No. 2—10—0384
Order filed April 15, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re the Marriage of DEBRA CYRANOSKI, Petitioner-Appellee, and STEVEN CYRANOSKI, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 05—D—2726 Honorable John W. Demling, Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Bowman and Burke concurred in the judgment.

ORDER

Held: The trial court's orders denying payor spouse's petition to modify maintenance and ordering him to pay attorney fees constituted abuses of discretion, warranting reversal.

On May 22, 2009, respondent, Steven Cyranoski, petitioned the trial court pursuant to section 510 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/510 (West 2008)), alleging that a substantial change in circumstances warranted a modification to the unallocated family support he paid to his ex-wife, petitioner, Debra Cyranoski. On June 8, 2009, based on Steven's failure to pay the full amount of unallocated support, Debra petitioned for indirect civil

contempt and attorney fees against him. On March 15, and 16, 2010, the trial court held a two-day hearing on the petitions and, on April 13, 2010, the court held the attorney fees hearing. Steven appeals four trial court rulings with respect thereto.

Specifically, Steven appeals the court's March 16, 2010, order: (1) denying his petition to modify the maintenance portion of unallocated support; and (2) requiring him, despite his annual salary of $70,000, to continue monthly maintenance to Debra in the allocated amount of $3,771 per month (the amount he paid to her when earning $195,000 annually). The court ordered that, because Steven is not financially able to pay $3,771 per month in maintenance alone, the maintenance should take the form of an accruing judgment.

Further, Steven appeals the trial court's April 13, 2010, order: (1) simultaneously finding that his failure to pay the full amount of unallocated support as required by the dissolution judgment was not contemptuous because it resulted from an involuntary termination of his employment, but *also* that his failure to pay the full amount while his petition to modify support was pending was without compelling cause or legal justification; and (2) that, as a result, Steven should be responsible for $5,400 in Debra's attorney fees, not for violating the original judgment but, rather, because he failed to correctly anticipate and pay the support order found appropriate by the court during these proceedings. For the following reasons, we reverse.

I. BACKGROUND

A. Judgment for Dissolution

Steven and Debra are both attorneys. On January 2, 2008, the trial court entered a judgment dissolving their marriage. The dissolution judgment incorporated the parties' settlement agreement,[1] which required Steven to be exclusively responsible for maintaining health insurance for the parties' two children and to pay one-half of any of the children's unreimbursed health care expenses. Further, the agreement provided for Steven to pay to Debra unallocated family support that would be reviewable after 36 months. The unallocated family support provision of the agreement specified that "Debra will be under no obligation whatsoever during the first twelve (12) months" of the judgment to obtain employment. During months 13 through 36, however, Debra "must" seek employment. Further, "[b]ased on [Steven's] base salary of $195,000," Steven was required to pay Debra $7,650 monthly for the first 12 months following the judgment (commencing January 1, 2008). Thereafter, and again based on Steven's salary of $195,000, Steven would pay Debra $6,800 monthly for months 13 through 36 of the support period.

The settlement agreement provided a separate section dividing the parties' property, including their automobiles, retirement accounts, and the marital home. The agreement provided that, as the parties jointly owned the home, Debra was to pay Steven $85,000 and, in turn, Steven

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[1] The agreement provided in introduction "NOW, THEREFORE, in consideration of the mutual and several promises and undertakings contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby mutually acknowledged, the parties do freely and voluntarily agree to each and every term and provision hereinafter set forth in this Marital Settlement Agreement."

would provide Debra with a quitclaim deed so that Debra would cause Steven's name to be removed from the mortgage. The agreement awarded Debra exclusive possession of the marital residence.

B. Trial

On December 11, 2008, almost one year after the settlement agreement was entered, Steven's employer, the law firm of Michael Best and Friedrich LLP, notified him that, effective February 28, 2009, his employment would be terminated.

1. Paul Benson's Testimony

Paul Benson, chair of Michael Best's litigation practice group, testified at trial regarding Steven's termination. Benson explained that his decision to terminate Steven was based upon the downturn in the economy and the firm's excess capacity in the Chicago office. The economic circumstances resulted in a lack of work at the firm, and Steven did not have his own work to keep himself busy. Benson testified that Steven's termination was part of a reduction-in-force within the firm and that two other attorneys were given termination notices at the same time. Benson testified that the decision to terminate Steven was not based on Steven's work performance and, specifically, that there were no problems with Steven's work. Prior to his December 11, 2008, conversation with Steven notifying him of his termination, Benson had never discussed with Steven the possibility of his being terminated.

Steven began working for Michael Best in March 2006 (approximately two years prior to his termination).[2] Due to his years of practice experience (about 16 years), the firm held out Steven as

[2]The evidence later revealed that, prior to his employment with Michael Best, Steven was employed with the law firm of Freeborn & Peters. Steven did not agree that Freeborn & Peters had terminated his employment, but he agreed that it had strongly suggested that he seek employment

a partner; however, Steven held no equity in the firm and was compensated like an associate. Benson testified that he considered many factors before selecting Steven for termination, including the fact that, although Steven had been practicing law for a significant period, he was not a developer of new business. Benson agreed that Steven was not profitable to the firm in 2008.

2. Steven's Testimony

a. Job Search

Steven testified that he had no warning that he would be terminated and that, immediately upon receiving notice of his termination, he began searching for a new job. Steven testified that he first searched for employment opportunities at private law firms ("I was looking for obviously primarily law-related jobs") and then looked concurrently for positions in-house and in the public sector. Steven contacted legal recruiters, former colleagues, some former opposing counsel, other lawyers and friends, and he "constantly" monitored seven or eight employment websites. Steven testified: "I was looking for the best job that I could possibly get. I started out looking for law-related jobs. I thought I would be qualified for those. But as time went on, I considered basically any employment that I could get. I was not being picky. I was not limiting myself because there was—I had to look for other options." He further testified that he directly applied for approximately 45 positions and, in addition to directly submitting resumes and applications, he utilized legal recruiters to investigate potential positions. According to Steven, he constantly looked for employment, stating: "I viewed my job was to get a job. And I treated it like that. So, I worked every single day to try to find new employment."

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elsewhere.

Michael Best had informed Steven that it would permit him to remain employed, drawing his full salary, until February 28, 2009. On January 28, 2009, Steven requested that the firm extend his termination date because he had not yet found new employment. According to an e-mail that was admitted into evidence, Steven explained to the firm that, as of that date, he had applied for 30 positions[3] and had made numerous other job inquiries, that he was working with legal recruiters and checking career links on the websites for the largest 170 companies in Chicago, and that he had two promising job prospects: (1) a position in the Civil Actions Bureau of the Cook County State's Attorney's Office; and (2) a position with the Office of the Independent Inspector General for Cook County (Inspector General). Steven explained that he had learned of both positions through contacts in those offices, had interviewed with one, and that he had been specifically asked to apply for the position within the Inspector General's office because that office planned to staff several new investigators "some of whom will be attorneys and some of whom will have law enforcement backgrounds." Neither position would be available prior to his termination date, and the application

[3]According to the e-mail, those potential employers included: Zurich Financial Services Group; the Securities and Exchange Commission; Underwriters Laboratories Inc. (two positions); Verizon Wireless; DiamondBlade Warehouse; Swanson Martin & Bell, LLP; Tressler, Soderstrom, Maloney & Priess, LLP; Navistar, Inc.; McDonald's; Nicor; Axiom; American Bar Association; Allstate Insurance Company (two positions); Fortune 100 Company (applied through a recruiter, company name not disclosed); Sears; American Family Insurance; Exelon Corporation (two positions); Cook County State's Attorney's Office; Office of the Independent Inspector General, Cook County; CNA (four positions); Northern Trust; Founders Insurance Company; Monitor Liability Managers, Inc.; The Hartford Financial Services Group, Inc.; and Boeing.

process with other employers was moving slowly, with Steven having received responses to only 2 of the 30 positions for which he had applied. Steven noted that, to have a chance at the positions, he needed to remain employed into March; otherwise, his candidacy would be jeopardized. Michael Best determined that Steven was making good faith efforts to find alternative employment, and it agreed to grant Steven's extension, at two-thirds his regular salary, until March 31, 2009. Later, for similar reasons, Steven asked for another extension of his termination date and the firm again agreed, for the last time, to extend Steven's termination date, at one-half of his regular salary, until April 30, 2009.

From December 11, 2008 (the date he was given notice of his pending termination) until the time he became re-employed (May 11, 2009), Steven received *one* job offer. That offer was extended from the Inspector General's office in mid-April 2009. When asked whether he had turned down any job offers, he replied "No. That was the only offer that I had." Steven accepted the position within days of receiving it because: "[I]t was the only job offer that I had. I knew that, at the end of April, I would not have employment at Michael Best. I wouldn't have any health care coverage for my children. And I needed the income."

At the time of the hearing (March 2010), Steven remained employed with the Inspector General's office, earning $70,000 annually and receiving other benefits, including "extremely comprehensive and fairly inexpensive health care benefit[s]" for himself and his two children. Steven's title within the Inspector General's office is Investigator 3. In his position as Investigator 3, Steven interviews witnesses, issues subpoenas, reviews document productions, performs legal research and writes legal memoranda, and attends continuing legal education classes. According to the job posting, an advanced degree in law, while not required, is preferred. Steven testified that

advancement is available in the position, noting that Investigator 5 positions pay an $85,000 annual salary, and Deputy Inspector General positions earn approximately $105,000 to $110,000 annually.

Debra's counsel primarily questioned Steven concerning his professional qualifications and experience as compared to that required by the investigator position. Specifically, counsel confirmed with Steven that he had 16 years of practice experience and that his job search had, nevertheless, included several non-attorney positions that did not appear to require law licenses. Further, Steven agreed that, to his recollection, most, if not all, positions for which he directly applied posted salaries less than the $200,000 he had earned at Michael Best, adding: "I don't think that there were any in that range." Steven disagreed with counsel's assertion that he had not applied for a single job offering $200,000 per year as compensation, noting that he worked with several legal recruiters to inquire into jobs that did not involve direct submissions of applications. Steven agreed that, when he applied for some public sector jobs, he knew that they would provide him with less income than he had received from Michael Best. Counsel confirmed with Steven that he had applied for the Inspector General position in January 2009, shortly after hearing of his pending termination, and that the position, which he eventually accepted, did not require (although it preferred) a law license.

Steven agreed that, to carry out the duties of his current position he was not required to be a licensed attorney, that he was not engaged in the private practice of law, that his current position did not permit him to engage in the private practice of law and that, in fact, he had not, since obtaining the position, provided any legal services outside of the Inspector General's office. He did not, however, agree that he was not employed as a lawyer, noting that most of the investigators are lawyers. "I do provide legal services at work. I do get paid for work. But it's not private practice."

Further, "I am a licensed attorney and I do go to work. And that's why I was hired for the job. I am not in private practice."

Counsel questioned Steven's efforts, after accepting the job with the Inspector General, to continue his search for "gainful employment."[4] Steven testified that he had not tried to obtain any work as a lawyer outside the Inspector General's office, nor, in response to counsel's inquiry as to whether he had looked for "gainful employment," had he applied for any particular positions. "Other than just keeping aware of reports of the job market and the economy, no, I haven't applied for any particular position." Steven (noting that one does not hire headhunters but, rather, maintains a relationship with them) agreed that, since becoming employed with the Inspector General, he had not continued the services of his job hunters to find him a job that "uses" his law license, noting that "they told me they are not aware of any." Nevertheless, Steven testified that, from time to time, he continues to monitor internet job sites and that he intends to keep his law license in good standing. Moreover, Steven confirmed the possibility of upward movement in the Inspector General's office, testifying that new positions had been allocated and budgeted and, while they had not yet been posted such that he could formally apply, he had expressed his interest in those positions. Steven denied that the reason he took the, as Debra's counsel referred to it, "lesser job" was so that he wouldn't have to pay Debra unallocated family support.

Debra's counsel asked Steven whether he was "aware [that] there are jobs out there for lawyers with 16 years of experience in the Chicagoland area" and he replied "I am not aware of that."

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[4] Counsel also asked "Well, you have 16 years of litigation experience. Isn't that a little demeaning to take a $70,000-a-year job?" After an objection, the court struck the question. Similarly, counsel later argued that Steven should find "a real job as a lawyer."

"You haven't looked, though, since you got your job in mid April of 2009; is that correct?" "Yeah. I haven't specifically [*sic*] for any particular position." Steven explained "I am not going to jeopardize my job." Later, Steven further explained why he did not actively apply for new employment since receiving the position with the Inspector General:

> "One of [the] main reasons is I am very concerned [that] I want to maintain employment with health benefits. I came very close to not having that. Looking for a job outside of the office, if that becomes known—and we have a lot of mutual acquaintances in the legal community in Chicago. Were I to apply somewhere and it gets back that I am looking for other work—I have only been there a matter of months. Just I want to keep the job that I have, maintain my employment during this job market and the economy. And the other reason is, like I said, we were just told that they were going to post— ***additional jobs***. So, it's really two things. I don't want to do anything to jeopardize the job that I have. And also, I see that there is room for advancement."

To rebut Debra's testimony regarding the job market (testimony that we summarize below), Steven testified that, at the time he was seeking employment, he was extremely familiar with the job market:

> "I checked online every day the Chicago Daily Law Bulletin. And a few times every week, I would see article after article, which I had printed out and brought them today. But about almost every law firm that I knew of downtown was laying off lawyers, cutting salaries, cutting staff. And I printed those articles out. The ABA magazine, I was reading about how to survive the recession for lawyers. I read that article. In addition to that, there w[as] article after article that I was seeing talking about unprecedented unemployment, in general, highest

> unemployment rate on record for Illinois. I talked to legal recruiters who would give additional information about law firms that weren't reported in the Daily Law Bulletin.
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> In trying to get a job through them, they would tell me, you know, Sidley [Austin LLP] just cut 20 lawyers, Jenner [& Block LLP] just cut these lawyers. And—and they told me, with no book of business, I wasn't going to get a job there anyway. They were getting rid of people, not taking them in. *** [F]riends of mine were laid off. We were, you know, in the same boat."

Steven confirmed that he did not have a book of business at the time of his job search; the business that he had went "bankrupt."

b. Payments to Debra and Expenses

Per the settlement agreement, Steven paid Debra monthly support of $7,650 through the first 12 months following the judgment. Further, Steven paid Debra the full amount owed to her under the settlement agreement (including toward the children's unreimbursed medical and dental expenses, etc.) in January, February, March, April and May 2009. To make the full March, April, and May 2009 payments on his reduced income (as of April he was making half of what he had previously made), Steven testified that he withdrew money from his savings/checking account. Although Steven paid Debra the full amount in May 2009, he filed that same month his petition to modify the unallocated family support. According to Steven, he also, in May 2009, informed Debra for the first time that his employment with Michael Best had been terminated.

The first month that Steven paid Debra less than the amount owed under the settlement agreement was June 2009. Steven testified that, in June 2009, he could not afford to pay Debra the $6,800 owed and, accordingly, he paid Debra approximately $2,138, having calculated the same

percentage of his monthly net income as that originally used to calculate the unallocated family support obligations. Steven thereafter continued to pay Debra less than owed under the agreement, but he did not completely miss any months and he continued to pay his portion of any unreimbursed childcare expenses and, beginning in October 2009, daycare expenses, as required under the agreement. In July 2009, Steven paid Debra $1,888, explaining that he nets $1,888 every two weeks, and, so, he initially took one check each month for himself and gave Debra the other. Defendant testified that he subsequently could not maintain that pace and was living on his savings, which totaled about $2,000. In September, Steven calculated that he could afford to pay Debra $1,000. He explained "[i]n April, May, and June, I gave her [$]15,000 and kept only [$]3,000 for myself. It was 80 percent of my income I had given to her, and I couldn't survive going forward. And I depleted, you know, my savings down to just a couple thousand dollars, so I paid what I could." As of March 2010, Steven was paying Debra $774.42 per month, as opposed to the $6,800 per month laid out under the agreement.

Steven testified that, upon learning that his employment would be terminated, he changed his lifestyle in that he cooked at home and did not purchase breakfast and Starbucks coffee every day (which he estimated to be a savings of $1,200 per year). Steven rarely buys clothes except those necessary for work, does not purchase personal items such as electronic devices, and does not take vacations other than to drive to Michigan with the children to stay with his relatives. Those trips involve expenses only for gas and incidentals. Upon learning of his pending termination, Steven could not reduce his rent because he had already renewed a 13-month lease on his apartment. When making purchases, Steven pays in cash or on his Nordstrom Visa credit card. From January through March 2009, Steven paid between $1,000 and $2,000 monthly to the credit card to cut down the

balance; beginning in August 2009 and continuing to trial, he paid only the minimum monthly payment. Defendant agreed that, during months when his payments to Debra decreased, he made large charges on credit cards, but he suggested that he used the card for living expenses. Defendant testified that he had not dipped into his retirement savings for his monthly expenses, but that he was in debt. "I have not withdrawn funds, and I have not been able to meet all of my living expenses." He agreed that his financial affidavits submitted appeared to reflect no change in monthly living expenses, but testified that he found it very difficult to say with precision his expenses in each category because expenses varied from month to month and, accordingly, that some of the numbers on the affidavits should be modified.

3. Debra's Testimony

Debra testified that she became a licensed attorney in 1992 and that she worked full time as an attorney for five years. After having her first child, Debra worked part time, three days per week, for five years (1997 until 2002). After having her second child, Debra stayed home with the children full time and was out of the work force from 2002 until 2009. Debra disagreed that Steven told her that he lost his employment with Michael Best, testifying that she learned of the event only by receiving the petition to modify unallocated support.

Debra testified that she was not required to seek employment during the first year of the three-year, reviewable, unallocated support period. She did, however, begin her job search at the "end of 2008," (*i.e.*, at the end of the first year of support and prior to learning that Steven lost his position at Michael Best). On October 1, 2009, Debra became employed as a front-desk supervisor for Lifetime Fitness, a health club, earning $10 per hour. She testified that her support payments from Steven had, at that point, dropped dramatically and that she had little money coming in for expenses.

For example, in September 2009, Debra testified, Steven paid her only $1,000, which was insufficient to meet her family's needs and expenses. Debra testified that the lack of payment of unallocated family support reduced her stream of income such that she was forced to get a job and to borrow $13,000 from her mother. She subsequently agreed, however, that she borrowed $13,000 from her mother in February 2009, before she knew that Steven had been terminated and for the purpose of home repairs. Further, Debra conceded that the settlement agreement mandated that she begin seeking employment in January 2009.

On October 26, 2009, 25 days after beginning her job at Lifetime Fitness and approximately 10 months after her job search for an attorney position started, Debra became re-employed as an attorney with the firm Power, Rogers & Smith. She is a contract attorney, paid $35 hourly and she averages 85 hours per two-week period. Debra was hired to a temporary position to replace a woman who was on maternity leave. However, the woman she replaced had returned from leave and, at the time of trial, Debra maintained her job. Debra testified that her average annualized income from October 2009 through March 2010 was $77,000. Debra agreed that her attorney job search took 10 to 11 months and that the market was difficult for her.

Debra testified that she is familiar with the job market for seeking employment as an attorney because she went online to different websites. Debra testified that she was told by a legal recruiter that she would be difficult to place because of her lengthy departure from the job market. Debra was asked "And in your judgment, were there and are there now more ads for an attorney with experience of 10 to 16 years than there are for one with four to five years of experience?" She replied, "Yes. *** Definitely." Debra testified that the postings she had seen for positions with about 15 years of experience reflected pay rates of $150,000 to $200,000. "Oh, there are jobs out there." On cross-

examination, Debra was asked whether those jobs she saw on the internet required a book of business and she answered "not all of them, no." She agreed that, to her knowledge, Steven does not have a portable book of business.

Debra testified that the judgment required her to refinance the marital home and give Steven $85,000. Debra was unable to refinance the home, so, her mother gave her the money and took a mortgage on the house. Debra paid Steven the $85,000.

C. Trial Court's Rulings

1. Petition to Modify

At the end of trial on March 16, 2010, Steven requested that the court reduce his support obligation retroactive to June 2009 (he filed his petition in May 2009, but paid Debra in full that month). In his closing argument, Steven's counsel noted that Steven practiced law for 16 years, but was without his own book of business which "is the kiss of death" in a bad economy. When he received only one offer from the Inspector General, he took it. "He doesn't have a choice. It's that or zero. He's got a former wife and two children and an unallocated family support order which is more than he makes per month now." In the meantime, counsel argued, Steven paid what he could and depleted his savings to make payments on his support obligations. Counsel suggested that maintenance should be terminated, but the court questioned whether the economy might recover at the end of the 36-month support period such that, despite having no book of business, Steven might again be capable of earning $150,000 or $200,000. Counsel then asserted that, instead of termination, a reasonable approach might be to review or reserve maintenance, "I think that the better approach would have been to say a reserved approach to wait for the economy to come back, if that happened. But that's why I—I honestly believe that he is not going—he is not the kind of guy they are going to

go hire for that kind of money if the economy comes back because you are going to get somebody who is younger, more attractive to the— to the practice of law."

The court stated that it was concerned by Steven's level of underemployment. "I don't have a problem on a temporary basis of a job is a job. And I would agree that, when you have no job and you have an obligation to support children, you take—***[y]ou take any job you have to." However, the court was concerned that Steven might think "this is not so bad" to have Debra picking up a much greater burden than was bargained for under the settlement agreement. Steven's counsel noted for the court that the agreement was reviewable and modifiable and that Debra was, in fact, supposed to obtain employment under the agreement. The court replied "if this were a reduction of 20 percent of his income, I think your argument would be well founded. This is a reduction of 65 percent of his income *** this is the sort of catastrophic change that nobody foresaw." The court acknowledged that "we are in what some people would say is an unprecedented job market. And clearly, attorneys are not immune from this issue."

The court ruled first that there was a change in circumstances and that Steven was terminated because of a lack of work and because he was the least profitable in the department based upon salary, but not due to a lack of performance or a voluntary act or deliberate conduct on Steven's part.

> "The real problem I have in the case is that he clearly is underemployed. And quite frankly, I think his underemployment is, to some degree, intentional. To some degree, it's as a result of the economy. But the evidence presented to me, which includes his job search, his testimony, and judging the credibility of the parties, [Steven], in my mind, was certainly content with receiving the job and the level of the job that he sought."

The court noted that Steven's law degree helps him in his job, but that he's an investigator and, therefore, is underemployed. The court continued:

> "And unfortunately, there is a certain, in my mind, a disturbing level of contentness with this position, he seems to be happy earning $70,000. I don't see that there is an incentive on him. And he has indicated that there really is no incentive. He has no intentions of looking for another job. His testimony is that he didn't want to jeopardize the job he has now. Well, I think that there is some degree of truth to that. Frankly, I think he is just simply content with having a job."

The court noted that there are advantages to a job in the public sector, "quite frankly, it's easier. *** He doesn't have a lot of the pressures that attorneys have *** it certainly is an easier job than practicing law." The court found that Steven's termination allowed him to take a job with less pressure on him, but it created significantly more pressure on Debra to contribute to support the children, that their lifestyle was dramatically changed, "and to her credit, [Debra] went out and got her job."

The court noted that the unallocated support included a maintenance component. It found that component to be contractual and that Debra:

> "[G]ave up certain things with respect to either her percentage of the marital estate or whatever to get that right to unallocated support for a period of at least 36 months. It certainly was reviewable. And I think the reviewable part was, you know, if it went up or down by percentages, whether it's 10, 20, even 30 percent. I don't think it anticipated nor the parties anticipated a drop in income that was 65 percent, as opposed to something that would ordinarily be modifiable."

The court found "disturbing" that Debra fully complied with her obligations under the judgment including paying to Steven $85,000 as part of the property disposition, but that Steven was, through his petition, asking that Debra give up that for which she had contracted.

The court found that, despite Steven's involuntary change in his job, he is underemployed and has no incentive to increase his job ("he seems to be satisfied working in the public sector. And you know, as a public sector employee, I can't necessarily disagree with that"). Accordingly, it decided that only child support would be modified. It found that 28% of Steven's prior salary of $195,000,would have been $3,129 for child support purposes. Therefore, the court found, the balance of the $6,800 Steven had been paying monthly represented the maintenance portion of the payment, or $3,771 ($6,800 - $3,129 = $3,771). The court modified Steven's child support obligation (based on defendant's $70,000 salary) to $1,053 per month. The court determined that maintenance in the amount of $3,771 monthly should not be modified and should continue to accrue as a judgment to Debra's benefit and that she can act as a judgment creditor. The court determined its order would be retroactive to June 1, 2009.

2. Rule to Show Cause and Attorney Fees

The court noted that it would not hold Steven in contempt of court for his failure to pay the full amount of unallocated support, because "I do not believe that his failure to pay was without cause—just cause."

However, the court noted that Steven unilaterally made decisions and calculations of his child support obligations, depending on what he believed he could pay under the circumstances. "Had he been paying in the nature of 50 percent, as opposed to 28 percent, I think I could—I could give him the benefit of the doubt." Accordingly, the court found that Steven's failure to pay "was without

cause or without reasonable cause or justification." Accordingly, the court ordered the parties to return for a hearing on Debra's petition for attorney fees.

Before adjournment, Steven's counsel noted to the court that, for attorney fees to be awarded under section 508(b) of the Act (750 ILCS 5/508(b) (West 2008)), Steven would have to know what is to be paid and intentionally not pay. Here, counsel emphasized, Steven could not pay the amount under the original judgment and the court's instant judgment, while retroactive to June 1, 2009, was unknown to Steven until the hearing. The court responded that Steven paid far less than the amount to which the court ultimately modified his payments and that he should have paid the full amount until the judgment was modified; then, if the court permitted a reduction, Steven would have received a credit. Counsel noted that, at the time in question, Steven did not have the ability to pay in full and did not know to what amounts the court would modify the judgment. The court replied: "He certainly had the ability to pay more than what he paid. And therein lies the distinction. He unilaterally picked a number, you know. And I guess, to a degree, you raise a legitimate point. He guessed, and he guessed wrong." The court continued, "he wouldn't have to guess at all if he paid the full amount. He couldn't do that. But if he paid more, frankly, I said, had he paid 50— whether 50 or 53 percent of whatever it was, I would not have had a problem. He paid 28 percent of what he felt was appropriate under the circumstances. And in some cases, he may not even have paid that."

3. Attorney Fees Hearing - April 13, 2010

On April 13, 2010, the parties returned to court for a determination of reasonable attorney fees. In the end, the court ordered that Steven pay $5,400 toward Debra's attorney fees. In the course of the proceeding, however, the court "clarified" its findings with respect to modification of

maintenance and its determination that Steven's failure to pay was without reasonable cause or justification.

With respect to the latter, Debra's counsel noted that while Steven may have involuntarily lost his job, his acceptance of a job with an income about one-third of his prior income was not in good faith. Steven's counsel responded that the court had not previously found that Steven acted in bad faith. The court interjected and clarified that it found that, while the loss of Steven's job was not voluntary, Steven did *not* exercise good faith in trying to obtain employment at a level commensurate with this abilities because "he simply accepted a job, a lesser position" for which a law degree was not necessary. The court reiterated that the maintenance component is to some degree a property issue. "And while maintenance is modifiable, and there was nothing in the judgment that said it was nonmodifiable, I recognize that," the court felt that Steven's lack of good faith came into play because "in my mind, judging the credibility, the testimony of the parties, the exhibits, I believe the evidence sustained the position that he was comfortable in not exercising his energies in obtaining a position because this was simply an issue of moneys that went to his wife."

The court stated that it had found that, without compelling cause or justification, Steven did not, after June 1, 2009, pay the unallocated family support allocation. The court denied that it had found that Steven could not have paid the support obligation, stating that it had, instead, found that Steven's loss of income was not voluntary and so he would not be held in contempt, but that is not to say that his failure to pay was without compelling cause or justification.

The court disagreed with Steven's counsel's assessment that the rulings were inconsistent ("if you find that the judgment needs to be modified because there has been a substantial change in the

circumstances, then how can you find his conduct is not justified in those change in circumstances?"), noting that it had not found Steven in contempt. The court noted that Debra is now employed:

"Court: And the bad faith element of it is, to be honest with you, is to be honest with you, I think he sat back—and from his testimony, the demeanor and the credibility and judging all of that, it's my view that he sat back and said, well, heck she is only earning—she is only earning $70,000 so that's all I have to earn.

Steven's Counsel: It was the other way around though.

Court: What?

Steven's Counsel: It didn't happen that way.

Steven's Counsel: The facts aren't that way. You are changing the facts.

Court: Well, whether—

Steven's Counsel: The facts were he lost his job. Okay. They kept him on for a number of months to find a job. He got a job at 70 grand. And then all the way around the next part of the year she gets reemployed.

Court: Right. Because she had to—

Steven's Counsel: It wasn't the other way around.

Court: She had no choice basically to maintain any level—

Steven's Counsel: No, the judgment required.

Court: It didn't require it within a specific period—

Steven's Counsel: It did.

Court: —at that time. He lost his job. She had no choice.

Steven's Counsel: The judgment required her to start looking for jobs.

Court: Start looking for a job, absolutely.

Steven's Counsel: That's right.

Court: Maybe she should still be looking. And, again, I tend to agree with your interpretation there, and I think that that was the interpretation that he put on. He said well, heck, she doesn't have a job so why should I have to bust my butt and earn $200,000 when she is not earning anything now? That is what came across in his testimony loud and clear. She wasn't working. She hadn't gotten a job. I lost my job so why should I bust my butt and earn as much as I did before when she is not doing anything.

Steven's Counsel: I didn't hear a word of that testimony.

Court: You didn't hear it. It was part of the demeanor and manner in testifying.

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Court: Unfortunately, my job is to judge that credibility and the demeanor and manner.

Steven's Counsel: But there is no evidence in the record to substantiate that finding if that was a finding.

Court: The circumstances of everything that occurred plus his testimony I think led to that."

The court continued that Steven's testimony was that he was "perfectly happy" earning $70,000 per year and that the only thing he intended to do was to perhaps get a slight bump in the same office with minimal increases. Moreover, "to the extent that I modified child support, maybe I shouldn't because I will make clear that my findings were that he is underemployed and he didn't exercise good faith in an attempt to try to become employed." The court reiterated that Steven has no interest in earning more than $70,000 and:

"Court: I didn't hear [what] maybe would justify it, oh, you know what, I've been practicing law for 25 years. I'm burnt out. I can't deal with clients anymore, blah, blah. All of the things that is [*sic*] not necessarily unreasonable—

Steven's Counsel: I think you heard he is not a business generator and he gets kicked from firm to firm. You heard that. I know you heard that.

Court: Yeah. And he got kicked from firm to firm for a period of time and continued to make pretty good money. And—

Steven's Counsel: And then the economy changed and all the jobs left and everybody got kicked out for a $70,000 job and now he is being penalized because he got a job.

Court: He is not being penalized because he got a job. He is being penalized because—

Steven's Counsel: He didn't get a good job, a good enough job.

Court: He didn't get a job commensurate with what I believe his skills and what he indicated his skills were.

Steven's Counsel: Yeah.

Court: The real issue is the level of content that he appeared to exercise with respect to this particular position. He made it very clear that he never intended to try to go out and get another job that weren't [*sic*] anywhere near the $200,000. And it wasn't—I don't believe it wasn't because he couldn't do it. He simply is content in this job. And to a degree, maybe the job is far less stressful than working for a large firm. ***And he also showed no indication of ever attempting to improve his position within the near future at least as long as he had an obligation for maintenance and possibly for support as well."

The trial court awarded Debra $5,400 in attorney fees. Steven appeals.

II. ANALYSIS

A. Standards of Review

On appeal, Steven challenges the trial court's orders denying his petition to modify maintenance, setting the maintenance award at an amount he could not pay and, accordingly, in the form of an accruing judgment, and requiring him to pay attorney fees under section 508(b) of the Act. We review each of these issues for an abuse of the trial court's discretion. See *In re Marriage of Mitteer*, 214 Ill. App. 3d 317 (1993) (modification); *In re Marriage of Schneider*, 214 Ill. 2d 152, 173 (2005) (terms of maintenance award); *In re Marriage of Samardzija*, 365 Ill. App. 3d 702, 709 (2006) (attorney fees).

The abuse-of-discretion standard is the most deferential standard of review next to no review at all (*In re D.T.*, 212 Ill. 2d 347, 356 (2004)); it does not, however, equate to no review at all. A court abuses its discretion when: (1) its findings are unreasonable, arbitrary, or fanciful (*Blum v. Koster*, 235 Ill. 2d 21, 36 (2009)); (2) no reasonable person would agree with its position (*In re Marriage of Sanfratello*, 393 Ill. App. 3d 641, 646 (2009)); or (3) when it exceeds the bounds of reason and ignores recognized principles of law, resulting in substantial injustice (*In re Marriage of Beeler*, 353 Ill. App. 3d 1101 (2004)). We allow a trial court's factual findings to stand unless they are contrary to the manifest weight of the evidence, *i.e.*, when they are unreasonable or not based on the evidence. *In re Marriage of Eberhardt*, 387 Ill. App. 3d 226, 233 (2008). To the extent our review of the issues on appeal requires us to consider an issue of law, our review is *de novo*. *In re Marriage of Crook*, 211 Ill. 2d 437, 442 (2004).

B. Maintenance (Issues 1 and 2 on Appeal)

Steven argues that the trial court abused its discretion where it found that a substantial change in circumstances occurred that warranted a modification in the child support portion of unallocated support, but that *no* modification was warranted for the maintenance portion of support. He argues that the court erred in awarding Debra any maintenance, and that it certainly erred in awarding $3,771 per month in maintenance, the amount he paid prior to his income reduction. Steven further argues that the court erred in applying a contract-property analysis to conclude that maintenance was required because Debra gave up rights for it— a position, he asserts, that is not supported by any evidence in the record.

Debra, citing *In re Marriage of Imlay*, 251 Ill. App. 3d 138, 142 (1993), argues that the court correctly considered a two-prong test, *i.e.*, whether Steven's employment change was voluntary and in good faith. Debra argues that the court correctly found, based heavily on Steven's demeanor, that he "seized an opportunity to get out from under his family support obligation" when he became "underemployed" as an investigator. Debra argues that this conclusion is supported by the record, noting that Steven applied for many non-attorney positions and, when he received an offer at $70,000, he "sat back" and stopped looking for an attorney position. Debra asserts that, after finding Steven did not make a good faith effort to earn a sufficient income, the court properly set the support obligation at a level appropriate to his skills and experience. Pointing to the agreement's introductory paragraph, Debra asserts that the court properly considered the settlement agreement as a whole to determine maintenance should continue. Finally, Debra notes that, in closing argument, Steven's attorney conceded that, instead of terminating maintenance, reserving it would be appropriate.

Section 510 of the Act provides that a maintenance order may be modified only upon a showing of a substantial change in circumstances. 750 ILCS 5/510(a—5) (West 2008). A

"substantial change in circumstances" may be shown when the ability to pay maintenance has changed. *In re Marriage of Neuman*, 295 Ill. App. 3d 212 (1998). When deciding whether to modify maintenance, the court "shall consider" the applicable factors set forth in sections 504(a) and 510(a—5) of the Act,[5] including: (1) any change in the employment status of *either* party and whether the change has been made in good faith (750 ILCS 5/510(a—5)(1) (West 2008)); (2) the efforts made by the party receiving maintenance to become self-supporting (750 ILCS 5/510(a—5)(2) (West 2008)); (3) the property awarded to each party under the dissolution judgment and the present status of the property (750 ILCS 5/510(a—5)(6) (West 2008)); and (4) the increase or decrease in *each party's* income since the prior judgment or order from which a modification is being sought (750 ILCS 5/510(a—5)(7) (West 2008)). See also *Blum v. Koster*, 235 Ill. 2d 31, 36 (2009) ("When deciding whether to reduce or terminate an award of unallocated maintenance, a court must consider all of the factors set forth in sections 504(a) and 510(a—5)").

Here, the trial court found a substantial change in circumstances occurred—indeed, it characterized the change in circumstances as a "catastrophic change that nobody foresaw." It further found that Steven's employment change was *not* voluntary and that it did not result from any deliberate conduct on Steven's part. The court divided the unallocated support into child support and maintenance portions and found that the substantial change in circumstances warranted a modification of child support, but *not* of maintenance. In reaching that conclusion, the court did not engage in an analysis of whether maintenance should be modified based upon, for example, the decrease in Steven's income *and* the increase in Debra's income; rather, the court apparently based its decision

[5]Section 504(a) provides 12 factors a court must consider in granting maintenance awards. 750 ILCS 5/504(a) (West 2008).

to not modify maintenance on three overarching findings: (1) Steven was underemployed and did not exercise good faith in trying to obtain employment commensurate with his abilities; (2) Steven is content in his job and has not in good faith continued to search for new employment; and (3) maintenance was contractual. For the following reasons, we find each of these findings contrary to the manifest weight of the evidence and, accordingly, conclude that the court abused its discretion in denying Steven's petition to modify maintenance.

1. Steven's "Underemployment"

A substantial change in circumstances warranting modification may occur upon: (1) involuntary change or loss of employment; (2) voluntary change of employment made in good faith; (3) a change in the needs of the recipient spouse or the ability of the payor spouse to make the payments; or (4) the lack of good-faith effort on the part of the recipient spouse to achieve economic independence. *In re Marriage of Brent*, 263 Ill. App. 3d 916, 922 (1994) (citing cases).

Here, the court found that Steven's loss of employment was involuntary. Further, the evidence was uncontradicted that Steven applied for high-paying legal positions through legal recruiters, directly applied for approximately 45 positions, and that he received only one job offer. The evidence was uncontradicted that Steven did not turn down any job offers. The evidence was uncontradicted that, while Steven has practiced law for a significant period, he is not a developer of new business, does not have his own book of business, and that this weakness (for lack of a better term) in his overall ability to contribute to a private law firm on apparently two occasions resulted in those firms asking him to seek alternative employment. The evidence was also uncontradicted that, when Steven sought new employment, the economy experienced a significant downturn such that, as the trial court noted, Steven faced an "unprecedented job market" from which "clearly, attorneys are not

immune***." The evidence was uncontradicted that, when Steven performed his job search, legal recruiters informed him that there were no positions available, representations that were, according to Steven, supported by legal periodicals citing the fact that large Chicago law firms that paid the highest salaries were laying off attorneys, not hiring them.[6]

In this vein, we think Debra's reliance on *Imlay*, where a request to modify maintenance was considered in the context of a *voluntary* change in employment, is misplaced. There, the court denied a petition to modify maintenance after it determined that the payor spouse's deliberate actions caused his termination and, therefore, that he could not meet the burden of establishing that the employment change was made in good faith. *Imlay*, 251 Ill. App. 3d at 142 (noting that "a party who *voluntarily* changes employment resulting in a reduced income and seeks to modify a support obligation must show the employment change was made in good faith") (Emphasis added.) Here, Steven's employment change was not voluntary. As such, we think that this record more closely resembles the following three cases where employment changes warranted support modifications.

First, in *In re Marriage of Barnard*, 283 Ill. App. 3d 366 (1996), the payor spouse, an attorney, petitioned to reduce his child support obligation. The payor spouse had been employed with his law firm for 20 years, was the firm's chief trial lawyer, and had earned a salary of $191,000. For various reasons, the payor spouse felt forced to leave the firm. He established his own law practice but, to supplement his income, he accepted part-time work with the Adams County State's Attorney's office for $30,000 per year. He petitioned the court to reduce his support in light of his greatly reduced

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[6]Debra's testimony that she located postings for higher-paying positions and that not *all* of them required a book of business, does not change the fact that, despite his search and use of legal recruiters, Steven was not offered any other positions.

earnings. The trial court found that the payor spouse left his law firm in good faith (he was essentially forced to resign), that the change resulted in a substantial change in circumstances, and that child support would be temporarily reduced for a period of six months with the accrued balance to be paid at a later date. The appellate court affirmed, finding that, although the payor spouse made the job change expecting to earn less than he had at the firm, the choice to leave his former employer was motivated by concerns of job security, there was no evidence that the change was motivated by bad faith, and that he had made considerable efforts to obtain other employment. *Id.* at 372. Given the circumstances surrounding his leaving the firm, the court agreed that he "was not required to wait until his change of employment became an involuntary one to justify a reduction" in support. *Id.*

Next, *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 1078 (2009), the trial court denied a petition to modify child support, but the appellate court reversed because the payor spouse was involuntarily unemployed and, within months of his termination, found another position in the financial management industry (moving from a salary of $755,497 in 2006 to $110,000 in 2008). The appellate court disagreed with the trial court's finding that the payor spouse should earn more than the $110,000 (specifically, $350,000), noting that "he did not willingly leave his job and then remain unemployed" and that "nothing in the record suggests an attempt to evade a support obligation." *Id.* The appellate court noted that, immediately after he lost his job, the payor spouse began searching for new employment and continued to make support payments. *Id.* Further, the court found notable that there was no evidence of "an unreasonable failure to take advantage of an employment opportunity," or that he had been offered a position that would have paid him $350,000. *Id.* "At the time of trial, [the payor spouse] had no employment opportunity that would have produced an income

in the range imputed by the trial court. Indeed, there is no evidence that a job of that income was available to someone of [his] experience in 2008." *Id.*

Finally, in *In re Marriage of Lavelle*, 206 Ill. App. 3d 607 (1990), the appellate court reversed the trial court's denial of a petition to modify child support and order finding the payor spouse in contempt. There, the payor spouse, at the time of the original judgment, was self-employed as the owner of an electronics store. The store went bankrupt. After filing for bankruptcy, the payor spouse enlisted a headhunting agency to find him employment in the electronics field, but those efforts proved fruitless. While unemployed, the payor spouse became licensed as a stockbroker and became employed at an investment firm with his entire salary based on commission. He testified that he expected his income at the firm would increase. The appellate court disagreed with the recipient spouse's argument that, while the bankruptcy was unfortunate, the payor spouse voluntarily changed careers and should instead have obtained a job in the electronics field for which he was qualified. The court concluded that, where the loss of employment was involuntary and where the payor spouse's efforts to obtain a position in the electronics field failed, even with an agency's assistance, he had demonstrated that a substantial change in circumstances warranted a reduction or modification of his support obligations and, therefore, that the trial court had abused its discretion in denying the petition to modify. *Id.* at 611-12.

The aforementioned cases persuade us that, here, the trial court's findings that Steven is underemployed in the current market and did not exercise good faith in trying to obtain employment commensurate with his abilities are contrary to the manifest weight of the evidence and, therefore, that it abused its discretion in concluding that modification should be denied.[7] As in *Barnard*,

[7]We note that, as Steven asserts, consideration of good faith appears relevant to *voluntary*

Gosney, and *Lavelle*, the record here reflects that Steven's job change was forced, not voluntary, that there was a significant economic downturn, he actively sought re-employment on his own *and* by using legal recruiters, he continued to make support payments, and there was no evidence that he was offered, but turned down, any higher paying legal positions.

Specifically, and in accordance with the foregoing cases, we disagree with the court's assessment that Steven's acceptance of the Inspector General job was not in good faith merely because, unlike his former position, he receives a lower salary and does not privately practice law. While Steven's 16 years of litigation experience previously allowed him to earn the salary that formed the basis of the support payments, the record did not establish that he is currently qualified, in this market, for those positions or that such a position was available and he turned it down. Specifically, the record reflects that, due to his "deficiencies" in business generation, Steven was not profitable and/or marketable to a position with a $200,000 salary. The record does not suggest that Steven's qualifications have changed such that employers with those positions, if they exist at all, would consider him as a candidate. Nor is there evidence in the record that the economy has improved and that attorneys with extensive experience but no business are being courted as attractive candidates. Indeed, the court's reliance on Steven's former ability to earn a high salary based on his years of experience ignores the economic reality (as supported by Benson's testimony) that, when an attorney has no independent source of business, having a significant number of years of experience might even

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employment changes, not involuntary employment changes. See *e.g.*, *Brent*, 263 Ill. App. 3d at 922 (listing as separate circumstances warranting modification an involuntary job change versus a voluntary job change made in good faith).

hinder a job search, as the salary that would typically be expected to accompany such experience would not necessarily be offset by the attorney's profitability.

We also note that the trial court here intimated that Steven was being "penalized" for not finding a job commensurate with his abilities. It is true that, unlike in his former positions, Steven is not engaged in the private practice of law. However, Steven did not *exclude* attorney positions from his job search—in other words, he did not apply *only* for positions that would not require him to practice law. Rather, realizing that the economic realities rendered those positions scarce, he expanded his search to include positions that would permit him to use his law degree and maintain health benefits. Indeed, an argument could be made that *not* taking these actions, or turning down the Inspector General position as "beneath him" given his experience,[8] would have reflected a conscious disregard for (or failure to take seriously) his obligations to Debra and his children. Thus, while the court here acknowledged that Steven needed to accept any job he could, the result of the

[8]It is unfortunate that a pervasive characterization in this hearing was that a $70,000 job that *uses* a law degree but does not *require* a law license was a "lesser job" not constituting "gainful employment" or a "real job as a lawyer." We note that many "real jobs" that do not require use of a law license for private practice are filled by experienced lawyers (*e.g.*, judicial law clerks and judges). Further, many demanding positions that require use of a law license often pay less than the $70,000 that Steven is earning (smaller private law firms, assistant State's Attorneys, and public defenders). Thus, while the actual salary component of Steven's job with the Inspector General is clearly relevant to the modification request, the assessment that his new position was demeaning or beneath someone with his practice experience was not, in our view, necessary or appropriate.

court's focus on his perceived underemployment resulted in a finding that is, on this record, arbitrary and an abuse of discretion.

2. Steven's Failure to Search for New Employment

Next, the court, after determining that Steven's employment change was involuntary, found Steven did not exercise good faith because he did not continue to seek employment after accepting the Inspector General position. We note again that, as Steven asserts, consideration of good faith appears relevant to *voluntary* employment changes, not involuntary employment changes. See *e.g.*, *Brent*, 263 Ill. App. 3d at 922. Further, if a job change was involuntary or if it was voluntarily made in good faith, then it does not appear that the payor spouse remains burdened with a continuing obligation to seek employment commensurate with the prior employment. See *e.g.*, *In re Marriage of Kowski*, 123 Ill. App. 3d 811, 816 (1984) (noting that the movant left his job in good faith; therefore, although he made no attempt to find employment to duplicate his earnings, "he was under no *absolute obligation* to do so"(emphasis in original.)). In the end, we need not decide the issue because, even if Steven's efforts to *continue* seeking employment are relevant, we conclude that, here, the court's finding that Steven did not act in good faith is contrary to the evidence. The court's finding was apparently based on both misapprehensions of the record and facts not in the record.

The court found that Steven did not in good faith continue to search for a job after he accepted the Inspector General position. However, while the record reflects that, after Steven commenced his job with the Inspector General, he told his legal recruiters that he did not need them to continue their search and he did not subsequently apply for alternative positions, he continued to generally keep an eye on the market and monitor job websites. Steven explained that he did not continue to actively seek new employment after starting the Inspector General job because he did not want to jeopardize

that job or the health benefits that he and the children received. Further, he testified that he expressed to his employer his interest in being promoted to two positions, one of which paid up to $110,000 per year. The court agreed that not wanting to jeopardize a new position was reasonable and that Steven was likely content "just to have a job," presumably given that he had experienced an extensive job search that resulted in only one job offer. Nevertheless, the court found that Steven's not seeking a new job on these bases was not in good faith. While mindful of the deferential standard of review, we find that the court's finding, although it acknowledged job security, did not give due consideration to Steven's job security concerns.

Again, in *Barnard*, the appellate court held that the trial court correctly modified a maintenance award where the movant's job change was partly motived by concerns over job security. *Barnard*, 283 Ill. App. 3d at 372. Similarly, in *Kowski*, the appellate court *reversed* a trial court's denial of modification where the movant's decision to leave a job for a salary of one-half of what he had been making was motivated by job security concerns. *Kowski*, 123 Ill. App. 3d at 816. Here, Steven's concerns find support in the record, namely that: (1) Steven had been asked (apparently twice) to leave firms because of circumstances that had not changed as of the time of trial; (2) despite his experience, Steven spent almost six months applying for numerous jobs and received only one offer; (3) Steven had partly relied on a contact within the Inspector General's office to obtain the position and, due to mutual acquaintances within the profession, actively seeking alternative employment might come to his employer's attention and to that of the contact who had worked on his behalf; and (4) if the Inspector General's office learned that Steven was not interested in remaining employed long-term, it presumably would not, in a depressed economy, have difficulty replacing Steven. Further, Steven's motivation for job security was heightened by the fact that his

current position provides extensive benefits, including affordable health care for his children, a consideration that surely weighs in his favor in a good-faith analysis. Finally, Steven's concern for job security included his perception that, if he stayed in the job, he would have the opportunity to advance and increase his current income. The court glossed over Steven's hope for advancement within the office, suggesting that Steven's aspirations to be promoted to a $110,000 salary within the office did not reflect a good faith interest in improving his position, whereas, if he quit or *lost* that job to seek a $150,000 annual salary his efforts would, in contrast, reflect good faith. We think such a finding is arbitrary.

We also note that much of the court's expressed rationale for its determination that Steven acted in bad faith was based either on a misapprehension of the record or on alleged facts outside the record. For example, the court stated that it found that Steven "sat back," did not want to "bust his butt," enjoyed and was content in the Inspector General job because it is "easier," that Steven is "happy earning $70,000," and that Steven showed no indication of wishing to "improve his position at least as long as he had an obligation for maintenance and possibly for support as well." With respect to Steven's alleged disinterest in earning more money than Debra, Steven's counsel confronted the court with the fact that it had confused the factual circumstances and, in fact, that Steven had obtained his position with the Inspector General *before* Debra had obtained her attorney position and, therefore, he could not have been motivated to make only the same amount. The court then altered its explanation, couching the foregoing comments as constituting credibility or demeanor evaluations. In fact, the court's comments were factual findings with no support in the record. The court did not, based on demeanor or after weighing conflicting witness testimony, simply disbelieve Steven's explanations. Rather, the court on its own speculated as to why Steven might appear

"content," none of which were in the record. Steven was never asked if he even *likes* his new job, let alone did he testify that he finds it easier, that it is less pressure, that he enjoys making $70,000 per year, that he did not want to "bust his butt," or that Debra's employment or lack of employment in any way influenced his failure to, in the court's view, adequately seek to improve his position. While demeanor may certainly be used to evaluate evidence, it is not, itself, evidence. Here, the court attributed to Steven motivations and beliefs not in the record and then used those findings as a basis for ruling that modification was unwarranted because Steven did not act in good faith.

Again, the record reflects that Steven does not want to jeopardize his job security and health insurance, that he continues to monitor the job market, that he hopes to advance his position and salary, and that he informed his employer of his desire to be considered for higher positions. In short, the court's finding that Steven did not act in good faith (assuming this consideration is relevant in the context of an involuntary employment change) was apparently derived from either outside the record or a misapprehension of the record. Accordingly, its conclusion on this basis that maintenance should not be modified was an abuse of discretion.

3. Maintenance was Contractual

The third basis expressed by the court for its refusal to modify maintenance was that maintenance was bargained for as part of the settlement agreement. Again, several of the court's findings in this regard are belied by the record.

It is undisputed that the parties anticipated in their settlement agreement that the unallocated support obligations would include a maintenance component. Under the Act, parties may enter into written agreements addressing support obligations and, further, may expressly preclude or limit modification of those support terms. 750 ILCS 5/502(a), (f) (West 2008). Here, the parties entered

into an agreement concerning support, but they did not expressly preclude modification. To the contrary, as acknowledged by the court, the parties clearly contemplated (and the agreement expressly provided) that maintenance *would* remain reviewable and modifiable. It is well-settled that a change in economic circumstances is one event that may warrant a review or modification of maintenance obligations. *Brent*, 263 Ill. App. 3d at 922. The agreement here, while entered into in consideration of the promises within, based the support obligations upon a specific salary—a salary that no longer existed. Thus, it seems apparent from the agreement that modification was reviewable based on a substantial change in circumstances, including economic circumstances.

The court, however, viewed the fact that the provision remained reviewable as follows: "the reviewable part was, you know, if it went up or down by percentages, whether it's 10, 20, even 30 percent. I don't think it anticipated nor the parties anticipated a drop in income that was 65 percent, as opposed to something that would ordinarily be modifiable." Quite simply, there is no basis in the record for the court's assumptions. Nothing in the testimony or the agreement itself supports the court's finding that the parties anticipated a change in support if circumstances changed only mildly, not drastically. Setting aside the fact that modification of support is logically more necessary the more "substantial" the change in circumstances, the court's conclusion is not supported by testimony or the agreement itself.

Nor is there any specific evidence that Debra "gave up" something to receive support. The only support the court mentioned for this finding, and its finding that Debra performed under the agreement but that Steven now wants her to give up what she bargained for, was that, in the property settlement, Debra paid Steven $85,000. But what Debra apparently "bargained for" in that transaction was that, if she paid Steven $85,000, she would receive the marital home and Steven's name would

be removed from the deed. In that vein, she received what she bargained for and Steven was not asking her to return the house. In any event, there is nothing in the record reflecting that the provisions regarding the house were specifically tied to the maintenance provision, whereas the maintenance provision *was* specifically linked to Steven's salary as it existed when the agreement was made. Debra notes that the introduction to the agreement provides that the entire agreement was entered into in exchange for the consideration therein. Yet, by suggesting that entering into a global marital settlement agreement results in a bargained-for maintenance amount that is *fixed* is to ignore the fact that the provision was expressly modifiable.

4. Conclusion

The foregoing reflects that Steven's loss of employment was involuntary and constituted a substantial change in circumstances. The court abused its discretion in denying modification of the maintenance obligation because its expressed reasons for the denial were contrary to the manifest weight of the evidence. As such, we reverse the court's denial of the modification of the maintenance obligation and remand the cause with instructions to redetermine Steven's maintenance obligation consistent with the views expressed in this court's opinion. We note further that, in determining an appropriate modification, the court should consider the factors set forth in section 510(a—5) of the Act.

C. Attorney Fees (Issues 3 and 4 on Appeal)

Steven next argues that the court erred in ordering him to pay section 508(b) attorney fees. Steven argues that attorney fees under that section may be awarded only if his failure to pay "the judgment" was without compelling cause or justification. He asserts that he clearly did not violate the dissolution judgment without compelling cause or justification; indeed, he notes, the court found

that the judgment should be modified retroactive to June 1, 2009, due to his inability to pay the full amount of unallocated support as of that date. However, the court the proceeded to find that his failure to pay the full amount after June 1, 2009, was without compelling cause or justification, because he did not correctly "guess" the amounts to which the court would modify the support payments. Further, Steven argues the court erred in awarding fees on the basis that it had found him too content in his current job and that his failure to seek a better paying job was in bad faith. He argues that section 508(b) of the Act limits an attorney fees award to a finding that there was, without compelling cause or justification, a failure to comply with the judgment.

Debra argues that the trial court was well within its discretion to award $5,400 in attorney fees, noting that she had requested $32,000 and that Steven's counsel agreed that, if fees were awarded, $2,300 would be appropriate. Thus, she asserts, the question is whether the court abused its discretion in awarding the difference, *i.e.*, $3,100 ($5,400 awarded - $2,300 conceded). She argues that the court's rulings were not inconsistent and that the attorney fees were not awarded due to Steven's underemployment but, rather, because he unilaterally made decisions that put more pressure on her to support the family. Debra concludes that the court's finding that Steven's failure to pay was without compelling cause or justification was supported by the record, particularly in light of the court's findings that Steven's demeanor and manner in testifying reflected a hostile attitude, and that he had made unilateral payments and expressed no drive to find a higher-paying job. We disagree.

The problem here is not the amount of attorney fees awarded but, rather, that fees were awarded at all. Section 508(b) of the Act provides, in relevant part, "in every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against

whom the proceeding is brought to pay promptly the costs and reasonable attorney's fees of the prevailing party." 750 ILCS 5/508(b) (West 2008). Here, the court agreed that Steven's failure to pay the full amount under "the judgment," which could only have been the dissolution judgment, was not without just cause. The court acknowledged that Steven could not pay the full amount under the judgment ("he wouldn't have to guess at all if he paid the full amount. He couldn't do that").

Nevertheless, the court found that Steven had not paid a sufficient amount toward support as determined in its *modified* judgment at trial that it dated retroactive to June 1, 2009. In other words, the original judgment was out of the picture because Steven did not fail to pay the full amount under that judgment without justification. But, after June 2009, Steven paid less than the amount the court would later figure to be appropriate. In essence, Steven was found to have acted without compelling cause or justification because the payments that he made did not correctly anticipate what the court, 10 months later, would find warranted.[9] The court's ruling effectively creates an unworkable standard; namely, that a party may be held responsible for attorney fees *not* for violating the judgment in effect at the time, but for not correctly anticipating what the court's ruling on a petition to modify will be and whether the court will retroactively date the order. We do not think that section 508(b) anticipates such a result.

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[9] We note that, while the record is a bit unclear, it appears that the trial court criticized Steven for paying only 28% of his current salary toward his support obligation (finding Steven unilaterally calculated child support obligations and paid in the nature of 28% whereas, had he paid closer to 50% the court would have given him the benefit of the doubt), but, in fact, the trial court modified Steven's child support payment to exactly 28% of his salary. Thus, it appears that Steven's "guess" was not always wrong or completely misguided.

In *Lavelle*, the appellate court reversed the trial court's ruling that found the payor spouse in contempt, holding that a review of the record reflected that nonpayment was due to a lack of sufficient income, not a wilful and contumacious act. *Lavelle*, 206 Ill. App. 3d at 613-14. Next, the court reversed the trial court's award of attorney fees to the recipient spouse, noting that fees may *only* be awarded when the failure to comply with the support order was without cause or justification and "because we have found that respondent was justified in not making child support payments, we likewise find that the trial court erred in awarding attorney fees to petitioner." *Id.* at 614. Similarly, here, Steven's failure to pay the full amount under the judgment was justified—he was involuntarily terminated from his job. It is for this very reason that he was *not* found in contempt of court. For the same reasons, we conclude that the court abused its discretion in finding that Steven's failure to pay the full amount under the *modified* judgment was without compelling cause or justification.

Debra points out that the court imposed fees in part because it found that Steven's failure to pay burdened her with more responsibility to support the children. First, again, the issue is whether Steven's failure to pay under the judgment existing at the time was without compelling cause or justification—the court acknowledged that Steven's involuntary loss of employment rendered him unable to pay and, therefore, that his failure to pay was not without cause. The inquiry should end there. Second, regarding the burden to Debra, we disagree that the record justified attorney fees on this basis.

We acknowledge that, if circumstances were such that Debra continued in her employment *and* Steven had not lost his job, Debra would be receiving not only her salary but also the $6,800 monthly support payment. Accordingly, Steven's decrease in income and resulting inability to fully pay under the agreement negatively altered the monthly amount Debra receives. However, the court

appeared to focus on Debra's new responsibilities as resulting solely from Steven's job change; it did not appear to give due consideration to the fact that Debra's job search began before she learned of Steven's termination, before a single support payment was lower than required under the judgment, and that the loan she obtained from her mother in February 2009 was not, as she states on appeal, to make ends meet in light of Steven's unilateral decisions, but, rather, was borrowed *prior* to a reduction in any payment from Steven and was for the purpose of home repairs. The court found "to her credit" that Debra got a job, but only reluctantly agreed that, under the judgment, Debra was *obligated* to seek employment beginning in January 2009. Moreover, in faulting Steven for unilaterally paying only what he felt appropriate after the "catastrophic change that nobody foresaw" and while his petition to modify the obligation was pending, the court did not seem to account for the fact that, despite his reduction in salary in March 2009, Steven depleted his savings to make the full support payments until June 2009 and continued thereafter to make payments toward the obligation and to pay pursuant to the judgment the children's unpaid medical expenses, daycare expenses, etc. Thus, we disagree that, where Steven's economic situation was involuntary and Debra was obligated to seek employment, Steven's subsequent unilateral decisions and reduced payments rendered his failure to pay under the original judgment without compelling cause or justification. See *In re Marriage of McGuire*, 305 Ill. App. 3d 474, 479, 482 (1999) (affirming a trial court's refusal to impose attorney fees where husband showed compelling cause for falling behind in his maintenance payments—namely, that he was not making enough money to pay them, his economic circumstances were not self-imposed, the trial court had not held him in contempt, and, while unilateral decision to *stop* making payments was unwise, the court had not found it warranted fees); see also *Faris v. Faris*,

142 Ill. App. 3d 987, 1003 (1986) (husband's unilateral reduction of support did not warrant finding that failure to comply with judgment was without compelling cause or justification).

For the foregoing reasons, we reverse the court's attorney fees award.

III. CONCLUSION

The judgment of the circuit court of Du Page County denying Steven's petition to modify the maintenance portion of unallocated support is reversed and the cause is remanded for a determination of Steven's maintenance obligation consistent with this opinion. The attorney fees award is reversed.

Reversed; cause remanded.