

IN THE SUPREME COURT OF OHIO

FRANCES MANDELBAUM : On Appeal from the Montgomery  
County Court of Appeals, Second  
Appellee : Appellate District Court of Appeals  
Case No. CA 21817

v.

08-0375

STANLEY E. MANDELBAUM

Appellant

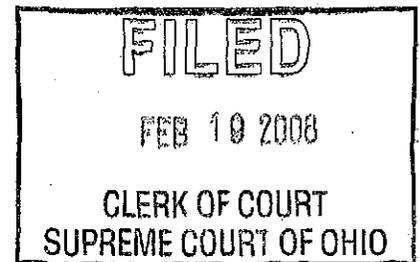
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NOTICE OF CERTIFIED CONFLICT

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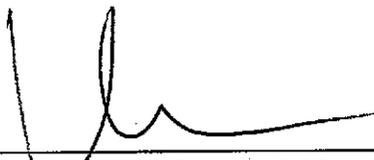
Notice

Appellant Stanley E. Mandelbaum hereby gives notice that on January 29, 2008, the Montgomery County Court of Appeals, Second Appellate District issued

a DECISION AND ENTRY pursuant to App. R. 25(A) certifying that a conflict exists.

The DECISION AND ENTRY of the Montgomery County Court of Appeals, Second Appellate District certifying the conflict, and copies of the conflicting court of appeals opinions, are attached.

Respectfully submitted,



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Mark Edward Stone (0024486)  
COUNSEL FOR APPELLANT  
STANLEY E. MANDELBAUM

Certificate of Service

I certify that a copy of this Notice of Certified Conflict was sent by ordinary U.S. mail to counsel for appellee, Charles D. Lowe, 1500 Kettering Tower, Dayton, OH 45423 on the 4<sup>th</sup> day of February, 2008.



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COUNSEL FOR APPELLANT  
STANLEY E. MANDELBAUM



set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals." *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 1993-Ohio-223, 613 N.E.2d 1032 (emphasis in original).

Mandelbaum contends that we should certify a conflict with *Kingsolver* on two related, but distinct issues. The first issue is whether R.C. 3105.18(F) requires a trial court to find that a change of circumstances is "substantial" in order for the court to have jurisdiction to modify a spousal support award. The second issue is whether R.C. 3105.18(F) requires a trial court to find that a change in circumstances was not contemplated by the parties at the time of the prior order in order for the court to have jurisdiction to modify a spousal support award. We disagree that these issues are distinct, as we did not treat them separately in our opinion. See, generally, *Mandelbaum v. Mandelbaum*, Montgomery App. No. 21817, 2007-Ohio-6138.

Our opinion in *Mandelbaum* held that before a court may modify spousal support, there must be a substantial change of circumstances that was not contemplated by the parties at the time of the original decree. 2007-Ohio-6138, at ¶ 91. Among other things, we discussed a conflicting opinion by the Ninth District Court of Appeals decision in *Kingsolver*, which had held that:

"trial courts have jurisdiction to modify spousal support based on 'any' change, rather than a substantial change in circumstances. \* \* \* [T]herefore, \* \* \* once any change in circumstances occurs, the trial court must only analyze whether spousal support is still appropriate, and if so, the amount that is reasonable." *Mandelbaum*, at ¶ 26, citing *Kingsolver*, 2004-Ohio-3844, ¶ 12 and 22-24.

We noted in *Mandelbaum* that the Ninth District had relied on 1986 amendments to R.C. 3105.18, which addressed a trial court's authority to modify existing alimony or spousal support orders. The Ninth District concluded that the Ohio General Assembly's failure to specifically define a "change of circumstances" in 1986, had caused Ohio courts to supplement the statute with a judicial definition requiring a substantial change in circumstances. *Kingsolver*, 2004-Ohio-3844, at ¶ 17. The Ninth District additionally concluded that the General Assembly had amended R.C. 3105.18 again in 1991, to rectify the lack of a definition. The added language, in R.C. 3105.18(F), stated that "a change of circumstances includes, but is limited to any increase or voluntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses." *Kingsolver*, 2004-Ohio-3844, at ¶ 17.

We noted in *Mandelbaum* that:

"The Ninth District concluded that the word 'any' was unambiguous, and that the Ohio legislature did not intend the term to mean 'substantial' or 'drastic.' \* \* \* The Ninth District recognized that this interpretation broadened a trial court's authority to modify support orders, but found this consistent with prior case law giving trial courts broad discretion in determining whether spousal support should be awarded." *Mandelbaum*, 2007-Ohio-6138, at ¶ 32.

Accordingly, the Ninth District concluded in *Kingsolver* that trial courts had jurisdiction to modify spousal support orders based on a finding that any change in circumstances had occurred. The Fifth and Eleventh Appellate District subsequently agreed with the Ninth District in the *Buchal* and *Tsai* cases. See *Buchal*, 2006-Ohio-3879, at ¶ 14, and *Tsai*, 2005-Ohio-3520, at ¶ 18. However, most other appellate

districts, including our own, continued to require a substantial change in circumstances that was not contemplated at the time of the prior order. *Mandelbaum*, 2007-Ohio-6138, at ¶ 33.

Notably, *Mandelbaum* specifically disagreed with the legal conclusions of the Ninth District Court of Appeals. Unlike the Ninth District, we concluded that requiring a substantial change of circumstances was not a response to the 1986 amendments. Instead, Ohio courts had used this standard for more than 100 years prior to 1986, as a prerequisite for modifying alimony orders. *Id.* at ¶ 36. We also noted that the 1986 amendments to R.C. 3105.18 were intended to address confusion among Ohio courts about whether courts had the power to modify spousal support in dissolution cases where the parties had agreed to reserve jurisdiction. *Id.* at ¶ 48-59. Before the 1986 amendments, some courts had refused to allow modification, even where the parties had agreed to reserve jurisdiction. *Id.*

We also noted that after the 1986 amendments, Ohio courts had continued to routinely apply a substantial change in circumstances as a threshold requirement for modifying alimony, without any dispute over the standard. *Id.* at ¶ 65. We saw no evidence that the 1991 amendments were intended to significantly change a requirement that had been applied for many years. *Id.* at ¶ 70-81. We also noted that Ohio courts had routinely followed this requirement for well over a decade after the amendments became effective in 1991. *Id.* at ¶ 81. Accordingly, we concluded that:

"In view of the well-established nature of the existing law since 1885, and the legislature's failure to even mention what would have been a significant change, we do not share *Kingsolver's* view of the 1991 amendments. If these amendments were

intended to disrupt law that had been established for many years, and had intended to confer jurisdiction on trial courts for 'any' change in circumstances, regardless of the magnitude of the change, the General Assembly would likely have said so. Furthermore, as a matter of public policy, the General Assembly would not have intended to confer unrestricted ability on litigants to continually re-open judgments to re-litigate support issues, particularly since it had restricted jurisdiction in 1986. And, as we mentioned before, there is no indication that any significant events, including conflicting case interpretations or struggle applying the law, had occurred between 1986 and 1990, when the statute was again amended." *Id.* at ¶ 82.

Unlike the Ninth District, we also concluded that the legislature's use of the word "any" in R.C. 3105.18(F) was ambiguous. In this regard, we noted that before 1991, wages, salaries, bonuses, medical expenses, and living expenses were not among the factors specifically listed in R.C. 3105.18. Therefore, the legislature could simply have intended to provide further guidance about appropriate items that should be included in deciding if a change of circumstances had occurred. *Id.* at ¶ 83-87. In addition, we noted that:

"The legislature could also have used 'any' as an all-inclusive term designating all items within a particular category. For example, 'living expenses' and 'medical expenses' are broad categories. The use of the word 'any' eliminates arguments about whether a specific type of expense within these categories could be considered in deciding if a change of circumstances has occurred. We find these interpretations more logically consistent with the history and purpose of alimony and spousal support modification than *Kingsolver's* conclusion that 'any' change of circumstances confers jurisdiction on courts

to modify \* \* \* prior orders.” Id. at ¶ 88.

Accordingly, we concluded in *Mandelbaum* that:

“when R.C. 3105.18(F) became effective in 1991, the General Assembly did not intend to change the well-settled requirement that before modification of a spousal support order can be permitted, the change in circumstances must be substantial and must not have been contemplated at the time of the prior order. \* \* \* As we noted in *Heckman*, to reach any other result would open the courts to a deluge of requests for modification, no matter how trivial.” Id. at ¶ 91, citing *Heckman v. Heckman*, Clark App. No. 2004-CA-62, 2005-Ohio-6141, at ¶ 22.

Based on the preceding discussion, we conclude that our opinion in *Mandelbaum* conflicts on a rule of law with the opinion of the Ninth District Court of Appeals in *Kingsolver v. Kingsolver*, Summit App. No. 21773, 2004-Ohio-3844, the opinion of the Eleventh District Court of Appeals in *Buchal v. Buchal*, Lake App. No. 2005-L-095, 2006-Ohio-3879, and the opinion of the Fifth District Court of Appeals in *Tsai v. Tien*, 162 Ohio App.3d 89, 2005-Ohio-3520, 832 N.E.2d 809. Having concluded that a conflict exists, we certify the following question to the Ohio Supreme Court for review and consideration:

May a trial court modify spousal support under R.C. 3105.18 without finding that:

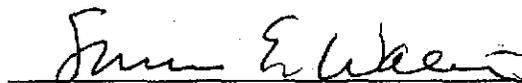
- (1) a substantial change in circumstances has occurred; and
- (2) the change was not contemplated at the time of the original decree?

IT IS SO ORDERED.



MIKE FAIN, Judge

  
MARY E. DONOVAN, Judge

  
SUMNER E. WALTERS, Judge

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FILED  
2007 NOV 16 AM 8:31  
A. BUSH  
CLERK

IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY

FRANCES B. MANDELBAUM

*Plaintiff-Appellant*

v.

STANLEY E. MANDELBAUM

*Defendant-Appellee*

Appellate Case No. 21817

Trial Court Case No. 98-DR-1400

(Civil Appeal from Common Pleas  
Court, Domestic Relations Division)

.....  
OPINION

Rendered on the 16<sup>th</sup> day of November, 2007.  
.....

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Attorney for Plaintiff-Appellant

MARK EDWARD STONE, Atty. Reg. #0024486, Stone & McNamee Co., L.P.A., 42  
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Attorney for Defendant-Appellee

.....  
FAIN, J.

Plaintiff-appellant Frances Mandelbaum appeals from an order reducing her spousal support from \$1,500 to \$925 per month. Defendant-appellee Stanley Mandelbaum cross-appeals from the award of spousal support.<sup>1</sup>

<sup>1</sup>The parties will be referred to in this opinion as Frances and Stanley.

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Frances contends that the trial court abused its discretion by failing to impute rental income for the purpose of modifying spousal support. Frances also contends that the trial court erred in failing to consider income that Stanley receives by sharing expense with his new spouse and by failing to consider income that Stanley deducted from his business revenue for the benefit of his new spouse.

Stanley contends that the trial court erred in making the spousal support reduction effective on March 6, 2006, rather than in May, 2005, when his motion to reduce support was filed.

We conclude that the trial court erred in failing to consider, as a threshold matter, whether the changes in the parties' circumstances were substantial and were not contemplated at the time of the prior order. Although the parties reserved jurisdiction in the decree to modify spousal support, R.C. 3105.18(E), also requires a substantial change of circumstances before a spousal support order may be modified.

Accordingly, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings.

I

The final judgment and decree of divorce was filed in December, 2000. At the time, the Mandelbaums had been married for more than forty years. The decree contained the following provisions pertinent to spousal support:

"1. SPOUSAL SUPPORT. The Husband agrees to pay to the Wife, as and for spousal support, the sum of \$18,000.00 per year, payable in monthly installments of \$1,500.00 per month, beginning with August 1, 2000, to be discharged in equal amounts

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according to the pay schedule of the Obligor Husband. \* \* \*

"Said spousal support shall be sooner terminated upon the Husband's death, the Wife's death or the Wife's remarriage and shall be subject to the ongoing and continuing jurisdiction of this Court.

\* \* \* \*

"The parties shall, by April 30<sup>th</sup> of each calendar year, exchange their respective personal income tax returns.

"Either party shall have the right to apply to this Court for the purposes of modifying the spousal support, due to a change in the financial circumstances of either party.

"It is the parties' intent that, for the purposes of spousal support, the parties' combined incomes be equalized between the two of them. The parties, in reaching an agreement as to the annual spousal support payment of \$18,000.00 per year by Husband to the Wife, have used \$60,900.00 of income for the Husband and \$25,131 of income for the Wife."

In May, 2005, Stanley filed a motion to reduce support, claiming that his income had decreased from \$60,900 to \$17,675. The affidavit of financial disclosure filed with the motion listed his income from Carillon Realty Company as \$17,675. Stanley added \$15,309 in Social Security and pension income, and \$111 of interest income for a total income of \$33,095. He then deducted the \$18,000 in alimony to arrive at the figure listed in his motion (about \$17,000).

Hearings on the motion were held on three different days before a magistrate. The magistrate filed a decision in March, 2006, rejecting the motion for a reduction, based on the evidence and the credibility of the witnesses. The magistrate imputed income to

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Stanley in the amount of \$14,700 per year based on Stanley's decision to voluntarily decrease his gross income by selling a rental property. Based on Stanley's gross income of \$84,405 and Francis's gross income of \$40,239, the magistrate found that Stanley had failed to show a change in circumstances sufficient to reduce spousal support.

Stanley filed timely objections from the magistrate's decision. Without taking further evidence or conducting a hearing in which it could assess the credibility of the witnesses, the trial court found Stanley's income to be \$61,876. The court concluded that there was insufficient evidence to support a finding that Stanley had sold the rental property in an effort to deprive Francis of spousal support. The court also used a net rental income figure for the properties Stanley retained and did not allow depreciation taken on the properties to be added back into Stanley's income. The court did not make any findings with regard to whether a substantial change in circumstances had occurred.

II

For purposes of convenience, we will consider the assignments of error out of order and will also combine the Second and Third Assignments of Error. Frances's Second Assignment of Error is as follows:

**"THE TRIAL COURT ABUSED ITS DISCRETION BY NOT CONSIDERING THE BENEFITS THAT APPELLEE RECEIVES FROM SHARING LIVING EXPENSES WITH HIS NEW SPOUSE IN DETERMINING APPELLEE'S INCOME FOR THE PURPOSE OF MODIFYING SPOUSAL SUPPORT."**

Frances's Third Assignment of Error is as follows:

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"THE TRIAL COURT ABUSED ITS DISCRETION BY NOT CONSIDERING THAT APPELLEE CONTRIBUTES TO THE FINANCIAL WELFARE OF HIS NEW SPOUSE AND BY DEDUCTING EXPENSES FROM HIS OWN REVENUE THAT RIGHTFULLY SHOULD BE BORN [SIC] BY HIS NEW SPOUSE IN DETERMINING APPELLEE'S INCOME FOR THE PURPOSE OF MODIFYING SPOUSAL SUPPORT."

Under these assignments of error, Frances contends that the trial court should have considered the income of Stanley's spouse, Carol, in modifying spousal support, given that Stanley benefitted from sharing living expenses with a new spouse. Frances further contends that income that Stanley could have received as the 100% owner of Carllion Realty, was improperly reduced by the expenses of maintaining a branch office and promoting Carol's career. In response, Stanley claims that the divorce decree limits the court to merely equalizing the parties' incomes and does not allow for consideration of the factors in R.C. 3105.18 governing modification of spousal support.

We review spousal support decisions for abuse of discretion, which means that the trial court's decision must have been arbitrary, unconscionable, or unreasonable in order to merit reversal. *Norbut v. Norbut*, Greene App. No. 06-CA-112, 2007-Ohio-2966, at ¶ 14. Decisions are unreasonable if they are not supported by a sound reasoning process. *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597.

Under R.C. 3105.18(E), trial courts are deprived of jurisdiction to modify spousal support unless two conditions are satisfied: (1) the divorce decree must authorize modification; and (2) the court must determine "that the circumstances of either party have changed." Under R.C. 3105.18(F), a change in circumstances "includes but is not limited

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to any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses." We have traditionally held that the change must be substantial and must not have been contemplated at the time of the prior order. *McHenry v. McHenry*, Montgomery App. No. 20345, 2004-Ohio-4047, at ¶ 14, citing *Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703, 706, 676 N.E.2d 1249. Accord, *Norbut*, 2007-Ohio-2966, at ¶ 15; *Reveal v. Reveal*, 154 Ohio App.3d 758, 761, 2003-Ohio-5335, 798 N.E.2d 1132, at ¶ 14; *Conde v. Conde* (Nov. 11, 2001), Montgomery App. No. 18858, 2001 WL 1468894, \*2 and *Phillips v. Phillips* (Mar. 31, 2000), Darke App. No. 99-CA-1501, 2000 WL 331799, \*1.

The divorce decree in the case before us reserves jurisdiction to modify, leaving only the issue of whether a substantial change of circumstances has occurred that was not contemplated by the parties. The trial court's magistrate rejected the motion for modification, finding that Stanley had failed to prove a substantial change of circumstances. In particular, the magistrate arrived at an income figure of \$84,405 for Stanley and \$40,239 for Frances. Stanley's income included \$14,700 that was imputed. In this regard, the magistrate was troubled by the fact that Stanley had sold an income-generating property and had voluntarily decreased his gross income while using the proceeds to pay off about \$80,000 in debt for a property purchased with his new wife. As a result, the magistrate imputed an additional \$14,700 in income to Stanley annually. The magistrate did not find it inequitable to refuse to impute further income to Stanley based on the fact that Stanley's new wife had failed to remit commissions to Stanley's realty company, which paid for the expenses of a branch office.

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In ruling on Stanley's objections, the trial court did not consider whether a substantial change of circumstances had occurred, but instead relied on the content of the divorce decree. The court commented that the decree was silent as to how the parties had arrived at the original income figures used to compute support and with regard to whether the parties intended the equalization of income to be ongoing. However, the decree had ordered the parties to exchange annual income information. Because the decree retained jurisdiction to modify spousal support, the trial court concluded that in the absence of language to the contrary, the parties intended equalization to be ongoing. While the trial court did not specifically state that this nullified the obligation to find a substantial change of circumstances, the court also did not discuss the point. Furthermore, based on its conclusion about "equalization," the trial court did not address the factors in R.C. 3105.18 that normally govern the determination of the amount of spousal support that is reasonable and appropriate.

The trial court also concluded that there was insufficient evidence to support a finding that Stanley had sold the rental property to deprive his ex-wife of support. Therefore, after failing to impute income to Stanley and deducting business expenses for Stanley's rental properties, the court found \$40,239 in income for Frances and \$61,876 in income for Stanley. The court then decreased spousal support in the amount of \$500 per month.

In view of the standards we have historically applied, the issue becomes whether the trial court erred in failing to address the issue of a substantial change in circumstances. In *Kingsolver v. Kingsolver*, Summit App. No. 21773, 2004-Ohio-3844, the Ninth District Court of Appeals held that trial courts have jurisdiction to modify spousal support based

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on "any" change, rather than a substantial change in circumstances. *Id.* at ¶ 22. The Ninth District, therefore, concluded that once any change in circumstances occurs, the trial court must only analyze whether spousal support is still appropriate, and if so, the amount that is reasonable. *Id.* at ¶ 12, 23, and 24.

In reaching these conclusions, the Ninth District relied on 1986 amendments to R.C. 3105.18, and further amendments to the statute in 1991. According to the Ninth District, the 1986 amendments were the first time the legislature had specifically addressed the trial court's authority to modify existing alimony or spousal support orders. The statute, as amended, indicated that a trial court entering a divorce decree or dissolution or marriage: "does not have jurisdiction to modify the amount or terms of alimony unless the court determines that the circumstances of either party have changed and unless \* \* \* the decree or a separation agreement \* \* \* contains a provision specifically authorizing the court to modify the amount or terms of alimony." *Id.* at ¶ 16, quoting from R.C. 3105.18(D).<sup>2</sup>

The Ninth District concluded that Ohio courts supplemented R.C. 3105.18(D) with a judicial definition of "a change in circumstances" because the legislature had failed to define this phrase in the 1986 amendments. *Id.* at ¶ 17, citing *Leighner v. Leighner* (1986), 33 Ohio App.3d 214, 215, 515 N.E.2d 625. In this regard, the Ninth District stated that:

"[T]he Tenth District Appellate court in *Leighner* defined a 'change of circumstances' as something 'substantial' and 'not contemplated [by the parties] at the time of the prior order.' \* \* \* After the court's decision in *Leighner*, however, the legislature once again amended R.C. 3105.18. In January 1991, not only did the legislature add language which allowed trial courts to modify both alimony and spousal support orders, but it also defined

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<sup>2</sup>This section is currently codified as R.C. 3105.18(E).

'change of circumstances.'" *Id.* (emphasis in original).

The added language referred to by the Ninth District is contained in R.C. 3105.18(F), which was enacted as part of Am. H. B. 514. H. B. 514 was approved in August, 1990, and the effective date of R.C. 3105.18(F) was in January, 1991. 143 Ohio Laws, Part III, 5426, 5457, and 55516-17. R.C. 3105.18(F) has remained the same since its effective date, and states that:

"For purposes of divisions (D) and (E) of this section, a change in the circumstances of a party includes, but is not limited to, any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses."

The Ninth District concluded that the word "any" was unambiguous, and that the Ohio legislature did not intend the term to mean "substantial" or "drastic." 2004-Ohio-3844, at ¶ 21. The Ninth District recognized that this interpretation broadened a trial court's authority to modify support orders, but found this consistent with prior case law giving trial courts broad discretion in determining whether spousal support should be awarded. *Id.* at ¶ 22. Both the Fifth and Eleventh Appellate Districts have subsequently agreed with the Ninth District. See *Buchal v. Buchal*, Lake App. No. 2005-L-095, 2006-Ohio-3879, at ¶ 14, and *Tsai v. Tien*, 162 Ohio App.3d 89, 93, 2005-Ohio-3520, 832 N.E.2d 809.

However, many other districts, including our own, continue to require a substantial change of circumstances that was not contemplated at the time of the prior order. See, e.g., *Reveal*, 154 Ohio App.3d at 761 (Second District); *Norbut*, 2007-Ohio-2966, at ¶ 15 (Second District); *Trotter v. Trotter*, Allen App. No. 1-2000-86, 2001-Ohio-2122, 2001 WL 390066, \*2 (Third District); *White v. White* (Mar. 3, 1998), Scioto App. No. 97 CA 2511, 1998 WL 101353, \*4 (Fourth District); *Ortmann v. Ortmann*, Lucas App. No. L-01-1045,

2002-Ohio-3665, 2002 WL 445049, \*5 (Sixth District); *Reeves v. Reeves*, Jefferson App. No. 06-JE-13, 2007-Ohio-4988, at ¶ 18 (Seventh District); *Calabrese v. Calabrese*, Cuyahoga App. No. 88520, 2007-Ohio-2760, at ¶ 20 (Eighth District); *Sweeney v. Sweeney*, Franklin App. No. 06AP251, 2006-Ohio-6983, at ¶ 21 (Tenth District); and *Carnahan v. Carnahan* (1997), 118 Ohio App.3d 393, 397, 692 N.E.2d 1086 (Twelfth District).

In *Heckman v. Heckman*, Clark App. No. 2004-CA-62, 2005-Ohio-6141, we rejected a position similar to the one advanced by *Kingsolver*. In this regard, we stated that:

"Finally, we address Ms. Heckman's contention that the trial court erred by determining that a substantial change in circumstances, as opposed to any change at all, is required for a modification of spousal support. We agree with her claim that neither the decree nor R.C. 3105.18 uses the word 'substantial' when discussing a modification of spousal support. However, this court has interpreted the statute as requiring a substantial change before a modification can be had. See, *Tremaine*, supra. Therefore, we find no error on the part of the trial court in requiring a substantial change in circumstances as a predicate for a modification of spousal support. A contrary holding would subject trial courts to innumerable motions to modify support orders upon the slightest change in the parties' circumstances." *Id.* at ¶ 22, citing *Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703, 676 N.E.2d 1249.

We still agree with this view. Further, we disagree with *Kingsolver*, which was not discussed in *Heckman*. As a preliminary point of disagreement, we note that requiring a "substantial" change in circumstances was not a judicial response to the 1986 amendments to R.C. 3105.18. A "substantial" or "material" change of circumstances was the standard

used for more than one hundred years prior to 1986 as a requirement for modification of alimony. See *Olney v. Watts* (1885), 43 Ohio St. 499, 3 N.E. 354. In *Olney*, the trial court had dismissed a husband's request to enjoin further alimony payments based on his ex-wife's remarriage. The Ohio Supreme Court reversed the trial court and allowed the request for an injunction to proceed, commenting that:

"The real contention touches the right and duty of the court in a case like this to review, modify, or vacate a former decree granting alimony payable in installments, by an original suit or proceeding instituted for that purpose, when such power had not been reserved by the language and form of the former decree. It has been determined by this court that a decree for alimony is not necessarily affected by the subsequent marriage of the wife, although such a marriage may, in some cases, have the effect of reducing the amount. \* \* \*

" 'By the general doctrine, and as practiced in the country whence our laws are derived, aside, it seems, from all considerations of the form of the decree, the court may, from time to time, on any change in the circumstances of the parties, increase or reduce the sum allotted for alimony temporarily or permanently.' \* \* \*

"In this issue, as in all others, what is once adjudged is not to be retried. Yet, as the allowance is a continuous support for the wife, changed facts may require an altered decree. As observed by Dr. Lushington, '*where there is a material alteration of circumstances, a change in the rate of alimony may be made.*' " 43 Ohio St. at 507-08 (citations omitted) (emphasis added).

Notably, the Ohio Supreme Court referred in *Olney* to "any change in circumstances" as a generic description of events that could potentially cause a reduction

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or increase in alimony. However, the condition required for modification was whether a "material alteration" of circumstances had occurred. The reason for requiring a material alteration of circumstances was concern over finality of decrees and a recognition that decrees should not lightly be set aside.

Subsequently, the Ohio Supreme Court held in *Law v. Law* (1901), 64 Ohio St. 369, 375-76, 60 N.E. 560, that alimony is not subject to modification where it is fixed by court pursuant to an agreement of the parties, in the absence of fraud or mistake. *Olney* was distinguished because it did not involve such an agreement. *Id.* Thus, the general rule followed by Ohio courts was that:

"Where the terms of an agreement between the parties have been approved by the trial court, and have been embodied by reference in the decree, such decree is not subject to modification upon petition by one of the parties in the absence of fraud or mistake, and in the absence of a reservation by the trial court of jurisdiction with reference to the agreed terms of alimony." *Taylor v. Taylor* ( Dec. 18, 1975), Franklin App. No. 75AP-369, 1975 WL 182031, \*4 (citations omitted)

Where an agreement did not exist, but the alimony was ordered by decree, the general law applied was that:

"[E]ven in the absence of a specific provision in the decree retaining jurisdiction, the trial court may exercise its equity jurisdiction and modify the decree as it would relate to periodic alimony payments upon proof of changed circumstances of the parties." 1975 WL 182031, \*6 (citations omitted).

In the latter event, the change in circumstances "must be *material* and not purposely brought about by the complaining party, they must be considered on the basis that the

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judgment sought to be modified was proper when made, and they must be of such nature or character that they could not have been reasonably anticipated and taken account of at the time of the original trial or hearing.

"A change in the financial condition of either the ex-husband or the ex-wife may justify modification of the alimony award, *if the change is material or substantial*, and the alleged change was not one which the trial court expected and probably made allowances for when entering the original decree." *Id.* (Emphasis added; citations omitted).

Thus, after 1885, and well before the amendment of R.C. 3105.18 in 1986, Ohio courts adhered to the concept of finality of decrees and the requirement of a material or substantial change in circumstances before modifying an alimony or spousal support decree. The refusal to allow modification in situations involving agreement of the parties was recognized as harsh, but courts considered themselves bound to apply the rule in the absence of action by the Ohio Supreme Court or the General Assembly. *Miller v. Miller* (C.P. 1958), 153 N.E.2d 355, 358-359.

In 1976, the Ohio Supreme Court issued a decision involving a request to terminate alimony payments where the parties' separation agreement did not reserve jurisdiction to modify the agreement. *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 350 N.E.2d 413. "Prior to *Wolfe*, a separation agreement entered into by the parties to a divorce was treated as a contract. A separation agreement which was incorporated into the divorce decree was not subject to modification by the court in the absence of mistake, misrepresentation, or fraud, and in the absence of a reservation of jurisdiction with reference thereto." *Riedinger v. Riedinger* (Apr. 29, 1982), Franklin App. Nos. 81AP-137 and 81AP-196, 1982 WL 4142, \*4.

In *Wolfe*, the Ohio Supreme Court discussed the historical origins of alimony and concluded that "most awards of property incident to a final divorce are readjustments of the party's property rights, and ' \* \* \* whether in the judgment such adjustment is called "alimony" or "division of property" \* \* \* (has not been considered) important.' " 46 Ohio St.2d at 411 (parenthetical material in original). The Ohio Supreme Court also stated that the power to award alimony had always been derived from the statutory law, which in its present form sets out an eleven-factor guide for deciding first if alimony was "necessary" and second, the " 'nature, amount, and manner of' payments of the sum allowed as 'alimony.'" Id. at 414. In this regard, the Ohio Supreme Court observed that many of the statutory factors had little relevance to possible need for sustenance, but were instead pertinent to property settlement. Id.

After extensively considering the issue of jurisdiction to modify, the Ohio Supreme Court concluded in *Wolfe* that prior cases in Ohio had alluded to the "inviolability of an alimony decree which is formulated by the incorporation of an agreement of the parties." Id. at 416. However, the court reviewed an annotation on modification of alimony decrees, and noted that many courts allowed modification of periodic payments for alimony even though based on agreement, under one of the following three rationales: (1) public policy; (2) the theory that incorporated agreements are advisory, rather than binding on courts; and (3) the concept that agreements lose their contractual nature once they are adopted by a court and are merged into the decree. Id. at 416, citing Annotation (1975), 61 A.L.R. 3d 520, 551-52.

The Ohio Supreme Court acknowledged that settlements of property rights are not modifiable, but observed that it had previously adopted the view that obligations of child

support and alimony are imposed not by contract but by decree, where an agreement is incorporated in a decree. Therefore, the court adopted the merger doctrine for alimony modification proceedings and held that a decree would not be subject to modification if the alimony award "is not solely for support but is in settlement of property rights." *Id.* at 418.

The court then noted that:

"It is self-evident that a separation agreement, which purports to set a fair level of alimony for sustenance, as well as divide and distribute the property of the parties and settle their affairs, is not necessarily continually fair and equitable thereafter. We may assume that it is fair at the moment of its execution, and that it continues to be fair at the time of divorce if the parties offer it for inclusion and merger into the decree. At that point, all that can be said is that it sets a fair and equitable 'initial level' of obligations.\* \* \*

"Such initially fair agreements may be rendered manifestly oppressive in countless situations, such as where the custodian of the children fails to provide proper care and guidance, or where the receiver of alimony makes no attempt at self-support \* \* \* or where the economic situation of either or both of the parties drastically changes. The holding in this case, that a court has continuing modification jurisdiction over alimony for sustenance awards, is to assure that such awards are continually just." *Id.* at 418 (footnotes omitted).

Accordingly, *Wolfe* allowed courts to modify alimony, even though the parties had reached agreement, and had also failed to provide for a reservation of jurisdiction in their agreement. After *Wolfe* was decided, trial courts continued to require a substantial or material change of circumstances before permitting modification of alimony.<sup>3</sup> However,

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<sup>3</sup>See, e.g., *Bertsche v. Bertsche* (Dec. 12, 1976), Warren App. No. 87, 1976 WL 190497, \*1; *Huffman v. Huffman* (Aug. 8, 1978), Franklin App. No. 78AP-80, 1978 WL 217007, \*3; *Moore v. Moore* (June 19, 1979), Franklin App. No. 78AP-755, 1979 WL

while the substantial circumstances requirement remained unchanged, *Wolfe's* adoption of implied reservation of continuing jurisdiction was the subject of debate.

In 1984, the Ohio Supreme Court limited *Wolfe* to divorce actions, holding that trial courts do not retain continued jurisdiction to modify periodic alimony payments in dissolution actions. *McClain v. McClain* (1984), 15 Ohio St.3d 289, 473 N.E.2d 811, syllabus. The decision in *McClain* was based on the consensual nature of separation agreements that are incorporated into dissolution decrees and the legislature's removal of alimony in 1975 from the matters over which trial courts retain jurisdiction under R.C. 3105.65(B), governing dissolution actions. *Id.* at 290-91. The dissent in *McClain* argued that *Wolfe's* continuing modification jurisdiction was synonymous with the trial court's inherent equitable jurisdiction. *Id.* at 291 (Ford, dissenting).

In 1984, the Ohio Supreme Court also held that where the parties have agreed to, and the trial court has decreed, sustenance alimony for an ascertainable amount over an ascertainable term of years, the award is not subject to modification absent an express reservation of jurisdiction. *Colizoli v. Colizoli* (1984), 15 Ohio St.3d 333, 336, 474 N.E.2d 280. The Ohio Supreme court stated that this decision was not a retreat from *Wolfe*, which continued to control when the amount and/or duration of alimony was indefinite. The court stressed that "where a decree incorporates an agreement of the parties which specifically

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209130, \*3; *Mattoni v. Mattoni* (Feb. 22, 1980), Lucas App. No. L-79-129, 1980 WL 351170, \*3; *Learmonth v. Learmonth* (Mar. 3, 1981), Franklin App. No. 80AP-537, 1981 WL 3030, \*2; *Davis v. Davis* (Oct. 21, 1981), Clark App. No. 1568, 1981 WL 2578, \*4; *Forkapa v. Forkapa* (June 26, 1981), Lucas App. No. L-8-305, 1981 WL 5670, \*2; *Bauer v. Bauer* (Apr. 15, 1982), Montgomery App. No. 7596, 1982 WL 3719, \*1; *Riedinger v. Riedinger* (Apr. 29, 1982), Franklin App. Nos. 81AP-137 and 81AP-196, 1982 WL 4142, \*4; *Blakemore v. Blakemore* 5 Ohio St.3d 217, 220, 450 N.E.2d 1140; and *Bingham v. Bingham* (1983), 9 Ohio App.3d 191, 459 N.E.2d 231.

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delineates the amount and duration of sustenance alimony, \* \* \* such a decree should be accorded its proper degree of finality." *Id.* at 336.

Subsequently, in 1985, the Ohio Supreme Court again distinguished *Wolfe*, in a case involving a divorce decree, rather than a separation agreement. This time, the Ohio Supreme Court stated that the trial court lacks jurisdiction to modify sustenance alimony awarded for a fixed period of years, even though the decree is subject to termination in the event of remarriage, death, or cohabitation. *Ressler v. Ressler* (1985), 17 Ohio St.3d 17, 476 N.E.2d 1032, syllabus. The Ohio Supreme Court observed that it was "promoting the concept that alimony decrees should possess a degree of finality and certainty," and that divorce decrees "determined by court order deserve the same finality as those ordered pursuant to an agreement." *Id.* at 18-19. Justice Celebreeze, in his dissent, reasoned that the decree in question was insufficiently distinguishable from the decree in *Wolfe*. Justice Ford agreed, commenting that the court's "re-examination of its principles \* \* \* appears to be the creation of an amorphous trial that is difficult to follow." *Id.* at 21 (Ford, dissenting).

These problems were addressed when R.C. 3105.18 was amended by Am. H. B. 358, effective May 2, 1986. See 141 Ohio Laws, Part II, 3388. The Senate Judiciary Committee Report for H. B. 358 noted that existing law did not specifically authorize alimony awards in actions other than alimony proceedings. Despite this fact, courts had judicially recognized continuing jurisdiction to modify periodic monetary payments in divorce cases, even where alimony had been awarded pursuant to a settlement agreement incorporated into a divorce decree. In contrast, trial courts did not view themselves as having continuing jurisdiction to modify alimony that had been agreed to and incorporated into dissolution decrees. Am. H.B. 358, as reported by S. Judiciary, pp. 1-2, Ohio

Legislative Service Comm. 1985-1986, LSC Box 34. During its discussion of these points, the Judiciary Committee Report referred specifically to both *Wolfe* and *McClain*. In addition, the Judiciary Committee Report noted that:

"According to testimony before the House Civil and Commercial Law Committee, some Ohio courts will *not* modify alimony agreed to in a separation agreement involved in a dissolution of marriage case *even if* the parties expressly have provided in the agreement that the alimony is modifiable by a court. The courts have concluded that the Revised Code does not grant them continuing jurisdiction over alimony in such a case and that only the General Assembly, not the parties to a proceeding, can confer jurisdiction on the courts." *Id.* at 2-3 (emphasis in original).

H.B. 358 proposed changes that would govern modification of orders in both divorce and dissolution actions. Consistent with the fact that only the legislature can confer jurisdiction, new subsection (D) was added to R.C. 3105.18, and stated that:

"If a continuing order for periodic payments of money as alimony is entered in a divorce or dissolution of marriage action that is determined on or after the effective date of this amendment, the court that enters the decree of divorce or dissolution does not have jurisdiction to modify the amount or terms of the alimony unless the court determines that the circumstances of either party have changed and unless one of the following applies:

"(1) in the case of a divorce, the decree or separation agreement of the parties to the divorce that is incorporated into the decree contains a provision specifically authorizing the court to modify the amount or terms of alimony;

"(2) in the case of a dissolution of marriage, the separation agreement that is approved by the court and incorporated into the decree contains a provision specifically

authorizing the court to modify the amount or terms of alimony." 141 Ohio Laws, Part II, 3388, 3389.

As a *jurisdictional* matter, the amended statute required both a change of circumstances and a reservation of jurisdiction. This was a change in the law as established in *Wolfe*, since implied reservation of jurisdiction would no longer be allowed. In discussing existing law, the Judiciary Committee Report also stated that "changed circumstances commonly is [sic] the basis for such a modification." Am. H.B. 358, as reported by S. Judiciary, at 1. By referring to the common basis for modification, the legislature clearly indicated an awareness of the existing requirements being applied by courts.

After the 1986 amendments to R.C. 3105.18, Ohio courts continued to routinely apply a substantial change in circumstances as a threshold requirement for modification of alimony. As we mentioned, *Kingsolver* cites the 1986 Tenth District Court of Appeals decision in *Leighner* as supplementing the 1986 amendments to R.C. 3105.18 with a judicial definition of "changed circumstances." 2004-Ohio- 3844, at ¶ 17. In our view, *Leighner* simply applied well-established law that:

"Where modification of an existing order for the payment of sustenance alimony is requested, the threshold determination is whether the order can be modified, which requires a finding of a change in circumstances since the order was entered. The change in circumstances must be substantial and must be such as was not contemplated at the time of the prior order. Only if the necessary prerequisite has been satisfied may the trial court move on to a consideration of whether the order should be modified." *Leighner* (1986), 33 Ohio App.3d 214, 215, citing *Bingham* (1983), 9 Ohio App.3d 191, 459 N.E.2d

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As is evident, the case cited by *Leighner (Bingham)* was issued well before the 1986 enactment of R.C. 3105.18(D). Consequently, the "substantial" change of circumstances requirement was not adopted as a result of the lack of definition in the statute.

Furthermore, the Tenth District would not have been in a position to adopt a judicial definition in response to the alleged lack of definition of "changed circumstances" in R.C. 3105.18(D), since R.C. 3105.18(D) specifically provided that it would apply only to continuing orders for periodic alimony entered on or after the effective date of the amendments, which was May 2, 1986.

The Tenth District decision in *Leighner* was issued in June, 1986, which was only about two months after the amendments. The original order for periodic alimony in *Leighner* was also entered two years before the request for modification was filed. 33 Ohio App.3d at 215. Therefore, the pertinent events occurred well before the 1986 amendments, and R.C. 3105.18(D) did not even apply to the case. Consequently, the Tenth District would have had no reason to "supplement" the lack of definition in the amended statute.

In 1991, a number of changes to the domestic relations laws became effective, including the addition of subsection (F) to R.C. 3105.18. See 143 Ohio Laws, Part III, 5426-5457. As we noted, the Ninth District concluded in *Kingsolver* that subsection (F) was enacted for the purpose of giving trial courts broad jurisdiction, and to eliminate the requirement of a substantial change of circumstances. *Kingsolver*, 2004-Ohio-3844, at ¶ 21.

We see no indication that this was the General Assembly's intent. In contrast to the debate over implied reservation of jurisdiction, courts had routinely required a substantial change of circumstances in cases where the 1986 amendments applied, without any indication of a dispute over interpretation of the amended statute. See, e.g., *Sony v. Sony* (August 2, 1990), Franklin App. No. 1367, 1990 WL 110268, \*3 (original decree was filed in 1988, reserving jurisdiction to modify; appellate court required "substantial change" of circumstances in 1990); *Turella v. Turella* (Nov. 21, 1990), Cuyahoga App. No. 57724, 1990 WL 180646, \*2 (original decree was filed in October, 1986; court required "substantial change" of circumstances in 1990); and *Coder v. Coder* (June 13, 1990), Montgomery App. No. 11738, 1990 WL 80564, \*3 (original decree was filed in October, 1987; court applied substantial change of circumstance in 1990).

Legislative history also fails to reveal any concern over jurisdictional issues in the alimony context. For example, in March, 1986, the 116<sup>th</sup> General Assembly created a 15 member Domestic Relations Task Force for the purpose of conducting a comprehensive review of Ohio's domestic relations law. The Task Force held eleven public hearings in locations representing every region of the state. See The Domestic Relations Task Force Final Report Submitted to the Ohio General Assembly pursuant to Sub. S. JR 12 of the 116<sup>th</sup> General Assembly, p. 1. Following these public hearings, the Task Force Report was submitted to the General Assembly in June, 1987.

The Report noted that public testimony did not focus on the issue of alimony. *Id.* at 10. However, the Report did contain some general comments on alimony. For example, the Report discussed alimony support payments and nationwide statistics on the number of women being granted alimony, which had declined to some extent between

1980 and 1984. After discussing the current state of the law on alimony, the Report recommended that R.C. 3105.18(A) be amended to allow alimony out of the marital estate as the court deemed reasonable to either party. The report concluded that this change would clarify what judges could consider as alimony. It would "exempt separate property from distribution and require alimony to be allowed only from marital property or as maintenance payments." *Id.* at 14. However, the Task Force Report did not mention either R.C. 3105.18(D) or the existing standards for modifying alimony.

Recommendations were made on a wide variety of other subjects, including resolving disputed custody and visitation issues in mediation; penalizing false reports of abuse during domestic relations cases; adoption of shared parenting laws; adoption of factors to be considered in forming visitation orders; adoption of child support guidelines; performance standards for domestic relations courts; and changes in domestic violence laws.

Subsequently, in July, 1990, the 118<sup>th</sup> General Assembly enacted H. B. 514, which replaced actions for alimony only with actions for legal separation, established procedures for distributing separate property and marital property in actions for divorce or legal separation (new R.C. 3105.171); replaced "alimony" payments with "spousal support," and eliminated some existing factors used to determine the type and amount of spousal support. Some new factors to be used in the spousal support determination were also added. See 143 Ohio Laws, Part III, 5426-5457. See also, Sub. H.B. 514, as reported by S. Judiciary, p. 1., Ohio Legislative Service Comm. 1989-1990, LSC Box 43. And, of course, H.B. 514 also added R.C. 3105.18(F). *Id.*

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In discussing the existing law on spousal support, the Judiciary Committee Report for H. B. 514 indicated that currently, reasonable alimony could be awarded, and courts were required to consider all relevant factors in determining whether alimony was necessary. *Id.* at 6. This part of the Judiciary Committee Report did not mention existing law on modification of alimony.

In describing the operation of the proposed bill, the Judiciary Committee Report noted that courts would be able to award spousal support, but only after determining disbursement of property under the bill. *Id.* at 7. With respect to modification, the Judiciary Committee Report stated only that:

"For the purposes of modifying a prior order for periodic payments of money as spousal support in a divorce or dissolution action, or in an action for legal separation, a change in circumstances of a party (which is necessary for modification) would include, but not be limited to any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses." *Id.*

Finally, the Judiciary Committee Report observed that the bill would eliminate existing specific requirements for determining the type and amount of alimony, such as property brought to the marriage by either party and contributions of a homemaker. Other factors were also being added, such as income of the parties from all sources, including income from property "distributed" under the marital property and separate property division; mental conditions of the parties; and contributions of each party to the education of the other. *Id.* at 8.

In contrast to the specific discussion of elements that were being eliminated and changed in R.C. 3105.18(C), there were no similar remarks or comment on changes being

made by R.C. 3105.18(F). The amendments to R.C. 3105.18 took effect in January, 1991, and Ohio courts continued for well over a decade to uniformly apply the requirement of a substantial change of circumstances, until the *Kingsolver* decision in 2004.

In view of the well-established nature of the existing law since 1885, and the legislature's failure to even mention what would have been a significant change, we do not share *Kingsolver's* view of the 1991 amendments. If these amendments were intended to disrupt law that had been established for many years, and had intended to confer jurisdiction on trial courts for "any" change in circumstances, regardless of the magnitude of the change, the General Assembly would likely have said so. Furthermore, as a matter of public policy, the General Assembly would not have intended to confer unrestricted ability on litigants to continually re-open judgments to re-litigate support issues, particularly since it had restricted jurisdiction in 1886. And, as we mentioned before, there is no indication that any significant events, including conflicting case interpretations or struggle applying the law, had occurred between 1886 and 1990, when the statute was again amended.

We also do not find the language used by the General Assembly to be free from ambiguity. In assessing changes of circumstances prior to the 1991 amendments, many courts had focused their attention on the factors specifically listed in R.C. 3105.18. For example, in *Connors v. Connors* (Sept. 27, 1979), 79 AP-284, 1979 WL 209359, \*3, the court rejected a request for termination of alimony payments because there had been no "substantial change of circumstances in any of the factors provided by R.C. 3105.18." Among the facts, raised, however, was a \$5,000 increase in the ex-wife's salary since the time of the original decree. *Id.*

Rather than focusing on the increase in salary, the court stressed that the ex-wife's earning ability had not increased since the divorce, because she had not received more training, nor did she work for a different employer so that she could substantially increase her salary. *Id.* See also, e.g., *Moore v. Moore* (June 19, 1979), Franklin App. No. 78AP-755, 1979 WL 209130, \*3 (finding that no substantial change had occurred because the plaintiff's earning ability had not changed, "nor have any of the other factors in 3105.18(B)").

This does not mean that Ohio courts never considered increases in income. For example, the court in *Bingham* observed that it was inconceivable that a substantial change of circumstances had not occurred in the eight years since the original decree was entered, "if only in view" of the fact that the support recipient's earnings had more than tripled. 9 Ohio App.3d 191, 193.

Courts also considered changes in living expenses, even though that was not an item listed in R.C. 3105.18. See *Tisdale v. Tisdale* (Dec. 5, 1986), Hocking App. No. 436, 1986 WL 13656, \*3 (holding that the trial court did not err in finding a substantial change of circumstances based on the ex-wife's satisfaction of her mortgage with post-decree accident proceeds. This decreased the ex-wife's living expenses and she received voluntary contributions as well from a friend with whom she shared her home).

Nonetheless, prior to 1991, wages, salaries, bonuses, medical expenses, and living expenses were not among the items specifically listed in R.C. 3105.18. Since these items were not listed, the legislature could simply have intended to provide further guidance to courts as to matters that are appropriately included in determining whether a change in circumstances has occurred. *Olney*, 43 Ohio St. 499, 508.

The legislature could also have used "any" as an all-inclusive term designating all items within a particular category. For example, "living expenses" and "medical expenses" are broad categories. The use of the word "any" eliminates arguments about whether a specific type of expense within these categories could be considered in deciding if a change of circumstances has occurred. We find these interpretations more logically consistent with the history and purpose of alimony and spousal support modification than *Kingsolver's* conclusion that "any" change of circumstances confers jurisdiction on courts to modify its prior orders.

Furthermore, some of the factors listed in R.C. 3105.18(B) before the 1991 amendments, like the parties' "relative assets and liabilities," "expectancies and inheritances," and "property brought to the marriage," were more relevant to decisions on property division than to support and maintenance.<sup>4</sup> See *Stevens v. Stevens* (1986), 23 Ohio St.3d 115, 123, 492 N.E.2d 131 (Wright, concurring). *Stevens* involved the issue of whether a spouse's contribution to her husband's professional degree should be considered marital property subject to division or as an element in reaching an equitable award of alimony. The Ohio Supreme Court adopted the latter position, deferring to the legislature for any changes in the domestic relations law on treatment of a professional degree upon divorce. *Id.* at 120, n. 5.

In a concurring opinion, Justice Wright commented on the fact that R.C. 3105.18 listed factors more appropriate to property division, and on the fact that the lack of clarity in the current "hybrid" statute made it difficult to interpret legislative intent. *Id.* at 123. The

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<sup>4</sup>R.C. 3105.18(B) was renumbered as R.C. 3105.18(C) in the 1991 amendments and retains that designation to date. See 143 Ohio Laws, Part III, 5426, 5456.

1991 amendments to R.C. 3105.18 appear to address these concerns by adding factors for contributions of a spouse to the education and training of the other spouse; by eliminating certain factors relating to "property division," like "expectancies and inheritances" and "property brought to the marriage;" and by adding R.C. 3105.18(F), which included matters more pertinent to maintenance, like wages, salary, living expenses, and medical expenses, under the category of a change of circumstances. 143 Ohio Laws, Part III, at 5456-57. Again, increases or involuntary decreases in wages and expenses are pertinent to the issue of spousal support, and were considered by courts prior to 1991. However, they were not specifically included as part of the equation before the 1991 amendments.

Accordingly, we conclude that when R.C. 3105.18(F) became effective in 1991, the General Assembly did not intend to change the well-settled requirement that before modification of a spousal support order can be permitted, the change in circumstances must be substantial and must not have been contemplated at the time of the prior order. *McHenry*, 2004-Ohio-4047, at ¶ 14, citing *Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703, 706, 676 N.E.2d 1249. As we noted in *Heckman*, to reach any other result would open the courts to a deluge of requests for modification, no matter how trivial. 2005-Ohio-6141, at ¶ 22.

*Kingsolver* discounted this concern based on existing guidelines governing frivolous pleadings and its belief that the use of the word "any" could not reasonably be contemplated to mean a nominal change. 2004-Ohio-3844, at ¶ 23, n. 4. However, this position contradicts *Kingsolver's* unqualified interpretation of the word "any" as meaning "unmeasured or unlimited in amount, quantity, number, time or extent." *Id.* at ¶ 21.

Furthermore, guidelines on frivolous pleadings indicate that a pleading will be considered frivolous if it is "not warranted under existing law." R.C. 2323.51(A)(2)(ii). If the word "any" means "unlimited in amount," one would be hard-pressed to argue that a pleading raising even a nominal change in circumstances is not warranted under existing law. Notably, this does not even take into consideration the difficulty in deciding what changes are more than nominal or are of sufficient magnitude to avoid sanctions for frivolous conduct, and the amount of litigation that could be spawned from parties contesting these matters.

In the present case, the trial court's failure to apply the correct legal standard was an abuse of discretion, since decisions are unreasonable if they are not supported by a sound reasoning process. *AAAA Enterprises, Inc.* (1990), 50 Ohio St.3d 157, 161. Regardless of the terms of the divorce decree (which in this case was based on an agreement read into the record in open court), the parties could not agree to confer jurisdiction on the court. Subject-matter jurisdiction "is always fixed and determined by law and cannot be conferred on the court by any consent or acquiescence of the parties." *Polak v. Polak* (Dec. 12, 1986), Montgomery App. No. 9993, 1986 WL 14245, \*3. The parties could agree to reserve jurisdiction in the decree, but R.C. 3105.18(E) sets forth an additional prerequisite for jurisdiction that must be met.

Accordingly, the order of modification in this case must be reversed, and this cause must be remanded so that the trial court can consider whether a *substantial* change of circumstances has occurred that was not contemplated by the parties at the time of the original decree. If this threshold inquiry is satisfied, the court may then determine whether the existing order should be modified and what amount of support is reasonable and

appropriate.<sup>5</sup>

Based on the preceding discussion, the Second and Third Assignments of Error are sustained.

### III

Frances's First Assignment of Error is as follows:

**"THE TRIAL COURT ABUSED ITS DISCRETION BY NOT INCLUDING OR NOT IMPUTING RENTS FROM THE BENCHWOOD RENTAL IN DETERMINING APPELLEE'S INCOME FOR THE PURPOSE OF MODIFYING SPOUSAL SUPPORT."**

Under this assignment of error, Frances contends that the trial court abused its discretion by failing to include certain income for purposes of modifying spousal support. A property that Stanley owned on Benchwood Drive generated \$14,700 in yearly rental income, without deducting items like property taxes and insurance, but was sold during the

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<sup>5</sup>In this regard, we note that the trial court concluded that the spousal support provisions in the decree are ambiguous. "Agreements incorporated into divorce decrees are contracts and are subject to the rules of construction governing other contracts." *Jackson v. Hendrickson*, Montgomery App. No. 20866, 2005-Ohio-5231, at ¶ 7. "Whenever a clause in a separation agreement is deemed to be ambiguous, it is the responsibility of the trial court to interpret it. The trial court has broad discretion in clarifying ambiguous language by considering not only the intent of the parties *but the equities involved*." *In re Marriage of Seders* (1987), 42 Ohio App.3d 155, 156, 536 N.E.2d 1190 (emphasis added). In addition, "parol evidence is admissible to explain the parties' understanding at the time the agreement was made when contractual provisions are ambiguous and subject to different interpretations." *Scartz v. Scartz* (Apr. 25, 1989), Franklin App. Nos. 88AP-724, 88AP-728, 1989 WL 43255, \*2. Neither the magistrate nor the trial court received any evidence as to the understanding of the parties at the time of their agreement, which could be helpful. We also note that an equitable concept in assessing spousal support, is the benefit an individual receives from sharing expenses with another. See *Gallo v. Gallo*, Lake App. No. 2004-L-193, 2006-Ohio-873, at ¶ 34, and *McNutt v. McNutt*, Montgomery App. No. 20752, 2005-Ohio-3752, at ¶ 15 (noting that "the ability to share expenses is relevant in deciding whether an obligor's claim of poverty is well-taken.")

pendency of the trial court proceedings. As we mentioned above, the magistrate imputed income to Stanley in the amount of \$14,700 per year based on Stanley's decision to voluntarily decrease his gross income by selling a rental property. In ruling on Stanley's objections, the court excluded the rental income because it found insufficient evidence that Stanley sold the property in an effort to deprive Frances of support.

Frances contends that the trial court improperly allowed Stanley to benefit from voluntary acts that reduced his income for spousal support purposes and also eliminated marital debt. The voluntary acts were Stanley's sale of the Benchwood property and his subsequent use of sale funds to pay off mortgages on personal and marital property. Stanley contends, however, that the Benchwood property was purchased with inherited funds and that he did not have to use his inheritance to produce income.

In view of our disposition of the First and Second Assignments of Error, this assignment of error is moot. If the trial court reaches this issue on remand, we note for the court's guidance that "changes in income within the context of a spousal support modification must be involuntary and not brought on by the payor." *Addington v. Addington*, Scioto App. No. 05CA3034, 2006-Ohio-4871, at ¶ 9. See also, *Melhorn v. Melhorn* (Jan. 30, 1989), Montgomery App. No. 11139, 1989 WL 8452, \*1.

We also note that the magistrate's decision, including the choice of imputing income, was premised on credibility. We have previously stressed that a magistrate is "a subordinate officer of the trial court, not an independent officer performing a separate function." *Wingard v. Wingard*, Greene App. No. 2005-CA-09, 2005-Ohio-7066, at ¶ 17. As a result, the trial court does not assume the position of an appellate court in reviewing the magistrate's work. *Id.* Therefore, a *de novo* standard of review, not an abuse of

discretion standard applies, and the trial court should not adopt the magistrate's factual findings unless it agrees with them. *Crosby v. McWilliams*, Montgomery App. No. 19856, 2003-Ohio-6063, at ¶¶33-34.

Nevertheless, where a magistrate comments on credibility and the trial court does not take additional evidence as is authorized under Civ. R. 53(D)(4)(b), "the judgment of the magistrate on issues of credibility is, absent other evidence, the last word on the issue for all practical purposes." *Quick v. Kwiatkowski*, Montgomery App. No. 18620, 2001-Ohio-1498, 2001 WL 871406, \*4. See also, *MacConnell v. Nellis*, Montgomery App. No. 19924, 2004-Ohio-170, at ¶ 16, n.1 (indicating that a trial court does not improperly defer to the magistrate where it gives "some deference to the magistrate's credibility determinations," but also independently considers the evidence before it).

In view of the disposition of the Second and Third Assignments of Error, the First Assignment of Error is moot.

#### IV.

Stanley's Cross-Assignment of Error is as follows:

"THE TRIAL COURT ABUSED ITS DISCRETION BY MAKING THE REDUCTION IN SPOUSAL SUPPORT EFFECTIVE MARCH 6, 2006."

Under this assignment of error, Stanley contends that the trial court erred in its choice of the effective date of the reduction in spousal support. The trial court reduced support as of the date of the hearing before the magistrate, rather than the date on which Stanley served Frances with the motion to reduce support.

Because this matter is being remanded, the cross-assignment of error is moot. We do note that such decisions are subject to an abuse of discretion standard. See, e.g., *Ridenour v. Ridenour*, Delaware App. No. 04CAF12082, 2005-Ohio-3922, at ¶ 18.

Accordingly, the Cross-Assignment of Error is moot.

IV

Frances's Second and Third Assignments of Error having been sustained, and the First Assignment of Error and Stanley's Cross-Assignment of Error having been overruled as moot, the order of the trial court modifying spousal support is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

.....

(Hon. Sumner E. Walters, retired from the Third Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

DONOVAN and WALTERS, JJ., concur.

Copies mailed to:

Charles D. Lowe  
Mark E. Stone  
Hon. Denise L. Cross

Not Reported in N.E.2d  
 Not Reported in N.E.2d, 2004 WL 1620723 (Ohio App. 9 Dist.), 2004 -Ohio- 3844  
 (Cite as: Not Reported in N.E.2d)

**C**  
 Kingsolver v. Kingsolver  
 Ohio App. 9 Dist., 2004.

CHECK OHIO SUPREME COURT RULES FOR  
 REPORTING OF OPINIONS AND WEIGHT OF  
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Ninth District, Summit  
 County.

John T. KINGSOLVER, Appellee

v.

Carole A. KINGSOLVER, Appellant.

No. 21773.

Decided July 21, 2004.

**Background:** Ex-husband and ex-wife filed motions for modification of spousal support. The Court of Common Pleas, Summit County, No. 21773, denied motions, and ex-wife appealed.

**Holdings:** The Court of Appeals, Whitmore, P.J., held that:

(1) term "any," as used in statute addressing modification of spousal support and providing that change in circumstances includes any increase or involuntary decrease in party's wages, salary, bonuses, living expenses, or medical expenses, does not mean "substantial" or "drastic," and

(2) change in circumstances existed, and thus, trial court had jurisdiction to modify spousal support.

Reversed and remanded.

West Headnotes

[1] Divorce 134 ↪ 245(2)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k230 Permanent Alimony

134k245 Modification of Judgment or Decree

134k245(2) k. Grounds and Rights of Parties. Most Cited Cases

Term "any," as used in statute addressing modification of spousal support and providing that

change in circumstances includes any increase or involuntary decrease in party's wages, salary, bonuses, living expenses, or medical expenses, does not mean "substantial" or "drastic;" statute merely requires court to determine whether change has occurred in party's economic status. R.C. § 3105.18(E,F).

[2] Divorce 134 ↪ 245(2)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k230 Permanent Alimony

134k245 Modification of Judgment or Decree

134k245(2) k. Grounds and Rights of Parties. Most Cited Cases

Change in circumstances existed, and thus, trial court had jurisdiction to modify spousal support, where evidence indicated that ex-husband's salary increased from \$84,696 to \$134,889, that ex-wife's salary increased from \$16,000 to \$25,746, and that child was no longer living with mother, but was living with sister in condominium supplied by ex-husband. R.C. § 3105.18(E, F).

Appeal from Judgment Entered in the Court of Common Pleas, County of Summit, Ohio, Case No. 21773.

Kenneth L. Gibson and Sharyl W. Ginther, Attorneys at Law, Cuyahoga Falls, OH, for Appellant.

Robert H. Brown, Attorney at Law, Akron, OH, for Appellee.

DECISION AND JOURNAL ENTRY

\*1 This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

WHITMORE, Presiding Judge.

{¶ 1} Defendant-Appellant Carole A. Kingsolver has appealed from a decision of the Summit County Court of Common Pleas, Domestic Relations Division that denied her motion for modification of spousal support. This Court reverses and remands.

{¶ 2} Defendant-Appellant Carole A. Kingsolver and Plaintiff-Appellee John T. Kingsolver were married in Detroit, Michigan, on December 30, 1972. Two children were born as issue of the marriage, to wit: Jennifer and Laura. Appellee filed for divorce on December 11, 1996. Appellant filed an answer and counterclaim for a legal separation on February 26, 1997; she later withdrew her answer and counterclaim. Before a trial was held on the matter, however, Appellant filed a motion for conciliation pursuant to R.C. 3105.091, wherein she requested the trial court order the parties to undergo conciliation for a period of ninety days and order the parties to undergo counseling. The order was granted on November 12, 1997.

{¶ 3} The divorce was granted on June 9, 1998. A separation agreement, which the parties had previously entered into, was incorporated into the judgment entry of divorce. Appellant was designated as the primary residential parent and legal custodian of the minor child, Laura. Appellee was ordered to pay Appellant child support in the amount of \$800 per month, plus a monthly processing fee. The terms of the divorce decree further provided that Appellee would pay Appellant spousal support in the amount of \$1,500 per month, plus a 2% processing fee.

{¶ 4} On June 24, 2002, Appellee filed a motion for: 1) change of custody <sup>FN1</sup>; 2) modification of spousal support; 3) child support; 4) referral to family court services; 5) appointment of guardian ad litem; and 6) attorney's fees. Specifically, Appellee requested an order changing custody of Laura from Appellant to him based on changed circumstances and to terminate his spousal and child support obligations. On August 5, 2002, Appellant filed a motion to increase spousal support. A hearing on the parties' motions was held on August 13, 2002. In an order dated August 23, 2002, the magistrate found that Laura was no longer residing with Appellant, but living with her adult sister in a condominium owned by Appellee. The magistrate set another hearing to address the financial issues (i.e., child support and spousal support) raised by both parties.

FN1. Appellee later withdrew the motion for reallocation of parental rights.

{¶ 5} Another hearing was held on October 25, 2002. In an order dated November 26, 2002, the magistrate found that in addition to Laura living in a condominium owned by Appellee, Appellant paid

"little or nothing" for Laura's expenses. The magistrate further found that at the time of the divorce, Appellee earned \$84,696 and, "[f]or some reason not explained to the magistrate [,]" Appellant, a homemaker at the time of the divorce, was attributed earnings of \$16,000. After the divorce, the income of both parties changed. The magistrate found that Appellee had retired, but that his annual income rose to \$91,455, in addition to \$43,434 pension he received annually. Appellant remained unemployed and the magistrate concluded that "[i]t is unlikely that she will enter the workforce." She did, however, receive \$22,746 a year from Appellee's pension, in addition to interest income in the amount of \$3,000 a year. The magistrate concluded that "[t]he parties' relative positions have not substantially changed since the divorce was granted" and that "[a] change in the amount of spousal support to be paid [was] not warranted." The magistrate dismissed Appellee's motion for change of custody; terminated Appellee's child support obligation; awarded Appellee judgment against Appellant in the amount of \$3,500 for Laura's education expenses; and denied both parties' motions for modification of spousal support.

\*2 {¶ 6} Appellant filed objections to the magistrate's decision. Appellant argued that the trial court erred in denying her motion for modification of spousal support. She maintained that the magistrate "failed to acknowledge and/or consider that, in addition to his substantial increase in salary, [Appellee] now annually receives 90% more than [Appellant] in pension benefits. From this change alone, the Magistrate erred by concluding that the parties' relative positions 'have not substantially changed since the divorce was granted.'" Appellant further argued that "the Magistrate erred when she failed to consider the termination of child support and the impact that loss of \$800 per month in income caused [Appellant's] 'relative position.' Indeed, with [Appellee's] position \$800 per month improved and [Appellant's] position \$800 per month worsened, the differential on the 'ledger' is \$1,600 per month." In essence, Appellant contended that "[i]t was an abuse of the Magistrate's decision [sic] and an error as a matter of law for her to fail to find that the parties' relative positions had substantially changed." Appellee filed a response to Appellant's objections.

{¶ 7} On September 15, 2003, the trial court overruled Appellant's objections. The trial court dismissed Appellee's motion for change of custody; terminated Appellee's child support obligation; awarded Appellee judgment against Appellant in the

amount of \$3,500 for Laura's education expenses; and denied both parties' motions for modification of spousal support.

{¶ 8} Appellant has timely appealed, asserting one assignment of error.

## II

### *Assignment of Error*

[1]“THE TRIAL COURT ERRED IN HOLDING THAT [APPELLANT] HAD NOT SHOWN A CHANGE IN CIRCUMSTANCES SUFFICIENT TO PERMIT MODIFICATION OF THE SPOUSAL SUPPORT SET FORTH IN A DECREE WHICH EXPRESSLY RESERVES TO THE COURT THE AUTHORITY TO MODIFY SPOUSAL SUPPORT UPON A CHANGE OF CIRCUMSTANCES.”

{¶ 9} In Appellant's sole assignment of error, she has argued that the trial court erred when it denied her motion for modification of spousal support. Specifically, Appellant has argued that the trial court employed the wrong standard of review when it determined whether there was a change of circumstances warranting a modification in spousal support.

{¶ 10} As an initial matter, this Court notes that a trial court has broad discretion in determining a spousal support award, including whether or not to modify an existing award. Mottice v. Mottice (1997), 118 Ohio App.3d 731, 735, 693 N.E.2d 1179; Schultz v. Schultz (1996), 110 Ohio App.3d 715, 724, 675 N.E.2d 55. Absent an abuse of discretion, a spousal support award will not be disturbed on appeal. Schultz, 110 Ohio App.3d at 724, 675 N.E.2d 55. An abuse of discretion connotes more than a mere error in judgment; it signifies an attitude on part of the trial court that is unreasonable, arbitrary, or unconscionable. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. Berk v. Matthews (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

\*3 {¶ 11} R.C. 3105.18 governs the trial court's authority to modify an existing spousal support or alimony order. In order for a trial court to modify the amount or terms of spousal support, it must conduct a two-step analysis. Leighner v. Leighner (1986), 33 Ohio App.3d 214, 215, 515 N.E.2d 625. In the first

step, the trial court must determine whether: 1) the divorce decree contained a provision specifically authorizing the court to modify the spousal support; and 2) the circumstances of either party have changed. R.C. 3105.18(E); Leighner, 33 Ohio App.3d at 215, 515 N.E.2d 625. A change of circumstances “includes, but is not limited to, any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses.” R.C. 3105.18(F). The first step is jurisdictional in nature; if the moving party is unable to satisfy the first step, then the trial court does not have jurisdiction to modify the existing spousal order. R.C. 3105.18(E); Leighner, 33 Ohio App.3d at 215, 515 N.E.2d 625.

{¶ 12} Once the trial court finds that the moving party has satisfied the requirements of the first step, that is it determines that there was a change of circumstances *and* that the trial court retained jurisdiction to modify spousal support, the trial court must next determine “whether or not the existing order *should* be modified.” (Emphasis sic.) Leighner, 33 Ohio App.3d at 215, 515 N.E.2d 625. The court in Leighner explained that “[t]his latter inquiry involves re-examination of the existing order in the light of the changed circumstances, and requires a two-step determination: First, is \* \* \* alimony still necessary? And, if so, what amount is reasonable?” *Id.* at 215, 515 N.E.2d 625; see, also, Johnson v. Johnson (Dec. 23, 1993), 10th Dist. No. 93AP-806, 1993 Ohio App. LEXIS 6171, at \*9 (noting that R.C. 3105.18(C)(1) modified Leighner to the extent that the trial court need not find that spousal support is still “necessary,” but must determine if it is “appropriate”). The trial court should look to the relevant factors listed in R.C. 3105.18(C) in addressing the last prong of the Leighner two-step analysis. *Id.* at 215, 515 N.E.2d 625, citing Bingham v. Bingham (1983), 9 Ohio App.3d 191, 459 N.E.2d 231.

{¶ 13} In the instant matter, the trial court denied Appellant's motion for modification of spousal support, stating:

“After a review of the transcript, the Court concludes that there has been no change of circumstances that the parties should not have contemplated at the time of the divorce. The parties were aware when Laura would emancipate and when [Appellee] would reach retirement age. The possibility that [Appellee] may obtain another position after retirement should have also been contemplated because of his young retirement age.”

{¶ 14} Based on the above cited language employed by the trial court, it is clear that the trial court only

conducted the first step of the two-step analysis outlined in *Leighner*. In *Leighner* the court explained that a “change of circumstances must be substantial and must be such as was not contemplated at the time of the prior order.” Here, the trial court stated that a change of circumstances had not occurred because the events that took place after the parties divorced should have been contemplated at the time of the divorce. Although the trial court did not specifically state that it did not have jurisdiction to modify the existing spousal support order, by concluding that any changes that occurred should have been contemplated by the parties or foreseeable at the time of the divorce the trial court necessarily held that it did not have jurisdiction to alter or modify the support order.

\*4 {¶ 15} Appellant has contended that the definition of a “change of circumstances” applied in *Leighner*, and in later Ninth District Appellate cases like *Moore v. Moore* (1997), 120 Ohio App.3d 488, 698 N.E.2d 459, is no longer viable in light of the statutory amendments to R.C. 3105.18(E).<sup>FN2</sup> Specifically, Appellant has argued that “[n]either the 1986 nor the 1991 statutory amendments [to R.C. 3105.18] incorporated any language which suggested that a court’s jurisdiction to modify support depended upon a ‘drastic’ or even a ‘substantial’ change of circumstances.” This Court, after reviewing the legislative history and judicial treatment of R.C. 3105.18, agrees with Appellant’s assertion that a moving party attempting to demonstrate a “change of circumstances” is not required to show that the change was “substantial” or “drastic.”

<sup>FN2</sup>. This Court, and other appellate courts, have consistently relied on the holding in *Leighner*, even after the 1991 amendment to R.C. 3105.18. We have held that in order to modify an existing spousal support order the party requesting the modification must show a change of circumstances that is “substantial” (see *Laubert v. Clark*, 9th Dist. No. 03CA0077-M, 2004-Ohio-2113, at ¶ 8; *Simcox v. Simcox*, 9th Dist. No. 21342, 2003-Ohio-3792, at ¶ 5; *Koch v. Koch*, 9th Dist. No. 02CA001-M, 2002-Ohio-4400, at ¶ 6; and *Bowen v. Bowen* (April 5, 2000), 9th Dist. No. 2944-M, at 3) or “drastic” (see *Mottice v. Mottice* (1997), 118 Ohio App.3d 731, 693 N.E.2d 1179; *Zahn v. Zahn*, 9th Dist. No. 21541, 2003-Ohio-6124, at ¶ 18 and *Abate v. Abate* (Mar. 29, 2000), 9th Dist. No. 19560, at 17).

{¶ 16} R.C. 3105.18 was enacted in 1958. As originally enacted, R.C. 3105.18 did not specifically provide for modification of existing alimony or spousal support orders. Because such authority was not specifically conveyed to the trial courts, the Ohio Supreme Court held that the authority to modify an existing support order was implied in the divorce decree. *Wolfe v. Wolfe* (1976) 46 Ohio St.2d 399, 350 N.E.2d 413, paragraph two of the syllabus; see, also, *McClain v. McClain* (1984), 15 Ohio St.3d 289, 290, 473 N.E.2d 811 (limiting the scope of *Wolfe*). It was not until May 2, 1986, that the legislature specifically addressed the trial court’s authority to modify existing alimony or spousal support orders. In 1986, the following provision was added to R.C. 3105.18:

“(D) If a continuing order for periodic payments of money as alimony is entered in a divorce or dissolution of marriage action that is determined on or after the effective date of this amendment, the court that enters the decree of divorce or dissolution of marriage does not have jurisdiction to modify the amount or terms of the alimony unless the court determines that the circumstances of either party have changed and unless one of the following applies:

“(1) In the case of a divorce, the decree or a separation agreement of the parties to the divorce that is incorporated into the decree contains a provision specifically authorizing the court to modify the amount or terms of alimony;

“(2) In the case of a dissolution of marriage, the separation agreement that is approved by the court and incorporated into the decree contains a provision specifically authorizing the court to modify the amount or terms of alimony.” (Emphasis added.) R.C. 3105.18(D) as amended by Am.H.B. 858.

{¶ 17} The amended version of R.C. 3105.18 fails to provide a definition of “change of circumstances.” As the Ohio legislature failed to statutorily define “change of circumstances,” Ohio courts supplemented the statute with a judicial definition of the phrase. As previously discussed, the Tenth District Appellate court in *Leighner* defined a “change of circumstances” as something “substantial” and “not contemplated [by the parties] at the time of the prior order.” *Leighner*, 33 Ohio App.3d at 215, 515 N.E.2d 625. After the court’s decision in *Leighner*, however, the legislature once again amended R.C. 3105.18. In January 1991, not only did the legislature add language which allowed trial courts to modify both alimony and spousal support orders, but it also defined “change of circumstances.” The following is the January 1, 1991

version of R.C. 3105.18, as amended by Am.Sub.H.B. No. 514 (note that R.C. 3105.18 has been restructured and subdivision (D) is now subdivision (E)): \*5 “(E) If a continuing order for periodic payments of money as alimony is entered in a divorce or dissolution of marriage action that is determined on or after May 2, 1986 and before the effective date of this amendment or if a continuing order for periodic payments of money as spousal support is entered in a divorce or dissolution of marriage action that is determined on or after the effective date of this amendment, the court that enters the decree of divorce or dissolution of marriage does not have jurisdiction to modify the amount or terms of the alimony or spousal support unless the court determines that the circumstances of either party have changed and unless one of the following applies:

“(1) In the case of a divorce, the decree or a separation agreement of the parties to the divorce that is incorporated into the decree contains a provision specifically authorizing the court to modify the amount or terms of alimony or spousal support;

“(2) In the case of a dissolution of marriage, the separation agreement that is approved by the court and incorporated into the decree contains a provision specifically authorizing the court to modify the amount or terms of alimony or spousal support.

“(F) For purposes of divisions (D) and (E) of this section, a change in the circumstances of a party includes, but is not limited to, any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses.” R.C. 3105.18, as amended by Am.Sub.H.B. 514.

{¶ 18} As cited above, the Ohio legislature has defined “change of circumstances” to mean “any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses.” R.C. 3105.18(F). The statutory definition of “change of circumstances” is not as narrowly defined as *Leighner's* definition of “change of circumstances.” The *Leighner* definition is more restrictive because it not only requires a showing that there is “any” change, but that such a change is “substantial” and unforeseen. Thus, the party requesting the modification in child support has a greater or heavier burden of proving a change of circumstances under the *Leighner* definition.

{¶ 19} Despite the statutory definition of “change of circumstances” inserted into R.C. 3105.18 in January 1991, Ohio courts have continued to use the *Leighner* definition of “change of circumstances.” It is this Court's obligation, however, to correctly apply a statute as it was intended by the legislature. In

carrying out this task, we are keenly aware of the laws of statutory interpretation. The Ohio Supreme Court has held that “[i]n construing a statute, the court's paramount concern is legislative intent.” (Alteration sic.) *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545, 660 N.E.2d 463, citing *State ex rel. Solomon v. Police & Firemen's Disability & Pension Fund Bd. of Trustees* (1995), 72 Ohio St.3d 62, 65, 647 N.E.2d 486. The Ohio Supreme Court has further explained:

\*6 “In determining legislative intent, the court first looks to the language in the statute and the purpose to be accomplished. If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary.” (Citations omitted.) *Savarese*, 74 Ohio St.3d at 545, 660 N.E.2d 463.

{¶ 20} Relying on prior Ohio Supreme Court case law, this Court has also held that “[a] court may interpret a statute only where the statute is ambiguous.” *Donnelly v. Kashnier*, 9th Dist. No. 02CA0051-M, 2003-Ohio-639, at ¶ 27. “To interpret language that is already plain is to legislate, which is not a function of the court.” *Tolliver v. City of Middletown* (June 30, 2000), 12th Dist. No. CA99-08-147, 2000 Ohio App. LEXIS 2970, at \*12, appeal not allowed (2000), 90 Ohio St.3d 1450, citing *Sears v. Weimer* (1944), 143 Ohio St. 312, 55 N.E.2d 413. A statute may be considered ambiguous if its language is susceptible to more than one reasonable interpretation. *State ex rel. Toledo Edison Co. v. Clyde* (1996), 76 Ohio St.3d 508, 513, 668 N.E.2d 498.

{¶ 21} The term “any” is defined as “unmeasured or unlimited in amount, quantity, number, time or extent: up to whatever measure may be needed or desired.” Webster's 3rd New International Dictionary (1993) 97. The term “any” contained in R.C. 3105.18(F) is unambiguous; the use of that term does not yield more than one reasonable interpretation. Thus, this court need not attempt to interpret the statute, but must apply the statute as written. Based on Webster's definition, this Court finds that the Ohio legislature did not intend to have the term “any,” as the word is used in R.C. 3105.18(F), interpreted to mean “substantial” or “drastic.” <sup>FN2</sup> It is obvious that the term “any” is not as narrow in scope as the terms “substantial” or “drastic.” This Court believes that if the Ohio legislature envisioned a more restrictive standard for the phrase a “change of circumstances,” it would have included such terms as “substantial,” “drastic,” “material,” or “significant” in the 1991

amendments. Instead, however, the legislature chose to use the term "any," which refers to changes that have an effect on the economic status of either party.

FN3. In addition to the requirement that any change of circumstances be "substantial" or "drastic," the *Leighner* court also explained that the changes should not have been contemplated by the parties at the time of the divorce. However, the statutory amendments to R.C. 3105.18 do not require that economic changes be reasonably unforeseeable. We find that such a limitation on the phrase "change of circumstances" was also, therefore, not contemplated by the Ohio Legislature.

{¶ 22} Our view of the legislature's intent undoubtedly broadens the trial court's authority to modify a support order. Giving the trial court greater authority to review a party's request for modification of spousal support (or accept jurisdiction) pursuant to this Court's interpretation of the term "any" is consistent with prior case law that has held that a trial court has broad discretion in determining whether spousal support should be awarded, and the amount to be awarded. See *Mottice*, 118 Ohio App.3d at 735, 693 N.E.2d 1179; *Schultz*, 110 Ohio App.3d at 724, 675 N.E.2d 55. This Court, therefore, finds merit in Appellant's argument that "[b]y requiring-as a jurisdictional prerequisite-that the change of circumstances be 'substantial' or 'drastic' this court's prior rulings unduly impair[s] the discretion which the legislature intended to confer upon the trial courts."

\*7 {¶ 23} In sum, we find that the holding in *Leighner* remains good law with respect to the two-part analysis that should be applied when a trial court is asked to modify an existing spousal support order. However, the *Leighner* definition of "change of circumstances" is no longer the appropriate standard in determining whether a trial court has the jurisdiction to modify a support order. The term "any," as it is used in R.C. 3105.18(F), does not mean "substantial" or "drastic." In reviewing a party's request to modify a spousal support, the trial court need only determine whether a change has occurred in the party's economic status (i.e., an increase or decrease in wages, salary, living expenses, or medical expenses) after the spousal support order was entered into. The change could have less than a significant effect on the party's economic status; it is within the discretion of the trial court to decide whether a

change has, in fact, occurred.<sup>FN4</sup>

FN4. We note that existing guidelines regarding the filing of frivolous pleadings are necessarily incorporated into the change of circumstances analysis. Moreover, it cannot reasonably be said that the Ohio Legislature's use of the word "any" change was contemplated to mean any nominal change or to condone the filing of frivolous pleadings merely for the purpose of harassment.

{¶ 24} Because this Court finds that the standard for determining whether the trial court has the authority to modify an existing support order pursuant to R.C. 3105.18(E) is a showing that there has been "any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses," we find that the trial court erred in holding that "there has been no change in circumstances that the parties should not have contemplated at the time of the divorce." The evidence presented at the hearing held on October 25, 2002, showed that Appellee's salary increased from \$84,696 a year to \$134,889 a year. Appellant's salary increased from \$16,000 a year, which was imputed to her via a worksheet at the time of the divorce, to \$25,746 a year. The parties' also testified that Laura was no longer living with Appellant, but with her sister in a condominium supplied by Appellee. These changes may not be considered "substantial" or "drastic" or unforeseen as was required by *Leighner*, but they most certainly qualify as "any" increase or involuntary decrease in the parties' economic status. As such, we find that the trial court had jurisdiction to modify the spousal support order because a change of circumstances had occurred pursuant to R.C. 3105.18(E) and (F). This is not to say, however, that the trial court *should* have modified the spousal support order. The trial court never addressed the second step of the *Leighner* two-part analysis once it concluded that there was no change of circumstances. This matter should be addressed by the trial court on remand, and in considering whether a modification of spousal support is warranted the trial court must remember to consider the factors listed in R.C. 3105.18(C).

{¶ 25} Appellant's assignment of error is well taken.

III

{¶ 26} Appellant's sole assignment of error is sustained. The judgment of the trial court is reversed and the cause remanded for proceedings consistent with this opinion.

\*8 Judgment reversed, and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

Exceptions.

BAIRD and BATCHELDER, JJ., concur.

Ohio App. 9 Dist., 2004.

Kingsolver v. Kingsolver

Not Reported in N.E.2d, 2004 WL 1620723 (Ohio App. 9 Dist.), 2004 -Ohio- 3844

END OF DOCUMENT

**H**

Buchal v. Buchal  
Ohio App. 11 Dist., 2006.

CHECK OHIO SUPREME COURT RULES FOR  
REPORTING OF OPINIONS AND WEIGHT OF  
LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Lake  
County.

Linda K. BUCHAL, Plaintiff-Appellee  
v.

Jeffrey J. BUCHAL, Defendant-Appellant.  
No. 2005-L-095.

Decided July 28, 2006.

Civil Appeal from the Court of Common Pleas,  
Domestic Relations Division, Case No. 98 DR  
000967.

Linda D. Cooper, Painesville, OH, for plaintiff-  
appellee.

Wilbur N. Ischie, Painesville, OH, and Richard L.  
Dana, Perry, OH, for defendant-appellant.

**OPINION**

CYNTHIA WESTCOTT RICE, J.

\*1 ¶ 1 Appellant, Jeffrey Buchal, appeals from the judgment entry of the Lake County Court of Common Pleas, Domestic Relations Division denying his motion to modify spousal support and establish a termination date of his obligation. Upon review, we find the trial court did not abuse its discretion and therefore we affirm.

¶ 2 The parties to the instant appeal were divorced via final decree on September 15, 2000. As part of the final decree, appellant was ordered to pay appellee \$1,000 per month in spousal support. The judgment entry did not establish a termination date of the support, but did reserve jurisdiction to modify the order.

¶ 3 On May 4, 2004, appellant filed a motion to modify spousal support based upon a change in his financial circumstances; appellant also moved the court to establish a termination date. On September 29, 2004, a hearing was held before the magistrate during which a host of exhibits detailing, inter al., the parties' relative financial positions. On November 2,

2004, the magistrate filed his decision and determined appellant's support obligation should be reduced to \$800 per month. However, the magistrate declined to provide a date on which appellant's support obligation would be terminated.

¶ 4 Both parties filed objections to the magistrate's decision. On May 23, 2005, after considering all the evidence, the trial court rejected the magistrate's decision reducing the amount of spousal support but adopted the magistrate's decision refusing to establish a termination date. From this judgment entry, appellant now appeals and assigns two errors for our review:

¶ 5 "[1.] The trial court erred in determining that Mr. Buchal was not entitled to a modification of his spousal support obligation.

¶ 6 "[2.] The trial court erred in failing to set forth a date for termination of Mr. Buchal's spousal support obligation."

¶ 7 A trial court's decision to adopt, reject, or modify a magistrate's decision will not be reversed absent an abuse of discretion. *Bandish v. Bandish*, 11th Dist. No. 2002-G-2489, 2004-Ohio-3544, at ¶ 13. An abuse of discretion is more than an error of law or judgment; it implies the court, in rendering its decision, harbored an unreasonable, arbitrary or unconscionable attitude. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

¶ 8 According to R.C. 3105.18(E), a trial court may not modify an award of spousal support in a divorce decree unless the circumstances of either party have changed and the decree of divorce specifically contains a jurisdictional reservation authorizing the modification. See, *Wantz v. Wantz* (Mar. 23, 2001), 11th Dist. No. 99-G-2258, 2001 Ohio App. LEXIS 1386, 5. A change in circumstances is defined as, but is not limited to "any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses." R.C. 3105.18(F).

¶ 9 Once a court has determined a change of circumstances exists, the moving party still bears the burden of demonstrating the current support award is no longer appropriate and reasonable. See, R.C. 3105.18(C); *Reveal v. Reveal*, 154 Ohio App.3d 758,

2003-Ohio-5335, at ¶ 14. In deciding whether the movant has met his or her burden, the court “re-examines the existing award in light of the changed circumstances.” *Gallo v. Gallo*, 11th Dist. No.2004-L-193, 2006-Ohio-873, at ¶ 17.

\*2 {¶ 10} Under his first assignment of error, appellant initially argues the trial court erred by requiring a “substantial” change in circumstances as a condition precedent to modifying the spousal support order.

{¶ 11} In its judgment entry, the trial court utilized the following statement of law to guide its analysis:

{¶ 12} “ ‘a trial court may modify an award of spousal support if there has been a substantial change in the circumstances of one or both of the parties. The change in circumstances must not have been contemplated at the time of the existing award.’” *DeChristefero v. DeChristefero*, 11th Dist. No.2002-T-0021, 2003-Ohio-2234, at ¶ 13.

{¶ 13} As a result, the trial court rejected the magistrate's decision that there had been “a significant change in circumstances to warrant reduction of the spousal support herein pursuant to O.R.C. 3105.18(F).”

{¶ 14} We first note that a finding of a “significant” or “substantial” change of circumstance is neither necessary nor sufficient to support a modification of a spousal award pursuant to R.C.3105.18(E).<sup>FNI</sup> In this respect, appellant's argument has merit. However, an error of this dimension is only reversible if the record demonstrates the trial court abused its discretion in arriving at its conclusion. That is, if, after observing the proper legal requirements, the record demonstrates the trial court's decision was reasonable in light of the evidence, we have no choice but to affirm its decision.

FNI. In *DeChristefero*, this court held that the evidence put forth at the trial court demonstrated a “substantial” change in circumstances which, under those facts, justified modification of spousal support. However, other cases, including additional authority in this District, have held the change need not be substantial. See, *Davis v. Davis* (Mar. 31, 2000), 11th Dist. No. 98-P-0122, 2000 Ohio App. LEXIS 1443, 8-9; *Wantz*, supra; *Kingsolver v. Kingsolver*, 9th Dist. No. 21773, 2004-Ohio-3844; *Tsai v.*

*Tien*, 162 Ohio App.3d 89, 2004-Ohio-3520, at ¶¶ 18-19.

{¶ 15} That said, appellant maintains he put forth sufficient evidence of an involuntary decrease in his salary and therefore experienced a statutory change in circumstances pursuant to R.C. 3105.18(F). We disagree.

{¶ 16} Appellant testified that his income at the time of the divorce was greater than that at the time of the hearing because he was able to work regular overtime. After the divorce, however, he transferred departments at his place of employment. Appellant was led to believe his new position would afford him nearly “unlimited overtime.” It did not and at the time of the hearing, his company ceased offering overtime to his department.

{¶ 17} These circumstances notwithstanding, appellant also testified he had turned down overtime in a separate department “which [he did not] like working for.” Accordingly, the evidence demonstrates appellant could have worked overtime but voluntarily declined the offers. As such, the court could reasonably infer appellant's income decrease was a result of his voluntary acts or omissions. Therefore, the trial court did not abuse its discretion when it found appellant failed to show a change of circumstances pursuant to R.C. 3105.18(F).

{¶ 18} Next, appellant argues the trial court erred in failing to find he suffered a sufficient change in income to warrant a modification of his spousal support obligation. As indicated above, were appellant's decrease in income involuntary, any change would suffice to show a change in circumstances. Because the evidence demonstrated appellant voluntarily declined overtime which would have placed him in a better financial position, his change in income was insufficient to warrant a modification. Moreover, while appellant did experience a decrease in his income since the divorce, the evidence demonstrated appellee's household income was still only one-third that of appellant's. The court carefully considered appellant's change of income in light of all other evidence and determined the decrease in question was not sufficient to merit a change of circumstance such that the original support should be modified. We do not believe this decision was unreasonable. Appellant's argument is unavailing.

\*3 {¶ 19} However, assuming appellant put forth sufficient evidence to demonstrate a change of

circumstances, we believe he still failed to meet his burden of showing a modification would be reasonable and appropriate pursuant to the factors set forth under R.C. 3105.18(C)(1).<sup>FN2</sup>

FN2. Appellant asserts the appropriate metric for evaluating a motion to modify spousal support is necessity. In this respect, appellant argues appellee would not need his spousal support if she was not supporting their thirty-four year old son who does not work and lives with appellee without contributing to household expenses. Appellant's statement of the law is the relevant question is whether the support order under consideration is appropriate and reasonable under the circumstances. See, R.C. 3105.18(C); see, also, *DeChristefero*, supra, at ¶ 15. inaccurate. While need is a factor to consider, the relevant question is whether the support order under consideration is appropriate and reasonable under the circumstances. See, R.C. 3105.18(C); see, also, *DeChristefero*, supra, at 15.

{¶ 20} To wit, after considering the factors set forth under R.C. 3105.18(C)(1), the court determined:

{¶ 21} "The parties' marriage had a duration of almost 32 years. Herein, it was clearly contemplated at the time of the divorce that Wife's modest mortgage payment of \$213.00 per month would end in a couple of years. Husband received the income producing assets in the divorce; Wife received the marital house and its equity. Further, even with Husband choosing to decline whatever 'minimal' overtime he has been offered in the last few years, his W-2 income in 2002 and 2003 is more than three times that of Wife's. Thus, his retirement contributions to his plan are at a higher rate than Wife's.

{¶ 22} " \* \* \*

{¶ 23} "Accordingly, the Court does not find that Husband has sustained his burden of proof for the modification of the spousal support. The Court rejects the Magistrate's Decision filed November 2, 2004 and finds the Husbands objections are not well-taken and are denied."

{¶ 24} We again underscore that a trial court enjoys considerable discretion in determining whether an

existing spousal support order should be modified. *Mottice v. Mottice* (1997), 118 Ohio App.3d 731, 735. Accordingly, where the trial court's judgment is reasonable and supported by the evidence, an appellate court is not free to substitute its judgment for that of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169. Here, the trial court's judgment is supported by the evidence and is neither arbitrary nor unreasonable. Thus, appellant's first assignment of error is without merit.

{¶ 25} Under his second assignment of error appellant contends the trial court erred in failing to set forth a termination date for his spousal support obligation.

{¶ 26} In *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, paragraph one of the syllabus, the Supreme Court of Ohio held "[e]xcept in cases involving a marriage of long duration \* \* \* an award of sustenance alimony should provide for termination of the award." Moreover, this court has stated that "when a trial court is modifying a spousal support order, it should also consider whether a termination date of spousal support should be established." *Griffith v. Griffith* (June 17, 1994), 11th Dist. No. 93-G-1778, 1994 Ohio App. LEXIS 2664, at 12. However, "establishing a termination date for spousal support is not mandatory." *Id.*

{¶ 27} Here, the trial court considered establishing a termination date pursuant to appellant's motion. However, the court declined to do so. In support of its decision, the trial court emphasized the lengthy duration of the marriage (thirty-two years). Moreover, the evidence demonstrated appellee was fifty-six at the time of the hearing and worked full-time for \$8 an hour. Although some of appellee's income was directed at supporting the couple's thirty-four year old son, the court indicated appellee could spend her spousal support in any way she desired. The court ultimately held appellant's desire for certainty in his personal financial planning does not supersede the propriety of the support award.

\*4 {¶ 28} Under the circumstances, the court was not required to set forth a termination date. The court decided not to do so and set forth its reasons for declining appellant's request in its judgment entry. Accordingly, we do not believe the trial court abused its discretion. Appellant's second assignment of error is without merit.

{¶ 29} For the foregoing reasons, appellant's assignments of error are not well taken and the

decision of the Lake County Court of Common Pleas,  
Domestic Relations Division, is therefore affirmed.

DONALD R. FORD, P.J., and COLLEEM M.  
O'TOOLE, J., concur.

Ohio App. 11 Dist., 2006.

Buchal v. Buchal

Slip Copy, 2006 WL 2105508 (Ohio App. 11 Dist.),  
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C

Tsai v. Tien  
 Ohio App. 5 Dist., 2005.

Court of Appeals of Ohio, Fifth District, Stark  
 County.

TSAI, Appellant and Cross-Appellee,  
 v.

TIEN, Appellee and Cross-Appellant.  
 No. 2004CA00312.

Decided July 5, 2005.

**Background:** Former husband filed motion for modification of child support and spousal support. The Court of Common Pleas, Stark County, No. 2000DR01987, refused to modify spousal support, but did modify divorce judgment as to how former husband was required to maintain life insurance for children's benefit. Former husband appealed, and former wife cross-appealed.

**Holdings:** The Court of Appeals, William B. Hoffman, J., held that:

(1) statute governing modification of spousal support does not require a substantial change of circumstances, and

(2) to amend provision of separation agreement requiring former husband to maintain life insurance for children's benefit until children were 25 years old, former husband was required to file motion for relief from judgment, not motion to modify separation agreement.

Reversed and remanded.  
 West Headnotes

[1] Divorce 134 ⚡ 245(2)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k230 Permanent Alimony

134k245 Modification of Judgment or Decree

134k245(2) k. Grounds and Rights of Parties. Most Cited Cases

While statute governing modification of spousal support requires more than a nominal change of circumstances, it does not require a substantial change of circumstances. R.C. § 3105.18(E).

[2] Divorce 134 ⚡ 286(3.1)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k278 Appeal

134k286 Review

134k286(3) Discretion of Lower Court

134k286(3.1) k. In General. Most

Cited Cases

Modifications of spousal support are reviewable under an abuse-of-discretion standard. R.C. § 3105.18.

[3] Divorce 134 ⚡ 245(2)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k230 Permanent Alimony

134k245 Modification of Judgment or Decree

134k245(2) k. Grounds and Rights of Parties. Most Cited Cases

To constitute a basis for modifying spousal support, the change of circumstances required must be material and not purposely brought about by the moving party and not contemplated at the time the parties entered into the prior agreement or order. R.C. § 3105.18.

[4] Divorce 134 ⚡ 245(3)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k230 Permanent Alimony

134k245 Modification of Judgment or Decree

134k245(3) k. Application, Bill, or Petition, and Hearing Thereof. Most Cited Cases

Burden of establishing the need for modification of spousal support rests with the party seeking modification. R.C. § 3105.18.

[5] Divorce 134 ⚡ 245(1)

134 Divorce

134V Alimony, Allowances, and Disposition of Property

134k230 Permanent Alimony

134k245 Modification of Judgment or Decree

134k245(1) k. Power and Authority.

Most Cited Cases

Trial court had authority to modify former husband's spousal-support obligation; divorce decree provided that trial court expressly retained jurisdiction with respect to amount of spousal support. R.C. § 3105.18(E).

[6] Child Support 76E 221

76E Child Support

76EV Proceedings

76EV(D) Judgment

76Ek221 k. Amendment and Clarification.

Most Cited Cases

In seeking to amend provision of separation agreement requiring former husband to maintain life insurance for children's benefit until children were 25 years old, former husband was required to file motion for relief from judgment, not motion to modify separation agreement, which had been incorporated into divorce judgment; language that former husband sought to modify was clear and unambiguous. Rules Civ.Proc., Rule 60(B).

**\*\*810 Stanley R. Rubin**, Canton, for appellant and cross-appellee.

**John Werren**, Canton, for appellee and cross-appellant.

**WILLIAM B. HOFFMAN**, Judge.

**\*91 \*162** Appellant and cross-appellee, John Tsai, appeals the September 8, 2004 judgment entry of the Stark County Court of Common Pleas, Domestic Relations Division, denying his motion to modify his spousal-support obligation. Appellee and cross-appellant, Xiao-Ying Tien, appeals the section of the September 8, 2004 judgment entry modifying the parties' separation agreement relative to appellant and cross-appellee's obligation to maintain a policy of life insurance for the benefit of the parties' children beyond the age of the children's majority.

**\*\*811 STATEMENT OF THE FACTS AND CASE**

{¶ 2} The parties were married on June 24, 1988, and two children were born as issue of their marriage.

Appellant and cross-appellee filed a complaint for divorce on December 21, 2000. On June 28, 2002, the trial court issued a judgment entry and decree of divorce, incorporating the parties' separation agreement. On August 5, 2002, appellant and cross-appellee filed a motion for modification of child and spousal support. By judgment entry filed September 28, 2002, the trial court overruled the motion.

{¶ 3} On January 24, 2003, appellant and cross-appellee again moved for modification of his child- and spousal-support obligations. The trial court conducted an evidentiary hearing on February 26, 2004. In an amended magistrate's decision, the magistrate recommended a reduction in appellant and cross-appellee's child-support obligation from \$2,488.20 to \$2,114.26 per month. The trial court denied the remainder of appellant and cross-appellee's motion for modification of his spousal-support obligation, and modified the parties' divorce-decree provision requiring that appellant and cross-appellee maintain life insurance for the benefit of the parties' children until they reached the age of 18.<sup>FN1</sup> On September 8, 2004, by judgment entry, the trial court approved and adopted the amended magistrate's decision, overruling the parties' objections.

<sup>FN1</sup>. The decree of divorce specified that life insurance was to be maintained until the children reached age 25.

{¶ 4} It is from the trial court's September 8, 2004 judgment entry that the parties now appeal. Appellant and cross-appellee assigns as error:

{¶ 5}“I. The trial court abused its discretion in refusing to modify appellant's spousal support obligation where his income had decreased by \$60,000, or 12%.”

\*92 {¶ 6} Appellee and cross-appellant assigns as error:

{¶ 7}“I. The trial court erred when it modified the provisions of an in-court separation agreement, incorporated into the parties' 2002 decree of divorce, relative to cross-appellee's obligation to maintain a policy of life insurance for the benefit of the parties' children beyond the age of the children's majority.”

{¶ 8}“II. Did the trial court commit reversible error when it modified the provisions of an in-court separation, incorporated into the parties' 2002 decree of divorce, relative to cross-appellee's obligation to

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(Cite as: 162 Ohio App.3d 89, 832 N.E.2d 809)

maintain a policy of life insurance for the benefit of the parties' children beyond the age of the children's majority?"

{¶ 9} We first address appellant and cross-appellee's arguments. In his sole assignment of error, appellant and cross-appellee maintains that the trial court erred in denying his motion to modify his spousal-support obligation despite a reduction in his income.

[1][2][3] {¶ 10} Modifications of spousal support are reviewable under an abuse-of-discretion standard. Booth v. Booth (1989), 44 Ohio St.3d 142, 541 N.E.2d 1028. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 5 OBR 481, 450 N.E.2d 1140. "Modification of a spousal support award is appropriate only when there has been a substantial change in the circumstances of either party that was not contemplated at the time the existing \*\*812 award was made." Moore v. Moore (1997), 120 Ohio App.3d 488, 491, 698 N.E.2d 459, citing Leighner v. Leighner (1986), 33 Ohio App.3d 214, 215, 515 N.E.2d 625. See R.C. 3105.18(E). In order to constitute a basis for modifying spousal support, the change of circumstances required must be material and not purposely brought about by the moving party and not contemplated at the time the parties entered into the prior agreement or order. Roberson v. Roberson (Nov. 29, 1993), Licking App. No. 93-CA-42, 1993 WL 500325.

{¶ 11} R.C. 3105.18 governs the trial court's consideration in modifying an existing spousal-support order. The statute states:

{¶ 12} "(E) If a continuing order for periodic payments of money as alimony is entered in a divorce or dissolution of marriage action that is determined on or after May 2, 1986, and before January 1, 1991, or if a continuing order for periodic payments of money as spousal support is entered in a divorce or dissolution of marriage action that is determined on or after January 1, 1991, the court that enters the decree of divorce or dissolution of marriage does not have jurisdiction to modify the amount or terms of the alimony or spousal support unless the court determines that the circumstances of either party have changed and unless one of the following applies:

\*93 {¶ 13} "(1) In the case of a divorce, the decree or a separation agreement of the parties to the divorce that is incorporated into the decree contains a provision specifically authorizing the court to modify

the amount or terms of alimony or spousal support.

{¶ 14} "(2) In the case of a dissolution of marriage, the separation agreement that is approved by the court and incorporated into the decree contains a provision specifically authorizing the court to modify the amount or terms of alimony or spousal support.

{¶ 15} "(F) For purposes of divisions (D) and (E) of this section, a change in the circumstances of a party includes, but is not limited to, any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses."

[4] {¶ 16} The burden of establishing the need for modification of spousal support rests with the party seeking modification. Tremaine v. Tremaine (1996), 111 Ohio App.3d 703, 676 N.E.2d 1249.

[5] {¶ 17} It is clear that the trial court had authority to modify the spousal-support obligation, as the parties' divorce decree provides, "The Court hereby expressly retains jurisdiction with respect to the amount of spousal support."

{¶ 18} Accordingly, we proceed to the statutory analysis set forth above and adopt the opinion of the Ninth District Court of Appeals in Kingsolver v. Kingsolver, 9th Dist. No. 21773, 2004-Ohio-3844, 2004 WL 1620723, holding that R.C. 3105.18 does not require a substantial change in circumstances. The Ninth District held:

{¶ 19} "In sum, we find that the holding in Leighner [33 Ohio App.3d 214, 515 N.E.2d 625] remains good law with respect to the two-part analysis that should be applied when a trial court is asked to modify an existing spousal support order. However, the Leighner definition of 'change of circumstances' is no longer the appropriate standard in determining whether a trial court has the jurisdiction to modify a support order. The term 'any,' as it is used in R.C. 3105.18(F), does not mean 'substantial' or 'drastic.' In reviewing a party's request to modify a spousal support, the trial court need only determine\*\*813 whether a change has occurred in the party's economic status (i.e., an increase or decrease in wages, salary, living expenses, or medical expenses) after the spousal support order was entered into. The change could have less than a significant effect on the party's economic status; it is within the discretion of the trial court to decide whether a change has, in fact, occurred." (Emphasis sic.)

\*94 {¶ 20} While we find the statute requires more

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than a nominal change, we depart from prior holdings requiring the party seeking modification to demonstrate a substantial change.

{¶ 21} The amended magistrate's decision held:

{¶ 22} "A court that enters a spousal support order in a decree of divorce is authorized to modify its spousal support order if the agreement contains a provision specifically authorizing the court to modify the amount or terms of the spousal support and the circumstances of either party have changed since the decree was entered. O.R.C. 3105.18(E).

{¶ 23} " 'Modification of a spousal support award is appropriate only when there has been a substantial change in the circumstances of either party that was not contemplated at the time the existing award was made.' Moore v. Moore (1997), 120 Ohio App.3d 488, 698 N.E.2d 459, citing Leighner v. Leighner (1986), 33 Ohio App.3d 214, 215, 515 N.E.2d 625. See O.R.C. 3105.18(E). To justify a modification of spousal support, there must be a drastic change in the economic situation of either party. Caughenbaugh v. Caughenbaugh [ (Apr. 1, 1987), 5th Dist. No. 32-CA-86, 1987 WL 9959]. See also, Wolfe v. Wolfe (1976), 46 Ohio St.2d 399 [75 O.O.2d 474], 350 N.E.2d 413.

{¶ 24} "6. *Only after satisfying this threshold determination of a substantial change in circumstances may the court then proceed to a consideration of whether or not the existing order should be modified.* This latter inquiry requires a re-examination of the existing order in light of the changed circumstances, and requires a two-step determination: First, is sustenance alimony still necessary? And, if so, what amount is reasonable? In addressing the question of whether the existing order should be modified, the trial court's discretion is guided and limited by consideration of all relevant factors, including those listed in O.R.C. 3105.18(B), Leighner v. Leighner (1986), 33 Ohio App.3d 214, 215, 515 N.E.2d 625. See also, Schwab v. Schwab (August 23, 1999), Stark App. No. 98-CA-315 at 3 [1999 WL 668847] citing Norris v. Norris (1982), 13 Ohio App.3d 248 [13 OBR 310], 469 N.E.2d 76.

{¶ 25} "7. The burden of persuasion with respect to the modification sought remains with the movant. Joseph v. Joseph (1997), 122 Ohio App.3d 734, 702 N.E.2d 949. See O.R.C. 3105.18(E).

{¶ 26} "8. 'A change in the circumstances of a party includes, but is not limited to, any increase or

involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses.' O.R.C. 3105.18(F). The change of circumstances must not have been purposely brought about by the party seeking the modification. Roach v. Roach (1989), 61 Ohio App.3d 315, 319, 572 N.E.2d 772, 774.

\*95 {¶ 27} "9. The court has jurisdiction to address the issue of spousal support in this case. The parties specifically reserved jurisdiction for modification of the amount of monthly spousal support. The issue before this court is whether a change of circumstances exists which would justify a modification of spousal support. As noted above, Section 3105.18(F) indicates that an involuntary decrease in a party's earnings \*\*814 can be a change of circumstance to justify modifying a spousal support order. However, case law has established that a *modification of a spousal support award is appropriate only when there has been a substantial change in the circumstances of either party* that was not contemplated at the time the existing award was made. Clearly, Plaintiff's income has decreased since the decree of divorce was filed. But definitely not to the extent of causing a *substantial change* in the circumstances of the Plaintiff nor to other provisions contained within item number thirteen (13), page four (4) of the parties' decree of divorce remain in full force and effect unless specifically modified herein." (Emphasis added.)

{¶ 28} Upon review, we find that the trial court's opinion is misguided and tainted by the analysis of a substantial change in circumstances rather than the appropriate standard set forth in Kingsolver. Although the trial court apparently went on to conduct the second part of the statutory analysis, we fear that its stated reliance upon the wrong standard (substantial change) may well have influenced its conclusion. Therefore, we believe that the interests of fairness require us to sustain appellant's sole of assignment of error and remand the matter to the trial court to redetermine the motion to modify spousal support using the Kingsolver standard for change of circumstances.

[6] {¶ 29} On cross-appeal, appellee and cross-appellant argues that the trial court erred in modifying the parties' divorce decree incorporating their separation agreement. The separation agreement provides:

{¶ 30} "13. Plaintiff shall designate defendant as a beneficiary of his life insurance to the extent of any

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unpaid spousal support due and owing Defendant in the event of the death of the Plaintiff prior to paying all spousal support in full. Plaintiff shall further designate the minor children of the parties as beneficiaries of his life insurance providing a \$500,000.00 death benefit to each child, unless such child attains 25 years of age. The Plaintiff shall provide proof of maintaining such life insurance to Defendant at the end of each year.”

{¶ 31} The trial court's September 8, 2004 judgment entry modified the provision, finding:

{¶ 32}“10. Item number thirteen (13) on page four (4) of the parties' final decree of divorce is vacated to the extent that it requires the Plaintiff to designate the minor children of the parties as beneficiaries of his life insurance \*96 until each child reaches 25 years of age. Said requirement with regard to the children is replaced with the following: Plaintiff shall further designate the minor children of the parties as beneficiaries of his life insurance providing a \$500,000.00 death benefit to each child, unless such child attains the age of eighteen (18) years of age and is graduated from high school, whichever occurs later. All other provisions contained within item number thirteen (13), page four (4) of the parties' decree of divorce remain in full force and effect unless specifically modified herein.”

{¶ 33} Appellee and cross-appellant argues that the parties agreed to the original provision in order to insure the availability of funds for the children's college education. Appellee and cross-appellant cites Ohio case law holding that it is sound public policy to endorse agreements between parties to provide a college education for a child even after such child has reached the age of majority. Grant v. Grant (1977), 60 Ohio App.2d 277, 14 O.O.3d 249, 396 N.E.2d 1037.

\*\*815 {¶ 34} Appellant and cross-appellee argues that he never agreed to maintain the insurance policies until his children reached 25 years of age. Rather, he believed, at the time the parties agreed to the terms of the separation agreement, he was obligated to maintain the insurance policies only until the children reached the age of 18. He maintains that he did not sign the agreed entry and did not review the language until after it had been filed. As a result, appellant and cross-appellee moved the court to modify the provision of the decree.

{¶ 35} Upon review, we find the trial court's modification of the provision improper. Such terms

in the consent decree could only be modified upon the filing of a Civ.R. 60(B) motion. The language sought to be modified was clear and unambiguous, not requiring judicial interpretation. Appellant and cross-appellee's appropriate remedy lies in filing a formal Civ.R. 60(B) motion for relief from judgment. Therefore, we decline to address either party's arguments with regard to the merits of modification at this time. Appellee and cross-appellant's assignments of error are sustained.

{¶ 36} The September 8, 2004 judgment entry of the Stark County Court of Common Pleas, Domestic Relations Division, is reversed, and this matter is remanded to the trial court for further proceedings.

Judgment reversed and cause remanded.

BOGGINS, P.J., and EDWARDS, J., concur.  
Ohio App. 5 Dist., 2005.

Tsai v. Tien

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