

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) 1 CA-CV 09-0687
)
DEBORAH JAAP,) DEPARTMENT E
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules
) of Civil Appellate
JAMES M. JAAP,) Procedure)
)
Respondent/Appellant.)
)

Appeal from the Superior Court in Yavapai County

Cause No. V1300D0820060507

The Honorable David L. Mackey, Judge

AFFIRMED

Dennis P. Bayless
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Cottonwood

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Phoenix

H A L L, Judge

¶1 James Jaap (Husband) appeals from the trial court's denial of his petition to modify spousal maintenance. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 James Jaap and Deborah Jaap (Wife) were married on June 17, 1972. On December 22, 2006, Wife filed a petition for dissolution. On December 13, 2007, the trial court entered a decree of dissolution allocating the parties' assets, assigning the parties' debts, and ordering Husband to pay Wife spousal maintenance of \$800.00 per month from October 1, 2007 until September 20, 2018. The trial court based the spousal maintenance award on the standard of living established during the parties' marriage, the length of the parties' marriage, Wife's age and earning capacity, the parties' comparative resources, Husband's ability to meet his needs, Wife's financial resources, and the parties' joint and individual waste of community resources through gambling.¹

¶13 On December 28, 2007, Husband filed a motion for new trial, requesting that the court "re-examine the award of spousal maintenance" because Wife allegedly became "self-sufficient" when she applied a portion of her allocated assets to eliminate her assigned community debt. Husband also argued that his ability to pay off his assigned debts was hampered by a decline in the housing market and the corresponding loss of equity in his home. The trial court denied Husband's motion, stating in relevant part:

¹ The trial court specifically found that Husband and Wife "equally wasted community assets in furtherance of their gambling."

The new information provided to the Court is a post-trial revised affidavit from [Husband] and the non-evidentiary assertions of post-trial refinancing difficulties encountered by [Husband] and that "[Wife] has since paid off her portion of the community debt thus reducing her monthly expenses by that amount." This information relates to post-trial events; yet, [Husband] is seeking a new trial, not modification of the spousal maintenance award.

¶4 On August 1, 2008, Husband filed a petition to modify spousal maintenance. In his petition, Husband claimed that he "has had a sever[e] change in his financial status" and that he is "floundering with the debts he has taken as part of the parties' property settlement and exacerbated by the order of spousal maintenance." Indeed, Husband asserted that his "financial situation is in dire peril and the continuance of any form of spousal maintenance will continue to harm" him.

¶5 The trial court held a two-day hearing on Husband's petition to modify spousal maintenance. The following evidence was presented.

¶6 On direct examination, Husband testified that his annual salary is approximately \$83,000.00 and that in recent years he has received an annual bonus of approximately \$6,500.00. Husband also testified that since the time the dissolution decree was entered, his monthly mortgage payment has increased approximately \$800.00, his monthly electricity payment has increased approximately \$45.00, and his monthly dish television payment has increased approximately \$11.00. Husband also testified that he filed for bankruptcy in

March 2008 and, according to the Bankruptcy Code, he has "zero" disposable income.

¶17 On cross-examination, Husband admitted that his annual income, including salary and bonus, has not decreased since the dissolution decree was entered. Husband also acknowledged that the \$40,000.00 in unsecured debt that he was assigned as part of the dissolution decree, representing a monthly expense of approximately \$1,200.00, was completely discharged in his bankruptcy. In addition, Husband also acknowledged that his car payment is \$110.00 less than reflected on his bankruptcy petition and that his personal accounting does not reflect that he has been making monthly payments of \$250.00 to his father as claimed in the bankruptcy petition.² When asked how his financial situation has deteriorated since the entry of the decree, in which the trial court specifically found he had over \$2,000.00 in monthly surplus income, Husband stated that he had "no idea" how the trial court arrived at that conclusion and insisted that he had "no disposable income." Husband also testified that his yearly bonus should not be considered because it is not guaranteed and that his home repair expenses should be deemed \$250.00 per month higher than his actual expenses because he anticipates making substantial home repairs in

² Moments later, however, Husband nonetheless stated that his "actual expenditures were actually all higher than what was listed on that bankruptcy filing."

the future. Husband also argued that his transportation expenses should be deemed \$600.00 per month higher than his actual expenses because he may obtain another vehicle, although he is currently using a vehicle provided by his employer. Husband also asserted that a voluntary retirement contribution of \$420.00 per month should be deemed part of his monthly expenses, although he acknowledged that he has not actually paid into that account in several years.

¶18 On direct examination, Wife testified that her monthly income is the same as at the time the dissolution decree was entered (her wages are the same and her trust income was reduced by \$40.00 per month to \$154.00 per month) and her monthly expenses have not substantially changed. Wife testified that she used most of the \$21,000.00 she received as her share of the community home to pay off her assigned credit card debt and acknowledged that she has since "racked up" \$14,000.00 in additional unsecured debt, such that her monthly credit card payments are approximately the same as at the time of the divorce.

¶19 On cross-examination, Wife acknowledged that since the parties' divorce, she has withdrawn approximately \$20,000.00 in cash from her bank accounts and stated that she used these funds for "everyday living expenses." Wife also acknowledged that, like Husband, she reported expenses on her affidavit of financial information that she did not actually incur, such as an additional

\$700.00 per month for home expenses because she "feel[s] very strongly that [she] should be able to have a home comparable to the [marital residence]." When asked whether she was self-sufficient, Wife stated that she is "with the help of spousal maintenance."

¶10 After the parties concluded their presentation of evidence, the trial court denied Husband's petition for modification, stating in relevant part:

Part of [Husband's] case with respect to his petition to modify is at least the suggestion that [the trial judge] was wrong in his analysis, and I decline to accept that argument as a basis for a modification when that decree and the findings upon which that decree was based was not challenged by appeal. I'm not about to make a change based on whether or not I agree or disagree with [the trial judge's] analysis. His analysis stands as the facts and orders in this case.

Considering all the evidence that has been submitted with respect to whether or not there has been a substantial and continuing change of circumstances that warrants the Court exercising its discretion to modify spousal maintenance, I find that [Husband] has failed to meet his burden of establishing a substantial and continuing change of circumstances.

¶11 Husband timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(B) (2003).

DISCUSSION

¶12 Husband contends that the trial court erred by denying his petition to modify spousal maintenance. He asserts that he

demonstrated a substantial and continuing change in the financial circumstances of both parties.

¶13 Pursuant to A.R.S. § 25-327(A) (2007), a spousal maintenance order “may be modified or terminated only on a showing of changed circumstances that are substantial and continuing.” The party seeking modification bears the burden of proving a change in circumstances. *Scott v. Scott*, 121 Ariz. 492, 494, 591 P.2d 980, 982 (1979). “[A] substantial change in the financial circumstances of either the husband or wife” may support a modification of a spousal maintenance award. *Chaney v. Chaney*, 145 Ariz. 23, 25, 699 P.2d 398, 400 (App. 1995). Nonetheless, in determining whether to modify a spousal maintenance award, the trial court should consider “the same [] factors taken into consideration when granting an award for support and maintenance.” *Scott*, 121 Ariz. at 495 n.5, 591 P.2d at 983 n.5. These factors include the financial resources of the party receiving spousal maintenance, the ability of the party receiving spousal maintenance to produce sufficient income, and the financial resources of the party paying spousal maintenance. *Id.*; *Nace v. Nace*, 107 Ariz. 411, 413, 489 P.2d 48, 50 (1971); see also A.R.S. § 25-319(B) (2007).

¶14 We review a trial court’s ruling on a motion to modify spousal maintenance for an abuse of discretion. *Kelsey v. Kelsey*, 186 Ariz. 49, 53, 918 P.2d 1067, 1071 (App. 1996). We will not find an abuse of discretion unless the record is “devoid of

competent evidence to support" the trial court's decision, *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999) (quoting *Fought v. Fought*, 94 Ariz. 187, 188, 382 P.2d 667, 668 (1963)), or the court made an error of law, *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 455-56, 652 P.2d 507, 528-29 (1982). Whether a substantial and continuing change of circumstances has occurred is a question of fact. *Schroeder v. Schroeder*, 161 Ariz. 316, 323, 778 P.2d 1212, 1219 (1989). We review a trial court's factual findings for clear error. *Kelsey*, 186 Ariz. at 51, 918 P.2d at 1069.

¶15 In his petition to modify spousal maintenance, Husband claimed he suffered a "severe change in his financial status." At the evidentiary hearing, however, Husband admitted that his income has remained constant since the time the dissolution decree was entered. Although he testified that his monthly mortgage payment has increased by approximately \$800.00 and his monthly utility payments have also increased to some degree, he also acknowledged that his assigned portion of the community debt, representing a monthly obligation of approximately \$1,200.00, was extinguished in his bankruptcy proceeding. His other claims of increased expenses do not reflect actual expenses; rather, they are speculative future expenses.

¶16 Likewise, Husband failed to produce any evidence of a substantial and continuing change in Wife's financial

circumstances. The record reflects that her income has also remained constant since the entry of the dissolution decree (her trust income decreased by a de minimus amount) and her monthly expenses are substantially the same. Husband points out that, in the dissolution decree, the trial court found that Wife "demonstrates the ability to become self-sufficient upon reduction of her debts and continued employment" and argues that the spousal maintenance order should therefore be terminated because Wife extinguished her assigned community debt with her allocated interest in the community home. The trial court, however, was aware of the assets allocated to Wife when it entered the spousal maintenance order and nonetheless found that the spousal maintenance award was appropriate. Because Husband failed to demonstrate a substantial and continuing change in either party's financial circumstances since the time the dissolution decree was entered, we cannot find that the trial court abused its discretion in denying his motion to modify spousal maintenance.³

CONCLUSION

¶17 For the foregoing reasons, we affirm the trial court's order denying Husband's motion to modify spousal maintenance. Wife

³ In his reply brief, Husband contends that the trial court failed to make the necessary findings of fact to support its ruling. We disagree. The trial court found that Husband failed to demonstrate any substantial and continuing change in the parties' financial circumstances since the entry of the dissolution decree and specifically affirmed the findings of fact the trial court entered at the time of the decree regarding the parties' financial resources and Husband's ability to pay the award.

has requested an award of her attorneys' fees and costs on appeal and, in the exercise of our discretion, we award Wife her reasonable attorneys' fees and costs pursuant to A.R.S. § 25-324(A) (Supp. 2009) upon her compliance with Arizona Rule of Civil Appellate Procedure 21(a).

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge