

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

Nancy Jane Dingess (fka Smith)	:	
	:	
Plaintiff-Appellee,	:	Case No. 09CA18
	:	
v.	:	
	:	
Stephen Lindsey Smith	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	File-stamped date: 1-26-10

APPEARANCES:

Lawrence J. White, Dayton, Ohio, for Appellant.

Joseph H. Brockwell, Marietta, Ohio, for Appellee.

Kline, J.:

{¶1} Stephen L. Smith (hereinafter “Smith”) appeals the judgment of the Washington County Court of Common Pleas. The trial court denied Smith’s motion to modify his spousal support payments to Nancy Jane Dingess (hereinafter “Dingess”). First, Smith contends that the trial court should have modified spousal support because of an increase in Dingess’s income. Dingess’s brother receives Veteran’s Disability benefits. As her brother’s court-appointed guardian, Dingess has control over that money. For this reason, Smith contends that the trial court should have counted the Veteran’s Disability benefits as Smith’s income. We disagree. Smith has a legal duty to use that money for

her brother's benefit. Moreover, Smith may not engage in self-dealing.

Accordingly, the trial court did not abuse its discretion by excluding the Veteran's Disability benefits from Dingess's income. Next, Smith contends that the trial court should have modified spousal support because of a decrease in his own income. We disagree. Smith has not demonstrated a substantial change from the time of the prior spousal support modification. Finally, Smith contends that the trial court should have modified spousal support because of increases in Smith's medical expenses. The trial court did not consider this particular issue. Therefore, as a court of review, we decline to address whether Smith's increased medical expenses created a change of circumstances. Accordingly, we affirm, in part, and reverse, in part, the decision of the trial court, and we remand this matter so that the trial court may consider the issue of Smith's increased medical expenses.

I.

{¶2} Smith and Dingess were married in 1970. In 2001, Dingess filed a complaint in divorce. The trial court granted Dingess a divorce and ordered Smith to pay \$1,000.00 per month in spousal support.

{¶3} At the time of the divorce, Smith made approximately \$35,000.00 per year as a union member in the heating and air conditioning industry. However, because of a subsequent injury, Smith could no longer work in that field. Instead, he started working as a real estate agent. This change in occupation caused Smith's income to decrease. And in 2004, Dingess obtained two separate judgments against Smith for unpaid spousal support.

{¶4} In October 2004, Smith filed a motion to modify spousal support. Smith claimed that his income had gone from “\$35,000 to \$40,000 per year to \$9,721 in 2003, and gross income-to-date in 2004 of approximately \$13,500.” In its April 7, 2005 ruling on Smith’s motion, the trial court found that “[Smith] made gross income of \$25,626 in 2004, which was a substantial increase from the previous year. On his taxes he deducted vehicle expenses of \$4,291, which included 15,000 business miles. With other expenses to deduct, he reached a taxable income of \$9,517, from which he paid spousal support of \$4,361.” Because of the decrease in Smith’s income, the trial court reduced Smith’s spousal support payments to \$350.00 per month.

{¶5} In 2007, Smith suffered a stroke. Soon thereafter, he stopped working in the real estate field and started receiving Social Security Disability Insurance benefits. On October 20, 2008, Smith filed another motion to modify spousal support. In an affidavit attached to this motion, Smith stated the following:

{¶6} “1. I was awarded Social Security Disability Insurance benefits on or about February 8, 2008 due to a stroke I suffered in 2007.

{¶7} 2. I receive \$1443.00 [sic] per month for a total of \$17,316.00 per year.

{¶8} 3. I no longer am working in the Real Estate field. In the year of 2008 I have only received \$3276.00 [sic] and I have no current listings on file and no transactions pending due to the Real Estate market crash.

{¶9} 4. I have medical bills over \$30,000.00 because I no longer had health insurance.”

{¶10} The trial court held a hearing on Smith's 2008 motion to modify spousal support. At the hearing, Smith testified about his medical problems, his expenses, and his decreased income. Dingess testified that she was not employed and that she lived in a trailer on her family's property. Dingess further testified that she received some life insurance benefits after her mother died. However, after repeated questioning, Dingess could not remember the amount of those benefits.

{¶11} Dingess also testified about her relationship with her brother (hereinafter the "Brother"). Dingess and her Brother live on the same property, but the Brother lives in a separate house. Apparently, Dingess spends most nights at the Brother's house instead of at her own trailer. Dingess further testified (1) that a probate court appointed her to be the Brother's guardian and (2) that the Brother receives Veteran's Disability benefits. Dingess could not testify as to the exact amount of these benefits, but the trial court noted that the Brother's Veteran's Disability benefits may total between \$3,000.00 and \$3,500.00 per month. Dingess testified that she had "check writing authority" over her Brother's money, including the Veteran's Disability benefits.

{¶12} After hearing the evidence, the trial court found, in part, the following: "[Smith's] disability payments are not subject to income tax according to his returns, and are thus the equivalent of a higher earned income. * * * None of Mr. Smith's expenses are in evidence. He relies entirely on the reduction in his income as the basis for this motion. * * * The argument of Mr. Smith is that Ms. Dingess has access to \$3,500.00 per month. The Court, according to Mr. Smith

should consider that to be her own income[.] * * * The disability payments for her brother, which are handled by Ms. Dingess, are not her income and will not be considered by the Court to be so. She undoubtedly receives some derivative benefit from living with her brother in a home that he owns while she cares for him. But this is not a change from the time of the previous court hearing[.]” For these reasons, the trial court denied Smith’s motion to modify spousal support.

{¶13} Smith appeals, asserting the following assignment of error: I. “The Trial Court Abused its Discretion by Failing to Include Increases in Appellee’s Income, Decreases in Appellant’s Income and Increases in Appellant’s Expenses.”

II.

{¶14} In his only assignment of error, Smith contends that the trial court should have modified his spousal support payments for various reasons. “A trial court has broad discretion in establishing and modifying a spousal support award.” *Cassidy v. Cassidy*, Pike App. No. 03CA721, 2005-Ohio-3199, at ¶27, citing *Schultz v. Schultz* (1996), 110 Ohio App.3d 715, 724. See, also, *Addington v. Addington*, Scioto App. No. 05CA3034, 2006-Ohio-4871, at ¶8. “Thus, we will not reverse a spousal support award absent an abuse of discretion. * * * An abuse of discretion involves more than an error of law or judgment; it connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary.” *Cassidy* at ¶27, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218 (internal citation omitted).

{¶15} Trial courts engage in a two-step analysis in deciding whether to modify spousal support. See *Cassidy* at ¶29. “First, the court must determine

whether there has been a change in the circumstances of either party.” *Id.*, citing R.C. 3105.18(E). “[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). For a trial court to modify spousal support, the change of circumstances must be (1) substantial and (2) a change that had not “been contemplated and taken into account by the parties or the court at the time of the prior order.” *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, at ¶32. Further, “[t]he party seeking a spousal support modification bears the burden to show that a change of circumstances has occurred.” *Addington* at ¶8, citing *Reveal v. Reveal*, 154 Ohio App.3d 758, 2003-Ohio-5335, at ¶14. If the trial court determines that a change of circumstances has occurred, the court “must then determine the amount of spousal support that is appropriate and reasonable.” *Cassidy* at ¶29, citing *Fallang v. Fallang* (1996), 109 Ohio App.3d 543, 548-49.

A. Increases in Dingess’s Income

{¶16} Smith contends that the trial court should have modified spousal support because of an increase in Dingess’s income. The trial court noted that the Brother may receive anywhere from \$3,000.00 to \$3,500.00 a month in Veteran’s Disability benefits. As her Brother’s guardian, Dingess controls the allocation of these benefits. For that reason, Smith argues that the trial court should have considered the Veteran’s Disability benefits to be Dingess’s income.

{¶17} We cannot agree with Smith’s arguments regarding the Veteran’s Disability benefits. Dingess testified that a probate court appointed her to be her

Brother's guardian. The record does not contain any court orders related to this guardianship. Therefore, we do not know (1) which probate court appointed Dingess to be her Brother's guardian or (2) the exact type of guardianship at issue. Nevertheless, we can apply general principles of guardianship law to the present case. "The guardian acts in the ward's stead and for the ward's benefit and interests. * * * A guardian is a fiduciary, appointed by and accountable to the probate court." 53 Ohio Jurisprudence 3d, Guardian and Ward 1. See, also, R.C. 2111.13; R.C. 2109.43. "A 'fiduciary' has been defined as a person having a duty, created by his undertaking, to act *primarily for the benefit of another* in matters connected with his undertaking." *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 216 (citations omitted) (emphasis sic).

{¶18} Here, although Dingess "controls" her Brother's Veteran's Disability benefits, she is limited in how she can use that money. That is, Dingess must use those funds in a manner that benefits her Brother. Furthermore, as a fiduciary, Dingess may not engage in "self-dealing." See Black's Law Dictionary (8th ed.2004) (defining "self-dealing" as the "[p]articipation in a transaction that benefits oneself instead of another who is owed a fiduciary duty"); see, also, *Jones v. Elsea*, Pickaway App. No. 02-CA-27, 2003-Ohio-4900, at ¶18 (stating that a fiduciary "is ordinarily completely prohibited from any self-dealing"); *Whitaker v. Estate of Whitaker* (1995), 105 Ohio App.3d 46, 54 ("Self-dealing by a fiduciary is generally prohibited.").

{¶19} We recognize that there are some questions as to how Dingess pays her monthly bills. Nevertheless, Smith did not demonstrate that Dingess had

violated her fiduciary duty to her Brother. For that reason, we cannot say that the trial court abused its discretion in determining that the Veteran's Disability benefits did not create a change of circumstances. If the trial court had counted the Veteran's Disability benefits as part of Dingess's income, the court would have ignored well-established guardianship and fiduciary law. Dingess has a legal duty to use those funds for her Brother's benefit. By lowering Smith's spousal support payments because of the Veteran's Disability benefits, the trial court would have implicitly encouraged Dingess to engage in prohibited self-dealing transactions. We cannot agree with Smith's proposed outcome.

{¶20} Accordingly, we overrule Smith's assignment of error as it relates to increases in Dingess's income.

B. Decreases in Smith's Income

{¶21} Smith also contends that the trial court should have modified spousal support because of decreases in his own income. However, because Smith has failed to demonstrate a substantial change of circumstances, we cannot find that the trial court abused its discretion.

{¶22} In April 2005, the trial court reduced Smith's spousal support payments from \$1,000.00 a month to \$350.00 a month. The trial court based this modification, in part, on reductions in Smith's income. According to the trial court's April 7, 2005 Ruling on Motion to Modify Spousal Support, Smith had a gross income of \$25,626 in 2004. But after deducting business expenses, Smith's taxable income in 2004 was just \$9,517. Currently, Smith receives

\$1,443.10 per month in Social Security Disability payments. That equates to \$17,317.20 per year with no business expenses.

{¶23} In our view, this change in income does not demonstrate a substantial change of circumstances from the time of the trial court's April 2005 order modifying spousal support. We have no reason to doubt the trial court's findings regarding Smith's 2004 income. And based on these findings, one could argue that Smith actually has a higher income now than he did at the time of the 2005 modification. Thus, we cannot say that the trial court abused its discretion by failing to find a change of circumstances based on decreases in Smith's income.

{¶24} Accordingly, we overrule Smith's assignment of error as it relates to decreases in his own income.

C. Increases in Smith's Expenses

{¶25} Finally, Smith contends that the trial court should have modified spousal support because of increases in Smith's medical expenses.

{¶26} During the proceedings below, Smith presented evidence about his increased medical expenses. In the affidavit attached to his motion to modify child support, Smith stated that he has medical bills totaling more than \$30,000.00. Similarly, at the hearing, Smith testified that he "owed \$35,000 in medical bills from [a] hospital stay of five days." Motions Hearing Transcript at 39. Therefore, we recognize that Smith produced some evidence related to his increased medical expenses. However, in its February 26, 2009 Ruling on Motion to Modify Spousal Support, the trial court noted the following: "None of

Mr. Smith's expenses are in evidence. He relies entirely on the reduction in his income as the basis for this motion."

{¶27} A change of circumstances may include any increase in a party's medical expenses. See R.C. 3105.18(F). Here, because the trial court did not consider this issue, we decline to address whether Smith's increased medical expenses created a change of circumstances. "In light of the Ohio Supreme Court's determination in *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 360, 604 N.E.2d 138, we, as an appellate court, should not first consider an argument that the trial court did not address." *Lang v. Holly Hill Motel, Inc.*, Jackson App. No. 05CA6, 2005-Ohio-6766, at ¶22. In *Murphy*, the court stated the following: "A reviewing court, even though it must conduct its own examination of the record, has a different focus than the trial court. If the trial court does not consider all the evidence before it, an appellate court does not sit as a reviewing court, but, in effect, becomes a trial court." *Murphy* at 360.

{¶28} Thus, we remand this matter to the trial court so that it may consider the issue of Smith's increased medical expenses. "Failing to remand would mean that we would, in effect, be sitting as a trial court rather than reviewing a trial court's decision." *Lang* at ¶23. See, also, *Bentley v. Pendleton*, Pike App. No. 03CA722, 2005-Ohio-3495, at ¶9; *Farley v. Chamberlain*, Washington App. No. 03CA48, 2004-Ohio-2771, at ¶12. We take no position as to whether Smith's increased medical expenses created a substantial change of circumstances. Further, we take no position as to whether Smith presented enough evidence to carry his burden. Instead, we simply recognize that it would

be inappropriate for this court to be the first to address the issue of Smith's medical expenses.

{¶29} Accordingly, we sustain Smith's first assignment of error as it relates to his increased medical expenses. We remand this matter so that the trial court may first address whether Smith's increased medical expenses created a change of circumstances.

III.

{¶30} In conclusion, we overrule Smith's assignment of error as it relates to (1) an increase in Dingess's income and (2) a decrease in Smith's income. However, we sustain Smith's assignment of error as it relates to Smith's increased medical expenses. We take no position as to whether Smith's medical expenses actually created a change of circumstances. Rather, because the trial court did not consider this issue, we decline to address it. Accordingly, we remand this matter so that the trial court may consider the issue of Smith's increased medical expenses.

**JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART,
AND CAUSE REMANDED.**

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, IN PART, and REVERSED, IN PART and this CAUSE BE REMANDED to the trial court for further proceedings consistent with this opinion. Appellant and Appellee shall equally pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J. and Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.