



## **Case Summary**

Karen Spivey appeals the trial court's order terminating her ex-husband Charles Topper's obligation to pay spousal maintenance. We affirm.

### **Issue**

The dispositive issue is whether the trial court properly terminated Topper's obligation to pay spousal maintenance to Spivey because she was receiving Social Security disability payments.

### **Facts**

Spivey and Topper were married in 1993 and divorced on November 29, 2006. At the dissolution hearing, evidence was presented that Spivey suffered from several health conditions, including connective tissue disorder, bipolar disorder, hypertension, and chronic obstructive pulmonary disease. Spivey's physician testified that the connective tissue and bipolar disorders rendered her disabled. There was no evidence presented at the dissolution hearing that Spivey had applied for or was receiving any type of governmental disability assistance. In the dissolution decree, the trial court ordered Topper to pay maintenance to Spivey in the amount of \$200.00 per week because of her disability, but only for a period of twenty-six weeks. On appeal, we concluded that there was insufficient evidence to support a time limitation on the maintenance and remanded for the trial court to amend the dissolution decree so that maintenance was to continue for an indefinite time. Spivey v. Topper, 876 N.E.2d 781, 786, 788 (Ind. Ct. App. 2007).

However, we rejected Spivey's argument that the amount of maintenance was inadequate and affirmed on that point. Id. at 786.

On December 21, 2007, shortly after remand, Topper filed a motion to modify the maintenance order after he learned that Spivey had applied for and was receiving Social Security disability benefits. At a hearing conducted on April 30, 2009, it was revealed that Spivey had applied for such benefits before the divorce was final. A few months later, her application was approved and she received a lump-sum payment of \$10,666.00. She also began receiving a monthly disability payment; as of April 2009, the amount of that monthly payment was \$772.00. At the time of the modification hearing, Spivey also had been living with another ex-husband, Jerald Breeze, for about two years. Although Breeze had lung cancer, he and Spivey had been sharing household expenses. Spivey also testified that she has a Medicaid monthly "spend down" of \$477.00, which is in essence a monthly deductible on health care spending she must meet before Medicaid will cover her health care expenses.<sup>1</sup>

There was evidence presented at the hearing that Topper's income had declined due to cutbacks by his employer. He was slated to earn \$63,850.93 in 2009, which represented approximately a \$200-\$250 monthly reduction in Topper's income. In 2008, Topper, incurring tax penalties, withdrew significant funds from a retirement fund that he had been awarded in the dissolution decree, and he used the funds to buy a new car and to

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<sup>1</sup> Topper testified that he believed the "spend down" was that high in part because it was calculated after taking into consideration his maintenance obligation to Spivey. There is no documentary evidence to that effect in the record, however.

pay off certain debts. As of the date of the hearing, Topper had made \$15,100.00 in maintenance payments to Spivey. His total maintenance obligation from the date of the dissolution decree to the date of his petition to modify would have been \$11,200.00; Topper made some maintenance payments to Spivey after he filed his modification petition.

Spivey testified that she would be willing to accept only \$200.00 per month in maintenance from Topper, rather than \$200.00 per week. However, on June 26, 2009, the trial court terminated Topper's maintenance obligation altogether and found that he owed Spivey no arrearage. Spivey now appeals.

### **Analysis**

Trial courts have broad discretion to modify a spousal maintenance award, and we will reverse only upon an abuse of that discretion. McCormick v. McCormick, 780 N.E.2d 1220, 1223 (Ind. Ct. App. 2003). Discretion affords trial courts the privilege to act in accordance with what is fair and equitable under the facts of each case. Id. (quoting In re Marriage of Dillman, 478 N.E.2d 86, 88 (Ind. Ct. App. 1985)). An abuse of discretion occurs only if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. Id.

Indiana Code Section 31-15-7-2(1) provides: "If the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself or herself is materially affected, the court may find that

maintenance for the spouse is necessary during the period of incapacity, subject to further order of the court.” Modification of a maintenance order may be made if a party demonstrates “changed circumstances so substantial and continuing as to make the terms unreasonable.” Ind. Code. § 31-15-7-3(1). In determining whether a substantial change in circumstances has occurred, the trial court considers the factors underlying the original maintenance award, which are: the financial resources of the party seeking to continue maintenance, the standard of living established in the marriage, the duration of the marriage, and the ability of the spouse paying maintenance to meet his or her own needs. Mitchell v. Mitchell, 875 N.E.2d 320, 323 (Ind. Ct. App. 2007), trans. denied.

In the first appeal in this case, we added a footnote stating in part:

We also note, as did the trial court, that if Karen is totally and permanently disabled as she claims and as the evidence in the record tends to suggest, she is entitled to Social Security disability benefits, which will enable her to pay her bills.

A trial court could properly consider a spouse’s possible eligibility for Social Security disability benefits in determining whether maintenance is warranted. Specifically, if it is clear that the need for maintenance is offset by a program such as Social Security, then it may be that maintenance is not justified. Moreover, it would not be just to permit a party to delay applying for such benefits based on financial comfort stemming from the maintenance payments.

Spivey, 876 N.E.2d at 786 n.2 (citation omitted). In Mitchell on the other hand, we held that a party’s receipt of Social Security disability benefits does not automatically excuse or eliminate the need for spousal maintenance in every case. Mitchell, 875 N.E.2d at

324. In that case, we affirmed the trial court's decision not to completely eliminate a maintenance award, despite the ex-spouse's receipt of disability benefits. Id. Spivey and Mitchell are not in conflict. Taken together, they reaffirm the general rule that an award and/or modification of spousal maintenance is within a trial court's broad discretion. The facts and circumstances of one case may justify complete elimination of spousal maintenance where the ex-spouse is receiving Social Security disability benefits; the facts and circumstances of another case may not.

Here, the evidence established that the monthly amount of Spivey's Social Security disability benefit was roughly equal to the amount of maintenance Topper had been ordered to pay. On direct appeal, we affirmed the reasonableness of that level of maintenance, and there was no evidence that Spivey was receiving disability benefits at the time of the original maintenance award. Additionally, Topper's own income had been reduced since the time of the dissolution and original maintenance award. Spivey also was in a living arrangement where she was able to share household expenses with another ex-spouse, Breeze, which had not been the case at the time of the original maintenance award. Although Spivey points out that Topper fairly recently purchased a new car, he was only able to do so by liquidating an asset he had been awarded in the dissolution decree, and he incurred substantial tax penalties in doing so. Topper's one-time liquidation of his retirement fund and purchase of the vehicle is not an indication of his ongoing income or ability to pay maintenance.

Spivey posits various reasons why she should continue receiving some level of maintenance from Topper, including that Breeze apparently has terminal lung cancer and that Topper's income may rise to its previous level at some time in the future. We believe these were factors to be considered by the trial court in exercising its discretion in deciding whether to terminate Topper's maintenance obligation. The bottom line is that when maintenance originally was awarded, \$200.00 per week or approximately \$800.00 per month was determined to be a fair amount, in light of Topper's income and given Spivey living by herself and not receiving any Social Security disability payments. Now that she is sharing living expenses with someone, and Topper's income has been reduced, and most importantly because she is receiving disability payments in an amount roughly equal to the maintenance amount, we cannot say the trial court abused its discretion in terminating Topper's maintenance obligation.<sup>2</sup>

### **Conclusion**

The trial court did not abuse its discretion in deciding to completely eliminate Topper's maintenance obligation to Spivey. We affirm.

Affirmed.

BAILEY, J., and MAY, J., concur.

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<sup>2</sup> Spivey raised as a second issue that the trial court erred in ruling that Topper owed no maintenance arrearage. That issue was dependent upon her successfully arguing that maintenance should not have been eliminated in the first place. The trial court terminated Topper's maintenance obligation retroactive to the date he filed his modification petition, which was permissible. *Cf. Carter v. Dayhuff*, 829 N.E.2d 560, 567-68 (Ind. Ct. App. 2005) (noting that modification of child support obligations may be made retroactive to the date the modification petition was filed). Because Topper made some maintenance payments after he filed his petition, he ended up paying nearly \$4000.00 more in maintenance than he was required to do.

