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2015 IL App (4th) 140349-U

NO. 4-14-0349

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

February 27, 2015

Carla Bender

4th District Appellate

Court, IL

In re: MARRIAGE OF)	Appeal from
KAREN S. MITTELSTEADT,)	Circuit Court of
Petitioner-Appellee,)	Logan County
and)	No. 10D80
ROGER L. MITTELSTEADT,)	
Respondent-Appellant.)	Honorable
)	Thomas W. Funk,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Pope and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding the trial court did not err by (1) denying respondent's petition to modify his maintenance and (2) finding respondent in contempt of court for failing to comply with the maintenance order.

¶ 2 In June 2012, the trial court entered an order dissolving the marriage of petitioner, Karen S. Mittelsteadt, and respondent, Roger L. Mittelsteadt. As part of the judgment, the court ordered Roger to pay maintenance to Karen pursuant to section 504 of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/504 (West 2010)).

¶ 3 In May 2013, Karen filed a petition for rule to show cause after Roger failed to pay his court-ordered maintenance. The following month, Roger filed a petition to modify his maintenance obligation. In February 2014, the trial court granted Karen's petition and found Roger in contempt of court and, further, denied Roger's petition to modify his maintenance obligation.

¶ 4 Roger appeals, asserting the trial court erred by (1) denying his petition to modify maintenance, and (2) holding him in civil contempt for willful failure to pay his court-ordered maintenance. For the following reasons, we affirm.

¶ 5 I. BACKGROUND

¶ 6 A. Dissolution Proceedings

¶ 7 In June 2010, Karen filed for dissolution of her marriage to Roger. In June 2012, the trial court entered an order dissolving the marriage and dividing the marital assets. Part of the court's order provided for Roger to pay maintenance to Karen.

¶ 8 In awarding maintenance to Karen, the trial court found, for the majority of the marriage, Roger was the breadwinner of the family while Karen served as the primary caretaker for the children. Karen did not work outside the home for the first 29 years of marriage, from 1970 until 1999, which removed her from the employment market for a majority of their marriage, thus decreasing her potential for future earnings and retirement savings. In recent years, Karen had obtained employment with a salary of \$35,000, which contrasted with Roger's average income from 2008 to 2010 of \$49,254.

¶ 9 Despite her entry into the workforce, the trial court found Karen's prospects for advancement or higher earnings were limited, whereas Roger had higher income-earning potential due to his vast experience. Though Roger's income had recently declined, the court noted that was due to the death of his previous landlord, which constituted circumstances unlikely to recur in the future. The court found Roger would likely increase his income once presented with motivation to pursue new customers and stated, "Roger will not have the uncertainty of being 'punished' by a Court for doing well in business, which is a motivator that this Court has often observed to drive behavior *** involving self-employed people." Thus, the

court averaged Roger's average gross income from 2008 to 2010 to arrive at an average income of \$49,254. Accordingly, the court found Karen earned 41.67% of the parties' total income. To bring her income equal to Roger, the court would need to order maintenance in the amount of \$7,000 annually. The court therefore ordered Roger to pay Karen \$7,000 in annual maintenance in monthly increments of \$583.33. The maintenance order would be reviewable after five years.

¶ 10 **B. Disputes Over Maintenance**

¶ 11 In May 2013, Karen filed a petition for rule to show cause, alleging Roger willfully refused to pay maintenance as ordered by the trial court. Though Roger made regular, consistent payments from July 2012 through January 2013, he paid only \$500 for February 2013 and failed to make any payments in March, April, or May 2013. Karen requested \$1,833.32 in past-due maintenance payments and \$0.45 per day in arrearage.

¶ 12 In June 2013, Roger filed a petition to modify maintenance, alleging a substantial change in circumstances. Specifically, he asserted (1) his gross annual income had decreased by \$50,000 due to the termination of his farm leases, (2) his gross annual income decreased by \$7,200 because the Logan County Cemetery Maintenance District (Cemetery District) eliminated his \$600 per month retainer, (3) the Cemetery District eliminated his mileage reimbursement, and (4) his annual income decreased \$12,000 due to the Cemetery District's decreased need for grave digging.

¶ 13 **C. Hearing Regarding Maintenance**

¶ 14 In December 2013, a two-day hearing on both Roger's petition to modify his maintenance payments and Karen's petition for rule to show cause commenced. No transcript or bystander's report from the first day of the hearing exists, though the record reflects Roger testified and was subject to cross-examination on that date. By that time, the trial court received

an update as to Roger's 2013 maintenance payments, indicating he paid (1) \$583.33 in January and February; (2) \$500 in March; (3) nothing in April, May, or June; (4) \$583.33 in July; (5) \$150 in August and September; (6) \$100 in October and November; and (7) an additional \$750 in November. In all, Roger was short \$2,916.64 in maintenance payments during 2013.

¶ 15 In January 2014, the trial court held the second part of the hearing, which began with redirect and re-cross-examinations of Roger.

¶ 16 *1. Redirect and Re-cross-examinations of Roger*

¶ 17 During redirect examination, Roger acknowledged his testimony during the December 2013 hearing was "slow" or "confused," due to him taking certain prescription medications that he "believed" might affect his ability to think quickly. He then sought to clarify his previous testimony.

¶ 18 According to Roger, in 2013, he received \$21,000 from grain sales on a farm lease that subsequently expired. He then sought additional leases or other income, naming approximately 14 individuals he spoke with about obtaining farm leases or using his equipment for hauling. He also attempted to procure full-time employment with the Cemetery District. Despite his efforts, Roger testified he had no success in obtaining additional income.

¶ 19 On re-cross-examination, Roger admitted, at the initial hearing, he only mentioned four people he spoke with about procuring additional income, as "[t]hat's just what came to mind at the moment." He asserted his testimony at the January 2014 hearing was more accurate than his testimony the previous month. Though he admitted he could have asked those individuals he spoke with to testify and verify he made inquiries, he explained he found "[n]o reason to" do so.

¶ 24

3. The Trial Court's Observations

¶ 25 Following the presentation of evidence, the trial court took the matter under advisement. However, before doing so, the court made the following observations and findings. First, the court found Roger's credibility lacking, given the "stark difference" between his testimony during the first and second hearings. Based on Roger's reaction to the court's statement, the court went on to note, "[a]nd frankly, your expression on your face right now, seems to be [a] little disingenuous when you consider the difference between the two." Second, the court stated Roger's failure to produce any witnesses to verify that he made inquiries into farm leases or hauling opportunities suggested those individuals would not support his testimony. The court found that aspect of Roger's testimony "frankly unbelievable." Finally, the court found Roger had not demonstrated a decrease in his average income, nor had he demonstrated good-faith diligence in procuring employment.

¶ 26

4. The Trial Court's Written Order

¶ 27 In February 2014, the trial court issued a written order denying Roger's petition to modify his maintenance and finding Roger in contempt of court. The court found Roger demonstrated a significant decrease in income but determined the change was not made in good faith. Initially, the court found Roger did not act in bad faith at the time he lost his farm lease or had his income through the Cemetery District reduced. However, in looking at Roger's actions afterward, the court determined Roger "did little if anything" to find a new farm lease. The court placed little credibility in respondent's testimony about his efforts to procure additional income due to the stark discrepancies between his testimony at the first and second hearings. Moreover, the court wrote, "[Roger's] reaction when the Court commented on the discrepancy between the testimony at the two hearings, laughing and shaking his head, seemed to confirm

the court erred by finding him in contempt as the reduction in his income "was not intentional or caused by [Roger's] wrongful purpose."

¶ 32 In April 2014, the trial court denied Roger's motion to reconsider.

¶ 33 This appeal followed.

¶ 34 II. ANALYSIS

¶ 35 On appeal, Roger asserts the trial court erred by (1) denying his petition to modify maintenance, and (2) holding him in civil contempt for willful failure to pay his court-ordered maintenance. We take these arguments in turn.

¶ 36 A. Petition To Modify Maintenance

¶ 37 As an initial matter, Roger asks this court to "scrutinize the reasoning of the [t]rial [c]ourt in awarding Karen maintenance" in its initial June 2012 order. We decline to reconsider the trial court's initial order for maintenance, as it is beyond the scope of our review. See *In re Marriage of S.D.*, 2012 IL App (1st) 101876, ¶ 41, 980 N.E.2d 1151 ("A maintenance award is *res judicata* as to facts at the time the award was entered."). We will, however, consider the factors the court relied upon in crafting the initial maintenance order insofar as is necessary to determine whether the court erred by denying Roger's petition to modify his maintenance obligation. See *In re Marriage of Pedersen*, 237 Ill. App. 3d 952, 956, 605 N.E.2d 629, 633 (1992) (in a petition to modify maintenance, the court should consider the factors initially relied upon in calculating maintenance). We now turn to whether the trial court erred by denying Roger's petition to modify maintenance.

¶ 38 1. *Substantial Change in Circumstances*

¶ 39 Roger asserts the trial court erred by denying his petition to modify maintenance because the court acknowledged he demonstrated a substantial change in circumstances. In

considering a petition to modify a maintenance order, the trial court must first determine whether the petitioner demonstrated a substantial change in circumstances warranting modification of the existing maintenance order. 750 ILCS 5/510(a-5) (West 2012). The burden of proof remains with the petitioner to demonstrate a substantial change in circumstances. *In re Marriage of Neuman*, 295 Ill. App. 3d 212, 214, 693 N.E.2d 876, 878 (1998).

¶ 40 After hearing the evidence, the trial court determined Roger demonstrated a substantial change in circumstances. Though Roger's income for 2013 was approximately \$47,000, which was consistent with his average income at the time the court issued its June 2012 maintenance order, approximately \$30,000 of that arose from the sale of his trailer and the previous year's grain. He no longer had any farm leases and his income from the Cemetery District had decreased. Thus, as Roger points out, the court properly found he demonstrated a substantial change in circumstances. However, the inquiry does not end at that point. Rather, the court must then consider the factors set forth in the Marriage Act to determine whether, given the substantial change in circumstances, modification is warranted.

¶ 41 *2. Modification Factors*

¶ 42 In ruling on a petition to modify a maintenance order, the trial court must consider the nine factors set forth in section 510(a-5) of the Marriage Act, including:

"(1) any change in the employment status of either party
and whether the change has been made in good faith;

(2) the efforts, if any, made by the party receiving
maintenance to become self-supporting, and the reasonableness of
the efforts where they are appropriate;

(3) any impairment of the present and future earning capacity of either party;

(4) the tax consequences of the maintenance payments upon the respective economic circumstances of the parties;

(5) the duration of the maintenance payments previously paid (and remaining to be paid) relative to the length of the marriage;

(6) the property, including retirement benefits, awarded to each party under the judgment of dissolution of marriage, judgment of legal separation, or judgment of declaration of invalidity of marriage and the present status of the property;

(7) the increase or decrease in each party's income since the prior judgment or order from which a review, modification, or termination is being sought;

(8) the property acquired and currently owned by each party after the entry of the judgment of dissolution of marriage, judgment of legal separation, or judgment of declaration of invalidity of marriage; and

(9) any other factor that the court expressly finds to be just and equitable." 750 ILCS 5/510(a-5) (West 2012).

We must also consider the section 504 factors relied upon by the court in crafting its original maintenance order. See *Pedersen*, 237 Ill. App. 3d at 956, 605 N.E.2d at 633.

¶ 43 In considering whether the petitioner has established the facts necessary to justify modification of maintenance, the trial court's role is to determine the credibility of the witnesses and the weight to be given to the evidence. See *In re Marriage of Johnson*, 215 Ill. App. 3d 174, 180, 574 N.E.2d 855, 858 (1991). "Each case for termination of maintenance must rest on its own facts, given the unique nature of personal relationships." *Id.* "The decision to modify or terminate maintenance is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *Pedersen*, 237 Ill. App. 3d at 956, 605 N.E.2d at 632.

¶ 44 Initially, we note no transcript or bystander's report exists to memorialize the first day of the hearing, during which time Roger was subject to direct and cross-examinations. Because it is the appellant's duty to supply this court with the record of all proceedings at issue in this case, we will resolve any inconsistencies related to the lack of a transcript or bystander's report against Roger. *McGee v. State Farm Fire & Casualty Co.*, 315 Ill. App. 3d 673, 679, 734 N.E.2d 144, 150 (2000).

¶ 45 With regard to the statutory factors contained in sections 504 and 510 of the Marriage Act (750 ILCS 5/504, 510 (West 2010)), Roger argues the trial court failed to make explicit findings as to which factors it considered in denying his petition. Though the court must consider all of the relevant statutory factors, "when the basis for an award of maintenance is established in the record, it is not mandatory that the trial court make explicit findings for each of the statutory factors." *Blum v. Koster*, 235 Ill. 2d 21, 38, 919 N.E.2d 333, 343 (2009). Absent evidence to the contrary, we presume the court followed the law. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 72, 958 N.E.2d 227. Again, it was Roger's duty as the appellant to provide the necessary transcripts of the proceedings for our review, and any inconsistencies arising from his failure to provide transcripts or bystander's reports shall be construed against him. *McGee*, 315

Ill. App. 3d at 679, 734 N.E.2d at 150. We find nothing in the record on appeal to demonstrate the court ignored or failed to consider any of the statutory factors; to the contrary, the court alluded to several of the factors in reaching its decision. Regardless, we conclude the evidence adduced during the hearing was sufficient for the court to deny Roger's petition to modify his maintenance payments.

¶ 46 Under the first section 510 factor, the trial court should consider "any change in the employment status of either party and whether the change has been made in good faith." 750 ILCS 5/510(a-5)(1) (West 2012). Specifically, Roger asserts the court failed to take into consideration that Karen's present income nearly equaled his. The court considered this issue in issuing its initial June 2012 maintenance order. There, the court determined Karen's "age, education, and relative lack of work experience" limited her ability to find higher-paying employment, whereas Roger's vast experience provided him with greater income-earning potential.

¶ 47 In 2013, due to the loss of his farming lease and a decrease in his Cemetery District wages, Roger's gross income was approximately \$47,000, whereas Karen's income remained roughly the same as in June 2012. In his brief, Roger points out \$30,000 of his income derived from the one-time sale of his trailer and the sale of grain from his final farm lease. Based on the decrease in Roger's steady income, which the court determined to be substantial, Roger asserts the court should have granted his petition to modify his maintenance payments.

¶ 48 The trial court acknowledged Roger's loss of income was not due to any wrongdoing or fault on his behalf. Rather, the court focused on Roger's efforts following the loss of employment. Roger argues the court should not have relied on whether he made a good-

faith effort to find replacement work because it is not included as a statutory factor for the determination of maintenance under either section 504 or 510 of the Marriage Act. We disagree.

¶ 49 Though sections 504 and 510 do not specifically state the trial court should consider the petitioner's good-faith efforts to find replacement work, the court is required to look at the facts unique to the case. See *Johnson*, 215 Ill. App. 3d at 180, 574 N.E.2d at 858. Here, Roger knew his farm lease was expiring and his wages through the Cemetery District had been cut. Nevertheless, the court found Roger did "little if anything" to find additional work and subsequently impaired his ability to find work by selling his trailer. This was a trend in Roger's behavior, as the court noted in its initial 2012 order in rejecting Karen's argument that Roger dissipated marital assets, stating, "[a]t worst, Roger has been proven to be indifferent to whether he gains new business." Even if subsection (a-5)(1) failed to apply to this situation, the court had the authority to consider Roger's failure to make good-faith efforts under subsection (a-5)(9), which allows the court to consider "any other factor that the court expressly finds to be just and equitable." 750 ILCS 5/510(a-5)(9) (West 2012).

¶ 50 As to his good-faith efforts, Roger asserts the trial court improperly found his testimony incredible based on the contradictory statements he made during the two hearing dates. The difficulty with that argument is Roger failed to provide the transcripts from the December 2013 hearing that would allow us to review the extent to which he offered contradictory testimony. Because Roger failed to provide the necessary transcripts, we resolve any inconsistencies against him. See *McGee*, 315 Ill. App. 3d at 679, 734 N.E.2d at 150.

¶ 51 During the December 2013 hearing, Roger was purportedly "confused" or "slow" at answering questions. When asked which individuals he consulted about procuring replacement work, he named four people. Conversely, at the January 2014 hearing, Roger

named approximately 14 people he consulted about replacement work. Because Roger failed to produce any of those individuals to testify on his behalf regarding these alleged contacts, the court was left to determine whether it believed Roger's statement that he contacted 14 people in a good-faith effort to procure replacement employment. The court found Roger's inconsistent testimony rendered his statements incredible. Roger contends the inconsistent testimony can be attributed to Roger, during the first hearing, forgetting with whom he spoke. While it is possible Roger may have experienced a lapse of memory while on the witness stand, as Roger concedes in his brief, the court's role is to determine the credibility of the witnesses and the weight to be given to their testimony. *Johnson*, 215 Ill. App. 3d at 180, 574 N.E.2d at 858. Roger's inconsistent testimony, coupled with the court's observation that Roger's laughter demonstrated Roger found the proceedings to be a "joke," justified the court's decision to disregard Roger's unsupported, inconsistent testimony that he sought replacement work.

¶ 52 Roger also argues the trial court erred by improperly injecting its personal knowledge of the farming industry in determining whether Roger made a good-faith effort to find replacement work. We disagree. The court required no special knowledge to determine that asking around town for open positions is not the best course for finding employment. Rather, the court was noting that Roger failed to present stronger evidence of his good-faith efforts, such as the common-sense approach of searching the classifieds or speaking to a banker who specializes in farm loans.

¶ 53 The second factor in determining whether to modify a maintenance order is whether Karen made reasonable efforts to become self-supporting. See 750 ILCS 5/510(a-5)(2) (West 2012). Throughout this period of time, Karen's income remained stable. The parties do not argue Karen failed to make reasonable efforts toward becoming self-sufficient and the record

demonstrates she maintained the employment she had when the court entered its initial order for maintenance.

¶ 54 Under the third factor, the trial court may consider whether either party took actions to impair present or future earning capacity. 750 ILCS 5/510(a-5)(3) (West 2012). Here, the court noted Roger, a farmer, impaired his future earning capacity by selling his trailer, a crucial piece of farm machinery, and "retiring" from farming. This action substantially impaired his ability to farm, which had been his primary employment, and therefore impaired his future earning capacity. Roger asserts the sale was necessary to offset a bank loan; however, Roger provided no documentation to the court indicating that his debts or obligations had been reduced by \$9,000.

¶ 55 Roger also contends the trial court, in its original order, failed to take into consideration that his criminal conviction and registration as a sex offender would impede his ability to find replacement work and, therefore, impaired his future earning capacity. Though, practically speaking, it is reasonable to believe Roger's criminal background will impact his future income potential, nothing provided in the record or any supporting documentation demonstrated his criminal conviction or registration as a sex offender (1) impacted his farm leases or his contract with the Cemetery District, or (2) later contributed to his inability to procure replacement work.

¶ 56 As to the fourth factor, the parties presented no evidence to the trial court regarding the tax consequences of the maintenance payments, so we will not consider that as a significant factor in this matter. See 750 ILCS 5/504(a-5)(4) (West 2012).

¶ 57 The fifth factor requires the trial court to consider the duration of the maintenance payments made in comparison to the length of the marriage. 750 ILCS 510(a-5)(5) (West 2012).

The court initially ordered maintenance for five years, with the amounts to be reconsidered as the parties approached retirement. Roger paid his ordered monthly maintenance obligation for only eight months before either failing to pay or making largely reduced payments. Though Roger consistently paid his maintenance from July to December 2012, for the year of 2013, he had paid \$3,499.99 in maintenance, leaving a balance of \$2,916.64. Roger's 8 months of maintenance payments paled in comparison to the parties' 42 years of marriage, which was an appropriate consideration for the court.

¶ 58 Under the sixth factor, the trial court was to consider the value of the property owned by each party. 750 ILCS 5/510(a-5)(6) (West 2012). Roger asserts the court, in setting its initial maintenance award, failed to take into consideration that Karen's net share of the marital estate more than doubled his. He contends his property is heavily encumbered with debt, including a \$60,000 bank loan. As noted above, when calculating the initial maintenance order, the court carefully considered both the debts and assets of each party. Though Roger was encumbered by a \$60,000 loan, he also possessed the income-producing farm equipment subject to that loan. Conversely, Karen's part of the marital estate did not include any income-producing property. Accordingly, we conclude the court properly considered the value of the property awarded to each party.

¶ 59 The seventh factor requires the trial court to consider each party's change in income from the date of the original order. See 750 ILCS 5/510(a-5)(7) (West 2012). Karen's income remained substantially unchanged following the June 2012 maintenance order. The court acknowledged Roger, after losing his farm lease and finding his Cemetery District contract reduced through no fault of his own, faced a substantial decrease in his 2013 income. However, the court also determined Roger's failure to take remedial measures by engaging in a good-faith

search for work, accompanied by his decision to sell the means by which he performed his work—his trailer—justified retaining the present maintenance level.

¶ 60 Under the eighth factor, the trial court should consider the property acquired and owned following the dissolution of marriage. 750 ILCS 5/510(a-5)(8) (West 2012). The record reveals little change in terms of the parties' property ownership following the dissolution of marriage. The most significant change was Roger's sale of his trailer for \$9,000, which he claimed offset part of his \$60,000 bank loan. However, Roger's financial affidavit reflected he still owed \$60,000 on the loan, only \$2,000 less than the amount he owed when the court initially set maintenance in June 2012. Regardless of where Roger applied the \$9,000, nothing in the record shows the proceeds from the sale of his trailer were provided to Karen for maintenance.

¶ 61 After reviewing the record and the careful calculations of the court, we cannot conclude the court's consideration of the parties' unique circumstances resulted in an abuse of discretion. Accordingly, we hold the court's decision to deny Roger's petition to modify maintenance was not an abuse of discretion.

¶ 62 B. Petition for Rule To Show Cause

¶ 63 Roger next contends the trial court erred by finding him in contempt of court for failing to comply with the court's order for maintenance. In order to find a person in contempt of court, the court must determine the person willfully refused to obey the court's order. *In re Marriage of Logston*, 103 Ill. 2d 266, 285, 469 N.E.2d 167, 175 (1984). "The noncompliance with an order to pay maintenance constitutes *prima facie* evidence of contempt." *Id.* Once a *prima facie* showing is made, the burden is on the respondent to demonstrate his inability to pay. *Id.* The respondent must demonstrate "he neither has money now with which he can pay, nor has disposed wrongfully of money or assets with which he might have paid." *Id.* "[W]hether a party

is guilty of contempt is a question of fact for the trial court[;] *** a reviewing court will not disturb the finding unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion." *Id.* at 286-87, 469 N.E.2d at 176.

¶ 64 Here, there is no doubt Roger failed to make his monthly maintenance payments as ordered. Rather, our focus is on whether Roger's failure to pay constituted a willful refusal to obey the trial court's order.

¶ 65 In the fall of 2013, Roger sold his trailer for approximately \$9,000. He testified the proceeds went toward repayment of a bank loan. He provided no evidence to support that statement; rather, the records presented to the trial court showed his obligation to the bank remained unchanged. Further, his repayment of the loan was not a necessity to support his bare living expenses. See *id.* at 286, 469 N.E.2d at 175-76 (it is proper for a respondent to pay his bare living expenses prior to paying on the decree). Regardless, the record clearly demonstrates he did not use any of the \$9,000 to pay toward his maintenance obligation, for which he was already in arrears. Roger's failure to pay part of the \$9,000 toward his arrearage, coupled with the court's finding that Roger failed to act with good faith in seeking replacement income, demonstrates a willful violation of the court's order to pay maintenance.

¶ 66 Roger blames his failure to pay on the trial court's unrealistic expectations that his present and future income would increase despite his sex-offender status. However, nothing in the record demonstrates Roger's loss of income or inability to procure additional income was the result of his criminal conviction and subsequent sex-offender registration.

¶ 67 Accordingly, we conclude the trial court did not err by finding Roger in contempt of court for his willful failure to pay his maintenance obligation.

¶ 68 III. CONCLUSION

¶ 69 For the foregoing reasons, we affirm the trial court's judgment.

¶ 70 Affirmed.