[Cite as *Allan v. Allan*, 2013-Ohio-1475.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Sandra J. Allan

Appellee

v.

Roger W. Allan

Appellant

Court of Appeals No. S-12-017
S-12-023

Trial Court No. 10-DR-962

DECISION AND JUDGMENT

Decided: April 12, 2013

* * * * *

Daniel L. Brudzinski, for appellee.

Kevin J. Zeiher, for appellant.

* * * * *

SINGER, P.J.

{¶1} This is an appeal from the Sandusky County Court of Common Pleas, Domestic Relations Division, in which the trial court granted appellee, Sandra Allan, and appellant, Roger Allan, a divorce from each other. For the reasons that follow, we affirm in part and reverse in part.

{¶2} The parties were married in August 1985. They have an emancipated daughter. Appellee has a high school education. She worked as a grocery store manager until their daughter was born. While raising their daughter, appellee worked part-time cleaning houses. At the time of the divorce, appellee was 51 years old. She had been working at a medical office for seven years making $11 an hour, 32 hours a week.

{¶3} Throughout the marriage, appellant worked as a teacher. He has a bachelor's degree in education as well as some post-graduate credits. While teaching full-time, he worked part-time as a groundskeeper at a golf course. In addition, he earned extra money periodically as a local musician. At the time of the divorce, he had retired after a 30 year teaching career. He maintained his part-time position at the golf course following the divorce.

{¶4} The parties were divorced on May 18, 2012. Appellant was ordered to pay appellee $1000 per month in spousal support to terminate only upon the death of appellee, remarriage, or her co-habitation with an unrelated male as though married. On appeal, appellant sets forth the following assignments of error:

> I. The trial court abused its discretion by ordering an award of spousal support and ignoring the tenets of Ohio Revised Code 3105.171 when appellee was employed and able to support herself.
>
> II. The trial court abused its discretion, to the prejudice of appellant in awarding spousal support to the appellee by finding that the appellant

was voluntarily underemployed without identifying any supporting testimony that demonstrated that he had voluntarily retired solely in order to defeat a spousal support order.

III. The trial court abused its discretion in finding appellant was voluntarily underemployed when appellant's decision to retire after thirty (30) years as a teacher was not unilateral but was anticipated and contemplated by both appellant and appellee before the filing of the divorce.

IV. The trial court abused its discretion in finding that appellant was voluntarily underemployed when appellant retired on time after thirty (30) years of employment as a school teacher.

{¶5} In awarding appellee spousal support, the court, in its decision, noted that her employment options are limited due to her back surgeries. Appellant, in his first assignment of error, contends that nothing in the record supports the court's conclusion.

{¶6} At the final divorce hearing, appellee testified that she is currently working at a call center for a doctor's office where she answers calls and makes appointments. While moving out of her marital home, she injured her back picking up boxes. As a result, on July 22, 2011, she underwent surgery for a herniated disc. Days later, she testified, she woke up in pain. A magnetic resonance imaging ("MRI") scan showed that she had reherniated the disc. A second surgery was scheduled for August. While waiting

for her second surgery, appellee testified that she was unable to walk and unable to work. Following her second surgery, she was unable to work until October. Appellee testified that she is still in pain due to scar tissue from the surgeries. Her doctor has prescribed physical therapy three times a week for the pain but, she testified, she is unable to afford the $200 sessions. Appellee submitted documentation of her surgeries into evidence.

{¶7} Before she experienced back problems, appellee was able to supplement her income by cleaning doctor's offices. She testified that due to her back problems, she is no longer able to provide cleaning services.

{¶8} Given appellee's testimony as well as the documentation, we find that there was evidence before the court showing that appellee's employment options are somewhat limited.

{¶9} Appellant also contends that in awarding appellee spousal support, the court failed to consider the fact that appellee will be receiving a portion of his retirement income, that she will receive a portion of the proceeds from the marital home, that she will benefit from the equalization of their annuities and their vehicles and, that she will receive money representing ½ of appellant's sick leave benefits. We disagree with appellant's contention. A cursory review of the court's judgment entry clearly shows that the court considered each and every one of the above factors in reaching a decision. Accordingly, appellant's first assignment of error is not well-taken.

{¶10} In appellant's second, third and fourth assignments of error, he again challenges the award of spousal support to appellee. Specifically, he argues that the court erred in finding that he was voluntarily underemployed for purposes of spousal support, consequently, imputing additional income to him based on his pre-retirement salary. We will address these assignments of error together.

{¶11} An appellate court reviews a trial court's judgment awarding spousal support under an abuse of discretion standard. *Kunkle v. Kunkle*, 51 Ohio St.3d 64, 67, 554 N.E.2d 83 (1990). An abuse of discretion connotes that the trial court's judgment was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "Even though a trial court has broad discretion in awarding spousal support, its determination of whether spousal support is 'appropriate and reasonable' the nature, amount, duration and terms of payment of spousal support is controlled by the factors in R.C. 3105.18(C)(1)." *Crites v. Crites*, 6th Dist. Nos. WD-04-034, WD-04-042, 2004-Ohio-6162, ¶ 26-27, citing *Schultz v. Schultz*, 110 Ohio App.3d 715, 724, 675 N.E.2d 55 (10th Dist.1996). Although a trial court need not enumerate each R.C. 3105.18(C)(1) factor, it must demonstrate that it considered all the "relevant factors." *Stockman v. Stockman*, 6th Dist. No. L–00–1053, 2000 WL 1838937 (Dec. 15, 2000).

{¶12} Additionally, when awarding spousal support, "the trial court's judgment must contain sufficient detail to enable a reviewing court to determine that the spousal

support award is 'fair, equitable and in accordance with the law.'" *Crites*, *supra*, at ¶ 27, quoting *Kaechele v. Kaechele*, 35 Ohio St.3d 93, 518 N.E.2d 1197 (1988).

{¶13} R.C. 3105.18(C)(1) provides:

> In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:
>
> (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 of the Revised Code;
>
> (b) The relative earning abilities of the parties;
>
> (c) The ages and the physical, mental, and emotional conditions of the parties;
>
> (d) The retirement benefits of the parties;
>
> (e) The duration of the marriage;
>
> (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;
>
> (g) The standard of living of the parties established during the marriage;

(h) The relative extent of education of the parties;

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

(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;

(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;

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

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

(n) Any other factor that the court expressly finds to be relevant and equitable.

{¶14} "Courts have routinely considered whether a spouse is 'voluntarily underemployed' in spousal support cases." *Koch v. Koch*, 9th Dist. No. 03CA0111-M, 2004-Ohio-7192. (Citations omitted.) If a court finds that a party has voluntarily retired solely in order to avoid a spousal support obligation the court would impose, a trial court

may find that the party is voluntarily underemployed and attribute additional income to the retired party. *Meyer v. Meyer*, 6th Dist. No. L-04-1359, 2005-Ohio-6249. Such a determination is a finding of fact and this court will not reverse a trial court's finding of fact if the finding is supported by some competent, credible evidence in the record. *Bucalo v. Bucalo*, 9th Dist. No. 05CA0011-M, 2005-Ohio-6319. "If there is no evidence of a purpose to escape an obligation of spousal support and the decision to retire appears reasonable under the circumstances, then the trial court should not impute additional income to the retired party." *Perry v. Perry*, 2d Dist. No. 07-CA-11, 2008-Ohio-1315, citing *Reed v. Reed*, 2d Dist. No. 2000CA81, 2001 WL 127873 (Feb. 16, 2001); *Melhorn v. Melhorn*, 2d Dist. No. 11139, 1989 WL 8452 (Jan. 30, 1989).

{¶15} At the divorce hearing, appellant testified that he retired from the Fremont City School System on May 31, 2011, after serving 30 years as a teacher. His retirement came nine months after appellee filed her divorce complaint. He testified that he began contemplating retirement approximately five years before because he was concerned about the solvency of his state teacher's pension fund. He testified that during that time, he met with pension officials on at least two occasions to determine his best course of action. He stated that after exploring his options, and before appellee had filed for divorce, he had decided to retire after 30 years "no matter if we were still married or not." He added that he also decided to retire because teaching had changed and he no longer wanted to endure the stress involved.

{¶16} John Elder, a teacher with the Fremont City School System and a former teacher's union representative, testified that the earliest appellant could have retired was when he did, after 30 years. He acknowledged that appellant could have stayed in the system for five more years to maximize his benefit but he was not obligated to do so. He testified that in his experience, school systems are not likely to rehire teachers after they have retired because it is a "public relations disaster." He noted that after a teacher is retired, it is costly for that teacher to renew his or her teaching certificate, a process that includes more education. Moreover, there is no guarantee that a retired teacher will get rehired. As to appellant's current status as a retired teacher, Elder opined that it would not be worthwhile for appellant to return to teaching because of the cost involved and the unlikelihood there would be a job available to him.

{¶17} Appellee testified that she and appellant began discussing divorce in 2009 and that before she filed for divorce, she was aware of appellant's intention to retire from teaching after 30 years. She further testified "[I] feel he earned the right to retire, but I knew financially it was gonna be hard for him because of [the divorce]."

{¶18} The trial court, in finding that appellant was voluntarily underemployed, cited to this court's 2005 decision in *Meyer v. Meyer*, supra. In *Meyer*, a wife filed for divorce in 2003 after a 19-year marriage. In March 2004, the husband was ordered to pay his wife $2,500 in temporary spousal support. He retired the following month after working 28 years for the same company. He claimed his retirement was largely due to

his asthmatic condition. His wife claimed he retired to avoid paying spousal support. In support, she submitted evidence showing that her husband had continued to engage in manual labor for another business.

{¶19} The trial court found, and this court agreed, that the husband's decision to retire was motivated by his desire to defeat his wife's claim to spousal support and ordered her support income to be based on his pre-retirement income. "[The husband] may have to invade assets to meet his obligation. However, [the husband] created this financial situation with his unilateral decision to terminate his employment by retiring to avoid paying spousal support and he must now deal with the economic consequences of that decision." *Id.* at ¶ 8.

{¶20} The facts in the *Meyer* case are distinguishable from the facts before us. Mainly, *Meyer* can be distinguished in that evidence was before the court disputing husband's alleged basis for retiring. Here, there was testimony that appellant had planned for his retirement well before appellee filed for divorce. Appellant's retirement came when he was eligible, pursuant to a pension fund he had contributed to and, after a reasonable period of time in the same profession. *See Cope v. Guehl*, 7th Dist. No. 10-CO-26, 2011-Ohio-4311, ¶ 32 ("retirement from employment" is not the same as "a change in jobs"). Moreover, appellee acknowledged that she knew of his plans before she filed for divorce. Accordingly, we find no competent, credible evidence of appellant's purpose or intent to retire solely in order to avoid a spousal support

obligation. Appellant's second, third and fourth assignments of error are found well-taken.

{¶21} The judgment of the Sandusky County Court of Common Pleas, Domestic Relations Division, is affirmed in part and reversed in part. This case is remanded to the trial court for modification of the parties' spousal support order consistent with this decision. Appellant and appellee are each ordered to pay one-half of the costs of this appeal pursuant to App.R. 24.

Affirmed in part, and
reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE