2018 IL App (2d) 170216-U
No. 2-17-0216
Order filed July 5, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| *In re* MARRIAGE OF SUZANNE A. ANDERS, | ) | Appeal from the Circuit Court of Lake County. |
| Petitioner/Counter-Respondent-Appellee, | ) | |
| v. | ) | No. 11-D-2416 |
| BRIAN S. ANDERS, | ) | |
| Respondent/Counter-Petitioner-Appellant. | ) | Honorable Donna-Jo R. Vorderstrasse, Judge, Presiding. |

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JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court's property classifications as non-marital and marital were not against the manifest weight of the evidence. Also, the trial court did not abuse its discretion in issuing its $16,667 monthly maintenance award, to be reviewed in eight years.

¶ 2 Appellant, Brian Anders, appeals the trial court's $5 million-plus property award and $16,667 monthly maintenance award to appellee, Suzanne Anders. Brian challenges the court's underlying determination that his annual year-end bonus from Durable, Inc., often exceeding $2 million, did not constitute non-marital property under section 503(a)(8) of the Illinois Marriage

and Dissolution of Marriage Act (Act) (750 ILCS 5/101 *et seq.*, 503(a)(8) (West 2016) (income from non-marital property that is not attributable to the personal effort of the spouse)).

¶ 3 Durable is a closely-held, third-generation, family-run business that manufactures aluminum goods for consumer and commercial use in the food service industry. The six key participants include Gary Anders (Brian's father), Dennis Anders (Brian's uncle), Brian, Scott Anders (Brian's brother), Darren Anders (Brian's first cousin and Dennis's son), and Corey Anders (same). Gary and Dennis, of the second generation, became involved in the company in the 1970s. In 1996, five years before Brian and Suzanne's 2001 marriage, Gary and Dennis began to gift their ownership in the company to four members of the third generation, Brian, Scott, Darren, and Corey. The transfer of stock was completed ten years later, in 2006, making Brian, Scott, Darren, and Corey each 25% shareholders. Gary and Dennis no longer had any ownership interest, but they continued to work for the company. It was Durable's practice during the decade-long transfer, and continuing thereafter, to award each of the six key participants a large year-end bonus, often exceeding $2 million. The key participants paid personal income tax on the bonus and then loaned back the remaining amount to the company. The company used the funds, at least in part, to operate. The loan was reflected as a company liability in the accounting books. Therefore, the award-and-loan-back practice lowered the value of the company, making it easier to gift stock shares to the next generation without incurring taxes. Each loan to the company was reflected as a credit in each participant's personal Notes Payable Account.[1] By the date of trial, each member of the third generation had approximately

[1]The parties also refer to the Notes Payable Accounts as shareholder accounts. However, because non-shareholders, like Gary and Dennis, also maintain similar accounts with the company, we do not use that term.

$15 million in his Notes Payable Account, on which each accrued interest in excess of $200,000 per year.

¶ 4 The parties now agree that Brian's 25% stock ownership in Durable is non-marital property. However, they continue to dispute whether Brian's bonus, and, therefore, the $15 million in his Notes Payable Account, is non-marital property pursuant to section 503(a)(8) of the Act. Brian urged at trial that the bonus was income based solely on his stock ownership and not due to his personal efforts. The trial court rejected this argument. For the reasons that follow, we affirm.

¶ 5 I. BACKGROUND

¶ 6 In March 2001, Brian and Suzanne married. At that time, Brian was working for Durable and Suzanne, three years out of college, had recently finished a paid internship at Evanston Hospital. During the marriage, the parties agreed that Suzanne would be a homemaker and stay-at-home mother. Their first child, a girl, was born in May 2002. Their next two children, twin boys, were born in 2005. Suzanne filed for divorce in 2011. A lengthy legal battle ensued, which culminated in 10 days of hearings in December 2015 and a 2016 judgment.

¶ 7 A. Durable's Corporate Structure and the Nature of the Bonus

¶ 8 1. Richard Edelheit

¶ 9 Richard Edelheit, an accountant, has prepared Durable's tax returns since 1980. He testified to the company's corporate structure and the nature of its annual bonus distributions. According to Edelheit, "many, many years ago," when Gary and Dennis still held all the stock, Edelheit advised the company on its corporate structure. He presented two options: (1) an S-Corporation; or (2) a C-Corporation. In an S-Corporation, profits and losses pass directly to the

owners and are reported on their individual income tax returns. In a C-Corporation, profits and losses are taxed directly at the corporate level. Then, shareholders receive dividends, which are reported on the owners' individual income tax returns. The company chose to structure itself as an S-Corporation to avoid what it saw as the C-Corporation structure's double tax.

¶ 10 Within the S-Corporation structure, there are two ways that the owners may report the profits on their individual income tax return: (1) the bonus-distribution method; and (2) the retained-earnings method. In the bonus-distribution method, the recipients are taxed only once per year. The company pays the withholding tax associated with the bonuses. Under the retained-earnings method, the corporation's taxable income is reported *pro rata* on each shareholder's individual return via a K-1 form. The retained-earnings method also requires quarterly estimated payments and an additional 1.5% Illinois replacement tax. The retained-earnings income, less taxes, is retained by the company for business operations and used as working capital. The shareholders do not have personal use of the funds. As the retained earnings increase, the value of the company increases, because the earnings contribute to the company's equity.

¶ 11 Edelheit advised Gary and Dennis to implement the bonus-distribution method. This would avoid onerous K-1 forms, quarterly reporting, and the 1.5% replacement tax. However, in practice, shareholders could still return the bonuses back to the company to fund its operations in the form of a loan. In contrast to the retained-earnings method, the loans would constitute a company liability, rather than a company asset. The money would never leave the company. Instead, it would be re-categorized in the company books as a loan to the company from the recipients of the bonus. The accounting of the loan to the company from each shareholder would be kept separate in each respective shareholder's Notes Payable Account. The company would

pay each shareholder interest on his loan to the company, which would be reinvested into his individual Notes Payable Account.

¶ 12 On cross-examination, Edelheit acknowledged that, unlike a dividend, the bonuses are not distributed in a *pro rata* manner flowing from each stockholder's 25% share. If the company had adopted the retained-earnings method, the dividends would be distributed only to stockholders in a *pro rata* manner. At Durable, the bonuses went to stockholders and non-stockholders, and the bonuses were not distributed in a *pro rata* manner. Each sub-family, Gary and his sons and then Dennis and his sons, typically received the same total amount. However, each individual within the family did not receive the same amount. For example, in 2013, the total amount for each sub-family was $2,250,000. In Gary's family, Scott received exactly half of that at $1,125,000, Brian received $65,000, and Gary received the remaining $1,060,000. In Dennis's family, Darren and Corey each received $975,000 and Dennis received $300,000. Edelheit first stated that he was not sure whether the difference in bonus amounts was due to performance. He was then impeached with his deposition testimony that the bonuses were based on performance.

¶ 13 Edelheit admitted being surprised to learn, during the deposition, that the family members had withdrawn money from their Notes Payable Accounts. However, following the deposition, this did not prompt him to investigate the regularity of the practice or the amounts withdrawn. When told at trial that Brian had withdrawn $2,905,000 since 2008, Edelheit answered "I ha[d] no idea." Similarly, he did not know that, since 2010, Dennis, Darren, and Gary had all withdrawn money to buy houses. (As documented in various exhibits, the withdrawn amounts were $2,600,000, $1,081,000 and $640,000, respectively. Gary withdrew the $640,000 to purchase a house for Brian to live in after the divorce proceedings commenced.)

¶ 14 2. Gary Anders

¶ 15 Gary testified that Scott, Brian, Darren, and Corey are each 25% shareholders of the company. Although he and Dennis had completed the gifting of shares by 2006, Gary still considered himself to be "the head guy." Gary followed the advice of his accountant, Edelheit. He put the company profits back in the company. That is how the company grew. According to Gary, the profits were kept by the company as "retained earnings." Gary explained that the retained earnings were like a "cash register." Gary ran the company in an "old fashioned" manner. If one of his son's wanted to "take out his girlfriend," he could "open the cash register" and "take $5." Usually, the boys took "small money." Occasionally, they took "big money," to buy a house, for example. The boys "needed that money to live." When one person withdrew a large amount of money, the others often did the same, to ensure that everyone got along. Scott decides how much money each person receives in his respective drawer of the cash register. At the end of the year, Scott and Gary may say, "Brian, you haven't really done a really good job. *** You've been sloughing off, so you are only going to get this amount." Or, they might say, "Brian, you have been a bad boy. I put that in that drawer. And, Scott, you have done good, so I give you that drawer." The difference in bonus amounts did not matter, because the bonus "never left the company, *** so who cares." Even though Gary was no longer a shareholder, he liked to maintain a balance of at least $3 million in his drawer. He viewed this as insurance for his wife, should anything happen to him. When Brian's divorce proceedings began, Gary paid the remaining $400,000 mortgage on Brian's marital residence, bought a separate $640,000 house for Brian to live in, and bought a $60,000 car for Brian to drive. The funds for these purchases came from the company "cash register."

¶ 16 During cross-examination, Gary agreed to documentation showing that his 2014 regular pay was $239,000 and his bonus was $1,475,000. When asked where he "put" the $1,475,000, he answered: "I don't know. I never saw it." When pressed whether the money went into his Notes Payable Account, he again answered that he did not know, and he offered that perhaps the money went to purchase aluminum.

¶ 17 3. Scott Anders

¶ 18 Scott testified that he was a 25% shareholder and the president of Durable. He runs the day-to-day operations of the company, and he decides the bonus amounts to be given to himself, Brian, Darren, Corey, Gary, and Dennis. Gary and Dennis are not shareholders, but they receive bonuses. He, Brian, Darren, and Corey are equal shareholders, but they do not receive equal bonuses. He repeatedly stated that he "did not know" why the bonus amounts were not equal. He also stated, "It was just how I felt at the time." When asked why, in 2014, he received a $2.95 million bonus, while Brian received $1.47 million bonus, he stated that he "did not recall the criteria for the difference." Finally, when asked why, in 2013, he, Darren, and Corey each received an approximately $1 million bonus, but Brian received only a $65,000 bonus, Scott conceded that Brian's comparatively low bonus was due to poor attendance. When asked why Gary received over a $1 million bonus that year, Scott answered that Gary "did a fantastic job that year helping and advising me." Scott set the 2015 bonus amounts 48 hours prior to his testimony, but he could not remember if he was to receive the same amount as Brian.

¶ 19 Scott also controlled withdrawals from the Notes Payable Accounts. He "could not say" whether various withdrawals, including a $2.5 million withdrawal by Corey, were put to personal use. He acknowledged, however, that family members used certain withdrawals to purchase

homes. He recalled prohibiting Brian from making a withdrawal, but he could not remember when. He could not give a date.

¶ 20 4. Darren Anders

¶ 21 Darren testified that he is a 25% shareholder at Durable. He maintains the Notes Payable Accounts for each of the six men. However, he did not know if he received a higher or lower bonus than his brother or father. He also did not know whether, in 2011, his father withdrew over $2 million from his Notes Payable Account to purchase a home in Florida. After further questioning over several pages of transcript, and after being presented with documentary evidence, Darren conceded, "yes, apparently," that was true.

¶ 22 5. Corey Anders

¶ 23 Corey testified that he is a 25% shareholder at Durable. He performs sales and marketing for the company. For compensation, he receives a $2,000 weekly salary, plus a year-end bonus. First, he testified that the bonus was not based on his performance. He was then impeached with his deposition testimony, where he stated that he did not believe he should receive the same bonus as others. "If I sell a lot of cases, I hope at the end of the year the company does well and I make a nice bonus." After being read his deposition testimony, he acknowledged that, in some years, his bonus was based on performance. He understood that his bonus was reflected as a credit due to him in his Notes Payable Account. He "rarely" withdrew funds from his Notes Payable Account, and even then only with Scott's permission. Last year, he withdrew $667,000 to buy land. According to him, the Notes Payable Account held "retained earnings," which the company used to operate. When asked whether he knew the definition of retained earnings "as an accounting principle," he answered that he did not know "the specifics of it."

¶ 24 6. Brian Anders

¶ 25 Brian testified that he is a 25% shareholder in Durable. He is a sales manager. In that role, he works 25 to 45 hours per week. He earns a base salary of $140,000, plus a $90,000 average payment by Durable of his personal American Express charges. He did not believe the $2 million income typically reflected on his W-2 was actually in the nature of a bonus. When asked to view documentary evidence, he refused to read the bonus amount aloud. Then, he read the number aloud, referring to the exercise as an eye test. He was "not familiar" the nature of his Notes Payable Account. He "knew nothing" about his $15 million in outstanding loans to the company reflected in his Notes Payable Account. He stated: "I'm a salesman. I sell foil. They handle the rest. It's been like that my whole life," and "You'll have to check with Scott." Scott determined the size of Brian's bonus. Scott granted Brian permission to withdraw money from his Notes Payable Account. (Suzanne later pointed to Brian's Notes Payable Account ledger, that showed Brian averaged nearly $500,000 in withdrawals per year.)

¶ 26 7. Mark Reilly

¶ 27 Mark Reilly testified as a compensation expert for Brian. Reilly has worked as a compensation consultant for 20 years. He evaluated Brian's compensation between 2007 and 2015 relative to Brian's professional peers, individuals with similar positions at comparable companies. Reilly determined that Brian's annual compensation was $230,000. This included a $140,000 base salary and a $90,000 average payment by Durable of Brian's personal American Express charges. (Reilly did not know whether the $90,000 was pre- or post-tax.) A compensation of $230,000 put Brian in the middle 50% compared to his professional peers. Reilly did not consider Brian's annual $2 million-plus bonus, because it was not paid in cash and it was retained by the company. He did not rely on Brian's W-2 or income tax returns, which

included the bonus as earned income. Instead, he relied only on records of the weekly salary deposits to determine the $140,000 base salary.

¶ 28 On cross-examination, Reilly conceded that it did not matter whether the bonus was paid in cash before Brian loaned it back to the company, or whether the bonus was reflected from the beginning as a loan to the company and a credit due to Brian in his Notes Payable Account. Reilly could not recall if he reviewed the balance of, or the withdrawals from, Brian's Notes Payable Account. He thought that the $90,000 credit card payment was the only withdrawal from the Notes Payable Account. He did not personally see documentation of the withdrawal or independently confirm it. Rather, he received a "summary document" from Brian's attorney. He trusted it. He did not know that Brian had withdrawn over $2 million in recent years from the Notes Payable Account. Even with this new information, he would stick by his report. Also, Reilly spoke to Scott about Brian's bonus, and Scott told him it was based "in part" on Brian's performance. Scott "very briefly" told him that he was not happy with Brian's performance.

¶ 29 B. Maintenance and Lifestyle

¶ 30 1. Lee Gould

¶ 31 Brian retained Lee Gould, a certified public accountant, to testify as a lifestyle expert. Gould had 25 years' experience conducting financial analyses and business evaluations. He examined the parties' bank and credit card statements from 2010 to 2012. The parties were living together during this time. Gould placed all expenditures in one of four categories, with the following respective monthly totals: Suzanne ($4,046), household ($3,787), the three children ($9,245), and Brian ($5,638). He excluded legal expenses and income taxes. Among Suzanne's monthly expenses were $565 for transportation, car maintenance, and gas, $340 in groceries and at Target, $240 for medical, dental, and fitness, $230 for clothing, $200 for her pets, and $2,333

for remaining expenses such as vacation, entertainment, gifts, and charity. Among the household expenses were the real estate taxes, utilities, lawn care, cleaning service, and cable. (The household expenses did not include a mortgage, because Gary paid it off when divorce proceedings began.) Among the children's expenses were $4,400 for vacation and $300 for clothing. They also participated in extracurricular activities, such as hockey. Brian's expenses were similar to Suzanne's, but he spent more money on vacation, at $3,600.

¶ 32 2. Suzanne Anders

¶ 33 Suzanne testified that she earned a 1998 bachelor's degree in nutrition from Loyola University. Between 1998 and 2001, she worked several jobs. She worked for two years as a personal shopper for Neiman Marcus, earning $10 per hour. Next, she obtained a paid internship with Evanston Hospital in an attempt to use her degree. Just a few years out of college, she was still exploring various career paths. She discussed her career goals with Brian. However, in the process of getting engaged, Brian told her that he "did not want someone who was married to her career." He and Suzanne agreed that she would be a homemaker and stay-at-home mother. Suzanne was happy with this. The parties married in 2001, and, over the course of their marriage, Suzanne worked various jobs in the $10-per-hour range. She usually worked about 10 hours per week, not to earn income, but to "get out a little." Brian never complained that Suzanne did not pursue a career, until they separated.

¶ 34 The children remained Suzanne's focus: "My life revolves around them. They're my job. I hate saying my job. They're my life." At the time of trial, the children were 10, 10 and 13 years old. On a typical day, Suzanne gets the children off to school before 8 a.m. She goes to the gym, runs errands, cleans, does laundry, and takes care of the family's three dogs. When the children return from school, she takes them to their extracurricular activities, helps them with

homework, makes them dinner, and ensures that they shower. Some days, she allows them to invite friends to the house, and she watches all the children.

¶ 35 After the parties separated, Suzanne found it difficult to obtain employment with the flexibility necessary to raise her children. As of the trial, she did not work, but she volunteered four to six hours per week at the animal shelter. Suzanne looked into becoming a vet tech, but that would require going to class every day and lab two evenings per week. Nevertheless, she hoped to pursue that or a similar vocation when the children were older.

¶ 36 Suzanne submitted a financial affidavit that set forth expenses of $16,645 per month. Her counsel's paralegal helped her to format the financial affidavit. To create it, she reviewed her checkbook and her credit card statements. She attempted to average monthly expenses over the preceding three years. Her current expenses were "about the same" as when she and Brian lived together. Some expenses went down, but others went up.

¶ 37 When married, the parties took nice vacations. In 2009, for example, they went to St. Thomas (17 days), Arizona (9 days), Beaver Creek (7 days), and on a Disney Cruise. The children participated in summer camps ranging in price from $2,500 to $8,000 each. The children were also enrolled in Hebrew school, the tuition for which was $3,000 per year. The parties had a full-time nanny until the twins were four years old. Then, the parties occasionally employed a babysitter.

¶ 38 Suzanne testified that Brian had a gambling problem. In 2004, Brian "got in trouble" with Gary about gambling. Suzanne was put in charge of the joint accounts. In 2006, Brian claimed that he quit gambling, and his name was put back on the accounts. However, Suzanne later found Brian's gambling book. It listed games Brian had watched and bet on. She also heard Brian talking about gambling on the phone. The amount of money at issue was "a lot."

¶ 39 In general, Suzanne was kept in the dark about family finances. Early in the marriage, Brian took out a $500,000 mortgage on the marital residence. He told her about the mortgage 18 months later. Also, the Anders family set up an account for the children under the Uniform Transfers for Minors Act (UTMA account) (760 ILCS 20/1) (West 2016)). Brian was the custodian of the account, and Suzanne had no control over it.

¶ 40 During cross-examination, Suzanne acknowledged several errors in her financial affidavit. For example, Suzanne did not properly average over three years the amount spent on a babysitter. The error was not in her favor, because she forgot to average in higher costs from prior years when the children were younger. Also, she inaccurately included pet expenses in the grocery category. Finally, she estimated that her clothing costs were $400 per month, but she did not add up receipts to prove it.

¶ 41 3. Brian Anders

¶ 42 Brian ultimately admitted that he withdrew over $300,000 from the children's UTMA accounts. First, however, he testified that he did not know about the accounts. Then, he stated that he did know about the accounts, but he did not set them up. "You would have to check with Darren." Finally, when asked if he was the only person who could remove money from the accounts, he conceded: "Sure." Indeed, Brian is the custodian of the children's UTMA accounts.

¶ 43 Brian submitted no documentation as to how he spent the $300,000. He claimed that $100,000 was spent on his daughter's bat mitzvah. However, the bat mitzvah occurred in May 2015, and many of the withdrawals occurred in 2012 and 2013. When referencing a 2012, $22,000 withdrawal from his son's account, he first stated that he drew upon his son's funds for his son's camp. When reminded that his son was only seven years old at that time, he then stated that he used his son's funds for his daughter's bat mitzvah. (She would have been 10 that year.)

¶ 44 Brian testified to his personal checking account. There were many transfers into the checking account, some as high as $20,000. The three possible sources of the influx were: the children's UTMA accounts, Brian's home-equity line, or money from the Notes Payable Account. He mingled these funds in his personal checking account. There were also many transfers out of the checking account. Brian admitted that he gambled. He admitted that one $800 withdrawal was used to wine and dine customers at a casino. However, he could not explain two separate $6,500 withdrawals that occurred the next day. Similarly, there were several cash withdrawals in the $7,000 range that Brian could not explain.

¶ 45 C. Trial Court Judgment

¶ 46 1. Property Classification

¶ 47 The trial court held that Brian's 25% interest in Durable was non-marital property. The transfer of stock shares from the second generation to the third was part of a decades-long company pattern that had nothing to do with the marriage of one of its members. Thus, many shares were exempted pursuant to section 503(a)(6), property acquired before the marriage. Additionally, all shares were exempted pursuant to section 503(a)(1), property acquired by gift, legacy, or descent.

¶ 48 However, the court determined that Brian's annual bonus from Durable constituted earnings during the marriage and did not satisfy any of the section 503(a) exclusions. It rejected Brian's argument the bonuses were profit distributions flowing solely from his ownership of Durable stock and not attributable to his personal efforts. The bonuses were not non-marital property under section 503(a)(8), income from non-marital property not attributable to his personal efforts. These bonuses were not distributed as a direct result of stock ownership, because they were not distributed in proportion to stock ownership and because Gary and

Dennis, non-shareholders, also received bonuses. Also, these bonuses were attributable to Brian's personal efforts. "There was recurring testimony that these bonuses were performance-based." The court found distinguishable Brian's citation to *In re Marriage of Samardzija*, 365 Ill. App. 3d 702, 707 (2006), because, there, only shareholders received bonuses, and the bonuses were not due to employment.

¶ 49 The court recounted that Brian's bonuses were held in his Notes Payable Account. In fact, all of the funds in Brian's Notes Payable Account came from the loaning back of his bonuses during the marriage. Thus, the court determined, the $15,916,880 in Brian's Notes Payable Account was marital property. The court divided the funds in Brian's Notes Payable Account 2/3 to Brian ($10,611,253) and 1/3 to Suzanne ($5,305,627).

¶ 50 The court explained that funds in the Notes Payable Account were not akin to retained earnings. If they were retained earnings, withdrawals from the account for personal use would not have been permitted. "The monies in the Notes Payable Accounts appear to be held for the participant's personal use whenever they need or want it." Although Scott testified that he must approve all withdrawals, his testimony was "vague and evasive and did not reveal any rules or restrictions regarding the monies in the Notes Payable Accounts." Further, Edelheit's testimony did not support that the Notes Payable Account was akin to retained earnings. Durable did not follow Edelheit's advice. The court stated: "Edelheit admitted that he was surprised to learn that all shareholders do not receive the same distributed amount, that he did not know [the reason for the disparity], and that he was unaware that the shareholders were taking money from these accounts."

¶ 51 The court also discounted Reilly's testimony. Reilly had testified that Brian's $230,000 income, which did not include his bonus, was in the middle 50% compared to his professional

peers. According to Brian, this meant that the $230,000 income was due to his personal efforts, and the remaining income, *i.e.*, his bonus, was not. The court disagreed with the substance of Reilly's testimony: "The validity of [Reilly's] findings was called seriously into question on cross-examination." It also disagreed with the conclusions Brian drew from Reilly's testimony: "[Brian's reasoning] is backwards." The court explained that, under section 503(a)(8), a spouse first must show that the income in question flows from a non-marital asset before either party may attempt to prove, through the use of "adequate compensation" testimony, that a portion of that income was, nevertheless, based on the spouse's personal efforts. It does not work the other way. Establishing "adequate compensation" for a given position does not prove that anything above that amount flows from a non-marital asset. Durable is not bound by industry standards when it sets the compensation of its employees. Here, the bonus did not flow from a non-marital asset to begin with, because it was not based on stock ownership. Therefore, the court concluded, "Reilly's testimony is not relevant, and the court places no evidentiary weight on Reilly's testimony."

¶ 52 2. Maintenance

¶ 53 In awarding maintenance, the court expressly declined to apply the section 504(b-1) guidelines, which pertain only to parties with combined gross incomes of less than $250,000. 750 ILCS 5/504(b-1) (West 2016). It stated: "Brian earns substantially more than $250,000 per year." Instead, the court issued its maintenance award after considering the factors set forth in section 504(a). 750 ILCS 5/504(a) (West 2016).

¶ 54 Specifically, the court considered the income of each party. The court noted that Brian had a base salary of $140,000, plus an annual bonus that averaged $2,404,444 over the last nine

years, for an annual income of over $2.5 million. (The court included the $90,000 credit-card expenses paid by Durable as part of the bonus.)

¶ 55 Historically, Brian accessed about $640,000 of his $2.5 million income for living expenses. The court arrived at $640,000 by averaging Brian's annual, pre-taxed withdrawals from the Notes Payable Account and adding his $140,000 base salary. There was no clear evidence on how Brian used the withdrawn money, except that he used part of it to pay taxes. The court deduced that Brian also used the withdrawn money to support his gambling habit, noting that Suzanne had credibly testified that Brian's gambling habit "cost a great deal of money." The court projected that Brian would continue to receive a high salary, and it noted that Brian had received a $10 million property award from the Notes Payable Account.

¶ 56 The court acknowledged that Suzanne had received a $5 million property award from the Notes Payable Account, plus the $650,000 marital home. It stated, however, that Suzanne should not have to utilize her property award to support herself. Although Suzanne has a 1998 bachelor's degree in nutrition, her years of "devotion to her domestic duties" have "seriously impaired" her earning potential. Moving forward, as child-care duties lessen and/or are shared by Brian, Suzanne will have greater opportunity to seek employment. Suzanne is still relatively young, in her early 40s. Her realistic earning potential, however, will never approach Brian's.

¶ 57 The court also considered Suzanne's financial needs. It found "reasonable" the expenses outlined in Suzanne's financial affidavit, which totaled $16,645 per month. Even though Brian extensively cross-examined Suzanne on this figure, his own expert independently reached a similar figure. Gould determined that the household expenses for Suzanne and the children had been $17,000 per month. The court observed that Suzanne's personal expenses of $4,046 "seemed low" for someone in the parties' income bracket, which supported Suzanne's testimony

that Brian controlled her spending but not his own. It also noted that, as set forth in the child-support portion of the judgment, Suzanne would continue to incur expenses for the children, such as providing a home, food, clothes, entertainment, and transportation while they stayed with her. However, Suzanne would no longer pay for the children's education, medical, or extracurricular expenses. Therefore, *the court subtracted these expenses* from Suzanne's and Gould's estimation of Suzanne's need. Taking all of this into consideration, the court determined that Suzanne needed $11,000 to $12,000 *net* per month to meet her living expenses.

¶ 58 The court awarded maintenance of $16,667 *gross* per month, or $200,000 gross per year, to terminate in eight years. Eight years' time would allow Suzanne to seek education and employment, invest her marital award for the future, and continue to spend time with the children "as she always has," until they are past the age of majority and in college.

¶ 59 The court did not award child support, citing equal parenting time. Each parent was to pay for everyday expenses, such as food, clothes, and entertainment, as necessary during the children's stay. Brian was to pay for extra expenses, such as education, medical, and extracurricular activities.

¶ 60 Finally, the court ordered that Brian return $322,500 to the children's UTMA accounts. Brian did not prove that the withdrawn funds were used for the benefit of the children. Even if a portion of the funds were used for the benefit of the children, the withdrawal itself was inappropriate. Moreover, Brian admitted that he used some of the funds for his own benefit, "to live." Brian withdrew these funds even though he had a salary and a Notes Payable Account. Brian deposited some of the withdrawals into his checking account, and then he asked for cash back. The cash amounts were "large," such as $7,500 and $9,500. This cash cannot be traced. All of this supports Suzanne's allegation that Brian had a "gambling habit."

¶ 61 Following a motion to reconsider, the trial court determined that the $16,667 monthly maintenance award would not terminate, but would be subject to review, in eight years. This appeal followed.

¶ 62 II. ANALYSIS

¶ 63 Brian argues that the trial court's classification of his bonus income and, thus, the $15 million in his Notes Payable Account, as marital was against the manifest weight of the evidence. He also argues that the trial court abused its discretion in awarding Suzanne $16,667 in monthly maintenance, to be reviewed in eight years.

¶ 64 A. Property

¶ 65 We first address the court's classification of the bonus income and Notes Payable Account. A court in divorce proceedings is charged with allocating the parties' property. In order to allocate the parties' property, the court first must classify each asset as marital or non-marital. *In re Marriage of Jelinek*, 244 Ill. App. 3d 496, 503 (1993). Then, the court must assign each spouse's non-marital property to that spouse and divide the marital property in just proportions. 750 ILCS 5/503(d) (West 2016).

¶ 66 There is a rebuttable presumption that all property acquired during the marriage is marital property. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 45. The party claiming that the property is non-marital has the burden of proving its claim by clear and convincing evidence. *Id.* The trial court's classification of property as marital or non-marital will not be disturbed on review unless it is against the manifest weight of the evidence. *Samardzija*, 365 Ill. App. 3d at 706. A court's determination is against the manifest weight of the evidence only if the opposite result is clearly apparent or the court's findings appear to be arbitrary, unreasonable, or not based on the evidence. *Romano*, 2012 IL App (2d) 091339, ¶ 44.

¶ 67 Brian argues that the bonus income qualifies as non-marital property under subsections 503(a)(1), (8) of the Act.[2] Those subsections state:

> "(a) For purposes of this Act, 'marital property' means all property, including debts and other obligations, acquired by either spouse subsequent to the marriage, except the following, which is known as 'non-marital property':
>
> (1) property acquired by gift, legacy or descent or property acquired in exchange for such property;
>
> * * * and,
>
> (8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection *if the income is not attributable to the personal effort of a spouse*." (Emphasis added.) 750 ILCS 5/503(a)(1), (8) (West 2016).

According to Brian, the court erred when it failed to categorize the bonus income and, thus, the Notes Payable Account, as non-marital property, because that income stemmed solely from a non-martial source, *i.e.*, his 25% ownership in Durable stock, and was not attributable to his personal efforts.

¶ 68 At oral argument, Brian took a contrary position. He twice stated that the bonus income *was* attributable to his personal effort. This amounts to a concession that he failed to satisfy the statutory requirements of section 503(a)(8), and it is a virtual forfeiture of the issue. However, also at oral argument, Brian continued to cite to Reilly's adequate-compensation testimony, the point of which had been to establish that any income over the $230,000 mark had *not* been

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[2] Brian focuses on (a)(1), gift, rather than (a)(6), property acquired before marriage, because all the shares fall under (a)(1) but not all the shares fall under (a)(6).

attributable to Brian's personal efforts. Given these inconsistent oral representations, we choose to address the arguments set forth in Brian's brief.

¶ 69 Brian argues that *Samardzija* controls the instant case. In *Samardzija*, the husband's parents gifted him 25% ownership of the company stock. The company shareholders, including the husband, "would sometimes receive 'profit bonuses' which they would then loan back to the company." *Id.* at 707. "[T]he bonuses were given only to stockholders and were not based on employment." *Id.* The court determined that, pursuant to subsection 503(a)(1), the gifted stock was non-marital property. *Id.* Further, it determined that, pursuant to subsection 503(a)(8), the profit bonuses were non-marital property, because they flowed from the ownership of the non-marital stock and were not related to employment. *Id.*

¶ 70 We disagree that the facts of *Samardzija* are analogous to those here. It is not clear that the loan practice in *Samardzija* is at all analogous to Durable's loan practice. In its one-paragraph section 503(a)(8) analysis, the *Samardzija* court stated that the shareholders "would sometimes receive 'profit bonuses' which they would then loan back to the company." However, it did not detail the circumstances of the loan. In its statement of facts, it hinted at a circumstance nothing like the instant case, in that the company loaned the husband $112,000 to purchase a home, and the husband then repaid the loan by returning the bonuses he was given. Neither did the *Samardzija* court provide any detail about the nature of the "profit bonuses." We do not know if, unlike here, the bonuses were in the nature of dividends, issued *pro rata* to each shareholder.

¶ 71 More to the point, the controlling factors in *Samaradzija* are not present here. In *Samardzija*, the bonuses were: (1) given only to stockholders; and (2) not based on employment.

Here, it is undisputed that Gary and Dennis, non-shareholders received bonuses. And, as we will discuss further, the bonuses were based on employment performance and personal effort.

¶ 72 The factors in *Samardzija* mirror the section 503(a)(8) requirements that the income: (1) be "from" a non-marital asset; and (2) not attributable to personal effort. Here, the court did not err in determining that Brian failed to prove that these requirements were met.

¶ 73 Looking to the first requirement, Brian failed to prove that the bonus income was "from" his stock ownership. Again, non-shareholders also received the bonuses. Also, if the bonuses flowed solely from the stock ownership, as Brian argued, one would expect the four equal shareholders to receive equal bonus amounts. They did not. Brian, Scott, Darren, and Corey each held a 25% share of company stock, but each received different bonus amounts between 2008 and 2014. In 2013, for example, the bonus amounts were as follows: Brian ($65,000), Scott ($1,125,000), Darren ($975,000) and Corey ($975,000).

¶ 74 Looking to the second requirement, Brian failed to prove that the bonus income was not attributable to personal effort. Indeed, as the trial court determined, the evidence strongly supports that the bonus income was attributable to performance. Numerous witnesses testified as much. When asked in deposition whether Gary and Dennis received bonuses as a payment for the turnover of stock to the next generation, Edelheit answered, "Absolutely not. *** It [was] a performance bonus." Scott testified similarly: "I told [Gary] he did a fantastic job that year helping and advising me." Likewise, Corey testified: "We're evaluated on our performance." Turning specifically to Brian's bonuses, Gary testified: "At the end of the year we say, you know Brian, you haven't really done a good job, okay? *** You have been sloughing off, so you are only going to get this amount. [And], Scott, you have done good, so I give you [this higher amount.]" (Internal quotes omitted.) Scott also explained that Brian received a comparatively

low bonus "to try and motivate him to come to work more." Finally, Brian's compensation expert, Reilly, testified that Brian's bonus was based "in part" on performance and that Scott had "very briefly" discussed with him "dissatisfaction with Brian's individual performance."

¶ 75 These witnesses were called by Brian. The trial court found that some of them, *i.e.*, Brian and his family, had a tendency to bend the truth in their own favor and against Suzanne. "The testimony of Gary, Scott, Darren, Corey, and Brian was full of 'I don't know' answers regarding the bonuses. *** The court finds much of their testimony to be evasive, incredulous, and not credible." Despite their bias, they slipped concessions.

¶ 76 Brian points to Reilly's testimony to argue that the bonus was not based on personal effort. Reilly testified that Brian's salary, excluding the bonus, had been adequate compensation. According to Brian, this tended to support that, while his salary was performance-based, the bonus was solely a result of his stock ownership. However, Brian fails to acknowledge that the trial court harshly discounted Reilly's testimony. During cross-examination, Reilly revealed that he did not know that Brian had withdrawn more than $2 million from the Notes Payable Account in recent years. He thought that Brian effectively withdrew only $90,000 per year when Durable paid Brian's credit card. He never saw documentary evidence of any of the withdrawals that Brian used "to live." Despite these errors underlying his report, he averred that he would stand by it. Brian does not address the weaknesses in Reilly's testimony. Brian should not freshly argue the import of Reilly's testimony without acknowledging the trial court's decision to discount it. It is within the trial court's discretion to evaluate the credibility of witnesses and the weight to be afforded to their testimony, and, here, we find no abuse. See *In re Marriage of Ligas*, 110 Ill. App. 3d 1, 6 (1982).

¶ 77 Brian did not show that the funds in the Notes Payable Account met the requirements of section 503(a)(8). He does not argue that, accepting the property classification, the court erred in its division. As such, our analysis could end here. Nevertheless, we address Brian's remaining argument concerning the classification of retained earnings.

¶ 78 Brian next argues that the bonus and Notes Payable Accounts were *like* retained earnings, so section 503(a)(8) cases addressing the classification of retained earnings control. These cases include: *In re Marriage of Dann*, 2012 IL App (2d) 100343, ¶ 90 (summary judgment reversed where the husband had not, as a matter of law, rebutted the presumption that the retained earnings were a result of personal effort); *In re Marriage of Lundahl*, 396 Ill. App. 3d 495 (2009) (the retained earnings were marital property, because they were a result of the husband's personal effort); and *In re Marriage of Joynt*, 375 Ill. App. 3d 817 (2007) (the retained earnings were non-marital property, because they flowed solely from his ownership of company stock and were not a result of personal effort). *Dann*, *Lundahl*, and *Joynt* set forth two primary factors to consider in classifying the retained earnings: (1) the nature and extent of the stock holdings, *i.e.*, is a majority of the stock held by a single shareholder spouse with the power to distribute the retained earnings; and (2) to what extent the retained earnings are considered in the value of the corporation. *Lundahl*, 396 Ill. App. 3d at 503.

¶ 79 Contrary to Brian's position, these factors do not constitute a new two-part test. *Id.* Rather, the section 503(a)(8) requirements of (1) income from non-marital property that is (2) not attributable to personal efforts remains the only "test." The two *Joynt* factors simply aid in the trial court's classification where the income at issue is retained earnings. *Id.*

¶ 80 We reject Brian's assertion that section 503(a)(8), retained-earnings cases control. First, Brian cites no authority for the proposition that income *like* retained earnings *are* retained

earnings for purposes of property classification. See Ill. S. Ct. Rule 341(h)(7) (eff. November 1, 2017). Second, even if we accepted Brian's premise, the Notes Payable Account does not operate like retained earnings.

¶ 81 Retained earnings are corporate net income that is available for distribution as dividends, for payment of wages, salaries, and bonus, and other proper corporate purposes. *Lundahl*, 396 Ill. App. 3d at 504 (citing *Ramon v. Ramon*, 963 A.2d 128, 133 (Del. 2008)). Retained earnings and profits of a subchapter S-corporation are a corporate asset and remain the corporation's property until severed from the corporation. *Dann*, 2012 IL App (2d) 100343, ¶ 78 (quoting *Joynt*, 375 Ill. App. 3d at 820-21).

¶ 82 The Notes Payable Accounts here are not corporate net income. *Lundahl*, 396 Ill. App. 3d at 504; *Dann*, 2012 IL App (2d) 100343, ¶ 78. Here, the corporate profits were severed from the corporation when they were unevenly distributed as bonuses to shareholders and non-shareholders alike. When the bonuses were then loaned back to the company, they became corporate debt. Whereas retained earnings are a company asset, the Notes Payable Accounts represent a company liability. It does not matter that the transfer occurred on the books rather than via a physical check.

¶ 83 Also, the court noted that no evidence was presented to show that the funds held in the Notes Payable Accounts were used to support proper company purposes. *Lundahl*, 396 Ill. App. 3d at 504. And, again, it is Brian's burden to show that they were, so as to support his assertion that the funds were a non-marital asset. There was, however, evidence that the funds in the Notes Payable Account were *not* used for company operations: numerous family members withdrew "big money" to purchase homes. Brian's average withdrawals for personal use exceeded $500,000 per year.

¶ 84 Brian points to Edelheit's testimony that the company was to issue bonuses, which would be loaned back to the company to fund its operations. However, Edelheit acknowledged that this loaning procedure was different than retained earnings, because it would lower the value of the company and make it easier to gift shares to the next generation. As the trial court noted, the Anders family must live by its chosen tax plan. Certain actions may have been advantageous in some situations, like gifting stock, but not in others. Moreover, Edelheit's plan was not followed. Edelheit was surprised to learn that the Anders family removed funds from the Notes Payable Accounts to purchase homes and, as Gary testified, "to live." Edelheit's testimony does not help to establish that the Notes Payable Accounts operated like retained earnings.

¶ 85 For these reasons, we reject Brian's theory on appeal that the trial court was swayed by semantics in classifying the bonus distributions and Notes Payable Account. The Notes Payable Account was not retained earnings and it was not like retained earnings.

¶ 86 B. Maintenance

¶ 87 Brian challenges the trial court's $16,667 monthly maintenance award, to be reviewed in eight years. A trial court may award maintenance within its sound discretion, and we will not overturn its award absent an abuse of that discretion. *In re Marriage of Schneider*, 214 Ill. 2d 152, 173 (2005). Under the abuse-of-discretion standard, the question is not whether the appellate court would have decided differently, but whether a reasonable person could take the position adopted by the trial court. *In re Marriage of Gowdy*, 352 Ill. App. 3d 301, 307 (2004).

¶ 88 Brian raises the threshold argument that this case is governed by section 504(b-1) guidelines, because the parties' combined gross income was less than $250,000 per year. 750 ILCS 5/504(b-1) (West 2016). Section 504(b-1), as in effect in 2016, states that, when the parties' combined gross income is less than $250,000 per year, the maintenance amount and term

are governed by a formula. *Id*. The court is to follow the formula, unless it makes a finding that application of the formula would be inappropriate. *Id*. According to the formula, a payor with a $230,000 gross income should pay $5,750 per month for a term of six years, far less than what the court ordered here.

¶ 89 We reject Brian's section 504(b-1) argument, because we reject his premise that he earns $230,000 per year. As the trial court acknowledged, the question of the family income and lifestyle was tricky. While the $2 million-plus annual bonus income and resulting $15 million Notes Payable Account were not non-marital property under section 503(a)(8), Brian did loan back his $2 million bonus to the company. Still, at a minimum, Brian accessed approximately $640,000 annually, to spend and invest as he wished. This included a $140,000 base salary and a $500,000 average annual withdrawal from the Notes Payable Account. The trial court reasonably attributed to Brian a "usable" income of $640,000 per year. Thus, we agree with the trial court that Brian earns "substantially more" than $250,000 per year, and section 504(b-1) does not apply.

¶ 90 In a non-guidelines case, the court is to issue its maintenance award after considering all of the relevant section 504(a) factors. 750 ILCS 5/504(a), (b-1)(2) (West 2016). Section 504(a) provides:

> "(a) Entitlement to maintenance. In a proceeding for dissolution of marriage ***, the court may grant a maintenance award for either spouse in amounts and for periods of time as the court deems just, without regard to marital misconduct, and the maintenance may be paid from the income or property of the other spouse. The court shall first determine whether a maintenance award is appropriate, after consideration of all relevant factors, including:

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

(2) the needs of each party;

(3) the realistic present and future earning capacity of each party;

(4) any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage;

(5) any impairment of the realistic present or future earning capacity of the party against whom maintenance is sought;

(6) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment or any parental responsibility arrangements and its effect on the party seeking employment;

(7) the standard of living established during the marriage;

(8) the duration of the marriage;

(9) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and the needs of each of the parties;

(10) all sources of public and private income including, without limitation, disability and retirement income;

(11) the tax consequences of the property division upon the respective economic circumstances of the parties;

(12) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;

(13) any valid agreement of the parties; and

(14) any other factor that the court expressly finds to be just and equitable." 750 ILCS 5/504(a) (West 2016).

¶ 91 Brian concentrates his claim on income (factors 1 and 10), Suzanne's employment potential (factors 3, 4, 6 and 9), and need and lifestyle (factors 2 and7). As to income, Brian argues that he earns only $230,000 per year, so the $16,667 maintenance award is too high. We have already held that Brian earns well over $230,000 per year. We have also already held that Brian's bonus is not income from non-marital property. Even if it was, however, section 504(a) calls for the court to consider income from non-marital property in determining maintenance awards. See 750 ILCS 5/504(a)(1) (West 2016). Brian's income is over $2 million, of which he uses $640,000 per year. The $500,000 portion withdrawn from his Notes Payable Account has already been taxed. Suzanne will pay taxes on the $200,000 she receives annually. After taxes, at a minimum, Brian will have over $400,000 per year, and Suzanne will have less than $200,000.

¶ 92 Brian argues that the trial court ignored Suzanne's $5 million property award and the income she will be able to generate from it. This is simply not true. The trial court expressly addressed the $5 million property award:

"The court also takes into consideration [section] 504(a)(1) regarding 'the income and property of each party ***.' *Suzanne has received an award of over $5 million* of the marital property plus the home she and the children reside in; however, Suzanne should not be forced to utilize her award of marital property to support herself under these

> circumstances. Suzanne should have a specific amount of time to become employed, to seek education and training, or to invest her marital award for the future, while allowing her to care for the children as she always has." (Emphasis added.)

It is difficult to address an argument that begins with a false premise. Worse, Brian fails to mention that, while Suzanne received a $5 million property award, he received a $10 million property award, on which he earns income. The factor of income does not help Brian.

¶ 93 As to Suzanne's earning potential, Brian argues that Suzanne should be required to use her nutrition degree to become self sufficient. Brian recites that Suzanne moved from job to job and never used her degree. He depicts her as an undisciplined person who used motherhood as an excuse to live in "self-imposed poverty." *In re Marriage of Schuster*, 224 Ill. App. 3d 958, 970 (1992).

¶ 94 However, it is the trial court's role to assess credibility, and the court was not required to take so harsh a view. In fact, several of the job changes cited by Brian occurred in Suzanne's first three years out of college. Suzanne testified that she, like many her age, was unsure of her career path. In the 15 years that followed, however, she did not waver. Suzanne was "devoted" to her domestic duties. She got the children ready for school, helped them with their homework, and took them to extracurricular activities. She ran the household. The parties agreed to Suzanne's role as homemaker prior to, and throughout, the marriage. The court did envision that Suzanne, who was still relatively young, would work toward self-sufficiency. However, it also envisioned that Suzanne would acquire skills gradually within the eight-year term. The court explained that Suzanne should continue to spend time with the children, then 10, 10, and 13, "as she always has." The court further reasoned that, when Suzanne did establish her vocation, her

earning potential would never approach Brian's. The factor of Suzanne's earning potential does not help Brian.

¶ 95 As to Suzanne's need and the marital lifestyle, Brian argues that Suzanne's financial affidavit was unreliable. Indeed, Suzanne's financial affidavit contained errors. She merely estimated clothing costs and erred, albeit against her own interests, as to babysitting costs. However, her total estimate of $16,645 was slightly *less* than that of Brian's own expert, Gould, at $17,078. Suzanne and Gould each included all of the children's expenses in the estimate. The trial court subtracted child-related costs that would be paid by Brian moving forward, such as education, medical, and extracurricular expenses. It then determined that Suzanne needed $11,000 to $12,000 net. Suzanne's monthly award of $16,667 gross will likely be just over that after taxes. In his reply brief, Brian asserts that the $16,667 award "double dips," because Suzanne will no longer have to pay for certain child-related expenses. Brian yet again misrepresents the facts. As we have stated, the trial court *did* subtract those child-related costs for which Brian will be responsible moving forward. It is also of note that the trial court did not award child support, citing equal parenting time. Suzanne will draw from her maintenance award to support her children and provide them with food, clothing, shelter, entertainment, and transportation while they are in her care. These costs are not insignificant and further support the $16,667 monthly award.

¶ 96 The parties were married for 10 years before Suzanne filed for divorce and 15 years before the divorce was finalized. They had three children, to whom Suzanne devoted herself. In this context, the trial court awarded property and income two to one in favor of Brian. Brian received $10 million of the $15 million in the Notes Payable Account. Brian's income, while somewhat amorphous, was, at a minimum, $640,000 per year. Of that, Brian will pay Suzanne

$200,000. Brian will continue to earn a high income and have the opportunity to create financial security through his property award. Suzanne will have eight years to see the children to adulthood, acquire a marketable skill, and create financial security through her property award. The trial court's maintenance award was reasonable.

¶ 97 III. CONCLUSION

¶ 98 For the reasons stated, we affirm the trial court's property and maintenance awards.

¶ 99 Affirmed.