

2013 IL App (2d) 120866-U
No. 2-12-0866
Order filed February 5, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF SANDRA)	Appeal from the Circuit Court
POPPEHAGEN, n/k/a Sandra Tebbens,)	of McHenry County.
)	
Petitioner-Appellee,)	
)	
and)	No. 08-DV-1027
)	
JAMES E. POPPEHAGEN,)	Honorable
)	Gerald M. Zopp, Jr.,
Respondent-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice Hudson concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not abuse its discretion in: (1) denying respondent's petition to terminate or abate maintenance, where the court found respondent's testimony incredible; and (2) limiting the relief to that specified in respondent's prayer for relief, where respondent never requested a modification of maintenance. Affirmed.
- ¶ 2 Following the dissolution of the parties' marriage, respondent, James E. Poppenhagen, petitioned to terminate or abate his maintenance obligation to petitioner, Sandra Poppenhagen, n/k/a Sandra Tebbens, alleging a substantial change in circumstances. Following a hearing, the trial court denied the petition. Respondent appeals. We affirm.

¶ 3

I. BACKGROUND

¶ 4 The parties married in 1980, and their marriage was dissolved on May 4, 2011. At the time of the dissolution judgment, petitioner, age 67, was unemployed. Respondent, age 71, worked at Home Depot, earning about \$33,000 in annual gross income. The dissolution judgment ordered that respondent's HB Fuller pension be divided, with petitioner receiving 60% and respondent receiving 40%. Respondent's T. Rowe Price IRA, valued at about \$195,000, was similarly divided. However, respondent received 100% of his Chevron pension, which equals \$269 per month. The judgment also ordered respondent to pay petitioner \$800 per month in maintenance.

¶ 5 On February 8, 2012, respondent petitioned to terminate maintenance or, in the alternative, to abate maintenance, alleging that a substantial change in circumstances had occurred since entry of the judgment in that he was re-diagnosed with prostate cancer. Respondent would have to undergo 43 radiation treatments and would be unable to continue his employment with Home Depot; his income has significantly decreased. He alleged that petitioner had more income than himself. In his prayer for relief, respondent requested that the court enter an order either terminating maintenance or abating it "until [his] medical condition is fully known and determined; and for such other and further relief as may be appropriate under the existing circumstances and which may become apparent to the Court upon presentation of any argument and/or admissible evidence."

¶ 6 On July 27, 2012, a hearing was held on the petition. Respondent testified that, at the time of dissolution, he worked 40 hours per week at Home Depot, earning about \$1,700 per month. In November 2011, he was re-diagnosed with prostate cancer and subsequently underwent 43 treatments of radiation and hormone therapy. He continued working full-time for a short period and then worked part-time, about 13 to 18 hours per week. Respondent stated that he felt extremely tired

from the radiation and, so, he retired on April 16, 2012. Respondent continues to see doctors for his prostate cancer.

¶ 7 Currently, respondent's income consists of social security (\$2,375 gross) and pension (\$895 gross) payments. On his financial affidavit, he lists his net monthly income as \$1,844. Respondent testified that his income has greatly decreased since his retirement and that he is barely able to pay his expenses. He utilizes credit cards to pay expenses. In his financial affidavit, respondent listed his monthly living expenses as \$2,722 (plus \$850 in monthly debt service, with \$3,200 in remaining credit card debt). Respondent has \$1,000 in his checking account. The marital residence was foreclosed. In the affidavit, respondent calculated his total available income per month as a shortage (*i.e.*, negative value) of \$1,728. According to respondent, he can no longer continue to pay \$800 maintenance.

¶ 8 Petitioner, who appeared *pro se*, testified that she is unemployed. She currently receives \$938 per month from petitioner's HB Fuller pension. She also received 60% of respondent's IRA (she has \$84,000 from her share, which she has no plans to spend) and receives \$764 in monthly social security payments. Petitioner was living off of a \$27,000 payment from a CD she received after her father passed away; she has spent it all. Petitioner further testified that her rent is \$1,250 per month. In her financial affidavit, petitioner listed her net monthly income at \$1,704, her total monthly living expenses as \$3,410, resulting in a monthly shortage of \$1,706.

¶ 9 The trial court itself questioned the parties. At the end of the hearing, it declined respondent's counsel's request to make a closing statement, but accepted tender of his case law. The court explained that, given that one of the parties appeared *pro se*, it was "not taking any additional testimony in the form of potential argument."

¶ 10 On the same day, the trial court denied respondent's petition (which, again, was filed less than one year after dissolution of the parties' marriage). It found as follows. Although respondent's health may have worsened, only respondent's testimony was presented to support this contention; his medical condition "is not fully known to this court." The court noted that it had no documentation from a doctor corroborating respondent's testimony.

¶ 11 The court found that respondent receives \$625.99 per month from his HB Fuller pension and petitioner receives \$938.99 per month from that pension. As to social security payments, the court found that it "cannot consider social security in its decision." It further noted that it anticipated respondent's retirement in its dissolution judgment. The court determined that respondent voluntarily left his employment "as there was no evidence other than his own testimony that he is unable to work." The court *did* find that respondent's income had decreased, where he earned \$36,000 per year at the time of the dissolution judgment, but would be earning only \$21,810 per year (prorated from his last pay stub in April 2012) if he was currently working. However, the court stated that, although the evidence presented "may well have qualified for modification *** no modification was requested" by respondent; rather, he requested either abatement or termination of his maintenance obligation. Accordingly, the court found that respondent's retirement and subsequent claim of unemployment did not constitute a substantial change in circumstances under section 510 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/510 (West 2010)). Respondent appeals.

¶ 12

II. ANALYSIS

¶ 13 Respondent argues first that the trial court abused its discretion in denying his petition to terminate or abate maintenance, where the testimony demonstrated a substantial change in circumstances. For the following reasons, we reject his argument.

¶ 14 Initially, we note that petitioner has not filed an appellee's brief with this court. However, because the record is simple and because we can easily rule on respondent's allegations of error without the aid of an appellee's brief, we will consider the appeal. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 15 A trial court's denial of a petition to terminate maintenance will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Bryant*, 206 Ill. App. 3d 167, 172 (1990). An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court. *In re Marriage of McLauchlan*, 2012 IL App (1st) 102114, ¶19. In addition, it is well established that the credibility of the witnesses and weight to be given to their testimony is for the trier of fact to decide, and a reviewing court may not substitute its judgment for that of the fact finder. *In re Marriage of Gordon*, 233 Ill. App. 3d 617, 657-58 (1992).

¶ 16 Section 510(a-5) of the Act provides that maintenance may be modified or terminated only where the moving party can demonstrate a "substantial change in circumstances." 750 ILCS 5/510(a-5) (West 2010). When deciding whether to modify or terminate maintenance, the trial court should consider the same factors it considered when it made the initial maintenance award, which are set forth in sections 504(a) and 510(a-5) of the Act. *In re Marriage of Turrell*, 335 Ill. App. 3d 297, 308-09 (2002); 750 ILCS 5/504(a), 510(a-5) (West 2012). Those factors include the following: (1) any changes in the employment status of either party and whether the change has been made in good faith; (2) any impairment of the present and future earning capacity of either party; (3) the

property acquired and currently owned by each party after the dissolution; and (4) any other factor the court deems just and equitable. 750 ILCS 5/510(a-5) (West 2012).

¶ 17 Respondent argues first that he presented undisputed testimony that demonstrated a substantial change in circumstances sufficient to terminate his maintenance obligation. He relies on his testimony that he underwent a significant change in employment status: at the time of the dissolution, he earned \$1,700 per month from working 40 hours per week at Home Depot; currently, he is retired due to his cancer diagnosis and resulting fatigue from the associated treatment. Respondent argues that his retirement was made in good faith, was due to circumstances beyond his control (*i.e.*, cancer), resulting fatigue, and his age (70, which, he notes, is well past customary retirement age). Respondent also argues that petitioner received a favorable division of the marital property, where she received 60% of his IRA and HB Fuller pension and subsequently received \$27,000 from her father's estate.

¶ 18 Whether a spouse may rely on his or her retirement as a change in circumstances to justify the modification of maintenance depends on the circumstances of each case. *In re Marriage of Schrimpf*, 294 Ill. App. 3d 246, 251-52 (1997). The relevant factors to consider include the spouse's age, health, and motives, and the timing of his or her ability to pay maintenance after retirement, as well as the (other) former spouse's ability to provide for herself or himself. *Id.* at 252.

¶ 19 Respondent's claim fails because his allegations concerning his ability to work and health were disputed by petitioner (in her response to his petition) and the trial court found his testimony on these points incredible. The court determined, after hearing respondent's testimony and in the absence of any evidence substantiating it, such as a doctor's report, that respondent voluntarily left his employment, failed to establish that he was unable to work, and failed to establish the status of

his medical condition. We cannot conclude that the court's assessment of the evidence was unreasonable. The court was not bound to accept respondent's testimony, and, without more, we will not interfere with its credibility determination. See, e.g., *Thompson v. Bernardi*, 112 Ill. App. 3d 721, 724 (1983). Further, the cases upon which respondent relies are distinguishable because the petitioner's credibility in those cases was not called into doubt. See *In re Marriage of Colombo*, 197 Ill. App. 3d 767, 769 (1990) (reversing judgment for former wife; "husband presented evidence that he had chosen to cease working upon the advice of his physician and following heart pains significant enough to cause his hospitalization"); see also *In re Marriage of Anderson*, 409 Ill. App. 3d 191, 203 (2011) (affirming termination of petitioner's maintenance obligation; 80-year-old petitioner testified that, due to his age and health issues, he could not return to work).

¶ 20 We also reject respondent's claim that the trial court erroneously considered his social security payments in assessing whether he experienced a substantial change in circumstances. First, the court explicitly found that it "cannot consider social security in its decision." Second, respondent's argument that the court "essentially" did so because its order "forces him" to pay maintenance out of this benefit due to his reduced earnings is, again, a challenge to the court's credibility findings (*i.e.*, relates to his argument that he cannot work because of his health and age), which we rejected above.

¶ 21 Respondent argues second that the trial court abused its discretion in limiting the relief he sought to that specified in his prayer for relief, namely, termination or abatement of maintenance. He argues that, in his prayer, he also asked for such other and further relief as may be appropriate or that may become apparent to the court. We reject this argument. Section 2-604 of the Code of Civil Procedure provides, in relevant part, that: "Except in case of default, the prayer for relief does

not limit the relief obtainable, but where other relief is sought the court shall, by proper orders, and upon terms that may be just, protect the adverse party against prejudice by reason of surprise.” 735 ILCS 5/2-604 (West 2012). Respondent maintains that the trial court had the power to enter an order modifying maintenance and abused its discretion in not doing so. Although the trial court may be empowered to enter a modification order (after finding that the evidence supported this relief), it was not obligated to do so (indeed, it would have resulted in unfair surprise to petitioner) and respondent cites no authority supporting this contention. Further, respondent did not raise the modification option at the hearing on his petition.

¶ 22

III. CONCLUSION

¶ 23 For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 24 Affirmed.