

2015 IL App (1st) 140811-U
No. 1-14-0811
July 28, 2015

SECOND DIVISION

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 DISTRICT

SCOTT KAPLAN,)	Appeal from the Circuit Court
)	Of Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 06 D3 30699
)	
JANE KAPLAN,)	
)	The Honorable
Defendant-Appellee.)	Hyman Riebman,
)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pierce and Liu concurred in the judgment.

ORDER

¶ 1 *Held:* When the appellant files in the appellate court a record that does not adequately support his factual assertions and arguments, the appellate court must affirm the trial court's judgment.

¶ 2 Scott Kaplan appeals from an order denying his motion to modify maintenance and support payments he owed to Jane Kaplan under the terms of their divorce settlement. He argues that the evidence presented at trial proved that his circumstances changed substantially when he took early retirement from his job. However, Scott did not include in

the record on appeal the exhibits or the transcripts of most of the testimony at trial. Because the record filed in this court presents no basis for reversing the trial court's judgment, we affirm.

¶ 3

BACKGROUND

¶ 4

Scott and Jane married in 1977. They had three children: Sarah, born in 1984, Andrew, born in 1987, and Benjamin, born in 1991. Scott moved to Ohio after he accepted a new job with Western & Southern Agency in 2006. Western paid Scott a base salary of \$120,000 per year, and he received substantial bonuses. In July 2006, Scott filed a petition for dissolution of his marriage to Jane.

¶ 5

Jane petitioned for temporary support and maintenance, alleging that she had not held a paying job for more than 20 years. Scott admitted that a court "found *** Andrew *** to be a disabled person that is totally without understanding or capacity to make or communicate decisions regarding his person, totally unable to manage his estate or financial affairs and appointed [Jane] as plenary guardian of Andrew Kaplan's estate and person."

¶ 6

The trial court ordered Scott to pay Jane \$3,000 per month in maintenance and support. Scott stopped paying the mortgage on the family's home in Mount Prospect, Illinois. On February 21, 2007, the bank filed a complaint to foreclose the mortgage. The court granted a foreclosure judgment. A judicial sale in 2008 disposed of the parties' interest in the house.

¶ 7

Scott and Jane agreed on the terms for their divorce. In June 2009, the trial court entered a judgment of dissolution, and the court incorporated into the judgment Scott and Jane's settlement agreement. Scott agreed to pay Jane \$600 per month specifically for Andrew's needs, and Scott agreed to pay 70% of Benjamin's college expenses, as long as those

expenses did not exceed \$5,000 per year. Scott agreed to pay Jane maintenance of \$2,750 per month, with the maintenance subject to modification by the court if the parties showed "a substantial change in circumstances."

¶ 8 On January 17, 2013, Scott filed a motion to modify maintenance and support. He alleged that in 2009, he earned about \$141,000. In 2010, he accepted a position as a district manager for Western. His base income dropped to \$30,000, and he earned only \$60,000 more in commissions in 2012. He alleged that he expected commissions to decrease further in 2013 due to a corporate restructuring. He retired on January 1, 2013, reducing his income to \$2,275 per month. He asked the trial court to eliminate the maintenance and support payments.

¶ 9 Jane filed a petition for a rule to show cause, alleging that Scott simply stopped paying the ordered maintenance and support, without waiting for the trial court to hear evidence on his motion for modification. In his answer to Jane's petition, Scott alleged:

"JANE sent letters to employees of Western *** disparaging SCOTT and conveying personal information about him which injured his reputation and damaged his respect in the company. ***

*** With his damaged reputation, in July of 2010, SCOTT moved to Louisiana and became District Manager at Western."

¶ 10 Because of the decrease in income he suffered in 2012, and his expectation of further decreases in 2013, Scott took early retirement.

¶ 11 Jane filed a second petition for a rule to show cause in April 2013, alleging that Scott refused to pay the amount established in the settlement agreement for Benjamin's college

education. In May, Jane filed a petition for a temporary restraining order, alleging that Scott had misrepresented to her and to the court the amount he would receive from Western.

¶ 12 On May 6, 2013, the court entered an order temporarily restraining Scott from transferring \$15,000 he received from Western, pending a full evidentiary hearing scheduled to begin August 5, 2013. The court also ordered Scott to pay Jane \$1,500 per month, "without prejudice to a hearing on Scott Kaplan's Motion to Modify Support."

¶ 13 Jane filed a third petition for a rule to show cause on August 28, 2013, alleging that Scott failed to pay the support as directed by the order dated May 6, 2013. Scott admitted that he had failed to pay about \$2,000 of the amounts ordered for May, June and July 2013. He alleged that he lacked sufficient resources from which to pay the ordered support.

¶ 14 After several days of hearings on the motion to modify maintenance and support, on September 20, 2013, the trial court entered an order directing Scott to pay Jane \$11,000 for Benjamin's college expenses, in accord with the settlement agreement. The court permitted Scott to defer payment until he received his scheduled payment from Western in March 2014. The court ordered support payments of \$650 for October 2013 and \$325 for September 2013.

¶ 15 On October 31, 2013, Jane filed her fourth petition for a rule to show cause, alleging that Scott failed to pay Jane amounts due under the settlement agreement and subsequent orders. The court entered an agreed order on November 5, 2013, directing Scott to pay Jane \$5,391 within 7 days. In an agreed order entered January 6, 2014, the court directed Scott to pay Jane the \$11,000 previously ordered for Benjamin's college expenses, plus the agreed share of Scott's payments from Western.

¶ 16 Scott rested his case on the motion to modify maintenance and support on January 8, 2014. Jane moved for a judgment at the close of Scott's case, arguing that the evidence did not provide sufficient grounds to grant Scott any relief from the settlement. The court said:

"[In] 2012 *** there were proposed changes *** that were going to take place at Western ***. And in anticipation of that, Mr. Kaplan made a decision that he was going to leave there. ***

This change was voluntary and it was not fortuitous. It was a guess on his part that he was going to be working so hard and making less money. ***

* * *

Mr. Kaplan could have gone back and done what he had been doing the majority of his career and be in the insurance business. That's where he was most successful. After he made the change, he went into a sales business. He moved his *** new family and went to another location. And he became incredibly, incredibly underemployed by his own decision. And I agree, he didn't sit down and say, you know what, I think I'm going to do this and I'm going [to] live off my \$3,000 and whatever else I can make because that way I'll really put it to Ms. Kaplan. And if she thinks that's what he did, I don't think he did that. I think that he chose his second family over the obligations that he had in 2009.

*** [R]eductions in a payor's ability to pay maintenance that are not fortuitous cannot be used to modify maintenance obligations. What happened here was

not fortuitous, but his decision did affect his support obligations to his previous family, to Andrew and to Jane Kaplan.

* * *

*** This is a case where he created his own problem. *** He could have stayed with Western *** until he knew he could have found another job that was going to be able to help him meet his obligations from the order of 2009 and to also be able to meet the obligations of his second family. ***

*** He chose to take early retirement at the age of *** 56 years old."

¶ 17 The court denied the motion to modify maintenance and support.

¶ 18 The court entered an order, dated February 19, 2014, finding Scott in indirect civil contempt of court for failure to make support payments mandated by the settlement agreement. The court in that order also entered a judgment against Scott for \$30,617.01, for unpaid maintenance and support for 2013.

¶ 19 Scott filed a timely notice of appeal from the order of February 19, 2014. He has filed a brief, *pro se*, and six volumes of record. The common law record takes up the first five volumes of the record. The sixth volume is a transcript of the hearing held on January 8, 2014, the final day of the hearings on the motion for modification of maintenance and support. The volume includes a transcript of a small part of Scott's testimony, but no part of the testimony from any other witnesses.

¶ 20 Jane filed a motion asking this court to compel Scott to file a complete record including a full transcript of all the testimony in this case. We denied the motion. Scott then filed in this court a volume of documents, claiming that the volume included the exhibits and full transcripts of the trial.

¶ 21 ANALYSIS

¶ 22 This court cannot consider any documents or evidence not included in the record on appeal. *Babich v. River Oaks Toyota*, 377 Ill. App. 3d 425, 430 (2007). Scott's volume of documents, lacking proper certification, forms no part of the record. See Ill. S. Ct. R. 329 (eff. Jan. 1, 2006).

¶ 23 Jane asks this court to strike the portions of Scott's briefs that refer to the documents in the volume he filed, and not to the record on appeal. We see no need to strike portions of Scott's brief. We will disregard all factual assertions and arguments that lack support in the record. See *James v. Yasunaga*, 157 Ill. App. 3d 450, 452 (1987).

¶ 24 We confront the difficult task of addressing Scott's *pro se* assertions and arguments. We copy here, without modification, his "assignment of error:"

"1. The Trial Court Erred By Violating My Rights To Due Process Of Law
And The Right To A Fair Hearing.

2. The Trial Court Erred By Not allowing the facts of the Petitioner's to be
sufficiently presented by Petitioner's attorney to the court; and

3. The Trial Court Erred by Modifying the Original Distribution of Marital
Property

4. The Trial Court Erred by not having Jurisdiction and authority to modify Original Marital Property Agreement.
5. The Trial Court Erred by ruling on a modification of marital property when no petition filed in those regards.
6. The Trial Court Erred in the court's interpretation of Retirement Benefits as Maintenance rather Than Marital Property.
7. The Trial Court Erred by not awarding a reduction in maintenance.
8. The Trial Court Erred By Not [sic] The Trial Court Erred By Not considering Plaintiff's Respondents' Change in circumstances; and
9. The Trial Court Erred By Not considering Respondents' Change in circumstances; and
10. The Trial Court Erred by Not considering Respondents' obligation to financially contribute to the support of the family; and
11. The Trial Court Erred by concluding Petitioner did not act in good faith."

¶ 25 Scott does not explain in what way the trial court denied him due process. In the record on appeal, Scott's attorney at trial did not complain that the court foreclosed the presentation of evidence in any way. We find no basis in the record for the first two assertions of error.

¶ 26 The trial court did not modify the original distribution of marital property specified in the settlement agreement. The court only enforced the agreement's provisions for maintenance and support. We find no basis in the record for the third, fourth and fifth assignments of error.

¶ 27 The settlement agreement made explicit provisions for the distribution of Scott's income and retirement benefits. The court enforced that agreement, including the provisions for maintenance and support. Scott claimed that he had no resources other than his retirement benefits from which to pay maintenance and support. The claim, even if true, does not establish grounds for invalidating the settlement agreement or the orders enforcing that agreement. See *In re Marriage of Schweih*s, 272 Ill. App. 3d 653, 660 (1995). We see no basis in the record for the sixth assignment of error.

¶ 28 The trial court expressly made no finding as to good faith. Instead, the court said that even if Scott acted in good faith, he still could not avoid his obligations under the settlement agreement by voluntarily quitting gainful employment while he remained capable of finding sufficiently remunerative work. Thus, we find no basis in the record for the eleventh assignment of error.

¶ 29 The remaining assignments of error appear to revolve around a single contention, that in light of Scott's circumstances, the trial court should have granted Scott's motion to modify maintenance and support. In the reply brief Scott filed, he argues only that the evidence presented throughout the trial contradicts the court's finding of no substantial change in circumstances that would justify a reduction of the amount of maintenance and support Scott must pay. Scott includes one citation to the record for the trial court's factual finding, and numerous citations to the uncertified volume of documents he filed in this court.

¶ 30 Because the record on appeal does not include transcripts of the testimony at trial, we must presume that the record sufficiently supports the trial court's factual findings. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). We find no sufficient basis in the record for

overturning the trial court's finding that Scott failed to show grounds for modifying the agreed award of maintenance and support. Accordingly, we affirm the trial court's judgment.

¶ 31

CONCLUSION

¶ 32

Because the record on appeal does not support any of Scott's allegations of trial court error, we affirm the trial court's judgment.

¶ 33

Affirmed.