

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

Kristen Howard

Appellee

Court of Appeals No. L-12-1302

Trial Court No. DR2008-0145

v.

Andrew J. Howard

Appellant

DECISION AND JUDGMENT

Decided: August 16, 2013

* * * * *

Joseph B. Clarke, for appellee.

Thomas P. Kurt, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Andrew Howard, appeals from the October 5, 2012 judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, overruling appellant's objections to the magistrate's decision of July 13, 2012. For the reasons which follow, we affirm in part and reverse in part.

{¶ 2} In 2008, appellee, Kristen Howard, sought a divorce from appellant, Andrew Howard. The parties entered into a separation agreement, which was incorporated into

the final decree journalized on May 14, 2009. On July 25, 2011, appellee filed a motion to show cause why appellant should not be held in contempt for noncompliance with the separation agreement by: 1) failing to pay the loan balance on appellee's 2007 Chevrolet Suburban, which resulted in its repossession; 2) failing to pay the loan balance on a substituted lower-priced vehicle as the parties orally agreed; 3) failing to apply his share of a retirement account to pay his debt obligations under the separation agreement; 4) failing to pay the mortgage expenses on the first and second mortgages for the family residence; 5) failing to list the undeveloped properties on Weckerly Road, Monclova, Ohio, for sale and failing to make the mortgage payments on the two properties (which resulted in the mortgages being subject to a pending foreclosure action); 6) failing to pay appellee's attorney fees; 7) refusing to pay for their children's private education; 8) disparaging appellee in front of their children and permitting the children to cuss at her in public; and 9) failing to maintain a major medical insurance policy on appellee, which resulted in a lapse of insurance coverage. Appellee refutes that appellant is financially unable to meet these obligations.

{¶ 3} On September 12, 2011, appellant filed a motion to modify the order of spousal support and child support. Appellant asserted that since the time the agreement was signed, his income was reduced and he cannot meet all of his obligations under the settlement agreement. He attached a child support obligation worksheet indicating that his annual gross income was \$132,000. He sought to alter his child support obligation to reflect his decreased income; eliminate the spouse support; modify the agreement to

require appellee to pay at least half of the mortgage payment on her residence or sell the property and find affordable housing; and to require that appellee seek gainful employment and provide for her own health insurance. He later amended his motion to request a change in the shared-parenting agreement to provide that the children would reside primarily with him or name him as the residential and custodial parent.

{¶ 4} Appellee amended her motion to show cause on November 14, 2011, to add additional items of default.

{¶ 5} Following a hearing on May 2 and 9, 2012, a magistrate determined that appellant had violated the separation agreement and held appellant in contempt of court. The trial court adopted the magistrate's decision on July 16, 2012. The court upheld its decision on October 5, 2012, after overruling appellant's objections.

{¶ 6} Appellant asserts the following assignments of error:

I. The trial [sic] erred in refusing to accept the parties' stipulation of fact concerning appellant's income.

II. The trial court abused its discretion in finding appellant in contempt of court for failure to meet his obligations under the separation agreement, where appellant proved the affirmative defense of impossibility with respect to both the terms of the separation agreement and with respect to the court's purge provision.

III. The trial court abused its discretion in sentencing appellant to ten days of incarceration for contempt of court.

IV. The trial court erred in overruling appellant's motion to modify his spousal support obligation.

V. The trial court erred in overruling appellant's motion to modify his child support obligation.

{¶ 7} In his first and fifth assignments of error, appellant argues that the trial court's determination of his yearly income for 2012 was contrary to the manifest weight of the evidence. He argues that the court erred by refusing to accept the parties' stipulation of fact concerning appellant's income. He also argues that the trial court erred by not considering his future ability to pay child support.

{¶ 8} The parties stipulated that appellant earned \$140,840 in salary and commissions from his employer, Kenakore, in 2011. While the parties also stipulated that appellant's income was reduced to \$84,000 per "month¹" on September 26, 2011, the court rejected the stipulation because the referenced Exhibit A (appellant's pay stub) was not attached to the stipulations. However, the court did accept that appellant had not received commissions since early 2011. In its objections to the magistrate's report, appellant argues that the court cannot ignore the stipulations to determine his current annual income, but must accept the stipulated fact of his current income.

{¶ 9} In overruling appellant's objections, the court focused on appellant's yearly income, which was the basis for the calculation of the support orders. At the time of the

¹ While the stipulation stated a monthly income, appellant argues that this was an obvious typographical error and should have indicated a yearly wage, otherwise there would not have been a reduction in his income.

original decree in 2009, appellant's annual income was \$150,000, plus imputed income of \$14,500, or \$164,500, and his child support obligation was calculated to be \$598.09 per month. In 2011, the court determined appellant's annual income was determined to be \$154,640 (\$140,840 based upon the parties' stipulation of appellant's primary income and additional income of \$13,800 from evidence of secondary employment), which would result in a higher child support obligation of \$605.62 per month. Appellee asserts that the primary employment income was based upon an annual salary of \$184,000 from January to June 1, 2011; an annual salary of \$132,000 from June 1 to September 26, 2011, and an annual income of \$84,000 from September 26 to December 31, 2011.

{¶ 10} Because the recalculated child support based on an annual income of \$154,640 constituted less than a ten percent change, the court found that there had not been a change in circumstances.

{¶ 11} The trial court held that the stipulation of appellant's \$84,000 annual income could be rejected on the authority of *Boraggina v. Boraggina*, 6th Dist. Lucas No. L-99-1272, L-99-1409, 2001 WL 304091, *10 (Mar. 30, 2001) (the trial court can consider additional facts as part of the court's inherent powers to review the entire case to determine the best interest of the child at issue and whether the prior child support order should be modified). We agree that the court could have considered additional evidence, such as appellant's gradual decrease in annual income and the additional income from his secondary employment.

{¶ 12} Furthermore, the trial court held that consideration of the child support obligation was limited to the year in which the motion was filed to avoid making a sua sponte modification of child support. The court relied on *Hoch v. Carr*, 9th Dist. Summit No. 26097, 2012-Ohio-1445, ¶ 6, and *Overstreet v. Evans*, 8th Dist. Cuyahoga No. 83426, 2004-Ohio-2408, ¶ 11.

{¶ 13} We find neither of these cases applicable to the case before us. The *Hoch* case dealt with a motion to modify child support before the child entered kindergarten and, therefore, the former spouse's ability to work had not yet changed. In the case before us, appellant's income had already started to decline prior to the filing of the motion.

{¶ 14} Furthermore, the *Overstreet* case involved the modification of child support for additional years beyond the year which was the subject of a decision, appeal, reversal, and remand. That case did not address the issue of whether a court should consider a change in income over the time period the motion to modify child support was pending. *Accord Child Support Enforcement Agency ex rel. Hunter v. Harrison*, 8th Dist. Cuyahoga No. 87725, 2007-Ohio-402, ¶ 17, and *Anthony v. Clark*, 5th Dist. Richland No. 07-CA-117, 2009-Ohio-894, ¶ 86.

{¶ 15} In the case before us, the full impact of the change in appellant's income on June 1, 2011, and a further reduction on September 26, 2011, would not be manifested until the following year because of appellant's higher earnings early in the year. We find that the trial court erred as a matter of law when it concluded that it could not consider

appellant's change in income because it did not impact the 2011 calculation of his child support obligation. The reduction in income would obviously impact the calculations in succeeding years. Appellant did not have to wait until the impact of his lower income was felt before filing a motion to modify his future child support obligation. Appellant's first and fifth assignments of error are found well-taken.

{¶ 16} In his second assignment of error, appellant argues the trial court abused its discretion by finding appellant in contempt of court for failing to meet his obligations under the separation agreement when he had proved that the terms of the separation agreement and purge conditions were impossible because his income had been reduced.

{¶ 17} We review a trial court's finding of contempt under an abuse of discretion standard. *State ex rel. Bitter v. Missig*, 72 Ohio St.3d 249, 252-253, 648 N.E.2d 1355 (1995). That standard requires that we find the trial court's decision was more than an error of judgment; it must reflect an attitude that was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 18} While we recognize that appellant's income was reduced mid-2011, we find, as the trial court did, that there was sufficient evidence of his ability to meet his prior court-ordered obligations. In addition to his income, appellant received partnership income and sales proceeds from the sale of partnership property. Instead of using this income to meet his obligations, he spent significant sums related to his current home and family. Therefore, we cannot find that the trial court abused its discretion by finding that

he had the ability to meet his obligations and finding him in contempt for disobeying the court's prior orders. Appellant's second assignment of error is not well-taken.

{¶ 19} In this third assignment of error, appellant argues that the trial court abused its discretion in sentencing appellant to ten days of incarceration for contempt of court. The contempt jail term in this case was conditioned upon appellant's failure to meet his obligations under the court's order of July 16, 2012. We find that appellant has failed to demonstrate the trial court abused its discretion. Appellant's third assignment of error is not well-taken.

{¶ 20} In his fourth assignment of error, appellant argues that the trial court erred by refusing to modify his spousal support obligation.

{¶ 21} A party may seek to modify a prior award of spousal support if the trial court retained jurisdiction over the spousal support award (R.C. 3105.18(E)) and there has been a substantial change in circumstances that was not anticipated at the time the existing award was made. R.C. 3105.18(F)(1)(b) and *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, 905 N.E.2d 172, paragraph two of the syllabus. However, the trial court exercises its discretion in making a determination of whether or not a modification would be reasonable and appropriate. R.C. 3105.18(F)(1)(a) and *Miller v. Miller*, 6th Dist. Lucas No. L-10-1097, 2010-Ohio-6521, ¶ 14. Therefore, we review the trial court's decision under an abuse of discretion standard. *Id.*

{¶ 22} The trial court denied appellant's motion to modify his spousal support obligation. The trial court reasoned that at the time of the divorce, it had already

considered appellant's declining income. Appellant had testified at the time that his income was impacted by a downturn in his business. For that reason, the trial court set spousal support in May 2009 at \$2,000 for 84 months, based on appellant's \$150,000 annual income, even though his income before that year had been in excess of \$200,000. Furthermore, appellant's annual income used for the support calculations did not include his partnership income, the sale of partnership assets, nor his secondary employment income. Therefore, the trial court concluded that appellant's future decrease in income was anticipated by the parties and court at the time of the initial award. The court also found that appellant's 2011 income actually increased from the original annual income used in the support obligation calculations.

{¶ 23} Furthermore, the court noted as relevant the following testimony presented at the hearing on the motions. While appellee attended college, she did not complete her degree, and she had left her employment in 1992 to care for the couple's children at appellant's request. Appellee expected to enter a nursing program in the fall of 2013. While appellee completes her degree, spousal support would be her sole means of support. Even though appellant's salary and commissions decreased in 2011 to \$154,640, he also received partnership income until the time of its sale and \$74,000 from the sale of partnership assets. Appellant has remarried and voluntarily incurred additional debts by purchasing a \$235,000 home and a car for his current spouse. Appellant's current wife is employed and her contribution to their living expenses actually lowers appellant's monthly expenses used in the support obligation calculations.

The court determined that appellant voluntarily incurred additional debts related to his remarriage that caused his inability to meet his prior spousal support obligation.

{¶ 24} We find that the trial court had sufficient evidence to support its finding that appellant had the financial ability to meet his support obligations under the 2009 divorce decree through 2011. Furthermore, we find that the trial court did not err by refusing to modify the spousal support award despite the reduction in his annual base salary in mid-2011. The downturn in appellant's business was anticipated at the time of the initial spousal support award and it was adjusted in anticipation of appellant's declining income. Therefore, we find the trial court did not abuse its discretion by denying appellant's motion to modify the award. Appellant's fourth assignment of error is not well-taken.

{¶ 25} Having found that the trial court did commit error prejudicial to appellant in part, the judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is affirmed in part and reversed in part. This decision is reversed only insofar as the trial court did not consider whether appellant's future child support obligations should be modified. This case is remanded to the lower court for further proceedings consistent with this decision. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment 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

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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