NOTICE
Decision filed 05/08/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 100588-U

NO. 5-10-0588

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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 re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
PAMELA SZCZEBLEWSKI,	)	Franklin County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 99-D-258
	)	
JAMES R. SZCZEBLEWSKI,	)	Honorable
	)	Paul W. Lamar,
Respondent-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not abuse its discretion in denying the respondent-husband's motion to modify maintenance when he failed to prove that his retirement constituted a substantial change in circumstances.

¶ 2 This action arises out of the Franklin County circuit court's denial of the respondent-husband's petition to modify maintenance. Due to the contentious history between the parties, we will only set forth those facts which are directly pertinent to the issues on appeal.

¶ 3 James Szczeblewski (Jim) and Pamela Szczeblewski (Pam) were married in 1975. Two children were born of the marriage, both of whom were over the age of 18 at the time of their parents' separation. Pam was 20 years old when the parties were married, had not completed high school or received her GED, and was employed as a dishwasher. Pam was not employed outside of the home during the marriage and was experiencing significant health problems at the time of the dissolution.

¶ 4 During the marriage, Jim was primarily employed as a boilermaker. When he was working full-time, he earned approximately $51,000 per year. When he was not employed full-time, Jim drew unemployment benefits and contributed labor to his farm partnership. Jim and his brother established their farm partnership in 1973 and grew grain and beans on approximately 635 acres. Jim held a 50% interest in the partnership.

¶ 5 Pam filed for dissolution of the marriage on October 5, 1999, when she was 44 years old and Jim was 48 years old. Pam filed her initial financial affidavit on October 22, 1999. Jim did not file his initial financial affidavit until October 2000. Neither Jim's initial financial affidavit nor his second affidavit, filed in September 2001, mention the farm partnership or any benefits Jim derived therefrom.

¶ 6 The farm partnership was allowed to intervene in the dissolution proceedings. In September 2001, the partnership filed an affidavit listing its assets and liabilities. Based on the partnership's self-evaluation, its assets were valued at $565,900 and liabilities at $363,252.

¶ 7 An order dissolving the parties' marriage was entered on February 13, 2002. The circuit court valued the partnership's assets at $533,000 and its encumbrances at $233,581. The court held Jim's half-interest in the partnership to be nonmarital property. The parties' marital home and the 216 acres on which it resided (with a stipulated value of $174,000) were awarded to Jim because the partnership's buildings and bins were located on the property. Jim was directed to pay Pam $116,000 as her share of the marital home. Jim's boilermaker pension (valued at $52,600) and an annuity (valued at $33,501) were divided equally, with distributions to occur upon Jim's retirement.

¶ 8 Taking into account the factors listed in section 504 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/504 (West 2000)), the court awarded Pam $100 per week in permanent maintenance. The court also noted that the sum "is limited in part due

to Jim's inability to pay more based upon being between 'good jobs.' " In so holding, the court took particular note of the length of the parties' marriage (24 years) and Pam's lack of education, GED, and employment outside of the home during the marriage. In addition, the court considered Pam's health problems that began before, and continued through, the dissolution.

¶ 9 Pam appealed the circuit court's classification of nonmarital property as well as the maintenance award. This court affirmed the circuit court. *In re Marriage of Szczeblewski*, No. 5-02-0175 (2003) (unpublished order under Supreme Court Rule 23 (eff. July 1, 1994)).

¶ 10 In February 2003, Pam filed a petition for modification of maintenance. Both parties filed supplemental financial affidavits, but Jim's still did not list any income or benefits from the partnership. The court ordered the parties to file supplemental financial affidavits "to correct omitted items of income" within 14 days. Jim did not and Pam filed a motion to compel Jim's complete affidavit in April 2003. In both June and July 2003, Jim's attorney told the court that the amended financial affidavit had been mailed, but it was never received by Pam or the court.

¶ 11 On August 11, 2003, the circuit court increased Jim's maintenance obligation to $240 per week, effective April 8, 2002. The court noted that the evidence clearly indicated that Jim's financial affidavit "was not complete and contained significant omissions of financial information." Not only had Jim failed to list cash rent and farm subsidy payments, he had also omitted vehicles and transportation-related benefits that he had received from the partnership. In increasing his maintenance obligation, the court noted that "Jim's affidavit appears to understate his income direct and indirect by at least one-third."

¶ 12 In January 2005, an order was entered directing Jim to pay maintenance at a rate of $240 per week for the period from April 8, 2002, through December 31, 2002. The court took the issue of the amount of maintenance owed for 2003 and 2004 under review and

directed the parties to file amended financial affidavits along with supporting documentation. While he filed an amended financial affidavit, Jim failed to submit his income tax returns or pay stubs for 2003 and 2004.

¶ 13 On October 10, 2008, Pam filed a petition for rule to show cause asking that Jim be held in indirect contempt for failing to make maintenance payments at a rate of $240 per week from April 8, 2002, until December 31, 2002; failing to provide income tax returns to the court; and failing to attach evidence of his income. Pam also asked for attorney fees and costs associated with her motion for the unpaid maintenance from April 8, 2002, to December 31, 2002.

¶ 14 On November 19, 2008, Jim filed a petition to modify maintenance, alleging that he retired on October 1, 2008. Jim argued that his retirement constituted a "substantial change in circumstances" sufficient to terminate his support obligation. He argued that his maintenance obligation should be terminated because Pam was receiving one half of his pension along with $240 per week in maintenance, leaving nearly no money for him.

¶ 15 Subsequently, Jim's individual tax returns for the years 2003-2007 were provided to the court by Pam. These returns show that in 2003, Jim grossed $60,175, but did not report any income or benefits from the farm. In 2004, Jim grossed $69,474, including $28,821 in income from the farm. In 2005, Jim grossed $50,868, including $20,419 in income from the farm. In 2006, Jim grossed $78,971, including $29,362 in income from the farm. And in 2007, Jim grossed $102,116, including $43,564 in income from the farm. None of the tax returns include benefits Jim received from the farm.

¶ 16 On November 4, 2009, the circuit court ruled on both Pam's petition for rule to show cause and Jim's petition to modify maintenance. In awarding Pam the requested attorney fees, the court held Jim to be in indirect civil contempt for failing to pay maintenance at a rate of $240 per week from April 8, 2002, to December 31, 2002, after being so ordered in

2005. The court directed Pam to file additional information so that her attorney fees could be computed. The court also ruled that maintenance should remain at $240 per week from January 1, 2003, to September 15, 2008, and found Jim to be $46,810 in arrears. The court also denied Jim's petition to modify maintenance and ordered maintenance to continue at $240 per week.

¶ 17 On December 3, 2009, Jim filed a motion to reconsider his petition to modify maintenance. A hearing was held on this motion on January 6, 2010. In its February 17, 2010, order, the court ordered Jim to pay $5,180 in back maintenance to purge himself of contempt and $41,630 for maintenance owed from January 1, 2003, until September 15, 2008. The court continued maintenance at $240 per week.

¶ 18 On February 22, 2010, Pam filed a petition for rule to show cause alleging that Jim had not paid the $5,180 to purge his contempt. The court entered an amended order on March 10, 2010, denying Jim's motion to reconsider the motion to modify maintenance. The court entered a final order denying the motion to modify maintenance on November 17, 2010, and ordered Jim to pay Pam's attorney fees of $5,134.65 and $3,336.75.

¶ 19 It is from the denial of his motion to modify maintenance that Jim appeals. On appeal, Jim contends that his retirement constitutes a substantial change in circumstances sufficient to support the termination of maintenance.

¶ 20 The decision to modify or terminate maintenance is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *In re Marriage of Carpenter*, 286 Ill. App. 3d 969, 972 (1997). An abuse of discretion occurs when no reasonable person would take the view adopted by the circuit court. *In re Marriage of Carpenter*, 286 Ill. App. 3d at 972. The party seeking modification of a maintenance order bears the burden of showing that a substantial change in circumstances has occurred. *In re Marriage of Waldschmidt*, 241 Ill. App. 3d 7, 10 (1993). The award can be modified when either the

needs of the spouse receiving support or the ability of the other spouse to pay maintenance changes. *In re Marriage of Waldschmidt*, 241 Ill. App. 3d at 10. In order to determine whether and to what extent maintenance should be modified, a trial court should consider the same factors it considered in making the initial award. *In re Marriage of Waldschmidt*, 241 Ill. App. 3d at 10. These factors include: (1) the income and property of each party, including marital and nonmarital property; (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; (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; and (9) any other factor that the court expressly finds to be just and equitable. 750 ILCS 5/504(a) (West 2010). In addition, when considering terminating or modifying maintenance, the court should also consider:

> "(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, judgment of legal separation, or judgment of declaration of invalidity 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, judgment of legal separation, or judgment of declaration of invalidity of marriage; and

(9) any other factor that the court expressly finds to be just and equitable." 750 ILCS 5/510(a-5) (West 2010).

Whether retirement constitutes a substantial change in circumstances sufficient to justify the modification of maintenance depends upon the circumstances of each individual case. *In re Marriage of Waller*, 253 Ill. App. 3d 360, 362 (1993).

¶ 21 In the instant case, Jim asserts that his retirement constitutes a substantial change in circumstances sufficient to terminate his maintenance obligation. He argues that his retirement income is limited to his $2,600 per month pension and because Pam is already receiving half of the pension ($1,300 per month), to continue to pay her $240 per week (or $960 per month) in maintenance reduces Jim's monthly income to an amount which is too small to live upon.

¶ 22 The burden is on Jim to prove that his retirement constitutes a substantial change in circumstances. He has failed to meet this burden. Aside from alleging that little is left of his pension after making maintenance payments, Jim does not address the impact of the maintenance obligation on himself or his current standard of living. Jim does not allege that he cannot maintain the standard of living he enjoyed during the marriage, that Pam has become self-supporting, or that he is liquidating assets in order to meet the maintenance obligation. Instead, Jim merely argues that little is left of his pension after he makes

maintenance payments.

¶ 23 Jim's pension income, however, is not determinative of his maintenance obligation. It is clear to this court, as it was to the circuit court, that Jim has withheld information regarding his finances. The circuit court's statement that it believed Jim to have underreported his income by approximately one-third was bolstered by Jim's individual tax returns which showed that he earned, on average, approximately $30,000 per year from the partnership, exclusive of benefits. Thus, while Jim implies that his retirement income is limited to his pension, this is simply not the case.

¶ 24 Like the circuit court, we find that Jim has willfully and repeatedly failed to provide the court with a clear and accurate depiction of his finances. Jim's silence on the issue of the income and benefits he receives from the partnership does not prevent the court from considering the matter. We find there is ample evidence in the record to support the finding that Jim derives a substantial financial benefit from the partnership.

¶ 25 Overall, Jim has failed to prove that his retirement impacted his ability to pay $240 per week in maintenance to Pam. As such, he has not met his burden of proving that a substantial change in circumstances has occurred sufficient to terminate his maintenance obligation. As such, the circuit court did not abuse its discretion in denying Jim's motion to modify maintenance.

¶ 26 Additionally, attorney fees may be awarded for defending an appeal of any order or judgment entered under the Illinois Marriage and Dissolution of Marriage Act. 750 ILCS 5/508(a)(3) (West 2010). In the instant case, Jim presented a meritless basis for his appeal. As such, Pam is entitled to the attorney fees she incurred as a result of the defense of this appeal.

¶ 27 For the foregoing reasons, we affirm the decision of the circuit court of Franklin County.

¶ 28 Affirmed.