

[Cite as *Bishop v. Bishop*, 2015-Ohio-2711.]

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

JAMES W. BISHOP, SR.

Plaintiff-Appellee

V.

MILDRED A. BISHOP

Defendant-Appellant

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Appellate Case No. 26397

Trial Court Case No. 1998-DR-00787

(Appeal from Domestic Relations Court)

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OPINION

Rendered on the 2nd day of July, 2015.

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WELBAUM, J.

{¶ 1} Defendant-appellant, Mildred A. Bishop, appeals from the decision of the Montgomery County Court of Common Pleas, Domestic Relations Division, modifying the spousal support obligation of plaintiff-appellee, James W. Bishop, Sr., from \$1,000 per month to \$350 per month. For the reasons outlined below, the judgment of the trial court will be affirmed.

{¶ 2} James and Mildred Bishop were married in 1961. They produced two children, Yvonne Baker and James Bishop, Jr., who are now adults. After 38 years of marriage, on October 13, 1999, James and Mildred obtained a final judgment and decree of divorce. Pursuant to the decree of divorce, James was ordered to pay \$1,000 per month in spousal support to Mildred until either the death or remarriage of either party. At the time of the divorce, the parties imputed \$12,000 in annual employment income to Mildred and acknowledged that she received approximately \$7,000 in rental income per year. In contrast, James received annual employment income in the amount of \$30,000, plus an additional \$9,000 per year in VA disability benefits.

{¶ 3} Through the divorce, James retained the family business, Englewood Glass, and all the property associated with the business, including the office building and company vehicles. James also retained residential real property located at 412 Westview Place, Englewood, Ohio. Mildred retained a commercial building next to the Englewood Glass office building, residential real property located at 123 Chestnut Street, Englewood, Ohio, and two vehicles.

{¶ 4} Between 2009 and 2013, James filed various motions to modify his spousal support obligation, all of which the magistrate denied. As relevant here, James's most

recent motion to modify was filed on September 12, 2013. In that motion, James alleged there was a substantial change in circumstances warranting a modification of his spousal support obligation due to his age, deteriorating health, and Mildred cohabiting with a male who allegedly provided her with financial support.

{¶ 5} A hearing on James's September 12, 2013 motion was held on March 10, 2014. At the hearing, James, who is 71 years old, testified regarding his various physical ailments. Specifically, James testified that he had a metal plate inserted into his back in 1972; heart attacks in 1987, 1989, and 1993; a metal rod inserted into his neck in 2001 or 2002; and shoulder screws and prostate cancer in 2009. James also testified that he is going to get his knee replaced within the next year and is currently awaiting test results to determine if his prostate cancer has returned. James further testified that he had wrist surgery for Carpal Tunnel Syndrome in May 2013. Due to the issue with his wrist and having arthritis in both his hands, James testified that he is unable to do simple tasks such as twisting off bottle caps, pushing or pulling objects, using tools such as a screwdriver, and driving for long periods of time.

{¶ 6} Continuing, James testified regarding his employment, income, and liabilities. As part of this testimony, James testified that he worked at Englewood Glass for 40 years, but permanently retired due to his age and health. His testimony at prior hearings, which the magistrate took judicial notice of, established that after leaving Englewood Glass, James worked at Home Depot and also as a courier. In 2009, James grossed \$10,400 in employment income working for Home Depot and received approximately \$24,000 in Social Security and disability benefits. While working as a courier, James grossed \$24,000 in 2010 and \$8,000 to \$9000 in 2011, plus his Social

Security and disability benefits. More recently, James filed an Affidavit of Financial Disclosure on September 12, 2013, stating that his gross income after retirement is now \$15,517.80 a year. According to his affidavit, this amount is derived solely from Social Security, pension, and disability benefits. James also testified that Mildred has initiated a foreclosure action on his home at 412 Westview Place based on a judgment she received against him for spousal support arrearages. James currently owes arrearages in the amount of \$19,526.20.

{¶ 7} In addition, James testified regarding Mildred's relationship with another man named Don Thomas. According to James, Don resides with Mildred when he is in Ohio and provides her with financial support. At the hearing, Mildred admitted to having a relationship with Don. She also admitted that Don stays at her home from time to time, but denied receiving financial support from him.

{¶ 8} James and Mildred's daughter, Yvonne, also testified at the hearing. Yvonne testified that she worked at Englewood Glass for five or six years before James left the business. During that time, Yvonne testified that she made James's spousal support payments from the business's account. In 2007, James transferred Englewood Glass and its real property to Yvonne. In exchange, Yvonne assumed some of the business's debt and continued to make James's spousal support payments. Yvonne acknowledged that she had agreed to pay the spousal support, but indicated that it was her understanding that it would only be for a certain period of time, as she anticipated the spousal support would be reduced once James retired. Yvonne also acknowledged that she paid James's spousal support obligation until 2009, but eventually had to stop due to the business falling on hard financial times.

{¶ 9} James and Yvonne both testified that James still visits the Englewood Glass office daily and answers the phone when Yvonne takes her kids to school. Yvonne also testified that James sometimes gives her advice on certain projects that she is unfamiliar with. James testified that in exchange for his help, Yvonne simply gives him gas money or buys him lunch and breakfast. Otherwise, James remains unemployed.

{¶ 10} Mildred, who is 68 years old, has a ninth grade education and has been unemployed for many years. She filed an Affidavit of Financial Disclosure on July 22, 2013, indicating that her annual gross income from Social Security, pension, and disability benefits was \$18,376.80. Mildred currently owns her residence at 123 Chestnut Street free and clear of any mortgage as well as a trailer in South Carolina. In addition, Mildred still owns the commercial property next to Englewood Glass and receives rental income from the parking lot. The commercial building itself needs repairs, which has prevented her from selling or renting the property.

{¶ 11} After hearing all the testimony and taking judicial notice of testimony given at prior hearings, the magistrate denied James's September 12, 2013 motion to modify his spousal support obligation. Specifically, the magistrate found that James's circumstances had not substantially changed and that he had the ability to make the payments as ordered. The magistrate also found that James intentionally engaged in conduct to defeat his spousal support obligation by transferring Englewood Glass to his daughter as opposed to selling it and using the sale proceeds to pay his spousal support. The magistrate further found that there was no evidence that Don Thomas provides Mildred with financial support and that the parties' divorce decree does not require a modification of spousal support for cohabitation.

{¶ 12} On April 10, 2014, James filed various objections to the magistrate's decision and supplemented those objections on May 19, 2014. The trial court issued a decision on August 25, 2014, reversing the magistrate's decision. In so holding, the trial court found a substantial change in circumstances based on the decrease in James's income due to his retirement and inability to work as a result of his deteriorating health. The trial court also found the fact that Yvonne continued to make James's spousal support payments to Mildred after James transferred Englewood Glass to her negates the inference that James did this to intentionally avoid his spousal support obligation. The trial court further noted there was no evidence establishing that a sale of Englewood Glass would have generated enough income for James to fulfill his spousal support obligation. Having found a substantial change in circumstances and no intentional avoidance by James, the trial court reduced James's spousal support obligation from \$1,000 per month to \$350 per month.

{¶ 13} Mildred now appeals from the trial court's decision to reduce James's spousal support obligation, raising one assignment of error for review. Her sole assignment of error is as follows:

THE TRIAL COURT ABUSED ITS DISCRETION BY ERRONEOUSLY
CONCLUDING THAT A CHANGE OF CIRCUMSTANCES OCCURRED
JUSTIFYING A MODIFICATON OF APPELLEE'S SPOUSAL SUPPORT
OBLIGATION.

{¶ 14} Under her single assignment of error, Mildred contends the trial court's decision to modify James's spousal support obligation was an abuse of discretion and against the manifest weight of the evidence. Specifically, she argues that the evidence

does not establish that there was a significant change in circumstances warranting the modification or that the original award of spousal support was no longer appropriate. We disagree.

{¶ 15} As a preliminary matter, we note that civil cases are governed by the same manifest weight standard that is used to review criminal cases. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17. Therefore, in civil cases, “[w]hen a [judgment] is challenged on appeal as being against the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact ‘clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.’” *State v. Hill*, 2d Dist. Montgomery No. 25172, 2013-Ohio-717, ¶ 8, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). “A judgment should be reversed as being against the manifest weight of the evidence ‘only in the exceptional case in which the evidence weighs heavily against the [judgment].’” *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 16} Trial courts have broad discretion regarding spousal support orders. *Chepp v. Chepp*, 2d Dist. Clark No. 2008 CA 98, 2009-Ohio-6388, ¶ 5. Therefore, an appellate court ordinarily will not disturb spousal support orders absent an abuse of discretion. (Citation omitted.) *Id.* A trial court abuses its discretion when the court’s attitude was unreasonable, arbitrary, or unconscionable. *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). “It is to be expected that most instances of abuse of discretion will

result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.” *Id.* “A decision is unreasonable if there is no sound reasoning process that would support that decision.” *Id.*

{¶ 17} “The person seeking a reduction of spousal support bears the burden of showing that the reduction is warranted.” (Citation omitted.) *Young v. Young*, 2d Dist. Darke No. 2012 CA 1, 2012-Ohio-5310, ¶ 15. “A trial court has the authority to modify spousal support if the court determines that ‘the circumstances of either party have changed’ and that the [divorce] decree * * * contains a provision authorizing the court to modify the amount or terms of spousal support.” *Allread v. Allread*, 2d Dist. Darke No. 2010 CA 6, 2011-Ohio-1271, ¶ 19, quoting R.C. 3105.18(E).

{¶ 18} A change of circumstances “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). “The change of circumstances must be ‘substantial,’ and cannot have been contemplated and taken into account by the parties or the court at the time of the original decree.” *Papp v. Papp*, 2d Dist. Montgomery No. 25333, 2013-Ohio-506, ¶ 13, citing *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, 905 N.E.2d 172, ¶ 32-33. “Courts have misconstrued that standard by applying a test of foreseeability: was the particular circumstance one reasonably to be anticipated? The better test is one grounded in the record, and contemplates a finding that the circumstance is not one that ‘was thoroughly considered at the time of the divorce.’ ” *Allread v. Allread*, 2d Dist. Darke No. 2011-CA-14, 2012-Ohio-2093, ¶ 16, quoting *Palmieri v. Palmieri*, 10th Dist. Franklin No. 04AP-1305, 2005-Ohio-4064, ¶ 19.

{¶ 19} We also note that the party seeking the modification of spousal support

must not have purposefully brought about the alleged change of circumstances. *Kaput v. Kaput*, 8th Dist. Cuyahoga No. 94340, 2011-Ohio-10, ¶ 15; *Bauer v. Bauer*, 2d Dist. Montgomery No. 7596, 1982 WL 3719, *1 (Apr.15, 1982).

{¶ 20} “[R]etirement, 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.’ ” *Chepp*, 2d Dist. Clark No. 2008 CA 98, 2009-Ohio-6388 at ¶ 10, quoting *Melhorn v. Melhorn*, 2d Dist. Montgomery No. 11139, 1989 WL 8452, *2 (Jan. 30, 1989). (Other citation omitted.) “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.’ ” *Id.*, quoting *Friesen v. Friesen*, 10th Dist. Franklin No. 07AP-110, 2008-Ohio-952, ¶ 42. (Other citations omitted.)

{¶ 21} If a substantial change in circumstances has occurred, the trial court must then examine the existing order in light of the changed circumstances, considering whether spousal support is still appropriate and reasonable and, if so, in what amount. *Norbut v. Norbut*, 2d Dist. Greene No. 06-CA-112, 2007-Ohio-2966, ¶ 15. When deciding whether the existing order should be modified, a trial court must consider all relevant factors, including those listed in R.C. 3105.18(C)(1). *Id.* The factors relevant to this case are:

- (1) 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 of the Revised Code;

- (2) The relative earning abilities of the parties;
- (3) The ages and the physical, mental, and emotional conditions of the parties;
- (4) The retirement benefits of the parties;
- (5) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;
- (6) Any other factor that the court expressly finds to be relevant and equitable.

See R.C. 3105.18(C)(1).

{¶ 22} In this case, there is no dispute that the parties' divorce decree contains a provision providing the trial court with continuing jurisdiction over spousal support for modification purposes. In addition, the divorce decree does not discuss what effect James's retirement would have on the award of spousal support. Accordingly, the record supports the trial court's conclusion that the parties did not contemplate or take into account James's retirement at the time of their divorce.

{¶ 23} In declining to adopt the magistrate's decision, the trial court found that the decrease in James's income due to his retirement and health issues was a substantial change in circumstances warranting a modification of the spousal support order. As noted earlier, James, who is 71 years old, has suffered from issues with his neck, back, heart, knee, and shoulder over the years. James also suffered from prostate cancer in 2009, and is currently awaiting test results to confirm whether the cancer has returned. In addition, James recently had surgery on his wrist and suffers from arthritis in both

hands, which makes it difficult for him to complete everyday tasks. Although James worked at Home Depot and as a courier for a period of time after leaving Englewood Glass, his age and various ailments have made it impossible for him to continue such employment. Under these circumstances, it was not unreasonable for the trial court to conclude that James's retirement was appropriate and not a means to avoid his spousal support.

{¶ 24} We also find that the trial court reasonably concluded that there was insufficient evidence establishing that James transferred Englewood Glass to Yvonne in order to intentionally avoid his spousal support obligation. The trial court found that the agreement for his daughter to make spousal support payments from the business account, and the daughter's act of continuing to make the payments after James left Englewood Glass negates an inference of intentional avoidance. Such a conclusion is reasonable and supported by the record.

{¶ 25} As a result of James's retirement, his income, which was approximately \$39,000 when the parties divorced, has decreased to \$15,517.80 per year, which includes Social Security, pension, and disability benefits. See Affidavit of Financial Disclosure (Sept. 12, 2013), Montgomery County Court of Common Pleas Case No. 1998 DR 0787, Docket No. 135, p. 1. Given the reduction in income, as well as the foreclosure initiated on his home by Mildred, it was reasonable for the trial court to find that James's financial position has substantially changed to warrant a modification of his spousal support obligation.

{¶ 26} We further note that both parties are of similar advanced age, suffer from physical ailments, and are not generating any employment income. The Affidavit of

Financial Disclosure filed by Mildred on July 22, 2013, shows that her gross income from Social Security, pension, and disability benefits amounts to \$18,376.80 per year. See Affidavit of Financial Disclosure (July 22, 2013), Montgomery County Court of Common Pleas Case No. 1998 DR 0787, Docket No. 126, p. 1. Mildred also owns her home free and clear of any mortgage, as well as the commercial building next to Englewood Glass and a trailer in South Carolina. In addition, the parties have similar monthly expenses, as Mildred's is \$2,228.90 and James's is \$2,280.66. See Affidavits at 4.

{¶ 27} For the foregoing reasons, the trial court's decision finding a substantial change of circumstances was not an abuse of discretion nor against the manifest weight of the evidence, as the decision is supported by the testimony and the magistrate's findings of fact. Also, after reviewing the relevant factors under R.C. 3105.18(C)(1), we find that based on the parties' income, assets, and liabilities, it was reasonable for the trial court to reduce James's spousal support obligation from \$1,000 per month to \$350 per month.

{¶ 28} Mildred's sole assignment of error is overruled and the judgment of the trial court modifying the spousal support obligation is affirmed.

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FROELICH, P.J. and FAIN, J., concur.

Copies mailed to:

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