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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Marriage of:

NANCI J. COSTA, *Petitioner/Appellant*,

v.

CHARLES V. COSTA, *Respondent/Appellee*.

No. 1 CA-CV 15-0091 FC
FILED 3-15-2016

Appeal from the Superior Court in Maricopa County
No. FN 2013-092168
The Honorable Benjamin R. Norris, Judge, *Retired*

REVERSED

COUNSEL

Adam C. Rieth, P.L.L.C., Gilbert
By Adam C. Rieth
Counsel for Petitioner/Appellant

Larson & Simpson, PLC, Chandler
By Todd D. Simpson
Counsel for Respondent/Appellee

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MEMORANDUM DECISION

Chief Judge Michael J. Brown delivered the decision of the Court, in which Acting Presiding Judge Patricia A. Orozco and Judge Kenton D. Jones joined.

B R O W N, Chief Judge:

¶1 Nanci J. Costa (“Wife”) appeals from the trial court’s order granting Charles V. Costa’s (“Husband”) petition to modify spousal maintenance. Because we conclude that Husband failed to meet his burden of establishing a substantial and continuing change of circumstances, we reverse the order modifying spousal maintenance.

BACKGROUND

¶2 The parties married in 1983. In July 2013, Wife petitioned for dissolution of the marriage, requesting, among other things, “spousal maintenance in the amount of \$200.00 a month for life.” Husband failed to respond to the petition and the trial court entered a default decree of dissolution, including the requested spousal maintenance award, on October 10, 2013.

¶3 In July 2014, Husband filed a petition to modify the support order, alleging he had “experienced a significant, substantial and continuing change in circumstances” that warranted terminating his spousal maintenance obligation. Specifically, Husband alleged he was employed part-time when the decree was entered, but was unable to “maintain his employment” for health reasons, leaving Social Security disability benefits as his only source of income.

¶4 At a subsequent evidentiary hearing conducted by a different judge, Husband (age 57 at the time) testified that during the preceding eighteen-month period, he had worked part-time at a retail store from September 4, 2013 until December 4, 2013. He quit because health problems, including emphysema, prevented him from performing required tasks, such as stocking shelves, and his employer refused any accommodation. At the time the decree was entered, Husband received \$750 per month from his part-time employment and \$1550 per month in Social Security disability payments, after Medicare deductions. Husband

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acknowledged that the nature and severity of his physical disability remained unchanged since the time the decree was entered, but explained his financial situation changed significantly because he was simply unable to meet the physical demands of his employment and had been unable to find new employment that would accommodate his disability. Husband presented evidence that his monthly disability benefits increased slightly since the decree was entered to \$1575 after Medicare deductions.

¶5 Wife (age 80 at the time) testified that she continues to need spousal maintenance to meet her monthly expenses. Her net income, minus Medicare deductions, is \$1489. Wife further testified that she was unaware Husband was employed at the time the decree was entered and that no evidence was presented to the trial court at that time “other than disability benefits.”

¶6 The trial court found there had been a substantial and continuing change in circumstances “in that Husband was unable for medical reasons to continue with the employment he had at the time of the decree.” The court further determined it was “appropriate . . . to give each party the same income.” Therefore, because Husband’s net monthly income was \$1,575 and Wife’s net monthly income was \$1489, the court reduced Husband’s spousal maintenance obligation to \$42.85 per month.

DISCUSSION

¶7 Wife argues the trial court erred by finding Husband’s voluntary termination of employment justified a reduction of the spousal maintenance award. As provided by statute, a spousal maintenance award may be modified “only upon a showing of changed circumstances which are substantial and continuing[.]” Ariz. Rev. Stat. (“A.R.S.”) § 25-327(A). We review a trial court’s determination that a sufficient change in circumstances supports a modification of a spousal maintenance award for an abuse of discretion, deferring to the court’s findings of fact. *Van Dyke v. Steinle*, 183 Ariz. 268, 273 (App. 1995). An abuse of discretion occurs when the record, viewed in the light most favorable to the appellee, “is devoid of competent evidence to support” the court’s decision. *Little v. Little*, 193 Ariz. 518, 520 (1999) (internal quotation omitted).

¶8 “The burden of proving changed circumstances is on the party seeking modification.” *Scott v. Scott*, 121 Ariz. 492, 494 (1979). “The changed circumstances alleged must be proved by a comparison with the circumstances existing at dissolution.” *MacMillan v. Schwartz*, 226 Ariz. 584, 588, ¶ 12 (App. 2011).

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¶9 Wife first argues the trial court erred when it found that Husband’s voluntary decision to quit his part-time job was a substantial and continuing change of circumstances under A.R.S § 25-327(A). Wife asserts that the court should have compared Husband’s current financial circumstances to “the circumstances known to the court at the time the default decree” was entered when determining whether a change in circumstances occurred. *See Smith v. Mangum*, 155 Ariz. 448, 451 (App. 1987) (“A reference to ‘changed circumstances’ required by § 25-327(A) for modification of spousal maintenance is clearly a reference to the economic circumstances that justified the original award, as set forth in § 25-319.”). Although the doctrine of res judicata prevents a party who failed to participate in a dissolution proceeding and did not appeal the spousal maintenance award included in a default decree from “obtaining a modification of the award based on facts which could have been raised at the hearing,” the doctrine “does not prevent a person from introducing evidence of circumstances at the time of the dissolution in order to demonstrate a change in circumstances since the dissolution.” *See In re Marriage of Rowe*, 117 Ariz. 474, 475-76 (1978). “Otherwise, a person could never satisfy the prerequisites needed to modify a support order, as set forth in A.R.S. § 25-327. Although one may argue that proof of conditions as they existed at the time of the dissolution is a heavy burden for a party to bear, it is a burden brought about solely because that party failed to produce evidence at the original hearing[.]” *Id.* at 476.

¶10 Applying *Rowe*, Husband was not precluded from petitioning for modification and asserting that his circumstances had changed since entry of the decree. However, he carried the “heavy burden” of showing the “conditions as they existed at the time of the dissolution.” *Id.* Without question, Husband established that he was employed at the time the divorce decree was entered. He has not established, however, that the trial court was aware Husband had earnings from part-time employment when the court awarded spousal maintenance. Equally important, Husband has failed to show how evidence of his employment at that time would have impacted the court’s decision to set the award at \$200 per month, and no reasonable argument can be made that the court would have awarded less than \$200 if it had been apprised of Husband’s additional income. Based on the very limited record before us, the court approved Wife’s requested spousal maintenance award based on Husband’s disability income, which necessarily means there was no change in the economic conditions upon which the court entered the decree and those existing when Husband filed his petition for modification. In other words, because the original award was not impacted by Husband’s additional income, his loss of that income did not constitute a change justifying modification.

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¶11 In our discretion, we also consider Wife’s alternative argument that the trial court abused its discretion by modifying Husband’s spousal maintenance obligation without evidence that he was unable to pay the original award or that she was no longer in need of support. The trial court found that Husband was unable to continue working due to medical reasons. Accepting that finding, we nonetheless conclude that Husband failed to meet his burden of demonstrating the continuing nature of his change in circumstances.

¶12 At the evidentiary hearing, Wife presented undisputed evidence that her living expenses exceed her monthly income. Husband likewise testified that his monthly disability benefit is insufficient to meet his living expenses such that he has resorted to taking out a loan on his vehicle to pay bills. Husband also testified that he quit his part-time job because he could not complete the physical tasks required, but acknowledged that his medical condition remains stationary and has not worsened since his employment. Husband further testified that he has sought subsequent employment, but has been unable to find any job for which he is qualified and the employer is willing to accommodate his physical limitations. As noted by Wife, Husband did not present any evidence from a medical professional or vocational expert demonstrating that he is physically unable to work. More importantly, Husband did not testify that he is unable to work. To the contrary, Husband testified that he has sought employment, demonstrating an implicit belief that he is employable. Although Husband testified generally that he has looked for employment, he did not present any evidence regarding the nature and extent of his job search. Husband therefore failed to establish that he was currently incapable of earning any additional income.

¶13 Accordingly, the trial court abused its discretion in implicitly concluding that Husband met his burden of showing a substantial and continuing change in circumstances. If Husband is able to provide competent evidence that he is unable to acquire any employment that would allow him to earn additional income, he may petition the court in a future proceeding for modification of the spousal support award. *See Rowe*, 117 Ariz. at 476 (explaining that husband could petition for spousal maintenance modification again if circumstances changed but that speculation as to what may occur in the future does not constitute, “by definition, a changed circumstance”).

¶14 Finally, Wife argues the trial court erred by denying her request for attorneys’ fees. She contends Husband’s position was unreasonable and thus he should have been ordered to pay fees,

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notwithstanding the relative financial resources of the parties. We review a court's denial of a request for attorneys' fees for an abuse of discretion. Pursuant to A.R.S. § 25-324, after consideration of the parties' financial resources and the reasonableness of their positions, a court may order a party to pay a reasonable amount to the other party for attorneys' fees.

¶15 Applying A.R.S. § 25-324, the trial court found that neither party has substantially greater financial resources than the other nor did they take unreasonable positions. Because the record supports the court's findings, the court did not abuse its discretion by denying Wife's request for attorneys' fees.

CONCLUSION

¶16 For the foregoing reasons, we reverse the trial court's order modifying spousal maintenance. In the exercise of our discretion, we deny both parties' requests for attorneys' fees incurred on appeal under A.R.S. § 25-324. As the prevailing party, however, Wife is entitled to an award of taxable costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.



Ruth A. Willingham · Clerk of the Court
FILED : ama