

FILED: December 26, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of

SANDRA JEAN TILSON,
Petitioner-Respondent
Cross-Appellant,

and

DOUGLAS VICTOR TILSON,
Respondent-Appellant
Cross-Respondent.

Washington County Circuit Court
C103209DRC

A151442

Keith R. Raines, Judge.

Argued and submitted on May 06, 2013.

Helen C. Tompkins argued the cause for appellant-cross-respondent. On the briefs was Launa Lawrence Helton.

Margaret H. Leek Leiberan argued the cause for respondent-cross-appellant. With her on the briefs was Jensen & Leiberan.

Before Schuman, Presiding Judge, and Duncan, Judge, and Lagesen, Judge.*

LAGESEN, J.

Affirmed on appeal and cross-appeal.

*Lagesen, J., *vice* Wollheim, J.

1 LAGESEN, J.

2 The issue in this case is whether wife's remarriage approximately five
3 months after the dissolution of her marriage to husband resulted in "a substantial change
4 in economic circumstances" sufficient to permit the trial court to reconsider the spousal
5 support award to wife under ORS 107.135(3)(a),¹ and, if so, whether the trial court
6 abused its discretion when it continued husband's \$1,000 monthly maintenance support
7 obligation after terminating husband's \$500 monthly transitional support obligation. We
8 hold that the trial court correctly concluded that wife's remarriage resulted in a sufficient
9 change in wife's economic circumstances to authorize the trial court to reconsider the
10 spousal support award and that the trial court acted within its discretion when it continued
11 maintenance support. Accordingly, we affirm.

12 I. BACKGROUND

13 In accordance with our standard of review, we "state the facts consistently
14 with the trial court's express and implied findings, supplemented with uncontroverted

¹ ORS 107.135 provides, in relevant part:

"(3) In a proceeding under this section to reconsider the spousal or child support provisions of the judgment, the following provisions apply:

"(a) A substantial change in economic circumstances of a party, which may include, but is not limited to, a substantial change in the cost of reasonable and necessary expenses to either party, is sufficient for the court to reconsider its order of support, except that an order of compensatory spousal support may only be modified upon a showing of an involuntary, extraordinary and unanticipated change in circumstances that reduces the earning capacity of the paying spouse."

ORS 107.135(3)(a).

1 information from the record." *Kirkpatrick and Kirkpatrick*, 248 Or App 539, 541, 271
2 P3d 361 (2012). The parties' 20-year marriage was dissolved on June 9, 2011. At the
3 time of the dissolution, husband earned a monthly gross income of \$5,411.18 from his
4 job as a TriMet light-rail operator. Wife earned approximately \$726 per month as a self-
5 employed nail technician. The trial court awarded spousal support to wife as follows:
6 \$2,000 per month (\$1,000 as transitional support and \$1,000 as maintenance support) for
7 three months, from May 1, 2011 to August 1, 2011; \$1,500 per month (\$500 as
8 transitional support and \$1,000 as maintenance support) for two years, to August 1, 2013;
9 and \$1,000 per month as maintenance support for an indefinite period of time beginning
10 August 1, 2013. The dissolution judgment stated that spousal support was

11 "awarded based on the length of the marriage (20 year marriage); the
12 disparity in the parties' income; Wife sacrificed her career in part to help
13 advance Husband in his career and to help care for Husband's son; and
14 Wife is not afforded the same benefits from employment as Husband."

15 The judgment further stated, "At any point, if Wife obtains employment where she
16 consistently grosses \$3,600.00 a month plus full benefits, Husband may [move] the court
17 for a Show Cause hearing regarding modification of spousal support."

18 Approximately five months later, wife remarried. At the time of
19 dissolution, wife had been cohabitating with her new spouse, Prucha. However, at that
20 point, neither wife nor husband anticipated that wife would marry Prucha. Upon learning
21 of wife's remarriage, husband moved to modify the award of spousal support.

22 The trial court held an evidentiary hearing in March 2012 to evaluate the
23 parties' respective financial positions. At that time, husband was earning approximately

1 \$400 less per month than he had been earning at the time of dissolution because of a
2 reduction in his shift length, but husband did not contend that that reduction in income
3 warranted a reduction in his spousal support obligation. Wife was employed as a cashier
4 for a bark-dust company, a job she had held for several months. She was earning
5 approximately \$1,668.33 per month. The job permitted wife to take online classes in her
6 free time at work. Through those classes, wife was developing the skills required to
7 transition into better employment. Prucha was earning at most \$3,856.67 per month² as a
8 drafter for a manufacturing company. Prucha had a \$413.60 monthly child support
9 obligation and paid \$50 a month for his son's health insurance coverage. Wife obtained
10 dental insurance through Prucha's employer, paying for that coverage herself; wife
11 recently had obtained basic medical coverage through her employer.

12 Wife and Prucha had not commingled their finances and were leery of
13 doing so because of their experiences with prior marriages. Nonetheless, Prucha's intent
14 in marrying wife was to live with her, and to take care of her, for the rest of his life. As a
15 result of her remarriage, wife felt that she no longer needed the \$500 monthly transitional
16 support, which was scheduled to run for nearly another year and five months, provided
17 that she could ask the trial court to restore the additional support if her new marriage did

² That number is computed in accordance with the formula set out in the Oregon Uniform Support Declaration form: Gross income = (gross hourly wage x average number of hours worked per week x 52 weeks per year)/12 months per year. Prucha testified inconsistently about his gross hourly wage. This estimate of Prucha's gross income is computed based on Prucha's testimony that he earned \$22.25 an hour, the highest wage to which Prucha testified.

1 Husband requests *de novo* review only conditionally, asking that we engage
2 in *de novo* review on appeal if we grant wife's request for *de novo* review on cross-
3 appeal, but not otherwise. Although wife requests *de novo* review on cross-appeal, she
4 has not demonstrated that this is an "exceptional case" warranting *de novo* review.⁴ ORS
5 19.415(3)(b); ORAP 5.40(8)(c); *Kaptur and Kaptur*, 256 Or App 591, 596 n 2, 302 P3d
6 819 (2013). Accordingly, we decline to review *de novo* on either the appeal or cross-
7 appeal. Instead, we review as follows.

8 Whether there has been a "substantial change in economic circumstances of
9 a party" sufficient to warrant reconsideration of an award of spousal support under ORS
10 107.135(3)(a) presents a mixed question of fact and law. We review the trial court's
11 implicit and explicit findings of historical fact regarding the parties' economic
12 circumstances to determine whether those findings are supported by any evidence in the
13 record. *Long and Leduc*, 237 Or App 652, 654, 241 P3d 340 (2010). We review the
14 court's determination that those facts constitute a "substantial change in economic

⁴ Wife asserts that the trial court determined that her remarriage alone, without regard for its effect on her economic circumstances, constituted the threshold substantial change in circumstances sufficient to permit reconsideration of spousal support under ORS 107.135. She further contends that the trial court erred by failing to assess the economic effect of remarriage, and that that legal error by the trial court makes *de novo* review appropriate on the cross-appeal.

Wife is correct that it would have been error for the trial court to conclude that the fact of remarriage alone constituted a substantial change in wife's economic circumstances, regardless of the remarriage's actual effect on wife's economic circumstances. *Thomas and Thomas*, 160 Or App 365, 371, 981 P2d 382 (1999). However, we disagree that the trial court's decision, when viewed in context of the record as a whole, reflects that legal error. Taken as a whole, the record demonstrates that the trial court properly focused on the actual economic effects of remarriage on wife.

1 present, then the trial court must determine what amount of support is "just and equitable
2 under the totality of the circumstances." *Frost*, 244 Or App at 23 (internal quotation
3 marks and ellipses omitted); *see also Barron and Barron*, 240 Or App 391, 397, 246 P3d
4 500 (2011) (setting forth framework).

5 A. *Substantial, Unanticipated Change in Economic Circumstances*

6 Here, the trial court correctly concluded that wife's remarriage resulted in a
7 substantial, unanticipated change in the economic circumstances of the parties sufficient
8 to permit the court to reconsider the award of spousal support. First, husband and wife
9 both testified that they did not anticipate wife's remarriage at the time of the initial award
10 of spousal support. Given that testimony, the court correctly found that wife's remarriage
11 was unanticipated.

12 Second, with respect to whether the unanticipated remarriage substantially
13 changed wife's economic circumstances, the key question is the extent to which Prucha's
14 income was, in fact, *available* to the new marital household. *Rubey and Rubey*, 165 Or
15 App 616, 622, 996 P2d 1006 (2000). Although wife contends that the trial court erred by
16 finding that any of Prucha's income was available to her, given the evidence of the
17 couple's separate finances, other evidence supports the court's implicit finding. Prucha
18 testified that his intent in marrying wife was to take care of her for the rest of his life, and
19 wife testified that it would be fair to eliminate the \$500 monthly transitional support
20 award, provided that she could seek restoration of the award if the new marriage failed.
21 That testimony supports the inferences that some portion of Prucha's income was

1 available to wife, and that the availability of that income reduced her total need for
2 support by one third in a way that had not been contemplated at the time of dissolution.
3 That, in turn, permitted the trial court to conclude--correctly--that there had been a
4 threshold unanticipated "substantial change in economic circumstances" of wife sufficient
5 to authorize reconsideration of spousal support under ORS 107.135(3)(a).

6 Wife also argues that *Boni and Boni*, 208 Or App 592, 145 P3d 331 (2006),
7 precludes the conclusion that her remarriage resulted in a "substantial, unanticipated
8 change" to her economic circumstances. It does not. In *Boni*, we addressed whether the
9 wife's remarriage qualified as a "substantial, unanticipated change" to her economic
10 circumstances sufficient to permit reconsideration of spousal support established through
11 a stipulated support agreement. 208 Or App at 598-99. At the time of the dissolution in
12 *Boni*, the wife was cohabitating and sharing expenses with the man who became her
13 spouse. *Id.* at 594-95. The parties' stipulated agreement regarding spousal support took
14 into consideration the wife's expense-sharing arrangement with her partner in setting the
15 amount of spousal support. *Id.* at 598-99. Because the wife's remarriage did not change
16 her financial relationship with her new spouse, and--more to the point--because the
17 parties' stipulated spousal support award accounted for that financial relationship, we
18 concluded that the remarriage did not constitute a change in the wife's economic
19 circumstances sufficient to permit reconsideration of spousal support. *Id.*

20 Here, by contrast, the initial support award did not take into account wife's
21 relationship with Prucha; at the time of dissolution, wife did not know in what direction

1 that relationship was headed. In addition, unlike in *Boni*, wife's marriage to Prucha
2 changed her financial relationship with Prucha. In marrying wife, Prucha committed
3 himself to supporting wife in a way that he had not been committed to doing at the time
4 of dissolution. Moreover, as a result of that support, wife herself felt that her
5 circumstances had changed sufficiently to reduce her monthly award by eliminating the
6 \$500 transitional support that she was scheduled to receive for another year and five
7 months. Accordingly, *Boni* does not require a different outcome in this case. We
8 therefore conclude that the trial court correctly determined that wife's remarriage, with its
9 attendant benefits, sufficiently changed wife's economic circumstances to permit
10 reconsideration of spousal support.

11 B. *"Just and Equitable" Support in the Light of the Award's Original Purpose*

12 The next question is whether the trial court acted within its discretion by
13 modifying the spousal support award by eliminating the \$500 monthly transitional
14 support while maintaining the \$1,000 monthly maintenance support. When making the
15 discretionary determination whether and how to modify an award of spousal support
16 because of the obligee spouse's remarriage, the key inquiry for the trial court is the extent
17 to which the remarriage satisfies the purposes behind the original spousal support award.
18 *Bates and Bates*, 303 Or 40, 46, 733 P2d 1363 (1987); *Frost*, 244 Or App at 23. The
19 court's ultimate task is to determine a just and equitable amount of support, in the light of
20 how the remarriage has--or has not--satisfied the original purposes of the award. *Frost*,
21 244 Or App at 23-24. Here, neither party claims that the court abused its discretion by

1 eliminating transitional support,⁵ and the court permissibly concluded that continuing the
2 \$1,000 monthly maintenance support was just and equitable in view of the original
3 purposes underlying the award of spousal support.

4 As an initial matter, the court permissibly concluded that most of the
5 original purposes behind the award of spousal support were not satisfied by wife's
6 remarriage. The dissolution judgment stated that the purposes of the award were to
7 support wife because of the length of the marriage, because wife had sacrificed her own
8 career to advance husband's career and to care for husband's son, because of the
9 difference in the parties' incomes, and because wife did not have the same benefits from
10 employment that husband did. Wife's remarriage did not satisfy most of those purposes.
11 It did not change the length of her prior marriage, it did not alter the career sacrifices that
12 she made to advance husband's career and to care for husband's son, and it did not result
13 in wife receiving full benefits from employment (or through Prucha).

14 Further, although wife's remarriage reduced the parties' income gap, the
15 trial court acted within its discretion in concluding that the reduction in the differential
16 between the parties' incomes did not fully satisfy the award's original purpose. The
17 dissolution judgment stated that husband could seek to modify spousal support if wife

⁵ Although wife argues on cross-appeal that the trial court erred by eliminating transitional support, she bases that argument on the theory--which we have rejected--that the court lacked statutory authority to reconsider the award of spousal support. Wife does not assert that it was an abuse of discretion for the trial court to eliminate transitional support, provided that the court had the predicate authority to reconsider the spousal support award.

1 consistently earned \$3,600 a month with full benefits. That indicates that one of the
2 primary purposes of the spousal support award was to provide support to wife, in the light
3 of her contributions to the parties' 20-year marriage, until she was earning \$3,600 a
4 month, with full benefits, independently of the spousal support award. Wife's remarriage
5 to Prucha did not cause her income to reach that level, even if we assume that all of
6 Prucha's income, except that amount committed to his support and insurance obligations
7 for his son, was available to the marital household upon his marriage to wife.

8 Specifically, at the time of the modification hearing, as a result of
9 remarriage and new employment, wife's monthly potential shared income, excluding
10 spousal support, was, at most, \$2,530.70. Prucha had income of \$3,393.07 per month
11 after fulfilling his child support obligation and paying for his son's insurance coverage.
12 Wife was earning approximately \$1,668.33 per month from her job. Therefore, their
13 household potential shared income was \$5,061.40, if all of Prucha's income is treated as
14 available to the marital household, apart from that portion of his income committed to his
15 son. If wife is treated as having access to half that amount, her potential shared income
16 on remarriage was only \$2,530.70. *Barron*, 240 Or App at 401-02 (illustrating
17 computation of a spouse's potential shared income upon remarriage); *Hall and Hall*, 86
18 Or App 51, 55, 738 P2d 218 (1987) (same). In fact, even if wife's \$1,000 monthly
19 maintenance support award is added to wife's portion of the household potential shared
20 income, she would still have an income under the \$3,600 monthly income that the
21 support award was intended to help wife achieve.

1 Husband argues that the provision in the dissolution judgment specifying
2 that husband could seek to modify spousal support if wife consistently earns \$3,600 a
3 month is unlawful to the extent that it prohibits modification of support before wife
4 achieves that income. He further suggests that, as a result, we should not consider the
5 \$3,600 target income for wife in assessing whether the trial court abused its discretion in
6 continuing maintenance support. We reject that argument. We do not read the provision
7 to unlawfully limit husband's ability to request modification of spousal support upon a
8 substantial, unanticipated change in the parties' economic circumstances, even if wife has
9 not yet achieved a \$3,600 monthly income. Indeed, the trial court did not read that
10 provision to so limit husband's ability to request modification; the trial court, in fact,
11 modified spousal support even though wife had not achieved that income level. Rather,
12 we consider the provision because it is probative of the original spousal support award's
13 objective. It shows that one purpose of spousal support is to provide financial support to
14 wife until she can achieve a consistent income level of \$3,600 a month, with full benefits.
15 Because that purpose has not been satisfied, by wife's remarriage or otherwise, the trial
16 court permissibly concluded that it was just and equitable to continue the \$1,000 monthly
17 maintenance support.

18 In sum, the record before the trial court permits the conclusion that wife's
19 remarriage did not address some of the purposes of the original spousal support award,
20 and did not fully satisfy the purposes that it did address. The record also permits the
21 conclusion that it remains just and equitable for wife to receive \$1,000 monthly

- 1 maintenance support. Accordingly, the trial court acted within its discretion when it
- 2 opted to continue maintenance support, after eliminating transitional support.
- 3 Affirmed on appeal and cross-appeal.