2018 IL App (1st) 162918-U
Order filed: May 4, 2018

FIRST DISTRICT
FIFTH DIVISION

No. 1-16-2918

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re THE MARRIAGE OF:	)	Appeal from the
	)	Circuit Court of
DANICA MILENKOVICH,	)	Cook County
	)	
Petitioner-Appellant,	)	
	)	No. 10 D 11608
and	)	
	)	
NENAD MILENKOVICH,	)	Honorable
	)	Mary Susan Trew,
Respondent-Appellee.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
JUSTICES HALL and LAMPKIN concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed the trial court's orders entered in postdissolution proceedings that deviated below statutory child support guidelines when modifying respondent's child support obligations and denied petitioner's request for respondent to contribute to the payment of petitioner's attorney fees. We reversed the order denying modification of respondent's contribution to the children's additional expenses and remanded for further proceedings.

¶ 2 Petitioner-appellant, Danica Milenkovich, appeals from orders entered in postdissolution of marriage proceedings that deviated below statutory child support guidelines when modifying the child support obligations of respondent-appellee, Nenad Milenkovich; denied an increase in respondent's contribution to the children's additional expenses; and denied petitioner's request

for respondent to contribute to the payment of her attorney fees. We affirm the orders which modified respondent's child support payment and denied the petition for contribution to her attorney fees; reverse the order denying an increase in respondent's contribution to the children's additional expenses; and remand for further proceedings.

¶ 3 Petitioner and respondent were married on October 10, 1993, and have three children, twins, Petar and Polina, born in 2002, and Kristina, born in 2005. On November 30, 2010, petitioner filed for divorce. A judgment for dissolution of marriage, incorporating a marital settlement agreement and a joint parenting agreement, was entered on June 14, 2012.

¶ 4 Pursuant to the joint parenting agreement, the parties have joint custody of their three children; petitioner is designated as the primary residential parent. Respondent is provided regular parenting time on alternating weekends from Friday to Sunday and two evenings per week, in addition to vacation time and alternating holiday parenting time.

¶ 5 Pursuant to the marital settlement agreement, the parties agreed that they were gainfully employed (petitioner as a physician and respondent as an attorney), capable of supporting themselves, and therefore they waived maintenance from one another. Pursuant to their property settlement, respondent was awarded a property on South Michigan Avenue and another property on North Ashland Avenue, both in Chicago. Petitioner received two condominium properties on South Indiana Avenue, and a condominium property on South Des Plaines Street in Chicago. Petitioner also received the marital home on South Indiana Avenue. The parties retained their own separate bank and retirement accounts.

¶ 6 The parties agreed that respondent would pay petitioner $2,841 per month in child support, which was 32% of respondent's net employment income at the time. Respondent also agreed to pay petitioner an additional $750 per month toward the children's additional expenses,

including their education at the Francis Xavier Warde School (FXW), extracurricular activities, childcare, tutoring, and health insurance premiums. If respondent received a bonus at work, he was to pay petitioner $3,000 as an additional contribution to the children's expenses, as well as 32% of the remaining bonus (less the $3,000). Respondent was also to pay one-half of the children's uncovered medical expenses.

¶ 7 On February 19, 2015, petitioner filed a motion to modify the child support payments, alleging that the children's needs, expenses, and costs of living had increased, and that petitioner did not have sufficient funds to pay for all these increased expenses. Petitioner alleged that respondent's income had substantially increased since the dissolution judgment, and she requested an increase in his child support obligation, as well as an increase in his contribution to the children's additional expenses, including their tuition, child care expenses, extracurricular activity expenses, tutoring costs, and health insurance premiums.

¶ 8 In response, respondent admitted that his income had increased since the judgment of dissolution of marriage, but he denied that a modification and increase of child support and contribution to the children's additional expenses was warranted.

¶ 9 On December 15, 2015, petitioner filed a petition seeking contribution from respondent for her attorney fees. Petitioner contended that, since February 2015, she had incurred approximately $30,000 in attorney fees and costs and she lacked the ability to pay the same.

¶ 10 In response, respondent claimed that petitioner's income and assets had increased since the dissolution judgment and that she had the ability to pay her own attorney fees.

¶ 11 A two-day hearing was held on petitioner's motion to modify child support. The testimony and evidence revealed the following:

¶ 12 I. Petitioner and the Children

¶ 13 Petitioner is employed as an attending physician at Mercy Hospital and Medical Center (Mercy), where she works approximately 40 to 50 hours per week, including weekends. She has been employed there since 1999. Petitioner also works an average of 15 additional hours per week "moonlighting," *i.e.*, working a second job as a physician. Petitioner earned $185,715 in 2011 and $256,044 in 2012, the year the parties were divorced. In 2015, petitioner earned a total of $288,365, comprised of $207,906 from Mercy, $73,425 from moonlighting as a physician for Echo Locum Tenens, and an additional $7,034 from three rental properties awarded to her in the parties' divorce.

¶ 14 On the first day of the hearing, December 14, 2015, petitioner testified that her moonlighting contract with Echo Locum Tenens would terminate on January 1, 2016, and that she "will no longer be able to make additional income." When asked if she had another moonlighting job lined up for 2016, she replied "no."

¶ 15 On the second day of the hearing, petitioner was shown a contract she had signed on December 15, 2015, pursuant to which she would receive $110 to $125 per hour for moonlighting for a new company, Physician Staffing, Inc. Petitioner testified that it was just a "coincidence" that she signed the contract the day after testifying on December 14, 2015, that she had no moonlighting job lined up for 2016. Under the new moonlighting contract, petitioner will be required to travel two to four hours, round trip, in rush hour traffic, from Chicago to the North Shore suburbs to work the night shift, in addition to her full-time hours at Mercy.

¶ 16 Petitioner and the three children continue to reside in the former marital residence, a 2,800 square foot three-bedroom townhouse, in downtown Chicago. Petitioner filed two asset disclosure statements, one dated March 4, 2012, and the other dated March 1, 2015, as well as a W-2 wage and tax statement from 2015, a 1099-miscellaneous income form for 2015, and a 2015

form detailing her monthly expenses for rental properties. These financial forms show that, at the time of the divorce in 2012, the children's expenses were $8,816 per month. When petitioner filed her motion to modify in 2015, their expenses had increased to $9,878.33 per month.

¶ 17 Petitioner testified that since the divorce, her total monthly expenses, including household expenses such as her mortgage, real estate taxes, utilities, and food, plus transportation expenses, clothing, medical and entertainment expenses, as well as the children's expenses, are $21,190.26. Petitioner contends her net monthly income is only $8,590.61, meaning that her monthly expenses exceed her net monthly income by $12,599 (amounting to an annual deficit of $151,188).

¶ 18 The financial forms (asset disclosure statements, W-2 and 1099 forms) submitted by petitioner indicate that, from 2012 to 2015: petitioner's gross monthly income increased by $2,693 (from $21,337 to $24,030); her total monthly expenses decreased by $1,711.74 (from $22,902 to $21,190.26); she retired $15,628 in debt on her property at 1250 S. Indiana Avenue; she retired $13,986 in debt on her property at 210 S. Des Plaines Street[1]; her MetLife annuity increased by $31,733 (from $66,572 to $98,305); and her other retirement accounts increased by $131,878 (from $81,703 to $213,581).

¶ 19 Petitioner also has a savings account at Chase Bank. From January 2014 to November 2015, the balance of her savings account increased from approximately $25,000 to $88,000. However, after paying attorney fees, taxes, and credit card expenses from that account, it had a balance of $28,000 as of December 7, 2015.

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[1] Respondent argues that petitioner's 2012 and 2015 asset disclosure statements indicate that she also retired $456,002 in debt on her property at 1341 S. Indiana Avenue from 2012 to 2015. However, as correctly noted by petitioner on appeal, the 2012 asset disclosure statement appears to double-count one of her mortgages on that property, making it unclear as to her total debt on the 1341 S. Indiana Avenue property in 2012 and rendering us unable to determine how much debt was retired by 2015.

¶ 20 Beginning in 2016, the children's tuition expenses decreased by about $2,000 per month because the twins, Petar and Polina, started public high school, and were no longer attending FXW. Petitioner's only current tuition expense is for her daughter Kristina, who attends FXW at a cost of approximately $13,000 per year (about $1,080 per month).

¶ 21 Since the divorce, petitioner has taken a number of trips/vacations without the children. Specifically, she spent a weekend in Miami Beach in 2013, vacationed 14 days in Hong Kong and other parts of Asia in 2013, traveled to Steamboat Colorado in 2014, vacationed in Bali in the summer of 2014, went to Breckenridge Colorado in December 2014, and went to Maui and Aruba in 2015. The Steamboat, Maui, and Aruba trips were for work-related conferences for which she was reimbursed by Mercy.

¶ 22 Petitioner has taken her children on three "bigger vacations" each year since the divorce. Each winter, she takes the children on one or two four-day skiing trips to Wisconsin. She also takes them to "a different part of the United States" on spring break each year. In 2015, she took them to Wisconsin, the Grand Canyon, and Red Rock State Park in Arizona; in 2014, she took them to Niagara Falls in Toronto; in 2013, she took them to San Francisco. She also takes the children to Serbia every summer and has taken them on side-trips to Greece, Croatia, France and London. The children's travel/vacation schedule is the same as it was during the marriage.

¶ 23 Petitioner testified that during the marriage, each of the children participated in two sports (tennis and gymnastics), took piano lessons, and were enrolled in Kumon (which provides math and reading programs). Since the divorce, her daughter Polina plays club volleyball, which requires travels to St. Louis and Florida. Petitioner transports Polina to her practices and pays for the other travel expenses. Polina continues to take piano lessons.

¶ 24 Petar plays football, basketball, and runs track. Petitioner did not sign Petar up for club basketball this year because respondent has refused to pay for half of the expenses.

¶ 25 Kristina plays volleyball and basketball and takes piano.

¶ 26 All three children have a private tutor for "test prep and other courses." They no longer are enrolled in Kumon.

¶ 27 II. Respondent

¶ 28 Respondent has been a licensed attorney since November 2000. At the time of the divorce in 2012, respondent was an income partner at the law firm McDonald Hopkins earning $175,000 annually. The parties based respondent's support obligation on this income.

¶ 29 Respondent became an income partner at the law firm Much Shelist, P.C. in January 2015, where he earns an annual nonrecourse draw of $425,000. He is entitled to additional compensation based on the amount of business he generates, as follows: 35% of the first $1.75 million in receipts, 29% of the next $1.75 million in receipts, and 25% of any additional receipts. He contributes $1,500 per month to his 401(k) retirement plan.

¶ 30 Respondent also has a clinical doctorate in pharmacy and is a columnist for *Drug Topics Magazine*.

¶ 31 Since his divorce, respondent has remarried and purchased a condominium in Chicago for $475,000 and a second home in Florida for $300,000.

¶ 32 Respondent filed an asset disclosure statement dated May 15, 2015, which stated that his gross monthly income was $36,194.30, which consisted of his law firm pay of $35,416.67 per month, plus $200 per month that he earned from writing his column, $6.67 in interest income, and $570.96 in monthly rental income. Respondent's net monthly income was $20,203.47, while his total monthly living expenses were $14,337.43. After paying all his monthly expenses,

respondent has a remaining monthly surplus of $5,266.04. He also has two savings accounts with a balance of $43,380.62, two IRAs worth approximately $225,000, and a 401(k) worth $5,000.

¶ 33 Respondent testified to his parenting schedule with the children, stating that he drives them to school every morning, and that they stay with him on Monday and Thursday evenings, every other weekend, and on certain holidays and vacations. Respondent is willing to spend more time with the children, including taking them to their doctor's appointments and activities, in the event petitioner is "on call or has to work."

¶ 34 During the marriage, he and petitioner took the children on two vacations each year, specifically, to Serbia to visit petitioner's family, and to Cleveland to visit respondent's family. They also took the children to Florida "from time to time," and sometimes took them to Michigan or Wisconsin for a weekend. Since the divorce, respondent takes the children to Florida over their winter break and to Cleveland in the summer to visit their grandparents.

¶ 35 Respondent does not agree with petitioner that the children need private tutoring, because the education they are receiving is adequate and they are all doing well in school.

¶ 36 III. The Trial Court's Ruling

¶ 37 On July 8, 2016, the trial court issued a written order finding that both parties' incomes had increased since the dissolution judgment, but that respondent's income had increased "substantially." Petitioner now grosses more than $288,000 per year, while respondent grosses more than $400,000 per year. The court noted that the "substantial change in circumstances is [respondent's] marked increase in his income, as well as the increased needs of the children as they have aged."

¶ 38 The court further noted that under the minimum child support guidelines as set forth in section 505 of the Illinois Marriage and Dissolution of Marriage Act then in effect (Act) (750 ILCS 5/505 (West 2016)), respondent would pay 32% of his net income in child support for his three children, which would be $7,872 per month, unless the court found that a deviation from the guidelines was appropriate. *Id*. The court found that a deviation from the guidelines was appropriate because "the financial resources and needs of the parents are such that a guideline amount would result in a windfall to [petitioner], given her own high income. Additionally, each parent on his or her own is fortunate enough to be able to maintain a standard of living for the children that they would have enjoyed had the marriage not been dissolved."

¶ 39 The court ordered respondent to pay 20% of his net monthly income, $4,921, in child support, an increase of $2,080 per month over his previous child support obligation. The court explained that it had examined petitioner's 2015 asset disclosure form and determined that one-half of her monthly household expenses plus one-half of the children's expenses (excluding tuition and certain other extracurricular costs) was $4,842 per month "which is close to the 20% of [respondent's] net income."

¶ 40 The court further stated that "to be consistent with this court's order, the 32% of bonus (after deducting $3,000) to be paid is modified to 20% of bonus." The court left intact respondent's obligation to pay an additional $750 per month for the children's other expenses.

¶ 41 In a separate order on July 8, 2016, the court denied petitioner's petition for respondent to contribute to her attorney fees. The court had held a hearing on the petition for attorney fees on June 1, 2016, but the transcript of the hearing is not contained in the record on appeal.

¶ 42 On July 19, 2016, petitioner filed a "motion to clarify" the July 8 child support order. First, petitioner asked the court to make respondent's increased child support obligation

retroactive to the date petitioner filed her motion to modify. Second, petitioner noted that the court had ordered respondent to pay petitioner 20% of any bonus, but that such an obligation is illusory because the additional monies that respondent earns is not a bonus; rather, he earns monies for bringing in business over his nonrecourse draw of $425,000 per year. Petitioner asked the court to order respondent to pay her 20% of the monies he so earns over his nonrecourse draw, including 20% of such monies he had already earned in 2016. Third, petitioner asked the court to order respondent to provide her with proof of any additional income he receives from any source within seven days from its receipt.

¶ 43 On September 30, 2016, the trial court entered an order finding: (1) petitioner was entitled to retroactive support effective February 19, 2015, in the amount of $34,720; (2) the term "bonus" means "additional compensation (not regular compensation) awarded to an employee, typically given in the form of a one-time payment"; (3) the additional income respondent earns for bringing in new business over his nonrecourse draw of $425,000 is not a bonus and, thus, petitioner is not entitled to 20% thereof; and (4) respondent must provide proof of any bonus income to petitioner within seven days of the receipt thereof.

¶ 44 Petitioner appeals.

¶ 45 IV. Appellate Jurisdiction

¶ 46 Respondent contends we lack jurisdiction over petitioner's appeal because it was not timely filed. Supreme Court Rule 303 governs the timeliness of appeals, and states:

> "The notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from, or, if a timely posttrial motion directed against the judgment is filed, whether in a jury or a nonjury case, within 30 days

after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order." Ill. Sup. Ct. R. 303(a)(1) (eff. July 1, 2017).

¶ 47 "A motion qualifies as a post-trial motion under Rule 303(a)(1) and tolls the time for filing a notice of appeal if it requests one or more of the types of relief authorized in section 2-1203 of the code of Civil Procedure." *Hanna v. American National Bank and Trust Co. of Chicago*, 176 Ill. App. 3d 938, 942 (1988). Among the types of relief specified in section 2-1203 is a motion to modify the judgment. See 735 ILCS 5/2-1203 (West 2012).

¶ 48 The trial court here entered its order modifying respondent's child support payments on July 8, 2016. Petitioner filed a timely postjudgment motion on July 19, 2016, captioned: "Motion [t]o Clarify July 8, 2016 Memorandum Opinion [a]nd Order." Respondent argues that a motion for clarification is not a proper postjudgment motion because it is not directed against the judgment (*Giammanco v. Giammanco*, 253 Ill. App. 3d 750, 755 (1993)) and, therefore, petitioner's motion for clarification did not toll the time for filing the notice of appeal. We disagree. The nature of a motion is determined by its substance rather than its caption. *Heiden v. DNA Diagnostics Center, Inc.*, 396 Ill. App. 3d 135, 140 (2009). Although petitioner's motion was captioned as a "motion to clarify," the substance of the motion sought modification of the July 8, 2016, order so as to make respondent's child support obligation retroactive to February 19, 2015, and to require respondent to pay her additional child support from his income earned in excess of his nonrecourse draw. Petitioner's postjudgment motion, the substance of which sought modification of the July 8, 2016, order, requested a type of relief authorized under section 2-1203 and tolled the time for filing the notice of appeal until the court ruled on the motion. The court ruled on the postjudgment motion on September 30, 2016, and petitioner

timely filed her notice of appeal on October 28, 2016. Accordingly, we have jurisdiction to consider petitioner's appeal.

¶ 49 V. Petitioner's Appeal

¶ 50 Petitioner contends the trial court erred by deviating below the Act's statutory guidelines when modifying respondent's child support obligation.

¶ 51 Motions to modify judgments awarding child support are governed by section 510(a) of the Act (750 ILCS 5/510(a) (West 2016)), which provides that an order for child support may be modified "upon a showing of a substantial change in circumstances." *Id*. The party seeking the modification must show an increase in the children's needs and an increase in the noncustodial parent's ability to pay. *In re Parentage of I.I.*, 2016 IL App (1st) 160071, ¶ 53. An increase in the children's needs may be presumed on the basis that the children have grown older and the cost of living has risen. *In re Marriage of Pylawka*, 277 Ill. App. 3d 728, 731 (1996).

¶ 52 Neither party disputes the presumption that the children's needs have increased as they have grown older and the cost of living has risen, or that respondent's ability to pay has substantially increased. Rather, the dispute centers on whether the trial court erred in ordering respondent to pay 20% of his net income in child support instead of the statutory guideline of 32%.

¶ 53 The Act provides that the statutory guidelines shall be applied in each case unless the court finds that a deviation from the guidelines is appropriate after considering the best interest of the child in light of the evidence, including, but not limited to, one or more of the following relevant factors:

"(a) the financial resources and needs of the child;

(b) the financial resources and needs of the parents;

(c) the standard of living the child would have enjoyed had the marriage not been dissolved;

(d) the physical, mental, and emotional needs of the child; and

(d-5) the educational needs of the child." 750 ILCS 5/505(a)(2) (West 2016).

¶ 54 The party seeking a deviation from the guidelines bears the burden of producing evidence that compelling reasons exist to justify the deviation. *In re Marriage of Hill*, 2015 IL App (2d) 140345, ¶ 29. The trial court's decision to deviate from the statutory guidelines will not be disturbed absent an abuse of discretion. *Id.* ¶ 28. An abuse of discretion occurs when no reasonable person could agree with the trial court's decision. *In re Marriage of Sheaffer*, 2013 IL App (2d) 121049, ¶ 10.

¶ 55 "A trial court is justified in awarding child support below the guideline amount where the parties' incomes are more than sufficient to provide for the reasonable needs of the parties' children. However, the trial court is not required to do so. When dealing with a parent who has a high income, the trial court must balance the concerns that (1) a child support award should not be a windfall and (2) the standard of living that the children would have enjoyed absent the dissolution should be maintained. In light of the standard of living that the children would have enjoyed, child support is not to be based solely upon their shown needs." [Internal citations omitted.] *Id.* ¶ 30.

¶ 56 Petitioner argues that the trial court employed the wrong analysis by failing to consider the standard of living that the children would have enjoyed absent the dissolution. Petitioner argues that the trial court merely divided her household expenses and a few of the children's expenses in half to support its conclusion that $4,921 per month, equating to roughly 20% of respondent's net income, was an appropriate amount of support to meet the children's reasonable

needs. Petitioner contends that the trial court "completely discounted" the standard of living that the children would have enjoyed absent the divorce and limited their support to just some of their basic shown needs.

¶ 57 Review of the record indicates that the trial court did not discount the standard of living that the children would have enjoyed absent the divorce, where the court's order modifying the child support award noted that both parents "are high income earners" and explicitly stated:

> "Child support shall deviate from guidelines for the reason that the financial resources and needs of the parents are such that a guideline amount would result in a windfall to [petitioner], given her high income. *Additionally, each parent alone is able to maintain a standard of living for the children that they would have enjoyed had the marriage not dissolved*." (Emphasis added.)

¶ 58 Thus, contrary to petitioner's argument, the court's order reflects that it understood the need to consider whether a downward deviation from the statutory child support guidelines would prevent the children from maintaining the standard of living they were accustomed to during the marriage. The issue is whether the trial court abused its discretion in entering the downward deviation, and ordering respondent to pay petitioner monthly child support in the amount of 20% of his net income ($4,921 per month) instead of the statutory guideline of 32% ($7,872 per month).

¶ 59 We find no abuse of discretion. We begin by discussing the children's standard of living. The testimony established that during the marriage, the children's lifestyle consisted of living in downtown Chicago, attending an elite private school (FXW) and receiving private tutoring, engaging in a number of competitive sports activities, taking piano lessons, having live-in child care and taking multiple annual vacations in and outside of the United States. Petitioner

testified that even after the dissolution, the children continue to live in the former marital residence in downtown Chicago; Kristina continues to attend FXW while Petar and Polina also attended FXW until 2016, when they were admitted to public high school; the children engage in a number of competitive sports activities, specifically, Petar plays football, basketball, and runs track, while Polina plays club volleyball, and Kristina plays volleyball and basketball; the children have private tutors and a live-in nanny; and petitioner has taken the children on multiple annual vacations, including to Wisconsin, the Grand Canyon, Arizona, Niagara Falls, San Francisco, Serbia, Greece, Croatia, France and London. Respondent also takes the children on vacations to Florida and Cleveland. Clearly, the children maintain the same standard of living they would have enjoyed if the parties had remained married, as they reside in the same house and engage in the same schooling and tutoring, sporting activities, vacations, extracurricular activities, and receive the same child care.

¶ 60 Next, we discuss the trial court's finding that the financial resources and needs of the parents and children are such that a child support award in the guideline amount of $7,872 per month would result in a windfall, *i.e.*, an unanticipated profit (Black's Law Dictionary (9th ed. 2009)), for petitioner that exceeds the children's needs.

¶ 61 Petitioner contends that a guideline award would not exceed the children's needs and amount to a windfall or profit for her, because since the divorce she has increased her work hours by moonlighting 15 hours per week in addition to her regular hours at Mercy, and has used all of her income to maintain the children's standard of living, and yet her expenses exceed her income by $12,599 per month. Petitioner argues that respondent's financial resources are far greater than hers, specifically, that he earns $150,000 more per year than she does and lives a lavish lifestyle, and that if he paid her the guideline amount she would not have to increase her

moonlighting hours and use all her income to maintain the standard of living that the children would have enjoyed had the parties not divorced.

¶ 62 Initially, we note that, although petitioner contends on appeal that she has had to increase her moonlighting hours since the divorce in order to maintain the children's same standard of living that they enjoyed during the marriage, the evidence presented at the hearing indicated that petitioner's moonlighting is not new, as she admitted that she has been "working these two jobs" since "a year or two" before the dissolution, and she offered no evidence that those hours have increased since then.

¶ *63* Next, we note that petitioner's testimony at the hearing indicating that her monthly expenses exceed her income was belied by her 2015 asset disclosure statement, W-2 form, and 1099 form, which reveal that her financial resources (her $288,000 annual income as a physician, coupled with her $586.17 in monthly rental income and the original child support award of $2,841 per month), left her with a monthly surplus, even after paying her expenses and the children's expenses. Petitioner used this surplus from 2012 to 2015 to save over $160,000 for retirement, pay her credit card debts in full, retire almost $30,000 in debt on two of her properties, and engage in discretionary spending on vacations inside and outside the United States. Given the evidence showing petitioner's high income and the monthly surplus she enjoyed after paying her household expenses and her children's expenses, the trial court determined that an award of child support in the guideline amount of 32% of respondent's current net income, or $7,872 per month, would exceed the children's needs and amount to a windfall for her. Instead of awarding petitioner the windfall amount of $7,872 per month, the court examined petitioner's 2015 asset disclosure statement and determined that her household expenses and child support costs (excluding certain additional costs discussed later in this order)

amounted to $9,684 per month, and it ordered respondent to pay petitioner a little more than one-half of that amount, $4,921 per month, which amounted to 20% of his net income. In so ordering, the trial court correctly provided for both high-earning parents to bear the joint obligation of supporting the children (*In re Marriage of Singleteary*, 293 Ill. App. 3d 25, 38 (1997)), without providing a windfall to petitioner. We find no abuse of discretion.

¶ 64 *Singleteary* is informative. In *Singleteary*, the trial court entered a judgment for dissolution of marriage between the petitioner and the respondent, which incorporated a marital settlement agreement. *Id*. at 27. The agreement provided that the petitioner pay the respondent child support of $864 per month, or 20% of his net income, whichever amount was greater. *Id*. At the time of the divorce, the petitioner was a self-employed businessman with an annual income of $90,000. *Id*. The respondent was a banker with an annual salary of $55,000. *Id*.

The petitioner subsequently filed an amended petition for modification of child support, arguing that his income had substantially increased to $300,000 per year and, therefore, that a child support award of 20% of his net income would exceed the needs of the child and result in a windfall to respondent. *Id*. at 29. The trial court found:

> "A 20% support order would result in payment of a minimum of $36,000 yearly which is in excess of the needs of this child and therefore not appropriate. On the other hand, the current order for $864.00 monthly does not meet his needs or enable him to enjoy the standard of living he would have had the marriage not been dissolved. Balancing the needs of the child, Petitioner's resources and needs, Respondent's resources [*sic*] and needs, and the lifestyle the child would have had if the parents had not separated, the court finds that an order for $2,000.00 per month is appropriate." *Id*. at 37.

¶ 65 The respondent appealed. *Id*. at 28.

¶ 66 The appellate court first noted that, under the Act's guidelines, the petitioner should pay 20% of his net income for support for his one child. *Id*. at 32. However, the appellate court stated:

> "When dealing with above-average incomes, the specific facts of each case become more critical in determining whether the guidelines should be adhered to." *Id*. at 36. The appellate court proceeded to examine the specific facts of the case, including the respective income and expenses of the parties and children, and found that the trial court did not abuse its discretion in ruling that a total award of $2,000 per month effectively balanced the needs of the child with the needs and financial resources of the parents and allowed the child to maintain the same standard of living he would have enjoyed had the parents remained married. *Id*. at 38.

¶ 67 Similarly, in the present case, where both parents have above-average incomes, the specific facts of the case are critical in determining whether the guidelines should be adhered to. The trial court here examined the respective income and expenses of the parties and children, and determined that a guideline award of 32% of respondent's net income would exceed the needs of the children and amount to a windfall for petitioner. The court found that a child support award of 20% of respondent's net income, $4,921 per month, would cause both high-earning parents to pay roughly 50% of the children's expenses, which amount was sufficient to maintain the same lifestyle that the children would enjoy had the marriage not ended. We find no abuse of discretion.

¶ 68 Petitioner next argues that the trial court erred when it ordered respondent to pay her additional child support in the amount of 20% of any "bonus" income, which the court defined as "additional compensation (not regular compensation) awarded to an employee, typically given in

the form of a one-time payment," but denied her any additional child support from monies that respondent receives for bringing in new business to his law firm. Petitioner contends that, under respondent's agreement with his law firm, he will never receive a one-time bonus, but will, instead, receive 35% of the first $1.75 million in new business he brings in—29% of the next $1.75 million in new business, and 25% of any additional new business. Petitioner asks us to reverse and remand the case to the trial court so that it may expressly award her additional child support from any monies respondent receives for bringing in new business to the law firm. Respondent counters that an award of additional child support based on a percentage of the monies he receives for bringing in new business to the firm will amount to the type of windfall that the trial court sought to avoid when it deviated downward from the statutory child support guidelines.

¶ 69 We agree with respondent. As discussed earlier in this order, the trial court here carefully considered the parties' respective incomes and expenses, including the children's expenses, and determined that a $2,080 per month increase in respondent's child support obligation, to $4,921 per month, effectively balanced the needs of the children with the needs and financial resources of both parents, and was sufficient to maintain the same lifestyle that the children would have enjoyed had the marriage not ended. The court determined that a child support award greater than $4,921 per month would amount to respondent paying more than 50% of the child support costs, resulting in an unjustified windfall for the high-earning petitioner.

¶ 70 We believe that the trial court properly weighed all relevant factors and committed no abuse of discretion by limiting the child support modification to $4,921 per month and by not awarding petitioner additional child support from the monies respondent receives for bringing in

business to the firm, which amount the court determined would be a windfall to petitioner and exceed the needs of the children.

¶ 71 Next, petitioner argues that the trial court erred by denying her request to increase respondent's contribution to the children's additional expenses under section 505(a)(2.5) of the Act in effect at the time of the dissolution (750 ILCS 5/505(a)(2.5) (West 2016)). Section 505(a)(2.5) provides:

> "The court, in its discretion, in addition to setting child support pursuant to the guidelines and factors, may order either or both parents owing a duty of support to a child of the marriage to contribute to the following expenses, if determined by the court to be reasonable:
>
> (a) health needs not covered by insurance;
>
> (b) child care;
>
> (c) education; and
>
> (d) extracurricular activities." *Id*.

¶ 72 In the marital settlement agreement, the parties agreed that, pursuant to section 505(a)(2.5), respondent would pay petitioner $750 per month toward the children's additional expenses, including their education at FXW, extracurricular activities, tutoring, child care, and health insurance premiums. Respondent would also pay one-half of the children's uncovered medical expenses.

¶ 73 In her motion to modify, petitioner sought an increase in the $750 monthly payment. The court denied plaintiff's request, finding that "the expenses originally contemplated by [section 505(a)(2.5)] have been substantially reduced [by about $2,000 per month] due to the two oldest

children attending public rather than private schools." Accordingly, the trial court ordered that respondent's monthly contribution to the section 505(a)(2.5) expenses remain at $750 per month.

¶ 74 However, the trial court failed to taken into account that, according to petitioner's 2015 asset disclosure form, even with the $2,000 per month reduction in tuition costs, the remaining section 505(a)(2.5) expenses for the children amount to about $4,345 per month (*i.e.*, $1,800 per month in child care, $1,080 per month in tuition, $465 in monthly medical costs, and $1,000 in extracurricular activities). The trial court had the discretion to order respondent to pay petitioner an increased portion of these remaining section 505(a)(2.5) expenses, but it never exercised that discretion because, after finding that the children's tuition costs had decreased by $2,000 per month, the court ended its analysis and never considered whether respondent should pay an increased amount for the remaining expenses. Accordingly, we reverse the order denying petitioner's motion to modify respondent's monthly contribution to the section 505(a)(2.5) expenses. We remand for the court to consider whether, and in what amount, respondent's contribution to those expenses should be increased, retroactive to the date of the filing of the motion to modify, to help petitioner pay the $4,345 in monthly expenses remaining even after the $2,000 reduction in tuition costs.

¶ 75 Further, petitioner argues that the trial court failed to consider that she paid almost 100% of the tuition at FXW for all three children, from the filing of her motion to modify in February 2015, through the twins' graduation from eighth grade in May/June 2016. According to petitioner, the total cost of nearly 1.5 years of tuition for all three children was $59,460. Petitioner contends that, in light of respondent's significantly increased income, the trial court should have ordered him to retroactively reimburse her for all the tuition she paid for the three children from February 2015 through the twins' graduation in May/June 2016.

¶ 76 Under section 505(a)(2.5), the trial court had the discretion to order respondent to reimburse petitioner for some or all of the tuition payments she made from February 2015 through May/June 2016, but the court never considered the issue, instead ending its analysis after determining that the children's tuition costs had decreased by $2,000 per month as of the twins' graduation from FXW. On remand, the trial court is to consider whether, and in what amount, respondent should retroactively pay petitioner for the FXW tuition she paid for the three children from February 2015 to May/June 2016.

¶ 77 We recognize that the Act has been amended effective July 1, 2017, subsequent to the filing of the notice of appeal, and there is a question as to whether the trial court should apply the amended Act on remand. Section 801(d) of the Act answers that question, stating:

> "In any action or proceeding in which an appeal was pending or a new trial was ordered prior to the effective date of this Act, the law in effect at the time of the order sustaining the appeal or the new trial governs the appeal, the new trial, and any subsequent trial or appeal." 750 ILCS 5/801(d) (West 2016).

"Although section 801(d) is addressed to the Act itself, in our judgment it should be applied to amendments (to the Act) as well." *In re Marriage of Sweet*, 119 Ill. App. 3d 1033, 1040 (1983).

¶ 78 As petitioner's appeal was pending prior to the effective date of the amended Act, the trial court, on remand, is to apply "the law in effect at the time of the order sustaining the appeal." 750 ILCS 5/801(d) (West 2016). This phrase refers, not to the law in effect at the time of the judgment entered by the reviewing court upon the appeal but, rather, to the law in effect at the time of the order of the trial court which forms the basis of the appeal. *In re Marriage of Brown*, 127 Ill. App. 3d 831, 834-35 (1984). Thus, in the present case, the trial court, on remand, is to apply the law in effect at the time of the July 8, 2016, and September 30, 2016

orders giving rise to the appeal. See *In re Marriage of Smith*, 162 Ill. App. 3d 792, 795-96 (1987).

¶ 79 Next, petitioner contends that the trial court erred by denying her petition for respondent to pay her attorney fees. Petitioner has failed to include in the record on appeal any transcript from the June 1, 2016, hearing on her fee petition. As the appellant, petitioner has the burden to present a sufficiently complete record to support her claim of error and, in the absence of such a record on appeal, we presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 80 For all the foregoing reasons, we affirm in part, reverse in part, and remand for further proceedings.

¶ 81 Affirmed in part, reversed in part, and remanded for further proceedings.