

NOTICE

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2016 IL App (4th) 150935-U

NO. 4-15-0935

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

December 29, 2016

Carla Bender

4th District Appellate Court, IL

In re: MARRIAGE OF)	Appeal from
REBECCA L. SCHMIDT,)	Circuit Court of
Petitioner-Appellant,)	Sangamon County
and)	No. 11D712
JOHN F. SCHMIDT,)	
Respondent-Appellee.)	Honorable
)	John M. Madonia,
)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion by (1) granting respondent's motion to reconsider and reopen the evidence or (2) awarding petitioner maintenance in gross.

¶ 2 In February 2015, the trial court entered a judgment of dissolution of marriage, dissolving the marriage of petitioner, Rebecca L. Schmidt, and respondent, John F. Schmidt. As part of its judgment, the court awarded Rebecca permanent maintenance in the amount of \$700 per month. In November 2015, following a hearing on John's motion to reconsider and reopen the evidence, the court modified Rebecca's maintenance award to a lump sum maintenance-in-gross payment of \$16,576. Rebecca appeals, asserting the court abused its discretion by (1) granting John's motion to reconsider and reopen the evidence and (2) awarding her maintenance in gross. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The parties were married on May 4, 1985, and have one adult child, Jonathon. On August 24, 2011, Rebecca filed a petition for dissolution of marriage, as well as a petition for a temporary restraining order regarding the parties' marital assets and a petition for temporary relief. At the time of her petitions, Rebecca was 51 years old and John was 52 years old.

¶ 5 On September 13, 2011, the trial court entered a temporary restraining order directing both parties to refrain from disposing of marital assets.

¶ 6 On February 14, 2012, the trial court entered a temporary order directing John to pay Rebecca \$4750 per month in temporary support, retroactive to November 1, 2011, and to maintain health insurance on Rebecca and the parties' son during the pendency of the case.

¶ 7 On November 28, 2012, John filed a petition to modify the temporary order. According to his petition, John lost his job on October 19, 2012, but was provided with a severance package that included a lump-sum payment of \$131,556.46. At the time he filed his petition, John had applied for, but had not received, unemployment benefits. His petition further alleged that Rebecca had been working as a nurse in a part-time capacity and had not attempted to obtain full-time employment. Also on November 28, 2012, Rebecca filed an emergency motion to enforce the temporary order, requesting that the trial court require John to (1) enroll in continuing health insurance coverage and (2) segregate his severance payment and to draw an amount equal only to his monthly salary so that he could continue to pay his other obligations, including temporary maintenance. On January 23, 2013, the court entered an order requiring John to use his severance funds to pay the ordered monthly maintenance, his own bills, and to obtain Consolidated Omnibus Budget Reconciliation Act (COBRA) health insurance.

¶ 8 Following a June 19, 2013, hearing, the trial court entered an order resolving financial issues pending trial. In part, the court awarded each party \$10,000 and each attorney

\$5000 from the proceeds of a joint money market account. It also ordered that \$10,000 in undisputed credit card debt be paid from the proceeds of the joint money market account.

¶ 9 The trial commenced on September 18, 2014. Rebecca testified that she worked as a registered nurse in Missouri from 1981 to 1985. After she and John married in 1985, she stopped working for several years. In 1989, she returned to work full-time as a clinic nurse at the Arthritis Center, where she has worked for the past 25 years. When the parties' son was born in 1989, she reduced her workload to a part-time schedule, working three mornings a week. When Jonathon was two years old, she started working two full days per week. In 2000, she began traveling to satellite offices for work, working a total of six days per month. In February 2014, Rebecca increased her work hours enough to qualify for health insurance through her employer. As of the date of trial, Rebecca continued to work at the Arthritis Center in a part-time capacity. According to Rebecca, the parties never agreed that she would return to full-time work.

¶ 10 Rebecca testified that the parties moved to the current marital residence when Jonathon was nine months old. Rebecca continued to reside at the marital residence, along with her 93-year-old father, for whom she was the primary caretaker. Her father had been living with her since June 2014, and he was no longer capable of living independently.

¶ 11 Rebecca testified that her monthly expenses included the mortgage payment on the marital residence, real estate taxes, homeowner's insurance, utilities, telephone, cable and Internet bill, household maintenance expenses, groceries, and gas for her car. Her father had contributed \$500 for expenses for the last two months. However, Rebecca stated she was unable to meet her reasonable needs based on her current earnings. She was also unable to take tropical vacations, which she stated the parties had been accustomed to taking once a year during their marriage.

¶ 12 Rebecca further testified that she had never used a computer for work, which she felt would be a limitation on her ability to obtain full-time employment. She agreed that she had not attempted to obtain employment anywhere other than at the Arthritis Center. She further agreed she had not taken any classes to improve her computer skills and had not returned to college to obtain her bachelor's degree, for which she was one year shy.

¶ 13 John testified at trial that he was currently a contractual employee with the State of Illinois's Office of Coal Development. He possessed a bachelor of science degree in mining engineering and had worked in the mining industry since 1981. From 1984 to January 2005, he worked for Turriss Coal in a number of capacities.

¶ 14 In 2005, John began working for Peabody Energy. He lost this job on October 19, 2012. Upon his departure from Peabody Energy, he was paid a severance package, which included nine months' salary. Per the trial court's prior order, John stated he had been paying maintenance to Rebecca from those funds, which had since been depleted. According to John, upon losing his job, he immediately began looking for employment and continued his job search up to the date of his testimony.

¶ 15 In November 2013, he obtained a temporary position as a contract miner to do underground labor work through GMS, a temporary contract service for the mining industry. He was paid \$450 per day for this work and worked an average of 15 hours per day. This job ended on February 28, 2014. John testified that he could not physically keep up with the nature of the job due to his age and health.

¶ 16 Immediately after leaving GMS, he began his current contract position with the State of Illinois. John testified that his current contract with the State was guaranteed for 60 days for each extension, with a maximum extension to March 2015. He was paid \$350 for each day

he worked, and he could work a maximum of five days per week, for a maximum annual salary of \$90,000. John testified the State job required him to travel between Marion and Springfield during the week. In addition to travel expenses, John stated that he paid for catastrophic medical insurance, which costs \$559 a month and has a \$12,000 deductible.

¶ 17 John testified that the coal industry had been in a downturn since 2010 and that he had expanded his job search to include jobs outside of the coal industry. In the last six months, John had received only one job offer in the service industry, and he would have made \$12 per hour with no benefits. He had applied for full-time positions with the State of Illinois and had pending applications, but he had no interviews scheduled. John believed his applications were still pending because the State had not yet received approval to fill the vacancies.

¶ 18 John denied taking annual tropical vacations during the parties' marriage. He further testified that he had "hundreds" of conversations with Rebecca regarding his intent to retire in his early 50's and her intent to return to full-time work at that time.

¶ 19 The parties introduced exhibits regarding their annual incomes from 2000 through 2012. John introduced a group exhibit consisting of W-2 forms for his employment from 2000 through 2008. According to the exhibit, John's gross earnings were approximately \$100,859 in 2000; \$110,425 in 2001; \$103,381 in 2002; \$106,214 in 2003; \$79,036 in 2004 (he did not receive a bonus in 2004); \$123,029 in 2005; \$178,938 in 2006; \$179,788 in 2007; and \$174,000 in 2008. Rebecca introduced copies of the parties' joint federal and state tax returns for the years 2009 through 2012. According to her exhibits, the parties' adjusted gross income was as follows: \$392,760 in 2009; \$192,897 in 2010; \$279,786 in 2011; and \$513,187 in 2012 (which included John's severance pay). Rebecca also introduced a copy of her individual tax return for 2013, which showed an adjusted gross income of \$15,533.

¶ 20 Kari Stafseth's evidence deposition was admitted into evidence. She testified that she was a vocational rehabilitation counselor. She had been retained by both parties to perform vocational interviews and perform a labor market survey to determine the types of jobs that would be available to the parties based on their education, work history, and skills. Regarding Rebecca, Stafseth believed that she was capable of completing computer training and would be employable as a registered nurse in a full-time capacity making between \$20 and \$30 per hour. Regarding John, Stafseth testified that the coal mining industry was a narrower industry and the labor market survey she conducted revealed few jobs in the industry, none of which offered the same type of compensation he had previously made. She did believe his skills were transferable and that his income range would be between \$35 and \$45 per hour.

¶ 21 On February 26, 2015, the trial court entered a judgment of dissolution of marriage, dissolving the marriage, distributing the parties' assets and debts, and awarding Rebecca permanent maintenance of \$700 per month. Regarding the distribution of property, the court awarded John \$877,098.42 in assets and Rebecca \$844,743.49 in assets. Rebecca's assets included the marital residence, for which the mortgage was almost paid. The court found the award of permanent maintenance would allow Rebecca to approach the standard of living that the parties had established during the marriage. The court noted as follows:

"In categorizing this award of maintenance as permanent, the [c]ourt really is referring to the indefinite duration of the award, and the term 'permanent' can truly be a misnomer in this particular case since this case presents many future variables that could trigger the application of the modification factors of 750 ILCS 5/510 [(West 2014)]. This award *** is subject to review,

modification, and even termination if either party realizes a substantial change in circumstances subsequent to the entry of this Judgment. This case is ripe for such possibilities which is ultimately why the [c]ourt decided on an award of continual maintenance on a permanent monthly basis as opposed to an award of maintenance in gross which could have been ascertained by awarding [Rebecca] a large portion of the parties' liquid assets in the marital estate."

The court then identified a number of possibilities which could change the parties' financial circumstances, including Rebecca resuming full-time work or realizing a decline in monthly expenses, or John acquiring more lucrative employment.

¶ 22 On March 26, 2015, John filed a motion to reconsider and to reopen the evidence. He alleged that "new evidence which was not available at the time of trial would establish that, in fact, his contract [with the State of Illinois] has expired and [he] is no longer employed." John asked the trial court, in relevant part, to reconsider its ruling with respect to permanent maintenance.

¶ 23 On May 12, 2015, the trial court granted John's motion to reconsider and to reopen the evidence, and a hearing on the motion was held on November 2, 2015. At the hearing, John testified that his contract with the State of Illinois expired at the end of February 2015. According to John, he had been searching for jobs since July 2014, but he increased his job search substantially since learning at the beginning of September 2014 that his contract would not be extended past February 2015. According to John, he looked worldwide for jobs and even traveled to Russia for a possible underground mining job, but he had yet to hear back

from that prospect. He testified that he looked at approximately 18,600 job openings, most of which had salaries below \$75,000 a year, and many below \$55,000 a year. Of those job openings, he submitted resumes or otherwise applied for 58 of them. However, between February 2015 and the date of the hearing, John had only obtained one small contract job, which lasted a few weeks and for which he anticipated receiving a total payment of \$1250. He had a prospect for a contract job with the State of Illinois, but it had not been finalized and he was unsure if it would be finalized. John had been approved for unemployment and had received \$426 per week for 24 to 26 weeks. John testified that he had looked for jobs in the construction industry, but he opined he was not qualified for those jobs due to his age and lack of computer skills. John testified that he had to use credit cards and borrow money from family and friends to meet his living expenses.

¶ 24 At the conclusion of the hearing, Rebecca asked the trial court to either (1) reserve the issue of maintenance until such time as John was making \$75,000 to \$80,000 per year or (2) award a lump sum of maintenance to cover a four-year period at \$7,500 per year.

¶ 25 On November 3, 2015, the trial court issued its amended judgment. The court amended the maintenance award, finding that John's circumstances had "drastically changed" due to the loss of his employment. The court noted that despite John actively seeking employment, he had failed to secure employment in any field that would offer him the type of compensation that would justify his employment and stated, "it is more apparent now than it was at the time of trial, that [John] will continue to have these types of employment issues in the future." The court continued as follows:

"The [c]ourt acknowledges that this is a significant reconsideration of the original judgment; however the facts and circumstances that have developed over time justify such alternative conclusions.

While the circumstances for [John] have drastically changed, there has been no evidence offered to indicate that [Rebecca] is any differently situated now th[a]n she was when this case was litigated. This is a relevant consideration for this [c]ourt because, in its original judgment, the [c]ourt was focused on [John's] higher income that he was earning on a monthly basis, and determined that maintenance was best paid from [John] to [Rebecca] on a monthly schedule in order to provide [Rebecca] with some income security and stability during the initial months of the post-dissolution period. But, since the entry of the Judgment, [Rebecca] is the party that is earning a steady, and dependable monthly income from her employment, while [John's] only source of income since the entry of the original Judgment, his unemployment benefits, terminated over two months ago. [John] currently has no means of support and no income being earned from employment. He provides for his daily needs through credit card advances and loans from family."

Thus, the court found that the maintenance award must be amended and opined that "a reasonable award of [m]aintenance in [g]ross would result if the [c]ourt equals the allocation of the marital assets that were previously divided between the parties." Accordingly, the court

ordered John to pay Rebecca a lump sum award of maintenance in gross in the amount of \$16,576, to be taken from the proceeds of his portion of the marital assets he had previously been awarded.

¶ 26 This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 Rebecca raises two issues on appeal. She first asserts that the trial court abused its discretion in granting John's motion to reconsider and reopen the evidence. Second, she contends the court's award of maintenance in gross was an abuse of discretion.

¶ 29 A. The Propriety of Granting John's Posttrial Motion

¶ 30 Rebecca first challenges the trial court's decision to grant John's motion to reconsider and reopen the evidence.

¶ 31 Initially, we note that the parties disagree somewhat on the nature of John's motion. Rebecca focuses on John's request that the court reconsider its ruling, asserting the motion did not identify "newly discovered evidence" that was unavailable at the original trial. She argues the trial court was aware at the time of trial that John's contract with the State of Illinois would not be renewed, although that had not yet happened. John asserts his motion asked the court both to reconsider its original decision and to reopen the case to hear specific new evidence, which included evidence that he was no longer employed and was not receiving any unemployment benefits.

¶ 32 "The purpose of a motion to reconsider is to bring to the trial court's attention (1) newly discovered evidence not available at the time of the hearing, (2) changes in the law, or (3) errors in the court's previous application of existing law." *Stringer v. Packaging Corp. of America*, 351 Ill. App. 3d 1135, 1140, 815 N.E.2d 476, 481 (2004). "When a movant seeks

reconsideration based on newly discovered evidence, 'a party must show that the newly discovered evidence existed before the initial hearing but had not yet been discovered or was otherwise unobtainable.' " *Simmons v. Reichardt*, 406 Ill. App. 3d 317, 324, 943 N.E.2d 752, 758 (2010) (quoting *Stringer*, 351 Ill. App. 3d at 1141, 815 N.E.2d at 481).

¶ 33 On the other hand, a motion to reopen the evidence does not necessarily require that the evidence sought to be admitted existed at the time of the earlier evidentiary hearing, although the court may deny the introduction of evidence offered for the first time in a posttrial motion if it could have been produced earlier. See *Stringer*, 351 Ill. App. 3d at 1141-42, 815 N.E.2d at 481. In determining whether a party should be permitted to reopen the evidence, a court considers "(1) whether the failure to introduce the evidence occurred because of inadvertence or calculated risk, (2) whether the adverse party will be surprised or unfairly prejudiced by the new evidence, (3) whether the new evidence is of the utmost importance to the movant's case, and (4) whether any cogent reason exists to justify denying the request." *Id.*

¶ 34 A trial court's decision to grant or deny a motion to reconsider or a motion to reopen the evidence lies within its sound discretion, and we will not disturb the court's ruling absent an abuse of that discretion. *Id.* at 1140-41, 815 N.E.2d at 481-82. "An abuse of discretion occurs only when no reasonable person could find as the trial court did." *In re Marriage of Ward*, 267 Ill. App. 3d 35, 40, 641 N.E.2d 879, 883 (1994).

¶ 35 Based on our review of the record, we find that the trial court granted John's posttrial motion to allow him to reopen the evidence and did not treat it as a motion to reconsider its prior decision based on newly discovered evidence that existed at the time of the original trial as Rebecca contends. We note that at the hearing on John's motion, the court stated it was a "hearing on a Motion to Reopen Evidence, which was previously granted." In our review of the

transcript of the court's remarks at this hearing, it is clear the court limited its consideration of the maintenance award in light of the new evidence of John's loss of employment and his unsuccessful efforts in obtaining new employment—evidence which did not exist prior to the original trial.

¶ 36 Further, we find that the relevant factors as described in *Stringer* weigh in favor of finding the trial court's decision to grant John's motion to reopen the evidence was not an abuse of discretion. First, the failure to introduce evidence relating to the loss of his job was not a "calculated risk" because, at the time of trial, John was employed. Second, Rebecca could not claim surprise or unfair prejudice considering John's extensive testimony at the original trial regarding his employment, which included his difficulty in finding a job and the fact that his contract job would not be extended past March 2015. Third, John's loss of his job, and his inability to obtain other employment, was of the utmost importance to his case, especially as it pertains to a monthly maintenance obligation which he now has no means to pay. Finally, no cogent reason existed to deny John's motion to reopen the evidence. Accordingly, the trial court's decision to grant John's motion was not an abuse of discretion.

¶ 37 B. The Trial Court's Award of Maintenance in Gross

¶ 38 Rebecca next challenges the trial court's award of maintenance in gross.

¶ 39 Maintenance in gross is defined as "a non-modifiable sum certain to be received by the former spouse regardless of changes in circumstances." *In re Marriage of Freeman*, 106 Ill. 2d 290, 298, 478 N.E.2d 326, 328 (1985). At the time of the maintenance award at issue here, section 504(a) of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/504(a) (West 2014)), provided that a trial court could grant a maintenance award in gross or for a fixed or indefinite period of time after consideration of the 12 enumerated factors

contained therein. Specifically, those factors include "(1) the income and property of each party; (2) the respective needs of the parties; (3) the present and future earning capacity of each party; (4) any impairment to the parties' present or future earning capacity, resulting from domestic duties or delayed education or employment opportunities due to the marriage; (5) the time necessary for the party seeking maintenance to acquire the necessary education or training, whether that party can support himself or herself through appropriate employment or whether as the custodial parent, it is not appropriate for the party to seek employment; (6) the standard of living during the marriage; (7) the duration of the marriage; (8) the age and physical and emotional condition of both parties; (9) the tax consequences of the property division; (10) the contributions by the spouse seeking maintenance to the education and career of the other spouse; (11) the valid agreement of the parties; and (12) 'any other factor that the court expressly finds to be just and equitable.'" *In re Marriage of Patel*, 2013 IL App (1st) 112571, ¶ 83, 993 N.E.2d 1062 (quoting 750 ILCS 5/504(a) (West 2008)). No one factor is determinative, and the court is not required to give equal weight to each factor. *Id.* ¶ 84. Although periodic maintenance is the judicially preferred form of maintenance, section 504(a) of the Marriage Act "authorize[s] the trial judge to award maintenance in gross if he finds it to be appropriate in a particular case.'" *Id.* ¶ 85 (quoting *Freeman*, 106 Ill. 2d at 298, 478 N.E.2d at 326).

¶ 40 "[T]he propriety of a maintenance award is within the discretion of the trial court and the court's decision will not be disturbed absent an abuse of discretion." *In re Marriage of Schneider*, 214 Ill. 2d 152, 173, 824 N.E.2d 177, 189 (2005). An abuse of discretion occurs "only where no reasonable person would take the view adopted by the trial court." *Id.* Further, the party seeking reversal of a maintenance award has the burden of showing an abuse of discretion. *Id.*

¶ 41 While Rebecca focuses much of her argument on the reasons why an award of permanent maintenance is appropriate, she recognizes it is her burden to show the trial court's award of maintenance in gross in this case was an abuse of discretion. To that end, she maintains that the award of maintenance in gross was an abuse of discretion because the trial court "simply failed to consider the far more appropriate alternatives available, under the facts presented in [this case]." For the reasons stated below, we do not find the trial court abused its discretion in awarding maintenance in gross.

¶ 42 Rebecca relies on *In re Marriage of Smith*, 150 Ill. App. 3d 34, 501 N.E.2d 1323 (1986). In *Smith*, the parties had been married for 28 years. The trial court awarded the husband \$120,000 in assets and the wife \$81,465 in assets. In addition, the court awarded the wife—who at the time of the trial was unemployed but was a certified high school teacher seeking a full-time teaching position—\$1200 per month for 12 years as maintenance in gross. The husband appealed, and on review, a majority of the appellate court found the award of maintenance in gross was an abuse of discretion because it "left no room for the innumerable combinations and permutations of factors which might have changed in the upcoming years." *Id.* at 35-36, 501 N.E.2d at 1324. In the majority's opinion, the trial court could have awarded periodic maintenance or "could have used the increasingly-popular 'reserved jurisdiction' approach of awarding a fixed, monthly sum for a specified period and then reviewing the situation at the end of that period." *Id.* at 37, 501 N.E.2d at 1324-25.

¶ 43 *Smith* is distinguishable from the instant case. In *Smith*, the award of maintenance in gross was to be paid in monthly installments over a 12-year period, during which time the award was not modifiable. Thus, even in the event the husband lost his job—the evidence showed he would be unable to work within 8 to 12 years due to a normal loss of manual

dexterity— or the wife obtained a good job and/or remarried, the husband would still be required to make the monthly maintenance payments. Here, however, the award of maintenance in gross is to be paid in one lump sum from marital assets which have already been awarded to John. Further, unlike the husband in *Smith*, John is unemployed and the trial court found it is unlikely he will be successful in procuring future employment in any industry which "would offer him the type of compensation that would justify his employment." Most importantly, unlike in *Smith*, where periodic maintenance was practical, John's lack of employment and the fact he is incurring debt to pay for his daily living expenses was an appropriate consideration for the trial court in its decision not to award periodic maintenance.

¶ 44 We find the trial court here properly considered the statutory factors set forth in section 504(a) of the Marriage Act (750 ILCS 5/504(a) (West 2014)) and the available alternatives regarding maintenance prior to determining an award of maintenance in gross was appropriate. As noted, the court found that the financial circumstances of the parties had "drastically changed" between the time of the original trial and the subsequent hearing on John's motion to reconsider and reopen evidence. In its original judgment, the court found John was able to pay monthly maintenance based on his higher monthly income. However, since the trial, the evidence showed not only that John lost his contract job with the State of Illinois, but that despite his best efforts to obtain employment in any industry, he had been unable to do so, and he would continue to experience difficulties securing employment in the future. Further, John was no longer receiving unemployment benefits and was paying for his daily living expenses by incurring debt through credit card advances and loans from family. Conversely, Rebecca was—as she had been at the time of the trial—earning a steady, dependable monthly income from her employment, and she "had a much more positive employment outlook going forward in the

foreseeable future." The court recognized John had no means of paying a monthly maintenance award, either at the time of the hearing or going forward, due to his problems in procuring employment. On the other hand, he had the ability to pay an award of maintenance in gross because a lump sum payment could be paid immediately from the proceeds of his portion of the previously awarded marital assets.

¶ 45 Here, the trial court balanced the competing factors, including the length of the marriage, Rebecca's contributions to the household during the marriage, the "considerable" award of temporary maintenance in the amount of \$4750 per month that Rebecca had previously enjoyed, and the marital assets she had already been awarded and determined a lump sum award of \$16,756 was proper. In the trial court's opinion, the award "sufficiently satisfies the needs of the parties and balances [John's] ability to pay going forward, especially in light of all he has paid during the pendency of this case." In addition, the court noted an award of maintenance in gross would provide closure to the parties considering the uncertainty regarding their future earned income capacities and the concern for continued litigation of future maintenance requests. While Rebecca takes issue with the trial court's voiced concern about future litigation, we note that finality is a reasonable basis on which a court may justify an award of maintenance in gross if the circumstance so provide. See *Patel*, 2013 IL App (1st) 112571, ¶ 94, 993 N.E.2d 1062 ("The elimination of endless and destructive arguments between the parties over personal or financial matters is a factor in awarding maintenance in gross."). We further note that while Rebecca asserts on appeal that an award of maintenance in gross was improper *per se*, one of the remedies she sought in the trial court at the conclusion of the hearing on John's motion was a lump sum award of maintenance in gross to cover a four-year period.

