

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

BECKIE J. SUTMOLLER,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-03-020
- vs -	:	<u>OPINION</u>
	:	10/24/2011
NICO SUTMOLLER,	:	
Defendant-Appellant.	:	

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 10 DR 33483

Allen Law Firm, LLC, Mitchell W. Allen, 5947 Deerfield Blvd., Suite 201, Mason, Ohio 45040,
for plaintiff-appellee

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defendant-appellant

HENDRICKSON, P.J.

{¶1} Defendant-appellant, Nico Sutmoller, appeals the decision of the Warren County Court of Common Pleas, Domestic Relations Division, ordering him to pay spousal support and to secure the support obligation by maintaining a life insurance policy payable to plaintiff-appellee, Beckie J. Sutmoller. For the reasons discussed below, we reverse the trial court's decision.

{¶2} The parties were married on March 21, 1983. On February 4, 2011, the parties were granted a divorce. In its final judgment and decree of divorce, the trial court ordered appellant to pay appellee spousal support in "the sum of \$1,500.00 per month, plus 40% of any gross commissions, for a period 9½ years, or upon the death of either party or [appellee's] remarriage or her cohabitation with an unrelated adult in a relationship similar to marriage, whichever event occurs earlier." The court further ordered appellant to secure the spousal support obligation by "maintain[ing] \$100,000.00 of life insurance payable to [appellee] through his employment." Appellant timely appealed, alleging two assignments of error.

{¶3} Assignment of Error No. 1:

{¶4} "THE TRIAL [COURT] COMMITTED REVERSIBLE ERROR IN THE AMOUNT AND MANNER OF SPOUSAL SUPPORT IT GRANTED TO APPELLEE/WIFE."

{¶5} Assignment of Error No. 2:

{¶6} "THE TRIAL [COURT] COMMITTED REVERSIBLE ERROR IN ORDERING HUSBAND TO MAINTAIN LIFE INSURANCE PAYABLE TO WIFE TO SECURE SPOUSAL SUPPORT."

{¶7} In his first assignment of error, appellant argues that the trial court erred by failing to place a limit or maximum dollar amount on that which appellee is entitled to receive from his yearly gross commissions. Appellant contends that the trial court abused its discretion in ordering him to pay 40% of his gross commissions to appellee, in addition to the \$1,500 a month, as the court's order does not take into consideration his ability to pay or appellee's need. Because the award of spousal support is not based on appellee's need, appellant maintains that the court's order requiring him to pay a fixed percentage of his gross commissions acts as a penalty.

{¶8} "[A] trial court is given wide latitude in determining the amount of spousal support to be awarded, as long as the trial court properly considers the statutory factors of R.C. 3105.18(C)." *Guenther v. Guenther*, Butler App. No. CA2001-04-072, 2002-Ohio-376, at 4-5, citing *Schneider v. Schneider* (1996), 110 Ohio App.3d 487, 494. "A reviewing court cannot substitute its judgment for that of the trial court unless, considering the totality of the circumstances, the trial court abused its discretion." *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67. An abuse of discretion constitutes more than an error of law or judgment; it requires a finding that the trial court acted unreasonably, arbitrarily or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶9} An award for spousal support must be appropriate and reasonable. R.C. 3105.18. "'Need' is an essential element in determining whether spousal support is 'appropriate and reasonable.'" *Carnahan v. Carnahan* (1997), 118 Ohio App.3d 393, 399. "When * * * spousal support is not limited to the payee's needs, the award has the effect of punishing the payer and rewarding the payee. * * * Each of the factors in the present statute, R.C. 3105.18(C)(1)(a)-(n), is related, directly, or indirectly, either to the obligee spouse's need for sustenance or the obligor spouse's ability to pay." (Internal citations omitted; internal quotation marks omitted.) *Id.* at 399-400.

{¶10} In *Kunkle v. Kunkle*, 51 Ohio St.3d at 71, the Supreme Court held that "absent an agreement between payor and payee spouses, it is improper to include in an award of sustenance alimony a clause requiring the payor to pay alimony based on a fixed percentage of the payor's income, gross or otherwise, when the award is in the form of a penalty or is not based on the payee's need." In *Kunkle*, the trial court ordered appellant-husband to pay appellee-wife support alimony in the sum of 33 $\frac{1}{3}$ % of husband's gross earned income, with a minimum monthly support award of \$2,000. *Id.* at 69. Because the trial court fashioned the support award in a manner that would fluctuate monthly, the Supreme Court held that the trial

court was "merely * * * guessing what the needs and abilities of appellee and appellant [would] be." *Id.* at 71. "[A]n award based solely on a percentage of appellant's income, gross or otherwise, does not take into consideration appellee's needs or appellant's ability to pay." *Id.* at 70.

{¶11} Although *Kunkle* was decided before the current version of R.C. 3105.18(C) became effective, the rationale behind the Supreme Court's decision is still applicable. The award of spousal support must be based on a spouse's need and cannot be used as a means of penalizing or rewarding either party. *Kunkle* at 71; *Carnahan*, 118 Ohio App.3d at 399.

{¶12} In the present case, the trial court found that appellant earns a base salary of \$75,000 per year, plus commissions, which are generated on work completed in earlier years. In 2009, appellant made \$95,754, and in 2010, appellant made \$106,649. The trial court imputed an annual income of \$20,400 to appellee and further found that appellee receives annual rent in the amount of \$9,600. Thereafter, the court determined spousal support under R.C. 3105.18(C) was appropriate and ordered appellant to pay appellee spousal support in "the sum of \$1,500.00 per month, plus 40% of any gross commissions, for a period 9½ years, or upon the death of either party or [appellee's] remarriage or her cohabitation with an unrelated adult in a relationship similar to marriage, whichever event occurs earlier." In reaching this decision, the trial court did not discuss the monthly needs or expenses of appellee. Further, there is nothing in the record that indicates the trial court considered appellant's ability to pay given the fluctuating nature of his yearly commissions. Rather, from the record, it appears that the trial court was merely guessing about the needs and abilities of appellee and appellant. The trial court's decision ordering appellant to pay \$1,500 per month, plus 40% of any gross commissions was therefore unreasonable and an abuse of its discretion.

{¶13} Accordingly, appellant's first assignment of error is sustained. The spousal support award is reversed and this matter is remanded to the trial court for a recalculation of the amount of spousal support appellant is required to pay.

{¶14} In his second assignment of error, appellant contends that the trial court erred by ordering him to maintain a life insurance policy with appellee as the named beneficiary because the trial court did not expressly require spousal support to continue beyond his death.

{¶15} R.C. 3105.18(B) states that "[a]ny award of spousal support made under this section shall terminate upon the death of either party, *unless the order containing the award expressly provides otherwise.*" (Emphasis added.) "Expressly means 'in an express manner; in direct or unmistakable terms; explicitly; the opposite of impliedly.' Black's Law Dictionary (6 Ed.Rev.1990)." *Woodrome v. Woodrome* (Mar. 26, 2001), Butler App. No. CA2000-05-074, at 3. In the present case, the trial court expressly determined that the "death of either party" terminates the support order. Accordingly, that portion of the divorce decree ordering appellant to maintain life insurance in order to secure his spousal support obligation is unreasonable and inappropriate. Appellant's second assignment of error is therefore sustained, and that portion of the trial court's order requiring appellant to secure his spousal support obligation by maintaining a life insurance policy payable to appellee is vacated.

{¶16} Judgment reversed and remanded.

PIPER and HUTZEL, JJ., concur.