

STATE OF MICHIGAN
COURT OF APPEALS

RICKY SWEENEY,

Plaintiff-Appellant,

v

LOLA AUGUSTINE-SWEENEY a/k/a LOLA
AUGUSTINE,

Defendant-Appellee.

UNPUBLISHED

May 13, 2014

No. 312169

Livingston Circuit Court

LC No. 01-030988-DM

Before: FITZGERALD, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted from the post-judgment order reducing his spousal support obligation to \$700 per month. Plaintiff had sought a complete end to his obligation to support defendant in light of a reduction in his annual income due to his retirement. We vacate the order and remand for further proceedings.

The parties divorced by judgment dated September 9, 2002. The judgment obligated plaintiff to pay modifiable spousal support to defendant in the amount of \$220.15 per week. The judgment also awarded defendant 50 percent of plaintiff's pension. Thereafter, plaintiff's support obligation was modified upward to \$1,131 per month.

On September 1, 2011, plaintiff retired and the parties began receiving their respective pension benefits from plaintiff's pension. In particular, plaintiff received \$3,042.64 a month, and defendant received \$1,847.45 a month. On September 27, 2011, plaintiff moved to modify his spousal support obligation on the ground that his income had significantly decreased due to the fact that he had been laid-off from work for several months and then had retired. Plaintiff noted that he had an annual income of \$36,512 from plaintiff's pension, while defendant had an annual income of \$39,290 from his pension and her employment. Thus, plaintiff asserted that defendant would have a higher income even if alimony was terminated.

A hearing was held on plaintiff's motion on October 13, 2011. Plaintiff, who is 54 years of age, testified that he earned approximately \$60,000 annually while employed. He retired from "ACP" effective September 1, 2011, and receives his "Carpenter's Pension." His sole income in retirement is his pension income. He grosses \$3,042.64 a month and nets \$2,894.54 a month. Defendant received half the value of his pension as of the date of divorce and, therefore, she receives \$1,847.45 before taxes and \$1,770.73 after taxes. According to plaintiff, if he had

shoulder surgery, he might be able to return to carpentry work. He retired because there is “no work out there.”

Plaintiff further testified that his monthly house payment is \$993.63. His property taxes are \$2,500 annually. Plaintiff pays home owners insurance in the amount of \$800 annually. He pays health insurance premiums of \$750 a month. His utilities range between \$50 and \$200 a month depending on the season. He has no vehicle payment.

Plaintiff also testified that he is recently remarried. Although he did not know his wife’s annual income, he estimated that she earned around \$40,000 annually. Plaintiff indicated that she assists financially with the household expenses.

Finally, plaintiff testified that the marital property had been evenly split after the 26-year marriage ended. Both parties worked during the marriage, but plaintiff earned the greater income during the marriage. Plaintiff estimated that defendant earned approximately \$18,000 annually from her employment.

Defendant, who is 54 years of age, testified that she works for the Pinckney Community Schools and earns approximately \$17,000 annually. She resides in her own home and is able to pay her monthly expenses based on her current level of spousal support. With regard to whether a reduction in support would adversely affect her ability to pay her bills, defendant testified, “I think any reduction of pay you know decreases a person’s ability to pay their bills.” She suggested that she might have to “dip into my savings” if her support decreased and “not go out as much and enjoy life.”

Defendant further testified that she had three prescription medications, the costs of which are not totally covered by insurance. These medications cost her approximately \$100 a month out-of-pocket. She indicated that she was in “fair” health. She undergoes mammograms at 6-month intervals because she has had breast cancer. The frequency of these mammograms results in added medical expenses she must pay. Finally, defendant testified that plaintiff is \$4,000 in arrearages on his support obligation.

Following the close of testimony, the trial judge referred the matter to the friend of the court [“FOC”] for a support recommendation. The FOC issued a report on November 21, 2011. The report contained two recommendations. One recommendation was based on plaintiff’s actual income and one recommendation was based on “the anticipated earnings for Plaintiff if he was still employed with the former employer in the construction business.” The FOC recommended a monthly support award of \$462 per month based on plaintiff’s actual income. That recommendation increased to \$991 per month based on plaintiff’s anticipated income.

Subsequent to the issuance of this report, the FOC learned that it failed to include in its calculations the income defendant was receiving from plaintiff’s pension. Consequently, on December 6, 2011, the FOC issued an amended report. The FOC recommended no spousal support based on the actual incomes of the parties, which the FOC calculated as \$39,290 annually for defendant and \$36,512 annually for plaintiff. Alternatively, the FOC recommended a monthly support award of \$1,058 per month based on plaintiff’s anticipated income from his re-employment with his former employer.

On December 8, 2011, the trial court issued an order modifying spousal support and reducing plaintiff's spousal support obligation to \$991 per month. Plaintiff moved for reconsideration on the ground that the judge based her decision on the flawed November 21, 2011, FOC report and not the amended December 6, 2011, FOC report.

The trial court granted reconsideration and by opinion and order entered on January 13, 2012, reduced plaintiff's spousal support obligation to \$700 per month. The court, in reaching its conclusion, stated in part that "Plaintiff's income, in equity, shall include consideration of the \$40,000.00 contributed annually by Plaintiff's new spouse to Plaintiff's financial situation."¹

Plaintiff argues that the trial court erred by imputing the full amount of plaintiff's new spouse's estimated annual income to plaintiff.

We review for clear error a trial court's findings of fact with respect to a motion to modify spousal support. *Thornton v Thornton*, 277 Mich App 453, 458; 746 NW2d 627 (2007). "If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts." *Id.* at 458-459 (citation and internal quotation marks omitted). "This Court must affirm the trial court's decision regarding spousal support unless we are firmly convinced that it was inequitable." *Id.* at 459.

"An alimony award can be modified on the basis of a showing of new facts or changed circumstances." *Thornton*, 277 Mich App at 459. The new facts or changed circumstances must have arisen after the judgment of divorce. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). When a trial court considers whether to modify an alimony award, it should "consider *all* the circumstances of the case." *McCallister v McCallister*, 205 Mich App 84, 87-88; 517 NW2d 268 (1994) (emphasis in original). The modification of alimony must be supported by the record, and if the record is insufficient for review, this Court may remand for additional proofs. *Thornton*, 277 Mich App at 459.

Defendant does not dispute that plaintiff's retirement constituted a change of circumstances. The trial court correctly took into consideration the fact that plaintiff's new wife assists financially with the household expenses and, thereby, mitigates the financial burden on plaintiff imposed by those expenses. This Court has long recognized that "the effect of cohabitation on a party's financial status" is an appropriate factor to consider in evaluating spousal support. *Berger v Berger*, 277 Mich App 700, 727; 747 NW2d 336 (2008), quoting *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003); see also *Kersten v Kersten*, 141 Mich App 182, 184-185; 366 NW2d 92 (1985) (modification of alimony may be warranted to the extent that a party received an economic benefit from cohabitation, which includes but is not limited to remarriage).

¹ The court effectuated this ruling by entry of a modified uniform spousal support order on March 22, 2012.

In this case, however, the trial court went a step further and imputed plaintiff's new wife's entire income to plaintiff without considering the extent to which plaintiff's remarriage affected his financial status.² The existing evidentiary record regarding the income and contributions of plaintiff's new wife is insufficient to sustain the trial court's decision to impose a modified support obligation of \$700 per month. Under questioning by the judge, plaintiff testified only that his new spouse assists with the household expenses and that, while he did not know his wife's actual annual income, he estimated that that income was "around forty" thousand dollars annually. Although plaintiff testified that his new wife has a "car payment" and other expenses, the record is silent with regard to her actual debt or other financial obligations that she must satisfy from her own income. The trial court failed to consider the effect of plaintiff's remarriage on plaintiff's financial status. *Berger*, 277 Mich App at 727. Similarly, defendant's brief testimony about her ongoing need for alimony to maintain her current standard of living does not provide this Court with an appropriate record for review. We therefore vacate the existing order and remand this case to the trial court to take additional proofs and for reconsideration of plaintiff's motion consistent with this opinion.

Vacated and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ William C. Whitbeck

² There is no case law addressing whether a trial judge may impute the entire income of a new spouse to the payor spouse in order to calculate the recipient spouse's support. However, such an imputing of income exceeds the bounds of propriety and effectively obligates the new spouse to pay support to the former spouse. Rather, plaintiff's remarriage is relevant to the extent that it affects plaintiff's financial status. *Berger*, 277 Mich App at 727; *Kersten*, 141 Mich App 184-185.