No. 126802

IN THE SUPREME COURT OF ILLINOIS

IN RE THE MARRIAGE OF:	
SANDRA D. DAHM-SCHELL,	Petition for Leave to Appeal from the Illinois Appellate Court, Fifth District, No. 5-20-0099 filed November 30, 2020
Respondent/Appellee,	There Heard on Appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois Hon. Patricia Kievlan, Associate Judge No. 14-D-637
v.	
MARK R. SCHELL,	
Petitioner/Appellant,	

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Introduction

The parties were married on November 7, 1992 and had five children, three of which were not emancipated at the time of the dissolution being entered. At the time the dissolution was entered, Mark was 56 years old, working as a civil engineer for William Tao & Associates. The parties stipulated in court that Mark had received approximately $614,000.00 in inheritance from his mother, and that same should be awarded to him as his non-marital property. Sandra then filed a Motion to Reconsider dated November 21, 2016, requesting that she be awarded a portion of the inheritance for child support and maintenance. In its Amended Judgment and Rulings entered on December 18, 2017, and Second Amended Judgment and Rulings entered on December 28, 2017, the Court ordered only that "the dividends from his inheritance shall be considered and added to his monthly income for maintenance and child support purposes." On March 28, 2018, prior to the final ruling on the Motions to Reconsider, Mark petitioned the Court to reduce his child support and maintenance based on a reduction in his income. At the hearing on Mark's Motion to Modify, he testified that he was "required" to take the IRA distributions as mandatory required minimum distributions. It is Mark's position that these withdrawals should not constitute income. On September 5, 2018, the trial court entered an Order declining to include Mark's inherited mandatory retirement income when calculating maintenance and child support. Sandra then filed an appeal with the Fifth District that, after argument, was dismissed by the Appellate Court since it was not a final order. The trial Court then entered an order certifying for appeal, pursuant to Supreme Court Rule 308, the following question: "Whether inherited mandatory retirement distributions are income for purposes of child

support and maintenance calculations." Sandra filed her Application for Leave to Appeal pursuant to Rule 308 on March 18, 2020, and on June 2, 2020, the Fifth District granted the Application. The Fifth District, in their decision filed November 30, 2020, amended the certified question to state as follows: "Whether mandatory distributions or withdrawals taken from an inherited individual retirement account (IRA) containing money that has never been imputed against the recipient for the purposes of maintenance and child support calculations constitute 'income' under 750 ILCS 5/504(b-3)(West 2018) and 750 ILCS 5/505(a)(3)(West 2018)." The Fifth District answered the question in the affirmative and Mark filed his Petition for Leave to Appeal to the Supreme Court, which was subsequently allowed. The issue before the Court is whether or not mandatory retirement withdrawals constitute income for child support and maintenance purposes.

ISSUE PRESENTED

Whether or Not Mandatory Retirement Withdrawals or Distributions are Income for Purposes of Calculating Child Support and Maintenance, as a conflict of laws exist between the First, Second, Third, Fourth (and Now Fifth) Districts.

JURISDICTION

Jurisdiction is conferred upon this court pursuant to Supreme Court Rule 315, which provides for appeals from the Appellate Court to the Illinois Supreme Court if the Petition for Leave to Appeal is Allowed.

STANDARD OF REVIEW

The standard of review for the issue on appeal is *de novo*. *In re Marriage of McGrath,* 2012 IL 112792 at ¶ 10, 970 N.E.2d 12 (2012).

STATEMENT OF FACTS

On August 12, 2014, Sandra filed her Petition for Judgment of Dissolution against Mark. C-14. On October 11, 2016, the trial Court entered a Judgment of Dissolution of Marriage in case number 14-D-637 in St. Clair County, Illinois. C-376. The parties were married on November 7, 1992 and had five children, three of which were not emancipated at the time of the dissolution being entered. C-377. At the time the dissolution was entered, Mark was 56 years old, working as a civil engineer for William Tao & Associates, and earning $105,169.00 per year. C-382. Mark's gross monthly income at the time was approximately $8,800.00 per month from his employment in addition to dividends of $462.33 from his various investment accounts. C-382. The parties stipulated in court that Mark had received approximately $614,000.00 in inheritance from his mother, and that same should be awarded to him as his non-marital property. C-384. Sandra then filed a Motion to Reconsider dated November 21, 2016, requesting that she be awarded a portion of the inheritance for child support and maintenance. C-417. In its Amended Judgment and Rulings entered on December 18, 2017, and Second Amended Judgment and Rulings entered on December 28, 2017, the Court ordered only that "the dividends from his inheritance shall be considered and added to his monthly income for maintenance and child support purposes." C-505, C-512. These rulings were not appealed.

On March 28, 2018, prior to the final ruling on the Motions to Reconsider, Mark petitioned the Court to reduce his child support and maintenance based on a reduction in his income. C-427. On page two (2) of Mark's Financial Affidavit prepared on March 21, 2018, he claimed that his income was approximately $7,800.00 per month from employment, $1.67 per month from interest, $743.92 per month from dividends, and $894.25 per month from

his mandatory withdrawals from his inherited IRA's. E-62, E-63. At the hearing on Mark's Motion to Modify, he testified that he was "required" to take the IRA distributions as mandatory required minimum distributions, and that those funds were being transferred from his mom's account to "another non-marital account...it's immediately transferred to a retirement account that I've established, non-marital." Mark testified that he receives the withdrawals from the account he inherited from his mother, as he is required to do, and transfers them into another non-marital account that does not require the mandatory withdrawals. R.21. It is Mark's position that these withdrawals should not constitute income. On September 5, 2018, the trial court entered an Order declining to include Mark's inherited mandatory retirement income when calculating maintenance and child support. A-44. Sandra then filed an appeal with the Fifth District that, after argument, was dismissed by the Appellate Court since it was not a final order. The trial Court then entered an order certifying for appeal, pursuant to Supreme Court Rule 308, the following question: "Whether inherited mandatory retirement distributions are income for purposes of child support and maintenance calculations." A-45. Sandra filed her Application to for Leave to Appeal pursuant to Rule 308 on March 18, 2020, and on June 2, 2020, the Fifth District granted the Application. A-46, A-50. The Fifth District, in their decision filed November 30, 2020, amended the certified question to state as follows: "Whether mandatory distributions or withdrawals taken from an inherited individual retirement account (IRA) containing money that has never been imputed against the recipient for the purposes of maintenance and child support calculations constitute 'income' under 750 ILCS 5/504(b-3)(West 2018) and 750 ILCS 5/505(a)(3)(West 2018)." A-2. The Fifth District answered

the question in the affirmative, which prompted this Petition for Leave to Appeal to the Supreme Court, which was subsequently allowed.

ARGUMENT

I. WHETHER OR NOT MANDATORY RETIREMENT WITHDRAWLS OR DISTRIBUTIONS ARE INCOME FOR PURPOSES OF CALCULATING CHILD SUPPORT AND MAINTENANCE, AS A CONFLICT OF LAWS EXIST BETWEEN THE FIRST, SECOND, THIRD, FOURTH, AND NOW FIFTH DISTRICTS.

As the Fifth District stated in their decision on this case filed November 30, 2020, "[t]he issue of whether or not IRA distributions or withdrawals constitute "income" as it relates to child support and maintenance payments is currently unsettled in Illinois." A-6 ¶ 13. The Fifth District went on to state that "While a number of appellate court cases have addressed the specific issue of IRA distributions in the context of child support and maintenance payments, our Illinois Supreme Court has not." A-7 ¶ 14. There appears to be a clear split between the districts as to whether or not IRA distributions are to be considered income. However, the courts have made it clear that whether or not the money is taxable pursuant to the Internal Revenue Code is irrelevant to determining income. The Illinois Supreme Court stated that "a variety of payments will qualify as 'income' for purposes of section 505(a)(3) of the Act that would not be taxable as income under the Internal Revenue Code. As our appellate court has recognized, however, the Internal Revenue Code is designed to achieve different purposes than our state's child support provisions...it does not govern the determination of what constitutes 'income' under the statutory child support guidelines enacted by the General Assembly." *In re Marriage of Rogers,* 213 Ill.2d 129 at 137, 820 N.E.2d 386, 289 Ill.Dec. 610 (2004). "As the word itself suggests, 'income' is simply 'something that comes in as an increment or addition***: a gain or recurrent benefit that is usu[ually] measured in money***: the value of goods and services received by an individual in a given period of time.' " *Id.* at

136-137 (quoting Webster's Third New International Dictionary 1143 (1986)) "It has likewise been defined as '[t]he money or other form of payment that one receives, usu[ually] periodically, from employment, business, investments, royalties, gifts and the like." *Id.* at 137 (quoting Black's Law Dictionary 778 (8th ed. 2004)).

The 2nd District stated that "[i]n reviewing the circuit court interpretation of the Act, we adhere to well settled principles of statutory construction. Our primary objective is to determine and give effect to the intent of the legislature...The best indicator of legislative intent is the language of the statute and we must give that language its plain and ordinary meaning." *In re Marriage of Lindman*, 356 Ill.App.3d 462 at 465-466, 824 N.E.2d 1219 (2nd Dist. 2005). The Second District, in holding that IRA disbursements were income, went on to state that, "Illinois courts have concluded that, for purposes of calculating child support, net income includes such items as a lump-sum worker's compensation award [citation omitted], a military allowance [citation omitted], an employees deferred compensation [citation omitted], and even the proceeds from a firefighter's pension...We see no reason to distinguish IRA disbursements from these items." *Id.* at 466. However, mandatory IRA disbursements are clearly distinguishable from the list provided in *Lindman.* These disbursements are required whether you have gained money or lost money in your IRA. To say that they are income would be to completely ignore the fact that the IRA values fluctuate on a daily basis. An individual is required to take a set amount from the IRA for Federal Tax purposes, under certain circumstances, and this would completely ignore the actual value of the IRA, which could ultimately increase or decrease daily.

The Fourth District, after quoting language from *In re Marriage of Lindman* out of the Second District, reasoned as follows:

> "It would appear from the above quote that the Second District would find that any IRA disbursement would constitute income. We disagree and do not find *Rogers* supports this proposition. The Second District's decision does not adequately take into account that IRAs are ordinarily self-funded by the individual possessing the retirement account. Except for the tax benefits a person gets from an IRA and the penalties he or she will incur if he or she withdraws the money early, an IRA basically is no different than a savings account, although the risks may differ. The money the individual places in an IRA already belongs to the individual. When an individual withdraws money he placed into an IRA, he does not gain anything as the money was already his. Therefore, it is not a gain and not income. The only portion of the IRA that would constitute a gain for the individual would be the interest and/or appreciation earning from the IRA." *In re Marriage of O'Daniel*, 382 Ill.App.3d 845 at 850, 889 N.E.2d 254 (4th Dist. 2008).

In 2012, the Supreme Court was faced with deciding whether or not withdrawals from a savings account constituted income for child support purposes. The trial court found that the withdrawals were income stating that, "it believed that its decision was supported by two appellate court cases, *In re Marriage of Lindman*...which held that IRA disbursements could be included in the calculation of net income under section 505 of the Act." *In re Marriage of McGrath, supra,* at ¶ 6. Mark appealed the decision and argued that, "it was error for the circuit court to include money he withdraws from his savings account in its calculation of his net income. Respondent relied on *In re Marriage of O'Daniel*, [citation omitted], in which the Fourth District rejected the holdings of the cases that the trial court relied on and held that the money withdrawn from an IRA is not income. The Appellate Court held that it did not need to resolve the conflict in the appellate court over whether IRA withdrawals can be considered income under section 505(a) because this case does not involve an IRA." *Id* at ¶ 7. The Appellate Court affirmed the trial court's decision, stating that "the money respondent withdraws from his

savings account was properly included in the circuit court's calculation of 'net income' because the statute's definition of 'net income' is expansive: 'the total of all income from all sources…an unemployed parent who lives off regularly liquidated assets is not absolved of his child support obligation." *Id* at ¶ 8. The Illinois Supreme Court then allowed Mark's petition for leave to appeal the Appellate Court's ruling. The Illinois Supreme Court, after laying out the factors for deviation contained within 750 ILCS 5/505, stated that "Where the trial court erred, however, was in its initial calculation of respondent's net income, because it included amounts that respondent regularly withdraws from his savings account." *Id* at ¶ 13. The Illinois Supreme Court, in holding that withdrawals from a savings account were not income, stated that, "[t]he money in the account already belongs to the account's owner, and simply withdrawing it does not represent a gain or benefit to the owner. The money is not coming in as an increment or addition, and the account owner is not 'receiving' the money because it already belongs to him." *Id* at ¶ 14. "[F]or it is the term 'income' itself that excludes respondent's savings account withdrawals. The appellate court should not have been looking for savings account withdrawals in the statutory deductions from income, because those withdrawals were not income in the first place." *Id* at ¶ 15. "The trial and appellate courts were rightly concerned that the amount generated by respondent's actual net income was inadequate, particularly when the evidence showed that respondent had considerable assets and was withdrawing over $8,000 from his savings account every month. The Act, however, specifically provides for what to do in such a situation. If application of the guidelines generates an amount that the court considers inappropriate,

then the court should make a specific finding to that effect and adjust the amount accordingly." *Id* at ¶ 16.

Black's Law Dictionary defines income as "money or other form of payment that one receives, usu[ally] periodically, from employment, business, investments, royalties, gifts, and the like." Black's Law Dictionary (11th ed. 2019). In regards to maintenance, "the term 'gross income' means all income from all sources..." 750 ILCS 5/504(b-3). In regards to child support, gross income "means the total of all income from all sources..." 750 ILCS 5/505(3)(A). The Supreme Court stated that income "includes gains and benefits that enhance a noncustodial parent's wealth and facilitate that parent's ability to support a child or children." *In re Marriage of Mayfield,* 2013 IL 114655, ¶ 16. Although the word investments is listed in the Black's Law Dictionary definition of income, it is misleading because it may or may not constitute a gain at all. In fact, you could take an IRA withdrawal at a time where the account principal is lower than the initial investment due to market losses. This obviously would not be a withdrawal that increases an individual's wealth, but it would essentially become the case if the Fifth District ruling in this case is not overturned.

There is a case out of the Third District, *In re Marriage of Kuper,* which also refers to withdrawals from an IRA. The trial court used the expenses of the individual to calculate his net income since he had a small income and substantial assets. The Third District, in affirming this issue, stated that "[t]he trial court expressly stated it did not consider LaVern's withdrawals as additional income and rejected Rita's argument that LaVern's income was $181,812, which represented all the withdrawals he took from his various investment accounts. The trial court relied on the inheritances LaVern received

and the financial opportunities those assets provided him in calculating his income. We find it did not abuse its discretion in determining LaVern's monthly income to be $14,114.15" *In re Marriage of Kuper,* 2019 IL App (3d) 180094 at ¶ 25, 125 N.E.3d 568 (3rd Dist. 2019). This is consistent with the ruling in *In re Marriage of Mcgrath* which found that the court can look at the assets of an individual in order to determine if there should be a deviation from the statutory guidelines.

There are two additional cases, that further support the conflict between the courts in this area of law. The Second District in, *In re Marriage of Verhines and Hickey*, 2018 IL App (2d) 171034 (2018), the court stated that "[w]e are not convinced that *Lindman* and *O'Daniel* are in absolute conflict. *Lindman* stated that IRA withdrawals are income, after subtracting for "double counting."...*O'Daniel* stated that IRA withdrawals are not income, except for that portion representing interest and appreciation." Based on this analysis, the Second District stated "[t]hus, both *Lindman* and *O'Daniel* allow for the possibility that a portion of the IRA withdrawals would constitute income." *In re Marriage of Verhines and Hickey, supra,* at ¶ 65. This comparison is simply not accurate. The Second District went on to state that a portion of the withdrawal could potentially be found to be income and then stated that, "[e]ven if the $400,000.00 cannot be categorized as income, we still must consider whether the statutory factors unquestionably warrant an upward deviation from the guideline amount." *Id.* at ¶ 101. It appears as if the Second District did not want to overrule their prior decision in *Lindman,* but also felt the need to acknowledge that the IRA withdrawals could be considered when determining whether or not to deviate from the statutory amounts, which is consistent with the Fourth District's ruling. Additionally, interest would be easy to calculate and

include as income, however, appreciation could change by the second depending on market fluctuation. It would be essentially impossible to calculate the exact amount of increase or decrease in an IRA because it constantly changes, usually depending on the market.

The First District in, *In re Marriage of McLauchlan,* 2012 IL App (1st) 102114 (2012), stated that "child support cases that hold it proper to include the return of capital withdrawals from retirement benefits as 'gross income' are well founded on the court's obligation to protect the best interest of children and public policy determinations that parents financially support their children. Those interests and public policy determinations are not applicable in determining a modification of maintenance." *In re Marriage of McLauchlan, supra,* at ¶ 28. The First District went on to state that the "trial court's finding that 'gross income' includes monies drawn from David's retirement benefits when modifying maintenance was improper." *Id.* at ¶ 29. The First District relied on the party's marital settlement agreement which awarded the retirement account to the husband. However, this is no different from when the court awards a retirement account to a specific party following a trial. In either circumstance, it would be a property division and thus non-modifiable. The First District stated that, "[u]nder such circumstances neither Illinois case law nor section 504(a) permits the trial court to consider withdrawals from retirement accounts when deciding whether to modify maintenance and in setting the amount of a new maintenance award." *Id.* The First District reasoned that, "to do so violates the parties' original intent when contracting and represents a modification of the parties' property settlement agreement rather than a modification of maintenance provisions of the dissolution judgment based on a

substantial change in circumstances." *Id.* The inherited accounts being awarded to Mark was a property distribution by the trial court. The mandatory withdrawals, under *McLauchlan*, would not be included as gross income for purposes of calculating maintenance. In fact, Sandra stipulated at trial that Mark's inherited accounts were non-marital and should be awarded to him. Based on *McLauchlan,* the funds from the inherited retirement accounts should not be considered for maintenance purposes.

The court declined to award Sandra any proceeds from Respondent's inheritance at the time that the divorce was entered in 2016. Since Respondent's mother's death, he has been forced to take required minimum distributions from the account each year. This is not a choice that Mark has made, but rather a federal requirement that a specific amount of funds be withdrawn from the account every year so that they can be taxed, regardless if the overall value of the account has increased or decreased. Sandra subsequently chose not to appeal the judgment of dissolution entered October 11, 2016, the Amended Judgment and Rulings entered December 18, 2017, or the Second Amended Judgment and Rulings entered December 28, 2017. Since the initial dissolution proceedings already addressed the inherited IRA's, confirming that they belonged solely to Mark, we are left with only the question of whether the mandatory retirement account withdrawals are income. Whether or not the account was inherited became irrelevant when it was awarded to Mark in 2016 and was not appealed by Sandra. At that time, it was confirmed to be the sole property of Mark. It is important to note that the word 'income' appears in the definition of 'gross income' in the maintenance and child support statutes. This is extremely important because the Illinois Supreme Court has already stated, in *In re Marriage of McGrath*, that money already belonging to an individual is

not income because "the account owner is not 'receiving' the money because it already belongs to him." *In re Marriage of McGrath, supra,* at ¶ 14. In the present case, the money that Mark has in his IRA already belongs to him. It belonged solely to him the minute that it was awarded to him in the October 11, 2016, Judgment of Dissolution Marriage, which was never appealed. In the event that it was to be counted as income, it should have been done in the year that it was received as a lump sum asset. At the point that it was awarded to him, or prior, Mark could have put it in a savings account, spent it, and/or cashed it out, all of which would have excluded it from being included in child support and maintenance calculations. It does not make any sense that the money could now be included in the maintenance and child support calculations merely because he decided to invest it to save for his retirement. There is no reason that an individual should be penalized for setting aside assets for retirement, which public policy would favor. Additionally, by choosing to invest same, Sandra has received an additional benefit because we would agree that the dividends and interest, which are earned on the investments, would be income for child support purposes. In summary, mandatory IRA withdraws/distributions should not be deemed as income, but used as an asset in determining whether or not deviation from the statutory calculations is appropriate. An individual should be granted the freedom to move assets from account to account, by withdrawing same, without the fear that it is going to affect the amount that he is obligated to pay in child support and maintenance.

The Fifth District decision states as follows:

> "[The Respondent] argues that 'the money that [the Respondent] has in his IRA already belongs to him. It belonged to him the minute that the October 11, 2016, judgment of dissolution became final.' We disagree and believe the Respondent oversimplifies the *McGrath* holding…While it is true that the October 11, 2016,

> order awarded the respondent the inheritance based upon the parties' stipulation that the inheritance was nonmarital property, there was no finding in the circuit court's order or any language in the parties' property settlement agreement that indicated that the inheritance was now barred from being considered income for the purposes of child support and maintenance. The order simply stated '[t]hat [the respondent] is awarded all of his inherited funds, including his Vanguard Inherited IRA, his Vanguard Inherited Roth IRA, his Bank of America account (#8827), his Bank of America Money Market Savings account (#4302), and his TD Ameritrade account.' Nowhere in the order or any other pleadings did the petitioner relinquish her right to or claim to the inheritance...Instead this order merely acknowledged that this inheritance constituted nonmarital property that should be awarded to the Respondent...Thus, here, where there was no waiver of the petitioner's interest in the inheritance and, in fact, the petitioner challenged the circuit court's refusal to include the inheritance in its initial calculation of child support and maintenance in her petition to reconsider following the original October 11, 2016, order, the inherited IRA's are not immune from later being considered as income for the purposes of determining child support and maintenance." A-8, A-9 ¶ 16 & 17

The above portion of the Fifth Districts holding simply cannot be accurate. The court could not order a waiver of any future retirement interest as it relates to child support. Case law is well established in Illinois that Courts are not bound by the agreement of the parties when determining child support. The Court, by statute, can always consider these assets when determining whether or not to deviate from statutory child support and maintenance amounts. To state that the Court could have explicitly stated that Sandra waived any future interest in the accounts for child support purposes is not accurate based on well established Illinois law. Additionally, to state that she did not waive her interest in the account by stipulating that same was non-marital does not make much sense either. A stipulation that an asset is non-marital, is an agreement that the party does not have any ownership interest in the property. Mark was clearly the owner of the accounts prior to, and after, the Judgement of Dissolution was entered.

Finally, the Fifth District states that:

> "[t]here is no evidence in the record that the circuit court has ever factored the $615,000 inheritance into any child support calculations...we distinguish the present case from that in McGrath, in that the money being withdrawn here is not money that 'already belonged to the owner' but, instead, was a gift from his mother that he inherited upon her death, money that has never been imputed to him as income in child support or maintenance calculations. Thus, because the money has never been imputed to him as income, we do not have an issue of 'double counting.' If, however, the circuit court had imputed the inheritance as income to the respondent in its initial determination of child support and maintenance in the October 11, 2016, order, we would not now do so upon his receipt of the distributions because the money received would have already been counted as income." A-15, ¶ 25

Although the Fifth District states that there is no evidence in the record to show that the Circuit Court ever factored in the $615,000.00 in inheritance, Mark would argue that there is just as much evidence to show that the court did factor in the inheritance when they declined to deviate from the statutory amounts based on the inheritance. The court did deviate based on Sandra being underemployed which was specified in paragraph fifteen (15) in the Judgment of Dissolution. A-27. The inherited accounts were not added into income because they are simply not income to Mark. The law does not require the Court to detail their reasons for not deviating in a court order. The Court, as it clearly states in the October 11, 2016 Judgement was well aware of the inheritance that Mark had received. In the event that a deviation was necessary, the court would have done so in the Judgment, and the reasons for the deviation would have been stated in the court order, as the Court laid out in regards to Sandra being underemployed. The issue was also raised in subsequent motions which the court denied, choosing not to deviate from the statutory amounts. It is extremely relevant that the Judgment of Dissolution entered October 11, 2016, the Amended Judgment, and the Second Amended Judgment, were not appealed by Sandra, when she knew full well that the court had not deviated from the statutory amounts for child support and maintenance. More importantly, Mark

had no way of knowing that the Fifth District would take this stance in the future. Had this been the law, he could have filed a motion for clarification requesting that the court specifically state that they were aware of the inheritance and had considered same. Regardless, if assumptions have to be made, it appears clear that the court considered the income and declined to deviate from the statutory amounts. This is much more likely than the Fifth District's opinion which states that the Court did not consider the income because it is not worded specifically within the Judgment of Dissolution. The inheritance was well known to the parties and the court throughout the dissolution proceedings.

CONCLUSION

Mandatory retirement withdrawals should not be factored into income for child support and maintenance calculations. As the Fourth District stated in *O'Daniel* and the Illinois Supreme Court in *McGrath*, IRA distributions are essentially nothing more than tax deferred savings accounts. Whether or not the funds are marital or non-marital is irrelevant. The money in the IRA already belongs to Mark, and simply withdrawing it does not represent a gain or benefit to him. Additionally, as noted in *McGrath,* Mark is not 'receiving' the money because he already has ownership of same. It simply does not make any sense to say that if Mark had put his inheritance into a savings account then the withdrawals would not have been income but, since he decided to leave that same money in an IRA, his mandatory withdrawals now become income. In fact, Sandra is actually benefitting from Mark depositing the money into the IRA because he is earning substantial dividends and interest, which are calculated into his income for child support and maintenance purposes. The inheritance is nothing more than an asset to Mark which could be considered (pursuant to statute) for deviation purposes, just like any other asset that Mark could have received through an inheritance. It is simply not income.

Mark's mandatory retirement withdraws are redistributed into other retirement accounts where they are reinvested. Sandra previously requested money from these accounts in her Motion to Reconsider and that request was denied by the trial court. There is no reason to deviate from the statutory guidelines in this case. Mark is already paying a substantial amount of money for child support and permanent maintenance Sandra did not present any evidence at the hearing to warrant a deviation pursuant to the

factors listed in the statute and Sandra was awarded a substantial amount of assets pursuant to the Judgment of Dissolution of Marriage.

Mark respectfully requests that the trial court's order of September 5, 2018, which declined to include Mark's mandatory retirement distributions from maintenance and child support calculations, be affirmed, and that the Supreme Court over turn the decision of the Fifth District filed November 30, 2020, in *In re Marriage of Dahm-Schell.*

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APPENDIX

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2020 IL App (5th) 200099

NO. 5-20-0099

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
SANDRA D. DAHM-SCHELL,	)	St. Clair County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 14-D-637
	)	
MARK R. SCHELL,	)	Honorable
	)	Patricia H. Kievlan,
Respondent-Appellee.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court, with opinion.
Justices Boie and Wharton concurred in the judgment and opinion.

OPINION

¶ 1 On February 18, 2020, upon the motion of the petitioner, Sandra D. Dahm-Schell, the circuit court of St. Clair County certified the following question for interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019): "Whether inherited mandatory retirement distributions are income for purposes of child support and maintenance calculations." For the following reasons, we find that answering the certified question, as written, will not materially advance the ultimate termination of this litigation. As such, we limit the scope of our answer to the facts of this case. Accordingly, we answer the following question: "Whether mandatory distributions or withdrawals taken from an inherited individual retirement account (IRA)

containing money that has never been imputed against the recipient for the purposes of maintenance and child support calculations constitute 'income' under 750 ILCS 5/504(b-3) (West 2018) and 750 ILCS 5/505(a)(3) (West 2018)." Under these circumstances, we answer the certified question, as we have framed it, in the affirmative, holding that "gross income" and "net income," as defined in sections 504 and 505 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/504(b-3), 505(a)(3) (West 2018)), includes distributions or withdrawals taken from a party's IRA when said IRA only contains money received via inheritance and said inheritance has not previously been imputed on the party as income for the purposes of calculating child support and maintenance. Having answered the certified question as we have reframed it in order to materially advance the termination of this litigation, and in the interests of judicial economy and the need to reach an equitable result, we vacate the circuit court's order entered on September 5, 2018, refusing to consider the distributions from the inherited IRA as income and remand this cause with instructions that the circuit court recalculate the respondent's required child support and maintenance amounts with the inherited IRA distributions considered in its calculations as required by the Act.

¶ 2 I. BACKGROUND

¶ 3 The petitioner and the respondent were married on November 7, 1992. On August 12, 2014, the petitioner filed for a dissolution of marriage. While the dissolution of marriage action was pending, the respondent's mother died, and he inherited approximately $615,000. The inheritance was held in various checking accounts and investment accounts, the majority being held in two IRAs. On October 11, 2016, the circuit court entered a judgment of dissolution of marriage in the parties' divorce case, No. 14-D-637. At the time the judgment was entered, the respondent was 56 years old and worked as a civil engineer. The parties had five children, three of whom were minors

at the time of the dissolution of the marriage. In the judgment of dissolution of marriage, the circuit court found that based upon the 2015 financial statements provided by the respondent, he earned a monthly gross income of $8301.83 at his place of employment. He also earned $462.33 per month in dividends from the inherited IRAs, bringing his monthly gross income to $8764.16 per month or $105,169.92 per year. The parties stipulated in the circuit court proceedings that the inheritance was the respondent's nonmarital property and the respondent was subsequently awarded all of the inheritance he received from his mother. When initially calculating child support and maintenance in its October 11, 2016, order, the circuit court did not include the respondent's inheritance as part of his income; instead, the circuit court only included the respondent's dividend earnings from the inherited IRAs.

¶ 4 On November 10, 2016, and November 21, 2016, respectively, the respondent and the petitioner filed motions to reconsider the circuit court's October 11, 2016, order. Relevant to this case, the petitioner in her November 21, 2016, motion to reconsider argued that the circuit court should have considered the respondent's inheritance when determining the proper amount of child support and maintenance required to be paid by the respondent. In the circuit court's amended judgment and rulings entered on December 18, 2017, and its second amended judgment and rulings entered on December 28, 2017, the circuit court reaffirmed its prior position and ordered that only "the dividends from [the respondent's] inheritance shall be considered and added to his monthly income for maintenance and child support purposes."

¶ 5 On March 28, 2017, prior to any rulings on the motions to reconsider or the circuit court's amended judgments discussed above, the respondent filed pleadings petitioning the circuit court to reduce the amount of child support and maintenance he was obligated to pay to the petitioner. The basis for the reduction articulated in the respondent's motion was that his employer reduced

his pay by 20% due to the company's financial issues and one of the previous three minor children had now graduated high school and was no longer a minor. In the respondent's financial affidavit prepared on March 21, 2018, in support of his petition to modify child support and maintenance, he claimed his gross monthly income at that time was $7800 from his regular employment as an engineer, with additional income as follows: (1) interest income of $1.67, (2) dividend income of $743.92, and (3) distributions and draws of $894.25 (from the inherited IRAs).

¶ 6 Thus, the respondent, at the time of the preparation of the 2018 financial statement, had a gross income of $9439.84 per month or $113,278.08 annually if the mandatory distributions and withdrawals from the inherited IRAs were included or a gross income of $8545.59 per month or $102,547.08 annually if the distributions were not included. In other words, $10,731 per year of the respondent's income could be attributed to distributions and withdrawals from the inherited IRAs. It is this portion of the respondent's income that the certified question before us seeks to have properly categorized by this court.

¶ 7 On May 3, 2018, a hearing was held in the circuit court on the respondent's March 28, 2017, motion to reduce child support and maintenance. The respondent testified at the hearing that he filed for the reduction because his employer cut his pay by 20% and one of his children was no longer a minor. He testified that he received $10,731 in mandatory IRA distributions from the inherited accounts as indicated by his financial statement, but noted that upon receiving those distributions, he immediately transferred the money into another "non-marital account" held in his name. He testified that these distributions were the mandatory minimum distributions required under federal law. He also testified that he received dividends on the inherited IRAs but clarified that he doesn't actually "receive the dividends. They're in an account that's reinvested." He then went on to affirm that these dividends were still considered income.

¶ 8 It was the respondent's position during the hearing that his mandatory withdrawals of $894.25 per month should not be considered income for the purpose of calculating child support and maintenance because he had no choice but to take the distributions from the inherited IRAs (now transferred into his own IRA) and the inheritance was not marital property. He further stated that "[the circuit court] ruled that [the petitioner] was not entitled to my nonmarital inheritance."

¶ 9 On September 5, 2018, the circuit court entered an order declining to include the respondent's inherited mandatory retirement distributions when calculating child support and maintenance. Following the circuit court's entry of the September 5, 2018, order, the petitioner filed a motion to reconsider the September 5, 2018, order on October 5, 2018. The circuit court denied the petitioner's motion to reconsider on January 29, 2019. The petitioner then attempted to appeal the circuit court's September 5, 2018, order in this court in case No. 5-19-0075. However, that appeal was dismissed for lack of jurisdiction because the September 5, 2018, order was not a final and appealable order.

¶ 10 On February 18, 2020, the petitioner made an oral motion before the circuit court requesting that it certify the issue of whether mandatory IRA distributions constituted income as a question for interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019). On that same day, the circuit court granted the motion and entered an order pursuant to Rule 308, certifying the aforementioned certified question for our review, and we subsequently granted the petitioner's petition for leave to appeal.

¶ 11 II. ANALYSIS

¶ 12 We begin our analysis with an outline of the applicable standard of review. This appeal concerns questions of law certified by the circuit court pursuant to Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019); therefore, our standard of review is *de novo*. *In re M.M.D.*, 213 Ill. 2d 105,

113 (2004). "Although the scope of our review is generally limited to the questions that are certified by the circuit court, if the questions so certified require limitation in order to materially advance the ultimate termination of the litigation, such limitation is proper." *Crawford County Oil, LLC v. Weger*, 2014 IL App (5th) 130382, ¶ 11. "In addition, in the interests of judicial economy and the need to reach an equitable result, we may consider the propriety of the circuit court order that gave rise to these proceedings." *Id.*

¶ 13 The issue of whether IRA distributions or withdrawals constitute "income" as it relates to child support and maintenance payments is currently unsettled in Illinois. Before we get into our analysis of the main issue raised by the certified question before us, we first quickly discuss the definition of "income" under the Act that controls child support and maintenance payments. The term "gross income" has the same meaning in regard to both child support payments and maintenance payments, "except maintenance payments in the pending proceedings shall not be included." 750 ILCS 5/504(b-3), (b-3.5) (West 2018). The term "gross income" is simply defined in the Act as "all income from all sources." *Id.* § 505(a)(3)(A). The definition then goes on to list numerous specific benefits or payments that are exempted from being counted as income, none of which are applicable to this case. *Id.* The Act does not separately define the term "income" despite it being used within the definition for "gross income." Thus, as our Illinois Supreme Court did in *In re Marriage of Rogers*, 213 Ill. 2d 129 (2004), we look to the plain meaning. "As the word itself suggests, 'income' is simply 'something that comes in as an increment or addition ***: a gain or recurrent benefit that is usu[ually] measured in money ***: the value of goods and services received by an individual in a given period of time.' " *Id.* at 136-37 (quoting Webster's Third New International Dictionary 1143 (1986)). Black's Law Dictionary defines income as " '[t]he money or other form of payment that one receives, usu[ually] periodically, from employment, business,

investments, royalties, gifts and the like.' " *Id.* at 137 (quoting Black's Law Dictionary 778 (8th ed. 2004)). "Under these definitions, a variety of resources that would not be taxable under the Internal Revenue Code will qualify as income for the purposes of child support." *In re Marriage of Verhines*, 2018 IL App (2d) 171034, ¶ 54. Our Illinois Supreme Court has held that income "includes gains and benefits that enhance a noncustodial parent's wealth and facilitate that parent's ability to support a child or children." *In re Marriage of Mayfield*, 2013 IL 114655, ¶ 16 (citing *Rogers*, 213 Ill. 2d at 137).

¶ 14 Having discussed the definition of the term "income" under the Act, we now turn to Illinois case law for guidance as to the certified question before this court. While a number of appellate court cases have addressed the specific issue of IRA distributions in the context of child support and maintenance payments, our Illinois Supreme Court has not. Instead, the most analogous case to the present in which our Illinois Supreme Court has given guidance is *In re Marriage of McGrath*, 2012 IL 112792. At issue in *McGrath* was whether money that an unemployed parent regularly withdrew from a savings account must be included in the calculation of income when setting child support under section 505 of the Act. *Id.* ¶ 10. The facts of *McGrath* were unique because although the parent was unemployed, he was using his savings to "maintain a lifestyle in which his household expenses were similar to [the] petitioner's expenses for a household of three." *Id.* ¶ 6. The Illinois Supreme Court noted the following in relation to the money withdrawn from the savings account:

> "Money that a person withdraws from a savings account simply does not fit into any of these definitions. The money in the account already belongs to the account's owner, and simply withdrawing it does not represent a gain or benefit to the owner. The money is not

coming in as an increment or addition, and the account owner is not 'receiving' the money because it already belongs to him." *Id.* ¶ 14.

¶ 15 The Illinois Supreme Court went on to state that, even though the money withdrawn from a savings account would not constitute "income" because it was money that "already belongs to him" (*id.*), it might be appropriate for a court to determine if a deviation may be necessary under section 505(a)(2) of the Act (*id.* ¶ 16), which allows for the circuit court to deviate from the standard child support and maintenance calculations where the income amount does not properly represent the financial status of the party required to pay support. Thus, focusing on the issue before us of what constitutes "income," the takeaway from *McGrath* is the Illinois Supreme Court's holding that the withdrawals from the savings account were not income under the Act because "[t]he money in the account already belongs to the account's owner, and simply withdrawing it does not represent a gain or benefit to the owner." *Id.* ¶ 14.

¶ 16 The respondent in this case argues that the holding in *McGrath* supports his position that an IRA distribution, which is similar to a savings account withdrawal, does not constitute income under the Act. Specifically, he argues that "the money that [the respondent] has in his IRA already belongs to him. It belonged to him the minute that the October 11, 2016, judgment of dissolution became final." We disagree and believe the respondent oversimplifies the *McGrath* holding.

¶ 17 First, we take issue with the respondent's assertion that the money "belonged to him the minute that the October 11, 2016, judgment of dissolution became final." While it is true that the October 11, 2016, order awarded the respondent the inheritance based upon the parties' stipulation that the inheritance was nonmarital property, there was no finding in the circuit court's order or any language in the parties' property settlement agreement that indicated that the inheritance was now barred from being considered income for the purposes of child support and maintenance. The

order simply stated "[t]hat [the respondent] is awarded all of his inherited funds, including his Vanguard Inherited IRA, his Vanguard Inherited Roth IRA, his Bank of America account (#8827), his Bank of America Money Market Savings account (#4302), and his TD Ameritrade account." Nowhere in the order or any other pleadings did the petitioner relinquish her right to or claim to the inheritance. See *In re Marriage of McLauchlan*, 2012 IL App (1st) 102114 (property settlement agreement in the dissolution of marriage case controlled where former wife had specifically waived any and all interests in former husband's retirement plans). Instead, this order merely acknowledged that this inheritance constituted nonmarital property that should be awarded to the respondent. This court has previously held that retirement benefits awarded to a party following a dissolution of marriage are not barred from use in determining income for child support purposes. See *In re Marriage of Klomps*, 286 Ill. App. 3d 710, 715-17 (1997). Whether the money was awarded to the respondent and whether that money can later be considered income for the purposes of determining the amount of child support and maintenance are two separate questions. Thus, here, where there was no waiver of the petitioner's interests in the inheritance and, in fact, the petitioner challenged the circuit court's refusal to include the inheritance in its initial calculation of child support and maintenance in her petition to reconsider following the original October 11, 2016, order, the inherited IRAs are not immune from later being considered as income for the purposes of determining child support and maintenance.

¶ 18 Understanding that the circuit court's awarding of the inheritance to the respondent does not preclude it from being included in child support and maintenance calculations, we now look at the holding of *McGrath* to see if it still controls this case as the respondent contends. The Illinois Supreme Court in *McGrath* was addressing withdrawals from a savings account, not an IRA distribution. In fact, despite the lower court's reliance on cases that dealt with IRA withdrawals,

the *McGrath* court did not specifically speak to IRAs in its opinion. However, despite this, we still find the reasoning behind the *McGrath* court's holding to be instructive, especially when read alongside the case law specifically dealing with IRAs. The *McGrath* court ruled that the withdrawals from the savings account did not constitute income because "[t]he money in the account already belongs to the account's owner, and simply withdrawing it does not represent a gain or benefit to the owner." *McGrath*, 2012 IL 112792, ¶ 14. In other words, the *McGrath* court looked past the type of account, choosing not to make a bright-line rule, and instead looked at the money held within the account being withdrawn to determine if that money should be considered as income. Because the money held within the savings account was already earned and placed into the account, the withdrawal did not represent a "gain" or a "benefit." Though the *McGrath* court does not expressly state so in its opinion, it appears the money contained within the savings account had already been considered "income" at some point prior. Thus, because that money had already been considered income at some time prior to the withdrawal, the money withdrawn could not now also constitute income. This issue has been referred to by the appellate courts as the issue of "double counting." We believe it is now helpful to turn to the case law that specifically addresses IRAs and discusses the "double counting" issue.

¶ 19 There are three cases that we find warrant discussion. The first case is *In re Marriage of Lindman*, 356 Ill. App. 3d 462 (2005). *Lindman* is a Second District case in which the court held generally that distributions from an IRA constituted "income" for the purpose of calculating income under the Act. *Id.* at 466-67. The court noted that under Illinois law, for the purpose of calculating child support, such items as worker's compensation awards, military allowances, deferred compensation payments, and even pensions, constituted "income." *Id.* at 466. The court went on to state, "[w]e see no reason to distinguish IRA disbursements from these items. Like all

of these items, IRA disbursements are a gain that may be measured in monetary form." *Id.* at 466. Importantly, the *Lindman* court separately acknowledged that there might be "a potential 'double counting' issue that petitioner does not raise." *Id.* at 470. The court went on to explain the issue of "double counting":

> "Consider, for example, the following situation. In year one, a court sets a parent's child support obligation at X. This amount is based on a calculation of the parent's year one net income, which includes money the parent puts into an IRA. In year five, the parent begins receiving disbursements from the IRA, and, that same year, the parent asks the court to modify his or her child support obligation. To determine whether modification is proper, the court looks to see whether there has been a change in the parent's net income. See 750 ILCS 5/510 (West 2002). In making that determination, the court considers as part of the parent's year five net income the amount of the disbursements from the IRA. It may be argued that the court is double counting this money, that is, it is counting the money on its way into and its way out of the IRA. In other words, the money placed into the IRA from year one to year five is being counted twice. To avoid double counting in this situation, the court may have to determine what percentage of the IRA money was considered in the year one net income calculation and discount the year five net income calculation accordingly." *Id.*

While the court acknowledged the potential issue, it went on to decline to take a firm position because the petitioner in *Lindman* did not raise the issue or claim that the IRA money had been double counted. *Id.* at 470-71.

¶ 20 Following *Lindman*, the Fourth District heard the case of *In re Marriage of O'Daniel*, 382 Ill. App. 3d 845 (2008). The court in *O'Daniel* disagreed with the *Lindman* decision, stating that

the "Second District's decision does not adequately take into account that IRAs are ordinarily self-funded by the individual possessing the retirement account." *Id.* at 850. The court went on to note:

> "Except for the tax benefits a person gets from an IRA and the penalties he or she will incur if he or she withdraws the money early, an IRA basically is no different than a savings account, although the risks may differ. The money the individual places in an IRA already belongs to that individual. When an individual withdraws money he placed into an IRA, he does not gain anything as the money was already his. Therefore, it is not a gain and not income. The only portion of the IRA that would constitute a gain for the individual would be the interest and/or appreciation earnings from the IRA." *Id.*

The court finally noted that it did not have before it "what portion of [the former husband's] IRA was made up of his contributions. As a result, [the court could not] say what portion of [the former husband's] withdrawals might have constituted income for child-support purposes." *Id.* Thus, following *O'Daniel*, it appeared that the appellate court case law was split as to how to handle IRA distributions when calculating child support and maintenance.

¶ 21 In 2018, the Second District revisited the issue in *Verhines*, 2018 IL App (2d) 171034. The court in *Verhines* opined that despite the appearances of *Lindman* and *O'Daniel*, the cases may not directly contradict each other. The court explained:

> "We are not convinced that *Lindman* and *O'Daniel* are in absolute conflict. *Lindman* stated that IRA withdrawals are income, after subtracting for 'double counting.' (It did not consider 'double counting,' because the appellant did not raise the issue.) *O'Daniel* stated that IRA withdrawals are not income, except for that portion representing interest and appreciation. (It did not consider interest and appreciation because the

appellant did not raise the issue.) Thus, both *Lindman* and *O'Daniel* allow for the possibility that a portion of IRA withdrawals would constitute income.

Lindman stated that double counting would occur if earnings deposited into IRA were counted as income both in the year they were deposited and in the year they were withdrawn. [Citation.] To avoid that double counting, the court might have to determine what percentage of the IRA was considered income in the year it was deposited and discount that amount from the calculation of income in the year of withdrawal. [Citation.] The *Lindman* court detailed a double-counting hypothetical where the father contributed to and withdrew from the IRA during years that he was paying child support. However, we did not preclude the double-counting scenario set forth in *O'Daniel*. The double-counting scenario set forth in *O'Daniel* was broader. *O'Daniel* excluded as income not only what had already been documented as income in a prior support year, but anything that was not new growth, interest, or appreciation." *Id.* ¶¶ 65-66.

¶ 22 After reviewing the case law as discussed above, and taking *McGrath*, *Lindman*, *O'Daniel*, and *Verhines* together, we find that the proper mechanism for determining if an IRA distribution or withdrawal is "income" for the purposes of child support and maintenance is to first determine the source of the money at issue and whether or not that money has been previously imputed against the individual receiving the distribution or withdraw so as to avoid double counting. If the money that constitutes the IRA has already been imputed against the party receiving the distribution or withdrawal as "income" for child support and maintenance purposes, then as stated in *O'Daniel*,

"[t]he money the individual places in an IRA already belongs to that individual. When an individual withdraws money he placed into an IRA, he does not gain anything as the money

> was already his. Therefore, it is not a gain and not income. The only portion of the IRA that would constitute a gain for the individual would be the interest and/or appreciation earnings from the IRA." *O'Daniel*, 382 Ill. App. 3d at 850.

We believe it would be improper to count the money both as "income" first when it is earned or initially received and then again when it is withdrawn. It is our opinion that this is in accordance with the reasoning of the Illinois Supreme Court's decision in *McGrath* that double counting should be avoided.

¶ 23 Turning to the present case, we note that we have different facts from the previous cases discussed above. Here, the respondent has inherited a large sum of money from his mother. The bulk of this money is held in IRAs that have been left to him. Due to federal law, the respondent is required to take distributions from these IRAs in the sum of approximately $10,700 per year. He has petitioned the circuit court to lower the amount of child support and maintenance he is required to pay, mainly due to the fact that he now works for a different employer and is not making as much money as he was in 2016. However, if we factor the approximately $10,700 worth of IRA distributions into his income when determining his child support and maintenance payments, the respondent's income is actually higher than it was in 2016 by approximately $8000.

¶ 24 "The Act creates a rebuttable presumption that all income, unless specifically excluded by the statute, is income for support purposes." *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 280 (2006). In *Rogers*, 213 Ill. 2d at 137, the Illinois Supreme Court held that gifts or "loans" from parents received by a father constitute income for the purpose of child support payments because "[t]hey represented a valuable benefit to the father that enhanced his wealth and facilitated his ability to support [his child]." Although there are no published Illinois decisions directly addressing the question of whether inheritance constitutes income for the purposes of child support

or maintenance, based upon the Illinois Supreme Court's holding in *Rogers*, remaining consistent with our *dicta* in *In re Marriage of Fortner*, 2016 IL App (5th) 150246, ¶ 11 n.1, and in keeping with the spirit of the Act, we find that the statutory definition of "income" as found within the Act is broad enough that it includes an individual's inheritance when determining child support and maintenance.

¶ 25 Therefore, because an individual's inheritance must be considered as income under the Act and, in the present case before us, there is no evidence in the record that the circuit court has ever factored the $615,000 inheritance into any child support or maintenance calculations, we now answer the certified question in the affirmative: the distributions that the respondent is receiving from the inherited IRAs must be included as income in the calculations for determining child support and maintenance. To further clarify, we distinguish the present case from that in *McGrath*, in that the money being withdrawn here is not money that "already belonged to the [account] owner" but, instead, was a gift from his mother that he inherited upon her death, money that has never been imputed to him as income in child support or maintenance calculations. Thus, because the money has never been imputed to him as income, we do not have an issue of "double counting." If, however, the circuit court had imputed the inheritance as income to the respondent in its initial determination of child support and maintenance in the October 11, 2016, order, we would not now do so upon his receipt of the distributions because the money received would have already been counted as income. The fact that the respondent is required by law to take the distributions, or the fact that he chooses to move the distributions immediately into another IRA, is of no concern. Because the money is being distributed, the respondent is receiving the benefit of the money to use as he pleases, and it has not previously been imputed to him as income, the circuit court must now include it as income for the purpose of calculating child support and maintenance.

¶ 26 III. CONCLUSION

¶ 27 For the foregoing reasons, and having answered the certified question as we have reframed in the affirmative, we vacate the circuit court's September 5, 2018, order and remand these proceedings to the circuit court with directions that the circuit court recalculate the child support and maintenance amounts in accordance with this opinion.

¶ 28 Certified question answered and order vacated; cause remanded with directions.

No. 5-20-0099

Cite as:	*In re Marriage of Dahm-Schell*, 2020 IL App (5th) 200099
Decision Under Review:	Appeal from the Circuit Court of St. Clair County, No. 14-D-637; the Hon. Patricia H. Kievlan, Judge, presiding.
Attorneys for Appellant:	Rhonda D. Fiss, of Law Office of Rhonda D. Fiss, P.C., of Belleville, for appellant.
Attorneys for Appellee:	Dustin S. Hudson, of Neubauer, Johnston & Hudson, P.C., of Fairview Heights, for appellee.

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

IN RE THE MARRIAGE OF:

SANDRA D. DAHM-SCHELL,

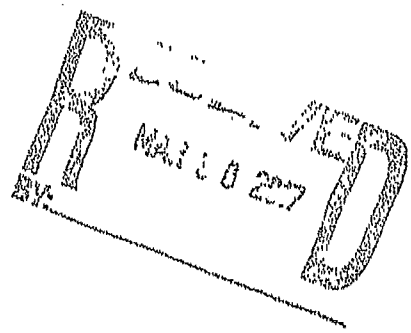
Petitioner,

v.

MARK R. SCHELL,

Respondent.

No. 14-D-637



PETITION TO MODIFY CHILD SUPPORT

Comes now the Respondent, Mark Schell, by and through his attorney, Dustin S. Hudson of the Law Office of Neubauer, Johnston & Hudson, and for his Petition to Modify Child Support, states as follows:

1. That on October 11, 2016, a Judgment of Dissolution of Marriage incorporating a Marital Settlement Agreement was entered by this Court that provided that Respondent shall pay permanent maintenance in the sum of $1,905 per month and $1,266.16 per month as and for child support.

2. That since the entry of said Order, there have been substantial changes in circumstances in that:

   a. On or about March 10, 2017, the Respondent was notified that his pay was being reduced by 20%, effective the pay period beginning March19, 2017. At the same time, approximately 33% of the staff was laid off, however, the Respondent was retained with Respondent's income being significantly decreased.

3. That the child support and maintenance were calculated based on the statutory amounts and those amounts should be modified due to Respondent's reduction in pay which was without fault on the part of the Respondent.

WHEREFORE, Respondent, Mark Schell, prays that this Court enter an order as follows:

A. That Respondent's maintenance and child support obligation be retroactively modified as of the filing of this petition reflecting current net income due to his income being decreased without any fault on his part.

B. Grant the Respondent such other and further relief as the Court deems just and equitable in the premises.

DUSTIN S. HUDSON - #06298446
Attorney for Respondent
955 Lincoln Highway
Fairview Heights, IL 62208
(618) 632-5588

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record for all parties to the above cause by enclosing the same in an envelope addressed to such attorneys at their business address as disclosed by the pleadings of record herein, with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail Box in the City of Fairview Heights, Illinois on the 27 day of March, 2017.

Rhonda Fiss
Attorney at Law
23 Public Square, Suite 230
Belleville, IL 62220

MARK R. SCHELL

Under the penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in the above and foregoing pleading are true and correct, except as to the matters therein stated to be on information and belief, and as to such matters, the undersigned certifies as aforementioned that (s)he verily believes the same to be true.

MARK R. SCHELL

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IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT
ST CLAIR COUNTY, ILLINOIS

SANDRA D. DAHM-SCHELL,

Petitioner,

v.

MARK R. SCHELL,

Respondent.

Case No. 14-D-637

JUDGMENT OF DISSOLUTION OF MARRIAGE

This matter came before the Court for a hearing on all remaining issues. Petitioner, Sandra D. Dahm-Schell (hereinafter referred to as "Mother" or "Sandra") appeared in person and by counsel, John Hipskind, of Hipskind & McAninch; Respondent, Mark R. Schell (hereinafter referred to as "Father" or "Mark") appeared in person and by counsel, Francine M. Johnston of Neubauer, Johnston & Hudson. The Court, being fully advised in the premises, and having considered the testimony of the parties, the exhibits submitted and offered into evidence, the *in camera* interviews of the minor children, and the applicable terms of the Illinois Marriage and Dissolution of Marriage Act, the Court hereby **FINDS AS FOLLOWS:**

1. The Court has jurisdiction over the subject matter and the parties who are each domiciled in the State of Illinois and have been for at least ninety (90) days prior to execution of the Judgment of Dissolution of Marriage.

2. The Petitioner, Sandra D. Dahm-Schell, is 51 years of age, resides at the marital home located at 800 Catawba Avenue in Swansea, Illinois, and is employed by DS Vespers-The Edge as a Special Projects Manager.

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DOB. 4/12/60

3. The Respondent, Mark R. Schell, is 56 years of age and resides at 304 Lake Lorraine Drive in Swansea, Illinois, which is Mark's non-marital home that he purchased after the parties separated with non-marital assets he inherited from his deceased mother. Mark is employed by William Tao & Associates as a Civil-Structural engineer.

4. The parties were married on November 7, 1992 and the marriage was registered in St. Clair County, Illinois.

5. Five (5) children were born to the parties, namely, Anthony Schell, born in 1996, who is emancipated; Samantha Schell, born in 1997, who is emancipated; Kristen Schell, born in 1999; Rachel Schell, born in 2001; and Allison Schell, born in 2002.

6. That the parties have not adopted any children during the marriage and Sandra is not now pregnant.

7. Irreconcilable differences have caused the irretrievable breakdown of the marriage, and efforts at reconciliation have failed and would be impracticable and is not in the best interests of the parties herein.

8. No other petition for dissolution of marriage is pending in any other county or state.

9. The parties agree to share joint decision making regarding the health, education, religion, and extra-curricular activities of the minor children. The Court finds that the parties can and have communicated successfully about these issues and that continued joint decision making by both parents is in the children's best interest.

10. Under 750 ILCS 5/602.7, the Court shall allocate parenting time unless the parties agree. The parties in this case do not agree and have proposed different parenting time schedules. In making its decision, the Court "shall allocate parenting time

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according to the child's best interests" considering "all relevant factors, including, without limitation, the following:"

(1) the wishes of each parent seeking parenting time: Father wishes to share parenting time equally. Mother wishes the Court to make the temporary order regarding parenting time the permanent order. The temporary order grants Father parenting time every Wednesday from 6 p.m. until Thursday morning when he takes the minor children to school, as well as every other weekend.

(2) the wishes of the minor children: The Court met with the children *in camera* and has considered their wishes in making a determination on parenting time.

(3) the amount of time each parent spent performing caretaking functions with respect to the children in the 24 months preceding the filing of any petition for allocation of parental responsibilities or, if the child is under 2 years of age, since the child's birth: The Court addresses factors (3) and (4) together below.

(4) any prior agreement or course of conduct between the parents relating to caretaking function with respect to the children: The Court addresses factors (3) and (4) together. Father has always worked a typical 40 hour a week (or more) schedule outside the home. In 1999, after the birth of the parties' third child, the parties decided that Mother should stay home to care for very young minor children. Mother stayed home with the children for many years while Father worked. Mother performed a majority of the caretaking functions with respect to the minor children as they grew up. Soon after she left her job outside the home, Mother began to keep the books for her sister and brother in law's business, DS Vespers/The Edge. She conducted this date entry work at home 10-15 hours a week and continued to perform the majority of the caretaking functions for the minor

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children. From 2007 to the present, she has worked 35 hours per week on-site at DS Vespers/The Edge, but has the flexibility to set her schedule around the children's schedules and needs. Throughout this time frame to the present, Mother has performed the majority of the caretaking functions for the children.

(5) the interaction and interrelationship of the children with his or her parents and siblings and with any other person who may significantly affect the children's best interest: The children are comfortable with their Mother taking the lead role in providing their care as she has always done. They are more comfortable in the marital home now that Father is living elsewhere and the parties are not arguing in front of them. They enjoy spending time with their Father as provided under the temporary order.

(6) the child's adjustment to his or her home, school, and community: The Court finds that the children are well-adjusted at Mother's home and are starting to become adjusted to spending time with Father at this home. All of the children are very bright, do very well in school, and are active in extra-curricular activities.

(7) the mental and physical health of all individuals involved: The Court finds both parties are mentally and physically capable of caring for the children, that they provide for the children's mental and physical health, and that the children are mentally and physically healthy.

(8) the children's needs: The Court finds that the children's physical and emotional needs are being met equally by each party. Both parents clearly love the children and provide for their needs.

(9) the distance between the parents' residences, the cost and difficulty of transporting the children, each parent's and the children's daily schedules, and the ability of

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the parents to cooperate in the arrangement: The parties live very close to each other. The children are very busy with school and extra-curricular activities. Although Father has adjusted his work schedule to take the children to school when they spend the night, Mother is more able to accommodate the children's busy school and extra-curricular activities.

(10) whether a restriction on parenting time is appropriate: The Court finds a restriction on parenting time is not appropriate.

(11) the physical violence or threat of physical violence by the children's parent directed against the children or other member of the children's household: The Court finds this factor to be inapplicable.

(12) the willingness and ability of each parent to place the needs of the children ahead of his or her own needs: The Court finds that each party has and is willing to place the needs of the children ahead of their 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 children: Around the time Mother filed her petition for dissolution, it appeared that she was not encouraging the children to have a close relationship with Father. Since the temporary order has been entered, the Court finds that Mother has encouraged this relationship and Father's parenting time.

(14) the occurrence of abuse against the children or other member of the children's household: The Court finds this factor is inapplicable.

(15) whether one of the parents is a convicted sex offender or lives with a convicted sex offender . . .: The Court finds this factor is inapplicable.

(16) the terms of a parent's military family-care plan . . .: The Court finds this factor is inapplicable.

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11. After considering all of the factors listed above, the Court finds that parenting time with the three remaining minor children as detailed in the temporary order is in the minor children's best interest. This shall be more specifically set forth in Judgment of Allocation of Parental Responsibilities and Parenting Time.

12. Sandra seeks maintenance. Under 750 ILCS 5/504, "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 has considered the fourteen factors set forth by 750 ILCS 5/504 and finds that an award of permanent maintenance is appropriate. Sandra has a degree in business management with a specialization in human resources. After the parties married, Sandra worked and supported Mark while he pursued an engineering degree. Mark graduated in two years and thereafter, both parties worked. Mark worked as a structural engineer at two different firms, but has worked at William, Tao & Associates for the past 16 years. Sandra worked for Graybar Electric for a total of 6 years. She left after the birth of the parties' third child. The parties agreed that she should stay home and care for their three minor children, and the parties also planned to continue to grow their family (which they did by having two more children). When she left Graybar, Sandra was the manager of two departments.

While caring for the parties' growing family, Sandra worked 15 hours a week from home for her sister and brother-in-law's business. Since 2007, she has worked 35 hours per week at this business doing general office and accounting work. The Court finds that because Sandra was out of the work force for many

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years and because Sandra continues to avail herself to accommodate the busy schedules of the parties' minor children, she earns substantially less than Mark and substantially less than what she would be earning if she had stayed in her position at Graybar or a comparable company.

13. According to his Financial Statement filed 7/9/15,[1] Mark earns $8301.83 per month gross at William Tao. He also earns $462.33 per month in dividends from his inherited investment accounts. Therefore, his total monthly gross income is $8,764.16 or $105,169.92 per year. His net income is $5,862.00 per month.

14. Sandra filed a Financial Statement which showed she grossed $2,333.33 per month or $28,000.08 for 2014. This is reflected on Defendant's Exhibit 40 which shows Sandra's yearly income for 2012, 2013, 2014, and 2015. From January 1, 2015 through November 15, 2015, Sandra grossed $24,500.07 which put her on track to gross exactly the same amount, or $28,000.08 total for 2015. C-38

15. Under the guidelines provided under 750 ILCS 5/504, Mark would pay Sandra $25,267.92 per year or $2105.66 per month in maintenance. However, the Court deviates from this amount for the following reasons: Sandra testified that she has worked around 35 hours per week since 2007. Two of the five children are now adults who are in college. The remaining three minor children are all in high school. The Court finds that Sandra can work 40 hours per week and increase her income slightly without additional training or education. If the Court imputes gross income to Sandra for a 40 hour week at $16.66 per hour gross (which is her

[1] The Court heard no testimony and was presented with no documents regarding Mark's income since his 7/19/15 Financial Statement was filed. He testified that he got a raise, but never testified how much more he earned gross. However, he did testify that due to an increase in health insurance premiums, his net monthly pay remained approximately the same after the raise.

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gross hourly rate assuming she works 35 hours per week now), she would make $32,000 gross per year. Under the guidelines using $32,000 as her gross income, Mark shall pay Sandra $22,867.96 per year or $1905.66 per month in maintenance on a permanent basis.

16. Mark's net income for child support purposes should be reduced by the amount of maintenance he will pay per month. This results in a statutory net income for Mark of $3,956.78 per month. Based upon that statutory net income, guideline child support for three children at 32% is $1,266.16 per month.

17. The parties divided their personal property through an Agreed Order dated April 27, 2016.

18. Mark has asserted Sandra dissipated marital assets. Dissipation occurs when one spouse uses marital funds or assets for his or her sole benefit and for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown. *In re Marriage of Tletz*, 605 N.E.2d 670 (4th Dist. 1992); *In re Marriage of Dhillon*, 20 N.E.3d 1272 (3rd Dist. 2014). It is the burden of the party who is charged with dissipation to provide clear and convincing evidence of the disposition of those marital funds. *In re Marriage of Gurda*, 304 Ill.App.3d 1019 (1st Dist. 1999). Mark asserts that while the parties' marriage was irretrievably broken and irreconcilable differences existed during their separation, Sandra withdrew $7,559.00 from their joint account, $19,000.00 from the parties' home equity line of credit, and sold parties' van located at the marital residence for $400.00. At trial, Sandra could only explain that she spend $3000.00 to purchase a car for the parties' daughter without Mark's consent, and

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spent $2000 for attorneys' fees for Cannady & AuBuchon. Sandra could give no accounting of where the rest of the money went, nor did she produce any documents to show where the money went. The Court finds that Sandra dissipated $7,559.00 for the withdrawal from the joint account, $15,899.91 from the home equity line of credit (as shown by Defendant's Exhibit 2), and $400.00 for the sale of the vehicle for a total of $23,858.91. The Court subtracts $3000 from this number because it can be recovered from the asset – the vehicle. Therefore, the Court finds the total amount dissipated to be $20,858.91 (and that Sandra must "repay" $10,429.45 to the marital estate). The Court also notes that Sandra could also not explain why she cashed the children's savings bonds, what the values were, or what she did with the money.

19. In 2014, Mark inherited in excess of $615,000.00 from his deceased mother. Specifically, Mark inherited a Bank of America checking account (*8827), a money market savings account (*4302), a Vanguard account, a TD Ameritrade account, a Vanguard IRA and a Vanguard Roth IRA. The parties stipulate and the Court finds that this is Mark's non-marital property, as it was never commingled with marital property. The Court notes that Mark will receive additional monies through his inheritance after the sale of property held in trust at some unknown time in the future.

20. Sandra worked at Y98 radio station prior to the parties' marriage and has a non-marital retirement account from same.

21. Upon the parties' separation, and entry of the Order on January 21, 2015, Mark purchased a home at 304 Lake Lorraine Drive in Swansea, Illinois. Mark

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purchased the home with money he inherited from his deceased mother. Sandra signed a Waiver of Homestead Rights and Exemptions with regard to Mark's new home.

22. Both parties proffered an appraisal to the Court of the fair market value of the marital home located at 800 Catawba Avenue, Swansea, Illinois. This house has no mortgage and is "paid off." Sandra's appraisal was dated January 13, 2015 and valued the home at $105,000.00. Mark's appraisal was dated June 30, 2015 and valued the home at $125,000.00. Sandra's appraisal only included comparable homes located in Belleville, Illinois. Mark's appraisal only included comparable homes located in Swansea, Illinois. The Court therefore, accepts Mark's appraisal because it is slightly newer and because it compares homes within the town in which the marital home is located.

23. The parties share the following items of marital property:

Vehicles:	Value:
2000 Honda Odyssey	$2,156.00
2000 Dodge Caravan	$400.00 (previously disposed of by Sandra without Mark's input)
1990 Buick Regal (used by non-minor son)	$928.00
2011 Chevrolet Cruse	Value unknown (Sandra bought vehicle for non-minor daughter without consent or agreement of Mark)
2000 Buick Park Avenue (Mark asserts this is non-marital)	unknown but de minimus

Real Estate:	Value:
800 Catawba Avenue, Swansea, Illinois	$125,000.00

Retirement & Investment Accounts:	(Approximate) Value:

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Sandra's Vanguard Roth IRA	$3,543.00
Sandra's DS Vespers 401(k)	$2,361.00
Sandra's DS Vespers Roth 401(k)	$2,059.00
Sandra's DS Vespers Retirement Match	$2,172.00
Sandra's Northwestern Mutual Individual Retirement Annuity	$68,884.00
Mark's American Funds 401(k)	$329,207.00
Mark's Vanguard IRA	$8,557.00
Mark's Vanguard Roth IRA	$1,986.00
Mark's 50 shares of William, Tao stock	unknown but de minimus

Assets specifically held for the Children

Various 529 Accounts
Children's Savings Bonds (cashed and unaccounted for by Sandra)
Children's CDs at Associated Bank

Insurance	Value:
Sandra's Northwestern Mutual Life Ins. Policy on Sandra's life	$534.00
Sandra's Northwestern Mutual Life Ins. Policy on the children's lives	$226.00 (combined)

24. The parties do not have a serious dispute as to the division of property herein, with the exception of Mark's request that the property be divided on a 50/50 basis and Sandra's proposal that the property be divided on a 65/35 basis. The Court, having had the benefit of testimony of expert Michele Laws as to the future impact of division of marital assets, and having considered the length of the marriage and the disparity in income and earning potential between the parties, finds that it is appropriate in this matter to divide the assets in an equal manner, with 50% of the marital assets being awarded to Sandra and 50% being awarded to Mark.

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25. The Court notes that under various temporary orders, Mark has paid all utilities, all real estate taxes, and all insurance associated with the marital residence. Mark has also paid all vehicle insurance premiums, as well as various other expenses associated with the marital residence. In addition, from January to July of 2015, Mark paid every bill associated with the children's extracurricular activities, tuition, and the children's medical expenses.

26. Sandra wants Mark to pay her attorneys' fees. "As a general rule, attorney fees are the primary responsibility of the party for whom the services are rendered." *In re Marriage of Krivi*, 283 Ill.App.3d 772, 780, 670 N.E.2d 1162 (5th Dist. 1996). A party seeking attorney fees must show two things: (1) an inability to pay, and (2) the ability of the other spouse to pay. *In re Marriage of Bussey*, 108 Ill.2d 286, 299-300, 483 N.E.2d 1229, 1235 (Ill. 1985). "Financial inability exists where payment would undermine the economic stability of the spouse incurring the debt." *In re Marriage of Orlando*, 218 Ill.App.3d 312, 323, 577 N.E.2d 1334, 1343 (1st Dist, 1991). In this case, the Court finds that Sandra has sufficient income and marital assets to pay her own attorneys' fees without undermining her economic stability.

27. That as these proceedings were pending, Mark paid approximately $1,904.00 as and for a joint Associated Bank credit card (#-5199) of which Mark did not use since the parties were separated. At the time of the parties' separation in August 2014, the card had an approximate balance of $2,484.70 and a credit line of only $4,000.00. As of the November 2014 statement, Sandra had increased the credit line to $6,000.00 (without Mark's approval or consent) and the approximate

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balance had increased to $3,876.60. (Plaintiff's #16). That Mark and Sandra each have other credit cards in their names that were used by each of them solely after the parties separated.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

A. That the bonds of matrimony between Petitioner, Sandra D. Dahm-Schell, and Respondent, Mark R. Schell, are dissolved and a Judgment of Dissolution of Marriage is hereby awarded and entered herein.

B. That the parties are awarded equal allocation of significant parental responsibilities and are awarded parenting time as set forth in the Judgment of Allocation of Parental Responsibilities and Parenting Order also entered this date. A copy of said Judgment of Allocation of Parental Responsibilities and Parenting Order are attached hereto and incorporated by reference herein.

C. That having considered the statutory factors in 750 ILCS 5/504, Mark shall pay $22,867.96 per year or $1903.66 per month to Sandra in maintenance on a permanent basis. This monthly amount shall be paid directly to Sandra (one-half on the 15th of the month and one-half on the 30th of every month.) Further, no retroactive maintenance shall be awarded in light of the temporary orders of support.

D. That the monthly amount of child support paid by Defendant to Plaintiff will be $1,266.16 per month, said sum to be paid directly to Sandra (one-half on the 15th of the month and one-half on the 30th of every month.) Further, no retroactive child support shall be awarded since Mark paid Sandra more than the statutory amount for expenses during the pendency of these proceedings.

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E. That Mark shall provide health insurance for the minor children and the parties will equally divide any costs not covered by insurance.

F. That Sandra shall claim the three older children for the 2015 tax year and the Mark shall claim the two youngest children for the 2015 tax year. Thereafter, the parties shall alternate with Mark claiming the three older children in even numbered tax years and the Sandra claiming the two younger children in even numbered tax years and vice versa in odd numbered tax years. When the oldest child is no longer eligible to be claimed for tax exemption purposes, the parties will each claim two of the children. Each parent will be allowed to claim one of the younger children and one of the two older children at that time. When the second oldest child is no longer eligible to be claimed for tax exemption purposes, the parties shall alternate with Mark claiming the two older children in even numbered tax years and Sandra claiming the youngest child in even numbered tax years and vice versa in odd numbered tax years. When the third oldest child is no longer eligible to be claimed for tax exemption purposes, the parties will each claim one child until the fourth oldest is no longer eligible to be claimed for tax exemption purposes. At that time, the parties will alternate claiming their youngest child with Mark claiming her in even numbered tax years and Sandra claiming her in odd numbered tax years.

G. That the issue of post-minor educational and support expenses for the minor children is reserved. Each child's §529 account shall be maintained for use toward said minor child's educational expenses incurred after graduation from high school. Neither party shall be permitted to remove any funds from any minor child's §529 account for any other purpose.

H. That the CDs at Associated Bank, of which Sandra is the custodian, shall be maintained for use of the children. Neither party shall be permitted to remove any funds from

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these CDs. They are awarded to the parties' children for use when each CD matures and/or when each child reaches the age of 18.

I. That Sandra shall be awarded all right, title and interest in and to the parties' marital residence located at 800 Catawba Avenue, Swansea, Illinois and Sandra shall pay Mark for one-half of the equity or $62,500.00. Sandra shall also pay any associated debt of said residence. Specifically, Sandra shall pay the home equity loan due to her dissipation of the money obtained from the home equity loan for which she cannot account. The home equity loan was taken out in the amount of $15,899.91. Since this is more than her half of total dissipation (which is $10,429.45), the Court will account for the difference of $5,470.46 now owed to Sandra elsewhere.

J. That pursuant to the Waiver of Homestead Rights and Exemptions Sandra executed, Mark shall be awarded all right, title, and interest in and to the home he purchased with non-marital funds at 304 Lake Lorraine Drive in Swansea, Illinois.

K. That Sandra shall be awarded the 2000 Honda Odyssey and 2011 Chevrolet Cruse (which she purchased for the parties' oldest daughter after the parties had separated) and any associated liability for either vehicle. Since Sandra is now awarded the asset for which she used $3000 of the martial assets to purchase, Sandra owes Mark $1500.00. (This brings the amount owed to Sandra above to $3,970.46.) Each party shall execute any documents necessary to remove the other party's name from the title, if necessary.

L. That Mark shall be awarded the 2000 Buick Park Avenue and any associated liability. Each party shall execute any documents necessary to remove the other party's name from the title, if necessary.

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M. That the parties' son, Anthony Schell, shall be awarded the 1998 Buick Regal. Each party shall execute any documents necessary to transfer the vehicle to the party's son.

N. Each party is awarded all items of personal property pursuant to the Agreed Order entered April 27, 2016. Each party is also awarded any other personal property in their current possession free and clear of any claim by the other.

O. Each party is awarded any and all bank accounts in their own names.

P. Each party is to pay the credit card indebtedness currently in their separate names and shall indemnify and hold the other party harmless therefrom.

Q. That Mark shall be awarded his American Funds 401k through his employer, William, Tao & Associates. However, Sandra shall be awarded one-half of said 401k as of the date of this Judgment of Dissolution of Marriage less the following:

1) $58,529.54 (which represents $62,500.00 as and for the equity in the marital home minus $3,970.46 to offset the fact that Sandra is taking the entire home equity loan as explained above);

2) One-half of the value as of the date of this dissolution of marriage of Sandra's Plaintiff's Northwestern Mutual Variable Annuity/IRA (#2021920l);

3) One-half of the value as of the date of this dissolution of marriage of Sandra's T. Rowe Price Retirement investments (DS Vespers 401(k), Roth 401(k), and retirement match accounts) held through her employer;

4) One-half of the value as of the date of this dissolution of marriage of Sandra's Vanguard Roth IRA account (#-5098);

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5) One-half of the cash value as of the date of this dissolution of marriage of Sandra's Northwestern Mutual life insurance policy (of which she is the insured) and

6) One-half of the cash value as of the date of this dissolution of marriage of Sandra's Northwestern Mutual life insurance policy (of which the parties' children are the insured),

Any necessary paperwork shall be completed by Sandra's counsel to effectuate this transfer and Marks shall cooperate with said transfer.

R. That Sandra shall be awarded the other half of all of her investment accounts specified in Paragraph Q, as well as the entire amount of her Fidelity Investment through her previous employer Y98 IRA, which the Court finds is non-marital.

S. That Mark is hereby awarded his Vanguard Rollover IRA and his Vanguard Roth IRA (not his inherited IRAs). However, Sandra shall receive one-half of said accounts as of the date of this dissolution of marriage. Any necessary paperwork shall be completed by Mark's counsel to effectuate this transfer.

T. That the Defendant is awarded all of his inherited funds, including his Vanguard Inherited IRA, his Vanguard Inherited Roth IRA, his Bank of America account (#8827), his Bank of America Money Market Savings account (#4302), and his TD Ameritrade account.

U. That Defendant is awarded his 50 shares of stock with William, Tao & Associates with an unknown, but de minimus, value.

V. That each party shall be responsible for the credit card debt on the credit card accounts held in their own names.

W. That each party shall be responsible for their own remaining attorney's fees.

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X. That Judgment is entered in favor of attorney John E. Lee of Aubuchon & Lee, P.C. and against Petitioner, Sandra D. Dahm-Schell in the amount of $6,676.00 for past attorney's fees already awarded after hearing and argument.

Y. That this Court expressly retains jurisdiction of this cause for the purpose of enforcing all the terms of this Judgment of Dissolution of Marriage.

SO ORDERED this 11th day of October, 2016.

JULIA R. GOMRIC, Associate Circuit Judge

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IN THE TWENTIETH JUDICIAL CIRCUIT
ST CLAIR COUNTY, ILLINOIS

SANDRA DAHM SCHELL,

Petitioner,

V.

MARK SCHELL,

Respondent.

14D637

AMENDED JUDGMENT
AND RULINGS ON MOTIONS FOR CLARIFICATION & TO RECONSIDER

The Court has heard argument and has reviewed the parties' motions for clarification and to reconsider the Court's 10/11/16 Order and makes the following amendments to the Judgment, as well as the following rulings.

Husband seeks an assignment of the credit card debt. The Court intends to split that debt equally, especially in light of the expenses paid by Husband during the litigation. Pursuant to Exhibit A attached to his 11/10/16 motion for clarification, however, the Court finds that after it credits Husband with those payments, Wife owes Husband $3,838.44 in relation to the credit card debt.

Given this Court's order that Wife is completely responsible for the home equity line of credit, she must refinance the debt to remove Husband's name within the next 90 days.

That the remainder of the Husband's motions for clarification and to reconsider are denied.

That regardless of whether Husband's pending motion for modification of maintenance and child support is granted, the dividends from his inheritance shall be considered and added to his monthly income for maintenance and child support purposes.

Husband shall also obtain and maintain a life insurance policy in the amount of $500,000 for Wife's benefit to secure the maintenance and child support.

Husband shall also provide health insurance for all the children, including all minors and non-minors, for as long as he is able pursuant to the benefits available to him at his employment.

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That the remainder of the Wife's motions for clarification and to reconsider are denied.

SO ORDERED this 18th day of December, 2017.

Hon. Julia R. Gomrig

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IN THE TWENTIETH JUDICIAL CIRCUIT
ST CLAIR COUNTY, ILLINOIS

SANDRA DAHM SCHELL,	)	
	)	
Petitioner,	)	
	)	
V.	)	14D637
	)	
MARK SCHELL,	)	
	)	
Respondent.	)	

SECOND AMENDED JUDGMENT
AND RULINGS ON MOTIONS FOR CLARIFICATION & TO RECONSIDER

The Court has heard argument and has reviewed the parties' motions for clarification and to reconsider the Court's 10/11/16 Order and makes the following amendments to the Judgment, as well as the following rulings.

Husband seeks an assignment of the credit card debt. The Court intends to split that debt equally, especially in light of the expenses paid by Husband during the litigation. Pursuant to Exhibit A attached to his 11/10/16 motion for clarification, however, the Court finds that after it credits Husband with those payments, Wife owes Husband $3,838.44 in relation to the credit card debt.

Given this Court's order that Wife is completely responsible for the home equity line of credit, she must refinance the debt to remove Husband's name within the next 90 days. Any credit given to her for the home equity is intended to be removed from the original order.

That the remainder of the Husband's motions for clarification and to reconsider are denied.

That regardless of whether Husband's pending motion for modification of maintenance and child support is granted, the dividends from his inheritance shall be considered and added to his monthly income for maintenance and child support purposes.

Husband shall maintain his life insurance policy through his current employer and shall name Wife as the beneficiary so long as he is obligated to pay any familial support. Husband shall also cooperate with all appropriate steps for Wife to obtain at her expense a new life insurance policy to secure

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future child support, any future educational expenses for the minor or emancipated children, and maintenance.

Husband shall also provide health insurance for all the children, including all minors and non-minors, for as long as he is able pursuant to the benefits available to him at his employment.

That the remainder of the Wife's motions for clarification and to reconsider are denied.

SO ORDERED this 28th day of December, 2017.

Hon. Julia R. Gomrie

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served upon the attorneys of record of all parties to the above cause by:

- ☐ Facsimile: addressed to such attorneys at their business address as disclosed by the pleadings of record herein.
- ☐ Hand delivery: addressed to such attorneys at their business address as disclosed by the pleadings of record herein.
- ☐ U.S. Mail: enclosing the same in an envelope addressed to such attorneys at their business address as disclosed by the pleadings of record herein, with postage fully prepaid, and by depositing with the U.S. Mail at 23 Public Square, Suite 230, Belleville, IL. 62220.
- ☒ E-Mail: transmitting the same addressed to such attorneys at their business e-mail address as disclosed by the pleadings of record herein.

this: 6 day of August, 2019.

Dustin Hudson
Neubauer, Johnston & Hudson
955 Lincoln Highway
Fairview Heights, IL 62208
Telephone: (618) 632-5588
Fax: (618) 632-5789
E-Mail: dhudson@neubauerlaw.org
Attorney for Respondent/Appellee

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IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

IN RE THE MARRIAGE OF:

SANDRA DAHM SCHELL,

Petitioner,

vs.

MARK R. SCHELL,

Respondent.

No. 09-D-230

FILED
ST. CLAIR COUNTY
SEP 06 2016
CIRCUIT CLERK

ORDER

This matter coming before the court on May 3, 2016, Petitioner appearing in person and with her attorney, Rhonda Fiss, Respondent appearing in person and with his attorney, Dustin Hudson. Testimony from the parties and witnesses heard, the Court having jurisdiction over the parties and the subject matter FINDS as follows:

A. The Court declines to include Respondent's inherited, mandatory retirement income when calculating maintenance and child support.

Parties are ordered to calculate child support for the two remaining children based on this Court's ruling.

JUDGE PATRICIA KIENLAN

cc: Fiss
Hudson

Ex. A

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State of Illinois

IN THE TWENTIETH JUDICIAL CIRCUIT, ST. CLAIR COUNTY, BELLEVILLE, ILLINOIS

Sandra Dahm-Schell
PLAINTIFF

vs.

Mark Schell
Defendant

No. 14-D-637

FILED
ST CLAIR COUNTY
FEB 18 2020
Kathleen A. Clay
CIRCUIT CLERK
45

ORDER

This cause coming before the Court, the Court being fully advised in the premises and having jurisdiction of the subject matter,

The Court finds: .....

IT IS THEREFORE ORDERED: Cause comes before the court on oral motion of Petitioner's counsel to have question for appeal certified. After explanation to the court, & neither party objecting to same, the court hereby certifies the following question for appeal:

"Whether inherited mandatory retirement distributions are income for purposes of child support & maintenance calculations."

the court finds that the order entered September 5, 2018, involves a question of law as to which there is substantial ground for difference of opinion & that an immediate appeal from the order may materially advance the ultimate termination of the litigation

Attorneys:

.....
Plaintiff

.....
Defendant

Enter:

.....
Judge

White—CC, Yellow—Plaintiff, Pink—Defendant

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CC-14-95

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5-20-0099

NO: 5-20-_____

IN THE APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

IN RE THE MARRIAGE OF:

SANDRA D. DAHM-SCHELL,

Petitioner,

vs.

MARK R. SCHELL,

Respondent.

E-FILED
Transaction ID: 5-20-0099
File Date: 3/18/2020 7:16 PM
John J. Flood, Clerk of the Court
APPELLATE COURT 5TH DISTRICT

St. Clair County Case No: 14-D-637
Appeal No: _____

APPLICATION FOR LEAVE TO APPEAL UNDER SUPREME COURT RULE 308

Now comes Petitioner, Sandra D. Dahm-Schell, by and through her attorneys, The Law Office of Rhonda D. Fiss, P.C., and for her Application for Leave to Appeal under Supreme Court Rule 308, respectfully submits the following:

I. PERTINENT FACTS:

Petitioner filed for dissolution in 2014. In 2015, Respondent inherited approximately $614,000.00 from his mother. The money was in retirement accounts that required mandatory periodic withdrawals. The parties were awarded a Judgment of Dissolution of Marriage on October 11, 2016. Petitioner was awarded permanent maintenance of $1,905 per month and child support of $1,266.16 per month for the parties' then three minor children.

On March 28, 2017, Respondent filed a pleading titled "Petition to Modify Child Support" which prayed for a reduction in both child support and maintenance on the basis that his employment pay had been reduced by 20%. In determining Respondent's initial child support obligation, the trial court included the dividend Respondent earned on his inherited money, but not the mandatory withdrawals he had taken from the accounts in 2015 and 2016.

At the hearing on Respondent's petition, Petitioner argued that the sums of money Respondent had received from monthly mandatory withdrawals from his inherited retirement accounts should be included in his income for the purpose of calculating child support and

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maintenance, which would have eliminated any basis for a reduction of those obligations. Respondent argued that mandatory withdrawals from a retirement account should not be included as income.

On September 5, 2018, the trial court entered an order as follows:

"A. The Court declines to include Respondent's inherited mandatory retirement income when calculating maintenance and child support." (Ex. "A")

Petitioner filed an appeal from the above order, which was dismissed on February 26, 2020, for lack of jurisdiction. (Case No: 5-19-0075). On February 18, 2020, the trial court entered an order certifying the following question for consideration on appeal:

"Whether inherited mandatory retirement distributions are income for purposes of child support and maintenance calculations."

II. The resolution of the above question will materially advance this litigation because once the parties and the trial court know whether inherited mandatory retirement distributions are to be included in Respondent's income, the calculations for child support and maintenance can be done, which will resolve the issue of whether Respondent is entitled to a reduction of his child support and maintenance obligations. In addition, Illinois courts do not have an appellate ruling on the issue of whether inherited mandatory retirement distributions should be included as income for the purpose of child support and maintenance calculations, which will assist practitioners within this state who may be confronted with this issue in the future.

III. Petitioner requests that the Court grant her leave to appeal under SCR 308 and that the Record on Appeal formerly filed under 5-19-0075 be transferred to the new case on appeal, if this application is granted.

IV. In support of this application for leave to appeal, Petitioner directs the Court to the following documents in the record on appeal from St. Clair County, No. 14-D-637:

C-382

C-505

C-512

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V. The orders that form the basis of this appeal and whichare to be included in the record are attached hereto as:

Exhibit "A"-trial court's order of September 3 2018;

Exhibit "B"-trial court's order of February 18, 2020 certifying question for appeal;

VI. The parties have previously briefed these issues in the former case on appeal, and shortening the time for the filing of brief will not prejudice either party and will expedite the appeal process."

WHEREFORE, Petitioner, Sandra D. Dahm-Schell, respectfully prays as follows:

A. That she be granted leave to appeal the trial court's order of 2/18/20 under Supreme Court Rule 308;

B. That the record on appeal for Case #14-D-637, formerly Appeal No: 5-19-0075 be transferred into the new case on appeal;

C. That the parties' time to file briefs be shortened pursuant to Supreme Court Rule 343;

D. That Petitioner be allowed to supplement the record on appeal with the trial court's order of February 18, 2020;

E. For such other and further relief as the Court deems just and proper.

BY:

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Attorney for Petitioner

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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing document was served upon the attorneys of record of all parties to the above cause by:

- ☐ Facsimile: addressed to such attorneys at their business address as disclosed by the pleadings of record herein.
- ☐ Hand delivery: addressed to such attorneys at their business address as disclosed by the pleadings of record herein.
- ☐ U.S. Mail: enclosing the same in an envelope addressed to such attorneys at their business address as disclosed by the pleadings of record herein, with postage fully prepaid, and by depositing with the U.S. Mail at 23 Public Square, Suite 230, Belleville, IL. 62220.
- ☒ E-Mail: transmitting the same addressed to such attorneys at their business e-mail address as disclosed by the pleadings of record herein.

this 18th day of March, 2020.

Dustin Hudson
Neubauer, Johnston & Hudson
955 Lincoln Highway
Fairview Heights, IL 62208
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Attorney for Respondent

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FILED
June 02, 2020
APPELLATE
COURT CLERK

5-20-0099

In re MARRIAGE OF SANDRA D. DAHM-SCHELL, Petitioner-Appellant, and MARK R. SCHELL, Respondent-Appellee.	St. Clair County Trial Court/Agency No.: 14D637

ORDER

This cause coming on to be heard on appellant's application for leave to appeal pursuant to Supreme Court Rule 308, and the court being advised in the premises:

IT IS THEREFORE ORDERED as follows:

That appellant's application for leave to appeal pursuant to Supreme Court Rule 308 is GRANTED;

That appellant's request to shorten briefing time is DENIED and appellant's brief is due 35 days from the date of this order;

That appellant's request to transfer the record on appeal from Case 5-19-0075 to the current appeal is hereby ALLOWED and the request to supplement the record on appeal with the February 18, 2020, order is hereby ALLOWED.

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5th JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE 20th JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

SANDRA D DAHM-SCHELL

Plaintiff/Petitioner

V.

MARK R SCHELL

Defendant/Respondent

Appellate Count No: **5-19-0075**
Circuit Count No: **14-D-0637**
Trial Judge: **PATRICIA KIEVLAN**

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Plaintiff/Petitioner

V.

MARK R SCHELL

Defendant/Respondent

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5-19-0075

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Transaction ID: 5-19-0075
File Date: 4/12/2019 4:05 PM
John J. Flood, Clerk of the Court
APPELLATE COURT 5TH DISTRICT

SANDRA D DAHM-SCHELL
Plaintiff/Petitioner

Appellate Court No: **5-19-0075**
Circuit Court No: **14-D-0637**
Trial Judge: **PATRICIA KIEVLAN**

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5-19-0075

E-FILED
Transaction ID: 5-19-0075
File Date: 4/12/2019 4:04 PM
John J. Flood, Clerk of the Court
APPELLATE COURT 5TH DISTRICT

SANDRA D DAHM-SCHELL

Plaintiff/Petitioner

Appellate Count No: **5-19-0075**

Circuit Count No: **14-D-0637**

Trial Judge: **PATRICIA KIEVLAN**

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Defendant/Respondent

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ST. CLAIR COUNTY, ILLINOIS

SANDRA D DAHM-SCHELL

Plaintiff/Petitioner

Appellate Court No: **5-20-0099**
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Trial Judge: **PATRICIA KIEVLAN**

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Defendant/Respondent

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 22 pages.

/s/ Dustin S. Hudson
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Attorney for Appellant, Mark Schell

CERTIFICATE OF SERVICE

The undersigned certifies that the Appellant's Brief was submitted for filing to the Illinois Supreme Court Clerk's Office by Electronic means on April 26, 2021, and that a copy of same was sent by electronic means to opposing counsel's email address provided below:

Ms. Rhonda D. Fiss
Attorney at Law
jdd@fisslawoffice.com

/s/ Dustin S. Hudson

Under the penalties as provide d by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in the above are true and correct.

/s/ Dustin S. Hudson
Dustin S. Hudson

E-FILED
4/26/2021 1:08 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK