

NOTICE
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2014 IL App (5th) 130472-U

NO. 5-13-0472

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).

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
MARVIN H. SCHULTZ,)	Madison County.
)	
Petitioner-Appellant,)	
)	
and)	No. 00-D-1139
)	
BARBARA J. SCHULTZ,)	Honorable
)	Elizabeth R. Levy,
Respondent-Appellee.)	Judge, presiding.

JUSTICE SPOMER delivered the judgment of the court.
Justices Chapman and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Judgment of the circuit court modifying petitioner's \$800 per month rehabilitative maintenance obligation to \$275 per month, effective August 2013, and characterizing it as permanent maintenance affirmed where the same was not an abuse of discretion.

¶ 2 The petitioner, Marvin H. Schultz, appeals the July 15, 2013, order of the circuit court of Madison County that, rather than terminating his rehabilitative maintenance obligation to the respondent, Barbara J. Schultz, modified his monthly payment to \$275 effective August 2013 and reclassified the same as permanent maintenance. For the following reasons, we affirm.

¶ 3

FACTS

¶ 4 The parties were married on June 23, 1978. The circuit court dissolved the marriage in an order entered May 31, 2001, in which Marvin was ordered to pay Barbara \$950 per month in rehabilitative maintenance, reviewable in 24 months. Both parties appealed and this court entered a disposition on December 9, 2002, affirming the circuit court's order. On May 22, 2003, Barbara filed a motion to review maintenance, in which she requested an extension of the maintenance. Marvin responded on June 16, 2003, with a request to terminate maintenance. On October 14, 2003, the circuit court entered an order requiring Marvin to deposit maintenance payments of \$950 per month into an escrow account while litigation was pending on the parties' motions. The matter remained at an impasse for nearly four years.

¶ 5 On May 8, 2007, the circuit court entered an order releasing to Barbara the funds held in escrow and requiring Marvin to continue rehabilitative maintenance, reviewable in 12 months. The circuit court further ordered Barbara to seek psychiatric care within 60 days and to fully comply with the treatment directives of her psychiatrist. Barbara was also ordered, after six months, to provide a report under seal from the psychiatrist to the court regarding her prognosis, diagnosis, treatment plan, and compliance with the treatment plan. The issue of permanent maintenance was reserved. The circuit court reduced Marvin's maintenance obligation to \$800 per month in an order entered on May 4, 2009, but did not characterize the maintenance as rehabilitative or permanent.

¶ 6 On April 12, 2012, in anticipation of his soon-to-be retirement, Marvin filed another motion to terminate maintenance. A hearing on the motion was conducted on

January 14, 2013. At the time of the hearing, Barbara was 61 years old and Marvin was 62 years old. The parties stipulated at the outset that Marvin receives \$3,368 per month, which consists of \$1,539 per month from a Dynegy Midwest Generation Inc. Union Pension Plan (Dynegy pension), \$1,707 per month from social security, and approximately \$122 per month from the General Chemical Corporation pension plan (GCC pension). The parties also stipulated that Barbara receives \$103.16 per month from the GCC pension and \$490.06 per month from the Dynegy pension and that she would be entitled to receive 35% of Marvin's social security benefit or \$597.45 per month when she turned 62 in August 2013, with an expected combined total of \$1,190.67 per month.

¶ 7 Barbara testified at the hearing that she and her 27-year-old son reside in the same home, that her son has resided with her all of his life, and that he does not pay any of the household expenses, is not disabled in any way, and occasionally works odd jobs. Barbara admitted that she occasionally gives her son money for food or gasoline. She noted that she and her son both get food stamps. Also, Barbara testified that she and her brother inherited a house from her mother, which was worth less than \$30,000. She and her brother expected to receive the proceeds from the sale of the house.

¶ 8 In addition to the amounts of income stipulated to at the commencement of the hearing, Barbara testified that she occasionally cleans houses. No evidence was presented regarding the amount she earns for cleaning. Barbara reported that Marvin stopped making the \$800 per month maintenance payments when he retired on June 1, 2012. Her final check of \$369.23 was reflected on Marvin's June 15, 2012, paystub.

Barbara also has an American Funds IRA in the amount of \$4,860 and a \$45,000 401(k) invested with Vanguard. She testified that when Marvin stopped making his monthly maintenance payments, she was required to use money from the IRA and to borrow \$27,300 from her brother, which she intended to pay back after the sale of her mother's home.

¶ 9 Barbara attested that she owns 51 shares of stock from Prudential Insurance Company, a checking account at U.S. Bank with an approximate balance of \$6,500, a savings account at U.S. Bank with a balance of \$3,900, the amount which was received from her insurance company for her vehicle which was hail damaged, and a checking account at Associated Bank in the amount of \$5,240, which was received from her insurance company for the roof of her home which was hail damaged. She planned to use the full \$5,240 for the roof repair and \$1,000 of the \$3,900 as the insurance deductible for the roof. She did not plan to repair her vehicle, as it is a 1999 model and not in the greatest shape. Barbara added that she has four life insurance policies which are payable to her sons upon her death, two of which have a combined cash surrender value of \$6,872.

¶ 10 Barbara testified that she does not have health insurance, she was denied Medicaid, and the only insurance company that would accept her was ICHIP, with premiums of \$740 per month as of May 2010, and no other companies would accept her because of her preexisting conditions, including prolapsed mitral valve, panic disorder, depression, COPD, agoraphobia, and osteoarthritis. Accordingly, any medical bills Barbara had were paid out of pocket and she is treated for her conditions as she can

afford to be. She applied for social security disability, but was denied multiple times. Barbara testified that her bottom line total household expenditures per month total \$1,608, which exceeds her income by \$400 per month, thereby requiring her to withdraw money from her 401(k) to make up the difference.

¶ 11 Marvin testified that he was employed as an electrician for 20 years and retired at the age of 62, as he had planned to do for some time. He testified that his retirement was not an attempt to avoid paying maintenance to Barbara. He added that his retirement was completely voluntary and the only ailment he complained of was "the usual arthritic." After divorcing Barbara, Marvin remarried. His current wife does not work outside the home, and her earnings consist of social security and a pension. Pursuant to his affidavit of expenses, Marvin testified that he pays all of the home maintenance, vehicle insurance and maintenance, groceries, electric, phone, and cable bills, half of the homeowner's insurance, and real estate taxes. Expenses Marvin pays exclusively for himself include gasoline, life insurance, clothing, health insurance, laundry, hair care, recreation, health club, personal items, and charity. In addition to the stipulated income of \$3,368 per month, Marvin also has \$15,000 in a savings account.

¶ 12 On July 15, 2013, the circuit court entered an order directing Marvin to continue making maintenance payments in the amount of \$800 per month and ordering him to make up the payments he had missed since he retired and stopped paying in June 15, 2012. The circuit court modified the maintenance award to \$275 per month, effective August 2013, when Barbara would begin receiving social security, and classified it as permanent maintenance. Marvin filed a timely notice of appeal.

¶ 13

ANALYSIS

¶ 14 The sole issue on appeal is whether the circuit court erred by modifying Marvin's maintenance obligation rather than terminating it. "Section 510(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) provides that maintenance may be modified only where the moving party can demonstrate a 'substantial change in circumstances.' " *In re Marriage of Bothe*, 309 Ill. App. 3d 352, 356 (1999) (quoting 750 ILCS 5/510(a) (West 1998)). " 'In determining whether to modify or terminate maintenance, the trial court should consider the same factors it considered when making the initial award of maintenance.' " *Id.* (quoting *In re Marriage of Kocher*, 282 Ill. App. 3d 655, 661 (1996)). The relevant factors courts should utilize when considering an award of maintenance are enumerated in section 504(a) of the Act (750 ILCS 5/504(a) (West 2012)). " 'An award of maintenance must be made on the basis of the circumstances disclosed by the evidence at the time of the hearing.' " *In re Marriage of Bothe*, 309 Ill. App. 3d at 356 (quoting *In re Marriage of Sisul*, 234 Ill. App. 3d 1038, 1040 (1992)). "As a general rule, 'a trial court's determination as to the awarding of maintenance is presumed to be correct.' " *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 650 (2008) (quoting *In re Marriage of Donovan*, 361 Ill. App. 3d 1059, 1063 (2005)). "The decision to modify or terminate maintenance is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *In re Marriage of Bothe*, 309 Ill. App. 3d at 355. "An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court." *Id.* at 356.

¶ 15 In this case, Marvin argues that the circuit court abused its discretion by not terminating the maintenance, but modifying it to a reduced amount and characterizing it as permanent maintenance. We find several factors to support the circuit court's decision. As required, a substantial change of circumstances occurred on August 19, 2013 (*In re Marriage of Bothe*, 309 Ill. App. 3d at 356), when Barbara turned 62 and began receiving monthly social security of \$600 per month, thereby increasing her income (750 ILCS 5/504(a)(1) (West 2012)). We find that the factor of Barbara's increased income supports the reduction of the monthly maintenance award from \$800 to \$275, but do not find it indicative of a justification to terminate the maintenance altogether as Marvin contends. Barbara testified that, even after accounting for the monthly social security she would receive in August 2013, her expenses still exceeded her income by \$400 per month. This justifies a modification rather than a termination of the maintenance.

¶ 16 Marvin stipulated that his monthly income was \$3,368 after he retired, which exceeds Barbara's income by \$2,177.33 per month. In addition to the income of the parties, also relevant is the present and future earning capacity of the parties (750 ILCS 5/504(a)(3) (West 2012)). Barbara testified that she occasionally cleans houses and that she stopped regularly cleaning in 2011. She receives food stamps to pay for her groceries, and her projected monthly income beginning August 2013 was \$1,190.67. Marvin retired in June 2012. He testified that his long-term plan had been to retire at the age of 62, after completing 20 years of employment. He averred that he was not forced to retire, but did so voluntarily. After retiring, Marvin unilaterally stopped paying maintenance to Barbara, which defied the then-effective order of the circuit court.

Marvin attempted to justify his argument to terminate maintenance because his income decreased when he retired. We disagree. The circuit court aptly held that Marvin's retirement was not a justification to grant his petition to terminate maintenance because his retirement was not fortuitous but voluntary, that he failed to establish that he was unable to work, and that he failed to establish that his health prevented him from working.

¶ 17 As the appellate court held in *In re Marriage of Waller*, 253 Ill. App. 3d 360, 362 (1993), although a person may have the right to retire, the same does not necessarily justify a termination of maintenance. In *In re Marriage of Waller*, the 63-year-old respondent retired rather than accepting another position offered by his employer. *Id.* at 361. He then filed a petition to terminate maintenance, alleging that his retirement substantially changed his financial circumstances, thereby justifying termination. *Id.* The appellate court observed that the respondent had not reached the customary age of retirement, his health was good, he was able to pay his bills, and he was capable of continuing the maintenance payments using his retirement income. *Id.* at 362. The appellate court held that because the *In re Marriage of Waller* respondent's retirement was the result of circumstances within his control, the circuit court properly denied his petition to terminate maintenance. *Id.* at 361.

¶ 18 Applying these principles to the case at bar, at the time of the hearing, Marvin was 62 years of age, one year younger than the respondent in *In re Marriage of Waller*. Marvin retired by his own choice, rather than being forced into it. His monthly income exceeds his monthly expenses, and some of his expenses are discretionary (750 ILCS

5/504(a)(1) (West 2012)). In contrast, Barbara was required to borrow money from her brother and withdraw money from her 401(k) in order to meet her expenses. There is no evidence that Marvin's health prevents him from holding a job (750 ILCS 5/504(a)(8) (West 2012)). The only medical problem Marvin complained of was common arthritis. In contrast, Barbara suffers from prolapsed mitral valve, panic disorder, depression, COPD, agoraphobia, and osteoarthritis. We also find the factor of Barbara's health problems in direct correlation to a decreased future earning capacity (750 ILCS 5/504(a)(3) (West 2012)), in spite of Marvin's argument that Barbara's poverty is self-inflicted and that she has the means to earn more income by cleaning more houses. No evidence was presented regarding how much Barbara earns cleaning houses. She testified that she stopped cleaning on a regular basis in 2011, and we find it reasonable to assume that Barbara's multiple health issues necessarily hinder her ability to earn more money. These factors also support the maintenance award.

¶ 19 Also relevant is that the parties were married for 23 years (750 ILCS 5/504(a)(7) (West 2012)) and the standard of living established during the marriage (750 ILCS 5/504(a)(6) (West 2012)) was obviously better than Barbara's current standard of living. There is no evidence that the parties used food stamps or were required to borrow money and to withdraw from their 401(k) to pay expenses during the marriage, as Barbara was required to do after the divorce. Without the combined marital income, it will be impossible for Barbara to maintain the standard of living she enjoyed during the marriage, and the maintenance award is supported by this factor.

¶ 20 In light of the established change of circumstances and the evidence supporting the maintenance award in consideration of the above factors, we cannot say that no reasonable person would have taken the view adopted by the circuit court. See *In re Marriage of Heroy*, 385 Ill. App. 3d at 651. Accordingly, the circuit court did not abuse its discretion in modifying the maintenance award to \$275 per month as permanent maintenance, rather than terminating the previous award of rehabilitative maintenance.

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, we affirm the July 15, 2013, order of the circuit court of Madison County.

¶ 23 Affirmed.