

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

LAURA ZEMLA

Appellant

v.

MICHAEL ZEMLA

Appellee

C. A. No. 09CA0019

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE No. 06-DR-0365

DECISION AND JOURNAL ENTRY

Dated: August 23, 2010

BAIRD, Judge.

{¶1} Plaintiff-Appellant, Laura Zemla (“Wife”), appeals from the judgment of the Wayne County Court of Common Pleas. This Court affirms.

I

{¶2} Wife and Michael Zemla (“Husband”) married on June 10, 1983 and had one child during their marriage. On July 24, 2006, Wife filed a complaint for divorce. Wife sought both temporary and permanent spousal support and other relief, specifically requesting temporary spousal support in the amount of \$2,000 per month. The parties came before a magistrate on the issue of temporary orders. On September 18, 2006, the magistrate issued an agreed judgment entry awarding Wife \$2,200 per month in temporary spousal support. On October 3, 2006, Husband filed a motion to modify the temporary orders based on a change in circumstances.

{¶3} Thereafter, Wife sought a motion for contempt based on Husband's failure to pay support. When the magistrate finally issued an order on February 1, 2007 after several continuances, the order indicated that the parties were going to attempt to reconcile and granted another continuance for a ninety-day period. The attempted reconciliation failed, and Wife again filed a motion for contempt on June 13, 2007. On July 23, 2007, the magistrate ordered a reduction in temporary spousal support based upon a recent reduction in Husband's disability benefit. Specifically, the magistrate reduced Wife's temporary support award to \$1,800 per month, effective October 3, 2006. The magistrate also found Husband in contempt for missing several support payments, but suspended his sentence on the condition that he comply with the current order. Additional contempt motions followed in the course of the litigation.

{¶4} The magistrate held several hearings over the next two years and granted the parties another continuance in the proceedings in order to file for bankruptcy. The bankruptcy filing never occurred, and Husband continued to seek a reduction in spousal support. After completing the hearings on the complaint for divorce and the parties' outstanding motions, the magistrate issued an order. The magistrate awarded Wife \$750 per month in spousal support for a period of sixty months. The magistrate further determined that, as of October 26, 2007, Husband's temporary support obligation should have been reduced from \$1,800 per month to \$1,000 per month. Accordingly, the magistrate reduced Husband's arrearage balance by \$800 per month, starting on October 26, 2007. The trial court journalized the parties' divorce decree the same day that the magistrate issued his decision.

{¶5} On October 14, 2008, Wife filed objections to the magistrate's spousal support award. Husband also filed objections. The trial court overruled both parties' objections and adhered to the magistrate's decision. Wife now appeals from the trial court's order and raises

four assignments of error for our review. For ease of analysis, we consolidate several of the assignments of error.

II

Assignment of Error Number One

“THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY FAILING TO DETERMINE MICHAEL ZEMLA IS VOLUNTARILY UNDEREMPLOYED, AND THEREFORE, FAILED TO IMPUTE HIS PRIOR WAGES FOR PURPOSES OF DETERMINING HIS SPOUSAL SUPPORT OBLIGATION.”

Assignment of Error Number Two

“IN LIGHT OF THE FACTORS CONTAINED IN SECTION 3105.18, THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY ORDERING MICHAEL ZEMLA TO ONLY PAY \$750.00 PER MONTH TO LAURA ZEMLA AS HIS SPOUSAL SUPPORT OBLIGATION.”

Assignment of Error Number Three

“THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY ORDERING MICHAEL ZEMLA TO PAY SPOUSAL SUPPORT FOR A LIMITED PERIOD OF SIXTY MONTHS.”

{¶6} In her first assignment of error, Wife argues that the trial court erred by refusing to impute \$80,000 worth of potential income to Husband on the basis that he is voluntarily underemployed. Specifically, Wife argues that Husband chose not to return to work after he recovered from a temporary disability. In her second and third assignments of error, Wife argues that the trial court erred by failing to award her a reasonable and appropriate amount and term of spousal support. Specifically, Wife argues that she is entitled to a greater spousal support award in light of the factors set forth in R.C. 3105.18.

{¶7} “This Court reviews the trial court’s determination of spousal support for an abuse of discretion.” *Miller v. Miller*, 9th Dist. No. 07CA0061, 2008-Ohio-4297, at ¶40. See, also, *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18 (providing that, in

considering a trial court's action with respect to a magistrate's decision, this Court looks "to the nature of the underlying matter"). Absent an abuse of discretion, this Court will not reverse a trial court's decision that a certain amount or duration of spousal support is reasonable or that a spouse is voluntarily underemployed. *Miller* at ¶40-41; *Streza v. Streza*, 9th Dist. No. 05CA008644, 2006-Ohio-1315, at ¶17, quoting *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶8} In determining what constitutes a reasonable amount and duration of spousal support and whether a spouse is voluntarily underemployed, a trial court must look to R.C. 3105.18(C). *Miller* at ¶41; *Bucalo v. Bucalo*, 9th Dist. No. 05CA0011-M, 2005-Ohio-6319, at ¶46. The court shall consider:

- “(a) The income of the parties, from all sources ***;
- “(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 ***;
- “(j) The contribution of each party to the education, training, or earning ability 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.”
R.C. 3105.18(C)(1).

Unlike the abuse of discretion standard that applies to a trial court’s ultimate determination as to the reasonableness of a spousal support award, this Court will review a trial court’s factual finding on any particular factor for competent, credible evidence. *Bucalo* at ¶44.

{¶9} Wife does not challenge any particular factual finding on the part of the trial court with regard to the amount or duration of her spousal support award. That is, she does not argue that any of the trial court’s factual findings are against the manifest weight of the evidence. She only argues that the court’s ultimate conclusion was unreasonable and, therefore, an abuse of discretion. As such, we only review the record to determine whether the court abused its discretion by limiting Wife’s spousal support award to \$750 per month for sixty months.

{¶10} Husband reported the following amounts on his income tax returns in 2004, 2005, and 2006, respectively: \$81,471; \$77,641; and \$35,908. Husband testified that he worked for a railroad owned by Mittal Steel until he broke his ankle in 2005. Husband started receiving disability and his income dropped significantly. His income further decreased when his ankle mended and he lost \$704 per week in disability payments. Husband testified that, although he recovered after his injury, he remained occupationally disabled. Husband’s doctor advised him that he could no longer perform the strenuous physical duties his railroad job demanded.

{¶11} Shortly before the hearing, Husband was receiving \$2,825.30, pre-tax, per month from the Railroad Retirement Board and \$834.57 per month from an LTV Hourly Pension Plan for a total of \$3,659.87 per month. Several days before the hearing, a pension analyst from the LTV Hourly Pension Plan notified Husband that his monthly payments were being reduced from \$834.57 per month to \$351.03 per month. As such, at the time of the hearing, Husband was receiving a total of \$3,176.33 per month. Of the \$2,825.30 Husband was receiving from the Railroad Retirement Board, only \$981.30 represented Tier II, divisible benefits. The remaining \$1,844 constituted Tier I benefits “not subject to division.” In the future, Husband is entitled to a monthly annuity from the Steelworkers Pension Trust, presently valued at \$25,501.03, with payments to commence upon his sixty-fifth birthday.

{¶12} Husband testified that he resided with his mother and, before that, had slept in his truck and at a friend’s house. He admitted that he had failed to make court-ordered mortgage, insurance, and spousal support payments, but argued that he did not have any money to pay these items. According to Husband, his disability insurance paid the mortgage on the parties’ marital residence while he was disabled, but the payments stopped once his ankle mended. Husband testified that his employer never offered him a less physically demanding job and he was not actively looking for work because he believed another job “would cut [his] railroad retirement out.” Husband estimated that his monthly budget at the time of the hearing was approximately \$2,270, plus an additional \$1,381.27 for medication expenses. The record reflects that the parties had a significant amount of outstanding debt at the time of the hearing.

{¶13} Wife estimated that Husband’s monthly budget was approximately \$2,420 per month. She did not include Husband’s medication expenses or money for rent, but included an estimated \$600 per month expense for “Cigarettes & Pop.” Wife estimated that her own monthly

expenses amounted to \$4,767.56 per month, excluding any future health insurance payment that she might have to make. Wife testified that she obtained quotes for health insurance coverage that averaged approximately \$600 per month.

{¶14} Wife agreed that Husband was occupationally disabled, but argued that he had the opportunity to earn the same hourly rate he made before. According to Wife, Husband told her that his former employer offered him a job sweeping floors for \$19.36 an hour, but he refused the offer. Wife also claimed that Husband told her he could earn \$700 per month without disturbing his railroad retirement benefits. Yet, Wife did not present any evidence to corroborate her testimony that Husband's former employer offered him another job or that Husband could earn up to \$700 per month without disturbing his benefits. Wife also did not present any evidence that other employment opportunities currently existed for Husband.

{¶15} As for herself, Wife testified that she engaged in limited part-time work during the course of the marriage, but stopped working in 2004. When she worked, Wife earned approximately \$11,000 per year. Wife testified that she only had a ninth grade education, had no job skills, was not a desirable applicant, and was completely unable to work in any event due to health issues. Wife asked the court to impute \$80,000 worth of income to Husband and to award her a sizeable amount and duration of spousal support because she intended to rely upon it as her only source of income. Wife admitted that her daughter worked and lived with her, but testified that her daughter's income was used to pay for expenses related to the ten dogs and one cat that Wife kept in the marital home. Wife testified that the parties had an "adequate" standard of living during the marriage, but that she could not "make ends meet" as of the date of the hearing. Wife acknowledged that she would receive approximately \$922 per month from Husband's Steelworkers Pension Trust when he reached the age of sixty-five.

{¶16} At the time of the parties' divorce, they had been married approximately twenty-five years. Husband was fifty-three years of age, and Wife was fifty-two years of age. The parties did not have any minor children, but did have sizeable marital and individual debts. Both claimed that they were unable to work and both indicated that their monthly expenses exceeded their monthly incomes. Wife argued that \$2,200 per month for ten years was reasonable in this case, and Husband argued that Wife was not entitled to any spousal support. The trial court considered all of the foregoing evidence and concluded that \$750 per month for sixty months, plus arrearages, was a reasonable spousal support award. Based on the evidence in the record, we cannot conclude that the court abused its discretion in so concluding.

{¶17} Apart from Wife's own testimony, there is no evidence in the record that Husband could earn the same hourly rate he did before. By her own testimony, Wife agreed that Husband was occupationally disabled and unable to return to any work resembling his former employment. Wife relied upon her lack of education and job skills to testify that, even if she looked for employment, no one would hire her. Yet, Wife's own testimony reflects that she was capable of earning \$11,000 per year prior to 2004 and capable of caring for eleven pets at home. In light of the factors set forth in R.C. 3105.18(C)(1) and the evidence in the record, this Court must conclude that the trial court's decision was not unreasonable. See *Streza* at ¶19-21. Wife's first, second, and third assignments of error lack merit.

Assignment of Error Number Four

“THE TRIAL COURT ABUSED ITS DISCRETION BY RETROACTIVELY
MODIFYING MICHAEL ZEMLA'S SPOUSAL SUPPORT OBLIGATION BY
\$800.00.”

{¶18} In her fourth assignment of error, Wife argues that the trial court abused its discretion by ordering a retroactive reduction of Husband's temporary spousal support

obligation. Wife argues that the reduction, especially in light of the fact that it was awarded absent a hearing, was “unfair, inequitable, and unjust[.]”

{¶19} Wife’s assertion that the court failed to hold a hearing after October 2007 to receive evidence on Husband’s motion to modify temporary spousal support is meritless. The record reflects that the magistrate held hearings in February 2008, June 2008, and July 2008. Additionally, Wife’s own brief provides that the request for modification “was lumped into the issues contested at the final hearing.” The record simply does not support Wife’s assertion that she was not afforded a hearing. Further, the record that Wife has supplied this Court does not support her argument that the lower court abused its discretion as to the issue of temporary spousal support. Presumably, the magistrate collected evidence from the parties at all of the foregoing hearings. The magistrate’s own order specifies that the additional hearings he scheduled were, in part, dedicated to the issue of Husband’s request to review temporary spousal support. Wife, however, only requested a transcript of the February 11, 2008 hearing. Without a complete transcript, this Court cannot question the lower court’s discretionary decision to reduce Husband’s support obligation and to make the reduction retroactive. *Carrion v. Carrion*, 9th Dist. No. 07CA009138, 2007-Ohio-6142, at ¶12. Because Wife only argues that the lower court abused its discretion and this Court must presume regularity in this instance, Wife’s argument lacks merit.

III

{¶20} Wife’s assignments of error are overruled. The judgment of the Wayne County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

WILLIAM R. BAIRD
FOR THE COURT

DICKINSON, P. J.
CONCURS

BELFANCE, J.
CONCURS, SAYING:

{¶21} I concur. I write separately to emphasize that our decision is a result of the limited evidence contained in the record. The parties were married for twenty-five years during which time Husband was essentially the sole support for the household. Wife had worked for a limited period in the past at minimum wage but testified that she had suffered back injuries and was unable to work. The trial court assessed Wife's credibility on this point and determined that Wife would be capable of earning minimum wage. Husband broke his ankle and received disability as a result. He could not return to his precise job, so he was able to collect

occupational-disability benefits. Wife testified that Husband told her that he could go back to his employer in a light duty position. Husband disputed Wife's testimony. However, Husband acknowledged that he had not attempted to find employment and he admitted that he was able to work. He claimed that if he worked elsewhere it would adversely affect his disability benefit. There was likewise no evidence concerning the duration of this benefit. Because Wife did not offer other evidence concerning what kind of employment Husband might be able to secure or any evidence concerning Husband's disability benefit, the trial court was unable to assess whether Husband's choice to rely on the disability income was a sound financial choice or a poor one. Thus, I agree that in light of the limited evidence before the trial court, it did not abuse its discretion in failing to impute income to the Husband.

{¶22} With respect to the duration of spousal support, one might be tempted to question the wisdom of awarding such a limited period of spousal support given that this was a marriage of long duration where Wife was a homemaker and depended upon Husband as her primary means of support. However, in light of the evidence in the record and in keeping with our deferential standard of review which does not permit this Court to substitute its judgment for that of the trial court, I cannot say that the trial court abused its discretion.

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(C), Article IV, Constitution.)

APPEARANCES:

ROSANNE K. SHRINER, Attorney at Law, for Appellant.

CHRISTOPHER A. SCHMITT, Attorney at Law, for Appellee.