

NOTICE
Decision filed 09/10/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 140178-U

NO. 5-14-0178

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
JOHNNY GWALTNEY,)	Johnson County.
)	
Petitioner-Appellant,)	
)	
and)	No. 11-D-72
)	
KIA MARIE GWALTNEY,)	Honorable
)	Joseph Jackson,
Respondent-Appellee.)	Judge, presiding

JUSTICE STEWART delivered the judgment of the court.
Justices Spomer and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in awarding the mother sole custody of the minor child where there was evidence that the father did not have a willingness or ability to facilitate a close and continuing relationship between the child and the mother. The trial court did not abuse its discretion in awarding the wife attorney fees where the wife earned significantly less than the husband and no evidence was presented that she had access to money to pay her attorney fees. The trial court did not abuse its discretion in awarding the wife rehabilitative maintenance for two years where the wife had worked a variety of part-time jobs during the marriage so she could be available to care for the parties' child, where she earned significantly less than the husband, and where her present ability to support herself provided a standard of living well below the standard of living enjoyed during the marriage.

¶ 2 On December 23, 2011, Johnny Gwaltney filed a petition for dissolution of marriage from Kia Marie Gwaltney. On February 24, 2012, an order for temporary relief was granted. On January 22, 2014, the trial court entered a letter ruling awarding joint custody of the minor child to the parents and primary residential custody to Kia. The parties were directed to attempt to reach a joint parenting agreement. On February 21, 2014, a judgment for dissolution of marriage was entered. The order stated that the matter would be set for a status hearing to resolve whether joint custody would be awarded. On February 27, 2014, Johnny filed a motion to reconsider. On February 28, 2014, the court entered a docket entry finding that the parties could not cooperate and awarding custody of the minor child to Kia. On March 28, 2014, the trial court heard the motion to reconsider and awarded custody of the minor child to Kia with reasonable visitation to Johnny. Johnny filed a timely notice of appeal. We affirm.

¶ 3 **BACKGROUND**

¶ 4 Johnny and Kia were married in Gatlinburg, Tennessee, on October 10, 2002. The parties had one child, Hailey M. Gwaltney, born July 1, 2003.

¶ 5 On December 23, 2011, Johnny filed a petition for dissolution of marriage from Kia alleging that she exhibited extreme and repeated mental cruelty toward him. On the same day he filed a motion for temporary relief. He requested temporary custody of Hailey. He asserted that Kia suffered from serious psychological problems that inhibited her ability to act appropriately around Hailey and to provide the child with the level of care she needs. He also alleged that Kia had a history of going to bars while he was

working. He stated that Kia made inappropriate remarks to Hailey causing her distress and anguish, that she cussed at Hailey, that she threatened to hit Hailey, and that she had smacked Hailey in the face because she would not sit still. He also requested exclusive possession of the marital home.

¶ 6 On January 30, 2012, Johnny filed an emergency motion for a temporary restraining order alleging that since the petition for dissolution of marriage and the motion for temporary relief had been filed, Kia continuously and repeatedly verbally and mentally abused Johnny and Hailey. On February 17, 2012, Kia filed a counterpetition for temporary relief requesting temporary custody of Hailey, possession of the marital home, maintenance, and attorney fees.

¶ 7 On February 24, 2012, the trial court entered an order for temporary relief. The trial court noted that the parties had advised that they had reached an agreement as to some of the issues, and the court found the agreement fair and reasonable and adopted it. An order of protection that previously had been entered against Kia was dismissed without prejudice. Johnny's petition for a temporary restraining order was dismissed. Johnny was allowed to reside in the marital home until further written agreement by the parties. The order does not specify if Johnny was awarded sole custody of Hailey or if it was an award of joint custody. The parties were granted visitation "with the minor as they agree with the goal that the parties maxim[ize] the time that each party has available to spend with the child taking into account each parties' work schedule and the school schedule of the child." The order further stated that if "the Parties don't agree then they

will resort to the parenting schedule as set forth in Order of Protection." Contact between the parties was limited to contact regarding Hailey and necessary contact regarding their finances.

¶ 8 On December 13, 2013, and January 16, 2014, the court conducted hearings on the petition for dissolution of the parties' marriage. At the January 16, 2014, hearing, the parties stipulated that they had been separated for over two years and that there were irreconcilable differences. Both parties testified that there had been an irretrievable breakdown in the marriage and that attempts had been made to resolve the issues. They testified that further efforts would not result in saving the marriage. The court found that irreconcilable differences had been proven.

¶ 9 Johnny testified that he works as a correctional officer at Vienna Correctional Center. His annual salary is approximately \$62,000 per year without overtime. At the time of the hearing, he worked Wednesday through Sunday from 7 a.m. until 3 p.m.

¶ 10 Kia testified that throughout the course of the parties' marriage she held numerous jobs. Johnny was the primary wage earner in the family during their marriage. She stated that prior to their separation, the couple agreed that she would only work part time because they did not want Hailey to have to go to a babysitter. Kia testified that she was currently self-employed as a licensed independent insurance agent. Kia testified that she expected to earn approximately \$12,000 in 2013. She stated that spousal maintenance on a temporary rehabilitative basis would help her cover her day-to-day bills while she tried to build her business.

¶ 11 Until Johnny filed the petition for an emergency order of protection he worked the midnight shift. Because he slept during the day, Kia testified that up until the time she and Johnny separated, she primarily cared for Hailey. Johnny testified that even though he worked the midnight shift he got Hailey ready for school, took her to school, picked her up from school, helped her with homework, cooked dinner, and took her to Girl Scouts or sports.

¶ 12 Hailey is currently enrolled in the Goreville school district. Kia stated that Hailey was a well-rounded child who had always performed well in school. Hailey's grades remained consistent with the grades she earned since she started school.

¶ 13 Kia testified that Johnny did not convey any information to her regarding Hailey's grades or school activities. Johnny stated that he did not try to keep information about Hailey's school from Kia. He admitted that he does not give Kia copies of Hailey's grade cards, but stated Kia knew her grades because Hailey told her mother. Kia stated that she speaks to Hailey's teacher or the principal to learn how Hailey is doing in school.

¶ 14 Kia further testified that Johnny did not provide her with any information related to Hailey's extracurricular activities. Johnny failed to inform her that he enrolled Hailey in a softball league. She said that he may have provided her with one schedule, but typically she has to find the information out from the coach or other mothers. Hailey is also involved in basketball and band. Kia said she only knew about these extracurricular activities because Hailey told her about them.

¶ 15 Johnny testified that he did not consult with Kia before enrolling Hailey in daycare

or in sports. He stated that he did not feel the need to tell Kia about enrolling Hailey in sports because she had always been active in sports so he felt that this was something that Kia was aware of and knew about. Johnny testified that Hailey likes to tell Kia about her activities so he allows her to do so instead of telling Kia himself.

¶ 16 Johnny described Hailey's care schedule. Wednesday through Friday Johnny wakes Hailey at 5:30 a.m. She eats breakfast and gets dressed. He drops her off at daycare at 6 a.m., and she goes back to sleep. At 8 a.m. the daycare takes her to school. After school she takes the bus to daycare, and he picks her up at around 3:30 p.m. Prior to putting Hailey in daycare, Hailey went to a babysitter's house. Hailey went through a series of babysitters including two teenage sisters before she was placed in daycare. On the weekends when Hailey is not with Kia, Johnny's teenage son from a prior relationship, Noah, watches her.

¶ 17 Kia testified that her work schedule was flexible and that she could have stayed with Hailey before and after school while Johnny was at work so that Hailey would not have needed to be placed in daycare. Johnny admitted that Kia made this offer. Kia testified that she made continual efforts to arrange more time with Hailey. She asserted that Johnny would hang up on her when she called. She stated that at first she made the request daily, but because she received no response, she made the request weekly. Kia testified that Johnny's typical response was to tell her that he was not speaking to her. Kia stated that Johnny mainly communicated with her through messages sent through Hailey. She stated that approximately 98% of the time that she requested additional time

with Hailey, Johnny was working and Hailey was being watched by a babysitter.

¶ 18 Both parents described instances where they allowed the other parent to have extra time with Hailey. Kia testified that she let Hailey go with Johnny on Thanksgiving so that they could go duck hunting. Johnny testified that if Hailey did not have school and she wanted to be with her mother instead of at daycare or with Noah, he would let her stay with Kia. Kia testified that pursuant to the temporary order, she had Hailey on Wednesdays and the first and third weekend of the month. In the summer of 2012 she had Hailey every other week, and in the summer of 2013 she picked Hailey up at 6 a.m. on Wednesdays and returned her on Sunday.

¶ 19 Angela Bernard testified that her child attends school with Hailey, that she is Hailey's Girl Scout leader, and that she babysat for Hailey when the parties first separated. She stated that she knows both parents equally. Ms. Bernard testified that both parents were involved with Hailey and Girl Scouts. Johnny frequently picked Hailey up from Girl Scout meetings and Kia accompanied Hailey on the trips. Ms. Bernard testified that her daughter also plays softball and basketball with Hailey. She has had occasions to observe Kia at those games and at Girl Scout events and Kia is engaged and interested in what was going on. Ms. Bernard testified that Johnny was always polite and that she never had any arguments with him about babysitting or anything else. Ms. Bernard testified that she did not "agree that people should get divorced." She further stated: "I think this whole process has been horrible, but I felt like Johnny should have had Kia watching her when Johnny couldn't and Kia should have Johnny watching her

when—there should be joint custody. There [*sic*] both good parents and they both should have their child equally."

¶ 20 Ardon Lee Smith, Kia's sister, testified about various arguments between Kia and Johnny. Ms. Smith described an incident that occurred in November or December of 2010, when Hailey phoned her crying because Johnny had Kia in a corner and had been yelling at her for at least one hour. Ms. Smith stated that she could hear Johnny yelling in the background and Kia screaming in duress. Ms. Smith testified that Kia came to her house with Hailey on numerous occasions over the years to avoid being with Johnny.

¶ 21 Kia stated that during the marriage if things did not go Johnny's way, he would stand over her and hold her in a corner and yell at her for hours at a time. She felt very controlled around Johnny. She stated that she always had to do what Johnny wanted.

¶ 22 Kia and Johnny admitted they had heated arguments. They both described arguments where the other was portrayed as unreasonable. Both parties described an argument that occurred in the spring of 2009. Johnny testified that the fight started because a friend from work sent him an inappropriate message. Kia became angry and threw his cell phone at him. Kia testified that she wanted to leave the house and that Johnny would not let her leave. She tried phoning the police on the house phone and he held her down. She hit him on the head with the house phone in an effort to get away. Johnny denied trying to prevent her from calling 911.

¶ 23 Johnny testified that the couple fought over Kia's housekeeping. He described her as "a filthy person." Johnny said that Kia would throw things on the floor and not pick

them up for months or until he picked them up. He stated that his house is much cleaner now than when Kia resided there.

¶ 24 Johnny testified that he has problems communicating with Kia. He claimed that she calls the house and cusses, screams, and threatens. He stated that when Kia starts to leave a message on the answering machine he does not pick up the phone and that he typically does not respond to the messages. He stated that he will respond to her text messages if they are "a civil text." He testified that he will respond to phone calls if they are civil conversations. He stated that he could communicate with Kia regarding Hailey and could make major decisions with Kia regarding Hailey's education "as long as it's a civil conversation."

¶ 25 Kia admitted that she left several messages on Johnny's answering machine. Johnny offered the answering machine messages into evidence to show the parties' lack of ability to communicate and Kia's lack of ability to foster a relationship with him. The messages were admitted.

¶ 26 When asked about the phone messages Johnny introduced into evidence, Kia stated that whenever she asked for additional time with Hailey, Johnny would say he was not going to have a conversation with her and would hang up the phone. She would then call back and he would not answer the phone so she would leave a message. She would tell him to pick up the phone and admitted that at times she would yell at him.

¶ 27 An appraisal of the marital home was admitted into evidence. The parties stipulated that the value of the house was \$11,000 less than the appraised value. They

agreed that the value of the house was \$120,050–\$120,500. Both parties sought to be awarded the marital home. They both felt that it was in Hailey's best interest that she remain in the home.

¶ 28 Kia testified that she currently split her time living at her mother and sister's houses. She stated that she was waiting to see if she was awarded the marital home before she established another residence. Kia testified that she sought refinancing of the marital home and was able to obtain it through US Bank if her father cosigned the loan. She stated that if she refinanced the house, her mortgage payment would be \$365 per month. Kia testified that her family would help her pay Johnny for his half of the equity in the home. Kia testified that if she were awarded the marital home, she had a full-time job offer with an insurance company in Anna that would pay her enough income to afford the home.

¶ 29 Johnny testified that since the time of the separation he made all the mortgage payments on the home. He stated that to pay Kia for her share of the equity in the home he planned to sign over to Kia the entire amount of his marital portion of his deferred compensation plan. Both parties provided purchase ready buyer certificates from US Bank indicating that they were both qualified purchase ready buyers. These were entered into evidence.

¶ 30 Johnny stated that, in his opinion, the best custodial arrangement would be for him to be Hailey's primary residential caregiver. He felt that Kia has a hard time controlling her emotions, that she explodes without provocation, and that it would be mentally

detrimental to Hailey to be subjected to Kia's outbursts full time.

¶ 31 On cross-examination Kia was asked if she applied for social security disability benefits and listed affective disorder, bipolar disorder, depression, anxiety, and personality disorder as the reasons she was seeking benefits. She testified that she filed for disability because of an underactive thyroid and related problems including depression and anxiety. She denied having a clinical diagnosis of bipolar disorder. She stated that she did not recall listing bipolar disorder as a reason she was seeking social security disability benefits. Her application was denied.

¶ 32 Kia testified that she had concerns about Johnny's being awarded custody because of their communication issues. Kia testified that she felt it was in Hailey's best interest if she and Johnny were awarded joint custody and that Hailey "got to spend as much time as she could with both parents." She stated that because Johnny refused to communicate with her, she felt it was in Hailey's best interest if she were the primary custodial parent. Kia testified that if she were granted custody of Hailey, she wanted Hailey to have a relationship with Johnny. She stated that she made efforts to schedule activities for Hailey to engage in with both parents, but Johnny refused to participate. Kia testified that Hailey has a close relationship with her extended family. She stated that she had invited Johnny to family dinners, but he ignored the invitations. She expressed hope that in the future Johnny would join Hailey at family events.

¶ 33 On January 22, 2014, the trial court entered a letter ruling after considering all pleadings of record, all evidence presented, the *in camera* interview of Hailey, the

arguments of counsel, and the applicable law including the relevant statutory factors regarding the best interest of the child set forth in section 602 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602 (West 2010)). The court found that both parents were very involved with Hailey and were dedicated to being the best parents that they could be. The court noted that Johnny's son from a prior relationship was now a member of his household. The court found that both parents were fit to have the care, custody, and control of Hailey, but found that placement of Hailey with Johnny as the primary residential custodian was not in her best interest. In making this decision, the court considered Johnny's decision, based on his work schedule, to wake Hailey up early and take her to daycare instead of allowing Kia to come to the marital residence. The court also considered Johnny's practice of sending Hailey to a babysitter when Kia was available to watch her. The court found that Johnny, as primary caretaker, exhibited a lack of communication with Kia and did not have the willingness or ability to facilitate and encourage a close and continuing relationship between Hailey and Kia. It based this finding on evidence that Johnny felt he "did not need to advise [Kia] of [Hailey's] extracurricular activities because they had continued as in the past and [Kia] should have known, or in the alternative, [Hailey] could have told [Kia] if [Hailey] chose to do so." The court further found that Johnny did not advise Kia of Hailey's grades. The court noted that it was aware that Johnny felt he was acting in Hailey's best interest and that he was unable to communicate with Kia due to her violent mood swings and desire to argue for no reason. The court stated that it carefully considered the testimony of the

acrimonious relationship that existed between the parties. The court found that Kia expressed a willingness to communicate with Johnny and concluded that an award of joint custody was appropriate. The court awarded Kia primary residential custody and directed the parties to attempt to reach a joint parenting agreement. The court noted that in the interest of maintaining stability and continuity in Hailey's life, Kia was awarded the marital home, she was ordered to refinance it, and Johnny was awarded one-half of the agreed-upon equity in the marital home. The court granted Kia's request for attorney fees in the amount of \$4,000. Johnny was ordered to pay 20% of his net pay for child support. He was also ordered to pay Kia rehabilitative maintenance in the amount of \$400 per month for two years.

¶ 34 On February 21, 2014, the court entered a judgment of dissolution of marriage. The order incorporated the terms of the letter ruling. The court ordered that the matter be set for a status hearing to resolve whether joint custody would be awarded or whether a further hearing was necessary to determine a visitation schedule.

¶ 35 On February 27, 2014, Johnny filed a motion to reconsider. On February 28, 2014, the court entered a docket entry that the motion was to be set for hearing. It wrote that it reconsidered joint custody and found that joint custody was not a viable option because the parties could not cooperate. It awarded sole custody of Hailey to Kia. On March 14, 2014, the court heard Johnny's motion to reconsider. At the start of the hearing the court noted that Kia's attorney had been trying unsuccessfully to contact Johnny's attorney and that "obviously there was some concern because it was the Court's

desire to have an award of joint custody in this case, and that would take some amount of cooperation between the parties, and it appeared that was not going to be the case." The court found that joint custody was not a viable option because the parties could not cooperate. The trial court entered an order awarding custody of Hailey to Kia and reasonable visitation rights to Johnny. Johnny was ordered to start paying rehabilitative maintenance within 21 days of March 14, 2014. He was ordered to pay the attorney fees within 45 days of March 14, 2014. Closing on the marital home was ordered to take place within 45 days from March 14, 2014, and Kia was ordered to refinance the home. The court denied all other matters contained in Johnny's motion to reconsider.

¶ 36 On April 18, 2014, Johnny filed a notice of appeal. On the same day he filed a motion to stay the judgment. On April 28, 2014, the trial court denied the motion to stay.

¶ 37

ANALYSIS

¶ 38 Johnny argues that the trial court abused its discretion in the way it handled the case after the judgment of dissolution was entered. He argues that the trial court initially awarded the parties joint custody with Kia as the primary residential custodian, and then, after he filed a motion to reconsider, *sua sponte* entered an order awarding Kia sole custody of Hailey. He asserts that after the trial court entered this docket order, it set the matter for hearing.

¶ 39 In the letter ruling, the trial court directed the parties to attempt to reach a joint parenting agreement. In the judgment of dissolution the trial court held that "this matter shall be set for status to resolve whether joint custody will be awarded or whether further

hearing is necessary to set forth [Johnny's] reasonable visitation schedule." The parties did not submit a proposed joint parenting agreement, and following the entry of the judgment of dissolution, Johnny filed a petition to reconsider. The Illinois Marriage and Dissolution of Marriage Act (the Act) provides that upon application of either or both parents, or on its own motion, the court shall consider an award of joint custody and shall request the parties to produce a joint parenting agreement. 750 ILCS 5/602.1(b) (West 2012). In the event the parents fail to produce a joint parenting agreement, the court may award sole custody under the standards of sections 602, 607, and 608. 750 ILCS 5/602.1(b) (West 2012). Pursuant to section 602.1(b), the trial court had the authority to award Kia sole custody of Hailey after the parties failed to produce a joint parenting agreement.

¶ 40 Johnny argues that the trial court erred in awarding sole custody and primary physical custody of Hailey to Kia. Child custody determinations are governed by section 602 of the Act. 750 ILCS 5/602 (West 2012). Under section 602, the court shall determine custody in accordance with the best interest of the child and shall consider all relevant factors including the wishes of the child's parent or parents as to her custody; the wishes of the child as to her custodian; the interaction and interrelationship of the child with her parent or parents, her siblings, and any other person who may significantly affect the child's best interest; the child's adjustment to her home, school, and community; the mental and physical health of all individuals involved; and the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the

other parent and the child. 750 ILCS 5/602(a) (West 2012). The trial court need not make specific findings about each of these factors as long as evidence was presented from which the court could consider the factors prior to making its decision. *In re A.S.*, 394 Ill. App. 3d 204, 213 (2009).

¶ 41 The trial court has broad discretion in determining custody. *In re Marriage of D.T.W. & S.L.W.*, 2011 IL App (1st) 111225, ¶ 81. Its decision rests on temperaments, personalities, and the capabilities of the parties. *Id.* A trial court's custody determination is given great deference because the court is in a superior position to judge the credibility of witnesses and determine the best interests of the child. *In re Marriage of Iqbal & Khan*, 2014 IL App (2d) 131306, ¶ 55. A reviewing court will reverse that determination only when it is clearly against the manifest weight of the evidence. *Id.* A judgment is against the manifest weight of the evidence only when an opposite conclusion is clearly apparent or the findings appear to be unreasonable, arbitrary, or not based upon the evidence. *In re Marriage of Ricketts*, 329 Ill. App. 3d 173, 181-82 (2002). Where evidence allows multiple reasonable inferences, the reviewing court will accept those inferences that support the trial court's decision. *Id.* at 177.

¶ 42 Stability for the child is a major consideration in an award of custody under section 602. *In re Marriage of Wycoff*, 266 Ill. App. 3d 408, 409 (1994). Stability can be achieved when a child is moved from a home where there is turmoil to one that is quiet or by maintaining a sense of continuity and the absence of change. *Id.* at 410.

¶ 43 Johnny argues that he will provide the more stable environment for Hailey with

respect to her adjustment to her home, school, and community. He asserts that he has provided a stable environment for Hailey for the past two years and that she has done well in school while maintaining a healthy amount of extracurricular activities outside the classroom. He argues that the stability and continuity of the child is of paramount concern to the court in cases where there has been an extended period of temporary custody.

¶ 44 A court may consider the length of time a child has spent with a parent by virtue of a temporary custody order, but there is no presumption in favor of the existing custodian under section 602 of the Act as there is in modification cases. *In re Marriage of Hefer*, 282 Ill. App. 3d 73, 78 (1996). In the instant case, the trial court's award of primary physical custody to Kia did not cause a change in Hailey's environment. Kia was awarded the marital home allowing Hailey to continue to reside in the home she has lived in since she was three years old. Hailey will continue in the Goreville school district that she has attended since she started school. Because Hailey remains in the community where she has spent most of her life, her adjustment to home, school, and community will remain the same as it would if Johnny was awarded custody.

¶ 45 Johnny argues that he has a greater willingness and ability to facilitate and encourage a close and continuing relationship between Kia and Hailey than Kia has in facilitating his relationship with Hailey. He points to the messages Kia left on his answering machine as evidence that she "shows utter venom and contempt" toward him. Johnny states in his brief that "it is impossible for an individual to work with one who

makes such pejorative comments to him."

¶ 46 Kia testified that when she telephoned Johnny to discuss visitation with Hailey he refused to discuss it with her and he hung up on her. When she called back, he would not answer the phone. She admitted that at times she would leave messages where she would yell at him and shout for him to pick up the phone. Johnny admitted that he did not answer the phone if he heard Kia leaving a message and that generally he did not respond to her messages. He claimed to be willing to discuss issues with Kia only if she would have a "civil conversation."

¶ 47 Johnny provided Kia with limited information about Hailey's extracurricular and school activities. He admitted not providing Kia with copies of Hailey's grades, instead relying on Hailey to tell her mother how she was doing in school. Kia testified that she received her information about Hailey's progress in school and school activities from Hailey's teachers and principal. Johnny stated that he did not inform Kia about signing Hailey up for sports because she should have known from prior years that Hailey would participate. Kia stated that she learned about Hailey's games from the coach or other mothers. Johnny stated that he usually relied on Hailey to tell Kia about her activities.

¶ 48 Kia testified that if awarded custody she felt it was important that Hailey maintain a good relationship with Johnny. She further stated that she had attempted to include him in family gatherings with Hailey and he ignored the invitation, but that she hoped in the future their relationship would evolve to where he would participate.

¶ 49 The trial court stated in its letter ruling that it carefully considered the testimony of

the acrimonious relationship between Kia and Johnny. It further noted that it was aware that Johnny's position was that he has not been able to facilitate and encourage a close and continuing relationship between Hailey and Kia because of Kia's violent mood swings and her desire to argue for no reason. The trial court considered who it felt would facilitate a close relationship between Hailey and the other parent. In the letter ruling the trial court found that Johnny's opinion that he did not need to advise Kia about Hailey's extracurricular activities because she should have known or Hailey could have told her, and his failure to advise Kia of Hailey's grades, showed a lack of communication by Johnny with Kia and "seems to establish that [Johnny], as primary caretaker, does not have the willingness or ability to facilitate and encourage a close and continuing relationship between the child and [Kia]." The trial court is in the best position to review the evidence and to weigh the credibility of the witnesses. *In re Marriage of Bates*, 212 Ill. 2d 489, 515 (2004).

¶ 50 Johnny argues that the trial court's reliance on his utilizing daycare instead of allowing Kia to care for Hailey was not a valid reason to award custody to Kia. The court considered Johnny's practice of "sending the child to a babysitter when [Kia] was available to watch the child," and of sending Hailey to daycare before school when Kia offered to come to the residence to allow Hailey to sleep additional time before school, showed Johnny's lack of willingness or ability to facilitate and encourage a close and continuing relationship between Hailey and Kia. Pursuant to the temporary order, the parties were to maximize the time that each party had available to spend with Hailey.

Johnny's failure to allow Kia to care for Hailey before school while he was at work and other times when he was working shows an unwillingness to maximize Kia's time with Hailey in accordance with the temporary order.

¶ 51 Johnny argues that the trial court failed to consider Kia's mental condition when it awarded her sole custody of Hailey. He asserts that the trial court erred in excluding a document from the Social Security Administration that showed Kia applied for benefits due to anxiety and depression.

¶ 52 In determining the best interest of the child the court can consider the mental and physical health of the parents. 750 ILCS 5/602(a)(5) (West 2012). Kia was asked whether she had ever applied for social security disability benefits and, if so, on what basis. She testified that she applied due to a thyroid condition and underlying issues caused by the condition. She was asked if some of the underlying issues were "affective disorder, bipolar, depression, anxiety, and personality disorder." She admitted that the underlying issues were anxiety and depression. She stated that she did "not have a clinical diagnosis of being bipolar," and did not recall claiming to have bipolar disorder on her application for benefits.

¶ 53 Johnny attempted to introduce a copy of an explanation of benefits from the Social Security Administration. Kia objected on the ground that the document was hearsay. The trial court sustained the objection. Johnny asked if the document could be used for impeachment purposes, and the court replied no because it did not "[s]ee what it impeaches." Kia testified that she did not receive social security disability benefits. The

court informed Johnny that he could call an expert witness to present evidence to support his claim that Kia had mental health issues, but he did not. The explanation of benefits from the Social Security Administration is not in the record on appeal.

¶ 54 Kia testified that she applied for social security disability benefits because she had a thyroid condition that caused anxiety and depression. While Johnny argues that the trial court did not consider Kia's mental health condition, he does not present any evidence that the court failed to consider Kia's testimony. In a bench trial, the trial court is presumed to know the law, and that presumption is only rebutted when the record affirmatively shows the contrary. *People v. Taylor*, 344 Ill. App. 3d 929, 937 (2003). There is no evidence in the record that the trial court failed to consider Kia's testimony regarding her mental health condition.

¶ 55 The trial court found that both parents were very involved with Hailey and were dedicated to being the best parents they are able to be. It found Kia and Johnny to be fit to have the care, custody, and control of Hailey. "[I]f the evidence before the trial court did not clearly favor either party, this court cannot say that the trial court's decision to place permanent custody of the children with one of the parents was against the manifest weight of the evidence." *In re Marriage of D.T.W. & S.L.W.*, 2011 IL App (1st) 111225,

¶ 82. Having had a superior opportunity to observe the witnesses, the temperaments and personalities of the parents, evaluate the evidence, and consider Hailey's needs, the trial court was in a better position than we are to determine Hailey's best interest. In light of the evidence presented at the hearings, the trial court's award of sole custody of Hailey to

Kia was not against the manifest weight of the evidence.

¶ 56 Johnny argues that if this court reverses its ruling on child custody, the court must remand the matter back to the trial court for a determination of the proper amount of child support. Because this court affirms the trial court's child custody determination, this issue is moot.

¶ 57 Johnny makes a four sentence argument about visitation. He argues:

"Again, the decision regarding visitation requires a reversal by this Court as to the issue of custody. It seems reasonable to require the previous order to stand as the parties had been following that same visitation schedule since 2012. However, the Trial Court does not actually set forth a visitation schedule as the Petitioner went from having primary residential custody of the child to now having minimal time with the child. This matter should be set to give the Petitioner the maximum time with the child."

It is not entirely clear to the court what Johnny's argument is, and he fails to cite any authority in support of his argument. Thus, the argument is waived.

¶ 58 Assuming that Johnny is arguing that the trial court erred in failing to set forth a visitation schedule, this argument has no merit. The trial court granted Johnny "reasonable rights of visitation." At the hearing on the motion to reconsider, the following colloquy took place:

"THE COURT: My question was for the Judgment of Dissolution. Should it say reasonable visitation or should it say from 3:30 Wednesday or whatever? I

don't know if his schedule changes or not."

MR. BRADLEY [Johnny's attorney]: It pretty much doesn't. I think reasonable visitation at this point, and then if we have a problem we can always petition the court.

THE COURT: So then it will be just an award of custody to [Kia] with reasonable visitation to [Johnny]?

MR. BRADLEY: Yes."

The trial court specifically asked whether it should set a specific schedule of visitation or reasonable visitation, and Johnny opted for reasonable visitation. While he may not be happy with the result of "reasonable rights of visitation," he cannot argue that the trial court did not set forth a visitation schedule when the court gave him a choice and adopted the visitation schedule he recommended.

¶ 59 Johnny argues that the trial court erred in its award of property. Johnny concedes that the trial court should have awarded the marital residence to the spouse having custody of the child. He argues that should this court reverse the award of custody, then the marital home should be returned to his possession. He asserts that since the trial court erred on the issue of custody, it also erred in its award of the marital home to Kia. As discussed, the trial court's decision to award sole custody of Hailey to Kia was not against the manifest weight of the evidence. As a result, the trial court did not err in awarding Kia the marital residence.

¶ 60 Johnny argues that the trial court erred in awarding attorney fees to Kia. We

review the trial court's award of attorney fees under section 508(a) of the Act (750 ILCS 5/508(a) (West 2012)), under the abuse of discretion standard. *In re Marriage of Lonvick*, 2013 IL App (2d) 120865, ¶ 57. A trial court abuses its discretion when it acts arbitrarily, without conscientious judgment, or in light of all the circumstances its decision exceeds the bounds of reason and ignores recognized principles of law. *In re Marriage of Sobieski*, 2013 IL App (2d) 111146, ¶ 37. Although attorney fees are generally the responsibility of the party who incurred the fees, section 508(a) of the Act permits the trial court to order a party to contribute to the other party's attorney fees in certain instances. *Id.* ¶ 38. Section 508(a) of the Act provides in pertinent part:

"The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order any party to pay a reasonable amount for his own or the other party's costs and attorney's fees. *** At the conclusion of any pre-judgment dissolution proceeding under this subsection, contribution to attorney's fees and costs may be awarded from the opposing party in accordance with subsection (j) of Section 503 and in any other proceeding under this subsection." 750 ILCS 5/508(a) (West 2012).

Section 503(j)(2) provides that any award of contribution from one party to the other shall be based on the criteria for division of marital property under section 503, and if maintenance has been awarded, on the maintenance criteria under section 504. 750 ILCS 5/503(j)(2) (West 2012). The criteria include the property awarded to each spouse, their incomes and present and future earning capacities, and "any other factor that the court

expressly finds to be just and equitable." See 750 ILCS 5/503(d), 504(a) (West 2012).

¶ 61 In the instant case, maintenance was awarded, and therefore the criteria from both sections 503 and 504 apply. Section 508(a) directs the court to consider many factors when deciding the amount of contribution to attorney fees a party may be ordered to make. *In re Marriage of Haken*, 394 Ill. App. 3d 155, 162 (2009). Nowhere in the statute is there a requirement that a person seeking contribution show an inability to pay. *Id.* The factors under sections 503(d) and 504(a) are there to compare the relative financial standings of the parties. *In re Marriage of Sobieski*, 2013 IL App (2d) 111146, ¶ 49. "The statutory factors are the means by which a trial court can determine whether a spouse has an inability to pay or whether the parties' financial situations are so similar that a contribution to attorney fees would be improper." *Id.* The plain language of the statutory factors provides a framework within which to compare the relative means of parties to pay their attorney fees. *Id.*

¶ 62 Section 504(a)(1) directs the court to look at the income and property of each party. 750 ILCS 5/504(a)(1) (West 2012). Johnny earns \$62,000 per year excluding overtime. Kia testified that she expected to earn \$12,000 that year. Johnny argues that Kia's income is actually greater than \$12,000 because he was ordered to pay maintenance and child support. Child support payments are for the use of the parties' child, and not for the spouse's personal use or payment of attorney fees. *In re Keon C.*, 344 Ill. App. 3d 1137, 1147 (2003). Johnny was ordered to pay Kia rehabilitative maintenance in the amount of \$400 per month for two years. Adding the maintenance to the \$12,000 Kia

testified she anticipated she would earn that year only brings her income to \$16,800 per year. Even with an award of maintenance, a great disparity in income exists.

¶ 63 Pursuant to section 504(a)(4) the court should examine whether there was any impairment of the present and future earning capacity of the party seeking contribution due to the fact that the party has devoted time to domestic duties and has foregone education or career opportunities due to the marriage. 750 ILCS 5/504(a)(4) (West 2012). Johnny was the primary wage earner during the marriage. Kia testified that throughout the marriage she only held part-time jobs because the parties agreed that it was best for Hailey not to be placed with a babysitter or in daycare. Because of this agreement, Kia's present earning capacity was impaired. Johnny has had a steady work history and has held the same job for over 10 years.

¶ 64 Johnny argues that Kia has access to money to pay her attorney fees as evidenced by her offer to pay \$120,000 to purchase the marital home. At a hearing on May 10, 2013, Kia's attorney stated, "I do have someone who is ready right now to pay off the debt on the house, period, write a check and pay it off." At the December 13, 2013, hearing, Ms. Smith testified that she had offered to write a check for \$120,000 to help Kia with the purchase of the marital home. Kia testified that her sister's one-time settlement offer was not a gift, but was a loan. Kia stated that her sister offered to help her to expedite the lengthy litigation so she could obtain the marital residence and Hailey could remain in the Goreville school district. While Ms. Smith made a one-time offer in May 2013 to loan Kia the money to pay for the marital home, no evidence was presented

that Kia had access to money to pay for her attorney fees.

¶ 65 Under section 508(a) the award of attorney fees is discretionary and is made after the court considers the relative financial resources of the parties. 750 ILCS 5/508(a) (West 2012). The trial court found an award of attorney fees would be appropriate under section 508(a). After considering the various statutory factors, especially the disparate incomes of the parties, we conclude that the trial court did not abuse its discretion in awarding Kia \$4,000 for attorney fees.

¶ 66 Johnny argues that the trial court erred in awarding Kia rehabilitative maintenance. He asserts that the trial court arbitrarily determined an amount of \$400 per month and that this was not based on evidence of Kia's needs or expenses.

¶ 67 "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." *In re Marriage of Nord*, 402 Ill. App. 3d 288, 292 (2010). The spouse seeking reversal of a maintenance award bears the burden of showing that the trial court abused its discretion. *Id.* Section 504(a) of the Act sets out 12 factors a trial court is to consider in deciding whether to grant a maintenance award, including: the income and property of each party; the needs of each party; the present and future earning capacity of each party; 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 foregone or delayed education, training, employment, or career opportunities due to the marriage; 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; the standard of living established during the marriage; the duration of the marriage; the age and the physical and emotional condition of both parties; contributions and services by the party seeking maintenance to the career or career potential of the other party; and any other factor that the court expressly finds to be just and equitable. 750 ILCS 5/504(a) (West 2012). The trial court is not required to give each factor equal weight so long as the balance struck by the court is reasonable under the circumstances. *In re Marriage of Nord*, 402 Ill. App. 3d at 293. The trial court is required to consider all the relevant statutory factors, but need not make specific findings as to the reasons for its decision. *Id.* In determining whether the amount of maintenance is reasonable, the benchmark is the recipient's reasonable needs in light of the standard of living established during the marriage. *Id.*

¶ 68 The parties married in 2002 and separated in 2011. There was no income-producing property. Johnny concedes that "[t]he property awarded was in equal portions." Johnny earned \$62,000 per year excluding overtime, and Kia testified that she only anticipated earning \$12,000 that year. While the goal of rehabilitative maintenance is for the dependent spouse to become self-supporting, this does not mean the ability to merely meet one's minimum needs, but entails the ability to earn an income which will provide a standard of living similar to that enjoyed during the marriage. *In re Marriage of Abrell*, 386 Ill. App. 3d 718, 733 (2008). The parties did not live a lavish lifestyle

prior to the dissolution of their marriage. However, as a result of the dissolution, Kia's standard of living, considering her ability to support herself, will be greatly diminished, while Johnny will be able to maintain a lifestyle very similar to the one he previously enjoyed.

¶ 69 Johnny was the primary wage earner, and the parties agreed that Kia only worked part-time jobs so that she could be home to care for Hailey. It is inequitable to saddle a party with the burden of her reduced earning potential and to allow the other spouse to continue in the advantageous position he reached through their joint efforts. *In re Marriage of Reynard*, 344 Ill. App. 3d 785, 792 (2003). Because she was never fully engaged in the workforce during the marriage, Kia was disadvantaged by the marriage in comparison to Johnny. Kia is still young and has the ability to increase her income. The court recognized this and only awarded her \$400 per month for two years. Maintenance will enable Kia to acquire financial independence for the future. The trial court did not abuse its discretion in awarding Kia rehabilitative maintenance.

¶ 70

CONCLUSION

¶ 71 For the reasons stated, we affirm the judgment of the circuit court of Johnson County.

¶ 72 Affirmed.