

[Cite as *Sizemore v. Sizemore*, 2009-Ohio-6596.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

MADALINE L. SIZEMORE (nka LAUDER):

Plaintiff-Appellee

v.

JAMES DARRELL SIZEMORE, SR.

Defendant-Appellant

Appellate Case No. 2008-CA-89

Trial Court Case No. 2002-DR-965

(Civil Appeal from Common Pleas
Court, Domestic Relations)

.....

OPINION

Rendered on the 11th day of December, 2009.

.....

REED P. JEWETT, Atty. Reg. #0025983, R.P. Jewett Co., LPA, 1345 West First Street, Springfield, Ohio 45504
Attorney for Plaintiff-Appellee

ANDREW D. LUCIA, Atty. Reg. #0067191, Lopez, Severt & Pratt Co., LPA, 18 East Water Street, Troy, Ohio 45373
Attorney for Defendant-Appellant

.....

BROGAN, J.

{¶ 1} James Sizemore appeals from the trial court’s refusal to modify a previous spousal support order in favor of his former spouse, Madaline Lauder. The Sizemores were divorced in January 2004 after thirty-five years of marriage. In the final divorce decree, the trial court ordered James to pay \$800 per month to Madaline

for 120 months or until she was eligible for social security benefits as spousal support. The trial court retained jurisdiction to modify the award.

{¶ 2} In November, 2007, James moved to modify the order contending that his health had failed and he lost his commercial driver's license due to his diabetic condition. He contended he was unable to work and his only source of income was \$900 a month which he receives from the Veterans Administration.

{¶ 3} On February 11, 2008, the motion was heard by a magistrate. James testified that he was 59 years of age and last worked in September 2007 as a truck driver. James testified he lost his commercial driver's license in September 2007 because he became insulin dependent. He testified he presently was receiving \$1,000 a month from the Veteran's Administration as compensation for injuries related to Agent Orange which he received during the Vietnam War. He also testified he would begin receiving in April 2008 approximately \$1,600 per month from the Social Security Administration for a disability. James testified he previously earned approximately \$35,000 a year driving a truck for Forward Air. James testified he could not live on his current income and he requested the court terminate the spousal support order.

{¶ 4} James testified he presently pays \$1,130 dollars a month in house rent, \$400 a month in utilities, \$400 a month on food, \$150 a month for car insurance, and \$350 a month for a car payment.

{¶ 5} Madaline did not testify at the motion hearing because she presently lives in Anchorage, Alaska. The parties stipulated that she earned \$34,694 in 2007, while employed by FedEx. Madaline is 58 years of age and lives with her father in

Anchorage.

{¶ 6} At the conclusion of the hearing, the magistrate determined that James had not demonstrated that there had been a substantial change of circumstances because James' income had only decreased from \$35,000 a year to \$32,052. He recommended the trial court overrule James' motion.

{¶ 7} James filed timely objections to the magistrate's findings and recommendations. He objected, inter alia, that the magistrate failed to recognize that he previously made \$46,144 per year but now earns only \$32,052, a thirty-one percent decrease in income. James argued that the magistrate failed to consider that by continuing to pay the spousal support order he would have an annual income of \$22,452 (\$32,052 minus \$9,600) and Madaline would have an annual income of \$44,294 (\$34,694 plus \$9,600).

{¶ 8} The trial court granted a supplemental hearing to determine what Madaline's income was at the date of the parties' divorce so that it could decide whether the previous spousal support should continue or be modified.

{¶ 9} At the supplemental hearing, James testified he earned \$35,000 in 2003 and Madaline earned \$16,000. (Tr. 12.) He testified that in 2007 his monthly income was \$3,713 and his monthly expenses were \$3,699 a month without considering his \$816 monthly spousal obligation to Madaline, leaving him with a monthly deficit of \$802 per month. (Tr. 14.) James also testified that he borrowed a substantial amount of money to meet his monthly obligations.

{¶ 10} James testified that he presently did not have the ability to meet his alimony obligation to Madaline. He testified that based on the affidavit which

Madaline provided the court, her income had increased substantially and her expenses were now less since she lived at home with her father.

{¶ 11} Madaline stated in her affidavit that she incurs approximately \$1,400 a month in expenses for food, medicine, car insurance, and credit card payments. There was no evidence presented as to Madaline's expenses in the year before her divorce when she lived separate and apart from James.

{¶ 12} The trial court made the following findings in support of its ruling:

{¶ 13} "At the supplemental evidentiary hearing which took place on August 21, 2008, Mr. Sizemore acknowledged that he filed his Motion to modify and/or terminate his spousal support obligation within one month of the date of his marriage to his current wife, Angela Sizemore, who he married in October of 2007. He also acknowledged that commencing in April, 2008, he began receiving disability benefits and currently receives approximately \$1,659.00 per month plus an additional \$1,012.00 in VA benefits per month, for a combined monthly total of \$2,671.00 which is the equivalent of \$32,052.00 per year.

{¶ 14} "He also acknowledged that his new wife, Angela, also receives disability benefits and he contends their combined monthly income is \$3,713.00 per month from all sources. Mr. Sizemore also contends that his current monthly living expenses are \$3,698.73, which includes house payments, real estate taxes, home owners insurance and a home equity line of credit, all of which are a result of a home which he recently purchased after the filing of his Motion to modify spousal support.

{¶ 15} "The Court also notes that Mr. Sizemore and his new wife own a fifth wheel; a boat; a truck; and two cars.

{¶ 16} “In his testimony at the hearing herein, Mr. Sizemore presented this Court with documentation confirming his income for the years 2002; 2004; 2005; 2006; and 2007, however, conspicuously he presented to the Court no documentation for his income for the year 2003, which is the income which he was realizing when the parties negotiated the terms of their Divorce Decree filed January 6, 2004. Rather, Mr. Sizemore only provided to this Court his recollection of his income from 2003, without any supporting documentation. This Court does not find Mr. Sizemore’s testimony in this case to be credible.

{¶ 17} “In his testimony, Mr. Sizemore contends that for the year 2003, his combined income from his prior employment as a truck driver and his VA benefits were approximately \$40,000.00 per year, which is the equivalent of \$3,333.00 per month. Even if this were the case, Mr. Sizemore’s income in 2003 when he negotiated the terms of his spousal support obligation was approximately \$365.00 per month less than his current household obligation which includes the disability income which his new wife receives. In other words, Mr. Sizemore has \$365.00 per month more household income than he had in 2003 at the time he negotiated his spousal support obligation, if his testimony were to be believed.

{¶ 18} “It is significant to note that Mr. Sizemore did not present this Court with any evidence concerning his living expenses in 2003 when he negotiated his spousal support obligation, rather, he only provided the Court with his current living expenses. The parties’ living expenses are just as relevant as their incomes when evaluating that which has transpired since the original Order. To this end, Mr. Sizemore has not provided this Court with sufficient evidence to establish, if, in fact, there is any

difference in his current living expenses and those which he had in 2003.

{¶ 19} “Likewise, Mr. Sizemore provided this Court with no evidence concerning the living expenses of Ms. Lauder, as they existed in 2003 which would give the Court a basis to compare with her current living expenses.

{¶ 20} “In support of his request, Mr. Sizemore primarily focuses on the fact that Ms. Lauder has greater income currently than she had in 2003, although, once again, the Court has not been provided with sufficient evidence establishing Ms. Lauder’s 2003 income so as to compare it with her current income and, as mentioned, it has not been provided with evidence establishing her living expenses for 2003 so as to enable the Court to compare those with her current living expenses.

{¶ 21} “In this Court’s Entry, filed May 2, 2008, the Court specifically quoted the Second District Court of Appeals in Tremaine v. Tremaine (1996), 111 Ohio App.3d 703 when it, in essence, held that a trial court does not have jurisdiction to modify a spousal support order unless there has been a change of circumstances and the change is substantial and not one contemplated at the time of the prior order. To this end, the Court held that a change of circumstances includes, but is not limited to, any increase or involuntary decrease in the income and living expenses of the obligee or obligor’s spouse. (emphasis added).

{¶ 22} “The burden of showing that change of circumstances has occurred is upon the party claiming it, who, in this case, is Mr. Sizemore.

{¶ 23} “This Court finds, from the totality of the credible evidence, that despite the fact that Mr. Sizemore has been afforded two hearings to present this Court with sufficient evidence in support of his request to modify and/or eliminate his spousal

support obligation, he has not done so and, in consideration of the foregoing, his Motion is not well taken.”

{¶ 24} James’ assignment of error is as follows:

{¶ 25} “THE TRIAL COURT IMPROPERLY LIMITED ITS REVIEW OF EVIDENCE TO THE PARTIES’ LIVING EXPENSES AT THE TIME OF DECREE AND COMMITTED REVERSIBLE ERROR BY FAILING TO CONDUCT A REVIEW OF THE SPOUSAL SUPPORT ORDER IN ACCORDANCE WITH THE FACTORS LISTED IN R.C. 3105.18 AND DENYING APPELLANT’S MOTION DESPITE HIS CLEAR SHOWING OF A SUBSTANTIAL CHANGE OF CIRCUMSTANCES NOT CONTEMPLATED AT TIME OF DECREE.”

{¶ 26} James argues that the trial court erred in limiting its review of the evidence to the living expenses of the parties without considering all of the factors contained in R.C. 3105.18(C)(1)(a) through (n). James argues that the loss of his commercial driver’s license and the resultant loss of his lifelong profession as a truck driver, coupled with Madaline’s ability to support herself through full-time employment and shared expense, constitutes a substantial change of circumstances justifying a modification of the previous spousal support order.

{¶ 27} Madaline argues the trial court did not abuse its discretion in denying James’ motion because James receives \$2,671 monthly from his Social Security disability income and veterans benefits for the equivalent of \$32,052.00 in annual income. She also notes that James’ new spouse receives disability benefits which combined with James’ income equals his prior income as a truck driver.

{¶ 28} R.C. 3105.18(C)(1) contains the requirement that the court consider all of the following factors:

{¶ 29} (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 [3105.17.1] of the Revised Code*:

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

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

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

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

{¶ 34} (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;

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

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

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

{¶ 38} (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;

{¶ 39} (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;

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

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

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

{¶ 43} A trial court lacks jurisdiction to modify a prior order of spousal support unless the decree of the court expressly reserved jurisdiction to make the modification 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. *Mendelbaum v. Mendelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222.

{¶ 44} James' loss of his employment as a truck driver is a substantial change of circumstances which was not contemplated at the time of the parties' divorce. Although James lost his employment as a trucker in September 2007, he married again in October 2007 and his present wife receives disability income which supplements James' household income. James' present household income is nearly the same as before he became disabled. Madaline's income has increased from \$16,000 a year in 2003 to \$34,694 in 2007. It is reasonable to conclude that such a substantial increase in Madaline's wages was not contemplated by the trial court when it awarded spousal support to Madaline. We are unable to determine whether Madaline's household expenses have decreased since the date of the

divorce since the record does not reflect what those expenses were at that time. Likewise, James failed to demonstrate that his household expenses have substantially increased since the parties' divorce. The Appellant's assignment of error is Sustained. The judgment of the trial court is Reversed and Remanded to the trial court to determine whether modification is appropriate in light of Madaline's substantial change in income since the parties' divorce in 2004.

.....

DONOVAN, P.J., concurs.

GRADY, J., concurring:

{¶ 45} In *Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703, we wrote that the change of circumstances which an obligor or obligee must demonstrate to warrant consideration of a motion to modify a spousal support order are "any increase or decrease in a party's wages, salary or living expenses." *Id.*, at 706. That showing, which is required by R.C. 3105.18(E), is a jurisdictional prerequisite to modification, which may then be ordered upon consideration of the factors in division (F) of R.C. 3105.18. To satisfy the jurisdictional prerequisite, the required change or changes must be substantial and not contemplated when the prior order was entered. *Id.*, citing *Leighner v. Leighner* (1986), 33 Ohio App.3d 214.

{¶ 46} Instead of viewing the statutory grounds of the required change in the alternative, as we did in *Tremaine*, the court in the present case viewed them, or at least "income and living expenses," as a combined showing, and then found that the

change in one cancelled out the change in the other. However, the substantiality requirement applies to the particular change in income or living expenses shown, in isolation and independent of any change in the other side of the equation. Once that is shown, then all the factors in R.C. 3105.18(F) which may apply must be weighed anew to determine whether spousal support is equitable and, if so, the amount of spousal support which is "appropriate and reasonable." R.C. 3105.18(C)(1).

.....

Copies mailed to:

Reed P. Jewett
Andrew D. Lucia
Hon. Thomas J. Capper