

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RONALD KUMPUS	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellant	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009CA00106
CAROL KUMPUS	:	
	:	
	:	
Defendant-Appellee	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of
Common Pleas, Family Court Division,
Case No. 2005DR00193

JUDGMENT: AFFIRMED IN PART; REVERSED AND
REMANDED IN PART

DATE OF JUDGMENT ENTRY: August 16, 2010

APPEARANCES:

For Plaintiff-Appellant: For Defendant-Appellee:

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Delaney, J.

{¶1} Plaintiff-Appellant Ronald Kumpus appeals the April 2, 2009 judgment of the Stark County Court of Common Pleas, Family Court Division, finding him in contempt of the Final Divorce Decree and modifying his spousal support obligation.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant and Defendant-Appellee Carol Kumpus were married on June 3, 1972. Two children, now emancipated, were born as issue of the marriage. Appellant filed a complaint for divorce on February 11, 2005 and Appellee filed a counterclaim for divorce on March 3, 2005.

{¶3} At the time of the divorce, Appellant was 57 years old and in general good health. He was employed as a bus driver with Canton City Schools, working 4.0 to 4.5 hours each school day. Appellant also received a monthly distribution from a 401(k) account.

{¶4} Appellee was 54 years old at the time of the divorce. She was employed full-time as a manager with Finlay Fine Jewelry Corporation, who leased a site at then Kaufmann's store located in Jackson Township. Appellee suffered from multiple sclerosis for which she took monthly medication.

{¶5} The matter came on for hearing and the trial court issued the Final Divorce Decree on May 4, 2006. In the Decree, the trial court ordered Appellee to vacate the marital residence by March 31, 2006. The trial court gave Appellant the option of retaining the marital residence, conditioned upon Appellant securing refinancing sufficient to remove Appellee from any mortgage or home equity obligation within six months. If Appellant did not refinance within six months, Appellant was to list the home

for sale immediately and both parties were to cooperate with that process. Any net proceeds or deficiencies were to be shared equally between the parties. (Final Divorce Decree, May 4, 2006).

{¶6} The trial court also awarded spousal support to Appellee. The Final Decree states, “Commencing the first date of the first month following the filing of the Final Decree, the Husband shall pay spousal support to the Wife in the amount of \$1.00 per year, for a period of ten (10) years. The Court shall retain continuing jurisdiction over the amount but not the duration of spousal support. This obligation shall terminate upon the conclusion of the ten-year period or upon the death or remarriage of the Wife.”

{¶7} Neither party appealed the Final Divorce Decree.

{¶8} After the issuance of the Final Divorce Decree, the parties conflicted on the implementation on the terms of the Decree. They filed multiple motions with the trial court, to wit: Appellee’s Motion to Vacate, filed October 23, 2006; Appellee’s Motion to Show Cause, filed December 27, 2006; Appellant’s Motion to Show Cause, filed on December 27, 2006; and Appellant’s Motion for Relief filed, July 9, 2007. The trial court held an evidentiary hearing on the motions on August 21, 2007.¹

¹ There is no transcript of the August 21, 2007 evidentiary hearing in the trial court record.

{¶9} The trial court ruled on the motions on August 28, 2007. The trial court found that, “the Plaintiff has failed to abide by the terms of the final divorce decree which required him to remove the Wife from any mortgage or home equity obligation within six months of the filing of the decree or alternatively listing the home for sale and cooperating with that process.” The trial court determined that based on Appellant’s inability to refinance the property, he continued to be in default on the mortgages and failed to cooperate with the sale of the property for an offer price of \$220,000 and a Sheriff’s Sale of the property, which could have garnered \$210,000 for the home. Appellant was found to have removed fixtures from the home, reducing the fair market value of the home to Appellee’s detriment and in violation of the court order.

{¶10} The trial court found Appellant willfully violated the Final Decree with regard to his failure to hold Appellee harmless on the mortgages and his failure to cooperate with the sale of the residence. Because of Appellant’s contempt, the trial court ordered Appellant to hold “*** Defendant harmless on all outstanding indebtedness, including the first and second mortgages and any deficits/costs resulting from the foreclosure.” (Judgment Entry, August 28, 2007). The trial court went on to state, “This provision shall be construed as in the nature of satisfaction of a marital obligation and non-dischargeable in bankruptcy. In the event that the obligation is discharged, the Court reserves jurisdiction to modify spousal support orders.” Id.

{¶11} No appeal was taken from the August 28, 2007 judgment entry.

{¶12} On November 19, 2008, Appellee filed a Motion to Award Defendant Spousal Support and a Motion for Contempt. In her affidavit, Appellee alleged that while Appellant was ordered to hold Appellant harmless for all deficiencies from the sale

of the marital residence, Beneficial Mortgage had contacted Appellee to pay off a \$31,000 deficiency and the deficiency was listed on Appellee's credit report. Appellee also alleged that she was now disabled because she suffered a stroke and her job was in jeopardy because of her health issues.

{¶13} A hearing on the motions was held before the magistrate on February 4, 2009. At the hearing, Appellee testified that the marital residence was sold by Sheriff's Sale for \$166,000 in February 2008. (T. 4). In May 2008, Appellee was contacted by Beneficial Mortgage to pay the \$31,000 deficiency on the home. (T. 6). Because the amount is listed on her credit report, she stated that it was affecting her ability to purchase a home. (T. 7).

{¶14} Appellee also requested increased spousal support because of her health issues. In June 2008, Appellee suffered a stroke that temporarily caused her to lose her speech and the use of her right hand. (T. 8). Appellee recovered from the stroke, but she still had issues with her speech and it impacted her ability to work full time at her retail position. (T. 8-9). Appellee testified that she was notified by her manager that if she did not return to work, she would be terminated. (T. 9).

{¶15} Appellee stated that she never received the \$1.00 per year in spousal support as ordered by the Final Decree. (T. 9).

{¶16} Appellant also testified at the hearing. Appellant attempted to bring in evidence that showed Appellant's inability to refinance or to cooperate with the sale of the marital residence. The magistrate ruled that the evidence was inadmissible as it went to the issues heard at the August 21, 2007 evidentiary hearing and was disposed

of by the August 28, 2007 judgment entry finding Appellant in contempt. The magistrate allowed Appellant to proffer the evidence. (T. 23-28).

{¶17} Appellant testified that he was aware of the \$31,000 deficiency. (T. 31). On December 22, 2008, Beneficial Mortgage offered to accept \$4,734.00 as full settlement of the deficiency but Appellant testified that he could not pay that amount because he did not have any credit. Id. While Appellant has a brokerage account in the amount of \$87,000, he was unwilling to withdraw a lump sum from the account due to the tax penalties associated with such a withdrawal. (T. 33). In January 2007, the account was valued at \$130,000 and Appellant had withdrawn \$43,000 to pay bills and other expenditures. (T. 60-61).

{¶18} Appellant testified that he continued to work 21.25 hours per week as a school bus driver. (T. 51). He resided with his girlfriend and shared in the expenses. (T. 37). Appellant had health issues, including upcoming heart surgery and shoulder surgery. (T. 51).

{¶19} The magistrate issued a decision on February 10, 2009. The magistrate concluded that Appellant had the financial ability to pay the proposed settlement of the deficiency and failed to hold Appellee harmless on the financial obligations related to the marital home. The magistrate further concluded that Appellant had the ability to pay spousal support and Appellee had the need for spousal support.

{¶20} The magistrate decided that Appellant was in willful contempt and ordered Appellant to serve 90 days in jail. Appellant could purge his contempt by full satisfaction of the deficiency.

{¶21} As to spousal support, the magistrate awarded Appellee spousal support in the amount of \$500 per month, to expire in 133 months (eleven years and one month) or upon the death of one of the parties or remarriage of Appellee.

{¶22} Appellant filed objections to the Magistrate's Decision. On March 31, 2009, Appellant filed the transcript of the evidentiary hearing before the magistrate.² The trial court held a hearing on Appellant's objections on March 31, 2009.

{¶23} On April 2, 2009, the trial court issued its judgment entry overruling Appellant's objections and adopting the Magistrate's Decision.

{¶24} It is from this decision Appellant now appeals.

{¶25} Appellant raises two Assignments of Error:

{¶26} "I. THE TRIAL COURT ERRED WHEN IT AWARDED APPELLEE SPOUSAL SUPPORT AS IT WAS CONTRARY TO LAW, CONSTITUTED AN ABUSE OF DISCRETION AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶27} "II. THE TRIAL COURT ERRED WHEN IT REFUSED TO CONSIDER PROFFERED EVIDENCE WHICH WAS ESSENTIAL TO THE SPOUSAL SUPPORT AND CONTEMPT EVIDENTIARY HEARINGS."

I.

{¶28} Appellant argues in his first Assignment of Error that the trial court abused its discretion in modifying the amount of spousal support that Appellant must pay Appellee to \$500.00 per month for 133 months. We agree, in part.

² Appellee states in her brief that Appellant did not file a transcript of the hearing before the magistrate, thereby affecting the ability to argue the facts of this case on appeal. A review of the record shows that Appellant filed a transcript of the magistrate's hearing with the trial court on March 31, 2009, before the trial court ruled on Appellant's objections to the Magistrate's Decision. Accordingly, we find the transcript of the February 4, 2009 magistrate's hearing properly before this Court for our consideration.

{¶29} Modifications of spousal support are reviewable under an abuse of discretion standard. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 541 N.E.2d 1028. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. The burden of establishing the need for modification of spousal support rests with the party seeking modification. *Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703, 676 N.E.2d 1249.

{¶30} R.C. 3105.18(E) governs the trial court's consideration in modifying an existing spousal support order. The statute provides in relevant part:

{¶31} “(E) If a continuing order for periodic payments of money as alimony is entered in a divorce or dissolution of marriage action that is determined on or after May 2, 1986, and before January 1, 1991, or if a continuing order for periodic payments of money as spousal support is entered in a divorce or dissolution of marriage action that is determined on or after January 1, 1991, the court that enters the decree of divorce or dissolution of marriage does not have jurisdiction to modify the amount or terms of the alimony or spousal support unless the court determines that the circumstances of either party have changed and unless one of the following applies:

{¶32} “(1) In the case of a divorce, the decree or a separation agreement of the parties to the divorce that is incorporated into the decree contains a provision specifically authorizing the court to modify the amount or terms of alimony or spousal support.”

{¶33} In this case, the original decree states, “The Court shall retain continuing jurisdiction over the amount but not the duration of spousal support.”

{¶34} R.C. 3105.18(F) defines a change in circumstances as including any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses.

{¶35} Although R.C. 3105.18(F) sets forth a partial listing of what can be considered as a change in circumstances for purposes of establishing trial court jurisdiction, it does not alter the requirement that a trial court must find a substantial change in circumstances before modifying a prior order for spousal support. *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 905 N.E.2d 172, 2009-Ohio-1222, ¶ 1 of the syllabus. A trial court lacks jurisdiction to modify a prior order of spousal support unless the decree expressly reserved jurisdiction to modify and unless the court finds (1) that a substantial change in circumstances has occurred and (2) that the change was not contemplated at the time of the original decree. *Id.* at syllabus 2.

{¶36} R.C. 3105.18 does not require the lower court to make specific findings of fact regarding spousal support awards. The factors a court considers in making its original award of spousal support are set out in R.C. 3105.18(C)(1):

{¶37} “(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;

{¶38} “(b) The relative earning abilities of the parties;

{¶39} “(c) The ages and the physical, mental, and emotional conditions of the parties;

{¶40} “(d) The retirement benefits of the parties;

{¶41} “(e) The duration of the marriage;

{¶42} “(f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;

{¶43} “(g) The standard of living of the parties established during the marriage;

{¶44} “(h) The relative extent of education of the parties;

{¶45} “(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;

{¶46} “(j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;

{¶47} “(k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;

{¶48} “(l) The tax consequences, for each party, of an award of spousal support;

{¶49} “(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

{¶50} “(n) Any other factor that the court expressly finds to be relevant and equitable.”

{¶51} In deciding whether to modify a support order, the court should take into consideration not only whether any of the factors, *supra*, have changed, but also the comparative weight to give each factor in light of all the facts and circumstances, because the court has discretion to determine the weight to be given each factor. *Mizer*

v. Mizer, Coshocton App. No. 08CA004, 2009-Ohio-1390, ¶36 citing *Collins v. Collins*, Licking Co. No. 2008-CA-00028, 2008-Ohio-4993.

{¶52} At the time of the divorce, Appellee was diagnosed with multiple sclerosis. Since the divorce, Appellee testified she suffered a stroke resulting in increased medical expenses and the possibility that she would not be able to perform her job. (T. 9-10). When the parties came before the trial court on March 31, 2009, for a hearing on Appellant's objections to the Magistrate Decision, counsel stated that Appellee had been terminated from her employment. (T. 12).

{¶53} We find the trial court did not abuse its discretion in finding that a substantial change occurred in Appellee's health that was not contemplated at the time of the original decree. Appellee's declining health status impacted her earning capacity.

{¶54} The magistrate's decision also reviewed the R.C. 3105.18(C)(1) factors as to the parties' relative incomes and earning abilities. The magistrate found that Appellant worked 21.25 hours per week, earned \$2,229 per month in income from his job and retirement benefits, and had \$1,655 per month in expenses. Appellant had a retirement account currently valued at \$87,000. In 2007, he withdrew \$43,000 to pay expenses. Appellee worked 40 hours per week and earned \$1607 per month. She had \$2,150 per month in expenses.

{¶55} Upon review of the record, we find no abuse of discretion in the trial court's decision to modify the amount of spousal support to \$500.00 per month. We find the trial court utilized R.C. 3105.18 and properly found that a substantial change had occurred that was not contemplated at the time of the original decree.

{¶56} We find, however, that the trial court exceeded its jurisdiction when it extended the duration of the spousal support to 133 months. The Final Decree filed on May 4, 2006, stated, “Commencing the first date of the first month following the filing of the Final Decree, the Husband shall pay spousal support to the Wife in the amount of \$1.00 per year, for a period of ten (10) years. *The Court shall retain continuing jurisdiction over the amount but not the duration of spousal support.* This obligation shall terminate upon the conclusion of the ten-year period or upon the death or remarriage of the Wife.” (Emphasis added).

{¶57} In extending the duration of the spousal support to 133 months from February 10, 2009, the trial court went beyond the terms of the original decree that set the duration of the spousal support at ten years beginning in June 2006. We therefore reverse the decision of the trial court as to the duration of spousal support and remand the matter for further proceedings consistent with this opinion and the terms of the Final Decree.

{¶58} Accordingly, Appellant’s first Assignment of Error is overruled in part and sustained in part.

II.

{¶59} Appellant argues in his second Assignment of Error that the trial court abused its discretion when it refused to consider the proffered evidence at the February 4, 2009 magistrate’s hearing. We disagree.

{¶60} At the magistrate’s hearing, Appellant attempted to bring in evidence that showed Appellant’s inability to refinance or to cooperate with the sale of the marital residence. The magistrate ruled that the evidence was inadmissible as it went to the

issues heard at the August 21, 2007 evidentiary hearing and was disposed of by the August 28, 2007 judgment entry finding Appellant in contempt. The magistrate allowed Appellant to proffer the evidence. (T. 23-28).

{¶61} Appellant did not appeal the August 28, 2007 judgment entry finding him in contempt.

{¶62} The matters before the trial court on February 4, 2009 were Appellee's motion for contempt based on Appellant's failure to hold Appellee harmless for a \$31,000 deficiency as a result of the foreclosure on the marital home and Appellee's motion to modify spousal support based on Appellee's health problems. The evidence proffered by Appellant went to issues heard by the trial court at the August 21, 2007 contempt hearing.

{¶63} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343. We find the trial court did not abuse its discretion in excluding the proffered evidence as it was not relevant to the issues in dispute.

{¶64} Appellant's second Assignment of Error is overruled.

{¶65} The judgment of the Stark County Court of Common Pleas, Family Court Division, is affirmed in part and reversed and remanded in part for proceedings consistent with this opinion and judgment entry.

By: Delaney, J.

Edwards, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. SHEILA G. FARMER

PAD:kgb

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RONALD KUMPUS	:	
	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
CAROL KUMPUS	:	
	:	
	:	
	:	Case No. 2009CA00106
Defendant-Appellee	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Stark County Court of Common Pleas, Family Court Division, is affirmed in part and reversed and remanded in part for proceedings consistent with this opinion and judgment entry. Costs to be assessed equally to Appellant and Appellee.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. SHEILA G. FARMER