

2019 IL App (2d) 180835-U
No. 2-18-0835
Order filed May 15, 2019

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF GILMAN L. SATHER,)	Appeal from the Circuit Court of McHenry County.
)	
Petitioner-Appellant,)	
)	
and)	No. 07-DV-427
)	
ANNETTE N. SATHER,)	Honorable
)	Michael E. Coppedge,
Respondent-Appellee.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Jorgensen and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court acted within its discretion in denying petitioner's petition to modify maintenance. Therefore, we affirmed.

¶ 2 Petitioner, Gilman L. Sather, appeals from the trial court's decision denying his petition to modify maintenance payments to respondent, Annette Sather. Petitioner argues that the trial court abused its discretion. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The parties were married on October 8, 1966, and on January 19, 2012, their marriage was dissolved. In the dissolution judgment, the trial court awarded respondent maintenance. We summarize its findings on this subject, which applied to 2012. Respondent was 67 years old, and petitioner was 68. The parties separated after 38 years of marriage and had been married for over 45 years. They both had college educations and were in relatively good health, other than respondent's hearing problems and petitioner's asthma and skin cancer. Respondent taught elementary school for a few years when the parties were first married, and she worked as a substitute teacher from 1984 to 2004. Respondent was currently receiving \$349 per month from Social Security, with \$96.40 deducted from that amount for Medicare. She was also receiving \$2,046.71 per month in temporary maintenance.

¶ 5 Petitioner began an accounting practice in 1987, established a brokerage practice in 1993, and was also licensed to sell health and life insurance. Petitioner was earning a salary of \$60,000 and additionally earning about \$45,805 annually from his brokerage business. His actual income was nebulous because he paid many personal expenses through his business. Petitioner's business had decreased partially because of a loss of some clients, but also because he was spending less time on the job, asserting a desire to retire. "Both parties [were] at an age where retirement [was] feasible."

¶ 6 The trial court stated that based on the statutory factors considered in awarding maintenance, along with considerations of the parties' 45-year marriage and their ages, it was awarding respondent monthly maintenance of \$2,500, which represented about 50% of petitioner's gross monthly salary. Petitioner was also to pay respondent as additional maintenance half of his brokerage earnings, after subtracting \$416.67 per month in expenses. The trial court concluded:

“Maintenance shall terminate pursuant to 750 ILCS 5/510 which provides for the termination of maintenance upon the death of either party, the remarriage of the party receiving maintenance or if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis. Either party may petition the Court to modify maintenance upon proper Notice and Petition.”

¶ 7 Respondent appealed, arguing that the trial court erred in certain findings regarding dissipation, nonmarital property, and income. We affirmed the trial court’s dissolution judgment. *In re Marriage of Sather*, 2013 IL App (2d) 121420-U.

¶ 8 On May 31, 2013, petitioner filed a motion to modify maintenance. Petitioner alleged that he had partially retired from his accounting practice and had a contract to sell his brokerage business. He alleged that the maintenance award was based on a monthly salary of about \$5,000, whereas his current gross monthly income was about \$2,663. On July 2, 2014, the trial court entered an “Agreed Order” (2014 Agreed Order) modifying petitioner’s obligation to pay maintenance to \$1,100 per month. The modification was retroactive to July 1, 2013. The order does not contain additional findings, nor is there a report of proceedings in the record for the related hearings.

¶ 9 Several years later, on June 21, 2017, petitioner filed a petition to modify maintenance in which he sought to terminate maintenance; that petition forms the basis of this appeal. He alleged that there had been a substantial change in circumstances in that he had retired from his accounting practice. He alleged that the maintenance award and modification order were based on a monthly salary of about \$5,644, whereas his current monthly gross income was \$2,484 from Social Security, interest, and dividends. Petitioner alleged that he also continued to receive limited income from mandatory distributions from retirement investment accounts, but he argued

that they should not be considered income because the assets were already divided in the dissolution.

¶ 10 At the hearing on the petition to modify on September 18, 2018, respondent provided the following testimony. She was 74 years old. She had not worked since the dissolution judgment, and she received income from Social Security, maintenance, and required distributions from retirement assets that she received in the divorce. In 2018, she received about \$32,000 from retirement distributions. In a financial affidavit executed on May 6, 2014, she stated that her gross monthly income was \$1,226, and she was receiving \$2,047 in monthly maintenance. Respondent listed monthly gifts of \$122 and monthly donations of \$35. That year, maintenance was modified by an agreed order to \$1,100 per month. Respondent also filed financial affidavits on July 26, 2017, and July 31, 2018. In 2017, she listed gifts of \$1,083 per month and donations of \$725 per month. In 2018, she listed gifts of \$350 per month and donations of \$500 per month. The amounts she had listed for monthly gifts had changed because at times she had financially assisted relatives with health problems, and in some years she had gone to weddings. Respondent was currently living off of her checking and savings accounts, which were funded by her maintenance and Social Security payments. She may have taken some money out of her investment accounts at times. Respondent had various assets that had increased in value, though since 2014 her personal expenses had also increased.

¶ 11 Petitioner testified as follows. He was 74 years old. When he filed the motion to modify maintenance in 2013, he had sold his brokerage practice but still had his accounting practice. He completely retired from working on April 15, 2017, because he was becoming more forgetful and had less stamina than when he was younger. Since retirement, petitioner had been making the monthly maintenance payments from assets he was awarded in the dissolution. His current

sources of income were his required retirement distributions, Social Security, and a small amount of dividends.

¶ 12 Petitioner's 2013 motion to modify maintenance stated that he had partially retired from his accounting practice; he had reduced his work to half days. At that time, there was a consideration that he would fully retire at some point in the future. He had filed a financial affidavit on August 10, 2018, that listed a total gross monthly income of \$3,917. This income was more than the \$2,663 he had listed as monthly income when he requested a modification in 2013. Petitioner still had the ability to pay \$1,100 for monthly maintenance, but he was paying the maintenance from assets awarded to him in the dissolution. As of August 2018, he had \$920,857 in assets whereas respondent had \$1.445 million in assets. Petitioner admitted that he owned a building that he had valued at \$110,000, but he had listed it for sale for \$225,000.

¶ 13 When asked if he negotiated the 2014 Agreed Order at arm's length, petitioner testified that the parties' maintenance figures were initially far apart. The trial judge stated that a fair maintenance amount was \$1,100 per month. Petitioner admitted that the order did not provide for further reductions of maintenance.

¶ 14 The trial court denied petitioner's motion to modify maintenance, reasoning as follows. Petitioner was effectively requesting that his maintenance be terminated. The dissolution judgment set maintenance at \$2,500 per month, and it was clear that the award was one of permanent maintenance. In 2014, the parties agreed to modify maintenance to \$1,100. At that time, petitioner's gross monthly income was \$2,663. In his 2017 petition, petitioner alleged a substantial change of circumstances in that he was fully retired. However, he listed a gross monthly income of \$2,484, which was essentially the same gross income he listed in his 2013 petition to modify. Petitioner pointed to respondent's substantial assets, but the parties held the

same assets that were distributed between them in the dissolution. The trial court rejected petitioner's contention that his full retirement was a substantial change in circumstances, because his gross income from 2013 to 2017 was effectively the same, and petitioner honestly testified that the parties contemplated his full retirement when they modified maintenance to \$1,100. There was also not a substantial change in circumstances for respondent even though her gift payments had increased since 2014, because since that time her investment assets had not changed.

¶ 15 Petitioner thereafter appealed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, petitioner argues that the trial court abused its discretion in denying his motion to modify maintenance. A trial court may modify maintenance only upon a showing of a substantial change in circumstances. 750 ILCS 5/510(a-5) (West 2018). The party seeking a modification has the burden of establishing a substantial change of circumstances, which can be shown through evidence that the needs of the spouse receiving maintenance has changed, or the ability of the other spouse to pay the maintenance has changed. *Shen v. Shen*, 2015 IL App (1st) 130733, ¶ 132. The court is to consider nine statutory factors: (1) any change in the employment status of either party, and whether it has been made in good faith; (2) any efforts of the party receiving maintenance to become self-supporting; (3) any impairment of earning capacity of either party; (4) the tax consequences of the maintenance payments; (5) the duration of previous maintenance payments relative to the marriage's length; (6) the property, including retirement benefits, awarded to each party in the dissolution; (7) the increase or decrease in each party's income; (8) property acquired after the dissolution; and (9) any other factor the trial court expressly finds to be just and equitable. 750 ILCS 5/510(a-5) (West 2018). The trial court should

also consider the same factors used in determining the initial maintenance award. *Shen*, 2015 IL App (1st) 130733, ¶ 134. We will not disturb a trial court's ruling on a request to modify or terminate maintenance absent an abuse of discretion. *In re Marriage of Reynard*, 378 Ill. App. 3d 997, 1003 (2008). An abuse of discretion occurs only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the trial court's view. *In re Marriage of Johnson*, 2016 IL App (5th) 140479, ¶ 93.

¶ 18 Petitioner argues that his retirement and respondent's decreased needs each amount to a substantial change in circumstances. First, petitioner argues that his decision to retire was made in good faith. See *In re Marriage of Waldschmidt*, 241 Ill. App. 3d 7, 13 (1993) (employment changes that are voluntary must be made in good faith and not prompted by a desire to avoid maintenance obligations). He points to his testimony that he had been working part-time for many years and that he fully retired because he was becoming older and more forgetful.

¶ 19 Petitioner asserts that the original maintenance award was based upon his income as an accountant, and because he is retired and no longer has that income, he is forced to use property that was awarded to him in the dissolution to fund the maintenance payments. He argues that this effectively modifies the original property judgment. Petitioner cites *In re Marriage of Munford*, 173 Ill. App. 3d 576, 579-80 (1988), where the appellate court held that the trial court erred in increasing the husband's maintenance obligation based on additional income generated from his retirement assets. The appellate court stated that the wife had expressly waived any interest in those assets, with no distinction between the plans themselves and the income generated from them, and that the trial court's ruling effectively modified the parties' property settlement agreement. *Id.* at 580. Petitioner argues that requiring him to pay \$1,100 per month from the assets that he received in the dissolution similarly reopens the property judgment.

¶ 20 Petitioner recognizes that the trial court based its decision, at least in part, on its order following petitioner's 2013 petition to modify maintenance. The trial court determined that there was no change in circumstances because petitioner's current income was approximately the same as his income when he was working part-time in 2013. Petitioner argues that, however, there is no evidence in the record as to the bases for the 2014 modification.

¶ 21 Petitioner additionally argues that the trial court focused on his ability to pay maintenance and unreasonably disregarded respondent's needs and her ability to support herself. Petitioner cites *Waldschmidt*, 241 Ill. App. 3d at 13, where the court stated, "Maintenance should be terminated, even after a long-term marriage, when the spouse receiving the maintenance has become virtually self-sufficient." In *Waldschmidt*, the appellate court held that the trial court should have terminated maintenance because the husband retired in good faith, the wife's income had increased while the husband's income had decreased, and the wife owned substantially greater assets. *Id.* Petitioner argues that the instant case is similar. He points out that the trial court originally valued the equity in the marital estate at almost \$2 million,¹ and that at the time of the 2018 hearing, respondent owned assets valued at \$1,455,464.94. Petitioner argues that respondent has not only sufficient assets with which to support herself, she was giving gifts and donations exceeding her maintenance. He notes that she testified that she does not use the income that she receives from marital assets to support herself, whereas he argues that he has been forced to deplete marital assets to pay her maintenance. Petitioner also points to a large disparity in their adjusted gross incomes in 2016 and 2017, an increase in respondent's monthly

¹ We note that in the trial court's ruling on the parties' motions for reconsideration of the dissolution judgment, it changed its valuation of the equity in the marital estate to \$2,621,653.33.

Social Security benefits from \$882.40 in 2014 to \$1,040.90 in 2018, and a decrease in respondent's household expenses from 2017 to 2018.

¶ 22 In denying the petition to modify, the trial court relied on *In re Marriage of Bernay*, 2017 IL App (2d) 160583, ¶ 18, which instructs that a termination of maintenance is not warranted if the change was contemplated when permanent maintenance was ordered. Petitioner argues that *Bernay* is distinguishable because here the trial court did not state that it was awarding permanent maintenance, and it specifically noted that either party could petition the court to modify maintenance. Petitioner also argues that the trial court awarded half of his "gross monthly salary income," thus tying the maintenance award to his salary from working. Petitioner further contends that the payor spouse in *Bernay* had not retired, and that the case did not address the needs and assets of the recipient spouse.

¶ 23 Respondent counters that the dissolution judgment is clear that the maintenance awarded was permanent, as the trial court found. She cites *In re Marriage of Anderson*, 409 Ill. App. 3d 191, 198-99 (2011), for the proposition that the trial court is to consider only the facts occurring since the last modification hearing and modify the maintenance only upon a showing of a substantial change of circumstances since that date. Respondent argues that petitioner was therefore required to demonstrate a substantial change of circumstances since July 2, 2014. She points out that petitioner's current petition to modify maintenance was premised on his full retirement from his accounting practice and an alleged decrease in his monthly income. Respondent argues that petitioner's income does not represent a substantial change in circumstances because his 2017 financial affidavit shows that his monthly gross income had increased by \$1,228.

¶ 24 Respondent contends that petitioner’s full retirement is also not a substantial change in circumstances because it was contemplated at the time of entry of the last maintenance order. She analogizes this case to *Bernay*. There, after prior modifications of maintenance, the trial court awarded the wife permanent maintenance, finding that even though she was employed, she could not support herself consistent with the standard of living established during the marriage, whereas the husband had substantial income and investments. *Bernay*, 2017 IL App (2d) 160583, ¶¶ 7-8. Years later, the husband petitioned to terminate maintenance, alleging that his salary had decreased significantly, he wished to retire within a few months, and he had a health issue. *Id.* ¶ 11. The trial court granted the petition, and this court reversed. *Id.* ¶ 11. We stated that the trial court failed to provide any deference to the order awarding permanent maintenance (*id.* ¶¶ 14, 16) and that the husband’s retirement was clearly contemplated when the permanent maintenance was ordered because the parties were both in their mid-fifties at the time, and their “finances and not-too-distant retirement plans were *directly* at issue” (emphasis in original) (*id.* ¶ 18). Respondent highlights that in 2014, the parties were in their late sixties, and she argues that petitioner’s retirement was expressly contemplated in that he pointed to his partial retirement as grounds for modification.

¶ 25 Respondent further argues that petitioner has sufficient assets and income to continue to pay his maintenance obligation. She maintains that the trial court did not unreasonably disregard her needs and ability to support herself, but rather expressly found petitioner’s argument on this issue unpersuasive. Respondent argues that her assets are substantially the same as they were at the time of the dissolution judgment, and more pertinently, the same as they were on July 2, 2014, with both orders resulting in permanent maintenance. Respondent argues that it is also

notable that she offered un rebutted testimony that since 2014, her personal expenses have actually increased.

¶ 26 We conclude that the trial court did not abuse its discretion in ruling that petitioner did not meet his burden of showing that there had been a substantial change in circumstances warranting the termination of maintenance to respondent. First, it is clear that respondent was awarded permanent maintenance, as permanent maintenance “remains in full force and effect until modified by the court or one of the statutory criteria set forth in section 510(b) of the Dissolution Act occurs.” *In re Marriage of Gunn*, 233 Ill. App. 3d 165, 173 (1992). Here, the dissolution judgment specifically stated that it would terminate upon respondent’s death, remarriage, or continuing conjugal cohabitation. The fact that the trial court noted that either party could petition to modify maintenance did not change its character of being permanent maintenance, because, unless the parties agree otherwise, even an award of “permanent” maintenance is implicitly modifiable upon showing a substantial change in circumstances. *Bernay*, 2017 IL App (2d) 160583, ¶ 14; see also *Shen*, 2015 IL App (1st) 130733, ¶ 84 (“An award of permanent maintenance may be modified or terminated either by agreement or as provided in section 510(c) of the Act.”) The 2014 Agreed Order modified only the amount of monthly maintenance and did not modify its nature of being permanent/indefinite maintenance.

¶ 27 Second, we agree with respondent that petitioner was required to show a substantial change in circumstances since the last modification hearing, *i.e.*, the 2014 Agreed Order. A maintenance award is *res judicata* as to the facts when the order was entered, and in subsequent modification proceedings, the parties may present evidence occurring after the latest petition to avoid relitigating settled issues. *In re Marriage of S.D.*, 2012 IL App (1st) 101876, ¶ 41.

¶ 28 Although petitioner argues that his full retirement constitutes a substantial change in circumstances, as far back as the original dissolution judgment, the trial court noted that petitioner was working less partially because he was asserting a desire to retire, and that both parties were at an age where retirement was feasible. The trial court still awarded permanent maintenance. Petitioner's retirement was even more directly at issue in his 2013 petition to modify maintenance, as he alleged that he had partially retired from his accounting practice and had a contract to sell his brokerage business. The parties agreed to reduce maintenance to \$1,100 monthly, and they did not change its permanent duration. Pursuant to *Bernay*, petitioner's retirement cannot form the basis for a substantial change in circumstances because it was clearly contemplated during the proceedings leading to the 2014 Agreed Order. We note that this situation is more compelling than *Bernay* in that, as respondent points out, in *Bernay* the parties were in their mid-fifties at the time of the maintenance order, while here the parties were in their late sixties.

¶ 29 Petitioner's attempts to distinguish *Bernay* (see *supra* ¶ 22) are unpersuasive because we have determined that respondent was awarded permanent maintenance; the 2014 Agreed Order did not tie the maintenance amount to petitioner's salary from working; and the *Bernay* court stated that retirement was contemplated when the maintenance was awarded.

¶ 30 We further note that petitioner's retirement did not represent a substantial change in the cash flow available to him. In petitioner's 2013 petition to modify maintenance, he alleged that his gross monthly income was about \$2,663. His 2017 financial affidavit showed a gross monthly income of \$3,891, and his 2018 financial affidavit showed a gross monthly income of \$3,917. Accordingly, petitioner's gross monthly income actually increased from the time of the previous modification of maintenance. He also did not dispute that he had the financial ability to

pay \$1,100 monthly maintenance. This case is distinguishable from *Munford*, 173 Ill. App. 3d at 580, because there the trial court had increased the husband's maintenance obligation, with the result that it had effectively modified the parties' property settlement agreement, whereas here the trial court left maintenance unchanged.

¶ 31 We also find no abuse of discretion in the trial court's determination that petitioner did not show a substantial change of circumstances regarding respondent's needs and ability to support herself. As the trial court pointed out, respondent held the same assets that were distributed to her in the dissolution judgment. Further, there was no evidence that respondent's underlying assets had changed since the 2014 Agreed Order, at which time the parties made no change to the permanent nature of the maintenance award.

¶ 32 **III. CONCLUSION**

¶ 33 For the foregoing reasons, we affirm the judgment of the McHenry County circuit court.

¶ 34 Affirmed.