[Cite as *Somers v. Somers*, 2010-Ohio-1831.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WENDELL J. SOMMERS	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
DEBRA K. SOMMERS	:	Case No. 2009CA00188
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Family Court Division, Case No. 2006DR01351
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 26, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
WENDY J. ROCKENFELDER 5502 Market Avenue North Suite B Canton, OH 44721	STANLEY R. RUBIN 437 Market Avenue North Canton, OH 44702

Farmer, J.

{¶1} On April 5, 1992, appellant, Wendell Sommers, and appellee, Debra Sommers, were married. The couple had three children. On September 12, 2007, a divorce decree was filed terminating the parties' marriage and setting forth child and spousal support obligations pursuant to a separation agreement. Appellant was to pay appellee $1,500 per month in child support, and $6,500 per month in spousal support until the marital residence was sold, then $5,500 per month. The spousal support was to continue for fifty-four months.

{¶2} On February 29, 2008, appellant filed a motion to modify his child and spousal support obligations due to business failures. Hearings before a magistrate were held on September 10, and October 21, 2008. By decision filed January 30, 2009, the magistrate recommended imputing income to appellant in the amount of $60,000, ordered appellant to seek work, reduced his child support obligation, and reduced his spousal support obligation to $1,500 per month for one year and thereafter it would be increased to $2,500 per month. The magistrate also extended the term of the spousal support by seventeen months.

{¶3} Appellant filed objections. A hearing was held on June 16, 2009. By judgment entry filed June 17, 2009, the trial court overruled the objections and approved and adopted the magistrate's decision.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE TRIAL COURT ABUSED ITS DISCRETION IN AUTOMATICALLY INCREASING APPELLANT'S SPOUSAL SUPPORT OBLIGATION AFTER ONE YEAR AND IN EXTENDING THE DURATION BY 17 MONTHS."

II

{¶6} "THE TRIAL COURT'S REFUSAL TO MAKE APPELLANT'S CHILD SUPPORT MODIFICATION RETROACTIVE TO THE DATE OF THE FILING OF HIS REQUEST AMOUNTED TO AN ABUSE OF DISCRETION."

III

{¶7} "THE TRIAL COURT'S REFUSAL TO MAKE APPELLANT'S SPOUSAL SUPPORT MODIFICATION RETROACTIVE TO THE DATE OF THE FILING OF HIS REQUEST AMOUNTED TO AN ABUSE OF DISCRETION."

IV

{¶8} "WHERE THE TRIAL COURT IMPUTED INCOME TO APPELLANT, IT ERRED IN ALSO REQUIRING HIM TO SEEK WORK."

V

{¶9} "THE TRIAL COURT ERRED IN REFUSING TO DEVIATE FROM THE WORKSHEET-CALCULATED AMOUNT OF CHILD SUPPORT WHERE APPELLANT HAS SHARED PARENTING AND IS RESPONSIBLE FOR OTHER SIGNIFICANT EXPENSES FOR THE PARTIES' CHILDREN."

I

{¶10} Appellant claims the trial court erred in automatically increasing his spousal support obligation after one year and extending the obligation by seventeen months. We disagree.

{¶11} The trial court is provided with broad discretion in deciding what is equitable upon the facts and circumstances of each case. *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64. We cannot substitute our judgment for that of the trial court unless, when considering the totality of the circumstances, the trial court abused its discretion. *Holcomb. v. Holcomb* (1989), 44 Ohio St.3d 128. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶12} Under R.C. 3105.18, a trial court must base its spousal support decision on whether it is appropriate and reasonable under the circumstances. *Harris v. Harris,* Ashtabula App. No.2002-A-81, 2003-Ohio-5350. This determination is governed by the following factors set forth under R.C. 3105.18(C):

{¶13} "(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 [3105.17.1] of the Revised Code;

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

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

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

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

{¶18} "(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;

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

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

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

{¶22} "(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;

{¶23} "(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;

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

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

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

{¶27} In the magistrate's January 30, 2009 decision, as approved by the trial court, the magistrate recommended the following:

{¶28} "**SPOUSAL SUPPORT:** Spousal support is modified as follows: Husband shall pay spousal support in the amount of $1,500 per month for a period of 12 months commencing 11/1/2008. Commencing 11/1/2009, Husband shall pay spousal support in the amount of $2,500 for a period of 44 months. The Court shall retain continuing jurisdiction over the amount and duration of spousal support. All arrears shall remain due and payable."

{¶29} It is important to note that the parties agreed to a specific aggregate spousal support amount in their separation agreement, incorporated into the divorce decree, as follows:

{¶30} "The Husband shall pay as spousal support (alimony) to the Wife the sum of Six Thousand Five Hundred Dollars ($6,500.00) PER MONTH, plus 2% processing fee, commencing on August 1, 2007, and continuing on the first day of each consecutive month for a total of fifty-four (54) months, for a total set amount of spousal support to be paid to the Wife in the amount of $303,000, subject to earlier termination only as provided below. Once the martial Residence is sold, the Husband shall pay as spousal support (alimony) to the Wife the sum of Five Thousand Five Hundred Dollars ($5,500.00) PER MONTH, plus 2% processing fee, and continuing on the first day of each consecutive month remaining upon the original fifth-four (54) month obligation."

{¶31} In the magistrate's decision, this aggregate sum was recognized and reconciled with appellant's reversal of fortune:

{¶32} "Under the parties' Separation Agreement, Husband was to pay Wife $6,500 per month in spousal support; that amount was to be reduced to $5,500 per month after the marital residence sold. The spousal support would extend for a period

of 54 months. The provision in the Separation Agreement also makes reference to a 'total set amount of spousal support to be paid to the Wife in the amount of $303,000…'

{¶33} "(The statements appear to be inconsistent because $6,500 x 54 months = $351,000. $5,500x54 months = $297,000.)

{¶34} "**The court shall reconcile this apparent inconsistency by assuming that the marital residence was going to be sold part of the way through the term of spousal support (as the parties had anticipated) such that there would be a number of months at $6500 and the remaining months at $5500 but that such number would be set at an amount $303,000 over a time period of about 54 months.

{¶35} "The parties provided that spousal support could be modified 1) if Husband's business failed, 2) if the marital residence was not sold in a timely fashion.

{¶36} "**The court finds that both of these circumstances have occurred – Husband's business has failed, AND the marital residence was not sold in a timely fashion, instead, it is in foreclosure.

{¶37} "The Separation Agreement provides that the Court may 1) lower the amount of monthly spousal support, 2) lengthen the term, or 3) make adjustments to the *amount* of spousal support to the Wife.

{¶38} "**Therefore, the Court finds that it has jurisdiction to modify the amount and/or term of spousal support *regardless* of the 'set amount' in the agreement."

{¶39} Appellant argues the increase of support from $1,500 for one year and then $2,500 for forty-four months was not according to law. However, what appellant neglects to consider is that the agreed aggregate sum must somehow be fulfilled.

{¶40} It is obvious from the uncontested findings that the trial court had a problem with appellant's apparent lack of motivation in seeking some employment, and relying on the support of a live-in, a small amount of quarterly payments from a design and development business, and $57,185 deposited into his bank accounts during the pendency of the hearings.

{¶41} Pursuant to the parties' agreement, we find the trial court was empowered to modify and then increase the amount due for monthly spousal support in order to satisfy the aggregate amount and attempt to free each party from each other. Further, the total amount was adjusted to $128,000. The amount due from the date of the divorce to the adjustment date was in excess of $78,000, but the total was not near the agreed aggregated sum.

{¶42} Upon review, we find the trial court did not abuse its discretion in increasing appellant's spousal support obligation after one year.

{¶43} Assignment of Error I is denied.

II, III

{¶44} Appellant claims the trial court erred in setting November 1, 2008 as the date spousal support and child support was to be adjusted instead of February 29, 2008, the date he filed his motion to modify. We disagree.

{¶45} If a court determines that a support order should be modified, it may make the order effective from the date the motion to modify was filed. *Tobens v. Brill* (1993), 89 Ohio App.3d 298; *Murphy v. Murphy* (1984), 13 Ohio App.3d 388. The determination of whether to make a modification order retroactive is a matter within the trial court's sound discretion. *Murphy*; *Blakemore*.

{¶46} R.C. 3119.84 governs modification of support order after notice of petition to modify and states, "A court with jurisdiction over a court support order may modify an obligor's duty to pay a support payment that becomes due after notice of a petition to modify the court support order has been given to each obligee and to the obligor before a final order concerning the petition for modification is entered."

{¶47} Appellant argues the November 1, 2008 date is arbitrary, has no relation to the facts, and creates an unfair amount of arrearages. He argues the conditions for modification per the parties' separation agreement were met at the date of the filing of his motion to modify, February 29, 2008:

{¶48} "The spousal support provisions in this Agreement are modifiable and the parties agree that the court shall only have jurisdiction to modify the obligation as follows: in the event that the Husband's businesses fail or that the marital Residence is not sold in a timely fashion, the Court shall retain jurisdiction to modify this Section 3 in order to lower the monthly amount of spousal support to be paid, lengthen the term of the spousal support or make adjustments to the amount of in spousal support to the Wife. This restricted modification provision has been specifically included by the parties in recognition of the current depressed real state (sic) market in Northeastern Ohio and is not intended to provide for modification for any other change of circumstance."

{¶49} Although it is true that as of the date of appellant filing his motion the conditions were met, nonetheless, motions for contempt filed by appellee and two continuances filed by appellant caused the hearings to be delayed until September 10, and October 21, 2008. Also, based upon the evidence and the magistrate's findings,

the contempt motions were deemed not to be frivolous. The trial court consolidated the contempt hearings with the motion to modify.

{¶50} We find November 1, 2008 was not an arbitrary date, but was the next calendar month after the completion of the evidentiary hearings on all the issues. Because the date has a relationship to the completion of the taking of evidence, we cannot find it was an abuse of discretion.

{¶51} Assignments of Error II and III are denied.

IV

{¶52} Appellant claims the trial court erred in ordering him to seek work. We disagree.

{¶53} Appellant argues it is improper for a trial court to impute income and also order a party to seek work as in the case sub judice. Appellant does not challenge the imputation of income, just the added seek work order. In support of his argument, appellant cites the case of *Avery v. Avery,* Greene App. Nos. 2002 CA 121, 2003 CA 1, 2002 CA 105, 2003-Ohio-4975, ¶70, wherein our brethren from the Second District in dicta stated, "perhaps it would be appropriate for the trial court to order her to seek work and/or to impute income on her behalf." The use of the conjunction "and/or" implies trial courts may impute income *and* issue a seek work order.

{¶54} It is obvious from the magistrate's language in her decision she believed appellant was malingering and not actively seeking gainful employment. Appellant is still working, trying to build houses in a depleted housing market. Naturally, the trial court's concern is for the maintenance of the children. Appellee was forced to obtain public assistance because of appellant's business failures. We find by ordering

appellant to seek work, the trial court was endeavoring to motivate appellant given the amount of pending support and arrearages.

{¶55} Upon review, we find the trial court did not err in ordering appellant to seek work.

{¶56} Assignment of Error IV is denied.

V

{¶57} Appellant claims the trial court erred in not deviating from the worksheet-calculated child support amount. We disagree.

{¶58} Appellant argues the amount should be adjusted because he has custody of the children fifty percent of the time and pays significant spousal support and other expenses of care and maintenance for the children.

{¶59} R.C. 3119.23 governs factors for deviation and states the following:

{¶60} "The court may consider any of the following factors in determining whether to grant a deviation pursuant to section 3119.22 of the Revised Code:

{¶61} "(A) Special and unusual needs of the children;

{¶62} "(B) Extraordinary obligations for minor children or obligations for handicapped children who are not stepchildren and who are not offspring from the marriage or relationship that is the basis of the immediate child support determination;

{¶63} "(C) Other court-ordered payments;

{¶64} "(D) Extended parenting time or extraordinary costs associated with parenting time, provided that this division does not authorize and shall not be construed as authorizing any deviation from the schedule and the applicable worksheet, through the line establishing the actual annual obligation, or any escrowing, impoundment, or

withholding of child support because of a denial of or interference with a right of parenting time granted by court order;

{¶65} "(E) The obligor obtaining additional employment after a child support order is issued in order to support a second family;

{¶66} "(F) The financial resources and the earning ability of the child;

{¶67} "(G) Disparity in income between parties or households;

{¶68} "(H) Benefits that either parent receives from remarriage or sharing living expenses with another person;

{¶69} "(I) The amount of federal, state, and local taxes actually paid or estimated to be paid by a parent or both of the parents;

{¶70} "(J) Significant in-kind contributions from a parent, including, but not limited to, direct payment for lessons, sports equipment, schooling, or clothing;

{¶71} "(K) The relative financial resources, other assets and resources, and needs of each parent;

{¶72} "(L) The standard of living and circumstances of each parent and the standard of living the child would have enjoyed had the marriage continued or had the parents been married;

{¶73} "(M) The physical and emotional condition and needs of the child;

{¶74} "(N) The need and capacity of the child for an education and the educational opportunities that would have been available to the child had the circumstances requiring a court order for support not arisen;

{¶75} "(O) The responsibility of each parent for the support of others;

{¶76} "(P) Any other relevant factor."

{¶77} On the issue of child support, the trial court determined the following:

{¶78} "Husband's child support obligation is modified to $215.39 per month per child ($646.18 total for 3 children) when health insurance is provided plus processing fees and $215.58 per month per child ($646.74 for 3 children total) when health insurance is not provided plus processing fees through the Stark County CSEA commencing 11/1/2008. Cash medical is ordered in the amount of $53.58. Husband shall also pay $150.00 per month plus processing fees toward the arrearages. (The amount paid toward arrearages shall increase as the children emancipate such that the total child support payment – current plus arrearage payment – remains at $796.18 until all arrears are paid in full.)"

{¶79} Given the disparity of the parties' income (although appellant's was imputed), the loss of the marital residence to foreclosure, and the substantial reduction in spousal support payments, we cannot find that the trial court abused its discretion. R.C.3119.24 does not mandate a reduction, but leaves it to the wisdom of the trial court. In the matter sub judice, the reversal of appellant's fortune caused a substantial reduction in the aggregate spousal support listed in the parties' separation agreement, approximately $100,000. We find it would be an abuse of discretion to further diminish the lives of the children. The children should not be victimized by the fact that appellant has to pay arrearages.

{¶80} Upon review, we find the trial court did not err in not deviating from the worksheet-calculated child support amount.

{¶81} Assignment of Error V is denied.

{¶82} The judgment of the Court of Common Pleas of Stark County, Ohio, Family Court Division is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Delaney, J. concur.

_s/ Sheila G. Farmer_____

_s/ W. Scott Gwin_____

_s/ Patricia A. Delaney_____

JUDGES

SGF/sg 0319

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

WENDELL J. SOMMERS	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
DEBRA K. SOMMERS	:	
Defendant-Appellee	:	CASE NO. 2009CA00188

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, Family Court Division is affirmed. Costs to appellant.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ Patricia A. Delaney

JUDGES