DIVISION ONE
FILED: 03/13/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 11-0188
	)	
SAMIR S. SHIBAN,	)	DEPARTMENT A
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	
v.	)	(Not for Publication –
	)	(Rule 28, Arizona Rules of
LALINE SHIBAN,	)	Civil Appellate Procedure)
	)	
Respondent/Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC2006-093249

The Honorable James P. Beene, Judge

AFFIRMED

Curry Law Office, PLC — Mesa
By Andrea Curry
Attorney for Petitioner/Appellee

Abram Meell & Candioto, PA — Phoenix
By Mark H. Candioto
Attorneys for Respondent/Appellant

G O U L D, Judge

¶1 Laline Shiban ("Mother") appeals the trial court's order reducing Samir S. Shiban's ("Father's") monthly spousal

maintenance obligation, declining to hold Father in contempt, awarding Mother only a portion of her attorneys' fees, and finding Father had not committed perjury. For the following reasons, we affirm.

Factual and Procedural Background

¶2 Mother and Father were divorced in 2007. A settlement agreement was incorporated by reference into the parties' consent decree. In the settlement agreement, Father agreed to pay: $1,250 per month in spousal maintenance for five years; taxes on land located in Maricopa; and Mother's health and car insurance premiums.

¶3 In January 2010, Mother filed a petition for enforcement and contempt ("petition") because Father had failed to make payments required under the settlement agreement. Father filed a response and counter-petition seeking to modify obligations contained in the settlement agreement.

¶4 The trial court held an evidentiary hearing on the petition and counter-petition. The evidence presented showed Father was in arrears in his spousal maintenance payments and had stopped paying Mother's health insurance premiums.

¶5 Father presented evidence at trial that he could only work three or four hours a day after being diagnosed with and treated for stomach cancer in 2009. Additionally, the general

decline in the economy had negatively impacted the income he earned from the two businesses he owned. In fact, in 2009, Father had withdrawn more than $200,000 from an IRA to pay his obligations and keep his businesses afloat. Mother characterizes these withdrawals as income which, she says, proves that Father's ability to pay spousal maintenance has increased, not decreased. For this reason, Mother argues, Father is not entitled to a reduction in his spousal support obligation.

¶6 The trial court entered judgment in favor of Mother finding that Father owed her $6,875 in past spousal maintenance obligations, but denied her petition for contempt related to non-payment of this obligation. Holding Father in contempt for failure to pay Mother's health insurance, the trial court ordered him to reinstitute her health insurance. The trial court granted Father's counter-petition and ordered that his monthly spousal maintenance obligation be reduced to $500. Finally, the trial court denied Mother's request that Father's testimony be stricken as perjured testimony and sanctions awarded. As for attorneys' fees, the trial court ordered Father to pay $2,500 of Mother's attorneys' fees.

¶7 Mother timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(2) (Supp. 2011).[1]

Discussion

1. Reduction of Father's Spousal Maintenance Obligation

¶8 Mother appeals the trial court's reduction of Father's monthly spousal maintenance obligation. "[W]e review the trial court's decision regarding the existence of changed circumstances to support a modification of spousal maintenance awarded in a dissolution decree on an abuse of discretion standard." *Van Dyke v. Steinle*, 183 Ariz. 268, 273, 902 P.2d 1372, 1377 (App. 1995). To find an abuse of discretion, "the record must be devoid of competent evidence to support the decision." *Platt v. Platt*, 17 Ariz. App. 458, 459, 498 P.2d 532, 533 (1972).

¶9 The provisions of a decree regarding spousal maintenance "may be modified or terminated only on a showing of changed circumstances that are substantial and continuing." A.R.S. § 25–327(A) (2007). "The changed circumstances alleged must be proved by a comparison with the circumstances existing

[1] We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

at dissolution." *MacMillan v. Schwartz*, 226 Ariz. 584, 588, ¶ 12, 250 P.3d 1213, 1217 (App. 2011) (quoting *Richards v. Richards*, 137 Ariz. 225, 226, 669 P.2d 1002, 1003 (App. 1983)).

¶10 Mother asserts that the trial court failed to make the comparison required by *MacMillan*. Mother is mistaken. In its order, the trial court expressly stated that its decision was based on the toll Father's diagnosis with stomach cancer had taken on his ability to work and current economic conditions, which had adversely impacted Father's ability to earn income "at the rate he was making at the time the spousal maintenance obligation was incurred." Thus, the reduction of Father's spousal support obligation was premised on a comparison of Father's ability to earn income at the time of dissolution with his ability to do so at the time of modification.

¶11 The record also supports the trial court's finding that Father's earnings had substantially declined from the date of dissolution in 2007 and that the decline was likely to be ongoing due to his continuing health problems. In 2007, Father's adjusted gross income of $88,257 was primarily derived from salary and wages ($48,462) and taxable interest ($33,683). In 2008, Father's adjusted gross income of $132,904 was derived primarily from salary and wages ($90,000), taxable interest ($6,456) and pension and annuities ($27,181). In 2009, Father

had no salary or wage income. Father's adjusted gross income was $219,680, but nearly all of it came from a taxable IRA distribution.[2]

¶12 Contrary to Mother's contention, Father's distribution from his IRA is not income or earnings and should not be counted as such for the purposes of evaluating whether spousal support should be modified. *See Jenkins v. Jenkins*, 215 Ariz. 35, 40, ¶ 21, 156 P.3d 1140, 1145 (App. 2007) (stating that the law does not require a father to liquidate his sole and separate assets so that his income can be increased in order to justify increased child support payments); *Scott v. Scott*, 121 Ariz. 492, 495, 591 P.2d 980, 983 (1979) (stating that husband's liquidation of his pension plan was a transformation of his assets from one form to another, and is not, in and of itself, a changed circumstance).

¶13 We also decline to accept Mother's assertion that Father's large withdrawal from his IRA supports her position that he was better able at the time modification was sought, than at the time of dissolution, to pay the agreed upon spousal maintenance. The change in Father's circumstances related to

[2] Father was awarded his IRAs as his sole and separate property in connection with the property distribution agreed to by the parties in the settlement agreement.

his IRA distribution is not a "continuing" change. According to the record, Father had $400,000 or $500,000 invested in IRAs, 401ks and CDs for his retirement. In 2009 he withdrew nearly half of this amount to pay his obligations and "subsidize" his businesses. At that rate, all his retirement savings would be depleted in a year or two. Therefore, Father's increase in what Mother erroneously characterizes as "income," is not continuing. We do not consider it in connection with Mother's objection to his request for a reduction in spousal maintenance. *See Pearson v. Pearson*, 190 Ariz. 231, 236, 946 P.2d 1291, 1296 (App. 1997) (stating that a change must be "continuing" to warrant consideration under A.R.S. § 25-327(A)).

¶14 Mother also urges that as the sole owner of Innovative Engineering Solutions, Inc. ("IES") and Pure Air Systems, LLC ("Pure Air"), Father should pay himself based on the companies' gross sales and that he avoids doing so by retaining money in "retained earnings" accounts. However, Mother confuses gross sales with profit and corporate income with personal income. Just because a company has significant gross sales does not mean that it will realize a profit, and if it does, all profit earned by a closely held corporation is not imputed to a sole shareholder as his income.

¶15 The record shows that since the dissolution, IES's and Pure Air's profitability have declined dramatically, and loans from shareholders (i.e. Father, since he is the sole shareholder of both companies) have increased. Retained earnings for IES have not changed significantly. Although Pure Air's retained earnings have fluctuated, they were substantially lower in 2009 than in 2008. We conclude that Mother's suggestion that Father is "hiding" income in retained earnings by not paying himself wages or dividends is not supported by the evidence.

¶16 The evidence demonstrates that Father has suffered a significant and continuing change in circumstances in that his earnings have declined dramatically due to his health problems and the decline in profitability of his businesses. The trial court did not abuse its discretion in reducing Father's monthly spousal maintenance payments to $500.

2. Differing Contempt Rulings

¶17 The trial court held Father in contempt for failing to pay Mother's health insurance, but it declined to hold him in contempt for failing to pay spousal maintenance and other obligations set forth in the settlement agreement. We review a trial court's contempt order for an abuse of discretion. *Danielson v. Evans*, 201 Ariz. 401, 412, ¶ 40, 36 P.3d 749, 760 (App. 2001).

¶18 Mother contends that the trial court abused its discretion when it failed to hold Father in contempt for his failure to pay her car insurance and taxes on the land in Maricopa. However, Mother did not request in her petition, her trial testimony, or her written closing statement, that the trial court hold Father in contempt for failure to pay these two obligations. Rather, she asked the court to hold Father in contempt only for "his willful failure to comply with his Spousal Maintenance and health insurance obligation as set forth in the Decree." Thus, the trial court did not abuse its discretion in declining to hold Father in contempt for failure to pay the car insurance premiums and taxes on the Maricopa land.

¶19 Next, Mother argues that the trial court must have abused its discretion because it found Father in contempt for failure to pay Mother's health insurance premiums, but not for failure to pay spousal maintenance. Mother demonstrated, and Father admitted, that he did not make the court-ordered spousal support payments or health insurance premium payments. This is all that is necessary to make out a prima facie case that Father's refusal to pay was willful. It was therefore incumbent upon Father "to show his *excusable inability* to make the

payments ordered" in order to avoid a finding of contempt. *Dyer v. Dyer*, 92 Ariz. 49, 52, 373 P.2d 360, 362 (1962).

¶20 With respect to spousal support, Father presented credible evidence that he could no longer pay this obligation due to his recent and continuing health problems and the significant decrease in his earnings from IES and Pure Air. In other words, he demonstrated his excusable inability to pay the past-due spousal support.

¶21 In contrast, Father did not claim that he did not pay Mother's health insurance premiums because he could no longer afford to pay them. Rather, he took the position that the premiums had increased by more than 50%. Father testified at trial that the health insurance representative told him that Mother's premium was $72 a month at the time of the divorce. At the time he stopped paying, the premiums had increased to $145 a month. The settlement agreement relieves Father of the obligation of paying Mother's health insurance premiums if that premium is "50% more than the premium paid while COBRA coverage existed." COBRA coverage would exist for the eighteen months following dissolution. It appears that Mother's COBRA coverage began on May 17, 2007. A copy of the invoice for her first full month of coverage shows that Mother's monthly premium was $111. An increase thereafter to $145 per month was not an increase of

more than 50%. Thus, with respect to payment of Mother's health insurance premium, Father failed to show an excusable inability to pay.

¶22 The record contains competent evidence to support the trial court's rulings regarding whether Father was in contempt (or not) for his failure to pay spousal support and Mother's health insurance premiums. *See Platt*, 17 Ariz. App. at 459, 498 P.2d at 533. Thus, the trial court's differing rulings on Mother's petition for contempt was not an abuse of discretion.

3. Father's Testimony

¶23 Mother argues that Father's withdrawals from his IRA accounts and the retained earnings in Pure Air and IES' 2009 federal tax returns should have been included as income in Father's Affidavit of Financial Information ("AFI"), and his failure to include these amounts as income constitutes perjury or sanctionable conduct. We disagree.

¶24 The AFI contains income information only for January 1, 2010 through the date of the AFI; here, May 4, 2010. Thus, any IRA withdrawals or profits earned by Pure Air or IES in 2009 are irrelevant unless paid to Father in 2010. Mother provides no evidence to controvert Father's testimony and evidence that he derived no income from Pure Air or IES through May of 2010.

¶25 Also, the fact that both companies had retained earnings does not mean that Father could have or should have paid himself those retained earnings in 2009 or 2010. Indeed, retained earnings are not synonymous with cash; they often represent non-liquid assets held by a corporation.[3] The evidence shows that Father withdrew more than $200,000 from his IRAs in 2009. Father testified that he used this money to pay his obligations and to keep IES and Pure Air afloat. The Pure Air federal tax return substantiates that loans from shareholders (i.e. Father) increased from $303,849 in 2008 to $421,115 in 2009.[4]

¶26 Mother claims that Father's failure to list any income from Shiban & Son's, LLC is a material omission, claiming that the limited liability company "has regular income." Mother points to no evidence in the record to support her claim and our review reveals no such evidence. Regardless, Mother confuses business income with personal income. Even if Shiban & Sons was

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[3] To illustrate this point, in 2009, IES reported unappropriated retained earnings of $132,623 and cash on hand at the end of the year of $4,592; Pure Air reported unappropriated retained earnings of $52,124 and $30,339 in cash. Even if Father had decided to pay himself wages or dividends equal to the unretained earnings, neither company had the available cash to do so.

[4] Shareholder loans to IES were slightly down from $79,712 in 2008 to $76,781 in 2009.

shown to have generated a profit, all profits would not necessarily be paid to Father. Father's AFI is designed to disclose his personal income, not income earned by businesses owned by him (unless paid to him).

¶27 Next, Mother contends that Father's failure to include the distributions from his IRA in 2010 as income on his AFI is proof that the AFI is false. Again, Mother is incorrect. The AFI specifically sets forth thirteen categories of income which must be disclosed, and none of these categories include distribution from an IRA. Indeed, withdrawing money from an IRA is analogous to withdrawing money from a savings account. Any such withdrawals are not fairly characterized as income. Similarly, Arizona Rule of Family Law Procedure 49 provides a laundry list of types of income which a party must disclose in connection with the party's Resolution Statement. These include: "salaries, wages, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, worker's compensation benefits, unemployment insurance benefits, disability insurance benefits, recurring gifts, prizes, and spousal maintenance." Rule 49(C)(2). Absent from this list is a withdrawal of principal from an IRA, 401k, or any other type of savings or investment vehicle.

¶28 Next, Mother claims Father falsely testified that "over [the] last few years, IES has done nothing in sales." Mother claims this is a false statement because IES's 2009 federal tax return shows that it had sales of $26,809. Father testified that "the last few years Innovative Engineering Solutions didn't do anything." He did not specifically mention sales. The tax return shows that IES had income of $26,809, with deductions of $24,233 and a net operating loss deduction of $2,576. The bottom line was that IES had no taxable income in 2009. In other words, Father's testimony was accurate.

¶29 Father also agreed with his attorney that IES had lost over $100,000 in gross sales from 2008 to 2009. Mother cites to the two year summary included with IES's 2009 tax return as support for her charge that Father lied when he testified to the $100,000 loss in sales.[5] The two year summary cited by Mother is in error. IES's federal tax return for 2008, which was also entered into evidence, clearly shows gross sales of $174,891 in 2008. IES's 2009 return indicates gross sales of $26,809. Thus, the evidence corroborates Father's testimony that IES had

[5] The Form 1120 two year comparison cautions: "Keep for your records – Do not file." It is a comparison routinely prepared for the convenience of the taxpayer by the preparer and is not filed with the IRS.

a decline of more than $100,000 in gross sales between 2008 and 2009.

¶30 Mother has not provided any evidence that Father made any intentional, material false statement to the trial court rising to the level of perjury or warranting sanctions. *Franzi v. Superior Court (Livermore)*, 139 Ariz. 556, 564, 679 P.2d 1043, 1051 (1984) (explaining that a statement must (1) be made in the course of an official proceeding, (2) while under oath, (3) false, (4) believed by the speaker to be false, and (5) a material statement, to be perjury). Thus, the trial court did not abuse its discretion in refusing to sanction Father or find him guilty of perjury.

4. Award of Mother's Attorneys' Fees

¶31 The only issue remaining is whether the trial court abused its discretion in awarding Mother only a portion of her attorneys' fees pursuant to A.R.S. § 25-324. *See Alley v. Stevens*, 209 Ariz. 426, 429, ¶ 12, 104 P.3d 157, 160 (App. 2004) ("[T]he failure to award fees in a child-support matter will not be reversed unless the court abused its discretion."). Pursuant to § 25-324, a court has discretion to award attorneys' fees in a dissolution proceeding "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings."

Ascertaining the parties' financial resources and the reasonableness of the parties' positions pursuant to § 25-324 is a factual determination for the trial court based on the issues raised and the evidence the parties present to support their positions.

¶32 The evidence supports the trial court's award of only a portion of Mother's attorneys' fees. In this case, the trial court stated it considered the factors articulated in A.R.S. § 12-324; specifically, the relative financial conditions of the parties and the reasonableness of their positions throughout these proceedings. Father testified that he could not afford to pay for Mother's attorneys' fees. Moreover, many of the positions adopted by Mother were unreasonable, including her view that Father's IRA distributions and his companies' unretained earnings should have been counted as income. Mother also refused Father's initial attempts to voluntarily meet and confer to resolve the situation, and she declined to participate in a settlement conference. In this regard, she took the position that because the trial court had neglected to check the "Order" boxes in the consent decree, she and Father were still married and the entire property settlement would have to be "re-done." This, despite the fact that her petition sought to enforce the consent decree and settlement agreement. In

awarding partial fees, the trial court noted that it had granted Mother's petition for contempt, in part.

¶33 Because the trial court is in the best position to observe and assess the conduct of the parties before it, we cannot say that the trial court clearly erred when it awarded Mother only $2,500 in attorneys' fees. *See Graville v. Dodge,* 195 Ariz. 119, 131, ¶ 56, 985 P.2d 604, 616 (App. 1999).

¶34 Finally, we deny Father's request for an award of attorneys' fees on appeal because he failed to cite any authority in support of his request. *See Roubos v. Miller*, 214 Ariz. 416, 420, ¶ 21, 153 P.3d 1045, 1049 (2007) ("When a party requests fees, it . . . must state the statutory or contractual basis for the award[.]"). As the prevailing party, however, Father is entitled to an award of costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

Conclusion

¶35 For the foregoing reasons, we affirm the trial court's order.

/S/

ANDREW W. GOULD, Judge

CONCURRING:

/S/

MAURICE PORTLEY, Presiding Judge

/S/

ANN A. SCOTT TIMMER, JUDGE