

NOTICE
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2016 IL App (5th) 150140-U

NO. 5-15-0140

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
MARJORIE L. WEBER,)	Madison County.
)	
Petitioner-Appellee,)	
)	
and)	No. 02-D-681
)	
FRANK E. WEBER,)	Honorable
)	Martin J. Mengarelli,
Respondent-Appellant.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* Where Frank E. Weber failed to prove a substantial change of circumstances, the trial court's denial of his motion to terminate, or in the alternative, modify maintenance was correct.

¶ 2 Marjorie and Frank Weber divorced in 2003 after 31 years of marriage. The trial court awarded Marjorie \$1,000 monthly in permanent maintenance. After Frank's retirement on December 31, 2014, he asked the court to terminate or modify the maintenance award citing his retirement as a substantial change of circumstances. The trial court denied Frank's petition. We affirm.

¶ 3

FACTS

¶ 4 Marjorie was primarily a homemaker during the marriage. Frank worked at the Hartford Wood River Terminal. When the trial court dissolved the marriage, Marjorie was then 50 years of age, while Frank was 53 years of age. The trial court's August 11, 2003, order awarded permanent maintenance to Marjorie. The court's order stated that the court could later terminate or modify maintenance in keeping with Illinois statutes, and further stated:

"The Court specifically notes that the retirement of [Frank] shall be a modifying factor subject to review by the Court upon appropriate petitions being submitted."

In his motion to terminate, or in the alternative, modify maintenance, Frank cited this statement, and stated that his retirement constituted a substantial change in circumstances, warranting termination or modification of maintenance.

¶ 5 Marjorie testified at the March 2015 hearing about her housing since the divorce. Marjorie was then 63 years of age. She testified that after she vacated the marital home in 2003, she rented an apartment in Alton. She lived in the Alton apartment until 2008 when she moved in with her brother and his wife in Godfrey. Marjorie's brother worked full-time and his wife suffered from dementia. Marjorie moved in with her brother in order to stay with her sister-in-law while her brother worked because her sister-in-law's condition had deteriorated to the point that she could not be left alone. She did not receive compensation for caring for her sister-in-law. Marjorie testified that she did not technically pay her brother rent, but instead she bought groceries for the household,

which amounted to approximately \$700 per month. Marjorie was still living with her brother on the date of the hearing.

¶ 6 Marjorie also testified about the assets she received in the 2003 divorce. She testified that the court awarded her \$35,000 in equity from the marital residence. The court awarded her one vehicle. She also received a 50% share of Frank's pension, which she believed it to be "sixty some thousand."

¶ 7 Marjorie also testified to her current overall financial status. She testified that she spent the \$35,000 she received as her share of the equity in the marital home in the 12 years since the divorce. She used the money to pay for basic expenses like rent, car repairs, and insurance payments. She no longer had the vehicle the court awarded her in the divorce. On the date of the hearing, she had approximately \$100 in her checking account. She testified that the cash value of a life insurance policy she had was \$606.68. Marjorie still owned some jewelry that she received during the marriage and testified that she had pawned two tennis bracelets for \$500. Her brother listed her name on the title of one of his cars so that if he died, she would have a car to continue to care for her sister-in-law.

¶ 8 Marjorie testified that her only current source of income was the maintenance payments. Marjorie's brother did not pay her to watch his wife. She testified that when she received the 50% share of Frank's pension, she opened an Individual Retirement Account (IRA). Each year she received a disbursement from the IRA. In 2013, the disbursement was \$4,222. On the date of the hearing, she testified that there was only approximately \$1,000 left in her IRA. Marjorie also testified that the Social Security

Administration contacted her to inform her that she was eligible and could begin drawing on Frank's social security benefits. She explained that she had not begun drawing social security, because by waiting she could receive a higher monthly amount. If she began drawing social security when she was 63 years of age, she would receive approximately \$800 per month. By waiting until she turned 66, she would receive an additional \$300 per month.

¶ 9 On examination by her own attorney, Marjorie testified about her job skills and employability, as well as her current health. She graduated from high school and attended a cosmetology school but quit when she and Frank married. She stayed at home to raise their son. Marjorie testified that out of the 31 years of marriage, she had worked outside of the home for approximately 5 years. At the time of the divorce, she was working at a convenience store as a cashier and as a cook in the kitchen. She continued to work at this convenience store for more than two years on a part-time basis, but quit due to chronic neck and back pain that she attributed to the fact that she was on her feet most of the time at work. Her rate of pay when she quit working was \$7.25 per hour. Marjorie testified that she suffered from arthritic pain in her neck and back. Despite her arthritis, she testified that she did not have difficulty caring for her sister-in-law because she did not have to lift her.

¶ 10 Frank also testified during the hearing. He was then 66 years of age. Frank testified that his gross monthly income at the time of the divorce in 2003 was \$4,600. His gross monthly social security benefit on the date of the hearing was \$2,300. He explained that he worked until he was eligible to receive social security. His

interpretation of the 2003 court order was that his maintenance obligation to Marjorie would end upon retirement.

¶ 11 Frank also testified about his current financial situation. His current wife, Bethany, worked as a billing clerk, earning approximately \$40,000 per year. Frank testified that he and Bethany had two joint bank accounts. On the date of the hearing, the balance in one of the accounts was \$28,729.53, and the balance in the other account was \$6,807.70. Frank testified that he and Bethany owned four vehicles. Frank testified that he had a life insurance policy with a face value of \$23,764. He also testified that he owned his home. He estimated that the value of his home was \$135,000. Frank testified that he still owed \$32,000 on the mortgage. He estimated that he would have the mortgage paid off in five years, as he had been financially able to pay an extra \$350 in principal payments each month. Since the divorce, Frank had made numerous repairs and upgrades to the home, including a remodeled kitchen and bathroom, upgraded HVAC system, new siding, new flooring, a new roof, new doors, and the addition of a two-vehicle carport. Finally, Frank testified about the value of his profit sharing plan account based upon records admitted into evidence at the hearing. The balance in his account in 2014 was \$273,780.15. He testified that while he was eligible to draw from this account upon retirement that he had elected not to do so yet.

¶ 12 The trial court entered its order on March 26, 2015, concluding that Frank's retirement at the end of 2014 was in good faith and noting that Frank was the oldest worker at the plant. The court found that his profit sharing plan account was currently worth \$280,000, and that given his 15-year life expectancy based upon United States

Census Bureau data, he could draw \$1,600 per month from his profit sharing plan account without factoring in any additional increase in value. Adding his gross monthly social security payment of \$2,300 to his imputed \$1,600 per month from his profit sharing plan account, the court concluded that Frank had access to \$3,900 per month in gross income. Additionally, the court noted that Frank had \$100,000 in equity in his home and checking account balances totaling \$35,000. The court found that after 31 years of marriage, Marjorie worked approximately 5 of those years, and although she had a high school diploma, at the age of 63, she had no marketable skills. Given her lack of skills, her neck and back issues, and the time she spent watching her sister-in-law, the court found that it was implausible for her to obtain employment. The only property Marjorie owned was an older vehicle. Her only income was the \$1,000 per month maintenance payment, \$700 of which she provided in groceries to her brother's household in lieu of rent. The trial court imputed the \$800 in social security benefits as monthly income to Marjorie because she was then eligible to receive that amount. The trial court concluded that Frank failed to meet his burden of proof that there had been a substantial change in circumstances warranting a termination or a reduction in the maintenance amount.

¶ 13 Frank appeals from this order.

¶ 14 **LAW AND ANALYSIS**

¶ 15 The only issue on appeal is whether the trial court's denial of Frank's motion to either terminate or reduce Marjorie's maintenance award constituted an abuse of discretion. *In re Marriage of Breuer*, 259 Ill. App. 3d 94, 96, 630 N.E.2d 1245, 1246

(1994). On appeal, the reviewing court will not reverse a trial court's ruling on a petition to terminate or modify maintenance unless the trial court acted arbitrarily or without conscientious judgment. *In re Marriage of Schrimpf*, 293 Ill. App. 3d 246, 252, 687 N.E.2d 171, 175 (1997) (citing *In re Marriage of Breuer*, 259 Ill. App. 3d at 96, 630 N.E.2d at 1246).

¶ 16 We first turn to the applicable Illinois statutes governing maintenance awards and termination and modification of maintenance awards. Section 510(a-5) of the Illinois Marriage and Dissolution of Marriage Act (Act) authorizes the termination or reduction of a maintenance award if there has been a substantial change in circumstances. 750 ILCS 5/510 (West 2014). In considering the petition, the trial court must consider the factors from section 504(a) of the Act that the court originally considered. Those factors include the income and property of each party, the current needs of the party, the present and future earning capacity of each party, the standard of living established during the marriage, the duration of the marriage, and the age and physical condition of the parties. 750 ILCS 5/504(a) (West 2012). Additionally, the court must consider the relevant factors listed in section 510(a-5), including change in employment status, efforts to become self-sufficient, the present status of property originally awarded (including retirement benefits), any decrease in income, and the value of property acquired after the dissolution. 750 ILCS 5/510(a-5) (West 2012).

¶ 17 In this case, the original 2003 order stated that Frank's retirement would be a modifying factor. Although the trial court mentioned the possibility of Frank's retirement precipitating a change in the maintenance award, that mention is insufficient to require a

change. The trial court must still consider all of the statutory factors in contemplating a petition seeking termination or modification. 750 ILCS 5/504(a), 510(a-5) (West 2012). Retirement, including the corresponding decrease in income, is one of numerous factors the trial court must consider.

¶ 18 Frank cites a few Illinois cases in support of his argument that his retirement constituted a substantial change in circumstances. We find that his reliance on these cases is inapposite.

¶ 19 In *In re Marriage of Puls*, 268 Ill. App. 3d 882, 888, 645 N.E.2d 525, 529 (1994), the trial court awarded the wife most of the marital estate's cash and liquid assets. In the same order, the trial court awarded the wife maintenance of \$2,750 per month and tied the duration of the award to the husband's continued employment. *Id.* at 888, 645 N.E.2d at 529-30. The court ordered maintenance to cease upon husband's retirement. *Id.* At the time of the trial court's order, the husband was close to retirement. *Id.* at 888, 645 N.E.2d at 529. The appellate court denied the wife's request that the award was insufficient in both amount and duration. *Id.* at 888, 645 N.E.2d at 529-30. The appellate court noted that the trial court awarded the wife the bulk of the marital assets, and that since husband was nearing retirement, he would be forced to rely upon what property he was awarded. *Id.* We find that *In re Marriage of Puls* is distinguishable because the maintenance award was temporary and was set to end upon the husband's retirement. Furthermore, at issue on appeal in *In re Marriage of Puls* was the original maintenance award—not an attempt to have a permanent award terminated or modified.

¶ 20 Frank also argues that *In re Marriage of Garelick*, 168 Ill. App. 3d 321, 522 N.E.2d 738 (1988), supports his argument. However, *In re Marriage of Garelick* involved an award of rehabilitative maintenance, not permanent maintenance. *Id.* at 324, 522 N.E.2d at 741. The trial court found that there had been a substantial change in circumstances warranting a reduction in rehabilitative maintenance because the wife's income had increased over time signifying her partial rehabilitation. *Id.* In contrast to *In re Marriage of Garelick*, Marjorie's original maintenance award was permanent and since 2003, her income has decreased. Additionally, here the court found that due to her age, physical condition, and lack of skills, it was unrealistic that she could obtain employment.

¶ 21 Frank finally argues that *In re Marriage of Waldschmidt*, 241 Ill. App. 3d 7, 608 N.E.2d 1299 (1993), is supportive of his argument. In *In re Marriage of Waldschmidt*, the trial court originally awarded the wife a set percentage of husband's income. *Id.* at 8, 608 N.E.2d at 1300. The husband filed a petition to terminate or reduce the maintenance award arguing that his income had decreased due to retirement, while the wife's financial situation had improved because of an inheritance. *Id.* The trial court initially denied the petition, but later modified its order and reduced the wife's maintenance award by lowering the percentage. *Id.* at 8-9, 608 N.E.2d at 1300. The husband filed another petition 18 months later arguing that wife's income from her inherited property continued to rise. *Id.* at 9, 608 N.E.2d at 1300. The trial court concluded that there was not a substantial increase in the wife's income and denied the petition. *Id.* at 10, 608 N.E.2d at 1301. On appeal, the court reversed and remanded with directions to enter an order terminating the wife's maintenance. *Id.* at 13, 608 N.E.2d at 1303. The court stated that

"[m]aintenance should be terminated *** when the spouse receiving the maintenance has become virtually self-sufficient." *Id.* (citing *In re Marriage of Henzler*, 134 Ill. App. 3d 318, 322, 480 N.E.2d 147, 149-50 (1985)). In reaching this decision, the court noted that the wife now earned substantially more income than the husband did, and she owned more assets. *Id.* at 13, 608 N.E.2d at 1301. Our case is similar to *In re Marriage of Waldschmidt* in that the husband was retired and that lowered his income. However, although the court in *In re Marriage of Waldschmidt* considered the effect of the husband's retirement, its primary concern was that the wife had inherited an income-producing farm, and that she was then earning substantially more than her ex-husband was earning. Here, Marjorie's only source of income was the maintenance, and therefore *In re Marriage of Waldschmidt* is not analogous.

¶ 22 We find that this case is quite similar to *In re Marriage of Schrimpf*, 293 Ill. App. 3d 246, 687 N.E.2d 171 (1997). In *In re Marriage of Schrimpf*, the husband and wife had been married twice—the first marriage lasted 17 years, and the second marriage lasted 9 years. *Id.* at 248, 687 N.E.2d at 173. The couple was divorced for the second time in 1979, and the court awarded the wife \$750 per month in permanent maintenance. *Id.* at 247, 687 N.E.2d at 172. The husband retired in 1995 after having worked 48 years. *Id.* at 248, 687 N.E.2d at 173. After retirement, the husband received income from social security, his pension plan, and payments on a promissory note, for a total of \$3,064.78 per month. *Id.* at 248-49, 687 N.E.2d at 173. He was remarried, but his current wife did not work and had no source of income. *Id.* at 249, 687 N.E.2d at 173. The husband had life insurance policies with cash surrender values totaling \$146,261.13. *Id.* The value of

his pension plan was \$427,980.10, and he testified that he had the ability to increase the monthly disbursement amount. *Id.* at 249-50, 687 N.E.2d at 173.

¶ 23 In contrast, the wife's only source of income for the first 11 years after the divorce was the maintenance payments. *Id.* at 250, 687 N.E.2d at 174. Her only assets were the home the court awarded her, and one vehicle. *Id.* at 250, 687 N.E.2d at 173. In the years leading up to this hearing, the wife borrowed \$16,000 from her daughter in order to pay her bills. *Id.* at 250, 687 N.E.2d at 173-74. In 1990, the wife began receiving \$550 per month in social security benefits based upon the husband's earnings. *Id.* at 250, 687 N.E.2d at 174. She also received \$35 per month for the rental of her garage. *Id.* She had not saved any money since the second divorce. *Id.*

¶ 24 In *In re Marriage of Schrimpf*, the trial court denied the husband's request to reduce or terminate the maintenance award. *Id.* at 251, 687 N.E.2d at 174. On appeal, he argued that the trial court's order was erroneous because his retirement and resulting lower income was a substantial change of circumstances. *Id.* He testified that due to his current wife's medical bills, he spent more money than he received each month. *Id.* The appellate court disagreed finding that the husband had more than enough assets that could be used to continue paying his ex-wife maintenance. *Id.* at 252-53, 687 N.E.2d at 175.

¶ 25 Factually, *In re Marriage of Schrimpf* is very similar to the facts of this case. Despite the fact that Frank's current wife continues to work while Mr. Schrimpf's current wife did not, in both cases, the income available to the husbands far exceeded the income available to the former wives. Unlike the wife in *In re Marriage of Schrimpf*, Marjorie has essentially no assets, and is in financially worse shape.

¶ 26 We have reviewed the entire record and considered the provisions of sections 504(a) and 510(a-5) of the Act, as well as relevant case law. We have also considered the financial status and assets available to Frank and to Marjorie. We concur with the trial court that Frank's retirement at the age of 66 was in good faith. Although Marjorie has a high school diploma, she has no appreciable job skills. Furthermore, her chronic neck and back pain prevent her from working. Marjorie's only income is the \$1,000 maintenance award. The total value of Marjorie's assets on the date of the hearing was approximately \$1,700, plus one vehicle. In contrast, the total value of Frank's assets on the date of the hearing was \$438,230, plus four vehicles. Frank's social security benefit is \$2,300 per month. Frank's wife continues to work. Frank has opted not to take disbursements from his profit sharing account, and by making that choice, he has created a financial picture that he spends more money than he receives in retirement. We concur with the trial court's assessment that Frank could take \$1,600 per month based upon his life expectancy. As Marjorie could receive \$800 per month in social security benefits, the trial court correctly imputed that amount to her as income. We find no basis to conclude that the trial court abused its discretion by denying Frank's petition.

¶ 27 Alternatively, Frank argues that the trial court "double-dipped" in considering the income that could be derived from his profit sharing account because the trial court had previously divided the 2003-value of the account. He argues that it is improper to consider the same asset as both property and income. Frank cites no Illinois case law or statutory authority for this proposition. He cites to a case from Wisconsin, *In re Marriage of Olski*, 540 N.W.2d 412 (Wis. 1995) (citing *Kronforst v. Kronforst*, 123

N.W.2d 528 (Wis. 1963)). However, case law from another state interpreting that state's laws is not binding on this court.

¶ 28 The double-dipping concept has been recognized in Illinois in cases of professional and nonprofessional goodwill of a business. Double dipping occurs if the trial court considered the goodwill as both an asset and as income within the same divorce order. See *In re Marriage of Zells*, 143 Ill. 2d 251, 572 N.E.2d 944 (1991); *In re Marriage of Talty*, 166 Ill. 2d 232, 652 N.E.2d 330 (1995).

¶ 29 We find no basis to hold that the trial court counted the profit sharing account twice. In the original dissolution, the value of the profit sharing account was divided equally. After this disbursement was made to Marjorie, Frank continued to add to his profit sharing account, and over the years since 2003, the account substantially increased in value. In considering Frank's request to modify or terminate Marjorie's maintenance award, the trial court must consider all assets and income of the parties at the date of the hearing, including assets originally awarded. 750 ILCS 5/510(a-5) (West 2012). Frank's profit sharing account is an asset that could be income-producing if he elected to receive disbursements. The trial court properly considered the value of this account as an asset that Frank could utilize to increase his monthly income stream.

¶ 30 Frank also argues that it is inappropriate to consider social security as income for purposes of calculating maintenance. Frank's argument on this subject is misplaced as the cases he cites discuss the impropriety of consideration of social security benefits when dividing property. See *In re Marriage of Roberts*, 2015 IL App (3d) 140263. In this case, the trial court did not assign or divide social security benefits in determining

whether to terminate or modify Marjorie's right to maintenance. As stated earlier, the trial court must consider all sources of income and assets, and as social security constitutes a source of monthly income, the trial court properly considered the monthly amount Frank received in social security benefits.

¶ 31 Frank also claims that the trial court improperly considered the U.S. Census Bureau statistics of life expectancy. The trial court is allowed to take judicial notice of any fact that can be found by utilizing accurate sources. Ill. R. Evid. 201 (eff. Jan. 1, 2011). We do not find that the trial court's reference to census bureau statistics in the context of determining the appropriate monthly distribution available to Frank was arbitrary.

¶ 32 Finally, Frank argues that Marjorie was under a duty and obligation to improve her circumstances. In this case, we disagree. The couple had been married for 31 years at the time of the divorce; Marjorie spent 26 of those years as a homemaker; Marjorie had no higher education; Marjorie had no appreciable skills; and Marjorie attempted to work after the divorce, but had to stop because of physical ailments. Furthermore, in 2003, the trial court awarded Marjorie permanent maintenance, not rehabilitative maintenance, and thus concluded that there was no expectation that Marjorie would improve her circumstances. For these reasons, this argument lacks merit.

¶ 33 **CONCLUSION**

¶ 34 For the foregoing reasons, the judgment of the circuit court of Madison County is hereby affirmed.

¶ 35 Affirmed.