IN THE SUPREME COURT OF MISSOURI

SC90996

TANYA L. LINDHORST,

Appellant,

v.

ERIC J. LINDHORST,

Respondent.

Appeal from the Circuit Court of the County of St. Louis
Twenty-First Judicial Circuit
The Honorable Robert S. Cohen, Judge

APPELLANT'S SUBSTITUTE BRIEF

Craig J. Hoefer, No. 37100
16204 Bay Harbour Court
Wildwood, Missouri 63040
(636) 345-7100 (telephone)
(636) 458-5058 (facsimile)
choefer01@charter.net

Attorney for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Missouri Case Law

Constitution of the State of Missouri

Missouri Statutory Authority

Local Rules of the Circuit Court of St. Louis County

Code of Federal Regulations

JURISDICTIONAL STATEMENT

This appeal arises out of a final judgment entered on February 5, 2009 by the Honorable Robert S. Cohen in the Family Court of St. Louis County on the parties' cross-motions to modify and to compel compliance with certain provisions of their original decree of dissolution. At issue in this appeal is whether the trial court erred in reducing Appellant's maintenance and in failing to make the increase in child support awarded by the trial court retroactive to the date of service of Appellant's motion to modify. Appellant appealed the trial court's decision to the Missouri Court of Appeals for the Eastern District, which entered a per curiam order on April 27, 2010 affirming the trial court's judgment. After the Court of Appeals denied Appellant's motion for rehearing or, alternatively, to have the case transferred to this Court, Appellant filed an application for transfer with this Court. On August 31, 2010, this Court entered an Order granting the transfer.

This Court possesses jurisdiction over this action pursuant to Article V, Section 10 of the Missouri Constitution, which provides this Court "may finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as on original appeal."

STATEMENT OF FACTS

This case originates from the divorce of Appellant, Tanya L. Lindhorst (now known as Tanya L. Templeton), from the Respondent, Eric J. Lindhorst. Legal File ("L.F.") at 18, 97; Petitioner's Exhibit ("Pet. Ex.") 4. The parties were married on June 10, 1989 and bore two children, Taylor M. Lindhorst (born April 2, 1993) and Alexander C. Lindhorst (born July 1, 1996). L.F. at 18-19, 22, 89, 97; Tr. at 85-86; Pet. Ex. 4. The marriage was dissolved on April 21, 1998. L.F. at 18-28. Under the terms of the original dissolution decree, Ms. Templeton was granted legal and primary physical custody of the children, subject to Mr. Lindhorst's rights of visitation and temporary custody. L.F. 19. The original decree ordered Mr. Lindhorst to pay $1,100.00 per month in child support on behalf of his two children and $1,000.00 per month in maintenance to Ms. Templeton. L.F. at 18-19, 22-24, 89-91, 97-98; Pet. Ex. 4.

When the original decree was entered, Mr. Lindhorst was able-bodied and employed full-time as an attorney for Deutsche Financial Services, earning an annual salary of approximately $66,000.00 or $5,500.00 per month. L.F. at 19, 97-98; Pet. Ex. 4. During the parties' marriage and at the time that the original decree was entered, Ms. Templeton was diagnosed with, and continued and continues to, suffer from rheumatoid arthritis, a chronic, auto-immune disease, and was employed part-time as a registered nurse for a private physician, earning an annual

salary of approximately $16,644.00 or $1,387.00 per month. L.F. at 19, 97-98; Transcript ("Tr.") at 20-21, 87-88, 474-75; Pet. Ex. 4. Ms. Templeton was not offered and did not receive any health insurance or other employee benefits through her employer. L.F. at 19. As part of its original decree, the trial court specifically found, as a matter of law, that Ms. Templeton, "suffers from a physical impairment due to rheumatoid arthritis that arguably prevents her from being able to work more than approximately twenty (20) hours in a given work week…**"** L.F. at 22, 98; Pet. Ex. 4.

Since the entry of the original decree, Mr. Lindhorst has remained employed as an attorney, working as in-house counsel for an international banking corporation and then for a major law firm, before creating his own law firm, Eric J. Lindhorst & Associates, LLC, where his practice areas include litigation, banking, real estate, and family law. L.F. at 99-100; Tr. at 430, 490-91. Since the divorce, Ms. Templeton's health continued to deteriorate to the point where her employer, John B. Costello, M.D., who also served as her treating physician and rheumatologist for over fifteen years, determined that he could no longer employ Ms. Templeton as a registered nurse in his office, even on a part-time basis, because her rheumatoid arthritis interfered with her ability to perform her job duties, several of which had to be assumed by other employees because of her inability to perform those duties. Tr. at 24-25, 81-82, 89-90, 100-02. Dr. Costello

recommended to Ms. Templeton that she apply for disability benefits through the Social Security Administration, which she did in March 2003. Tr. at 25-28, 33, 96; Pet. Ex. 3. Approximately five years after the original decree was entered, the Social Security Administration determined Ms. Templeton to be disabled and, thus, eligible to receive Social Security disability benefits for herself and her children. L.F. at 99; Tr. at 96-97; Pet. Ex. 3. As part of its determination, the Social Security Administration found that no jobs existed in significant numbers which Ms. Templeton could perform, given that her symptoms impaired her ability to sit, stand, walk and concentrate. L.F. 99; Tr. at 97-98; Pet. Ex. 3. Specifically, the Social Security Administration found that Ms. Templeton's allegations were "credible" including "credible symptoms of pain," that she "cannot maintain adequate concentration" or "an adequate work presence," that she "is not able to sustain a regular work day/week," that she "cannot perform her past relevant work," that she "does not have transferable skills to perform other work within her residual functional capacity" and that "there are no jobs existing in significant numbers which she can perform". L.F. at 99; Tr. at 97-98; Pet. Ex. 3. Since her disability determination in 2003, Ms. Templeton has not been employed. L.F. at 105, 192; Tr. at 97-98, 106-07.

On November 8, 2006, Ms. Templeton instituted the underlying proceeding by filing a motion to modify, seeking *inter alia* an increase in child support based

upon an increase in Mr. Lindhorst's income, an increase in the cost of living associated with the growth and maturation of the children, and her inability to work because of her disability. L.F. at 1, 91. Approximately a year and one-half after Ms. Templeton brought her motion to modify, Mr. Lindhorst filed a counter-motion seeking to decrease his child support obligation and to terminate his maintenance obligation on the grounds that Ms. Templeton was receiving Social Security disability benefits, that her income had substantially increased, that her expenses had substantially decreased, and that she was receiving direct and indirect support from her parents with whom she and her children reside. L.F. at 51-55.

A four day hearing on the parties' motions to modify was held in December 2008. L.F. at 96. Despite Mr. Lindhorst's testimony that his annual salary was approximately $66,000.00, the same amount he was earning ten years earlier at the time of the divorce, the trial court found that his deductions for his law firm's business expenses were excessive, that his claimed income was substantially understated, and that his annual income was at least $125,000.00 or $10,417.00 per month. L.F. at 101.

Because he is self-employed and the sole member of his own law firm, a limited liability corporation, Mr. Lindhorst controls his income and determines the frequency and amount of any draws that he receives from his firm. Tr. at 293-94, 430. Mr. Lindhorst testified, however, that he does not adhere to general

accounting practices in the operation or management of his law firm. Tr. at 430-34. His law firm does not regularly generate any financial or accounting statements, such as balance sheets or profit and loss statements, nor does it create or maintain any reports relating to his business expenses. Tr. at 430-31, 479.

Mr. Lindhorst testified that various documents produced by him during the course of discovery did not represent his true income and, therefore, could not be relied upon by the trial court, including three profit and loss statements for his law firm that he specifically generated in response to Ms. Templeton's discovery requests, as well as two loan applications that he signed under oath and submitted to mortgage companies. L.F. at 101; Tr. 433-34, 448-51, 465-66; Pet. Ex. 25, 31. The profit and loss statements generated by Mr. Lindhorst reflected that, during the first eleven months of 2008, his law firm boasted the largest gross profit in the firm's five year history ($309,019.31) and the second highest gross receipts ($359,196.16). Pet. Ex. 25. On the loan applications, Mr. Lindhorst in turn represented that his gross, annual base income was $216,000.00 and $286,000.00, respectively. Tr. 448-51; Pet. Ex. 31. One loan application that was signed and initialed on each page under penalty of perjury by Mr. Lindhorst and his current wife, Brenda L. Lindhorst, was submitted in connection with the refinancing of the mortgage on their primary residence located in Chesterfield, Missouri. Pet. Ex. 31. Despite Mr. and Mrs. Lindhorst's acknowledgement as to the truthfulness and

accuracy of this application, it was riddled with numerous errors and misrepresentations including that neither Mr. Lindhorst nor his wife had any dependents, that Mr. Lindhorst had no duty to pay child support or maintenance, that Mr. Lindhorst was not due and owing any federal debt, and that there was no lien on the property being refinanced. Tr. at 448-51, 487-90; Pet. Ex.31.

The accuracy of the income reflected on Mr. Lindhorst's income tax statements[1] and other financial documents also was called into question at the hearing by Ms. Templeton's financial expert, Robert M. Mielziner, a certified public accountant. After reviewing certain bank statements and other limited documents produced by Mr. Lindhorst, Mr. Mielziner concluded that numerous withdrawals from Mr. Lindhorst's law firm's bank account were treated as business expenses, rather than as draws. Tr. 295-99, 300-02, 310-11; 324-26; Pet. Ex. 23. Mr. Lindhorst testified that he withdrew monies from his law firm's bank

[1] Mr. Lindhorst's federal 2004, 2005 and 2006 income tax returns all were filed outside the permissible time periods and after the commencement of this litigation. Tr. 434-37, 481-85; Pet. Ex. 28, 29; Resp. Ex. C, D, E. At his deposition and at the hearing, Mr. Lindhorst could not recall whether he had filed his 2006 and 2007 state income tax returns. Tr. at 436-37. He, likewise, could not recall what documents he produced that would substantiate or support his expenses and figures contained on his tax returns. Tr. at 462-67.

account to pay for personal expenses. Tr. at 441-46. Mr. Mielziner testified that under the relevant tax laws and regulations, a myriad of expenses that Mr. Lindhorst was treating as ordinary and necessary business expenses, as testified to at the hearing by Mr. Lindhorst, did not qualify as such because they were not business related, but rather were personal in nature, including the mortgage payment on a vacation timeshare not owned by his law firm, the mortgage payment on an investment property owned by a separate joint venture, the mortgage payment on his personal residence, the fuel charges and docking fees for a boat that was not titled to his law firm, veterinarian and equestrian equipment fees for a horse purchased as a gift for his daughter, meals at various restaurants for his personal benefit, and a purported home office that was not used exclusively for business use. Tr. at 295-99, 310-11, 324-26, 441-46, Pet. Ex. 23. Mr. Mielziner testified that the monies taken by Mr. Lindhorst from his law firm accounts to pay these expenses should have been treated as draws rather than business deductions. Tr. at 293-94; Pet. Ex. 23, 24. Mr. Mielziner determined that, if the deductions had properly been classified as draws, Mr. Lindhorst's 2007 gross annual income would have been approximately $182,000.00 and his 2008 gross annual income would have been approximately $220,000.00. Tr. at 308-09; Pet. Ex. 23, 24. Based upon this testimony and the other evidence adduced at the modification

hearing, the trial court found that Mr. Lindhorst's annual income was at least $125,000.00. L.F. at 101.

Ms. Templeton testified at the hearing that her rheumatoid arthritis has become worse since the time of her divorce, and that she continues to suffer, on a daily basis, joint pain, swelling, stiffness, and fatigue, in addition to decreased range of motion and side effects from her prescription medications. Tr. at 100-01, 104. Ms. Templeton further testified that her current medication regimen included weekly Enbrel injections, methotrexate, prednisone, ultracet, hydrochlorothiazide, lasix, restoril, synthroid and multiple vitamins. Tr. at 104-06. Ms. Templeton also received, for a period of five years every six weeks, outpatient intravenous infusions at a hospital infusion center. Tr. at 104. Dr. Costello, likewise, testified that Ms. Templeton's symptoms include bilateral joint pain and deformity, discomfort and swelling of the hands, wrists, feet, knees, shoulders, hips and ankles, decreased range of motion, fatigue and insomnia and that she has been prescribed numerous medications for the treatment of her disease. Tr. at 23-24, 30-31, 50-51, 63; Pet. Ex. 2, 3. Side effects of these medications include headaches, gastrointestinal upset, blood and liver count changes, fibrosis, infection, lowered resistance, elevated blood sugar, elevated cholesterol, weight gain, fluid retention and lung concerns. Tr. at 30-31.

Because of her limited income and the limitations caused by her rheumatoid arthritis in being able to perform certain household functions, Ms. Templeton and her children moved in with her parents, where she has had to utilize an electric chair lift to go from the first to the second floor of the home and has had to rely upon various assistive devices to be able to perform everyday tasks such as getting dressed, cooking and eating. Tr. at 101-04, 150-51. While the divorce was pending, Ms. Templeton and her children, for a period of time, also have resided with her parents. Tr. at 150-51.

Despite living with her parents, Ms. Templeton has remained responsible for supporting her children, including paying for their food, clothing, medical care, recreation, school expenses and other necessities. Tr. at 118-20, 126-27, 135-36, 150-55; 156-57, 159, 183-84, Pet. Ex. 9, 10, 12, 18, 20, 32, 33. Due to a substantial increase in her medical costs, Ms. Templeton's personal living expenses increased dramatically since the entry of the original decree. Tr. at 113-15, 134, 151-52, 153-57; Pet. Ex. 7, 8, 18, 20. Even with the benefit of a grant to offset the cost of her prescriptions and Medicare coverage, Ms. Templeton incurred $4,737.34 in out-of-pocket medical expenses in 2008 during the eleven months preceding the hearing. Tr. at 109-15, Pet. Ex. 7, 8. These expenses will significantly increase if Ms. Templeton no longer continues to receive this grant, which is not guaranteed, or if she would no longer be eligible for Medicare health

insurance.[2] Tr. at 108-09, 132-34. Ms. Templeton testified that the retail cost of her prescriptions, at the time of the hearing, was approximately $25,000.00. Tr. at 34. In 2004, prior to her Social Security disability award, her private health insurance premium was $679.00 per month without any prescription coverage. Tr. at 34.

Aside from paying her own medical expenses and other living expenses (such as her food and clothing), Ms. Templeton also is responsible for paying her parents $1,100.00 in rent each month, and likewise, is responsible for the loan payment, insurance, taxes, license, gas and maintenance (which is approximately $652.62 each month) on the vehicle owned by her parents that she uses to transport the children. Tr. at 151-52, 156; Pet. Ex. 18. As a result, Ms. Templeton's total expenses have increased from $3,461.18 each month in 1998 to $5,147.68 each month as of the date of the trial. Pet. Ex. 5, 18.

---

[2] At the hearing, counsel for Ms. Templeton questioned her about what medical costs she would incur if she no longer qualified for Medicare coverage based upon her disability status. Although the trial court was reserved to hear testimony on this issue, it did acknowledge that Appellant's yearly out-of-pocket medical costs, if it should determine her capable of working and no longer eligible for Medicare insurance or not otherwise covered by private insurance, was a proper subject for the court to consider in arriving at its decision in this case. Tr. 132-34.

Ms. Templeton further testified that, as of the date of the hearing, she received Social Security disability benefits of $1,215.60 per month for herself. L.F. at 99. The income that Ms. Templeton now receives through her Social security disability benefits simply offsets the wages that she was earning through her part-time work as a registered nurse at the time of the original decree. Tr. at 99-100. Ms. Templeton's reported gross income on her tax returns during the several years preceding the hearing has remained at approximately $12,000.00 each year. Tr. at 94-95, 147-49; Pet. Ex. 14, 15, 16, 17.

Based upon the functional limitations caused by her rheumatoid arthritis, Dr. Costello, Ms. Templeton's former long-term employer and rheumatologist who has treated her for this condition for nearly a decade and a half, and who regularly has examined her approximately every three months, testified that it was his medical and expert opinion that she remains unable to work on either a full-time or part-time basis, even in a sedentary position. Tr. at 24-25, 27, 31-32, 34, 36, 44, 51-53, 55, 76-77, 81-82. While Dr. Costello noted in his testimony that certain medications helped delay some of the progression of Ms. Templeton's disease, allowing her condition to remain steady over the past few years, he also observed that Ms. Templeton's disease had worsened, has caused significant joint deformity, and regularly produces pain, discomfort and swelling in her hands, wrists, joints and knees, causing her to be unable to function on a full-time basis. Tr. at 23-24,

30-31, 63-64, 82. According to Dr. Costello, even though Ms. Templeton can engage in certain activities on an intermittent basis on those days that she is feeling better, her disease prevents her from engaging in any strenuous activity on a daily basis or throughout the course of a day. Tr. at 23-24. Based upon Ms. Templeton's ongoing symptoms and the knowledge of her condition that he derived through his extended treatment of her, Dr. Costello concluded that Ms. Templeton was incapable of working "any amount of time at any long task," was not gainfully employable (even in a sedentary position), and that it was not in Ms. Templeton's best interest to return to work because working would only exacerbate her health problems. Tr. at 24-25, 27, 31-32, 36, 64.

Timothy Kaver, a vocational rehabilitation counselor retained by Mr. Lindhorst, testified that Ms. Templeton would not be employable if she is unable to function on at least a sedentary level of activity for eight hours each workday in a given work week. Tr. at 223-24, 226; Resp. Ex. BB. Specifically, in his expert report, Mr. Kaver stated that if "Tanya Templeton is unable to function on at least a sedentary level of activity, then she would not be employable." Tr. at 226; Resp. Ex. BB, pp. 4, 6. Based upon his report, Mr. Kaver testified that unless Ms. Templeton was physically capable of working at a sedentary level for at least eight hours a day, five days a week, for fifty-two weeks per year, she would not, in his expert opinion, be deemed employable. Tr. at 223-24, 226. Rather, Mr. Kaver's

report indicated that Ms. Templeton would be employable only if she "is able to perform a sedentary to light level of physical activity for an 8 hour work day." Resp. Ex. BB, pp. 5, 6. Mr. Kaver's report does not purport to find Ms. Templeton employable on a part-time basis and, therefore, did not provide any data regarding what, if any, sedentary part-time positions, were available in the St. Louis metropolitan area for which Appellant may be qualified. Tr. at 226-27. Mr. Kaver exclusively limited his investigation and labor market survey to full-time positions and did not contact or speak with a single employer in the St. Louis metropolitan area regarding the availability, compensation, and hours of any open part-time positions for which the Appellant may be qualified. Tr. at 225-28. Although Mr. Kaver usually conducts a labor market survey, "…to demonstrate or prove that there are openings at that time" when rendering an expert opinion, he failed to do this regarding any part-time positions despite stating that "somewhere out in the marketplace" there are also part-time sedentary nursing jobs. Tr. at 225-28.

Although another expert retained by Mr. Lindhorst, Richard Brasington, M.D., testified at the hearing that it was his medical opinion that Appellant was capable of working in a sedentary position, he rendered his opinion without having met or having examined Ms. Templeton, and without having reviewed the most

recent four years of her medical records[3]. Tr. at 303-04. His opinion partially was based on videotape of Ms. Templeton, recorded almost daily over a seven to nine month period by private investigators hired by Mr. Lindhorst, during times when the Appellant was in public and obviously less affected by the symptoms of her disease. Tr. at 404-05. Despite this extensive surveillance, the videotapes captured

[3] In order to protect Appellant's privacy, Ms. Templeton's medical records were reviewed in camera by the trial court which subsequently released to Respondent's counsel those records relating to Appellant's rheumatoid arthritis. At the hearing, Dr. Costello testified that he had forwarded to the court all of the Appellant's medical records, despite the assertion by Respondent's counsel that she had not received the last four years of records. Tr. at 11-12, 16-17, 19. The trial court noted that, as a clinician, Dr. Costello did not need these records in order to testify about Ms. Templeton's medical condition, symptoms and capabilities, but did note the importance of these records for an expert who does not examine a live patient commenting that, "an expert who doesn't examine the live patient couldn't reach these kinds of conclusions without the records." Tr. at 20-21. Dr. Brasington, however, never met or physically examined Ms. Templeton and never reviewed her most recent four years of medical records before rendering his opinion that she was capable of working in a sedentary position. Tr. at 303-04.

some incidents where Ms. Templeton engaged in certain physical activities, including walking, carrying, decorating and yard work, for a limited period of no more than twenty minutes. Tr. at 406, 499-500.

Unlike Dr. Costello, Dr. Brasington never observed Ms. Templeton attempting to work in an office setting performing repetitive tasks over the course of a forty hour work week, or in any type of work setting. Tr. at 403-04. Dr. Brasington, however, agreed that generally a treating physician is in a better position to assess a patient's capabilities. Tr. at 406.

Notwithstanding the lack of any physical examination or testing of Ms. Templeton by Dr. Brasington and the lack of any review by Dr. Brasington of her medical records for the four years immediately preceding the hearing, the trial court relied upon the testimony of Dr. Brasington in finding that Ms. Templeton "is not totally disabled and is able to perform work" and that "part time employment, primarily in a sedentary position, appears feasible and appropriate." L.F. at 103. Even though Mr. Kaver's report did not consider and did not include any market information for any available part-time sedentary positions, the trial court nevertheless imputed income to Ms. Templeton of "20 hours per week at $20.00 per hour, for 48 weeks a year, or an average of $1,600.00 per month." L.F. at 106. In its opinion, the trial court recognized this amount "as income ***in addition to*** her Social Security disability benefit" and found that, while Ms. Templeton remains in

need of maintenance, her need is now at a reduced level. L.F. at 106. Based upon this imputed income and the trial court's assumption that some of Ms. Templeton's household expenses were shared[4], the trial court reduced in half Ms. Templeton's monthly maintenance from $1,000.00 to $500.00. L.F. at 106. While the trial court, as part of its February 5, 2009 order increased Appellant's monthly child support from $1,100.00 to $1,273.00, this increase was only retroactive to January 1, 2009 of the prior month. L.F. at 107.

After the trial court denied the Respondent's post-hearing motion to reconsider or amend the trial court's determination, Appellant filed a timely notice of appeal with the Missouri Court of Appeals for the Eastern District. Although Respondent sought leave to file a notice of appeal over four months later, the Court of Appeals denied Respondent's motion to file his untimely notice. In a per curiam opinion entered on April 27, 2010, the Court of Appeals affirmed the trial court's decision. After the Court of Appeals summarily denied Appellant's motion for rehearing, or alternatively to transfer, on June 8, 2010, Appellant filed an

[4] As part of the trial court's findings in support of its decision to reduce maintenance, the court found that, "it is unclear as to exactly what portion of the household expenses are Mother's responsibility. Certainly, some of the expenses are shared and economies are achieved." L.F. 106.

application for transfer with this Court. This Court sustained that application on August 31, 2010.

POINTS RELIED ON

I. The trial court erred in reducing the amount of maintenance awarded to Appellant, based upon its finding that there existed a change in the financial circumstances of the parties, where Respondent, as the movant, failed to meet his burden of proving through detailed evidence that there had been changed circumstances so substantial and continuing as to make the terms of the original maintenance award unreasonable in that:

A. Respondent failed to establish through credible evidence any substantial and continuing reduction in his income, or that he was unable to pay, at the time of the modification hearing, maintenance at the rate assigned in the original decree, where the trial court found that his income had substantially increased since the entry of the original decree despite his testimony that his income had remained the same.

B. Respondent failed to establish through credible evidence any substantial and continuing change in Appellant's chronic disease that limited her, both at the time of the original decree and at the time of the modification hearing, to working no more than twenty hours per week.

C. Respondent failed to establish through credible evidence any substantial and continuing increase in Appellant's financial resources or any decrease in Appellant's reasonable living expenses where the detailed evidence

presented at the modification hearing revealed that Appellant's reasonable living expenses had significantly increased despite residing with her parents and that her Social Security disability benefits simply offset the income that she could no longer earn through part-time employment.

Katsantonis v. Katsantonis, 245 S.W.3d 925 (Mo. Ct. App. 2008)

Batka v. Batka, 171 S.W.3d 757 (Mo. Ct. App. 2005)

Monning v. Monning, 53 S.W.3d 241 (Mo. Ct. App. 2001)

Draper v. Draper, 982 S.W.2d 289 (Mo. Ct. App. 1998)

II. The trial court erred in imputing income to Appellant, based upon the testimony of Respondent's vocational expert who speculated as to the existence of available part-time jobs "somewhere out in the marketplace," because a trial court cannot calculate or impute income based solely upon speculation.

Wightman v. Wightman, 295 S.W.3d 183 (Mo. Ct. App. 2009)

Hern v. Hern, 173 S.W.3d 653 (Mo. Ct. App. 2005)

Johanson v. Johanson, 169 S.W.3d 897 (Mo. Ct. App. 2005)

Monning v. Monning, 53 S.W.3d 241 (Mo. Ct. App. 2001)

III. The trial court, in a matter of first impression, erroneously considered both the income that Appellant derives from Social Security disability benefits, as well as the income imputed by the trial court to her based upon its

finding that she was able to work part-time, in assessing whether there had been a change of circumstances so substantial and continuing as to make the terms of the original award of maintenance unreasonable. In doing so, the trial court ignored federal regulations that prohibit the receipt of Social Security disability benefits if an individual is gainfully employed in even a part-time position past a brief trial work period, thereby precluding the possibility that an individual could receive income from both part-time employment and from Social Security disability benefits for any continuing or substantive period of time.

20 C.F.R. § 404.401a

20 C.F.R. § 404.1592

IV. The trial court abused its discretion and erred in failing to follow the presumption of retroactivity established by the trial court's own local rules, Local Rule 68.9(1), and making the modified child support award retroactive to the date on which Respondent was served with Appellant's original motion to modify child support. No evidence or facts were presented in this case warranting the rebuttal of this presumption, particularly given the significant disparities between the parties' respective incomes, the Respondent's understatement of income by no less than $59,000.00, and his submission of inaccurate financial statements.

Klingseisen v. Klingseisen, 216 S.W.3d 706 (Mo. Ct. App. 2007)

Reis v. Reis, 105 S.W.3d 514 (Mo. Ct. App. 2003)

St. Louis County Circuit Court Rule 68.9(1)

ARGUMENT

Standard of Review

Appellate review of a trial court's judgment modifying a dissolution decree is limited to determining whether the judgment is supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. *Kubley v. Brooks*, 141 S.W.3d 21, 25 (Mo. 2004)(en banc); *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976)(en banc); *Wightman v. Wightman*, 295 S.W.3d 183, 187 (Mo. Ct. App. 2009). No deference needs to be given to a trial court's judgment if the evidence is not in conflict or if the law has been erroneously declared or applied. *See, e.g., McKown v. McKown*, 280 S.W.3d 169, 172 (Mo. Ct. App. 2009); *McBride v. McBride*, 288 S.W.3d 748, 751 (Mo. Ct. App. 2009). Certain provisions of the judgment entered by the trial court in this case warrant reversal, because those provisions of the judgment are not supported by the evidence, against the weight of the evidence, and misapplied the applicable law.

I. The trial court erred in reducing the amount of maintenance awarded to Appellant, based upon its finding that there existed a change in the financial circumstances of the parties, where Respondent, as the movant, failed to meet his burden of proving through detailed evidence that there had been changed

circumstances so substantial and continuing as to make the terms of the original maintenance award unreasonable in that:

A. Respondent failed to establish through credible evidence any substantial and continuing reduction in his income, or that he was unable to pay, at the time of the modification hearing, maintenance at the rate assigned in the original decree, where the trial court found that his income had substantially increased since the entry of the original decree despite his testimony that his income had remained the same.

By statute, the provisions of any judgment relating to maintenance "may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms" of the original award unreasonable. Mo. Rev. Stat. § 452.370.1; *see also Katsantonis v. Katsantonis,* 245 S.W.3d 925, 927 (Mo. Ct. App. 2008); *Peine v. Peine,* 200 S.W.3d 567, 578 (Mo. Ct. App. 2006). Changed circumstances sufficient to support a modification of maintenance must be proven by detailed evidence and must show that the prior decree is unreasonable. *Katsantonis,* 245 S.W.3d at 927; *Peine,* 200 S.W.3d at 578; *Goodman v. Goodman,* 165 S.W.3d 449, 500 (Mo. Ct. App. 2005). The party seeking the modification carries the burden of establishing through detailed

evidence that there are changed circumstances warranting modification. *Katsantonis,* 245 S.W.3d at 927-28; *Peine,* 200 S.W.3d at 578. To meet this burden, the movant must produce detailed evidence of not only the circumstances as they currently exist, but also how they existed at the time of the original decree. *See, e.g., Swartz v. Johnson,* 192 S.W.3d 752, 756 (Mo. Ct. App. 2006)(quoting *Smillie v. Smillie,* 989 S.W.2d 619, 622 (Mo. Ct. App. 1999)). The movant cannot meet his burden of proof through bare assertions. As the courts have reiterated, bare assertions alleging in broad terms that circumstances have changed since the prior decree but which are not supported by evidence at the hearing on the motion simply do not rise to the level of changed circumstances as mandated by the statute. *See, e.g., Swartz,* 192 S.W.3d at n.2 (quoting *Moseley v. Moseley,* 744 S.W.2d 874, 878 (Mo. Ct. App. 1988).

The ultimate issue in a maintenance modification case is whether the changes in circumstances "are sufficiently substantial and continuing so as to make the original terms of the decree unreasonable." *Katsantonis,* 245 S.W.3d at 928 (citing *Rustemeyer v. Rustemeyer,* 148 S.W.3d 867, 870-71 (Mo. Ct. App. 2004)); *accord Swartz,* 192 S.W.3d at 755. A change in circumstance "must be unknown and unforeseeable at the time of the entry of the judgment that the spouse seeks to modify." *Katsantonis,* 245 S.W.3d at 928 (citing *Rustemeyer,* 148 S.W.3d at 871); *Swartz,* 192 S.W.3d at 755. To warrant modification, the change in circumstances

"must involve a departure from prior known circumstances, including those known at time of dissolution." *Id.* The courts have maintained that this standard was intended to be strictly observed in order to discourage recurrent and insubstantial motions for modification. *Peine*, 200 S.W.3d at 579 (quoting *Goodman*, 165 S.W.3d at 500-01); *Swartz*, 192 S.W.3d at 755.

In the case at hand, Respondent failed to demonstrate through detailed evidence at the hearing that the original maintenance award had become unreasonable through substantial and continuing changed circumstances. Respondent, for example, failed to show that he was unable at the time of the hearing to pay maintenance at the rate assigned in the original decree. Despite Mr. Lindhorst's attempts to convince the trial court that his salary had remained unaltered during the interim between the original decree and his motion to modify maintenance, the trial court discredited his testimony finding that Mr. Lindhorst had understated his income by nearly half. L.F. at 101. Whereas Mr. Lindhorst testified that his annual income was approximately $66,000.00, the trial court found that his deductions for claimed business expenses were excessive and that his annual income was, in actuality, at least $125,000.00. L.F. at 101.

B. Respondent failed to establish through credible evidence any substantial and continuing change in Appellant's chronic disease that limited her, both at the time of the original decree and at the time of the modification hearing, to working no more than twenty hours per week.

Based upon the expert medical testimony provided at the hearing, the trial court concluded that Ms. Templeton is capable of performing twenty hours of part-time employment per week, primarily in a sedentary position. L.F. at 103, 106. As such, the trial court's finding in the modification hearing below is no different than that reached by the trial court in the original divorce proceeding. At the time that the original dissolution decree was entered, Ms. Templeton was found to suffer from rheumatoid arthritis that arguably prevented her from being able to work more than twenty hours in a given work week. L.F. at 22, 103, 106. At the time of the original decree, Ms. Templeton was employed as a registered nurse on a part-time basis. L.F. at 19. Because Ms. Templeton's ability to work was found to be no different at the time of the modification hearing than it was at the time that the original modification was ordered, there has not been any substantial and continuing change in her circumstances with respect to her disease or her earning capacity to warrant a modification of maintenance.

C. Respondent failed to establish through credible evidence any substantial and continuing increase in Appellant's financial resources or any decrease in Appellant's reasonable living expenses where the detailed evidence presented at the modification hearing revealed that Appellant's reasonable living expenses had significantly increased despite residing with her parents and that her Social Security disability benefits simply offset the income that she could no longer earn through part-time employment.

While Mr. Lindhorst alleged in his motion to modify that Ms. Templeton's expenses had been greatly reduced since the entry of the original decree by residing with her parents, Mr. Lindhorst himself failed to produce at the hearing any detailed evidence regarding Ms. Templeton's living expenses either at the time of the original decree or at the time of the hearing, nor did he challenge at the hearing the reasonableness or the amount of expenses claimed by Ms. Templeton. Ms. Templeton presented detailed evidence at the hearing that her living expenses had increased dramatically since the entry of the original decree. Even though she and her children live with her parents because of her disease and limited financial resources, Ms. Templeton presented evidence that she remains responsible for paying her own living expenses (including food, clothing, medical care), paying rent to her parents each month in the amount $1,100.00, and paying the loan installment, insurance, taxes, license, gas and maintenance (which is approximately

$652.62 each month) on the vehicle owned by her parents that she uses to transport her children. A significant expense incurred by Ms. Templeton is the cost of the medication that she must take to treat her disease. Even with the benefit of Medicare coverage and a grant to offset the cost of her prescriptions (neither of which are guaranteed to continue in the future), Ms. Templeton incurred $4,737.34 in out-of-pocket medical expenses during the eleven months in 2008 preceding the trial. *See* Pet. Ex. 7, 8. As a result, Ms. Templeton's expenses have increased from $3,461.18 per month in 1998 to $5,147.68 per month as of the date of the hearing. *Compare* Pet. Ex. 5 with Pet. Ex. 18.[5] Because Mr. Lindhorst did not

[5] Ms. Templeton submitted her First Amended Statement of Income and Expenses on a new form approved by the Circuit Court for St. Louis County in effect at the time of the hearing and which appeared on that court's website. When the trial court admitted Ms. Templeton's statement into evidence, it informed Appellant's counsel that it preferred the prior version of that form. In light of the trial court court's preference, Ms. Templeton submitted a Second Amended Statement of Income and Expenses on the form preferred by the trial court following the hearing, transferring the same information to the old form. The figure for the total monthly expenses ($5,147.68) reflected on the first amended statement is identical to that reflected on the second amended statement. Because that form inadvertently was omitted from Appellant's Inventory of Exhibits, Appellant will respectfully

offer any detailed evidence to refute any of the expenses claimed by Ms. Templeton, Mr. Lindhorst failed to establish any significant and continuing decrease in Ms. Templeton's reasonable living expenses that would have provided legal justification for reducing her maintenance under the original decree.

While Mr. Lindhorst also alleged in his motion to modify that Ms. Templeton's financial position had increased substantially since the entry of the original decree through her receipt of Social Security disability benefits, the evidence presented at the hearing revealed that the amount that Ms. Templeton received each month in Social Security disability benefits for herself ($1,215.60) at the time of the hearing is less than what she was earning in monthly salary (approximately, $1,387.00) through part-time employment as a registered nurse at the time of the original decree. Ms. Templeton's financial resources, therefore,

---

seek leave from this Court to amend her inventory to include that exhibit. Even in the absence of that exhibit, however, Ms. Templeton's reasonable living expenses at the time of the hearing can readily be ascertained through a review of Petitioner's Exhibits 7, 8 and 18 and Appellant's extensive testimony at the hearing. *Cf. Anderson v. Anderson*, No. ED75455 n.1 (Mo. Ct. App. Nov. 9, 1999)(notwithstanding the exclusion of certain forms from the record on appeal, the appellate court nevertheless was able to review the propriety of the trial court's decision based upon other information contained within the record).

cannot be deemed to have improved since the entry of the original decree based solely upon her receipt of Social Security disability benefits.

II. The trial court erred in imputing income to Appellant, based upon the testimony of a vocational expert who speculated as to the existence of available part-time jobs "somewhere out in the marketplace," because a trial court cannot calculate or impute income based solely upon speculation.

In assessing whether a modification of maintenance was warranted under the facts of this case, however, the trial court not only considered the income that Ms. Templeton derived from her receipt of Social Security disability benefits, but also elected to impute income to her as well. Notwithstanding the Social Security Administration's determination and the testimony of Ms. Templeton's long-standing treating physician and former employer to the contrary, the trial court found that Ms. Templeton was not totally disabled and was capable of performing part-time employment of a sedentary nature, and chose to impute income from part-time employment to Ms. Templeton in the amount of one thousand, six hundred dollars ($1,600.00) per month. L.F. at 106. The trial court based this imputed income amount upon the labor market survey contained in Mr. Kaver's report, *see* L.F. at 105, and specifically recognized this amount as "income in addition to her Social Security disability benefit." L.F. at 106.

Because Mr. Kaver's report, however, was premised on the conclusion that Ms. Templeton would not be employable if she is unable to function on at least a sedentary level of activity for eight (8) hours each workday in a given work week, the labor market survey referenced in his report did not address any part-time positions, but rather focused only on available full-time positions. No substantive evidence, therefore, was presented at the hearing by Mr. Kaver or any other witness regarding the availability of any actual part-time positions within the St. Louis metropolitan area that Ms. Templeton was capable of performing in light of her past experience and physical limitations. Because Mr. Kaver did not inquire as to the availability of any part-time positions, the number of hours required in any such positions, or the hourly compensation paid in any such positions, the extent to which Mr. Kaver expressed an opinion that there are part-time jobs available "somewhere out in the marketplace" paying twenty dollars an hour, that opinion is purely speculative. Courts repeatedly have held that a trial court cannot calculate or impute income based solely upon speculation. *See, e.g., Wightman*, 295 S.W.3d at 191; *Hern v. Hern*, 173 S.W.3d 653, 655 (Mo. Ct. App. 2005)("a trial court's assessment of an amount to impute to a party must be supported by evidence at trial and not based upon mere speculation"); *Johanson v. Johanson*, 169 S.W.3d 897, 900 (Mo. Ct. App. 2005). In *Monning v. Monning*, 53 S.W.3d 241 (Mo. Ct. App. 2001), for example, the appellate court reversed the imputation of income to

an individual who was found to be unable to work full-time on the ground that the record did not contain any evidence of any part-time jobs available in the area that the individual could perform or what type of wages that the individual could obtain in such a position. *Id.* at 247. Because the trial court in this case imputed income to Ms. Templeton based upon speculation that part-time positions were available in her locale for which she was qualified and which would pay her twenty dollars per hour, the trial court committed reversible error.

III. The trial court, in a matter of first impression, erroneously considered both the income that Appellant derives from Social Security disability benefits, as well as the income imputed by the trial court to her based upon its finding that she was able to work part-time, in assessing whether there had been a change of circumstances so substantial and continuing as to make the terms of the original award of maintenance unreasonable. In doing so, the trial court ignored federal regulations that prohibit the receipt of Social Security disability benefits if an individual is gainfully employed in even a part-time position past a brief trial work period, thereby precluding the possibility that an individual could receive income from both part-time employment and from Social Security disability benefits for any continuing or substantive period of time.

The trial court also erred as a matter of law in assuming that Ms. Templeton could earn the income imputed to her in addition to her Social Security disability benefits.[6] In determining that Ms. Templeton's need for maintenance is now at a reduced level, the trial court specifically noted that the income imputed to her was "in addition to her Social security disability benefit." L.F. at 106. Federal regulations, however, provide that a recipient of Social Security disability benefits will stop receiving benefits if the recipient continues to be employed in a substantial gainful activity following a trial work period, notwithstanding the recipient's disabling impairment.[7] 20 C.F.R. §§ 404.401a, 404.1592 (copies of

[6] Even though the principles relative to the calculation of a spouse's income for the purposes of child support cases are equally applicable to modification of maintenance cases, *see, e.g.*, *Payne v. Payne*, 206 S.W.3d 379, 384 (Mo. Ct. App. 2006); *Monning v. Monning*, 53 S.W.3d 241, 248 (Mo. Ct. App. 2001)(quoting *Ramsey v. Ramsey*, 956 S.W.2d 365, 372 (Mo. Ct. App. 1998), the trial court in this case elected to consider both Ms. Templeton's imputed income and her Social Security disability benefits in assessing maintenance, but rightfully recognized that Ms. Templeton's Social security disability benefits should not be considered in determining child support. L.F. at 106, 121-22.

[7] Ms. Templeton testified at the hearing that it was her understanding that, under the Social Security laws, she would lose her disability benefits if she remained

these regulations are contained in the Appendix to this brief). Under these regulations, a recipient of Social Security disability benefits is generally permitted only one cumulative nine-month trial work period and is deemed to have engaged in substantial gainful activity if that recipient works 80 hours in a given calendar year or derives net earnings of approximately $530.00. *See* C.F.R. 404.1592.

Ms. Templeton, therefore, would be precluded under these regulations from receiving Social Security disability benefits if she remained employed in a part-time position past the trial work period. Any income attributed to Ms. Templeton in determining whether there has been a substantial and continuing change in circumstances, therefore, must be limited to either the income that she receives from Social Security disability benefits or the income that can be attributed to her through part-time employment, but not both.

---

employed, even in a part-time position, past a short work trial period. The trial court also was specifically referred to the relevant Social Security regulations as part of Appellant's response to Respondent's post-hearing motion to reconsider. Even if the trial court had not been provided with a specific citation to the pertinent regulations, the trial court nevertheless should be charged with understanding and applying the applicable law, regardless of whether that law is embodied in a judicial decision, a statute or a regulation.

The trial court's conclusion that Ms. Templeton's income had substantially increased for the purposes of determining maintenance in that she was capable of earning an average income of $1,600.00 each month through part-time work, in addition to her Social Security disability benefits, thus is not supported by competent evidence or in accord with the relevant law. Simply put, Ms. Templeton's ability under the federal law to derive income from Social Security disability benefits, as well as through part-time employment, could not be sustained past a total of nine months and, as such, can not be deemed either substantial or continuing.

If the trial court properly had limited its consideration of Ms. Templeton's income to either the amount that she receives in Social Security disability benefits, or alternatively, to the income that the trial court imputed to her based upon part-time employment, the trial court necessarily would have had to have found that Mr. Lindhorst failed to meet his burden of demonstrating a change in circumstances so substantial as to make the original award of maintenance unreasonable. The evidence presented at the hearing revealed little more than the continuation of the circumstances that existed at the time of the original decree. Ms. Templeton's circumstances as of the time of the hearing were not significantly different, if at all, from those at the time of the original decree. At both times, Ms. Templeton suffered from rheumatoid arthritis that arguably prevented her from being able to

work more than twenty (20) hours in a given work week. L.F. at 22, 103, 106. At the time of the original decree, Ms. Templeton was employed as a registered nurse on a part-time basis, earning a monthly salary of approximately $1,387.00. L.F. at 19. At the time of the hearing, Ms. Templeton was receiving $1,215.60 in disability benefits for herself each month. L.F. at 99. Given that Ms. Templeton suffered from a chronic, disease at the time of the original decree, it was foreseeable at that time that she may become disabled and unable to work at some point in the future. The fact that Ms. Templeton qualified for Social Security disability benefits, therefore, was not unforeseeable at the time the original decree was entered. If, as the trial court suggests in its judgment, Ms. Templeton's disease has stabilized through the "positive effects of new medication" back to the point where she is once again capable of working as a registered nurse on a part-time basis and as such should no longer be entitled to disability benefits, there is no evidence in the record to show that this medication will necessarily remain effective, that her chronic disease will not become progressively worse notwithstanding that medication,[8] that she will continue to be able to pay for that medication in the future, or that this purported change will be continuing as required to support a modification. In any event, even if Ms. Templeton is capable

[8] Dr. Costello testified that Ms. Templeton's condition likely will worsen if she resumes working. Tr. at 31-33, 64, 82.

of earning approximately $1,600.00 per month working as a registered nurse on a part-time basis as the trial court found, her circumstances are essentially the same as they existed at the time that the original decree was entered. Her ability to earn approximately $200.00 more each month is not the degree of change contemplated by the statute to warrant a modification, particularly in light of Ms. Templeton's increased living expenses. *See, e.g.*, *Bauer v. Bauer*, 28 S.W.3d 877, 883 (Mo. Ct. App. 2000)(denying a modification of maintenance even though the former spouse earned four thousand dollars more per month than at the time of the original decree). While Ms. Templeton's income essentially has remained stagnant since the entry of the original decree, her expenses have increased in 1998 from $3,461.18 each month to $5,147.68 each month as of the date of the hearing. Any minimal increase in income that may be imputed to Ms. Templeton, therefore, has been dissipated by the significant increase in her expenses and is insufficient for her to meet her reasonable needs. For purposes of argument only, even if one combines Ms. Templeton's monthly Social Security disability benefits of $1,215.60, with the $1,600.00 per month that the trial court imputed to her, as well as the original monthly maintenance award of $1,000.00, that total ($3,815.60) still falls far short of her reasonable living expenses of $5,147.68 per month. Because the total income attributed to Ms. Templeton still will not allow her to meet her reasonable needs, the trial court should have found that there was no change in

circumstances making the original award unreasonable or warranting a reduction in maintenance. *Eaton v. Bell,* 127 S.W.3d 690, 696 (Mo. Ct. App. 2004)(whether the obligee spouse's income has increased, but she still cannot meet her needs, a change in circumstances making the original award unreasonable has not occurred).

When confronted with a similar set of facts in other cases, the courts repeatedly have held that a modification of maintenance was not warranted. For example, in *Katsantonis v. Katsantonis,* 245 S.W.3d 925 (Mo. Ct. App. 2008), the appellate court reversed a trial court's modification of maintenance, because the evidence failed to reveal "a departure from prior known conditions, including those known at time of dissolution." *Id.* at 929. In that case, the trial court reduced a prior award of maintenance based upon the court's finding that the former wife was financially underemployed in that she worked at the gift shop of the Saint Louis Art Museum even though she had a master's degree in audiology. In reversing the trial court's decision, the appellate court observed that there had not been a demonstrated change in circumstances, given that the former wife had received her audiology degree prior to the date of the dissolution judgment and was not working at the time of the dissolution. *Id.*

A similar result was rendered by the appellate court in *Batka v. Batka,* 171 S.W.3d 757 (Mo. Ct. App. 2005). In that case, a disabled former spouse sought to

have the original decree modified so as to allow for an increase in maintenance based upon the deterioration of her health and her inability to work. In reversing the trial court's decision to grant the modification, the appellate court noted that there had not been any significant change in circumstance warranting a modification, because even though the disabled spouse's health had worsened, both her health condition and her inability to work were not new circumstances. *Id.* at 761. The disabled spouse was not working due to her disability at the time of the original decree and still was not working due to her disability at the time that she sought the modification. *Id.; see also Swartz v. Johnson*, 192 S.W.3d at 756 (continuing disability that was present at the time of the original decree did not constitute a change in circumstances warranting a modification of maintenance).

In accordance with this line of cases, this Court should find that the trial court abused its discretion in reducing Ms. Templeton's maintenance, because its decision on this issue misapplied the applicable law and also is not supported by and is against the weight of the evidence. *See, e.g., Rende v. Rende,* 191 S.W.3d 56, 58-59 (Mo. Ct. App. 2006)(reversing a modification of maintenance where the income imputed to the recipient spouse was insufficient to meet her reasonable needs); *Eaton v. Bell*, 127 S.W.3d 690, 695-96 (Mo. Ct. App. 2004)(no significant change in circumstances warranting a modification of maintenance, even though the spouse paying the maintenance had his employment as a physician terminated

following the death of a patient, where the other spouse remained unable to meet her reasonable needs with her own income); *Draper v. Draper*, 982 S.W.2d 289, 292 (Mo. Ct. App. 1998)(modification of maintenance not warranted where, even though the husband's income had decreased because he decided to quit work and receive long-term disability benefits instead, his income continued to be significantly greater than his former spouse, who continued to be in need of maintenance because her expenses had increased since the original order due to significant medical bills, so much so that she could not meet her monthly financial obligations on her income alone). The trial court's decision regarding maintenance therefore should be reversed, with the maintenance being restored to its original amount of one thousand dollars ($1,000.00) per month effective as of January 1, 2009. *See, e.g., Shannon v. Shannon*, 179 S.W.3d 920, 930 (Mo. Ct. App. 2005)(an appellate court that believes that the trial court abused its discretion may enter the judgment the trial court should have entered).

IV. The trial court abused its discretion and erred in failing to follow the presumption of retroactivity established by the trial court's own local rules, Local Rule 68.9(1), and making the modified child support award retroactive to the date on which Respondent was served with Appellant's original motion to modify child support. No evidence or facts were presented in this case warranting the rebuttal of this

presumption, particularly given the significant disparities between the parties' respective incomes, the Respondent's understatement of income by no less than $59,000.00, and his submission of inaccurate financial statements.

The trial court in this case was subject to the Local Rules for the Circuit Court of St. Louis County. One of those rules, Local Rule 68.9, provides in pertinent part that:

> In all proceedings to modify any provision for support of a minor child or children in a decree of dissolution or order of paternity, there shall exist a presumption that any modification (increase or decrease) of the obligation for payment of support for a minor child shall be retroactive to the date of filing of movant's statement of income and expenses or the date of service of movant's motion to modify, whichever shall occur later.

St. Louis County Circuit Court Rule 68.9(1)(a copy of which is contained in the Appendix to this brief). While a trial court has discretion in determining the effective date for the modification of a child support award, it cannot select the effective date for such a modification without careful deliberation, but rather must give due consideration to the presumption created by that court's own local rules. The record in this case is devoid of any facts that would provide a basis for

overcoming the presumption of retroactive child support established by Local Rule 68.9.

In *Payne v. Payne*, 206 S.W.3d 379 (Mo. Ct. App. 2006), the appellate court found that the trial court did not abuse its discretion in electing not to make a reduced child support award retroactive to the filing of the motion based upon "the relative financial circumstances of the parties." *Id.* at 384. In determining whether a party is entitled to retroactive child support, the courts have maintained that it is "the function of the trial judge to 'balance the equities'" and that the trial court should consider "the financial inability of the custodial parent to provide for all of the children's needs and the noncustodial parent's ability to provide financial assistance in providing those needs." *See, e.g., Malawey v. Malawey*, 137 S.W.3d 518, 526 (Mo. Ct. App. 2004); *see also Downard v. Downard*, 292 S.W.3d 345, 347-50 (Mo. Ct. App. 2009)(affirming a retroactive award of increased child support in light of the substantially greater income of the father, an attorney, and his deception to the trial court regarding his own income and assets).

The equities in this case favor the increase in child support being made retroactive to the commencement of the underlying proceeding. Facts that support favoring retroactivity include the significant financial disparities between the parties (L.F. 99, 101; Pet. Ex. 18), the Respondent's increased income which was understated by no less than $59,000.00 (L.F. at 101), his submission of inaccurate

financial statements and mortgage applications (Tr. 448-51, 487-90; Pet. Ex. 25, 31), his failure to submit or file several tax returns (Tr. 434-37, 481-85), his untimely payment of child support and maintenance sometimes with insufficient funds (Tr. at 143-46), and his continued refusal to pay his proportionate share of the children's uncovered medical expenses (Tr. 120-22, 162-63; Pet. Ex. 11). In contrast, the Appellant throughout the underlying litigation, had been paying the primary expenses of the children including food, housing, medical, vision, clothing, shoes, educational supplies, school accounts and haircuts. Tr. at 136, 158-59, 183-84, Pet. Ex. 9, 10, 11, 12, 20.

Because the presumption in favor of retroactive child support was not overcome under this set of facts, this Court should find that the trial court abused its discretion by failing to make the increase in child support retroactive to the date that Respondent was served with Appellant's initial motion to modify.

CONCLUSION

Certain provisions of the trial court's judgment were not supported by substantial evidence, were against the weight of the evidence or misapplied the law, thereby warranting reversal of those provisions. The trial court's decision to reduce maintenance, for example, warrants reversal, because the Respondent, as the movant, did not satisfy his burden of demonstrating through detailed evidence at the hearing a change in circumstances so substantial and continuing as to render

the original maintenance decree unreasonable. Contrary to the contentions raised by Respondent in his motion to modify, Appellant's earning capacity did not substantially change since the entry of the original decree, and her living expenses actually increased since that time due to the significant cost of the medications that she takes to treat her chronic disease. The trial court further erred by disregarding the presumption for retroactive child support established by the trial court's own local rules. In light of these errors, Appellant respectfully moves this Court to enter an order reversing the trial court's modification of maintenance, restoring the maintenance to the amount set forth in the original decree ($1,000.00 per month), ordering that the modified child support award entered by the trial court be made retroactive to January 6, 2007, the date that Respondent was served with Appellant's original motion, to award Appellant her reasonable costs and attorneys' fees in pursuing this appeal, and to afford all further other relief that this Court deems just and appropriate.

Respectfully submitted,

Craig J. Hoefer, No. 37100
16204 Bay Harbour Court
Wildwood, Missouri 63040
(636) 345-7100 (telephone)
(636) 458-5058 (facsimile)
choefer01@charter.net

Attorney for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies, in accordance with Rule 84.06(c), that this brief contains the information required by Rule 55.03, complies with the page limits set forth in Rule 84.06(b) in that this brief appears, based upon computer software, to contain a total number of 10,189 words, excluding those contained in the cover, certificate of service, this certificate of compliance, the signature block, appendix, table of contents and table of authorities, and that a disk containing a copy of this brief is being filed contemporaneously herewith and has been scanned for viruses and is virus-free.

_____

Craig J. Hoefer

CERTIFICATE OF SERVICE

The undersigned certifies that two (2) copies of Appellant's brief and one (1) copy of the brief contained on a disk were served on Respondent's counsel, Ms. Margaret Smith, Eric J. Lindhorst & Associates, LC, 1308 Papin Street, St. Louis, Missouri 63103, by depositing the same, with postage prepaid in a United States Postal Service, first class mail mailbox on this 20th day of September 2010.

_____

Craig J. Hoefer

APPENDIX

A-1 20 CFR § 404.401a

A-2 20 CFR § 404.1592

A-6 St. Louis County Local Rule 68.12