[Cite as *Kelly v. Forbis*, 2010-Ohio-3071.]

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

Kathleen E. Kelly	Court of Appeals No. WD-09-050
Appellee/Cross-Appellant	Trial Court No. 01 DR 176
v.	
John T. Forbis	**DECISION AND JUDGMENT**
Appellant/Cross-Appellee	Decided: June 30, 2010

* * * * *

Frederic E. Matthews, for appellee/cross-appellant.

John L. Straub and Rebecca E. Dupuis, for appellant/cross-appellee.

* * * * *

COSME, J.

{¶ 1} This appeal arises from the trial court's modification of appellant's spousal support obligation reducing the monthly amount to $3,500, but imputing income not currently being earned. Appellee/cross-appellant challenges the amount of the reduction in her spousal support. Because we find that the trial court's decision was supported by

competent, credible evidence, we affirm the judgment of the Wood County Court of Common Pleas, Domestic Relations Division.

I. BACKGROUND

{¶ 2} Defendant-appellant/cross-appellee, John Forbis, and plaintiff-appellee/ cross-appellant, Kathleen Kelly, were married on October 20, 1967, and divorced on July 30, 2004. Pursuant to the judgment entry of divorce, John was ordered to pay Kathleen $7,500 per month in spousal support for an indefinite period of time beginning August 1, 2003, and subject to further order of the court. The amount was calculated on the basis that "John's average annual compensation, including bonus, was $270,000." As additional spousal support, John was ordered to pay Kathleen an amount equal to the premium on a Minnesota Life insurance policy that insured John's life for one million dollars. The annual premium on that policy was $3,750, which added another $312 to John's monthly support obligations. Those orders were affirmed by this court in *Forbis v. Forbis,* 6th Dist. Nos. WD-04-056, WD-04-063, 2005-Ohio-5881, ¶ 71-74.

{¶ 3} On March 31, 2008, John filed a motion to terminate his spousal support obligations on grounds that he was terminated from employment with Sierra Concrete Design as of February 25, 2008. Thus, John argued that his earned income "will disappear" in six months upon the expiration of his severance payments. John then unilaterally reduced his monthly spousal support obligations to $3,500 until August 2008, when he ceased making payments altogether. Kathleen responded on August 20, 2008, with a motion to show cause as to why John should not be held in contempt for failing to

comply with the trial court's prior orders of spousal support. The matter proceeded to hearing on February 19, 2009, and the following evidence was adduced.

{¶ 4} At the time of the divorce proceedings, John was employed as president and CEO of Kroy Building Products, Inc. ("Kroy"), an extruder of vinyl fence products, and had a base gross salary of $18,639 per month or approximately $224,000 annually. His employment with Kroy was terminated in January 2004, and he received a severance package, which included a salary continuation plan through 2005. During that time, John worked as a consultant in his own business, JTF Enterprises, while he sought to locate a business in which he could co-invest. John's adjusted gross income was approximately $1.5 million in 2003, which included a bonus payment of $1 million, and $4 million in 2004, due in large part to a payout of rolled-over stock options.

{¶ 5} In July 2006, John began employment as the president and CEO of Sierra Concrete Design ("Sierra"), a Santa Anna, California company that produced fiberglass reinforced cement products. John's starting salary at Sierra was $225,000 ($232,000 with the inclusion of his car allowance), plus a possible $50,000 target bonus that was never realized. As part of his employment arrangement, John invested $500,000 in Sierra, $400,000 of which he obtained from an IRA account.

{¶ 6} Between late 2005 and early 2007, John acquired six high-end condominiums and resort communities for investment purposes in California, Florida, and Nevada at an aggregate cost of $3,465,000. His plan was to generate sufficient rental income from the units to cover their mortgages and ultimately sell some of them at a

sufficient profit to pay off one or two units. Those units would then become his retirement home. He also purchased a home in Tustin, California for $1,530,000 subject to a mortgage of $1,200,000 and a vacation home in Lake Las Vegas.

{¶ 7} On February 25, 2008, John was terminated from his position at Sierra and given a severance package of $59,300, payable in six monthly installments of $9,883.33 beginning in March 2008. Based on Sierra's declining business and financial condition, it is unlikely that John will recover his $500,000 investment. John testified that after losing his job at Sierra, he "did subscribe to multiple executive [web]sites that post senior level jobs, and * * * sent off a number of resumes, and did contact a number of recruiters and passed on my resume at some conversations, but never any that got to an interview with a client." Believing that his chances for obtaining comparable employment were slim because he was 61 years of age, "overweight, have high cholesterol, high blood pressure, cancer survivor," John purchased a "Mr. Handyman" franchise to be operated in San Juan Capistrano, California. He initially purchased the franchise in August for $63,000 and then invested another $60,000 in capital. The business was opened in October 2008.

{¶ 8} John also testified that his financial situation has deteriorated significantly since his termination from Sierra and that he now has no income or assets from which to pay spousal support. The luxury condominiums that he purchased have declined in value and have not generated sufficient rental income to cover their mortgages. Except for one of the units that sold at a break-even price, John has been unable to sell those properties without incurring substantial losses. In October 2008, John ceased making mortgage

payments on all the units. His vacation home is also in default. John's home in Tustin is presently listed for sale at $1,599,000 and he is delinquent on his taxes in the amount of $14,000.

{¶ 9} As to the Mr. Handyman franchise, John testified that he is receiving only minimum wage of $8 per hour as an employee of the franchise. He initially made financial projections that the business would "basically break even in the first year; and then, * * * at sales of somewhere around $400,000 [would] be profitable in a year or two doing $100,000, give or take." He has since become "somewhat pessimistic on that," however, because the business incurred first-quarter losses and does not appear likely to break even for the year.

{¶ 10} On May 4, 2009, the trial court rendered its judgment reducing John's monthly spousal support obligation to $3,500 and continuing his obligation to pay the life insurance premium. In so doing, the court found that "John did have a material change in circumstances when he was terminated from his $232,000 per year job with Sierra" and that "it was not contemplated that John would lose his salary at age 61." The court further determined:

{¶ 11} "However, in reviewing the relative earning abilities of the parties, the court finds that through his substantial business experience, John still possesses high earning abilities. The court finds that with his Mr. Handyman franchise, hoping to earn $100,000 per year, John is not fully exploiting his earning abilities. The court finds that Kathleen's earning abilities are unchanged and are negligible. The court also finds that

John's attempts to find employment at his full earning potential were not as focused and thorough as they might have been. While John was able to secure a new chief executive officer position at age 58, he now feels that he is unemployable at age 61. Further, he spent only a few months searching before he opted for the Mr. Handyman franchise."

{¶ 12} It is from this judgment that the parties have filed their respective appeals.

II. APPELLANT'S ASSIGNMENT OF ERROR

{¶ 13} In his assignment of error, John asserts:

{¶ 14} "The trial court's decision not to terminate Appellant's spousal support obligation constitutes an abuse of discretion.

{¶ 15} "I. The trial court abused its discretion in failing to consider Appellant's inability to pay the modified spousal support order.

{¶ 16} "II. The trial court abused its discretion in imputing income to Appellant when the evidence established that his underemployment, if any, was a result of Appellant's age and health and the dire economic times."

{¶ 17} Since the two parts of John's assignment of error raise overlapping and interrelated issues, we will consider them together even though they are argued separately.

{¶ 18} John contends that the trial court abused its discretion in failing to terminate or suspend his spousal support obligations until such time that he has the financial ability to pay. Specifically, John argues that the trial court erred by ignoring evidence of his actual income and imputing income to him without a proper factual basis. According to

John, "the undisputed evidence * * * establishes that [his] underemployment was involuntary."

{¶ 19} We disagree.

{¶ 20} The burden of showing that a modification of spousal support is warranted is on the party who seeks it. *Billingham v. Billingham* (Feb. 16, 2001), 2d Dist. No. 18403; *Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703, 706. "A trial court has broad discretion in determining a spousal support award, including whether or not to modify an existing award." *Cooper v. Cooper*, 12th Dist. No. CA2003-05-038, 2004-Ohio-1368, ¶ 16. "The trial court also has discretion in determining the amount of a spousal support award." *Rodehaver v. Rodehaver*, 10th Dist. No. 08AP-590, 2009-Ohio-329, ¶ 11. Its decision will not be disturbed on appeal absent an abuse of discretion. "An abuse of discretion is more than an error of law or judgment; it implies that the trial court's attitude in reaching its judgment was unreasonable, arbitrary or unconscionable." *Forbis*, supra, 2005-Ohio-5881, ¶ 33.

{¶ 21} The trial court's discretion is guided and controlled, however, by R.C. 3105.18(C)(1), which provides:

{¶ 22} "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:

{¶ 23} "(a) The income of the parties, from all sources, including, but not limited to, income from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;

{¶ 24} "(b) The relative earning abilities of the parties;

{¶ 25} "(c) The ages and the physical, mental, and emotional conditions of the parties;

{¶ 26} "(d) The retirement benefits of the parties;

{¶ 27} "(e) The duration of the marriage;

{¶ 28} "(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;

{¶ 29} "(g) The standard of living of the parties established during the marriage;

{¶ 30} "(h) The relative extent of education of the parties;

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

{¶ 32} "(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;

{¶ 33} "(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;

{¶ 34} "(l) The tax consequences, for each party, of an award of spousal support;

{¶ 35} "(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

{¶ 36} "(n) Any other factor that the court expressly finds to be relevant and equitable."

{¶ 37} All of the factors enumerated in R.C. 3105.18(C)(1) relate, either directly or indirectly, to the obligee spouse's need or the obligor spouse's ability to pay support. *Abbott v. Abbott*, 6th Dist. No. F-06-020, 2007-Ohio-5308, ¶ 78. Accordingly, "a spousal support award must balance the obligee's need for support against the obligor's ability to pay." *Tremaine*, supra, 111 Ohio App.3d at 707. It is well-established that an award of spousal support should not exceed the obligor's ability to pay support. See *Norbut v. Norbut*, 2d Dist. No. 06-CA-112, 2007-Ohio-2966, ¶ 21; *White v. White*, 7th Dist. No. 02-CO-74, 2003-Ohio-3279, ¶ 32; *Carnahan v. Carnahan* (1997), 118 Ohio App.3d 393, 399; *Wiggins v. Wiggins* (Sept. 27, 1993), 12th Dist. No. CA92-12-110; *Lee v. Lee* (1983), 10 Ohio App.3d 113, 114.

{¶ 38} In determining the supportive spouse's ability to pay spousal support, however, the trial court is directed by statute to consider both the payor's actual income and the payor's earning ability. R.C. 3105.18(C)(1)(a) and (b). See, also, *Miller v. Miller* (Dec. 28, 1994), 2d Dist. No. 14540. Earning ability under R.C. 3105.18(C)(1)(b)

includes "both the amount of money one is capable of earning by his or her qualifications, as well as his or her ability to obtain such employment." *Haninger v. Haninger* (1982), 8 Ohio App.3d 286, 288. "'When considering the relative earning abilities of the parties in connection with an award of spousal support, Ohio courts do not restrict their inquiry to the amount of money actually earned, but may also hold a person accountable for the amount of money a person could have earned if he made the effort.'" *Brown v. Brown*, 12th Dist. No. CA2008-08-021, 2009-Ohio-2204, ¶ 59, quoting *Rotte v. Rotte*, 12th Dist. No. CA2004-10-249, 2005-Ohio-6269, ¶ 13.

{¶ 39} Because R.C. 3105.18(C) permits inquiry into a party's earning potential, Ohio courts often impute income to parties who are voluntarily underemployed or otherwise not working up to their full earning potential. See, e.g., *Brown v. Brown*, 5th Dist. No. 08-CA-64, 2009-Ohio-3832, ¶ 71; *Brown*, supra, 2009-Ohio-2204, ¶ 59; *Ebbinghaus v. Ebbinghaus*, 12th Dist. No. 2008-G-2853, 2009-Ohio-1000, ¶ 18; *Seaburn v. Seaburn*, 5th Dist. No. 2004CA00343, 2005-Ohio-4722, ¶ 33. Thus, even if it is determined that a party has no actual or current income, the trial court can impute income based on the party's earning ability. *Seaburn*, 2005-Ohio-4722, ¶ 33; *Motycka v. Motycka* (June 19, 2001), 3d Dist. No. 15-01-02; *Petrusch v. Petrusch* (Mar. 7, 1997), 2d Dist. No. 15960; *Miller*, supra. Moreover, the decision to impute income for purposes of spousal support, as well as the amount of potential income to be imputed, also lies within the discretion of the trial court. *Rodehaver*, supra, 2009-Ohio-329, ¶ 14; *Havanek v. Havanek*, 10th Dist. No. 08AP-465, 2008-Ohio-6966, ¶ 23; *Gavorcik v. Gavorcik*, 7th

Dist. No. 05-HA-573, 2005-Ohio-6443, ¶ 43; *Ford v. Ford* (Mar. 15, 2001), 8th Dist. No. 77417.

{¶ 40} In this case, the trial court considered John's current financial condition and acknowledged that John was without a salary since he lost his job at Sierra; that his Mr. Handyman "business has not turned the corner yet"; that his rental properties are not producing sufficient income to cover their mortgage payments and are "causing a substantial drain on John's cash reserves"; that his house in Tustin is up for sale and is not believed to have any equity; and that there is little chance that John will recoup his $500,000 investment in Sierra. Instead, the trial court imputed income to John based on his purportedly high earning ability, finding that John was less than sincere in his efforts to obtain employment consistent with his skills and qualifications. The propriety of both parts of John's assignment of error pivots on the reasonableness of this determination.

{¶ 41} Our review of the record indicates that there is sufficient evidence to support the trial court's determination. John has been a successful businessman consistently earning upwards of $100,000 per year since the late 1980s and upward of $200,000 per year since 1996. He had adjusted gross income of approximately $1.5 million in 2003 and $4 million in 2004. When he lost his position as CEO at Kroy in January 2004, he was able to obtain a comparable position at Sierra in July 2006 within six months after his severance from Kroy expired. However, 35 days after he lost his position at Sierra on February 25, 2008, John filed his motion to terminate spousal support already predicting that it was "extremely unlikely that he will be able to secure

employment at or near a level of income which he has recently enjoyed." Although John was 59 years of age when he was hired as CEO of Sierra, he suggested in his motion that he was currently unemployable because he "will be 61 years of age in approximately one month."

{¶ 42} Although John testified that he did subscribe to executive websites, send off a number of resumes, and contact recruiters before he opted for the Mr. Handyman franchise, he also testified that he did not hire a professional consultant or other employment specialist; that he relied solely on "networking" or "personal contacts with people I've known through the industry"; that he had no cover letters to the places he sent resumes; and that he limited himself in this manner because he felt his "chances for employment were very slim." Moreover, while John expressed some pessimism as to the prospects for significant income from his Mr. Handyman franchise in the near future, this testimony was based on the purported fact that the franchise had suffered substantial first-quarter losses. However, John was not able to produce any records to substantiate those losses and he further stated that his original financial projections for the franchise, which indicated yearly profits in the area of $100,000, were established on the basis that the business would in fact lose money in the first quarter.

{¶ 43} We are not suggesting that the conclusion reached by the trial court is the only conclusion that can be drawn from the evidence in this case, but it is certainly a reasonable one. It is often the case that a particular record is capable of supporting differing conclusions. "The credibility of witnesses and the weight to be given their

testimony are primarily for the trial court's determination." *Tremaine*, supra, 111 Ohio App.3d at 707. "As the trier of fact, the trial court was free to believe any, all, or none of the testimony of the parties regarding [the payor spouse's] sincerity as it related to his job search, his current earning potential, and the reason for his [unemployment]" or in this case, underemployment. *Bauer v. Bauer*, 5th Dist. No. 02 CA 22, 2002-Ohio-4874, ¶ 31. The trial court chose to believe that John was not fully exploiting his earning ability, that he was less than sincere and diligent in his efforts to find employment commensurate with his earning potential, and essentially that he was voluntarily underemployed as a minimum wage earner for a Mr. Handyman franchise. Based on the totality of the evidence, we cannot say that the trial court abused its discretion in imputing income to John on the basis of his earning ability.

{¶ 44} Accordingly, appellant's assignment of error is not well-taken.

III. CROSS-APPELLANT'S ASSIGNMENT OF ERROR

{¶ 45} In her assignment of error, Kathleen asserts:

{¶ 46} "The trial court abused its discretion when it failed to: (a) impute sufficient income to Appellant; (b) to consider Appellant's access to financial resources; and (c) failed to consider Appellee's continued need."

{¶ 47} Each part of Kathleen's assignment of error presents a distinct issue and will be addressed in turn.

A. Imputation of Income

{¶ 48} Relying on *Ruiz-Bueno v. Ruiz-Bueno*, 11th Dist. No. 2207-L-180, 2008-Ohio-3747, Kathleen argues that once the trial court determined that John was not working up to his full earning potential, "a look back as to what his income actually had been and imputation based thereon should have been the guiding principle for the court * * * in determining Appellant's earning ability and the appropriate amount of spousal support."

{¶ 49} We disagree.

{¶ 50} The trial court in *Ruiz-Bueno* did not impute income to the payor spouse or otherwise consider the payor's earning ability in determining the amount of his income. In that case, the husband-payor was terminated from his employment during the course of the divorce proceedings and the trial court used his wages from the previous year to determine his income for purposes of spousal support. Thus, the appellate court explained, "The trial court did not impute income to him, but rather, estimated his income based on his earning history." Id. at ¶ 45. Moreover, the court did not hold that a spouse's income must be estimated on the basis of his or her prior income or earning history. Instead, the court held, "A domestic relations court *can* estimate a spouse's income based on his earnings in a prior similar business in establishing an award of spousal support." (Emphasis added.) Id.

{¶ 51} We can discern no requirement in the statute or the case law that a party's earning ability must be determined solely on the basis of his or her prior income. To the

contrary, this court has recognized that a party's earning potential includes "the party's past *or potential* ability to earn that amount." (Emphasis added.) *Abbott*, supra, 2007-Ohio-5308, ¶ 43.

{¶ 52} Accordingly, we reject this portion of Kathleen's assignment of error.

B. Access to Financial Resources

{¶ 53} Kathleen also asserts that the trial court failed to consider John's access to financial resources pursuant to R.C. 3105.18(C)(1)(i), which requires a consideration of the relative assets and liabilities of the parties.

{¶ 54} We disagree.

{¶ 55} Kathleen seems to be arguing that John might have some undisclosed income-producing assets because he has been able at various times before and after his termination from Sierra to tap funds in order to invest in real estate, buy a home in Tustin, purchase the Mr. Handyman franchise, and make certain payments to his current fiancé and her son. However, there is no evidence in the record to that effect. To the contrary, the record reflects that other than his wage from Mr. Handyman, some rental payments that were used to pay his mortgages on the condominiums before he defaulted, and a single payment out of a fund in which he invested in 2001, John has received no income since his last severance payment from Sierra. Moreover, most of the expenditures that Kathleen refers to either occurred while John was still employed by Sierra or were expressly considered by the trial court.

{¶ 56} We cannot find any evidence in the record that John is hiding assets or concealing income, or that he has any significant asset from which he could draw income. No additional sources of income, other than those already considered by the trial court, exist in the record. Accordingly, we reject this portion of Kathleen's assignment of error as well.

C. Appellee's Continuing Need

{¶ 57} Finally, we find no merit in Kathleen's contention that the trial court failed to consider her continued need for spousal support in modifying its original award. Although the trial court did in fact reiterate its previous findings in regard to Kathleen's health, earning ability, and standard of living before the divorce, Kathleen appears to argue that the trial court did not specifically consider her current standard of living and expenses. But Kathleen is not claiming that her needs have changed or increased since the divorce. To the contrary, Kathleen asserts that she is "still in need of approximately $8,000 a month to maintain her household."

{¶ 58} In considering a motion to modify a spousal support order, the trial court "need only consider the factors which have actually changed since the last order." *Mizenko v. Mizenko* (June 7, 2001), 8th Dist. No. 78409. As explained by the court in *Kucmanic v. Kucmanic* (1997), 119 Ohio App.3d 609, 613:

{¶ 59} "* * * [T]here is no express requirement that the domestic relations court's order granting or denying a motion to modify spousal support reexamine *in toto* the factors listed in R.C. 3105.18(C)(1). The domestic relations court should set forth the

basis for its decision with enough detail to permit the proper appellate review. * * * As a practical matter, however, a change in circumstance for one spouse as found under R.C. 3105.18(F) will not affect, for the most part, the otherwise static factors contained in R.C. 3105.18(C)(1). Consequently, a rehash of findings made in the initial spousal [support] order would not be helpful * * * [as it] would add nothing new to the spousal support determination."

{¶ 60} For the foregoing reasons, we conclude that the trial court did not abuse its discretion in failing to impute more income to John, in failing to consider John's access to financial resources, or in failing to consider Kathleen's continued need for spousal support. Accordingly, Kathleen's assignment of error is not well-taken.

{¶ 61} The judgment of the Wood County Court of Common Pleas, Domestic Relations Division, is affirmed. Appellant and appellee are each ordered to pay one-half of the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE