[Cite as *Brys v. Brys*, 2012-Ohio-524.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

DEBORAH A. BRYS,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-T-0113**
- vs -	:	
DAVID A. BRYS,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Domestic Relations Division, Case No. 06 DR 179.

Judgment: Affirmed.

Anthony G. Rossi and *Deborah L. Smith*, Guarnieri & Secrest, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Plaintiff-Appellee).

Donald R. Ford, Sr. and *John D. Falgiani, Jr.,* Ford, Gold & Falgiani Law Group, 8872 East Market Street, Warren, OH 44484 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, David A. Brys, appeals the Order of the Trumbull County Court of Common Pleas, Domestic Relations Division, increasing the amount of his spousal support obligation. The issue to be determined by this court is whether the trial court abused its discretion in finding a substantial change of circumstances and ordering an increase in the amount of support, where the obligor is permanently disabled and the obligee is voluntarily underemployed. For the following reasons, we affirm the decision of the court below.

{¶2} On June 9, 1984[1], David and plaintiff-appellee, Deborah A. Brys, were married. Three children were born of the marriage. During the course of the marriage, David worked as an orthopedic surgeon and Deborah as the primary caregiver for the children.

{¶3} In October 2003, David was in a motorcycle accident that rendered him a quadriplegic.

{¶4} On April 30, 2008, the parties obtained a Decree of Divorce from the Trumbull County Court of Common Pleas, Domestic Relations Division. The Decree of Divorce provided as follows with respect to spousal support:

> **{¶5}** Having determined [sic] the statutory factors in O.R.C. 3105.18, the Court determines that rehabilitative spousal support is appropriate and reasonable. The Court finds that Defendant shall pay as and for spousal support the sum of Two Thousand Dollars ($2,000.00) per month, together with poundage thereon through the Trumbull County Child Support Enforcement Agency, the same to commence on May 1, 2008, and to continue until further order of Court. Support to terminate sooner and immediately upon the death of either party, remarriage of Plaintiff, or her cohabitation with a person in a marital relationship as defined by the laws of the State of Ohio and the rulings of its Courts.
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> **{¶6}** The Court retains jurisdiction to modify either the amount of support to be paid or to modify the terms of the spousal support if there is a substantial change of circumstances of either party, including but not limited to, any increase or involuntary decrease in wages and a change in the Social Security benefits of either party specifically the transfer of Defendant from a disability payment to a retirement benefit.

{¶7} On July 21, 2009, David filed a Motion for Termination of Spousal Support or, in the alternative, Modification of Spousal Support.

1. According to the Complaint, the parties were married on June 7, 1984.

{¶8} On August 5, 2009, Deborah filed a Motion, seeking to increase the amount of spousal support, amended on August 27, 2009.

{¶9} On July 26, 2010, the domestic relations court held a hearing on the parties' Motions.

{¶10} On September 24, 2010, the domestic relations court issued an Order, increasing the amount of spousal support to $3,000 per month. The court's Order found, in relevant part:

> **{¶11}** Plaintiff is currently residing in the Pennsylvania home she received in the divorce property division, having sold the real property located in Cortland, Ohio. Plaintiff is not employed, but has recently started her own business making and selling stained glass windows and jewelry trees. Plaintiff has made no income from this business.
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> **{¶12}** Plaintiff claimed that she had attempted to obtain employment this year at a bank in Pennsylvania but was not successful. Plaintiff obtained a college decree in 1985 and did some work in Defendant's medical office during the marriage. She admitted that other than attempting to get the job in the bank she has made no effort to find employment since the finalization of the divorce action.
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> **{¶13}** Plaintiff described her day as working around the house, doing yard work, and taking care of herself. She related that she had to do all of this work herself since she did not have people to do it for her.
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> **{¶14}** Plaintiff provided an expense affidavit that showed her total monthly obligations to be Three Thousand Five Hundred Fifty Four Dollars and Eighty Eight Cents ($3,554.88). Plaintiff's monthly expenses have decreased from the time of the final divorce trial because she sold the second home and no longer has a minor child in her household.
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> **{¶15}** Plaintiff has lost income as a result of no longer receiving the Social Security benefit for the parties' minor child. She has also lost the rental income [of] One Thousand Five Hundred Dollars ($1,500.00) per month since The Brys Family Limited Partnership is no longer receiving rental income for the medical office. Plaintiff's only source of income at this time is spousal support and investment income.

{¶16} Defendant claims that he has lost income in that he is no longer doing medical evaluations for U.S. Evaluations. According to Defendant, sitting at the computer to do the medical evaluations caused him to have pressure sores on his hips. As a result of the sores, he was hospitalized for five (5) weeks in 2010. Defendant related that the pain was so severe when he was sitting at the computer that he made the decision to stop doing the evaluations and claimed that he did not intend to go back to doing the evaluations. As a result, Defendant now has less income th[a]n he did when the order of spousal support was made by this Court.

{¶17} Defendant has also lost income in the amount of One Thousand Eight Hundred Dollars ($1,800.00) per month since The Brys Family Limited Partnership is no longer receiving rental income for the medical office. According to Defendant, St. Joseph Hospital has terminated its lease for the office building. The property is listed for sale, but there have been no acceptable offers.

{¶18} Defendant's current income is his disability insurance from (2) policies in the amount of Fifteen Thousand Nine Hundred Ninety Dollars ($15,990.00) a month and his Social Security disability income in the amount of Two Thousand One Hundred Thirty Seven Dollars ($2,137.00) gross per month. According to Defendant's calculations, he has net income each month in the amount of Seventeen Thousand Five Hundred Fifty Dollars ($17,550.01) [sic] per month.

{¶19} Defendant also has income from investments, but neither party provided the Court with the income from their investments. Defendant acknowledged that he had dividend and interest income in 2009 of Sixteen Thousand Eight Hundred Thirty Five Dollars ($16,835.00), but is allowing the money to accumulate in his accounts to provide for needs and repairs in the future.

{¶20} Defendant testified that there are several items he wants or needs for exercise or to help him get around at home and out of the home. Defendant wants to adapt the house by putting in an elevator which would give him access to the second floor of the home. The total cost to these projects and items will be Seventy Nine Thousand Nine Hundred Forty Eight Dollars ($79,948.00).

{¶21} On cross examination, Defendant acknowledges that he has about Nine Hundred Thousand Dollars ($900,000.00) in investment accounts. He testified earlier that he was required to draw money from his investment accounts to meet his monthly obligations.

Defendant also admitted that he had recently purchased a GTO automobile at a cost of Thirty One Thousand Dollars ($31,000.00). Defendant has been practicing tithing to his church and admitted that in 2009 he gave his church Twenty Three Thousand Dollars ($23,000.00).

{¶22} Defendant provided an expense affidavit that showed his total monthly obligations to be Nineteen Thousand Ninety Eight Dollars and Ninety Four Cents ($19,098.94) before payment of spousal support and a debt from a lawsuit and an investment with Engintec.

{¶23} The Court finds that Defendant requested and was given all rights and obligations to the investment and lawsuit from Engintec in the divorce property division as he hoped that the investment would show some promise in the future. To now allow him to use that obligation against disposable income that could be used for spousal support would not be equitable.

{¶24} * *

{¶25} The Court finds that while Defendant has lost the U.S. Evaluations income and the rental income, he has also decreased his expenses. The Court finds that while Defendant has increased his food cost significantly, he has reduced the cost of home health care even more significantly. Defendant's Motion to terminate spousal support is therefore denied.

{¶26} The Court finds that, although the termination of the Social Security benefits for the minor child would have been contemplated, this Court has consistently held that the end of child support would constitute a change of circumstances for the Court to review spousal support. This Court expected Plaintiff to have sought and obtained employment by this time when the rehabilitative spousal support was awarded and is baffled by the fact that she has just gotten around to starting her own business.

{¶27} The Court finds that there has been substantial change of circumstances regarding the income of Plaintiff. As such, the Court finds that Plaintiff's motion to modify support shall be granted.

{¶28} Having determined [sic] all of the statutory factors in O.R.C. 3105.18, the Court determines that spousal support is appropriate and reasonable. The Court finds that Defendant shall pay as and for spousal support the sum of Three Thousand Dollars ($3,000.00) per month, together with poundage thereon through the Trumbull County Child Support Enforcement Agency, the same to

> commence on September 1, 2010, and to continue until further order of Court. Support to terminate sooner and immediately upon the death of either party, remarriage of Plaintiff, or her cohabitation with a person in a marital relationship as defined by the laws of the State of Ohio and the rulings of its Courts.
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> **{¶29}** The Court retains jurisdiction to modify either the amount of support to be paid or to modify the terms of the spousal support if there is a substantial change of circumstances of either party, including but not limited to, any increase or involuntary decrease in wages and a change in the Social Security benefits of either party specifically the transfer of Defendant from a disability payment to a retirement benefit. This order shall take preceden[ce] over any other order herein.

{¶30} On October 22, 2010, David filed his Notice of appeal. On appeal, David raises the following assignments of error:

{¶31} "[1.] The trial Court erred in failing to set a termination date for Appellant's spousal support obligation."

{¶32} "[2.] The trial Court abused its discretion and acted contrary to law in increasing Appellant's monthly spousal support obligation."

{¶33} In matters relating to spousal support, the "trial court is provided with broad discretion in deciding what is equitable upon the facts and circumstances of each case." *Kunkle v. Kunkle*, 51 Ohio St.3d 64, 67, 554 N.E.2d 83 (1990); *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 24, 550 N.E.2d 178 (1990) ("[a] trial court has considerable but not unbridled discretion in fashioning sustenance alimony awards"). "A reviewing court," therefore, "cannot substitute its judgment for that of the trial court unless, considering the totality of the circumstances, the trial court abused its discretion." *Kunkle* at 67.

{¶34} In his first assignment of error, David argues the domestic relations court abused its discretion by failing to set a termination date for spousal support, given the

circumstances that such support was meant to be rehabilitative, Deborah was found voluntarily unemployed, and David is permanently disabled.

{¶35} With respect to spousal support, the Ohio Supreme Court has held: "Except in cases involving a marriage of long duration, parties of advanced age or a homemaker-spouse with little opportunity to develop meaningful employment outside the home, where a payee spouse has the resources, ability and potential to be self-supporting, an award of sustenance alimony should provide for the termination of the award, within a reasonable time and upon a date certain, in order to place a definitive limit upon the parties' rights and responsibilities." *Id.* at paragraph one of the syllabus. However, "providing a termination date is not legally mandated." *Id.* at 68, citing *Koepke v. Koepke*, 12 Ohio App.3d 80, 81, 466 N.E.2d 570 (6th Dist.1983). "[I]f under reasonable circumstances a divorced spouse does not have the resources, ability or *potential* to become self-supporting, then an award of sustenance alimony for life would be proper." (Emphasis sic.) *Id.* at 69.

{¶36} We find no abuse of discretion. In the first instance, the domestic relations court expressly retained jurisdiction to modify the amount of spousal support in the future. It has been often held that the failure to assign a termination date is not an indefinite or lifetime award, "where the court retains continuing jurisdiction to decrease or terminate the spousal support based on a change in either party's circumstances." *Tyler v. Tyler*, 8th Dist. No. 93124, 2010-Ohio-1428, ¶ 20 (citation omitted); *Hiscox v. Hiscox*, 7th Dist. No. 07 CO 7, 2008-Ohio-5209, ¶ 48; *Bowen v. Bowen*, 132 Ohio App.3d 616, 627, 725 N.E.2d 1165 (9th Dist.1999); *Donese v. Donese*, 2nd Dist. No. 97-CA-70, 1998 Ohio App. LEXIS 1493, *10-11 (Apr. 10, 1998). Thus, at any

subsequent modification hearing, "the court can once again determine if it is appropriate to set a termination date." *Tyler* at ¶ 20.

{¶37} Assuming, arguendo, that the domestic relations court's decision not to fix a definite termination date, as a practical matter, constitutes an indefinite award, it is equally well-settled that "a marriage of long duration 'in and of itself would permit a trial court to award spousal support of indefinite duration without abusing its discretion or running afoul of the mandates of *Kunkle*.'" (Citation omitted.) *Vanke v. Vanke*, 93 Ohio App.3d 373, 377, 638 N.E.2d 630 (10th Dist.1994); *Gore v. Gore*, 2nd Dist. No. 09-CA-64, 2010-Ohio-3906, ¶ 29 (citations omitted); *Batten v. Batten*, 5th Dist. No. 09-CA-33, 2010-Ohio-1912, ¶ 69 (citations omitted); *Handschumaker v. Handschumaker*, 4th Dist. No. 08CA19, 2009-Ohio-2239, ¶ 21 (citations omitted); *Ballas v. Ballas*, 7th Dist. No. 04 MA 60, 2004-Ohio-5128, ¶ 57 (citations omitted). The Brys' marriage lasted for twenty-three years. According to any of the authorities cited above, "marriages lasting over 20 years have been found to be sufficient to justify spousal support of indefinite duration." (Citations omitted.) *Hiscox* at ¶ 47.

{¶38} Finally, the two circumstances which David cites as rendering an indefinite award an abuse of discretion, i.e., his disability and Deborah's voluntary unemployment, were recognized at the time the domestic relations court issued the Decree of Divorce. Since these factors were considered at the time of the original support award, which was not appealed, they carry little weight in determining whether the modification of that award was erroneous.

{¶39} The first assignment of error is without merit.

{¶40} In the second assignment of error, David argues that the termination of child support in the form of Social Security benefits does not constitute a change of circumstances necessary for the modification of the spousal support order, where the domestic relations court expressly found that such a change in circumstances was contemplated by the parties at the time of the divorce.

{¶41} In order to modify the award of spousal support in the Decree of Divorce, the domestic relations court must determine "that the circumstances of either party have changed." R.C. 3105.18(E). In *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, 905 N.E.2d 172, the Ohio Supreme Court held that the statutory requirements of R.C. 3105 did not abrogate the common law requirements necessary to modify an award of spousal support. *Id.* at ¶ 27-31. Thus, in order to modify a prior award of support, the court must find "(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 paragraph two of the syllabus.

{¶42} Under *Mandelbaum*, Deborah's loss of Social Security benefits for the parties' minor child cannot constitute a change in circumstances, sufficient to vest the domestic relations court with jurisdiction to modify the spousal support award, inasmuch as that change was contemplated at the time of the original decree. *Piliero v. Piliero*, 10th Dist. No. 10AP-1142, 2011-Ohio-4364, ¶ 18 (termination of child support did not satisfy the jurisdictional prerequisite that the change was not contemplated at the time of the original degree); *Ballas v. Ballas*, 7th Dist. No. 08 MA 166, 2009-Ohio-4965, at ¶ 38 ("a finding of a substantial change in circumstances based solely on, for example, the cessation of child support, could be an abuse of discretion"). Here, the court

expressly stated such a change was contemplated at the time of the original Decree as triggering a review of spousal support.

{¶43} The domestic relations court, however, did not identify the termination of Social Security benefits as the sole change in circumstances justifying a modification. Rather, the court stated that "there has been substantial change of circumstances regarding the income of Plaintiff." Deborah lost income in the form of Social Security benefits in the amount of $1,000 per month according to the Decree of Divorce, but she also lost rental income in the amount $1,500 per month. The loss of rental income is comparatively more significant than the loss of benefit income. Moreover, the loss of benefit income was offset by a decrease in Deborah's monthly living expenses, which were determined to be $4,500 at the time of the divorce when the minor child resided with her, but only $3,554.88 at the time of the modification hearing.

{¶44} With the loss of the rental income in addition to the termination of benefit income, Deborah's only sources of income were spousal support and investment income.[2] The decrease in income may constitute a significant change in circumstances that warrants a modification of the award. *Compare* R.C. 3105.18(F) ("a change in the circumstances of a party includes, but is not limited to, any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses").

{¶45} David further argues under this assignment of error that the domestic relations court's modification of the award was "patently unreasonable and arbitrary," in that "the permanently disabled Obligor (Appellant) who could not work part-time

2. The relevance of the investment income is impossible to reckon, since, as the domestic relations court noted, neither party provided it with the necessary information. At the time of the Decree of Divorce, however, the court found that each party received $740 per month in dividend income.

anymore in order to supplement his income was ordered to pay one-third more in monthly spousal support to the voluntarily underemployed Obligee (Appellee), who five years after the divorce was filed still had not made meaningful efforts to find work."

{¶46} In the present case, the domestic relations court's decision to increase the amount of the spousal support award from $2,000 to $3,000 per month does not constitute an abuse of discretion. It is a given, in the present case, that some amount of spousal support is reasonable and appropriate, and that a reasonable and appropriate amount of support "is not strictly based on merit or necessity." *Harkey v. Harkey*, 11th Dist. No. 2006-L-273, 2008-Ohio-1027, ¶ 110 (citation omitted). Rather, "equity requires that a party receive sufficient sustenance alimony to bring him or her to a reasonable standard of living, one in reasonable relationship to the standard maintained during the marriage." *Buckles v. Buckles*, 46 Ohio App.3d 102, 546 N.E.2d 950 (10th Dist.1988), paragraph five of the syllabus.

{¶47} The domestic relations court's impatience with Deborah's efforts to find employment does not render its decision to increase the amount of the award an abuse of discretion. As noted above, Deborah's voluntary unemployment was a factor considered in the original award of support, as was David's disability. *Compare Haninger v. Haninger*, 8 Ohio App.3d 286, 287, 456 N.E.2d 1228 (10th Dist.1982) ("in determining alimony * * * each party must be deemed employed to the extent of his or her earning capacity in the absence of evidence that such employment cannot be obtained"). As demonstrated above, an extended award of support is justifiable in cases such as these, where the marriage was of long duration and one of the spouses was a homemaker.

{¶48} Here, the increase in spousal support serves to offset the decrease in Deborah's income. The domestic relations court acknowledged that David has also lost income, including the same loss of rental income as Deborah. The court deemed it proper to partially offset Deborah's loss by requiring David to pay an additional $1,000 per month in support. Although David's expenses are greater than Deborah's, he also has greater income and resources. For example, David's purchase of a GTO automobile and charitable contributions alone exceeded Deborah's yearly expenses. In light of David's overall financial situation, an additional $12,000 per year to maintain and support Deborah at the standard of living contemplated by the original Decree is not unreasonable. *Vanke v. Vanke*, 80 Ohio App.3d 576, 583, 609 N.E.2d 1328 (10th Dist.1992) ("[a] modification of an award of spousal support does not necessarily involve a consideration of proportionality of the parties' income, but rather, whether there is a continued need, and if so, the reasonableness of an amount in light of the changed circumstances").

{¶49} The second assignment of error is without merit.

{¶50} For the foregoing reasons, the Order of the Trumbull County Court of Common Pleas, Domestic Relations Division, increasing the amount of David's spousal support obligation, is affirmed. Costs to be taxed against the appellant.

CYNTHIA WESTCOTT RICE, J.,

GENE DONOFRIO, J., Seventh Appellate District, sitting by assignment,

concur.