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THIRD DIVISION
August 24, 2016

NOS. 1-15-0031 & 1-15-0421 (cons)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

In re the Marriage of:)
SARAH J. NOLAN,) Appeal from the
) Circuit Court
) of Cook County,
) Illinois.
)
)
) No. 11D1358
)
)
) The Honorable
) Renee Goldfarb,
) Judge Presiding.
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JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concur in the judgment.

ORDER

¶ 1 Held: In dissolution of marriage case, maintenance order is affirmed; portion of judgment of dissolution requiring wife to remain as co-trustee of irrevocable family trust although terms of trust grant husband exclusive power to name and/or remove trustee is stricken from language of judgment of dissolution. Affirmed as modified.

¶ 2 Respondent Thomas Nolan appeals from the trial court's judgment for dissolution of his marriage to petitioner Sarah Nolan. Thomas contends that the trial court erred by: (1)

ordering him to pay permanent maintenance to Sarah in the amount of \$52,000 per month; and (2) ordering Thomas not to remove Sarah as trustee from an irrevocable family trust. For the following reasons, we affirm as modified.

¶ 3

BACKGROUND

¶ 4

The parties were married in Massachusetts in 1989. They have three grown children together: twin boys CN and RN, who were born in 1993, and a daughter, MN, who was born in 1996. Sarah filed a petition for dissolution of marriage in 2011, alleging irreconcilable differences. Thomas filed a counter-petition for dissolution of marriage three months later, also alleging irreconcilable differences.¹ Sarah then filed an amended petition for dissolution of marriage in July 2011.

¶ 5

In November 2011, the court entered a custody judgment that incorporated the parties' joint parenting agreement (JPA). As of May 2014, all three children are emancipated, and the JPA and custody judgment are not at issue herein.

¶ 6

In December 2014, following a 20-day trial, the circuit court of Cook County entered a 58-page memorandum order dissolving the 25-year marriage of Sarah and Thomas. In addition to dissolving the marriage, the court made findings of fact regarding the value of the couple's estate and distributed the marital estate between the parties. The details of this distribution are discussed herein.

¶ 7

In the early stages of the couple's marriage, Thomas worked as an accountant and Sarah worked as an event planner. Sarah graduated from Holy Cross with a bachelor's degree and then, after college and before the marriage, held various jobs including working as a hotel concierge, hotel assistant guest services manager, conference coordinator, and

¹ This petition was eventually dismissed.

event planner. Her last job before marriage was with Summit Technologies as an international event planner. She traveled extensively for the job. Her highest annual salary was \$24,000. Following the birth of their twins in 1993, Sarah left the paid workforce to stay home with the children. Thomas then worked for a series of companies, eventually becoming the chief executive officer of Spirit Realty Capital Inc. in 2011, a position he still held at the time of trial.

¶ 8 The parties' income grew substantially throughout the 25-year marriage. Their 1989 federal income tax return, included in the record on appeal, reflects combined wages that year of \$126,248. Of that, Sarah's wages comprised \$24,000. Their federal income tax returns reflect the following approximate income, including capital gains and/or losses: 1990: \$183,200; 1991: \$241,400; 1992: \$244,700; 1993: \$293,000; 1994: \$339,700; 1995: \$331,800; 1996: \$378,000; 1997: \$916,600; 1998: \$2,003,000; 1999: \$2,709,000; 2000: \$3,958,000²; 2001: \$2,712,400³; 2002: \$1,268,482; 2003: \$1,437,900; 2004: \$3,160,943⁴; 2005: \$3,685,800⁵; 2006: \$2,300,700⁶; 2007: \$2,539,000⁷; 2008: \$554,345⁸; 2009: \$3,668,900⁹; 2010: \$31,737,400¹⁰; 2011: \$23,145,200¹¹; 2012: \$4,609,000¹². The parties'

² This includes Thomas' wages of \$894,525, plus capital gains of \$1,315,811, plus Schedule E income of \$1,415,592.

³ This includes Thomas' wages of \$843,814, plus capital gains of \$1,798,833.

⁴ This includes Thomas' wages of \$640,753, plus capital gains in the amount of \$2,171,221, plus dividends and interest.

⁵ This is comprised of Thomas' wages of \$23,000, plus capital gains of \$1,452,370, and income from other sources.

⁶ This includes Thomas' wages of \$463,168, plus capital gains of \$1,301,333,

⁷ This includes Thomas' wages of \$48,698, plus capital gains of \$1,613,713, plus income from other sources, including \$137,145 from a limited partnership.

⁸ We note that, although the parties' income as reflected on their 2008 federal tax return was \$554,345, CPA Tom Levato, who was charged with establishing a historical spending analysis for the Nolans, testified at trial that their net cash flow from income was \$1,216,900 that year, and the family's total spending that year was \$922,674.

⁹ The bulk of this amount (\$3,575,990) is comprised of Thomas' wages and bonus.

2013 tax return had not yet been prepared at the time of trial, but Thomas' W-2 for 2013 reflects that he received \$5,682,945 in income, \$2,160,000 of which was comprised of salary and bonus.

¶ 9 The twins were born eight weeks premature in July 1993. Sarah was put on bed rest the month before their birth. The babies were hospitalized for about five weeks after their birth. One child had a heart condition requiring frequent cardiologist appointments for the first five years of his life. The other also had various health conditions, including difficulty breathing, which necessitated close monitoring. Sarah did not return to work following the twins' birth, but stayed home with the children. Both Thomas and Sarah testified at trial that Thomas never asked Sarah to return to the workforce. Sarah never returned to full-time employment during the marriage.

¶ 10 Thomas and Sarah purchased their first house, a 4,000 square foot home, in Massachusetts in July 1993 for \$446,000. They then undertook a significant renovation project, expanding the kitchen, removing the back portion of the house, expanding the family room, and installing a patio. Their daughter was born in January 1996.

¶ 11 In the year 2000 or 2001, the Nolans purchased a 3,000 square foot second home in a ski resort in New Hampshire.

¹⁰ This includes Thomas' wages and bonus in the amount of \$28,375,849, plus capital gains in the amount of \$547,017. Thomas' employer, GGP, had gone into bankruptcy in spring 2009 and emerged from bankruptcy in November 2010. Thomas remained employed by GGP throughout and, as a result of the company's successful emergence from bankruptcy, received a significant payout under a key employee incentive plan (KEIP).

¹¹ This amount also included money from the KEIP payout.

¹² Although the parties' 2012 tax return reflects income of \$4,608,969, the Spirit Realty Capital, Inc. form 10-K, which was entered into evidence at trial, reflects Thomas' total compensation as Chief Executive Officer in the amount of \$12,987,035, consisting of \$700,000 in salary, \$1,400,000 as bonus, \$10,880,000 in stock awards, and \$7,035 in other compensation.

¶ 12 During this time, Thomas worked as an accountant for AEW Capital Management (AEW) as an institutional money manager investing institutional capital exclusively in the real estate sector. Thomas was employed by AEW for 20 years, the last 15 of which were during the parties' marriage. His position required significant travel. During this time, Sarah took care of the children and the home. She had assistance from a once-per-week housecleaner as well as from au pairs.

¶ 13 Sarah also entertained Thomas' business associates on a regular basis. She coordinated Thomas' social life and assisted in the coordination of his business travel. At times, she would attend business functions with Thomas, and her job was to be his partner and make friends. She testified she and Thomas talked about Thomas' work, including the projects he was working on, the different investments he was working on, what the deals he was working on would entail, and issues among his employees. She said, "[e]very aspect of his world was our world." She explained that Thomas' work "was central to our lives. It was all the time, every day." Thomas worked long hours at AEW while Sarah raised the family. Thomas did attend important meetings and conferences for the children during this time and was engaged with them on the weekends.

¶ 14 Thomas' mother, Eileen, moved into the family home in 1999 and lived with them approximately 3 years. During this time, Sarah was Eileen's caregiver. She changed bandages, took her regularly to a wound clinic and to physical therapy appointments. Thomas and Sarah renovated their house to accommodate Eileen, making the home more handicapped accessible. Eventually, Eileen's condition deteriorated and she was moved into a nursing home. Sarah visited her there almost daily.

¶ 15 As the twins grew older, they were each diagnosed with learning disabilities that required extra tutoring and therapies throughout grade school. Sarah was primarily responsible for taking them to their appointments and assisting them with their needs. MN also suffers from anxiety and depression and has required extra help. For example, in the fall of 2013, Sarah travelled to Africa to bring MN home because MN, while studying abroad in Africa, had experienced a series of anxiety attacks.

¶ 16 Thomas left work with AEW and started work with Loreto Bay Enterprises (Loreto Bay), in Scottsdale, Arizona, in 2004. The parties sold both their Massachusetts and New Hampshire homes and moved to Arizona. They purchased a house in Scottsdale for \$1,050,000, which they renovated for between \$1,000,000 and \$2,000,000. Renovations included updating the poolside casita and removing and replacing the kitchen. The house was featured in the Phoenix Home and Garden magazine and won an award from the Arizona Society of Interior Design. Sarah hosted 100 guests for the Loreto Bay holiday party at their home for two years.

¶ 17 During this time, Thomas and Sarah also purchased a vacation time share in Aspen, Colorado, for \$200,000. They sold this timeshare in 2007 for \$325,000.

¶ 18 In 2005, the parties purchased a vacant parcel of land in Park City, Utah, for \$695,000. They then built a 6,500 square foot vacation home on the land, which they used for ski trips. The parties stipulated at trial that the fair market value of the Park City home was \$2,600,000. This home, too, was featured in Utah Magazine.

¶ 19 Thomas continued working with Loreto Bay until the end of 2007. He left Loreto Bay in early 2008 and was unemployed. However, he continued to receive substantial income from his AEW partnership interests during this time: in 2007, when Thomas received no

income from the Loreto Bay partnership, the parties' adjusted gross income was, nonetheless, \$2,539,000.

¶ 20 In 2008, Thomas began employment with General Growth Properties (GGP) in Chicago, first as interim president and then as chief operating officer with a base salary of \$1,250,000 and annual bonuses of up to \$3.2 million per year, plus awards of stock. The family moved from Arizona to Winnetka, Illinois.

¶ 21 In 2010, Thomas and Sarah purchased an unfinished, 8,000 square foot home in Winnetka for \$3,590,000. They then spent approximately \$1,293,000 to have it professionally decorated and furnished. This home, too, was featured in an interior design magazine. The parties stipulated at trial that the fair market value of the Winnetka home was \$3,252,500, and the value of the personal property in the house was \$277,895. Sarah acclimated the family to their new home, including new schools, new doctors, and new therapists.

¶ 22 The parties' affluent lifestyle included vacations to Cape Cod, Europe, the Caribbean, and the Bahamas. They regularly invited friends and family to join them on these vacations, and often paid the travel costs for them to do so. They also vacationed frequently to their various second homes. The family also enjoyed memberships at country clubs and golf clubs. MN showed some of the many horses owned by the family, and the family traveled to horse competitions around the country. The children attended an annual four- to six-week summer camp in Spain. The parties also owned several sets of tickets for sports teams, including season tickets for the Boston Red Sox, the New England Patriots, the Arizona Diamondbacks, the Arizona Cardinals, and the Phoenix Suns. The family would fly back

East to see the New England Patriots play during the regular season and follow the team around the country during playoffs.

¶ 23 While Thomas worked for GGP, GGP entered into and emerged from bankruptcy. Thomas helped lead an effort to restructure the company. He worked long hours, including nights and weekends, to take GGP out of bankruptcy, while Sarah maintained the home and cared for the children.

¶ 24 As a result of the company's successful emergence from bankruptcy under Thomas' leadership, he received a significant payout under a key employee incentive plan (KEIP). Thomas' pre-tax share of the KEIP was \$37 million. This KEIP was paid in two annual installments, the first in 2010 and the second in 2011. It was reported on the parties' joint income tax returns as ordinary income. Thomas also received another \$13 million by exercising stock options from GGP and its spinoff, Howard Hughes Corporation.

¶ 25 Sarah testified that Thomas asked her for a divorce soon after the family moved into the Winnetka house. Thomas characterizes this as a mutual decision to divorce. Thomas moved out of the Winnetka house and into a rented apartment in Chicago in early 2011.

¶ 26 Thomas began working for Spirit in 2011. He initially was hired in July 2011 as a consultant by Spirit Finance Corporation and Redford Holding Co., LLC, the entities that existed before the Spirit IPO. Then, in September 2011, he became Spirit's CEO and Chairman of its Board of Directors. He had an annual salary of \$700,000, a target bonus of 150% (\$1,050,000), and a maximum bonus of 200% of base (\$1,400,000). He was also entitled to a success award based on the price of the initial public offering once Spirit went public.

¶ 27 At the time Thomas began working for Spirit, one of Spirit's main objectives was to go public. Thomas' employment agreement provided certain stock incentives if Spirit did an initial public offering. It did so in September 2012, and Thomas was awarded Spirit stock under this plan. Some of the awarded stock was "restricted" in that it did not vest until a defined future date. Under the terms of the incentive plan, Thomas had to remain employed by Spirit on the future vesting date in order for his interest in the shares to vest. At the time of judgment, some of the restricted stock had not yet vested.

¶ 28 In 2012, Spirit adopted a long-term incentive award plan, which also included awards of restricted stock to key employees including Thomas. In the next two years, Thomas received three awards of restricted Spirit stock under this incentive plan, and would continue to receive stock so long as he remained employed at Spirit. The plan also provided two awards of Spirit performance shares, which also have a future vesting date. He will receive the performance shares if he remains employed by Spirit and Spirit achieves certain defined performance benchmarks as of the vesting date.

¶ 29 After taking the job with Spirit, Thomas moved to Dallas, Texas.¹³ Sarah and the children remained in Winnetka, with Sarah taking care of the home, getting the twins ready for college, and helping MN through high school. Thomas began building a new, 15,000 square foot house which, at trial, had a projected cost of \$12 million. Thomas testified about the Texas house, and architectural plans were entered as exhibits. The house has, in part, a wine cellar, studies, an elevator, maid's quarters, and a two-story pool cabana with 2,000 square feet of living space. The architectural drawings are labeled the "Nolan-Reid

¹³ Although Spirit's headquarters is in Scottsdale, Arizona, Thomas chose his personal home base as Dallas, Texas, where his girlfriend lives.

residence." Penny Reid is Thomas' paramour. Thomas testified at trial that Reid had not paid any money toward the design or building of the house.

¶ 30 In September 2013, Sarah purchased a condominium in Paradise Valley, Arizona for \$950,863, and in December 2013, purchased land in Scottsdale, Arizona, for \$1,153,284. Sarah testified that she hoped to one day retire in Arizona.

¶ 31 Thomas submitted a financial disclosure statement dated April 19, 2013. By that disclosure, Thomas claimed total monthly expenses of \$136,971. The expenses related to the Texas home were not included in this disclosure. The expenses included: Thomas' personal clothing (\$6,155); mortgages (Winnetka and Park City) (\$20,875); Park City real estate taxes (\$2,624); Winnetka real estate taxes (\$4,298); and vacations (\$16,000).

¶ 32 Sarah also submitted a financial disclosure statement dated January 2014. By it, Sarah claimed total monthly expenses of \$112,863.¹⁴ These expenses included: Sarah's personal clothing (\$2,312); mortgages (Winnetka and Park City); Winnetka real estate taxes (\$5,282); Park City real estate taxes (\$1,655); and vacations (\$16,000).

¶ 33 Both Thomas and Sarah presented experts who offered conflicting opinions regarding the parties' finances. The court found Thomas' expert incredible, stating:

"Thomas presented the testimony of Mr. Nathan who admitted he had never done investment management for individuals, but only companies. It is not part of his expertise to do individual portfolio management, in fact, he has never designed an individual portfolio. He further admitted that he came up with a life expectancy of Sarah of 83 years, although he is not an actuary, he has no

¹⁴ Sarah originally stated total monthly expenses of \$164,869, but corrected that amount at trial in recognition that there are no longer minor or dependent children in the home.

knowledge specific to Sarah, nor does he hold himself out to be an actuary. He was not an expert in this area.

He presented an equal division of assets. However, Mr. Nathan included retirement accounts in determining assets available to generate income. Although retirement accounts may at some point be includable, no such analysis or adjustment was made by him. He opined Sarah's rate of return on income producing assets to be 6.3%-6.5%. However, Mr. Nathan did not know the actual return that the Nolans received in the past, which indicated conservative investment. This court finds that Mr. Nathan's analysis was flawed."

¶ 34 Thomas also presented a lifestyle witness, Cathleen Belmonte Newman, who analyzed the parties' spending during 2007-2010.¹⁵ Belmonte Newman calculated that, during 2007-2010, the family spent an average of \$75,347 per month for day-to-day expenses.

¶ 35 Tom Levato of Plante and Moran, PLLC, testified as Sarah's witness regarding the parties' historic spending habits and to his opinion as to the amount Sarah would need to maintain the marital standard of living. Levato is a CPA who analyzes fraud and forensics in marital dissolution and legal malpractice cases. He examined the parties' financial data from January 2008 through June 2013. Levato prepared a summary of the parties' reported income and actual annual cash flow based on the Quicken spreadsheet that Thomas had historically prepared annually to track the family's spending. In 2008, the family spent \$922,674, but in 2009, the family spent \$1,452,008. Levato reported the family's net after cash from income was:

2008: \$1,216,900

¹⁵ Thomas claims these are the years relevant to the lifestyle analysis, as these years were pre-separation and pre-KIEP payout.

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2009: \$2,660,647

2010: \$19,359,048

2011: \$13,983,806

2012: \$3,726,944

Levato also reported the family's historical total spending as follows (not including significant capital expenditures such as the purchase of real estate or major donations):

2008: \$922,674

2009: \$1,452,008

2010: \$2,066,917

2011: \$4,019,564

2012: \$3,342,206

¶ 36 After making a number of findings of fact, the trial entered a judgment which divided the marital property. In its distribution calculation, the trial court specifically considered the parties dissipation, charging Thomas with total dissipation of marital assets of \$553,349 and Sarah with total dissipation of marital assets of \$643,141. In total, the judgment valued the marital estate at almost \$37 million. The court distributed \$18,421,905 to Sarah and \$18,421,105 to Thomas.

¶ 37 On appeal, the parties do not dispute the equitable distribution of the majority of the estate, but do disagree as to the award of certain stocks. In its judgment, the trial court found that Thomas was entitled to a number of Spirit Realty Capital Unvested Stock Awards, as well as a number of Spirit Realty Performance Shares and Dividends which had been awarded during the marriage but had not yet vested, noting they were similar to stock options. Acknowledging that these stocks were difficult to value, the court went into a very

detailed analysis of the stocks and their potential values. It also noted that the number of the performance shares to be awarded is unknown, as is the amount of accumulated dividends that Thomas will be entitled to when those shares are determined and vest. Moreover, the court acknowledged that "the [Spirit shares'] price on the New York stock exchange varies by the day and does not take into account volatility, tax consequences, vesting schedules, etc." The court divided the unvested stocks in kind between Thomas and Sarah.

¶ 38 The trial court assigned a value of \$11.41 per share to those Spirit shares that had vested as of the date of the judgment. The total value of those shares was \$8,143,272, which was divided equally with each party receiving Spirit stock valued at \$4,071,636.

¶ 39 The judgment of dissolution also considered certain funds held for the benefit of the children, including an irrevocable family trust. Specifically, in 1998, Thomas created the Thomas H. Nolan Jr. 1998 Irrevocable Family Trust (the trust). The Trust names Sarah and Thomas' brother, Robert, as trustees.¹⁶ The trust was specifically established for the benefit of Sarah and the parties' children. The court ruled the parties should "maintain the status quo" regarding this trust and other accounts maintained for the children's benefit, stating:

"The parties control certain funds for their children's benefit. These include checking accounts at Chase Bank, accounts at Bank of America and UTMA accounts. There are also irrevocable trusts. While those funds are not part of the marital estate, the Court has considered them in its Judgment. The Court finds that the parties should maintain the status quo regarding those funds. Specifically, the parties should remain joint custodians on the Bank of America accounts; Sarah should remain custodian of the children's Chase Bank checking accounts;

¹⁶ The trust was amended in 2006 to name Thomas' brother, Charles Nolan, as trustee after Robert's death.

Thomas should remain as trustee of the children's UTMA accounts; and Sarah should remain as co-trustee of the 1998 Thomas H. Nolan Irrevocable Family Trust."

¶ 40

The court also ordered Thomas to pay maintenance to Sarah, stating:

"Based on all the evidence, the Court finds that Thomas's future earning capacity, based on his business achievements developed during the marriage, is substantial. Kevin Charlton, a Spirit board member and compensation committee member, testified that Thomas heads the finest executive team in the company's industry. The Incentive Award Plan states, 'It is expected the employee will receive long-term incentive awards.' According to Mr. Charlton, the Spirit board anticipates continuing to award Thomas restricted shares of Spirit stock, and performance shares, on an annual basis exceeding his salary and bonus. As these vest, they will provide Thomas with additional income and additional assets which are not available to Sarah.

Thomas's salary alone in 2013 was \$2,160,000 and his salary alone for 2014 will exceed \$2.2 million. This court finds that Thomas is likely to continue to earn such a substantial income in the future.

After careful consideration of all the relevant factors of Section 504 of the IMDMA that are applicable to this case, this court awards Sarah permanent maintenance in the amount of \$52,000.00 per month commencing on January 1, 2015. All maintenance shall be includable as income for Sarah on her federal and state tax returns and deductible by Thomas on his federal tax return. As a resident of Texas, he will no longer be paying State taxes."

¶ 41 The court ordered, in part:

"24. Thomas is forever barred from seeking maintenance from Sarah. Thomas shall pay maintenance to Sarah in the amount of \$52,000 per month commencing on January 1, 2015. The sum of \$52,000 shall be paid to Sarah on the first day of each month until the first of the following termination events:

(a) The death of Sarah or Thomas;

(b) The remarriage of Sarah;

(c) Upon a Court finding of Sarah's cohabitation with another person on a resident, continuing conjugal basis which shall be retroactive to the date found to be the commencement of cohabitation."

¶ 42 Thomas appeals.

¶ 43 ANALYSIS

¶ 44 As an initial matter, Sarah has renewed her motion to strike Thomas' brief and dismiss this appeal. She previously filed this motion and, in December 2015, this court denied the motion "without prejudice to Appellee's renewal of its Motion and request in its brief." On appeal, Sarah renews the motion, requesting this court to strike particular portions of Thomas' brief and to enter sanctions against Thomas for violating various appellate rules. In so doing, Sarah brings to this court's attention various errors in Thomas' brief, including argument represented as fact, misrepresentations of the record, and failure to cite to the record in Thomas' brief. She also brings to our attention the fact that Thomas relies in his brief on facts *de hors* the record, such as the alleged sale of the marital residence. This house was awarded to Sarah in the dissolution and, according to Thomas, sold *after* the dissolution order we are reviewing. Thomas also includes information in his brief regarding the alleged

vesting of certain shares awarded Sarah that, again, allegedly took place *after* the circuit court's judgment of dissolution. Sarah asks us to dismiss the appeal based on these errors and omissions or, in lieu of that, to disregard any inappropriate argument and all information not properly before us.

¶ 45 We agree that Thomas' brief fails to comply with the requirements of Illinois Supreme Court Rule 341. Ill. S.Ct.R. 341. Rule 341 provides that all briefs should contain a fact section which "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal," and an argument section with citations to the pages of the record relied upon. Ill. S.Ct.R. 341. In the present case, Thomas failed to cite to the record in portions of his brief and, at times, misrepresented what occurred in the court below. In addition, Thomas relied on information *de hors* the record. The rules of procedure concerning appellate briefs are rules, not mere suggestions, and it is within the appellate court's discretion to strike a brief and dismiss the appeal for failure to comply with those rules. See *Niewold v. Fry*, 306 Ill. App. 3d 735, 737 (1999). However, we find that appellant's lack of compliance with Rule 341 does not preclude our review, as the errors are not dispositive to our decision. Accordingly, despite these deficiencies, we will not dismiss the appeal. In considering the appeal, however, we give no consideration to the information appellant presents that is *de hors* the record.

¶ 46 a. The Maintenance Award

¶ 47 Thomas first contends that the trial court erred in awarding Sarah permanent maintenance. Alternatively, Thomas contends that, even if maintenance were appropriate,

the maintenance award of \$52,000 per month was too high. In support, Thomas argues the trial court miscalculated both the amount Sarah reasonably needed to sustain her marital lifestyle, as well as Thomas' actual salary. According to Thomas, the trial court abused its discretion in awarding maintenance where the property distribution included income-producing assets such that Sarah had sufficient income to maintain her standard of living achieved during the marriage. He also argues that Sarah's financial disclosure was made at a time when the parties' income was artificially inflated. Specifically, while the large KEIP award was a one-time award, it changed the parties' lifestyle dramatically, as they increased their spending during their last three years of marriage. According to Thomas, "Sarah's only relevant lifestyle spending figures" are from the years preceding the KEIP award.¹⁷ Additionally, Thomas argues that the court erred in its finding that Thomas' 2014 salary was over \$2 million, a finding which included other Spirit compensation, some based on Thomas' and Spirit's future performance, when his actual salary was really only \$742,630.

¶ 48 Under the Illinois Marriage and Dissolution Act (the Act), 750 ILCS 5/504 (West 2014) , a court may grant temporary or permanent maintenance for a spouse "in amounts and for periods of time as the court deems just." 750 ILCS 5/504(a) (West 2014). "Section 504(a) of the Marriage Act requires a trial court to consider the following factors when contemplating an award of temporary or permanent maintenance: (1) the income and property of each party; (2) the respective needs of each party; (3) the present and future

¹⁷ In fact, while acknowledging that no court in Illinois has ever so found, Thomas urges us to consider the parties' lifestyle only while the parties were "functioning as a married couple," or prior to the large KEIP award. Thomas says, "[a]lthough Illinois courts have not squarely addressed this issue, logic, common sense and matters of public policy lead to the inescapable conclusion that for [purposes of section 504(a) of the Act], the relevant period 'during the marriage' is the pre-separation period when the parties were jointly establishing their lifestyle together." Conveniently for Thomas' argument, that time period is prior to the large monetary award.

earning capacity of each party; (4) any impairment of the present and future earning capacity, resulting from a party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage; (5) the time necessary for the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party can support himself or herself through appropriate employment or is the custodian of a child making it appropriate that the custodian not seek employment; (6) the standard of living established during the marriage; (7) the duration of the marriage; (8) the age and the physical and emotional condition of both parties; (9) the tax consequences of the property division upon the respective economic circumstances of the parties; (10) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse; (11) any valid agreement of the parties; and (12) any other factor that the court expressly finds to be just and equitable. 750 ILCS 5/504 (West 2014). "No single factor is determinative when considering the duration and amount of a maintenance award, and the trial court is not limited to a review of the factors outlined in section 504 of the Act in setting a maintenance award." *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 651 (2008) (citing *In re Marriage of Murphy*, 359 Ill. App. 3d 289, 304 (2005)); *In re Marriage of Dea*, 2013 IL App (1st) 122213, ¶18 (a trial court has wide latitude in considering which factors to use in its determination of reasonable needs, and it is not limited to the factors listed in the Act).

¶ 49 "As a general rule, 'a trial court's determination as to the awarding of maintenance is presumed to be correct.' " *In re Marriage of Heroy*, 385 Ill. App. 3d at 650 (quoting *In re Marriage of Donovan*, 361 Ill. App. 3d 1059, 1063 (2005)). " 'Maintenance issues are presented in a great number of factual situations and resist a simple analysis.' " *In re*

Marriage of Reynard, 344 Ill. App. 3d 785, 790 (2003) (quoting *In re Marriage of Mayhall*, 311 Ill. App. 3d 765, 769 (2000)). "The trial court has discretion to determine the propriety, amount, and duration of a maintenance award. A reviewing court will not reverse the trial court's maintenance determination absent an abuse of discretion." *Reynard*, 344 Ill. App. 3d at 790 (citing *In re Marriage of Dunlap*, 294 Ill. App. 3d 768, 772 (1998)). "A trial court abuses its discretion when it acts arbitrarily, without conscientious judgment, or, in view of all of the circumstances, exceeds the bounds of reason and ignores recognized principles of law, resulting in substantial injustice." *In re Marriage of Bradley*, 2011 IL App (4th) 110392, ¶ 26. The question, therefore, is "whether any reasonable person could have taken the position adopted by the trial court." *In re Marriage of Samardzija*, 365 Ill. App. 3d 702, 708 (2006).

¶ 50 First, we note here that, although Thomas argues that the court erred by "revers[ing] the sequencing of the maintenance analysis by focusing first on Thomas' income instead of Sarah needs," this is not how we read the dissolution judgment. Rather, at the outset of the section titled "Maintenance," the court outlined the section 504(a) factors, briefly described the relevant procedures to date, and then found that Sarah was in need of maintenance because she had "virtually no prospect of ever earning sufficient income to support herself in accordance with her standard of living," while Thomas' professional future "could not be brighter." Specifically, the court found:

"Because Sarah devoted her time to raising three children and managing the Nolan household during this 25 year marriage, her earning potential and employment opportunities are severely limited. No evidence was presented at trial regarding any potential employment opportunity. It is unlikely that Sarah

will be able to obtain appropriate education, training or employment in the future to support herself in the standard of living established during the marriage. In light of her age and experience, the Court finds that Sarah has virtually no prospect of ever earning sufficient income to support herself in accordance with her standard of living.

Thomas on the other hand has had, for the most part, tremendous success in the business world. His future could not be brighter. As of January 1, 2014, Thomas' base salary is \$745,630 per year and a bonus with a target of \$1,113,945 and a maximum of \$1,485,260. Thomas has historically received the maximum. The 2014 bonus, performance shares and restricted stock will not be awarded to Thomas until the first quarter of 2015. His continual compensation package and future benefits from stock awards as the CEO of Spirit Realty are substantial and have been previously delineated in this Judgment. The W-2 statement from Spirit Realty alone for 2013 showed \$5,682,945."

Thomas' argument in this regard is unpersuasive where the court clearly considered Sarah's ability to meet her needs and her standard of living before it considered Thomas' income-earning ability.

¶ 51 We therefore move on to the substantive maintenance award. Thomas asserts that even if maintenance was appropriately awarded, the amount was unreasonable. Two of the goals of maintenance are to terminate the financial interdependence of former spouses, if possible, and to allow an ex-spouse the time and resources to achieve self-sufficiency. *Kiep*, 332 Ill. App. 3d at 878-79. The court looks to the reasonable needs of the party seeking maintenance

as measured by the standard of living the parties enjoyed during their marriage. *Kiep*, 332 Ill. App. 3d at 878-79.

¶ 52 The court may, in its discretion, award an amount and duration of maintenance it feels appropriate in the particular circumstances of each case. The benchmark is not whether Sarah is meeting her minimum needs, but whether she is receiving assistance in achieving a standard of living similar to that of the marriage. *In re Marriage of Gunn*, 233 Ill. App. 3d 165, 174 (1992).

¶ 53 Here, the trial court's detailed order reveals that it conducted a careful analysis of the relevant section 504(a) factors in fixing the maintenance award and plainly applied them to the evidence before it. The court reasonably concluded that Sarah would not be able to support herself at the standard of living to which she was accustomed during the marriage, and we cannot say the amount of maintenance ordered was an abuse of discretion. See, e.g., *In re Marriage of Heroy*, 385 Ill. App. 3d at 652 ("[I]n reviewing the propriety of the trial court's permanent maintenance award, we must consider not simply whether [the receiving spouse] is able to support herself, but rather, whether she is able to support herself at the standard of living enjoyed by the parties during the marriage").

¶ 54 In assessing the 504(a) factors, the trial court considered the income and property of each party, noting that Sarah had not been employed for the duration of the marriage since the twins were born. It noted that Sarah's highest income ever earned was \$24,000 per year and compared that to Thomas' income, which was counted in the millions. It acknowledged that Sarah would have, as of the date of judgment, over \$10 million in income-producing assets and noted that it had "taken this income into consideration as well as the possible

future stock awards, bonus income and dividends she will receive from Spirit Realty, as well as all the tax consequences attendant thereto."

¶ 55 The court also noted in its judgment that the parties had an affluent standard of living:

"The Nolan family for many years lived a luxurious and affluent lifestyle. In addition to maintaining multiple, elaborately decorated and furnished residences, the parties and their children vacationed frequently in places such as Cape Cod, Europe, the Caribbean and elsewhere. The Nolans belonged to country clubs, hosted large parties, their three children attended private schools and are avid skiers. Their daughter [***] is an accomplished competitive equestrian, attending several shows per year and having won a national championship."

¶ 56 As to the respective needs of each party, the court considered each party's financial expert and the expert's testimony regarding historical spending. The court also considered the parties' financial disclosure statements to determine the parties' needs. As to the third factor, the present and future earning capacity of each party, the court found:

"Based on all the evidence, the Court finds that Thomas's future earning capacity, based on his business achievements developed during the marriage, is substantial. Kevin Charlton, a Spirit board member and compensation committee member, testified that Thomas heads the finest executive team in the company's industry. The Incentive Award Plan states, 'It is expected the employee will receive long-term incentive awards.' According to Mr. Charlton, the Spirit board anticipates continuing to award Thomas restricted shares of Spirit stock, and performance shares, on an annual basis exceeding his salary and bonus. As these

vest, they will provide Thomas with additional income and additional assets which are not available to Sarah.

Thomas's salary alone in 2013 was \$2,160,000 and his salary alone for 2014 will exceed \$2.2 million. This court finds that Thomas is likely to continue to earn such a substantial income in the future."

As quoted above, the trial court also found that Sarah's future earning capacity was insufficient to support her marital lifestyle and, in addition, found that her present and future earning capacity was impaired due to the time she devoted to raising the children, her age, and her experience. Specifically, the court found:

"Because Sarah devoted her time to raising three children and managing the Nolan household during this 25 year marriage, her earning potential and employment opportunities are severely limited. No evidence was presented at trial regarding any potential employment opportunity. It is unlikely that Sarah will be able to obtain appropriate education, training or employment in the future to support herself in the standard of living established during the marriage. In light of her age and experience, the Court finds that Sarah has virtually no prospect of ever earning sufficient income to support herself in accordance with her standard of living."

¶ 57 While a trial court is not required to consider all of the section 504(a) factors, this particular trial court issued an exhaustive, detailed 58-page judgment of dissolution in which it analyzed many of the financial issues of this dissolution, including numerous section 504(a) factors as discussed above. See *In re Marriage of Dea*, 2013 IL App (1st) 12213, ¶18 (A trial court has wide latitude in considering which factors to use in its determination of

reasonable needs, and it is not limited to the factors listed in the act). In view of all the circumstances presented here, this judgment does not exceed the bounds of reason. See, *In re Marriage of Bradley*, 2011 IL App (4th) 110392, ¶ 26.

¶ 58 Thomas also argues (in the "fact" section of his opening brief) that Sarah was awarded sufficient marital property in the proceedings such that she should not require maintenance:

"Sarah also converted income producing assets into non-income producing assets [by purchasing two properties in Arizona during the divorce proceedings and subsequently renovating them]. If Sarah had not spent this money on these non-income producing properties during the divorce, she would have had an additional \$2,823,391 of income producing assets available to her.

Altogether, when the dissipation, [charitable donation referred to as the Lowell gift] and Arizona properties are considered, Sarah's own decisions during the divorce proceedings reduced her income producing assets by \$3,766,533. Had Sarah not done this, her income producing property would have exceeded \$18.5 million and she could have generated in excess of \$1 million of annual income from her property distribution alone."

Setting aside the fact that argument is inappropriate in the fact section of an appellate brief (see discussion regarding Supreme Court Rule 341 above), this argument is unpersuasive. Sarah is not required to impair her capital in order to maintain herself in a similar manner to that established during the marriage. *In re Marriage of Thornton*, 89 Ill. App. 3d 1078, 1080 (1980), *In re Marriage of Keip*, 332 Ill. App. 3d 876, 879 (2002).

¶ 59 Thomas attempts to "clarify" this argument in his reply brief, explaining that he actually "merely pointed out" that Sarah "took action" prior to the judgment that "reduced the

amount of income-producing assets otherwise available," which acts should be counted against her and in favor of Thomas because "it would be against public policy to encourage such extravagant expenditures by awarding additional maintenance as a reward for doing so." The trial court, however "was not required to apply various rates of return and make specific findings regarding the amount of income that [the receiving spouse's] assets could produce." *In re Marriage of Heroy*, 385 Ill. App. 3d at 657. From a simple reading of the judgment of dissolution, we can see that the court was clearly aware in its calculations of the expenditures of the parties. In fact, as discussed above, the court included a section on dissipation of marital assets in its property distribution section, acknowledging the properties Sarah purchased (potentially with an eye toward retirement), as well as a charitable donation by Sarah, all of which Thomas complains reduced the amount of income-producing assets available to Sarah.¹⁸ Either way—whether Thomas argues that Sarah should be required to impair her capital in order to maintain her standard of living, or whether he argues that Sarah purposefully reduced her income-producing assets—we find no abuse of discretion where the trial court need not impute income to Sarah based on pure speculation regarding investments or rates of return that Thomas thinks Sarah should or should not have pursued.

¶ 60 Thomas also contends that the trial court's finding that his 2014 salary was approximately \$2.2 million, when in fact it was \$742,630, was against the manifest weight of the evidence. "When a party challenges a trial court's factual finding regarding a maintenance determination, this court will not reverse a trial court's findings unless the findings are against the manifest weight of the evidence." *In re Marriage of Nord*, 402 Ill. App. 3d 288, 294 (2010). Findings are against the manifest weight of the evidence if the

¹⁸ The trial court, in fact, assessed these amounts against Sarah in dissipation.

opposite conclusion is clearly evident, or if the trial court's findings are unreasonable, arbitrary, and not based on any of the evidence. *In re Marriage of Heroy*, 385 Ill. App. 3d at 663. Thomas takes issue with the trial court's statement, on page 48 of its memorandum judgment of dissolution, that "Thomas's salary alone in 2013 was \$2,160,000 and his salary alone for 2014 will exceed \$2.2 million. This court finds that Thomas is likely to continue to earn such a substantial income in the future." Thomas argues that, because his 2014 salary was actually \$742,630, "in one stroke of the pen, the circuit court almost tripled Thomas' salary and then—assuming he would earn that inflated amount indefinitely—based the maintenance award thereon." This presents us with a dual argument: first, that the trial court had a base misunderstanding of Thomas' compensation; and second, that Thomas thinks this misunderstanding will cause him to pay inflated maintenance "indefinitely." Addressing the issue of a misunderstanding of Thomas' compensation, we find that the trial court did not misunderstand Thomas' compensation but, on the contrary, had a nuanced understanding of it. In fact, the court had described his 2014 compensation thusly:

"Thomas on the other hand has had, for the most part, tremendous success in the business world. His future could not be brighter. As of January 1, 2014, Thomas' base salary is \$745,630 per year and a bonus with a target of \$1,113,945 and a maximum of \$1,485,260. Thomas has historically received the maximum. The 2014 bonus, performance shares and restricted stock will not be awarded to Thomas until the first quarter of 2015. His continual compensation package and future benefits from stock awards as the CEO of Spirit Realty are substantial and have been previously delineated in this Judgment. The W-2 statement from Spirit Realty alone for 2013, showed \$5,682,945."

For Thomas to argue on appeal that the trial court misunderstood his 2014 compensation strikes this court as disingenuous. We find no abuse of discretion in the trial court's findings regarding Thomas' compensation.

¶ 61 This brings us to the second portion of Thomas' argument, that he will be forced to pay "inflated" maintenance "indefinitely." This argument ties into further argument Thomas makes regarding future maintenance payments. Specifically, Thomas argues that the court abused its discretion by finding that he would continue making the same salary and compensation from Spirit in the coming years when "there was no evidence that Thomas would even continue with Spirit into the future" because executives' job security in the real estate market is "tenuous at best" and "there was no evidentiary basis for the circuit court to conclude that Thomas would always succeed and continue making the same amount of money years into the future."

¶ 62 This was not the conclusion of the trial court. Rather, the trial court, in setting maintenance, is tasked with assessing the reasonable needs of the party seeking maintenance as measured by the standard of living the parties enjoyed during their marriage. *In re Marriage of Keip*, 332 Ill. App. 3d at 879. The court, of course, is unable to foresee the future. For this reason, section 510 of the Act provides for modification and termination of awards of maintenance, support, educational expenses, and property disposition. 750 ILCS 5/510 (West 2014). A maintenance order can be modified when there is a substantial change in circumstances. 750 ILCS 5/510(a-5) (West 2014). In the future, if Thomas' situation changes substantially, then his remedy is to seek modification under section 510 of the Act. The trial court's reasoned expectation that Thomas would continue earning compensation at a

similar level as what he earned at the time of the judgment of dissolution is not an abuse of discretion.

¶ 63 After a thorough review of the record, we conclude that the factual findings of the trial court were not against the manifest weight of the evidence, and the trial court's award was not an abuse of discretion. In so doing, we recognize, as Thomas urges, that this is a large maintenance award. As an appellate court, however, we are constrained by the standard of review on appeal; it is not our place to determine whether this award is of the amount we would have awarded had we been sitting in the place of the trial court. Rather, the question we ask on review is "whether any reasonable person could have taken the position adopted by the trial court." See *In re Marriage of Samardzija*, 365 Ill. App. 3d at 708. In this circumstance, because we think a reasonable person could have taken the position adopted by the trial court, we affirm the trial court's award of maintenance in the amount of \$52,000 per month.

¶ 64 b. The Trust

¶ 65 Next, Thomas challenges the trial court's decision in its judgment of dissolution regarding the trust known as the Thomas H. Nolan, Jr. 1998 Irrevocable Family Trust. Specifically, Thomas argues that the trial court erred by modifying this trust when it lacked jurisdiction because the trust itself was not a part of the marital estate. Sarah responds that the trial court did not, in fact, modify the trust, but was "simply exercising its equitable authority to maintain assets for the benefit of the Nolan family."

¶ 66 Initially, Sarah contends that Thomas has waived this issue for appeal. She argues, "The only reason the Trust was raised at the trial at all was because Sarah put the information

into evidence and asked to be maintained as a trustee. Tom did not object—neither his closing argument nor his reply to Sarah's closing argument addresses the Trust at all." We read the record differently; in fact, Thomas' attorney specifically addressed the trust in court, arguing:

"MS. GERTLER (ATTORNEY FOR THOMAS): *** [I]f you don't extricate these two people financially from each other, I think the consequences are going to be disastrous, which leads me to one point that she raised in her brief which I think is real important.

Mrs. Nolan is asking the Court to prevent Mr. Nolan from removing her as a trustee on the Nolan Family Trust. The Nolan Family Trust is not a marital asset.

MR. BERGER (ATTORNEY FOR SARAH): Judge, this is not even before the Court.

THE COURT: I - - I want to listen. Go ahead.

MS. GERTLER: If you look at - - if you look at the manner in which Mrs. Nolan has expended funds during the separation and take away the judgment, take away the vilification or even the suggestion that she did it purposefully to bolster a claim for maintenance, take that away for a moment, just look at the facts, look at what she spent. Millions and millions of dollars that could have been used to support herself. Take that as a fact.

You cannot permit her to manage a trust that is intended to protect the wealth of children going forward, legal and factually. You can't do that anyway. I don't think the Court intends to do that. But she should - - she should not be

managing the children's funds in any way, shape or form, nor should she have any reason to want to control those funds. These are adult children at this juncture.

They are the beneficiaries of a trust. There is a trustee."

Sarah's argument that Thomas waived this argument for review by failing to argue it at trial is unpersuasive.

¶ 67

Thomas established the trust in 1998 for the benefit of Sarah (also referred to as "wife") and the parties' children. Under the heading "Purpose", the trust states: "This trust is being established to hold property for the benefit of my wife and my issue." The trust names Sarah and Thomas' brother as co-trustees. Under a section titled "Resignation and Appointment of Trustees," the document states:

"A trustee of any trust hereunder may resign by an instrument in writing delivered or mailed to me or, if I am not then living, to my wife or, if she is not then living, to the accountees of such trust.

I do not require that there shall always be more than one trustee serving hereunder, but I do require that at least one of the trustees so serving shall qualify as Disinterested Trustee. If there shall be no trustee of a trust hereunder or if an additional trustee is required by the terms hereof, a trustee (who may not be myself) shall be appointed by me or, if I am not then living, by my wife or, if she is not then living, by the accountees of such trust.

I shall also have the power and, following my death, my wife shall have the power, by written instrument delivered to my Trustees, to appoint additional trustees, to designate successor trustees, to revoke the designation of any

successor trustee, or to change the method for appointing additional or successor trustees or for designating successor trustees.

During my lifetime I shall have the power, but written instrument delivered to a trustee hereunder, to remove such trustee: provided, however, that immediately after the exercise of said power of removal with respect to any separate trust hereunder, there shall be trustee of such trust who is neither a holder of said power nor a related or subordinate party to a holder of said power, within the meaning of Section 672 of the Internal Revenue Code, as amended. The foregoing sentence may be amended from time to time by written instrument signed by the holder of such power and delivered to my Trustees, but only to the extent that such amendment limits the number of times any power of removal can be exercised within any given period or further restricts the identity of the persons or organizations which may be appointed. Any such amendment shall, if so stated, restrict both the current and future holders of such power. Anyone having a power, present or future, under this Article, may at any time release the same by delivery of a written instrument so stipulating to my Trustees.

In each case an appointment or designation of a trustee shall be by an instrument in writing and shall become effective upon the written acceptance of the trustee so appointed and the satisfaction of any conditions stated therein; provided, that I shall never become a trustee hereunder."

¶ 68 In its judgment of dissolution, the trial court addressed the trust, in its "distribution of marital estate" section, stating:

"The parties control certain funds for their children's benefit. These include checking accounts *** and UTMA accounts. There are also irrevocable trusts. While those funds are not part of the marital estate, the Court has considered them in its Judgment. The Court finds that the parties should maintain the status quo regarding those funds. Specifically, *** Sarah should remain as co-trustee of the 1988 Thomas H. Nolan Irrevocable Family Trust."

¶ 69 The parties' argument centers around whether or not the trial court modified the trust. We consider this question concerning the division of marital assets under an abuse of discretion standard. *In re Marriage of Wojcik*, 362 Ill. App. 2d 144, 162 (2005).

¶ 70 Sarah argues that the judgment does not actually modify the trust, but only prohibits Thomas from changing the terms of the trust. The judgment, she says, affects Thomas, not the trust. Sarah does not precisely argue that the court had jurisdiction over the trust itself, but instead argues that, because the trial court had jurisdiction to hear and decide the issues raised in the parties' dissolution of marriage action, it also had jurisdiction to make reasonable provision for support and for the preservation and conservation of marital assets during the litigation, as well as to provide for the educational expenses of the children following the dissolution of the parties' marriage. She says that maintaining the trust is reasonably related to those goals and that "[b]y ordering that the Irrevocable Nolan Family Trusts 'remain unchanged,' the trial court was simply exercising its equitable authority to maintain assets for the benefit of the Nolan family."

¶ 71 Thomas argues that, because he alone has the authority to remove a trustee from the trust, as expressed by the terms of the trust itself, the judgment requiring it to "maintain the

status quo" and keep Sarah as co-trustee of the trust in effect modifies the trust itself. We agree with Thomas.

¶ 72 While the trial court may have the equitable authority to require parties to maintain assets for the children's benefit, as Sarah argues, that is not what occurred here. Rather, in this case, the trial court acknowledged that the trust was "not part of the marital estate," but nonetheless proceeded to order that Sarah be kept on as co-trustee of the trust. The terms of the trust are clear: while Thomas is living, he has ultimate power to remove a trustee from the trust. When the court ordered the parties to "maintain the status quo" and ordered that "Sarah should remain as co-trustee" of the trust, it infringed upon Thomas' exclusive right to control the naming and removal of trustees in the trust he created. It appears the trial court was under the impression that it was not, in fact, modifying the terms of the trust when it ordered Sarah to continue as co-trustee. In this, the court was mistaken. We find an abuse of discretion here, where requiring Sarah to remain as co-trustee was, effectively, a modification of the terms of the trust.

¶ 73 Accordingly, we strike the portion of the judgment of dissolution requiring that the parties maintain the status quo as to the Thomas H. Nolan, Jr. 1998 Irrevocable Family Trust, as well as the portion of the judgment stating "and Sarah should remain as co-trustee of the 1998 Thomas H. Nolan Irrevocable Family Trust."

¶ 74 CONCLUSION

¶ 75 For all of the foregoing reasons, the decision of the circuit court of Cook County is affirmed and modified in part.

¶ 76 Affirmed as modified.