

No. 1-08-3500

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> THE MARRIAGE OF CHRISTINE GURDA,)	Appeal from the
)	Circuit Court of
Petitioner-Appellee,)	Cook County.
)	
and)	No. 94 D 330753
)	
JOSEPH GURDA,)	Honorable
)	Barbara A. Riley
Respondent-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hall and Justice Lampkin concurred in the judgment.

ORDER

HELD: Where circuit court incorrectly found maintenance obligation contained in dissolution judgment to be nonmodifiable maintenance in gross instead of rehabilitative maintenance subject to modification, the circuit court's judgment was reversed and cause was remanded for further consideration of postjudgment motion to modify maintenance obligation.

This appeal arises out of a postjudgment motion filed by respondent, Joseph Gurda, seeking to modify a maintenance provision contained in the judgment dissolving Joseph's marriage to petitioner, Christine Gurda. Joseph sought to terminate or reduce his maintenance obligation because he had been injured and his earning capacity had been diminished. The circuit court dismissed Joseph's motion without an evidentiary hearing, finding that Joseph's obligation was for

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“maintenance in gross” and therefore could not be modified. For the following reasons, we reverse and remand for further proceedings.

I. BACKGROUND

Joseph and Christine were married in 1975, and in 1994 Christine filed a petition for dissolution of the marriage. After a trial, the circuit court entered a written order dissolving the parties’ marriage on August 8, 1997. That 32-page order contained a number of findings and provisions relevant to this appeal.

After reviewing the evidence of the parties’ financial history, the circuit court found that Joseph had completed a number of transactions during the marriage without Christine’s knowledge. For example, Joseph had entered into personal injury and workers’ compensation settlements without informing Christine. He also obtained a home equity loan without Christine’s knowledge, and secretly transferred the proceeds from two other real estate transactions to a personal bank account. The circuit court further found that Joseph had funneled these and other funds toward personal investments in various corporations located in the Cayman Islands. In total, the circuit court determined that Joseph had dissipated a net total of \$188,100.57 in marital property.

These findings were utilized by the circuit court to support its division of the parties’ marital property and to provide for Christine’s support. Specifically, the circuit court found that a disputed individual retirement account (IRA) held in Joseph’s name was marital property. In a section entitled “Property Distribution,” the circuit court tallied the parties’ assets and liabilities, accounted for Joseph’s dissipation of marital assets, and found that “[t]here is due from respondent the sum of \$218,927.80 in order to satisfy the Courts’ [*sic*] distribution as herein before set forth. **Judgment**

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will be entered thereon and respondent is ordered to pay one half of said sum to petitioner within 120 days of the date of entry of judgment herein and the remaining one-half 120 days thereafter.” (Emphasis in original.)

Thereafter, the circuit court considered the issue of maintenance in a separately titled section of its order. The court initially stated that “[u]nder the facts and circumstances presented here the award of marital property to Mrs. Gurda provides for her long term needs.” The circuit court noted, however, that this conclusion assumed that Joseph would comply with the property distribution provisions contained in the order. Ultimately, the circuit court concluded that the circumstances of the case indicated that Christine was entitled to \$400 biweekly in limited, rehabilitative maintenance. The circuit court’s decision was supported by the observation that “[a]bsent the sums necessary to equalize the distribution ordered by this Court or until it is satisfied by Mr. Gurda, Mrs. Gurda will have a short fall [*sic*] of income to expenses.” With respect to these biweekly payments, the court ordered that:

“such sums shall be paid by an order of withholding and shall commence instanter. They shall continue to be paid until the whole of the sum of \$218,927.80 in satisfaction of her property interest is paid to her. That such maintenance is also subject to her death or remarriage or her living with another on a continuing conjugal basis. These maintenance payments are not to be considered a credit toward the \$218,927.80 ordered to be paid.”

Finally, the circuit court also ordered that Joseph was to surrender his passport to the clerk of the circuit court until such time as the terms of the dissolution judgment were satisfied.

Joseph appealed from the circuit court's judgment, challenging the determination that the IRA was marital property, that he had dissipated marital assets, and that Christine was entitled to maintenance in addition to the property settlement. Joseph also challenged one of the circuit court's evidentiary rulings, as well as its order regarding the surrender of his passport. This court rejected each of Joseph's first four arguments, but we did find the order requiring Joseph to surrender his passport to be an abuse of discretion. *Gurda v. Gurda*, 304 Ill. App. 3d 1019, 1029-30 (1999).¹ With respect to rehabilitative maintenance, this court affirmed the circuit court's order after finding that the award of maintenance would allow Christine to maintain her standard of living until she further developed her skills and Joseph fulfilled his obligations under the property distribution. In addition, this court found that the maintenance provision would provide Joseph with an incentive to timely complete the property distribution. *Gurda*, 304 Ill. App. 3d at 1027-28.

Shortly after this court's prior decision, Joseph filed a bankruptcy petition. The parties do not dispute that while Christine was listed as a creditor in the petition, she did not take any part in the bankruptcy proceeding. They also agree that the \$218,927.80 marital property settlement contained in the dissolution judgment was discharged by order of the bankruptcy court on November 29, 2000.

On May 2, 2008, Joseph filed a postjudgment motion in the circuit court seeking to modify the \$400 biweekly maintenance provision contained in the dissolution judgment. In the motion,

¹ Although neither party has referenced this court's prior opinion, and the opinion is not included in the record on appeal, "a court of review may take judicial notice of prior litigation." *Sundance Homes, Inc. v. County of DuPage*, 195 Ill.2d 257, 275 (2001).

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Joseph asserted that he had experienced a substantial change in circumstances affecting his ability to pay maintenance to Christine. Specifically, Joseph contended that he had sustained an injury and as a result was no longer able to work full-time. Indeed, Joseph's motion stated that he had been approved for "Social Security Disability." In light of these facts, Joseph requested that the order for maintenance be terminated, reduced, or abated.

Christine responded to Joseph's motion not by challenging his assertions of a change in financial circumstances, but by arguing that the \$400 biweekly maintenance provision was actually "maintenance in gross." Specifically, Christine asserted that the dissolution judgment called for a \$218,927.80 marital property settlement that could be paid over time in \$400 biweekly payments. Citing to caselaw holding that such property settlements can not be modified, Christine asked that Joseph's motion be denied. Christine acknowledged that the \$218,927.80 property settlement obligation had been discharged in bankruptcy, but noted that it had still not been "paid." Christine opined that Joseph had therefore still not fully complied with the terms of the dissolution judgment and he should therefore continue to pay \$400 in nonmodifiable biweekly maintenance in gross until the original property settlement amount was satisfied.

In a November 25, 2008, order the circuit court held that Joseph's payments to Christine were "non-modifiable maintenance in gross." The court went on to find that all property transfers and all payments by Joseph to Christine "are to be credited against the amount due." Finally, Joseph's motion was dismissed. Joseph timely appealed.

II. ANALYSIS

On appeal, Joseph asks this court to reverse the circuit court's order and extinguish his

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maintenance obligation, or, alternatively, to remand for an evidentiary hearing on his motion. He contends that the trial court incorrectly determined his maintenance obligation to be non-modifiable maintenance in gross and improperly “revived” the property distribution that had been discharged in bankruptcy by ordering that the maintenance payments should be “credited against the amount due.”

We initially note that the nature of Joseph’s maintenance obligation to Christine – whether it is properly described as being rehabilitative or in gross – is arguably a question governed by the law of the case doctrine. The law of the case doctrine generally bars relitigation of an issue previously decided in the same case. *Krautsack v. Anderson*, 223 Ill. 2d 541, 552 (2006). Thus, “‘the determination of a question of law by the Appellate Court on the first appeal may, as a general rule, be binding upon it on the second appeal.’” *Krautsack*, 223 Ill. 2d at 552, quoting *Zerulla v. Supreme Lodge Order of Mutual Protection*, 223 Ill. 518, 520 (1906). Notably, this doctrine includes both a court’s explicit decisions and those made by necessary implication. *Commonwealth Edison Co. v. Illinois Commerce Commission*, 368 Ill. App. 3d 734, 742 (2006), citing *In re Marriage of Connors*, 303 Ill. App. 3d 219, 224 (1999).

As noted above, in the prior appeal in this case Joseph challenged the circuit court’s award of maintenance. In affirming the circuit court, this court analyzed the award as “rehabilitative maintenance.” *Gurda*, 304 Ill. App. 3d at 1027. At the least implicit in this analysis is a finding that the award was *not* maintenance in gross, and therefore the law of the case doctrine bars the parties from contesting the issue in this appeal. “The doctrine, however, merely expresses the practice of courts generally to refuse to reopen what has been decided; it is not a limit on their power.”

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Commonwealth Edison Co., 368 Ill. App. 3d at 742. Because the questions at issue in this appeal were not directly addressed in the prior appeal, we will not apply the law of the case doctrine here.

A. Standard of Review

In this case, the circuit court never considered any evidence or addressed the merits of Joseph's motion. Instead, the circuit court's decision was based upon its construction of the original dissolution order filed in this case. Our review therefore addresses a matter of law rather than a finding of fact. *In re Marriage of Braunling*, 381 Ill. App. 3d 1097, 1101-02 (2008) (interpretation of a statute presents a question of law); *In re Marriage of Avery*, 251 Ill. App. 3d 648, 652 (1993) (construction of prior court order a question of law). We review questions of law *de novo*. *In re Marriage of Thompson*, 357 Ill. App. 3d 854, 857 (2005).

B. Statutory Framework

The resolution of this appeal necessarily involves the Illinois Marriage and Dissolution Act (Act), which, among other things, attempts to provide adequate procedures for the solemnization and dissolution of marriage and to make adequate provision for the needs of spouses and children after marriage. 750 ILCS 5/102(1)(2)(5) (West 2008). Of particular relevance here are those portions of the Act that relate to the proper division of marital property, the provision of maintenance, and the subsequent modification of property division or maintenance orders.

Specifically, section 503(d) of the Act requires the circuit court to divide marital property in any proceeding for dissolution of marriage and provides a host of factors that must be considered in such a division. 750 ILCS 5/503(d) (West 2008). That list of factors notably includes "the dissipation by each party of the marital or non-marital property." 750 ILCS 5/503(d)(2) (West 2008).

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Section 510(b) of the Act further states that, with respect to a judgment for dissolution of marriage, the “provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this State.” 750 ILCS 5/510(b) (West 2008). Section 510(b) has been widely construed to mean that any property rights created by a judgment of dissolution become vested when the judgment is final, and such property distributions are generally not modifiable or revocable. *In re Marriage of Hall*, 404 Ill. App. 3d 160, 164 (2010); *In re Marriage of Hubbard*, 215 Ill. App. 3d 113, 116 (1991).

In turn, section 504(a) of the Act grants the circuit court authority, after considering a number of additional factors, to award maintenance. 750 ILCS 5/504(a) (West 2008). That section states:

“In a proceeding for dissolution of marriage or legal separation or declaration of invalidity of marriage, or a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a temporary or permanent maintenance award for either spouse in amounts and for periods of time as the court deems just, without regard to marital misconduct, in gross or for fixed or indefinite periods of time, and the maintenance may be paid from the income or property of the other spouse ***.” 750 ILCS 5/504(a) (West 2008).

Finally, section 510(a-5) of the Act states that orders for maintenance may be modified “only upon a showing of a substantial change in circumstances[,]” while section 510(c) provides that:

“[u]nless otherwise agreed by the parties in a written agreement set forth in the judgment or otherwise approved by the court, the obligation to pay future maintenance is terminated upon

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the death of either party, or the remarriage of the party receiving maintenance, or if the party receiving maintenance cohabits with another person ***.” 750 ILCS 5/510(a-5)(c) (West 2008).

Construing all of these separate statutory sections together, it has been recognized that in Illinois “a support obligation can take several forms, including: (1) periodic maintenance, payments for an indefinite period in an indefinite amount subject to modification in response to a change in the parties' circumstances; (2) maintenance in gross, a fixed sum of money, payable in installments for a fixed period of time, that is nonmodifiable; and (3) property settlements in lieu of maintenance, a lump sum payment, often payable in installments, given in exchange for a waiver of rights, including periodic maintenance, that is nonmodifiable.” *In re Marriage of Adamson and Cosner*, 308 Ill. App. 3d 759, 769 (1999).

More specifically courts have recognized that courts may award limited, temporary rehabilitative maintenance if the “ ‘receiving spouse has the present or future ability to become self sufficient or the ability to acquire skills that would allow employability at an appropriate income level, but to do so would require some time.’ ” *In re Marriage of Awan*, 388 Ill. App. 3d 204, 208 (2009), quoting *In re Marriage of Brackett*, 309 Ill. App. 3d 329, 340 (1999). Such periodic, rehabilitative maintenance is subject to subsequent modification. *Blum v. Koster*, 235 Ill. 2d 21, 35-36 (2009). On the other hand, our supreme court has held that maintenance in gross is in the nature of a property settlement, creates a vested interest in the recipient, and is therefore nonmodifiable. *In re Marriage of Freeman*, 106 Ill. 2d 290, 296-98 (1985).

C. Construction of Original Dissolution Order

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With the above principals in mind, it is clear that in dismissing Joseph's motion to modify the circuit court incorrectly interpreted the nature of the \$400 biweekly maintenance provision contained in the original dissolution judgment.

First, the original dissolution judgment contained a separate section in which the parties' marital property was evaluated and divided. The order clearly analyzed this question in light of the factors contained in section 503(d) of the Act, including the evidence of Joseph's dissipation of assets, before concluding that Joseph owed Christine \$218,927.80. Judgement was entered in that amount and Joseph was ordered to pay Christine in two installments. Christine's rights to this property distribution vested at that time, and this portion of the order was not modifiable. 750 ILCS 5/510(b) (West 2008); *In re Hall*, 404 Ill. App. 3d at 164. We do note that Joseph's obligation to pay this amount was later discharged in the bankruptcy proceeding.

The order continues with a separate section considering maintenance. The court found that its award of marital property to Christine would provide for her long term needs. However, the court also noted that Christine would not be fully provided for until Joseph paid her the \$218,927.80 property distribution. In light of Joseph's history of dissipating assets, the court likely anticipated the possibility that Joseph would not pay this amount in a timely manner. The court therefore awarded Christine \$400 biweekly in what was described as "limited" and "rehabilitative" maintenance to support her until Joseph fulfilled his obligations.

Notably, the payment of this maintenance was not a part of the property distribution, was not to be credited toward that distribution, and would terminate once the distribution was fully paid. Payments of maintenance would also terminate upon Christine's death, remarriage, or her living with

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another on a continuing conjugal basis. These are the very three reasons specified in section 510(c) of the Act under which periodic maintenance should terminate. 750 ILCS 5/510(c) (West 2008). It is evident that the order calls for rehabilitative maintenance to be paid only until the court-ordered property distribution was completed, or circumstances changed in such a way as to make the payments unnecessary. There is simply nothing in the language of the original dissolution order reflecting any intent that the maintenance payments were in the nature of a property settlement, thus constituting maintenance in gross.

We find that the circuit court incorrectly found the \$400 biweekly maintenance provisions to be “non-modifiable maintenance in gross.” The court’s order that Joseph’s payments to Christine should somehow be credited toward his obligation to pay the property distribution was also in error, as the parties agree that this obligation was discharged in the bankruptcy proceeding. We therefore remand this case to the circuit court for further consideration of Joseph’s motion to modify his maintenance obligation. The court’s consideration should take into account the relevant factors listed in sections 504(a) and 510(a-5) of the Act. 750 ILCS 5/510(a-5) (West 2008) (identifying factors to be considered in proceedings to modify or terminate maintenance order).

III. CONCLUSION

For the foregoing reasons, the judgment of the circuit court is reversed and this cause is remanded for further proceedings consistent with this order.

Reversed and remanded.