

FIRST DIVISION
SEPTEMBER 28, 2015

1-13-0290
1-13-2996

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 THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> MARRIAGE OF:)	Appeal from the
)	Circuit Court of
DONNA TUKE, f/k/a DONNA TUKE HEROY,)	Cook County
)	
Petitioner-Appellee,)	
)	
and)	No. 03 D 10451
)	
DAVID F. HEROY,)	Honorable
)	Moshe Jacobius,
Respondent-Appellant.)	Judge Presiding.

ORDER

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

¶ 1 *Held:* The trial court did not abuse its discretion in modifying the permanent maintenance award based on David's substantial change in circumstances. The trial court made a calculation error in determining the amount of permanent maintenance awarded to Donna based on 25% of David's income; and the trial court erred in awarding Donna attorneys fees since she did not establish an inability to pay her own fees.

¶ 2 Respondent-appellant, David F. Heroy (David), appeals from the judgment of the circuit court of Cook County granting modification of maintenance payments to petitioner-appellee, Donna Tuke (Donna), and granting her petition seeking contribution by David to her attorneys

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fees. On appeal, David contends that: (1) the trial court erred in awarding Donna continued permanent maintenance and in failing to take into account Donna's failure make any effort to become self-supporting; (2) the trial court made a calculation error in its modification of the amount of maintenance reduction; and (3) the trial court erred in requiring David to contribute to Donna's attorneys fees for the underlying modification petition as well as awarding Donna prospective attorneys fees to defend this appeal. For the following reasons, we vacate the trial court's award of modified permanent maintenance, reverse the award of attorneys fees and remand the case to the trial court with directions to enter modified permanent maintenance award of 25% of David's cash flow as voiced by the trial court and supported by expert testimony and the record.

¶ 3 On January 23, 2012, the trial court entered its order modifying permanent maintenance payments which had been awarded to Donna in 2006, pursuant to a judgment for dissolution of marriage. David filed his motion to reconsider the January 23, 2012 order, which the trial court denied on December 17, 2012. David filed a proper notice of appeal on January 15, 2013. On August 21, 2013, the trial court entered another order awarding prospective attorneys fees to Donna to defend the pending appeal. David's notice of appeal from that subsequent order was filed on September 20, 2013. This court has consolidated the two appeals.

¶ 4 BACKGROUND

¶ 5 These parties come before this court for the second time. Only those facts necessary to the resolution of the issues before us on this appeal will be recounted, as an exhaustive recitation of the facts in the underlying dissolution case, can be found in our prior opinion: *In re Marriage of Heroy*, 385 Ill. App. 3d 640 (2008). David and Donna were married on September 13, 1980.

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A judgment for dissolution of their marriage was entered by the circuit court of Cook County on November 21, 2006. The trial court in the 2006 dissolution proceedings found that the parties had enjoyed a lavish lifestyle during the marriage. Both parties were highly educated. David had an undergraduate and law degree. Donna held an undergraduate degree, a Master of Library Science degree, as well as, a law degree. David was employed as a partner at a large law firm at the time of the dissolution in 2006 and was employed as a partner at a different, large law firm, Baker & McKenzie, at the time of the maintenance modification proceedings in 2010. Donna had worked full-time as the head law librarian at a Chicago law firm at the time of her marriage to David. Thereafter, she reduced her hours to part time, eventually electing to become a full time homemaker. Donna was not employed outside the home at the time of the dissolution of the marriage in 2006 and remained unemployed throughout the ensuing years since the divorce. David also owns a minority interest in a family business, Angola Wire Products, located in Indiana. He derives income from that business. Sometime in the 1980s, Donna started an in-home business called Alert Publications, in which she published newsletters for law and business libraries. At the time of the dissolution of the marriage and property division in 2006, the trial court ascribed a value of \$0 to Alert Publications. David and Donna have three children, all of whom were emancipated as of the time of the trial court's January 23, 2012 order of modification. At the time of the dissolution in 2006, David was 55 years old and Donna was 56 years old.

¶ 6 Upon dissolution of the marriage, Donna sought \$63,000 per month in permanent maintenance. The trial court awarded Donna \$35,000 per month in permanent maintenance, plus \$4,500 per month in retroactive temporary maintenance in addition to the \$6,000 per month which she had been receiving prior to the entry of judgment. The trial court also distributed the

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couple's marital estate, awarding Donna 55% of the marital estate and David 45%. After addition and subtraction of various fees and addition of the parties' non-marital property, Donna received a net amount of \$3.7 million which included her non-marital property. David received approximately \$6.7 million which included his non-marital property. After hearing extensive testimony and the opinions of various financial and other experts for each of the parties, in the 2006 dissolution proceeding, the trial court awarded Donna permanent maintenance as described above. Donna was also awarded ownership of Alert Publications. The trial court ordered each party to pay his own attorneys fees.

¶ 7 On appeal following the trial court's 2006 dissolution judgment, this court affirmed the trial court's permanent maintenance award of \$35,000 per month to Donna. *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 657 (2008). However, although affirming the disproportionate award of the marital estate, this court found that David was not required to contribute to Donna's attorneys fees, as he had apparently, inadvertently, done. Additionally, this court made two other rulings which it directed the trial court to address on remand. We held that the retroactive maintenance payments made to Donna by David should have been taken from the marital estate prior to its division, rather than from David's sole share; further, David was entitled to receive a \$25,296 credit for money that David had advanced to Donna. The trial court's award of non-marital property to each party was affirmed. We rejected David's argument that the trial court's award of permanent maintenance was an abuse of discretion.

¶ 8 On December 1, 2009, David filed a modification petition in the circuit court of Cook County requesting the termination or modification of Donna's permanent maintenance award. In the petition, David cited three grounds supporting his request: (1) a decrease in his income; (2) a decrease in his net worth; and (3) Donna's failure to make any reasonable efforts to become

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self-supporting since the dissolution judgment in 2006. The trial court conducted an extensive hearing on the petition and rendered a judgment. It is that order that is the subject of the instant appeal.

¶ 9 In the modification proceedings, the trial court noted that David had changed law firms since the 2006 dissolution judgment and now worked as an attorney at the law firm of Baker & McKenzie. He also continued to earn income from his family's business Angola Wire Products. Both parties presented expert witnesses to support their respective arguments as to their financial circumstances following the dissolution of marriage in 2006 and at the time of the modification proceedings. The parties differed as to the methodology used by their individual financial experts to determine David's assets and cash flow for purposes of his modification petition.

¶ 10 David presented evidence that he continued to work full time as a partner at the law firm of Baker & McKenzie. Following the dissolution of his marriage, he moved to a two-bedroom rental apartment where he resided at the time of the modification proceedings. David retained ownership of the parties' Michigan vacation home, having purchased Donna's interest from her following the 2006 dissolution judgment. David presented evidence through testimony and expert witnesses regarding his reduction in income and cash flow. The evidence presented by David showed a reduction in his law firm income as well as a reduction in the income he receives from his family business, Angola Wire Products. According to David's expert, David's net income decreased by 54% between 2005 and 2009, those years being the year immediately prior to the dissolution judgment and immediately prior to the modification petition.

¶ 11 David testified regarding a wide range of lifestyle matters, including residence and living expenses since the 2006 dissolution judgment. He collects art and wine and has a weekly cleaning person. After changing law firms in 2007, David's income declined. David

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presented expert testimony from Jack Katz, a certified public accountant, who had prepared taxes for the parties during the marriage and individually since 2007. Katz gave detailed testimony that David's net income had declined by 54% between 2005 and 2009. David presented a disclosure statement during the modification proceedings, declaring total assets of approximately \$5.8 million and monthly living expenses of \$18,619. He also owed \$836,621 in outstanding business and personal loans.

¶ 12 Donna presented the expert financial testimony of Jeffrey Newman. Newman used a different methodology than that used by David's expert, Jack Katz to calculate David's income and cash flow. Newman concluded that David's income had decreased by 26% between 2005 and 2009.

¶ 13 Donna testified that in 2007 she purchased a vintage cooperative residence for herself for \$1.2 million, with down payment and closing costs amounting to \$328,639.83. Donna also made additional voluntary pre-payments on her mortgage in the amounts of \$200,000 in 2009, \$100,000 in May 2010, and \$204,000 in July 2010. Donna also spent approximately \$228,000 on furnishings, décor, repairs, and maintenance. At the time of the modification hearing, Donna employed three household helpers, including a cleaning person, a professional organizer and a personal assistant.

¶ 14 The trial court also heard testimony regarding Donna's efforts to become self-supporting. Donna had applied for one position since the dissolution judgment in 2006, and at the time of the modification hearing, she did not have a current resume. Donna testified that as part of her effort to earn income, she tried to make Alert Publications a viable business, and that she had expended more than \$160,000 in that effort. She testified that only shortly before the modification proceedings had she realized that Alert Publications would not be profitable and

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she was therefore considering selling it. Regarding her other efforts to earn income, Donna testified that she made inquiries with a temporary agency which places librarians. She also testified that she was told by someone in the field of library science, that she did not have the skills at present to work as a librarian. Donna also trained with H & R Block as a tax preparer and earned \$9 per hour doing part-time, seasonal tax preparation work. In 2010, Donna earned \$229.50, and in 2011, she earned \$437.31 from that endeavor. At the time of the modification proceedings, Donna's financial expert, offered an analysis of Donna's expenses which showed the following cash flow report for the period from 2007 through 2009: \$488,989.19 for household employees; \$44,128.70 for furnishing; \$19,006.93 for repairs and improvements; \$25,599.34 for transportation; \$173,190.50 for personal expenses, including \$99,835.20 for clothes, shoes and jewelry, and \$7,419.86 for personal care; \$431,211.39 for miscellaneous expenses, which included \$24,226.98 for dining; \$10,496.49 for entertainment; \$60,208.05 for gifts to family and friends; \$90,254.16 for travel; \$51,478.09 for unspecified cash; \$14,166.14 for subscriptions, books, photographs and music; \$50,115.70 for the Women's Athletic Club; and \$535,149.50 for taxes and legal fees.

¶ 15 During the pendency of the modification proceedings, Donna submitted a balance sheet listing assets as follows: real estate of \$855,499; cash and investments, broken down as follows: \$37,868 in cash and cash equivalents plus \$269,859 in investments; \$847,569 in retirement funds; \$410,830 in personal property; and a \$184,054 loan to Alert Publications, as well as, liabilities of \$52,562.

¶ 16 During the proceedings, David's counsel elicited testimony from Donna that she had not applied for any job through the temporary librarian agency, but had visited the website. She did not post her qualifications on any employment web site, and she did not seek the help or services

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of any career counselors or head hunters. Further, she did not have a current Illinois law license and was unfamiliar with the necessary criteria to activate her law license. In 2011, Donna applied for a position as a law librarian at a Chicago law firm, but she was not hired.

¶ 17 On January 23, 2012, after hearing the evidence related to David's petition for termination or modification of Donna's permanent maintenance and the financial situation of the parties, the trial court acknowledged that there was great disparity between the opinions of the financial experts for David and Donna. The trial court accepted the opinion of Donna's expert over David's regarding David's changed financial circumstances. The trial court determined that according to Donna's expert, David's cash flow and income had in fact decreased by 26% between 2005 and 2009. The court also stated that David "is entitled to maintain a semblance of the standard of living established during the marriage." Therefore, the trial court found that David had met his burden of establishing a substantial change in circumstances as required by section 510 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/510 (West 2013)), entitling him to a modification of the permanent maintenance which he must pay to Donna. The trial court rejected David's request to terminate Donna's permanent maintenance payments.

¶ 18 In determining a modified maintenance amount, the trial court noted that it was required to consider the factors set forth in sections 504 and 510 of the Act. At the time that the trial court found that David had established a substantial change in circumstances to warrant a reduction in maintenance, it determined that the new amount of permanent maintenance which David would be required to pay to Donna would be \$27,500 per month, retroactive to December 2010. The trial court acknowledged that it had relied mainly on Donna's financial expert in reaching its conclusion that David's income from his law practice and his family business had

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declined by 26%. While acknowledging that David's income had declined, the court noted that it was factoring into its maintenance award decision, certain intangible economic benefits which David enjoyed from his law firm practice.

¶ 19 After making a determination regarding the modified amount of permanent maintenance, which David must pay, the trial court addressed Donna's petition for contribution by David to her attorneys fees to defend the modification petition. The parties stipulated that the reasonable and necessary amount of fees incurred by Donna for the modification proceeding was \$345,000. In considering Donna's request for fees, the trial court found David's net worth to be approximately \$5 million and his annual cash flow to be slightly less than \$1 million. Donna had assets worth approximately \$2.3 million and under the new maintenance order Donna would receive \$330,000 annually in permanent maintenance payments from David. David's retirement account was valued at \$1,435,470, and Donna's retirement account was valued at \$847,569. Donna's investment account contained \$268,859, and David's investment account was valued at \$932,175. After reviewing this financial information, the trial court determined that "David is in a much superior financial position to defray some of [Donna's] attorneys fees." On February 22, 2012, the trial court opined that it was convinced by Donna's argument that payment of her own attorneys fees would undermine her financial stability. The trial court then went through another review of the parties' assets, noting that at the time of the divorce in 2006, Donna had received the lion's share of the couple's marital assets. However, the court noted that Donna's assets had declined somewhat during the years since the divorce and that Donna's payment of her own attorneys fees would continue to deplete her assets. The court then concluded that David was in a stronger financial position than Donna, and should therefore contribute to her attorneys fees. The court ordered David to contribute \$125,000 toward Donna's attorney fees incurred

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during the maintenance modification proceedings. That amount was to be paid within 45 days of the entry of the trial court's judgment. The trial court also made several other findings which it included in the order of January 23, 2012. David filed a motion to reconsider the trial court's January 23, 2012 modification order.

¶ 20 In his motion to reconsider, David sought: (1) a vacatur of the award of attorneys fees to Donna; (2) a further reduction in his maintenance payments to Donna; (3) correction of certain claimed factual errors by the trial court; (4) modification of the court's order for production of income documents to make the obligation bilateral, rather than only binding on David; and (5) modification of the court's order so as to make income documents produced by the parties confidential.

¶ 21 On December 17, 2012, the trial court issued its final memorandum opinion and order in response to David's motion to reconsider the court's January 23, 2012 order. The court opined that it had reviewed the written submissions of the parties and had conducted limited oral argument in August 2012, on the motion to reconsider. The trial court then essentially reiterated its original order. The court also made an effort to explain its analysis with respect to its rulings on maintenance and attorneys fees. Of significance to this appeal, regarding the issue of attorneys fees awarded to Donna, is the trial court's statements that the award of attorneys fees is based on the court's analysis of *In re Marriage of Schneider*, 214 Ill. 2d 152 (2005). The trial court also stated that it based its award of modified permanent maintenance to Donna, on its analysis of the extensive financial data regarding David's changed financial circumstances as presented during the protracted modification proceedings. The court acknowledged that the evidence presented by Donna's expert established that David's income had decreased by 26%. The court found that to be a substantial change in circumstances thereby

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warranting a modification of the amount that David was required to pay to Donna. Of additional significance to this appeal is the court's statement that it intended to award Donna approximately "25%" of David's cash flow as modified permanent maintenance. The court also stated that it had considered all of the required statutory factors outlined in the Act in reaching its conclusion. However, the court then left the maintenance award at \$27,500 per month as earlier ordered in its January 23, 2012 order. To conclude the reconsideration proceedings, the court made several other rulings pertaining to matters such as exchange of financial documents. None of those rulings are at issue in this appeal.

¶ 22 On January 23, 2013, David filed a timely notice of appeal from the trial court's December 17, 2012, ruling on his motion to reconsider. Thereafter, on March 21, 2013, Donna filed a motion in the trial court seeking contribution from David for prospective attorneys fees related to the appeal. The trial court granted Donna's motion. The trial court also noted that the parties' economic circumstances had remained the same since its December 2012 order. It commented that David's assets "predominated" over Donna's assets, and that she had a yearly income of approximately \$330,000 per year from maintenance while David's income was slightly less than \$1 million per year. The court also found that Donna's investment account contained \$94,000, by the time of her petition for fees and David's investment account contained about \$1 million. Although David had an \$850,000 loan to pay ongoing expenses, the trial court discounted that liability, noting that the loan would be "made up" when David's law firm paid its distributions. The court determined that while Donna "has some ability to contribute to her own attorneys' fees," her economic situation would be compromised if she had to pay all of her appellate fees herself. On August 21, 2013, the court ordered David to contribute \$35,000 toward Donna's prospective appellate attorneys fees within 30 days of the court's order entered

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August 21, 2013. Subsequently, on September 20, 2013, David filed a timely notice of appeal from the trial court's August 21, 2013 order directing him to pay Donna's attorneys fees of \$35,000. As noted, this court consolidated both appeals. Accordingly, this court has jurisdiction to resolve these consolidated appeals pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 23

ANALYSIS

¶ 24 On appeal David contends that: (1) Donna's permanent maintenance should have been terminated or reduced further based on Donna's failure to make any effort to become self-supporting and therefore the trial court erred in failing to take that fact into account; (2) the trial court made a calculation error in its modified permanent maintenance award; and (3) the trial court erred in ordering David to contribute to Donna's attorneys fees, when she has not shown an inability to pay her own fees.

¶ 25 First, David contends that the trial court erroneously refused to consider whether Donna has made reasonable efforts to become financially self-supporting since the dissolution judgment in 2006. He argues that an ex-spouse's attempts at self-supporting are a statutory factor which trial courts must consider in determining whether to terminate or modify an order of maintenance. See 750 ILCS 5/510 (a-5)(2) (West 2012). David argues that the trial court in this case, refused to address the issue of Donna's efforts to become self-supporting, and that the court erroneously found that the 2006 dissolution judgment was *res judicata* as to Donna's ability to become self-supporting. He points out that the trial court *must* consider all of the factors set out in section 510(a-5)(2) of the Act, regarding the reasonableness of Donna's efforts to become

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self-supporting since the divorce. David posits that this court should conduct a *de novo* review of this issue because of his assertion that it involves a statutory interpretation.

¶ 26 Donna argues that David's reliance on section 510(a-5)(2) of the Act, is misplaced. Her argument infers that the language of the statute is not applicable in this case because her maintenance award was permanent. Further, she asserts that the statutory language limits consideration of the reasonableness of a maintenance recipient's efforts at becoming self-supporting to circumstances where they are appropriate. Donna further points out that the trial court in the modification proceedings must consider the prior court's order regarding any impairment which prevents her from earning a significant enough salary to maintain the lavish lifestyle which she enjoyed during the marriage. Donna suggests that because her award of maintenance was permanent, she has no affirmative duty to become self-supporting. Donna further argues that this court must review this issue under the abuse of discretion standard.

¶ 27 We agree with Donna, that, generally, a court's determination regarding modification of a maintenance award is reviewed according to the abuse of discretion standard. *In re Marriage of Dunseth*, 260 Ill. App. 3d 816, (4th Dist. 1994). A court may modify a maintenance award upon a showing of a substantial change in circumstance. Section 510(a-5) of the Act lists factors for the trial court to consider in reviewing maintenance awards, one of which is the effort of the party receiving maintenance to become self-supporting. 750 ILCS 5/510(a-5)(2) (West 2012). David focuses strongly on this factor, pointing to the fact that Donna "did not have a current resume, had not posted her qualifications on any web site, had not met with any career counselors or head hunters, had not attended any career or job fairs, and had not maintained her standing as an Illinois attorney or researched what it would take to resume her law license."

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However, David's argument overlooks the fact that "[n]o single factor is determinative when considering the duration and amount of a maintenance award." *Heroy*, 385 Ill. App. 3d at 651.

¶ 28 Although David argues that the statutory language of section 510(a-5)(2) of the Act makes it clear that the trial court was required to consider Donna's efforts at becoming financially self-supporting, the Act does not require the trial court to elevate that factor above all others. David details Donna's efforts or lack thereof, at financial self sufficiency, describing them as woefully inadequate and minimal at best. He argues that after the entry of the 2006 judgment, Donna did not make *any* effort at becoming self-supporting, let alone anything that could remotely be characterized as a *reasonable* effort. David relies on *In re Marriage of Koenigsknecht*, 302 Ill. App. 3d 474 (1998), in support of his argument that at a minimum, this court should remand the matter to the trial court for a further reduction in the permanent maintenance award since Donna failed to make *any* effort to achieve some level of self sufficiency. In *Koenigsknecht*, this court reversed the trial court's ruling extending a maintenance award to the ex-wife by two years, finding that the ex-wife was a highly educated person who was capable of finding gainful employment and that a continuation of maintenance would only reward the ex-wife's behavior in conducting an unrealistic job search and in choosing to run an unprofitable business. *Id.* at 479. David argues that *In re Marriage of Cantrell*, 314 Ill. App. 3d 623 (2000), also supports his argument that Donna's maintenance payments should be terminated or reduced further. He urges us to consider that in *Cantrell*, as in this case, the parties enjoyed a high standard of living before the divorce. Like the wife in *Cantrell*, Donna is educated, has no health issues, her children are emancipated and yet Donna has made little to no effort at becoming financially self-supporting. The appellate court in *Cantrell* terminated the wife's maintenance payments.

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¶ 29 The trial court in this case in making its determination, noted that after David filed his petition for modification, Donna did make some effort to seek earnings. The trial court pointed out that Donna continued to try to make Alert Publications profitable. Further, Donna made inquiries of a temporary librarian placement agency where she learned that she did not have the required skills to work as a librarian. The trial court also noted that Donna enrolled in a class offered by H & R Block where she gained certification to prepare income taxes enabling her to get temporary, seasonal, employment, albeit at only \$9 per hour. Further, Donna also submitted an application for a law librarian position, but was not interviewed for the job.

¶ 30 Donna also points to those efforts in support of her argument that although she was not required to do so after having received an award of permanent maintenance in 2006, she made reasonable efforts at becoming financially self-supporting. Therefore, she argues, that based on her efforts as described, any alleged statutory duty which required her to make efforts to become financially self-supporting has been met. The trial court agreed with Donna.

¶ 31 As a reviewing court, we do not reweigh the statutory factors and substitute our judgment for that of the trial court, absent an abuse of discretion. *In re Marriage of Viridi*, 2014 IL App. (3d) 130561, ¶ 26. Even if we may have reached a different conclusion, we cannot use that as the basis for finding that the trial court abused its discretion. In this case, following the hearing on David's modification petition, the trial court found that David had met his burden of proving a substantial change in circumstances and was entitled to a modification reduction of his permanent maintenance payments to Donna *on that basis*. The trial court also found that Donna's efforts to achieve financial self-sufficiency since the entry of the divorce judgment, were reasonable. Therefore, the trial court rejected David's argument that it should have terminated or further reduced Donna's permanent maintenance based on Donna's failure, as David sees it, to

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meet her statutory obligation to seek financial self-sufficiency. Although David characterizes Donna's efforts as non-existent and the record suggests that they were minimal, we cannot say that the trial court abused its discretion by not terminating or significantly reducing Donna's permanent maintenance payments on that basis as David argues is appropriate. The trial court was not required to accept the premise advanced by David as the basis for terminating or modifying Donna's maintenance award.

¶ 32 David devotes a significant portion of his argument in the trial court and on appeal, to challenging the trial court's finding that Donna is incapable of financial self sufficiency. We will not recount David's arguments in detail, but they may be summarized as opining that Donna is highly educated, both as a lawyer and as a librarian, had previously enjoyed a highly successful career as a law librarian, and had no health problems or childcare responsibilities, which would hinder her from seeking employment. Yet, according to David's argument, Donna continues to spend lavishly, and has refused to make any effort to achieve financial self sufficiency, while he is required to continue paying her large sums of money in the form of permanent maintenance.

¶ 33 Donna argues that the question of whether she is capable of achieving financial self sufficiency in light of the lifestyle which she enjoyed during the marriage was determined by the trial court in the 2006 dissolution judgment. Accordingly, Donna points out that the issue of her ability to achieve financial self sufficiency in the context of her marital lifestyle, is *res judicata*. The trial court agreed that the question of whether Donna was in a position to earn a sufficient income to support herself in the marital lifestyle, was indeed *res judicata*.

¶ 34 "*Res judicata* bars the relitigation of an issue between the same parties after a final judgment on the merits has been rendered by a court of competent jurisdiction." *In re Marriage*

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of *Lehr*, 317 Ill. App. 3d 853, 860 (2000). A maintenance award is *res judicata* as to facts established and ruled upon by the trial court at the time the order was entered. *Id.*

¶ 35 In its 2006 order, the trial court awarded Donna permanent maintenance pursuant to its authority under section 504(a) of the Act. The Act authorizes the trial court to order both permanent and rehabilitative maintenance. *In re Marriage of Brackett*, 309 Ill. App. 3d 329, 340 (1999). "Rehabilitative maintenance may be granted if the receiving spouse has the present or future ability to become self-supporting or the ability to acquire skills that would allow employability at an appropriate income level, but to do so would require some time." *Id.* On the other hand, permanent maintenance "is appropriate when the former spouse is unemployable or employable only at a low income in light of the standard of living established during marriage." *Id.*

¶ 36 David appealed the 2006 order awarding Donna permanent maintenance, arguing that the trial court failed to give proper consideration to Donna's ability to generate income to support herself. In reviewing David's appeal from the 2006 judgment, this court disagreed, finding that "in reviewing the propriety of the permanent nature of the award, the [trial] court carefully considered Donna's employment opportunities and ability to earn income." This court affirmed the trial court's award of \$35,000 per month in permanent maintenance to Donna. *In re Marriage of Heroy*, 285 Ill. App. 3d at 658. Therefore, since the trial court in its 2006 order addressed Donna's self-sufficiency, and her ability to support herself in the lifestyle she enjoyed during her marriage, those issues are *res judicata* as of the time of entry of the 2006 judgment. *Lehr*, 317 Ill. App. 3d at 860.

¶ 37 However, the Act also sets out factors which the trial court must consider in addressing a petition for *modification* of a maintenance award. Facts and issues which have arisen *since* the

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entry of the 2006 judgment are not *res judicata*. This presents a fine line which the trial court must walk because facts and circumstances arising *since* the judgment may be considered by the trial court in addressing a modification petition such as that brought by David. It is this narrow overlap in the interpretation of the statutory requirement upon which David bases his argument.

¶ 38 The record from the 2006 dissolution proceedings is replete with references to the lavish lifestyle enjoyed by the parties during the marriage. The testimony during the proceedings on David's modification petition suggests that even post divorce the parties individually continued to enjoy a high standard of living. However, notwithstanding the many references to the luxurious lifestyle which the parties enjoyed as a couple while they were married, David suggests that it is not beyond reason or possibility that after divorce circumstances change and the parties may not be able to maintain that same lavish level of living in two separate households. Consequently, in such a situation, the spouse receiving maintenance has an obligation to make reasonable efforts to become self-sufficient. David points out that Donna has made no such efforts. Accordingly, he argues that the lack of effort should be the basis for terminating the permanent maintenance which he is required to pay to her.

¶ 39 The trial court, after an extensive hearing, found that David had met his burden of proving a significant change in his circumstances as required by the statute, thereby allowing the court to order modification of the permanent maintenance payments on that basis. See *In re Marriage of Viridi*, 2014 IL App (3d) 130561. David does not disagree with the basis for the court's ruling. However, we find that the trial court's action was consistent with the evidence and it was not required to make its ruling as David argues, based on Donna's lack of effort at financial self-sufficiency as there was ample evidence supporting the court's finding of a substantial change in circumstances. Thus, the court made its ruling on that basis.

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Accordingly, David's argument fails. We hold that the trial court did not err in refusing to terminate or further reduce Donna's permanent maintenance award based on David's preferred theory.

¶ 40 David next argues that the trial court made a calculation error in determining the amount of modified maintenance which it awarded to Donna following the modification hearing and the motion to reconsider. He points to the trial court's statement during its lengthy explanation upon ruling on the motion to reconsider, that it intended to award an amount of about "25% of David's cash flow." Further, in the conclusion section of the trial court's memorandum opinion and order dated December 17, 2012, the court stated that it was the court's intention to make an award of about "25% of David's cash flow." David makes a detailed argument that the trial court made a calculation error in determining the amount of the award of modified maintenance.

¶ 41 David also takes issue with the fact that much of Donna's substantive response to his argument that the trial court made a calculation error, is contained in a footnote in her brief on appeal, in violation of Supreme Court Rules. David points out that even using the figures provided by Donna's expert which the trial court accepted, 25% of his cash flow equals \$25,745 per month, not \$27,500. David further argues that in light of the retroactivity of the maintenance award to December 2010, the difference between the accurate award amount and the erroneous amount is significant. David explains by way of example that even if one accepted Donna's argument that the trial court was utilizing a range of years in determining the amount of the award, the amount still would not equal \$27,500. In his example, David calculates that 25% of the two year average of his cash flow, using Donna's expert's figures, equals \$25,811, not the \$27,500 ordered by the trial court.

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¶ 42 Donna does not dispute that fact. Instead, she claims that David's assertion of a calculation error is based on a misreading of the trial court's decision. Donna does not explain how the court decided upon the \$27,500 figure after announcing that the maintenance award would be based upon 25% of David's cash flow. Instead, Donna suggests that the 25% figure was simply illustrative of the court's reasoning. She further points out that the \$27,500 amount is "reasonable." Donna opines that the trial court could have determined that awarding one-third of David's income was appropriate. We note, however, that the trial court did not use one-third of David's income as its basis for the award, but rather voiced 25% as the measure which it used. Donna concludes that the trial court was "thoroughly reasonable" in awarding her permanent maintenance of \$27,500 per month.

¶ 43 Maintenance by its very nature is reviewable by the trial court regardless of how it is characterized. See 750 ILCS 5/510(a-5) (West 2012); see also *In re Marriage of Dunseth*, 260 Ill. App. 3d 816 (1994). Thus, the entry of an award of permanent maintenance does not preclude a petitioner from seeking modification of the maintenance which he is ordered to pay, if he can meet certain criteria, specifically, as in this case, a substantial change in circumstances. Therefore, the trial court has the authority to modify an order of maintenance upon a showing of a substantial change in circumstances. 750 ILCS 5/510(a-5) (West 2012). The party seeking modification bears the burden of proving that a substantial change in circumstances has occurred. *In re Marriage of Logston*, 103 Ill. 2d 266, 287 (1984). A reviewing court will not disturb the trial court's decision to modify maintenance absent an abuse of discretion. *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009). An abuse of discretion occurs when the trial court's determination is arbitrary or fanciful, or where no reasonable person would take the trial court's view. *Id.*

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¶ 44 We will not disturb the trial court's factual findings in determining a maintenance award unless they are against the manifest weight of the evidence. *In re Marriage of Nord*, 402 Ill. App. 3d 288, 294 (2010). In the instant case, however, for purposes of reviewing the allegation of a calculation error, it is not the award of modified maintenance itself that is at issue, but rather the *amount of the award*, based upon the trial court's percentage determination regarding David's income upon which the court based the award. The trial court used 25% of David's cash flow in making the award. Donna's expert calculated David's cash flow to be \$1,235,773 after taxes. David contends that 25% of \$1,235,773 would result in a modified monthly maintenance amount of \$25,745. Donna does not dispute this fact. The trial court, however, awarded Donna \$27,500 per month in modified maintenance. David points out that the trial court explained that it used the 25% figure based on the opinion offered by Donna's expert that David's cash flow, after taxes was \$1,235,773. Twenty-five percent of \$1,235,773, would result in a maintenance payment of \$25,745 per month, not \$27,500 per month. Donna acknowledges in her brief on appeal that the amount awarded by the trial court is actually 28.5% of David's law firm income over the period in question, not 25%.

¶ 45 We agree after a careful review of the record, that the trial court stated that it intended to make an award of about "25% of David's cash flow." The record reveals no other percentage amount voiced by the trial court at any time before or after the time that the court ruled that the modified maintenance amount would be based on about 25% of David's cash flow. On the other hand, the record provides considerable support for the trial court's conclusion that 25% of David's cash flow was an appropriate modification percentage given his substantial change in circumstances which established a 26% decrease in his income according to Donna's expert. Yet, there is no reasonable explanation in the record regarding how the trial court reached the

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\$27,500 figure in the context of 25% of David's cash flow. Thus, we agree with David's argument that a reasonable conclusion is that the trial court made a calculation error. The difference in the actual dollar amount of the award (\$27,500) and the intended amount of the award (\$25,745) is significant. This is especially so given the permanent nature of the award and the fact that the award is retroactive to December 2010. Thus, we cannot agree as Donna urges that the trial court's comments that it intended to award about "25%" of David's cash flow was of no moment since the award is actually only "28.5%" of David's law firm income for the period in question. A difference of 3.5% is significant for the reasons already discussed. Donna's argument taken to its logical extreme suggests that 3.5% above or below 25% would be an acceptable award based on this record. Under that reasoning, 21.5% of David's income would qualify as acceptable. We do not agree. Based on the history of this case and the arguments advanced by Donna, we believe that she would also find such a result untenable. Accordingly, we find that the result actually reached by the trial court in which David is ordered to pay \$27,5000 in modified monthly maintenance is equally untenable in that it is 3.5% more than the *only percentage identified by the court* as the underpinning of the modified maintenance award.

¶ 46 Donna does not dispute David's contention that 25% of his cash flow would equal \$25,745 per month. Rather, she argues that the trial court could have found that a third of David's law firm income was an appropriate award and that the court did a "thorough" analysis. However, the record is clear that the court specifically cited 25% as the basis for the modification award. No other percentage was mentioned by the trial court anywhere in the record in arriving at the dollar amount. Further, the evidence supports a finding that 25% is appropriate. In our view and for the reasons already discussed, the difference between \$27,500

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per month and \$25,745 constitutes a significant sum over time. Accordingly, we find that the trial court made a calculation error in awarding Donna \$27,500 in modified monthly maintenance after opining that it was basing the award on 25% of David's cash flow. It is significant that the record supports the trial court's maintenance award of 25% of David's cash flow based on the evidence and including figures provided by Donna's expert. Thus, we vacate the \$27,500 modified monthly maintenance award and remand this case to the trial court to enter an award of modified monthly maintenance equal to 25% of David's cash flow or \$25,745, consistent with the opinion which the trial court had previously voiced in support of its ruling.

¶ 47 David next argues that the trial court erred in ordering him to contribute \$125,000 to Donna's attorneys fees for the modification proceeding as well as ordering him to pay prospective attorneys fees of \$35,000 to Donna to defend this appeal. A trial court's decision to award attorneys fees in a modification proceeding will not be reversed absent an abuse of discretion. *In re Marriage of Kennedy*, 214 Ill. App. 3d 849, 862 (1991); *In re Marriage of Hasabnis*, 322 Ill. App. 3d 582, 598-99 (2001).

¶ 48 David contends on appeal that in awarding Donna attorneys fees, the trial court failed to take into account Donna's net worth of approximately \$2.5 million, "including \$307,727 of cash, cash equivalents, and investments," and that she has paid all but \$80,987 of her outstanding attorneys and expert's fees, and that she "had converted \$504,000 of liquid assets into an illiquid asset by voluntarily and unnecessarily prepaying her mortgage and loaning *** an additional \$157,199 to Alert." David further argues that notwithstanding the trial court's statement that it based its ruling on *In re Marriage of Schneider*, the trial court used the inappropriate "comparable ability to pay" standard rather than the inability to pay standard expressed in *Schneider* and recognized as the appropriate standard by Illinois law. David also contends that

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Donna "manipulate[d] cash liquidity" in order to obtain a fee contribution award, by making it appear that her assets were diminished or less than they actually are. For example, he points to the \$157,199, which she loaned to Alert Publications, as well as, the voluntary prepayment of more than \$504,000 on her mortgage.

¶ 49 David also argues that Donna has the ability to pay her attorneys fees because she has paid all but \$80,987, the outstanding fees as of her March 2013 petition. David first raised this issue in his initial brief, but did not elaborate or cite to supporting cases in violation of Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013). In his reply brief, David briefly addressed the issue by citing to *In re Marriage of Mantei*, 222 Ill. App. 3d 933 (1991).

¶ 50 Donna argues that the award of fees was appropriate as her assets are dwindling. She points to the reduced maintenance payment which she receives in the amount of \$27,500 per month instead of \$35,000 per month. Donna claims that in order to pay her attorneys fees she would have to liquidate her retirement funds and obtain a second mortgage on her home. She argues that she is not required to show that she is destitute in order for the trial court to order David to contribute to her attorneys fees. She characterizes the payment ordered by the trial court as egregiously low and claims that she should not be responsible for her own attorneys fees since the fees were brought about "through no fault of her own." Donna argues the inferiority of her financial position when compared to David's. Donna essentially disagrees with all of David's arguments and denies that the trial court employed a comparable ability to pay standard in violation of *Schneider* and established Illinois case law. She points to the trial court's pronouncement that it was basing its award of fees specifically on *Schneider*. In summary, Donna's argument suggests that the trial court acted within its discretion in light of the financial

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evidence in record, reliance on *Schneider* and the many factors which the court considered in accordance with established Illinois law.

¶ 51 Section 508 of the Act permits the trial court to award attorneys fees where one party lacks the financial resources and the other party has the ability to pay. 705 ILCS 5/508 (West 2008). The party seeking payment of attorneys fees by an ex-spouse *must establish* her inability to pay and the ex-spouse's ability to do so. *In re Marriage of Schneider*, 214 Ill. 2d 152 (2005). In *Schneider*, our supreme court explained what financial inability really means in the context of seeking an award of attorneys fees. The court made it clear that "[f]inancial inability exists where requiring payment of fees would strip the party [seeking the award] of her means of support or undermine her financial stability." *Schneider*, 214 Ill. 2d at 174, citing *In re Marriage of Puls*, 268 Ill. App. 3d 882, 889 (1994). In *Schneider*, our supreme court rejected the wife's argument, noting that the record did not indicate the wife's inability to pay her own fees, nor that requiring her to do so would strip her of her means of support and undermine her financial stability. Illinois law has long established that it is the responsibility of each party to litigation to pay his or her own fees. However, in dissolution proceedings, the Act provides an alternative. That alternative however, has been interpreted by our courts to place the burden upon the party petitioning for fees to meet the standard discussed above.

¶ 52 Specifically, the real question in this case, is not whether David has more financial resources than Donna. The question is whether Donna has the ability to pay her own fees without depleting her assets to such an extent as to undermine her financial stability. Notwithstanding Donna's argument to the contrary, we agree with David that the record is devoid of any evidence that payment of her attorneys fees would undermine Donna's financial stability. A review of the record does not support the award of attorneys fees to Donna under the

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principles outlined in *Schneider*. David points out that Donna has millions in assets and enjoys a permanent maintenance award of \$27,500 per month or \$330,000 per year. The trial court found that as of December 31, 2010, the total value of Donna's assets was \$1,545,683. Of that amount, \$442,949 consisted of the net equity in her residence, \$847,569 consisted of the value of her retirement accounts, with the remaining \$269,859 as liquid assets. The trial court's statement that "David is in a much superior position to help Donna defray some of the attorneys fees," underscores the court's use of the incorrect "comparable ability to pay" standard. This is inconsistent with our supreme court's ruling in *Schneider*. The principles enunciated in *Schneider* have their origin in earlier Illinois cases and our supreme court used *Schneider* to outline those principles with clarity. It is now well established that merely showing that the other spouse has a greater ability to pay the attorneys fees is not sufficient. The petitioning spouse must also establish her own inability to pay her own fees.

¶ 53 Therefore, as stated, the question is not whether David has more resources and is in a better position to "help Donna defray some of her legal expenses," but whether Donna can pay her own legal fees. We answer that question in the affirmative, as she clearly is able to pay her own attorneys fees. The record shows that Donna has substantial assets, having received 55% of the considerable marital estate. She currently receives \$27,500 in monthly maintenance and has other significant assets as well. Further, the legal fees which remain outstanding can hardly be said to be such that payment would undermine Donna's financial stability. David points out that Donna's assets are in the millions of dollars. The additional legal fees which the trial court has ordered David to pay for Donna's representation total \$160,000. Nothing in the record supports the conclusion that payment of an additional \$160,000 by Donna to satisfy her own legal fee obligations would undermine her financial stability. Additionally, it is highly likely

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that the amount of outstanding attorneys fees which remain unpaid by Donna are considerably less than that amount. However, even without accepting David's argument on that point, Donna has not met her burden of establishing *her own inability* to pay her attorneys fees. We also note that in the appeal of the dissolution proceedings, which came before this court following the 2006 judgment, we affirmed the trial court's order that *each party was responsible for his or her own attorneys fees*. Nothing in the record suggests that we should depart from that ruling now especially considering David's showing of a substantial change in his circumstances. The record shows that Donna clearly has the ability to pay her own attorneys fees. Therefore, it was error for the trial court to award Donna attorneys fees.

¶ 54

CONCLUSION

¶ 55 In summary, we hold that the trial court did not abuse its discretion in finding that David met his burden of proof regarding a substantial change in circumstances and therefore modifying his maintenance obligations on that basis, rather than on the basis of Donna's lack of effort at attaining financial self sufficiency. We further hold that the record supports a finding of a modified maintenance award to Donna in the amount of 25% of David's cash flow based on the evidence including the findings of her expert witness. However, for the reasons discussed, we hold the trial court committed a calculation error in awarding \$27,500 per month as modified maintenance as that figure totals more than 25% of David's cash flow. Accordingly, we vacate that award and remand the matter to the trial court to enter an award consistent with 25% of David's cash flow, specifically \$25,745 per month.

¶ 56 On the issue of payment of Donna's attorneys fees by David, we hold that Donna has failed to meet her burden of establishing her inability to pay her own attorneys fees. Accordingly, it was error for the trial court to order David to contribute \$160,000 toward

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Donna's attorneys fees. Therefore, we reverse the trial court's ruling awarding Donna attorneys fees.

¶ 57 Propriety of award of modified maintenance affirmed; amount of modified maintenance award vacated; award of attorneys fees reversed; cause remanded to the trial court to entered an award of modified monthly maintenance consistent with 25% of David's income, specifically, \$25,745.