2017 IL App (3d) 160742-U

Order filed December 1, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

In re MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
EDGAR B. WOOLSEY,	)	Peoria County, Illinois.
	)	
Petitioner-Appellant,	)	Appeal No. 3-16-0742
	)	Circuit No. 14-D-492
and	)	
	)	
REBECCA S. WOOLSEY,	)	The Honorable
	)	Mark E. Gilles,
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice Carter concurred in the judgment.
Justice Schmidt specially concurred.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion by finding that petitioner's retirement was in bad faith and by imputing income for purposes of calculating maintenance and child support. The trial court did not err by calculating the amount of maintenance based on evidence outside of the parties' joint tax returns. The trial court erred when announcing the termination date for maintenance. The trial court did not abuse its discretion by finding petitioner committed indirect civil contempt and imposing a sanction requiring petitioner to pay a share of respondent's attorney's fees. The trial court properly considered the parties' respective social security benefits as income when calculating the amount of

maintenance. Based on the arguments presented in the trial court, the trial court correctly refused to reduce petitioner's child support obligation above the $850 for dependent benefits D.W. received. We affirm in part and reverse in part. The cause is remanded for the trial court to enter an order consistent with this decision.

¶ 2 The petitioner, Edgar B. Woolsey, appeals from the judgment of dissolution of marriage order entered by the trial court on November 10, 2016. Petitioner requests our court to reverse multiple decisions of the trial court pertaining to the proper amount of petitioner's income to be used when calculating maintenance. Petitioner challenges the applicable dates for maintenance and the trial court's finding that petitioner was in indirect civil contempt of court. Petitioner contests the trial court's decision imposing a sanction for indirect contempt. Petitioner also claims the trial court erred by considering petitioner's social security benefits as income when calculating maintenance and denying petitioner's request for a credit against his child support obligation for social security wife's insurance benefits respondent received. We affirm in part and reverse in part. The cause is remanded for the trial court to enter an order consistent with this decision.

¶ 3 FACTS

¶ 4 The petitioner, Edgar B. Woolsey, a.k.a. Baird Woolsey (petitioner), and the respondent, Rebecca Woolsey (respondent), first married in 1991, but divorced around 2002. The parties remarried each other on October 12, 2007, when petitioner was retired. During the gap in their marital status, respondent gave birth to a daughter, D.W., in 2003. Petitioner was not D.W.'s biological father. However, petitioner adopted D.W. in 2008. The family's source of income after the second marriage consisted of rental apartment income and the principal of various investments.

¶ 5 The parties separated in 2009 or 2010. In September 2009, petitioner began working as a financial associate with Thrivent Financial (Thrivent), a life insurance company. In spite of living separately, the couple maintained a joint checking account, attempted to work on their marriage, and attended counseling.

¶ 6 In 2013, while separated, the couple began building a house together that they hoped to occupy as a family after resolving their marital difficulties. Once construction was completed, the family planned to occupy the home together until D.W. graduated from high school and left for college.

¶ 7 The cost of building the new home was $580,000. In 2014, the couple took out a loan to finance the home with a 10-year adjustable rate mortgage with a 30-year amortization period. Respondent testified that petitioner planned to continue his full-time employment at Thrivent to pay for the mortgage.

¶ 8 On September 25, 2014, petitioner filed a petition for dissolution of marriage in Peoria County, Illinois. At this time, petitioner was employed by Thrivent as a full-time financial associate and was 67 years old. Respondent was 50 years old and D.W was eleven and one-half years old at the time petitioner filed the dissolution petition in 2014.

¶ 9 On November 19, 2014, the trial court entered an order requiring petitioner to continue providing health insurance for respondent and D.W. on a temporary basis until further order by the court. The order stated, in relevant part:

> "Baird Woolsey shall continue to provide & maintain health insurance for the respondent & the parties[']' minor child on a temp. basis until further ordered by the Court. Petitioner shall reinstate coverage & provide proof ASAP along w/any new insurance info or cards."

On February 13, 2015, the trial court entered a temporary order requiring petitioner to pay respondent $4,640 in unallocated support by February 15, 2015, and on the 15th day of each month thereafter until further order of the court.

¶ 10 On November 18, 2015, the parties entered into a partial marital settlement with respect to nonmarital property, marital property and debts. At the hearing on November 18, 2015, after the trial judge stated that the issue of maintenance would be resolved another day, petitioner announced that he was "going to retire tomorrow." Later that night, petitioner emailed respondent stating petitioner would be submitting his retirement notice to Thrivent "tomorrow."

¶ 11 On December 30, 2015, respondent filed a petition alleging petitioner downgraded the existing premier health care coverage for respondent and D.W. contrary to the court's order dated November 19, 2014. Respondent requested the court to find petitioner in indirect civil contempt of the court, order petitioner to reinstate the premier health care coverage, and pay respondent's attorney's fees arising out of this issue.

¶ 12 On December 31, 2015, petitioner retired as a financial associate with Thrivent. The next day, January 1, 2016, petitioner returned to Thrivent as an "associate" under the supervision of his former business partner, Jim Yocum. After petitioner's retirement on December 31, 2015, Yocum received the fees on any managed accounts that petitioner brought into Thrivent. However, petitioner continued to receive trailer fees for mutual funds written before the date of his retirement, which amounted to about $500 per month. Petitioner still saw clients and helped his daughter from his first marriage, Alexandra Lamprecht, who worked in the same office. Since his change in employment status with Thrivent in January 2016, petitioner worked a maximum of 10 to 12 hours per week. Petitioner admitted that he had the option of returning to

his position as a financial associate with Thrivent's approval. Petitioner's insurance license from the State of Illinois was effective through August 31, 2017.

¶ 13 On February 4, 2016, petitioner sent email correspondence to respondent stating that he had resigned as a financial associate on December 31, 2015, and stating his Thrivent benefits ended on that date. On February 10, 2016, the trial court entered an order requiring petitioner to reinstate the premier health insurance plan and reserved ruling as to all other issues raised in the 2015 contempt petition.

¶ 14 On March 14, 2016, petitioner filed a petition to modify temporary support and maintenance due to his retirement. On June 8, 2016, respondent filed a response to petitioner's request for a reduction of temporary maintenance and child support, arguing that petitioner's change in employment status was not made in good faith as required by section 510(a-5) of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/510(a-5) (West 2016)).

¶ 15 In June and July of 2016, a hearing began to resolve the issues of maintenance and child support and the remaining issues regarding contempt. According to documentation prepared by Thrivent and submitted to the court, in 2015, petitioner's W-2 income before certain deductions with special tax treatment was $135,716.37. Petitioner's 2015 1099 income from Thrivent equaled $59,543.45, making petitioner's total gross income from Thrivent $195,259.82 in 2015. The parties' 2015 joint income tax return showed that the parties reported a total income of $188,615, which included income from various sources.

¶ 16 During the 2016 hearing, respondent testified she had been unemployed since 2001 and remained incapable of employment due to migraine headaches and injuries from a 1991 traffic accident. Respondent testified that her current income includes approximately $1700 per month in petitioner's social security benefits, which is comprised of $850 per month in D.W.'s social

security dependent benefits and $850 per month in social security wife's insurance benefits. Respondent testified that D.W. suffers from "severe allergies, food allergies, environmental allergies, sensitivities, and intolerances."

¶ 17 Petitioner testified that he retired from his position as a financial associate with Thrivent at the age of 68 due to his old age, declining physical and mental health, and the stress of his job. In September 2015, petitioner contracted *Clostridium difficile* (C. diff.), a bacterial infection of the colon. Petitioner testified that the infection left him weak and unable to work. He received several courses of antibiotics for months, and the infection did not resolve until January 2016. In addition, petitioner testified that he suffered from gout and was seeing a psychiatrist for depression. According to petitioner, his health problems adversely affected his ability to perform his job and his poor performance resulted in an errors and omissions claim for a "couple hundred thousand dollars."

¶ 18 On September 14, 2016, the trial court found petitioner in indirect civil contempt due to petitioner's decision to reduce the level of health insurance coverage and ordered petitioner to pay $50,000 towards respondent's attorney's fees. The trial judge indicated that this amount took into consideration "all [respondent's attorney's] work in the case, causes of delay, [and] contempt that I have found with respect to the temporaries." The trial judge indicated that this amount could be satisfied by adjusting the property settlement previously agreed upon by the parties.

¶ 19 With respect to maintenance, the trial judge considered all the factors contained in section 504(a) of the Act (750 ILCS 5/504(a) (West 2016)), and found that a maintenance award to respondent was appropriate. This ruling is not at issue on appeal.

¶ 20 The trial court found that the timing of petitioner's retirement was in bad faith and stated as follows:

> "I'm not sure you would have retired if it weren't for this case. I believe you wouldn't have. [Respondent's attorney] did a good job of convincing me there was a plan. There was a house. There were all these things that were going to be taken care of. And regardless of what you said, I don't think the C. diff. would have ended your career although I think it was real and I think it contributed to your decision. I think the fact that this marriage ended, it wasn't going where you wanted it to go in a long time, I think at your age it's appropriate to retire but not without thinking about the consequences of what your retirement would have on the living situation of the people you're supposed to support."

¶ 21 At the September 14, 2016, hearing, the court also stated: "[A]t the outset, maintenance will be effective February 15, 2015, in the amount of $5,336.92 per month, the amount I found appropriate in exhibit, Demonstrative Exhibit 2B of Defendant's. That amount is going to be the effective amount through December 15th of this year, 2016." The trial court considered the parties' respective social security benefits when calculating their respective incomes.

¶ 22 The trial court ordered that effective January 15, 2017, respondent would receive reduced monthly maintenance payments of $1841.50 because the judge felt that petitioner would have been appropriately retired at that time. The trial judge stated: "I'm ordering maintenance for two years and nine months from today's date or actually from tomorrow's date, the 15th, to make things uniform." Further, the trial court stated, "I'm not ordering that it terminates on that date nor am I extending it beyond that date without further pleading on behalf of Ms. Woolsey."

¶ 23 Further, the court ordered that beginning on January 15, 2017, child support would be reduced to $936.75 per month. The trial court also stated that petitioner would receive a credit against his child support obligation for the $850 per month for the social security dependent benefits respondent received for D.W. The trial court refused to provide a setoff for the $850 per month respondent receives in social security wife's insurance benefits.

¶ 24 The trial court ordered petitioner, "to avoid any contempt, to pay no less than the $1,841.60 amount for maintenance and the [$]936.75 minus the credit for child support ***." The court stated that any arrearage for the higher maintenance payments prior to 2017 "should be satisfied in an adjustment of property pursuant to the parties' property judgment."

¶ 25 On November 10, 2016, the trial court entered a final judgment of dissolution of marriage, which incorporated the court's oral rulings from the September 14, 2016, hearing. On November 30, 2016, petitioner filed a timely notice of appeal.

¶ 26 ANALYSIS

¶ 27 In this appeal, petitioner argues that the trial court abused its discretion by finding that petitioner's retirement on December 31, 2015, was in bad faith. Petitioner also claims the trial court used incorrect financial information when setting maintenance and erred when announcing the applicable dates for court-ordered maintenance. In addition, petitioner challenges the trial court's order requiring him to contribute $50,000 towards respondent's attorney's fees as a sanction for indirect contempt. Further, petitioner claims that the trial court incorrectly considered petitioner's social security benefits as income when calculating maintenance. Finally, petitioner asserts that the trial court abused its discretion by failing to give him a credit against his child support obligation for social security wife's insurance benefits respondent received. Respondent contends that the trial court correctly resolved these issues.

¶ 28 I. Imputed Income

¶ 29 First, we consider petitioner's contention that the trial court abused its discretion by finding that petitioner's retirement on December 31, 2015, was in bad faith and by calculating maintenance from February 15, 2015, through December 15, 2016, based on petitioner's preretirement income. Petitioner argues that the trial court's finding of bad faith was not supported by the manifest weight of the evidence.

¶ 30 Section 504 of the Act (750 ILCS 5/504 (West 2016)) governs maintenance awards. A trial court has broad discretion to determine the propriety, amount, and duration of a maintenance award. *In re Marriage of Donovan*, 361 Ill. App. 3d 1059, 1062 (2005). "The standard of review of a support order is whether it is an abuse of discretion, or whether the factual predicate for the decision is against the manifest weight of the evidence." *In re Marriage of Bates*, 212 Ill. 2d 489, 523 (2004). If the trial court's exercise of discretion has an evidentiary basis, then the reviewing court will consider the manifest weight of the evidence. *Id.* at 524. We note that because the trial judge sees and hears the witnesses, he is in a superior position for assessing their demeanor, judging their credibility, and weighing the evidence. *In re Marriage of Sturm*, 2012 IL App (4th) 110559, ¶ 6. An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court. *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1113 (2004). When deciding whether a judgment is contrary to the manifest weight of the evidence, we view the evidence in the light most favorable to the appellee. *In re Marriage of Bates*, 212 Ill. 2d at 516.

¶ 31 In Illinois, a trial court may impute income to a spouse when the court finds that spouse is (1) voluntarily unemployed, (2) is attempting to evade a support obligation, or (3) has unreasonably failed to take advantage of an employment opportunity. *In re Marriage of Lichtenauer*, 408 Ill. App. 3d 1075, 1089 (2011). Courts pay special attention where there is a

difference between the paying spouse's actual and potential income that is a result of a totally voluntary retirement or change in employment status. *In re Marriage of Smith*, 77 Ill. App. 3d 858, 862 (1979). When deciding whether it was appropriate for the supporting spouse to voluntarily retire or cut back on his or her income, the court may consider: "the age, health of the party, his motives in retiring, the timing of the retirement, his ability to pay maintenance even after retirement and the ability of the other spouse to provide for himself or herself." *In re Marriage of Smith*, 77 Ill. App. 3d at 863. The burden of proving good faith is on the party who voluntarily changed employment. *In re Marriage of Stone*, 155 Ill. App. 3d 62, 76 (1987).

¶ 32 In *Smith*, the court held that the 54-year old husband, who was in good health and retired during the pendency of the divorce proceedings, should pay maintenance that was "calculated on the basis of his ability to pay which, in turn, is linked to the amount he could have made had he chosen not to resign." *In re Marriage of Smith*, 77 Ill. App. 3d at 864. The court observed:

> "[The husband] has not reached the customary retirement age in our society; his health is good. His resignation was the result of circumstances completely under his control rather than anything fortuitous. Furthermore, the circumstances and timing of his resignation call his motives in doing so into question."

Id. at 863. However, the court clarified that the court was not holding that the husband must continue working at the same position, or indeed at all. *Id*. at 864.

¶ 33 Petitioner argues that the *Smith* case is distinguishable because petitioner was 68 years old when he retired and was having health problems unlike the supporting spouse in *Smith*. Petitioner asserts that "whatever the 'customary retirement age' is in Illinois, the age is certainly

lower than 68." We agree that age is an important consideration, but not the only factor to be balanced by a trial court when deciding whether to impute income.[1]

¶ 34 The record in this case reveals that petitioner was retired when the couple remarried in 2007. However, the record also shows that after petitioner adopted D.W. in 2008, petitioner abandoned his retirement and began full-time employment as a financial associate at Thrivent in 2009. The couple planned that petitioner would continue working as a financial associate at Thrivent from 2009 until their minor daughter, D.W., graduated from high school. Further, the record shows that in 2014, the couple took out a loan to finance the $580,000 in costs to construct a new home. The loan had a 10-year adjustable rate mortgage with a 30-year amortization period. Once completed, the family planned to live together in the newly constructed house until D.W. left the home for college.

¶ 35 The record documents petitioner remained employed until petitioner abruptly announced his intent to retire "tomorrow" on November 18, 2015. The announcement to return to a retired lifestyle occurred at the conclusion of the hearing on November 18, 2015, after the issue of maintenance was raised before the court. Petitioner sent respondent an email later that evening reiterating that petitioner intended to submit his retirement notice and advising respondent that the health insurance benefits for D.W and respondent would end upon his retirement. The record supports the conclusion that petitioner's retirement in 2015 was motivated by a desire to significantly reduce his income for maintenance purposes. The trial court's findings are not contrary to the manifest weight of the evidence presented to the court. Therefore, we affirm the trial court's decision to use imputed income to calculate petitioner's maintenance obligations prior to January 1, 2017.

[1]Petitioner, citing to case law from other jurisdictions, urges this court to adopt a "customary retirement age" of 65 and hold that after that age, courts cannot impute preretirement income to a retired spouse. We decline to adopt such a bright-line rule.

¶ 36 II. The Trial Court's Determination of Maintenance

¶ 37 Next, petitioner contends that the trial court made additional errors when calculating maintenance. First, petitioner claims the trial court should have relied on the financial information contained in the couple's 2015 joint income tax return, which he claims reported his income as "totaling $188,615,"[2] rather than erroneously considering respondent's demonstrative exhibit 2b that calculated petitioner's gross income as $225,534. Petitioner contends that the trial court erred by considering evidence of petitioner's income outside of the parties' joint income tax returns.

¶ 38 Subsection 504(b-1)(1) of the Act provides guidelines for a trial court to calculate a maintenance award based on the parties' gross incomes. 750 ILCS 5/504(b-1)(1) (West 2016). Subsection 504(b-3) defines "gross income" to include "all income from all sources, within the scope of that phrase in Section 505 of this Act." 750 ILCS 5/504(b-3) (West 2016). When a party challenges a trial court's factual findings pertaining to a maintenance determination, we will not reverse those findings unless the findings were against the manifest weight of the evidence. *In re Marriage of Nord*, 402 Ill. App. 3d 288, 294 (2010).

¶ 39 As respondent argues, courts have held that tax-reported income does not provide "conclusive evidence" of a party's income under the Act. *In re Marriage of Carpel*, 232 Ill. App. 3d 806, 818 (1992). Moreover, petitioner asserts the trial court used incorrect financial information to calculate the parties' gross income, but does not address what amounts included in respondent's demonstrative exhibit 2b were inaccurate. Consequently, we find petitioner's contentions of error to also be unsupported and unpersuasive.

[2]We note that this figure is inaccurate because this amount includes both parties' incomes, as listed on the parties' 2015 joint federal tax return.

¶ 40 Next, petitioner agrees that the duration of maintenance should be two years and nine months, but asserts the beginning date for maintenance should relate back to the date of the 2014 dissolution petition. Petitioner argues that "[t]he statute calculates maintenance based on 'the time the action was commenced,' not when of [sic] maintenance is ordered." This argument misconstrues the language of the statute.

¶ 41 Section 504(b-1)(1)(B) provides, in relevant part, as follows:

> "(B) The duration of an award under this paragraph (1) shall be calculated by multiplying the length of the marriage at the time the action was commenced by whichever of the following factors applies: 5 years or less (.20); more than 5 years but less than 10 years (.40); 10 years or more but less than 15 years (.60); or 15 years or more but less than 20 years (.80). For a marriage of 20 or more years, the court, in its discretion, shall order either permanent maintenance or maintenance for a period equal to the length of the marriage." 750 ILCS 5/504(b-1)(1)(B) (West 2016).

Contrary to petitioner's assertion on appeal, this section does not have any application to the beginning date for maintenance or require maintenance to apply retroactively to the date of the 2014 dissolution petition. Instead, section 504(b-1)(1)(B) clearly addresses the proper method to calculate the duration of maintenance based on the length of the marriage, as measured from the date the dissolution action is commenced.

¶ 42 When reviewing the length of maintenance, we focus on the trial court's language. At the September 14, 2016, hearing, the court stated: "[A]t the outset, maintenance will be effective February 15, 2015, in the amount of $5,336.92 per month, the amount I found appropriate in exhibit, Demonstrative Exhibit 2B of Defendant's. That amount is going to be the effective

amount through December 15th of this year, 2016." The trial court ordered that effective January 15, 2017, monthly maintenance payments would be reduced to $1841.50 because the judge felt that petitioner would have been appropriately retired at that time. The trial judge also stated: "I'm ordering maintenance for two years and nine months from today's date or actually from tomorrow's date, the 15th, to make things uniform." However, the court also ordered that petitioner would receive "credit for any amounts that have been paid in unallocated support" from February 15, 2015, through December 15, 2016, in the amount of $5336.92 per month.

¶ 43 On appeal, petitioner asserts the maintenance period should relate back to the date the dissolution petition was filed on September 25, 2014. This contention cannot be supported by any remark attributable to the trial court. Based on this record, we conclude the trial court intended the maintenance period to be retroactive, beginning on February 15, 2015, in order to allow defendant credit for the $4640 payments for unallocated support, if made, and resulting in a monthly deficiency for maintenance during the time frame that unallocated support payments applied. Based on this conclusion, we hold that maintenance would terminate two years and nine months from February 15, 2015. The court's order is reversed and the matter is remanded to the trial court for the entry of an order consistent with our decision.

¶ 44 Next, petitioner complains that the trial court failed to set a specific termination date for the maintenance payments. When addressing maintenance, the trial court judge stated, "I'm not ordering that it terminates on that date nor am I extending it beyond that date without further pleading on behalf of Ms. Woolsey." Based on our holding set forth above, maintenance will conclude two years and nine months after the retroactive date of February 15, 2015, unless a subsequent court order affects the termination date based on subsequent pleadings by either party.

¶ 45 III. Indirect Civil Contempt

¶ 46 Petitioner asserts that the trial court abused its discretion by finding respondent in indirect civil contempt and then ordering petitioner to pay $50,000 toward respondent's attorney's fees as a sanction. In support of this contention of error, petitioner claims that there was not a court order that precluded him from reducing respondent's or D.W.'s health insurance plan from the premier policy to a basic policy. We disagree.

¶ 47 The court order at issue, dated November 19, 2014, clearly provides:

> "Baird Woolsey shall continue to provide & maintain health insurance for the respondent & the parties[']minor child on a temp. basis until further ordered by the Court. Petitioner shall reinstate coverage & provide proof ASAP along w/any new insurance info or cards."

Here, petitioner focuses only on the first sentence of the order and ignores that petitioner was required to "reinstate" the same coverage he had previously terminated. The term "reinstate" is commonly defined as "[t]o place again in a former state or position" or "to restore." *Black's Law Dictionary* 1477 (10th ed. 2014). Based on this definition, we conclude that the court order requires petitioner to reinstate the insurance coverage that was in place before petitioner reduced the health insurance coverage for D.W. and respondent to a basic plan with higher deductibles.

¶ 48 Next, we address petitioner's contention that the trial court abused its discretion by ordering petitioner to pay $50,000 of respondent's attorney's fees. Based on this record and the difficulties the health insurance issue caused for respondent, the trial court did not abuse its discretion by requiring petitioner to pay a portion of respondent's attorney's fees. In addition, the trial court judiciously allowed petitioner to satisfy this sanction by adjusting the property settlement previously agreed upon by the parties. Thus, we conclude the trial court's award of

attorney's fees was within the bounds of reason and represented an appropriate sanction for indirect civil contempt of court.

¶ 49 IV. Social Security Benefits

¶ 50 Petitioner argues that the trial court incorrectly considered the social security benefits petitioner received when calculating maintenance. First, we consider petitioner's argument that the trial court should have ignored the social security benefits petitioner received for purposes of calculating the proper amount of maintenance.

¶ 51 In support of his argument, petitioner relies on *In re Marriage of Mueller*, 2015 IL 117876 (2015). In *Mueller*, the supreme court addressed the issue of whether the husband, who participated in a government pension program in lieu of social security, must be placed in a position similar as his wife, who participated in social security and whose benefits under the program were exempt by federal law from equitable distribution under section 503(d) of the Act (750 ILCS 5/503 (West 2016)). *In re Marriage of Mueller*, 2015 IL 117876, ¶¶ 1, 4. The court noted that 42 U.S.C. § 407(a) "imposes a broad bar against using any legal process to reach Social Security benefits." *Id*. at ¶ 20. The supreme court stated that social security benefits are not marital property under the Act because "[u]nlike pension benefits, Social Security benefits are not owned in any proprietary sense." *Id*. at ¶ 24 (internal quotations omitted). Instead, participants in the program have mere expectancies or noncontractual interests. *Id*. The supreme court explained that if social security benefits are not marital property, then they cannot be used to pare down the value of marital property. *Id*. at ¶ 25. In addition, the court stated "as a matter of policy, any rule permitting trial courts to consider the mere existence of Social Security benefits without considering their value, and thereby violating federal law, is nearly impossible to apply." *Id*.

¶ 52 In *Mueller*, the court concluded by stating "that Congress intended to keep Social Security benefits out of divorce cases." *Id*. at ¶ 27. The court also stated that "[f]ailing to consider Social Security benefits may paint an unrealistic picture of the parties' finances, but it is not the province of this court *** to interfere with the federal scheme, no matter how unfair it may appear to be." *Id*. (internal quotations omitted). For these reasons, the supreme court held that the trial court's decision not to consider the wife's social security benefits and reduce the husband's pension benefits by hypothetical social security benefits was correct. *Id*.

¶ 53 Following the supreme court's decision in *Mueller*, the Third District Appellate Court addressed this precise issue in *In re Marriage of Roberts*, 2015 IL App (3d) 140263 (2015). There, this court held that "[w]hile Social Security benefits cannot be considered in property division, they may be considered in determining a maintenance award." *Id*. at ¶ 21.

¶ 54 In this appeal, petitioner argues that the *Mueller* decision prohibits trial courts from considering social security income when setting maintenance. Further, petitioner contends that *Roberts* was incorrectly decided by this court.

¶ 55 As respondent points out, the *Mueller* case did not address the issue raised in this appeal regarding whether social security benefits may be considered as income for purposes of maintenance or child support. Thus, we decline to revisit our decision in *Roberts*. For these reasons, we conclude that the trial court did not abuse its discretion in considering both petitioner's social security income and respondent's social security benefits in calculating their respective incomes when determining the amount of maintenance in this case.

¶ 56 Next, we address petitioner's assertion that the trial court abused its discretion by failing to reduce his child support obligation by the amount of social security benefits respondent received as social security wife's insurance benefits pursuant to 42 U.S.C. § 402(b) (West 2016).

In this case, it is undisputed that respondent receives $850 per month in social security dependent benefits for D.W. and an additional $850 per month in social security wife's insurance benefits. Further, the trial court granted petitioner a setoff of $850 per month against his child support obligation for the dependent benefits D.W. receives, but refused to provide a setoff for the additional $850 in social security wife's insurance benefits.

¶ 57 Respondent argues that petitioner's contention that the $850 in social security wife's insurance benefits are paid for the support of D.W. is unsupported by facts of record. Without a citation to the record, we are unable to determine the underlying purpose of these paid benefits issued to respondent. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2017). For this reason, we affirm the trial court's refusal to give petitioner a setoff against his child support for the $850 per month in social security wife's insurance benefits paid to respondent.

¶ 58 CONCLUSION

¶ 59 The judgment of the circuit court of Peoria County is affirmed in part and reversed in part. The cause is remanded for the trial court to enter an order consistent with this decision.

¶ 60 Affirmed in part and reversed in part.

¶ 61 Cause remanded.

¶ 62 JUSTICE SCHMIDT, specially concurring.

¶ 63 I concur in the majority's holding with a couple of observations.

¶ 64 The majority describes the family's source of income after the second marriage as consisting of "rental apartment income and the principal of various investments." *Supra* ¶ 4. Respectfully principal is not income. The majority is referring to the income derived from various investments.

¶ 65 With respect to footnote 2 (*supra* ¶ 37), I am not sure of the point of that footnote as the majority acknowledges that respondent testified that she had been unemployed since 2001.

¶ 66 With respect to paragraph 57, the record adequately establishes that the $850 in Social Security paid to respondent was actually for child support. The record establishes that respondent is too young to draw her own retirement benefits from petitioner's Social Security account. That being said, the trial court did consider that $850 as income to respondent when calculating petitioner's maintenance obligation. To also give him a set-off in the amount for child support would constitute a double set-off for the same $850. The trial court's decision in this regard was not an abuse of discretion.