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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 05/12/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: GH

In re the Matter of: ) No. 1 CA-CV 10-0483  
)  
JEFFERY OBANNON JOHNSON, ) DEPARTMENT A  
)  
Petitioner/Appellee, ) **MEMORANDUM DECISION**  
)  
v. ) (Not for Publication -  
) Rule 28, Arizona Rules  
CHERYL MARIE JOHNSON, ) of Civil Appellate Procedure)  
)  
Respondent/Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. DR 1997-070244

The Honorable William L. Brotherton, Jr., Judge

**AFFIRMED**

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Curry, Pearson & Wooten, PLC Phoenix  
By Kristen Curry  
Attorneys for Petitioner/Appellee

The Murray Law Offices, P.C. Phoenix  
By Stanley David Murray  
Attorneys for Respondent/Appellant

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**D O W N I E**, Judge

¶1 Cheryl Marie Johnson ("Wife") appeals from an order terminating the spousal maintenance obligation of Jeffery

Obannon Johnson ("Husband") and the denial of her motion for new trial. For the reasons that follow, we affirm.

#### FACTS AND PROCEDURAL BACKGROUND

¶2 The parties divorced in 1998. The court stated in the decree that Wife was "unable to hold employment because of her physical and mental condition" and awarded her \$1800 per month in spousal maintenance indefinitely. The court ordered Wife to attempt to obtain Social Security or disability benefits and stated that, for any such benefits obtained, the spousal maintenance award would be reduced dollar for dollar.

¶3 In December 2007, Husband petitioned to modify spousal maintenance based on a change in his financial circumstances and his belief that Wife qualified for Social Security or disability benefits. After an evidentiary hearing, the family court terminated spousal maintenance effective April 30, 2008. In an earlier appeal by Wife, this Court vacated the family court's order and remanded for additional proceedings. *Johnson v. Johnson*, 1 CA-CV 08-0506A, 2009 WL 350906 (Ariz. App. Feb. 12, 2009) (mem. decision). We held that the court erroneously required Wife to prove she could not work and failed to consider the factors listed in Arizona Revised Statutes ("A.R.S.") section 25-319. *Id.* at 4-5, ¶¶ 17 & 20-21.

¶4 Following an evidentiary hearing on remand, the family court made findings regarding the statutory spousal maintenance

factors and terminated maintenance effective April 1, 2008. After the court denied her motion for new trial, Wife timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101 (C), (F)(1).

## DISCUSSION

### I. Substantial and Continuing Change in Circumstances

¶15 Wife first argues Husband failed to establish a substantial and continuing change in circumstances. We conclude otherwise.

¶16 A spousal maintenance order may be modified or terminated upon "a showing of changed circumstances that are substantial and continuing." A.R.S. § 25-327(A). The burden of proving a change in circumstances is on the party seeking modification. *Scott v. Scott*, 121 Ariz. 492, 494, 591 P.2d 980, 982 (1979). Whether a substantial and continuing change in circumstances has occurred is a question of fact. *Schroeder v. Schroeder*, 161 Ariz. 316, 323, 778 P.2d 1212, 1219 (1989). It is within the family court's discretion to determine whether changed circumstances are sufficient to support modification or termination of spousal maintenance, and we will not disturb that decision absent an abuse of discretion. *Fletcher v. Fletcher*, 137 Ariz. 497, 497, 671 P.2d 938, 938 (App. 1983). We similarly review the denial of a motion for new trial for an abuse of

discretion. *Pullen v. Pullen*, 223 Ariz. 293, 296, ¶ 10, 222 P.3d 909, 912 (App. 2009).

¶7 When the decree was entered, Husband owned a painting company. That business, however, closed in 2007 due to the economic downturn and a corresponding lack of profitability. It is undisputed that Husband lacks the same income he had at the time of dissolution. See *Chaney v. Chaney*, 145 Ariz. 23, 25, 699 P.2d 398, 400 (App. 1985) (“[A] substantial change in the financial circumstances of either the husband or wife” may support a modification of a spousal maintenance award). Nevertheless, Wife contends the court should have attributed income to Husband at his previous earning level because he is employable in his field of expertise. We disagree.

¶8 The court specifically found that Husband is disabled.<sup>1</sup> A vocational expert determined Husband is best suited as a painter, which requires physical tasks Husband testified he cannot perform. The vocational expert agreed it is unlikely Husband could be a painter based on his medical conditions. Additionally, the expert opined that Husband is qualified for entry level work, such as a cashier, counter attendant, security guard, or shuttle driver. Such jobs, though, entail “prolonged standing and/or walking, prolonged driving, repetitive arm use,

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<sup>1</sup> Husband’s medical issues include osteoporosis, degenerative disc disease, COPD, and arthritis. The Social Security Administration declared Husband disabled in 2009.

and lifting of up to 24 pounds on a recurring basis," which Husband testified he cannot do.

¶9 Although some of Husband's disabilities stem from a 2002 motorcycle accident,<sup>2</sup> and he continued to operate his painting business until 2007, the record supports the finding that Husband is disabled and lacks sufficient earning ability. Husband testified he had not performed physical labor at his business for many years, but instead had "owner responsibilities" for the company. Husband testified he could not start another painting company for financial and physical reasons.

¶10 We defer to the family court's assessment of witness credibility, as it is in the best position to make such determinations. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998). The court obviously believed Husband's evidence regarding his disability. Additionally, the vocational report noted that the demand for residential painters is low due to the downturn in the housing market. Wife concedes Husband's business consisted mainly of painting newly-constructed homes.

¶11 Contrary to Wife's argument, Husband was not required to amend his petition to allege that he could not work because

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<sup>2</sup> It appears Husband suffered a head injury, neck fracture, broken back, thoracic fractures, ruptured lumbar disk, kidney injury, and lung injury in the accident.

he is disabled; nor was he required to prove his disability through medical or Social Security records.<sup>3</sup> See, e.g., *City of Phoenix v. Mullen*, 65 Ariz. 83, 88-89, 174 P.2d 422, 425 (1946) (permanency of an injury need not be proven by medical testimony and a plaintiff's testimony may be sufficient evidence). Section 25-327(A) does not require a petition to include every ground for modification. The statute requires only "a showing of changed circumstances." A.R.S. § 25-327(A). Husband proved the changed circumstances alleged in his petition. Wife also had ample notice that Husband was claiming to be disabled.

¶12 Wife argues spousal maintenance should not have been terminated because her own financial circumstances had worsened. See *Scott*, 121 Ariz. at 495, 591 P.2d at 983 (wife's changed circumstances are just as material to a petition to modify maintenance as are husband's). The record shows that, in January 2009, Wife began receiving \$674 per month from Social Security and that she remains disabled and unable to work. Wife's current expenses of roughly \$2,500 per month are similar

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<sup>3</sup> Relying on *Larsen v. Decker*, 196 Ariz. 239, 995 P.2d 281 (App. 2002), Wife asserts the Social Security Administration's finding that Husband is disabled is unreliable, irrelevant, and inadmissible. *Larsen* held the trial court did not abuse its discretion by excluding a Social Security Administration report as hearsay because it was not sufficiently reliable. *Id.* at 242-43, ¶¶ 10-17, 995 P.2d at 284-85. Here, Husband did not submit Social Security records into evidence, but instead testified about the disability benefits received from Social Security.

to her expenses in 1998. The record does not establish that Wife's financial circumstances have declined.<sup>4</sup>

¶13 The family court expressly considered the relevant statutory factors in reaching its decision.<sup>5</sup> See *Norton v. Norton*, 101 Ariz. 444, 445, 420 P.2d 578, 579 (1966) (in determining whether a modification of spousal maintenance is appropriate, the court must consider "the same factors as are required in determining the reasonableness of an award for support and maintenance at the time of the original decree"). The court determined that Wife still qualified for maintenance due to an inability to provide for her reasonable needs, though it questioned the validity of her stated expenses because the prior maintenance award was insufficient to cover them. A.R.S. § 25-319(B)(9), (11) (the court should consider the financial resources of the party seeking maintenance and excessive or abnormal expenditures). Additionally, the court found both parties are disabled and unable to work. See A.R.S. § 25-319(B)(5) (court should consider the financial resources of both spouses "including their comparative earning abilities in the labor market"). The court determined Husband's business

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<sup>4</sup> Wife testified she suffered injuries in an automobile accident in August 2000 and that unspecified medical conditions from that accident persist.

<sup>5</sup> The court did not issue findings on all of the factors because there was no evidence presented regarding several of them.

failed due to the economy, he receives \$2100 per month in disability benefits, is living off savings, and will likely have to sell assets to maintain himself. See A.R.S. § 25-319(B)(3)-(5). Both parties have homes with mortgages. Husband has assets, including cars and motorcycles, though most of them are not very valuable.

¶14 Wife also argues Husband has the ability to pay maintenance because he owns several vehicles and has significant savings. See A.R.S. § 25-319(B)(4) (the court must consider "[t]he ability of the spouse from whom maintenance is sought to meet that spouse's needs while meeting those of the spouse seeking maintenance"). The evidence shows, however, and the court found, that Husband is "upside down" in his monthly expenses; his expenses are "well over" the amount received from Social Security, which is now his only source of income.<sup>6</sup> Husband testified he has "zero money" and had to cancel his health insurance because he could not afford it. Additionally, though Husband owns vehicles, he lowered the insurance on some and canceled it on others because he could not afford it. With only Social Security income, the record supports the conclusion

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<sup>6</sup> Wife argues there was no evidence of Husband's monthly expenses. Husband, however, testified about his expenses consistent with the affidavit of financial information submitted with his petition for modification.

that Husband cannot meet his own needs and also pay spousal maintenance.

## II. Termination versus Modification

¶15 Wife next argues the court erred by terminating spousal maintenance because Husband only requested modification in his petition. The terms "modification" and "termination" are not synonymous. See *Diefenbach v. Holmberg*, 200 Ariz. 415, 417, ¶¶ 5-6, 26 P.3d 1186, 1188 (App. 2001) (noting "'modify' means 'to alter; to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce' [and] '[t]erminate' . . . means '[t]o put an end to; to make to cease; to end.'" (citation omitted)), *dictum disapproved on other grounds in In re Marriage of Waldren*, 217 Ariz. 173, 177 n.4, ¶ 17, 171 P.3d 1214, 1218 n.4 (2007). Section 25-327(A), governing modification and termination of maintenance, references both petitions for modification and petitions for termination.<sup>7</sup>

¶16 In his petition, Husband asked that spousal maintenance "be significantly reduced" due to the change in his income or Wife's receipt of benefits. Nonetheless, at the first evidentiary hearing in May 2008, Husband sought termination of his spousal maintenance obligation.

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<sup>7</sup> Addition of the word "termination" to A.R.S. § 25-327(A) in 2002 was not a substantive change; the statute implicitly included the power to both modify and terminate maintenance. *Waldren*, 217 Ariz. at 176, ¶ 15, 171 P.3d at 1217.

¶17 "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. . . . [F]ailure to so amend does not affect the result of the trial of these issues." Ariz. R. Fam. L.P. 34(B). Wife did not object to Husband's request that the court terminate maintenance rather than modifying it. Indeed, Wife's pretrial filings acknowledged that Husband was seeking modification or termination. Accordingly, Husband's request for termination of spousal maintenance is deemed to have been raised in his petition.

### III. Date of Termination

¶18 Wife argues the court erred in terminating maintenance effective April 2008 because she did not have notice of Husband's disability claim until August 2009. Section § 25-327(A) provides:

Modifications and terminations are effective on the first day of the month following *notice of the petition for modification or termination* unless the court, for good cause shown, orders the change to become effective at a different date . . . .

(Emphasis added.)

¶19 Wife received notice of the petition on January 27, 2008, when she was served.<sup>8</sup> Thus, under § 25-327(A), the

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<sup>8</sup> For the first time on appeal, Wife contends she did

presumptive effective date for the termination order was February 1, 2008. Nevertheless, the court ordered termination effective April 1, 2008. The date Wife received notice of Husband's disability claim has no bearing on the effective date of the termination order.<sup>9</sup> Further, contrary to Wife's claim, the court did not rely solely on Husband's disability in terminating maintenance. It also considered the fact that his business closed due to the economic downturn. There was no error regarding the effective date of the order.

#### **IV. Attorneys' Fees in Family Court**

¶20 Finally, Wife argues the court erred by not awarding her attorneys' fees pursuant to A.R.S. § 25-324. We review the denial of attorneys' fees for an abuse of discretion. *Alley v. Stevens*, 209 Ariz. 426, 429, ¶ 12, 104 P.3d 157, 160 (App. 2004).

¶21 Section 25-324(A) provides that the court may award reasonable attorneys' fees "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings."

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not receive notice of Husband's request for termination until trial. Because this argument was not raised below, it is waived. See *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 109, ¶ 17, 158 P.3d 232, 238 (App. 2007) (arguments raised for the first time on appeal are waived).

<sup>9</sup> We note there was testimony about Husband's disabilities at the first hearing in May 2008.

Although a court may award fees either for income disparity or unreasonable litigation, it is not required to do so. *Alley*, 209 Ariz. at 429, ¶ 12, 104 P.3d at 160.

¶22 The record reveals a disparity in income. However, the refusal to award fees on that basis is not necessarily an abuse of discretion. The court found Husband is "upside down" in his monthly expenses and owes fees to his own counsel. Although Husband apparently did not comply with all of Wife's discovery requests, the family court was in the best position to determine whether Husband had taken unreasonable positions throughout the proceedings. We find no abuse of discretion in denying Wife's fee request.

#### **V. Attorneys' Fees on Appeal**

¶23 Both parties request attorneys' fees on appeal under § 25-324. After considering the financial resources of the parties and the reasonableness of their positions, we decline to award fees to either party.

CONCLUSION<sup>10</sup>

¶24 For the foregoing reasons, we affirm the family court's orders terminating spousal maintenance and denying Wife's motion for new trial.

/s/

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MARGARET H. DOWNIE, Judge

CONCURRING:

/s/

\_\_\_\_\_  
DIANE M. JOHNSEN, Presiding Judge

/s/

\_\_\_\_\_  
JON W. THOMPSON, Judge

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<sup>10</sup> Because Wife's opening brief presents the same arguments as those raised in her motion for new trial, and we have addressed all of those arguments, we do not separately address the motion for new trial.