

FOURTH DIVISION
Rule 23 Order filed on November 3, 2016
Modified upon denial of rehearing January 19, 2017

No. 1-15-1003

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
KRISTINA BANIAK,)	Cook County.
)	
Petitioner-Appellant,)	
)	
and)	No. 06 D 7352
)	
RICHARD BANIAK,)	Honorable
)	Raul Vega,
Respondent-Appellee.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's order denying the petition to increase and extend temporary maintenance is affirmed, and the order denying the petition for attorney fees and costs associated with postdissolution proceedings is affirmed in part and reversed in part; the trial court did not abuse its discretion in finding petitioner had become self-sufficient or in finding petitioner failed to establish her inability to pay her attorney fees, but the trial court abused its discretion in failing to award petitioner mandatory statutory attorney fees.

¶ 2 This appeal arises from postdissolution of marriage proceedings in which petitioner, Kristina Baniak, sought to increase and extend the trial court's award of temporary maintenance, and in which she sought a contribution toward her attorney fees incurred in enforcing the dissolution judgment against respondent, Richard Baniak. The circuit court of Cook County denied petitioner's request to increase and extend maintenance and denied her petition for attorney fees. For the following reasons, we affirm the order denying the petition to extend maintenance and affirm in part and reverse in part the order denying the petition for attorney fees.

¶ 3 **BACKGROUND**

¶ 4 The parties married in 1991. Petitioner and respondent had three children: Connor, born March 22, 1993, Austin, born May 12, 1995, and Carson, born August 9, 1997. Petitioner filed a petition for dissolution of the marriage in July 2006. The trial court entered a judgment of dissolution on October 31, 2008. The dissolution judgment incorporated the parties' marital settlement agreement (MSA). Pursuant to the MSA, respondent was to pay petitioner child support in the amount of 32% of his net monthly base salary and additional child support from any additional net income, including bonuses, incentive plan payments, and increases in base salary. Respondent was also to pay petitioner maintenance in the amount of 13% of his gross income. Respondent's maintenance obligation would terminate upon the occurrence of certain events, the only pertinent event being the payment of 60 monthly payments by respondent to petitioner. The MSA provided that petitioner could seek an extension of the maintenance payments beyond 60 months by filing a petition with the trial court 60 days prior to the termination of maintenance as set forth in the MSA.

¶ 5 In January 2009, Connor, the oldest child of the parties, moved out of petitioner's home and began living with respondent. In August 2009, respondent filed a motion to modify his child

support obligation. Petitioner then filed a petition for rule to show cause based on respondent's alleged failure to pay the proper amount of child support and maintenance. Petitioner also filed a petition for interim attorney fees and costs. Those and other pending matters proceeded to a hearing in July 2012. Petitioner alleged that respondent failed to pay the proper amount of child support when he received a base salary increase in March 2009 and that respondent failed to pay the correct amount of child support from additional income he received in March 2010 (a "vested performance award" and "executive income compensation"). Petitioner also alleged respondent failed to pay her the correct amount of maintenance. Respondent argued he overpaid child support in 2009 because one of the children began living with him in January 2009.

¶ 6 On March 7, 2013, the trial court entered an order on those and other pending motions. The court found that respondent had failed to pay the correct amount of child support and maintenance since March 2009. The court found that respondent's "unilateral reduction or failure to pay the correct child support *** was without court order" but held that the resulting "failure to pay the child support at 32% of his net income between January 2009 to date of hearing [*sic*] was justified and not in scornful disregard of the parties' Judgment" because Connor now resided with respondent and respondent "believed, in good faith, that he was entitled to a reduction." But the court found that respondent's failure to pay the correct amount of maintenance was "willful and contumacious." Accordingly, the court found it would not find respondent in indirect civil contempt of court for failing to pay child support. The court did find respondent in indirect civil contempt for failure to pay petitioner "the correct or complete amount of maintenance due pursuant to the parties' settlement agreement."

¶ 7 As to petitioner's attorney fees, the trial court found that it could not determine what fees petitioner incurred for the rule to show cause and, therefore, the court could not determine what fees petitioner sought pursuant to section 508(a) or 508(b) of the Illinois Marriage and

Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/508(a), (b) (West 2012)).¹ The court also found that because petitioner's attorneys' time records were redacted it could not determine if any of the fees petitioner sought were incurred for an appeal that petitioner took relating to attorney fees from the predecree litigation.

¶ 8 In the March 7, 2013 order, the trial court also denied respondent's motion to modify and reduce maintenance. The court found that petitioner had demonstrated a need for the continued maintenance as well as respondent's ability to pay the agreed-upon maintenance. The court noted that petitioner was "making a good effort at becoming self supporting" and that although her income had increased since the dissolution, "she still needs the maintenance, especially with her housing costs." (At the time, petitioner continued to reside in the former marital residence, which was "under water.") The court also reduced respondent's child support obligation retroactive to the date respondent filed a motion to modify based on Connor having moved in with respondent, and ordered petitioner to pay child support to respondent for Connor. The court calculated the maintenance arrearage but determined, considering the reduction in child support and support due respondent for Connor, that as of July 2012 respondent had actually overpaid child support. The court granted petitioner leave to amend her interim fee petition to a final fee petition pursuant to section 508(a) of the Dissolution Act, and granted petitioner leave to file a separate fee petition pursuant to section 508(b) for the finding of contempt against respondent.

¶ 9 Both parties filed motions to reconsider the trial court's March 7, 2013 order.

Respondent later voluntarily withdrew his motion to reconsider and filed a response to

¹ Section 508(a) of the Dissolution Act permits the trial court to award attorney fees in connection with the "enforcement or modification of any order or judgment" (750 ILCS 5/508(a)(2)), while section 508(b) of the Dissolution Act allows the trial court to award attorney fees in proceedings for the enforcement of an order or judgment "when the court finds that the failure to comply with the order or judgment was without compelling cause or justification" (750 ILCS 5/50(b) (West 2012)).

petitioner's motion to reconsider. In his response respondent agreed the court's March 7, 2013 order contained a mathematical error and agreed to the proper amount of child support and maintenance he owed petitioner. On July 1, 2013, the trial court entered an order granting petitioner's motion to reconsider "only to the extent that it corrects the numbers according to [respondent's] calculation as provided in his response to [petitioner's] motion to reconsider."

¶ 10 On June 18, 2013, petitioner filed a petition for attorney fees and costs pursuant to sections 503(j), 508(a), and 508(b) of the Dissolution Act. The petition stated that petitioner's attorneys had been required to perform substantial legal services for petitioner, including preparing and prosecuting a petition for rule to show cause against respondent for his failure to pay child support and maintenance and defending against respondent's motion to modify child support. The petition for fees pursuant to sections 508(a) and 503(j) of the Dissolution Act sought contribution by respondent toward petitioner's attorney fees on the grounds petitioner "lacks sufficient property, money, income, or means to provide for her reasonable attorneys' [sic] fees and costs associated with this litigation," while respondent "is well able to pay the fees and costs incurred by [petitioner] while she is not able to pay for said expense." Petitioner supported the petition with an affidavit by one of her attorneys and "detailed billing records." The petition stated that the fees petitioner incurred for the appellate matter in these proceedings were not included in this request for fees.

¶ 11 The petition for fees pursuant to section 508(b) sought fees "based upon the Court's finding in its March 7, 2013 Order holding [respondent] in contempt for his willful violation of the parties' *** Judgment for Dissolution of Marriage." That portion of the petition further alleged that a substantial burden was placed on petitioner's attorneys "to provide labor intensive services in order to discover [respondent's] income and complete financial information in an effort to compel [respondent] to comply with the Judgment for Dissolution." The petition

claimed that the billing records delineate time entries related to enforcing respondent's child support obligations. The billing records attached to the petition for fees include a page titled "Total Hours, Fees, & Costs Billed Through May 31, 2012" (Total Hours) and a four-page document titled "Allocation of Fees Related to Enforcement of Support Provisions from the Judgment for Dissolution of Marriage" (Allocation of Fees). The Total Hours lists the totals of separate invoices, totals those invoices, then subtracts an amount for "appellate work," listing the remainder as "post decree work." The Allocation of Fees lists a date, an attorney's initials, a rate, a number of hours, and a total dollar amount. The document is in separate sections by invoice date. The Allocation of Fees does not list what actions were performed on the dates listed, only the attorney, the rate, the number of hours, and a dollar amount. Petitioner's attorney's affidavit in support of the petition states that "[p]ursuant to the Court's directive, copies of the redacted invoices through May 31, 2012 have been separately provided to opposing counsel and [the trial court.]"

¶ 12 On August 30, 2013, petitioner filed a petition to increase and extend maintenance (maintenance petition). The maintenance petition began by noting that due to two of the parties' children reaching majority, "the child support received by [petitioner] from [respondent] has been reduced from 32% of his net income to 20%." Petitioner stated that she had obtained employment at a net income in 2012 of \$3500 per month but her "job provides no opportunity for advancement and little opportunity to work overtime, and she does not expect to earn any significant increases in salary in the future." Petitioner asserted that although she had made a good faith effort to become self-sufficient, "her current employment as a respiratory therapist and earnings therefrom are insufficient to allow her to meet her living expenses without continued support from [respondent.]" Petitioner further stated it is unlikely she will be able to secure employment in the future that will "provide her with sufficient income to maintain the

lifestyle that she and the children enjoyed during the marriage, let alone save any money for her retirement.” She stated she cannot meet her and the children’s reasonable needs without depleting her assets.

¶ 13 When petitioner filed the maintenance petition she continued to reside in the marital residence with Austin (who had recently turned 18-years old) and Carson (then 16-years old). Petitioner stated that the expenses for the former marital residence alone exceeded her monthly net income from her employment. She relies on both the child support and maintenance to pay for her and the children’s needs, and the purported amount of base child support and maintenance, plus her income, fail to cover their monthly expenses (including housing expense) of \$11,617.38. Petitioner had “no liquid assets, no significant savings, and no retirement plan through her current employer.” She claimed the marital residence needed between \$15,000 and \$20,000 in repairs to allow it to be sold. Based on respondent’s income and assets, as well as the income of respondent’s new wife, with whom he splits his expenses equally, petitioner argued respondent has the financial ability to support himself and petitioner, but her resources and income “have continued to shrink.” Petitioner also argued that the trial court had “already found in its March 7, 2013 Order that [petitioner] is in need of continued maintenance when it denied [respondent’s] Motion to Modify his maintenance obligation.” Petitioner requested the court extend her maintenance beyond the 60 months provided in the MSA and increase her maintenance, and requested respondent be ordered to pay her attorney fees and costs incurred in pursuing the maintenance petition.

¶ 14 Respondent filed a response to the maintenance petition (maintenance response) in which respondent asserted that petitioner had misstated the facts where she has “far greater income, less expenses, and significantly greater assets than at the time the Judgment was entered.” Specifically respondent noted that from the period one year after the dissolution judgment to

December 2013 petitioner's gross annual income rose from \$40,000 to over \$60,000.

Respondent argued petitioner's 2013 financial disclosure statement (2013 Disclosure) was not credible where petitioner claimed her household expenses (including those for the children) have increased by \$2400 per year despite the fact only the youngest child lives with her full-time, and petitioner claimed in her 2013 Disclosure that the children's expenses were the same as when she paid the expenses for all three children. Respondent asserted two of the parties' children are in college and he pays 100% of their education and living expense. Respondent argued petitioner's 2013 Disclosure used only the base maintenance she received to calculate her "Income Available Per Month" and failed to include the total maintenance respondent pays from other sources of income; taking into consideration the total maintenance respondent paid in 2013 petitioner could cover her expenses and have an additional savings of \$83,689.92. Respondent stated in his maintenance response that petitioner has over \$126,000 in savings not including net proceeds from the sale of the former marital residence, over \$17,000 in an IRA not including her marital share of respondent's employee retirement plans, and over \$184,000 in stock options from respondent's employer. Respondent also filed a motion seeking permission to escrow the maintenance portion of certain incentive income he received from his employer after hearings on the maintenance petition began.

¶ 15 Petitioner had not worked outside the home for 10 years prior to the dissolution, but at the time of the hearing, she was employed as a respiratory practitioner. Petitioner's work schedule had recently changed from 5 days per week to 4 days per week. At the time of the hearing petitioner had sold the former marital residence and temporarily rented it back from the purchasers with the rent being prepaid from the proceeds of the sale. Petitioner had \$17,600 in an IRA and was entitled to monthly payments from her marital share of two of respondent's retirement plans through his employer, although at the hearing petitioner testified she had not

begun receiving those payments. Petitioner could begin receiving payment from one plan in August 2014 and from the other when respondent retired. Petitioner claimed to be unaware of the value of the payments but respondent testified petitioner would receive total gross monthly payments from both plans of \$2,339.74. Petitioner also received stock options from respondent's employer which purportedly had a gross value of \$202,485 before taxes. Petitioner had \$105,000 in a savings account in summer 2013.

¶ 16 On the same date that petitioner filed her petition to extend maintenance, she issued a check for \$80,000 to her mother. Petitioner stated she borrowed money from her family during the dissolution proceedings, and her mother resided with her during the proceedings and for a short time after the trial court entered the dissolution judgment. Petitioner stated her mother assisted petitioner financially and as a caregiver for the children. Petitioner stated that to repay these debts to her mother and other family members she issued a check for \$80,000 to her mother with the intention that \$40,000 be split equally between two family members to repay loans and the balance kept by her mother as repayment for her mother's financial assistance and caregiving. This payment left petitioner's bank account with a balance of \$42,556.74. Respondent submitted his own demonstrative exhibit estimating petitioner's income and expenses.

¶ 17 The trial court issued a detailed written order on March 9, 2015 (March 2015 Order). The court began by finding that petitioner was not a credible witness, stating its reasons for so finding. The court found petitioner removed \$80,000 from her estate "in an effort to convince this Court that she lacked funds and assets in this litigation" and cited facts in support of its finding. Next, the court found that petitioner's 2013 Disclosure failed "to accurately reflect her actual income, expenses and assets" and stated the reasons for that finding. Of note to the issues in this appeal is the court's finding that petitioner failed to include stock options she received in

the dissolution judgment on her 2013 Disclosure. The court noted that petitioner testified that “from the options that exist, she ‘could have paid her own attorneys’ [sic] fees.’ ” The court found that petitioner misrepresented her work schedule and her testimony regarding her alleged medical condition was not credible.

¶ 18 Turning to the merits of the maintenance petition the trial court found that the maintenance petition misstated the facts when it alleged that petitioner’s resources and income have continued to shrink and her current employment is insufficient to allow her to meet her living expenses. The court found that petitioner “has far greater income, less expenses and significantly greater assets than at the time the Judgment was entered.” The court relied on respondent’s exhibit stating petitioner’s income and expenses, and concluded that petitioner “has sufficient income from her employment, the child support that she will receive for the remainder of Carson’s minority, and her portion of the *** retirement benefits that she may begin receiving in August 2014 to pay all of her expenses for 2013 and beyond without any maintenance from [respondent] and still have a surplus each year to maintain her lifestyle.”

¶ 19 The trial court’s order details its findings as to petitioner’s income (based in part on returning to a 5-day work week, where the court had previously found she voluntarily reduced her work schedule), child support, share of the pension benefits, and expenses, then concludes that petitioner “had a surplus in 2013 and will continue to have a surplus in the future without receiving *** maintenance from [respondent.]” The court specifically found, in pertinent part, that pursuant to “the parties’ stipulation² during the hearing,” petitioner could begin to receive gross monthly payments of approximately \$1,664.58 from one of respondent’s pension plans beginning August 1, 2014 but not from the other until respondent retires, at which time she will

² In this appeal petitioner disputes whether the stipulation was ever entered into evidence, a topic discussed below.

receive an additional gross \$675.16 monthly. The court found that the actual recitation of petitioner's expenses was as set forth in the summary respondent prepared. The court found respondent's summary was uncontradicted and supported by petitioner's testimony. The court noted that petitioner's monthly expenses will be reduced in 2014 by the carrying costs of the former marital residence. The court found that beginning June 2015 (when the rental period for the former marital residence ends) she will be required to incur a rental or mortgage expense, and upon Carson's emancipation in June 2016, she will no longer have any expense for the parties' children. The trial court's order also found that petitioner "has substantial assets."

¶ 20 The trial court held, with regard to the maintenance petition, that given petitioner's employment income, the support she has received, the additional sources of income she will receive, and her significant assets, petitioner "has achieved the statutory goal of becoming self-sufficient, and there is no longer any justification for her continued receipt of maintenance." The court addressed its finding in the March 7, 2013 order that "while [petitioner's] income has increased since the parties were divorced, she still needs the maintenance, especially with her housing costs." With regard to those earlier findings, in the March 2015 Order the court found that petitioner's income had "increased substantially" since that time and petitioner "no longer has the housing costs of the former marital residence," thus, "the evidence established that she no longer requires any maintenance from [respondent] to meet her expenses." The court denied petitioner's request to increase and extend maintenance.

¶ 21 Next, the trial court addressed the petition for fees and costs pursuant to section 508(a). The court began by noting conduct by petitioner constituting noncompliance with the dissolution judgment which required respondent to seek relief before the court. The court found that the matters for which respondent sought relief "could have been avoided but for [petitioner's] conduct." The court then found that the amount of fees petitioner requested was not reasonable

and stated its reasons for so finding. In part the court found that the total fees respondent incurred postdissolution were less than one-half those petitioner incurred. The court found that the billing records petitioner submitted to the court contain entries in which both postdissolution matters (for which she could seek fees from respondent) and petitioner's appeal of a judgment against her for attorney fees in favor of her predissolution decree attorneys (in which respondent was not involved) were addressed. The court found it "impossible to determine from these bundled entries what portion of the fees incurred relates to tasks relating only to the appeal." Therefore, the court assumed the entire amount of the "bundled entries" was incurred in relation to the appeal and could not be subject to the petition for fees against respondent. The court made a similar finding with regard to certain costs. The court found other amounts unreasonable given the issues involved and those issues on which petitioner prevailed.

¶ 22 The trial court also found that petitioner was "well able to pay the fees and costs being requested" and stated the grounds on which it made that finding. Specifically, the court found, in pertinent part, that petitioner had assets valued at \$214,454 in the form of her stock options from respondent's employer (which she did not include on her 2013 Disclosure) available to her for the payment of her attorney fees and costs. The court also noted the explanation given for the \$80,000 petitioner gave her mother, purportedly to repay an undocumented debt, was not credible. The court found that based on petitioner's employment income, child support, and the pension benefits she will receive, petitioner had an after-tax surplus each year. The court also found that she misstated her expenses. The court found that since petitioner failed to establish her inability to pay her attorney fees and costs, it need not consider respondent's ability to pay and denied the petition for fees. The court denied petitioner's request for fees pursuant to section 508(a).

¶ 23 Finally, the trial court addressed petitioner’s request for fees pursuant to section 508(b) of the Dissolution Act in connection with her petition for a rule to show cause based on respondent’s alleged noncompliance with the dissolution judgment regarding child support and maintenance. The court noted that while respondent was found in indirect civil contempt of court for failing to pay the proper amount of maintenance, the court found that respondent’s reduction of his child support payments was not in scornful disregard of the dissolution judgment because respondent believed in good faith that he was entitled to a reduction, since the oldest child no longer lived with petitioner. The court found that petitioner “failed to identify what, if any, attorneys’ [sic] fees and costs were incurred in connection with the maintenance versus the child support issue, and therefore this Court has no way to determine that amount.” The court additionally found that the calculation of maintenance (13% of respondent’s gross income) was a simple calculation for which no additional fees beyond those incurred in relation to the child support issue could have been incurred. The court denied petitioner’s request for fees pursuant to section 508(b).

¶ 24 This appeal followed.

¶ 25 ANALYSIS

¶ 26 Petitioner argues the trial court (1) abused its discretion in failing to award increased and continued maintenance when it applied the wrong legal standard, and the factual findings it applied to that standard were against the manifest weight of the evidence; and (2) abused its discretion in denying petitioner’s request for fees pursuant to (A) section 508(a), because the court failed to consider the parties’ relative income, misstated the evidence and misapplied the law with regard to petitioner’s ability to pay, and failed to consider respondent’s conduct; and (B) section 508(b), because respondent was found in indirect civil contempt and the fees were reasonable and well delineated.

¶ 27 (1) Increased and Continued Maintenance

¶ 28 Petitioner first argues that the trial court erred when it denied her request for an order increasing and continuing maintenance beyond the 60-month period stated in the MSA.

¶ 29 Legal Standards

¶ 30 The modification of a maintenance obligation is governed by sections 502, 504(a), and 510(a-5) of the Dissolution Act (750 ILCS 5/502, 504(a), 510(a-5) (West 2012)). *Blum v. Koster*, 235 Ill. 2d 21, 29 (2009).³ Unless the parties have agreed to specific terms for the modification of a maintenance obligation in a marital settlement agreement, “the court must consider the statutory factors set forth in *** section 504(a)” in modifying maintenance and, in the absence of a written agreement to the contrary, “section 510(a-5) provides additional factors for the trial court to consider in determining whether modification *** is warranted.” *Id.* at 31. In this case the MSA “did not provide for consideration of any terms other than the statutory factors generally applicable to the trial court’s review and modification of maintenance.” *Id.* at 34. The statutory factors in section 504(a) of the Dissolution Act are:

“(1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance as well as all financial obligations imposed on the parties as a result of the dissolution of marriage;

³ The General Assembly modified section 504 of the Dissolution Act to provide maintenance guidelines “[i]n situations when the combined gross income of the parties is less than \$250,000 ***.” 750 ILCS 5/504(b-1)(1) (West 2014). In a petition for rehearing, petitioner argued this section should have been considered when determining petitioner’s maintenance amount and its duration pursuant to *In re Marriage of Johnson*, 2016 IL App (5th) 140479, ¶ 108. Petitioner’s reliance on *In re Marriage of Johnson* is misplaced because its holding was explicitly based on “all of the relevant statutory factors” in section 504(a)(1)-(12). *Id.* ¶¶ 94, 107. The *Johnson* court merely found “support” for its conclusions under section 504(a) in section 504(b-1). *Id.* ¶ 108. The trial court did not abuse its discretion is not considering section 504(b-1), which clearly does not apply in this case.

- (2) the needs of each party;
- (3) the realistic present and future earning capacity of each party;
- (4) any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage;
- (5) any impairment of the realistic present or future earning capacity of the party against whom maintenance is sought;
- (6) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment or any parental responsibility arrangements and its effect on the party seeking employment;
- (7) the standard of living established during the marriage;
- (8) the duration of the marriage;
- (9) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and the needs of each of the parties;
- (10) all sources of public and private income including, without limitation, disability and retirement income;
- (11) the tax consequences of the property division upon the respective economic circumstances of the parties;
- (12) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;
- (13) any valid agreement of the parties; and

(14) any other factor that the court expressly finds to be just and equitable.” 750
ILCS 5/504(a) (West 2012).

Section 510(a-5) states that an order for maintenance may be modified only upon a showing of a substantial change in circumstances, and the court is to consider the following additional factors:

- “(1) any change in the employment status of either party and whether the change has been made in good faith;
- (2) the efforts, if any, made by the party receiving maintenance to become self-supporting, and the reasonableness of the efforts where they are appropriate;
- (3) any impairment of the present and future earning capacity of either party;
- (4) the tax consequences of the maintenance payments upon the respective economic circumstances of the parties;
- (5) the duration of the maintenance payments previously paid (and remaining to be paid) relative to the length of the marriage;
- (6) the property, including retirement benefits, awarded to each party under the judgment of dissolution of marriage, judgment of legal separation, or judgment of declaration of invalidity of marriage and the present status of the property;
- (7) the increase or decrease in each party’s income since the prior judgment or order from which a review, modification, or termination is being sought;
- (8) the property acquired and currently owned by each party after the entry of the judgment of dissolution of marriage, judgment of legal separation, or judgment of declaration of invalidity of marriage; and
- (9) any other factor that the court expressly finds to be just and equitable.” 750
ILCS 5/510(a-5) (West 2012).

The trial court is “required to consider the factors in sections 504(a) and 510(a-5) ([citations]) in determining whether to modify” the terms of the maintenance agreement (*id.* at 36), but its decision “will not be disturbed absent a clear abuse of discretion” (*id.* at 36). “A clear abuse of discretion occurs when the trial court’s ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. [Citation.]” (Internal quotation marks omitted.) *Id.* at 36. “Section 504 of the [Dissolution Act] ([citation]) requires the trial court to consider all relevant factors, but does not require that they be given equal weight, so long as the balance struck by the court is reasonable under the circumstances. [Citation.]” (Internal quotation marks omitted.) *In re Marriage of Dunlap*, 294 Ill. App. 3d 768, 772 (1998) (quoting *In re Marriage of Miller*, 231 Ill. App. 3d 480, 485 (1992)).

¶ 31 Application of Legal Standards

¶ 32 Petitioner argues the trial court focused on her “self sufficiency” in her current lifestyle and did consider her current income and assets but completely failed to address the remaining statutory factors it was required to consider, and that a proper analysis of all of the applicable factors strongly favors not only continued maintenance, but permanent maintenance. Petitioner argues that “self-sufficiency” entails the ability to earn an income which will provide a standard of living similar to that enjoyed during the marriage. In support, she cites *Marriage of Abrell*, 386 Ill. App. 3d 718, 733 (2010) (quoting *Marriage of Sisul*, 234 Ill. App. 3d 1038, 1039-40 (1992)). Petitioner argues that here, by considering her current “diminished” lifestyle to determine petitioner was self-sufficient, rather than the lifestyle established during the marriage, the trial court applied the wrong standard and abused its discretion. She asserts the trial court made no findings concerning the standard of living the parties enjoyed during their marriage and failed to balance the goal of financial independence against the likelihood she will be able to

support herself “in some reasonable approximation of the standard of living established during the marriage.”

¶ 33 Petitioner analyzes the statutory factors in section 504(a) and 510(a-5) primarily in terms of the lifestyle she enjoyed during the marriage.⁴ For example, petitioner initially notes “a huge disparity in both the parties’ income and earning capacity.” She argues that she is “only employable at a low income *compared to that required to support her previous standard of living*” (emphasis added), and the “lop-sided earnings and earnings potential of the parties alone, renders the denial of continued maintenance reversible error.” Petitioner also argues that her gross employment income “barely provides for her basic needs, let alone the lifestyle she enjoyed throughout the parties’ marriage.” Petitioner concludes that the facts of this case establish that she will “not earn an income sufficient to support herself *in the manner she enjoyed during the marriage* without continued maintenance, which [respondent] can easily provide.” (Emphasis added.) Petitioner argues factors relating to property awarded in the dissolution and property acquired postdissolution “also weigh heavily in favor of a continued maintenance award.” After discussing each party’s property petitioner asserts her employment income is insufficient to satisfy her monthly expenses and that by terminating maintenance, the trial court denied petitioner the ability to “maintain the standard of living enjoyed during the marriage without depleting her scarce assets.”

¶ 34 Next, petitioner argues her “needs also strongly favor an award of continued maintenance.” She stated her “expenses at the time of hearing were not even on par with the lifestyle established during the marriage.” Petitioner further argues her present and future

⁴ To the extent petitioner argues the statutory factors weigh in favor of increased and continued maintenance that issue is addressed with petitioner’s argument the trial court abused its discretion notwithstanding its focus on her current lifestyle rather than the lifestyle the parties enjoyed during the marriage.

earning capacity was diminished by devoting her time to domestic duties and now she is “long past the point where she could obtain ‘appropriate employment’ commensurate with the marital standard of living.” She summarizes, given her “circumstances and continuing obligations to the children, the obstacles to any employment commensurate with the lifestyle enjoyed during the marriage are insurmountable, rendering it an abuse of discretion for the court not to have awarded continued maintenance.” Finally petitioner argues that the duration of the marriage, the age and physical and emotional condition of the parties, and the tax consequences of the property division all favor continued maintenance.

¶ 35 With regard to the parties’ standard of living during the marriage, petitioner argues only that “[t]he parties enjoyed a well appointed, spacious home, had multiple vehicles, retirement accounts, and more.” Later she argues that during the marriage the parties enjoyed the use of respondent’s \$200,000 plus annual income, owned a home with a mortgage of \$615,000, owned motor vehicles, accumulated retirement assets, and raised three children. Petitioner argues that by failing to continue maintenance the trial court deprived her “of the ability to ever qualify and afford a home comparable to the one the parties owned during the marriage because her employment income alone cannot cover such a cost.”

¶ 36 Respondent argues petitioner failed to present any evidence as to what the parties’ “marital lifestyle” actually was. He further argues the trial court properly considered all of the required statutory factors and properly determined petitioner is not entitled to an increase or extension of her maintenance. Respondent asserts the evidence establishes that petitioner has sufficient income and assets to pay her expenses and still have a surplus each year to maintain her lifestyle.

¶ 37 Petitioner had the burden to demonstrate that an extension of maintenance was justified in this case. *Cf. Blum*, 235 Ill. 2d at 535-36. In *Blum*, our supreme court held that because the

parties' marital settlement agreement specifically provided for maintenance to be reviewable after an initial 61-month period, the payor spouse in that case did not have the burden of proving a substantial change in circumstances in seeking to terminate his maintenance obligation. *Id.* In that case, the marital settlement agreement read in pertinent part as follows: "Judy's right to receive maintenance and Steven's obligation to pay maintenance after April 30, 2005 is reviewable. Maintenance shall not terminate without a court order." *Id.* at 33. Here, in contrast, the MSA states that respondent's obligation to pay maintenance shall terminate upon the first occurrence of any of the events listed in paragraph 7 of the MSA. If petitioner failed to timely seek an extension, maintenance in this case would terminate automatically. Accordingly we construe the maintenance petition as a petition to modify the maintenance provision of the dissolution judgment pursuant to section 510 of the Dissolution Act. "The party seeking modification of a maintenance order has the burden of persuading the trial court that a change in maintenance is justified." *In re Marriage of Dunseth*, 260 Ill. App. 3d 816, 827 (1994).

¶ 38 Part of petitioner's burden was to establish that continued maintenance was necessary to permit her to maintain the lifestyle she enjoyed during the marriage. We find no error in the trial court's finding that petitioner failed to meet that burden. As respondent argues, the only evidence of the marital lifestyle petitioner offers is the use of respondent's income, the residence in the marital home, the accumulation of retirement assets, and the raising of the parties' children. Petitioner failed to argue what evidence demonstrates what else the parties used respondent's income for or that her income and expenses (as determined by the trial court—an issue discussed in greater detail below) are insufficient to permit petitioner to meet her reasonable needs in view of the lifestyle she enjoyed during the marriage. See *In re Marriage of Reynard*, 344 Ill. App. 3d 785, 791 (2003) ("The benchmark determination when awarding maintenance is the 'reasonable needs of the spouse seeking maintenance in view of the standard

of living established during the marriage, *** the ability to become self-supporting, the income-producing property of a spouse, if any, and the value of the nonmarital property. [Citation.]”).

In a petition for rehearing (PFR), petitioner argued for the first time that the parties’ financial disclosures are “the proof of how they lived in their marriage.” Petitioner argued in the PFR that through his financial disclosures, respondent “admits to this marital lifestyle that the couple enjoyed in thorough detail, and by overlooking these detailed records, this Court ignored an important part of the proof of [petitioner’s] marital lifestyle.”

¶ 39 “A rehearing of an appeal is only granted for purposes of correcting errors which the court has inadvertently made, and the party cannot assign as error points or arguments which could have been raised on or before oral argument of the appeal. [Citation.]” *Ad-Ex, Inc. v. City of Chicago*, 207 Ill. App. 3d 163, 180 (1990). Moreover, “[t]he appellate court is not merely a repository into which an appellant may dump the burden of argument and research, nor is it the obligation of this court to act as an advocate ***. [Citations.]” (Internal quotation marks omitted.) *CE Design, Ltd. v. Speedway Crane, LLC*, 2015 IL App (1st) 132572, ¶ 18.

Petitioner’s arguments in her opening brief concerning the lifestyle she enjoyed during the marriage focused on her being forced to downsize her residence—which is discussed below.

We note that petitioner did argue in her opening brief that “[d]uring their marriage, the parties enjoyed the use of [respondent’s] \$200,000.00 plus annual income.” Now, in a PFR, petitioner argues for the first time that what the parties used that “\$200,000.00 plus annual income” for is exposed in respondent’s financial disclosures and included “clothes, club memberships, and vacations.” Petitioner did not make this argument in her initial brief to this court. “Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) provides, in part, that ‘[p]oints not argued [in an opening brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.’ ” *Fink v. Banks*, 2013 IL App (1st) 122177, ¶ 14. Petitioner forfeited the

argument the parties' financial disclosures are evidence of the lifestyle petitioner enjoyed during the marriage. *CE Design, Ltd.*, 2015 IL App (1st) 132572, ¶ 18 ("The failure to provide an argument and to cite to facts and authority, in violation of Rule 341, results in the party forfeiting consideration of the issue. [Citation.]").

¶ 40 As to the evidence of the parties' lifestyle petitioner did present, the dissolution judgment awarded petitioner one-half the marital share of respondent's retirement assets, therefore petitioner will be able to maintain the lifestyle enjoyed during the marriage in the context of retirement assets. See *In re Marriage of Dunlap*, 294 Ill. App. 3d at 774. The March 2015 Order specifically notes that petitioner no longer has the housing costs of the former marital residence. The trial court based its determination that petitioner could maintain her housing lifestyle based on what petitioner stated was a reasonable housing cost for herself. Petitioner's only argument contradicting the trial court's determination is that if petitioner purchased a home similar to the former marital residence, "these costs will certainly exceed her current \$2500 monthly rent." However, petitioner testified that she was investigating housing costs in anticipation of having to move from the marital residence and that she planned to downsize at that time, and that is how she determined a reasonable housing expense. "The trial court fashions an award of maintenance on the basis of the circumstances disclosed by the evidence at the time of the hearing. [Citation.]" *In re Marriage of Reynard*, 344 Ill. App. 3d at 791. Petitioner further argues that based upon "the lifestyle the parties enjoyed during their long marriage, [petitioner] should be able to purchase a home comparable" to the former marital residence. This argument in petitioner's brief is unsupported by any citation to evidence in the record. It calls for speculation as to the current monthly mortgage cost of a comparable residence and contradicts petitioner's testimony in the court below. On that basis we cannot find the trial court abused its discretion. See, e.g., *In re Marriage of Minear*, 287 Ill. App. 3d 1073, 1081-82 (1997) ("As to Robert's

claim the trial court failed to consider Melissa's upcoming college expenses, no evidence was adduced at trial as to the nature and extent, if any, of such expenses, so the trial court's order is appropriately silent with respect to these speculative 'expenses.' ”).

¶ 41 We agree the March 2015 Order does not contain specific findings as to the standard of living petitioner enjoyed during the marriage. In her PFR, petitioner directs this court's attention to the parties' disposable income during the marriage by pointing to the parties' expenses during the marriage other than child care expenses. However, the law does not require equalization of the parties' postdissolution disposable income. See *In re Marriage of Reynard*, 344 Ill. App. 3d at 791. Petitioner failed to satisfy her burden of proof to establish that the parties' lifestyle during the marriage justified an extension of maintenance under the circumstances of this case. We do not find an abuse of discretion in this regard in the March 2015 Order.

¶ 42 Notwithstanding what petitioner claimed was the wrong standard (viewing her self-sufficiency in terms of her current standard of living), petitioner argues the findings of fact the trial court used to determine her self-sufficiency are based on “incorrect and speculative information” that respondent provided, and, therefore, the trial court abused its discretion in denying the maintenance petition. Petitioner argues, based on her assertions concerning her income, expenses, and prospects for future income gains, the statutory factors weigh in favor of increased and continued (or permanent) maintenance.

¶ 43 A. Income

¶ 44 First, petitioner asserts that respondent's claims about the monthly income petitioner could begin to receive from one of his retirement plans had no basis in the evidence, therefore the trial court overestimated her income by the amount of the pension benefit. This is because the value was allegedly established by a report that was offered by stipulation on the condition that respondent's counsel provide petitioner with verifying data from respondent's employer.

Petitioner claims respondent's counsel failed to deliver, thus the report was not admitted and there is no evidence of any pension income to petitioner, or when petitioner can start to receive the benefit. Therefore, the trial court's finding with regard to that element of petitioner's income is against the manifest weight of the evidence.

¶ 45 Respondent argues petitioner's attorney represented he would contact the preparer of the report at issue and respondent's attorney proceeded in reliance on that representation, petitioner cites no evidence she did not have documentation of when she could start receiving the pension benefit, and, regardless of the foregoing, respondent testified without objection that petitioner could begin to receive the benefit "in the second half of this year" and the amount of the benefit. When the parties entered the stipulation, petitioner's attorney stated he needed something in writing to confirm that petitioner could elect to receive respondent's pension benefit early, which would result in a lower benefit (\$1664.58 per month for life) than if she waited until respondent's normal retirement age, and that he was reserving his right to argue petitioner should not have to elect to receive the lower amount.

¶ 46 We find that petitioner's argument that the trial court's reliance on the income she will receive from respondent's pension plan lacks basis in the record is without merit. The trial court admitted respondent's testimony to that fact into evidence. Petitioner cannot and does not complain that respondent could not testify to that fact. "An objection must be made to alleged incompetent evidence at the time of its admission. ([Citation.]). The failure to object at the original proceeding constitutes a waiver of the right to raise the issue on appeal." *In re Marriage of Winters*, 160 Ill. App. 3d 277, 280 (1987).

¶ 47 Next, petitioner argues the trial court's inclusion of child support in determining she was self-sufficient was improper because that income benefits the minor child and not petitioner. Petitioner's argument concerning the inclusion of child support in the court's determination of

self-sufficiency lacks merit because, as respondent argues, the trial court's determination that petitioner can satisfy her needs is based on respondent's calculation of petitioner's income and expenses, which only includes child support for the period of Carson's minority and not beyond. We also agree with respondent that it was appropriate for the court to consider child support as income since petitioner included expenses for the minor child in her argument she cannot pay her expenses without receiving maintenance. (\$2200 of petitioner's claimed \$9875.81 monthly living expenses in her 2013 Disclosure are children's expenses.) The court did not abuse its discretion in considering the remaining child support petitioner will receive because it is relevant to the determination of whether she needs continuing maintenance to satisfy her current and future expenses—which now include expenses for the minor child but will not after his majority, at which time the calculations the court relied upon no longer include child support.

¶ 48

B. Expenses

¶ 49 Petitioner argues the trial court's findings regarding her expenses listed in her 2013 Disclosure are against the manifest weight of the evidence. Petitioner argues the trial court's finding she exaggerated her grocery expenses is against the manifest weight of the evidence because she testified she averaged those expenses for the 2013 Disclosure and "no evidence was ever presented establishing that her average was incorrect." We disagree. Respondent testified that he analyzed petitioner's expenses for 2013 by reviewing her bank accounts, money market account, and checking account, and her credit card account, "her Chase accounts, her American Express accounts" and "every canceled check that went against these accounts." Petitioner had testified that all of her expenditures could be found in those accounts. Therefore, the trial court's acceptance of respondent's testimony is not against the manifest weight of the evidence.

¶ 50 Petitioner also argues the trial court's finding her expenses were not credible because she listed expenses for all three children is "erroneous and plainly contradicted" by her 2013

Disclosure. To support that statement petitioner argues she does document that her oldest child was emancipated and that her middle child resided with her and at college. However, that fact does not help petitioner because she does not dispute that the expenses included on the 2013 Disclosure are the same as when all three children resided with her, despite the statement in the 2013 Disclosure that her oldest child is emancipated and one child at best resides with her only occasionally. The fact she listed one child as emancipated and one in college does not change the fact she listed the exact same amount in expenses as on prior disclosure statements. The trial court could find the 2013 Disclosure lacked credibility on that basis. Petitioner argues to this court that her “testimony that she paid for Carson’s lunches and activities was never impeached.” Again, that statement is not helpful to her claim the trial court’s finding her 2013 Disclosure is not reliable is erroneous, because it does not address the trial court’s concern with the evidence concerning Carson’s lunches. The trial court did not dispute that she paid for Carson’s lunches—the problem was that she also testified that she packs his lunch from home. The trial court could view that discrepancy, which petitioner fails to address on appeal, as negatively affecting her credibility.

¶ 51 Finally, petitioner argues the trial court’s failure to include rent in its calculation of her expenses was “against the manifest weight of the evidence and an abuse of discretion” notwithstanding the fact her rent was prepaid from the proceeds of the sale of the marital home. Petitioner argues that if rent is included in her expenses “the purported ‘surpluses’ for 2014 and 2015 are drastically reduced by \$30,000 per year.” Including a rent expense in petitioner’s expenses would require including the escrowed prepaid rent in her assets. The net result of the calculation of petitioner’s income and expenses would be the same. The trial court’s chosen method of calculation was not an abuse of discretion.

¶ 52

C. Assets

¶ 53 Finally, petitioner argues the trial court “grossly overstated” her assets. Petitioner argues the trial court found her stock options had a value of \$214,454, but the record demonstrates that her share of the options had a gross value of \$202,485. The trial court’s March 2015 Order does state that petitioner’s 2013 Disclosure “excludes her *** stock options valued at approximately \$214,454.” Respondent submitted an exhibit listing the stock options awarded to petitioner in the dissolution. The exhibit lists an “exercisable gain” on the stock options as of February 20, 2014 at 4:00 p.m. ET. The total “exercisable gain” for the stock options listed in the exhibit as having been awarded to petitioner is \$202,485. However, the statement by the trial court about which petitioner complains was made in that section of the March 2015 Order wherein the trial court explained its reasons for finding petitioner was not a credible witness. The court found petitioner was not credible because she excluded the stock options from her 2013 Disclosure. (Petitioner’s argument the trial court was wrong because “[a]lthough not listed on her most recent Disclosure Statement, the options were listed in the Judgment and on a prior Disclosure Statement,” is not persuasive. The trial court’s concern stemmed from her failure to list the options specifically in her 2013 Disclosure, leading the court to find that document “fails to accurately reflect her actual income, expenses and assets.”) Further, petitioner’s argument that she failed to list the stock options on her 2013 Disclosure because respondent failed to provide any information about the options is belied by her statement the options were listed on prior disclosure statements. In discussing whether petitioner established that maintenance should be continued, the court said only that petitioner has substantial assets totaling “almost” \$400,000, and did so only after noting her income from various sources (including remaining child support and one of respondent’s pension plans which petitioner could begin to receive on a monthly basis in August 2014) and her expenses (including, “commencing in June 2015” when her prepaid rental period expires, “rental or mortgage expense”). There is nothing to suggest an almost

\$12,000 variance in valuing the stock options, if it existed⁵, had an effect on the trial court's judgment petitioner had "achieved the statutory goal of becoming self-sufficient."

¶ 54 Similarly, petitioner's argument that the trial court's judgment requires her "to liquidate her assets to support herself the children [*sic*], and pay her debts" fails to demonstrate an abuse of discretion by the trial court. The court did not consider petitioner's assets when it determined that petitioner "had a surplus in 2013 and will continue to have a surplus in the future without receiving a dollar of maintenance." The court made that determination based solely on petitioner's income and her expenses.

¶ 55 Finally, petitioner argues she no longer had the \$80,000 she allegedly repaid her family for financial and other assistance they provided and her testimony regarding her repayment of those loans and for the services she received was never contradicted. The trial court heard petitioner's testimony and rejected it as not credible. The court found petitioner was not credible because petitioner "failed to specifically identify when the funds were allegedly provided to her by her mother, brother or aunt, where the funds were deposited, and [she] produced no loan document evidencing that any amounts were due ***." On appeal, petitioner offers nothing to address the trial court's concerns and only complains that the court "refused to accept [her] testimony these debts had grown since 2012." "This type of credibility determination lies squarely within the province of the trial court, and we will not disturb it on appeal. [Citation.]" *In re Marriage of Stuhr*, 2016 IL App (1st) 152370, ¶ 69. We find no abuse of discretion in the trial court's determination of petitioner's assets.

⁵ Respondent's exhibit listing the value of the stock options explains that the "exercisable gain" varies with the price of respondent's employer's stock. It says: "For example, if the grant price is \$80 and the stock price increases to \$90, you have a \$10 gain on each share." Respondent's exhibit valued the stock as of February 20, 2014. The trial court entered the March 2015 Order on March 9, 2015.

¶ 56 We find no abuse of discretion in the trial court’s finding petitioner failed to meet her burden to establish that a continuation of maintenance was warranted. The trial court’s findings that petitioner’s income and expenses provide her with a surplus income to maintain her lifestyle are not against the manifest weight of the evidence. Petitioner failed to establish sufficient facts to demonstrate that she is unable to maintain the lifestyle she enjoyed during the marriage. The trial court stated its awareness of its obligation to consider all of the statutory factors and it was not required to give equal weight to each factor. *In re Marriage of Dunlap*, 294 Ill. App. 3d at 772 (quoting *In re Marriage of Miller*, 231 Ill. App. 3d at 485). The factors relating to income (including petitioner’s current and future earnings from employment), expenses (demonstrating petitioner’s needs), assets (providing petitioner property and other sources of income), and lifestyle amply support the court’s judgment. For the foregoing reasons, the trial court’s judgment denying the maintenance petition is affirmed.

¶ 57 (2) Petition for Attorney Fees and Costs

¶ 58 Petitioner argues the trial court erred in denying her petition for attorney fees and costs because (1) the court failed to consider the disparity in income and the parties’ relative ability to pay, and (2) it found respondent in indirect civil contempt of court, justifying an award of fees.

¶ 59 A. Fees Pursuant to Section 508(a)

¶ 60 Section 508(a) of the Dissolution Act states, in pertinent part, as follows:

“The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order any party to pay a reasonable amount for his own or the other party’s costs and attorney’s fees. *** Awards may be made in connection with the following:

(1) The maintenance or defense of any proceeding under this Act.

(2) The enforcement or modification of any order or judgment under this Act.” 750 ILCS 5/508(a) (West 2012).

¶ 61 Petitioner first argues that the trial court’s failure to consider the “gross disparity in the income between the parties” alone was an abuse of discretion warranting reversal.

“Section 508(a) directs that contribution to attorney fees may be ordered from an opposing party in accord with section 503(j) of the Act ([citation]). Pursuant to section 503(j), in deciding the petition for contribution, the trial court must consider the factors for property distribution set forth in section 503 ([citation]) and for maintenance set forth in section 504 ([citation]) of the Act ([citation]). In determining an award of attorney fees, the trial court considers the relative financial circumstances of the parties, including the allocation of assets and liabilities, maintenance and the parties’ relative earning abilities. [Citation.]” *In re Marriage of Anderson*, 2015 IL App (3d) 140257, ¶ 12.

“The party seeking an award of attorney fees must establish an inability to pay and the other spouse’s ability to do so. [Citation.] Financial inability exists where requiring payment of fees would strip that party of his means of support or undermine his financial stability.” *In re Marriage of Streur*, 2011 IL App (1st) 082326, ¶ 36. “An award of attorney fees rests in a trial court’s sound discretion, and we will not disturb the court’s decision unless it represents an abuse of discretion. [Citation.]” *In re Marriage of Winne*, 239 Ill. App. 3d 273, 284 (1992).

¶ 62 The trial court found that the fees petitioner sought were not reasonable and that she has the ability to pay her own attorney fees. The March 2015 Order relies on authority holding that if a party cannot satisfy the first prong of the test (lack of ability to pay) it is improper to even consider the ability of the other party to pay. In *In re Marriage of Ryan*, 138 Ill. App. 3d 1077, 1083 (1985), the court held: “We need not address the second question, defendant’s ability to

pay, as plaintiff has completely failed the burden of showing her inability to pay.” Because the propriety of an award of attorney fees is dependent upon a showing by the party seeking them of an inability to pay (*In re Marriage of Vance*, 2016 IL App (3d) 150717, ¶ 61), the trial court was not required to consider the parties’ relative income unless its finding that petitioner is capable of paying her own attorney fees was erroneous.

¶ 63 Petitioner argues the finding of her ability to pay misstates and misinterprets the evidence and Illinois case law. Specifically, petitioner asserts the trial court’s reliance on respondent’s calculations of petitioner’s income and expenses was misplaced and based on speculation, and the trial court ignored the rule that a party is unable to pay where doing so would strip that party of their means of support or undermine their economic stability. We have already found that the trial court’s acceptance of respondent’s calculations of petitioner’s income and expenses was not against the manifest weight of the evidence. Petitioner argues the calculation of her income is speculative because the income from one of respondent’s pension plans “has no basis in the record.” Petitioner argues the parties’ stipulation as to the amount of that benefit and when petitioner could begin to receive it was never entered into evidence. However, respondent testified to those facts, and the trial court could accept his testimony. Respondent also testified as to the bases of his calculation of petitioner’s expenses (based on a review of all of her expenditures), which petitioner has failed to refute. Further, the trial court explained its reasons for finding petitioner lacked credibility, and those findings are also not against the manifest weight of the evidence.

¶ 64 As to stripping of her economic stability, petitioner argues that even if she liquidated all of her assets, she could not pay the balance of her attorney fees and costs. The trial court relied on an annual surplus in petitioner’s income, in *addition* to substantial assets, to find that petitioner has the ability to pay her attorney fees. In support of her petition for fees, petitioner’s

attorney averred that \$253,229.75 “represents the balance of the attorney’s [sic] fees and costs solely attributable to the post-decree litigation that has occurred over the past three (3) years between the parties through the period ended May 15, 2013.” Petitioner asserts that requiring her to pay her own attorney fees would strip her of her means of support and undermine her financial stability; however, petitioner has failed to adequately demonstrate how her resources would be depleted. The trial court found that petitioner had accumulated almost \$400,000 in assets, and petitioner’s stock options alone had, at the time, a value of \$214,454. The court also found that petitioner’s testimony the \$80,000 she sent to her mother was for the repayment of debts was not credible. In addition to those assets, petitioner’s arguments concerning the allegedly speculative nature of the pension income lack merit. Petitioner does not challenge the evidence as to the cash balances in her various accounts, and the trial court’s findings as to her credibility regarding her other assets are not against the manifest weight of the evidence. We do not find that the trial court abused its discretion in finding petitioner has the ability to pay her own attorney fees. Petitioner argues that respondent’s litigiousness in these proceedings caused her to incur substantial attorney fees, which respondent should be required to pay, and her attorney fees are reasonable and necessary. Those arguments are immaterial because petitioner failed to make the threshold showing of her own *inability* to pay her own attorney fees. Finally, we find the trial court’s superfluous comment that respondent lacks the ability to pay petitioner’s attorney fees completely inconsequential. The trial court did not abuse its discretion in denying the petition for fees pursuant to section 508(a).

¶ 65

B. Fees Pursuant to Section 508(b)

¶ 66 Section 508(b) of the Dissolution Act states, in pertinent part, as follows:

“In every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without

compelling cause or justification, the court shall order the party against whom the proceeding is brought to pay promptly the costs and reasonable attorney's fees of the prevailing party." 750 ILCS 5/508(b) (West 2012).

"A finding of contempt is sufficient to require an award of fees under section 508(b)." *In re Marriage of Berto*, 344 Ill. App. 3d 705, 717 (2003). Petitioner had the burden to prove the fees she incurred in connection with respondent's failure to pay the proper amount of maintenance. See generally *In re Marriage of Douglas*, 195 Ill. App. 3d 1053, 1060 (1990) ("It is well settled that a party asserting a fact or issue generally has the burden of proof as to such fact or issue.").

¶ 67 In denying the petition for fees pursuant to section 508(b), the trial court found that petitioner's billing statements failed to identify which fees and costs were incurred in connection with the maintenance issue versus in connection with the child support issue, and that the court had no way to determine that amount. Additionally, the court found that petitioner did not incur any more fees in connection with the maintenance issue beyond the fees petitioner incurred in connection with the child support issue because petitioner had to determine respondent's net income for purposes of the child support issue and subsequently determining respondent's income for purposes of maintenance (13% of his gross income) was "a simple calculation for which no additional legal fees *** could have been incurred." Petitioner argues that because the trial court found respondent in contempt for failing to comply with the maintenance provision of the dissolution judgment, it was *required* to award petitioner attorney fees pursuant to section 508(b), and the court "ignored the detailed time records and Affidavit submitted by [petitioner's] counsel."

¶ 68 The "detailed time records" to which petitioner refers list only, repeatedly and consistently, time spent on the "Petition for Rule to Show Cause" without any further description. The petition for rule to show cause was in two distinct parts: one for the failure to

pay child support and one for the failure to pay maintenance. It is impossible to discern from the time records to which petitioner directs this court's attention, or from her attorney's affidavit, "what, if any, attorneys' fees and costs were incurred in connection with the maintenance versus the child support issue" just as the trial court found. The "Allocation of Fees Related to Enforcement of Support Provisions from the Judgment for Dissolution of Marriage" on which petitioner also relies is similarly unhelpful because that document only purports to distinguish fees incurred in connection with petitioner's appellate matter from the total fees incurred "in connection with prosecuting [petitioner's] rights pursuant to the Judgment for Dissolution," according to her attorney's affidavit. That document does not separately list the fees incurred in connection with respondent's failure to pay maintenance.

¶ 69 Petitioner also argues that even if the court could not determine the attorney fees and costs associated with respondent's failure to pay the proper maintenance, the court "could have simply awarded a reasonable fee *including both*." (Emphasis added.) Petitioner cites *In re Marriage of Michaelson*, 359 Ill. App. 3d 706 (2005), and *In re Marriage of Wiley*, 199 Ill. App. 3d 223 (1990) (cited in *Michaelson*) for the proposition that a trial court may award attorney fees as a sanction for contempt even when only a portion of the fees awarded were related to enforcement of the court's order. In *Michaelson*, the court found the trial court did not abuse its discretion in allowing fees related to matters beyond time spent on a petition for rule to show cause. *In re Marriage of Michaelson*, 359 Ill. App. 3d at 716. The *Michaelson* court relied on *Wiley*, which held that the respondent's argument "that the trial court failed to make a distinction in its fee award between time spent on contempt versus non-contempt issues" was not supported by the record. *In re Marriage of Wiley*, 199 Ill. App. 3d at 234. In *Wiley*, the trial court had found the spouse who was found in contempt " 'never intended to comply with the agreement ***. This bad faith prompts the Court to assess petitioner's attorney fees in total against the

respondent as a sanction for the contempt.’ ” *Id.* The *Wiley* court held that the trial court did not abuse its discretion. *Id.*

¶ 70 This case is factually distinguishable from *Wiley* and *Michaelson*. Here, the trial court found that respondent’s unilateral reduction in child support was “justified and not in scornful disregard of the parties’ Judgment” because respondent “believed, in good faith that he was entitled to a reduction.” Thus, unlike in *Wiley*, here there is no finding respondent never intended to comply with the dissolution judgment in whole. In *Michaelson*, the postdissolution proceedings related only to the payment of maintenance. See *In re Marriage of Michaelson*, 359 Ill. App. 3d at 709-10. The respondent sought to have the court limit the fee award to time spent on a rule to show cause. *Id.* at 716. The *Michaelson* court held that the trial court did not abuse its discretion in allowing the full fees because they were all related to enforcement of the maintenance provision in the dissolution judgment. See *Id.* at 708, 717. Here, petitioner is not asking for an award of fees related solely to postdissolution maintenance issues, but a reasonable fee “including both” maintenance and child support issues, where, in this case, respondent’s actions regarding child support were found to have resulted from a good faith belief respondent was entitled to a reduction in child support. Moreover, the holding in both *Michaelson* and *Wiley* was that the amount of the attorney fee award was not an abuse of discretion. We do not find that *Michaelson* or *Wiley* support petitioner’s argument the trial court abused its discretion in not awarding a reasonable fee for *both* the child support issue and the maintenance issue in petitioner’s rule to show cause.

¶ 71 Petitioner argues that in making its findings regarding attorney fees for the maintenance issue, the trial court “completely ignored its own finding that [respondent] had willfully and contumaciously violated the parties’ judgment by not paying [petitioner] the full amount of maintenance due to her and that [respondent’s] explanation regarding his willful conduct was not

credible.” Petitioner also questions the trial court’s findings that she did not incur additional attorney fees for the maintenance issue beyond the fees incurred for the child support issue. In support, petitioner notes that the trial court initially erroneously determined that respondent did not have a child support arrearage—a mistake that was corrected by the filing of a motion to reconsider. Thus, petitioner argues, determining respondent’s income was not a “simple calculation.”

¶ 72 First, the trial court’s judgment denying fees pursuant to section 508(b) does not ignore the finding of indirect civil contempt. If not for that finding, the court would have no occasion to consider section 508(b), which it did. Second, petitioner’s argument the calculation as to income was not simple because there was initially an error in calculating the child support arrearage miscasts the basis of the trial court’s finding that additional fees were not incurred and helps to demonstrate the correctness of that finding. Whether or not it was “simple” to calculate respondent’s income for purposes of determining the child support arrearage the thrust of the trial court’s finding is that the work to make that determination was done in connection with the petition for rule (and motion to reconsider) regarding child support, and there was no need to duplicate it (and incur substantial additional fees) for purposes of the maintenance claim.

¶ 73 Petitioner continues to confound the issues when she argues that “the trial court knew exactly what fees were related to [petitioner’s] enforcement of the Judgment’s support provisions,” therefore the court “abused its discretion by finding that it did not know which fees were related to the contempt finding.” Petitioner does not dispute that the court found respondent in contempt only on the issue of maintenance. The fees related to the “support provisions” include child support *and* maintenance. Because petitioner failed to carry her burden to prove the amount of fees she incurred in pursuing the maintenance issue, her arguments that all of her fees are reasonable and necessary are inapposite.

¶ 74 Notwithstanding the foregoing, “[w]here a trial court finds a party’s failure to pay was without cause or justification, the award of reasonable attorneys’ [sic] fees and costs is mandatory.” *In re Marriage of Michaelson*, 359 Ill. App. 3d at 715-16. While we do not agree with petitioner that if the court could not determine the attorney fees and costs associated with respondent’s failure to pay the proper maintenance the court “could have simply awarded a reasonable fee *including both*” (emphasis added), we do find that in the absence of sufficient proof by petitioner, the trial court should have exercised its discretion to award reasonable fees and costs pursuant to section 508(b) for the attorney fees and costs incurred only in connection with respondent’s willful and contumacious failure to pay the correct amount of maintenance. The court’s decision in *In re Marriage of Walters*, 238 Ill. App. 3d 1036 (1992), is instructive.

¶ 75 In *Walters*, the petitioner filed a petition for a rule to show cause against the respondent based on the respondent’s alleged failure to, among other things, pay child support and contribute to the college expenses of the parties’ minor children. *In re Marriage of Walters*, 238 Ill. App. 3d at 1088. On the issue of child support, the parties’ stipulated to the fact and amount of arrearage the respondent owed the petitioner, and the trial court found that the respondent’s failure to pay the child support was without cause or justification. *Id.* at 1098. The petitioner had submitted a petition for attorney fees totaling \$11,875. The trial court ordered the respondent to pay \$2500 of the petitioner’s fees. On appeal, the petitioner argued that because her attorney testified that he spent approximately 40% of his time on child support issues and approximately 10% of his time on matters related to college expenses, the trial court should have ordered the respondent to pay half the amount of her fee petition.

¶ 76 The *Walters* court began by noting that “Section 508(b) of the Act is mandatory, not discretionary, and does not allow for the court to exercise its discretion as to payment if the defaulting party’s conduct was without cause or justification. [Citation.]” *Id.* at 1098. The court

found that “under section 508(b), [the] petitioner was entitled to fees for the amount expended in securing the child support which was in arrears, but the time the attorney expended in working on the college expense issue would not be recoverable under section 508(b) because [the] respondent’s failure to pay for the expenses was due to [the] petitioner’s failure to request such payment.” *Id.* at 1099. The court held that “fees should have been awarded at approximately 30% to 40% of the reasonable fees, not the 50% figure requested by [the] petitioner.” *Id.* The only evidence of how much time the petitioner’s attorney allocated to the different issues was the attorney’s testimony estimating the time he spent on the various issues. *Id.* The court noted that the petitioner’s attorney’s testimony provided only a rough approximation of the actual breakdown of his time because his approximations did not total 100%. *Id.* The trial court in *Walters* found \$2500 “to represent reasonable fees expended in obtaining child support arrears,” which was “less than 25% of the fees requested.” *Id.* at 1099. The *Walters* court nonetheless found the trial court did not abuse its discretion. *Id.* “The trial court may accept or reject the testimony of the petitioning attorney as to the value of the legal services performed. The court may also rely on its own knowledge and experience in determining the value of the services rendered.” *Id.* In *Walters*, the court found the trial court did not abuse its discretion in awarding 25% of the fees being sought, despite testimony suggesting that 30-40% of the *reasonable* fees being sought were recoverable under section 508(b) (*id.*), in part because the trial court “specifically found that *** too much time was spent on all matters due to the parties’ failure to compromise, and some of [the] petitioner’s attorney fees were not sufficiently defined.” (Emphasis added.) *Id.*

¶ 77 In this case, the trial court expressed concern about the reasonableness of petitioner’s attorney fees, and the fees incurred specifically in relation to the maintenance issue in this case were not sufficiently defined. Rather than fail to award petitioner any attorney fees, because

section 508(b) is mandatory, the trial court should have relied on its own “knowledge and experience in determining the value of the services rendered.” *Id.* We hold the trial court abused its discretion in not awarding petitioner her reasonable attorney fees and costs incurred in connection with the maintenance issue for which the trial court found respondent’s failure to pay was willful and contumacious. That portion of the trial court’s judgment denying the petition for fees pursuant to section 508(b) of the Dissolution Act is reversed, and the cause is remanded for the trial court to award petitioner reasonable fees and costs consistent with this order. On remand, the trial court may hear additional evidence as to the fees and costs incurred in connection with the maintenance issue and the reasonableness thereof.

¶ 78

CONCLUSION

¶ 79 For the foregoing reasons, the circuit court of Cook County is affirmed in part, reversed in part, and remanded.

¶ 80 Affirmed in part and reversed in part. Cause remanded.