[Cite as *Kennedy v. Kennedy*, 2003-Ohio-976.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
JANET L. KENNEDY	:	Hon. Sheila Farmer, P.J.
	:	Hon. Julie Edwards, J.
Plaintiff-Appellant	:	Hon. John Boggins, J.
	:	
-vs-	:	
	:	Case No. 02CA40
JOE B. KENNEDY	:	
	:	
Defendant-Appellee	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from Licking County Court of Common Pleas Case 92 DR 01442

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: February 27, 2003

APPEARANCES:

For Plaintiff-Appellant

JAMES WILMORE BROWN
490 South High Street
2nd Floor
Columbus, OH 43215

For Defendant-Appellee

GEOFFREY G. JUDGE
964 North 21st Street
Newark, OH 43055

Edwards, J.

{¶1} Plaintiff-appellant Janet Kennedy appeals from the March 19, 2002, Judgment Entry of the Licking County Court of Common Pleas, Domestic Relations Division.

STATEMENT OF THE FACTS AND CASE

{¶2} As memorialized in an "Agreed Journal Entry Final Decree of Divorce" filed on November 29, 1993, appellant Janet Kennedy and appellee Joe Kennedy were granted a divorce on the ground of incompatibility. Appellee was ordered to pay appellant $3,500.00 per month, plus poundage, in spousal support. After appellee, in 1996, filed a motion seeking modification of spousal support, appellee's spousal support obligation was reduced to $2,750.00 per month effective February 20, 1997.

{¶3} Subsequently, on December 30, 1998, appellee, who resides and works in British Columbia, filed a second Motion for Modification of Spousal Support. Appellee, in his motion stated, in part, as follows:

{¶4} "Circumstances have unavoidably arisen which warrant a reduction of the spousal support ordered in this matter. The present level of obligation is no longer appropriate in light of these circumstances. Failure to change the present orders of the Court at this time will increase the hardship experienced by the Defendant. Among the factors and circumstances that have changed concerning this matter are the Defendant's retirement plans and the fact that he will turn 65 years of age on January 12, 1999, changes in the level of compensation and benefits available, changes in the health of the Defendant and his wife, further change in the monetary exchange rate between the U.S. and Canada, the current and future level of the profits of his employer and its corresponding negative effect on his compensation, along with various other factors related to his income and other matters."

{¶5} Following a hearing on appellee's motion held on March 25, 1999, the Magistrate, in an April 19, 1999, decision, held, in part, as follows:

{¶6} "...The Magistrate finds that a modification of the spousal support order is appropriate, however, the time for it is not ripe and will not be until the defendant takes action and his income at that time is known. The Magistrate also does not deem it appropriate to reduce the spousal support below the $2,000.00 per month level.

{¶7} "Based upon the evidence adduced at the hearing held herein the Magistrate enters the following orders:...

{¶8} "2. That upon the submission of his [appellee's] request for a reduction in his workload with the employer, the defendant shall furnish his counsel, plaintiff's counsel and the plaintiff with a copy. He shall also provide documentation from the company as to what his base salary will be. If the base salary is between $50,000.00 and $100,000.00 the spousal support shall be $2,000.00 per month. If it is less than $50,000.00 this matter shall come on for further non-oral hearing on the issue of the amount to be paid. If it is above $100,000.00 there shall be no modification...." (Emphasis added).

{¶9} After no objections were filed to the Magistrate's April 19, 1999, decision, the trial court, pursuant to an opinion filed on May 7, 1999, adopted the same and ordered appellee's counsel to prepare a Judgment Entry consistent with the Magistrate's Decision. The Judgment Entry that was filed on July 13, 1999, which was approved by the parties, contained the same language as in paragraph 2 above of the Magistrate's Decision.

{¶10} Thereafter, appellee, on December 18, 2001, filed a Motion to Modify Spousal Support and Life Insurance Obligation. Appellee, in his motion, indicated that due to his and his current wife's health problems, changes in the monetary exchange rate between the United States and Canada, and fluctuations in his salary due to his employer's fluctuating profits, it would be difficult for him to continue paying $2,000.00 per month.

Appellant further noted in his motion that he was retiring on January 15, 2002, at the age of sixty-eight and that his income "immediately will be reduced to a level which will make spousal support prohibitive." Appellee specified that he anticipated a retirement income in American Dollars, of approximately $1,150.00 from Social Security, $117.00 from the Canadian Pension Plan, $271.00 from his previous employer and $234.00 from his current employer. Finally, appellee further stated in his motion that supplemental materials, accompanied by an affidavit, would be submitted regarding financial information prior to the non-oral hearing date, which was scheduled for January 16, 2002. Thereafter, appellee filed supplemental materials and an affidavit on January 16, 2002. Appellee, in his affidavit, stated that his monthly retirement income would be approximately $1,177.61 The non-oral hearing date was continued by the Magistrate to February 7, 2002.

{¶11} On February 7, 2002, appellant filed a memorandum in opposition to appellee's motion requesting a modification of spousal support, alleging that appellee failed to present sufficient evidence regarding both his retirement income and his present wife's income. After appellee filed additional supplemental materials and a supplemental affidavit on February 4, 2002, Magistrate C. William Rickrich, in an order filed on February 20, 2002, canceled the non-oral hearing and scheduled an oral hearing for April 12, 2002. Magistrate Rickrich, in his order, stated, in relevant part, as follows:

{¶12} "The Magistrate has reviewed the contents of the Court's file including the divorce decree, the Court's 1997 and 1999 judgment entries modifying the spousal support obligation and the parties' written arguments and affidavits filed in conjunction with the pending motion. Having done so, the Magistrate finds that the parties' affidavits raise questions that may be best answered in the context of an oral hearing in which testimony is subject to cross-examination. The Magistrate believes that conducting an oral hearing on the pending motion will provide for a fuller opportunity to present relevant evidence and to

ascertain the weight and significance of such evidence."

{¶13} Subsequently, appellee, on March 4, 2002, filed a motion asking that the Magistrate's February 20, 2002, order be set aside. Appellee, in his motion, argued that the assignment of the matter to a new Magistrate[1] was unwise and inefficient and that it was "unnecessary and burdensome" to require appellee, who resided in British Columbia, to travel to Licking County, Ohio, for an oral hearing. In short, appellee requested that the matter be transferred back to Magistrate Berryhill for a non-oral hearing. In turn, appellant, on March 18, 2002, filed a memorandum in opposition to appellee's motion, requesting that the trial court proceed with oral hearing or, in the alternative should the trial court choose to proceed with a non-oral hearing, requesting "a short amount of time to file a final affidavit in support of her position."

{¶14} As memorialized in a Judgment Entry filed on March 19, 2002, the trial court granted appellee's motion to set aside the Magistrate's February 20, 2002, order. The trial court, in its March 19, 2002, entry, stated, in part, as follows:

{¶15} "In reviewing the documents submitted by both parties, the Court determines a resolution of defendant's motions is necessary and enters the following ruling.

{¶16} "Effective December 18, 2001, the defendant's spousal support obligation is modified to $239.00 per month. This is based upon the defendant's income of $1863.61 per month and plaintiff's income of $851.62 per month. The defendant shall provide this Court and plaintiff with all necessary tax documents to review the Court's decision on an annual basis."

{¶17} It is from the trial court's March 19, 2002, Judgment Entry that appellant now appeals, raising the following assignments of error:

---

[1] Magistrate John Berryhill was the original Magistrate assigned to the matter.

{¶18} "I. THE TRIAL COURT ERRED IN FAILING TO SET FORTH THE BASIS FOR ITS DECISION WITH ENOUGH DETAIL TO PERMIT PROPER APPELLATE REVIEW.

{¶19} "II. THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE SECOND WIFE'S INCOME IN DETERMINING THE EXTENT TO WHICH HUSBAND'S RETIREMENT CONSTITUTED A CHANGE OF CIRCUMSTANCES.

{¶20} "III. THE TRIAL COURT ERRED IN DETERMINING THE SPOUSAL SUPPORT MATTER BY NON-ORAL HEARING, WHERE THAT PROCEDURE DID NOT APPLY TO HUSBAND'S RETIREMENT."

{¶21} For purposes of judicial economy, we shall address appellant's assignments of error out of sequence.

III

{¶22} Appellant, in her third assignment of error, contends that the trial court erred in failing to hold an oral hearing on appellee's motion to modify spousal support. We agree.

{¶23} As is stated above, the July 13, 1999, Judgment Entry, which was approved by the parties, states as follows: "Upon submission of his [appellee's] request for a reduction in his work load with the employer, the defendant shall furnish his counsel, plaintiff's counsel and the plaintiff with a copy. He will also provide what his base salary will be from his employer....If it is less than $50,000.00 this matter shall come on for further non-oral hearing on the issues of the amount to be paid [in spousal support]." (Emphasis added). After appellee, on December 18, 2001, filed a motion for modification of spousal support indicating that he would be retiring on January 15, 2002, and that his income, after retirement, would be less than $50,000.00, a non-oral hearing was scheduled before a Magistrate. Therefore, as memorialized in a February 20, 2002, order, the Magistrate, after

reviewing the evidentiary materials that both parties submitted regarding modification of spousal support, canceled the non-oral hearing and scheduled an oral hearing on appellee's motion. The Magistrate, in such order, found that "the parties' affidavits raise questions that may be best answered in the context of an oral hearing in which testimony is subject to cross-examination." However, the trial court vacated such order after appellee filed an objection to the same and scheduled a non-oral hearing. Appellant now complains that "it was unfair for the Trial Court to decide the matter under an expedited procedure that did not apply in the context of husband's retirement" and that, based on the "confusing and contradictory" nature of the evidence, an oral hearing was necessary.

{¶24} We concur with appellant that the expedited procedure did not apply in the context of appellee's retirement. As noted by appellant in her brief, the parties, as memorialized in a July 13, 1999, Judgment Entry, agreed to such an expedited spousal support modification procedure in the event of appellee's prospective reduction in income due to "request for a reduction in his work." (Emphasis added.) However, there was, as appellant notes, no agreement between the parties for the expedited procedure to apply "if his [appellee's] income had a complete change of character to retirement income." Based on the foregoing, we find that the trial court erred in deciding the matter of modification of spousal support under an expedited procedure that clearly did not apply in the event of appellee's retirement, but rather to a reduction in income due to a change from full-time to part-time status. Appellee's retirement income appears to have several sources. In contrast, a reduction in appellee's work hours would require an examination only of appellee's pay information from his employer to determine appellee's income.

{¶25} Furthermore, upon our review of the record, we concur with the Magistrate that "the parties' affidavits [and the attached materials] raise questions that may be best answered in the context of an oral hearing in which testimony is subject to cross-

examination." Appellee, in an affidavit attached to his January 16, 2002, first supplemental memorandum in support of his motion to modify spousal support, indicated that he will be receiving monthly retirement income from A.B.B., Inc., the Social Security Administration, the Canadian Pension Plan, and C.A.E, Inc. Appellee was employed by both C.A.E., Inc. and A.B.B., Inc. Attached to appellee's January 16, 2002, supplemental memorandum is an otherwise unexplained e-mail to "Val" from "Jean-Francois" that appears to concern appellee's A.B.B. pension. There are no evidentiary materials in the file documenting appellee's C.A.E., Inc. Pension, and the evidence relating to appellee's Canadian Pension is illegible.

{¶26} Moreover, appellee, as part of his February 4, 2002, second supplemental memorandum, attached a document from the Social Security Administration indicating that appellee would be entitled to monthly retirement benefits beginning May of 2001 in the amount of $1,592.00. In a letter to his counsel dated February 1, 2002, which is attached as Exhibit B to appellee's February 4, 2002, second supplemental memorandum, appellee states, in part, as follows:

{¶27} "The Social Security monthly payment will be US $1592.00 per month until the CPP [Canadian Pension Plan] and CAE pension plans start at which time I must inform Social Security and they will reduce the Social Security payment by some amount expected to be equal to the US equivalent of the additional income. The bottom line is I will get US $1592.00 from the sum of Social Security, CPP, and CAE plans after the adjustments are made."

{¶28} However, there is no documentation in the file relating to these "adjustments". In short, due to the confusing and incomplete nature of the evidentiary materials, an oral hearing on appellee's motion for modification of spousal support was warranted.

{¶29} Based on the foregoing, appellant's third assignment of error is sustained.

{¶30} Appellant, in her first assignment of error, argues that the trial court erred in failing to set forth the basis for its decision with enough detail to permit proper appellate review of the trial court's decision to reduce the amount of spousal support to $239.99 per month. In her second assignment of error, appellant contends that the trial court erred in failing to consider appellee's second wife's income in determining the extent to which appellee's retirement income constituted a change in circumstances.

{¶31} Based on our disposition of appellant's third assignment of error, appellant's first and second assignments of error are moot.

{¶32} Accordingly, the judgment of the Licking County Court of Common Pleas, Division Relations Division is reversed and this matter is remanded to the trial court for further proceedings.

By Edwards, J.

Farmer, P. J. and

Boggins, J. concur - - - - In Re: Spousal Support Modification