NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
***See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24**

DIVISION ONE
FILED: 01/03/2013
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	1 CA-CV 12-0219
LINDA RAE SHARP,	DEPARTMENT E
Petitioner/Appellee,	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
v.	
MORRIS H. FAUSETT,	
Respondent/Appellant.	

Appeal from the Superior Court in Maricopa County

Cause No. DR1999-097119

The Honorable Benjamin R. Norris, Judge

AFFIRMED

Tarasccio & Del Vecchio PLLC — Mesa
By Adam Roberts
Attorneys for Petitioner/Appellee

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By Donald J. Newman
Attorneys for Respondent/Appellant

N O R R I S, Judge

¶1 Morris H. Fausett timely appeals the family court’s order terminating the spousal maintenance obligation of his ex-wife, Linda Rae Sharp. On appeal, Fausett argues the court

should not have terminated Sharp’s spousal maintenance obligation because, first, she did not present evidence showing a change in either his or her economic circumstances to warrant termination, and second, her expenses increased because of “her voluntary decision to invest in residential rental properties.” As discussed below, we hold the family court did not abuse its discretion in terminating Sharp’s spousal maintenance obligation.

FACTS AND PROCEDURAL BACKGROUND

¶2 Pursuant to a Property Settlement Agreement (“Agreement”), and as relevant here, a Decree of Dissolution of Marriage (“Decree”) entered on June 8, 2000, the family court ordered Sharp to, first, pay Fausett $700 per month for spousal maintenance until Fausett remarried, and second, maintain a $200,000 life insurance policy with Fausett as the beneficiary to secure his spousal maintenance payments, if she predeceased him. Both the Agreement and the Decree explained the “calculation” of Sharp’s monthly spousal maintenance obligation was based on the parties’ gross annual income at the time of the dissolution, which was $40,000 for Sharp and $33,520 for Fausett -- including his Social Security. Beginning in February 2008, Sharp began to either miss the monthly payments or to pay only part of them.

¶3 On June 22, 2011, Sharp petitioned the family court to terminate her spousal maintenance obligation, alleging she had experienced "serious financial loss" that amounted to "a substantial and systematic change in circumstances." Sharp explained she had "invested heavily in [r]eal [e]state" to purchase four rental houses ("investment expenses"), and because the real estate "market [had] crashed," she had "suffered financial loss and hardship."

¶4 At the evidentiary hearing on the petition, Sharp introduced into evidence her Affidavit of Financial Information, bank statements, pay stubs, W-2 and 1099 forms, Social Security benefit information, retirement benefit information, and rental income and expenses. This evidence demonstrated that, although her gross annual income was $9,000 more per year than at the time of the Decree, her current expenses exceeded her income by approximately $2,500 to $2,800 each month, excluding her $700 spousal maintenance obligation.

¶5 Sharp also testified she has been "juggling" payments to "keep [her] head above water," and although she had retired and was collecting retirement benefits, she had continued to work part-time to "survive" and had applied for work at several retail stores. She further testified she had "put all [her] eggs in one basket" by borrowing against her primary residence

from 2003 to 2007 to purchase the four rental houses as her "plan" for retirement, but had not anticipated the real estate market would "crash." She explained that after the crash, her rental houses had become unmarketable because the mortgages "far exceed[ed] the [houses'] current value"; and after she sold one of the houses, two of her remaining three houses had become unoccupied, providing her with only $292.50 in monthly rental income. Sharp testified she believed she could not "walk away" from her rental houses because the lenders would not forgive her debt. She also testified -- and Fausett did not controvert -- that he had told her he was not willing to marry his "long time girl friend" because he would lose the spousal maintenance.

¶6 In contrast to Sharp's evidence, Fausett provided only an incomplete -- because it was largely blank -- Affidavit of Financial Information, which showed his income had decreased by half since the dissolution, and his monthly expenses exceeded his income by approximately $800. Fausett testified he lived with his significant other, and although he did not pay rent, he paid for his share of the expenses as well as for their shared utilities. Fausett admitted, however, he received financial assistance from his significant other, but did not disclose the amount or nature of this financial assistance.

¶7 After considering the "testimony of the parties, their demeanor while testifying, [and] the exhibits admitted," the family court terminated Sharp's spousal maintenance obligation and ordered her to pay the arrearages. The court also ordered Sharp to maintain a life insurance policy in the amount of the arrearages plus 10%, with Fausett as the beneficiary until she paid off the arrearages.

DISCUSSION

¶8 A spousal maintenance award is modifiable "only on a showing of changed circumstances that are substantial and continuing." Ariz. Rev. Stat. ("A.R.S.") § 25-327(A) (2007). "[C]hanged circumstances" refers to the economic circumstances that justified the original award. *Smith v. Mangum,* 155 Ariz. 448, 451, 747 P.2d 609, 612 (App. 1987). To determine whether circumstances have changed, a court must compare the current economic circumstances to those existing at the time of the original award, *Richards v. Richards,* 137 Ariz. 225, 226, 669 P.2d 1002, 1003 (App. 1983) (to be material, change must occur after court enters original decree), and should consider "the same [] factors taken into consideration when granting an award for . . . maintenance," *Scott v. Scott,* 121 Ariz. 492, 495 n.5, 591 P.2d 980, 983 n.5 (1979), including the financial resources of the party receiving spousal maintenance, the ability of the

party receiving spousal maintenance to produce sufficient income, and the financial resources of the party paying spousal maintenance. *Nace v. Nace,* 107 Ariz. 411, 413, 489 P.2d 48, 50 (1971); *see also* A.R.S. § 25-319(B) (2007).

¶9 Whether there is a sufficient change in circumstances to modify a spousal maintenance award lies within the discretion of the family court. *Linton v. Linton,* 17 Ariz. App. 560, 563, 499 P.2d 174, 177 (1972). We review the family court's modification of spousal maintenance for an abuse of discretion. *Van Dyke v. Steinle,* 183 Ariz. 268, 273, 902 P.2d 1372, 1377 (App. 1995) (citations omitted). We will not find an abuse of discretion unless the record is "devoid of competent evidence to support" the family court's decision. *Little v. Little,* 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999) (citation omitted). On this record, we cannot say the family court abused its discretion in terminating Sharp's spousal maintenance obligation.[1]

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[1]Fausett's opening brief notes the family court did not make findings of fact. Fausett, however, failed to request factual findings. Without such a request, a court is not required to make detailed findings. *MacMillan v. Schwartz*, 226 Ariz. 584, 592, ¶ 39, 250 P.3d 1213, 1221 (App. 2011) (court not required to make findings of fact under A.R.S. § 25-324; litigant must "object to inadequate findings at the [family] court level so that the court will have an opportunity to correct them, and failure to do so constitutes a waiver.") (citation omitted). Nevertheless, when, as here, the family court does not make any factual findings that would explain the

¶10 Fausett initially argues Sharp failed to show a change in circumstances to warrant termination of her spousal maintenance obligation because, despite his cohabitation with his significant other, she failed to show his support needs had changed. *Smith,* 155 Ariz. at 450-51, 747 P.2d at 611-12 (cohabitation with significant other is not a sufficient basis, in itself, for termination or reduction of spousal maintenance; evidence of economic nature of cohabitants' relationship is relevant to show support needs changed). Although we agree that Sharp failed to make a case Fausett no longer needed support, she did, however, present sufficient evidence of changed circumstances based on her own economic circumstances. *See supra* ¶¶ 3-5; *Linton,* 17 Ariz. App. at 563, 499 P.2d at 177 (burden of proof to present sufficient evidence to show changed circumstances is on party seeking modification).

¶11 Despite this evidence, Fausett argues the court should not have terminated spousal maintenance because Sharp did not compare her current expenses to her expenses at the time of dissolution, and thus, failed to demonstrate a substantial and continuing change in her economic circumstances. We disagree for two separate reasons. First, Fausett did not raise this

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basis for its determination of the change in circumstances issue, appellate review may be difficult.

issue in the family court, and it is, therefore, not properly before us. *Van Loan v. Van Loan,* 116 Ariz. 272, 274, 569 P.2d 214, 216 (1977) (failure to raise issue in family court constitutes waiver on appeal). Second, although Sharp did not directly compare her pre-dissolution expenses to her post-dissolution expenses, she indirectly presented evidence her expenses had increased post-dissolution. As discussed above, Sharp testified she had invested in the rental houses only after the dissolution. *See supra* ¶¶ 2, 5. Thus, her investment expenses could not have come into existence until after the dissolution.

¶12 Finally, Fausett argues the court should not have terminated spousal maintenance because, first, Sharp could have avoided the investment expenses by not investing in the rental houses in the first place, and second, could have eliminated almost all of the investment expenses by letting the rental houses "go" to the mortgage lenders because the mortgages were nonrecourse. *See* A.R.S. § 33-814(G) (Supp. 2012). We reject both arguments.

¶13 In making the first argument, Fausett relies on *Little v. Little*, and argues a party's intentional decision "which later negatively impacted [her] financial condition is not grounds for modification." Fausett's reliance on *Little* is

misplaced. In *Little,* our supreme court held a former husband was not entitled to a downward modification of child support because he decided to forego employment to become a full-time student. 193 Ariz. at 524, 975 P.2d at 114. Here, Sharp invested in the rental houses to maximize her income for her retirement. *See supra* ¶¶ 3, 5. Further, Fausett presented no evidence she made these investments to avoid paying spousal maintenance.

¶14 As to the second argument, even assuming without deciding Sharp could have eliminated her investment expenses prospectively by letting the rental houses "go," *see Indep. Mortg. Co. v. Alaburda*, 230 Ariz. 181, 281 P.3d 1049 (App. 2012) (discussing anti-deficiency statute), Fausett did not show it would make economic sense to let them "go" given the amounts Sharp had already invested.

¶15 On the record presented, we disagree with Fausett's argument the family court abused its discretion in terminating Sharp's spousal maintenance obligation. Given our conclusion on this issue, we need not address Fausett's other requests for relief.

CONCLUSION

¶16 For the foregoing reasons, we affirm the family court's order terminating Sharp's obligation to pay spousal

maintenance. We deny the parties' requests for attorneys' fees, but award Sharp her costs on appeal subject to her compliance with ARCAP 21.

/s/

PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/

DIANE M. JOHNSEN, Judge

/s/

JON W. THOMPSON, Judge