

[Cite as *Lemke v. Lemke*, 2011-Ohio-457.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94557

KAREN L. LEMKE

PLAINTIFF-APPELLANT
and
CROSS-APPELLEE

vs.

LAWRENCE A. LEMKE, ET AL.

DEFENDANTS-APPELLEES
and
CROSS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. D-293201

BEFORE: Jones, J., Blackmon, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: February 3, 2011

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant/cross-appellee, Lawrence Lemke, appeals the December 24, 2009, decision of the trial court overruling both parties' objections and adopting the magistrate's decision in its entirety. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the trial court's order.

STATEMENT OF THE CASE

{¶ 2} A judgment entry terminating the parties' 33-year marriage was filed in the

Cuyahoga County Court of Common Pleas, Domestic Relations Division, on November 1, 2004. Defendant-appellant, Lawrence Lemke, agreed and was ordered to pay \$10,000 per month in spousal support. The spousal support award began on December 1, 2004, and provides for termination upon the death of either party or plaintiff-appellee's, Karen Lemke's, remarriage or cohabitation.

{¶ 3} Appellant filed a motion to modify or terminate his spousal support obligation on June 20, 2008. Appellant's motion was filed on the basis of changed circumstances affecting his business, health, and physical well being. Appellant, whose spousal support was to be paid directly to appellee, failed to pay his June 2008 spousal support obligation in a timely manner, and on July 7, 2008, appellee filed an affidavit in support of a wage garnishment on appellant's earnings. The trial court granted appellee's request on August 4, 2008 and issued a wage order.

{¶ 4} During a six-day trial, the magistrate heard significant evidence presented by both parties before issuing an extensive 19-page decision on June 29, 2009.

{¶ 5} The magistrate's decision was detailed and addressed many issues including: defendant's motion to modify support (post-decree); defendant's motion to terminate alimony; defendant's motion to vacate order of court; plaintiff's motion for attorney fees; plaintiff's motion to modify support (post-decree); and plaintiff's motion to show cause (spousal support).

{¶ 6} After being granted an extension of time in which to do so, appellant, on October 9, 2009, filed his objections to the magistrate's decision. On November 13, 2009, appellee filed her objections to the magistrate's decision and on December 24, 2009, the trial court judge issued her judgment entry adopting the magistrate's decision in its entirety. On January 21, 2010, appellant filed his notice of appeal of the trial court's December 24, 2009 judgment entry.

STATEMENT OF THE FACTS

{¶ 7} The parties were married for 33 years and were granted a divorce pursuant to the trial court's judgment entry of divorce journalized on November 1, 2004. The judgment entry provided that appellant shall pay appellee spousal support, terminable upon death of either party or cohabitation or remarriage of appellee, subject to the continuing jurisdiction of the court. The parties also reached an agreement as to an equitable division of marital property, including business interests, brokerage accounts, and other investments.

{¶ 8} Appellant filed a motion to modify or terminate his spousal support obligation on June 20, 2008, alleging a change in the circumstances affecting his business and health. In July of 2008, appellant began failing to pay the full amount of spousal support, only paying \$5,000 or \$6,000 per month instead of the full \$10,000 amount. Various motions were made and a trial was held.

{¶ 9} The magistrate found that appellant did have a decrease in income and that the decrease constituted a substantial change in circumstances sufficient to give the trial court justification to modify appellant's spousal support obligation. The magistrate reduced appellant's spousal support payments to \$7,500 per month, retroactive to June 20, 2008. The magistrate found appellant in contempt for failure to pay his monthly support in full, pursuant to the terms of the agreement, and awarded appellee attorney fees in the amount of \$7,500. Both parties filed objections to the magistrate's decision. However, the trial judge adopted the decision in its entirety.

ASSIGNMENTS OF ERROR

{¶ 10} Appellant assigns five assignments of error on appeal:

{¶ 11} "[1.] The trial court erred and abused its discretion by failing to terminate the Appellant['s], Lawrence Lemke's spousal support obligation.

{¶ 12} "[2.] The trial court erred and abused its discretion by reducing the Appellant['s], Lawrence Lemke's spousal support obligation by only twenty-five (25%) percent.

{¶ 13} "[3.] The trial court erred and abused its discretion by awarding the Appellee \$7,500.00 in attorney fees.

{¶ 14} "[4.] The trial court erred and abused its discretion by finding Larry in contempt of court.

{¶ 15} “[5.] The trial court erred and abused its discretion by adopting the magistrate’s decision without entering its own judgment on the issues.”

{¶ 16} Appellee assigns three cross-assignments of error:

{¶ 17} “[1.] The trial court erred and abused its discretion by overruling appellee’s objections and adopting the magistrate’s finding that the court had jurisdiction to modify spousal support and finding that a substantial change of circumstance in appellant’s income occurred to permit modification of the prior order of court regarding spousal support.

{¶ 18} “[2.] The trial court erred and abused its discretion by affirming the magistrate’s decision to refuse to admit into evidence appellee’s exhibits 2, 4, and 14.

{¶ 19} “[3.] The trial court erred and abused its discretion by affirming the magistrate’s decision to limit the award of attorney fees to appellee to \$7,500.00.”

LEGAL ANALYSIS

Spousal Support Obligation

{¶ 20} Appellant argues in his first two assignments of error that the trial court erred by failing to terminate the spousal support obligation, or in the alternative, only reducing the spousal support obligation by 25%. Because of the substantial interrelation in appellant’s first two assignments of error we shall address them together.

{¶ 21} Appellant argues that the lower court failed to accurately recount the evidence and correctly apply the law, thereby resulting in an abuse of discretion. However, we do not

find merit in appellant's claims.

{¶ 22} The standard of review for such matters is to determine whether the trial court abused its discretion in reaching its judgment. Absent a clear abuse of that discretion, the lower court's decision should not be reversed. *Mobberly v. Hendricks* (1994), 98 Ohio App.3d 839, 649 N.E.2d 1247.

{¶ 23} The term "abuse of discretion" connotes more than an error of law or judgment. It implies that a court's attitude is unreasonable, arbitrary or unconscionable. The term "discretion" itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. *Huffman v. Hair Surgeons, Inc.* (1985), 19 Ohio St.3d 83, 482 N.E.2d 1248.

{¶ 24} Domestic relations judges are generally given broad discretion in the fashioning of equitable relief under the specific facts and circumstances of each case. This discretion extends to the granting of spousal support, the equitable distribution of property, and evidentiary rulings. *Burkes v. Burkes*, Cuyahoga App. No. 75518, 2000-Ohio-1176. The credibility of witnesses is primarily a matter for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. See, also, *Jacobson v. Starkoff* (June 6, 1996), Cuyahoga

App. No. 69122.

{¶ 25} An appellate court will presume that the judge only considered relevant, material and competent evidence in rendering his judgment, *Dozer v. Dozer* (1993), 88 Ohio App.3d 296, 623 N.E.2d 1272, while maintaining regularity in his proceedings and correctness in his findings of fact. *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 615 N.E.2d 617.

{¶ 26} It is with the above standards in mind that we now address the case at bar. We find the record to be replete with evidence supporting the trial court's decision.

{¶ 27} The Lemkes were married for over 33 years during which appellant earned a high salary. However, the record demonstrates that at the time he filed his motion to modify his spousal support, appellant's earnings had dropped and the recession affected all areas of his company. Specifically, appellant's earnings have decreased since 2006 as follows:

{¶ 28} \$971,579 in total income and \$219,960 of it was his salary for 2006.

{¶ 29} \$783,979 in total income and \$230,723 of it was his salary for 2007.

{¶ 30} \$528,417 in total income and \$169,100 of it was his salary for 2008.¹

{¶ 31} Appellant stated that he was receiving a paycheck of \$8,850 per pay period in 2008. However, starting around August 1, 2008, and each month thereafter, he started receiving a paycheck in the amount of \$2,500 per pay period for the 2008 tax year because business was not doing well. Appellant had to take a lower salary to ensure that the workers

¹See Exhibits V, W, Y, line 22 and line 7 of tax returns.

were paid and the company could meet its monthly bills. Appellant's total salary was \$141,600 as of August 1, 2008, and \$169,100 as of December 31, 2008. Appellant also had to take out loans to help the company meet various financial obligations in 2008. A review of the record demonstrates appellant paid appellee a total of \$554,200 in spousal support for the years of 2004-2008.

{¶ 32} In contrast to appellant's financial situation, appellee's financial situation improved. Appellee increased her liquid assets, obtained at the divorce, from \$1,200,000 to nearly \$1,600,000.² Appellee's sources of income are derived from: teaching (part-time), spousal support of \$10,000 per month, interests and dividends received from investments of approximately \$1,200,000 of liquid assets that were awarded as outlined in the divorce decree.

{¶ 33} The court considered, in detail, the extensive financial issues involved in this case prior to making its decision. Specifically, the significant reduction in appellant's income due to the current economic recession and the conflicting evidence regarding the documentation and support of appellee's monthly expenses. The court found that the:

“Evidence establishing what assets Plaintiff [Karen Lemke] has today was difficult to follow because of the disruption in continuity in the presentation of the case and *her reluctance to answer questions honestly when the document before her revealed the information.* However the gist of *the evidence showed that after the divorce, Plaintiff moved money/assets into numerous accounts with Royal Alliance Associates, Inc. and Merrill Lynch. She also has financial accounts with Huntington National Bank. (Savings, Checking and CD's) Plaintiff has been able*

²See June 29, 2009, Magistrate's decision, p. 7.

through her careful planning to increase her liquid assets obtained at the divorce from \$1,200,000.00 to nearly 1,600,000.00.”

“Plaintiff has no mortgage and no car note. She maintains checking and savings account(s) at Huntington National Bank to pay her living expenses. She has no debt other than Mr. Wolf’s attorney fees.”

(Emphasis added.)

{¶ 34} The trial court’s decision was based on the fact that appellant’s business was not doing well financially and a majority of his income was directly attributable to his business salary. Moreover, the record demonstrates appellee’s financial assets were difficult to accurately assess and that fact is reflected in the record. Therefore, based on the record, hearings, motions, and trial evidence presented in the case, we find the decision of the trial court accurately recounts the evidence and applies the applicable law. Furthermore, we do not find any abuse of discretion on the part of the lower court.

{¶ 35} The domestic relations court’s review of the evidence was thorough and proper. Our own review of the evidence fails to reveal an abuse of discretion; that is, that the domestic relations court’s attitude was not unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 36} Accordingly, appellant’s first and second assignments of error are overruled.

Attorney Fees

{¶ 37} Appellant argues in his third assignment of error that the trial court erred and abused its discretion by awarding appellee \$7,500 in attorney fees.

{¶ 38} It is within the sound discretion of the trial court to award attorney's fees in a divorce action. *Schafer v. Schafer*, Lucas App. No. L-00-1255, 2002-Ohio-129. A decision to award attorney's fees will be reversed only upon a showing of an abuse of discretion. *Id.* R.C. 3105.18(H) provides, in material part:

"In divorce or legal separation proceedings, the court may award reasonable attorney's fees to either party at any stage of the proceedings, including, but not limited to, any appeal * * * if it determines that the other party has the ability to pay the attorney's fees that the court awards. When the court determines whether to award reasonable attorney's fees to any party pursuant to this division, it shall determine whether either party will be prevented from fully litigating his rights and adequately protecting his interests if it does not award reasonable attorney's fees."

{¶ 39} The record demonstrates that appellant was in contempt for failing to comply with the prior order of the court to pay spousal support and for other issues related to discovery.

Appellant's failure to comply directly caused appellee to incur attorney fees. Accordingly, the trial court determined that:

"After consideration of all the factors set forth in Ohio Revised Code 3105.73(B) and Local Rule 21, as well as the case law established in *Swanson v. Swanson* (1976) 48 Ohio App.2d 85, the Magistrate finds that an award of attorney fees in the amount of \$7,500.00 is reasonable. The issues were routine and straightforward. The hourly rate requested is commensurate with customary fees in this locality. Plaintiff has already paid \$20,948.91 to her attorney. Plaintiff's attorney is an experienced attorney who regularly practices in Domestic Relations Court. Further, Defendant's failure to comply with a prior order of this court required Plaintiff to incur attorney fees to enforce such order.

"In determining the amount of reasonable attorney fees for this case, consideration was given as to whether all the legal services rendered were

necessary and whether under the facts of this case the amount of time expended on such services was fully compensable. This trial took place over a span of six (6) days. This Court believes that it should have taken no more than four (4) days to complete this trial. The conduct of the attorney towards each other was disruptive and annoying to the parties. The conduct was displayed on a daily basis to the litigants and the Court, which made it difficult to stay focus[ed] on the issues.

“Upon consideration of the relative financial position and earning abilities of the parties, the Magistrate finds the Defendant should pay \$7,500 toward Plaintiff’s attorney fees.”³

{¶ 40} Review of the evidence in the case at bar demonstrates that the lower court considered many factors prior to awarding attorney fees to appellee. Accordingly, we find that the trial court did not abuse its discretion in awarding attorney fees of \$7,500.00 to appellee.

{¶ 41} Accordingly, appellant’s third assignment of error is overruled.

Contempt

{¶ 42} Appellant argues in his fourth assignment of error that the trial court erred and abused its discretion by finding appellant in contempt of court. Appellee filed a motion to show cause against appellant for his failure to pay the required monthly support obligation of \$10,000.

{¶ 43} Appellant’s partial payments were not sufficient to prevent him from being found in contempt of the court’s order. Appellant’s more recent payments were \$4,000 to

³See Magistrate’s decision, June 29, 2009, p. 14.

\$5,000 short of the required \$10,000 monthly payment. For the period from July of 2008 through March of 2009, appellant only paid appellee less than half of what the court ordered him to pay in spousal support. Appellant only paid \$43,500 instead of the court mandated \$90,000 in support. Accordingly, appellant was clearly in violation of the court's November 1, 2004, support obligation order.⁴

{¶ 44} A failure to pay court-ordered spousal support is a civil contempt. R.C. 3105.18(G). See, also, *Szymczak v. Szymczak* (2000), 136 Ohio App.3d 706, 713, 737 N.E.2d 980. Appellant cites *Chasko v. Chasko*, Cuyahoga No. 88949, 2007-Ohio-5451; however, *Chasko* is easily distinguishable from the case at bar. In *Chasko*, the defedant had been forced into early retirement and was unable to secure employment with equivalent earning potential and was unable to pay his obligations because his assets were frozen.

{¶ 45} The record demonstrates appellant had the means available to pay the \$46,500 shortfall in spousal support. Appellant was in violation of the court's order and did not present a valid excuse for non-payment during the time in question. The lower court properly found appellant in contempt.

{¶ 46} Accordingly, appellant's fourth assignment of error is overruled.

{¶ 47} Magistrate's Decision

{¶ 48} Appellant argues in his fifth assignment of error that the trial court erred and

⁴See, court order dated November 1, 2004, DJ Vol. 4405, pgs. 765-773.

abused its discretion by adopting the magistrate's decision without entering its own judgment on the issues.

{¶ 49} Contrary to appellant's assertions, review of the record demonstrates that the lower court's decision adopting the recommendation of the magistrate is proper. There is nothing in the record indicating that the trial court failed to conduct an independent review of the evidence before rendering its decision. Both parties submitted lengthy and detailed objections to the magistrate's decision and the trial court had transcripts and other evidence to evaluate.

{¶ 50} In *Ramos v. Khawli*, 181 Ohio App.3d 176, 2009-Ohio-798, 908 N.E.2d 495, the court stated the following:

{¶ 51} "In any event, the cutting and pasting of a magistrate's decision into a judgment entry does not show mere rubber-stamping, especially when the court also sets forth its standard of review. See *Schmidli v. Schmidli*, 7th Dist. No. 02BE63, 2003-Ohio-3274, ¶16 (anticipating that courts will copy magistrates' decisions in order to comply with the requirement of issuing a judgment defining the rights and obligations of the parties). See also *Jarvis v. Witter*, 8th Dist. No. 84128, 2004-Ohio-6628, ¶139 (upon accusation of rubber-stamping, the court held that the trial court is not obligated to modify the magistrate's decision when it fully agrees with that decision), citing *Madama v. Madama* (Sept. 3, 1998), 8th Dist. No. 73288. Instead, it shows that the court agrees with each statement of the magistrate."

{¶ 52} Nothing in the record demonstrates that the trial court failed to perform its duty of independent review. Accordingly, appellant's fifth assignment of error is overruled.

{¶ 53} Appellee's Cross-Assignments of Error

{¶ 54} Appellee/cross-appellant, Karen Lemke, argues in her first of three

cross-assignments of error that the trial court erred by modifying spousal support and finding that a substantial change in appellant's income occurred.

{¶ 55} She further argues in her second and third cross assignments of error that the trial court erred in affirming the magistrate's decision to refuse to admit appellee's exhibits 2, 4, and 14 and erred by limiting the attorney fees awarded to appellee to only \$7,500.

{¶ 56} We do not find merit in appellee/cross-appellant's first assignment of error. We find no abuse of discretion in the amount of spousal support awarded. Based on the previously mentioned substantial evidence presented in this case, we find that the trial court made the proper findings in arriving at its spousal support reduction.

{¶ 57} A reviewing court will not conduct an item-by-item review of a judge's determinations or interfere with his broad discretion to equitably divide marital property upon a divorce unless, viewing the totality of the circumstances, a judge abused that discretion. An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. But, when applying an abuse of discretion standard, a reviewing court may not substitute its judgment for that of the judge and must be guided by a presumption that the findings are correct. In order for there to be an abuse of discretion, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather passion or bias. *Kaiser v. Kaiser*, Cuyahoga App. No. 81346, 2003-Ohio-1343.

{¶ 58} Although a judge is granted freedom in making spousal support orders, she is constrained in the evaluation of the surrounding facts and circumstances by R.C. 3105.18, which mandates certain relevant factors to be considered when making such awards. R.C. 3105.18(C)(1) sets out the factors that must be considered when contemplating an order of spousal support. *Oleksy v. Oleksy*, Cuyahoga App. No. 80766, 2002-Ohio-5085.

{¶ 59} In the case sub judice, the trial court complied with R.C. 3105.18(C) in arriving at its spousal support award, and as previously discussed, substantial evidence supporting the trial court's decision was presented. Based on the evidence, we do not find that the trial court abused its discretion in its determination of the reduction and amount of spousal support awarded.

{¶ 60} Appellee/cross-appellant argues in her second assignment of error that the trial court erred in affirming the magistrate's decision to refuse to admit appellee's exhibits 2, 4, and 14.

{¶ 61} Review of the record demonstrates that exhibit 2, a life insurance policy document, was not properly identified or authenticated. There were a significant amount of handwritten notations on the document and appellee failed to obtain a certificate of the custodian of records stating that it was a true and accurate copy of the document that was kept in its file.

{¶ 62} Exhibit 4 is the parties' 2003 joint tax return and exhibit 14 is the 2003

Subchapter S, form 1120S tax return for appellant's business, Miles Rubber & Packing Company. The parties were divorced in 2004 and any financial records and/or documents prior to the judgment entry of divorce are not relevant to the court's determination of whether or not a change of circumstances occurred. Appellant's 2003 income is too remote in time and predates the judgment entry of divorce. We find the trial court's refusal to admit exhibits 2, 4, and 14 into evidence to be proper.

{¶ 63} Accordingly, appellee's second cross-assignment of error is overruled.

{¶ 64} Appellee/cross-appellant further argues in her third assignment of error that the trial court erred in only awarding her attorney fees of \$7,500. We do not find merit in cross-appellant's third argument. The amount of attorney fees awarded is discretionary with the court. *Ingalls v. Ingalls* (1993), 88 Ohio App.3d 570, 624 N.E.2d 368. A trial court does not per se abuse its discretion by awarding fees in an amount less than what had been requested. *Nori v. Nori* (1989), 58 Ohio App.3d 69, 568 N.E.2d 730; *Kelley v. Kelley* (Sept. 15, 1994), Cuyahoga App. No. 66137.

{¶ 65} In the case at bar, appellee argues that she should be awarded \$49,553.82 in attorney fees. However, as previously stated, we find the lower court's award of attorney fees to be proper. Based on the evidence presented, we find that the trial court did not abuse its discretion in awarding appellee \$7,500 in attorney fees.

{¶ 66} Accordingly, appellee's third cross-assignment of error is overruled.

Judgment affirmed.

It is ordered that appellant and appellee split 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 Cuyahoga 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.

LARRY A. JONES, JUDGE

PATRICIA A. BLACKMON, P.J., CONCURS;
MARY J. BOYLE, J., CONCURS IN
JUDGMENT ONLY