

SPOUSAL SUPPORT – MODIFICATION

Braun and Braun

302 Or App 778 (2020)

(Armstrong and Tookey, **Aoyagi**)

Issue. Whether the trial court’s modification of Husband’s spousal support obligation was “just and equitable” considering its factual findings.

Facts. Husband and Wife divorced in May 2016 pursuant to a stipulated General Judgment. Husband agreed to pay Wife \$1,800 per month in maintenance spousal support based on the following factors: Husband was 51 years old and Wife was 58 years old; they had been married for 17 years; they enjoyed a “comfortable standard of living” during the marriage; Husband earned \$8,269 from employment; Wife was disabled and unable to work, but had monthly income of \$3,200 from various sources.

In late December 2017 Husband lost his job. In January 2018 he filed a motion to terminate spousal support.

Trial Court. The hearing on Husband’s motion took place in September 2018 and lasted less than an hour. Husband was the only witness. He testified that he applied for jobs but was unable to get new employment. Instead, he decided to use some of his assets to purchase a restaurant with his live-in partner, which they operated together. At the time of the hearing Husband’s income from the restaurant was \$1,000 per month and his living expenses were about \$1,500 per month. Wife argued that Husband failed to prove a change in circumstances, that his job loss was voluntary, and that spousal support should not be modified.

In a written opinion, the trial court found that Husband was terminated from his prior job; that he did not leave his job voluntarily or to avoid his support obligation; that he had been denied unemployment; that he cashed out the retirement he was awarded in the divorce to purchase the restaurant; and that his current monthly income was “less than \$1,000 per month.” The court also found Wife’s income was \$2,863 per month, and that she was still unable to work due to her disability.

The trial court then reduced Husband’s support obligation to \$900 per month. It did not explain why the award was “just and equitable.” The trial court also ordered Husband to pay \$9,900 in arrears (plus interest) and \$3,781 in attorney fees and costs to Wife.

Appeal. Husband appealed and argued that the modified support obligation was not “just and equitable.” He argued that the trial court abused its discretion in requiring him to pay \$900 per month in support when it found his income was only \$1,000 per month. Even if the trial court implicitly found that Husband could earn more from the restaurant in the future, he argued there was no evidence at the hearing to support such a finding. Wife argued that it was reasonable to infer that Husband could, and would, earn much more from the restaurant given the investment he made.

When the court considers income in determining spousal support it can consider earning capacity and potential future income if there is sufficient information to make an informed determination. However, the court cannot speculate.

In this case, the trial court expressly found that Husband's income was \$1,000 per month. It then concluded, without explanation, that it was just and equitable for Husband to pay \$900 per month, indefinitely. The uncontroverted evidence was that Husband's expenses were about \$1,500 per month. Based on this record, there is no discernable basis for the trial court's award. As to Wife's argument that Husband's future income would be much higher, the Court of Appeals said that a person's "hopes that business will improve" is not a finding of actual future earning capacity. Considering the trial court's express findings, the award of \$900 per month was an abuse of discretion.

Result. Reversed and remanded.

SPOUSAL SUPPORT – RETROACTIVE

McKechnie and McKechnie

303 Or App 177 (2020)

(Schorr and James, **Ortega**)

Issue. Whether the trial court erred in awarding Wife retroactive spousal support when her petition did not include such a request.

Facts. Husband and Wife were married for 30 years. Wife filed her petition for dissolution of marriage using the court's DIY forms. She requested a finite term of transitional support, compensatory support and maintenance support, with each obligation commencing from the date of entry of judgment.

Trial Court. At trial there was no discussion of retroactive support. The trial court issued a letter opinion awarding Wife \$300 per month in transitional support for 24 months and \$700 per month in maintenance support, indefinitely. The court made the maintenance support award retroactive to the date of service of Wife's petition.

Before the general judgment was entered, Husband wrote to the court objecting to the retroactivity of the maintenance support award. Wife responded that if she had known she could request retroactive support she would have done so. The trial court responded that it had authority to make the spousal support award that it did and relied on *Triperinas and Triperinas*, 185 Or App 283 (2002). The court then entered a general judgment that included the retroactive support.

Appeal. Husband appealed arguing that the text of ORS 107.105(1)(d) does not permit the trial court to order retroactive spousal support where it has not been requested. The relevant text of ORS 107.105(1)(d) is as follows:

“A general judgment entered under this section may include an amount for support as requested in a petition filed under ORS 107.085 or under a motion for relief made pursuant to ORS 107.095 (1)(b) for which a limited judgment was not entered, payment of which commences no earlier than the date the petition or motion was served on the nonrequesting party, and the amount shall be considered a request for relief that has been decided by the general judgment for purposes of ORS 18.082(3)”

This language was added by the legislature in 2011, several years after *Triperinas* was decided. Thus, *Triperinas* is not informative.

The text of 107.105(1)(d) clearly says that an award of temporary support cannot begin any sooner than the date of service of the request. For the statute to have meaning, the inverse must also be true – that the court cannot make an award of temporary support in a general judgment if there was no such request served on the obligor. The Court of Appeals reviews the legislative history of the 2011 amendment, which also supports Husband's interpretation of the statute. Because Wife did not serve Husband with a request for temporary support, it was error for the trial court to award Wife retroactive spousal support.

Result. Reversed and remanded.

SPOUSAL SUPPORT – MODIFICATION

Minckler and Minckler

306 Or App 414 (2020)

(DeVore and James, **Lagesen**)

Issue. Whether the trial court erred in not taking into account Husband's potential income when it terminated his support obligation.

Facts. Husband and Wife divorced in 2009 after 20 years of marriage. Wife was awarded the long half of the marital estate, including several real properties. Husband was awarded his furniture making business and business property. The court awarded Wife \$2,000 per month in maintenance support, indefinitely. It was anticipated that Husband would earn \$70,000 - \$80,000 annually from his business. Wife was not working at the time of trial, but the court anticipated that she would earn some income from employment and from her investments. It was expected that the disparity in their incomes would persist.

In 2016 Husband filed a motion seeking to reduce or terminate his spousal support obligation. He said his business income had dropped dramatically, so he decided to retire. He was 61 years old. By the time of the modification hearing in November and December of 2017, Husband had sold the building in which he operated his business for \$850,000. He used \$650,000 of the sale proceeds to purchase a retirement home in California. The remaining proceeds were used to pay for his living expenses and the costs of renovating his home, which he was doing himself. He was receiving \$1,540 per month in social security benefits.

Trial Court. At the modification hearing Husband argued that his spousal support should be terminated because he was living off his social security benefits. Husband also argued that he had fewer assets than he had at the time of divorce, and that he should not be forced to use those assets to continue paying support to Wife.

Wife argued that the problems faced by Husband's business were not unanticipated, or even that different from the problems considered by the court in 2009 at the time of divorce. Wife also argued that Husband was still capable of working and earning an income, and that he has many employable skills.

The trial court found that the close of Husband's business was an unanticipated change in circumstances, which eliminated the disparity in the parties' incomes. The court asserted that it had no authority to require Husband to continue working and terminated his spousal support obligation.

Appeal. Wife appealed. She argued that the trial court erred in (1) failing to consider Husband's earning capacity and (2) whether he retired in good faith, as required by ORS 107.135(4)(b).

In this case, the evidence in the record supported the trial court's finding that there was a change in Husband's economic circumstances since the time of divorce based on

Husband's retirement. However, the trial court failed to consider whether this change was "substantial" and, if so, whether it was "just and equitable" to reduce or terminate his support obligation. In order to consider those two questions, the trial court needed to assess Husband's earning capacity. That is especially true when the basis for modification is voluntary early retirement.

Here, the trial court failed to account for Husband's earning capacity. While the trial court was correct that it cannot order Husband to work, that is different from considering Husband's ability to earn an income. Husband's earning capacity is relevant to the question of whether the change in his economic circumstances was "substantial" and whether it was "just and equitable" to terminate his support obligation to Wife.

Result. Reversed and remanded.

SPOUSAL SUPPORT – MODIFICATION

Cargal and Long-Cargal

306 Or App 526 (2020)

(Eagan and Landau, **Powers**)

Issue. Whether the trial court prematurely granted Wife’s motion to dismiss Husband’s motion to modify spousal support.

Facts. Husband and Wife divorced in 2013. Husband was ordered to pay Wife transitional support of \$500 per month for 12 months, and then \$1,000 per month for an additional 12 months. After that, Husband was obligated to pay Wife \$1,500 per month in maintenance spousal support for 36 months.

In 2005 Husband had been diagnosed with ALS. In 2006 his diagnosis was changed to Kennedy’s disease, which is similar to ALS but progresses at a slower rate. At the time of divorce Husband did not claim that his health prevented him from working. After the divorce was finalized, however, Husband worked less and less. In June 2015 he applied for disability benefits.

In August 2015 Wife filed a motion for remedial contempt against Husband for failing to pay child and spousal support. Husband then filed a motion to modify his child and spousal support obligations because he had no income for the past 18 months. The motions were consolidated for hearing.

Trial Court. At the hearing, Husband presented evidence from a vocational evaluator. The evaluator testified that Husband was unable to work, even part-time, and that Husband’s illness was progressive and not likely to improve. On cross examination, Wife’s counsel elicited testimony from the evaluator that Husband was unable to successfully work in 2012 as a result of his physical limitations (prior to the date of divorce).

After the evaluator testified, but before Husband testified, Wife moved to dismiss Husband’s motion to modify child and spousal support. Wife argued that according to Husband’s own expert, he was disabled and unable to work in 2012, prior to entry of the 2013 divorce judgment. Therefore, he failed to prove a change in circumstances. Husband countered that his ability to work in 2012 was irrelevant because the divorce judgment did not reflect any limitation on his ability to work. The trial court dismissed Husband’s motion to modify spousal support and noted that Husband’s condition was known to the parties at the time of divorce.

The court proceeded to hear Husband’s motion to modify child support and Wife’s motion for remedial contempt. The court modified Husband’s child support obligation, but found him in contempt for failing to pay child and spousal support.

Appeal. Husband appealed. He argued that the trial court erred in granting Wife’s motion to dismiss. ORCP 54B(2) authorizes the court, in a bench trial, “to enter a judgment of dismissal based on the insufficiency of the evidence at the close of

plaintiff's case." Dismissal is permitted only where the moving party has failed to present credible evidence on the essential elements of the claim. Otherwise, the motion should be denied.

In this case, the trial court erred in granting Wife's motion to dismiss because Husband had not finished presenting the evidence in his case; he had not even testified. Even through Husband's evaluator testified that he had physical limitations that prevented him from working back in 2012, that does not foreclose the possibility that Husband could have presented evidence explaining how his disease had progressed and impacted his income. Although Husband had the opportunity to present additional evidence about his income and earning capacity as part of the child support modification, the Court of Appeals concludes that the record may have been developed differently but for the premature dismissal of his motion to modify spousal support.

Result. Supplemental judgment vacated and remanded.

SPOUSAL SUPPORT – MODIFICATION

Owens and Owens

307 Or App 418 (2020)

(Armstrong and Aoyagi, **Tookey**)

Issue. Whether Husband's post-dissolution increase in income, and/or the improvement in a minor child's health, constitutes a substantial and unanticipated change in circumstances to support a modification of spousal support.

Facts. Husband and Wife divorced in 2016 after 13 years of marriage. At the time of divorce their two children were ages 10 and 9. The dissolution trial took place over two days in August and September 2016. Neither party was represented by counsel.

Wife worked part-time as a nurse earning \$4,982 per month. Husband worked in automotive sales, earning a base salary and commissions. His gross income in 2014 was \$228,000 and \$275,000 in 2015. Husband testified that he would be starting a new job managing a car dealership that would be opening soon. His base salary would be \$10,000 per month, plus 10 percent of the "net profits" of the dealership. He testified that initially his income would be lower than before, and that car dealerships are not normally profitable in the first year. He also testified that within about 24 months he expected his income would get back up to what he earned before, and that he would ultimately earn more than he did before. Wife testified that Husband could earn anywhere from \$30,000 - \$60,000 per month in his new job once the dealership got "up and going."

The trial court issued a letter opinion in November 2016. It found that the parties' daughter had physical and mental health issues, which compromised Mother's ability to work. The court also found that Husband had "no idea" what his income would be going forward, but that he changed jobs expecting to earn more. The court awarded Wife indefinite maintenance support of \$2,200 per month, plus 50% of the net profits that Husband receives from the dealership. The general judgment was entered in April 2017.

In October 2017 Husband moved to modify his spousal support award. Husband alleged that his income was now more certain than it had been at the time of trial, that basing spousal support as a percentage of the dealership's net profits was "not appropriate or equitable" and that the daughter's health issues had improved significantly, allowing Mother to work full time and earn more than she did at the time of divorce.

Trial Court. The hearing on Husband's motion took place in March 2018. Husband presented evidence showing his income for 2016 was \$234,387, and \$316,017 in 2017. In the first two months of 2018, Husband earned \$106,526. Husband testified that since starting his job he learned that his 10% share of the dealership's net profits could be \$40,000 - \$70,000 per month – much higher than anticipated at the time of divorce. Husband further testified that Wife is "an amazing nurse" and that she could work as much as she wants. He also testified that the daughter's health improved and

presented evidence that her absences during the school year had gone from 42.5 to 20.5 days, a reduction of 22 days.

Wife testified that although the daughter was doing better, she still received between 5 and 20 phone calls from her daily, which impacted her ability to work. The evidence showed that Wife's income had gone down to \$4,218 per month in 2017.

The court issued a letter opinion finding that Husband's income was much higher than he had expected at the time of divorce. Based on Husband's income for the first two months of 2018 (\$106,526), Wife would receive \$47,663 in support for those two months. The trial court opined that its job in modifying spousal support is to maintain the relative positions of the parties. Because Husband's bonuses were so much larger than anticipated at the time of divorce, the trial court found that that it would not be just or equitable to continue spousal support based on the formula ordered at the time of divorce. The court further found that because the daughter was missing less school, Wife had the ability to work and earn more.

Wife's spousal support award was modified to \$3,500 per month for seven years.

Appeal. Wife appealed. She argued that the increase in Husband's income was not a substantial and unanticipated change in circumstances. She also argued that there is no case law supporting the notion that an increase in an obligor's income justifies a reduction in the amount and duration of spousal support. Regarding Wife's income and earning capacity, she argued that there was no evidence quantifying whether and how much her income could increase as a result of the daughter's reduced absences.

The Court of Appeals explains that Husband's income ended up exceeding what he earned in his prior position, which is exactly what he and the trial court anticipated would occur. The fact that Husband's income increased sooner than he expected is not a "substantial change in circumstances" sufficient to justify reconsideration of the divorce court's spousal support award.

With respect to Wife's income and earning capacity, the evidence actually showed that she was earning less than at the time of divorce. Although the daughter was missing less school, the record lacked evidence showing, for example, what hours the children were in school, whether there were shifts available to Wife during those hours, or how many shifts Wife would be able to work. Due to the lack of evidence, the inference that Wife could work more as a result of the daughter's reduced absences was speculative and not a basis to find a substantial and unanticipated change in economic circumstances.

Result. Reversed.