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2011 IL App. (3d) 10656-U

Order filed August 4, 2011

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IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

<i>In re</i> MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
PETER A. MANNON,	)	Henry County, Illinois
	)	
Petitioner-Appellant,	)	Appeal No. 3–10–0656
	)	Circuit No. 04-D-11
and	)	
	)	
KIMBERLY I. MANNON,	)	Honorable
	)	Charles H. Stengel,
Respondent-Appellee.	)	Judge, Presiding.

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PRESIDING JUSTICE CARTER delivered the judgment of the court.  
Justice McDade concurred in the judgment.  
Justice Schmidt dissented.

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**ORDER**

- ¶ 1 *Held:* Under the applicable standards of review, the trial court did not err in finding that husband’s change of employment was not made in good faith, in holding husband in contempt for failure to pay maintenance, in requiring husband to pay entire maintenance arrearage within 60 days, in reducing husband’s annual maintenance payment by only \$6,000, in making the maintenance reduction retroactive to only a month earlier rather than to the filing date of the petition, and in requiring the husband to pay attorney fees for the contempt petition. The trial court’s order, therefore, was affirmed.
- ¶ 2 Petitioner, Peter A. Mannon, filed a post-dissolution petition to modify maintenance and to

address certain other related matters. Respondent, Kimberly I. Mannon, objected to the petition to modify and filed a petition for rule to show cause to have Peter held in indirect civil contempt for failing to pay maintenance as required. After a joint hearing on the two petitions, the trial court: (1) found that Peter's change of employment was voluntary and not made in good faith; (2) held Peter in indirect civil contempt for failing to pay some of the required maintenance out of his 2008 tax refund; (3) ordered Peter to pay the entire maintenance arrearage of over \$47,000 within 60 days; (4) reduced the annual maintenance amount by \$6,000; (5) made the maintenance reduction retroactive to April of 2010, rather than to the filing date of the petition to modify of March of 2007; and (6) ordered Peter to pay \$750 of Kimberly's attorney fees. Peter appeals, raising numerous issues. We affirm the trial court's ruling.

¶ 3

#### FACTS

¶ 4 Peter and Kimberly were married in 1991 and had five children together. They separated in 2003, and Peter filed for dissolution of marriage in 2004. A written judgment of dissolution of marriage (the judgment) was entered in January of 2006.<sup>1</sup> The parties entered into a marital settlement agreement (the agreement), which was read into the record and incorporated by reference into the judgment. Both parties stated on the record in open court that they believed that the agreement was fair and equitable, and the trial court made a corresponding finding in that regard. At the time of the judgment and agreement, Peter worked for Controls for Motion Automation (CMA) as a sales engineer and had a gross income of approximately \$147,000 a year. Kimberly was

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<sup>1</sup>It appears from the record that the proceedings occurred in August of 2005, but the written judgment was not signed by the trial judge until January of 2006.

a stay-at-home mother and had no income. Pursuant to the agreement, Peter was required to pay, among other things, \$16,500 per year in child support and \$38,500 per year in maintenance, for a total amount of \$55,000 per year. Both amounts were to be paid in monthly installments. The parties also agreed that the maintenance award was reviewable within five years of the date of the judgment.

¶ 5 In May or June of 2007, Peter left CMA and took a different job in Arizona. In so doing, Peter's income was significantly reduced. In March of 2007, before he took the other job and moved to Arizona, Peter filed a petition to modify maintenance and to address certain other related matters (the petition to modify). Although the record is not quite clear on this issue, it does not appear that the petition to modify was called up for a hearing at that time. In December of 2009, Kimberly filed a petition for rule to show cause to have Peter held in indirect civil contempt for failing to pay the required amount of maintenance (the petition for rule). Kimberly alleged that Peter was more than \$47,000 in arrears on his maintenance payments. As part of the proceedings, both parties filed new financial disclosure statements. Some of the amounts listed in Peter's financial disclosure statement were as follows: (1) a gross monthly income of \$8,333; (2) total monthly deductions of \$2,668.03, including income taxes, social security, medical or other insurance, a voluntary retirement account, the cost for a company vehicle, and mandatory group life insurance; (3) total net monthly income of \$5,179.56; (4) total monthly living expenses of \$4,841.70, including a mortgage payment and real property taxes on his current home in Arizona; (5) a house in Arizona, which he claimed was worth less than what he owed on it; (6) checking and savings accounts worth about \$3,200; (7) a retirement account with a balance of about \$110,000; (8) stock worth about \$400; (9) a vehicle worth about

\$11,500; and (10) credit card debt of about \$36,000.<sup>2</sup> As for Kimberly, some of the amounts listed in her financial disclosure statement were as follows: (1) a gross monthly income of \$2,486.50, including \$1,111.50 in wages and \$1,375 in child support or maintenance; (2) total monthly deductions of \$126.58; (3) total net monthly income of \$2,359.92; (4) total monthly living expenses of \$2,905.83, excluding a mortgage and a home equity loan on the family residence, which were paid by Peter as part of his maintenance requirement; (5) the family home in Geneseo, Illinois, which had about \$27,000 in equity built up in it; (6) a checking account with a slightly negative balance; (7) an individual retirement account with no value listed; (8) two vehicles with no value listed; (9) an interest in a farming partnership with the value listed as “unknown;” and (10) a loan of \$54,000 from her parents for living expenses, with the monthly payment listed as “none.”

¶ 6 The trial court held a joint hearing on the petition to modify and the petition for rule. The hearing was held over two days in April and May of 2010. At the hearing, Kimberly testified that she lived in the family residence in Geneseo, Illinois, with the parties’ five children. Kimberly had just found a new job where she was going to work about 20 hours per week and was going to make \$9.50 per hour. As of the January 2006 judgment and agreement, Peter was supposed to pay \$16,500 per year in child support and \$38,500 per year in maintenance. Peter was current in his child support payments, but was behind on his maintenance payments. In total, Peter’s monthly maintenance payment was \$3,208. That amount was paid each month by Peter paying the mortgage (\$1,442.62) and the home equity loan (\$300 or \$400) on the family home and then sending Kimberly a check for

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<sup>2</sup>In his testimony at the hearing, Peter corrected a mathematical error that was made in some of the figures listed in his financial disclosure statement.

the remainder of the maintenance payment. Although Peter continued to pay the mortgage and the home equity loan, starting in June of 2007, he stopped sending Kimberly a check for the remaining balance of the monthly maintenance. In total from June of 2007 through April of 2010, Peter was in arrears on his maintenance payments by \$47,103.22 (\$8,621.83 for 2007, \$16,429.93 for 2008, \$17,625.01 for 2009, and \$4,426.45 for the first part of 2010). As a result of the arrearage, Kimberly had to withdraw money from her IRA account and borrow money from her parents to pay the family's monthly living expenses. In total, Kimberly withdrew \$175,000 from her IRA, with 20% withheld for tax purposes, and borrowed over \$52,000 from her parents.

¶ 7 When questioned in more detail about some of the specific items listed in her financial disclosure statement, Kimberly stated that the current value of her IRA was not listed because she did not have an opportunity to look it up and that she also owned a small amount of stocks that were not listed on the statement. Kimberly acknowledged that Peter had paid her the following amounts of combined child support and maintenance over the past several years: \$55,008 in 2006, a little over \$46,000 in 2007, \$38,570 in 2008, and a little over \$37,000 in 2009. Kimberly stated that for the first three months of 2010, Peter had paid \$4,400 less than the \$13,750 of child support and maintenance that he was supposed to pay.

¶ 8 Kimberly testified that at the time of the agreement, she was advised by her attorney that the allocation percentages of maintenance and child support were the best possible scenario for tax purposes. According to Kimberly, the parties never agreed that Peter's combined child support and maintenance payment would be limited to 45% of his income. The only time that a 45% figure was discussed was in reference to the fact that Illinois law mandated that 45% be paid as child support for five children. Kimberly stated that the parties began their negotiations with the 45% amount and

added in her additional living expenses to reach a total combined amount that was necessary. Kimberly did not dispute, however, that the \$55,000 combined amount may have constituted 45% of Peter's income at the time.

¶ 9 Peter, called by Kimberly's attorney as an adverse witness, testified that he lived in Chandler, Arizona with his current wife and his step-son, who had special needs. Peter currently worked for Rockwell Automation as an engineer and had been working for that company for the past two years. His current salary was \$100,000 and there was an annual discretionary bonus that he was eligible for at the end of the year.

¶ 10 When asked about his financial disclosure statement, Peter acknowledged that his math was wrong in part of the statement and that his monthly deductions actually added up to be \$2,511.53, instead of \$2,668. Subtracting the corrected amount from his gross income yielded a corrected monthly net income of \$5,821.47. Although Peter lived with his current wife and step-son, he tried to put on the statement only the expenses that he paid. Peter's current wife was employed, but most of her income was used to support her son's special needs. After Peter subtracted his monthly expenses from his monthly net income, he did not have enough money to pay Kimberly's mortgage and home equity loan. Peter made those payments over the past three years by financing other debts on his credit cards. According to Peter, at the time of the hearing, he had \$46,000 in credit card debt. When asked about his change of employment, Peter acknowledged that he was not terminated or fired from CMA and that he voluntarily left his employment with CMA. Peter testified that he was told at CMA that there was going to be a merger and that he had no guarantee of a job. Peter estimated that he began looking for another job in early 2007. Peter only applied for one other job and received that position fairly quickly. That position was with Interstate Hydraulics (Interstate)

in Tempe, Arizona. According to Peter, he took the position based on the representation of the president of Interstate that his total income would be about the same as it was with CMA, even though his base salary was going to be about \$20,000 less. Peter started with Interstate in June of 2007. Peter worked at Interstate for about eight months and then, after he realized that his income was going to be significantly less than what he had previously thought, he left that position and took his current position with Rockwell.

¶ 11 Peter testified that for the years in question, his net income was as follows: \$127,603.10 for 2006, \$67,850.82 for 2007, \$70,867.73 for 2008, and \$77,286.36 for 2009. From that net amount, Peter was supposed to pay Kimberly \$55,000 in child support and maintenance. Unable to pay that amount, other than in 2006, Peter paid \$46,311.49 in 2007, \$38,570.03 in 2008, and \$37,374.95 in 2009. Thus, for the four year period, including the approximately \$55,000 he paid in 2006, Peter paid Kimberly a total of \$177,264.47 in child support and maintenance. Peter calculated those amounts to be 68% of his net income in 2007, 54% of his net income in 2008, and 48% of his net income in 2009. Peter stated that if he had paid only 45% of his net income, he would have paid \$15,778.62 less in 2007, \$6,679.60 less in 2008, and \$2,569.09 less in 2009, for a total of \$25,054.31 less for the entire time period. Peter estimated that for the four year period, he paid Kimberly approximately 52% of his net income, on average. During that same time period, Peter had a mortgage of his own to pay that was about \$1,600 per month. According to Peter, his current finances were extremely tight. He did not have cable television, did not go out to eat, and his current family did not do much. Peter stated that at the time of the judgment and agreement, several different scenarios were presented to Kimberly regarding the allocation of child support and maintenance and the tax consequences of those scenarios. According to Peter, the percentage that

was always used in their negotiations was 45%. The parties eventually agreed that Kimberly would get 14% of the 45% as child support and 31% of the 45% as maintenance. The parties also agreed that Kimberly would be allowed to claim two of the children for tax purposes and that Peter would be allowed to claim the remaining three children. Peter did not dispute that after May of 2007, he did not make the additional maintenance payments to Kimberly. He only paid the mortgage and home equity loan payments on the family home. Peter stated that he stopped making the additional payments because his salary dropped from \$147,000 to \$75,000.

¶ 12 During the hearing, a discussion was held on the record between the trial judge and the parties' attorneys regarding whether Peter's current attorney would call his prior attorney to testify about the alleged 45% limit and the structuring of the child support and maintenance percentages. The following conversation ensued:

“THE COURT: All right, the judgment was, what, \$16,500 a year – 38,500 a year for maintenance and \$16,500 a year for child support. That's what the judge ruled. That's what he was ordered to pay.

Now, here's – The issue is this: Did he willfully fail to pay the maintenance? That's the issue. Or did he not have the ability to do so? I don't care what [his prior attorney] would be testifying [to]. I have a court order that tells me what he is supposed to pay. I don't see why [his prior attorney] – what he would add to this. I don't see the relevance of it.

[PETER'S ATTORNEY]: Well, his testimony would be that that was not really maintenance; that was just a tax – a tax advantage to both of them.

THE COURT: I don't care. This was – The judgment was that he was to pay

\$55,000 a year. He was allegedly making \$147,000 a year. So I'm going to leave it at that.

I mean, if you want to call [his prior attorney] as part of your defense, you're entitled to do so.

[KIMBERLY'S ATTORNEY]: Well, he's not here today. I mean --

THE COURT: But I don't see the relevance of it. I mean, the issue that the Court sees is whether or not the petitioner, Peter Mannon, willingly, voluntarily left his job, reduced his income, and that made a detriment for his inability to pay the maintenance, or did he have no choice. That's the issue, and from what I've seen, all I have is his word. I don't have any other testimony.

[PETER'S ATTORNEY]: Well, we filed the petition for modification March 7th. That's when he knew that he was not going to be working at that particular job.

\* \* \*

THE COURT: It should have been heard back then.

[PETER'S ATTORNEY]: Well, I won't get into the issue with [his prior attorney] on that particular day that it was supposed to be heard.

THE COURT: Well, OK, but it's three years later, and I don't see anybody from Rockwell – or, CMA here to testify.

[PETER'S ATTORNEY]: Testify to what his income – his income was?

THE COURT: No, why he had to leave his job.

\* \* \*

[PETER'S ATTORNEY]: I believe Mrs. Mannon also testified that she

thought that there was a merger between the two companies.

THE COURT: So what, there's a merger. All she knows is what he allegedly tells her. That doesn't mean that she believes it.

[PETER'S ATTORNEY]: Nobody would voluntarily go to a lower-paying job unless they had to.

THE COURT: Well, not unless maybe they wanted to move someplace else. I have no idea why he picked Arizona.

[PETER'S ATTORNEY]: Can I continue questioning, Judge?

THE COURT: Yes."

¶ 13 Upon further questioning, Peter testified that Interstate was somewhat of a sister company of CMA. They sold the same products, had the same product lines, and did the same thing. When Peter was offered a guaranteed job in Arizona doing the same work and was told he was going to make the same amount of money, he took the job, because of the instability of the job situation at CMA. At CMA, Peter was told he was not guaranteed a job, that he would have to refile for employment, and that there was no promise of any pay scale. Peter commented that the pay had dropped since he left CMA. Peter commented further that he was making significantly more in his current job than he would have been making if he had stayed at CMA and that he believed in the long run that it was a good move. Peter testified that when he learned that what he had been promised at Interstate was not true, he found other employment to do the best he could to pay all of his obligations. Peter stated that after he went to Arizona, he was in so much debt, that he could not afford to do anything and that coming back for court was beyond his capacity because he was spending almost 70% of his money just to pay child support and maintenance. Peter testified further

that with the job uncertainty at CMA, he was scared because he knew how much he was committed to pay and that he felt like he had no choice but to take the job opportunity with Interstate in Arizona. Peter had a brother that lived in Arizona at the time that he could stay with until he got on his feet, which made Arizona a logical option for him.

¶ 14 When asked what the economy was like in 2007, Peter testified that the economy was falling and that the area where most of his business was in was devastated with about 18% unemployment. Peter stated that he felt like he had absolutely no choice other than to move elsewhere in order to try to pay the commitments he had made. According to Peter, a hearing was scheduled on the petition to modify in May of 2007, right before he left for Arizona. Peter met with Kimberly and her attorney before that scheduled hearing but was unable to work out an agreement with them. He left for Arizona shortly thereafter and did not bring up the petition to modify until he was served with papers to appear in court on Kimberly's petition for rule.

¶ 15 Peter acknowledged that his 2008 tax return showed a tax refund of \$11,150. Peter stated that he was seeking to reduce his total child support and maintenance payment to 45% of his current income, or about \$2,619 (\$1,375 in child support and \$1,244 in maintenance). Peter testified that at the time of the hearing, the ages of the parties' five children were 16, 13, 11, 8, and 5. Peter testified further that Kimberly had obtained a college degree since the divorce, was a bright, capable woman, and that he saw no reason why she could not obtain a job paying more than \$9 per hour. According to Peter, if he were required to continue paying child support and maintenance at the current level, he would have to declare bankruptcy. Peter stated that he tried the best he could to make the payments that he was required to make.

¶ 16 At the end of the first day of testimony in April of 2010, the case was continued to a further

date in May of 2010 for a second day of testimony. Although the record is not quite clear on this matter, it appears that on the second day of testimony, Peter's attorney presented her case-in-chief. Peter's attorney initially called Peter to testify. Peter provided additional testimony about his decision to take the job with Interstate and move to Arizona. Peter stated that CMA was going through a merger, that they were going to split territories, that they were going to re-interview all of the employees, and that there was no guarantee of a job. Peter had known the president of Interstate for several years through business acquaintances and had a confidence level in the stability of the job with Interstate, since it was essentially the same job that he was currently doing, selling the same products. After he took the job and moved to Arizona, Peter realized that he had been lied to and that his income in the new position was going to be significantly less than his income was when he worked for CMA. Peter, however, did not have a written contract with Interstate that he could enforce.

¶ 17 During the hearing, Peter's attorney tried to elicit testimony from Peter regarding what CMA was currently paying for his old position. The trial court, however, sustained a hearsay objection made by Kimberly's attorney to that testimony. Peter's attorney then sought permission to allow a witness, who could not be present because of a board meeting, to testify by phone as to what Peter's old position with CMA was currently paying in 2009 and 2010. Kimberly's attorney objected and the trial court denied that request.

¶ 18 Kimberly was called to testify as an adverse witness by Peter's attorney and provided additional information about her finances. In addition to what she had testified about previously, Kimberly testified that she started with over \$200,000 in her IRA and that she currently had about \$18,000 remaining. Kimberly stated that she had cut back on expenses as much as possible, that she

had cut back on groceries, that the family almost never went out to eat, that they rented movies at home rather than going to the movie theater, and that the children got by with hand-me-down clothes. As to the loan from her parents, Kimberly stated that the checks she received indicated that the amounts were a loan. Kimberly acknowledged, however, that there were no loan documents, a payment plan, or an interest rate. Kimberly testified that she had fallen behind on her utility, medical, and insurance bills in the past and commented that her gas and phone service had been shut off several times. Kimberly indicated that the last five years were a struggle for her and her family.

¶ 19 In response to questioning from the trial judge, Peter testified that he purchased a house in Arizona in August of 2007 with his current wife, although the mortgage was in his name alone. The purchase price was \$272,000, and Peter paid a 20% down payment, or about \$54,000, by taking a disbursement from his 401(k) account (retirement account). At the time of the divorce, Peter had approximately \$134,000 in his retirement account and currently had \$129,000 in that account.

¶ 20 At the conclusion of the second day of testimony relative to the issue of maintenance, the trial court made its ruling. The following was stated:

“THE COURT: I want to make my ruling with regards to the maintenance, the reviewable maintenance, and as to whether or not [Peter] should be held in contempt for not making payments.

The court has heard evidence on this case for over two days, and the Court has reviewed its notes as well as all the exhibits which have been tendered to the Court. I note that the petitioner, Peter Mannon, filed his petition back on March 14th, 2007. It’s been over three years. I didn’t start hearing anything about the case until April [of 2010].

The Court, in considering the factors, does consider the factors under 750 IL – ILCS 5/510, paragraph [(a-5)], and I also considered the case of Blum v. Koster, which is an Illinois Supreme Court case, 2009, Westlaw 3212542. It's a 2009 case which states that the burden of proof, when maintenance is reviewable, the Supreme Court said in Blum that when a husband sought reduction in maintenance, that he did not have the burden of proving a substantial change in circumstances. Rather, the trial court was to consider the factors in Sections 504, paragraph (a), and 510, paragraph (a-5). The Court has also considered the factors under 504(a) as well, to determine as to whether to modify or terminate the wife's maintenance.

In exercising my discretion and based upon the evidence here, the Court is going to modify the maintenance due to the change here, because the ex-wife has been working, and also the Court notes that the defendant changed his employment voluntarily. He was making \$147,000, and then he took a job in Arizona, and his income now is \$100,000 a year, approximately. I find that that was a voluntary change on his part.

I've considered the changes in employment status and as to whether or not the change was made in good faith. I find that the change has not been made in good faith. I haven't heard any evidence other than his own that he – that things were – that he was going to be losing his job. I don't find that to be credible.

I've also considered the tax consequences and also the efforts of any party receiving maintenance to become self-supporting and the reasonableness of the efforts where they are appropriate.

I have also considered any impairment of present and future earning capacities of either party and the tax consequences. I've also considered the increase and decrease of each party's income since the prior judgment.

I am going to – due to her employment, I am going to decrease the maintenance in the amount of \$6,000 a year. That is going to be retroactive to April of 2010. I find that there is an arrearage of \$47,076 that is to be paid.

I – I find that to make any other – I mean, this petition sat in the file for three years, and I think it would be unfair at this time, due to that, to make it any more retroactive, especially since he changed his job voluntarily.

Therefore, I decreased it by 6,000 only because you're working, taking into account the tax ramifications of the tax bracket you are brought into as well, receiving maintenance. The child support is going to remain at sixteen five, and maintenance is reduced by 6,500 [sic]. The \$47,076 is to be paid within 60 days. You can take money out of your 401(k) plan.

[KIMBERLY'S ATTORNEY]: Is there a finding of contempt, Your Honor?

THE COURT: In regards to the issue of contempt, he does have the ability to pay.

You received a tax refund in 2008 of approximately eleven thousand one hundred – one hundred fifty dollars in filing your tax return, so you did have the ability to pay something, and you didn't. However, I think that you were probably banking on the fact that this modification was going to be changed and that you wouldn't have to pay it, but that was at her detriment, and I think you did have the

ability to pay something, so I will hold you in contempt.”

¶ 21 After some additional testimony was presented, the trial court found Kimberly in contempt as well for failing to refinance the mortgage on the family home as required in the judgment and the agreement. The trial court questioned Kimberly’s attorney under oath as to the amount of attorney fees that were attributable to the petition for rule regarding maintenance. Peter’s attorney was given an opportunity to question Kimberly’s attorney on that issue, as well, but declined to do so. The trial court awarded Kimberly’s attorney \$750 in attorney fees. The trial court also awarded Peter’s attorney \$300 in attorney fees for the rule to show cause regarding Kimberly’s failure to refinance the mortgage. Peter’s attorney had asked for \$750 in attorney fees, but the trial court awarded a lesser amount, finding that more work went into the issue of maintenance than into the issue of the refinance.

¶ 22 A written order was later presented by the attorneys. When the order was presented, there was some disagreement as to the language that was to be put into the order pertaining to the payment of the arrearage. The following exchange took place between the trial court and the attorneys:

“[PETER’S ATTORNEY]: 9 B, she has: ‘He shall pay the sum of \$47,076 to the respondent within 60 days,’ and I put, comma, because you did say, ‘and take the money out of his 401(k) plan.’

[KIMBERLY’S ATTORNEY]: And I put ‘has the ability to take the money out of his 401(k).’ I didn’t know if you ordered him to do that or not.

[PETER’S ATTORNEY]: There was no finding that he had money anywhere else. I mean, we tendered all that at the time, so –

THE COURT: OK, Just say that – we don’t even need this. Just say, ‘He

shall pay the sum of \$47,076 --

[PETER'S ATTORNEY]: Well --

THE COURT: -- to the respondent in 60 days.' You don't need any additional language about his 401(k).

[PETER'S ATTORNEY]: Well, but that's what the -- that's what your ruling said.

THE COURT: So what? I'm just saying -- did I say he must take it out of his 401(k)?

[KIMBERLY'S ATTORNEY]: I think you highly suggested that he get it done.

[PETER'S ATTORNEY]: Yes, you did, and that was in the transcript.

THE COURT: All right. OK.

[KIMBERLY'S ATTORNEY]: But I don't think it was an order.

THE COURT: It doesn't matter where the money comes from. If he doesn't pay it, then he can be held in contempt. So I don't need anything about the 401(k) plan.

[KIMBERLY'S ATTORNEY]: OK.

THE COURT: He may want to take a loan. So I strike that out."

¶ 23 Peter brought the instant appeal to challenge the trial court's ruling. On appeal, Peter raises numerous issues, each of which will be addressed in turn.

¶ 24 ANALYSIS

¶ 25 On appeal, Peter argues first that the trial court erred in finding him in indirect civil contempt

for failure to pay maintenance. Peter asserts that, contrary to the trial court's finding, his change of employment was made in good faith and he did not willfully violate the order with regard to payment of maintenance. Kimberly asserts that the trial court's findings were proper and that the trial court's ruling should be affirmed.

¶ 26 A court may use its contempt powers to enforce an order to pay money but only if the failure or refusal to pay is wilful. See *In re Marriage of Logston*, 103 Ill. 2d 266, 285 (1984). The failure to comply with a court's order to pay maintenance constitutes *prima facie* evidence of contempt. *Logston*, 103 Ill. 2d at 285. Once a *prima facie* case has been established by the party seeking a contempt finding, the burden shifts to the opposing party, who may then defend by showing that the violation was not wilful in that he or she did not have the ability to pay. See *Logston*, 103 Ill. 2d 266, 285. To prove that defense, the opposing party must show that he or she does not have money now from which the amount due can be paid and that he or she has not wrongfully disposed of money or assets from which payment might have been made. *Logston*, 103 Ill. 2d at 285. Whether a party is guilty of contempt is a question of fact for the trial court, and a reviewing court will not reverse the trial court's finding in that regard, unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion. *Logston*, 103 Ill. 2d at 286-87.

¶ 27 In the present case, the trial court based its finding of contempt upon the fact that Peter received an income tax refund of over \$11,000 from his 2008 tax return but did not apply any of that refund amount to the maintenance arrearage. It is clear from the record and the facts presented, that Peter was ordered to pay a fixed annual amount of maintenance, that Peter filed a petition to modify in May of 2007 but never moved that matter to a hearing until 2010, that the amount of maintenance had not been modified prior to the hearing, and that Peter was in arrears on his maintenance

payments from 2007 through the hearing date. Thus, Kimberly established a *prima facie* case for contempt, and the burden shifted to Peter to defend. See *Logston*, 103 Ill. 2d at 285. As to the tax refund in question, Peter presented little or no evidence as to why at least a portion of it was not applied to the maintenance arrearage. Thus, under the circumstances of this case, regardless of whether Peter's job change was made in good faith, we cannot rule that the trial court's finding of contempt was against the manifest weight of the evidence or that it constituted an abuse of discretion. See *Logston*, 103 Ill. 2d at 285-87.

¶ 28 As his next point of contention on appeal, Peter argues that the trial court erred in ordering him to pay the \$47,000 arrearage within 60 days, which was premised upon the trial court's statement that Peter could take the money out of his retirement account. Peter asserts that he would have to pay almost \$20,000 in taxes if he withdrew the money from his retirement account—\$20,000 that he does not have—and that to do so would only worsen his current financial situation and hinder his ability to pay his current maintenance obligation even further. Thus, Peter contends that the trial court's ruling was arbitrary, unreasonable, and capricious and that it constituted an abuse of discretion. Kimberly argues that the trial court's ruling was proper and should be affirmed. In making that argument, Kimberly notes that the trial court did not order that Peter had to take money out of his retirement account to pay the arrearage.

¶ 29 Issues relating to a trial court's award of maintenance are generally reviewed for an abuse of discretion. See *In re Marriage of Gentry*, 188 Ill. App. 3d 372, 375 (1989). An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful or unreasonable or where no reasonable person would take the view adopted by the trial court. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991).

¶ 30 In the instant case, it is clear from the record that the trial court did not order Peter to withdraw the money from his retirement account. The trial court merely noted that funds were available in that account for Peter to use to pay the arrearage if he sought to do so. There was nothing erroneous about the trial court's statement in that regard. Peter had previously withdrew money from his retirement account to pay for the down payment on his home in Arizona, and Kimberly was required to almost completely deplete her account to pay her and the children's living expenses during the period when maintenance was in arrears. We also do not believe that the trial court erred in requiring Peter to pay the arrearage within 60 days. While it may be true, as Peter suggests, that it would have been more reasonable to have Peter pay an additional amount each month until the arrearage had been paid off, that, in and of itself, does not render the trial court's ruling arbitrary, unreasonable, or capricious. Peter has failed to establish that the trial court's ruling on this matter constitutes an abuse of discretion, and we will not substitute our judgment here for that of the trial court. See *Gentry*, 188 Ill. App. 3d at 375.

¶ 31 As his third point of contention on appeal, Peter argues that the trial court erred in reducing his maintenance obligation by only \$6,000 per year, despite the significant reduction in his annual income. Peter asserts that the reduction in his income was caused by a good-faith change in employment and that the trial court incorrectly found that the change was not made in good faith. Peter asserts further that the trial court's error was compounded when the trial court decided to make the reduction retroactive only to April of 2010, rather than to March of 2007, when the petition to modify was filed, despite the court's clear statutory authority to do so. Kimberly asserts that the trial court did not commit an abuse of discretion in finding that Peter's job change was not made in good faith and in determining the amount of the modification or the extent to which the modification

would apply retroactively. Thus, Kimberly argues that the trial court’s ruling on this issue should be affirmed.

¶ 32 A trial court’s ruling on a petition to modify maintenance will not be reversed on appeal absent a abuse of discretion. *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009). Although a party seeking a modification of maintenance usually must show a substantial change in circumstances, such a showing is not required when the parties have agreed in a marital settlement agreement that the issue of maintenance is reviewable within a certain period of time. See *Blum*, 235 Ill. 2d at 35-36. In determining whether a modification of maintenance is appropriate, the trial court must consider the same statutory factors used in the initial award of maintenance and set forth in section 504(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/101 *et seq.* (West 2008)). *Blum*, 235 Ill. 2d at 41. Those factors include:

“(1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance;

(2) the needs of each party;

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

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

(5) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment or is the custodian of a

child making it appropriate that the custodian not seek employment;

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

(7) the duration of the marriage;

(8) the age and the physical and emotional condition of both parties;

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

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

(11) any valid agreement of the parties; and

(12) any other factor that the court expressly finds to be just and equitable.”

750 ILCS 5/504(a) (West 2008).

None of the above factors, however, are dispositive. See *In re Marriage of Harlow*, 251 Ill. App. 3d 152, 157 (1993) (discussing previous version of the Act). Furthermore, the trial court does not have to give equal weight to each of the factors, as long as the balance struck by the trial court is reasonable under the circumstances. *In re Marriage of Dunlap*, 294 Ill. App. 3d 768, 772 (1998).

¶ 33 In addition to the 12 factors listed above, the trial court should also consider the factors listed in section 510(a-5) of the Act in determining whether maintenance should be modified. *Blum*, 235 Ill. 2d at 41. Section 510(a-5) provides that:

“An order for maintenance may be modified or terminated only upon a showing of a substantial change in circumstances. In all such proceedings, as well as in proceedings in which maintenance is being reviewed, the court shall consider the applicable factors set forth in subsection (a) of Section 504 and the following factors:

(1) any change in the employment status of either party and whether the change has been made in good faith;

(2) the efforts, if any, made by the party receiving maintenance to become self-supporting, and the reasonableness of the efforts where they are appropriate;

(3) any impairment of the present and future earning capacity of either party;

(4) the tax consequences of the maintenance payments upon the respective economic circumstances of the parties;

(5) the duration of the maintenance payments previously paid (and remaining to be paid) relative to the length of the marriage;

(6) the property, including retirement benefits, awarded to each party under the judgment of dissolution of marriage \*\*\* and the present status of the property;

(7) the increase or decrease in each party's income since the prior judgment or order from which a review, modification, or termination is being sought;

(8) the property acquired and currently owned by each party after the entry of the judgment of dissolution of marriage \*\*\*; and

(9) any other factor that the court expressly finds to be just and equitable.”

750 ILCS 5/510(a-5) (West 2008).

¶ 34 In determining whether maintenance should be modified, the trial court may consider a substantial reduction in income caused by a change in employment of the paying spouse. 750 ILCS 510(a-5)(1) (West 2008); see *In re Marriage of Horn*, 272 Ill. App. 3d 472, 476 (1995). A reduction in maintenance may be justified based upon a good-faith voluntary change in employment, which results in diminished financial ability. See *Horn*, 272 Ill. App. 3d at 476. “The test for determining

if a decision was made in good faith is whether the change was prompted by a desire to evade financial responsibilities for supporting the children or to otherwise jeopardize their interests.” *Horn*, 272 Ill. App. 3d at 476. It must be noted, however, that despite a significant reduction in income caused by a change in employment, a party may not unilaterally modify his or her payment obligations. See *Brandt v. Brandt*, 99 Ill. App. 3d 1089, 1108 (1981). Modification is a judicial function, which is to be administered by the trial court in its discretion. *Brandt*, 99 Ill. App. 3d at 1108.

¶ 35 In the present case, the only evidence the trial court had before it regarding the reasons for Peter’s change in employment was the testimony of Peter. Peter testified that his company was merging with another company, that he had no guarantee of a job, that he was scared, that he felt like he had no other choice, that the pay had been reduced since he left, and that his family was better off with him having taken the job in Arizona. Peter acknowledged, however, that he voluntarily left his job and that he was not fired or discharged. In finding that Peter’s change in employment was not made in good faith, the trial court specifically noted that it found that Peter’s testimony was not credible on the matter. Based upon the record before this court and the trial court’s finding regarding credibility, we cannot say that the trial court committed an abuse of discretion in determining that Peter’s job change was not made in good faith. Nor can we find that the trial court committed an abuse of discretion in reducing the annual maintenance by only \$6,000. Despite Peter’s claim to the contrary, it is clear the trial court considered the statutory factors and was aware of Peter’s drop in income, Peter’s current financial situation, and Kimberly’s slight increase in income. Finally, under the circumstances of the present case, we find no abuse of discretion in the trial court’s decision to make the modification retroactive only to April of 2010. The trial court’s reason for doing so was

made clear on the record—that the trial court felt it would be unfair to do otherwise when Peter filed the motion and then left it unheard for the previous three years. Although the trial court had the statutory authority to make the modification retroactive to the date that the petition was filed (see 750 ILCS 5/510(a) (West 2008)), it was under no obligation to do so, and we will not substitute our judgment for that of the trial court on this matter.

¶ 36 As his final point of contention on appeal, Peter argues that the trial court erred in awarding Kimberly \$750 in attorney fees for the petition for rule regarding the failure to pay maintenance. Peter asserts that the award should be reversed because: (1) the trial court was wrong in finding Peter in contempt, and in the alternative, (2) the trial court failed to make the finding necessary for an award of attorney fees under section 508(b) of the Act—that Peter’s failure to comply with the court’s order was without compelling cause or justification. Kimberly argues that the trial court’s ruling was proper and should be affirmed.

¶ 37 The decision of whether to grant a request for attorney fees rests in the sound discretion of the trial court and will not be reversed on appeal, absent an abuse of discretion. *In re Marriage of Cierny*, 187 Ill. App. 3d 334, 347 (1989). Pursuant to section 508 of the Act, a trial court may order one spouse to pay a reasonable amount for the costs and attorney fees incurred by the other spouse in connection with, among other things, the enforcement of any order or judgment under the Act. 750 ILCS 5/508(a)(2) (West 2008); *Cierny*, 187 Ill. App. 3d at 347. For an award of attorney fees to be justified, it must be shown that the spouse seeking attorney fees is financially unable to pay them and that the other spouse is able to do so. *Cierny*, 187 Ill. App. 3d at 347. However, when the opposing spouse does not request a hearing on the ability to pay, the right to a hearing on the matter is waived and the trial court may make its decision based upon the financial conditions of the parties

as shown by the record. *Cierny*, 187 Ill. App. 3d at 347. In addition, “[a] party who must seek court enforcement of the terms of a judgment of dissolution is entitled to reasonable attorney fees, even absent a showing of that party's inability to pay the fees and the other party's ability to pay, where the failure to comply with the terms of the judgment is without cause or justification.” *Cierny*, 187 Ill. App. 3d at 348; see also 750 ILCS 5/508(b) (West 2008). When an award of attorney fees stems from a finding of contempt for failing to comply with a court’s orders, the finding of contempt carries with it an implicit finding that the failure to comply was without cause or justification. *Cierny*, 187 Ill. App. 3d at 348.

¶ 38 In the present case, when the issue of attorney fees was addressed, Peter’s attorney did not request a hearing on the ability to pay. In addition, when given the opportunity to cross-examine Kimberly’s attorney on the amount of fees, Peter’s attorney declined to do so. Thus, Peter has forfeited any claim regarding the ability to pay or the amount of the fees. See *Cierny*, 187 Ill. App. 3d at 347. In addition, although Peter asserts that the trial court did not make the requisite finding of “without cause or justification,” as noted above, the finding of contempt was sufficient to satisfy those requirements. See *Cierny*, 187 Ill. App. 3d at 348. Thus, Peter’s argument to the contrary must be rejected. The award of \$750 of attorney fees to Kimberly in this case did not constitute an abuse of discretion.

¶ 39 For the foregoing reasons, we affirm the judgment of the circuit court of Henry County.

¶ 40 Affirmed.

¶ 41 JUSTICE SCHMIDT, dissenting:

¶ 42 I respectfully dissent from the majority's decision to affirm the trial court's finding of bad

faith with respect to the petitioner's job change. "Ordinarily, a man makes an investment or changes his occupation with the hope of improving his prospects for the future, including raising his own standard of living as well as that of his children. [Citation.] Following dissolution of marriage, the custodial parent and children cannot be allowed to freeze the other parent in his employment or otherwise preclude him from seeking economic improvement for himself and his family. So long as his employment, educational or investment decisions are undertaken in good faith and *not deliberately designed to avoid responsibility for those dependent on him*, he should be permitted to attempt to enhance his economic fortunes without penalty." (Emphasis added.) *Coons v. Wilder*, 93 Ill. App. 3d 127, 133 (1981). That is, "[t]he test for good faith is: 'whether the change in status was prompted by a desire to evade financial responsibility for supporting the children or to otherwise jeopardize their interests.'" *In re Marriage of Bush*, 209 Ill. App. 3d 671, 675 (1991).

¶ 43 Despite the pay cut, the petitioner has shown that in 2006, he paid 45% of his net income in support; in 2007 - 68%; 2008 - 54%; and in 2009 - 48%. While there is no doubt a shortfall, the record fails to provide any evidence that the change in employment status " 'was prompted by a desire to evade financial responsibility' " for paying support. See *In re Marriage of Bush*, 209 Ill. App. 3d at 675.

¶ 44 I recognize that a good faith change in employment status does not necessarily lead to the reduction in support payments requested by petitioner. The same is true with respect to the retroactivity of any reductions. There seems to be no good excuse evident in the record for the petitioner's delay of three years in scheduling a hearing on his motion for modification of support payments. That being said, I believe that the trial court's ruling on other issues in this case were flavored by its finding of bad faith; for example, the requirement that petitioner pay the shortfall

within 60 days. I would reverse and remand for the trial court to reconsider all the issues in light of the absence of any evidence of bad faith on the part of petitioner in his job change.