2012 IL App (2d) 100681-U
No. 2-10-0681
Order filed February 1, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF	)	Appeal from the Circuit Court
THOMAS G. DILLAVOU,	)	of Du Page County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 99-D-2222
	)	
KATHLEEN M. DILLAVOU,	)	Honorable
	)	James J. Konetski,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justice Burke concurred in the judgment.
Justice McLaren concurred in part and dissented in part.

ORDER

Held: The trial court did not err in denying petition for contribution to educational expenses or in finding that an IRA distribution was not income. However, the trial court did err in considering carryover losses in determining net income relative to a request for back child support.

¶ 1 The petitioner, Thomas Dillavou, and the respondent, Kathleen Dillavou, were married in 1989 and divorced in 2002. In 2009, Kathleen filed a petition to increase child support, a petition for contribution to educational expenses, and a rule to show cause for Thomas's failure to abide by certain provisions of the dissolution judgment. On April 13, 2010, following a hearing, the trial

court granted Kathleen's petition to increase child support but denied her petitions for contribution to educational expenses and for a rule to show cause. On June 1, 2010, the trial court denied Kathleen's motion to reconsider. Kathleen appeals from these orders. We affirm in part, reverse in part, and remand for additional proceedings.

¶ 2 I. BACKGROUND

¶ 3 On January 31, 2002, a judgment for dissolution of marriage was entered dissolving the parties' marriage. The judgment provided, in part, that Thomas would pay $765 per month in child support, a sum which represented 25% of his then net monthly income of $3,060.00. The judgment further provided as follows:

> "In addition to the base sum of $765.00 per month as set forth hereinabove, THOMAS agrees to pay to KATHLEEN an additional twenty-five (25%) percent of his net earnings on net income received from all sources including, but not limited to, bonuses, commissions and other payments of compensation received hereafter, for so long as THOMAS has an obligation to pay child support. Said additional child support shall be payable within (7) days of the end of each calendar quarter. In order to provide verification that THOMAS is in compliance with the child support provisions of this AGREEMENT, THOMAS shall provide to KATHLEEN written verification of income, including wage check stubs, commission, bonus payment stubs and the like, on a quarterly basis to be provided each year for so long as THOMAS shall pay child support ***."

Finally, the judgment provided that Thomas would maintain a $450,000 life insurance policy for the benefit of the children. Pursuant to the judgment, Thomas was to provide annual verification of the existence of that life insurance policy.

¶ 4 In 2009, Kathleen filed a petition to increase child support and a two-count petition for indirect civil contempt of court. There are no file-stamped copies of these petitions contained in the record on appeal. However, the record indicates that these petitions were filed on April 9, 2009. A non-file-stamped copy of the petition for indirect civil contempt of court was attached as an exhibit to Kathleen's later-filed motion to reconsider. However, the record does not contain a copy, either file-stamped or non-file-stamped, of the petition to increase child support. Nonetheless, the record indicates that the basis of that petition was a substantial change in circumstances as the parties' children were older and the statutory minimum child support guideline had increased from 25% to 28%.

¶ 5 Based on the non-file-stamped copy of the petition for indirect civil contempt of court, Kathleen argued, in count I, that Thomas had failed to comply with the dissolution judgment because he had failed to provide written quarterly verification of his income and had failed to pay to her the additional "25% of his net earnings on net income" within seven days of each calendar quarter. In addition, Kathleen argued, in count II, that Thomas violated the dissolution judgment by failing to provide proof of the required life insurance policy. Kathleen's prayer for relief requested that Thomas provide an accounting of his income since the dissolution of marriage and proof of life insurance. Kathleen also requested that Thomas be ordered to pay the additional child support with interest and pay her attorney fees incurred in filing her petition.

¶ 6 On April 28, 2009, Thomas filed responses to both petitions, essentially denying all the allegations. On that same day, Thomas also filed a petition to decrease child support. The basis of the petition was a substantial change in circumstances as the parties' oldest child had reached the age

of majority. Thomas requested that his child support obligation be reduced to 20% of his net income.

¶ 7 On June 1, 2009, Kathleen filed a petition for contribution to educational expenses. The petition indicated that the parties' oldest child, Kourtney, had graduated high school and would be attending Ball State University in Indiana. Kourtney's estimated annual college expenses were $33,000. Kathleen alleged that Thomas earned in excess of $200,000 per year. Kathleen indicated that she was currently earning only disability compensation of approximately $1,350 per month. She requested that Thomas be ordered to pay all reasonable and necessary expenses for Kourtney's college education.

¶ 8 Hearings were held on the foregoing petitions on December 3, 2009, and February 19, 2010. Thomas testified that he was a commodity trader. He had paid additional sums in child support beyond the base $765 per month. For instance, he paid $700 for his son to take the ACT, he purchased a car for his children, and he paid for their auto insurance. Thomas acknowledged that his 2006 income tax return indicated he had a net operating loss carryover of $160,900. He had both short- and long-term capital gains of $70,899. In that same year, he also received a distribution of $45,000 from an IRA. Due to the net operating loss carryover, he did not have to pay taxes on his short- and long-term capital gains or on the IRA distribution. He gave Kathleen an unsigned copy of his tax return. He did not provide Kathleen with any other written verification of his 2006 income.

¶ 9 Thomas further testified that, in 2007, he had short-term capital gains of $41,679 and long-term capital gains of $62,519. Part of the capital gains were due to a loan. He offset the capital gains with an $85,096 carryover loss from previous years. He ultimately paid income tax on $5,406.

He never advised Kathleen that he had income in excess of $3,060 per month in 2007. Thomas acknowledged that his 2008 tax return indicated that he earned $55,000 in wages, made $144,836 in capital gains, and took a $9,186 carryover loss. The record indicates that Thomas incurred $78,791 in business expenses. Thomas acknowledged, therefore, that he had an adjusted income of $112,699 in 2008. He never informed Kathleen that he had income in excess of $3,060 per month or made any additional child support payments.

¶ 10 Thomas testified that he started working for Webster Capital on January 1, 2008. However, he still traded for himself for about four months of that year. After April 1, 2008, he traded only for Webster. As a Webster Capital employee he was paid an annual salary of about $55,000 with the potential to earn bonuses. Bonuses were generally paid March 31st and October 31st each year. As of the hearing date, Thomas had not earned any bonuses in 2009.

¶ 11 Thomas further testified that, pursuant to the judgment for dissolution, he had an obligation to provide life insurance of $450,000. At the time of the hearing, he had life insurance with General American in the amount of $204,000, and with Minnesota Life in the amount of $250,000. The Minnesota Life policy was effective on July 7, 2009. The General American policy was originally acquired at the time of the divorce in the amount of $300,000. A second policy with General American was also acquired at the time of the divorce in the amount of $150,000. At some point, the amount of the $300,000 policy was lowered without his knowledge and the $150,000 policy was stopped.

¶ 12 Thomas testified that from 2002 to the present, he had never earned more than $3,060 per month. Throughout that time he rented an apartment for $1,800 per month, he belonged to the Lake Shore Athletic Club ($40/month), he drove a 2007 Jetta ($420/month), and took an annual weekend

trip to see the Cubs at spring training. He also had Cubs' season tickets that cost about $3,000 per year. Thomas estimated his monthly expenses at $5,500. He had $32,000 in credit card debt. He provided oral and handwritten quarterly updates to Kathleen that indicated he was not earning more than $3,060 per month.

¶ 13 On cross-examination, Thomas testified that in 2006 he had to cash in his IRA to make his child support payments. He was awarded the IRA as part of the 2002 divorce settlement. He paid penalties for cashing it in. Between 2002 and 2009, Kathleen never demanded quarterly reports of his income. Since he started working for Webster Capital in 2008, he had never received a bonus. He never missed a child support payment. He cashed out his IRA, took two loans from his parents, and incurred credit card debt so that he could stay current on his child support payments.

¶ 14 The first loan from his parents was in 2004 and the second in 2006. His parents transferred stock to him both times. When he sold the stock in those years he received about $82,000 and $81,000, respectively. He paid capital gains on the transactions. Written loan agreements with his parents indicated that he was to repay the loans at 1% interest by making monthly payments of $765 starting July 2, 2010 (his youngest son's 18th birthday). Although he sold the stock in 2004 and 2006, he declared the capital gains in 2008 because his carry-forwards were all used up. Accordingly, both loans showed up as income in 2008. He used the loans to pay child support and for his own living expenses. Finally, Thomas admitted his 2009 federal tax return into evidence. The return indicated that he earned $60,000 in wages and $4,459 in other income ("1099 income"). His salary for 2010 was $5,000 per month.

¶ 15 John Richards testified that he had known Thomas for 23 years. Richards was currently an investment manager for Webster Capital Partners, LLC. Richards was one of the LLC's two

members. Thomas started sharing office space with Webster in 2004 and became employed by Webster in 2007. Webster paid Thomas wages and any additional compensation was reported on a 1099 form. In 2009, Webster paid Thomas $44,000 in wages and Richards, personally, paid Thomas $16,000 in wages. Richards believed that Thomas was issued a 1099 bonus commission in April 2009. Richards believed that Thomas earned just over $100,000 in 2008 and was likely to earn just under $100,000 in 2009. He believed Thomas earned around $130,000 in 2007. Thomas was the lowest paid in the group because he contributed the least and spent the least amount of time in the office. Finally, Richards testified that Thomas did not fund trading accounts with his own money, Richards had no side agreements with Thomas, and Thomas did not have any interest in Webster.

¶ 16 Robert Dylla testified that he was a licensed certified public accountant. He had been licensed since June 1979. He had a bachelor's degree in accounting and a master's degree in taxation from DePaul University. Dylla's curriculum vitae was entered as an exhibit and he was accepted as an expert in taxation. Dylla testified that he reviewed Thomas's tax returns from 2003 to 2008. Dylla completed a written report, Exhibit No. 22, dated November 10, 2009. Dylla testified that Thomas's 2008 income was $106,752, which included wages and trading income. Dylla further testified that, taking into consideration $104,198 in trading income, $13,973 in trading losses, and $8,981 for self-employed health insurance, Thomas's 2007 trading income was $81,244. The IRS allowed self-employed taxpayers to deduct the cost of health insurance as an adjustment to income. In 2006, Thomas had trading losses of $41,000. This was based on $17,205 in trading income, $44,332 in expenses, and a health-insurance deduction of $14,754. Pursuant to Dylla's report, Thomas had a positive trading income in 2003, 2007, and 2008.

¶ 17 Dylla further testified that he did not include carryover losses when determining Thomas's income. Dylla explained that a net carryover loss was a loss carried over from a previous year and was used to offset the current year's income. It was a tax benefit, not an out-of-pocket expense. He acknowledged that carryover losses were actual trading losses. However, there were limits on how much of a loss could be claimed in a given year. Carryover losses were cumulative and could be carried over from year to year to year. Thomas's 2003 carryover losses could have been from 2002 or even earlier. Thomas's entire 2004 net operating carryover loss of $92,426 came from 2003. Of the $150,976 net operating carry forward loss in 2005, $92,426 of that loss was from 2004 and $58,000 was from 2005. The 2006 net operating carryover loss of $160,000 represented carryover losses of $92,426, $58,000, and $10,000, from 2004, 2005 and 2006, respectively. In 2007, Thomas used up most of his net operating carryover losses from prior years. He carried $9,000 over into 2008. At that point, Thomas used up all his operating losses.

¶ 18 Kathleen testified that she had never received quarterly statements of income from Thomas or additional child support payments. She never received proof of life insurance. About once a month, she would ask Thomas for quarterly statements of income. Around January of every year she would ask for proof of life insurance. Around spring break, prior to Kourtney's high school graduation, she talked to Thomas about contributing to college expenses. Kathleen testified that Kourtney had graduated high school and was attending Ball State University. Kourtney's annual college expenses were $33,000. Part of the cost was offset by financial aid, loans, and scholarships. Kourtney owed about $10,440 in loans.

¶ 19 Kathleen further testified that she did not work. She had been on permanent social security disability since 2004. She received $1,086 per month for herself and $543 per month for her son,

Travis. Travis was five months away from his 18th birthday. At the time of the dissolution her children were 9 and 10 years old. At the time of the hearing, they were 17 and 19. Food and clothing costs had substantially increased since the dissolution.

¶ 20 On April 13, 2010, the trial court issued a written order. The trial court granted Kathleen's petition to increase child support. The basis for the increase was that the expenses for the children had increased as they grew older and Thomas' annual income had increased from $36,720 in 2002 to $49,660 in 2009. The trial court increased the child support from $765 to $827 per month, retroactive to the time that Kathleen filed her petition. The trial court denied Thomas' petition to decrease child support.

¶ 21 Relative to the petition for rule to show cause, the trial court found that although Thomas had not provided documentation related to his income or consistently had the proper life insurance, Thomas had provided the information at trial and had obtained the proper amount of life insurance. Because Thomas had ultimately complied with the requirements of the dissolution judgment, the trial court found that there was no reason to hold Thomas in indirect civil contempt of court. Nonetheless, the trial court found that the failure to comply was without cause or justification and granted Kathleen leave to seek attorney fees pursuant to section 508(b) of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/508(b) (West 2008)).

¶ 22 The trial court also found that Thomas did not owe any amount in additional child support. The trial court noted that, by the parties' agreement, Thomas did not earn above $36,000 per year in 2004 or 2005. The trial court further found that carryover losses were trading losses actually incurred and that it would be inequitable to ignore those losses when determining net income. Specifically, the trial court noted:

> "The Court feels [the failure to consider carryover losses would] be largely inequitable to [Thomas] because it would redistribute losses retroactively while Section 510 of the [Dissolution Act] would not allow for [Thomas] to file a Petition to modify child support for those prior years. There also may very well have been periods of time when applying the then current losses to the then current income would have resulted in a decrease in the amount of child support payable to [Kathleen]."

The trial court further concluded that Thomas's 2006 IRA distribution could not be considered income for child support purposes. The trial court noted that the IRA was a marital asset awarded to Thomas pursuant to the dissolution judgment and that to include it as income would result in "an impermissible double counting of the IRA as both asset and income."

¶ 23 Finally, the trial court denied Kathleen's petition for contribution to educational expenses. The trial court noted that it considered the factors set forth in section 513(b) of the Act. Based on Thomas's financial position and his limited retirement funds, the trial court concluded that Thomas was not able to contribute to his daughter's educational expenses. Following the denial of her motion to reconsider, Kathleen filed a timely notice of appeal.

¶ 24 II. ANALYSIS

¶ 25 At the outset, we note that Thomas argues that Kathleen has forfeited, for purposes of appeal, any issues related to child support. We note that Kathleen's notice of appeal stated that she was appealing from the June 1, 2010, order of the trial court that denied her motion to reconsider and from the April 12, 2010, order of the trial court that denied her "request for an increase in child support, payments of back child support, contributions to educational expenses and other requests." Thomas argues that Kathleen has forfeited review of the trial court's order on her petition to increase

child support because she failed to include a copy of that petition in the record on appeal. However, despite the broad language in her notice of appeal, Kathleen is not seeking review of the trial court's decision on her petition to increase child support. Rather, relative to child support, Kathleen seeks review only of the trial court's finding the Thomas did not owe any additional child support for the years 2003, 2006, 2007, and 2008.

¶ 26 Thomas also argues that Kathleen has forfeited any argument that the additional child support provided in the dissolution judgment should be based on net income as defined in Section 505 of the Act. Thomas argues that Kathleen failed to make that argument in the trial court. Nonetheless, although the parties did not directly argue as to how net income should be defined, the issue was indirectly raised when the parties argued as to Thomas's net income and whether any additional child support was due under the parties' dissolution judgment. Moreover, forfeiture is a limitation on the parties and not on this court. *In re Atul R.*, 382 Ill. App. 3d 1164, 1169 (2008). Accordingly, we decline to find any of the issues raised by Kathleen forfeited.

¶ 27 Kathleen's first contention on appeal is that the trial court erred in finding that Thomas did not owe any additional child support. Specifically, Kathleen argues that the trial court erred in considering carryover losses when determining whether any additional child support was due. Kathleen argues that the trial court erroneously considered net income from a federal income tax point of view rather than under the definition of net income found in section 505(a)(3) of the Act (750 ILCS 5/505(a)(3) (West 2008)). In response, Thomas argues that based on the plain language of the parties' agreement within the dissolution judgment, the requirement that he pay an additional 25% of his "net earnings on net income," meant that he should pay additional child support based only on his taxable income.

¶ 28 A marital settlement agreement that is incorporated into a dissolution decree is interpreted in the same manner as other contracts. *In re Marriage of Mulry*, 314 Ill. App. 3d 756, 758 (2000). The construction of a contract is a question of law, which we review *de novo*. *Id.* A court construes the settlement provisions within a dissolution judgment so as to give effect to the parties' intention. *Id.* at 759. When the terms are unambiguous, the court determines the parties' intent solely from the plain and obvious language of the instrument. *Id.* The instrument must be considered as a whole. *Id.* "An agreement is unambiguous when it contains language susceptible to only one reasonable interpretation." *In re Marriage of Culp*, 399 Ill. App. 3d 542, 547 (2010).

¶ 29 In the present case, the language of the settlement agreement is unambiguous as it is susceptible to only one reasonable interpretation. The agreement stated that Thomas would pay additional child support of 25% of "net earnings on net income received from all sources." The only reasonable interpretation is that the parties intended this phrase to mean net income as defined in the Act. Section 505(a)(3) of the Act defines net income as "the total of all income from all sources" minus certain specified deductions. 750 ILCS 5/505(a)(3) (West 2000). Those specified deductions do not include carryover losses. *Id.*

¶ 30 Moreover, our interpretation of the settlement agreement is supported by other language used in the agreement. The agreement set the base child support at 25% of Thomas's annual net monthly income of $3,060, in accordance with the requirement of section 505(a)(1) of the Act (750 ILCS 5/505(a)(1) (West 2000)), as it existed at the time of dissolution. This supports a determination that the parties intended that the additional child support be determined in accord with the requirements of the Act. In addition, the agreement stated that Thomas would provide written verification of his income and pay the additional child support on a quarterly basis. The fact that the additional child

support payments would be made on a quarterly basis suggests the parties did not intend "net earnings on net income" to mean net income for federal tax purposes because tax returns are generally filed annually, not quarterly. Furthermore, if the parties intended that the additional child support be based on federal taxable income, the parties clearly could have included such language in the agreement. Accordingly, the trial court erred in considering carryover losses as a deduction to Thomas's net income.

¶ 31 The trial court noted that it would be inequitable to divide Thomas's earnings into calendar year "snapshots." However, Dylla's testimony indicated that a portion of the carryover losses were incurred in 2002 or possibly earlier, before the dissolution of the parties' marriage. Thomas's 2003 federal income tax return indicates that he was able to offset a $135,000 capital gain with a long-term capital loss carryover of $225,000. It would be inequitable to allow a post-dissolution deduction for pre-dissolution losses as such losses would not have an actual impact on Thomas's post-dissolution income. Federal taxable income does not necessarily reflect a person's actual net income. *See In re Marriage of Rogers*, 213 Ill. 2d 129, 137 (2004) (the Internal Revenue Code does not govern what constitutes "income" under our legislature's statutory child support guidelines; it is designed to achieve different purposes than our state's child support provisions). Moreover, by agreement, Thomas does not owe any additional child support for 2004 and 2005. It would be inequitable for Thomas to use carryover losses from those years in which Kathleen agreed he did not realize any additional net income and did not owe any additional child support. Accordingly, the trial court erred in considering carryover losses as a deduction to Thomas's net income for child support purposes. We remand for additional proceedings wherein the trial court can make a finding as to

Thomas's net income for 2003, 2006, 2007, and 2008 and determine whether any additional child support should have been paid.

¶ 32 Kathleen's second contention on appeal is that the trial court erred in finding that Thomas's 2006 IRA distribution cannot be considered income for child support purposes. Whether disbursements from Thomas's IRA are "income" for purposes of calculating net income under section 505 of the Act is a question of law that we review *de novo*. *In re Marriage of Lindman*, 356 Ill. App. 3d 462, 465 (2005). Nonetheless, the trial court's net income determination and child support award lie within its discretion. *In re Marriage of Anderson and Murphy*, 405 Ill. App. 3d 1129, 1134 (2010).

¶ 33 In *Lindman*, this court addressed whether an IRA distribution can be considered income under the Act and held that "regardless of [a marital] property settlement, the disbursements [a] petitioner receives from his retirement account are income at the time they are paid." *Lindman*, 356 Ill. App. 3d at 469; see also *In re Marriage of Eberhardt*, 387 Ill. App. 3d 226, 232 (2008) (First District Appellate Court agreeing with *Lindman* that, as a matter of law, an IRA awarded to a spouse in a property settlement can be regarded as income when liquidated). We note that the *Lindman* court did discuss "a potential 'double counting' issue" that was not raised in that case. *Id.* at 470. The court indicated that improper double counting could occur if the earnings deposited in an IRA were counted as income both when they were earned and again when the earnings were later withdrawn. *Id.* The court noted that to avoid double counting in that situation, the court may have to determine what percentage of the IRA was considered income in the year it was earned and discount the net income calculation accordingly if the funds are later withdrawn from the IRA. *Id.*

¶ 34 In the present case, the trial court found that the IRA distribution should not be included in the calculation of income for child support purposes. The trial court noted that the IRA was allocated to Thomas at the time of dissolution and that to include it as income would result in an impermissible double counting. Pursuant to *Lindman*, the "double counting" issues arises if Thomas contributed to the IRA after the dissolution and the contributions were considered as income in calculating the base amount of child support. See id. at 470 (double counting is when, relative to net income for child support purposes, the money is counted on its way into and its way out of the IRA). Double counting does not arise merely because the IRA was allocated as part of the dissolution judgment. Nonetheless, we need not determine as a matter of law whether there was any improper "double counting". Even if consideration of the IRA distribution as income would not be improper "double counting," we still could not say that the trial court abused its discretion in finding that the IRA distribution should not be included as income for 2006. See *In re Marriage of Baumgartner*, 384 Ill. App. 3d 56-57 (2008) (even though proceeds of sale of residence qualified as income under the Act, trial court did not err in excluding the proceeds from income for child support purposes). Kathleen's expert Dylla, testified that even excluding carryover losses, Thomas had trading losses of $41,000 in 2006. Thomas testified that he had to cash in the IRA to pay for his trading losses, his living expenses, and his monthly child support obligation. The evidence showed that despite his fluctuating income Thomas never missed a child support payment. Under these circumstances, the trial court's determination was not improper.

¶ 35 Kathleen's final contention on appeal is that the trial court erred in denying her petition for contribution to educational expenses. Section 513 of the Act provides that a trial court may grant a petition for contribution to educational expenses for a non-minor child. 750 ILCS 5/513(a) (West

2008). In making any such award, the trial court should consider all "reasonable and necessary" factors, including:

"(1) The financial sources of both parents.

(2) The standard of living the child would have enjoyed had the marriage not been dissolved.

(3) The financial resources of the child.

(4) The child's academic performance." 750 ILCS 5/513(b) (West 2008).

Whether a parent should provide their children with funds for post-high school education is within the sound discretion of the trial court. *In re Marriage of Treacy*, 204 Ill. App. 3d 282, 287 (1990). A trial court must consider the party's ability, at the time of the order, to contribute to educational expenses and should not order a party to pay more for educational expenses than he or she can afford. *In re Marriage of Thurmond*, 306 Ill. App. 3d 828, 834 (1999).

¶ 36 In the present case, we cannot say the trial court abused its discretion in denying Kathleen's petition for contribution to educational expenses. In making its determination, the trial court considered the proper factors as set forth in section 513(b) of the Act. The evidence showed that Thomas, at the time of the order, was earning $5,000 per month. Thomas also testified that his monthly expenses were roughly $5,500. Moreover, the trial court noted that Thomas had only "modest" retirement funds. The foregoing evidence supports a finding that Thomas was unable to contribute to Kourtney's college expenses at the time of the order. As such, we affirm the trial court's determination. *See id.*

¶ 37 III. CONCLUSION

¶ 38 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed in part, reversed in part and remanded for additional proceedings not inconsistent with this order.

¶ 39 Affirmed in part and reversed in part; cause remanded.

¶ 40 JUSTICE McLAREN, concurring in part and dissenting in part.

¶ 41 I disagree with the majority's conclusion that the language of the marital settlement agreement regarding additional child support "is unambiguous as it is susceptible to only one reasonable interpretation." Supra ¶ 29. Moreover, I disagree that, if only one reasonable interpretation of that language can be made, it would be that discerned by the majority. Therefore, I must dissent from that part of the majority opinion.

¶ 42 First, the majority gives short shrift to Thomas' contention that Kathleen has forfeited the argument that net income, as defined in Section 505 of the Act, should be the basis of the additional child support calculation. According to the majority, "although the parties did not *directly* argue as to how net income should be defined, the *issue* was indirectly raised when the parties argued as to Thomas' net income and whether any additional child support was due under the parties' dissolution judgment." (Emphasis added.) *Supra* ¶ 26. This misses the point; an argument may not be raised on the first time on appeal because the trial court should consider the various bases in support of a party's contention, not just the ultimate issue. See *Benson v. Stafford*, 407 Ill. App. 3d 902, 919-20 (2010) ("Plaintiffs did not raise these alternative bases for a duty to speak before the trial court on summary judgment, and the trial court did not consider them in its decision."). Obviously, the trial court here considered the issue of additional child support and how to calculate it, but there is no indication that Kathleen ever raised the argument that Section 505 should be the basis of that calculation. Indeed, Kathleen only argues that there "was no dispute on the issue of the definition of 'net income' at the trial court level," and never even cites to a page of transcript or the common

law record to support her contention. If there was no dispute as to the meaning of "net income" below, how did the trial court come to a different conclusion, and why is it an issue here on appeal?

¶ 43 We do not search the record for reasons to reverse the trial court's judgment. See *Lopez v. Northwestern Memorial Hospital*, 375 Ill. App. 3d 637, 648 (2007). The majority seems to be looking pretty hard, addressing an argument that was not "directly" raised in the trial court and to which the appellant cannot provide a citation. While we may elect to address a forfeited argument to reach a just result (*Benson*, 407 Ill. App. 3d at 920), I am not persuaded that such an election is necessary or even warranted in this case.

¶ 44 The majority cites much of the usual boilerplate regarding contract interpretation to support its "one reasonable interpretation" conclusion, including the tenet that an instrument must be considered as a whole. *Supra* ¶ 28. However, the majority left out another tenet of interpretation often attached: a contract should be interpreted as a whole, "*giving meaning and effect to every provision when possible*, and a court will not interpret the agreement so as to nullify provisions or *render them meaningless.*" (Emphasis added.) *Board of Managers of Hidden Lake Townhome Owners Ass'n v. Green Trails Improvement Ass'n*, 404 Ill. App. 3d 184, 190 (2010). The agreement here stated that Thomas would pay additional child support of 25% of "*net earnings on* net income received from all sources." (Emphasis added.) By concluding that "net earnings on net income" can only be interpreted "to mean net income as defined in the Act" (*Supra* ¶ 29), the majority gives no meaning or effect to the phrase "net earnings on" and renders it meaningless. Inexplicably, the majority asserts that, if the parties intended that the additional child support be based on federal taxable income, they "clearly could have included such language in the agreement." *Supra* ¶ 30. The parties *did* include language that differentiated the method of calculation of the additional

support from that of the Act, and the majority completely ignored that language. Would the majority give any more consideration to any other provisions?

¶ 45 The phrase "net earnings on net income received from all sources" is not the clearest expression of intent. But that is the point. It is not unambiguous and capable of only one interpretation, especially the interpretation given by the majority. The trial court gave meaning to the language of the agreement by determining that the phrase meant something other than the net income calculation contained in the Act and concluding that carryover losses could be deducted from Thomas' net income to calculate any potential additional support. This conclusion is not against the manifest weight of the evidence or an abuse of discretion, and I would affirm the trial court's decision on this issue. Therefore, I must dissent.