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 REPLY 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

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STATEMENT OF FACTS

Even though Missouri Supreme Court Rule 84.04(f) only requires the Respondent to submit a statement of facts if he is "dissatisfied with the accuracy or completeness" of the Appellant's facts, Respondent nevertheless devotes a significant portion of his brief to presenting his own statement of facts. A review, however, of Respondent's statement of facts reveals that he does not contest or dispute the principal facts underlying this action. With regard to the facts that are critical to a review of the trial court's decision to reduce maintenance in this case, Respondent either simply reiterates the facts presented in the Appellant's brief or does not address them. Respondent, for example, does not challenge or address the fact that his income as an attorney significantly increased following the entry of the original decree awarding Appellant maintenance or the fact that he remains capable of meeting his own financial needs while continuing to meet his support obligation. In his statement of facts, Respondent also does not challenge or contradict any of Appellant's facts relating to the amounts or the reasonableness of the expenses claimed by her, nor does he address or refer to any facts that reflect any shared expenses or economies between Appellant and her parents with whom she resides. Respondent, likewise, does not dispute that Appellant had been diagnosed with a chronic disease at the time of the dissolution, that she continued to suffer from that disease at the time of the modification, that she worked part-time as a nurse at the

time of the dissolution, that she continued to work part-time as a nurse for a number of years following the dissolution, that she was declared disabled by the Social Security Administration following the entry of the original decree, and that prior to the modification by the trial court, the only income that she derived for herself was the original maintenance awarded and her receipt of Social Security disability benefits due to her inability to work because of her disease.

ARGUMENT

I. Modification of Maintenance

While a trial court has discretion in modifying a maintenance award, that discretion is not unfettered. "[D]iscretion is not the equivalent of whim; discretion must be applied with control." *Wyeth v. Grady,* 262 S.W.3d 216, 219 (Mo. 2008)(en banc)(quoting *Anglim v. Missouri Pacific R. Co.*, 832 S.W.2d 298, 303 (Mo. 1992)(en banc)). When a judgment is "based on findings of fact which are antagonistic, inconsistent, [ambiguous,] or contradictory as to material matters, or when [the judgment] is based upon conclusions of law which are at variance with the findings of fact," then the judgment "cannot stand." *Barrett v. Barrett,* 963 S.W.2d 454, 457 (Mo. Ct. App. 1998)(quoting *Donnelly v. Donnelly,* 951 S.W.2d 650, 653 (Mo. Ct. App. 1997)); *see also Jablonowski v. Logan*, 163 S.W.3d 128, 132 (Mo. Ct. App. 2005). The determination of whether the evidence in a given case is substantial, as well as whether inferences drawn from a given set of facts,

are questions of law to be resolved by this Court. *See, e.g., Tharp v. Monsee,* 327 S.W.2d 889, 899 (Mo. 1954)(en banc); *Dorsey v. Dorsey,* 156 S.W.3d 442, 446 (Mo. Ct. App. 2005); *City of Sullivan v. Truckstop Restaurants, Inc.,* 142 S.W.3d 181, 191 (Mo. Ct. App. 2004).

By statute, a maintenance award "may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms" of the original decree unreasonable. Mo. Rev. Stat. § 452.370.1; *see also Katsantonis v. Katsantonis,* 245 S.W.3d 925, 927-28 (Mo. Ct. App. 2008); *Swartz v. Johnson,* 192 S.W.3d 752, 755 (Mo. Ct. App. 2006). Accordingly, "[n]ot every change of circumstances will automatically justify a modification of an original dissolution decree, as these motions will be appropriate only in unusual situations." *Hayes v. Almuttar,* 25 S.W.3d 667, 672 (Mo. Ct. App. 2000)(quoting *Crawford v. Crawford,* 986 S.W.2d 525, 528 (Mo. Ct. App. 1999)). The requisite changed circumstances must be proven by detailed evidence, and the party seeking the modification (in this case the Respondent) carries the burden of establishing that the terms of the original decree have become unreasonable. *See, e.g., Katsantonis,* 245 S.W.3d at 927-28. The trial court's decision, therefore, requires reversal if the respondent, as in this case, failed to meet his burden of proving through detailed evidence that the original maintenance award had become unreasonable as a result of substantial and continuing changed circumstances.

A change in circumstances rises to the requisite statutory level when it renders the obligor spouse unable to pay maintenance at the assigned rate or when the recipient of the support could meet his or her reasonable needs with a lesser amount of maintenance. *See, e.g., Clinton v. Clinton*, 231 S.W.3d 317, 320 (Mo. Ct. App. 2007); *Martino v. Martino,* 33 S.W.3d 582, 584 (Mo. Ct. App. 2000). In his brief, Respondent does not dispute or challenge the trial court's decision to disbelieve his testimony that he was earning $66,000.00 per year, or $5,500.00 per month, the same amount he was earning as an attorney at the time of the original decree, and find that his actual income was at a minimum $125,000.00 per year, or $10,417.00 per month. L.F. at 101; Respondent's Brief at pp. 13-14. Respondent furthermore does not dispute or challenge the fact that he is able to pay maintenance at the rate assigned in the original decree. *See* Respondent's Brief at p. 14, n.2.

Instead, Respondent claims that Appellant, at the time of the hearing on the motion to modify, was able to meet her reasonable needs with a lesser amount of maintenance because she lived with her parents and purportedly had additional sources of income. When maintenance originally was ordered, Appellant had been diagnosed with a chronic, auto-immune disease, rheumatoid arthritis, and was employed on a part-time basis as a registered nurse, earning an annual salary of approximately $16,644.00, or $1,387.00 per month. L.F. at 19, 97-98; Tr. at 20-

21, 87-88, 474-75; Pet. Ex. 4. Appellant's monthly expenses at that time were $3,461.18. Pet. Ex. 5.

Based upon the evidence presented in the original dissolution proceeding, the trial court concluded that Appellant "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...," and awarded maintenance to Appellant in the amount of $1,000.00 per month. L.F. at 18-19, 22-24, 89-91, 97-98; Pet. Ex. 14. During the ten year period between the entry of the original decree and the hearing on the motion to modify, Appellant's health deteriorated to the point that she stopped working based upon the advice of her treating physician, who also employed her, found it necessary to move in with her parents, was declared disabled by the federal Social Security Administration, and began to receive $1,215.60 per month in Social Security disability benefits for herself and additional benefits for her children. L.F. at 99; Tr. at 24-28, 33, 81-82, 89-90, 96-98, 100-02; Pet. Ex. 3.

Respondent argues in his brief that Appellant's receipt of Social Security disability benefits, coupled with her decision to live with her parents and her purported ability to work part-time, constituted a change in circumstances

warranting a modification of the original maintenance award.[1] Appellant's receipt of Social Security disability benefits, in and of itself, cannot constitute a substantial and continuing change given that her receipt of those benefits for herself merely offsets the income that she was earning through part-time employment at the time of the original decree. Through her receipt of Social Security disability benefits

[1] In his Statement of Facts Respondent states, without the benefit of any citations to the legal file or record, that the trial court "found Ms. Templeton to be in need of $500.00 per month in maintenance to meet her reasonable living expenses" based upon "Mr. Lindhorst's income, Ms. Templeton's imputed income and her Social Security benefits, the economies achieved by sharing living expenses with Ms. Templeton's parents, Ms. Templeton's Second Amended Income and Expense Statement, and noting the children's social security benefits to be 'relevant.'" *See* p.7 of Respondent's brief. Despite Respondent's assumptions concerning the basis for the trial courts finding, the trial did not specify in its judgment the factors it relied upon in determining that a substantial and continuing change had occurred in the parties' financial circumstances warranting a modification of maintenance. L.F. at 107.

rather than part-time wages, Appellant's income actually declined since the entry of the original decree from $1,387.00 per month to $1,215.60.[2]

Respondent maintains, however, that Appellant's receipt of Social Security disability benefits cannot be viewed in isolation, but rather must be considered in conjunction with the trial court's finding that Appellant's health condition has arguably improved through the use of medication to the point where she is again capable of working in a sedentary position on a part-time basis. L.F. at 103-04. Despite expert testimony from Appellant's rheumatologist, who had been treating her for over fifteen years and who regularly examined her every few months, that Appellant remained unable to work on either a full-time or part-time basis, in even a sedentary position, *see* Tr. at 24-25, 27, 31-32, 34, 36, 44, 51-53, 55, 76-77, 81-

[2] Respondent emphasizes in his brief the tax free status of Appellant's Social Security disability benefits. In actuality, such benefits are subject to taxation depending upon the amount of total income received by the recipient. Appellant did not earn enough income to subject her disability benefits to taxation. Pet. Ex. 14-17. Respondent further contends that the Social Security disability benefits paid to Appellant's dependent children should be treated as income to Appellant for the purposes of calculating maintenance, even though such benefits are treated for tax purposes as income to the children since they are the legal recipients of those benefits.

82, the trial court nevertheless relied upon the testimony of Respondent's expert who had never physically examined Appellant in concluding that she was "not totally disabled" and was capable of performing "part time employment, primarily in a sedentary position." L.F. at 103; Tr. at 303-04.

Even assuming that the trial court was correct in relying upon the testimony of Respondent's medical expert that Appellant is not the same as she was at the time that she was declared disabled by the federal Social Security Administration in 2004 and that "the patient that exists today" is not disabled, L.F. at 104, that evidence does not support a finding of a substantial and continuing change of circumstances in this case. The relevant point for measuring whether a substantial and continuing change of circumstances warranting a modification of maintenance in this case is not the date that Appellant was declared disabled for the purposes of receiving Social Security benefits (2003), but rather the date of the original decree (1998). At the time that the original decree was entered in 1998, Appellant was capable of working on a part-time basis, notwithstanding her rheumatoid arthritis. L.F. at 19, 97-98. The trial court's finding that Appellant, at the time of the hearing, was "not totally disabled," and appeared capable of performing "part time employment, primarily in a sedentary position," therefore reflects nothing more than a possible return to the same state of health she was in at the time of the dissolution through the use of an aggressive medication regimen (*see* Tr. at 104-

05) following a period during which her condition had been disabling. Even Respondent, in his own brief, recognizes that Appellant's health and ability to work may be subject to temporary changes. *See* p. 15 of Respondent's brief. Because Appellant's disease limited her to working on a part-time basis both at the time that the original decree was entered and at the time of modification hearing, no substantial and continuing change in circumstances could be based in this case on her ability to work.

In light of the Court's finding that Appellant is capable of working on a part-time basis, Respondent argues in his brief that Appellant has an affirmative duty to seek suitable, part-time employment and cannot rely upon her receipt of Social Security disability benefits to substitute this duty. *See* p.18 of Respondent's brief. While the courts have imposed a duty on the supported spouse to make a good faith effort to become self-supporting, *see, e.g., Karasiuk v. Karasiuk*, No. ED93632 (Mo. Ct. App. Sept. 7, 2010)(a spouse's failure to become self-supporting may be the basis for modification of a maintenance award, but it does not mandate modification), nothing contained within the record in this case suggests that Appellant did not reasonably and in good faith follow the advice of her treating rheumatologist that she was unable to work based upon the severity of her condition, and reasonably and in good faith believed that to remain self-supporting and financially independent could be best furthered in her case by

applying for and receiving Social Security disability benefits. Because health insurance often is not offered to part-time employees (as was the case when she was working part-time prior to applying for Social Security disability benefits, *see* L.F. at 19), it was not unreasonable for Appellant to believe that she could achieve greater financial independence by not jeopardizing her Social Security disability benefits, and her consequent eligibility for Medicare coverage to cover her excessive medical costs, through part-time employment. In other cases where the courts have found a good faith basis for the failure of the supported spouse to seek outside employment, the courts have declined to find a substantial and continuing change in circumstances warranting a modification of maintenance. *See, e.g., Hayes v. Almuttar*, 25 S.W.3d 667, 673 (Mo. Ct. App. 2000)(finding no change warranting a modification in maintenance where the supported spouse reasonably believed based upon the initial decree that she was not required to work).

In any event, as the trial court itself noted, the courts cannot make the supported spouse return to work, *see* Tr. at 132, but can only impute income to the supported spouse if the court determines that the supported spouse is underemployed. *See, e.g., Buchholz v. Buchholz,* 166 S.W.3d 146, 153 (Mo. Ct. App. 2005)(courts do not mandate the employment that a spouse is required to take). A court, in proper circumstances, may impute income to a spouse according to what that spouse could earn by use of his or her best efforts to gain employment

suitable to that spouse's capabilities.[3] *Id.* What constitutes "proper circumstances" depends upon the facts and must be determined on a case-by-case basis. *Id.* The courts have held, however, that "it is axiomatic that there must be evidence to support a finding that the parent is deliberating limiting his or her work to reduce income before it is appropriate to impute income," and that "[c]ourts should not impute income where the record does not establish an attempt to evade parental responsibilities." *Id.* at 156 (quoting *Davis v. Department of Soc. Servs.,* 21 S.W.3d 140, 141 (Mo. Ct, App. 2000), and *Smith v. Smith,* 969 S.W.2d 856, 859 (Mo. Ct. App. 1998)). The evidence presented in this case does not reveal any attempt by Appellant to evade her parental responsibilities. Appellant continued to work part-time for several years following her dissolution, notwithstanding her disease, up to the time where she could no longer perform her job duties and that

[3] The courts have held that a "parent must have the capacity to earn [the] income which is imputed to him or her." *Monning v. Monning,* 53 S.W.3d 241, 245 (Mo. Ct. App. 2001)(quoting *Walker v. Walker,* 936 S.W.2d 244, 248 (Mo. Ct. App. 1996). Even assuming that Appellant is physically capable of working on a part-time basis and that positions exist within the relevant market into which she could be placed, Appellant is restrained from being able to earn the income imputed to her by the limitations imposed by the Social Security Administration on her ability to return to work. *See* 20 C.F.R. §§ 404.401a, 404.1592.

her physician and employer advised her that she should stop working for health reasons and apply for Social Security disability benefits. Tr. at 24, 27-28, 62. Through her receipt of Social Security disability benefits, and the savings that she incurs in terms of being eligible for Medicare coverage, Appellant essentially has replaced the income that she previously was earning through part-time work. L.F. at 19, 98-99.

Even assuming that it was proper for the trial court to impute income to Appellant under the circumstances of this case, the trial court erred in its calculation of that imputed income by relying upon speculative testimony. While Respondent does not dispute in his brief that the appellate courts repeatedly have held that a trial court cannot calculate or impute income based solely upon speculation, *see, e.g., Wightman v. Wightman*, 295 S.W.3d 183, 191 (Mo. Ct. App. 2009); *Hern v. Hern*, 173 S.W.3d 653, 655 (Mo. Ct. App. 2005); *Johanson v. Johanson*, 169 S.W.3d 897, 900 (Mo. Ct. App. 2005); *Monning v. Monning*, 53 S.W.3d 241, 247 (Mo. Ct. App. 2001)("The trial court's assessment of the amount of income to impute to a party must be supported by the evidence, and the court is not allowed to set the amount solely based on speculation."), he attempts to distinguish these cases by arguing that the trial court imputed income to Appellant based upon the testimony of, and a market survey conducted by, a vocational expert. What Respondent chooses to ignore, however, is the fact that the trial court

imputed income based upon Appellant's purported ability to work part-time as a registered nurse and that the vocational expert retained by Respondent, Timothy Kaver, repeatedly acknowledged in his testimony that he limited his investigation and consideration of positions within the relevant market for which Appellant may be qualified to only full-time positions and that he, therefore, was unable to offer any data relating to part-time positions. Tr. at 222-27. Mr. Kaver's decision to limit his market survey to only full-time positions was consistent with his expressed opinion (both in his expert report and his deposition testimony) that Appellant would not be employable within the pertinent market if she was not able to function on at least a sedentary level of activity on a full-time basis, eight hours a day, five days a week, 52 weeks a year. Tr. at 222-23. Because Mr. Kaver did not contact even a single employer in the St. Louis metropolitan area regarding the availability, compensation, hours or any other particulars of any part-time positions for which the Appellant may be qualified, he could only speculate that such positions exist "somewhere out in the marketplace". Tr. at 222-23, 225-28. Mr. Kaver specifically acknowledged in his testimony that offering such speculation was inconsistent with his usual practice of conducting "a labor market survey to demonstrate or prove that there are openings at that time" whenever he testifies as an expert witness. Tr. at 227. It is curious that Mr. Kaver did not follow his usual practice of conducting a market survey in this case for part-time nursing positions

for which Appellant may be qualified, given the frequency with which he has been retained by Respondent's counsel's law firm to testify as an expert in these types of cases. Tr. at 221. Because Mr. Kaver did not attempt to identify any specific part-time positions into which Appellant could be placed and, therefore, could only assume that such positions existed based upon his past experience, his testimony must be viewed as being indistinguishable from the testimony found in cases such as *Wightman* and *Monning* as being too speculative to support a trial court's calculation of imputed income. Given the speculative nature of Mr. Kaver's testimony, the trial court thus erred in relying on that testimony and Mr. Kaver's report to infer the availability of any part-time positions for which Appellant may be qualified and to impute income to Appellant based upon that inference.[4] *Cf. Haynes v. Almuttar*, 25 S.W.3d 667, 673-74 (Mo. Ct. App. 2000)(finding that the evidence offered to reduce or terminate maintenance was too speculative when no evidence was presented that any hospital would hire a registered nurse, who was

[4] As part of its findings, the trial court noted Mr. Kaver's testimony regarding various full-time positions and that it "has reviewed a variety of jobs included in Mr. Kaver's report" in making its decision to reduce maintenance, even though each of those positions were full-time positions and even though the trial court had concluded that only part-time employment in a sedentary position was feasible and appropriate for Appellant. L.F. at 103, 105.

not disabled, but who had been absent from the workforce for an extended period of time). The role of the courts is "not [to] supply missing evidence, or the [respondent] the benefit of unreasonable, speculative or forced inferences." *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. 2001)(en banc)(quoting *Bauby v. Lake*, 995 S.W.2d 10, 13 n.1 (Mo. Ct. App. 1999)).

In addition to relying upon speculative evidence in imputing income, the trial court also erred in adding that imputed income to the amount of income that Appellant derives from Social Security disability benefits in determining whether a modification of maintenance was warranted. As part of its findings, the trial court specifically stated that it was recognizing the income imputed to Appellant "as income in addition to her Social Security disability benefit," *see* L.F. at 106, even though Social Security disability benefits are intended to "replace income lost due to the recipient's inability to work." *Weaks v. Weaks*, 821 S.W.2d 503, 506 (Mo. 1991)(en banc); *accord Smith v. Smith*, 202 S.W.3d 83, 86 (Mo. Ct. App. 2006). That finding by the trial court is inconsistent with and misapplies the law governing the receipt of Social Security disability benefits. *See* 20 C.F.R. §§ 404.401a, 404.1592. Under the applicable Social Security Administration regulations, Appellant will cease to receive disability benefits if she is employed in any substantial gainful activity past a brief trial period. Because twenty hours of part-time work each week would constitute substantial gainful activity under these

regulations, Appellant thus is precluded from deriving income from both part-time employment and Social Security disability benefits for any extended period of time.

In assessing whether there had been a substantial and continuing change in circumstances warranting a modification of maintenance, the trial court should have considered either the income imputed to Appellant or the income that she derives from her receipt of Social Security disability benefits, but not both. In an attempt to respond to this point, Respondent argues in his brief that the trial court may not have, in fact, considered both imputed income and Social Security disability benefits in its determination to reduce Appellant's maintenance. *See* pp. 25-26 of Respondent's brief. If the trial court truly limited its consideration of Appellant's income to either her imputed income or her receipt of disability benefits, as suggested by Respondent, then the trial court's finding of a substantial and continuing change in circumstances lacks any evidentiary support. If the trial court focused only on Appellant's receipt of Social Security disability benefits, Appellant's monthly income declined from the $1,387.00 per month she was earning through part-time employment at the time of the original decree to the $1,215.60 per month in Social Security disability benefits that she was receiving herself at the time of the hearing. If the trial court instead focused on the amount of income that it imputed to Appellant, the $1,600.00 in imputed income that

Appellant purportedly can now earn through part-time employment is only slightly more than she was earning through part-time employment at the time of the original decree. Neither scenario supports a conclusion that Respondent met his burden of demonstrating a substantial and continuing change in circumstances.

Respondent further seeks to avoid judicial consideration on this point by arguing that Appellant is precluded through a series of purported procedural errors from arguing on appeal that the trial court erred as a matter of law in considering both her imputed income and her Social Security disability income. Relying on cases that relate to a party's failure to submit factual evidence, Respondent claims that this Court cannot consider this issue, because Appellant did not seek to introduce into evidence or move for the trial court to take judicial notice of the applicable federal regulations, did not request findings of fact on the "speculative future disability status" of Appellant,[5] did not include in the legal file the

[5] Appellant's counsel not only filed a written motion pursuant to Supreme Court Rule 73.01 with the trial court on December 11, 2008, specifically requesting that the trial court issue a formal opinion containing findings of fact on the controverted fact issues raised in this case and a statement of the grounds for the court's decision, but also made an oral request to the trial court during the modification proceeding. Tr. at 453-54. As was the case in *Barrett v. Barrett*, 963 S.W.2d 454, 455 n.3 (Mo. Ct. App. 1998), the copy of the trial court docket sheet and the trial

memorandum submitted by Appellant to the trial court that addressed those regulations, and did not file a post-trial motion relating to those regulations. *See* pp. 24-26 of Respondent's brief. In contrast to the cases referenced by Respondent, however, the applicability of the federal Social Security disability regulations in this case present a legal, as opposed to a factual, issue that is reserved for de novo review by the appellate court. *See, e.g.*, *City of St. Joseph v. Village of Country Club*, 163 S.W.3d 905, 907 (Mo. 2005)(en banc); *Commerce Bank v. Blasdel*, 141 S.W.3d 434, 442 (Mo. Ct. App. 2004). Just as a party is not required to submit case law to the trial court in order to preserve an error of law, the appellate courts may take "notice of the laws of the United States and of the rules and regulations promulgated by federal agencies," even in those cases in which "neither party has briefed or even suggested that the [party's] rights are

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transcript demonstrate the filing of that request, even the specific request was not included in the legal file. Tr. 453-54; L.F. at 13. Respondent further misstates the record when he contends that Appellant offered no evidence on this issue. Appellant specifically testified that it was her belief that she would lose her disability benefits if she continued to work following an initial grace period, which is consistent with the pertinent regulations. Tr. at 108-09.

governed by federal law."[6] *In re Marriage of Lathem,* 642 S.W. 694, 697 (Mo. Ct. App. 1982); *see also Kawin v. Chrysler Corp.,* 636 S.W.2d 40, 44 (Mo. 1982)(en banc).

In addition to the claimed procedural errors, Respondent also cites *Liljedahl v. Asner (In re Liljedahl),* 942 S.W.2d 919 (Mo. Ct. App. 1996), for the proposition that Appellant is precluded from arguing that her income from disability benefits would cease following a trial work period if she became employed. In contrast to the case at hand, the court in *Liljedahl* reversed a trial court's award of maintenance to the wife in an original divorce decree, because the record in that case was devoid of any evidence that the wife ever exhibited any symptoms of her alleged disease or that her ability to function socially or occupationally had ever been impaired by her alleged disease. *Id.* at 925. The wife admitted in her testimony that her failure to work was merely a part of her husband's scheme to fraudulently establish her eligibility for Social Security disability benefits and a government pension. *Id.* Only after the scheme succeeded and she was granted

[6] To the extent that any plain errors in this case may not have been properly raised or preserved, Appellant respectfully urges this Court to review those errors under the plain error doctrine so as to avoid the occurrence of any injustice or miscarriage of justice. *See, e.g., Harris v. Parman,* 54 S.W.3d 679, 688 (Mo. Ct. App. 2001).

Social Security benefits did the wife learn from her husband that her alleged disability was based on "depression." *Id.* Given this set of facts, *Liljedahl* has no bearing on this case.

Finally, Respondent seeks to minimize the legal ramifications of the trial court's decision to include both imputed income and the receipt of Social Security disability benefits in its calculation of maintenance by suggesting that Appellant can institute her own separate motion to modify maintenance should she be denied future disability benefits based upon part-time employment. *See* p. 28 of Respondent's brief. That suggestion, however, completely disregards the repeated admonishment of the appellate courts that the standard for modifying maintenance must be strictly observed in order to discourage recurrent and insubstantial motions for modifications. *See, e.g., Peine v. Peine,* 200 S.W.3d 567, 568 (Mo. Ct. App. 2006); *Swartz v. Johnson*, 192 S.W.3d 752, 755 (Mo. Ct. App. 2006).

Even if the trial court was correct in adding the $1,317.00 that Appellant receives for herself each month in Social Security disability benefits to the $1,600.00 each month that the trial court imputed to her in assessing whether a modification of her maintenance was warranted, this purported increase in income would not alone warrant a modification of maintenance. *See, e.g., McKown v. McKown,* 280 S.W.3d 169, 172 (Mo. Ct. App. 2009); *Katsantonis v. Katsantonis,* 245 S.W.3d 925, 928 (Mo. Ct. App. 2008). The ultimate issue is whether that

purported change in income is sufficiently substantial and continuing so as to make the original terms of the decree unreasonable. *Id.* In this case, Respondent has not shown that the purported increase in income would allow Appellant to meet her reasonable needs with a lesser amount of maintenance. *See, e.g., Katsantonis,* 245 S.W.3d at 928; *Rustemeyer v. Rustemeyer,* 148 S.W.3d 867, 870 (Mo. Ct. App. 2004). Any purported increase in Appellant's income has been dissipated by the significant increase in her expenses, which rose from $3,461.18 each month at the time of the original decree to $5,147.68 each month as of the date of the hearing.

As the movant on his motion to terminate or modify maintenance, Respondent had the burden of producing detailed evidence of the circumstances as they existed both at the time of the original decree and at the time of the hearing on his motion, including detailed evidence of Appellant's expenses. *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)). Although Appellant was not required to offer any evidence regarding her expenses in regard to this motion, *see, e.g., White v. Director of Revenue,* No. SC90400 (Aug. 3, 2010)("the party not having the burden of proof on an issue need not offer any evidence concerning it"); *Martz v. Martz,* No. SD 29838 (Mo. Ct. App. Sept. 3, 2010), the only evidence offered at the hearing relating to Appellant's expenses was the evidence offered by

Appellant. In addition to the statements of income and expenses[7] and the exhibits that she offered into evidence, Appellant also provided detailed testimony regarding her current expenses, including the recurrent expenses that she makes to her parents for rent, the use of a vehicle and other expenses. Tr. at 109-15, 134,

[7] Appellant submitted into evidence her first amended statement of income and expenses on the form that had been approved by an Order of this Court dated December 23, 2008 and made effective April 1, 2009, *see* Appendix, and offered testimony at the hearing, subject to cross-examination, regarding the expenses reflected in that form. Pet. Ex. 18. Because the trial court judge expressed his dislike of this new form at the hearing, Tr. at 153-55, Appellant filed a second amended statement of income and expenses, transferring the information to the form previously used. Because the second amended statement was not formally introduced into evidence, that statement was not incorporated into the legal file. To the extent that may be considered a procedural error, Appellant should not be penalized for utilizing the form approved by this Court, particularly given that the Order approving that form specified that the form "shall be accepted by the courts of this state." Respondent's counsel never objected to the filing of Appellant's Second Amended Statement of Income and Expenses, the subject of which was discussed in detail between counsel for Appellant, Respondent and the trial judge. Tr. at 454-55.

151-52, 153-57; Pet. Ex. 5, 7, 8, 18. On cross-examination, Appellant unequivocally expressed that the expenses reflected on her first amended statement of income and expenses were the expenses that she herself incurred and that her parents did not contribute to, pay or share in those expenses. Tr. at 152. Even though Respondent did not contest the amounts or the reasonableness of the expenses claimed by Appellant and did not submit any contradictory evidence or any evidence regarding any expenses purportedly borne by Appellant's parents (even though he deposed both of them), the trial court nevertheless found that it was "unclear as to exactly what portion of the household expenses are [Appellant's] responsibility," and assumed that "some of the expenses are shared and economies are achieved" without any evidentiary support for this assumption and without specifying what any of those expenses or economies may be or making any attempt to evaluate Appellant's relationship with her parents to determine whether equity justified a modification based upon their co-habitation. *See, e.g., Karasiuk v. Karasiuk*, No. ED93632 (Mo. Ct. App. Sept. 7, 2010); L.F. at 106. Because a trial court's determination cannot be based upon speculation and assumption and because that determination lacks sufficient evidentiary support, the trial court's determination on this point cannot be upheld.

The evidence that was properly before the trial court revealed a continuing deficiency between Appellant's monthly income (even if maintenance, Social

Security disability benefits, and imputed income are added) and her reasonable expenses. In light of this deficiency and in light of Respondent's increased ability to meet his own financial needs, Respondent cannot show that the original decree has become unreasonable. *See, e.g., Magaletta v. Magaletta*, 691 S.W.2d 457, 459 (Mo. Ct. App. 1985). In those cases, such as this, where a great disparity exists between the yearly income of the parties, even when the wife is working, and the evidence discloses that the husband can meet his own needs while continuing to his support his support obligation, the courts have found that the original decree has not become unreasonable and that modification, therefore, is unwarranted. *See, e.g., McKinney v. McKinney,* 901 S.W.2d 227, 229-30 (Mo. Ct. App. 1995); *Mendelsohn v. Mendelsohn,* 787 S.W.2d 321, 324 (Mo. Ct. App. 1990); *Magaletta v. Magaletta*, 691 S.W.2d 457 (Mo. Ct. App. 1985).

Because Respondent failed to meet his burden through the submission of detailed and competent evidence demonstrating that the original decree has become unreasonable through a substantial and continuing change in circumstances, this Court should reverse the trial court's decision to reduce maintenance.

II. Retroactivity of the Increased Child Support

Even though Respondent argues in his brief that the trial court acted appropriately in not making the increased child support award retroactive to the

date that Appellant served her initial motion to modify child support on him, he offers no explanation as to why the trial court chose or should be allowed to deviate from the presumption of retroactivity imposed under the Local Rule 68.9, and fails to offer any evidence to suggest that the trial court even considered that rule in rendering its decision. While Respondent states generally that Appellant refers to facts not in evidence, he makes no attempt to address or refute the factors favoring retroactivity that were identified in Appellant's brief (with appropriate citations to the record) or to challenge the proposition that the equities in this case favor strict adherence to the presumption set forth in the local rule.

CONCLUSION

Appellant respectfully moves this court to enter an order reversing the trial court's modification of maintenance, restoring the maintenance to the amount originally ordered ($1,000.00 per month), ordering that the modified child support award ($1,273.00 per month) 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, and to afford all further other relief that this Court deems just and appropriate.

Respectfully submitted,

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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 6060 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.

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Craig J. Hoefer

CERTIFICATE OF SERVICE

The undersigned certifies that two (2) copies of Appellant's substitute reply brief and one 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 4th day of November 2010.

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Craig J. Hoefer

APPENDIX