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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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In re MARRIAGE OF	)	Appeal from the Circuit Court
STEPHANIE E. SZADY,	)	of Lake County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 13-D-1568
	)	
KENNETH J. SZADY,	)	Honorable
	)	Donna-Jo Vorderstrasse,
Respondent-Appellee.	)	Judge, Presiding.

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JUSTICE McLAREN delivered the judgment of the court.  
Justices Jorgensen and Burke concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court erred in its determination of income for purposes of a maintenance award. The court improperly: (1) excluded what it incorrectly found to be nonrecurring income; (2) relied on tax returns to determine income; and (3) disregarded all evidence of bank deposits as evidence of income. Reversed and remanded for further proceedings.

¶ 2 Petitioner, Stephanie E. Szady, appeals from the portion of the trial court's judgment of dissolution of marriage relating to the calculation of income of respondent, Kenneth J. Szady, for maintenance purposes. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 The marriage of Stephanie and Kenneth was dissolved on May 23, 2016. After a trial, Kenneth was granted sole custody of the parties' four teenage children. A separate trial on financial matters was held over approximately two weeks in late September, 2015. The trial court eventually awarded Stephanie statutory maintenance of \$6000 per month. However, Kenneth was authorized to withhold \$1000 per month as Stephanie's payment of child support to him until the termination of her support obligation.

¶ 5 Kenneth was a self-employed commercial real estate broker operating as Ken Szady Companies LLC ("KSC"). In 2012, KSC entered into an agreement with Cantor Fitzgerald ("Cantor") and Newmark, Grubb, Knight and Frank ("Newmark"), which is owned and operated by Cantor, whereby Ken could arrange financing for his commercial real estate clients through Cantor and would receive commission-based payments from Cantor. As part of the agreement, Kenneth received the opportunity to obtain optional grant awards of restricted equity units also known as BGC (Bernie G. Cantor) stock awards. The agreement also provided for a signing bonus and certain other monthly payments and reimbursements.

¶ 6 The agreement provided that the BGC stock awards "will have a Post-Termination Amount" of \$700,000. According to Kenneth, he could receive up to 20% of these awards, or \$140,000, each year of the agreement, "subject to the performance of the company and other metrics." The BGC stock would be deposited into a Raymond James account, where it would convert to a publicly traded stock which could then be sold. Kenneth testified that he received two grants, one in each 2014 and 2015, each of which was under \$100,000. He sold the stock "to pay for living expenses and legal fees" for the divorce in 2015, and the cash deposited into his Chase business account from the sale was \$60,000, "plus or minus." Kenneth also testified

that he could be awarded dividend income on unsold stock; such dividends would be paid into his Chase business account.

¶ 7 The trial court found Kenneth's testimony on the amounts of stock awarded to be "vague and uncertain" and that "there was minimal written evidence of what was received." There were other deposits into Kenneth's business account that Kenneth testified "could only be explained by the liquidation of stock," such as a July 2014 deposit of \$270,314 from Cantor. However, the only Raymond James account statements that had been presented were from 2015, and the statements indicated a sale of BGC stock on July 24, 2015 for \$55,194 that left a stock balance of \$16,584.

¶ 8 The court found credible Kenneth's testimony that he had used the proceeds from the sale of the stock to fund the extensive litigation as well as to pay for the children's expenses. The court also found that the exhibits related to the BGC stock substantiated Kenneth's claim that the stock awards were "discretionary and subjective with the company;" any future awards of the stock were "in the discretion of Cantor Fitzgerald and are based on Ken's work performance." Thus, the court found that the stock awards were "non-recurring income and will not be added to the calculation of Ken's income."

¶ 9 The trial court noted that "[t]he evidence regarding Ken's income occupied the majority of the trial and the exhibits and the closing arguments" of the financial trial. Because of "significant fluctuations" in Kenneth's income, the trial court found averaging his income to be appropriate. "However, the exact amount of annual income to be utilized for this calculation was a source of great controversy."

¶ 10 The trial court noted that Stephanie "relied heavily" on deposits to bank accounts and asset statements from 2007 and 2008 "to suggest that Ken was deceptive and was earning a great

deal more income than that to which he testified.” However, the court found that, “numerous times,” Stephanie was double-counting money moved from one account to another and counted as income expense reimbursement and liquidations of assets. The court placed “no evidentiary value” on Stephanie’s summary exhibit of Kenneth’s income.

¶ 11 The court also found Kenneth to be “not always credible” regarding his present income. In an instance occurring after the trial on finances, Kenneth moved to reopen proofs because he had received a U.S. Treasury income tax refund check for \$111,000, which had been endorsed and deposited into Kenneth’s bank account. Questions were raised about Kenneth’s knowledge and non-disclosure of the refund check, along with Stephanie’s endorsement on the check, about which she knew nothing. When questioned about Stephanie’s signature, Kenneth invoked his 5th Amendment right against self-incrimination. The court took a “negative inference” from this and found Kenneth “to not be credible” on this issue. However, the court found that, outside of the refund check, “most of [Kenneth’s] other testimony has proved credible.”

¶ 12 Ultimately, the trial court averaged the income reported on Kenneth’s tax returns from 2011 through 2013, which the court found to have been audited by the Internal Revenue Service, and estimates of Kenneth’s 2014 and 2015 income to reach an income for maintenance purposes of \$243,000. Applying the guidelines contained in section 504(b-1)(1)(A) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/504(b-1)(1)(A) (West 2016), the court ordered Kenneth to pay maintenance of \$6000 per month. Stephanie now appeals from this maintenance award.

¶ 13

## II. ANALYSIS

¶ 14 We first note that Kenneth has failed to file a brief in this appeal. Pursuant to *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill.2d 128, 133 (1976), we may

consider the merits of an appeal in the absence of an appellee's brief if “the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief.” Further, this court may reverse a trial court's judgment in the absence of an appellee's brief in cases in which “the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record.” *Id.* In analyzing the Indiana system of dealing with the lack of an appellee's brief, our supreme court quoted the following definition of *prima facie*:

“ ‘Prima facie means, “at first sight, on the first appearance; on the face of it, so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary.” [Citation.]’ ” *Talandis*, 63 Ill.2d at 132 (quoting *Harrington v. Hartman*, 142 Ind. App. 87, 233 N.E.2d 189, 191 (1967)).

¶ 15 Stephanie first contends that the trial court erred in calculating Ken's income for maintenance purposes by excluding BCG stock awards and relying on certain tax returns. section 505(a)(3) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/505(a)(3) (West 2010)) In general, a trial court's award of maintenance is presumed to be correct. *In re Marriage of Brill*, 2017 IL App (2d) 160604, ¶ 26. The amount of a maintenance award lies within the sound discretion of the trial court, and we will not reverse such a decision unless it is an abuse of discretion. *Id.* However, when the question is whether an item is income under section 505 of the Act, it is an issue of statutory construction and, thus, a question of law we review *de novo*. *In re Marriage of Shores*, 2014 IL App (2d) 130151 ¶ 24. “By extension, the *de novo* standard also applies to whether an item constitutes income for purposes of maintenance.” *In re Marriage of Ruvola*, 2017 IL App (2d) 160737, ¶ 18.

¶ 16 Stephanie first contends that the trial court improperly excluded Kenneth’s BGC stock awards from his income. Gross income, for maintenance purposes, is defined in section 504 of the Act as “all income from all sources, within the scope of that phrase in Section 505 of this Act. 750 ILCS 5/504(b-3) (West 2016). Section 505 of the Act, which addresses child support, defines “net income” as “the total of all income from all sources,” with specific deductions not at issue here. 750 ILCS 5/505(a)(3) (West 2016). As “income” is not separately defined in either section 504 or 505 of the Act, we will give it its plain and ordinary meaning. See *In re Marriage of Rogers*, 213 Ill. 2d 129, 136 (2004) (attempting to define “income” for purposes of section 505 of the Act).

¶ 17 Our supreme court has observed that the definition is broad, including gains and benefits that enhance a party’s wealth and (in the child support setting) facilitate that party’s ability to support a child or children. *Rogers*, 213 Ill. 2d at 137.

“As the word itself suggests, ‘income’ is simply ‘something that comes in as an increment or addition \* \* \*: a gain or recurrent benefit that is usu[ually] measured in money \* \* \*: the value of goods and services received by an individual in a given period of time.’ Webster's Third New International Dictionary 1143 (1986).” *Id.* at 136-37.

These gains and benefits “are normally linked to employment or self-employment, investments, royalties, and gifts.” *Mayfield v. Mayfield*, 2013 IL 114655, ¶ 16.

¶ 18 “All income from all sources” has been construed to include a wide variety of items: a one-time payment (*Mayfield*, 2013 IL 114655, ¶ 24; *In re Marriage of Pratt*, 2014 IL App (1<sup>st</sup>) 130465, ¶ 27); a parent's “pro forma” capital account to which his firm made allocations based on the firm's annual performance (*In re Marriage of Winne*, 239 Ill.App.3d 273, 285 (1992)); income from investments and bonuses from a closely held corporation (*In re Marriage of Olson*,

223 Ill.App.3d 636, 652 (1992)); potentially nonrecurring disbursements from an individual retirement account (*In re Marriage of Lindman*, 356 Ill. App. 3d 462, 467-68 (2005)); and gifts from parents (*Rogers*, 213 Ill.2d at 137; *Brill*, 2017 IL App (2d) 160604; *In re Marriage of Ruvola*, 2017 IL App (2d) 160737).

¶ 19 Our supreme court has held that payments that otherwise qualify as “income” under the Act are not to be excluded from consideration “merely because like payments might not be forthcoming in the future.” *Rogers*, 213 Ill. 2d at 138. “[T]he Act does not provide for a deduction of nonrecurring income in calculating net income for purposes of child support.” *Id.* at 138-39 quoting *In re Marriage of Hart*, 194 Ill.App.3d 839, 850 (1990). While the nonrecurring nature of an income stream is not irrelevant, the income “must be included by the circuit court in the first instance when it computes a parent’s ‘net income.’” *Id.* at 139. The court may consider evidence that shows that a party is unlikely to continue receiving certain payments in the future. *Id.* As our supreme court has said:

“Few, if any, sources of income are certain to continue unchanged year in and year out. People can lose their jobs, interest rates can fall, business conditions can wipe out profits and dividends. Accordingly, the relevant focus under section 505 is the parent’s economic situation at the time the child support calculations are made by the court. If a parent has received payments that would otherwise qualify as ‘income’ under the statute, nothing in the law permits those payments to be excluded from consideration merely because like payments might not be forthcoming in the future.” *Rogers*, 213 Ill. 2d at 138.

¶ 20 The trial court here extensively addressed the issue of the BGC stock and its relation to Kenneth’s income. The court first noted that it found “credible” Kenneth’s testimony that he

cashied in the stock in order to “sustain this litigation, which has included two trials and numerous motions; as well as to maintain the children’s expenses.” Thus, the court found that the “BGC stock asset was depleted” to achieve those aims. The court then found that the exhibits relating to the stock awards “substantiate” Kenneth’s argument that the awards “are non-recurring income, are discretionary and subjective with the company.” Any future stock awards “are in the discretion of Cantor Fitzgerald and are based on Ken’s work performance.” Thus, “the stock awards are non-recurring income and will not be added to the calculation of Ken’s income.”

¶ 21 This analysis is erroneous. The trial court rather nonchalantly labeled the awards “non-recurring” and seemed more concerned with Kenneth’s need to spend the proceeds of the stock awards on financing litigation and paying for the children’s home and activities than on the nature of the proceeds. However, the use of the funds is not at issue; generally, income is spent, and usually on maintenance of the family. The court merely stated that, since future awards are “in the discretion of Cantor Fitzgerald and are based on Ken’s work performance,” the awards were nonrecurring and would not be included in Kenneth’s income. However, as we have seen, “nonrecurrence” is insufficient to deduct a payment from “income.” In addition, the trial court’s finding that the stock awards were non-recurring itself was erroneous. The agreement with Cantor Fitzgerald was signed in March 2012 and provided the stock awards, potentially worth \$700,000, would vest over the next five years. Kenneth testified in September 2015 that he had received only two stock awards to that point and that each had been for less than \$100,000. At the time of Kenneth’s testimony, there still remained a year and a half of the agreement and the possibility of \$500,000 of awards. The failure to consider the BGC stock awards as income was error and requires remand for further calculation of income.

¶ 22 Stephanie next contends that the trial court erred in calculating Kenneth's income as it related to the maintenance award by relying on "audited" tax returns. The trial court stated that "[t]he IRS audited the business and personal tax returns of the parties, which included a detailed analysis of Ken's business records for 2011, 2012, and 2013." The court found these "audited personal and business tax returns are reliable evidence of Ken's income and business expenses for those years" because Ken "had to establish the legitimacy of all his business expenses and he was able to do so to the satisfaction of the IRS." The court noted that evidence of Ken's income for 2014 was limited, as his records for that year, along with his laptop, were stolen or destroyed, and it was "credible" that Stephanie removed or destroyed them. Regarding 2015, Ken provided a profit and loss statement through July 31; because of Ken's lack of credibility "regarding his present income," the court compared Kenneth's 2015 business expenses to exhibits for prior years and found them, in most instances, "consistent with the prior tax returns for 2011, 2012, and 2013." The court estimated Kenneth's adjusted gross income for 2014 at \$300,000 and for 2015 at \$275,000. The court then averaged Kenneth's income for the period of 2011 through 2015 and arrived at an adjusted gross income of \$243,000.

¶ 23 Stephanie first argues that the trial court's reliance on the tax returns as "audited" is misplaced. Stephanie points to multiple spots in the record in which Kenneth testified to an audit for the 2007 tax year that resulted in a tax lien in 2009 and, ultimately, the issuance of the \$111,000 check in 2015; however, she argues that, to the extent that the trial court relied on the 2011-2013 tax returns due to tax audits, "it is unclear which tax years were at issue."

¶ 24 Kenneth's testimony relating to tax audits is not precise. While much of the testimony was specific to the 2007 tax year, there are instances in which Kenneth referred to multiple years. When asked if the IRS audited his 2007 tax return, Kenneth replied that the IRS "automatically

audited for that and in future years.” At one point, when asked to which tax return he had testified when he stated that his return was “accurate,” he responded, “The one I filed through 2013 because they audited all of those up until that time, 2012.”

¶ 25 Although the testimony is not clear as to what exact years were audited, the trial court accepted them as “reliable evidence of Ken’s income and business expenses for those years,” not concrete evidence in its own right. The court compared 2014 and 2015 data to the 2011 through 2013 returns to determine that, in most instances, they were “consistent with the prior tax returns for 2011, 2012, and 2013.” Documents may be credible or incredible (see *Terminal-Hudson of Illinois, Inc. v. Goldblatt Bros., Inc.*, 51 Ill. App. 3d 199, 204-05 (1977)), and we will not substitute our judgment for that of the finder of fact on issues of credibility, weight to be given to evidence, or inferences to be drawn. See *Best v. Best*, 223 Ill. 2d 342, 350-51 (2006). The trial court heard all of the testimony regarding Kenneth’s tax returns and could have found that these returns were audited and reliable. We find no error in this finding or reliance.

¶ 26 Stephanie next argues that the trial court should not have relied on Kenneth’s tax returns because “tax-reported income does not provide conclusive evidence” of either gross or net income under the Act. While the use of Federal income tax returns is common in marital litigation, they are not conclusive as to ability to pay maintenance. *In re Marriage of McDonald*, 113 Ill. App. 3d 116, 118 (1983). As the Internal Revenue Code is designed to achieve different purposes from those of the Act, a variety of payments will qualify as “income” for purposes of the Act that would not be taxable as income under the Internal Revenue Code. *Rogers*, 213 Ill. 2d at 137. Here, other than the BCG stock awards (which the court improperly excluded), there is no evidence that the trial court considered whether the income and expenses that were appropriate for tax purposes were also appropriate for purposes of determining income for

maintenance. This outright reliance on the tax returns and the failure to analyze the income and deductions involved was error.

¶ 27 Stephanie also argues that the trial court erred in not considering Kenneth's bank statements in its determination of his income. According to Stephanie, looking at only deposits to Kenneth's personal (not business) accounts provides an average income of \$443,700 for the years 2011-2015, while the trial court calculated an average income of \$243,000. The trial court noted that Stephanie "relied heavily" on bank deposits and asset statements "to suggest that Ken was deceptive and was earning a great deal more income than that to which he testified." Noting that bank deposits "are not always the same as income" and that "[i]t was shown through the evidence numerous times that Stephanie was double counting moneys that had moved from one account to another, and that Stephanie was including expense reimbursements and liquidation of assets as income," the trial court placed "no evidentiary value" on Stephanie's Exhibit # 71, which was her summary exhibit of Kenneth's income.

¶ 28 Interestingly, the Exhibit Receipt for this case does not list a Petitioner's Exhibit # 71, and a search of the exhibits does not reveal one. However, the receipt shows many bank account statements and summaries of bank account statements as Stephanie's exhibits. On appeal, Stephanie presents multiple specific examples of deposits into Kenneth's personal accounts that she claims could not have been the result of double counting, asset liquidation, or business expense reimbursement. However, it is not the role of this court to retry the case and determine Kenneth's income; that is the role of the trial court. We can say that, even if some of Stephanie's attempts to prove income through use of bank deposits resulted in double counting and possibly the inclusion of some asset liquidations, not all such deposits are therefore incorrect or irrelevant. The trial court abused its discretion by disregarding bank deposits as possible evidence of

income and relying only on the tax returns. The court noted that it “had to work with the evidence presented” and that Kenneth’s “exact income is difficult to determine.” However, the court did not work with all the evidence that was presented, and that made the determination of Kenneth’s income less accurate and more difficult.

¶ 29 Stephanie has made a *prima facie* case that the trial court erred in calculating the income upon which her maintenance was to be based. Therefore, we reverse the judgment of the trial court as it relates to Kenneth’s income and the award of maintenance to Stephanie, and we remand the cause for further proceedings on those issues.

¶ 30 III. CONCLUSION

¶ 31 For these reasons, the judgment of the circuit court of Lake County is reversed, and the cause is remanded for further proceedings as to the issue of maintenance.

¶ 32 Reversed and remanded.