

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BETTY K. SCHUMAKER	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Petitioner-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	Case No. 2009-CA-00131
NEAL B. SCHUMAKER	:	
	:	
Respondent-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of
Common Pleas, Case Nos. 08DR00858 &
09DR0068

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: July 26, 2010

APPEARANCES:

For Respondent-Appellant

For Petitioner-Appellee

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Gwin, P.J.

{¶1} Respondent-appellant Neal B. Schumaker (“Husband”) appeals the November 18, 2009 Judgment Entry entered by the Licking County Court of Common Pleas, Domestic Relations Division, which overruled his objections to the Magistrate’s June 2, 2009 Decision, and approved and adopted said decision with some modification¹. Petitioner-appellee is Betty L. Schumaker (“Wife”).

STATEMENT OF THE CASE

{¶2} On June 23, 2008, Wife filed a petition in the Licking County Court of Common Pleas, Domestic Relations Division, seeking a Domestic Violence Civil Protection Order against Husband. The trial court conducted an ex parte hearing and issued an order of protection pursuant to R.C. 3113.31(F) (2). The terms of the order were effective until June 23, 2009. The magistrate conducted a full hearing on Wife’s petition on July 1, 2008. The Magistrate issued his Decision on July 9, 2008, recommending a permanent civil protection order be entered in favor of Wife with a duration of five years. Neither party filed objections to the magistrate’s decision, and the trial court adopted said decision on July 24, 2008. The trial court issued an order of protection on July 31, 2008. The order of protection included Civ. R.54 (B) language. Neither party appealed the order.

{¶3} Husband filed a motion to modify or suspend the CPO on October 28, 2008. Therein, Husband stated he had learned Wife was no longer living in the marital residence; therefore, Husband requested he be able to return to the residence if no

¹ Although appellant included the trial court case number for the divorce action on his docketing statement, we note that the divorce case, 09DR0068, was voluntarily dismissed in the trial court on February 17, 2010. Accordingly, only the civil protection order, case number 08DR00858, has been appealed.

longer occupied by Wife as he was currently living in a cargo trailer. Wife also filed a motion to modify the CPO, requesting Husband be ordered to pay temporary spousal support. Wife filed a Motion for Attorney Fees on February 25, 2009.

{¶14} The trial court scheduled the matter for hearing before a magistrate on March 17, 2009. The magistrate issued her decision on June 2, 2009, recommending Wife be awarded spousal support in the amount of \$750/month, retroactive to December 31, 2008, the date on which Wife filed her motion. Husband filed timely objections to the magistrate's decision. Prior to the magistrate's issuing her June 2, 2009 decision, but subsequent to the hearing on Wife's motion for spousal support, Husband filed a Complaint for Divorce in the Licking County Court of Common Pleas, Domestic Relations Division. Via Judgment Entry filed November 18, 2009, the trial court overruled Husband's objections and ordered the temporary spousal support order be transferred to the pending divorce action.

{¶15} It is from this judgment entry Husband appeals, raising the following assignments of error:

{¶16} "I. THE MAGISTRATE AND THE TRIAL COURT ERRED IN GRANTING AN ORDER FOR SPOUSAL SUPPORT SINCE APPELLEE DID NOT SEEK AN ORDER FOR SUPPORT IN THE ORIGINAL PETITION, NOR DID THE ORIGINAL CPO CONTAIN AN ORDER FOR SPOUSAL SUPPORT.

{¶17} "II. THE TRIAL COURT AND MAGISTRATE ERRED IN DATING THE ORDER TO THE DATE OF THE FILING OF THE MOTION FOR SUPPORT CONSIDERING THE LENGTH OF TIME FROM HEARING TO DATE OF ORDER AND THE INCOME AND EXPENSES OF APPELLANT.

{¶18} “III. APPELLANT WAS DENIED DUE PROCESS WHEN ATTORNEY FRIEDMAN WAS PERMITTED TO WITHDRAW ON MARCH 7, 2009, JUST TEN DAYS BEFORE TRIAL.

{¶19} “IV. THE TRIAL COURT AND MAGISTRATE’S ORDER RESULTS IN AN ABUSE OF DISCRETION SINCE IT WAS NOT ECONOMICALLY POSSIBLE FOR APPELLANT TO COMPLY BASED ON HIS INCOME AND HIS OBLIGATION TO PAY CAR PAYMENTS, INSURANCE AND OTHER OBLIGATIONS.

{¶10} “V. THE COURT FAILED TO GRANT SPOUSAL SUPPORT IN THE ORIGINAL FINAL CPO, SHORT OF RELIEF FROM JUDGMENT, THE APPROPRIATE PLACE TO SEEK SPOUSAL SUPPORT WAS BY SEPARATE ACTION IN THE DIVORCE CASE AND IT WAS ERROR TO SIMPLY TRANSFER THE SPOUSAL SUPPORT ORDER FROM THE CPO TO THE DIVORCE ACTION.”

I & II

{¶11} In his first assignment of error, appellant argues that the magistrate and trial court erred in ordering him to pay spousal support because the appellee did not ask for spousal support in her original petition for a civil protection order. In his second assignment of error appellant maintains that the magistrate and trial court erred in ordering spousal support retroactive to the date that appellee filed a motion to modify the civil protection order to include spousal support. Because we find the issues raised in appellant’s first and second assignments of error are closely related, for ease of discussion, we shall address the assignments of error together.

{¶12} “As an alternative to filing a criminal charge of domestic violence, R.C. 3113.31 provides the victim of domestic violence the ability to seek immediate relief

through a civil protection order, which enjoins the respondent from further violence against the family or household member. R.C. 3113.31(C) and (E).” *Parrish v. Parrish*, 95 Ohio St.3d 1201, 2002-Ohio-1623, 765 N.E.2d 359. (Stratton, J., dissenting). The statute gives the trial court extensive authority to tailor the domestic violence protection order to the exact situation before it at the time. R.C. 3113.31(E) permits a court to modify its previous civil protection order, and notice of the motion to modify must be made in accord with the Rules of Civil Procedure.

{¶13} R.C. 3113.31(G) provides:

{¶14} “Any proceeding under this section shall be conducted in accordance with the Rules of Civil Procedure, except that an order under this section may be obtained with or without bond. *The remedies and procedures provided in this section are in addition to, and not in lieu of, any other available civil or criminal remedies.*” (Emphasis added.)

{¶15} R.C. 3113.31(E) (3) (b) expressly provides that any order of support issued pursuant to subsection (E) (1) (e), “shall terminate on the date that a court in an action for divorce, dissolution of marriage, or legal separation brought by the petitioner or respondent issues a support order or on the date that a juvenile court in an action brought by the petitioner or respondent issues a support order.”

{¶16} Thus, by operation of law the support order in this case ceased on November 18, 2009 the date that the trial court issued its order in the divorce case.²

² 09 DR 686

The temporary support order in the divorce case ceased to be effective when the divorce case was dismissed on February 17, 2010.³

{¶17} The trial court had jurisdiction to grant in the divorce action the identical relief sought in the instant proceeding, with the exception of an order that the support relate back to December 31, 2008, a time before the divorce was pending. The availability of a temporary support order in the divorce proceedings vests authority in the trial court to deny R.C. 3113.31 relief where the parties are litigating, or could litigate, the same issue in the divorce proceedings. *Thomas v. Thomas* (1988), 44 Ohio App.3d 6, 8-9, 540 N.E.2d 745, 747.

{¶18} The issue now becomes whether the court in this case could order support for the period from December 31, 2008 when appellee filed her motion to modify to November 18, 2009 the date that the trial court ruled upon the motion.

{¶19} R.C. 3113.31(E)(8)(a) expressly provides, “[t]he court may modify or terminate as provided in division (E)(8) of this section a protection order or consent agreement that was issued after a full hearing under this section.” “Either the petitioner or the respondent of the original protection order or consent agreement may bring a motion for modification or termination of a protection order or consent agreement that was issued or approved after a full hearing. The court shall require notice of the motion to be made as provided by the Rules of Civil Procedure...” R.C. 3113.31(E) (8) (b).

{¶20} In general, 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.*

³ The parties have not raised or addressed the issue of whether the support order in this case would be revived upon the dismissal of the divorce case. Accordingly, we express no opinion on that issue.

Brill (1993), 89 Ohio App.3d 298; *Murphy v. Murphy* (1984), 13 Ohio App.3d 388,469 N.E.2d 564. In *Murphy*, our brethren from the Tenth District reviewed a child support increase case and held, "the parties are entitled to have the order of the trial court relate back to the date upon which the motion for a modification of child support was filed. Any other holding could produce an inequitable result in view of the substantial time it frequently takes to dispose of motions to modify... support obligations." 13 Ohio App.3d at 389, 469 N.E.2d 564. See also, *Pickenpaugh v. Pickenpaugh*, Muskingum App. No. CT2006-0026, 2007-Ohio-1438 at ¶ 20-21. Thus, a retroactive modification is appropriate to protect the parties from the delays that are inherent in our legal system. *State ex rel. Mullaney v. Mullaney* (Oct. 22, 1997), Medina App. No. 2628-M at *2.

{¶21} Although R.C. 3113.31 does not expressly provide for the modification of spousal support when no spousal support has been ordered initially in the protection order, it does not expressly prohibit a modification under those circumstances. A contrary holding would require a trial court to award spousal support in a nominal amount to act as a predicate for its reservation of jurisdiction to modify the award in the event of changed circumstances. In the alternative, the petitioner would be required to dismiss the civil protection order and to immediately re-file a second request for a protection order in which he or she expressly requests the court award spousal support. In light of the fact that appellant in the case at bar was given notice and a full evidentiary hearing to contest the appellee's request for spousal support, we find little will be gained by either procedure.

{¶22} In the case at bar, we find that the trial did not err in granting spousal support and making the award retroactive to the date the motion was filed.

{¶23} Appellant's first and second assignments of error are overruled.

III.

{¶24} In his third assignment of error appellant argues that he was denied due process when the trial court permitted his attorney to withdraw from his case ten days before the final hearing. We disagree.

{¶25} Motions for civil protection orders are civil in nature, not criminal. *Butcher v. Stevens* (2009), 182 Ohio App. 3d 77, 911 N.E.2d 928, 2009-Ohio-1754. Appellant was not threatened with incarceration or another form of punishment. Therefore, the constitutional rights to counsel and against double jeopardy do not attach. *Westlake v. Patrick*, Cuyahoga App. No. 85581, 2005-Ohio-4419.

{¶26} Appellant was served with a copy of counsel's motion to withdraw which was filed on February 27, 2009. Appellant had over two weeks to retain new counsel before the scheduled hearing date of March 17, 2009. Accordingly, appellant did have a sufficient opportunity to obtain new counsel. Further appellant did not request a continuance to obtain counsel.

{¶27} Appellant's third assignment of error is overruled.

IV.

{¶28} In his fourth assignment of error, appellant claims the trial court erred in awarding an unreasonable amount of spousal support.

{¶29} The trial court is provided with broad discretion in deciding what is equitable upon the facts and circumstances of each case. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293. 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, 541 N.E.2d 597. In order to find an abuse of that discretion, we must determine the trial court's decision was un-reasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 450 N.E.2d 1140.

{¶30} Both the magistrate and the trial court made findings specific to support the amount of spousal support. In particular, the magistrate discounted appellant's testimony that he is paying \$500.00 per month to stay on the property of friends and that after the motion for a civil protection order was filed, appellant cashed out an insurance policy in the amount of \$19, 352.16.

{¶31} The trial court made findings of fact in addition to, and in modification of, the magistrate's decision. The court noted that both parties' income is limited due to age and health factors. The court noted appellant works off his monthly rent of \$500.00 and respondent receives social security benefits in the amount of \$505.00 per month. The trial court reduced the spousal support from \$750.00 per month to \$500.00 per month.

{¶32} The above findings support the court's award of spousal support.

{¶33} We have reviewed the record before us, and we find the trial court did not abuse its discretion in fashioning this award. We further find the award is not against the manifest weight of the evidence.

{¶34} Appellant's fourth assignment of error is overruled.

V.

{¶35} In his fifth assignment of error appellant contends the trial court erred in transferring the spousal support award from this case to the divorce case.

{¶36} As noted in our disposition of appellant's first and second assignments of error, the spousal support award in this case ceased by operation of law on November 18, 2009 the date that the trial court issued its order in the divorce case. The temporary support order in the divorce case ceased to be effective when the divorce case was dismissed on February 17, 2010. We note the trial court had jurisdiction to grant in the divorce action the identical relief sought in the instant proceeding, with the exception of an order that the support relate back to December 31, 2008, a time before the divorce was pending.

{¶37} However, we have no jurisdiction to decide whether the trial court could transfer the order in this case to the divorce case because the divorce case has not been appealed; rather that case has been dismissed.

{¶38} Accordingly, appellant's fifth assignment of error is moot.

{¶39} For the foregoing reasons, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

By Gwin, P.J., and

Wise, J., concur;

Hoffman, J., dissents

HON. W. SCOTT GWIN, P.J.

HON. WILLIAM B. HOFFMAN, J.

HON. JOHN W. WISE, J.

Hoffman, J., dissenting

{¶40} I respectfully dissent from the majority's disposition of this appeal. I would sustain Husband's first assignment of error. My reason follows.

{¶41} Wife asserts the trial court's subsequent order of spousal support was a modification of the original CPO. Although I agree with Wife, R.C. 3113.31(E)(8)(a) grants the trial court authority to modify or terminate the protection order and the trial court is authorized by statute to include an order of spousal support, I find the addition of an order of spousal support represents more than a modification.

{¶42} The term "modify" is not defined in the statute; therefore, it must be afforded its plain and ordinary meaning. *Sharp v. Union Carbide Corp.* (1988), 38 Ohio St.3d 69, 70, 525 N.E.2d 1386; R.C. 1.42. Black's Law Dictionary defines "modify" as "[t]o alter; to change in incidental or subordinate features; * * *". In the instant action, the change made to the original CPO was neither "incidental" nor "subordinate". The award of spousal support was a substantive change to, not a modification of, the terms of the protection order. Accordingly, I find the trial court exceeded its authority under R.C. 3113.31(E)(8)(a). I would reverse the trial court's order.

{¶43} Based upon the above analysis, I would find Husband's remaining assignments of error to be moot.

HON. WILLIAM B. HOFFMAN

