

[Cite as *Fordyce v. Fordyce*, 2016-Ohio-4819.]
DeGENARO, J.

{¶1} Plaintiff-Appellant, Margaret Fordyce, appeals the judgment of the Noble County Court of Common Pleas modifying spousal support. On appeal, Margaret asserts that the trial court erred by decreasing Defendant-Appellee, Rocky A. Fordyce's monthly spousal support obligation and by ordering it to ultimately terminate in August 2016.

{¶2} The trial court erred by modifying support because Rocky failed to meet his burden to prove a substantial change in circumstances. Margaret's medical issues do not constitute a change in circumstances, nor does her attainment of an associate's degree, because she had been pursuing that degree early in the proceedings—evidence of such was presented to the trial court during the final divorce hearing. Thus, her degree was anticipated and cannot constitute a change in circumstances. Accordingly the judgment of the trial court is reversed and the case remanded to the trial court to reinstate its September 23, 2011 support order.

Facts and Procedural History

{¶3} This is the third appeal pertaining to this divorce action and much of the factual background is set forth in the prior appeals. Rocky and Margaret were married in 1980. The parties' two children were emancipated by the time Margaret filed her complaint for divorce in April 2009. At the start of proceedings, Margaret had a high school education and, at the time of the final divorce hearing in 2010, was studying social services at Washington State Community College. Throughout the marriage, Margaret worked mostly part-time in minimum wage jobs. At the time of the final hearing, Margaret was 47 years old and her last full-time job was over ten years earlier. Prior to filing for divorce, Margaret worked at Pilot, where she earned \$7.21 an hour and earned a total of \$8,871.27 in 2008 working, on average, 16 hours a week. Margaret testified that she left her employment at Pilot in January of 2009 to "work on her marriage," which she admitted amounted to merely sitting down and talking about the marriage with Rocky. Margaret also testified she had health problems including diabetes, a heart stent, severe depression, and anxiety.

{¶4} Rocky was the primary source of income during the marriage. He was

50 years old at the time of the final divorce hearing, had a high school education and worked at Furmanite of America for the last 16 years. Rocky was an account manager in 2009, with a salary of \$72,000.00 per year, but two weeks before the final divorce hearing, the company downsized and he was demoted to supervisor, with an hourly wage of \$26.00, or \$54,000.00 annually.

{¶15} On February 19, 2010, the trial court granted the parties a divorce. The trial court found that Margaret was voluntarily unemployed, but ordered Rocky to pay \$500.00 a month in spousal support until January 15, 2013, or until Margaret marries or cohabits with another, whichever occurs earlier. Margaret filed a timely appeal of this entry, challenging both the division of property and the spousal support award on the grounds that the trial court abused its discretion in dividing property and awarding support without explicitly considering the factors set forth in R.C. 3105.18(C)(1). This court sustained both of Margaret's assignments of error, reversing both the division of property and the support order, and remanding the matter to the trial court for further proceedings in accordance with R.C. 3105.171 and 3105.18(C)(1). *Fordyce v. Fordyce*, 7th Dist. No. 10 NO 372, 2011-Ohio-3406 ("*Fordyce I*").

{¶16} On remand, the trial court ordered both parties to submit proposed findings of fact and conclusions of law regarding the pending issues. In Margaret's, with regard to spousal support, she asserted, among other things, that she would have the earning capacity of no more than minimum wage and that she had numerous medical problems which "impact her ability to work."

{¶17} On September 23, 2011, the trial court issued another entry dividing the parties' property and awarded Margaret \$1,000.00 per month in spousal support until she remarries, cohabitates or dies, and retained jurisdiction over spousal support. The trial court found that amount of support was justified due to the long duration of the marriage, and the substantial disparity in the earning of the parties when imputing minimum wage to Margaret, who was voluntarily unemployed.

{¶18} Rocky appealed from that judgment, as it pertained to support and this court affirmed, concluding that the September 2011 support order was "based on a

consideration of all factors listed in R.C. 3105.18(C), without giving undue weight to any single factor," and was not an abuse of discretion, having been "expressly designed to achieve an appropriate and reasonable result under the circumstances." *Fordyce v. Fordyce*, 7th Dist. No. 10 NO 372, 2013-Ohio-536, ¶ 29 ("*Fordyce II*").

{¶9} Approximately two years after the prior support order, Margaret filed a pro-se motion for contempt against Rocky alleging nonpayment of spousal support and also requested an increase in her spousal support. Subsequent to that filing, Margaret retained the services of counsel to argue her motions.

{¶10} Rocky filed a motion to terminate spousal support or in the alternative to modify it as to duration. He argued that there had been significant changes in circumstances since the last support order, to wit, that Margaret had received an associate's degree; that a number of jobs for which she was qualified were open in her area; and that Margaret's "living arrangements and employment status justifies [the] termination [of spousal support.]" Further, Rocky asserted that Margaret had been attempting to "thwart disclosure of her current residence."

{¶11} Depositions were taken of both parties and filed with the trial court.

{¶12} At the final hearing on the contempt and the spousal support modification motions Margaret testified that she had been continuously unemployed since the divorce was granted. She sought employment on a weekly basis, having submitted an average of two online applications per week, but had received no job offers. Margaret's last full-time job was over ten years prior to the divorce. Her past work included work as a cashier, housekeeper, and an aide for handicapped adults. Her income exceeded minimum wage on only one previous job.

{¶13} Since the divorce, Margaret obtained an associate's degree in social services. However, she said her attempts to obtain employment in the social service field had been unsuccessful; she learned that employment in this field requires at least a bachelor's degree and some experience. She testified that she lacks the resources for any further education.

{¶14} During the hearing, Margaret was presented with print-outs from two

websites that purported to identify social service jobs in her geographical area. However, Margaret explained that all of these required degrees and qualifications well beyond her associate's degree. The trial court later declined to admit these print-outs as evidence.

{¶15} While admittedly not work-preclusive, Margaret testified to a number of health problems that had worsened since the divorce, including diabetes that is not always well-controlled by medication, and congestive heart failure, diagnosed in 2012. She also testified she suffers from post-traumatic stress disorder, for which she continues to see a counselor and receive medication, and high blood pressure, which is controlled by medication.

{¶16} Margaret testified that her monthly living expenses had increased since the divorce and she testified she no longer owned a car and that she goes to food banks biweekly to meet her needs. She had moved to New Jersey in 2011 to be closer to family but claimed that she received no support from them to meet her monthly expenses. She testified to \$8,000.00 in debt from student loans and \$5,000.00 in medical bills and said she does not carry health insurance because she cannot afford the premiums.

{¶17} On cross, Margaret was confronted with bank statements showing purchases in 2013 from stores such as Tiffany and Company, Scentsy, Fossil and a nail salon, but with no withdrawals to pay her rent. She explained that she had been using funds she received, approximately \$9,000.00, from the sale of the former marital residence in 2010, along with student loans proceeds, which she kept in a safe at home, to supplement her income from the spousal support. She said that those funds had since been depleted. She also backtracked from her statement that family had provided her no financial support, admitting that family members had helped her pay her several thousand dollars in attorney fees.

{¶18} Rocky testified that he remained employed full time at the same job that he had at the time of divorce. At the time of the divorce, his annual income was \$54,000.00, while his W-2 for 2013 reflected income of \$81,086.46. Rocky testified

that this increase was not due to an increase in his hourly wage, but due to the availability of overtime hours. He said that there was no guarantee that the overtime would continue and questioned his ability, at age 54, to continue to work 70 to 80 hours per week. He admitted that in addition to paying his spousal support obligation to Margaret, he was able to assist his girlfriend and others with living expenses.

{¶19} At the conclusion of the hearing, the trial court initially announced from the bench that he saw no reason for spousal support to be terminated or modified. However, Rocky then requested that the court consider the trial brief he had recently filed. The trial court agreed and granted Margaret 14 days to file her trial brief and agreed to hold its decision until it had reviewed both briefs.

{¶20} In its entry the trial court, inter alia, denied the contempt motion, reduced spousal support and then set an end date for spousal support, at which point its jurisdiction over spousal support would terminate.

Spousal Support

{¶21} Both of Margaret's assignments of error concern spousal support and will be discussed together:

The trial court order modifying the prior order of spousal support by reducing, rather than increasing it, constitutes an abuse of discretion.

The trial court erred in terminating spousal support in this marriage of long duration.

{¶22} An appellate court reviews matters of spousal support for an abuse of discretion. *Kunkle v. Kunkle*, 51 Ohio St.3d 64, 67, 554 N.E.2d 83 (1990). An abuse of discretion "means an error in judgment involving a decision that is unreasonable based upon the record; that the appellate court merely may have reached a different result is not enough." *Downie v. Montgomery*, 7th Dist. No. 12 CO 43, 2013-Ohio-5552, ¶ 50. A trial court is given broad discretion when determining the amount of spousal support. *Gilson v. Gilson*, 7th Dist. No. 10 HA 03, 2011-Ohio-6640, ¶ 13.

{¶23} A marriage of long duration in and of itself *can* permit a trial court to award spousal support of an indefinite duration. *Brys v. Brys*, 11th Dist. No. 2010-T-0113, 2012-Ohio-524, ¶ 37, citing case law, including, *Hiscox v. Hiscox*, 7th Dist. No. 07 CO 7, 2008–Ohio–5209, ¶ 49. On the other hand, a trial court is *not required* to award indefinite support for long marriages. See *Lepowsky v. Lepowsky*, 7th Dist. No. 06 CO 23, 2007-Ohio-4994, ¶ 81 ("[W]here the evidence reflects that the payee spouse has the ability to work outside the home and be self-supporting, a spousal support award should include a termination date.")

{¶24} The modification of spousal support is governed by R.C. 3105.18(E). In order to modify a spousal support order, a trial court must have: (1) reserved jurisdiction in the divorce decree to do so and (2) found a substantial change in circumstances has occurred for either party. *Flauto v. Flauto*, 7th Dist. No. 05 MA 100, 2006–Ohio–4909, ¶ 11; R.C. 3105.18(E)(1).

{¶25} A change in circumstances is further explained by the statute:

For purposes of divisions (D) and (E) of this section and subject to division (F)(2) of this section, 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, or other changed circumstances so long as both of the following apply:

(a) The change in circumstances is substantial and makes the existing award no longer reasonable and appropriate.

(b) The change in circumstances was not taken into account by the parties or the court as a basis for the existing award when it was established or last modified, whether or not the change in circumstances was foreseeable.

R.C. 3105.18(F)(1); see also *Pepin-McCaffrey v. McCaffrey*, 7th Dist. No. 12 MA 4,

2013-Ohio-2952, ¶ 13.

{¶26} It is the burden of the movant to establish that a substantial change in circumstances has occurred. See *Cope v. Guehl*, 7th Dist. No. 10-CO-26, 2011-Ohio-4311, ¶ 15. This change in circumstances must not have been contemplated by the trial court at the time of the divorce. *Pepin-McCaffrey*, *supra*, at ¶ 13; *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, 905 N.E.2d 172, paragraph two of the syllabus. In addition, the change in circumstances must not have been brought about by the purposeful actions of either party. *Pepin-McCaffrey*, *supra*, at ¶ 13, citing *Kaput v. Kaput*, 8th Dist. No. 94340, 2011-Ohio-10, at ¶ 15).

{¶27} As the Ohio Supreme Court explained in *Mandelbaum*, 121 Ohio St.3d 433, *supra*.

The word 'substantial' has been given various meanings by Ohio courts, such as 'drastic[],' *Wolfe*, 46 Ohio St.2d at 419, 75 O.O.2d 474, 350 N.E.2d 413, 'material,' *Cooper v. Cooper*, Clermont App. No. CA2003-05-038, 2004-Ohio-1368, 2004 WL 549784, ¶ 17, and 'significant,' *Palmieri v. Palmieri*, Franklin App. No. 04AP-1305, 2005-Ohio-4064, 2005 WL 1869706, ¶ 27.

Mandelbaum at ¶32.

{¶28} After finding a change in circumstances, the trial court must then evaluate the appropriateness and reasonableness of the modified award. *Molnar v. Molnar*, 7th Dist. No. 10-JE-19, 2011-Ohio-4318, ¶ 15; R.C. 3105.18(C)(1).

{¶29} In this case, the trial court reserved jurisdiction over spousal support, both in the initial divorce decree, and in the September 2011 support order.

{¶30} The issue then becomes whether the trial court abused its discretion in determining that a change in circumstances had occurred. Rocky argues that two changes in circumstances warrant the decrease and ultimately the termination of spousal support, first, that Margaret's medical issues no longer impacted her ability to

work, and second, that she had completed her associate's degree in social services.

{¶31} However, with regard to the first issue, during the final divorce hearing in 2009, Margaret testified that she had several health conditions and during the remand from this court, submitted proposed findings of fact and conclusions of law stating that these medical problems impacted her ability to work. In the most recent support order from September 2011, which awarded Margaret \$1000.00 in spousal support for an indefinite duration, the trial court found: "Plaintiff claims numerous medical problems which impact her ability to work. The Court believes they are grossly overstated."

{¶32} During the spousal support modification hearing, Margaret again testified to a variety of medical issues that had worsened since the divorce, but conceded that these issues did not preclude her from working.

{¶33} Thus, in making the September 2011 support order which Rocky seeks to modify, the trial court essentially made a finding that it did not believe Margaret's medical issues impacted her ability to work, and ordered an indefinite spousal support award in an amount that took into account that Margaret was physically able to work. Then, during the modification hearing Margaret admitted her health does not preclude her from working. This does not constitute a change in circumstances, let alone a substantial one, so as to merit the modification of support.

{¶34} With regard to the associate's degree, evidence was presented to the trial court demonstrating that Margaret was pursuing this degree at the time of the final divorce hearing. Thus, any potential impact this degree could have upon her earning ability was anticipated early in the proceedings, beginning at the time the trial court made its initial support order. Thus, this cannot constitute a change in circumstances, let alone a substantial one.

{¶35} The trial court cites *Lojek v. Lojek*, 4th Dist. No. 10CA8, 2010-Ohio-5156, for the proposition that where the payee spouse has the resources, ability and potential to be self-supporting, termination of spousal support within a reasonable time is appropriate. However, *Lojek* involved an appeal from an *initial* award of

support, not a modification as we have here, which additionally requires the movant prove a substantial change in circumstances. *Id.* Thus, the trial court erred by finding a substantial change in circumstances and modifying the original support order.

{¶36} Margaret takes her argument one step further and contends the trial court should have granted *her* motion to modify and *increased* spousal support; however, this argument is meritless. At the time of the divorce, Rocky's annual income was \$54,000.00, while his W-2 for 2013 reflected income of \$81,086.46. Rocky testified that this increase in income was not due to an increase in his hourly wage, but due to the availability of overtime hours. He said that there was no guarantee that the overtime would continue and questioned his ability, at age 54, to continue to work that many 70 to 80 hours per week. Insofar as this was not a permanent increase in wages, the trial court was correct to find this was not a substantial change in circumstances so as to merit an increase in support.

{¶37} In sum, Margaret's arguments are meritorious in part. The trial court erred by reducing the spousal support award, as well as setting a termination date which also coincided with the date it would relinquish jurisdiction. But the trial court did not err by failing to increase the support award. Accordingly, the trial court's judgment is reversed in part, and the matter remanded to the trial court to reinstate the spousal support order of September 23, 2011.

Waite, J., concurs.

Robb, J., concurs.