

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

DONALD C. BOATWRIGHT,)	1 CA-CV 04-0423
)	
Appellant,)	DEPARTMENT C
)	
v.)	MEMORANDUM DECISION
)	(Not for Publication -
CARMELITA D. BOATWRIGHT,)	Rule 28, Arizona Rules
)	of Civil Appellate
Appellee.)	Procedure)
)	
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		FILED 3/8/05

Appeal from the Superior Court in Maricopa County

Cause No. DR 1988-007053

The Honorable A. Craig Blakey, II, Judge

AFFIRMED

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Law Offices of Hubert E. Kelly, P.C.	Phoenix
By Hubert E. Kelly	
Attorneys for Appellant	
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By Monica H. Donaldson	
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B A R K E R, Judge

¶1 Donald C. Boatwright ("appellant") appeals the trial court's order denying modification of his spousal maintenance obligation to his former spouse, Carmelita D. Boatwright ("appellee").

Facts and Procedural Background¹

¶2 The parties were married on January 23, 1967, and divorced on September 11, 1978. There were no minor children from their marriage. The parties entered into a property settlement agreement that required appellant to pay \$3000 per month in spousal maintenance until appellee's death or remarriage, modifiable upon written agreement. On October 2, 1979, the parties agreed in writing to reduce the amount of spousal maintenance to \$2000 per month, again payable to appellee until her death or remarriage. In 1988, appellant unsuccessfully petitioned to modify or terminate his spousal maintenance obligation to appellee.

¶3 Appellant retired in 1999. He and his present wife have a community estate worth approximately \$1.7 million. All of appellant's income since retirement has been from sources other than earned income, such as investments, retirement distributions, and social security.

¶4 Appellee lives with her mother. Appellee's gross income consists of \$731 in social security and \$2000 in spousal maintenance from appellant. Appellee cannot drive due to her poor eyesight. Sloanne, appellee's 40-year-old daughter, helps appellee and appellee's mother once or twice a week with cooking, cleaning, and maintaining the house. Sloanne also helps her mother and

¹ A transcript of the proceedings was not filed with the superior court. As such, we rely on some uncontested facts from the briefs.

grandmother by driving them to appointments and picking up prescriptions. If Sloanne did not provide for her mother, her mother would need to hire a nurse or caretaker, which would exceed her monthly income. Appellee gives Sloanne \$1000 monthly for utilities and expenses. Appellee also pays Sloanne's car payment. In her deposition, Sloanne said of her relationship with her mother and grandmother: "We . . . just kind of put our resources together, and so I take care of them."

¶5 Appellant argues that retirement and a change in the source of his income from earnings to investments is sufficient to modify his spousal maintenance obligation. Appellant also alleges substantial and continuing changes in appellee's circumstances warrant modification. Further, appellant argues that the trial court erred in awarding attorneys' fees. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-120.21(A)(1) (2003).

Discussion

¶6 We review the trial court's determination of whether there are changed circumstances sufficient for modification of spousal maintenance for abuse of discretion. *See, e.g., Nace v. Nace*, 107 Ariz. 411, 413, 489 P.2d 48, 50 (1971). "On questions of law, however, we review de novo." *Van Dyke v. Steinle*, 183 Ariz. 268, 273, 902 P.2d 1372, 1377 (App. 1995).

¶7 Pursuant to A.R.S. § 25-327(A) (Supp. 2004),² modification of maintenance awards requires “a showing of changed circumstances that are substantial and continuing.” “The burden of proving changed circumstances is on the party seeking modification.” *Scott v. Scott*, 121 Ariz. 492, 494, 591 P.2d 980, 982 (1979).

¶8 Appellant argues that going from an earned income as a surgeon to a passive income as a retired investor constitutes a substantial and continuing change. Appellant relies on *Chaney v. Chaney*, 145 Ariz. 23, 699 P.2d 398 (App. 1985), for the proposition that good faith retirement and subsequent reliance on pensions constitutes substantial and continuing change of circumstances. In *Chaney*, the husband was ordered to pay \$450 monthly in spousal maintenance to the wife. *Id.* at 25, 699 P.2d at 400. “At the time of the decree, the husband earned approximately \$1200 per month and drew \$550 monthly from a military pension.” *Id.* Three years later, the husband retired and his monthly income was \$876, “consisting solely of his interest in both his civil service and military retirements and his social security.” *Id.* The wife received “nearly half of” the husband’s pensions “as her separate property.” *Id.* at 27, 699 P.2d at 402. “[T]his worked a substantial change both in his own financial condition and ability to pay spousal maintenance,

² We cite to the current version of the statute because the requirements for modification have been constant since the parties’ divorce.

and in the wife's financial condition and need for maintenance." *Id.* Here, appellant retired and relies on pensions, retirement, social security, and investments for his income. However, unlike *Chaney*, appellant's ability to pay did not substantially change as a result of appellant's retirement, though the source of the funding did. Accordingly, *Chaney* does not control.

¶9 Appellant cites *Shaughnessy v. Shaughnessy*, 164 Ariz. 449, 793 P.2d 1116 (App. 1990), for the proposition that retirement accounts are "exempt from the obligation of maintenance." However, *Shaughnessy* was based on the explicit allocation of retirement to husband in the decree. 164 Ariz. at 451, 793 P.2d at 1118. Here, appellant's retirement is a source of income but not explicitly allocated to either party through the property settlement. Appellant's passive income may be considered when determining whether to modify a spousal maintenance award. "[A]lthough the court could have considered capital gains and losses in determining whether there had been a substantial change in circumstances and what amount of support was reasonable, there is no mandate to do so in a way that disregards an increase in the party's actual earnings." *Burnette v. Bender*, 184 Ariz. 301, 305, 908 P.2d 1086, 1090 (App. 1995) (quoting *Erickson v. Erickson*, 409 N.W.2d 898, 890 (Minn. Ct. App. 1987)).

¶10 "[A] judgment will not be disturbed when there is any reasonable evidence to support it." *Roberts v. Malott*, 80 Ariz. 66,

68, 292 P.2d 838, 839 (1956). In denying appellant's petition for modification, the trial court made several findings on the record, including that appellant "medically retired" close to when he would have voluntarily retired; appellant's "alleged naivete in assuming that [appellee] would remarry is not a factor"; that appellant's retirement was foreseeable; that appellant has a current community estate with his current spouse valued at \$1.7 million and can meet his spousal maintenance obligation. The court further found that appellee "is unemployable, legally blind," and "[i]f she were not living with either her own mother or daughter, her expenses would clearly exceed her social security income." The court concluded that appellant failed to show continuous and substantial changes in circumstances.

¶11 Maintenance awards are computed pursuant to A.R.S. § 25-319 (Supp. 2004), which lists factors frequently relevant to such computations. The list is not exclusive. Section 25-319(B) states, "[t]he maintenance order shall be in an amount and for a period of time as the court deems just . . . after considering *all relevant factors*." (Emphasis added.) Here, the parties agreed to a maintenance award as part of their property settlement rather than having the trial court determine it. Nonetheless, we find instructive the statutory language requiring "all relevant factors" be considered. As such, the factors considered by the trial court were appropriate. The order denying modification of spousal

maintenance was not an abuse of discretion.

¶12 To the extent appellant's argument is that appellee's circumstances constitute the type of change necessary for modification of spousal maintenance, we likewise reject it. As we noted above, appellee now lives with her mother and contributes a substantial portion of her income to Sloanne to help pay her housing and transportation. Sloanne assists her grandmother and appellee to the point that it relieves appellee of the financial burden of hiring a nurse or caretaker. The trial court found appellee "is unemployable, legally blind," and the expenses she would incur if the family did not have this mutually dependent relationship "would clearly exceed her social security income." This is another way of saying that Sloanne is effectively being compensated for providing services and care in lieu of hiring a caretaker. Based on this record, we cannot say that the trial court abused its discretion by determining there was not a change in circumstances in appellee's need for maintenance payments.

¶13 In awarding attorneys' fees to appellee, the trial court considered "the financial resources of both parties as well as the reasonableness of their positions." "The primary intent of [A.R.S.] § 25-324 is to assure a remedy to the party least able to pay." *Gore v. Gore*, 169 Ariz. 593, 596, 821 P.2d 254, 257 (App. 1991).

¶14 Appellant contends the court erred in not allowing him to be heard on the issue prior to awarding attorneys' fees. Appellant

filed a motion in opposition to appellee's request for attorneys' fees. No separate hearing was held on the issue of attorneys' fees. In other contexts, we have held that the lack of a hearing prior to ruling on motions for attorneys' fees is not an abuse of discretion. See *Moran v. Pima County*, 145 Ariz. 183, 700 P.2d 881 (App. 1985) (denying fees under federal statute); *G & S Invs. v. Belman*, 145 Ariz. 258, 268-69, 700 P.2d 1358, 1368-69 (App. 1984) (denying fees under A.R.S. § 12-341.01). The trial court has an "immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and [] can better assess the impact of what occurs before [it]." *State v. Chapple*, 135 Ariz. 281, 297, n.18, 660 P.2d 1208, 1224, n.18 (1983). The trial court necessarily considered the relative financial situations of the parties as part of appellant's arguments for ending his spousal maintenance obligation. "The trial court did not need to hear further evidence and the lack of an evidentiary hearing has not hampered our review of [the] record" *Moran*, 145 Ariz. at 185, 700 P.2d at 883.

¶15 Because the record supports the trial court's conclusion that there was a substantial disparity in the ability to pay fees, we find no abuse of discretion in the trial court's order awarding fees to appellee. Appellant did not allege the amount awarded was excessive. Appellee requested attorneys' fees on appeal. Because neither party took an unreasonable position, we exercise our discretion to deny this request. See *Gutierrez v. Gutierrez*, 193

Ariz. 343, 351, ¶¶ 35-36, 972 P.2d 676, 684 (App. 1999) (denying attorneys' fees on appeal but affirming award of attorneys' fees at trial).

Conclusion

¶16 For the reasons above, we affirm.

DANIEL A. BARKER, Judge

CONCURRING:

ANN A. SCOTT TIMMER, Presiding Judge

LAWRENCE F. WINTHROP, Judge