

NOTICE

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2015 IL App (5th) 140485-U

NO. 5-14-0485

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

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

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
JEFFREY A. KUNSEMILLER,)	St. Clair County.
)	
Petitioner-Appellee and Cross-Appellant,)	
)	
and)	No. 11-D-65
)	
BEVERLY KUNSEMILLER,)	Honorable
)	Stephen R. Rice,
Respondent-Appellant and Cross-Appellee.)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Presiding Justice Cates and Justice Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the circuit court's determination of husband's income to calculate child support and maintenance, and we affirm the retroactivity of the order.

¶ 2 The respondent, Beverly Kunsemiller, appeals a judgment of dissolution of marriage, entered in the circuit court of St. Clair County, ordering the petitioner, Jeffrey A. Kunsemiller, to pay Beverly child support and maintenance. Beverly argues on appeal that in awarding her child support and maintenance, the circuit court miscalculated Jeffrey's income. Jeffrey cross-appeals, objecting to the retroactivity of the circuit court's order. For the reasons set forth below, we affirm the judgment of the circuit court.

¶ 3

I. BACKGROUND

¶ 4 Jeffrey, an orthodontist, and Beverly, a hair stylist, were married on November 28, 1992. Together, they have three children, A.K., born July 28, 2000; N.K., born October 25, 2001; and E.K., born August 29, 2005. The parties separated in 2009, when Jeffrey moved from the marital residence. On January 20, 2011, Jeffrey filed for dissolution of marriage.

¶ 5 During the proceedings, the parties agreed that Beverly would be granted primary custody of the children, and Jeffrey would be granted visitation. The circuit court entered a temporary order requiring Jeffrey to pay the utility bills at the marital residence, the parties' home owner and vehicle insurance premiums, health insurance premiums, and the sum of \$1,600 per month in unallocated child support and maintenance commencing August 1, 2011. The circuit court later modified the temporary order to require Beverly to pay for the children's tuition, fees, and expenses to attend St. Clare Catholic Grade School and for their latchkey and daycare expenses.

¶ 6 On September 26, 2013, at the hearing on the petition for dissolution of marriage, Jeffrey testified that he was 44 years old and was self-employed. Jeffrey testified that he finished his orthodontic education in 2004 and worked with Dr. Kim Littlefield until November 2009, when he was terminated. Jeffrey testified that he was thereafter unsuccessful in acquiring employment with an income comparable to that which he had with Dr. Littlefield. Jeffrey testified that in 2009, he mailed resumes "to every orthodontist within a hundred mile radius," but no one was hiring.

¶ 7 As a result, Jeffrey opened his own orthodontic practice in November 2010, after the parties' separation, by acquiring a business loan. Jeffrey testified that in acquiring a business loan, he did not accurately estimate business projections. Jeffrey testified that at the time of the hearing, he had expected to have been treating between 550 and 600 patients, but he was treating approximately 200. Jeffrey testified that the balance in his corporate account at the end of 2012 was between \$10,000 and \$34,000. Jeffrey estimated that his gross monthly income was \$10,000.

¶ 8 Jeffrey's 2011 corporate income tax return revealed a total income of \$290,996, deductions totaling \$287,338, and remaining ordinary business income of \$3,658. His 2011 individual tax return revealed a total and adjusted gross income of \$3,351. Jeffrey acknowledged that yearly gross receipts for his orthodontic business, pursuant to his 2012 federal corporate income tax return, amounted to \$376,355, with an ordinary business income of \$51,182, and that he was on pace in 2013 to bring in yearly receipts of approximately \$435,000. Jeffrey's 2012 federal individual income tax return reported income of \$64,577.

¶ 9 Jeffrey's 2012 profit and loss statement for Kunsemiller Orthodontics showed a total income of \$367,994, minus \$270,110 of expenses which included, among other amounts, \$7,076 in gifts, \$3,071 in travel, meals, and entertainment, and \$3,343 in legal and accounting fees, yielding a net ordinary income of \$97,884. Jeffrey submitted a financial statement based on 2012 tax return information, showing gross monthly income of \$5,964, and net monthly income of \$2,580, after subtracting FICA, federal, state, and Medicare tax, along with \$2,100 for educational loans. Jeffrey's August 2013

calculations, found in a similar financial statement, revealed gross monthly income of \$9,159 and net monthly income of \$3,650, after deducting for taxes, health insurance of \$476, and the educational loan payment of \$2,100.

¶ 10 The evidence revealed that from January 2013 until August 2013, Jeffrey paid thousands of dollars of charges through his corporate account at restaurants and retail stores. Jeffrey paid over \$3,000 to Amazon, \$700 to Best Buy, \$1,750 to Dance Station, \$1,100 to Dierbergs, \$3,440 to St. Louis Cardinals baseball, \$700 to Gateway Grizzlies baseball, \$560 to Sam's Club, \$700 to Schnucks, over \$1,000 to Target, and over \$260 to Walgreens. During this time, Jeffrey also paid \$8,200 to Saint Clare School, \$440 to Saint Clare Pediatrics, and \$400 to Washington University Physicians. Jeffrey calculated his projected future net income as \$4,183 per month.

¶ 11 Jeffrey acknowledged that he routinely withdrew funds from his corporate account for personal expenses. Jeffrey testified that in 2012, he paid \$7,000 in vehicle expenses and \$3,600 for meals for his staff. Jeffrey further acknowledged that in 2013, he paid from the corporate account \$4,000 in legal fees to pursue a termination action against his previous employer, a portion of the legal fees incurred for his divorce, \$700 for accounting services, and \$3,000 as repayment to his father for a loan that predated his practice. Jeffrey also acknowledged that in 2012 he had received \$19,000 in cash, which had not been fully accounted for in the 2012 or 2013 bank statements. Jeffrey testified that he kept cash at home, using it for living expenses.

¶ 12 Jeffrey testified that his outstanding debt exceeded \$1 million. Jeffrey contended that he owed over \$7,000 in state and federal taxes. Jeffrey testified that he paid \$3,497

per month for his business loan, which had an outstanding balance of \$250,652.94. Jeffrey testified that he also paid between \$1,550 and \$2,100 monthly for his educational loan, which had an outstanding balance of over \$600,000. Jeffrey testified that he had borrowed approximately \$115,000 from his parents and had paid them \$3,000 at the time of the hearing. Jeffrey acknowledged that he had not paid the \$3,000 monthly payment on the marital residence after he moved from it in 2009. The record reveals the mortgage deficiency on the former marital residence was \$275,000. Jeffrey asserted that he had outstanding attorney fees of \$27,912.

¶ 13 Jeffrey testified that during the proceedings he paid \$392.31 for weekly child support. Jeffrey also paid the fees for Beverly's cable, house insurance, water, sewer, electricity, gas, phone, internet, trash, alarm system, and vehicle insurance. Jeffrey testified that he paid the children's school tuition of approximately \$700 per month, even though the court had ordered Beverly to do so. Jeffrey testified that he paid his children's health insurance of \$500 per month. Jeffrey offered an exhibit showing itemized charges revealing he had expended an average of over \$5,000 per month on Beverly and the children from January until August 2013. Beverly offered the same exhibit into evidence.

¶ 14 At the time of the hearing, Beverly was 45 years old and was also self-employed. Beverly had worked as a hair stylist when the parties first married and then as a homemaker for approximately 12 years. Due to the parties' separation, Beverly returned to work in June 2010, when she purchased Nirvana Hair Salon, using funds loaned to her

by her father. Beverly testified that she worked four days a week and that other stylists rented chairs from her business.

¶ 15 Since she had purchased the salon in June 2010, Beverly had not filed personal income tax returns due to her minimal personal earnings. Beverly noted that Nirvana's corporate tax return for 2010 showed a net loss of \$3,800. Beverly testified that Nirvana paid her \$200 a week, in addition to the lease payment on her vehicle.

¶ 16 Beverly testified that she paid \$1,420 monthly to rent her business space and had outstanding rent due of approximately \$6,504.96. Beverly testified that she paid biweekly wages of \$192 to a cleaning assistant. Beverly testified that her father gave her \$24,000 to purchase the business and that she owed him over \$100,000. Beverly testified that the parties' three daughters attended St. Clare Catholic School, with tuition and fees of \$800 monthly.

¶ 17 Beverly testified that in early 2012, she filed for bankruptcy in the U.S. Bankruptcy Court for the Southern District of Illinois. When she filed for bankruptcy, her brother had bought the parties' marital home in foreclosure, and as a result, she had been allowed to live in the home, paying \$2,500 monthly. On June 27, 2013, the order closing Beverly's bankruptcy case and finalizing the discharge was granted, and Beverly was discharged from debts associated with the former marital residence, debts to her father, credit card obligations, and medical bills. Jeffrey did not join Beverly in the bankruptcy proceeding.

¶ 18 Beverly's father, Donald Parker, testified that Beverly owed him approximately \$125,000, which included a \$46,000 business loan, a \$28,000 personal loan, a \$20,000 miscellaneous loan, and a \$29,000 home equity loan.

¶ 19 On June 17, 2014, the circuit court entered an extensive 18-page judgment of dissolution of marriage, ordering Jeffrey to pay \$2,078 monthly child support and \$1,700 monthly maintenance. The circuit court noted that the financial evidence before it was "widely divergent" and that the financial record-keeping of both parties rendered the determination of income difficult. The circuit court found that Jeffrey's gross corporate revenue in 2011 was \$290,996, his gross corporate revenue in 2012 was \$376,355, and his projected gross revenue in 2013 was \$460,428. The court noted that Jeffrey had claimed as business expenses such items as his automobile expenses, meals and entertainment, and Cardinal baseball tickets.

¶ 20 To establish child support and maintenance, the circuit court found that Jeffrey's gross monthly income equaled \$13,100 and that his net monthly income equaled \$6,495. The circuit court found that Jeffrey's \$2,100 monthly payment for educational loans was deductible for purposes of computing child support.

¶ 21 The circuit court noted that Beverly had claimed she was not required to file personal income tax returns for 2010, 2011, and 2012 because she earned little or no personal income during that period. The circuit court also noted that Beverly had testified that her business income included \$200 per week and a \$463 monthly car lease payment. Beverly claimed her monthly family expenses were \$6,128. The circuit court

concluded that both parties were clearly living beyond their means, as shown by Beverly's bankruptcy and Jeffrey's excessive debt.

¶ 22 In addition to the determined child support and maintenance amounts, the circuit court further ordered Jeffrey to pay health insurance premiums for the children, 75% of any reasonable and necessary medical, dental, ophthalmologic, orthodontic, or other health care expenses, 75% of the children's \$700 to \$1,000 monthly private school tuition costs, and 75% of the children's extracurricular activities as defined in the parties' joint parenting agreement to be tendered to the court.

¶ 23 On September 10, 2014, after both parties filed timely posttrial motions, the circuit court entered an order resolving the parties' posttrial motions. The circuit court found that it had failed to make the appropriate changes to Jeffrey's net income regarding disqualified business expenses. The circuit court determined that the average outlays for these expenses were \$849.75 per month and recalculated Jeffrey's monthly net income as \$7,344.75. The circuit court therefore computed child support as \$2,350 per month. The court ordered this amount to be paid retroactive to the date of hearing on September 26, 2013, and thereby ordered Jeffrey to pay \$750 per month from the date of that hearing. The circuit court further recalculated maintenance as \$1,875 per month retroactive to the date of the hearing. The circuit court denied all other requests for modification or other relief.

¶ 24 On September 25, 2014, Jeffrey filed another posttrial motion, arguing that he was entitled to credit for payments made between September 26, 2013, the date of the hearing, and September 10, 2014, the date the judgment amounts of support and

maintenance were established. Jeffrey requested that the circuit court vacate the retroactive application of support, on the basis that the circuit court failed to credit Jeffrey for direct payments for Beverly and the children's expenses, including tuition payments. On November 3, 2014, the circuit court denied Jeffrey's motion. Beverly filed a timely notice of appeal, and Jeffrey filed a timely notice of cross-appeal.

¶ 25

II. ANALYSIS

¶ 26 On appeal, Beverly argues that the circuit court miscalculated Jeffrey's monthly net income to determine his maintenance and child support obligations. Noting that Jeffrey's 2011 gross corporate receipts equaled \$290,996, that his 2012 gross corporate receipts equaled \$376,355, and that his 2013 gross corporate receipts were on target to equal \$460,428, as of the hearing on September 26, 2013, Beverly argues that the evidence showed Jeffrey's disposable monthly income was \$14,000 to \$16,000 per month. Beverly argues that the circuit court improperly underestimated Jeffrey's profit margin, overestimated his tax liability, discounted evidence of additional, nonreported cash income, and discounted the magnitude of Jeffrey's monthly spending of over \$14,000 as evidence of his net income.

¶ 27 Jeffrey counters that the deferral of taxes he owed only delayed his future tax obligation, which he will encounter, including \$6,972 in unpaid taxes for 2012, and that some of the funds Jeffrey paid monthly, including payments for school loans, business loans, and health insurance premiums, were deductible when calculating statutory net income for child support purposes.

¶ 28 "In Illinois, the support of a child is the joint and several obligation of both the husband and the wife." *In re Marriage of Turk*, 2014 IL 116730, ¶ 14. "If the couple's marriage dissolves, the court may apportion child support obligations between them." *Id.* "The standards governing court-awarded child support are set forth in section 505 of the Illinois Marriage and Dissolution of Marriage Act [(the Act)]." 750 ILCS 5/505 (West 2010); *In re Marriage of Turk*, 2014 IL 116730, ¶ 14.

¶ 29 Section 505(a) of the Act sets forth guidelines for the minimum amount of support (as a percentage of the supporting party's net income) according to the number of children involved. 750 ILCS 5/505(a) (West 2010). "The guidelines create a rebuttable presumption that child support conforming to the guidelines is appropriate." *In re Marriage of Pratt*, 2014 IL App (1st) 130465, ¶ 28. Section 505(a) specifies the minimum amount of child support for three children as 32% of the payor's "net income," unless the trial court finds that the guidelines are inappropriate in the case before it. 750 ILCS 5/505(a)(1), (a)(2) (West 2010). Section 505(a)(3) of the Act, which was effective during the parties' proceedings, defined "net income" as "the total of all income from all sources," minus "properly calculated" deductions for state and federal income tax, social security, mandatory retirement contributions, union dues, dependent and individual health/hospitalization insurance premiums, prior obligations of support or maintenance, "[e]xpenditures for repayment of debts that represent reasonable and necessary expenses for the production of income," necessary medical expenditures, "reasonable expenditures for the benefit of the child and the other parent, exclusive of gifts," and foster care payments. 750 ILCS 5/505(a)(3) (West 2010). *In re Marriage of Tegeler*, 365 Ill. App.

3d 448, 453 (2006). "Section 505(a) was intended to protect the rights of children to be supported by their parents in an amount commensurate with the parents' income." *In re Marriage of Turk*, 2014 IL 116730, ¶ 25.

¶ 30 The relevant focus for determining income under section 505 of the Act "is the parent's economic situation at the time the child support calculations are made by the court." *In re Marriage of Rogers*, 213 Ill. 2d 129, 138 (2004). "[I]n determining income for child support purposes, the trial court has the authority to compel a party to pay at a level commensurate with his earning potential." *In re Marriage of Pratt*, 2014 IL App (1st) 130465, ¶ 26. "Although child support is the obligation of both parents, if one parent earns a disproportionately greater income than the other he or she should bear a larger share of the support." *Id.* ¶ 35. "If present income is uncertain, the trial court may impute income to the payor." *Id.* ¶ 26. "The trial court's determination of child support will not be reversed absent an abuse of discretion." *In re Marriage of Smith*, 2012 IL App (2d) 110522, ¶ 60.

¶ 31 By determining Jeffrey's income as evidenced by corporate and tax return information, the circuit court acted within its authority to estimate his income for child support and maintenance purposes. See *In re Marriage of Pratt*, 2014 IL App (1st) 130465, ¶ 26. As noted by the circuit court, however, Jeffrey had failed to maintain accurate financial records for his business since its inception, and the financial evidence is indeed widely divergent. As a result, the evidence before the circuit court, and in the record on appeal, reveal discrepancies with regard to Jeffrey's business income.

¶ 32 Nevertheless, after considering the available evidence before it, the circuit court calculated Jeffrey's monthly statutory net income as \$7,344.75, 32% of which calculated to \$2,350 in monthly child support. The circuit court further ordered Jeffrey to pay \$525 to \$750 for tuition expenses (75% of 700 to 1000), \$476 for the children's health insurance premiums, 75% of the children's reasonable and necessary medical, dental, ophthalmologic, orthodontic, mental health, or other health care expenses, and 75% of the children's extracurricular activities.

¶ 33 Although the financial evidence before the circuit court was inexact, Jeffrey asserted that he earned a monthly net income of \$10,000, and Beverly asserted that Jeffrey's monthly net income exceeded \$16,000. Nonetheless, the evidence supported an amended estimation of Jeffrey's monthly income after taxes as approximately \$14,000. Subtracting \$3,497 monthly for his business loan payment and \$2,100 monthly for his educational loan payment (750 ILCS 5/505(a)(3)(h) (West 2010); *In re Marriage of Baumgartner*, 384 Ill. App. 3d 39, 59-60 (2008); *In re Marriage of Davis*, 287 Ill. App. 3d 846, 856 (1997)), in addition to \$476 monthly for the children's health insurance premiums (750 ILCS 5/505(a)(3)(f) (West 2010)) and over \$582 (75% of \$700 to \$1000) monthly for the children's educational tuition (750 ILCS 5/505(a)(3)(h) (West 2010)), the circuit court appropriately determined that Jeffrey's statutory net income was \$7,344.75, 32% of which equaled \$2,350 monthly child support awarded. The circuit court clearly considered the evidence before it and adjusted for deductions permitted under section 505(a)(3) of the Act (750 ILCS 5/505(a)(3) (West 2010)). We find no abuse of discretion.

¶ 34 Beverly also argues that the circuit court erroneously calculated Jeffrey's maintenance obligation.

¶ 35 The Act allows for both temporary and permanent maintenance awards. 750 ILCS 5/504(a) (West 2010) ("court may grant a temporary or permanent maintenance award for either spouse in amounts and for periods of time as the court deems just"). "As a general rule, '[m]aintenance is intended to be rehabilitative in nature to allow a dependent spouse to become financially independent.'" *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 652 (2008) (quoting *In re Marriage of Samardzija*, 365 Ill. App. 3d 702, 708 (2006)). " 'Permanent maintenance is appropriate, however, where a spouse is unemployable or employable only at an income substantially lower than the previous standard of living.' " *Id.* "Ultimately, a maintenance award, whether it is temporary or permanent, must be reasonable [citation] and what is reasonable depends upon the facts of each individual case [citation]." *In re Marriage of Heroy*, 385 Ill. App. 3d at 652.

¶ 36 Section 504(a) of the Act (750 ILCS 5/504(a) (West 2010)) sets forth the factors for the trial court to consider when determining the amount of a maintenance award. "The benchmark for determination of maintenance is the reasonable needs of the spouse seeking maintenance in view of the standard of living established during the marriage, the duration of the marriage, the ability to become self-supporting, the income-producing property of a spouse, if any, and the value of the nonmarital property." *In re Marriage of Tietz*, 238 Ill. App. 3d 965, 972 (1992). However, the parties' financial resources will normally dictate whether they can maintain their predissolution lifestyle when living in separate households after divorce. *In re Marriage of Dunlap*, 294 Ill. App. 3d 768, 773

(1998). Accordingly, a spouse is entitled to maintenance in an amount sufficient to maintain the standard of living the parties enjoyed during the course of the marriage if the providing spouse has the means to provide for the other spouse without compromising his own needs. *Id.* at 774.

¶ 37 Section 504(a) of the Act (750 ILCS 5/504(a) (West 2010)) provides that a court may grant permanent or temporary maintenance upon consideration of "all relevant factors," including:

- "(1) the income and property of each party ***;
- (2) the needs of each party;
- (3) the present and future earning capacity of each party;
- (4) any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage;
- (5) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment or is the custodian of a child making it appropriate that the custodian not seek employment;
- (6) the standard of living established during the marriage;
- (7) the duration of the marriage;
- (8) the age and the physical and emotional condition of both parties;

(9) the tax consequences of the property division upon the respective economic circumstances of the parties;

(10) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;

(11) any valid agreement between the parties; and

(12) any other factor that the court expressly finds to be just and equitable."

750 ILCS 5/504(a) (West 2010).

¶ 38 In considering the aforementioned factors, the trial court is not required to give them equal weight so long as the court strikes a balance that is reasonable under the circumstances. *In re Marriage of Nord*, 402 Ill. App. 3d 288, 293 (2010). No one factor is determinative of the propriety of the maintenance award once it has been determined that an award is appropriate. *In re Marriage of Smith*, 2012 IL App (2d) 110522, ¶ 46.

¶ 39 Moreover, "[c]ourts have wide latitude in considering what factors to use in determining reasonable needs, and the trial court is not limited to the factors listed in the Act." *Id.* The trial court's determination regarding an award of maintenance is presumed to be correct. *In re Marriage of Nord*, 402 Ill. App. 3d at 292. "The amount of a maintenance award lies within the sound discretion of the trial court, and this court must not reverse that decision unless it was an abuse of discretion." *Id.* "An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court." *Id.* "The party seeking reversal of a maintenance award bears the burden of showing the trial court abused its discretion." *Id.*

¶ 40 We have concluded above that the circuit court's calculation of Jeffrey's net income was reasonable. Pursuant to its calculations, the circuit court awarded Beverly monthly maintenance of \$1,875, which calculated to over 25% of Jeffrey's monthly statutory net income of \$7,344.75. Accordingly, we find that the circuit court's permanent maintenance award was reasonable. See *In re Marriage of Reppen-Sonneson*, 299 Ill. App. 3d 691, 695 (1998) (award of maintenance constituting 15% of payor's monthly net income held to be reasonable). Based on the evidence presented to the circuit court, we cannot find that the circuit court abused its discretion in ordering Jeffrey to pay monthly maintenance of \$1,875 and monthly child support of \$2,350.

¶ 41 On cross-appeal, Jeffrey argues that the circuit court's decision to order child support and maintenance retroactively was not reasonable and just but an abuse of discretion. Jeffrey argues that he exceeded his obligations under the temporary order of August 2, 2011, during the months preceding the September 2013 hearing and during the 12 months following that hearing. Jeffrey requests that the court vacate the retroactivity of the September 10, 2014, order and make the judgment of June 17, 2014, prospective only.

¶ 42 It is within the trial court's discretion to award or not to award support on a retroactive basis. *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1119 (2004). "Retroactive allowance of support in a dissolution proceeding is within the discretionary power of the trial court if such allowance is deemed fit, reasonable and just." *In re Marriage of Rogliano*, 198 Ill. App. 3d 404, 410 (1990). This court will not disturb the trial court's award of retroactive support unless the trial court abused its discretion. *In re*

Marriage of Abu-Hashim, 2014 IL App (1st) 122997, ¶ 37; *In re Marriage of Toole*, 273 Ill. App. 3d 607, 618 (1995). "An abuse of discretion occurs when no reasonable person would take the view adopted by the trial court." *In re Marriage of Toole*, 273 Ill. App. 3d at 618.

¶ 43 We cannot conclude that the circuit court abused its discretion when ordering retroactive support. The evidence revealed that although Jeffrey faced financial challenges in starting his own business, he was able to maintain financial independence, and there is some prospect for his business to improve. Jeffrey earns a disproportionately greater income than Beverly. The circuit court's order clearly reflects that its decision to award Beverly retroactive child support and maintenance was based on a review of the statutory factors and the available evidence. We cannot conclude that the circuit court abused its discretion in awarding Beverly retroactive maintenance and child support.

¶ 44

III. CONCLUSION

¶ 45 For the reasons stated, we affirm the judgment of the circuit court of St. Clair County.

¶ 46 Affirmed.