



a homemaker. Pursuant to the marital settlement agreement, respondent was awarded \$3,000 per month in maintenance and \$3,000 per month in child support. The terms of the original 2002 maintenance agreement were as follows:

"Maintenance. That [petitioner] shall pay [respondent] the sum of THREE THOUSAND DOLLARS (\$3000.00) per month as maintenance for a period of four (4) years from the entry of the Judgment of Dissolution of Marriage, commencing in June 1, 2002. Said maintenance shall not be modifiable during its term, unless either party were to die, [respondent] were to remarry, or [respondent] were to cohabit with another person on a resident, continuing conjugal basis, in which event said maintenance would terminate. Further, said maintenance shall not extend beyond four (4) year period unless [respondent] were to file a petition seeking a review of the issue of maintenance prior to the expiration of the four (4) year period."

In addition to child support and maintenance, respondent was also awarded \$318,197 in cash, \$40,795 in a Schwab IRA, \$189,260 in a Schwab non-tax shelter, \$30,343 in a Union Planters account, \$32,783 and \$126 in West Pointe Bank accounts, and \$144,114 in American Funds.

¶ 5 On April 22, 2005, prior to the four-year expiration period for maintenance set forth above, respondent filed a petition to extend maintenance and for other relief. On January 9, 2007, the parties agreed to modify the original maintenance agreement as follows:

- "1. That child support shall cease effective August 1, 2006.
2. That maintenance shall be modified as follows:
  - A. \$5000 per month retroactive to August 1, 2006 through December 31, 2007, payable on the 1st day of each month. That a lump sum payment of \$10,000 shall be paid within 14 days for the amount due Aug - Dec 2006.
  - B. \$4000 per month Jan 1, 2008- Dec 31, 2008, payable on the 1st day of each

month[.]

C. \$3000 per month Jan 1, 2009[.] through Dec 31, 2015[.]

D. \$2000 per month from Jan 1, 2016[.] until the Petitioner's 62nd birthday at which time it shall cease.

3. That the Petitioner shall continue to maintain a life insurance policy on his life with the Respondent the beneficiary at the current level until Jan 1, 2009, at which time he may drop it to \$250,000 until Jan 1, 2016[.] at which time he shall drop the coverage to \$100,000 until his obligation to pay maintenance ceases."

Petitioner paid respondent as per the terms of the agreement.

¶ 6 On July 12, 2010, respondent filed a petition for modification of maintenance and other relief, asserting in pertinent part as follows:

"Subsequent to the entry of the January 9, 2007 Order, a substantial change of circumstances has occurred as the Respondent has had ongoing health issues and therefore has not been able to sustain gainful employment, and the Petitioner is gainfully employed and well able to provide additional maintenance."

Respondent also asked that petitioner pay her attorney fees and costs.

¶ 7 On August 9, 2012, a hearing was conducted on the petition to modify. Petitioner was called as an adverse witness and testified about his income. His W-2 for 2006 showed income at \$694,470. He testified that during the first six months of 2011, his income was \$311,000 from his periodontics practice. Since the parties' divorce, petitioner has accumulated over \$2 million in assets.

¶ 8 Respondent testified that her only source of income is \$3,000 per month in maintenance payments. Her assets totaled \$420,000, including home equity in the amount of \$120,000 and an IRA valued at approximately \$300,000. Respondent had a credit card bill in the amount of \$52,000 for which the minimum payment is \$2,000 per month. While

respondent intended to get a job or go back to school after the parties' divorce, she was successful at neither. She testified that she was now prohibited from working due to her physical condition. She said she was seeking an increase in maintenance to approximately \$10,000 per month, which would cover her monthly expenses.

¶ 9 Respondent admitted she was involved in two car accidents in 2000 and agreed that as far back as 2006, examining doctors diagnosed her with sleep difficulties, pain, stress, depression, right neck pain, right shoulder pain, and an inability to raise her arms above her chest. Respondent was unable to work when maintenance was modified on January 9, 2007. While respondent believed she would be able to seek employment after the original modification, she admitted she never felt capable of seeking employment after January 9, 2007, due to her physical limitations.

¶ 10 Beginning in 2009, respondent started experiencing problems with her left arm, including numbness and tingling in her fingers and hands. Since that time, she has had multiple surgeries and has treated with chiropractors, physical therapists, and an orthopedic surgeon. Despite treatment and surgery, respondent is not any better. Respondent testified that due to the condition in her left arm, she started using her right arm for everything, which caused her to start having trouble with her right arm. In February 2012, she had double ulnar surgery and carpal tunnel surgery. She said there are days when she cannot drive a car due to the condition of her arms and that tingling and "zingers" occur unexpectedly. She testified that she does not go out much unless her mother or sister takes her. She also needs help cleaning her house.

¶ 11 Dr. David Mitchell, one of respondent's treating physicians, testified about respondent's physical condition. He noted that in 2009, respondent developed lateral elbow pain and by August 2009, respondent reported to him that she was unable to work out because of pain in her left hand and elbow. A nerve conduction study was performed in May

2010 and showed loss of strength in respondent's left hand and loss of sensation in her fingers. By this time, respondent showed signs of atrophy in her left hand. Dr. Mitchell sent respondent to Dr. Roman and Dr. L'Hommedieu, both of whom performed surgery on respondent. Dr. Mitchell last examined respondent on March 14, 2012. He said respondent's ability to use her left hand was still "very limited" and she was "very close to maximum medical improvement" after her surgeries. Dr. Mitchell opined that respondent's condition would be a "major liability" for most employers.

¶ 12 Petitioner testified that he has seen respondent at local events such as Art on the Square, and she did not appear to be incapacitated. Both petitioner and respondent testified it was their understanding that the January 9, 2007, agreement was final and maintenance would not be increased. Nevertheless, respondent filed the instant petition.

¶ 13 After hearing all the evidence, the trial court entered an order denying respondent's petition for modification. The circuit court specifically found that "[t]he January 9, 2007[,] order did not modify the language of the Marital Settlement Agreement which stated maintenance shall not be modifiable during its term." The circuit court further found that respondent testified that she was not physically capable of working in 2007 when the agreement to modify maintenance was entered and that she was still physically incapable of working, that respondent has sought neither work nor education since 2007, that petitioner's income in 2007 and 2012 is approximately the same, that respondent has not proved a substantial change in circumstances since January 9, 2007, and that the January 9, 2007 agreement is a binding agreement and is nonmodifiable. Respondent now appeals.

¶ 14 ANALYSIS

¶ 15 The issue on appeal is whether the trial court erred in denying respondent's petition for modification of maintenance. Respondent first asserts that rather than relying on respondent's evidence, the trial court based its decision upon construction of the two prior

maintenance orders, and, therefore, the standard of review is *de novo*. Respondent insists the trial court's finding that the 2007 maintenance agreement is nonmodifiable has no basis in law and that the parties did not make the agreement nonmodifiable. In the alternative, respondent contends the trial court failed to conduct the proper analysis in denying respondent's petition and the statutory factors weigh in favor of respondent's petition for maintenance; thus, the trial court abused its discretion in denying the petition for modification of maintenance. Petitioner first responds the trial court properly denied the petition because maintenance was nonmodifiable pursuant to terms of the marital settlement agreement, and the January 9, 2007, order did not modify the language of that agreement. Second, petitioner responds that the trial court properly ruled there has been no material change in circumstances to warrant a modification of maintenance. We agree with petitioner.

¶ 16 The rules of contract construction are also applicable to the interpretation of a marital settlement agreement. *In re Marriage of Dundas*, 355 Ill. App. 3d 423, 425, 823 N.E.2d 239, 241 (2005). A court's primary objective is to give effect to the intent of the parties. *In re Marriage of Dundas*, 355 Ill. App. 3d at 426, 823 N.E.2d at 241. Absent an ambiguity, the language used in the marital settlement agreement is the best indicator of the parties' intent, and the terms in the agreement must be given their plain and ordinary meaning. *In re Marriage of Dundas*, 355 Ill. App. 3d at 426, 823 N.E.2d at 241.

¶ 17 Section 502(f) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/502(f) (West 2008)) governs marital settlement agreements and provides as follows:

"Except for terms concerning the support, custody or visitation of children, the judgment may expressly preclude or limit modification of terms set forth in the judgment if the agreement so provides. Otherwise, terms of an agreement set forth in the judgment are automatically modified by modification of the judgment."

Therefore, parties may agree that maintenance shall not be modified or terminated except

under certain specified conditions. "When the parties so agree, maintenance may be modified or terminated only under the circumstances specified in the agreement." *In re Marriage of Schweitzer*, 289 Ill. App. 3d 425, 428, 682 N.E.2d 759, 760 (1997). The purpose is to permit parties to plan for the future by eliminating concerns about subsequent motions to increase or decrease obligations. *In re Marriage of Schweitzer*, 289 Ill. App. 3d at 428, 682 N.E.2d at 760.

¶ 18 The marital settlement agreement here provided that petitioner would pay respondent \$3,000 per month for maintenance:

"[f]or a period of four (4) years from the entry of the Judgment of Dissolution of Marriage, commencing [o]n June 1, 2002. Said maintenance shall not be modifiable during its term, unless either party were to die, the wife were to remarry, or the wife were to cohabit with another person on a resident, continuing conjugal basis, in which event said maintenance would terminate. Further, said maintenance shall not extend beyond four (4) year period unless the wife were to file a petition seeking a review of the issue of maintenance prior to the expiration of the four (4) year period."

On April 22, 2005, prior to the expiration of the four-year period, respondent filed a petition to extend maintenance.

¶ 19 On January 9, 2007, the parties agreed to modify maintenance in the following manner:

"2. That maintenance shall be modified as follows:

A. \$5000 per month retroactive to August 1, 2006 through December 31, 2007, payable on the 1st day of each month. That a lump sum payment of \$10,000 shall be paid within 14 days for the amount due Aug - Dec 2006.

B. \$4000 per month Jan 1, 2008- Dec 31, 2008, payable on the 1st day of each month[.]

C. \$3000 per month Jan 1, 2009[,] through Dec 31, 2015[.]

D. \$2000 per month from Jan 1, 2016[,] until the Petitioner's 62nd birthday at which time it shall cease."

The January 9, 2007, order did not modify the contract language of the original marital settlement agreement which precludes modification of maintenance payments, except in certain situations such as death or remarriage of respondent.

¶ 20 A contract modified by the parties creates a single new contract consisting of both the terms of the prior contract which the parties have not agreed to change, as well as the new terms to which the parties have agreed. *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill. App. 3d 632, 637, 888 N.E.2d 657, 662 (2008). In the instant case, the January 9, 2007, order merely extended the maintenance as agreed to by the parties and set up a schedule of maintenance at various levels until respondent's sixty-second birthday; however, it did nothing to change the nonmodification clause.

¶ 21 We also point out that both parties specifically testified that it was their belief that maintenance could not be modified. During respondent's testimony at the hearing on her petition, the following colloquy ensued between respondent and petitioner's attorney:

"Q. [Attorney for petitioner:] Did you believe—okay. At this time did you believe these were the numbers you were going to be paid for those periods and then on your sixty second birthday this was to cease?

A. Yes.

Q. Did you believe at that time you could come back any time and ask for more money during this period?

A. No."

During his testimony, petitioner specifically testified that he agreed to the January 9, 2007, modification only because he thought it "was the end."



¶ 22 Under these circumstances, we conclude that the marital settlement agreement precludes any further modifications of maintenance payments. Accordingly, the trial court did not err in dismissing respondent's petition on this basis. Even assuming *arguendo* that the agreement is modifiable, we find that the trial court did not err in finding there has been no material change in circumstances to warrant a modification of maintenance.

¶ 23 Section 510(a-5) of the Act provides that "[a]n order for maintenance may be modified or terminated only upon a showing of a substantial change in circumstances." 750 ILCS 5/510(a-5) (West 2008). This section requires that in all proceedings seeking to modify or terminate maintenance courts take into consideration not only the nine listed factors, but also the factors listed in section 504(a) of the Act (750 ILCS 5/504(a) (West 2008)). 750 ILCS 5/510(a-5) (West 2008); *Blum v. Koster*, 235 Ill. 2d 21, 41, 919 N.E.2d 333, 345 (2009). The party seeking a modification bears the burden of presenting evidence to demonstrate a substantial change in circumstances. *In re Marriage of Izzo*, 264 Ill. App. 3d 790, 791, 637 N.E.2d 723, 724 (1994).

¶ 24 While the court must consider all of the factors listed, it is not mandatory that it make specific findings on the record for each of the factors. *Blum*, 235 Ill. 2d at 38, 919 N.E.2d at 343. A trial court's decision concerning modification of maintenance will not be disturbed absent a clear abuse of discretion. *Blum*, 235 Ill. 2d at 36, 919 N.E.2d at 342. An abuse of discretion occurs only when the court's ruling is arbitrary, fanciful, or unreasonable or where no reasonable person would take the same view. *Blum*, 235 Ill. 2d at 36, 919 N.E.2d at 342.

¶ 25 Here, the trial court specifically found that "[r]espondent has not proved a substantial change in circumstance since January 9, 2007." After careful consideration of the record before us, we cannot say the trial court's decision is an abuse of discretion. While respondent insists several of the statutory factors weigh in her favor, we agree with petitioner that there has not been a material change in circumstances to warrant modification.

¶ 26 It is well settled that the recipient of a maintenance award is under an affirmative obligation to become appropriately trained and obtain the skills necessary to become financially independent in the future. *In re Marriage of Martin*, 223 Ill. App. 3d 855, 860, 585 N.E.2d 1158, 1162 (1992). In the instant case, respondent has done little to advance the cause of becoming financially independent. Since her divorce in 2002, respondent took a couple of classes at a junior college, tried to sell Arbonne products, and dreamed of going into business with a relative. We point out that when maintenance was modified in 2007, respondent already claimed she was incapable of pursuing employment due to physical infirmities. During the instant hearing, respondent testified that she was never able to seek employment after the modification on January 9, 2007. Even though Dr. Mitchell described respondent's condition as deteriorating, we agree with petitioner that respondent's condition of being unable to work remains the same as it was on January 9, 2007. Respondent was allegedly incapable of working then and allegedly remains physically incapable of working.

¶ 27 Moreover, petitioner's income, while high, remains virtually the same as it was in 2006. Petitioner's income was stagnant because he lost a partner, but carried the same overhead. He is also doing fewer implants and is not getting as many referrals.

¶ 28 Respondent relies on *In re Marriage of Keip*, 332 Ill. App. 3d 876, 773 N.E.2d 1227 (2002), which specifically states, "Illinois law is clear that one is not required to liquidate assets in order to generate income to live on." *Keip*, 332 Ill. App. 3d at 882, 773 N.E.2d at 1232. *Keip* is distinguishable from the instant case because it was a wife's appeal from two portions of the final judgment dissolving her 22-year marriage, whereas the instant case is an appeal from the trial court's order denying respondent's petition for a modification of maintenance, which had already been previously modified. Here, it was highly unlikely that respondent would ever earn the same amount petitioner earned due to his high-paying career as a periodontist. In light of that fact, respondent was awarded assets in excess of \$750,000

as part of the marital settlement agreement. Respondent was also awarded child support and maintenance.

¶ 29 The parties' one child is now emancipated. Respondent has had years to seek training and employment, but has failed to do either. The agreement worked out in 2007 awards respondent maintenance until she reaches the age of 62. Under these circumstances, we cannot say the trial court's decision to deny respondent's petition was arbitrary, fanciful, or unreasonable or that no reasonable person would take the view adopted by the trial court. Simply put, respondent has failed to show a substantial change in circumstances warranting a modification of maintenance.

¶ 30 For the foregoing reasons, the judgment of the circuit court is hereby affirmed.

¶ 31 Affirmed.