, 191 Ill. App. 3d 249 (1989). In *Bush*, we held that, in setting the amount of child support, "the courts are not required to automatically open the door to a windfall for children where one or both parents have large incomes." *Id*. at 261. The "windfall" in that case, however, was $30,000 a year in child support for one four-year-old child. *Id.* at 260. It does not necessarily follow, from *Bush*, that a considerably lesser amount, $5,000 apiece for three children, is a "windfall."

¶ 60 *Bush* is further distinguishable in that that trial court in that case rigidly applied the statutory guideline of 20% (*id.*, see Ill. Rev. Stat. 1987, ch. 40, par. 505(a)(1)), whereas, in the present case, the trial court awarded a downward deviation. For respondent, the statutory

guideline was 32%, and 32% of $75,000 would have been $24,000 in child support. See 750 ILCS 5/505(a)(1) (West 2012). Instead of awarding that amount, the court awarded $15,000 in child support, which was 20% of $75,000. Presumably, in this downward deviation, the court took into account petitioner's large income and the amounts respondent had been depositing into the children's savings accounts. Therefore, we are unable to say the trial court abused its discretion by awarding $15,000 in child support out of respondent's inheritance of $75,000.

¶ 61 D. The Waiver of Maintenance

¶ 62 In its order of August 10, 2012, the trial court concluded that in the judgment of dissolution, to which respondent's attorney had agreed, respondent had "relinquish[ed] *** claims for maintenance" in return for "a downward deviation in child support." Respondent challenges that conclusion. He argues that any "waiver of maintenance" must be "express" (*Faris v. Faris*, 142 Ill. App. 3d 987, 999 (1986)), and he disputes that the judgment of dissolution contains an express waiver of maintenance.

¶ 63 The final page of the judgment of dissolution bears the signature of respondent's attorney, under the words "APPROVED AS TO FORM & SUBSTANCE." The judgment, to which respondent agreed, says: "Said offset of $900.00 per month shall continue for a period of five years ***." By that provision, respondent waived, or intentionally gave up, any further maintenance after the expiration of the five-year period. See *Pielet v. Hiffman*, 407 Ill. App. 3d 788, 798 (2011).

¶ 64 E. The Right of First Refusal

¶ 65 Respondent argues that by "requir[ing] [him] to alternate his opportunity to exercise his 'First Right of Refusal' with the maternal grandparents," the trial court violated section 607(a-5)(1)(B) of the Dissolution Act (750 ILCS 5/607(a-5)(1)(B) (West 2012)) as well

as his right to liberty under the fourteenth amendment (U.S. Const., amend. XIV). But years ago, in September 2007, the judgment of dissolution required respondent to "alternat[e] with Petitioner's parents (maternal grandparents)" in the exercise of the right of first refusal, and the judgment of dissolution was a final order, from which respondent never appealed. Indeed, it is hard to see how respondent could have appealed from the judgment of dissolution, considering that, through his attorney, he agreed to it as to both form and substance.

¶ 66 "A judgment is *res judicata* where an appeal has not been perfected, and an order from which an appeal might have been taken may not be reviewed on appeal from a subsequent order entered in the same case." *In re Application of the Cook County Collector*, 228 Ill. App. 3d 719, 736 (1991). "The law of the case doctrine is *** a stone's throw away from the doctrines of *res judicata* and collateral estoppel." *Emerson Electric Co. v. Aetna Casualty & Surety Co.*, 352 Ill. App. 3d 399, 417 (2004). "The rule of the law of the case is a rule of practice, based on sound policy that, where an issue is once litigated and decided, that should be the end of the matter and the unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit." *McDonald's Corp. v. Vittorio Ricci Chicago, Inc.*, 125 Ill. App. 3d 1083, 1086-87 (1984). The issue of whether respondent should be required to alternate with the maternal grandparents in the exercise of the right of first refusal was decided in a final and appealable order on September 13, 2007—and far from appealing the judgment of dissolution, respondent agreed to it. That should be "the end of the matter." *Id.* It is the law of the case that respondent should be required to alternate with the maternal grandparents in the exercise of the right of first refusal. See *id*.

¶ 67 III. CONCLUSION

¶ 68 For the foregoing reasons, we affirm the trial court's judgment in part and reverse it in part, and we remand this case for further proceedings. We reverse the award of child support in the amount of 32% of respondent's regular net income, and we remand this case for a redetermination of that child support. Otherwise, we affirm the trial court's judgment.

¶ 69 Affirmed in part and reversed in part; cause remanded with directions.