

[Cite as *Peters v. Peters*, 2009-Ohio-5929.]

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
WARREN COUNTY

DONALD L. PETERS,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-04-037
	:	
- vs -	:	<u>OPINION</u>
	:	11/9/2009
	:	
SHIRLEY A. PETERS,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS,  
DOMESTIC RELATIONS DIVISION  
Case No. 07-DR-30784

Timothy R. Cutcher, 1019 Main Street, Cincinnati, OH 45202, for plaintiff-appellant

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OH 45036, for defendant-appellee

**YOUNG, J.**

{¶1} Plaintiff-appellant, Donald L. Peters, appeals the decision of the Warren County Court of Common Pleas, Domestic Relations Division, decreasing his spousal support obligation.

{¶2} The parties were married in 1979. In January 2007, after more than 26 years of marriage, both parties filed for divorce. At the time, Donald was 71 years old

and retired; defendant-appellee, Shirley A. Peters, was 65 years old and in poor health. By divorce decree filed in November 2007, the trial court awarded the mortgage-free marital residence (worth \$399,000) to Donald; awarded over \$158,000 to Shirley as part of the property division; and ordered Donald to pay \$2,100 per month in spousal support. Donald was also ordered to pay \$23,100 to Shirley for spousal support accrued between January and November 2007.

{¶3} The divorce decree was based on the parties' then financial situations: Shirley was receiving \$538 per month from Social Security; Donald was receiving \$1,446.30 per month from his pension and \$1,475 per month from Social Security. In addition, Donald was the trustee and sole beneficiary of a trust valued then at close to \$1,000,000. The trust is a nonmarital asset and Donald's separate property. The trial court noted that since Donald was the sole beneficiary of the trust, his monthly income from pension and Social Security provided him security for the future. By contrast, Shirley was receiving only a "very modest amount" from Social Security and faced an uncertain future especially with regard to her prescription costs. In ordering Donald to pay Shirley \$2,100 per month in spousal support, the trial court took into account the fact that Donald was receiving approximately \$28,000 per year in interest and dividends from the trust. The trial court retained jurisdiction to modify the amount or term of spousal support in the event of a change of circumstances of a party, including any increase or involuntary decrease in the parties' income, living expenses, or medical expenses.

{¶4} In August 2008, Donald moved the trial court to modify his spousal support obligation. The motion stated that Donald's monthly expenses now included a mortgage payment (from a loan taken to pay Shirley her share of the equity in the

marital residence), and that due to the poor state of the nation's economy and stock market, the trust had suffered losses and his income from the trust had greatly declined. As a result, he could no longer pay \$2,100 per month in spousal support.<sup>1</sup>

{¶15} A hearing on the motion revealed that Donald's monthly mortgage payment was \$1,118. At the time of the divorce, the trust consisted of a substantial amount of Fifth Third stock then valued at \$56-60 per share. Subsequently, due to the downturn in the economy and stock market, the value of the Fifth Third stock started to decline. Once the stock fell to \$25 per share, Donald sold his Fifth Third shares at an alleged loss of "about \$260,000;" he then withdrew \$600,000 from the trust to purchase a \$600,000 annuity to "protect the principal and to make additional dividend money."

{¶16} Following the hearing, the magistrate granted Donald's motion and reduced his monthly spousal support obligation to \$1,850. The magistrate found that:

{¶17} "[T]here has been a change of financial circumstances for both parties since the filing of the Divorce Decree. Each has more expenses/debt. Wife has some additional income from her investment [of her share of the house equity], although that will decrease or disappear if she spends her savings account on a residence. Husband's income is reportedly less, a fact due not only to his action in purchasing an annuity but also the decline in the stock market. The trust balance itself has decreased from approximately 1 million to \$874,000.00 or so. Even if

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1. In his motion, Donald also stated that he was (now) receiving \$1,554.75 per month from his pension and \$1,556 per month from Social Security. Compared to what he was receiving at the time of the divorce decree, Donald was thus receiving an additional \$189.45 per month from his pension and Social Security (or an additional \$2,273.40 per year). Subsequently, at a hearing on his motion, Donald testified his monthly Social Security income increased by \$40 effective January 2009.

Husband has to withdraw some of the principal, the annuity should provide funds for him well into the future. The Court is permitted to consider each party's assets and liabilities in determining spousal support, regardless of the separate nature of those assets. The bottom line is that Husband has substantial assets, including a house (albeit mortgaged [ ]), while Wife has far fewer assets and no residence."<sup>2</sup>

**{¶8}** Both parties filed objections to the magistrate's decision. Relevant to this appeal, Donald argued that the magistrate, while noting the decline in value of the trust, failed to consider the resulting decline in Donald's annual income from dividends (from \$28,000 to \$6,600 a year according to Donald). Donald also challenged the fact the magistrate did not state how it reached the monthly \$1,850 figure.

**{¶9}** On March 13, 2009, the trial court overruled the parties' objections and affirmed the magistrate's decision. The trial court found that the decrease in the trust assets from \$1,000,000 at the time of the divorce to \$874,000 at the time of the magistrate's decision was due to the downturn in the economy, and was thus an involuntary change in circumstances. The trial court held that the magistrate's statement that "[Donald's] income is reportedly less, a fact due not only to his action in purchasing an annuity but also the decline in the stock market" was evidence the magistrate took the decrease in the dividend payments into account. The trial court further found that:

**{¶10}** "Even with the decline in the economy and Husband's subsequent decline in interest payments, Husband's assets are still much greater than Wife's.

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2. The magistrate found that the value of the remaining assets left in the trust and the newly-acquired annuity was \$874,000.

Husband still has the ability to withdraw funds from both his trust and annuity if need be, regardless of whether or not withdrawals from the annuity will retract from the principal. Because the value of the trust has decreased by over \$100,000 since the time of the divorce, a change in circumstances did occur. But, this change was not so substantial as to warrant a reduction further than that presented in the Magistrate's Decision."

{¶11} Donald appeals the trial court's decision, raising one assignment of error:

{¶12} "THE TRIAL COURT ERRED IN OVERRULING PLAINTIFF-APPELLANT'S OBJECTION TO THE MAGISTRATE'S DECISION DATED JANUARY 16, 2009."

{¶13} Donald argues that the trial court abused its discretion when it merely reduced his spousal support obligation by \$250, because ordering him to pay \$1,850 per month in spousal support will require him to deplete his trust, his separate and non-marital asset. Donald essentially contends that given his current circumstances, the trial court should have reduced his spousal support obligation by more than a mere \$250.

{¶14} It is well-settled that a trial court has broad discretion over matters of spousal support, including regarding the modification of spousal support. See *Wolf v. Wolf*, Preble App. No. CA2009-01-001, 2009-Ohio-3687; *Carlisle v. Carlisle*, 180 Ohio App.3d 569, 2009-Ohio-215. An appellate court will not disturb a trial court's decision regarding spousal support obligations absent an abuse of discretion. *Id.* An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*

(1983), 5 Ohio St.3d 17, 219. An appellate court may not substitute its judgment for that of the trial court. See *Berk v. Matthews* (1990), 53 Ohio St.3d 161.

{¶15} A party seeking to modify a spousal support order has the burden to prove a change of circumstances justifying a change in the level of spousal support. *Carlisle* at ¶10, citing *Joseph v. Joseph* (1997), 122 Ohio App.3d 734; R.C. 3105.18(E), (F). Nonmarital property may be considered by a trial court when determining a party's ability to pay spousal support. See R.C. 3105.18(C)(1)(a). In the case at bar, the trial court found that the decline in the value of the trust since the divorce decree was a change of circumstances under R.C. 3105.18. On appeal, neither party challenges this finding.

{¶16} Donald first challenges the trial court's failure to explain mathematically how it reached the reduced figure of \$1,850. Donald argues the trial court failed to give any basis or reasoning in reducing his monthly spousal support obligation to \$1,850 and cites *Freeland v. Freeland*, Jackson App. No. 02CA18, 2003-Ohio-5272, in support.

{¶17} In making a spousal support award, a trial court must indicate the basis for its award in sufficient detail to enable a reviewing court to determine that the award is fair, equitable, and in accordance with the law. *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 97. In *Kaechele*, the case was remanded to the trial court because it had failed to address a bonus to be received by the husband over the years. Because of the trial court's silence, it was unclear whether the trial court gave weight to the bonus in its property division or spousal support award.

{¶18} In *Freeland*, the Fourth Appellate District reversed and remanded a trial court's spousal support award on the ground that "the trial court did not sufficiently

indicate the reasons for its spousal support award so as to enable this court to determine that the trial court's \$1,200 monthly spousal support award is 'fair, equitable and in accordance with the law.'" Id. at ¶19. *Freeland* is clearly distinguishable however. In that case, the trial court awarded spousal support to the wife after it determined the parties' income. However, in doing so, the trial court failed to explain "why it chose to attribute income to [the husband] based upon his gross income, but to attribute income to [the wife] based upon her 'net' income." Id. at ¶19. The trial court also failed to explain why it relied on the wife's testimony as to her income rather than on her income tax returns. Id.

{¶19} Upon reviewing the magistrate's decision (as adopted by the trial court) in light of the evidence submitted by the parties, we find that regardless of the lack of calculations, the magistrate and the trial court indicated the basis for the reduced monthly spousal support obligation in sufficient detail as required under *Kaechele*. We are therefore able to determine whether the new spousal support is fair, equitable, and in accordance with the law.

{¶20} Donald next argues the trial court abused its discretion by reducing his monthly spousal support obligation by "a mere \$250," and by ordering him to pay \$1,850 per month in spousal support when doing so will deplete his trust.

{¶21} At the outset, we note that Donald correctly asserts that because of the decrease in the dividends from the trust, he is now required to pay 53 percent of his current annual income in spousal support whereas he was required to pay 40 percent of his income at the time of the divorce decree. However, the "substantial change in circumstances as envisioned by the \*\*\* law is that change which seriously threatens one's ability to meet up with the spousal payment obligations. It is not a number

game[.] Modification must not be ordered merely because a party no longer has as much income as he had when the original decree was entered." *Blunden v. Blunden* (May 26, 1994), Cuyahoga App. No. 65595, 1994 WL 236223, at \*2.

{¶22} At the hearing, Shirley testified that she received over \$181,000 at the time of the divorce but lost \$18,000 in the stock market, which left her with \$163,000; receives \$560 per month from Social Security (\$22 more than at the time of the divorce decree); receives an additional \$300-400 a month from earning a "two point some percent" interest on the \$163,000; and has lived with her daughter since the divorce but intends to buy a house.

{¶23} Donald testified that after the Fifth Third stock fell to \$25 per share, he withdrew \$600,000 from the trust and purchased a \$600,000 annuity to "protect the principal" of the trust; he was told he could make an eight per cent return but is currently not earning income from the annuity because of the economy; he owns 3,050 Procter & Gamble (P&G) shares stock worth \$198,000; he earns \$355.80 a month in P&G dividends; and his monthly expenses, which include a \$1,118 mortgage payment and spousal support, are greater than his monthly income; as a result and because of the way the economy is right now, he has to take money out of the trust to make up for the difference.

{¶24} With regard to the trust, Donald testified that as the sole trustee, he has sole discretion over whether to pay out any principal or interest; he can pay any amount he wants out of the trust; and he can withdraw up to \$48,000 per year from the principal. Donald further testified he can withdraw eight percent out of the principal of the annuity without any penalties. As noted earlier, Donald was awarded the marital residence (then valued at \$399,000).



{¶25} Upon thoroughly reviewing the record, we cannot say that the trial court's decision to reduce Donald's monthly spousal support obligation by a "mere" \$250 was an abuse of discretion. Notwithstanding the decline in the value of the trust and Donald's new mortgage obligation which the trial court took both into consideration, Donald has much greater assets than Shirley. Donald owns a house, receives over \$3,000 per month from his pension and Social Security (compared to Shirley's monthly \$560 from Social Security), owns P&G stock worth \$198,000 from which he receives dividends, is the sole beneficiary and trustee of a trust, has an annuity, and can withdraw funds (as he has done) from both the trust and annuity. By contrast, Shirley does not own a home (but plans on buying one), has \$163,000 in savings from which she receives a small monthly income, and will likely use some of her savings to buy a house. Donald's assertion that ordering him to pay \$1,850 a month in spousal support will completely deplete his trust is speculative and is based on the assumption that the economy will never rebound, the stock market will continue to decline, and/or the annuity will never pay dividends.

{¶26} We find that the trial court considered the statutory factors and the new circumstances of the parties before reducing Donald's spousal support obligation to \$1,850. We cannot say that the trial court's decision to order Donald to pay \$1,850 per month in spousal support is unreasonable, arbitrary, or unconscionable in light of the parties' current circumstances. As Shirley noted in her brief, the trust suffered a reduction of 12.6 percent (from \$1,000,000 to \$874,000); likewise, Donald's spousal support obligation was reduced by 11.9 percent. Further, because the trial court retained jurisdiction over spousal support, Donald is not foreclosed from a future decrease of his spousal support obligation upon demonstrating changed

circumstances.

{¶27} Donald's assignment of error is accordingly overruled.

{¶28} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.