

NOTICE
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2016 IL App (5th) 150337-U

NO. 5-15-0337

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
LAURA K. WELCH,)	Madison County.
)	
Petitioner-Appellant,)	
)	
and)	No. 11-D-895
)	
TIMOTHY WELCH,)	Honorable
)	Janet Heflin,
Respondent-Appellee.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Stewart and Cates concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where the trial court abused its discretion in denying Laura Welch's request for maintenance, we modify the judgment.

- ¶ 2 The trial court entered a judgment dissolving Laura and Timothy Welch's marriage in November 2011 after more than 24 years of marriage. Laura has significant medical problems and the Social Security Administration awarded her a social security disability during the marriage. She is unable to work. She asked the court to award her permanent maintenance. The trial court agreed that Laura needed maintenance, but concluded that Laura failed to establish that Timothy was earning sufficient money to afford

maintenance. The trial court denied Laura's request. We modify the judgment to award Laura permanent maintenance.

¶ 3

FACTS

¶ 4 Laura and Timothy married in May 1987 and separated in June 2011. They had two boys. The younger boy, Tyler Welch, passed away in 2011 shortly before the parties were divorced. The older son, Timothy Welch II, currently owns and operates an auto body business. Timothy is employed by his son.

¶ 5 Laura was 44 at the time of the divorce hearing. She suffers from systemic scleroderma, Reynaud phenomenon, and cardiac blockages. She has significant circulatory problems, and as a result, she has had a thumb and two toes amputated. Laura struggles with activities requiring the use of her hands due to these circulatory problems. In 1994, the Social Security Administration granted Laura's request for a disability award. Her physician will not release her to work. Laura's medical conditions are progressive and no improvement is expected. The State pays Laura's neighbor to perform daily tasks for her including cleaning, laundry, and personal grooming.

¶ 6 Timothy was 47 at the time of the divorce hearing. He worked throughout their marriage as an auto body repairman. Over the years, he worked full-time for various auto body shops. At his last full-time auto body shop job, Timothy earned \$65,000 annually. In addition, he worked evenings in his own shop located in Madison called Mafia Brothers Customs. He never included any income earned from Mafia Brothers Customs on his income tax returns. Laura testified that she did not know the total amount Timothy made from Mafia Brothers Customs, but that he gave her approximately \$20,000 in cash

over the course of each year from that business. In the spring of 2010, Timothy's employer terminated him from his full-time job. Instead of obtaining another full-time auto body job, he only worked at his own shop, Mafia Brothers Customs. He continued to do this until the end of 2011 when he shut the business down. Immediately after Mafia Brothers Customs closed in Madison, the business reopened in Gillespie with Timothy Welch II (LT) as its owner.

¶ 7 Timothy testified that he gave all of his tools, the Mafia Brothers Customs company name, and the business to LT. LT had only previously worked part-time in his father's shop. LT's only other work experience was at a Domino's Pizza establishment. Timothy testified that LT was still learning the trade. While Timothy testified that he was not working full-time at Mafia Brothers Customs after LT took over the business, his actions contradicted those statements as an investigator determined that he was working from open to close on a daily basis. Timothy confirmed that he was still performing auto body repair work, but testified that he also performed other tasks for his son's business including estimating jobs, setting prices, ordering parts, answering the phone, and greeting customers. LT provided Timothy with worker's compensation coverage. Additionally, Timothy had the financial authority to sign checks and make deposits on the Mafia Brothers Customs bank account.

¶ 8 Timothy had a history of surgeries to his hands and elbows about 10 to 15 years before the court's hearing. After he recovered from the surgeries, he was able to return to full-time employment in the auto body business. However, Timothy testified that he currently experienced periodic hand pain, numbness, and poor grip strength that

decreased the amount of time he could perform auto body work for LT. He filed for social security disability, but was denied in February 2012. He did not appeal this decision.

¶ 9 Timothy testified that he was currently living with his girlfriend in a two-bedroom, rented home in Gillespie. He denied that he paid any living expenses. However, he also testified that he had given his girlfriend approximately \$2,500 in the preceding 12 months, but admitted that he did not keep track of the total amount. During his testimony at the hearing, he repeatedly contradicted himself, saying that he had no income, but then admitting that he was able to pay for a cell phone, motor vehicle insurance, and up to \$100 per week on a Matco Tools loan. Timothy testified that he forgot to list Matco Tools as an expense on his income and expenses exhibit. He further testified that he had no idea how much he owed Matco Tools, and therefore he had no idea when the debt would be paid in full.

¶ 10 Timothy testified that he does not keep financial records at the Mafia Brothers Customs shop, and that his son paid him "under the table," and did not withhold any taxes. He testified that he had no idea how much money his son had paid him—that his son paid him when he could afford to do so. Timothy also testified that his son paid him \$100 to \$200 per week. He alternatively testified that his son was "barely making it" with the business and that his son was doing "pretty well." He testified that he had not paid his attorney any money to represent him, but that he did some work on his attorney's vehicle at no charge. He admitted that during the pendency of this case, he gave all of his

tools, valued in excess of \$5,000, to his son. Timothy testified that he owns no real estate, has an older truck, has no bank accounts, and has no significant assets.

¶ 11 At one point during Timothy's testimony, the trial judge became frustrated and commented that she was losing her patience, that his story was ridiculous, and that she was not "buying" his testimony that he knew nothing about the financial aspects of his life. The trial judge instructed Timothy to "make a better effort to answer [the] questions."

¶ 12 Laura testified at the hearing that she received a net amount of \$639 per month in disability benefits. She also testified that she received \$189 per month in food stamps. She was not receiving housing assistance at the time of the hearing, and she lived in an apartment in Granite City paying \$495 per month for rent. She testified that her power bill averaged \$150 per month, but that she had been unable to keep up with the bill, and at that time owed \$800. She testified that she spent approximately \$425 per month for food, household supplies, and clothing. She purchased a different car after the separation, because her original car needed extensive engine repair. Her monthly car payment was \$357.50. She could no longer afford the car insurance that was \$130 per month. She spent \$40 per month on prescriptions and \$25 per month for dental insurance. Her total income per month was \$828, and her total expenses per month were \$1,622.50. Laura asked the court to award her \$1,000 in monthly maintenance in order to meet her basic needs.

¶ 13 Laura testified that she and Timothy filed for bankruptcy relief in 1997 primarily because of her medical bills. Both Laura and Timothy testified that they were financially

struggling as of the date of the hearing. This contrasted with the lives they led while they were together. Laura testified that they "had money" while married. They had lived in a rented home and paid monthly rent of \$800 to \$900. They had two cars, went out every weekend for entertainment, and took a Florida vacation in 2010.

¶ 14 In an effort to disprove Timothy's claim that he was not working, Laura's lawyer had an investigator attempt to confirm Timothy's employment status with Mafia Brothers Customs. However, the doors to the business were closed, and so all that the investigator could confirm was that Timothy was at the shop every day.

¶ 15 At the conclusion of the hearing, the trial court found that Laura suffered from degenerative and progressive illnesses that prevented her from working. The court stated that Laura needed maintenance because she was otherwise unable to meet her monthly expenses. The court found that Timothy had no assets, and that he lived with his girlfriend who paid most of the bills. The court stated that Timothy's testimony was not credible, and that the court believed he made more money than the amounts to which he testified. However, the court noted that there was no evidence submitted that would support Timothy's ability to pay maintenance. Consequently, the court held that because Laura was unable to prove how much money he made, the court had no choice but to deny her request for maintenance.

¶ 16 Laura appeals from this decision.

¶ 17 **LAW AND ANALYSIS**

¶ 18 The only issue on appeal is whether the trial court's denial of Laura's request for an award of permanent maintenance constituted an abuse of discretion. *In re Marriage of*

Breuer, 259 Ill. App. 3d 94, 96, 630 N.E.2d 1245, 1246 (1994); *In re Marriage of Brackett*, 309 Ill. App. 3d 329, 340, 722 N.E.2d 287, 296 (1999). A trial court's order constitutes an abuse of discretion when no reasonable person would adopt the trial court's decision. *In re Marriage of Chapman*, 285 Ill. App. 3d 377, 382, 674 N.E.2d 432, 435 (1996) (citing *In re Marriage of Werries*, 247 Ill. App. 3d 639, 652, 616 N.E.2d 1379, 1390 (1993)).

¶ 19 We first turn to the applicable Illinois statutes and case law governing maintenance awards. There are two types of maintenance: rehabilitative and permanent. Rehabilitative maintenance is proper if evidence supports a potential for future employment that approximates the standard of living enjoyed during the marriage. *In re Marriage of Brackett*, 309 Ill. App. 3d at 340, 722 N.E.2d at 296 (citing *In re Marriage of Pearson*, 236 Ill. App. 3d 337, 347-48, 603 N.E.2d 720, 728 (1992)). Permanent maintenance is proper if the former spouse is either unemployable or employable only at a low income when considering the standard of living established during the marriage. *Id.* (citing *In re Marriage of Harlow*, 251 Ill. App. 3d 152, 159, 621 N.E.2d 929, 935 (1993)).

¶ 20 In considering a petition for maintenance, the trial court must examine the factors from section 504(a) of the Illinois Marriage and Dissolution of Marriage Act (Act). 750 ILCS 5/504(a) (West 2010). These factors include the income and property of each party, the current needs of each party, the present and future earning capacity of each party, the standard of living established during the marriage, the duration of the marriage, and the age and physical condition of each party. *Id.* There is not one specific section

504(a) factor that is determinative of whether maintenance is appropriate. *In re Marriage of Chapman*, 285 Ill. App. 3d at 382, 674 N.E.2d at 435 (citing *In re Marriage of Harlow*, 251 Ill. App. 3d at 157, 621 N.E.2d at 934). "However a trial court is *required* to consider the parties health and economic circumstances *as they exist when the court rules on the maintenance award.*" (Emphasis in original.) *Id.* (citing *In re Marriage of Brooks*, 138 Ill. App. 3d 252, 265, 486 N.E.2d 267, 275-76 (1985)). The court must consider a spouse's physical condition as a significant factor. *Id.* Permanent maintenance should be routinely awarded if the former spouse is disabled and unable to work. *In re Marriage of Brackett*, 309 Ill. App. 3d at 340, 722 N.E.2d at 296 (citing *In re Marriage of Chapman*, 285 Ill. App. 3d at 382, 674 N.E.2d at 435).

¶ 21 We agree with the trial court's statement that Laura was entitled to permanent maintenance. Laura has more than one progressive debilitating illness. She is unable to work. The Social Security Administration granted her a disability award. Additionally, the State has provided assistance for Laura in order to meet her most basic household and personal needs. While the parties were married, Laura testified that they always had money to go out on the weekends, and even to take a Florida vacation. After the parties separated, Laura was unable to pay all of her monthly expenses with the food stamps and limited money she received for disability benefits.

¶ 22 The trial court found that Timothy's testimony about his income and expenses was not credible. Despite this pronouncement, the trial court determined that without proof of actual income, there was no ability to award Laura permanent maintenance. However, in cases where there is an uncertainty of income, the court may choose to impute income.

¶ 23 In Illinois, in order to impute income the trial court must find that at least one of the following three factors apply: (1) the former spouse is voluntarily unemployed, (2) the former spouse is attempting to evade a support obligation, or (3) the former spouse has unreasonably not taken advantage of an employment opportunity. *In re Marriage of Lichtenauer*, 408 Ill. App. 3d 1075, 1089, 945 N.E.2d 119, 131 (2011) (quoting *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 1077, 916 N.E.2d 614, 618-19 (2009)).

¶ 24 There are several Illinois cases in which the courts concluded that imputing income was appropriate when former spouses made employment or other income changes in order to thwart maintenance requests. In *In re Marriage of Lichtenauer*, Mr. Lichtenauer sold two businesses while the divorce was pending; took a job making an hourly wage for a new corporation; installed his girlfriend as the president of this corporation with a \$120,000 annual salary; and loaned his girlfriend money to buy shares and become the majority shareholder of this new corporation. *In re Marriage of Lichtenauer*, 408 Ill. App. 3d at 1089, 945 N.E.2d at 130. The trial court found that the girlfriend's ascension to the presidency of the company was "somewhat contrived," and that Mr. Lichtenauer's purpose in doing so was to keep the majority of his assets out of the divorce proceeding. *Id.* at 1089, 945 N.E.2d at 130-31. The trial court concluded that he was attempting to evade a support allegation, imputed total income to him of \$120,000 per year, and ordered him to pay maintenance. *Id.* at 1089, 945 N.E.2d at 131. The appellate court confirmed. *Id.* at 1091, 945 N.E.2d at 132; see also *In re Marriage of Morse*, 240 Ill. App. 3d 296, 310, 607 N.E.2d 632, 642 (1993) (the trial court awarded maintenance based upon past earnings when the husband liquidated his company in order

to be unemployed); *In re Marriage of Smith*, 77 Ill. App. 3d 858, 863-64, 396 N.E.2d 859, 864 (1979) (during dissolution, husband voluntarily left his job and started a consulting firm earning less than he did at his former job; appellate court linked maintenance award to the amount he would have made had he not left his job).

¶ 25 In the oldest of these cases, *In re Marriage of Smith*, the court explained the Act's mandate that the court consider the spouse's "ability" to contribute to the other's support:

"the word 'ability' indicates that we should consider the level at which the maintenance-paying spouse is able to contribute, not merely the level at which he is willing to work." *In re Marriage of Smith*, 77 Ill. App. 3d at 862, 396 N.E.2d at 863.

¶ 26 In that context, the appellate court concluded that it was proper for the trial court to have considered not only the husband's current income, but also the husband's prospective income in determining the amount of the maintenance award, "particularly where the difference between actual and potential income is a result of totally voluntary retirement." *Id.*; 750 ILCS 5/504(a) (West 2010).

¶ 27 In considering all of the evidence in this case, we find that Timothy's actions met the standard for imputation of income, *i.e.*, he is marginally employed and attempting to evade a support obligation. The trial court found that Timothy's testimony and its relation to his income and expenses list was not credible. From our review of the hearing transcript, we agree with this statement. Timothy lost his job in 2010, but made no effort thereafter to find alternate full-time employment in any field. Instead, he only worked at his former side business, Mafia Brothers Customs. After the parties separated and while

the petition to dissolve the marriage was pending, Timothy unilaterally closed his Mafia Brothers Customs business in Madison, gave away all of his business-related assets, and allowed his son to take over the business in its new location in Gillespie. Timothy's son had very limited experience in the auto body business and his only other work experience was for Domino's Pizza.

¶ 28 Timothy claimed that while he may be present at his son's business each day, he did not fully participate in the auto body work in the shop due to his pain and loss of strength in his hands. He filed for disability and was denied in February 2012. He did not appeal that decision. At the hearing, he testified that he planned to refile a petition for disability. Timothy testified that although he had not had his hand examined or treated by any doctor for over two years, he planned to go see his doctor the following week. Timothy was 47 years old on the date of the hearing. There was no medical evidence introduced that Timothy could not work. There was no medical evidence introduced that Timothy needed additional surgery for his hands and/or elbows. We note that even if he had needed surgery that historically after Timothy recovered from surgery he resumed full-time employment.

¶ 29 Although Timothy testified that he worked for his son, he claimed to receive virtually no money for his labor—perhaps \$100 to \$200 per week depending upon what his son was able to afford. He further admitted that any money that he received from his son was "under the table," as neither he nor his son reported income from Mafia Brothers Customs. Despite the fact that he allegedly made little to no income, Timothy testified that he worked at Mafia Brothers Customs full-time; that he paid his son \$70 per month

for a cell phone; that he paid Matco Tools approximately \$100 per week; that sometimes he was able to pay his own motor vehicle and health insurance; that he had given his girlfriend \$2,500 for household expenses in the past year; and that had given his son tools valued in excess of \$5,000.

¶ 30 We conclude that Timothy's actions reflect his intent to both remain marginally employed and evade a maintenance obligation. After Timothy lost his job in 2010, he continued working at his Mafia Brothers Customs business; it was not until the divorce was pending and Laura sought maintenance, that he gave the business and all related assets to LT in 2011. He then claimed to work for his son full-time for next to nothing. He also claimed that he was supported by his girlfriend who worked part-time at a Casey's convenience store and to whom he had given \$2,500 in the preceding 12 months. Additionally, given the uncontested fact that Timothy was earning \$65,000 per year as an auto body repairman when he was last employed on a full-time basis as well as the lack of evidence that he is unable to work, we believe that his failure to secure a full-time job also serves as a means to avoid his obligation to pay maintenance.

¶ 31 It is obvious that Timothy is earning income. How much, we do not know because he admittedly is being paid "under the table." We will not punish Laura and reward Timothy for his participation in the "underground economy" whereby he attempts to thwart his legal obligations by not reporting income. While we appreciate the judge's frustration with Timothy's less than credible testimony, justice is not served by Timothy's benefiting from his lack of veracity when Laura has been found in need of maintenance.

¶ 32 We find that the imputation of income is clearly warranted here. In light of his age, and lack of medically disqualifying evidence, we hold that the amount of maintenance can be based on past earnings. *In re Marriage of Morse*, 240 Ill. App. 3d at 309, 607 N.E.2d at 642 (where current income is uncertain, a court may consider past earnings); see also *In re Marriage of Van Ness*, 136 Ill. App. 3d 185, 190, 482 N.E.2d 1049, 1052 (1985); *In re Marriage of Butler*, 106 Ill. App. 3d 831, 837, 436 N.E.2d 561, 565 (1982). Laura's testimony that Timothy earned approximately \$20,000 from his Mafia Brothers Customs business during the marriage was undisputed and was the only credible testimony regarding Timothy's employment income. Therefore, we find that the imputation of \$20,000 in annual income (\$1,666.67 per month) is fair and proper. Timothy claims \$529 in expenses per month. We note that at the hearing he testified to a Matco Tools loan, and that he was making regular payments of up to \$100 per week. However, he did not list this debt on his expense sheet, and as of the date of the hearing, April 21, 2014, Timothy had no idea how much he still owed on this loan. As he failed to establish the nature and duration of this debt, we do not add a Matco Tools loan payment amount to his expenses. However, after subtraction of Timothy's monthly expenses from his \$1,666.67 income, he is still left with \$1,137.67 from which he can continue to pay off his Matco Tools debt. Laura, on the other hand, has monthly income of \$828 and expenses totaling \$1,622.50 for a monthly deficit of \$794.50. We find that a \$500 per month maintenance award would strike a balance between Timothy's imputed ability to pay and Laura's needs. Accordingly, we hold that Laura is entitled to an award of permanent maintenance of \$500 per month.

¶ 33

CONCLUSION

¶ 34 We acknowledge that we must give great deference to the trial court's determination on the issue of maintenance, but conclude that in this case the trial court abused its discretion in denying maintenance. For the foregoing reasons, pursuant to Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we modify the judgment of the Madison County circuit court and award Laura permanent maintenance in the amount of \$500 per month.

¶ 35 Judgment modified.