

**IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS  
STATE OF MISSOURI**

|             |   |                 |
|-------------|---|-----------------|
| D. XXXXXX,  | ) |                 |
|             | ) |                 |
| Petitioner, | ) | Cause No.       |
|             | ) |                 |
| v.          | ) | Division No. 43 |
|             | ) |                 |
| M. XXXXXX,  | ) |                 |
|             | ) |                 |
| Respondent. | ) |                 |

**MODIFICATION JUDGMENT**

This Court dissolved the marriage between Petitioner D. XXXXXX (hereinafter “Petitioner”) and Respondent M. XXXXXX (hereinafter “Respondent”) on March 5, 2013. Respondent then filed a Motion to Modify on March 24, 2016 and Petitioner filed a Motion to Dismiss on April 26, 2016. Respondent subsequently filed an Amended Motion to Modify on September 27, 2016 and Petitioner filed a Motion to Dismiss the Amended Motion to Modify on October 10, 2016. Currently before the Court are Respondent’s Amended Motion to Modify and Petitioner’s Motion to Dismiss. Respondent alleges two separate arguments in support of his Motion to Modify his maintenance obligation to Petitioner: 1) Petitioner’s expenses greatly reduced shortly after the entry of the Dissolution Judgment and that her income increased because she unexpectedly received Social Security benefits from her first husband; and 2) Respondent’s income decreased due to his involuntary loss of employment and subsequent retirement.

This case, including both the Amended Motion to Modify and the accompanying Motion to Dismiss, was heard and tried on July 11th and 12th, 2017. Petitioner appeared by Skype and by attorney, SR. Respondent appeared in person and by attorney, DH. The Court takes judicial notice of its file and considers the evidence adduced, including exhibits,

the witnesses' testimony and the reasonable inferences therefrom and the credibility of the witnesses. In accordance with Rule 73.01(a)(2), all fact issues upon which no specific findings are made shall be considered as having been found in accordance with the results reached. Any finding of fact herein equally applicable as a conclusion of law is adopted as such and any conclusion of law herein equally applicable as a finding of fact is adopted as such.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. On March 5, 2013, the Court entered a Full and Final Judgment and Decree of Dissolution<sup>1</sup> (hereinafter referred to as "Judgment") dissolving the marriage between Petitioner and Respondent.

2. There have been no modifications of the Judgment since it was entered.

3. The last four digits of Petitioner's Social Security Number are XXXX and the last four digits of Respondent's Social Security Number are XXXX.

4. Pursuant to said Judgment, Respondent was ordered to pay to Petitioner the sum of \$3,400 per month as and for spousal support effective March 1, 2013. The Judgment stated that the amount of said spousal support shall be viewed as modifiable maintenance and shall continue until the first of the following events occur: Petitioner's remarriage, death of either party, or further order of the Court.

5. In essence, Respondent seeks to terminate or modify the maintenance due to Petitioner because of Petitioner's change in expenses, increase in income, and Respondent's subsequent decrease in income.

---

<sup>1</sup> Petitioner appealed said judgment in appeal number EDXXXXXX; however, the Missouri Court of Appeals, Eastern District, affirmed in whole the trial court's judgment.

### Petitioner's Income

6. It is undisputed that Petitioner is unemployed and does not have the ability to earn an income. Both Petitioner and Respondent testified that Petitioner suffers from various health issues during the latter part of their marriage, through the dissolution proceeding, as well as through the date of trial.

7. In addition to the maintenance being paid by Respondent, Petitioner receives Social Security benefits from her first husband and distributions from her various Individual Retirement Accounts ("IRAs").

8. According to Petitioner's Statement of Income and Expenses, her monthly income totals approximately \$2,992, excluding maintenance from Respondent.

9. Both parties and Mr. XXXXX, Petitioner's son, testified that it was unknown at the time of trial that Petitioner could receive Social Security benefits from her *first* husband.

10. Respondent argues that this unforeseen income is grounds to modify the judgment.

11. While the fact that the Respondent's *first* husband would be the source of social security may have been unforeseen, it was anticipated that Petitioner would receive Social Security income from Respondent. Therefore, the Court does not find the fact that Petitioner received this income from her first husband rather than Respondent as adequate grounds for modification or termination of maintenance.

12. The Judgment also stated that Petitioner would receive approximately \$2,000 per month in IRS distributions without interest and tax penalties.

13. Respondent's Exhibits S, V, and W show that various distributions were made to Petitioner from her retirement accounts but only Petitioner's 2015 tax return was introduced into evidence.

14. According to the evidence, Petitioner received \$19,425.37 in distributions from LPL Financial in 2014. (Resp't Ex. V.) In 2015, Petitioner received a total of \$46,616 (\$33,020.62 from LPL Financial and \$9,207.11 from Midland National) in distributions. (Resp't Exs. S, V, & W.) In 2016, Petitioner received \$18,348.54 (\$4,618.42 from LPL Financial and \$13,730.12 from Midland National) in distributions. (Resp't Ex. V.) Therefore, assuming that these were the only distributions made from Petitioner's retirement accounts, the average monthly distribution was approximately \$2,345, very close to the \$2,000 estimate in the Judgment.

15. On direct examination by Respondent's attorney, Petitioner testified that she did not know why the aforementioned distributions were made; however, Petitioner later testified that Mr. XXXXX, on her behalf, instructed LPL Financial to make the distributions.

16. Based on the evidence presented, Court does not find any substantial change in Petitioner's income so as to create a substantial change of circumstances. The Court, however, will use the average IRA distribution amount of \$2,345 when determining Petitioner's income for purposes of determining her ability to meet her reasonable needs. The Court, therefore, finds that for purposes of this Motion to Modify proceeding, that Petitioner's monthly income is \$3,027.

#### **Petitioner's Changed Expenses**

17. The next issue before the Court is whether Petitioner's expenses have changed sufficiently to warrant modification.

18. At trial in the underlying dissolution action, when deciding the issue of maintenance, the Court included as part of Petitioner's reasonable needs the cost of residing in an assisted living facility.

19. At trial in the underlying dissolution, the Court determined that Petitioner's reasonable monthly living expenses were approximately \$7,048, including the cost of an assisted living facility.

20. Mr. XXXXX testified that when Petitioner moved to Florida sometime in 2012 she resided in an assisted living facility until shortly after the Judgment was entered in March 2013. Petitioner then moved into Mr. XXXXX's residence at XXXXXX Drive, Tallahassee, Florida. Mr. XXXXX testified that Petitioner moved because she could not afford to stay in the facility.

21. Petitioner, Mr. XXXXX, Mr. XXXXX's girlfriend (now wife), JA, and Mr. XXXXX's daughter, JE, for whom he shares custody, resided in the home.

22. Mr. XXXXX stated that during the time Petitioner resided with him he provided Petitioner "24/7 care" including, but not limited to, driving Peitioner to her doctors' appointments, preparing Petitioner's meals, making sure that Petitioner took her medication in a timely manner, being responsible for Petitioner's daily hygiene, and managing her finances. Mr. XXXXX emphasized that he would make sure Petitioner was oriented to time and place and that he made an effort to engage her to help her emotional and mental well-being.

23. Petitioner and Mr. XXXXX testified that Mr. XXXXX took over Petitioner's financial transactions after she moved in with him but they could not recall specifically when that happened.

24. Mr. XXXXX testified that his name is on Petitioner's [REDACTED] Checking Account [REDACTED] and Savings Account [REDACTED]. Both Mr. XXXXX and Petitioner have debit cards connected to the checking account. Mr. XXXXX testified that any debits made by him were at the instruction of Petitioner and/or made on her behalf.

25. Further, Mr. XXXXX stated that there were times when he would "loan" Petitioner money when she was unable to pay for her expenses and that once she received her maintenance payment from Respondent she would "payback" Mr. XXXXX the money that was loaned.

Additionally, Mr. XXXXX testified that there were certain occasions that Petitioner would transfer money to him as a “gift.” (See Pet’r Ex. 23; Resp’t Ex. Y.)

26. Mr. XXXXX did not research and/or attempt to be designated as Petitioner’s home healthcare provider through the State of Florida in order to receive compensation for his services.

27. Mr. XXXXX testified that Petitioner lived with him until March 2017.

28. Mr. XXXXX testified that his house has 3 bedrooms and 2 bathrooms. According to Mr. XXXXX, while Petitioner resided with Mr. XXXXX she occupied the master bedroom because of the private bathroom.

29. Mr. XXXXX stated that he charged Petitioner the amount of her maintenance award monthly and used that sum to support the household by paying all household related expenses, including the mortgage (which was recently paid in full) and utilities. Petitioner would also pay for food for the entire household (including dining out). These expenses were for all of the residents of the household (Mr. XXXXX, his wife, and his child when she was in his custody) not just Petitioner. Mr. XXXXX considered this his compensation for taking care of his mother.

30. Petitioner’s other resources were used to pay her other bills and to pay for the cost of any vacations, including the vacation costs associated for Mr. XXXXX or others to accompany her when she traveled.

31. While it is Petitioner’s prerogative to spend her money as she wishes, when requesting maintenance, the reasonableness of her expenditures is relevant and essential to the analysis.

32. Mr. XXXXX testified that as time passed Petitioner’s physical condition deteriorated to such an extent that he could no longer care for Petitioner at home.

33. Approximately three months before trial, Petitioner, who is 78 years old, moved into CL, a senior living community, located at [REDACTED] Road, Tallahassee,

Florida, due to the deterioration of her various health conditions which include, but are not limited to, severe back pain, blood clots, and a split aorta.

34. Mr. XXXXX continues to assist his mother and provides her transportation to doctor's appointments and calls her regularly to keep her oriented and to help her emotional and mental well-being.

35. It is undisputed that Petitioner was served on March 29, 2016. It is undisputed that from that date until March 2017 Petitioner lived with Mr. XXXXX.

36. Therefore, the Court must review Petitioner's expenses from date of service until she entered the senior living facility in March 2017 and from March 2017 until the date of trial.

37. Petitioner admitted that her son prepared the Statements of Income and Expenses, as well as the Statements of Property filed in this matter on her behalf. When asked questions regarding the amounts in her bank accounts, brokerage accounts, and/or retirement accounts Petitioner was unable to say what the source of funds were for each account. Additionally, Petitioner stated that Mr. XXXXX is in charge of all of her banking and bill paying but he was also unsure of the source of funds for her various accounts.

38. Petitioner also testified she incurred tax debt because she filed her income taxes incorrectly since 2014 by failing to report the maintenance from Respondent she received as "income." Petitioner testified that a payment plan had been established with the Internal Revenue Service (IRS) but she was unaware of the terms and conditions of the payment plan.

39. Mr. XXXXX testified that Petitioner recently received a settlement of approximately \$11,500 from H&R Block due to its failure to report the maintenance received as income on Petitioner's 2014 and 2015 income tax returns.

40. According to Mr. XXXXX, even though Petitioner received a settlement from H&R Block, she entered into an installment agreement to pay-off the tax debt accrued for the years 2014 and 2015. (Resp't Ex. AA.)

41. Petitioner submitted her Statement of Income and Expenses on June 16, 2016.

42. Mr. XXXXX admitted that Petitioner's Statement of Income and Expenses dated June 16, 2016 reflects amounts that he believed retirement communities in the Tallahassee area would charge for services similar to those he rendered to Petitioner as outlined above and not the actual amount of Petitioner's monthly expenses. (Pet'r Ex. 7; Resp't Ex. M.)

43. Based upon the testimony and evidence adduced, the Court determines that Petitioner's reasonable needs on a monthly basis while residing with Mr. XXXXX, are:

| <b>Expense</b>  | <b>Monthly Cost</b> |
|---|---------------------|
| Rent or Mortgage (including gas, water, telephone, trash and sewer) | \$1,100.00          |
| <b><i>Utilities</i></b>   |                     |
| Electricity   | \$70.00             |
| Telephone (cell/pager)  | \$50.00             |
| Cable/Internet  | \$83.33             |
| <b><i>Insurance</i></b>   |                     |
| Life  | \$96.50             |
| Health Insurance  | \$237.63            |
| <b><i>Other Living Expenses</i></b>                                 |                     |
| Food  | \$350.00            |
| Clothing  | \$25.00             |
| Medical Care (including in home health care)                        | \$450.00            |
| Prescription Drugs  | \$193.53            |
| Recreation  | \$150.00            |
| Laundry and Cleaning  | \$25.00             |
| Barber and Beauty   | \$50.00             |
| <b><i>All Other Expenses</i></b>                                    |                     |
| Holiday, birthday gifts, etc.                                       | \$25.00             |
| Personal care items   | \$25.00             |
| Newspapers/magazines, etc.  | \$10.00             |
| Vacations   | \$50.00             |
| <b>Total</b>  | <b>\$2,990.99</b>   |



44. Petitioner's reduction of reasonable needs is significant and constitutes a changed circumstance so substantial and continuing that the current maintenance award of \$3,400 is unreasonable.

45. Petitioner's reasonable expenses remained static until she entered a senior living facility in March of 2017.

46. Petitioner updated her Statement of Income and Expenses in March 2017 and again in June 2017.

47. Mr. XXXXX testified that Petitioner likes to go on cruises and that Petitioner would bear the expense of the cruise for herself as well as the other family members who accompanied her because she could not go unescorted. Mr. XXXXX testified that he included this cost in the estimated costs listed in Petitioner's Amended Statement of Income and Expenses completed in June 2017.

48. Mr. XXXXX testified that unlike prior Statements of Income and Expenses, the June 2017 Statement of Income and Expenses included the actual cost of the senior living facility where Petitioner now resides. Upon examination of the [REDACTED] Bank statements, however, it appears that the actual cost of the senior living facility is \$3,249. (Resp't Ex. 23.)

49. Based upon the testimony provided, the Court determines that Petitioner's reasonable needs on a monthly basis as of March 2017 are:

| <b>Expense</b>                                       | <b>Monthly Cost</b> |
|--|---------------------|
| Rent or Mortgage (including utilities and telephone) | \$3,249.00          |
| <b><i>Utilities</i></b>                              |                     |
| Telephone (cell/pager)                               | \$50.00             |
| Cable/Internet                                       | \$125.00            |
| <b><i>Insurance</i></b>                              |                     |
| Life   | \$96.50             |
| Health Insurance                                     | \$237.63            |
| <b><i>Other Living Expenses</i></b>                  |                     |
| Food   | \$350.00            |

| <b>Expense</b>                               | <b>Monthly Cost</b> |
|--|---------------------|
| Clothing                                     | \$25.00             |
| Medical Care (including in home health care) | \$450.00            |
| Prescription Drugs                           | \$350.00            |
| Recreation                                   | \$150.00            |
| Laundry and Cleaning                         | \$25.00             |
| Barber and Beauty                            | \$50.00             |
| <b><i>All Other Expenses</i></b>             |                     |
| Holiday, birthday gifts, etc.                | \$25.00             |
| Personal care items                          | \$25.00             |
| Newspapers/magazines, etc.                   | \$10.00             |
| Vacations                                    | \$50.00             |
| Transportation                               | \$50.00             |
| <b>Total</b>                                 | <b>\$5,318.13</b>   |

50. Mr. XXXXX also testified that some of Petitioner's medical expenses were higher because after the Judgment Petitioner ill-advisedly changed her medical insurance to one that had less coverage.

#### **Respondent's Changed Income**

51. In addition to the reduction of Petitioner's expenses, Respondent argues that his involuntary separation from work and his subsequent retirement constitutes a substantial change that would render the maintenance award unreasonable.

52. Based upon the credible evidence submitted, including the Separation Package, Respondent's annual salary was \$123,360 and his monthly income totaled \$10,280. (Pet'r Ex. 10.)

53. In 2014, Respondent took \$61,758 in IRA distributions but did not take any distributions in 2015 or 2016.

54. It is undisputed that Respondent was employed with Emerson until September 30, 2016 and received 10 weeks' pay as severance. Thus, the effective date for the reduction of his income was December 9, 2016.

55. Therefore, Respondent's income decreased dramatically after December 9, 2016, the date his severance package ended.

56. At trial, Respondent testified that he was a professional engineer and had been employed as such, absent prior downsizings, since 1974. At the time Respondent filed his Motion to Modify, he was employed as a project manager by Emerson. At the time of trial, however, Respondent was unemployed due to downsizing at Emerson. (Pet'r Ex. 4; Resp't Ex. E.)

57. Respondent testified that he was offered a voluntary separation incentive in May of 2016 but that he declined because he wished to continue to work. He was then downsized in September of 2016.

58. As reflected in a letter dated September 15, 2016 and testified to by Respondent, Respondent received gross severance pay in the amount of \$23,723.08 which was approximately equal to 10 weeks' salary. (Pet. Ex. 10; Resp. Ex. BB.)

59. Respondent's W-2s and /or tax returns reflect that he made \$118,352.10 in 2013, \$122,303.31 in 2014, \$133,691.91 in 2015, and \$140,808 in 2016. Respondent's 2016 income was comprised of wages, unemployment benefits and Social Security benefits. (Pet'r Ex. 11 & 12; Resp. Ex. P, Q, R, & EE.)

60. On direct and cross-examination, Respondent testified as to his search for employment since being downsized in September 2016. Specifically, Respondent testified that in order to receive unemployment benefits he had to submit three applications per week to potential employers. Respondent kept a detailed spreadsheet of all of applications he submitted and inquiries he made with regard to employment opportunities. (Resp't Ex. CC.)

61. Respondent testified that he stopped looking for employment in or about March 2017.

62. At the time of trial, Respondent was 66 years old. Respondent testified that he believed his age impacted his ability to obtain another position as a project manager, where he had the most experience in project management.

63. Respondent testified that he has no intention of seeking employment because his prior attempts were not fruitful and he wishes to retire. Respondent also testified that he may, at some point in the future, decide to work full or part-time at a hardware store but that is not currently his plan.

64. Petitioner retained a vocational rehabilitation expert, Dr. Jeffrey Magrowski, who opined that Respondent could make between \$27,000 and \$91,167 annually.

65. Even though Respondent may be physically capable of working, retirement for someone of his age and in his financial position is reasonable, especially after an involuntary loss of employment and a good faith effort to gain new employment.

66. Petitioner's expert also opined that Respondent's retirement was "logical." He testified in his deposition as follows:

Mr. Roussin: Okay. And you also state in your conclusions that Mr. XXXXXX is no longer interested in working, he would like to retire and travel with his wife. Did he tell you that?

Dr. Magrowski: Yes.

Mr. Roussin: Did he say anything else about that?

Dr. Magrowski: Well, he said that it's time for him to retire and enjoy life.

Mr. Roussin: Okay.

Dr. Magrowski: And I -- that seemed to be a logical conclusion.

(Pet'r Ex. 19, p. 26, lns. 7-17.)

67. Respondent's monthly income was reduced to \$2,657 after his retirement. Respondent testified that he did not include any investment income in his Statement of Income and Expenses because he was not currently receiving any such income.

68. There was no evidence regarding what additional income Respondent's retirement accounts may generate but it was clear that Respondent based his decision to retire based upon the totality of his assets.

69. Respondent remarried on October 25, 2014. Respondent's current wife is not employed outside the home and she receives Social Security totaling approximately one-half (1/2) of the amount Respondent receives.

70. Respondent's expenses set forth on his Statement of Income and Expenses did not account for the expenses he shares with wife. The Court, therefore, adjusted those expenses accordingly to take into account the shared expenses.

71. Based upon the testimony provided, the Court determines that Respondent's reasonable needs on a monthly basis are:

| <b>Expense</b>                                       | <b>Monthly Cost</b> |
|--|---------------------|
| Rent or Mortgage (including utilities and telephone) | \$211.18            |
| <b><i>Utilities</i></b>                              |                     |
| Gas  | \$50.00             |
| Water  | \$30.00             |
| Electricity  | \$105.00            |
| Telephone (cell/pager)                               | \$25.00             |
| Cellular Phone                                       | \$50.00             |
| Sewer  | \$31.00             |
| Cable/satellite/internet                             | \$65.00             |
| <b><i>Automobile</i></b>                             |                     |
| Gas and Oil  | \$150.00            |
| Maintenance (routine)                                | \$50.00             |
| Taxes and License                                    | \$50.00             |
| <b><i>Insurance</i></b>                              |                     |
| Life   | \$336.50            |
| Health Insurance                                     | \$340.10            |
| Homeowners   | \$131.00            |
| Automobile   | \$55.00             |
| <b><i>Other Living Expenses</i></b>                  |                     |
| Food   | \$350.00            |
| Clothing   | \$25.00             |
| Medical Care and drugs                               | \$143.96            |
| Recreation   | \$150.00            |
| Laundry and Cleaning                                 | \$11.47             |
| Barber and Beauty                                    | \$20.00             |
| <b><i>All Other Expenses</i></b>                     |                     |
| Real Estate Taxes                                    | \$160.00            |

| <b>Expense</b>                | <b>Monthly Cost</b> |
|-------------------------------|---------------------|
| Holiday, birthday gifts, etc. | \$25.00             |
| Tools/Misc. House Maintenance | \$25.00             |
| Subdivision dues              | \$8.33              |
| Vacations                     | \$50.00             |
| <b>Total</b>                  | <b>\$2,648.54</b>   |

72. Petitioner filed a Motion for Contempt earlier in this litigation seeking to compel Respondent to pay the maintenance as ordered during the pendency of this action. At the time of trial, Respondent was current through July 15, 2017 in his maintenance to Petitioner.

73. Respondent testified that in the past year he took out \$83,000 in loans against his New York Life insurance policies to pay his attorney's fees and maintenance due pursuant to the Judgment, without tax consequences.

74. Respondent's Exhibits H, J, and L reflect the following amounts of the death and cash values of Respondent's policies:

| <b><u>Exhibit</u></b>   | <b><u>Policies</u></b> | <b><u>Death Value</u></b> | <b><u>Cash Value</u></b> |
|---|------------------------|---------------------------|--------------------------|
| H- Respondent's Statement of Property dated March 24, 2016                | Whole Life             | \$108,161                 | \$48,433                 |
|   | Whole Life             | \$203,911                 | \$62,270                 |
| J- Respondent's Amended Statement of Property dated December 22, 2016     | Whole Life             | \$127,191                 | \$49,026                 |
|   | Whole Life             | \$108,878                 | \$49,729                 |
| L- Respondent's Second Amended Statement of Property dated April 18, 2017 | Whole Life             | \$93,209                  | \$34,595                 |
|   | Whole Life             | \$78,777                  | \$1,386                  |

75. As of the time of trial, as reflected in Respondent's Amended Statement of Property (Pet'r Ex. 6B) dated April 1, 2017, Respondent had the following assets and debts:

| <u>Category</u>                                  | <u>Item/Account</u>                                 | <u>Fair Market Value</u>                 |
|--|---|--|
| Property   | Real Estate   | \$199,480 (subject to \$30,072 mortgage) |
|  | Motor Vehicles                                      | \$17,877.00                              |
| Bank Accounts                                    | First Community Credit Union                        | \$6,807.44                               |
| Cash on Hand                                     |   | \$200.00                                 |
| Securities                                       | Jackson Financial Group<br>LPL Financial            | \$84,083.00                              |
| Life Insurance                                   | NY Life   | \$33,209.00                              |
| Retirement, Pension, and/or Profit Sharing Plans | Vanguard (Emerson Employee Savings Investment Plan) | \$85,566.00                              |
|  | LPL Financial IRA                                   | \$331,857.00                             |
| Debt   | Credit Cards  | (\$8,818.86)                             |

76. Respondent has \$729,007.44 in assets, including \$331,857 in retirement accounts.

77. At the time of trial, as reflected in Petitioner's Amended Statement of Property (Pet'r Ex. 8b), dated June 30, 2017, Petitioner had the following assets and debts:

| <u>Category</u>                                  | <u>Item/Account</u>                      | <u>Fair Market Value</u>                    |
|--|--|---|
| Bank Accounts                                    | Wells Fargo Checking                     | \$16,625.25                                 |
|  | Wells Fargo Savings                      | \$402.55                                    |
| Cash on Hand                                     |  | \$100.00                                    |
| Securities                                       | Jackson Financial Group<br>LPL Financial | \$84,083.00                                 |
| Life Insurance                                   | NY Life                                  | \$49,116.00 (Death Benefit:<br>\$87,293.00) |
| Retirement, Pension, and/or Profit Sharing Plans | Midland National (-1466)                 | \$182,849.00                                |

|      |                          |  |
|------|--------------------------|--|
|      | Midland National (-1467) | \$88,577.00  |
| Debt | IRS                      | (\$24,600.00) less \$11,500<br>settlement proceeds |

78. Petitioner has \$421,752.80 in assets, including \$271,426 in retirement accounts.

79. At the time of the Dissolution, in addition to other property including one-half of Husband's Emerson pension/retirement/employee investment plan, Petitioner was awarded \$513,324 of an LPL Financial IRA account (less reimbursement of \$68,483 for Petitioner's attorney's fees charged on a joint credit card.) At trial, Petitioner's LPL account was worth \$84,083. Neither Petitioner nor Mr. XXXXX fully explained the reduction in the value of that account.

80. Based upon the evidence presented, Petitioner made some questionable financial decisions since the Judgment that have contributed to the dissipation of her assets.

81. Mr. XXXXX testified that Petitioner made some ill-advised financial decisions and ran up significant debt purchasing items on QVC.

82. Petitioner also paid an inordinate and unreasonable amount of attorney's fees for her dissolution and in defending this motion to modify. In addition, Petitioner's expenses were excessive while she was living with Mr. XXXXX.

83. Petitioner is also twelve years older than Respondent and, therefore, started drawing on her retirement accounts before Respondent.

84. No evidence was presented regarding how long Petitioner's investment and retirement accounts will sustain her at her current expense rate.

#### **Analysis**

85. The provisions of any judgment respecting maintenance or support may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable. Mo. Rev. Stat. § 452.370.1 (2014).



86. In a proceeding for modification of any child support or maintenance judgment, the court, in determining whether or not a substantial change in circumstances has occurred, shall consider all financial resources of both parties, including the extent to which the reasonable expenses of either party are, or should be, shared by a spouse or other person with whom he or she cohabits, and the earning capacity of a party who is not employed. Id.

87. While a decrease in the income of the spouse paying maintenance does not require the court to modify maintenance, it is a relevant factor for the court to consider. In re Marriage of Hammerschmidt, 48 S.W.3d 614, 619 (Mo. Ct. App. E.D. 2001) (citing Draper v. Draper, 982 S.W.2d 289, 291 (Mo. Ct. App. W.D. 1998)).

88. The fact that Respondent has reached retirement age is a factor the court may consider in determining the likelihood that the decrease in Respondent's income will be permanent. See Id.

89. While voluntary loss of employment is not usually a substantial and continuing change of circumstance that would support modification, an involuntary retirement may support a finding of changed circumstances. See Borchardt v. Borchardt, 496 S.W.3d 635, 641 (Mo. Ct. App. E.D. 2016).

90. The Missouri Court of Appeals, Eastern District stated in Borchardt v. Borchardt:

The trial court may impute income to a party but imputing income depends on the facts and is determined on a case-by-case basis. When calculating maintenance, the trial court must consider the income from retirement accounts apportioned as marital property. The trial court determines the amount of income, if any, imputed from these accounts based on the facts and circumstances of each case, including the cost to convert the account into cash, the age of the parties, their intent as to investment/consumption/retirement, the relative division of marital property and debts, and any equitable adjustment for reasonably certain taxes and penalties. This is but an application of the concept that the trial courts have broad discretion in determining the amount of maintenance and appellate courts do not interfere, absent an abuse of discretion.

496 S.W.3d at 641 (citing Hill v. Hill, 53 S.W.3d 114, 116-17 (Mo. 2001) (en banc)).

91. Further, this court must balance the ability to pay maintenance against the reasonable needs of those seeking maintenance. Hammerschmidt, 48 S.W.3d at 619 (citing McGehee v. McGehee, 943 S.W.2d 364, 368 (Mo. Ct. App. S.D. 1997)).

92. The Court has reviewed the factors as outlined in Mo. Rev. Stat. § 452.335.2 and the findings in the Judgment regarding those factors and finds that while maintenance is still appropriate, that the current maintenance amount of \$3,400 is unreasonable in light of both Petitioner's reduction of expenses and Respondent's reduction of income.

93. Based upon the credible evidence presented, the Court finds that Petitioner's reduced reasonable needs constitutes a substantial and continuing change that renders the maintenance awarded in the Judgment unreasonable.

94. Further, based upon the credible evidence presented, the Court finds that Respondent's separation from his employment and subsequent retirement was not voluntary and resulted in a substantial reduction of his income, thereby affecting his ability to pay maintenance as ordered in the Judgment. Respondent's reduction in income due to his retirement, therefore, constitutes a substantial and continuing change that renders the maintenance awarded in the Judgment unreasonable.

95. As in Borchardt, Respondent chose to retire after being involuntarily separated from employment because he believes he has sufficient assets to do so. In determining whether he can afford to retire, Respondent took into account his total assets and his ability to draw on his retirement accounts.

96. The Court, therefore, must take into account Respondent's retirement income and may impute retirement income when appropriate. See Borchardt, 496 S.W.3d at 641.

97. Based on the evidence, the purpose of Respondent's retirement accounts was to accumulate assets that would then supplement his income during retirement. The Court agrees that Respondent is entitled to retire and should not have to continue to work beyond a reasonable retirement age just to pay maintenance when he has sufficient assets to support himself during retirement.

98. Even though Respondent claims that he is unable to meet his expenses on his social security alone, Respondent elected not to withdraw any retirement income while this case was pending. Conveniently, that deprives the Court of any direct evidence of how much Respondent intends to draw as retirement income during his retirement.

99. Even though the parties failed to produce direct evidence of the amount of any additional retirement income Respondent can reasonably anticipate, the Court may still impute a reasonable retirement income to Respondent based upon the evidence presented.

100. Respondent did not present any evidence that there was a significant cost to convert his retirement accounts into cash or that there were significant tax penalties for doing so.

101. Respondent testified that he chose to draw down on his life insurance policies rather than take distributions from his IRAs because of the tax benefits. Since Respondent is over the age of 59 and a half, there should be no tax penalty for withdrawing on his IRA accounts but his withdrawals will be subject to income tax.

102. Given the relative age of the parties, Respondent's intent to accumulate his assets until he retires and then to consume them during his retirement, imputation of retirement income upon Respondent's retirement is appropriate.

103. To determine the appropriate amount of imputed retirement income, the Court has closely examined the amount Respondent borrowed from his life insurance policies.

104. Between December 22, 2016 and April 2017, Respondent borrowed \$62,774 from his life insurance policies. Respondent paid maintenance in the amount of \$22,100 from January 2017 to July 15, 2017. Therefore, he withdrew \$40,674 in excess of his maintenance obligation. Subtracting Respondent's legal fees from the amount he borrowed from his life insurance, Respondent withdrew \$24,117.47 in excess of his maintenance obligation and attorneys' fees between December 2016 and July 2017. Given that Respondent testified that he cannot pay his expenses as enumerated on his Statement of Income and Expenses on his social security alone, the Court concludes that Respondent has borrowed these additional sums to pay his expenses without tax consequences.

105. The evidence presented allows the Court to conclude that Respondent has taken a minimum of \$25,000 in 2017, before taxes, as supplemental income due to his retirement.

106. Further, if Respondent elects not to withdraw any retirement income, based upon the credible evidence, including Respondent's testimony and the loans Respondent has taken against his life insurance policies, Respondent would have to earn additional income to continue to live close to the standard to which he has become accustomed (as evidenced by his Statement of Income and Expenses). Therefore, in accordance with the credible evidence, the imputation of \$25,000 in annual income is reasonable and appropriate.

107. The Court imputes an additional \$25,000 of gross annual income on Respondent bringing his monthly gross income to \$4,740 per month.

108. Based upon the evidence presented, the Court finds that Petitioner is unable to meet her reasonable needs of \$2,990 from March 29, 2016 to March 1, 2017 and requires maintenance in the amount of \$450 to meet her reasonable needs during that time period.

109. Petitioner's reasonable needs then increased in March 1, 2017 and Respondent's income decreased on December 9, 2016.

110. Based upon the evidence presented and in light of Petitioner's increased reasonable needs as of March 2017 and Respondent's reduction of income, the Court finds that Petitioner is unable to meet her reasonable needs and Respondent is able to pay modifiable maintenance to Petitioner in the amount of \$750 per month and still meet his reasonable needs.

111. Respondent paid \$37,400 in maintenance from March 29, 2016 to February 28, 2017.

112. After applying the modified maintenance award of \$450 per month retroactively to March 29, 2016, the total maintenance due through February 28, 2017 is \$4,950.

113. Therefore, Respondent overpaid maintenance to Petitioner in the amount of \$32,450 between March 29, 2016 and February 28, 2017.

114. Respondent paid \$15,300 in maintenance between March 1, 2017 and July 15, 2017.

115. After applying the modified maintenance award of \$750 per month, the total maintenance due through July 15, 2017 is \$3,375.

116. Therefore, Respondent overpaid maintenance to Petitioner in the amount of \$11,925 between March 1, 2017 and July 15, 2017.

117. As a result, Respondent overpaid maintenance to Petitioner in the total amount of \$44,375 and is entitled to reimbursement of that sum from Petitioner.

#### **ATTORNEYS' FEES, COSTS OF COURT AND OTHER ORDERS**

118. In determining the amount of attorneys' fees to be paid by either party, the Court has considered all relevant factors as set forth in Mo. Rev. Stat. § 452.355, including each party's separate property and each party's income. The Court has further considered the request by each of the parties for attorneys' fees and the evidence which has been adduced.

119. Respondent, who bore the burden of proof in this case, incurred \$16,556.53 in attorney's fees. The Court finds that Respondent's attorney's fees are reasonable and appropriate but declines to award Respondent any attorney's fees.

120. Petitioner incurred \$55,889.67 in attorney's fees. The Court finds that Petitioner's attorney's fees are excessive and unreasonable in light of the work performed and declines to award Petitioner any attorney's fees.

121. Therefore, each party shall be responsible for the payment of their respective attorneys' fees and litigation costs incurred herein.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** as follows:

122. Petitioner's Motion to Dismiss is denied and Respondent's Amended Motion to Modify is hereby granted for the reasons set forth herein. Petitioner's award of maintenance is hereby reduced to \$450.00 per month until February 28, 2017 and \$750 per month thereafter.

123. Petitioner is ordered to pay Respondent the sum of \$44,375.00 as and for repayment of \$3,400 per month in maintenance from April 1, 2016 through July 15, 2017 (\$52,700) less \$450 per month in modified maintenance from March 29, 2016 to March 1, 2017 and \$750 per month in modified maintenance from March 1, 2017 to July 15, 2017. A Judgment in favor of Respondent and against Petitioner is hereby entered in the amount of \$44,375.00.

124. Maintenance as awarded herein is modifiable and shall terminate upon the death of either party or the remarriage of Petitioner.

125. Each party shall bear their own attorney's fees and costs.

126. The costs of Court shall be paid from the cost deposit previously posted except that the costs of depositions and trial subpoenas shall not be included in costs.

127. Unless specifically modified herein the provisions of the Judgment shall remain in full force and effect.

**SO ORDERED:**

Hon. Mondonna L. Ghasedi