

NOTICE

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2014 IL App (4th) 140021-U

NO. 4-14-0021

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

December 5, 2014

Carla Bender

4th District Appellate

Court, IL

In re: MARRIAGE OF)	Appeal from
MARY E. TAYLOR,)	Circuit Court of
Petitioner-Appellant,)	Coles County
and)	No. 07D27
DONALD L. TAYLOR,)	
Respondent-Appellee.)	Honorable
)	Brien O'Brien,
)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.

Justice Knecht concurred in the judgment.

Justice Turner specially concurred in part and dissented in part.

ORDER

¶ 1 *Held:* The trial court erred in reducing the award of maintenance, labeling it rehabilitative, and in ordering respondent to pay an insufficient amount of petitioner's attorney fees. The court did not err in refusing to hold respondent in contempt.

¶ 2 In October 2007, the trial court entered a judgment dissolving the marriage of petitioner, Mary E. Taylor, and respondent, Donald L. Taylor. Along with the division of property, the court ordered Donald to pay maintenance. In May and June 2013, respectively, Donald filed a petition to modify maintenance and Mary filed a motion to increase maintenance and a petition for interim attorney fees. In July 2013, Mary also filed petitions for adjudication of indirect civil contempt. In December 2013, the court reduced Donald's maintenance obligation, ordered him to contribute to Mary's attorney fees, and declined to hold him in

contempt.

¶ 3 On appeal, Mary argues the trial court erred in (1) reducing her award of maintenance, (2) finding the maintenance award was rehabilitative in nature, (3) denying her petitions for adjudication of indirect criminal contempt, and (4) determining the amount Donald was required to pay for her attorney fees. We affirm in part and reverse in part.

¶ 4 I. BACKGROUND

¶ 5 Donald and Mary were married in November 1973, and three children were born during the marriage. In October 2007, the trial court entered a judgment of dissolution of marriage. At that time, the court found both parties to be 52 years of age. Mary was unemployed, and Donald was the manager at County Market in Mattoon. The court also found, in part, as follows:

"8. The parties have been married for almost 34 years, and have three adult children. During the marriage, Petitioner did not work outside the home for any significant period of time. Any employment experience she had would not enhance her current employability. Petitioner has no education or training post-high school that would increase her current employability. Petitioner is 52 years old and has no physical impediment to her employability. Since the parties separated, Petitioner has made no efforts to find employment nor to obtain training or education that would increase her employability.

9. During the marriage, Respondent has been the wage

earner. He has employment history and experience that makes his income earning potential much greater than the Petitioner.

Respondent's gross income for 2006 was \$77,213.00. This reflects gross weekly wages of \$1,030 (x52=\$53,560.00), and gross bonuses totaling \$23,652.00. Respondent's net monthly income from wages (excluding bonuses) is \$3,268.59.

11. It is clear that under the guidelines set in 5/504, Petitioner is entitled to maintenance. It is also clear that the Petitioner's earning potential is diminished. Even so, Petitioner has an obligation to seek appropriate employment and make a good faith effort to support herself. It is also clear that even if the Petitioner finds employment, she will make substantially less than Respondent. The Court therefore awards Petitioner maintenance in the amount of \$1,300.00 per month, plus forty percent (40%) of the net bonuses received by the Respondent. Respondent is to provide the Petitioner with bonus documentation to pay to Petitioner her forty percent (40%) within 14 days of receipt. Said payments should continue until further order of the Court."

The decretal portion of the judgment does not order Mary to seek employment.

¶ 6 In February 2011, Donald filed a petition to modify the dissolution judgment.

Donald argued Mary had an obligation to seek gainful employment but had not been employed

since the entry of the dissolution judgment. Donald argued the maintenance payment "should be stayed, abated and discontinued."

¶ 7 In June 2011, the trial court left the \$1,300-per-month maintenance obligation intact but granted the motion to reduce maintenance, in part, as follows:

"The percentage paid to [Mary] is reduced to 30% for the next 3 bonuses, to 20% for bonuses 4-6, 10% for bonuses 7-9 and zero percent thereafter. The monthly obligation remains until [Donald] retires and the pension benefits [Mary] was awarded take effect or until further court order."

During this time, Mary's mother lived with her and contributed \$500 per month for groceries and also contributed to emergencies that occurred from time to time. Mary did not appeal the 2011 order.

¶ 8 In May 2013, Donald filed a second petition to modify maintenance, claiming Mary still had not made any efforts to obtain skills for employment or to find employment since the June 2011 order.

¶ 9 In June 2013, Mary filed a motion to increase maintenance. Mary claimed she had made good-faith efforts to become self-supporting but had been unable to find any long-term or permanent employment based on her lack of skills, her age, her poor health, and her lack of experience working outside the home. Mary stated she was "employable only at a very low income," and Donald's earnings and earning potential, as well as his ability to pay maintenance, had increased since the last modification. Mary also filed a petition for interim attorney fees, seeking \$4,000 from Donald to pay her fees.

¶ 10 In July 2013, Mary filed a petition for adjudication of indirect civil contempt, claiming Donald failed to pay the required amount of his bonuses. Mary alleged Donald deducted his 401(k) voluntary contributions before calculating the percentage of the bonus owed to her and obliterated any deductions so Mary could not verify whether she was receiving the appropriate amount. Mary claimed this was a deliberate attempt to violate the trial court's order.

¶ 11 Mary also filed a second petition for adjudication of indirect civil contempt, claiming Donald failed to mail the required June 2013 maintenance payment until July 1, 2013. Mary claimed the late mailing was "willful and contumacious" and caused late fees and additional expenses to her.

¶ 12 In August, October, and December 2013, the trial court conducted a hearing on the petitions. Mary stated she was 59 years old, had a high-school education, and had no additional education since she married at 19 years of age. During the 34-year marriage, Mary had health and dental insurance. After her COBRA insurance expired, she could not afford insurance. Moreover, the family had been able to go on vacations during the marriage. Donald told Mary it was not necessary she contribute income to the household. Mary stated she worked outside of the home during the marriage "a few times" to "get out of the house," but Donald never asked her to get a job to help pay the family expenses. In addition to caring for the children, Mary maintained the home. She painted, wallpapered, stripped floors, laid floors, installed drywall, and did the yard work. She also maintained a rental house owned by the parties during the marriage.

¶ 13 Mary testified in the previous two years, her income, other than maintenance, came from "working for people, cleaning houses, painting, yard work, dog sitting, whatever

comes [her] way." She stated her average income from these odd jobs was approximately \$41 per month. Since January 2011, Mary applied for employment via the Internet at ESS Cleaning, Home Depot, Staples, Walmart, Sears, J.C. Penney, Carsons, PetSmart, Sara Bush Lincoln Health Center, Rural King, and Cracker Barrel. She checked weekly via computer to see if there were new jobs to apply for and to refresh her existing job applications. Approximately once per month, she also went to the unemployment office to see if there were any jobs available. Mary stated she filled out applications for Lender's Bagels, Brookstone, CMR Solix, Select Remedy, General Electric, Goodwill, and the YMCA. Three weeks prior to the hearing, Mary became employed at PetSmart as a custodial associate. She works 15 hours per week, earns \$9.35 per hour, and hopes the position becomes full-time.

¶ 14 Mary testified she does not receive any health, dental, or vision insurance at PetSmart. She does not have any insurance because she cannot afford it. She receives assistance from Catholic Charities to pay for her medication for high blood pressure and acid reflux. She states she makes a \$15 donation to Catholic Charities every six months for the prescription assistance. She purchases medication for anxiety and cholesterol at Walmart. She also receives charitable financial assistance from the hospital. In 2013, Mary had a \$2,000 dental bill, for which she pays \$56 per month. She needs another \$2,000 in dental work but cannot afford it. In April 2012, Mary paid back \$1,860 to her son, Keith, for cremation expenses for her mother. She used \$13,000 from her mother's burial policy to buy windows and pay bills and taxes. Once Mary's mother died in spring 2012, she lost that financial resource. Mary's granddaughter stayed with her every day during the summer until she started working at Pet Smart. In October 2010, Mary filed for bankruptcy. Donald filed for bankruptcy in 2008.

¶ 15 In 2012, Mary purchased a 2012 Nissan Versa "to cut corners on a monthly payment," with the savings amounting to approximately \$50 per month. Her car payment is \$256 per month. She no longer has cable television or Internet access because she cannot afford it. She has a \$2,000 debt to the Department of Education for "trying to go back to school" in 2009. Her mortgage payment is \$426 per month. Her son loaned her money for plumbing work. Her son also paid some of her attorney fees, and they have a June 2013 written agreement indicating it was her "intent to pay Keith Taylor the full amount" within a reasonable time frame.

¶ 16 Mary's income from maintenance for 2011 was \$21,233. In her March 2011 financial affidavit, Mary listed her total monthly expenses as \$1,742 and listed her income as \$1,300. In her June 2013 financial affidavit, Mary listed her monthly expenses as \$1,475 plus \$236 in debts, for a total of \$1,711. With the \$1,300 per month in maintenance and the approximately \$100 a week from PetSmart, Mary stated she was able to "pay what needs to be paid" but "it doesn't leave anything else for anything." She believed to make ends meet and save for retirement, she would need approximately \$3,000 per month.

¶ 17 Keith Taylor, one of the parties' sons, testified he has paid some of Mary's attorney fees. He also testified to his specialized knowledge with regard to employment. He stated he has a master's degree in public administration and a Ph.D. in human and community development. He was familiar with the employment opportunities in the Coles County area for people in their 50s and 60s without any college education. His studies indicated the jobs in the area were service based and minimum wage. Further, the service jobs were often part-time to "skirt a lot of the health care regulations."

¶ 18 Keith testified after Mary's maintenance bonus payments were reduced in 2011,

things became chaotic because of her decline in income. She had to give up cable television and Internet service. He testified she was previously able to buy fresh food and cook at home. Now she relies on the dollar menus at McDonald's and other fast food restaurants. She had two packages of eggs and ice cubes in her refrigerator on August 16, 2013, the day of her son's testimony. Keith testified Mary cannot afford the gas to drive to Bloomington, Indiana, to see him and his family since her maintenance bonus payments were reduced. She has taken steps to get her medications and certain health-care costs covered by charity. However, she cannot afford a colonoscopy and her father died of colon cancer. She has no health or dental insurance because she cannot afford it. When asked if his mother had rejected any employment opportunity, Keith said:

"A. No, my mother wouldn't do that.

Q. Why do you say that she wouldn't do that?

A. Because she wanted to work. She was looking for jobs all the time. No one was calling her. And in this job market, I can attest, it's a very bad job market. There's just nothing out there for people in her age cohort."

Keith testified the trend is for employers to hire part-time workers rather than full-time to avoid an obligation to pay health insurance. Mary was working on job applications when he visited her, her friend Diane took Mary job hunting, and when he talked to her on the phone, she described she was out looking for jobs all the time. He also said, "[M]y mother has no reason to lie to me." He testified in 2012 her dining-room table was scattered with papers related to job applications to places like Walmart and stores at the mall. Keith testified he knew Mary had

applied for dozens of jobs.

¶ 19 Mary's neighbor, Edward Steele, testified Mary cleans his house, takes care of his dogs when he travels, and has worked on his rental properties. His payments to her have not exceeded \$1,000 per year. He helped her apply at General Electric for a job. Mary does work for another neighbor and for Steele's grandmother. He has never known her to reject any opportunity to work. He refers her to other people because she is dependable and does a good job.

¶ 20 Margaret Taylor, Donald's wife, testified they have been married for over five years. She works full-time at Masterbrand Cabinets. They have two trucks, a motorcycle, and a camper. The camper has been paid off in full since the divorce. They have vacationed in Michigan and Florida and are able to support two dogs, a cat, and a rabbit.

¶ 21 Donald testified he is the store director at County Market and works 50 to 70 hours per week. He is a salaried employee and receives three bonuses per year. Between January 2011 and February 2013, Donald received in excess of \$42,000 in bonuses. However, he stated his employment bonuses "have been going down." His income for 2011 was \$83,820 and for 2012 was \$77,232. Together with Margaret, their combined income for 2011 was \$107,150 and for 2012 was \$101,561. Margaret also receives \$1,000 per month for child support. As of November 2013, his gross pay totaled \$73,795. Donald stated their debt was decreasing and money had been spent on their house for rewiring, plumbing, and heating and air conditioning. Donald stated they have Wi-Fi in their home, cable television, and a \$50-per-month gym membership. Donald was able to accelerate payments on his motorcycle and double his contributions to his 401(k) savings plan.

¶ 22 Per the trial court's order, Donald paid a percentage of his bonuses to Mary. Mary was unable to determine whether she received the correct amount because Donald "blacked everything out" on his bonus statements. After Donald received the contempt petition regarding bonus payments, he and his attorney calculated what the payments should have been and Donald wrote a check for the amount that was not included.

¶ 23 Mary's attorney indicated her fees amounted to \$8,635, with an amount due of \$1,635. Donald had no attorney fees related to the trial court proceedings.

¶ 24 At the conclusion of the hearing, the trial court denied Mary's petition for indirect civil contempt as to the maintenance payment, finding that even though the June 2013 payment may have been two days late, "Donald's actions did not constitute a willful violation of the court's order."

¶ 25 In December 2013, the trial court issued its written order on the pending motions. On the issue of the modification of maintenance, the court found, in part, as follows:

"It is clear from the evidence that Mary's efforts to become self-sufficient have been inadequate. For that reason and because Mary's income has increased at least somewhat since the court's Order of June 28, 2011, the court finds that there has been a substantial change in circumstances that justifies a modification of Donald's maintenance obligation. It is clear from the evidence that Mary still has a need for maintenance and that Donald has the ability to pay. It is also clear that Mary's earning capacity is, and probably always will be, diminished. It is also clear, however, that

Mary is capable of working another part-time job (if not one full-time job) which would allow her to make approximately twice as much as she makes right now. It is not unreasonable to expect Mary to work 30 hours per week, especially in light of the language contained in the court's previous order and in light of the policy underlying rehabilitative maintenance which is to sever financial ties between the parties in an expeditious, but just, manner."

The court reduced Donald's maintenance obligation to \$800 per month.

¶ 26 As to Mary's petition for indirect civil contempt regarding the bonus payments, the trial court declined to hold Donald in contempt. The court found Donald owed Mary 30% of the net bonus of \$67.01 (March 3, 2012) and 20% of the net bonus of \$282.03 (November 23, 2012) for a total of \$76.51. The court indicated it declined to hold Donald in contempt "as a result of these 'missed' payments as there was no showing he willfully failed to make the payments."

¶ 27 As to Mary's claim for attorney fees, the trial court found she was unable to pay her fees and Donald had the ability to contribute toward those fees. The court found Donald should contribute \$3,635. This appeal followed.

¶ 28 II. ANALYSIS

¶ 29 A. Maintenance

¶ 30 Mary argues the trial court abused its discretion in granting Donald's petition to reduce maintenance and in denying her petition to increase maintenance. She asks this court to

reverse the trial court's order reducing the maintenance award and increase the monthly amount to \$2,500.

¶ 31 Section 510(a-5) of the Act provides that a maintenance order may be modified "only upon a showing of a substantial change in circumstances." 750 ILCS 5/510(a-5) (West 2012). A substantial change in circumstances "means that either the needs of the spouse receiving maintenance or the ability of the other spouse to pay that maintenance has changed." *In re Marriage of Anderson*, 409 Ill. App. 3d 191, 198, 951 N.E.2d 524, 531 (2011).

¶ 32 When deciding whether to modify a maintenance award, the trial court "shall consider" the applicable factors set forth in section 504(a) (utilized in determining the original maintenance award) and section 510(a-5) of the Act. 750 ILCS 5/504(a), 510(a-5) (West 2012); see also *Blum v. Koster*, 235 Ill. 2d 21, 41, 919 N.E.2d 333, 345 (2009) (stating "a court must consider all of the factors set forth in sections 504(a) and 510(a-5)"). The factors in section 510(a-5) include the following:

- (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).

¶ 33 The party seeking the modification has the burden to show a substantial change in circumstances. *In re Marriage of Reynard*, 378 Ill. App. 3d 997, 1003, 883 N.E.2d 535, 540 (2008). A trial court's decision to modify maintenance "will not be disturbed absent a clear abuse of discretion." *Blum*, 235 Ill. 2d at 36, 919 N.E.2d at 342. A clear abuse of discretion will be found "when 'the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.'" *Blum*, 235 Ill. 2d

at 36, 919 N.E.2d at 342. Moreover, "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." *Anderson*, 409 Ill. App. 3d at 199, 951 N.E.2d at 532.

¶ 34 In this case, the trial court considered the factors in both sections 504(a) and 510(a-5). The court noted Donald has secure employment, is able to meet his financial needs, and is of sound physical and emotional condition. The court found Mary works part-time at a low-wage job, appears unable to meet her present financial needs, has questionable present and future earning capacity, and claims to be in poor health. The court also noted the parties had been married 34 years and enjoyed a "comfortable standard of living," although both parties filed for bankruptcy after the divorce, which suggested "the parties may have lived beyond their means."

¶ 35 Despite the trial court's finding Mary was unable to meet her present financial needs and had questionable present and future earning capacity, it nevertheless lowered her maintenance to \$800 per month. The court correctly noted the length of the marriage (34 years) and the comfortable standard of living enjoyed by the parties during the marriage. The only party continuing to enjoy that standard of living is Donald. Mary is impoverished and unable to meet her medical or physical needs. Nothing in the record supports the court's finding Mary was not making a good-faith effort to contribute to her own support. Mary testified to numerous job applications she submitted. Her neighbor testified to the many odd jobs she did for him and how she accepted referrals to other potential employers. Indeed, he had never known Mary to reject an offer of employment. The parties' son, Keith, testified the job market for a person like Mary, age 59 with only a high school education and no work skills or work history, is abominable.

When offered part-time employment at \$9.35 an hour as a custodian at Pet Smart, she accepted it. Even if Mary found full-time employment at \$9.35 an hour, she would still need maintenance. Her house payment is \$426 and her car payment is \$256. She has to pay auto insurance and pays homeowners insurance, and she pays utilities, water, and sewer. She pays \$56 per month on a dental bill and has had to defer needed dental work because she cannot afford it. She cannot afford health insurance or dental insurance, cable television, Internet, or travel even to see her son in Indiana. She has accrued new debt of \$9,000 because she is unable to support herself on her income. Her refrigerator contained only eggs and ice. She is unable to afford fresh food.

¶ 36 In contrast, Donald's income has increased since the last hearing, as Mary's share of his bonuses has been phased out. His household income exceeds \$100,000, not counting an additional \$12,000 in child support received by Donald's wife for a child living in the home. Donald and his wife are able to travel, eat out regularly in restaurants, support four pets, belong to a gym, and have such "toys" as a camper and motorcycle.

¶ 37 Under these circumstances, it was error to reduce Mary's maintenance, as neither her need for maintenance, nor Donald's ability to pay maintenance, had changed.

¶ 38 B. Permanent vs. Rehabilitative Maintenance

¶ 39 Donald has taken the position the maintenance award was rehabilitative and not permanent. We reject that position for two reasons.

¶ 40 First, Donald's counsel said the following at the close of the hearing below:

"Now, Judge, I do not suggest to the Court that this should be rehabilitative maintenance. It's clear from the evidence and the testimony, and Judge Righter has also found that this woman does

not have the income potential that Mr. Taylor has and that she does not because she has not been employed outside the home as has he, but, Your Honor, it is also true that he's working 50 to 70 hours per week, and she's working 16 hours per week."

¶ 41 Thus, Donald's counsel recognized the award was a permanent award. He may not take a contrary position on appeal. See *Yaccino v. State Farm Mutual Automobile Insurance Co.*, 346 Ill. App. 3d 431, 442, 804 N.E.2d 677, 687 (2004).

¶ 42 Second, the original judgment found this was a 34-year marriage, during which Mary had no significant outside employment. The trial court further recognized any employment experience Mary had would not enhance her employability, and her lack of education and training likewise would not enhance her employability. While stating Mary had an obligation to seek appropriate employment, the court also recognized even if she found employment, she would make substantially less than Donald and would be in need of maintenance. Following these statements, the court's order provided: "It is Therefore Ordered, Adjudged and Decreed that: ***." Thereafter, the order contained paragraphs numbered A through M, which ordered the parties to do certain things. In Paragraph K, Donald was ordered to pay maintenance as discussed above. However, nothing in the decretal portion of the judgment ordered Mary to seek work and become self-supporting. Indeed, it is clear she is not capable of supporting herself. The maintenance award was to continue until further order. There was no time limitation set, nor was it referred to as temporary, time-limited, or rehabilitative maintenance.

¶ 43 In the June 2011 order, where the trial court phased out Mary's share of Donald's bonus payments, an order Mary never appealed, the court ordered maintenance until Donald

retired and the pension benefits Mary was awarded take effect, or until further court order. Thus, the maintenance was to be paid for an indefinite period.

¶ 44 We find the maintenance award was permanent and we also find that was the position Donald took in the trial court.

¶ 45 Since the June 2011 order, Mary located part-time employment. However, even with the part-time employment, she is in need of the \$1,300 monthly maintenance previously awarded. Moreover, when Mary's mother died, she lost \$500 per month in groceries her mother bought, as well as a resource for household emergencies. Donald's financial comfort has increased since the divorce—he has remarried and his household income exceeds \$100,000. He is able to pay \$1,300 per month in maintenance and still enjoy a comfortable lifestyle. Even with \$1,300 per month in maintenance, Mary will be living at or near the poverty level, unable to afford health insurance or a standard of living even close to that she enjoyed during the marriage. Accordingly, we find it was an abuse of discretion to lower Mary's maintenance any further.

¶ 46 C. Court's Failure To Increase Maintenance

¶ 47 As we stated above, the party seeking to modify a maintenance award has the burden of proving a substantial change of circumstances. On the issue of increasing maintenance, Mary shoulders the burden of proof. While it is true Mary lost her mother's contribution to the household in 2012, it is also true she gained part-time employment to offset that loss. We cannot find the trial court abused its discretion in failing to increase Mary's maintenance.

¶ 48 D. Contempt Petitions

¶ 49 Mary argues the trial court erred in denying her petitions for adjudication of

indirect civil contempt with regard to Donald's bonus payments and late maintenance payment. We disagree.

¶ 50 "In a civil contempt proceeding, the burden of proving the defendant is in contempt is on the party bringing the action, and the defendant must be proved guilty by a preponderance of the evidence." *In re Marriage of LaTour*, 241 Ill. App. 3d 500, 507, 608 N.E.2d 1339, 1345 (1993). The failure to comply with a maintenance order is *prima facie* evidence of contempt. *In re Marriage of Logston*, 103 Ill. 2d 266, 285, 469 N.E.2d 167, 175 (1984). "The party failing to make the allowances ordered has the burden of proving that his failure to comply was not willful or contumacious and that he has a valid excuse for his failure to pay." *In re Marriage of Elies*, 248 Ill. App. 3d 1052, 1058, 618 N.E.2d 934, 939 (1993); see also *Logston*, 103 Ill. 2d at 285, 469 N.E.2d at 175 (stating the burden shifts to the defendant once the *prima facie* showing is made).

¶ 51 In the October 2007 dissolution judgment, the trial court ordered Donald to pay \$1,300 per month in maintenance, "plus forty percent (40%) of the net bonuses" he received. In June 2011, after finding a change in circumstances, the court granted Donald's request to reduce maintenance and reduced the bonus-pay percentage to "30% for the next 3 bonuses, to 20% for bonuses 4-6, 10% for bonuses 7-9 and zero percent thereafter."

¶ 52 In her contempt petition regarding bonus payments, Mary claimed Donald "appears to be including as part of deductions (before calculating the percentage of his bonus owed to [Mary]) [his] voluntary contributions to his 401(k) ***, which should not have been included for his calculation of maintenance payment." Mary claimed Donald "obliterated said deductions, so as to make it impossible for [Mary] to know whether [Donald] was including only

statutory deductions, whether he was also including voluntary deductions (like 401(k)), or whether he was completely changing all of his numbers." Mary also claimed she never received any portion of the bonus payments made to Donald on July 16, 2011 (\$1,218), on February 25, 2012 (\$75), on November 17, 2012 (\$316.16), and on March 23, 2013 (\$75).

¶ 53 In its December 2013 order, the trial court noted the dissolution judgment required Donald to pay 40% of "all net bonuses" and the June 2011 order reduced the percentages without using the term "net." Since the term was "not more specifically defined," the court declined to hold Donald in contempt. The court found Donald paid a percentage of the net figure, with the exception of two missed payments in March 2012 and November 2013. The court ordered Donald to pay \$76.51 for those missed payments but declined to hold Donald in contempt because "there was no showing that he willfully failed to make the payments."

¶ 54 On appeal, Mary argues Donald's missed payments and "obliterated information" evidence his contemptuous acts. We find the trial court did not abuse its discretion by not holding Donald in contempt for the missed payments. The evidence was sketchy at best as to two of the four missed payments, and the court found the failure to pay the other two was not shown to be willful. As for the redactions, the "gross" and the "net" of the bonuses were clearly identified. The court found Donald paid a percentage of the net figure and noted "Mary did not object to Donald's method of calculation for almost six years and did not challenge the court's previous orders."

¶ 55 Mary also argued Donald should be held in contempt because he was late in paying maintenance for the month of June 2013. Mary claimed the June 2013 payment was not "mailed (post marked) until July 1, 2013," and not received by Mary until July 2, 2013. The trial

court found that, even though the payment may have been two days late, Donald's actions did not constitute a willful violation of the court's order.

¶ 56 We find the trial court did not abuse its discretion in declining to hold Donald in contempt. No evidence indicated the late payment was willful or contumacious. Further, no evidence indicated the late payment was part of a pattern of conduct on Donald's part to deprive Mary of her maintenance payment.

¶ 57 E. Attorney Fees

¶ 58 Mary argues the trial court abused its discretion in ordering Donald to pay only \$3,635 of her \$8,635 in attorney fees. We agree.

¶ 59 Generally, attorney fees are the primary responsibility of the person for whom the services are rendered. *In re Marriage of Bolte*, 2012 IL App (3d) 110791, ¶ 28, 975 N.E.2d 1257. Pursuant to section 508(a) of the Act, the trial court has the discretion, based on the financial resources of the parties, to order one party to pay all or part of the other's attorney fees. See 750 ILCS 5/508(a) (West 2012). Here, Mary has no funds to pay her attorney's fees. Donald was represented by counsel, who was not charging him a fee. Donald initiated the proceedings to reduce maintenance, causing Mary to retain counsel. Mary is unable to pay fees and Donald is clearly able to pay them. See *In re Marriage of Schneider*, 214 Ill. 2d 152, 174, 824 N.E.2d 177, 190 (2005). See also, *In re Marriage of Price*, 2013 IL App (4th) 120155, ¶ 39, 986 N.E.2d 236; *In re Marriage of Haken*, 394 Ill. App. 3d 155, 162, 914 N.E.2d 739, 744 (2009) (where maintenance has been awarded, the court is to consider the criteria for an award of maintenance under section 504 in determining contribution to an attorney's fees).

¶ 60 Where, as here, Donald is in a far superior financial position to Mary and was not

incurring any attorney fees himself, and where Mary clearly is unable to afford her fees, the trial court abused its discretion in awarding only \$3,635 where the fees totaled \$8,635. Consequently, on remand, the trial court shall increase the fee award by at least an additional \$3,000.

¶ 61

III. CONCLUSION

¶ 62 For the reasons stated, we affirm the trial court's judgment concerning the contempt findings. We reverse the court's judgment reducing maintenance and awarding only \$3,635 in attorney fees, and we remand for the trial court to enter a new order consistent with our directions herein.

¶ 63

Affirmed in part and reversed in part; cause remanded with directions.

¶ 64 JUSTICE TURNER, specially concurring in part and dissenting in part:

¶ 65 I agree the trial court did not abuse its discretion in declining to hold Donald in contempt. I dissent from the majority's decision with regard to maintenance and attorney fees.

¶ 66 A. Maintenance

¶ 67 In this case, the trial court found the factor relating to the maintenance recipient's efforts, if any, "to become self-supporting, and the reasonableness of the efforts where they are appropriate" (750 ILCS 5/510(a-5)(2) (West 2012)), "to be of significant import in this case." The court noted the October 2007 dissolution judgment indicated Mary had "an obligation to seek appropriate employment and make a good faith effort to support herself." The June 2011 order on the first motion to modify maintenance made reference to that obligation and found her efforts "woefully inadequate." In regard to the current motions to modify, the court found her efforts since 2011 to be once again "inadequate," stating, in part, as follows:

"Mary testified at some length about her efforts to find employment. It is interesting to note that some of those efforts pre-dated the court's Order of June 28, 2011. Specifically, Mary testified that she applied at Lender's, GE and Brookstone in 2011. She identified a number of other places where she applied, but offered little detail about her efforts. While she may have had one or two face-to-face contacts with prospective employers, most of her efforts came through on-line applications. It is also significant that she waited until after Donald filed his petition to modify before she got more serious about her job search."

The court concluded a substantial change in circumstances justified a modification of Donald's maintenance obligation.

¶ 68 In deciding the appropriate amount, the trial court found Mary was capable of working another part-time job, if not a full-time job. Further, the court stated it was not unreasonable for Mary to work 30 hours per week and calculated that "[e]ven if Mary were to work just 30 hours per week at the same rate of pay (\$9.35 per hour), she could net approximately \$1,000 per month." The court also found Mary's claim that her needs, including retirement savings, amounted to \$3,000 per month was not supported by the evidence. Instead, the evidence suggested Mary would need approximately \$800 per month to meet her needs "if she was working up to her potential by earning approximately \$1,000 per month." Accordingly, the court reduced the maintenance award to \$800 per month.

¶ 69 Initially, I note the "trial court is in a superior position to hear and weigh the evidence and determine the credibility of witnesses." *In re Estate of Feinberg*, 2014 IL App (1st) 112219, ¶ 38, 6 N.E.3d 310. Moreover, a court's maintenance determination "is entitled to great deference." *In re Marriage of Connors*, 303 Ill. App. 3d 219, 224, 707 N.E.2d 275, 280 (1999). "It is not the function of this court to reweigh the evidence or assess the credibility of testimony and set aside the trial court's determination merely because a different conclusion could have been drawn from the evidence." *In re Marriage of Pfeiffer*, 237 Ill. App. 3d 510, 513, 604 N.E.2d 1069, 1071 (1992). A court's decision to modify a maintenance award will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Reynard*, 378 Ill. App. 3d 997, 1003, 883 N.E.2d 535, 540 (2008). "The trial court abuses its discretion when its 'ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted

by the trial court.' " *In re Marriage of McLauchlan*, 2012 IL App (1st) 102114, ¶ 19, 966 N.E.2d 1151 (quoting *People v. Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000)).

¶ 70 Here, the trial court analyzed the relevant factors with the evidence before it, including the parties' testimony and the exhibits. The court was well aware of Mary's age, education, income, earning potential, debts, health, and standard of living, along with Donald's corresponding evidence on those matters. With that in mind, however, the court found Mary's attempts to become self-sufficient were lacking.

¶ 71 A maintenance recipient's failure "to make good-faith efforts to achieve financial independence, *e.g.*, to seek employment, can be the basis for a petition for modification pursuant to section 510(a)." *In re Marriage of Cantrell*, 314 Ill. App. 3d 623, 629, 732 N.E.2d 797, 802 (2000); see also *In re Marriage of Mayhall*, 311 Ill. App. 3d 765, 770, 725 N.E.2d 22, 26 (2000). Mary has had the incentive to achieve financial independence for over six years now, but the trial court found she only felt the need to search for jobs at or near the time when Donald filed his petitions to modify maintenance. To that end, separate trial judges have made similar conclusions regarding her efforts, finding her attempts to be "woefully inadequate" and "going through the motions" in 2011 and "still" inadequate in 2013.

¶ 72 The majority notes the job market for someone like Mary is "abominable." Mary claims to have applied to many jobs, but we really do not know the extent of her applications. A quick check of the Internet reveals many of the businesses she allegedly applied to are still hiring. See <http://www.indeed.com/l-Coles-County,-IL-jobs.html>. Now, from a cold record on appeal, the majority disregards two judges who actually heard the parties' testimony and concluded Mary's attempts to find work were inadequate. In applying the appropriate deference,

I would find the court did not abuse its discretion in finding a substantial change in circumstances.

¶ 73 In reducing the maintenance amount to \$800 per month, the trial court gave thoughtful consideration to the evidence and the applicable law. The court did not find Mary's representation of her monthly expenses credible. Nonetheless, the majority contends Mary's refrigerator only contained eggs and ice, and she is unable to afford fresh food. However, the trial court heard testimony from Mary that she believed it is cheaper to eat out than go to the store. The court also considered her testimony that she eats out daily, sometimes more than once. Further, that on October 3, 2011, Mary, perhaps accompanied by her granddaughter, went to McDonald's twice, Arby's, Subway, KFC, and Pizza Hut, spending over \$50. The court found Mary was "capable of working another part-time job (if not one full-time job)" and concluded she could meet her monthly expenses with the \$800 per month in maintenance and further employment. Because the court clearly considered the employment environment in Coles County for someone of Mary's age and skill level, I would find the court's calculations regarding additional hours and her monthly expenses were not arbitrary, fanciful, or unreasonable. Accordingly, I would find no abuse of discretion.

¶ 74 B. Attorney Fees

¶ 75 In the case *sub judice*, the trial court heard significant evidence regarding the financial status of the parties. The court found Mary was unable to pay her fees, considering her diminished earning capacity, whereas Donald was in a better position financially and had the ability to contribute toward Mary's fees. The court concluded Donald should contribute \$3,635, which included the initial \$2,000 retainer paid by Mary plus the remaining balance of \$1,635.

Now, on appeal, Mary argues the court erred in not requiring Donald to pay the full amount of her attorney fees. She notes her income was approximately \$15,000, while Donald's was approximately \$90,000.

¶ 76 As stated, the award of attorney fees is a matter within the trial court's discretion. The court ordered Donald to pay \$3,635 for Mary's attorney fees. Nothing in the statute indicates the court must order the entire amount be paid. It appears the bulk of Mary's attorney fees was paid by her son. While they have a written agreement for Mary to pay back the amount, there is nothing therein to indicate the amount of the loan, an interest rate, or a repayment schedule. In this case, the court ordered Donald to pay the amount Mary had paid and the remaining balance. I would find no abuse of discretion. See *In re Marriage of Landfield*, 209 Ill. App. 3d 678, 707, 567 N.E.2d 1061, 1077 (1991) (finding the trial court did not abuse its discretion in ordering the ex-husband to pay only half of his ex-wife's attorney fees).