

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

SUSAN BRANDNER, :  
 :  
 Plaintiff-Appellant, : CASE NO. CA2011-07-136  
 :  
 - vs - : OPINION  
 : 7/2/2012  
 :  
 DAVID S. BRANDNER, :  
 :  
 Defendant-Appellee. :

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
DOMESTIC RELATIONS DIVISION  
Case No. DR09-09-1013

John D. Smith Co., LPA, Andrew P. Meier, 140 North Main Street, Suite B, Springboro, Ohio 45066, for plaintiff-appellant

Jacqueline M. Handorf, 5740 Gateway Boulevard, Suite 202, Mason, Ohio 45040, for plaintiff-appellant

Fiehrer & Fritsch, LLC, Lawrence P. Fiehrer, Robinson-Schwenn Building, 10 Journal Square, Suite 400, Hamilton, Ohio 45011-3459, for defendant-appellee

**POWELL, P.J.**

{¶ 1} The question posed in this appeal is whether the money paid to a husband for a noncompete provision of the sale of his business should be excluded from his income calculations in the decision to modify his child and spousal support obligations. We find the

determination of income for spousal support is not limited by the nonrecurring income exception of R.C. 3119.01 and reverse part of the trial court's decision.

{¶ 2} A judgment entry and decree of divorce between David S. Brandner and Susan Brandner was filed in Butler County Domestic Relations Court in June 2010. The decree required husband to pay child support for the couple's two minor children, and spousal support to wife for 47 months. The trial court reserved jurisdiction to modify or terminate spousal support. The decree ordered husband to sell the pharmacy business and the couple to sell the marital home, with the proceeds of both divided equally.

{¶ 3} Five months after the decree was filed, husband moved to modify and reduce both his child and spousal support obligations. He argued that with the business now sold, his income as a pharmacist with Walgreens—the purchaser of his business—is \$118,000, a reduction from his previous annual salary of \$220,000 before the divorce.

{¶ 4} Wife did not contest that husband's annual salary is less than before, but argued that the support modification determination should also consider his salary along with the \$280,500 Walgreens gave husband as payment for agreeing not to compete with Walgreens within a 10-mile radius of his former pharmacy for five years.

{¶ 5} The contract for sale of the business indicates the purchase price for the purchased assets and the covenants and agreements shall be "an amount equal to the Records Amount, plus the Inventory Amount, plus the Non-Compete Payment." According to the decision issued by the domestic court magistrate, the parties apparently agreed on the record that the noncompete agreement payment was not marital property, and that issue has not been challenged.

{¶ 6} After holding a hearing on the modification motion, the magistrate found the one-time nature of the noncompete payment did not require a finding that it was nonrecurring income; rather, the magistrate found the payment constituted future wages. The magistrate

said that husband, by entering into the noncompete agreement, was agreeing to limit his income potential for the life of the agreement and this payment supplemented his income for five years. The magistrate divided \$280,500 by the term of five years and added that amount to husband's annual income. Based on that calculation, the magistrate modified the spousal support amount accordingly. The magistrate did not find sufficient change to modify the child support award.

{¶ 7} Husband objected to the magistrate's determination for both child and spousal support. The trial court overruled its magistrate, finding the noncompete payment was a one-time payment and was excludable from husband's income for child and spousal support purposes. The trial court also made additional findings, particularly in reference to child support, but wife limits her appeal to the noncompete payment issue.

{¶ 8} Assignment of Error:

{¶ 9} THE TRIAL COURT ERRED IN REVERSING THE MAGISTRATE'S DECISION AND FINDING THAT MONEY RECEIVED FOR SIGNING A NON-COMPETE AGREEMENT SHOULD NOT BE INCLUDED IN GROSS INCOME FOR PURPOSES OF DETERMINING CHILD AND SPOUSAL SUPPORT.

{¶ 10} Wife argues in her single assignment of error that the noncompete payment to husband represented future wages as a nonmarital asset and should be included in gross income. She also argues that if the noncompete payment is excludable as nonrecurring income for purposes of child support, it is still income that must be considered for purposes of spousal support.

{¶ 11} The purpose of the child support system is to protect the best interests of the child. *Rock v. Cabral*, 67 Ohio St.3d 108 (1993). Whether a prior order for child support should be modified is within the sound discretion of the trial court, and its decision in that regard may be reversed on appeal only for an abuse of that discretion. *Kauza v. Kauza*, 12th

Dist. No. CA2008-02-014, 2008-Ohio-5668, ¶ 10.

{¶ 12} Likewise, a trial court has broad discretion in determining a spousal support award, including whether or not to modify an existing award. *Strain v. Strain*, 12th Dist. No. CA2005-01-008, 2005-Ohio-6035, ¶ 10. Courts must look at the totality of the circumstances and determine whether the trial court acted unreasonably, arbitrarily or unconscionably in modifying a spousal support obligation. *Id.*

{¶ 13} The definitions provided for child support orders in R.C. 3119.01 state in pertinent part that "[a]s used in this chapter," and except as excluded in division (C)(7), "gross income" means the total of all earned and unearned income from all sources during a calendar year, whether or not the income is taxable, and includes income from salaries, wages, overtime pay, and bonuses. Also included are commissions, royalties, tips, rents, dividends, severance pay, pensions, interest, trust income, annuities, social security benefits, including retirement, disability, and survivor benefits that are not means-tested, workers' compensation benefits; unemployment insurance benefits, disability insurance benefits, spousal support actually received, and all other sources of income.

{¶ 14} "Gross income" does not include nonrecurring or unsustainable income or cash flow items, which is defined as "an income or cash flow item the parent receives in any year or for any number of years not to exceed three years that the parent does not expect to continue to receive on a regular basis." "Nonrecurring or unsustainable income or cash flow item" does not include a lottery prize award that is not paid in a lump sum or any other item of income or cash flow that the parent receives or expects to receive for each year for a period of more than three years or that the parent receives and invests or otherwise uses to produce income or cash flow for a period of more than three years. R.C. 3119.01(C).

{¶ 15} The statute dealing with spousal support, R.C. 3105.18, states in pertinent part, that a change of circumstance includes, but is not limited to, any increase or involuntary

decrease in the party's wages, salary, bonuses, living expenses, or medical expenses.

{¶ 16} R.C. 3105.18 provides that spousal support does not include any payment made to a spouse as part of a division or distribution of property or a distributive award, but an award of spousal support may be allowed in real or personal property, or both, or by decreeing a sum of money, payable either in gross or by installments, from future income or otherwise, as the court considers equitable.

{¶ 17} 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 the income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed. R.C. 3105.18.

{¶ 18} As previously noted, the trial court found the \$280,500 noncompete payment should not be included in husband's income for the determination of child and spousal support because it was a one-time, nonrecurring or unsustainable income or cash flow item under R.C. 3119.01. Based on that finding, the trial court used husband's annual income of \$118,000 for its respective decisions.

{¶ 19} After reviewing the statutes applicable for each support obligation, we find the trial court abused its discretion in failing to consider the noncompete payment for purposes of determining whether to modify husband's spousal support obligation.

{¶ 20} The statute dealing with spousal support, R.C. 3105.18(C), does not limit the sources from which income may be derived or the characteristics of income that may be considered for purposes of determining an appropriate award of spousal support. *Karis v. Karis*, 9th Dist. No. 23804, 2007-Ohio-759, ¶ 11.

{¶ 21} Conversely, R.C. 3119.01(C)(7) specifically excludes "[n]onrecurring or unsustainable income or cash flow" from gross income for purposes of child support. *Id.* This exclusion is not found in R.C. 3105.18, nor does R.C. 3105.18 incorporate this limitation

by reference. *Id.*; see also *Feldman v. Feldman*, 8th Dist. No. 92015, 2009-Ohio-4202, (R.C. 3105.18[C][1][a] does not limit the trial court's discretion to consider nonrecurring income); see *MacDonald v. MacDonald*, 8th Dist. No. 96099, 2011-Ohio-5389, ¶ 31-32.

{¶ 22} In *Cooper v. Cooper*, 12th Dist. No. CA2003-05-038, 2004-Ohio-1368, ¶ 23-31, this court, without addressing the issue directly, used the nonrecurring income exception in R.C. 3119.01(C) in deciding that specific income items would not be included in "gross income" when considering child and spousal support obligations. Upon reconsideration of the implications of that decision, we hereby limit the holding of *Cooper* and refuse to follow it as it pertains to using R.C. 3119.01 to limit spousal support income considerations.

{¶ 23} We agree with the reasoning of other Ohio courts cited previously that have found that income for child support and spousal support differ as reflected in the respective statutes. The legislature chose to address income differently for the spousal and child support obligations and we are obliged to follow that mandate.

{¶ 24} Accordingly, R.C. 3119.01 provides a gross income exclusion of nonrecurring or unsustainable income or cash flow items, and we cannot say the trial court abused its discretion when it chose to exclude the noncompete clause payment from its child support modification decision. However, the nonrecurring or unsustainable income or cash flow exception does not apply to spousal support, and therefore, we find the trial court abused its discretion in refusing to consider the noncompete clause payment for its spousal support decision.

{¶ 25} Wife's single assignment of error is sustained only as it pertains to spousal support.

{¶ 26} Judgment is reversed in part and remanded for consideration of the motion to modify spousal support. The judgment is affirmed in all other respects.

RINGLAND and PIPER, JJ., concur.