



In the Missouri Court of Appeals Eastern District

DIVISION THREE

STEVEN H. SEROT, by Next Friend)	ED104502
DEBRA SEROT,)	
)	
Respondent,)	Appeal from the Circuit Court
)	of St. Louis County
v.)	
)	
NANCY L. SEROT,)	Honorable Margaret T. Donnelly
)	
Appellant.)	Filed:

Introduction

Nancy L. Serot (Nancy) appeals from the trial court's Judgment granting the motion to modify maintenance filed by Steven H. Serot (Steven) through his Next Friend Debra Serot (Debra). In her three points on appeal, Nancy argues the trial court erred in denying her motions to dismiss and for summary judgment for Steven's failure to comply with the dissolution judgment, in granting the motion to modify because Steven failed to show a substantial and continuing change in circumstances, and in failing to award Nancy attorney's fees. We affirm.¹

Background

The trial court dissolved Nancy and Steven's marriage in 2006. During the marriage, Steven was self-employed selling insurance through his company Steven Serot and Associates,

¹ Appellant Nancy L. Serot has filed a motion to dismiss Respondent Steven H. Serot's brief on appeal. We deny the motion.

and Nancy did not work outside of the home. At the time of the 2006 dissolution judgment Steven's annual adjusted gross income was \$647,255.00. The dissolution judgment ordered Steven to pay Nancy \$15,000 per month in modifiable maintenance.

In March of 2014, Steven filed a motion to modify maintenance and a motion to appoint Next Friend. His motion to modify alleged a substantial and continuing change in circumstances, in that he suffered a stroke in November of 2013, rendering him incapacitated. Due to the stroke, he was unable to work selling insurance, thus eliminating or reducing his earning capacity and earned income. He further alleged that Nancy was able to provide for her reasonable needs. For his motion to appoint Next Friend, Steven asserted that Debra was Steven's attorney-in-fact pursuant to a general durable power of attorney dated from December of 2013. The trial court appointed Debra as Steven's Next Friend.

As relevant to this appeal, Nancy filed a motion to dismiss Steven's motion to modify, arguing that because Steven had willfully refused to comply with the maintenance order since March 15, 2014, he could not then move to modify the order. Nancy likewise filed a motion for summary judgment, asserting she was entitled to judgment as a matter of law on the same grounds set forth in the motion to dismiss. The trial court took both motions with the case. Throughout the pendency of the case, Nancy filed multiple garnishment applications and orders.

After a trial, the trial court granted Steven's motion to modify maintenance, finding that there had been a substantial and continuing change in circumstances since the 2006 dissolution judgment, in that following Steven's 2013 hemorrhagic stroke he is permanently disabled and will never be able to work again. Steven's income had decreased since the 2006 dissolution judgment and he no longer had the same resources to meet his reasonable needs, while Nancy's income had increased and her reasonable expenses had decreased. Accordingly, the trial court reduced

Steven's maintenance obligation from \$15,000 per month to \$5,000 per month, retroactive to March of 2014, when legal counsel for Nancy entered his appearance.

For support, the trial court found Steven's earning potential as of 2014 was \$317,721.00,² which was a decrease from his former income of \$647,255.00 at the time of the prior maintenance order. The trial court noted that Steven had received in 2014 a one-time payout from his deferred compensation fund of \$439,859.00, but the court concluded that the deferred payout was not income derived from his commissions for 2014 and accordingly did not consider this one-time disbursement in Steven's income for the purpose of calculating maintenance. The trial court concluded that, after taxes, Steven's net monthly income was \$25,835.17, and his reasonable monthly expenses were \$20,531.00.

Regarding Nancy, the trial court found that since the 2006 dissolution judgment, she had become self-employed as a part-time real-estate agent and had obtained a master's degree in biosecurity and disaster preparedness. However, the trial court also considered Nancy's reported health problems and found that while she was not disabled, she only had the ability to work 25 hours per week. While Nancy's reported annual income for 2014 was \$4,157, the court determined that in light of Nancy's job skills acquired since the 2006 dissolution, Nancy should be able to earn \$18,600.00 per year either as a part-time real-estate agent or in part-time security-system sales. Moreover, the court found that Nancy receives social security benefits, and that she can earn 3%

² The trial court calculated Steven's gross annual income from testimony at trial as follows:

Business income (less expenses)	\$46,725.00
Investment income, assuming a 3% rate of return	\$4,979.00
Lincoln National annual dividend	\$2,078.00
IRA earnings, assuming a 3% rate of return	\$6,887.00
Social Security disability benefit of \$2,665.00 per month	\$31,980.00
UNUM Group disability benefit of \$11,600.00 per month	\$139,200.00
Lincoln National disability benefit of \$7,156.00 per month	\$85,872.00
TOTAL GROSS INCOME	\$317,721.00

interest income—without drawing from the principal—from bank accounts valued at \$50,039, a family trust valued at \$250,000, and IRAs valued at \$940,429.00. Using these figures, the trial court determined Nancy was able to earn a gross annual income of \$67,070.00.³ The trial court concluded that, after taxes, Nancy’s net monthly income was \$4,910.00, and her reasonable monthly expenses were \$10,383.00.

As for Nancy’s motions to dismiss and for summary judgment for failure to comply with the 2006 maintenance order, the trial court denied the motions after the trial. The trial court agreed that Steven had not made regular maintenance payments since his stroke in November of 2013, but it found that Steven no longer had the ability to make the maintenance payments because his income had decreased significantly through no fault of his own. Nevertheless, because Steven’s failure to pay maintenance during the pendency of the case had required Nancy to file multiple garnishment orders, the trial court found it was reasonable for Steven to pay Nancy \$4,000 as and for attorney’s fees expended for the garnishments. Other than the \$4,000 award, the trial court declined to award attorney’s fees, finding the parties had the ability to pay their respective fees despite their income disparity. This appeal follows.

Discussion

Nancy raises three points on appeal challenging the trial court’s judgment denying her motions to dismiss and for summary judgment, granting Steven’s motion to modify, and granting only part of her attorney’s fees. We address these three points in the order raised.

³ The trial court calculated Nancy’s gross annual income as follows:

Imputed wages	\$18,600.00
Investment income, assuming a 3% rate of return	\$9,001.00
IRA earnings, assuming a 3% rate of return	\$28,213.00
Social Security benefit of \$938.00 per month	\$11,256.00
TOTAL GROSS INCOME	\$67,070.00

Point I

In her first point on appeal, Nancy argues the trial court erred in denying her motion to dismiss Steven's motion to modify and in denying her motion for summary judgment, because Steven had the ability to comply with the prior maintenance order during the pendency of the case but refused to do so. We disagree.

In her motions to dismiss and for summary judgment, Nancy sought dismissal under Rule 67.03,⁴ which allows a defendant to move for an involuntary dismissal of a civil case for the plaintiff's failure to comply with an order of the court. We review a trial court's decision to deny a motion to dismiss under Rule 67.03 for an abuse of discretion. Stine v. Stine, 401 S.W.3d 567, 570 (Mo. App. E.D. 2013). An abuse of discretion occurs when the trial court's order is clearly against the logic of the circumstances before the court, and is so arbitrary and capricious as to shock the sense of justice and indicate a lack of careful consideration. Staples v. Staples, 895 S.W.2d 265, 266 (Mo. App. E.D. 1995). As for Nancy's challenge on her motion for summary judgment, the trial court's denial of a motion for summary judgment is generally not subject to appellate review, and thus we decline to review it. Hiln v. Hiln, 235 S.W.3d 64, 67 (Mo. App. E.D. 2007).

A party may not "simultaneously flout and invoke the authority of the court." Staples, 895 S.W.2d at 267. Thus, where the facts show the paying party has the ability to comply with court-ordered maintenance but fails to do so, a trial court may properly dismiss the party's motion to modify the very order with which he or she has failed to comply. Id. Where, however, the facts show the paying party is unable to comply with the maintenance order, for example due to a reduction in income caused by retirement or medical conditions affecting his or her ability to work,

⁴ All rule references are to Mo. R. Civ. P. (2016), unless otherwise noted.

we will generally not find an abuse of discretion in the trial court's refusal to dismiss the motion to modify. See Stine, 401 S.W.3d at 570.

The trial court here found that Steven's stroke left him permanently disabled and unable to work, resulting in a significantly reduced income that did not allow him to meet both the maintenance payments of \$15,000 per month to Nancy and his own reasonable needs. The trial court found credible the evidence presented at trial showing that Steven's monthly income was \$25,835.17, while his reasonable monthly expenses were \$20,531.00. We defer to the credibility determinations of the trial court, even where the evidence could support a different conclusion. Gal v. Gal, 937 S.W.2d 391, 392 (Mo. App. E.D. 1997). With reasonable monthly expenses of only approximately \$5,000 less than his monthly income, the credible evidence shows that Steven was unable to comply with the prior maintenance order of \$15,000 per month. Where a party is unable to comply with the current order, the trial court does not abuse its discretion in denying a motion to dismiss under Rule 67.03. See Stine, 401 S.W.3d at 570.

Moreover, the evidence at trial showed that in order to pay his day-to-day expenses while he was unable to work and awaiting the results of his applications for disability benefits, Steven cashed out his deferred compensation fund in 2014. The trial court also found that Steven withdrew \$121,695.19 from a 401(k) savings plan on May 1, 2015 and deposited that amount with the circuit court to pay the maintenance obligation to Nancy. Nancy confirmed that she received a check for \$121,695.19 in June of 2015, which was prior to the August, 2015 trial. To the extent Nancy argues on appeal that Steven had substantial assets from which to pay his maintenance obligation, the evidence shows that he did in fact use his assets to pay maintenance as well as his own reasonable expenses.

Under these facts, we do not find the trial court here abused its discretion in denying Nancy's motion to dismiss under Rule 67.03. Point denied.

Point II

In her second point on appeal, Nancy argues the trial court erred in granting Steven's motion to modify because Steven failed to show a change in circumstances so substantial and continuing as to make the terms of the original dissolution judgment unreasonable. We disagree.

We review a trial court's judgment modifying a prior maintenance order for whether the judgment is supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. Stine, 401 S.W.3d at 569. We view the evidence and reasonable inferences therefrom in the light most favorable to the trial court's judgment, and we disregard all contrary evidence and inferences. Shanks v. Shanks, 117 S.W.3d 718, 720 (Mo. App. E.D. 2003). The trial court has broad discretion in determining the maintenance amount. Hill v. Hill, 53 S.W.3d 114, 116 (Mo. banc 2001). On appeal, we presume the trial court's judgment is valid, and the burden falls on the appellant to rebut this presumption and show an abuse of discretion. Borchardt v. Borchardt, 496 S.W.3d 635, 640 (Mo. App. E.D. 2016).

On a motion to modify, the movant has the burden to establish changed circumstances so substantial and continuing as to make the terms of the dissolution judgment unreasonable. Section 452.370.1⁵; Greenberg v. Greenberg, 454 S.W.3d 390, 394 (Mo. App. E.D. 2015). The movant must support the claim of changed circumstances with detailed evidence. Greenberg, 454 S.W.3d at 394. In determining whether there has been a substantial and continuing change in circumstances, the trial court must consider all financial resources of both parties. Section 452.370.1. A change in circumstances occurs either when the obligor spouse has had a change in

⁵ All statutory references are to RSMo (Cum. Supp. 2016), unless otherwise noted.

income rendering him or her unable to pay the original maintenance award, or the obligee spouse becomes able to meet his or her reasonable expenses without receiving maintenance. Greenberg, 454 S.W.3d at 394. The obligor's involuntary retirement can demonstrate changed circumstances supporting a modification of maintenance where there is evidence that the obligor spouse is unable to pay the current maintenance award due to reduced income. See Borchardt, 496 S.W.3d at 641.

On appeal, Nancy challenges three aspects of the trial court's modification of maintenance. First, she challenges the trial court's finding that Steven's income had substantially declined since the date of the 2006 dissolution judgement. Second, she challenges the evidence supporting the trial court's finding that Steven's stroke in fact reduced his ability to earn. Third, she argues the trial court erroneously considered interest income from her investments and IRAs awarded to her in the dissolution as part of her income for the purpose of calculating maintenance.

a. Calculation of Steven's Income

First, as to the trial court's calculation of Steven's income, Nancy argues the trial court erred in finding Steven's income had decreased since the date of the 2006 dissolution. Nancy pointed to Steven's 2014 income tax return, which showed that in 2014 Steven earned \$893,602.38, to argue that Steven's income had in fact increased substantially since the 2006 dissolution. Specifically, Nancy challenges the trial court's exclusion from Steven's 2014 income the pay-out of \$439,859.00 from his deferred compensation plan, asserting that the trial court must consider all of Steven's income in calculating maintenance.

Here, the evidence at trial was that prior to Steven's stroke, he derived his income from commissions earned when he sold new insurance policies, from renewal commissions on permanent policies, and from commissions for premium payments on permanent policies. However, since his stroke in November of 2013, Steven had been unable to work and had not sold

any new policies, resulting in a reduction of income. At the time of the 2006 dissolution, Steven's annual adjusted gross income was \$647,255.00. In 2011, Steven's net business income was \$569,079; in 2012, his net business income was \$297,113; and in 2013, his net business income was \$151,298. In 2014 following his stroke, Steven's net business income was \$31,707.

While Steven's 2014 tax return also showed a payment of \$439,859.00, testimony and evidence at trial reflected that this payment was a one-time, non-recurring disbursement from his deferred compensation plan. Debra testified at trial that she cashed out the full amount of the deferred compensation plan after Steven's stroke because Steven was not earning any income and his requests for disability had not yet been approved. While Nancy argues on appeal that the trial court erred in failing to treat this one-time disbursement as continuing income for purposes of calculating maintenance, Nancy's own filings on appeal reveal that in 2015 only \$728.82 remained in Steven's deferred compensation plan.

Last, Steven's tax returns showed that in 2014 he began receiving recurring Social Security disability payments and long-term disability payments under two separate insurance policies. A certified public accountant testified to his projections for Steven's future income, considering commissions from policy renewals and payments, the social security disability payments, the disability insurance payments, and investment income, for a projected total gross annual income of \$317,721.00. The trial court found the expert witness's projections of Steven's future income to be "credible and persuasive," and the trial court adopted the projections in its judgment modifying maintenance. On review, we defer to the trial court's findings both on contested factual issues and on credibility issues. Arndt v. Arndt, 519 S.W.3d 890, 898-99 (Mo. App. E.D. 2017).

On this record, we find substantial evidence supports the trial court's determination that Steven's income had decreased since the prior maintenance order. The trial court properly

considered all the evidence before it, specifically including the one-time disbursement from Steven's deferred compensation fund. In calculating the reasonableness of an existing maintenance award, it is proper for the trial court to consider the obligor's future income as well as his past and present income. Forbes v. Forbes, 133 S.W.3d 508, 511 (Mo. App. E.D. 2004). Steven had not worked since his stroke and had not sold any new insurance commissions. His retirement was not voluntary but was due to a debilitating stroke that left him with a multitude of health problems, as we discuss below. See Borchardt, 496 S.W.3d at 641 (involuntary retirement can prove change of circumstances when results in reduction of income). As well, since his stroke and involuntary retirement, Steven's income had decreased substantially: while he received disability payments and investment income, these sources of income were less than his prior income. Stine, 401 S.W.3d at 570-71 (decrease in income due to medical problems can provide sufficient evidence of changed circumstances justifying modification of maintenance). Under these facts, Nancy cannot overcome our presumption on appeal that the trial court's judgment was valid.

b. Steven's Ability to Earn Income

Likewise, Nancy asserts on appeal that the evidence at trial of Steven's future medical condition and ability to earn was speculative, and thus Steven failed to meet his burden to show a substantial and continuing change in circumstances to justify a modification of maintenance. We disagree.

At trial, Dr. Donald Morris testified to the following. He was Steven's primary care physician and familiar with Steven's medical condition. Following Steven's stroke in November of 2013, Steven suffers from persistent left-side weakness, chronic pain, impaired left-side vision, and a neurogenic bladder. As well, he has cognitive deficits, in that he cannot manage complex

tasks, although he can speak clearly and communicate. The resulting left-side weakness from the stroke has left Steven with muscle atrophy, and as consequence, he constantly holds his left arm flexed at the elbow and his left hand in the shape of a claw. He is unable to walk more than short distances without the help of a walker, and he cannot go to the bathroom without assistance and requires adult diapers. While Steven believes he can recover completely, Dr. Morris testified that he does not believe Steven will recover further, but rather that Steven is permanently disabled and unable to work. In addition, Debra testified that Steven no longer understands complex information about insurance policies, and that the social security administration approved Steven's disability benefits.

Despite this overwhelming evidence, Nancy argues on appeal that Steven failed to present evidence beyond speculation that his stroke and the complications therefrom have rendered him unable to work in the present or in the future. Nancy suggests that Steven could continue to generate new insurance commissions via the use of a speakerphone. Nancy's argument is without merit. While there are some facts in the record supporting Nancy's narrative, under our standard of review, we view the evidence in the light most favorable to the trial court's judgment and disregard contrary evidence and inferences. See Shanks, 117 S.W.3d at 720. Nancy bears the burden on appeal of overcoming our presumption that the trial court's decision was correct. See Borchardt, 496 S.W.3d at 640. Nancy cannot, by pointing to certain favorable facts, meet that burden here. The overwhelming weight of the evidence supports the trial court's finding of a substantial and continuing change in circumstances making the prior maintenance award unreasonable.

c. Nancy's Increase in Income

Last, Nancy argues the trial court erred in considering income available to her from earnings on her investments and IRAs because those investments did not constitute a change in circumstances, in that they were awarded her in the 2006 dissolution.

Either a decrease in the income of the spouse paying maintenance *or* an increase in the income of the spouse receiving maintenance can constitute a sufficient change in circumstances to justify the modification of maintenance, as long as the change is sufficiently substantial so as to render the terms of the original maintenance order unreasonable. See Greenberg, 454 S.W.3d at 394; Stine, 401 S.W.3d at 571. Here, Steven proved with detailed evidence that his income had substantially decreased since the date of the original maintenance order, which was sufficient to demonstrate a substantial and continuing change in circumstances justifying the trial court's modification of his maintenance obligation. Steven was not required to *also* prove that Nancy's income had increased in order to meet his burden on the motion to modify. Thus, any error the trial court may have made in calculating Nancy's income, which we do not determine, would have been harmless. The trial court did not err in reducing Steven's maintenance obligation from \$15,000 per month to \$5,000 per month based on his reduced income alone.

Because Steven met his burden to establish a substantial and continuing change making the prior maintenance order unreasonable, the trial court did not err in granting the motion to modify. Point denied.

Point III

In her third point on appeal, Nancy argues the trial court erred in failing to award her \$132,751.24 in attorney's fees because Steven has greater financial resources than Nancy, Steven's motion to modify had no merit, and Steven's actions during the pendency of the case caused Nancy to incur substantial attorney's fees. We disagree.

“Parties to a domestic relations case are generally responsible for paying their own attorney’s fees.” Goins v. Goins, 406 S.W.3d 886, 891 (Mo. banc 2013). The trial court may, however, award attorney’s fees pursuant to Section 452.355.1 after considering certain relevant factors, including the financial resources of both parties, the merits of the case, and the actions of the parties during the pendency of the action. Id. The trial court has broad discretion to award or deny a party’s request for attorney’s fees, and we will not overturn a trial court’s order absent a showing of abuse of this broad discretion. In re Marriage of Brown, 310 S.W.3d 754, 758 (Mo. App. E.D. 2010). Moreover, we consider the trial court an expert on attorney’s fees, and we presume its award of such fees is correct. Short v. Short, 356 S.W.3d 235, 248 (Mo. App. E.D. 2011); Andrews v. Andrews, 344 S.W.3d 749, 750 (Mo. App. E.D. 2011). We will reverse the trial court’s award of attorney’s fees only upon a finding of manifest injustice. Stine, 401 S.W.3d at 572-73.

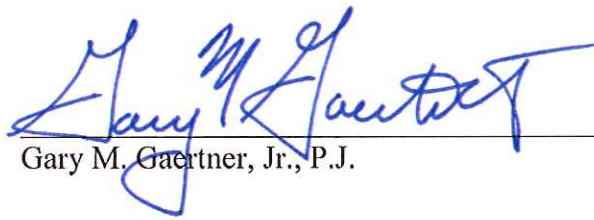
Here, Nancy requested that the trial court order Steven to pay \$132,751.25 of her attorney’s fees. The trial court concluded that both parties had the ability to pay their respective attorney’s fees but awarded Nancy \$4,000.00 upon finding that Nancy had to file a series of garnishments to collect maintenance Steven owed her during the pendency of the case. In reaching its decision, the trial court properly considered the financial resources of both parties, correctly noting that the fact that one party’s income is greater than the other’s does not compel an award of attorney’s fees. Edwards v. Edwards, 475 S.W.3d 218, 225 (Mo. App. W.D. 2015). Rather, each party is generally responsible for their own fees. Goins, 406 S.W.3d at 891. While Nancy argues Steven’s actions during the pendency of the case caused her to incur substantial attorney’s fees, the trial court specifically considered Steven’s actions during the case and awarded her \$4,000 in attorney’s fees accordingly. As for Nancy’s argument that Steven’s motion to modify was without merit, the trial

court disagreed, and we have previously found that substantial evidence supported the trial court's decision.

We see nothing in the record to support a finding that the trial court's award of attorney's fees was an abuse of discretion. See Short, 356 S.W.3d at 248. Point denied.

Conclusion

The judgment of the trial court is affirmed.



Gary M. Gaertner, Jr., P.J.

Robert M. Clayton III, J., and
Angela T. Quigless, J. concur.