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2013 IL App (3d) 120370-U

Order filed March 4, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2013

<i>In re the</i> MARRIAGE OF)	Appeal from the Circuit Court
)	of the 13 th Judicial Circuit,
KAY HOSACK,)	La Salle County, Illinois,
)	
Petitioner-Appellee,)	
)	Appeal No. 03-12-0370
v.)	Circuit No. 08-D-337
)	
)	
GARY HOSACK,)	
)	Honorable Eugene P. Daugherty,
Respondent-Appellant.)	Judge Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion by denying respondent's request to modify or terminate maintenance based on respondent's voluntary retirement in January 2012. The court did not err by finding respondent in contempt of court for failure to pay maintenance as ordered and properly ordered respondent to pay the portion of petitioner's attorney's fees directly related to petitioner's rule to

show cause.

¶ 2 Following 35 years of marriage, the court entered a judgment of dissolution which required respondent Gary Hosack to pay maintenance to petitioner Kay Hosack (now known as Kay Zorger) in the amount of \$1,200 biweekly, to be increased to a biweekly payment of \$1,400 following the sale of the couple's Lake Cottage. After the sale of the Lake Cottage in April 2011, respondent continued to pay \$1,200 biweekly. Respondent later filed a petition to terminate maintenance in anticipation of his early retirement in January 2012, and did not make any maintenance payments to petitioner after January 4, 2012. Consequently, petitioner filed a petition for rule to show cause and the court found respondent in contempt of court for not paying the increased maintenance payments, ordered respondent to pay the arrearages in addition to petitioner's attorney's fees, and denied the request to terminate or modify maintenance as previously ordered.

¶ 3 Respondent appeals. We affirm.

¶ 4 BACKGROUND

¶ 5 Petitioner and respondent were married on August 29, 1974, and, in 2008, petitioner filed a petition for dissolution of marriage. On January 27, 2009, the court entered a judgment for dissolution of marriage which incorporated a "Marital Separation Agreement," as part of the judgment of dissolution. By agreement, the court ordered respondent to pay \$1,200 every other week for maintenance, and provided that respondent was responsible for all expenses regarding the Lake Cottage, including maintenance and repairs, until the parties sold the Lake Cottage property. After this sale, the judgment ordered respondent to pay \$1,400 every other week for maintenance to petitioner.

¶ 6 On November 4, 2011, respondent filed a petition to terminate or modify maintenance claiming there was a substantial change of circumstances since the entry of the judgment of dissolution due to his retirement from employment, scheduled for January 4, 2012. It is undisputed that respondent did not make any maintenance payments in excess of \$1,200 and made no payments after his retirement on January 4, 2012. On March 29, 2012, petitioner filed a petition for rule to show cause based upon respondent's failure to make maintenance payments as ordered in the original judgment. The court held a hearing on both petitions on April 10, 2012.

¶ 7 At the hearing, respondent testified that the sale of the Lake Cottage property occurred in April 2011, after he paid \$4,000 to an attorney to subdivide some land adjacent to the Lake Cottage, jointly owned by the parties and other individuals, and paid the expenses to replace the well on the Lake Cottage property. According to respondent, he and petitioner agreed that petitioner would pay half of those expenses, or \$3,000. However, on April 7, 2011, respondent emailed petitioner with a proposal to continue paying petitioner \$1,200 biweekly in maintenance, rather than the court-ordered \$1,400 after the sale of the Lake Cottage, until her \$3,000 share of these expenses were paid. Respondent testified that petitioner did not respond to this email, so he unilaterally decided to begin withholding the additional \$200 of maintenance as proposed. Respondent stated that, at the closing for the Lake Cottage, the proceeds from the sale were divided equally between the parties, as ordered in the judgment of dissolution, and respondent did not request or receive petitioner's \$3,000 share of those expenses at the closing.

¶ 8 Respondent stated he earned approximately \$150,000 in 2011. At the time of the hearing, respondent stated he lived with his current wife, Peggy Liebert, in Floyd Knobs, Indiana, in Liebert's house, which she owned before their marriage and held all the assets in her name.

According to respondent, Liebert's house was held in trust for Liebert's three sons. Respondent said he started building a new residence four months prior to the hearing, in Litchfield, Kentucky, which would be completed soon.

¶ 9 Respondent testified about the circumstances surrounding his retirement, at age 64, after working for Consolidated Grain and Barge (CGB) for eight years, as a regional operations manager. Respondent explained CGB owned agricultural facilities that handled grains from farmers' fields, as well as fertilizer, road salts, insecticides, etc. Respondent stated he was transferred to sites that CGB wanted to upgrade or expand and respondent was responsible for the new installations. As part of his job, he worked in the field and supervised contractors, requiring him to climb ladders to inspect whatever was being installed to make sure it was being built correctly.

¶ 10 Respondent said he worked for CGB at the time of the divorce and "oversaw" the operations for multiple facilities, including the one in Utica, Illinois. He testified he was then transferred to Mt. Vernon, Indiana, and worked there until he was transferred to Jeffersonville, Indiana, where he became the manager of only that facility during its upgrade, but that project was now completed. Respondent stated CGB wanted him to become the project manager at a site in Defiance, Ohio, which was 5 ½ hours from his home and would require him to drive to the location on Monday and return home either Thursday or Friday each week for 15 to 18 months. Respondent said the job at Defiance also entailed going to the job site everyday and "chasing contractors around" for 10 to 14 hours per day. Respondent told the court he felt his knees could not handle it anymore. According to respondent, he retired from that job because of his knee problems, which began 12 to 15 years earlier. Respondent testified that he had each knee

“scoped” within the last 15 months and received “Synvisc” and cortisone shots and took ibuprofen for pain.¹

¶ 11 Respondent testified that, since his retirement, he received a \$1,003 monthly pension from Cargill and social security benefits of approximately \$2,159 monthly. Respondent also said he had an investment account with Lincoln Financial valued at \$379,000, which included \$140,000 from his 401(k) account that he rolled into the Lincoln Financial account when he retired. He stated that petitioner was now eligible to collect her portion of the Cargill pension.

¶ 12 During cross examination, respondent admitted the marital settlement agreement required him to pay all expenses for the Lake Cottage including: mortgage payments, real estate taxes, repairs, upkeep, and insurance costs. Additionally, respondent testified that, in September 2011, he participated in a 26-mile marathon, on rollerblades or inline skates, which took him 40 minutes longer to complete than his last marathon. Respondent said this marathon occurred after he had his knee scoped approximately 15 months ago. Respondent also stated he voluntarily retired from his job and, had he not retired, he would still be employed at the time of the hearing.

¶ 13 Petitioner next testified that she was 63 years old and had been working as a customer service rep at Utica Silicates for approximately 3 ½ years. She said she worked about 32 hours per week making \$20 per hour. She testified she needed to work until she was 66.2 years old to receive her full retirement benefits, and she elected not to draw on the Cargill pension, yet, because it would increase in value if she waited. She also said her COBRA insurance benefits expired in December 2011, so she now paid \$230 per month for a \$5,000 deductible health

¹ Respondent did not produce evidence from a medical doctor stating he could no longer work at his current occupation.

insurance plan.

¶ 14 Petitioner testified that she had been married to respondent for over 35 years when the court entered the divorce judgment, and very little had changed regarding her finances and employment since then. She stated that the maintenance payments were necessary for her to maintain her lifestyle. As to her own health, petitioner said she had to have a hip replacement in December 2010, and suffered a subsequent hip dislocation of that replaced hip since then. She said she owed Illinois Valley Community Hospital \$5,243 and she would have to pay the \$5,000 deductible before insurance would start to make payments toward that bill. Regarding her current health, petitioner testified she takes medications for asthma, arthritis, a thyroid condition, and irritable bowel syndrome.

¶ 15 Petitioner stated she received no maintenance payments from respondent since January 2012, but she thought the maintenance payments would continue until respondent's death, regardless of his earnings. Petitioner denied agreeing to allow respondent to continue to pay \$1,200 after the sale of the Lake Cottage, but admitted she did not complain to him or file a petition with the court when respondent failed to increase the maintenance payments to \$1,400 after the sale.

¶ 16 At the close of the hearing, the court ruled that the parties had been married for a long time, and the marital separation agreement and judgment of dissolution, entered in 2009, did not specify a termination date for the maintenance payments or an occurrence that would terminate the maintenance payments such as retirement. The court found respondent failed to prove that a substantial change of circumstances had occurred since the entry of the judgment to warrant a modification or termination of maintenance. The court further found that respondent's

retirement was voluntary and his employment and earnings would have continued had he not retired. The court also found that respondent's contention that his knee condition forced his retirement was not established by the evidence.

¶ 17 As to the rule to show cause, the court found respondent failed to abide by the court's order to increase his maintenance payments, from \$1,200 to \$1,400 biweekly, after the sale of the Lake Cottage, leaving an arrearage amount of \$3,000. Further, the court found respondent failed to make the \$1,400 court ordered payments from January 11, 2012, until the date of the hearing, thus leaving an arrearage amount of \$9,800. The court found respondent in contempt of court for failing to pay maintenance. Respondent filed a timely notice of appeal challenging this court order.

¶ 18 On May 17, 2012, the court held a hearing on petitioner's request for payment of her attorney's fees. Petitioner's attorney said petitioner only sought reimbursement from respondent for fees incurred pursuant to the rule to show cause. Petitioner's attorney testified that he spent 8.9 hours on the petition for rule to show cause and his reasonable and customary hourly rate was \$200 per hour. The court ordered respondent to pay petitioner's attorney's fees in that amount, totaling \$1,680. Thereafter, respondent filed a timely amended notice of appeal, which also challenged the court's ruling that he pay that amount of petitioner's attorney's fees.

¶ 19 ANALYSIS

¶ 20 On appeal, respondent first challenges the court's decision denying his petition to terminate or modify maintenance. Second, respondent contests the court's finding that respondent was in contempt of court for failing to abide by the court's order to pay maintenance in the amount of \$1,400 biweekly after the sale of the Lake Cottage, as well as failing to pay

maintenance after respondent retired from his employment. Finally, respondent contends that the trial court erred by ordering him to pay \$1,680 of petitioner's attorney's fees.

¶ 21 I. Petition to Terminate or Modify Maintenance

¶ 22 In this case, respondent alleges the trial court erred when it denied his 2011 request for termination or modification of his biweekly maintenance payment, as detailed in the parties' "Marital Separation Agreement" and incorporated into the judgment of dissolution dated January 27, 2009. A court may modify a maintenance award only upon a showing of a substantial change in circumstances. 750 ILCS 5/510(a-5) (West 2010). It is well-established that the party seeking modification bears the burden of proof regarding the change of circumstances. *In re Marriage of Logston*, 103 Ill. 2d 266, 287 (1984); see also *In re Marriage of Reynard*, 378 Ill. App. 3d 997, 1003 (2008). A trial court's decision regarding modification of maintenance will not be disturbed absent an abuse of discretion. *Logsdon*, 103 Ill. 2d at 287; *In re Marriage of Krupp*, 207 Ill. App. 3d 779, 797 (1990).

¶ 23 A maintenance award can be modified either when the needs of the spouse receiving the payments change or the ability of the spouse making the payments changes. *Reynard*, 378 Ill. App. 3d at 1003. In determining whether maintenance should be modified or terminated, a trial court should consider the same factors that it considered in making an initial award under section 504(a) of the Illinois Marriage and Dissolution Act (Act) (750 ILCS 5/504(a) (West 2010)), along with the additional factors set forth in section 510(a-5) of the Act. 750 ILCS 5/510(a-5) (West 2010). The relevant factors articulated in both statutory sections include: the standard of living during the marriage, the duration of the marriage, the age and physical condition of both parties, the financial resources of the party seeking maintenance, the ability of the spouse from

whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance, any change in the employment status of either party and whether the change has been made in good faith, and the duration of the maintenance payments previously paid and remaining to be paid based on the duration of the marriage. 750 ILCS 5/504(a); 510(a-5) (West 2010).

¶ 24 Here, the parties had been married for 35 years at the time the court entered the judgment of dissolution, in 2009, ordering respondent to pay maintenance to petitioner. At the time of the modification hearing, respondent was 64 years old and petitioner was 63 years old. The change of circumstances raised by respondent resulted from his reduced income following his voluntary retirement from his employment on January 4, 2012.

¶ 25 In Illinois, the question of whether a spouse may rely on retirement as a change in circumstances 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); *In re Marriage of Smith*, 77 Ill. App. 3d 858, 863 (1979). Relevant factors include his age, health, motives and timing of retirement, ability to pay maintenance after retirement, and the former spouse's ability to provide for herself. *Id.* It is well-established that a voluntary early retirement resulting in reduced income is not automatically a substantial change of circumstances warranting a reduction or termination of maintenance payments. *Id.*

¶ 26 Petitioner testified that the agreed maintenance payments were necessary for her to maintain her lifestyle. Petitioner continued to work at a job where she earned approximately \$32,000 annually, with little prospect to earn more than that amount, as compared to respondent's \$150,000 annual income prior to his retirement. She also said she needed to work

until she was at least 66.2 years of age to obtain her full retirement benefits. As to her own health issues, petitioner stated she had to have a hip replacement in December 2010, and suffered a subsequent hip dislocation of that replaced hip causing her to owe substantial medical bills. Petitioner also told the court that she takes prescribed medications for asthma, arthritis, a thyroid condition, and irritable bowel syndrome. As a result of petitioner's COBRA coverage expiring, petitioner stated her health insurance premiums changed and she now had a \$5,000 deductible before insurance would cover medical costs.

¶ 27 In the instant case, the court found respondent failed to prove that a substantial change of circumstances had occurred, since the entry of the judgment, to warrant a modification or termination of maintenance because respondent's retirement was voluntary, and his employment and earnings would have continued had he not retired. The court rejected respondent's contention that the condition of his knees forced his retirement. The record reveals that, in spite of some discomfort, respondent's knees allowed him to continue to enjoy physically demanding recreational activities which supports the court's finding that respondent's physical condition did not force his retirement. We conclude the trial court did not abuse its discretion, when applying the statutory factors in this case, by denying a modification or termination of maintenance pursuant to respondent's petition.

¶ 28 **II. Rule to Show Cause**

Respondent also challenges the trial court's decision finding him in contempt of court for his failure to pay court-ordered maintenance. In the instant case, the original judgment of dissolution, entered January 27, 2009, required respondent to pay \$1,200 every other week as and for maintenance until such time as the Lake Cottage property sold at which time respondent

would pay \$1,400 every other week for maintenance to petitioner. The Lake Cottage sold in April of 2011. There was no provision that allowed for the maintenance payments to be reduced or to terminate upon respondent's retirement.

¶ 29 Issues regarding whether the noncompliance of a court order is willful or the alleged contemnor had a valid excuse for noncompliance is a question of fact and this court will not disturb those findings unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion. *Logston*, 103 Ill. 2d at 287. In Illinois, the failure to comply with an order to pay maintenance constitutes *prima facie* evidence of contempt. *Id.* at 285. Once a petitioner makes the *prima facie* showing of nonpayment, the burden shifts to respondent to prove that he is unable to pay. *Id.* To prove this defense, a respondent must show that he neither has money now with which he can pay, nor has disposed wrongfully of money or assets with which he might have paid. *Id.*

¶ 30 In the instant case, the evidence showed that respondent took it upon himself to assess half the costs of installing a new well at the Lake Cottage against petitioner, in spite of the judgment ordering respondent to pay for all repairs and maintenance costs at the Lake Cottage. Additionally, after respondent voluntarily retired from his employment in January 2012, the evidence showed that respondent unilaterally elected to cease making maintenance payments altogether.

¶ 31 The court found respondent failed to abide by the court's order to increase his maintenance payments, from \$1,200 to \$1,400 biweekly, after the Lake Cottage sold, leaving an arrearage amount of \$3,000. Further, the court found respondent failed to make the \$1,400 court ordered payments from January 11, 2012, until the date of the hearing leaving an arrearage

amount of \$9,800. Based on the evidence, we agree that respondent did not present any evidence to show good cause why he failed to abide by the court's order regarding maintenance payments. We conclude that the trial court's findings were not against the manifest weight of the evidence and did not constitute an abuse of discretion.

¶ 32 III. Attorney's Fees

¶ 33 Finally, respondent contends that the trial court erred when it ordered him to pay \$1,680 of petitioner's attorney's fees. Decisions regarding attorney's fees rest largely within the discretion of the trial court. *In re Marriage of Edelstein*, 82 Ill. App. 3d 574, 576 (1980). Additionally, section 508 (b) of the Act provides:

“In every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against whom the proceeding is brought to pay promptly the costs and reasonable attorney's fees of the prevailing party.” 750 ILCS 5/508(b) (West 2010).

Petitioner's attorney presented evidence that he spent 8.9 hours in preparing for the rule to show cause portion of petitioner's case and his reasonable and customary hourly rate was \$200 per hour. Based on the attorney's unrefuted testimony, the court ordered respondent to pay that portion of petitioner's attorney's fees in the amount of \$1,680. Based upon the finding of contempt and facts and evidence presented to the court, the court did not abuse its discretion in ordering attorney's fees.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, we affirm the ruling of the circuit court denying respondent's

petition to modify or terminate maintenance, finding respondent in contempt for failure to pay maintenance as previously ordered, and ordering respondent to pay arrearages for unpaid court-ordered maintenance payments and to pay a portion of petitioner's attorney's fees.

¶ 36 Affirmed.