[Cite as *Wertz v. Wertz,* 2009-Ohio-6001.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

PHILIP A. WERTZ	:	
	:	Appellate Case No. 23180
Plaintiff-Appellant	:	
	:	Trial Court Case No. 01-DR-0677
v.	:	
	:	(Civil Appeal from Common Pleas
GAIL E. WERTZ (MARTIN)	:	Court, Domestic Relations)
	:	
Defendant-Appellee	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 13th day of November, 2009.

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BROGAN, J.

{¶ 1} This case is before the court on Philip Wertz's appeal from a domestic relations court's decision to modify spousal support. The trial court modified its original five-year support order because the health of Philip's former wife, Gail Martin (formerly Wertz), had deteriorated substantially in the year before support was to

end. Philip contends that the trial court lacks jurisdiction under R.C. 3105.18(E) to modify support because, since the original order, there has been no substantial and uncontemplated change in circumstances. We disagree.

I

{¶ 2} Philip is 71 years old, and Gail is 69. They were married for almost eighteen years, beginning August 15, 1984, and having a de facto end March 19, 2002.[1] Gail, because of health problems, never worked outside the home during the marriage, nor has she worked since the divorce. Philip, however, worked as an architect during the marriage, earning enough money that they enjoyed an above-average standard of living. They had no children together.

{¶ 3} In 2002, at the divorce hearing, Gail testified about her health this way:

{¶ 4} "I have–well COPD, chronic bronchitis with asthma, and I have fibromialgia, I have–I might–right now I'm going to a cardiologist on Tuesday, because of things they discovered with my heart that are wrong, and I have extreme stress and anxiety that I'm trying to work with my doctor, Dr. Levy, the psychologist, to stress over the years." (Transcript of final contested hearing, p.130).

{¶ 5} Gail further testified that on a few occasions an inability to control her asthma put her in the hospital for several days. In the divorce decree the court said, "As the result of her many illnesses and her physical condition Mrs. Wertz states she is unemployable." August 1, 2002 Decision, p.8. The trial court ordered Philip to

[1]They separated on April 18, 2001, and the divorce was granted on August 22, 2002.

pay Gail $1,500 per month in spousal support until July 22, 2008, a term of five years. In February 2004, after we affirmed Gail's appeal in part, *Wertz v. Wertz*, Montgomery App. No. 19520, 2003-Ohio-3782, the court increased that amount to $1,800 per month.

{¶ 6} In March 2008, a few months before her support payments were to end, Gail filed a motion asking the trial court to modify its spousal-support order, citing a change in her health and financial circumstances. The trial court delegated the matter to a magistrate, who held a hearing on the motion. Gail testified that, while already declining steadily since the divorce, in 2007 her health took a turn for the worst:

{¶ 7} "[I] spent two times in the hospital this past year, once in November for five days and again in February for 10 days, which I had pneumonia with it again, bacterial pneumonia. And flu. Basically, I have no immune system left. I catch everything and can't take the proper medication to heal myself because of the immune system. * * * I have really severe psoriasis on my hands and feet. I can barely walk. I have deep fissures in my feet. And, again, the medicine I was taking before to–that cleared it up, I'm not able to take now because it's too dangerous for me. It could kill me because of the immune system problem again. I have fibromyalgia, which I had before but now I have it all over my body. I have–let's see. I had–I have arthritis in both knees. And I had to have shoulder surgery here for tears." (Tr. 6-7).

{¶ 8} The magistrate found that Gail's health is worse than it was when support was first ordered, and found also that there has been a change in Gail's

financial situation. Gail's annual income is $26,290, noted the magistrate, $21,600 of which is spousal support payments from Philip. Philip's income, in contrast, said the magistrate, is roughly $70,000 annually. Finding that Gail has no opportunity for gainful employment, that her health has deteriorated since the divorce, that her medical expenses have increased, and that the evidence clearly shows that she does not have the ability to meet her basic needs without support, the magistrate recommended to the trial court that Philip continue paying $1,800 per month in spousal support for another five years. Philip objected.

{¶ 9} The trial court overruled his objection. It agreed that, since the divorce, Gail's circumstances have changed. Said the court, "At the time of the divorce, this court found that the defendant had been suffering from chronic bronchitis, fibromyalgia, heart problems and stress related illnesses. She had also been asthmatic for many years. As a result of her many illnesses and physical condition, the court found that defendant was unemployable." December 8, 2008 Decision and Judgment, p.2. The court then cited the magistrate's finding that Gail's health has deteriorated and her medical expenses have increased. Considering the relevant statutory factors, particularly the parties' age, health, and incomes, and Philip's acknowledged willingness to provide some continued support,[2] the court agreed to modify its original support order. It ordered Philip to continue paying spousal support but, departing from the magistrate's recommendation, at a reduced

[2]Philip disputes the trial court's characterization of his position. He argues that he said only that he was financially able to provide continued support, not that he was willing to do so. After reviewing the record, particularly Philip's testimony, we are inclined to agree. Nevertheless, even were we to disregard this bit of evidence there is sufficient ground for the trial court's decision.

rate of $1,000 per month for a term not to exceed two years.

{¶ 10} Philip's appeal of the court's order is now before us.

II

{¶ 11} Philip assigns a single error: "The trial Court erred in granting Appellee's Motion to Modify Spousal Support."

{¶ 12} Philip contends that the trial court does not have jurisdiction to modify its support order because there has been no substantial, uncontemplated change in the parties' circumstances, which R.C. 3105.18(E) and construing case law require. We review a trial court's decision to modify a spousal-support order for abuse of discretion. *Reveal v. Reveal*, 154 Ohio App.3d 758, 2003 -Ohio- 5335, at ¶14 (saying that "the order of the trial court allowing or disallowing a change in spousal support will not be disturbed in the absence of a showing of an abuse of discretion"). We conclude that the trial court did not abuse its discretion.

A. Jurisdiction

{¶ 13} As a threshold matter, before a trial court may modify a spousal-support order in a divorce decree, it must have jurisdiction to do so. The court has jurisdiction when (1) "the circumstances of either party have changed," and (2) the court, in the decree, retained jurisdiction over support. R.C. 3105.18(E)(1). Here, the second requirement is met; only the first is contested. The statue itself defines "change in circumstances" generally in terms of a monetary change: "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." R.C. 3105.18(F). Case law construes "change" as substantial and not contemplated. See *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, at ¶33. Gail has experienced a change in circumstances. The only question is whether the change is substantial and uncontemplated.

{¶ 14} The focus here must be the change in Gail's expenses, in particular, her medical expenses. The *Mandelbaum* Court allowed that "substantial," in this context, may mean "drastic," "material," or "significant." Id. at ¶32. Philip argues that Gail's medical expenses, far from increasing, have in fact declined since the divorce, and he cites as proof three financial disclosures and her 2007 federal tax return.

{¶ 15} On a May 4, 2001 financial disclosure, Gail listed out-of-pocket medical expenses totaling $1,195 per month. She stated that pre-divorce health insurance cost $700 per month, and she stated that anticipated post-divorce health insurance would cost as much as $1,000 per month. So Gail's medical-related expenses in 2001 totaled $2,195 per month. On September 11, 2002, soon after the divorce was granted, Gail filed a second financial disclosure. In it she listed out-of-pocket medical expenses totaling $300 per month and a health insurance premium of $1,130 per month. So, according to her second disclosure, her medical-related expenses totaled $1,430 per month. Finally, on March 28, 2008, accompanying her motion to modify spousal support, Gail filed a third financial disclosure. There, she listed out-of-pocket medical expenses of $200 per month and a Medicare premium of $96 per month, for a total of $296 per month in medical-related expenses. The

magistrate found, based on her federal tax return for the 2007 tax-year, that Gail spent $4,004 in out-of-pocket medical expenses that year, or roughly $334 per month. The magistrate also found that in 2007 Gail paid roughly $157 per month ($1,889 total) for eight prescriptions. And the magistrate said that she currently pays around $280 per month for co-pays. While it is not clear how the expenses in the last financial disclosure, the expenses listed on the 2007 tax-return, and the monthly co-pays relate, we will give Gail the benefit and assume that each represents a different medical expense. Gail's current medical-related expenses, then, are roughly $910 per month. Her medical-related monthly expenses, then, appear to have decreased from $2,195 in 2001 to $910 in 2008. Critically, however, Gail's health also deteriorated in that time, though in a less quantifiable way.

{¶ 16} As we said, Gail has been unable to work because of her medical condition since before she married Philip. And Philip earned enough money alone that they enjoyed a higher than average standard of living. Yet the court inexplicably ordered only five years of spousal support. In this situation, the court would have acted well within its discretion had it ordered Philip to pay Gail support indefinitely. See, e.g., *Forbis v. Forbis*, Wood App. Nos. WD-04-056, WD-04-063, 2005-Ohio-5881, at ¶70 (stating that "[w]here the marriage was of long duration and one party lacks the potential to be self-supporting, it is appropriate that spousal support be awarded for an indefinite period"), citing *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, paragraph one of the syllabus. It is puzzling why the court did not. Five years later, when her support from Philip was set to end, Gail asked the court for continued support. She cited her continuing inability to work; she said her health

deteriorated substantially in the previous year, in particular, her immune system has become severely compromised rendering her vulnerable to serious illness; and she said that without the support she will slip into destitution.

{¶ 17} Philip is right, the evidence does not show that Gail's medical expenses have increased–yet. Because of her recent decline in health, though, it is reasonable to infer that Gail's expenses will rise substantially in the near future. Experience teaches that health problems are usually costly, with cost rising in proportion to severity. Given the severity of Gail's health problems, her compromised immune system in particular, the cost has the potential to be significant. By continuing support for two years at an amount that is roughly half what it was, the trial court effectively hedged against this very real possibility. The court's decision recognizes three realities in this case: that it is simply too soon to tell how Gail's deteriorated health will affect her expenses, that when the support order expires the court will not have the authority to order Philip to begin paying support again, and that if support expires and her expenses increase the consequences to Gail would be dire. We cannot say that the court's finding of a substantial change was wrong.

{¶ 18} The second question is whether the change in circumstances was contemplated and accounted for at the time of the previous order. Philip argues that the trial court and the parties knew of Gail's poor health at the time of the divorce. But a serious and rapid decline in health is not contemplated. See *Board v. Board* (March 23, 2001), Clark App. No. 2000 CA 42 (rejecting the argument that because declining health naturally occurs with age the former husband's deterioration in

health as a result of Alzheimer's disease was contemplated because his health declined more seriously and rapidly than the parties had contemplated). While it is true the court knew that Gail had not worked for many years because of her poor health, it did not know that her health would decline as much as it evidently has. There is no evidence in the record suggesting that the trial court is the heir of Cassandra, foretelling Gail's health five years hence. We cannot say that the trial court was wrong to find that Gail's decline in health was not contemplated.

{¶ 19} The trial court found that Gail's health has recently taken a significant turn for the worst and that her medical expenses had increased. That the latter finding is unsupported by the evidence and that the trial court did not articulate the reasons for its decision the way we have does not preclude us from affirming its decision. What matters is that its judgment was correct. See *Maschari v. Tone*, 103 Ohio St.3d 411, 2004-Ohio-5342, at ¶32 (stating that "[r]eviewing courts are not authorized to reverse a correct judgment on the basis that some or all of the lower court's reasons are erroneous"). In this case, we cannot say that the trial court abused its discretion by agreeing to modify spousal support to account for this late change in circumstances.[3]

B. Express findings unnecessary

{¶ 20} Philip raises one related issue. He contends that the trial court's failure to find a substantial, uncontemplated change in Gail's health expressly and

[3]The threshold issue is the only one raised by Philip; he does not assign error to the support order itself.

specifically is alone reversible error.

{¶ 21} The spousal-support statute does not require such an express finding. It says only that a trial court does not have jurisdiction to modify support "unless the court determines that the circumstances of either party have changed." R.C. 3105.18(E). If the General Assembly intended an express finding, it would have said so, like it did in other provisions. See R.C. 3105.18(B) ("Any award of spousal support made under this section shall terminate upon the death of either party, unless the order containing the award *expressly* provides otherwise.") (Emphasis added); see, also, R.C. 3105.18(C)(1)(n) ("Any other factor that the court *expressly* finds to be relevant and equitable.") (Emphasis added). Also, an express statement is not required in this case for appellate purposes. Where the record clearly demonstrates the basis of the trial court's decision, we may affirm despite the absence of express findings. See *Whitmill v. Whitmill* (Aug. 1, 1997), Montgomery App. No. 16228 (affirming based on a record that clearly showed the reasonableness and appropriateness of an award of spousal support, despite the trial court's failure to state expressly the basis of the award). Here, the trial court's decision, supplemented by the record, is sufficient to show that the trial court did not abuse its discretion by assuming jurisdiction to modify support.

{¶ 22} The sole assignment of error is overruled.

III

{¶ 23} Having overruled the sole assignment of error, the trial court's order is Affirmed. . . . . .

DONOVAN, P.J., and FAIN, J., concur.

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