[Cite as *Chepp v. Chepp*, 2009-Ohio-6388.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

JEAN M. CHEPP :

Plaintiff-Appellee : C.A. CASE NO. 2008 CA 98

v. : T.C. NO. 00 DS 0322

MARK J. CHEPP : (Civil appeal from Common Pleas Court, Domestic Relations)

Defendant-Appellant :

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O P I N I O N

Rendered on the 4th day of December, 2009.

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FROELICH, J.

{¶ 1} Appellant Mark Chepp appeals from a September 25, 2008, trial court decision overruling his motion to modify spousal support. Mr. Chepp and Appellee Jean Chepp, were married in August, 1971. Two children were born during the

marriage, but both were emancipated prior to the end of the marriage. On April 13, 2000, the parties filed a petition for dissolution of their marriage, including a separation agreement. The following month, the trial court granted the petition and included the separation agreement as part of the final decree. In accordance with the parties' agreement, Mr. Chepp was ordered indefinitely to pay $2,711/month in spousal support to Mrs. Chepp.

{¶ 2} On December 21, 2006, Mr. Chepp filed a motion to modify spousal support because he was retiring at the end of the year. An evidentiary hearing was held on June 15, 2007, and the trial court overruled the motion the following month. Mr. Chepp filed objections, which he later voluntarily withdrew after filing another motion to modify spousal support. A hearing was held on the second motion in January, 2008, and the motion was again overruled. Mr. Chepp filed an objection to the magistrate's decision. Finding that the trial court had not considered all of the necessary factors, the trial court ordered a supplemental evidentiary hearing, which was held in September, 2008; the trial court subsequently denied Mr. Chepp's motion to modify his spousal support order. Mr. Chepp appeals.

I

{¶ 3} Mr. Chepp's sole assignment of error:

{¶ 4} "THE TRIAL COURT ERRED IN NOT EQUALIZING THE INCOMES OF THE PARTIES IN ACCORDANCE WITH THE LANGUAGE OF THE PARTIES' SEPARATION AGREEMENT."

{¶ 5} In his sole assignment of error, Mr. Chepp contends that the trial court erred in denying his motion to modify his spousal support order. Because trial

courts have broad discretion regarding spousal support orders, an appellate court will not disturb those orders absent an abuse of discretion. *Reveal v. Reveal,* 154 Ohio App.3d 1132, 2003-Ohio-5335, ¶14, citations omitted. An abuse of discretion is more than just an error of law or judgment; rather a trial court abuses its discretion when the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Moreover, a reviewing court may not merely substitute its judgment on factual or discretionary issues for that of the trial court. *Reveal,* supra, at ¶14.

{¶ 6} Mr. Chepp asked the trial court to modify the order of spousal support, in light of Mr. Chepp's retirement and Mrs. Chepp's increase in income. The trial court overruled the motion, concluding that Mr. Chepp's retirement was voluntarily taken, at least in part, to avoid further payment of spousal support. While this determination is within the trial court's discretion, and may warrant imputation of pre-retirement income to Mr. Chepp, the court failed to determine whether Mrs. Chepp's increase in income was a substantial change in circumstances warranting modification of the spousal support order. Therefore, the trial court abused its discretion in denying the motion.

{¶ 7} "R.C. 3105.18(E) governs the payment of alimony and spousal support and specifies the circumstances under which the trial court may modify such awards." *Kimble v. Kimble,* 97 Ohio St.3d 424, 2002-Ohio-6667, ¶4. "***[T]he 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: *** (2) In the case of a dissolution of marriage, the separation agreement that is approved by the court and incorporated into the decree contains a specific provision specifically authorizing the court to modify the amount or terms of the alimony or support." R.C. 3105.18(E). There is no dispute in this case that the trial court did reserve jurisdiction to modify the spousal support in the event of a "substantial change" in circumstances that was not contemplated at the time of the decree.

{¶ 8} Rather than focusing on whether there was a substantial change of circumstances, the bulk of Mr. Chepp's argument centers around the following language in the separation agreement and incorporated into the decree of dissolution: "It is the intent of the parties to equalize their incomes. Husband's annual income for the purposes hereof is $95,400. Wife's annual income for the purposes hereof is $30,326. Consequently, to equalize their respective incomes, Husband must pay to Wife the sum of $32,537. Accordingly, Husband shall pay to Wife as and for spousal support the sum of $2,711 per month for an indefinite period; provided, however, Husband's obligation shall terminate upon the death of either party, Wife's remarriage or Wife's cohabitation with an adult male unrelated to her, whichever occurs first. The Court shall retain jurisdiction over the issue of spousal support for the purpose of modification in the event of a substantial change in circumstances which now is not contemplated." This argument puts the proverbial cart before the horse. Until a substantial change in circumstances is found to have occurred, we need not address the question of how the spousal support should be re-calculated.

{¶ 9} "For purposes of divisions (D) and (E) of this section, 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). Although the language of the statute does not explicitly require that the change in circumstances be substantial, the Ohio Supreme Court has recently held 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, 2009-Ohio-1222, paragraph one of the syllabus. As the moving party, Mr. Chepp bears the burden of proving a substantial change in circumstances. See, e.g., *Reveal,* supra, at ¶14, citation omitted. Thus, the specific question before us is whether the trial court abused its discretion in finding that Mr. Chepp did not meet his burden of proving a substantial change of circumstances, within the meaning of R.C. 3105.18(E), to warrant modification of the spousal support order.

{¶ 10} We agree with Mr. Chepp that retirement, whether voluntary or involuntary, may amount to a substantial change in circumstances. However, we have previously held that when a voluntary early retirement is taken, any resulting decrease in income provides a basis for modification of spousal support only "if it was not done in an attempt to avoid a court ordered obligation to an ex-spouse." *Melhorn v. Melhorn* (Jan. 30, 1989), Montgomery App. No. 11139. See, also, *Lewis v. Lewis* (May 26, 1987), Montgomery App. No. 2264. In other words, "if a party retires with the intent of defeating the spousal support obligation, the retirement is considered 'voluntary underemployment,' and the party's

pre-retirement income is attributed to that party." *Friesen v. Friesen,* Franklin App. No. 07AP-110, 2008-Ohio-952, ¶42, citing *Koch v. Koch,* Medina App. No. 03CA0111-M, 2004-Ohio-7192, ¶21. See, also, *Zahn v. Zahn,* Summit App. No. 6124, 2003-Ohio-6124, ¶19, citations omitted; *Melhorn v. Melhorn* (Jan. 30, 1989), Montgomery App. No. 11139; *Reed v. Reed* (Feb. 16, 2001), Greene App. No. 2000CA81, citations omitted.

{¶ 11} "Before imputing income to a retired party, the trial court must make a finding that the retired person's decision to retire was based on an intent to defeat an award of spousal support. *Koch v. Koch,* Medina App. No. 03CA0111-M, 2004-Ohio-7192. If there is no evidence of a purpose to escape an obligation of spousal support and the decision appears reasonable under the circumstances, then the trial court should not impute additional income to the retired party. *Reed v. Reed* (Feb. 16, 2001), Greene App. No. 2000CA81; *Melhorn v. Melhorn* (Jan. 30, 1998), Montgomery App. No. 11139." *Perry v. Perry,* Clark App. No. 07-CA-11, 2008-Ohio-1315, ¶25.

{¶ 12} In *Lewis v. Lewis* (May 26, 1987), Montgomery App. No. 2264, the defendant retired from General Motors two years before his scheduled date of retirement, and the court found this was 'voluntary' for the purpose of having an alimony reduction; we could not say that the trial court abused its discretion by failing to terminate alimony on the evidence presented in the case.

{¶ 13} Some people retire earlier or later than their contemporaries for personal reasons that have absolutely nothing to do with their court-ordered spousal support. "The court should not create impediments for those who after

many hard years of working decide that they have earned a few more years of rest, just as it does not hinder those who after long years of working, decide that the rest of their lives should be equally filled with industriousness." *Melhorn,* supra, at *1. If a couple remains together, there is no legal impediment - although marital discord could certainly arise - for one spouse to precipitously quit a job or retire against the other spouse's wishes; the difference is that a voluntary contractual agreement, in a separation agreement adopted by a court order, involuntarily regulates such post divorce decisions.

{¶ 14} The question is whether the motivating factor for the retirement was the intent to avoid the court order or if it were one of the factors, was it a sufficiently controlling purpose.

{¶ 15} When asked during a deposition why he had decided to retire, Mr. Chepp explained, "I didn't find the job interesting anymore. There was no creative aspect to it. It was pretty much repeating what I had already done. I accomplished everything that I came here to do, and I spent 34 years in the museum profession, and decided that at this stage of life, it was time...to do something else." He expanded on this explanation when he testified, "I had been in my profession for about 34 years and I was reaching an age when I wanted to do other things in my life. I always wanted to teach at the university level and I could not do that while I was the Director of the museum, time-wise and by contract I was not allowed to do that. *** I wanted to open my own studio and try to be, try to make it as a studio artist as well. So, I didn't view it as retiring into doing nothing, I retired into doing another career, a different career."

{¶ 16} The trial court found, "from the totality of the credible evidence, that Mr. Chepp's retirement in this case was, in essence, facilitated to, among other things, reduce his Court ordered obligation to pay spousal support. While that may not be the only reason for his retirement, the credible evidence suggests that a reduction in his spousal support obligation was a factor in his decision to retire at the relatively young age of 58 and while perfectly healthy." In other words, the trial court found that although under some circumstances a voluntary early retirement could constitute a substantial change in circumstances, Mr. Chepp failed to meet his burden of proving that his retirement was not taken in order to avoid further payment of spousal support. While we may have come to a different conclusion, our role is only to review for an abuse of discretion, and we cannot substitute our judgment for the trial court's factual finding in this regard. Therefore, we conclude that the trial court did not abuse its discretion in finding that Mr. Chepp's voluntary early retirement did not constitute a substantial change in circumstances.

{¶ 17} Nevertheless, the trial court should also have considered whether Mrs. Chepp's increase in income constituted a substantial change in circumstances. The decree indicates that at the time of the parties' dissolution, Mrs. Chepp was earning $30,326/year. Mrs. Chepp submitted her 2006 income tax return into evidence, showing that she earned $66,754 for that year, which included her salary of $41,035, interest of $86, and $25,633 in pensions, but does not include spousal support. At the June 15, 2007, hearing, Mrs. Chepp testified that her salary for 2007 would be $52,000, though there was no testimony regarding her pension income. At the September 2, 2008, hearing, Mrs. Chepp

testified that her salary had increased to $53,456, while her annual pension income was $25,100, giving her an annual income of $78, 456. Using any of these figures, it is clear that during the course of the hearings below, Mrs. Chepp was earning far more than the $30,326/year that she was earning at the time of the decree.

{¶ 18} On its face, this increase in income appears to be a substantial change of circumstances. The court concluded this, but stated: "the Court has not been presented with sufficient evidence establishing differences in the parties' living expenses or medical expenses since the original dissolution hearing in the year 2000." While changes in living and/or medical expenses are a "consideration" for spousal support modification decisions, such changes are not necessarily present in each case. *Day v. Day,* Greene App. No. 2004 CA 59, 2005-Ohio-2015. Therefore, without any evidence of such changes, the trial court must presume that there has been no substantial change in those expenses since the divorce. Accordingly, we must remand this case to the trial court for a determination of the narrow issue of whether the increase in Mrs. Chepp's income is a substantial change of circumstances, within the meaning of R.C. 3105.18(F), taking into account the facts as they were at the time of the hearings below.

{¶ 19} For the foregoing reasons, we conclude that the trial court abused its discretion in denying Mr. Chepp's motion to modify the spousal support order. Accordingly, Mr. Chepp's sole assignment of error is sustained.

II

{¶ 20} Having sustained Mr. Chepp's sole assignment of error, the judgment of the trial court will be Reversed. The case is remanded to the trial court for

consideration of whether, considering the facts as they were at the time of the hearings below, Mrs. Chepp's increase in income constitutes a substantial change of circumstances, thus warranting the re-calculation of the spousal support order.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

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