

**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).

2016 IL App (4th) 150246-U

NO. 4-15-0246

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

April 22, 2016  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

In re: MARRIAGE OF KATHLEEN M.  
DURFLINGER, n/k/a KATHLEEN M.  
WURTSBAUGH,

Petitioner-Appellant,

v.

PHILLIP L. DURFLINGER,  
Respondent-Appellee.

) Appeal from  
) Circuit Court of  
) McLean County  
) No. 10D567  
)  
) Honorable  
) Lee Ann S. Hill,  
) Judge Presiding.

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JUSTICE POPE delivered the judgment of the court  
Presiding Justice Knecht and Justice Holder White concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not abuse its discretion in terminating respondent's maintenance obligation.

¶ 2 In December 2011, the parties entered into a marital settlement agreement, which provided respondent, Phillip L. Durflinger, would pay petitioner, Kathleen M. Durflinger, n/k/a Kathleen M. Wurtsbaugh, \$3,000 per month in permanent maintenance. In September 2013, Phillip filed a petition to modify or terminate maintenance. Following a hearing, the trial court granted Phillip's petition and ordered the maintenance obligation to "terminate permanently and no longer be reviewable by the court."

¶ 3 Kathleen appeals, arguing the trial court abused its discretion in (1) ordering Phillip's permanent maintenance obligation to end upon his retirement without allowing the

possibility for further review or modification and (2) denying her motion to reconsider or reopen the evidence where her temporary employment ended shortly after the hearing but before the written judgment was entered. We affirm.

¶ 4

## I. BACKGROUND

¶ 5 On March 13, 1987, Kathleen and Phillip were married. No children were born to the parties. Phillip was employed full-time throughout the marriage. Kathleen, as the homemaker, was unemployed for a substantial period of time during the marriage (1998-2011).

¶ 6 On January 5, 2012, the parties divorced. At the time of the divorce, Phillip, then 63 years old, was employed at State Farm Mutual Automobile Insurance Company (State Farm). His 2012 tax return showed wages of \$114,541. Kathleen was 54 years old and employed in an hourly position. Her 2012 tax return shows she earned \$14,740 in wages.

¶ 7 As part of the dissolution proceedings, the parties entered into a marital settlement agreement, dated December 20, 2011, and incorporated in the January 5, 2012, judgment of dissolution, which provided, *inter alia*, the following: (1) Kathleen would receive her State Farm pension free and clear of any interest by Phillip (Kathleen was receiving \$781 per month from her pension); (2) the marital portion of Phillip's State Farm pension plan would be divided through a qualified Illinois domestic relations order; and (3) Phillip would receive two rental properties. With regard to maintenance, the agreement specifically provided, in relevant part, the following:

"[Phillip] shall pay permanent maintenance to [Kathleen] in the amount of Three Thousand Dollars (\$3,000) per month beginning the first day of the month following entry of the Judgment of

Dissolution of Marriage. In addition, the parties agree that the below listed events constitute a substantial change in circumstances such that there shall be a review of [Phillip's] maintenance obligation upon the occurrence of one of those events and upon petition by either party. \*\*\* The events necessitating a review are the following:

A. [Phillip's] date of retirement from State Farm Insurance Companies;

B. [Kathleen's] election to receive her portion of [Phillip's] pension prior to his retirement.

Maintenance shall cease upon first to occur of the following contingencies:

A. [Kathleen's] remarriage;

B. [Kathleen] living on a conjugal basis with another person;

C. Either party's death."

¶ 8 On September 6, 2013, Phillip filed a petition to modify or terminate Kathleen's maintenance. In his petition, Phillip requested his maintenance obligation be reduced or ended as a result of Kathleen's new job at NTT Data (NTT) and in light of his anticipated retirement from State Farm. At the time, Kathleen was working as a temporary consultant for NTT, earning \$90,000 a year. According to Phillip's 2013 tax return, he earned \$124,746 in 2013.

¶ 9 On July 11, 2014, Kathleen filed a proposal, citing calculations prepared by her financial expert. She argued there was too much speculation involved in determining what the parties' incomes and expenses would be as of June 1, 2015, *i.e.*, Phillip's intended retirement

date. According to Kathleen's proposal, the court should instead wait and require Phillip to file a petition to modify maintenance upon his actual retirement date.

¶ 10 While Kathleen references an August 5, 2014, hearing date in her brief, according to the docket sheet, the hearing on Phillip's petition was held on July 30, 2014. (We note Kathleen has not included a report of the proceedings for this hearing in the record on appeal. Apparently, there was no court reporter present during the bench trial. Thus, no verbatim transcript of the hearing exists. The record also lacks either a bystander's report or an agreed statement of facts regarding this hearing.) According to the docket entry, the parties appeared with counsel and stipulated to the foundation for admission of reports by each others' experts. All of Phillip's exhibits were admitted without objection. Kathleen testified and the trial court heard the parties' arguments. The docket entry also indicates the court ruled from the bench and found the following: "Maintenance is modified from [the] time of filing to time of retirement to \$2,350.00 per mo[nth]. Upon [Phillip's] retirement the maintenance shall terminate permanently and no longer be reviewable by the court."

¶ 11 On December 4, 2014, the written order granting Phillip's petition was entered. (The delay in entering the written order was apparently the result of back and forth between the parties.) The order stated Phillip's maintenance obligation should be (1) "reduced to \$2,350 per month retroactive to September 3, 2013," and (2) "terminated permanently" at the time of Phillip's retirement and "shall not be subject to any further review or modification."

¶ 12 On January 2, 2015, Kathleen filed a "motion to reconsider or reopen" the evidence, arguing the trial court erred in its application of existing law when it terminated maintenance less than three years after the dissolution judgment, where their marital settlement

agreement specifically provided Phillip would pay permanent maintenance. Kathleen also stated she had been terminated from her employment at NTT on September 15, 2014, when her assignment ended due to a lack of work. Kathleen testified during the hearing her position was temporary and could end at any time. Kathleen argued her job loss was newly discovered evidence sufficient to justify reopening the proofs. Kathleen also referenced evidence from the hearing, including testimony regarding her health. According to Kathleen, she experiences loss of consciousness, which she characterized as "drop attacks." These events occur without warning and result in injury. The first incident occurred in August 2012 and resulted in a broken nose. Kathleen maintained these incidents limit her ability to drive and place potential limitations on her continued ability to work.

¶ 13 On January 20, 2015, Phillip filed his response to Kathleen's motion, arguing the trial court did not abuse its discretion in terminating his maintenance obligation. Phillip contended the evidence presented at the hearing showed Kathleen's salary at the time was equal to roughly 70% of his salary. Phillip also argued the fact Kathleen was terminated from her employment was inadmissible because it did not fit the definition of newly discovered evidence.

¶ 14 On March 11, 2015, the trial court held a hearing on Kathleen's motion. (That hearing was transcribed and a report of those proceedings is included in the record on appeal.) The parties referenced the evidence presented during the original hearing, including Kathleen's health condition as well as the temporary nature of her then current employment with NTT. Kathleen argued the court erred in its ruling because the parties' agreement explicitly provided for permanent and not rehabilitative maintenance. Kathleen noted the maintenance obligation was not for a specific period of time. Instead, it "was agreed, negotiated, and specifically labeled

as permanent maintenance." While she conceded the agreement allowed maintenance to be "reviewed" upon Phillip's retirement, Kathleen maintained it was inequitable for it to cease altogether without allowing for the possibility of reinstatement or modification. Kathleen also argued the fact she lost her job after the initial hearing was newly discovered evidence sufficient to reopen the case.

¶ 15 In denying Kathleen's motion, the trial court found, *inter alia*, the following:

"[You argue] I made a questionable decision on a rule of law, the reviewability placed within the agreement. I believe it was something that was bargained for. And I think you even said that it was contemplated that there would be changes. Well, there were substantial changes per the motion for termination due to retirement. [Kathleen], for a period of just short of two years, made income of, if I remember it right from [my] notes, it was almost \$90,000. Yes. [Kathleen] said it was a temporary job, and that she had been in this job for almost two years. She testified to some of her health issues, and things that it prevented her from doing, that was a consideration, but [she] had been working in this employment for, at that time a year and a half or close to two years.

I had some credibility issues with [Kathleen]. She talked about these health issues and that she couldn't drive, and that she couldn't do all these things, but she drove to court that day. She was not what I felt particularly forthright with the Court, so it caused me

to question some of the things she had testified to. And the Court remembers specifically \*\*\* your request that I consider continued reviewability. And I commented that I felt that that was not appropriate, for a variety of reasons, most of which, because I believe that there was potential for a manipulation that would open the door to coming back and there being more—basically another bite at the apple, and [Kathleen's] credibility was at issue. \*\*\*

\*\*\* The parties agreed [Phillip's retirement] was a substantial change in circumstances, but that wasn't the only substantial change of circumstances. The [other] change in circumstances was that [Kathleen] went from making substantially lower income to a very significant income. I mean, she had worked at State Farm. At State Farm she was making a good income. I understand that she had some health issues, and she went back to school. That didn't work out, then she had some time off, but then she went back and worked at a job where she was making close to \$90,000 for almost two years. That is a substantial change in circumstances also.

So I believe \*\*\* from the evidence I heard at the time, that the decision to terminate maintenance permanently was within the Court's discretion. \*\*\* [Kathleen's] motion to reopen—or to reconsider and reopen is denied."

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, Kathleen argues the trial court abused its discretion in (1) ordering Phillip's permanent maintenance obligation to end upon his retirement and (2) denying her motion to reconsider or reopen the evidence where the fact her temporary employment ended shortly after the hearing should qualify as newly discovered evidence.

¶ 19 As an initial matter, we note our ability to review this appeal is critically hampered by the lack of a transcript from the hearing on Phillip's petition, as no court reporter was present. While Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005) authorizes an appellant to supplement the record with either a bystander's report or an agreed statement of facts, Kathleen has failed to do either. Kathleen, as the appellant, has the burden to present this court with a sufficiently complete record on appeal. *Webster v. Hartman*, 195 Ill. 2d 426, 432, 749 N.E.2d 958, 962 (2001). A court of review will resolve any doubt arising from an incomplete record against the appellant. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958, 959 (1984). Absent a sufficient record on appeal, this court will not resort to speculation regarding the proceedings below, but will presume the trial court's ruling was correct at law and supported by a sufficient factual basis. *Foutch*, 99 Ill. 2d at 391-92, 459 N.E.2d at 959.

¶ 20 In this case, the record contains numerous exhibits which were introduced during the hearing and considered by the trial court. While the docket sheet shows exhibits were admitted into evidence, we have no way of knowing whether they were subject to any limitations or otherwise challenged during cross-examination. Likewise, because we lack a report of the proceedings reflecting the testimony admitted at the hearing, we cannot entertain Kathleen's



arguments regarding what constitutes newly discovered evidence regarding the court's denial of her motion to reconsider or reopen the evidence.

¶ 21 Further, the trial court stated it made credibility judgments regarding Kathleen's testimony. "Determinations regarding credibility and weight of testimony should be given deference upon review because it is the trial judge who enjoys the best position from which to observe the demeanor of witnesses." *Moniuszko v. Moniuszko*, 238 Ill. App. 3d 523, 531, 606 N.E.2d 468, 473 (1992). This is particularly true when the record contains no transcript of that testimony.

¶ 22 In sum, Kathleen has failed to provide us with the tools necessary to undertake any meaningful review of the trial court's judgment. As such, we must presume the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d 389, 391-92, 459 N.E.2d at 959. Accordingly, we are left with no choice but to affirm the trial court's judgment on this basis alone.

¶ 23 Moreover, we can say, as a matter of law, the trial court was within its authority to terminate Phillip's maintenance obligation.

¶ 24 A marital settlement agreement is construed in the same manner as any other contract. *In re Marriage of Doermer*, 2011 IL App (1st) 101567, ¶ 27, 955 N.E.2d 1225 (quoting *Blum v. Koster*, 235 Ill. 2d 21, 33, 919 N.E.2d 333, 340 (2009)). As such, courts seek to give effect to the parties' intent. *In re Marriage of Hulstrom*, 342 Ill. App. 3d 262, 269, 794 N.E.2d 980, 985 (2003). When the terms of a marital settlement agreement are unambiguous, a reviewing court determines the parties' intent solely from the plain language of the agreement. *In re Marriage of Culp*, 399 Ill. App. 3d 542, 547, 936 N.E.2d 1040, 1045 (2010); *In re Marriage*

of *Dundas*, 355 Ill. App. 3d 423, 426, 823 N.E.2d 239, 241 (2005) (the language used in the marital settlement agreement is generally the best indication of the parties' intent). We review *de novo* the interpretation of a marital settlement agreement. *Dundas*, 355 Ill. App. 3d at 426, 823 N.E.2d at 242.

¶ 25 Section 510(a) of the Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/510(a) (West 2012)) provides maintenance may be modified upon a showing of a substantial change of circumstances. *In re Marriage of Selinger*, 351 Ill. App. 3d 611, 617, 814 N.E.2d 152, 159 (2004) (citing *In re Marriage of Mayhall*, 311 Ill. App. 3d 765, 770, 725 N.E.2d 22, 25-26 (2000)). The question of whether a party may rely on retirement as a change in circumstances to justify modification of maintenance depends upon the circumstances of each individual case. *In re Marriage of Waller*, 253 Ill. App. 3d 360, 362, 625 N.E.2d 363, 365 (1993); *In re Marriage of Smith*, 77 Ill. App. 3d 858, 863, 396 N.E.2d 859, 863 (1979).

¶ 26 Here, the plain and unambiguous language of the parties' marital settlement agreement explicitly states "there shall be a review of [Phillip's] maintenance obligation" upon his retirement from State Farm. As such, Phillip did not have the burden of showing a substantial change in circumstances to trigger review of the maintenance award. See *Blum*, 235 Ill. 2d at 35-36, 919 N.E.2d at 342 (where the marital settlement agreement provides for a general review of maintenance, it is unnecessary to show a substantial change in circumstances).

¶ 27 We next examine the scope of the trial court's review of the maintenance award. Phillip's petition requested the trial court modify or terminate his maintenance obligation as part of its review. "A request to terminate maintenance would not be inconsistent with a general review of maintenance because \*\*\* termination is one of the options available to a court in a

review of maintenance." *In re Marriage of Golden*, 358 Ill. App. 3d 464, 471, 831 N.E.2d 1177, 1183 (2005). Indeed, while review of maintenance can encompass various issues, the trial court's ultimate judgment "can be to keep maintenance the same, to increase, decrease, or terminate maintenance, or to change the terms of payment." *Golden*, 358 Ill. App. 3d at 471, 831 N.E.2d at 1183.

¶ 28 Thus, the trial court was within its authority to terminate the maintenance award as part of the parties' agreed-upon review. See *In re Marriage of Bolte*, 2012 IL App (3d) 110791, 975 N.E.2d 1257 (permanent maintenance awards can be reviewed, modified, and terminated); *Selinger*, 351 Ill. App. 3d at 617, 814 N.E.2d at 159 (maintenance awards are reviewable and modification may include termination); *In re Marriage of Lenkner*, 241 Ill. App. 3d 15, 18, 608 N.E.2d 897, 900 (1993) (modification of maintenance awards may include termination).

¶ 29 The fact the parties' marital settlement agreement provided for permanent maintenance is of no import where it did not state that award would be nonmodifiable. "There is no language in section 510(a) \*\*\* which prohibits modification of a permanent maintenance award" and "[s]uch awards are therefore modifiable." *In re Marriage of Arvin*, 184 Ill. App. 3d 644, 651, 540 N.E.2d 919, 924 (1989) (distinguishing between permanent maintenance, which is modifiable, and nonmodifiable maintenance in gross); *In re Marriage of Gallagher*, 256 Ill. App. 3d 439, 444, 628 N.E.2d 389, 392 (1993) (finding the trial court did not abuse its discretion in terminating maintenance where the payments were permanent and thus subject to modification).

¶ 30 "[S]ection 502(f) of the Act expressly permits the parties to enter into an agreement which precludes or limits modification or termination of maintenance \*\*\*." *In re Marriage of Brent*, 263 Ill. App. 3d 916, 922, 635 N.E.2d 1382, 1386 (1994); 750 ILCS 5/502(f) (West

2012). In doing so, the parties may agree their maintenance provisions will be nonmodifiable or modifiable only in accordance with the terms of the agreement. *Brent*, 263 Ill. App. 3d at 922, 635 N.E.2d at 1386. An agreement expressly limiting a trial court's ability to modify maintenance will preclude modification on grounds unspecified in the agreement. *Brent*, 263 Ill. App. 3d 916, 924, 635 N.E.2d at 1388. "However, the intent of the parties to preclude or limit modification or termination of maintenance must be clearly manifested in their agreement." (Emphasis omitted.) *Brent*, 263 Ill. App. 3d at 923, 635 N.E.2d at 1387 (citing *In re Marriage of Scott*, 205 Ill. App. 3d 561, 564, 563 N.E.2d 995, 997 (1990)). Here, the parties' marital settlement agreement contains no such limiting provision. Thus, the trial court was free to terminate Phillip's maintenance obligation as part of its review of the maintenance award.

¶ 31 As to the decision to terminate maintenance, a review of the limited record in this case reveals sufficient facts to support the trial court's judgment. A trial court's ruling on a request to modify or terminate maintenance will not be disturbed absent an abuse of discretion. See *In re Marriage of Pedersen*, 237 Ill. App. 3d 952, 956, 605 N.E.2d 629, 632 (1992).

¶ 32 At the time of the hearing, Kathleen was employed and making \$90,000 per year. Regardless of the duration of her particular employment situation, Kathleen demonstrated the ability to be employed at that salary. While Kathleen argued her health issues could limit her ability to work, the trial court specifically stated it did not find her testimony regarding her health credible. Again, in the absence of a transcript, we must presume the court had a sufficient factual basis for its findings and resolve any doubts against Kathleen. See *Foutch*, 99 Ill. 2d at 391-92, 459 N.E.2d at 959. Further, the pleadings in the record reflect Kathleen was already collecting \$781 per month from her own pension and was entitled to an additional \$1,884 per

month from Phillip's pension. Thus, the court could reasonably conclude Kathleen had no further need of maintenance. The trial court did not abuse its discretion in terminating Phillip's maintenance obligation.

¶ 33

### III. CONCLUSION

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

¶ 35 Affirmed.