2018 IL App (5th) 180011-U

NO. 5-18-0011

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
MICHELE CAPELLE,	)	Madison County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 16-D-539
	)	
BRUCE CAPELLE,	)	Honorable
	)	Martin J. Mengarelli,
Respondent-Appellee.	)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's judgment of dissolution of marriage is affirmed.

¶ 2 The petitioner, Michele Capelle, appeals from the circuit court's judgment dissolving her marriage with the respondent, Bruce Capelle. She challenges the propriety of the judgment in multiple respects. For the reasons that follow, we affirm.

¶ 3 FACTS

¶ 4 The parties were married in August 1991, and the circuit court entered its order dissolving the parties' marriage in October 2017. The parties had one daughter and three

sons during the course of the 26-year marriage, but only the two youngest boys were minors when the dissolution was finalized.

¶ 5 In February 2016, the parties entered into an informal separation agreement and commenced a "bird-nesting" arrangement so that the minor children could remain in the marital home at all times. Pursuant to that arrangement, Michele stayed at the home with the children during the week and lived with her parents on the weekends, and Bruce stayed at the home with the children on the weekends and lived with his mother during the week. The parties used the bird-nesting arrangement until Michele moved out of the marital home in September 2016.

¶ 6 At a March 2016 marriage-counseling session, Michele advised Bruce that she wanted a divorce. At the following session in April 2016, Michele presented Bruce with a typewritten document entitled "Michele's Loan Account." The document listed approximately 40 purported loans that Michele had received from her father from April 2013 through February 2016. The loan amounts ranged from $100 to $4000 and totaled nearly $40,000. In Michele's handwriting, the document noted, "This was money borrowed from Michele's [d]ad for family expenses, and when available, family expenses will be repaid in full to Michele's [d]ad." The handwritten notation was dated "4/1/2016." At Michele's request, Bruce signed the document, and their counselor signed it as a witness. The signatures were also dated "4/1/2016." The typewritten portion of the document was allegedly prepared by Michele's father but did not bear his signature.

¶ 7 On June 23, 2016, Michele filed a petition for dissolution of marriage and a petition for temporary relief pursuant to the Illinois Marriage and Dissolution of Marriage Act (Act)

(750 ILCS 5/101 *et seq*. (West 2016)). The pleadings requested, *inter alia*, that the parties' debts and property be equitably apportioned and that Bruce be ordered to pay Michele temporary and permanent maintenance and child support. Bruce filed responses to the petitions in July 2016.

¶ 8 In August 2016, the circuit court ordered the parties to submit financial affidavits and proposed parenting plans. See 750 ILCS 5/602.10 (West 2016). The court also ordered the parties to participate in mediation as to the issues of parental responsibilities and parenting time. See *id*.

¶ 9 In September 2016, Michele moved from the marital home into a rental house, and the parties commenced their court-ordered mediation. The mediation resulted in an agreed-upon "2-2-3" parenting-time schedule of alternating weekends, with Bruce having the minor children every Monday and Tuesday and Michele having them every Wednesday and Thursday. The record indicates that the parties also agreed to a schedule governing holidays and vacations.

¶ 10 Michele subsequently filed a proposed parenting plan limiting Bruce's parenting time to every Friday from 3 p.m. to Saturday 9 a.m. and every other weekend from Friday 3 p.m. to Sunday 7 p.m., exclusive of exceptions for holidays and vacations. Bruce responded with a parenting plan proposing that the parties' agreed-upon 2-2-3 schedule continue, exclusive of exceptions for holidays and vacations. Both parties proposed that they share the significant decision-making responsibilities as to the minor children's education, health, religion, and extracurricular activities (see 750 ILCS 5/602.5 (West 2016)), and both requested the right of first refusal (see *id.* § 602.3). We note that the only significant

difference in the parties' proposed holiday and vacation schedules was that Bruce's limited the combination of weekend and vacation days to 10 consecutive days, while Michele's limited the combination to 7.

¶ 11 In November 2016, the circuit court entered an order awarding Michele temporary child support and maintenance. The court ordered the parties to sell the marital home and to continue the 2-2-3 parenting-time schedule of alternating weekends, with Bruce having the minor children every Monday and Tuesday and Michele having them every Wednesday and Thursday. The court also appointed Derek Filcoff to act as the children's guardian *ad litem* (GAL). See 750 ILCS 5/506(a)(2) (West 2016). Michele subsequently filed a position statement proposing that Bruce's weekday parenting days be changed from Monday and Tuesday to Tuesday and Wednesday.

¶ 12 In January 2017, Bruce moved into his mother's house. In February 2017, the parties sold the marital home, and by agreement, the money from the sale of the home was applied to the parties' joint debts.

¶ 13 In April 2017, the GAL filed his report with the circuit court. The GAL recounted the parties' history and advised that the parties had been using the same 2-3-3 parenting-time schedule since agreeing to it during their court-ordered mediation in September 2016. The GAL advised that the parties' only dispute was whether the schedule should be modified. The GAL reported that Bruce wanted the existing schedule to remain the same, while Michele wanted Bruce's weekdays changed from Monday and Tuesday to Tuesday and Wednesday. Michele maintained that the minor children would be better prepared for the school week if they stayed with her on Sunday nights. The GAL noted although the youngest

child's grades had recently shown some decline, the child was an admitted procrastinator, and his counselor reported that his grades had "suffered as a result of the stress of the divorce."

¶ 14 The GAL explained that Bruce and Michele both played important roles in the minor children's lives and that because Michele was not regularly employed, she had more time to assist the minor children with their homework and school activities. The GAL noted that both parties lived in Highland, both attended the same church, and both wanted the minors to remain in Highland through high school.

¶ 15 The GAL recommended that the parties jointly share the significant decision-making responsibilities and that their existing 2-2-3 parenting-time schedule remain intact. The GAL reported that the parties had demonstrated the ability to effectively coparent under the existing schedule. The GAL further reported that his recommendation that the schedule continue was heavily influenced by the wishes of the minor children and the recommendations of the parties' two adult children.

¶ 16 The GAL opined that when necessary, Michele should be considered the children's custodial parent. Noting that the parties had agreed that Michele would watch the children after school when Bruce could not, the GAL recommended that the right of first refusal not be granted with respect to either party.

¶ 17 In September 2017, the cause proceeded to trial. Michele testified that both minor children were in junior high school and participated in activities such as soccer and track. Michele testified that both children had been diagnosed with attention deficit disorder (ADD). Michele indicated that although the children were being treated with appropriate

medications, they still had "focus issues." Additionally, the younger child tends to procrastinate and had recently been having troubles with his grades at school. Michele testified that both children have a dermatological condition that requires them to monitor the frequency with which they bathe.

¶ 18 Michele testified that she had been employed as a physical therapist until she injured her back in December 2012. Michele stated that she had a history of back problems, that she was "physically unable to do [her] job as a physical therapist," and that she did not believe that she would ever be able "to return to work." Michele testified that in addition to the maintenance and child-support payments that she received from Bruce, she received $1841 per month in long-term disability income and was trying to obtain social security disability payments as well.

¶ 19 Michele testified that during the parties' marriage, she and Bruce had borrowed money from her father. Identifying the "Michele's Loan Account" document as Petitioner's Exhibit #8 (Exhibit 8), she explained that the listed loans had been used for family expenses and that she and Bruce had intended to repay the loans. Michele requested that Bruce be required to help pay the debts as part of the dissolution.

¶ 20 Michele testified that her current standard of living was less than her standard during the marriage. She explained that she had to shop at less expensive stores and could no longer buy extra clothing for the minor children. She stated that the only extra gifts that the children received came from her parents.

¶ 21 Michele testified that Bruce lived with his mother and that his mother's house was about four miles away from the house that Michele rented. Michele testified that neither she

nor Bruce had plans to move. Michele stated that she picked up and fed the children after school on Mondays and Tuesdays, even though those were Bruce's parenting days. She also transported the children to practices and activities when Bruce was unable to do so. Michele indicated that she and Bruce could generally work together regarding all matters directly affecting the minor children.

¶ 22 With respect to the parties' existing 2-2-3 parenting-time schedule, Michele requested that Bruce's weekdays be changed from Monday and Tuesday to Tuesday and Wednesday. She also wanted Bruce's weekend visits end on Sunday nights. Michele explained although the children's transitions from her house to Bruce's were "relatively smooth," the modifications would make Mondays less hectic and would allow her and the children to better prepare for the school week.

¶ 23 Michele stated that it was important for the children to spend time with Bruce but that she had more time to attend to the children's needs. Michele testified that Bruce was "a good dad" and that the children loved him.

¶ 24 When cross-examined, Michele acknowledged that the parties had been using their existing 2-2-3 parenting-time schedule for over a year and that if her proposed changes were instituted, there would always be a "break" in Bruce's five-day weeks that would require the children to make additional transitions between homes. Michele acknowledged that she received at least $1100 per month from her father. She indicated that the monthly payments were loans that she intended to pay back. Michele testified that she babysat 7 to 14 hours a week at $11 an hour and had made $400 doing so since late August.

¶ 25 When cross-examined regarding Exhibit 8, Michele acknowledged that she had presented the document to Bruce during a counseling session that had occurred after she had indicated that she wanted a divorce. She further acknowledged that the parties had been exercising the bird-nesting arrangement at the time.

¶ 26 When questioned as an adverse witness (see 735 ILCS 5/2-1102 (West 2016)), Bruce testified that was employed by WA Architects in St. Louis and earned $89,250 per year. He testified that his employer's insurance plan presently covered Michele and all four of their children, and he acknowledged that his $1200 monthly premium would significantly decrease after the parties' divorce. He acknowledged that he had borrowed money from his mother since the parties' separation and that he intended to pay her back. Bruce acknowledged that Michele is a good mother and has more time to spend with the children than he does.

¶ 27 With respect to Exhibit 8, Bruce acknowledged that he had signed the document and that the transfers from Michele's father had been used to pay family-related expenses during the parties' marriage. Bruce testified that he signed Exhibit 8 because he "was working on not getting divorced." Bruce indicated that the loans had resulted from discussions that Michele had had with her father and that he had never personally received any of the money.

¶ 28 When questioned by his own attorney, Bruce testified that he was still living with his mother and did not plan on moving until he was financially able to do so. Bruce testified that he had independently paid various household and family expenses during the pendency of the parties' divorce. Bruce indicated that he had eventually been unable to cover all of the family's monthly bills.

¶ 29 Bruce testified that that he had recently worked 35 hours at a three-day soccer tournament to reduce the minor children's extracurricular-activity costs. He also obtained a partial tuition waiver so that the children could continue attending their private school. Bruce testified that he also has ADD and that he and the minor children took similar medications.

¶ 30 Bruce produced documents showing that his IRA was worth $96,900 and that Michele's was worth $6800. Bruce testified that Michele had previously worked for Hospital Sisters Health System and that she had made all of her contributions to her pension plan during the course of the parties' marriage. Bruce asked the court to equally divide the IRAs and the pension and to award him the pension plan's joint and survivor annuity.

¶ 31 Bruce testified that he paid approximately $350 per month for the minor children's health insurance. Bruce explained how he and Michele had come to an agreement as to the division of the marital vehicles. Bruce testified that during the parties' marriage, Michele had handled the parties' accounts and bills.

¶ 32 When asked about Exhibit 8, Bruce testified that he had not seen the document before the parties' April 2016 counseling session. Bruce indicated that he had signed it because he did not want a divorce and was willing to do whatever he could to save his marriage. Bruce explained that he had previously agreed to Michele's modifications of their informal separation agreement for the same reason. With respect to the purported loans listed on Exhibit 8, Bruce testified that before Michele stopped working in December 2012, she had informed him that her father had agreed to make up the difference between her salary and her long-term disability payments and that she was going to pay her father back with the social security disability back-pay that she would "hopefully get in the future." Bruce indicated that

he not know exactly how much money Michele's father had given them over the years, but he believed that Michele's father would ultimately receive her back-pay. Referencing Michele's most recent financial statement, Bruce noted that she had not disclosed her babysitting income or the monthly income that she received from her father.

¶ 33 Bruce testified that he wanted the parties' parenting-time schedule to remain the same. Bruce explained that if his weekdays were changed from Monday and Tuesday to Tuesday and Wednesday, he would never have the minor children more than two nights in a row. Bruce also believed that Michele's proposed changes could disrupt the children's routine. Further explaining that his weekends with the minor children were generally busy, Bruce testified that Sunday nights were often the only times they had to wind down and relax.

¶ 34 Bruce acknowledged that Michele had always been primarily responsible for taking their children to their medical and dental appointments. Bruce stated that "it was better for her to do it because [he] didn't have to take off work." Bruce testified that since the parties' separation, he and Michele had been able to effectively communicate and cooperate with respect to the children's schedules. Bruce noted that he and the children had recently given Michele a ride home from an event that the family had attended in St. Louis.

¶ 35 On cross-examination, Bruce conceded that he had been unemployed for a six-month period in 2015 and that many of the loans listed on Exhibit 8 had been tendered during that time. Bruce acknowledged that he did not pay for the meals that Michele provided for the minors on Mondays and Tuesdays. Bruce further acknowledged that the income Michele received from her father was not necessarily guaranteed every month.

¶ 36 The GAL testified that having heard the parties' trial testimony, the recommendations set forth in his April 2017 report remained unchanged. The GAL noted that Michele and Bruce were capable of effectively communicating and cooperating with respect their parental responsibilities and that their ability to jointly make decisions with respect to the minor children had never been an issue.

¶ 37 The GAL testified that the parties possessed complementary parenting skills that collectively benefitted the minor children. The GAL indicated that Michele was better at organizing the children's routines and activities, for instance, while Bruce was better at providing them emotional support. The GAL noted that Bruce was also a positive role model for the children because he demonstrated that people with ADD can be "successful in life." Referring to the parties' two adult children, the GAL testified that the parties had a proven ability to raise "amazing kids" together.

¶ 38 The GAL testified that although Michele wanted to modify the parties' existing 2-2-3 parenting-time schedule, the arrangement had been working well for a long time, and all four of the parties' children wanted it to remain the same. Noting that the parties' adult children had provided insights into the family's history that had not been addressed in court, the GAL testified that their input regarding the parenting-time schedule had been "heavily weighed." The GAL further testified that none of the statutory factors suggested that a change in the parties' schedule was necessary. The GAL indicated that the schedule had no apparent impact on the minor children's grades.

¶ 39 Before taking the matter under advisement, the circuit court clarified that other than maintenance and child support, the only pending financial issues were the transfers from

Michele's father and the division of the IRAs and the pension. The court rightfully complimented the parties' attorneys for providing quality representation and encouraged the parties to continue to amicably cooperate for the good of the minor children.

¶ 40 On October 3, 2017, the circuit court entered a written order formally dissolving the parties' marriage. With respect to the minor children, the court adopted the GAL's recommendations that the parties jointly share the significant decision-making responsibilities, that their existing 2-2-3 parenting-time schedule remain unchanged, and that the right of first refusal not be awarded to either party. The court did not otherwise elaborate.

¶ 41 The court ordered Bruce to continue to provide health insurance for the minor children and to pay Michele $130 per month in child support per "the new statutory formula for child support." The court directed the parties to equally divide the minors' out-of-pocket medical expenses. The court ordered that for legally required purposes, Michele would be the children's designated custodian.

¶ 42 Determining that Bruce's annual gross income was $90,000 and that Michele's was $25,000, the court awarded Michele $1750 per month in permanent maintenance. Noting that the parties had agreed upon the division of all marital assets except for the IRAs and the pension plan, the circuit court divided those assets equally and ordered that Bruce be designated the beneficiary of the pension plan's joint and survivor annuity option.

¶ 43 With respect to the parties' "purported debt" to Michele's father, the court held that Exhibit 8 was not an enforceable contract and that if the listed amounts had been received, they had been gifts from Michele's father. Noting that Michele was seeking approximately $7700 in outstanding attorney fees and that Bruce was seeking approximately $7800 in

various offsets, the court determined that those amounts were "nearly equal" and denied both requests. The court's order stated that all matters not otherwise addressed were denied.

¶ 44 We note that prior to the entry of the circuit court's judgment, the parties did not submit an agreed parenting plan (see 750 ILCS 5/602.10(d) (West 2016)), and the court's written order did not include a holiday and vacation parenting-time schedule. The record indicates, however, that the parties agreed to a schedule for holidays and vacations during their court-ordered mediation, and, at trial, Michele specifically agreed that Bruce could combine his weekend and vacation days for periods not exceeding 10 consecutive days, as he had previously proposed.

¶ 45 On November 2, 2017, Michele was granted an extension of time to file a posttrial motion. See 735 ILCS 5/2-1203 (West 2016). Michele filed her posttrial motion on December 1, 2017, and the circuit court denied it on December 11. On January 9, 2018, Michele filed a timely notice of appeal.

¶ 46 DISCUSSION

¶ 47 On appeal, Michele maintains that the circuit court should have found that the loans listed on Exhibit 8 were marital debts, that the court erroneously calculated her yearly gross income, that the court should have deviated from the statutory guidelines when determining child support, that the court should not have ordered her to pay half of the minor children's out-of-pocket medical expenses, and that the court should not have awarded Bruce any benefits under her retirement plan. Michele further suggests that the circuit court should have modified the parties' parenting-time arrangement and granted her request for the right of first refusal.

¶ 48 Standards of Review

¶ 49 A circuit's court's factual determinations regarding marital debt and annual gross income will not be reversed unless they are against the manifest weight of the evidence. See *In re Marriage of Brill*, 2017 IL App (2d) 160604, ¶¶ 30-33; *In re Marriage of Patel*, 2013 IL App (1st) 112571, ¶ 66. A determination is against the manifest weight of the evidence "where the opposite conclusion is clearly evident or where the court's findings are unreasonable, arbitrary, and not based on any of the evidence." *In re Marriage of Bhati*, 397 Ill. App. 3d 53, 61 (2009). A circuit court's determinations regarding the appropriate amount of child support and the division of marital assets and out-of-pocket medical expenses are reviewed for an abuse of discretion. See *In re Marriage of Manker*, 375 Ill. App. 3d 465, 477 (2007); *In re Keon C.*, 344 Ill. App. 3d 1137, 1142, 1146 (2003). An abuse of discretion occurs where no reasonable person would take the view adopted by the circuit court. *In re Marriage of Takata*, 304 Ill. App. 3d 85, 96 (1999). Because the allocation of parenting time and whether to award a parent the right of first refusal are based on the best interests of the child, the circuit court's judgment on such matters will not be reversed unless it is against the manifest weight of the evidence, is manifestly unjust, or is the result of an abuse of discretion. See *In re Marriage of Whitehead*, 2018 IL App (5th) 170380, ¶¶ 21, 40.

¶ 50 Financial Issues

¶ 51 Michele first challenges the circuit court's finding that if the parties did in fact receive the monies listed on Exhibit 8, they were gifts from Michele's father. Michele argues that she rebutted the presumption that the transfers were gifts by proving that they were loans. See *In re Marriage of Heinze*, 257 Ill. App. 3d 782, 790 (1994) ("The law is clear that the

transfer of property from a parent to a child is presumed to be a gift, and the presumption may only be overcome by clear and convincing evidence to the contrary."). In response, Bruce cites *In re Marriage of Schmidt*, 242 Ill. App. 3d 961 (1993), and *In re Marriage of Blazis*, 261 Ill. App. 3d 855 (1994), which we find instructive.

¶ 52 In *Schmidt*, the husband maintained *inter alia* that checks totaling $30,500, which the parties had received from his parents during the course of the parties' marriage, were loans and not gifts. *Schmidt*, 242 Ill. App. 3d at 965-70. The note supporting the husband's claim that the checks were loans, however, was not prepared by the husband's father or signed by the husband until after the parties had separated. *Id*. at 965, 969. Additionally, the wife testified that "she could not remember a single instance when [the husband had] asked his parents for money in her presence." *Id*. at 965. Stating that courts are "rightly skeptical of transfers by the parents of one of the litigants in a dissolution case," the appellate court concluded that under the circumstances, a finding that the transfers in question had been gifts to the marriage "would not be not contrary to the manifest weight of the evidence." *Id*. at 968-69. The appellate court explained, "Transfers where the parents would never have sought repayment, if the marriage had remained intact, may be viewed from a different perspective when the marriage falls apart." *Id.* at 968.

¶ 53 In *Blazis*, the appellate court similarly upheld the circuit court's determination that transfers, which the respondent's mother had made to the parties during the marriage, were gifts rather than loans. *Blazis*, 261 Ill. App. 3d at 868-70. The respondent's mother gave conflicting testimony regarding if and when she expected repayment of the alleged loans, and several of the transfers were made without the petitioner's knowledge. *Id*. at 859-61,

869-70. Additionally, the notes on the loans had apparently been prepared at a time when the parties had been experiencing marital difficulties. *Id*. at 869. When affirming the circuit court's finding that the transfers were not debts that the respondent's mother would ever have required the parties to repay, the appellate court noted, "A court of review should not second-guess the trial court's factual findings on the validity of a debt when that finding is based upon the trial court's assessment of the credibility of witnesses and the weight it gives to their testimony [citations], unless the trial court's findings are against the manifest weight of the evidence [citation]." *Id.*

¶ 54 Here, Bruce indicated that he and Michele's father had never discussed the loans listed on Exhibit 8 and that the loans had stemmed from talks that Michele had had with her father before she stopped working. *Cf. In re Marriage of Radae*, 208 Ill. App. 3d 1027, 1032 (1991) (upholding the circuit court's determination that a $5000 payment that the parties received from the petitioner's parents during the marriage was a loan where the petitioner's unrefuted testimony established that she, her husband, and her parents all had an understanding that the money was to be paid back). Bruce indicated that Michele had told him that her father had agreed to make up the difference between her salary and disability payments and that she had agreed to repay the transfers with back-pay that she would "hopefully receive in the future." Bruce further indicated that Michele had handled the family finances and that he was not certain how much money her father had provided over the years.

¶ 55 We note that Exhibit 8 first appeared at a marriage counseling session after the parties' separation and that Bruce testified that he had signed it because he was trying to save

the marriage. We further note that Michele added Exhibit 8's notation regarding the repayment of the money when the parties signed the document. Moreover, Michele's father did not sign the document or testify at trial. See *In re Marriage of Simmons*, 221 Ill. App. 3d 89, 92 (1991) ("It has been held that the evidence most relevant in determining donative intent is the donor's own testimony."); *cf. In re Marriage of Marcello*, 247 Ill. App. 3d 304, 314 (1993) (upholding the circuit court's finding that the respondent's mother was entitled to repayment where the mother's testimony and supporting evidence showed that she had loaned the parties money to buy a home and expected repayment). The court was also aware that Michele's father provided her with supplemental income every month.

¶ 56 On appeal, Michele points to Bruce's acknowledgements of the loans as evidence that Bruce viewed the money as marital debt that required repayment. Even if Bruce subjectively believed that he and Michele would have eventually repaid the money, however, the circuit court could have nevertheless concluded that Michele's father would not have required them to do so had the marriage continued. See *Schmidt*, 242 Ill. App. 3d at 968-69; *Blazis*, 261 Ill. App. 3d at 869-70. The circuit court's determination that Michele failed to rebut the presumption that the loans from her father were actually gifts to the parties' marriage was thus not against the manifest weight of the evidence, and accordingly, we will not "second-guess" the circuit court's judgment. *Blazis*, 261 Ill. App. 3d at 869.

¶ 57 Michele next argues that the circuit court erroneously calculated her yearly gross income when awarding her permanent maintenance. We disagree.

¶ 58 The duration and amount of a maintenance award are calculated using statutory guideline formulas unless the court makes a specific finding that there is a reason to depart

from the guidelines. See 750 ILCS 5/504(b-1), (b-2) (West Supp. 2017); see also *In re Marriage of Harms*, 2018 IL App (5th) 160472, ¶ 1. Pursuant to the statutory guidelines, the amount of maintenance is calculated by taking 30% of the payor's gross income minus 20% of the payee's gross income. *Id*. § 504(b-1)(1)(A). "The amount calculated as maintenance, however, when added to the gross income of the payee, may not result in the payee receiving an amount that is in excess of 40% of the combined gross income of the parties." *Id*.

¶ 59 Here, when calculating Michele's maintenance award pursuant to these guidelines, the circuit court determined that Bruce's yearly gross income was $90,000 and that Michele's was $25,000. The court apparently determined Michele's yearly gross by estimating that she would babysit an average of 22 hours per month and then adding that income to her annual disability payments.

¶ 60 Michele argues that her future income from babysitting is too speculative and should not have been considered. Bruce counters that the circuit court underestimated Michele's likely income from babysitting and erred in not considering the monthly income that she receives from her father. Contending that Michele's annual gross income should have been calculated at no less than $38,000 per year, Bruce suggests that we should modify the circuit court's maintenance award accordingly. See *In re Marriage of Ruvola*, 2017 IL App (2d) 160737, ¶¶ 18-22.

¶ 61 We reject Bruce's request that we modify the circuit court's maintenance award. The request constitutes an improper cross-appeal. Without filing a cross-appeal, a party may raise any argument in support of the circuit court's judgment. *People v. Castleberry*, 2015 IL 116916, ¶ 22. "However, an appellee who does not cross-appeal may not 'attack the decree

with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.' " *Id*. (quoting *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924)); see also *In re Marriage of Fortner*, 2016 IL App (5th) 150246, ¶ 15 ("An appellee may not raise claims of error unless she timely files a cross-appeal or a separate appeal.").

¶ 62 We also reject Michele's contention that the circuit court erred in determining her annual gross income. When determining a proper maintenance award, " 'gross income' means all income from all sources, within the scope of that phrase in Section 505 of th[e] Act." 750 ILCS 5/504(b-3) (West Supp. 2017). Pursuant to section 505, income from all sources includes payments that may or may not be certain to reoccur, as the relevant focus is on a party's economic situation at the time the calculations are made. *In re Marriage of Rogers*, 213 Ill. 2d 129, 138-39 (2004); see also *In re Marriage of Anderson*, 405 Ill. App. 3d 1129, 1137-38 (2010).

¶ 63 Here, there was no evidence before the court as to when or if Michele intended to stop babysitting. Given that at the time of trial, she was babysitting an average of 7 to 14 hours per week, the circuit court's estimate as to her annual gross income was reasonable and not against the manifest weight of the evidence.

¶ 64 With respect to the propriety of Bruce's monthly child-support obligation, the circuit court calculated the amount using the shared physical care support obligation worksheet promulgated by the Illinois Department of Healthcare and Family Services. See 750 ILCS 5/505(a)(3.8) (West Supp. 2017); http://www.illinois.gov/hfs/SiteCollectionDocuments/StandaloneSharedPhysicalCareSupportObligationWorksheet.pdf (last visited June 6, 2018). The shared-care worksheet applies where, as here, "each parent exercises 146 or more overnights

per year with the child," and both "use the standardized tax amount to determine net income." 750 ILCS 5/505(a)(3.8) (West Supp. 2017). The worksheet incorporates the new statutory guidelines for child support, which are based on a "schedule of basic child support obligations that reflects the percentage of combined net income that parents living in the same household in this State ordinarily spend on their child." *Id.* § 505(a)(1). The worksheet takes the incomes of both parents into account; a shared-care child support obligation is calculated by multiplying the basic child support obligation by 1.5; and the obligor's support amount is based on a percentage share of the shared-care obligation. See *id.* § 505(a)(1), (1.5), (3.8); https://www.illinois.gov/hfs/SiteCollectionDocuments/StandaloneSharedPhysicalCareSupportObligationWorksheet.pdf (last visited June 6, 2018). Each parent's contributions to the cost of the child's health insurance premium and the total number of overnights per year that the child spends with each parent are also factored in. See 750 ILCS 5/505(a)(3.8), (4)(E) (West Supp. 2017); https://www.illinois.gov/hfs/SiteCollectionDocuments/StandaloneSharedPhysicalCareSupportObligationWorksheet.pdf (last visited June 6, 2018).

¶ 65 There is a rebuttable presumption that the amount of the support obligation derived from the statutory child support guidelines is the correct amount of support. 750 ILCS 5/505(a)(3.3) (West Supp. 2017). The court may only deviate from the guidelines where their application would be inequitable, unjust, or inappropriate. *Id*. § 505(a)(3.4). Additionally, a deviation from the guidelines must be accompanied by written findings by the court specifying the reasons for the deviation. *Id*. Such reasons "may include" extraordinary

medical expenses necessary to preserve the life or health of the child and additional expenses associated with a child who has special medical, physical, or developmental needs. *Id*.

¶ 66 On appeal, Michele argues that the circuit court should have deviated from the statutory guidelines because Bruce's income is greater than hers and because she has custody of the minor children after school on Mondays and Tuesdays, even though those are Bruce's parenting days. In response, Bruce asserts that a deviation was not warranted because Michele has more disposable income than he does. Bruce notes *inter alia* that Michele is able to afford a rental home, while his financial situation presently requires that he live with his mother. Bruce additionally maintains that the circuit court should have considered the monthly payments that Michele receives from her father as part of her income. See *id.* § 505(a)(3)(A).

¶ 67 We cannot conclude that the circuit court should have given special consideration to the fact that Michele watches the minor children after school on Mondays and Tuesdays while Bruce is at work. The evidence before the court was that the parties had mutually agreed that Michele would do so. Bruce acknowledged that he did not pay for the meals that Michele provided for the children on those days, but Michele presented no evidence regarding the costs of the meals, nor did she complain about having to supply them. Moreover, Bruce did not indicate that he would be unwilling to provide after-school snacks on Mondays and Tuesdays if necessary. We note that Bruce testified that the children were "always eating something" and that the circuit court recognized that "kids do eat."

¶ 68 We also reject Michele's contention that the court should have deviated from the statutory guidelines simply because Bruce's income is greater than hers. Under the statutory

guidelines, the incomes of both parents are already taken into account, and the calculated amount of support is presumptively correct. See 750 ILCS 5/505(a)(1), (1.5), (3.3), (3.8) (West Supp. 2017). We note that when the circuit court calculated Bruce's child-support obligation, the court determined that his monthly net income was $4236 and that Michele's was $3124. We further note that Bruce's monthly net income is $2486 after Michele's monthly maintenance award is deducted.

¶ 69 Under the circumstances, we cannot conclude that the circuit court abused its discretion by adhering to the statutory guidelines when determining Bruce's child support obligation. We rather conclude that Michele has failed to rebut the presumption that Bruce was ordered to pay the correct amount of support.

¶ 70 Michele next argues that the circuit court abused its discretion in ordering her to pay half of the children's out-of-pocket medical expenses. See 750 ILCS 5/505(a)(4)(B) (West Supp. 2017) ("The court, in its discretion, may order either or both parents to contribute to the reasonable health care needs of the child not covered by insurance ***."). She again cites the parties' incomes and "the additional time she has with the minor children on Mondays and Tuesdays and the added expenses she incurs from that." She claims that requiring her to pay half of the children's contingent medical expenses will cause her an undue burden.

¶ 71 In response, Bruce notes that Michele has failed to produce any evidence as to what the minor children's uninsured medical expenses might be. Bruce further emphasizes that he pays for the children's health insurance through his employer and that by statute, "[a] portion of the basic child support obligation is intended to cover basic ordinary out-of-pocket medical expenses." *Id.* § 505(a)(4)(A). Bruce again maintains that the monthly income that

Michele receives from her father should not be ignored when viewing the parties' respective financial situations.

¶ 72 We agree with Bruce's intimation that Michele's claim that requiring her to pay half of the children's contingent medical expenses will cause her an undue burden is conjecture. Additionally, Michele raises the claim for the first time on appeal, so the argument is technically waived. See *In re Marriage of Evanoff*, 2016 IL App (1st) 150017, ¶ 61. Waiver aside, we cannot conclude that the circuit court abused its discretion in ordering Michele to pay half of the children's out-of-pocket medical expenses.

¶ 73 The final financial issue that Michele raises on appeal is that the circuit court abused its discretion in awarding Bruce any benefits under her pension plan. Again, we disagree.

¶ 74 In a dissolution proceeding, the circuit court must divide the parties' marital property into "just proportions" considering all relevant factors including each party's contribution to the acquisition of the property, the parties' relevant economic circumstances, the amount and sources of each of the parties' income, the value of the property assigned to each spouse, the reasonable opportunity of each spouse to acquire future capital assets and income, and whether the apportionment is in addition to a maintenance award. 750 ILCS 5/503(d) (West Supp. 2017).

¶ 75 It is undisputed that that Bruce's IRA, Michele's IRA, and Michele's pension plan were the only marital assets that the circuit court was asked to distribute. At the time of trial, Bruce's IRA was worth approximately $97,000, and Michele's was worth approximately $7000. The record indicates that Michele's pension plan will result in a full-benefit payment of $960.61 per month, beginning October 1, 2034. As noted, the circuit court divided these

assets equally and ordered that Bruce be designated the beneficiary of the pension plan's joint and survivor annuity option.

¶ 76 Michele suggests that when awarding Bruce the interests in her pension plan, the circuit court failed to adequately consider that she solely contributed to the plan. As Bruce observes, however, had the court relied exclusively on that factor, then his IRA should not have been divided equally, either.

¶ 77 Maintaining that she is unemployable due to her disability, Michele further suggests that the circuit court failed to consider that she does not have the capacity to acquire future capital assets. Other than Michele's testimony that she was "physically unable to do [her] job as a physical therapist," that she did not believe that she would ever be able "to return to work," and that she was presently babysitting, however, her employability was not otherwise explored at trial. Moreover, Michele's maintenance award and the income that she receives from her father were also factors that the circuit court could have properly considered. See 750 ILCS 5/503(d) (West Supp. 2017).

¶ 78 As previously stated, an abuse of discretion occurs where no reasonable person would take the view adopted by the circuit court. *In re Marriage of Takata*, 304 Ill. App. 3d at 96. Here, the circuit court did not abuse its discretion in equally dividing the IRAs and pension plan.

¶ 79 Parenting Issues

¶ 80 Michele argues that the circuit court should have modified the parties' existing parenting-time arrangement to give her a majority of the parenting time. Michele further

argues that the court should have granted her the right of first refusal. We reject both of these claims.

¶ 81 Because the parties did not submit a mutually agreed written parenting plan for the circuit court's approval, the court was required to allocate their parenting time in accordance with the best interests of the children. See 750 ILCS 5/602.7(a), (b) (West 2016). Section 602.7 of the Act provides that in determining the child's best interests for the purpose of allocating parenting time, courts must consider all relevant factors, including: (1) the wishes of the parent; (2) the wishes of the child; (3) the amount of time each parent spent performing caretaking functions with respect to the child in the 24 months preceding the filing of any petition for allocation of parental responsibilities; (4) any prior agreement or course of conduct between the parents relating to the caretaking functions with respect to the child; (5) the interaction and interrelationship of the child with his or her parents and siblings or any other significant person; (6) the child's adjustment to home, school, and community; (7) the mental and physical health of all involved; (8) the child's needs; (9) the distance between the parents' residences, the cost of transporting, the families' daily schedules, and the ability of the parents to cooperate; (10) whether a restriction on parenting time is appropriate; (11) physical violence or threat of physical violence; (12) the willingness and ability of each parent to place the needs of the child ahead of his or her own needs; (13) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child; (14) the occurrence of abuse against the child or other members of the household; (15) whether one of the parents is a convicted sex

offender; (16) the terms of a parent's military family-care plan; and (17) any other factor that the court expressly finds to be relevant. *Id*. § 602.7(b).

¶ 82 Although the circuit court is required to consider all relevant factors when determining the best interests of a child, "it is not required to make an explicit finding or reference to each factor." *In re Custody of G.L.*, 2017 IL App (1st) 163171, ¶ 43. Because the circuit court is in the best position to assess the credibility of the witnesses and determine a child's best interests, "its decision regarding the allocation of parenting time must be accorded great deference." *In re Marriage of Whitehead*, 2018 IL App (5th) 170380, ¶ 15.

¶ 83 Section 602.3 of the Act provides that when allocating parenting time, "the court may consider, consistent with the best interests of the child as defined in Section 602.7, whether to award to one or both of the parties the right of first refusal to provide child care for the minor child or children during the other parent's normal parenting time." 750 ILCS 5/602.3(a) (West 2016). The " 'right of first refusal' means that if a party intends to leave the minor child or children with a substitute child-care provider for a significant period of time, that party must first offer the other party an opportunity to personally care for the minor child or children." *Id*. § 602.3(b).

¶ 84 Here, when allocating the parties' parenting time, the circuit court specifically adopted the GAL's recommendations that their existing 2-2-3 parenting-time schedule continue and that neither party be granted the right of first refusal. On appeal, Michele suggests that the court abused its discretion by adopting the GAL's recommendations because the relevant statutory factors weigh against them. We conclude, however, that the

relevant factors amply support the circuit court's judgment that the recommendations were in the minor children's best interests.

¶ 85 The first relevant factors are the wishes of the parents and the children. 750 ILCS 5/602.7(b)(1), (2) (West 2016). Here, Bruce and all four of the parties' children want the existing parenting-time schedule to remain the same. This weighs heavily against changing it. With respect to the right of first refusal, Bruce and Michele both requested it in their proposed parenting plans, but neither spoke of it at trial.

¶ 86 The next factor concerns the amount of time each parent spent performing caretaking functions for the children in the 24 months preceding the filing of any petition for allocation of parental responsibilities. *Id*. § 602.7(b)(3). During the first four months prior to the filing of Michele's petitions, the parties were utilizing the bird-nesting arrangement at the marital home. Michele stayed with the children during the week, and Bruce stayed with them on the weekends. During the 20 months prior to that, the parties and the children had been residing in the marital home together. The record indicates that the parties have traditionally shared the responsibilities associated with the children's care. The record further indicates that Michele has been primarily responsible for taking the children to their medical and dental appointments, because her schedule allows her to do so. When considering the time each parent spent performing caretaking functions in the 24 months preceding the filing of the petitions, the circuit court could have essentially concluded that Michele had watched the children on more days during the initial 4 months and had taken them to their medical and dental appointments during the entire 24.

¶ 87 The next factor requires the court to consider any prior agreements or course of conduct between the parties relating to the caretaking functions with respect to the children. *Id*. § 602.7(b)(4). Following their informal separation in February 2016, the parties used the bird-nesting arrangement until September 2016. In September 2016, the parties agreed to the 2-2-3 parenting-time schedule of alternating weekends, with Bruce having the minor children every Monday and Tuesday and Michele having them every Wednesday and Thursday.

¶ 88 By the time of trial, the parties had been using the same 2-2-3 schedule for a year and had agreed that Michele would watch the minor children after school on Mondays and Tuesdays while Bruce was at work. The GAL reported that the parties' existing schedule worked well, that the parties had demonstrated the ability to effectively coparent under the schedule, and that neither party needed the right of first refusal.

¶ 89 Michele asked the court to change the parties' schedule so that she and the children could better prepare for the school week. The GAL indicated, however, that the schedule had no apparent effect on the children's grades. Moreover, Bruce feared that changing the schedule might disrupt the children's routines. Bruce also noted that if Michele's changes were instituted, he would never have the children for more than two consecutive nights. Michele acknowledged that her proposed changes would result in additional home-to-home transitions for the children.

¶ 90 Given the success of the parties' prior agreements and course of conduct, the circuit court could have concluded that this factor weighed strongly against modifying the parties' present parenting-time schedule. See *In re Custody of G.L.*, 2017 IL App (1st) 163171, ¶ 46

(noting that stability and continuity serve the best interests of a child). The court could have further found that this factor weighed against awarding either party the right of first refusal.

¶ 91 The next relevant factors are the children's adjustment to their home, school, and community (750 ILCS 5/602.7(b)(6) (West 2016)) and the children's interaction and relationships with their parents, siblings, and any other individuals who might significantly affect their best interests (*id*. § 602.7(b)(5)). The evidence before the court indicated that the parties' minor children were well adjusted to their homes, school, and community and had positive relationships with their grandparents and older siblings. The GAL reported that Bruce and Michele both attended the same church with the children and that both wanted the children to remain in Highland through high school.

¶ 92 The following two factors involve the mental and physical health of all of the individuals involved (*id.* § 602.7(b)(7)) and the needs of the children (*id.* § 602.7(b)(8)). None of the evidence before the circuit court indicated that these factors were particularly relevant. The court was aware that Michele received disability income stemming from a back injury, but Michele did not suggest that her back problems impaired her ability to perform caretaking functions. Bruce testified that he was healthy. The court could have presumed that the children were physically fit by their participation in soccer and track. The court was aware of the children's dermatological condition, but the GAL indicated that there were no related concerns. The court was also aware that Bruce and the minor children were being pharmaceutically treated for ADD, but nothing suggested that the children required special-needs attention in addition to the medication and counseling they were already receiving. Michele references the youngest child's grades at school and emphasizes that she has more

time to help the children with their school work. However, the GAL indicated that the child's grades had declined as a result of the stress of the parties' divorce and that the parenting-time schedule had no apparent impact on the grades. The GAL further indicated that the children's needs were otherwise being met through the parties' combined efforts and skills.

¶ 93 The next factor involves the distance between the parents' residences, the attendant transportation costs, the families' daily schedules, and the ability of the parents to cooperate. *Id.* § 602.7(b)(9). The evidence before the court indicated that Bruce and Michele lived approximately four miles away from each other and that transportation had never been an issue. The parties testified that when Michele watches the children on Mondays and Tuesdays, she does so from 3:30 p.m. to 6:30 p.m. The GAL advised that Michele and Bruce were capable of effectively communicating and cooperating with respect to their parental responsibilities and that their ability to jointly make decisions regarding the children had never been an issue. The parties have agreed to share the significant decision-making responsibilities as to the children's education, health, religion, and extracurricular activities, and at trial, they both indicated that they could work together with respect to all relevant matters. Bruce and Michele had been using the existing parenting-time schedule for over a year with few, if any, problems. The record indicates that neither party has ever needed or used a substitute child-care provider. The parties' ability to cooperate for the sake of the children reflects favorably on both parties and supports the circuit court's findings that neither needed the right of first refusal.

¶ 94 The last two relevant factors are the willingness and ability of each parent to place the needs of the children ahead of the parent's own needs (*id.* § 602.7(b)(12)) and the

willingness and ability of each parent to foster and encourage the children's relationship with the other parent (*id.* § 602.7(b)(13)). The evidence before the court revealed that these factors also reflect favorably on both parties.

¶ 95 We lastly emphasize that the circuit court expressly adopted the GAL's recommendations that the parties' existing 2-2-3 parenting-time schedule continue and that neither party be granted the right of first refusal. Although the court was not required to accept the GAL's opinion (see *In re Marriage of Petraitis*, 263 Ill. App. 3d 1022, 1031 (1993)), it was certainly not precluded from doing so. The GAL was appointed to represent the minor children's best interests (see 750 ILCS 5/506(a)(2) (West 2016)), and he testified that he had interviewed them on four separate occasions. He further advised that he had also spoken with the parties, the youngest child's counselor, Bruce's mother, the attorneys involved in the case, and the parties' two adult children. We note that the circuit court was in the best position to evaluate the GAL's credibility.

¶ 96 "In determining the best interest of the child, the court must consider the particular facts and circumstances of each case." *In re Marriage of Stuart*, 141 Ill. App. 3d 314, 318 (1986). Here, considering all of the relevant factors, the circuit court did not abuse its discretion in concluding that the GAL's recommendations were in the best interests of the parties' minor children. The court could have reasonably concluded that there was no need to award either party the right of first refusal and that the parties' existing 2-2-3 parenting-time schedule had a proven track record of success that modification might have compromised.

¶ 97 CONCLUSION

¶ 98 For the foregoing reasons, the circuit court's judgment of dissolution of marriage is hereby affirmed.

¶ 99 Affirmed.