

**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).

**FILED**

December 18, 2017  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

2017 IL App (4th) 170142-U  
NO. 4-17-0142

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

In re MARRIAGE OF	)	Appeal from
HOWARD D. JENKEL,	)	Circuit Court of
Petitioner-Appellant,	)	Livingston County
and	)	No. 02D89
LESLIE JENKEL,	)	
Respondent-Appellee.	)	Honorable
	)	Matthew John Fitton,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.  
Justices Steigmann and DeArmond concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court abused its discretion by finding a substantial change in circumstances occurred for the purpose of modifying maintenance where respondent failed to show a substantial change in her financial needs.

¶ 2 In January 2015, respondent, Leslie Jenkel, filed a petition for modification of the monthly maintenance payments she received from her former husband and petitioner, Howard D. Jenkel. In September 2016, the Livingston County circuit court entered a written order, increasing the amount of maintenance payments to \$1984.70. Petitioner filed a motion to reconsider, which the court denied in November 2016.

¶ 3 Petitioner appeals, asserting the circuit court erred by increasing the amount of his monthly maintenance payments to respondent. We reverse.

¶ 4 I. BACKGROUND

¶ 5 The parties married in December 1986 and had one child, Howard Benjamin

(born in 1990). In June 2002, petitioner filed a petition for dissolution of the parties' marriage, and respondent later filed a counterpetition for dissolution. In September 2003, the circuit court entered a dissolution judgment, incorporating the parties' marital settlement agreement. Under the agreement, petitioner was to pay respondent \$1000 in monthly permanent maintenance until petitioner's retirement. At petitioner's retirement, the agreement provided a formula for a reduction in the amount of maintenance. In April 2009, the court entered an order in accordance with the agreement, reducing respondent's monthly maintenance to \$361 due to petitioner's retirement.

¶ 6 In November 2010, respondent filed a petition for modification of maintenance. On July 25, 2011, the circuit court entered a written order, first increasing the amount of monthly maintenance to \$500, effective December 1, 2010, and then increasing monthly maintenance to \$1000, effective June 1, 2013, or when petitioner's obligation for college expenses ceased, whichever occurred first. Respondent appealed, only asserting Illinois law granted the circuit court discretion to order petitioner to list her as a beneficiary on his life insurance policy as security for his maintenance payments. This court agreed the life insurance argument should be heard, reversed the circuit court's judgment, and remanded for further proceedings. *In re Marriage of Jenkel*, 2012 IL App (4th) 110889-U.

¶ 7 In January 2015, respondent filed the petition for modification of maintenance at issue in this appeal. In her petition, respondent asserted that, since the last modification, the following substantial changes in circumstances had occurred: (1) her disability had worsened and her mobility was further limited, (2) she was now required under federal law to have health insurance and could not afford it, (3) petitioner had and maintained substantial assets and received substantial retirement benefits. Respondent also noted that, since the last modification

of maintenance, the legislature had enacted new statutory guidelines as to the calculation of maintenance. Petitioner filed a response, opposing the modification.

¶ 8 On April 28, 2016, the circuit court held a hearing on respondent's modification petition. On appeal, the parties have submitted an agreed bystander's report of that hearing, which was approved by the circuit court. See Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005). According to the bystander's report, petitioner and respondent both testified as well as respondent's doctor, Dr. Travis Swink. The parties also presented numerous exhibits. The evidence relevant to the issue on appeal is set forth below.

¶ 9 Petitioner testified he was 70 years old and resided with his wife in Texas. He was unable to work due to a heart attack. His only income was his pension; a \$500 monthly payment from his individual retirement account (IRA), which was invested in an annuity; and social security benefits. His wife had little to no income. They owned a home with no mortgage and allowed a relative to reside there because the housing market was too depressed to sell the home. The \$150,000 to \$200,000 lump-sum payment petitioner had received when he retired in 2009 had been spent. A portion of that payment had been used to pay for their son's college expenses. Petitioner testified he had not had any major changes in his financial ability since 2011.

¶ 10 Respondent testified she was 59 years old and was last employed in 1987. She lived in the same residence as she did in 2011. The home was in very poor shape, and she was contemplating letting the bank take the house back. She believed the home was worth less than \$58,000 because it needed work. Respondent acknowledged the home was in poor shape the last time maintenance was addressed but stated the home was now worse. Since 2011, windows had fallen out of the house, squirrels had inhabited the house, the bathroom had mold, and the roof

had substantial issues.

¶ 11 Respondent also testified her physical condition was worse than in 2011. Her knees, lymphedema, and mobility were worse. She had significant pains in her leg as a result of lymphedema and fatty deposits. Respondent had not driven since June 2015 and could no longer get into a car. She no longer went grocery shopping.

¶ 12 Additionally, respondent testified she had no changes to her income since the monthly maintenance payments were last modified in 2011. She had applied for social security disability and supplemental security income, both of which were denied. One change that did occur was their son had lived with her since his graduation from college and contributed toward household expenses. If she had shortfalls in her monthly budget, their son made up the amount. Respondent also testified her debt load was largely the same as in 2011. She had the same credit card debts, the same car debt, and mortgage. Respondent had spent all of the money she received from the dissolution judgment. Moreover, she also now had to maintain health insurance under federal law. She first testified the cost of the insurance was \$402 per month. Respondent later testified it was only \$37 per month. Respondent also admitted she did not have cable and internet bills; paid \$0 to \$200 per month for food, as opposed to \$400 per month; and her payments for professional services totaled \$10 per month, not \$125.

¶ 13 Dr. Swink testified respondent suffers from morbid obesity, shortness of breath, and lymphedema. She also had fatty deposits, which impeded her ability to walk. He disagreed with respondent her mobility had decreased. Dr. Swink noted that, between 2010 and 2013, respondent did not leave her house, was not mobile, and did not drive. Since 2013, she had been leaving her house. Respondent did need a wheelchair to get around and required someone to drive her. Respondent had also lost more than 100 pounds over the last few years, which had

improved her health. She was working on losing more weight, which was needed before she could have the fatty deposits removed.

¶ 14 At the close of the evidence, the court invited the parties to submit written closing arguments. Petitioner asserted no change in circumstances had taken place since 2011. He further asserted that, even if a change had taken place, the statutory factors did not favor a modification of maintenance. Last, if the court decided to modify maintenance, then under the current statutory formula, the monthly maintenance payments would be \$1984.70. Respondent contended substantial changes had occurred, namely the decline in her health, the deterioration of her home, and her inability to obtain social security benefits. She argued the statutory factors did favor modification and calculated the modified monthly payments at \$1984.69.

¶ 15 On September 9, 2016, the circuit court entered a written order, granting respondent's petition and increasing the monthly maintenance payments to \$1984.70. The court found substantial changes in circumstances had occurred, which warranted a modification of maintenance. Specifically, respondent's health and her living situation had become worse, respondent had not been able to obtain social security benefits, and petitioner was no longer contributing to their son's education. The court then considered the statutory factors and found those factors favored increasing maintenance. The court determined the increase was legitimate and not a luxury. Using the calculation set forth in section 504(b-1) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/504(b-1) (West 2014)), the court set the monthly maintenance payment at \$1984.70.

¶ 16 On October 3, 2016, petitioner filed a timely motion to reconsider, asserting the circuit court should have applied the version of section 504 of the Dissolution Act in effect before the January 1, 2015, amendments. See 750 ILCS 5/504 (West 2012). After a November

23, 2016, hearing, the court denied petitioner’s motion to reconsider. According to the bystander’s report, the court stated it had applied the old statute and determined the amount of maintenance awarded was the same as under the new statute.

¶ 17 On December 22, 2016, petitioner timely filed his notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015). Accordingly, this court has jurisdiction of petitioner’s appeal under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 18 II. ANALYSIS

¶ 19 A. Standard for Modification of Maintenance

¶ 20 Section 510(a-5) of the Dissolution Act (750 ILCS 5/510(a-5) (West 2014)) provides an order for maintenance may be modified “only upon a showing of a substantial change in circumstances.” Illinois courts have held a “substantial change in circumstances” under section 510 of the Dissolution Act means either the needs of the spouse receiving maintenance or the other spouse’s ability to pay that maintenance has changed. *Shen v. Shen*, 2015 IL App (1st) 130733, ¶ 132, 35 N.E.3d 1178; *In re Marriage of Anderson*, 409 Ill. App. 3d 191, 198, 951 N.E.2d 524, 531 (2011). In determining whether a substantial change in circumstances has occurred, the court can only consider changes that occurred after the last maintenance award. *In re Marriage of Pedersen*, 237 Ill. App. 3d 952, 957, 605 N.E.2d 629, 633 (1992). “The party seeking modification bears the burden of establishing a substantial change of circumstances.” *Shen*, 2015 IL App (1st) 130733, ¶ 132, 35 N.E.3d 1178. Once the court determines a substantial change in circumstances has occurred, it then considers whether a modification of maintenance is warranted under the factors listed in sections 510(a-5) and 504(a) of the Dissolution Act (750 ILCS 5/504(a), 510(a-5) (West 2014)). See *In re Marriage of Heroy*, 2017 IL 120205, ¶ 25 (noting section 510(a-5) contains “a list of factors for the court to consider

in maintenance modification proceedings, including the factors set forth in subsection 504(a)').

¶ 21 Both the propriety of the maintenance award and the decision to modify such an award rest within the circuit court's discretion, and this court will not disturb the circuit's court determination absent an abuse of discretion. *Heroy*, 2017 IL 120205, ¶ 24. An abuse of discretion occurs when the circuit court's ruling is "arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the [circuit] court." (Internal quotation marks omitted.) *Heroy*, 2017 IL 120205, ¶ 24 (quoting *Blum v. Koster*, 235 Ill. 2d 21, 36, 919 N.E.2d 333, 342 (2009)). Additionally, this court may affirm the circuit court's judgment on any basis contained in the record. *Heroy*, 2017 IL 120205, ¶ 24.

¶ 22 B. Substantial Change in Circumstances

¶ 23 Petitioner first asserts the circuit court erred by finding a substantial change in circumstance occurred. Respondent asserts the court's decision was proper. The circuit court found substantial changes had occurred based on respondent's health, living situation, inability to obtain social security benefits; and petitioner no longer having to pay their son's educational expenses.

¶ 24 As to the evidence the court can consider in determining whether a substantial change in circumstances occurred, we highlight what was stated in the prior maintenance order, entered on July 25, 2011. It specifically provided respondent's maintenance would increase to \$1000 per month on June 1, 2013, or when petitioner's obligations for college expenses ceased, whichever occurred first. The order also noted respondent remained unemployable due to her health and had been denied social security disability payments. Additionally, it stated respondent claimed her home was in poor condition.

¶ 25 Turning to respondent's needs, she testified her health had further deteriorated,

and she could no longer get into a car. However, she did not explain how that fact increased her financial needs. She had been unable to work throughout the dissolution proceedings. No evidence was presented respondent's expenses increased due to the further decline in her health. Accordingly, her change in health did not constitute a substantial change in circumstances. Likewise, respondent had been denied social security disability benefits at the time of the prior maintenance award, and thus the denial of social security disability benefits does not constitute a substantial change in circumstances.

¶ 26 As to the deterioration of her home, respondent acknowledged her home was in poor shape in 2011. However, she noted that, since 2011, the home has had windows fall out, squirrels inhabiting the home, mold in the bathroom, and substantial issues with the roof. Respondent did not give any indication she desired to fix the home. In fact, she testified she was contemplating letting the bank take the house back. According to her financial affidavit, the home had a value of around \$58,000 and a mortgage balance of \$53,000. Again, respondent did not present evidence the worsening of the condition of her home increased her financial needs. Thus, we find the deterioration of respondent's home was not a substantial change in circumstances.

¶ 27 The bystander's report indicates respondent stated her health insurance was a change in circumstances. Respondent testified she must now maintain health insurance under federal law at the cost of \$402 per month. However, she admitted on cross-examination the cost was only \$37 per month and not \$402. The circuit court did not find the \$37 monthly increase in expenses was a substantial change in circumstances, and we agree, especially in light of the fact respondent now had assistance with household bills.

¶ 28 As to her financial needs, respondent testified her income and debt load were



largely the same as they were in 2011. The only change was their son was now living with respondent and contributing to the household expenses.

¶ 29 As to petitioner's ability to pay maintenance, respondent did not allege his ability changed, and the circuit court did not find such a change. The testimony at the hearing also indicates no change occurred, as petitioner testified his pension had remained the same since his retirement in 2009. Petitioner further testified he had no major changes in his financial ability since 2011, except for the decreasing value of his IRA. Additionally, the termination of petitioner's obligation to pay the college expenses of the parties' son was clearly contemplated in the prior maintenance order and thus is not a substantial change in circumstances.

¶ 30 Last, in support of her argument the circuit court did not abuse its discretion in finding a substantial change in circumstances, respondent cites *Blum*, 235 Ill. 2d at 41, 919 N.E.2d at 345, where the supreme court affirmed the circuit court's reduction in the amount of maintenance, noting, *inter alia*, the circuit court considered all of the statutory factors. However, the *Blum* decision did not address whether a substantial change in circumstances occurred because the parties' marital settlement agreement specifically provided for the maintenance review. *Blum*, 235 Ill. 2d at 35-36, 919 N.E.2d at 342. Thus, *Blum* is not instructive here.

¶ 31 While we sympathize with respondent's declining health and deteriorating home, the evidence before the circuit court did not show a substantial change in circumstances occurred in respondent's needs or petitioner's ability to pay. Thus, we find the circuit court abused its discretion, and respondent's request to modify maintenance should have been denied.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we reverse the Livingston County circuit court's judgment.

¶ 34 Reversed.