IN THE SUPREME COURT OF OHIO

FRANCES MANDELBAUM	:	Case No. 2007 - 2422 Case No. 2008 - 0375
Appellee	:	
	:	
v.		
	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate District
STANLEY E. MANDELBAUM	:	
Appellant		
	:	

MERIT BRIEF OF APPELLANT STANLEY E. MANDELBAUM

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STATEMENT OF FACTS

The parties, Frances and Stanley Mandelbaum, were divorced in 2000. (For ease of reading the parties will be referred to by their first names.) Their final decree of divorce contained language requiring Stanley to pay to Frances spousal support in the amount of $18,000 per year (at the rate of $1,500 per month), a provision terminating that obligation upon the death of either party or upon Frances' remarriage, a provision rendering such spousal support obligation "subject to the ongoing and continuing jurisdiction" of the court", a provision requiring the parties to exchange copies of their income tax returns each year, a provision giving either party the right to seek modification of the spousal support "due to a change in the financial circumstances of either party", and a provision expressing the parties intention that their combined incomes be equalized between the two of them. At the time of their divorce Stanley's income was approximately $61,000 per year and Frances's income was approximately $25,000 per year. (Appendix at 000047, 000048, 000050)

In 2005 Stanley sought a reduction of his spousal support obligation, which motion was heard by a magistrate. In his decision, the magistrate interpreted the language of the final decree as expressing an intention that at all times the parties' incomes would be equalized, found that Stanley's income had increased to approximately $84,500 and that, as stipulated by the parties, Frances' income had

increased to approximately $40,239, found that the economic and living arrangements between Stanley and his new wife did not warrant imputation of additional income to Stanley, held that no change in circumstances had occurred sufficient for a reduction in spousal support, and overruled Stanley's motion. (Appendix at 000059) Stanley filed objections to the Magistrate's Decision, objecting to several factual determinations relative to his income. (Appendix at 000065) Frances filed a response to Stanley's objections, in which Frances agreed that the decree required the parties' incomes to be equalized at all times, conceded that the magistrate had overstated Stanley's income in certain respects, disagreed with (but did not file objections to) the magistrate's findings relative to the economic and living arrangements between Stanley and his new wife, and urged the trial court to agree with the magistrate's Decision and Order overruling Stanley's motion. (Appendix at 000070) In ruling upon Stanley's objections, the trial court found that the language of the parties' divorce decree expressed an intention that at all times the parties' incomes would be equalized, granted some but not all of Stanley's objections, determined Stanley's income to be $61,876 and Frances' to be $40,239, and reduced Stanley's spousal support obligation to $925 per month. (Appendix at 000078)

Frances appealed the trial courts' decision, asserting that the trial court had abused its discretion in failing to impute additional income to Stanley and in failing

to consider what Frances argued were benefits to Stanley resulting from the economic and living arrangements between Stanley and his new wife. The court of appeals did not directly rule on Frances's assignments of error, ruling instead that the trial court had abused its discretion by failing to first determine whether the changes in the parties' circumstances were "substantial" and "not contemplated" at the time the original spousal support order had been entered. (Appendix at 000005, 000032)

At all levels of this litigation Frances and Stanley have both conceded, indeed argued, that their intention, as expressed in the agreement and language set forth in their divorce decree, was that at all times the amount of spousal support should be an amount that would equalize Frances' income with that of Stanley. Both the magistrate and the trial judge interpreted the language accordingly, and both the magistrate and the trial judge interpreted such language as a limitation upon or guide for determining what amount of spousal support would be appropriate and reasonable under the new circumstances. In her initial brief to the court of appeals Frances continued to concede and argue that the parties' "respective incomes were always to remain equal." (Appendix at 000089) In his appellate brief filed below Stanley agreed that the spousal support language in the decree required the parties' incomes to be equalized at all times. (Appendix at 000101) The court of appeals decision appears to completely reject this attempt by

the parties to place limitations upon or give guidelines to the trial court's exercise of its continuing jurisdiction, characterizing it as being an impermissible attempt by the parties to confer jurisdiction on the trial court. (Appendix at 000032)

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

INTRODUCTION

This consolidated appeal presents three important issues in the area of modification of spousal support awards in Ohio, all of which involve the interpretation of the language of R.C. 3105.18. (Appendix at 000116)

The first of these issues is whether R.C. 3105.18 requires a change of circumstances sufficient to invoke the trial court's continuing jurisdiction to modify an award of spousal support to be "substantial" or "drastic". R.C. 3105.18(F) contains the definition of "change of circumstances" for spousal support modification purposes. The statute uses the word "any" and does not include either the word "substantial" or "drastic". The courts of appeals are in conflict on this issue. A growing number of appellate districts have found that the word "any" as used in R.C. 3105.18(F) does not mean "substantial" or "drastic" and that the statute simply requires a court to determine whether a change has occurred in a party's economic status before the court can proceed to determining whether the existing spousal support award is still appropriate and reasonable. Conversely, the decision of the court of appeals in this case finds ambiguity in the

word "any" as used in R.C. 3105.18(F), and holds that a trial court must first find the change of circumstances to be "substantial" before the court can proceed to determining whether the existing spousal support award is still appropriate and reasonable. The necessity of a finding of "substantial" or "drastic" is also the interpretation of R.C. 3105.18(F) followed by several other appellate courts in Ohio. Courts which continue to rely upon and follow a "substantial change" or "drastic change" in their analysis of a motion to modify a spousal support award do so without any statutory authority. Additionally, focusing on the tangential consideration of "substantial" or "drastic" misses the point of R.C. 3105.18(C), i.e., that all awards of spousal support, whether original or as modified, must be "appropriate and reasonable". By refocusing the analysis on whether the award remains "appropriate and reasonable", the court would remain faithful not only to fundamental principles of statutory construction but to the words actually used in R.C. 3105.18 as well.

The second issue is whether R.C. 3105.18 requires that a change in circumstances sufficient to invoke the trial court's jurisdiction to modify an award of spousal support not have been "foreseeable to" or "contemplated by" the parties at the time the order being modified was made. Language imposing such requirement cannot be found in R.C. 3105.18(F). The courts of appeals are in conflict on this issue as well. The application of the "foreseeable to" or

"contemplated by the parties" rule is unevenly and inconsistently applied by trial and appellate courts, confuses the issues, and inhibits a more principled approach to spousal support modification.

The certified question involved in the consolidated appeal has condensed the foregoing two issues into one certified question.

The third issue is whether parties can define for themselves, by use of language in their divorce decrees, limitations upon or guidelines for the court's exercise of its continuing jurisdiction upon the happening of changes in the parties' circumstances or other future events. A trial court should be bound by limitations upon or guidelines for the court's exercise of its continuing jurisdiction to modify a spousal support award, if such limitations or guidelines are agreed upon by the parties, are set forth in the parties' divorce decree in the provision specifically authorizing the court to modify the amount or terms of the alimony or spousal support award, and do not otherwise violate public policy.

<u>Proposition of Law No. I:</u> The word "any" as used in R.C. 3105.18(F) does not mean "substantial" or "drastic".

The primary goal in statutory interpretation is to give effect to the intent of the legislature. *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St. 3d 38, 39-40, 2001-Ohio-236, 741 N.E.2d 121. In determining legislative intent, a court first looks to the language of the statute. *Bailey, id.*. In considering statutory language,

it is the duty of the court to give effect to the words used in a statute, not to delete words used or to insert words not used. *Bailey, id.* If the meaning of a statute is unambiguous and definite, it must be applied as written. *Bailey, id.* A word that is not defined in a statute must be afforded its plain and ordinary meaning. *Kimble v. Kimble* (2002), 97 Ohio St 3d 424, 425, 2002-Ohio-6667, ¶ 6, 780 N.E.2d 273, 275, citing *Sharp v. Union Carbide Corp.* (1988),. 38 Ohio St. 3d 69, 70, 525 N.E.2d 1386 and R.C. 1.42 (Appendix at 000119).

R.C. 3105.18 is the statute that authorizes a trial court to issue an award of periodic spousal support payments in divorce and legal separation actions. It also governs the jurisdiction of trial courts to modify awards of spousal support made in divorce and legal separation actions as well as dissolution of marriage actions. Under R.C. 3105.18(E), trial courts are deprived of jurisdiction to modify spousal support awards unless two conditions are satisfied: (1) the decree must authorize modification; and (2) the court must determine "that the circumstances of either party have changed." R.C. 3105.18(F) contains the language requiring interpretation, and it reads as follows:

> "(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."

The language set forth in R.C. 3105.18(F) was enacted as part of Am. H.B. 514, which legislation was approved in August, 1990. The effective date of R.C.

3105.18(F) was in January, 1991. *143 Ohio Laws, Part III, 5426, 5457, and 55516-17.* The language of R.C. 3105.18(F) has remained the same since its effective date. Prior to the adoption of R.C. 3105.18(F), no statute had addressed or set forth the meaning of the term "change of circumstances" in the context of alimony or spousal support.

Since the adoption of R.C. 3105.18(F), appellate courts in Ohio have been divided over its meaning. One line of cases holds that the word "any" as used in R.C. 3105.18(F) is unambiguous, and that the Ohio legislature did not intend the word "any" to mean "substantial" or "drastic". This reading of R.C. 3105.18(F) is now expressly followed by four appellate districts, as reflected in *Tsai v. Tien* , 162 Ohio App. 3d 89, 2005-Ohio-3520, 832 N.E.2d 809, paragraph one of syllabus (Fifth District)(Appendix at 000120), *Rollins v. Harvis*, Lucas App. No. L-06-1328, 2007-Ohio-6121, at ¶ 14, (Sixth District, an opinion issued the same day the decision in the instant appeal was issued)(Appendix at 000125), *Kingsolver v. Kingsolver*, Summit App. No. 21773, 2004-Ohio-3844, paragraph one of syllabus (Ninth District)(Appendix at 000128), and *Buchal v. Buchal*, Lake App. No. 2005-L-095, 2006-Ohio-3879, at ¶ 14 (Eleventh District)(Appendix at 000135). It also appears to be the interpretation of R.C. 3105.18(F) being applied in the Fourth District as reflected in *Cassidy v. Cassidy*, Pike App. No. 03CA721, 2005-Ohio-3199, at ¶ 29 (Appendix at 000139). And, also, it may now be the approach that is

being taken in the Tenth District. See *Friesen v. Friesen*, Franklin App. No. 07AP-110, 2008-Ohio-952, at ¶ 38, 39, which opinion was issued on March 6, 2008 (Appendix at 000146).

Taking a different approach, the appellate courts in the Second, Third, Seventh, and Twelfth appellate districts continue to interpret the language of R.C. 3105.18(F) as requiring a finding of "substantial" or "significant" or "drastic" change of circumstances before a trial court is even permitted to review an existing spousal support award. In the case that is the subject of this appeal, the court of appeals for the Second Appellate District stated "we . . . do not find the language used by the General Assembly to be free from ambiguity" and held 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 . . ." (Appendix at 000028 - 000031). See, also, *Trotter v. Trotter*, Allen App. No. 1-2000-86, 2001-Ohio-2122 (Third District) (Appendix at 000156); *Reeves v. Reeves*, Jefferson App. No. 06-JE-13, 2007-Ohio-4988, at ¶ 18 (Seventh District) (Appendix at 000159); and *Carnahan v. Carnahan* (1997), 118 Ohio App. 3d 393, 397, 692 N.E.2d 1086, 1089 (Twelfth District) (Appendix at 000164). [The Eighth Appellate district appears to have an internal conflict over this issue. Compare, e.g., *Calabrese v. Calabrese*, Cuyahoga App. No. 88520, 2007-Ohio-2760, at ¶ 20

(Appendix at 000171) with *Kucmanic v. Kucmanic* (1997), 119 Ohio App. 3d 609, 613, 695 N.E.2d 1205, 1207 (fn. 1) (Appendix at 000176) and *McKenzie v. Southworth*, Cuyahoga App. No. 88758, 2007-Ohio-3915, ¶ 20, 29 (Appendix at 000180). If the First Appellate District has weighed in on the issue such case cannot be found.]

The court of appeals below began its critique of the *Kingsolver, supra* approach by first putting forth the policy reason for continuing to follow the "substantial" or "drastic" requirement, such policy reason being that "[a] contrary holding would subject trial courts to innumerable motions to modify support orders upon the slightest change in the parties' circumstances." (Appendix at 000014) The opinion then reviews the history of litigation in Ohio involving modification of spousal support, establishing the point that before the Ohio Legislature enacted the statutory changes to R.C. 3105.18 in 1986 and 1991 Ohio courts had imposed a requirement that the change of circumstances justifying a change in the alimony award be "material" or "substantial". Ultimately, the court below opined that the language of R.C. 3105.18(F) is not "free from ambiguity", that it could not find any explicit intention on the part of the legislature to alter the "substantial" or "drastic" requirement that had developed through case law prior to the legislative changes enacted in 1986 and in 1991, concluded that therefore no such intention existed, and reiterated its admonition that "to reach any other result would open the

courts to a deluge of requests for modification, no matter how trivial". (Appendix at 000028, 000031)

The approach that continues to add the word "substantial" to the definition of change of circumstances set forth in R.C. 3105.18(F) appears to be premised on the belief that somehow the addition of such word adds a degree of clarity or precision not otherwise found in the statute. It also appears to be premised on the belief that adding the word "substantial" will somehow prevent litigation that would not otherwise be taking place.

As to the first premise, the word "substantial" has imbedded in it no greater degree of precision, clarity or predictability about what will or will not be enough of a change of circumstances to warrant a modification of support than if that word were not read into the statute. Nor is the word "substantial" any more precise or clear than the words "appropriate and reasonable", which R.C. 3105.18(C) expressly sets as the standard for every award of spousal support, whether original or as modified. Pursuant to the provisions of R.C. 3105.18(C) a trial court has the authority to overrule a motion to modify a spousal support award upon finding that even with the changed circumstances the existing award remains "appropriate and reasonable". Such a ruling would not be any more, or any less, of an abuse of discretion than declaring the motion to be dismissed because the changes have not been "substantial". In other words, just as that which is or is not "substantial" can

be subject to the eye of the beholder, the term "appropriate and reasonable" certainly accommodates as many views. The court can and should get to the "appropriate and reasonable" analysis required by the statute directly. By refocusing the analysis on whether the award remains "appropriate and reasonable", one remains faithful not only to the words actually used in R.C. 3105.18 but to fundamental principles of statutory construction as well.

As for the use of the word "substantial" as a litigation gatekeeper, it is no better of a gatekeeper than the words "appropriate and reasonable". Every request for modification of spousal support is decided on its own facts and on a case by case basis. With the word "substantial" read into the statute the attorney representing the client with money to throw away on a borderline request for modification of a spousal support award has no greater ability to predict the likelihood of success of that motion than with the current standard of "appropriate and reasonable". Either the facts of the case are or are not those to which the particular judge involved will likely be receptive, or they are or are not facts that are identical or similar to facts that have already passed prior appellate review as being within the trial judge's discretion to use as a basis for modifying the spousal support award. Whether that judge is analyzing them from the standpoint of "do these new facts constitute a substantial change" or from the standpoint of "do these new facts render the existing award no longer appropriate or reasonable", the

analysis is the same. Put another way, either the facts justify a finding that something other than the existing spousal support award is "appropriate and reasonable" or they do not. No measure of judicial economy is saved by the use of the word "substantial". For the judicial officer, the determination related to whether these changed circumstances are or are not "substantial" enough requires the same motion, the same trial and use of court time, and the same expenditure of time researching and writing the decision as would be spent determining whether the changed circumstances do or do not render the existing award "appropriate and reasonable". For the practitioner and parties, there will always be just one sure way to find out whether the changes in circumstances are sufficient enough to justify a modification, and that will be to file the motion and present the evidence, whether one is seeking to prove that the changes are "substantial" or to prove that the existing award is no longer "appropriate and reasonable". And, in the end, the concern about "a deluge of requests for modification, no matter how trivial" was either specifically rejected by the legislature when it enacted R.C. 3105.18 in 1986 and modified it again in 1991, or it was considered to not be of concern great enough to warrant the inclusion of the word "substantial" in the statute.

Perhaps there is no better example of how the inclusion of the word "substantial" neither adds clarity or precision to the words already contained in R.C. 3105.18(F), nor serves any real gate keeping function, than the present case.

The opinion from the court of appeals below holds that the trial court failed to expressly decide whether the facts presented constituted a "substantial" change of circumstances. Such a holding implies that for parties whose combined incomes totaled approximately $86,000 per year at the time of an initial $18,000 per year spousal support award it would be conceivable and legally permissible for a trial court to conclude that a $15,000 per year change in one party's income is not "substantial". There are no prior appellate cases from the same appellate court upon which counsel for either party could have relied, prior to filing the motion to modify, to confidently predict whether or not the trial court or the court of appeals would so conclude. Nor would it seem would there be any legal basis for a magistrate or judge to grant a dismissal of such a motion without taking testimony, or telling counsel at a pretrial on such a motion that the factual basis of such motion is so patently weak as to constitute a "trivial" motion which should not be pursued.

<u>Proposition of Law No. II:</u> R.C. 3105.18(F) does not require a change in circumstances to be unforeseeable or not contemplated in order to invoke the trial court's continuing jurisdiction to modify an award of spousal support.

The legal principles regarding statutory construction cited under Proposition of Law No. I apply to this Proposition of Law No. II with equal force but will not be repeated. And just as the definition of "change of circumstances" set forth in

R.C. 3105.18(F) does not include the words "substantial" or "drastic", it does not include the words "not foreseeable" or "not contemplated by the parties" and should not be read into the statute.

The concept of "not foreseeable" or "not contemplated by the parties" is one that has been read into the language of R.C. 3105.18(F) by all but one appellate district, that being the Ninth District in *Kingsolver, supra*, 2004-Ohio-3844, at ¶ 21, fn. 3. The *Kingsolver* interpretation faithfully adheres to well-settled principles of statutory interpretation and is the interpretation this Court should endorse and declare to be applicable to all courts in Ohio.

Elimination of the practice of excluding from the change of circumstances analysis facts or events that were or might have been foreseeable to the parties should go a long way toward eliminating egregious and sometimes bewildering holdings. For example, in *Birath v. Birath*, Franklin App. No. 04-AP-929, 2005-Ohio-2295 (Appendix at 000184), at the time of the divorce in 1987, the former wife was making $17,316 per year as a schoolteacher. By 1999, she was making approximately $34,086 per year as a nurse. In affirming the trial court's denial of the ex-husband's motion to reduce his spousal support obligation, the appellate court stated "[t]his represents only a five percent annual increase over 12 years . . . The parties must have anticipated at the time of the award that appellee would receive at least cost of living increases in her salary. Therefore, we conclude that

the trial court did not abuse its discretion in finding the increase in appellee's wages over the 12-year period is not a change in circumstances as contemplated by R.C. 3105.18(F).". In *Edmondson v. Edmondson* (Nov. 29, 1996), Montgomery App. Case No. 15813 (Appendix at 000187), appeal not allowed 78 Ohio St. 3d 1451, the appellate court held that a reduction in income due to voluntary retirement is literally a change of circumstances which might justify the termination or suspension of support, but also found that the ex-husband had contemplated retirement when he agreed to the spousal support amount at the time the decree was issued, and that because the retirement was contemplated, it was not grounds for a modification. In *Reveal v. Reveal* (2003), 154 Ohio App. 3d 758, 203-Ohio-5335, 798 N.E.2d 1132, ¶19 (Appendix at 000190), at the time they resolved their divorce by agreement the ex-husband knew his ex-wife would be eligible to receive her retirement funds at age 59-1/2, prior to the time his spousal support obligation would otherwise terminate. The court of appeals found no abuse of discretion in the trial court's refusal to modify husband's spousal support obligation based on a 250% increase in the value of the wife's retirement accounts and her attaining the age at which she could begin receiving income from those accounts, finding that there was no substantial change of circumstances "not contemplated" by the parties. In *Palmieri v. Palmieri*, Franklin App. No. 04AP-1305, 2006-Ohio-4064, ¶ 19 (Appendix at 000195), after paying spousal support

for 12 years, and at the age of 68, the ex-husband retired and sought termination in his spousal support obligation, which the trial court denied. The court of appeals affirmed stating that husband's "retirement, and the accompanying reduced income, was thoroughly considered at the time of the divorce . . . [b]oth the magistrate and the trial court found retirement was contemplated, discussed, and debated prior to the ultimate agreement on spousal support . . . [n]othing in the record suggests this was not the case . . . [t]he divorce decree lays out three specific terminating events for spousal support . . . Mr. Palmieri's retirement is not one of them . . . [a]t the time of the divorce, Mr. Palmieri could have negotiated a provision regarding modification or termination of spousal support upon retirement . . . [h]e was less than ten years from retirement age at the time of the divorce . . . [h]e did not do so and cannot now ask the court to relieve him of his choice . . . [a] court cannot base modification on a change that was contemplated at the time of the divorce." In *Howell v. Howell*, Clark App. No. 2005-CA-80, 2006-Ohio-3038, ¶'s 37, 38 (Appendix at 000200), at the time of the original divorce the trial court refused to consider as a factor for spousal support the husband's possible inheritance as being too speculative and uncertain. Subsequently, in a post-decree motion to modify spousal support, the trial court again refused to consider that same inheritance, which by then the ex-husband had actually received, for the

reason that it was "clearly contemplated at the time of the divorce. The appellate court found "this reasoning process unsound".

Additionally, even courts that have espoused the "forseeability" or "contemplated" principle as a reason for denying a modification appear at times to apply that principle in an inconsistent manner. An example of this can be found in *Strain v. Strain*, Warren App. No. CA2005-01-008, 2005-Ohio-6035, ¶'s 13-16, (Appendix at 000208). In *Strain*, the decree had ordered the husband to pay $833 per month in child support for a 15 year old child and $1,700 per month in spousal support, the latter for a period of six years. Three years after the divorce the minor child was emancipated and the child support obligation was terminated. The ex-wife then filed a motion to increase spousal support, and the trial court increased the spousal support obligation by $300 per month. In affirming the increase in spousal support and finding it not to be an abuse of discretion, the court of appeals rejected the ex-husband's argument that the loss of child support was foreseeable and was in fact known to and contemplated by the parties at the time of original decree and thus could not be a factor, either as to change of circumstances or as to the reasonableness or appropriateness of an increase. The appellate court did not directly explain why the foreseeable loss of child support was an exception to the rule, essentially skirting the issue and going straight to the "appropriate and reasonable" analysis by stating "the record reveals the trial court considered more

than just the emancipation of [the child] in rendering its decision . . . [t]he record reveals the court considered the totality of the circumstances, including the parties' salaries, earning capacities, and living expenses." However, the only other specific factors the court noted were that Husband's "current annual income is $98,000, up from $94,909 at the decree . . . [h]is monthly expenses decreased by $883 when his child support obligation ended . . . [a]ppellee's income remained basically unchanged, while her expenses grew . . . [h]er ability to meet her expenses was already suffering and the loss of over $10,000 per year toward these expenses made it impossible" and ultimately found that the increase in spousal support was "reasonable and necessary." Another example of this inconsistent application of the foreseeability principle can be found in the case of *Moore v. Moore*, Montgomery App. No. 21022, 2006-Ohio-1431 (Appendix at 000211). In *Moore*, the final decree issued in 2003 was the product of a negotiated settlement read into the record. The husband agreed to pay spousal support of $2,000 per month for a period of 60 months, and the language retaining continuing jurisdiction to modify spousal support prohibited husband from seeking a "reduction in spousal support based upon an increase in wife's income unless [wife] earned in excess of $18,000 per year from employment." The decree further awarded to Wife her share of Husband's military pension. After husband retired he moved to reduce his spousal support obligation, even though his combined income after retirement from his

new job and from his share of his retirement was virtually the same as it was at the time he agreed to pay $2,000 per month. In overruling husband's motion to reduce his spousal support the trial court appeared to have ignored the income wife was to receive as her share of husband's retirement, which was in excess of $18,000 (i.e., approximately $23,000 per year, or about two times what she had been earning in her minimum wage job that she had lost since the filing of the decree). The appellate court reversed and remanded, finding that the trial court "erred when it overruled [husband's] motion to reduce his spousal support obligation the court had imposed in the divorce decree . . . [t]he source of the error is the spousal support order in the 2003 divorce decree, from which no appeal was taken . . . [t]he error the court there committed would be beyond our review herein, except that as applied in the later order from which this appeal was taken, the error denies [husband] the relief to which he may be currently entitled . . . [t]he error in the decree's application is therefore preserved for our review." *Id.* at ¶12. The appellate court specifically held that the ex-wife's receipt of the income from her share of her ex-husband's retirement constituted "a change in circumstances." *Id.* at ¶'s 10, 13. The *Moore* opinion does not explicitly identify what "error" it was referring to, but the only conclusion that can be drawn from that opinion is that the "error" was the trial court approving a final decree, negotiated by the parties, that effectively excluded from Wife's income (for purposes of a spousal support

modification) the income she received as her share of husband's retirement. Nowhere does the *Moore* decision even discuss the issue of "foreseeability" of the wife's receipt of a share of the husband's retirement as having been something the parties "contemplated" at the time of the divorce.

While the application of the "foreseeability" doctrine is anything but well defined or consistently applied, it is not too much of a stretch to envision an enterprising and creative lawyer arguing, or another court using, the doctrine and cases that have used it as support for an expansion of its holding. See, for example, *Barnes v. Barnes*, Stark App. No. 2003CA00383, 2005-Ohio-544 (Appendix at 000215), albeit a case involving an attempt by the ex-husband, who lost his job after agreeing to a non-modifiable spousal support award, to modify that award by way of a Civ. R. 60(B) motion, where the court in overruling the motion declared that "future loss of income is always foreseeable." *Id.* at ¶32

As the *Kingsolver, supra* case points out, the requirement that the changes have been "unforeseeable" or "not contemplated by the parties at the time of the original award" is nowhere to be found in the language of the current statute. Several of the cases cited above (*Birath, Reveal, Palmieri*) could have easily been decided on the basis of "yes there has been a change, and yes some of those changes were foreseeable, but nevertheless the existing award remains appropriate and reasonable under the totality of the circumstances". The outcome in

Edmondson could have been the same simply on the basis of the trial court's alternative finding that the payor spouse had retired "solely to avoid paying spousal support" without having confused the issue with the "contemplated at the time of the divorce" reasoning. (It seems that the most difficult and potentially most punitive aspect of the "foreseeable" or "not contemplated by the parties" principle is the area of reductions in income brought about by retirement. When is retirement ever not foreseeable?) And the result in *Strain*, justified as it was by the court of appeals as being "appropriate" under the totality of the circumstances, would not stand as an aberration in an appellate district that otherwise appears to strictly follow the "foreseeable" or "not contemplated by the parties" rule. In short, the "foreseeability" or "contemplated by the parties" tool that has developed over time not only serves to confuse the issue but also inhibits a more principled approach to spousal support modifications.

<u>Proposition of Law No. III:</u> R.C. 3105.18(F) permits a trial court to modify a spousal support award upon any change of circumstances, whether or not such change was foreseeable or contemplated at the time of the issuance of the existing order, if the existing order contains language required by R.C. 3105.18(E) and if the trial court finds that the existing award is no longer appropriate or reasonable in light of the changed circumstances.

This proposition of law is the resulting corollary to and synthesis of Proposition of Law No. I and Proposition of Law No. II. The conflict among the appellate districts as to Proposition of Law No. I and Proposition of Law No. II

exist as to this Proposition of Law No. III for the same reasons, i.e., the differing interpretations of the language of R.C. 3105.18(F). The correct analysis of R.C. 3105.18(F) is the one followed by the Ninth Appellate District as set forth in *Kingsolver, supra,* and as expressed in *Malizia v. Malizia*, Summit App. No. 22565, 2005-Ohio-5186, as follows:

> "Before a trial court may modify the amount or terms of spousal support, it must conduct a two-step analysis. (Citations omitted.) First, the court must determine whether the original divorce decree specifically authorized the trial court to modify the spousal support, and if so, whether either party's circumstances have changed. (Citations omitted.) Second, the trial court must evaluate the appropriateness and reasonableness of the award. (Citations omitted.) . . . Changed circumstances can exist absent "drastic," "substantial" or "unforeseen" changes."

Malizia v. Malizia, 2005-Ohio-5186, at ¶'s 8, 14 (Appendix at 000221).

<u>Certified Question:</u> 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?

For all of the reasons set forth under Proposition of Law Nos. I, II and III, the answer to this question should be "yes". As a proposition or statement of law, and as a corollary to Proposition of Law No. III, the certified question could be stated in the affirmative as follows:

> "A trial court may modify a spousal support award 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 issuance of the order being modified, if the existing order contains language required by R.C. 3105.18(E) and if the trial court finds that the existing award is no longer appropriate or reasonable in light of the changed circumstances."

<u>Proposition of Law No. IV:</u> A trial court is bound by limitations upon or guidelines for the court's exercise of its continuing jurisdiction to modify a spousal support award, if such limitations or guidelines are agreed upon by the parties, are set forth in the final decree in the provision specifically authorizing the court to modify the amount or terms of alimony or spousal support award, and do not otherwise violate public policy.

It is common for parties in divorce proceedings to enter into agreements resolving and settling their disputes in lieu of a trial. Arguably, the encouragement of the resolution of disputes by all available means short of litigation has become the hallmark of the legal profession today. It goes without saying, and needs no citation to authority to confirm, that the wheels of justice would grind to a complete halt if every divorce case were resolved by way of an actual trial.

In settling their disputes regarding spousal support awards, it is also common for parties to want to define for themselves how their respective obligations to one another could change in the future, depending on the happening or not of certain events. Trial courts, and parties, are permitted to limit the reservation of continuing jurisdiction. *Kimble, supra* (the parties can agree to no continuing jurisdiction to modify at all); *Jordan v. Jordan*, Hancock App. No. 5-03-07, 2003-Ohio-7116, ¶'s 19-22 (Appendix at 000225), appeal not allowed, 102 Ohio St. 3d 1458 (the trial court can limit the circumstances that will entitle a party to modification to a finite set of circumstances); *McLaughlin v. McLaughlin* Athens App. No. 00CA14, 2001-Ohio-2450 (Appendix at 000229)(the parties

agreement that provided for modification only if the payor experienced an involuntary reduction in income and which, in that case, provided that the payor's spousal support obligation would be reduced proportionately to his loss of income, and further provided that his obligation would never exceed forty-six percent of his base salary was enforceable); *Dzina v. Dzina*, Cuyahoga App. No. 83148, 2004-Ohio-4497, ¶'s 57-60 (Appendix at 000233)(the separation agreement provided the parties with a "buy-out" option regarding the former wife's spousal support, the trial court found that the former husband validly exercised his buy-out option, and the agreement expressly provided that the former wife was not entitled to future spousal support after she was paid the buy-out amount); *Gemmell v. Gemmell*, Licking App. No. 2006 CA 00077, 2007-Ohio-5546, ¶'s 18-19 (Appendix at 000247)(the parties agreement to review of spousal support upon the happening of a certain event was enforceable; to hold otherwise would be to tell the parties they cannot return to court precisely because they agreed it was necessary to do so); *Stewart v. Stewart* (Nov. 29, 1999), Stark App. No. 1999CA00015 (Appendix at 000252)(a prior agreement to modify support at a later date relieves the trial court from the necessity of finding a change of circumstances); and *Harbert v. Harbert* (Oct. 17, 1997), Greene App. No. 96-CA-0161 (Appendix at 000256)(the language of R.C. 3105.18 authorizes a court to reserve jurisdiction to modify both amount and duration or either one but not the other). Also compare, in a property division

setting, *Jordan v. Jordan* (Mar. 17, 2000), Greene App. No. 99-CA-64 (Appendix 000259)(" . . . the trial court was relieved of its authority and responsibility to fashion an equitable division of marital property by the parties themselves who voluntarily entered into an agreement . . .").

In a footnote in its opinion, the court of appeals below asserts that the provisions in the parties' divorce decree were ambiguous on the issue of whether the parties intended the spousal support award at all times to equalize the differences in their incomes and that, perhaps, the trial court should have taken evidence as to the parties' understanding of their agreement. (Appendix at 000033) However, both the magistrate and the trial judge interpreted such language as expressing the parties intention that their incomes be equalized at all times and as being a limitation upon or guideline for determining what amount of spousal support would be appropriate and reasonable under the new circumstances. (Appendix at 000060, 000062 and 000079, 000080) And, the parties themselves were never uncertain about the meaning of the agreed upon spousal support language in the decree. At all levels of this litigation Frances has conceded, indeed argued, that the intention of the parties, as expressed in the agreement and language set forth in their divorce decree, was that at all times the amount of spousal support should be an amount that would equalize her income with that of Stanley. In her reply to Stanley's objections to the Magistrate's Decision Frances

argued that "it was necessary for the Magistrate to determine the parties' respective incomes in order to determine what amount of spousal support would equalize their incomes." (Appendix at 000071) In her initial brief to the court of appeals Frances continued to concede and argue that "their respective incomes were always to remain equal." (Appendix at 000092) The assignments of error that Frances urged upon the court of appeals asserted that the trial court had abused its discretion in failing to impute income to Stanley and failing to consider benefits she alleged Stanley received from or gave to his new wife and cited no error in the trial court's interpretation of the meaning of the spousal support continuing jurisdiction language. In his appellate brief filed below Stanley agreed that the correct interpretation of the spousal support language in the decree was that it gave the trial court the continuing jurisdiction to modify the spousal support award, with such continuing jurisdiction being limited to equalizing the parties' incomes when they change. (Appendix at 000108)

In effect, by agreeing that the spousal support award at all times should be an amount that equalizes their incomes, the parties in this case defined for themselves, and for the court, what amount of spousal support would be "appropriate and reasonable" and eliminated for the court the need to re-examine all of the factors set forth in R.C. 3105.18(C) each and every time their incomes changed. Last but not least among the factors a court is required to consider

pursuant to R.C. 3105.18(C)(1) is "any other factor that the court expressly finds to be relevant and equitable". The parties greatly simplified the process of determining the amount of spousal support by supplying such a factor, that factor being their expressed agreement to limit their disputes to issues involving determination of their respective incomes and the equalization of them. Given the language used by the parties in the decree, the only question to be resolved, beyond the mathematical equation involved in equalizing their incomes, is whether each party is earning income at a level that is legally acceptable given their ages, physical conditions, experience, etc. This is the framework within which the magistrate and the trial court analyzed this matter. Indeed, considering Frances' concessions that some of the magistrate's findings overstated portions of Stanley's income, when all is said and done, the trial court's decision not to impute $14,700 per year additional income to Stanley from money he had inherited after the divorce represented almost all of the difference between the trial judge and the magistrate in their assessments of the changes in income that had occurred. [The court of appeals opinion asserts that the magistrate's decision to impute this $14,700 as income to Stanley had something to do with the magistrate's assessment of the parties' credibility, and that the trial court had no right to second guess the magistrate's assessment of credibility without taking additional evidence. (Appendix at 000033 to 000035) But other than the magistrate's prefatory

comment in his decision that he had made his findings of fact "based upon the evidence presented, including the credibility of the witnesses", the magistrate made no further comments about the credibility of either party. Indeed, when reading the magistrate's recitation of the testimony that Stanley had given on his use of the money he had inherited after the divorce, one can see that Stanley was anything but evasive or deceptive about why he sold the property that he had purchased with the money or what he intended to do with the proceeds from that sale. (Appendix at 000061 to 000062) More importantly, rather than characterizing Stanley's testimony on the issue as somehow lacking credibility, the magistrate appears to have believed every word of what Stanley said on the issue and instead was "troubled by the inequity" of Stanley using money he inherited after the divorce to reduce his debts rather than to produce more income. (Appendix at 000061 to 000062) The trial judge did not find such facts to be so troubling or inequitable, which the trial judge had every right to do.]

In ignoring the apparent binding nature of this self-imposed equalization of incomes language in the decree, the court below held that "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." It further opined that "[s]ubject-matter jurisdiction is always fixed and determined by law and cannot be conferred on the court by any consent or

acquiescence of the parties", citing *Polak v. Polak* (Dec. 12, 1986), Montgomery App. No. 9993 in support. (Appendix at 000261) The court below finished its analysis by stating that 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." However, it was the act of including language in their decree, as required by R.C. 3105.18(E), giving the court the authority to modify the spousal support obligation that conferred subject matter jurisdiction on the trial court, not the additional language adopted by the parties that went further and was designed to limit or guide the trial court's exercise of that continuing jurisdiction to equalizing their incomes. And, the *Polak, supra* opinion cited as support by the court below dealt with the issue of whether parties in a dissolution of marriage proceeding could, prior to the statutory changes in 1986 and 1991 to R.C. 3105.18, vest the trial court with continuing jurisdiction to modify their spousal support award contained in their separation agreement. The *Polak, supra* opinion in no way addresses the issue of whether, since the enactment of the statutory changes in 1986 and 1991, parties can adopt language that both preserves the subject matter continuing jurisdiction to modify and limits or guides the trial court's subsequent exercise of that continuing subject matter jurisdiction. One other appellate court opinion can be found that puts forth a similar analysis of this issue, being the dissent filed in *Gemmell, supra*, which argues that since the parties had

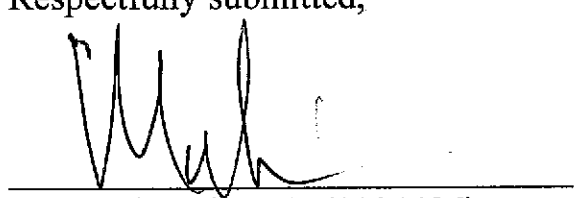
"contemplated" the completion of the property settlement payments therefore the happening of such event cannot be a change of circumstances. The dissent in *Gemmell*, echoing the treatment of the "equalization of incomes" agreement of the parties by the court of appeals below, opined that "parties cannot, by agreement, confer jurisdiction upon a court" and cited *Thomas v. Thomas,* 159 Ohio App. 3d, 761, 2004-Ohio-2928 (Appendix at 000264) and *Huffman v. Huffman,* Franklin App. Nos. 02AP-101, 02AP-698, 2002-Ohio-6031(Appendix at 000268) in support. But, the *Thomas, supra* opinion involved a separation agreement incorporated into a dissolution decree that failed to contain language expressly reserving any continuing jurisdiction. And the *Huffman, supra* appeal involved the interpretation of the "private judges" statute and whether the parties, by failing to object or point out the deficiencies in the process by which the private judge was appointed, can be deemed to have waived defects in that appointment and thus estopped from arguing error on appeal by continuing to appear before and let the private judge decide matters. Neither of those cases addressed at all the question of whether by virtue of the language of R.C. 3105.18 the parties can limit or in some fashion guide how the trial court, once it acquires subject matter jurisdiction by inclusion of language expressly reserving continuing jurisdiction in the decree, may or must exercise that subject matter jurisdiction.

On this issue, the court below seems to be saying, in effect, that there is only one way in which parties by agreement, or a trial court by decision, can preserve continuing subject matter jurisdiction, or only way in which a trial court can exercise its continuing subject matter jurisdiction, that being one that is open-ended and one that cannot in any way, shape or form be limited or guided by agreement of the parties or by the court itself. That interpretation of the language of R.C. 3105.18 is simply wrong.

CONCLUSION

The interpretation of the language of R.C. 3105.18(F) given by the court of appeals in this case is contrary to well-settled principles of statutory interpretation. Had the appellate court correctly interpreted the language of R.C. 3105.18(F), and had it permitted the trial court to enforce the parties' agreement to issue a modified spousal support order that continued to equalize the parties' incomes, the trial courts decision reducing Stanley's spousal support obligation should have been affirmed.

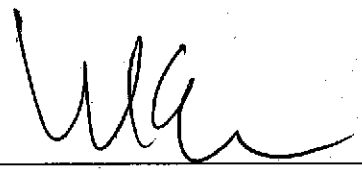
Respectfully submitted,



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

CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief of Appellant Stanley E. Mandelbaum was sent by ordinary U.S. mail to counsel for Appellee, Charles D. Lowe, 1500 Kettering Tower, Dayton, OH 45423 on the 27th day of May, 2008.



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

IN THE SUPREME COURT OF OHIO

FRANCES MANDELBAUM	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate District Court of Appeals Case No. CA 21817
Appellee	:	
	:	
v.	:	07-2422
STANLEY E. MANDELBAUM	:	
Appellant	:	

NOTICE OF APPEAL OF APPELLANT STANLEY E. MANDELBAUM

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FILED
DEC 27 2007
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellant Stanley E. Mandelbaum

Appellant Stanley E. Mandelbaum hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Montgomery County Court of

Appeals, Second Appellate District, entered in Court of Appeals case No. CA 21817 on November 16, 2007.

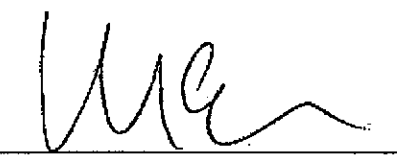
This case is one of public or great general interest.

Respectfully submitted,

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

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellee, Charles D. Lowe, 1500 Kettering Tower, Dayton, OH 45423 on the 27th day of December, 2007.



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Case: CA 021817
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IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

FRANCES B. MANDELBAUM	:	
Plaintiff-Appellant	:	Appellate Case No. 21817
v.	:	Trial Court Case No. 98-DR-1400
STANLEY E. MANDELBAUM	:	(Civil Appeal from Common Pleas Court, Domestic Relations Division)
Defendant-Appellee	:	**FINAL ENTRY**

. . . . . .

Pursuant to the opinion of this court rendered on the 16th day of November, 2007, the the order of the trial court modifying spousal support is **Reversed**, and this cause is **Remanded** for further proceedings consistent with this opinion.

Costs to be paid as stated in App.R. 24.

Mike Fain
MIKE FAIN, Judge

Mary E. Donovan
MARY E. DONOVAN, Judge

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

000003

SUMNER E. WALTERS, Judge
(sitting by Assignment)

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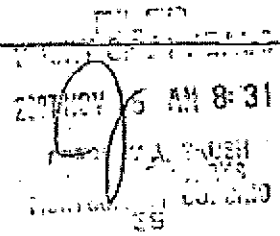

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

FRANCES B. MANDELBAUM	
Plaintiff-Appellant	Appellate Case No. 21817
v.	Trial Court Case No. 98-DR-1400
STANLEY E. MANDELBAUM	(Civil Appeal from Common Pleas Court, Domestic Relations Division)
Defendant-Appellee	

. . . . . .

OPINION

Rendered on the 16th day of November, 2007.

. . . . . .

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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.[1]

[1]The parties will be referred to in this opinion as Frances and Stanley.

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

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 30th 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

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:

"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 Carillon 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

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.

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

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).[2]

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

[2]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); *While v. While* (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

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

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.[3] However,

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[3]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 2576, *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.

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

231.

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 116th 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 116th 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 118th 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.

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 martial 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 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.

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 *Conners v. Conners* (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.[4] 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 martial 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

[4]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.[5]

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

[5]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

2008 JAN 29 AM 11: 31
CLERK OF COURTS MONTGOMERY CO. OHIO

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

FRANCES B. MANDELBAUM	:	
Plaintiff-Appellant	:	Appellate Case No. 21817
v.	:	Trial Court Case No. 98-DR-1400
STANLEY E. MANDELBAUM	:	
Defendant-Appellee	:	

FILED
COURT OF APPEALS
2008 JAN 29 AM 11: 33
GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO

DECISION AND ENTRY
January 29th, 2008

PER CURIAM:

This matter is before the court on the App. R. 25(A) motion of Defendant-Appellee Stanley Mandelbaum to certify a conflict. Plaintiff-Appellant Frances Mandelbaum has not responded to the motion. The alleged conflict cases are *Kingsolver v. Kingsolver*, Summit App. No. 21773, 2004-Ohio-3844, *Buchal v. Buchal*, Lake App. No. 2005-L-095, 2006-Ohio-3879, and *Tsai v. Tien*, 162 Ohio App.3d 89, 2005-Ohio-3520, 832 N.E.2d 809. These decisions were rendered by the Ninth, Eleventh, and Fifth Appellate Districts, respectively.

Before we can certify a conflict, we must first find that our judgment conflicts:

"with the judgment of a court of appeals of another district and the asserted conflict *must* be 'upon the same question.' Second, the alleged conflict must be on a rule of law – not facts. Third, the journal entry or opinion of the certifying court must clearly

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

MIKE FAIN, Judge

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

MARY E. DONOVAN, Judge

SUMNER E. WALTERS, Judge

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IN THE SUPREME COURT OF OHIO

FRANCES MANDELBAUM	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate District Court of Appeals Case No. CA 21817
Appellee	:	
	:	08-0375
v.	:	
STANLEY E. MANDELBAUM	:	
Appellant	:	

NOTICE OF CERTIFIED CONFLICT

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FILED
FEB 19 2008
CLERK OF COURT
SUPREME COURT OF OHIO

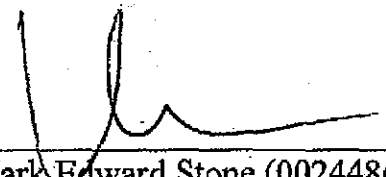
Notice

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,



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 14th day of February, 2008.

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

Frances B. Mandelbaum	Case No. 2008-0375
v.	ENTRY
Stanley E. Mandelbaum	

This cause is pending before the Court on the certification of a conflict by the Court of Appeals for Montgomery County. On review of the order certifying a conflict,

It is determined that a conflict exists. The parties are to brief the issue stated at page 6 of the court of appeals' Decision and Entry filed January 29, 2008, as follows:

"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 ordered by the Court that the Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Montgomery County.

It is further ordered that briefing in Case Nos. 2008-0375 and 2007-2422 shall be consolidated. The parties shall file two originals of each of the briefs permitted under S.Ct.Prac.R. VI and include both case numbers on the cover page of the briefs. The parties shall otherwise comply with the requirements of S.Ct.Prac.R. VI.

(Montgomery County Court of Appeals; No. 21817)

THOMAS J. MOYER
Chief Justice

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DOMESTIC RELATIONS COURT
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CRAIG [illegible]
CLERK OF COURTS
MONTGOMERY CO., OHIO

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS

FRANCES B. MANDELBAUM 7281 Candlewyck Court Centerville, Ohio 45459 SSN: 271-36-2715 DOB: 8/27/39	*	CASE NO. 98-DR-1400 (Judge Brigner)
Plaintiff	*	
-vs-	*	**FINAL JUDGMENT AND DECREE OF DIVORCE**
STANLEY MANDELBAUM 5605 Couch Drive, East, Apt. G Kettering, Ohio 45440 SSN: 268-38-3043 DOB: 12/9/38	*	
Defendant	*	

This cause came on to be heard upon the Complaint of the Plaintiff and the Answer and Counterclaim of the Defendant and the Court having jurisdiction of the cause of action and the parties thereto.

The Court finds that the Plaintiff, at the time of filing her Complaint, had been a resident of Montgomery County, Ohio for more than six months immediately preceding the filing of her Complaint; that the parties were married on the 18th day of January, 1957 and that two children have been born as the issue of said marriage, both of whom are emancipated.

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The Court further finds that the Plaintiff and Defendant have lived separate and apart, without cohabitation, for more than one year and therefore the Plaintiff is entitled to a divorce from the Defendant and the Defendant is entitled to a divorce from the Plaintiff.

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED by the Court that the Plaintiff be, and she hereby is, granted a divorce from the Defendant; that the Defendant be and he hereby is, granted a divorce from the Plaintiff; and that the bonds of matrimony heretofore existing between the parties are set aside and held for naught.

The Court further finds that the parties hereto have entered into an agreement, read in open Court, by which they have settled between them all questions arising as to spousal support, distribution of property rights and retirement rights, and it further appearing to the Court that said agreement is equitable, reasonable and proper and the same is hereby ratified, confirmed, approved, adopted and made an ORDER of this Court, and the parties are hereby ORDERED to carry out their respective covenants and agreements in the following particulars, to-wit:

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 according to the pay schedule of the Obligor Husband. In the event the discharge of this support order is in increments less than monthly, the Support Enforcement Agency shall administer this order on a monthly basis in the amount as set out above. Said spousal support payments shall be paid through the Support Enforcement Agency, 530 Reibold Building, 14 West Fourth Street, Dayton, Ohio 44522, plus an additional amount equal to two percent (2%) of each payment made by Husband, which sum shall be collected and retained by said SEA for services in processing said payment. Payments shall be made by cash, certified check or money order until such time as said amounts are withheld by the Withholding Notice issued herewith.

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 spousal support payable by the Husband to the Wife shall be tax deductible to the Husband and tax includable to the Wife, for income tax purposes.

The Court finds that the Husband (Obligor) has assets or income available for withholding and it is, therefore, Ordered that a spousal support deduction order be issued to Universal One Credit Union, Riverpark Drive, P.O. Box 467, Dayton, Ohio 45409-0467 in the name of Stanley Mandelbaum, Account No. 3141322-18 and the Obligor waives service of same.

All spousal support ordered by this order shall be withheld or deducted from the income or assets of the Obligor (Husband) pursuant to a withholding or deduction notice or appropriate court order issued in accordance with Section 3113.21 of the Revised Code or a withdrawal directive issued pursuant to Section 3113.214 of the Revised Code and shall be forwarded to the Obligee in accordance with Sections 3113.21 to 3113.213 of the Revised Code.

Obligor (Husband) is restrained from making spousal support payments directly to the Obligee (Wife) and the Obligee is enjoined from accepting direct payments from the Obligor. Any payments of support not made through the Support Enforcement Agency shall be deemed a gift.

Obligor shall immediately notify the SEA, in writing, of any change in employment status or employer. This duty to notify the SEA shall continue until further notice of the Court and a failure to provide such notification may make the Obligor liable for retroactive support that would have been ordered.

It is further ORDERED that the Obligee shall notify the SEA immediately, in writing, of remarriage if the remarriage would terminate the obligation to pay spousal support.

Both parties shall take notice of the Obligee's Rights and Remedies for Enforcement of Support, attached hereto, available to the Obligee in the event Obligor fails to make payment of support as ordered herein.

EACH PARTY TO THIS SUPPORT ORDER MUST NOTIFY THE SUPPORT ENFORCEMENT AGENCY, IN WRITING, OF HIS OR HER CURRENT MAILING ADDRESS, CURRENT RESIDENCE ADDRESS, CURRENT RESIDENCE TELEPHONE NUMBER, CURRENT DRIVER'S LICENSE NUMBER AND OF ANY CHANGES IN THAT INFORMATION. EACH PARTY MUST NOTIFY THE AGENCY OF ALL CHANGES UNTIL FURTHER NOTICE FROM THE COURT. IF YOU ARE THE OBLIGOR UNDER A SUPPORT ORDER AND YOU FAIL TO MAKE THE REQUIRED NOTIFICATIONS, YOU MAY BE FINED UP TO $50.00 FOR A FIRST OFFENSE, $100.00 FOR A SECOND OFFENSE, AND $500.00 FOR EACH SUBSEQUENT OFFENSE. IF YOU ARE AN OBLIGOR OR OBLIGEE UNDER ANY

SUPPORT ORDER AND YOU WILLFULLY FAIL TO MAKE THE REQUIRED NOTIFICATIONS, YOU MAY BE FOUND IN CONTEMPT OF COURT AND BE SUBJECTED TO FINES UP TO $1,000.00 AND IMPRISONMENT FOR NOT MORE THAN 90 DAYS.

IF YOU ARE AN OBLIGOR AND YOU FAIL TO MAKE THE REQUIRED NOTIFICATIONS, YOU MAY NOT RECEIVE NOTICE OF THE FOLLOWING ENFORCEMENT ACTIONS AGAINST YOU: IMPOSITION OF LIENS AGAINST YOUR PROPERTY; LOSS OF YOUR PROFESSIONAL OR OCCUPATIONS LICENSE, DRIVER'S LICENSE OR RECREATIONAL LICENSE; WITHHOLDING FROM YOUR INCOME; ACCESS RESTRICTION AND DEDUCTION FROM YOUR ACCOUNTS IN FINANCIAL INSTITUTIONS; AND ANY OTHER ACTION PERMITTED BY LAW TO OBTAIN MONEY FROM YOU TO SATISFY YOUR SUPPORT OBLIGATION.

The parties shall, by April 30th 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 purpose 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 $25,131.00 of income for the Wife. The Husband shall not be required to maintain any life insurance on his life, securing the spousal support obligation, for the reason that the Wife is having transferred to her, all the Husband's right, title and interest in the Prudential Life Insurance Policy in the amount of $50,000.00 less one-half of the cash value, which the Husband is receiving, as is more particularly set forth hereafter.

2. **LIFE INSURANCE.** The Husband is the owner of a Prudential Life Insurance Policy with the face value of approximately $50,000.00. The parties agree that they shall equally divide between them, the cash value in said insurance policy as of July 1, 2000, which is $20,720.11, with the Husband to receive $10,360.05 from the Wife.

The Husband shall transfer all of his right, title and interest in and to said policy to the Wife, within thirty (30) days from the filing of this Final Judgment and Decree of Divorce.

The Wife shall, simultaneously with the transfer of said policy, pay to the Husband, one-half of the July 1, 2000 cash value to which he is entitled under the parties' agreement. This payment shall be made directly to the Husband and the Wife shall retain all the remaining cash value and ownership interest in the policy, as her separate property. The Wife shall be responsible for the payment of all premiums thereon in the future and shall be free to maintain said policy in the future, cash the policy in or let it lapse, at her option.

3. **EQUALIZATION OF ASSETS AND CASH PAYMENT BY HUSBAND TO WIFE.**

Real Estate

a) The Husband shall convey to the Wife, by Quit Claim Deed, all of his right, title and interest in the real estate located at 7281 Candlewyck Court, Centerville, Ohio 45459. The Wife agrees that she will assume and pay, according to the terms and conditions thereof, the outstanding mortgage indebtedness against said property and further indemnify, hold and save the Husband harmless thereon.

b) The Wife shall transfer to the Husband, by Quit Claim Deed, all of her right, title and interest in and to the real estate known as 5007 Rye Drive, Huber Heights, Ohio 45424. The Husband agrees that he will assume and pay, according to the terms and conditions thereof, the outstanding mortgage indebtedness thereon and further indemnify, hold and save the Wife harmless thereon.

c) The Wife shall transfer to the Husband, by Quit Claim Deed, all of her right, title and interest in and to the real estate known as 810 Willard Avenue, Dayton, Ohio 45410. The Husband agrees that he will assume and pay, according to the terms and condition thereof, the outstanding mortgage indebtedness thereon and further indemnify, hold and save the Wife harmless thereon.

d) The Wife shall transfer to the Husband, by Quit Claim Deed, all of her right, title and interest in and to the real estate known as 166 S. Main Street, Centerville, Ohio 45458. The Husband agrees that he will assume and pay, according to the terms and conditions thereof, the outstanding mortgage indebtedness thereon and further indemnify, hold and save the Wife harmless thereon.

Bank Accounts

e) The Wife shall retain as her separate property, free from any claim of the Husband, her bank account formerly located with Citizens Federal, now known as Fifth/Third Bank and the account balance in her account located with National City Bank.

f) The Husband shall retain as his separate property, free from any claim of the Wife, his account balance in the Universal Credit Union account.

Stock

g) The Husband shall retain as his separate property, free from any claim of the Wife, all of his ownership interest in and to the shares of stock owned by him in Carillon Realty, which the parties have agreed is valued at $64,750.00, which is the fair market value of those shares.

Motor Vehicles

h) Each party shall retain as their separate property, free from any claim of the other, the motor vehicles presently titled in their respective names which are both free and clear of any encumbrance.

Other

i) Wife shall retain as her separate property, free from any claim of the Husband, her membership interest in what is generally known as "Financially Fit".

The parties have agreed that the total value of the assets retained by the Husband as described above is $221,820.00 and the assets retained by the Wife as described above is $150,252.00, and that the combined value of those assets is $372,072.00. The parties further agree that it is their intent to equalize the division of assets between the two parties with the difference being $72,686.00. The parties further agree that in order to equalize the division of the aforedescribed assets, the Husband shall pay to the Wife, the sum of $35,784.00 within thirty (30) days from the filing of this Final Judgment and Decree of Divorce.

In addition to all the foregoing and as previously set forth in Item 2 hereof, it is agreed by the parties that the Wife shall pay to the Husband, within that same thirty (30) day period, the one-half of the cash value in the

Prudential Life Insurance Policy as of July 1, 2000.

4. **ADDITIONAL CASH PAYMENTS TO THE WIFE.** The Husband will pay to the Wife, within thirty (30) days from the filing of this Final Judgment and Decree of Divorce, $457.86 for medical bills.

It is also the agreement of the parties that, upon presentment by the Wife of credit card charges claimed by her to have been made during the period prior to separation, in the approximate amount of $5,000.00, the Husband will pay one half of those charges up to and not exceeding $2,500.00, upon presentment of individual charges made by the Wife to the Husband and that a credit card statement alone, without detailing the charges and dates, shall be insufficient to require the Husband to pay that amount. The Wife shall be required to present those billing statements to the Husband within thirty (30) days from the filing of this Final Judgment and Decree of Divorce.

5 **HOUSEHOLD GOODS, FURNISHINGS & EQUIPMENT.** The parties state that the Wife shall be entitled to retain all household goods and furnishings located at the marital residence, with the exception of the following items which shall be the separate property of the Husband to wit: all items of furniture, including curios, located in the living room; all items of furniture and equipment located in the home office; a set of good china (white with silver band); one set of silverware; Lennox bread tray; 1 Seder plate; Lennox vase; 1 complete set of crystal or silver-plated glasses; all tools located in the garage, with the exception of a minimum set of basic tools for the Wife's utilization; all exercise equipment consisting of a rowing machine and bike and the parties shall exchange all family pictures of the parties' grandchildren and equally share in any duplicating cost incurred in the copying of such pictures. This exchange shall take place within thirty (30) days from the filing of this Final Judgment and Decree of Divorce, at a time and date to be mutually agreed upon by the parties, through their attorneys.

6. **HARSHMANVILLE AND RELATED ISSUES.** The Wife acknowledges receipt of the sum of $3,920.00 which has been paid to her from the trust account of Stephen J. Love, Attorney. This distribution represents the Wife's portion of funds due to her from MMR, a partnership interest held by the Husband. It is further acknowledged that the Husband has repaid to the Wife the sum of $956.00, which represents her unreimbursed medical expenses and the Wife has repaid to the Husband the sum of $4,114.00 which satisfies the Husband's claim against the Wife for capital gains taxes incurred in the sale of the Harshmanville property in 1998. Further, the aforesaid sum represents a credit in the amount of $1,000.00 given to the Husband for personal property, household goods and furnishings.

The parties state that the Wife still disputes the accuracy of that distribution but in consideration of the Husband paying her an additional $1,000.00 within thirty (30) days of the granting of the Final Judgment and Decree of Divorce, she forever releases, relinquishes, waives and gives up all or any claims that she may have under this Item 6, past, present or future, whether under Ohio Civil Rule 60(A) or 60(B) or by any other action.

7. IRA ACCOUNTS. The parties are the owners of various IRA accounts and the Husband is the owner of a Trust 100 account, which the parties have agreed to equalize as of the date of separation, which was August 10, 1998. The parties further agree that the Husband has made two contributions into his Trust 100 account, $4,000.00 in April 1999 and $5,000.00 in April 2000, for which he shall receive credit with the $9,000.00 amount not being included in any equalization of the parties' various retirement accounts as set forth in this Item 7. Husband shall be given credit for $9,000.00 before the equalization shall take place out of the remaining assets.

The parties further agree that each of them shall benefit from the appreciation in value of any of the accounts, from the date of separation and also bear the burden of depreciation or losses in any of those accounts, since the date of separation, up to the time of the equalization. The equalization, again, shall take place within thirty (30) days from the date of the filing of this Final Judgment and Decree of Divorce. Each party shall provide to the other, a copy of the most current statements of their respective accounts, so that, if required, an Order may be issued to the account from which the equalization will be made.

The balance of the parties' respective accounts will be combined, together with any appreciation or depreciation of those accounts, from the date of separation up until the date of division, with the Husband first receiving the $9,000.00 credit for contributions made since the date of separation. The parties state that it is anticipated that the Husband will be required to transfer funds out of his accounts into the Wife's accounts, in order to equalize the parties' respective accounts and that the Husband shall transfer to the Wife, whatever amount is required for the equalization out of his American Century IRA account.

The parties further state that the Husband has an American Century IRA account, an American Century Trust 100 IRA account and a State Teacher's Retirement System account and the Wife is the owner of a Dean Witter IRA account and an American Century IRA account.

The parties agree that after the equalization of the parties' IRA and/or trust accounts, each of them shall retain their interest in their

respective accounts as their separate property, free from any claim of the other. Each party will further give up any and all interest they have in said accounts by virtue of this marriage or as trustee of any of those accounts.

8. **SEARS RETIREMENT.** The Wife is the owner of a Sears Roebuck Pension Plan (commonly known as "Sears") and the parties agree that the Husband shall be entitled to one-half of any benefit payable to the Wife and the Wife shall provide a survivor's benefit under the terms of that plan for the Husband. The parties agree that a Qualified Domestic Relations Order shall issue to Sears Roebuck & Company, which shall provide that the Husband shall become an alternate payee for one-half of any benefit payable to the Wife under her pension plan, together with a survivor's benefit. The Husband shall be entitled to the same benefits that the Wife is entitled to as a participant of the plan and as an alternate payee shall be entitled to all benefits available to him under the plan as alternate payee.

9. **LEGAL FEES.** The Husband agrees to pay to the Wife, the amount of $7,000.00 to be applied to her legal fees and expenses arising out of the litigation of this matter; the same to be paid within thirty (30) days of the filing of this Final Judgment and Decree of Divorce.

10. **GRANDCHILDREN'S CUSTODIAL ACCOUNTS.** The Husband shall remain custodian under the Uniform Gift to Minors Act of the grandchildren's security accounts currently held in his name as custodian, and shall maintain those accounts for the benefit of the grandchildren until they attain 18 years of age. The Husband will not be permitted to withdraw any funds for his personal use and shall, by January 30th of each year, provide to the Wife, on an annual basis, a copy of all activity statements on each account received during each calendar year.

11. **COBRA.** The Husband and Wife agree that the Husband shall have available to him, the right to exercise his rights under the Consolidated Omnibus Budget Reform Act (COBRA), allowing him to procure health care insurance through his Wife's employment. The Wife agrees that she will cooperate in providing that information or paperwork to the Husband and the Husband shall cooperate in having the paperwork signed and returned to the employer. It is understood by the parties that the Husband has thirty (30) days from the date of the filing of the Final Judgment and Decree of Divorce in this matter to effectuate his rights. The Husband understands and agrees that he will have to pay the premiums thereon.

It is further ORDERED that all restraining orders previously issued are hereby released.

IT IS SO ORDERED.

APPROVED:

JUDGE V. MICHAEL BRIGNER

CHARLES D. LOWE 0035209
Attorney for Plaintiff
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Dayton, Ohio 45402
937/228-2306

GIANUGLOU, SKILKEN & REPLOGLE

C. DINO GIANUGLOU 0012590
Attorney for Defendant
130 W. Second St., Suite 2110
Dayton, Ohio 45402
937/223-0135

NOTICE OF FINAL APPEALABLE ORDER

You are hereby notified that this entry, which may be a final appealable order, has been filed with the Clerk of Domestic Relations Court.

Craig Zimmers, Clerk of Courts

By:_____
Date:_____

Case Name: Manolelbaum
Court Case No.: 98DR 1406
SETS No.: 202/606072

ADDENDUM TO DECREE / AGREED ENTRY

IT IS FURTHER ORDERED:

All child support and/or spousal support payments shall be made through the **Ohio Child Support Payment Central (OCSPC) P.O. Box 182394, Columbus, OH 43218-2394.** Obligor shall make said payments by certified check, or money order, plus the 2% service fee to the OCSPC, until such time as said amounts are withheld by the Withholding Notice issued herewith.

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OFL-20 (1/92)

OBLIGEE'S RIGHTS AND REMEDIES FOR ENFORCEMENT OF SUPPORT

Upon Obligor's failure to pay child support and/or spousal support or to provide medical insurance as ordered, the Obligee has the right to apply to the Montgomery County Support Enforcement Agency for assistance on obtaining any of the following:

A. An order for:

1. withholding of spousal support and/or child support from the personal earnings or bank accounts of the Obligor under Section 3113.21 of the Ohio Revised Code;

2. the assignment of the wages of the Obligor under Section 1321.33 of the Ohio Revised Code;

3. the enforcement of medical insurance support for the children.

B. A judgment, and then execution on that judgment through any available procedure, including but not limited to:

1. an execution against the property of the judgment debtor under Chapter 2329 of the Ohio Revised Code;

2. an execution against the person of the judgment debtor under Chapter 2331 of the Ohio Revised Code;

3. a proceeding in aid of execution under Chapter 2333 of the Ohio Revised Code, including:

a. a proceeding for the examination of the judgment debtor under Sections 2333.09 to 2333.12, and 2333.15 to 2333.27 of the Ohio Revised Code;
b. a proceeding for examination of the person holding property, money, or credits of the judgment debtor which is in the nature of garnishment or attachment by notice under Sections 2333.13 to 2333.27 of the Ohio Revised Code;
c. a proceeding for attachment of the person of the judgment debtor under Section 2333.28 of the Ohio Revised Code;
d. a creditor's suit under Section 2333.01 of the Ohio Revised Code;

4. the attachment of the property of the judgment debtor under Chapter 2715 of the Ohio Revised Code.

Failure of an Obligee to request the Montgomery County Support Enforcement Agency to maintain an action under Section 2301.38 of the Ohio Revised Code shall not operate as a waiver of any right of the Obligee to seek enforcement of a support order, including medical insurance. Upon receipt of support payments, the Support Enforcement Agency will pay out these support payments within two business days.

FILED
DOMESTIC RELATIONS COURT
2006 MAR -6 AM 9:08
DAN FOLEY
CLERK OF COURTS
MONTGOMERY CO., OHIO

SCANNED

(MDPO)

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS

FRANCES B MANDELBAUM
7281 CANDLEWICK
CENTERVILLE, OH 45459

PLAINTIFF,

vs.

STANLEY E MANDELBAUM
5605 COUCH DRIVE EAST APT. G
KETTERING, OH 45440

DEFENDANT.

Case No. 1998 DR 01400

SETS No. 7021606079

DENISE L. CROSS, Judge

NICHOLAS SYLVAIN, Magistrate

CHRISTIANSON, C.R.

ROSE, C.R.

MAGISTRATE DECISION AND PERMANENT ORDER
[Civ. R. 53]

This matter came on for hearing on December 20, 2005, January 17, 2006, and February 17, 2006 before the undersigned magistrate pursuant to defendant's motion to modify spousal support filed May 27, 2005. Present in court were plaintiff with attorney Charles Lowe and defendant with attorney Cynthia Martin.

Based upon the evidence presented, including the credibility of the witnesses, this magistrate makes the following findings of fact and conclusions of law. Plaintiff's Exhibits 1 through 20 and defendant's Exhibits A through I were admitted.

By decree filed December 22, 2000, defendant was ordered to pay spousal support to plaintiff of $1,500 for life, with the court retaining jurisdiction as to term and amount. The decree further states:

> It is the parties' intent that, for the purpose 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 per year by Husband to Wife, have used $60,900 of income for the Husband and $25,131 of income for the Wife.[1]

Plaintiff is living in the same residence as at the time of the divorce and has maintained employment as a line teller at 5/3 Bank. The parties stipulated that plaintiff's total income from all sources is $40,239, which apparently includes her gross employment, pension and Social Security incomes. Her health is "fair." Plaintiff has a monthly mortgage payment (including taxes and insurance) of $1,000 and other monthly expenses of $150-200 for DP&L, $40 per month for telephone services, and $150 per month (seasonally) for lawncare, as well as about $200 per week for food, supplies, and clothing. Plaintiff does not have a car payment. Plaintiff spends about $1200 per year for travel expenses to the Philadelphia area to visit her son and grandchildren, $1200 per year for dental expenses, and about $500 per year for home repair expenses. Plaintiff states that her finances are stable at the current level of income and spousal support.

Defendant's income was the primary point of contention during the hearings. Much of the testimony was not helpful to this magistrate because it covered issues relating to deductions and expenses for calculating defendant's net incomes, and not his gross incomes. Mr. Bibler testified that he started with the parties' 'total incomes' but then adjusted them for a 'true picture of disposable income.' This magistrate

[1] However, there is nothing in the decree that sheds any light on how these figures were computed. Furthermore, although not explicitly stated, this magistrate believes that it is implied that these are gross income figures.

believes that this is a misapprehension of the incomes to be compared in determining the spousal support award, in that the incomes to be compared should be gross incomes.[2] This understanding appears to be consistent with the language of the parties' divorce decree.

As he was prior to and at the time of the decree, defendant is self-employed through his own company, Carillon Realty, Inc., where he is the sole shareholder. Defendant receives a salary of $2,700 per month, which is reflected on a W-2 form. As defendant testified and as shown on plaintiff's Exhibit 4 and defendant's Exhibit D, Carillon Realty also pays to defendant $1,000 per month for rental of the property used by Carillon Realty at 166 S. Main St., Centerville, Ohio. Carillon Really also pays a car allowance to defendant of $2,817 per year. The parties also appear to agree that defendant has annual income of $310 from interest and dividends and $1,278 from an elective pension distribution. Defendant also has begun receiving Social Security retirement benefits of $1,500 per month. According to defendant's 2004 tax return (Defendant's Exhibit D) also reflects rental income for a property on Humphrey Drive, Dayton, Ohio of $3,000 per year.

Defendant also had rental income of $14,700 per year for a property on Benchwood Drive in Vandalia. As reflected in his testimony, defendant had purchased this property 'free and clear' after the divorce and has now sold it for about the same price. Defendant will be applying the proceeds of this sale to pay off personal debts, with the vast majority going towards paying off his debt for a property purchased with his current wife (about $80,000) (see Plaintiff's Exhibit 5) and his current residence in Kettering (about $18,000). This magistrate is troubled by the inequity of allowing defendant to voluntarily decrease his gross income (upon which spousal support is based) while simultaneously allowing defendant a clear economic benefit (through the payment of other debts, primarily in real estate). Furthermore, as the proceeds are being transferred primarily to other real estate, it is equitable to find that defendant can

[2] See R.C. 3105.18 (C)(1)(a), which requires a court to consider "the income of the parties, from all sources..." (emphasis added).

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generate at least equal income from his substitute properties. This magistrate therefore finds that it is fair and equitable to impute to defendant a further rental income of $14,700 annually for purposes of spousal support calculation.

Significant hearing time was expended covering the employment of defendant's current wife, Carol Ross (Mandelbaum) with Carillon Realty. Ultimately, it appears that Ms. Ross has been working for Carillon Realty since early 2005, but has kept the full value of her commissions and has not paid the usual share to Carillon Realty. This arrangement is in compensation for the fact Ms. Ross is managing a Columbus, Ohio branch of Carillon Realty without compensation, which includes duties well in excess of a normal realtor's. The cost of an office manager would substantially outweigh the income of Ms. Ross' commissions at this time. This magistrate does not find that this is an inequitable arrangement where further income should be imputed to defendant.

Therefore, this magistrate finds that for purposes of calculating spousal support plaintiff's income is $40,239 and defendant's income is $84,505. In considering the requirements and factors of R.C. 3105.18 as well as the language of the divorce decree, this magistrate finds that defendant has failed in his burden to prove a change of circumstances sufficient for a reduction in the award of spousal support.

IT IS THEREFORE ORDERED and the Support Enforcement Agency shall adjust its records accordingly:

1. **Defendant's motion to modify his spousal support obligation is overruled.**

2. **The court continues to retain jurisdiction as to the term and amount of spousal support, which as ordered in the decree of divorce shall be terminated by Husband's death, the Wife's death, or the Wife's remarriage.**

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IT IS FURTHER ORDERED BY THE COURT THAT DEFENDANT SHALL PAY THE CLERK ADMINISTRATIVE FEES FOR THIS ACTION. SAID AMOUNT SHALL BE REMITTED FORTHWITH UPON RECEIVING AN INVOICE FROM MONTGOMERY COUNTY CLERK OF COURTS.

NICHOLAS SYLVAIN, Magistrate

This Magistrate Decision contains findings of fact and conclusions of law referenced in Civ. R. 53. No additional request for findings of fact and conclusions of law will be granted. Upon review of the findings of fact and conclusions of law, the Magistrate Decision herein is adopted as a Permanent Order of this Court pursuant to Civ. R. 53. Any objection to the Magistrate Decision shall be filed within 14 days and supported by a transcript of all evidence submitted to the Magistrate relevant to that fact or an affidavit of such evidence if a transcript is not available. **A party may not assign as an error on appeal the Court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this Rule.** Responding objections may be filed no later than 10 days after the first objections are filed. If no objections are filed, the Magistrate Decision is the Permanent Order of the Court.

IT IS SO ORDERED:

DENISE L. CROSS, Judge
3-2-06

NOTICE OF FINAL APPEALABLE ORDER

Copies of foregoing order, which may be a final appealable order, were mailed to counsel of record and/or the parties, on the date indicated below by ordinary mail.

DAN FOLEY, Clerk of the Common Pleas Court

Chris Hickey, Deputy Date:_____

FRANCES B MANDELBAUM
PLAINTIFF

CHARLES D LOWE
ATTORNEY FOR PLAINTIFF
50 EAST THIRD STREET
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STANLEY E MANDELBAUM
DEFENDANT

CYNTHIA MARTIN
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BELLBROOK, OH 45305

Support Enforcement Agency

Assignment Office

NS/KSG/LSD 3/1/06

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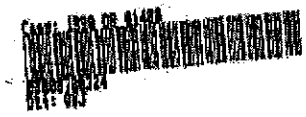

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DOMESTIC RELATIONS COURT
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CLERK OF COURTS
MONTGOMERY CO., OHIO

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
DIVIDSION OF DOMESTIC RELATIONS

FRANCES B. MANDELBAUM
7281 CANDLEWICK
CENTERVILLE, OH 45459

Plaintiff,

vs

STANLEY MANDELBAUM
5605 COUCH DR. EAST APT. G
KETTERING, OH 45440

Defendant.

Case No. 1998 DR 01400
Judge Denise Cross
Magistrate Nicholas Sylvain

OBJECTION TO
MAGISTRATE'S
DECISION AND ORDER
FILED MARCH 6, 2006

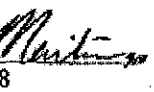
Now comes the Defendant, Stanley Mandelbaum, by and through counsel, Cynthia Martin, and objects to the Magistrate's findings as follows:

1. "Therefore, this Magistrate finds that for purposes of calculating spousal support, plaintiff's income is $40,239 and defendant's income is $84,505."

2. "Defendant's motion to modify his spousal support obligation is overruled."

A Memorandum dictating the reasons for objection is attached hereto and incorporated herein.

Respectfully submitted,



Cynthia Martin 0059738
Attorney for Defendant
90 E. Franklin St.
Bellbrook, OH 45305
(937) 848-8400

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MEMORANDUN IN SUPPORT

The Defendant/Movant, Stanley Mandelbaum, filed a motion to modify spousal support on May 27, 2005. Mr. Mandelbaum is asking the Court to order that his spousal support be reduced in order to equalize the parties incomes as set forth in the Final Decree of Divorce. Specifically, the Decree states as follows:

> It is the parties' intent that, for the purpose 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 per year by Husband to Wife, have used $60,900 of income for the Husband and $25,131 of income for the Wife.

While the parties stipulated that Mrs. Mandelbaum's income has increased to $40,239, the Magistrate further determined that Mr. Mandelbaum's income has increased to $84,505. In reaching this figure, the Magistrate used the following figures:

Salary from Mr. Mandelbaum's business:	$32,400.00
Rental Income Main St.:	$12,000.00
Car Allowance:	$ 2817.00
Social Security:	$18,000.00
Annual Pension:	$ 1,278.00
Interest and Dividends:	$ 310.00
Rental Income Humphrey Dr.:	$ 3000.00
Imputed Benchwood Rental Income:	$ 14,700

First, Mr. Mandelbaum objects to the inclusion of the $3,000 annual rental income for the property on Humphrey Drive in his gross income. Testimony at the hearing establish that this property was sold. Further, evidence submitted in the form of Mr. Mandelbaum's 2004 tax return established that, while the rental income was $3,000,

the mortgage, taxes, and insurance expenses on the property were $2,978. This left $22.00 of income for Mr. Mandelbaum, not $3,000.

Second, Mr. Mandelbaum objects to the imputation of $14,700 per one year of income for the Benchwood Drive property. Mr. Mandelbaum owned this property as a rental and the evidence submitted at trial, in the form of Mr. Mandelbaum's 2002 and 2003 tax returns, established that he earned little income from the property when the property was encumbered by a mortgage. Testimony establishes that upon the death of his mother, Mr. Mandelbaum inherited money and used this money to pay off the mortgage on this property, thus increasing Mr. Mandelbaums income from the property. Testimony further established that he then entered into a contract to sell the Benchwood property to use the money to pay off the mortgage on a new residence he purchased with his wife. The new residence is not an income producing property. Certainly, at 67 years of age, Mr. Mandelbaum is allowed to sell an asset if he so chooses. It is unfair to impute $14,700 of income to Mr. Mandelbaum when it simply does not exist.

Without this $17,700 of income for the two properties included in Mr. Mandelbaum's income, his income is $66,805. Therefore, Mr. Mandelbaum requests the decision to calculate defendant's income at $84,505 be overruled and to instead use the figure of $66,805 in establishing income for purposes of calculating spousal support.

Further, the Defendant requests thirty (30) days to obtain a copy of the transcript and supplement the objection raised herein.

Respectfully submitted,

Cynthia Martin 0059738
Attorney for Defendant
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Bellbrook, OH 45305
937-848-8400
937-848-8488 fax

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Defendant's Objection to Magistrate's Decision and Order and all supporting documents has been served upon Charles D. Lowe, Attorney for Plaintiff, 50 E. Third St., Dayton, OH 45402 by certified U.S. mail on this 16th day of March 2006.

Cynthia Martin
Attorney for Defendant

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FILED
DOMESTIC RELATIONS COURT
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CLERK OF COURTS
MONTGOMERY CO., OHIO

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
DOMESTIC RELATIONS DIVISION

FRANCES B. MANDELBAUM 7281 Candlewyck Ct. Centerville, Ohio 45459 DOB: 8/27/39 Plaintiff	Case No.98-DR-1400 Judge Cross Magistrate Sylvain
vs.	
STANLEY E. MANDELBAUM 5605 Coach Dr., East, Apt. G Kettering, Ohio 45440 DOB: 12/9/38 Defendant	**PLAINTIFF'S RESPONSE TO DEFENDANT'S OBJECTIONS TO MAGISTRATE'S DECISION AND ORDER**

Defendant, Stanley Mandelbaum ("Husband") objects to the Magistrate's Decision and Order filed March 6, 2006. The following addresses Husband's Objections as set forth in his Supplemental Memorandum in Support of his Objections.

INTRODUCTION

BACKGROUND

The parties were divorced by Decree on December 22, 2000. Husband was ordered to pay indefinite spousal support of $1,500, and the Court retained jurisdiction over the term and

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amount of spousal support. Further, the Divorce Decree provides that spousal support is based upon the equalization of the parties' respective incomes. At the time of the Decree, Husband's annual income was $60,900; and Wife's annual income was $25,131. Thus, spousal support was set at $18,000 per year, which equalized their respective incomes (the precise amount to equalize was $17,884.50, but was rounded to $18,000).

Husband sought a reduction in spousal support. Hence, it was necessary for the Magistrate to determine the parties' respective incomes in order to determine what amount of spousal support would equalize their incomes. For the purposes of the hearing, the parties stipulated Wife's annual income to be $40,239. As the Magistrate stated, "Defendant's [Husband's] income was the primary point of contention during the hearings. The Magistrate found Husband's annual income to consist of the following:

Salary from Carillon Realty (which Husband owns):	$32,400
Rent income from Main Street property:	$12,000
Car allowance:	$ 2,817
Social Security:	$18,000
Annual Pension:	$ 1,278
Interest and Dividends:	$ 310
Rent income from Humphrey Drive Property:	$ 3,000
Imputed Benchwood rental income:	$14,700
Total	$84,505

Because of their dissimilar incomes, the Magistrate determined that it would take in excess of the current annual spousal support order of $1,800 to equalize their incomes. Consequently, the Magistrate declined to modify Husband's spousal support obligation.

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HUSBAND'S OBJECTIONS

Husband advances four objections:

1. The Magistrate improperly utilized $12,000 of income from his Main Street rental, instead of $7,149.

2. The Magistrate should not have included $3,000 of annual rental from a rental property on Humphrey Drive.

3. The Magistrate should not have imputed $14,700 of rental income from his Benchwood property.

4. The Magistrate should not have included Husband's car allowance paid to him by his corporation (Carillon Realty, Inc.) in the amount of $2,817.

DISCUSSION

Wife's response to Husband's Objections follows.

1. THE MAGISTRATE IMPROPERLY UTILIZED $12,000 OF INCOME FROM HUSBAND'S MAIN STREET RENTAL, INSTEAD OF $7,149.

In deed, the gross annual rents from Husband's Main Street rental total $12,000, and his annual expenses add up to $4,851, leaving net rental of $7,149 (see Defendant's 2004 Federal Income Tax Return, Schedule E, Defendant's Exhibits B&C). However, his 2004 federal income tax return, Schedule E, reflects that he takes annual depreciation of $2,854 against the rents. Consequently, that depreciation should be added to his net rents of $7,149, resulting in net annual rents for his Main Street rental of $10,003.

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2. THE MAGISTRATE SHOULD NOT HAVE INCLUDED $3,000 OF ANNUAL RENTAL FROM A PROPERTY ON HUMPHREY DRIVE.

For purposes of this Memorandum only, Wife will concede that the annual rent of $3,000 from the Humphrey Drive rental should not be included in Husband's income.

3. THE MAGISTRATE SHOULD NOT HAVE IMPUTED $14,700 OF RENTAL INCOME FROM THE BENCHWOOD PROPERTY.

Husband accurately points out that he did not purchase the Benchwood property "free and clear" after the divorce. Rather, he initially purchased it with borrowed funds, but paid off the mortgage indebtedness with inherited funds, which were his separate property. By paying off the mortgage debt, he eliminated the expense of the mortgage, which resulted in the greater income of $14,700, which the Magistrate found to be the case. After he filed his Motion to Reduce Spousal Support, Husband voluntarily sold the Benchwood property and applied the proceeds ($98,000) to the reduction of the mortgage loan against the marital property that he and his new wife own. Thus, in doing so, Husband eliminated the annual rental income of $14,700, but benefited both himself and his new Wife by reducing their marital debt. As the Magistrate stated:

> "Defendant will be applying the proceeds of this sale to pay off personal debts, with the vast majority going towards paying off his debt for a property purchased with his current wife (about $80,000) (see Plaintiff's Exhibit 5) and his current residence in Kettering (about $18,000). This magistrate is troubled by the inequity of allowing defendant to voluntarily decrease his gross income (upon which spousal support is based) while simultaneously allowing defendant a clear economic benefit (through the payment of other debts, primarily in real estate)."

Imputing annual rental income of $14,700 is no different than imputing an income to a husband who voluntarily becomes underemployed. And the fact that Husband used his

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separate property to pay off the mortgage debt is immaterial. Wife is not seeking any part of Husband's inheritance. Wife respectfully urges the Court to adopt the Magistrate's imputation of rental income to Husband.

However, it might be unfair to impute the gross annual rental of $14,700 to Husband, because he had expenses associated with the rental, as set forth in his 2004 federal income tax return, Schedule E (Defendant's Exhibits B&C). A review of his Schedule E reveals expenses, excluding mortgage interest, of $5,946. But, as with his Main Street rental, he took $4,055 of depreciation. Thus, his true annual "net rental" was $12,809 ($14,700 less $5,946 plus $4,055 equals $12,809).

4. THE MAGISTRATE SHOULD NOT HAVE INCLUDED HUSBAND'S CAR ALLOWANCE PAID TO HIM BY HIS CORPORATION IN THE AMOUNT OF $2,817.

Husband's car allowance should be considered income to him. Recall that Husband owns one hundred percent of the shares of Carillon Realty, Inc., his employer. A review of Carillon Realty's federal income tax return for 2004 (Plaintiff's Exhibit 4) reveals that the corporation deducted auto expense of $2,817, thereby causing the profit of the corporation to be decreased by $2,817. So, if Husband were to have his way, not only would he not count the $2,817, but he also would be able to maintain the deduction of $2,817 from the profits of his corporation, thus benefiting him twofold. He should not be able to have it both ways i.e. receive it and deduct it at the same time. Such would not be the case if the automobile allowance were paid to another employee. But, that is not the case here. The Magistrate was correct in adding the automobile allowance to Husband's income.

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Incorporating the arguments set forth above, Husband's annual income would be $77,617 consisting of the following:

Salary	$32,400
Main Street Rental	$10,003
Benchwood Rental (imputed)	$12,809
Car Allowance	$ 2,817
Social Security	$18,000
Pension	$ 1,278
Interest/Dividend	$ 310
Total	$77,617

With Wife's stipulated annual income to be $40,239, the Divorce Decree would require Husband to pay $18,689 per year or $1,557 per month, which exceeds his present obligation.

But wait, there is something else. Husband's accountant, Charles Bibler, testified that Carillon Realty should report a profit of $1,501 for the year 2005 (see Plaintiff's Exhibit 2 and Husband's testimony at page 84 of the transcript). Because he is the sole shareholder, that extra profit would be considered his own. Hence, an additional $750 should be added to Wife' spousal support in order to equalize the parties' respective incomes.

Finally, the Magistrate assigned no significance to the facts that:

- Husband has *married* a successful realtor, Carol Ross, who has become his employee at Carillon Realty;
- Carol Ross earned $62,729 for not even a full year's employment by Carillon Realty in 2005 (see her W-2 Statement, Plaintiff's Exhibit 16);

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- Apparently none of her commissions of $73,550 earned in 2005 (see Plaintiff's Exhibits 13&14) were retained by Carillon Realty;
- Rather, she retained all her commissions ($73,550), which she probably spent on living costs, such as reducing the mortgage on the marital residence in Columbus that she and Husband own;
- Obviously Husband benefits from his new wife's income through her contribution to their living expenses; and
- By not turning over any of her commissions to her employer (Carillon Realty), she and Husband are diverting income away from Carillon Realty, which otherwise would increase substantially Carillon Realty's profits and hence Husband's income.

CONCLUSION

Wife urges the Court to affirm the Magistrate's Decision for the reasons set forth above.

Respectfully submitted,

Charles D. Lowe (0033209)
Attorney for Plaintiff
50 E. Third St.
Dayton, Ohio 45402
(937) 222-8091

CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following this 4th day of August 2006, by ordinary U.S. Mail:

Cynthia Martin
Attorney at Law
90 E. Franklin Road
Bellbrook, OH 45305

Charles D. Lowe

Charles D. Lowe
LAW OFFICES

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FILED

D&J

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS

FRANCES B MANDELBAUM
7281 CANDLEWICK
CENTERVILLE, OH 45459

PLAINTIFF,

vs.

STANLEY E MANDELBAUM
5605 COUCH DRIVE EAST APT. G
KETTERING, OH 45440

DEFENDANT.

Case No. 1998 DR 01400

SETS No. 7021606079

DENISE L. CROSS, Judge

NICHOLAS SYLVAIN, Magistrate

DECISION AND JUDGMENT

This matter is before the court upon defendant's motion to modify spousal support filed May 27, 2005.

The hearing was had on December 20, 2005, January 17, 2006 and February 17, 2006. Present were Frances B. Mandelbaum, hereinafter referred to as the plaintiff, represented by Charles D. Lowe and Stanley E. Mandelbaum, hereinafter referred to as the defendant, represented by Cynthia Martin. A magistrate decision and permanent order was filed on March 6, 2006. Defendant filed timely objections on March 20, 2006. Defendant filed supplemental objections on May 25, 2006. A transcript of the proceedings was filed April 28, 2006. The plaintiff filed a response to

Judge DENISE L. CROSS
Common Pleas Court
Division of Domestic Relations
Montgomery County, Ohio

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defendant's objection on August 4, 2006. This matter is now ready for decision and judgment pursuant to Civ. R. 53 and Mont. D.R. Rule 4.44.

The magistrate's decision recommended that defendant's motion to modify his spousal support obligation be overruled. In addition the magistrate recommended that the court continue to retain jurisdiction as to the term and amount of spousal support, which shall be terminated by husband's death, wife's death or the wife's remarriage.

The defendant contends that the magistrate erred by overruling his motion to reduce spousal support. Defendant contends that the magistrate erred in finding his annual income to be $84,505.00. Defendant states that his income should have been calculated at $59,137.00. In support of his contention defendant states that the magistrate should have deducted the ordinary and necessary expenses relating to the rental properties on Main Street and Humphrey Drive. Defendant further contends that the magistrate erred in imputing income from the Benchwood property that was purchased post decree and was in contract to be sold prior to the hearing. Finally, defendant states that the magistrate erred by including a car allowance as income because the money he received from the company was not a car allowance, but merely reimbursement for actual gas purchased in pursuing his business.

Based upon the evidence presented the court finds the following:

The parties' were granted a final judgment and decree of divorce on December 22, 2000. The defendant was ordered to pay the plaintiff the sum of $18,000.00 per year in spousal support, payable in monthly installments of $1,500.00. The final decree stated on page 4 paragraph 4:

Judge Denise L. Cross
Common Pleas Court
Division of Domestic Relations
Montgomery County, Ohio

"It is the parties' intent that, for the purpose 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 $25,131.00 of income to the Wife....."

The decree is silent as to how the parties arrived at the income figures used to compute the spousal support or if the parties intended the equalization of income to be ongoing, however the decree ordered the parties to continue to exchange their income information in April of each year. The court retained jurisdiction to modify spousal support. The court finds that absent language to the contrary, it was the parties intention that the equalization of the parties' income would be ongoing in light of the language contained in the final decree.

Since the divorce, the defendant has bought and sold several properties, some of which were income-producing properties. At the time of the divorce, defendant owned two rental properties in addition to an office building on Main Street in Centerville, Ohio that was rented by defendant's corporation Carillon Realty.

R.C. 3105.18(E) provides that the trial court may modify the amount or terms of a spousal support order once it determines that the circumstances of either party have changed, if the trial court retained jurisdiction with respect to the spousal support. Division (F) of that section describes a change in circumstances as including, but is not limited to any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses or medical expenses.

Judge DENISE L. CROSS
Common Pleas Court
Division of Domestic Relations
Montgomery County, Ohio

The parties agree that the plaintiff's income from all sources increased from $25,131.00 at the time of the final decree to $40,239.00. The following income figures for the defendant are not in dispute: $32,400.00 per year; his social security income to

be $18,000.00 per year; his annual pension to be $1,278.00 per year and interest and dividends $310.00 per year.

While defendant concedes that he does receive gross rents of $12,000.00 on the Main Street rental and $3,000.00 on the Humphrey Drive rental he objects to the magistrate not deducting the ordinary and necessary expenses. Defendant's Schedule E "Supplemental Income and Loss" statement for the tax year 2004 (see Defendant's Exhibit "D") lists three rental properties. The first, 166 S. Main Street, Centerville, Ohio, a commercial property rented to Carillion Realty at $12,000.00 per year. The allowable expenses are $795.00 for insurance, $100.00 for legal fees, $2,308.00 mortgage interest paid and $1,648.00 in taxes leaving a net rental income of $7,149.00. The second property listed on defendant's Schedule E is Humphrey Drive, Dayton rented at $3,000.00 per year. The listed expenses are $250.00 insurance, $100.00 legal fees, $1,461.00 mortgage paid to bank $1,267.00 taxes leaving a net rental income of - $78.00.

Defendant objects to the inclusion of potential income related to the property located at 3142-3144 Benchwood Drive, Vandalia since he no longer owns that property. According to the defendant's 2004 Schedule E, the yearly rental income on the property was $14,700.00 per year. The listed expenses were $184.00 for auto and travel, $250.00 for cleaning and maintenance, $740.00 insurance, $100.00 legal fees, $2,878.00 mortgage interest paid, $2,692.00 taxes, $1,980.00 water, sewer and lawn care leaving a net rental income of $5,876.00. Defendant purchased this property post decree subject to a mortgage. He later paid the mortgage by using an inheritance. After he filed his motion to decrease spousal support, Defendant listed the property with another broker, Joe Santel. At the time of the February 17, 2006, the property was in contract and scheduled to close on February 22, 2006. (see Defendant's Exhibit "H") Defendant was not receiving any rental income on the property. Defendant stated that he intended to use the proceeds to pay-off the mortgage on his

Judge Michael L. Chaney
Common Pleas Court
Division of Domestic Relations
Montgomery County, Ohio

residences in Dayton and Columbus where his current wife primarily lives. Defendant did this in an effort to reduce his debts so that he could either retire, restructure his business by merging with other agencies or limit his hours of work. Plaintiff offered no testimony to refute defendant's testimony.

Based upon the evidence adduced, the court finds that is appropriate to deduct the ordinary and necessary expenses associated with the rental properties. While R.C. 3105.18 does not specifically define "gross rental income" the courts look to R.C. 3119.01(C)(13) for guidance. R.C. 3119.01(C)(13) defines rental income as "self-generated income". In order to calculate a party's income from " self-generated income" ordinary and necessary expenses incurred must be deducted. The court further finds that the defendant no longer owns the Benchwood property and that there is insufficient evidence to support a finding that the defendant sold said property in an effort to deprive the plaintiff of spousal support. Therefore, the rental income from the Benchwood property will not be included in the defendant's income figures.

Defendant contends that the magistrate should not have included in his income $2,817.00 characterized as a car allowance because it is merely a reimbursement for gas paid for by the defendant. Defendant listed the same amount as an "auto expense" deduction on his U.S. Corporation Income Tax Return for the year 2004. (see Plaintiff's Exhibit "4") Again looking to R.C. 3119.01(C)(13) for guidance any reimbursements received by a party is to be include in "self-generated income." Because the defendant characterized this as an auto expense to his corporation the court finds this is a car allowance to defendant as an employee of the corporation and include it in his income for spousal support purposes.

Judge Dennis L. Cross
Common Pleas Court
Division of Domestic Relations
Montgomery County, Ohio

The court finds the plaintiff's income to be $40,239.00 per year and defendant's annual income $61,876.00 which is comprised of $32,400.00 salary, $18,000.00 social security, $1,278.00, pension income, $310.00 interest and dividends, net rental

income of $7,149.00 (Main Street) and $-78.00 net rental income (Humphrey Drive). The depreciation allowed for tax purposes does not decrease the net rents received and will not be deducted for income purposes.

The court hereby finds that both parties income has increased since the final divorce in this matter. There remains a discrepancy between the incomes and a spousal support award continues to be reasonable and necessary.

Accordingly, after careful consideration of the magistrate decision and permanent order, the findings of fact contained therein and the defendant's objections thereto, and the transcript, it is the order of this court that the defendant's objections filed March 20, 2006 to the magistrate decision and permanent order filed March 6, 2006 is found well-taken as related to the issues of deduction ordinary and necessary business expenses related to the rental income and the imputation of rental income on the Benchwood property and are hereby sustained, however the defendant's objection to the inclusion of the car allowance is found not to be well-taken and is hereby overruled.

The court hereby reduces the monthly spousal support award from $1,500.00 per month to $925.00 per month. Said award is taxable as income to the plaintiff and deductible by the defendant.

IT IS THEREFORE ORDERED as follows and the Support Enforcement Agency shall correct its records accordingly:

Judge [illegible]
Common Pleas Court
Domestic Relations Division
Montgomery County, Ohio

1. The defendant's objections filed March 20, 2006 to the magistrate decision and permanent order filed March 6, 2006 are found well-taken as

related to the issues of the deduction of ordinary and necessary business expenses from defendant's rental income and the imputation of rental income on the Benchwood property and are hereby sustained, however the defendant's objection to the inclusion of the car allowance is found not to be well taken and is hereby overruled.

2. The defendant's motion to modify his spousal support obligation is sustained.

3. The spousal support is decreased from $1,500.00 per month to $925.00 per month effective March 6, 2006.

4. The court continues to retain jurisdiction as to the term and amount of spousal support, which as ordered in the decree of divorce shall be terminated by husband's death, the wife's death, or the wife's remarriage.

5. Any and all stay orders are hereby vacated.

6. A Notice to Withhold shall issue to Universal One Credit Union, River Park Drive, P.O. Box 467, Dayton, Ohio 45409-0467 in the name of Stanley Mandelbaum, Account No. 3141322-18 to deduct the sum of $943.50 per month from Obligor's account/personal earnings and forward same to the Ohio Child Support Payment Central which shall be discharged in equal amounts according to the pay schedule of the Obligor. Said sum represents, $925.00 per month current spousal support, plus the 2% SEA processing fee. These payments must be made through Ohio Child Support Payment Central, P.O. Box 182394, Columbus, OH 43218-2394, and OBLIGOR SHALL MAKE SAID PAYMENTS by cash, certified check, or money order, UNTIL SUCH TIME AS SAID AMOUNTS ARE WITHHELD BY THE WITHHOLDING NOTICE ISSUED HEREWITH.

Judge Denise L. Cross
Common Pleas Court
Division of Domestic Relations
Montgomery County, Ohio

IT IS FURTHER ORDERED that all child support and spousal support ordered by this order shall be withheld or deducted from the income or assets of the Obligor pursuant to a withholding or deduction notice or appropriate court order issued in accordance with Chapter 3121 of the Revised Code or a withdrawal directive issued pursuant to Chapter 3123 of the Revised Code and shall be forwarded to the Obligee in accordance with Chapter 3121 of the Revised Code.

IT IS FURTHER ORDERED that Obligor is restrained from making said payments directly to the Obligee and the Obligee is enjoined from accepting direct payments from the Obligor. Any payments of support not made through the OCSPC shall be deemed a gift.

IT IS FURTHER ORDERED that Obligor and Obligee notify the SEA immediately, in writing, of their current mailing address, current residential address, current residence telephone number and current driver license number. This duty to notify the SEA immediately of any change in either addresses, phone numbers or driver license numbers shall continue until further notice of the Court.

IT IS FURTHER ORDERED that the Obligor shall notify the SEA immediately, in writing, of any change in employment status or employer. This duty to notify the SEA immediately shall continue until further notice of the Court, and a failure to provide such notification may make the Obligor liable for retroactive support that would have been ordered.

IT IS FURTHER ORDERED that the Obligor and Obligee shall notify the SEA immediately, in writing, of any change in the status of the minor children of the parties which would terminate the duty of Obligor to pay child support.

IT IS FURTHER ORDERED that the Obligor and Obligee shall notify the other party immediately, in writing, of *any change* in status which would effect child support and/or spousal support.

IT IS FURTHER ORDERED that if the Obligee is to receive spousal support from the Obligor, the Obligee shall notify the SEA immediately, in writing, of remarriage if the remarriage would terminate the obligation to pay spousal support.

Judge DENIELL CROSS
Common Pleas Court
Division of Domestic Relations
Montgomery County, Ohio

IT IS FURTHER ORDERED that both parties shall take notice of the Obligee's Rights and Remedies for Enforcement of Support, attached hereto, available to the Obligee in the event the Obligor fails to make payment of support as ordered herein.

IT IS FURTHER ORDERED THAT EACH PARTY TO THIS SUPPORT ORDER MUST NOTIFY THE CHILD SUPPORT ENFORCEMENT AGENCY IN WRITING OF

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HIS OR HER CURRENT MAILING ADDRESS, CURRENT RESIDENCE ADDRESS, CURRENT RESIDENCE TELEPHONE NUMBER, CURRENT DRIVER'S LICENSE NUMBER, AND OF ANY CHANGES IN THAT INFORMATION. EACH PARTY MUST NOTIFY THE AGENCY OF ALL CHANGES UNTIL FURTHER NOTICE FROM THE COURT OR AGENCY, WHICHEVER ISSUED THE SUPPORT ORDER. IF YOU ARE THE OBLIGOR UNDER A CHILD SUPPORT ORDER AND YOU FAIL TO MAKE THE REQUIRED NOTIFICATIONS YOU MAY BE FINED UP TO $50 FOR A FIRST OFFENSE, $100 FOR A SECOND OFFENSE, AND $500 FOR EACH SUBSEQUENT OFFENSE. IF YOU ARE AN OBLIGOR OR OBLIGEE UNDER ANY SUPPORT ORDER ISSUED BY A COURT AND YOU WILLFULLY FAIL TO MAKE THE REQUIRED NOTIFICATIONS YOU MAY BE FOUND IN CONTEMPT OF COURT AND BE SUBJECTED TO FINES UP TO $1,000 AND IMPRISONMENT FOR NOT MORE THAN 90 DAYS.

IT IS FURTHER ORDERED THAT IF YOU ARE AN OBLIGOR AND YOU FAIL TO MAKE THE REQUIRED NOTIFICATIONS YOU MAY NOT RECEIVE NOTICE OF THE FOLLOWING ENFORCEMENT ACTIONS AGAINST YOU: IMPOSITION OF LIENS AGAINST YOUR PROPERTY; LOSS OF YOUR PROFESSIONAL OR OCCUPATIONAL LICENSE, DRIVER'S LICENSE, OR RECREATIONAL LICENSE; WITHHOLDING FROM YOUR INCOME; ACCESS RESTRICTION AND DEDUCTION FROM YOUR ACCOUNTS IN FINANCIAL INSTITUTIONS; AND ANY OTHER ACTION PERMITTED BY LAW TO OBTAIN MONEY FROM YOU TO SATISFY YOUR SUPPORT OBLIGATION.

IT IS FURTHER ORDERED BY THE COURT THAT DEFENDANT SHALL PAY THE CLERK ADMINISTRATIVE FEES FOR THIS ACTION. SAID AMOUNT SHALL BE REMITTED FORTHWITH UPON RECEIVING AN INVOICE FROM MONTGOMERY COUNTY CLERK OF COURTS.

IT IS SO ORDERED.

DENISE L. CROSS, Judge 8-30-16

Judge DENISE L. CROSS
Common Pleas Court
Division of Domestic Relations
Montgomery County, Ohio

NOTICE OF FINAL APPEALABLE ORDER

Copies of foregoing order, which may be a final appealable order, were mailed to counsel of record and/or the parties, on the date indicated below by ordinary mail.

DAN FOLEY, Clerk of the Common Pleas Court

By: Christopher Hickey, Deputy Clerk Date: _____

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Support Enforcement Agency

DR Administration

Magistrate

Bailiff

Case Manager

DLC/CS 8/30/06

Judge DENISE L. CROSS
Common Pleas Court
Division of Domestic Relations
Montgomery County, Ohio

09-29 (4-01)

OBLIGEE'S RIGHTS AND REMEDIES FOR ENFORCEMENT OF SUPPORT

Upon Obligor's failure to pay child support and/or spousal support or to provide medical insurance as ordered, the Obligee has the right to apply to the Montgomery County Support Enforcement Agency for assistance on obtaining any of the following:

A. An order for:

1. withholding of spousal support and/or child support from the personal earnings or bank accounts of the Obligor under Chapter 3121 of the Ohio Revised Code;

2. the assignment of the wages of the Obligor under Section 1321.33 of the Ohio Revised Code;

3. the enforcement of medical insurance support for the children.

B. A judgment, and then execution on that judgment through any available procedure, including but not limited to:

1. an execution against the property of the judgment debtor under Chapter 2329 of the Ohio Revised Code;

2. an execution against the person of the judgment debtor under Chapter 2331 of the Ohio Revised Code;

3. a proceeding in aid of execution under Chapter 2333 of the Ohio Revised Code, including:

   a. a proceeding for the examination of the judgment debtor under Sections 2333.09 to 2333.12, and 2333.15 to 2333.27 of the Ohio Revised Code;
   b. a proceeding for examination of the person holding property, money, or credits of the judgment debtor which is in the nature of garnishment or attachment by notice under Sections 2333.13 to 2333.27 of the Ohio Revised Code;
   c. a proceeding for attachment of the person of the judgment debtor under Section 2333.28 of the Ohio Revised Code;
   d. a creditor's suit under Section 2333.01 of the Ohio Revised Code;

4. the attachment of the property of the judgment debtor under Chapter 2715 of the Ohio Revised Code.

Failure of an Obligee to request the Montgomery County Support Enforcement Agency to maintain an action under Section 2301.38 of the Ohio Revised Code shall not operate as a waiver of any right of the Obligee to seek enforcement of a support order, including medical insurance. Upon receipt of support payments, the Support Enforcement Agency will pay out these support payments within two business days.

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

FRANCES B. MANDELBAUM 7281 Candlewyck Ct. Centerville, Ohio 45459 SSN: 271-36-2715 DOB: 8/27/39 Plaintiff/Appellant vs. **STANLEY E. MANDELBAUM** 5605 Coach Dr., East, Apt. G Kettering, Ohio 45440 SSN: 268-34-3043 DOB: 12/9/38 Defendant/Appellee	)	Case No.CA021817

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

For ease of identification, Frances B. Mandelbaum, the Plaintiff-Appellant, shall be referred to as "Frances"; and Stanley E. Mandelbaum, the Defendant-Appellee, shall be referred to as "Stanley". Frances is 67 years of age, and Stanley is 68. They were married on January 18, 1957; 43 years later, on December 22, 2000, they divorced. Stanley was ordered to pay Frances the sum of $18,000 per year in spousal support, payable in monthly installments of $1,500. The Final Decree stated on page 4, paragraph 4

> "It is the parties' intent that, for the purpose 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 of $18,000 per year by Husband to the Wife, have used $60,900 of income for the Husband and $25,131.00 of income to the Wife."

Thus, their respective incomes always were to remain equal, with Stanley paying spousal support to make up the difference. The Court retained jurisdiction to modify spousal support. On May 27, 2005, Stanley filed a Motion seeking a reduction in his spousal support obligation. Hearings on Stanley's Motion took place on December 20, 2005, January 17, 2006 and February 17, 2006, before Magistrate Nicholas Sylvain. The Magistrate issued his Decision and Permanent Order on March 6, 2006, overruling Stanley's Motion. Stanley objected to the Magistrate's Decision on March 20, 2006. Frances filed a response to Stanley's Objection on August 4, 2006. On August 30, 2006, the Honorable Denise L. Cross issued her Decision and Judgment sustaining Stanley's Motion for modification and decreased his spousal support obligation from $1,500 per month to $925 per month. It is from Judge Cross's August 30, 2006 Decision and Judgment that Frances appeals.

STATEMENT OF FACTS

Frances incorporates in this Statement of Facts those that appear in the Statement of the Case, above. Stanley is a prominent Dayton real estate broker who operates his real estate business through Carillon Realty, Inc. Stanley owns 100% of the shares of Carillon Realty, Inc. Stanley has 19 agents working under him in the Dayton area (T.55). Stanley admits to working 60-80 hours per week (T.57). He claims to make only $32,400 per year in his real estate business. Stanley has an accountant who prepares his corporate and personal tax returns. However, the accountant testified that he does not conduct an audit or a review of Stanley's books. Rather, he relies solely upon what Stanley tells him in preparing financial reports and tax returns (T.41). Until very recently, Stanley taught courses in real estate at Sinclair Community College (T. 58), and his name appears on the Domestic Relations Court list of recommended real estate appraisers (T.58). Stanley remarried in 2005. Frances works as a teller at Fifth Third Bank. She has not remarried and lives alone. In her Decision, Judge Cross determined Stanley's annual income to be $61,876 consisting of the following:

Salary from Carillon Realty	$32,400
Social Security	$18,000
Pension	$ 1,278
Interest and dividends	$ 310
Net rental from Main Street	$ 7,149
Net rental from Humphrey Drive	+ 738
Total	$61,876

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The parties stipulated for the purpose of the hearing that Frances' annual income is $40,239, consisting of her wages, social security and a small pension.

In reaching her Decision, Judge Cross excluded from Husband's income the annual net rents from a duplex located at 3142-3144 Benchwood Drive, Vandalia, Ohio (the "Benchwood Rental"), which Stanley owned and leased to tenants. At the time of the last hearing, February 17, 2006, Stanley had contracted to sell the Benchwood Rental. Consequently, Judge Cross determined that the rent from the Benchwood Rental should not be included in Stanley's annual income, even though the Magistrate had included it. After the last hearing, Stanley sold the Benchwood Rental, realizing $123,000 in net proceeds (T.10), which he used, in part, to payoff an $18,000 mortgage against his Dayton condominium (T.12) and to pay off an $80,000 mortgage against the new residence that he and his new wife purchased in Columbus, Ohio (T.12). At the hearings below, Frances argued that the rent from the Benchwood Rental should be included or imputed to Stanley because he voluntarily sold the property thereby voluntarily reducing his income, but, at the same time, benefiting himself and his new wife by paying off their mortgage.

Stanley married Carol Ross on June 26, 2005. Ms. Ross is, and has been, a successful realtor in the Columbus, Ohio area for 26 years (T.19). As Stanley stated at Trial, "she [Ms. Ross] has done very well. Better than I have." (T.19). Presently, Ms. Ross is an agent for Stanley's Carillon Realty, Inc. Prior to their marriage, Stanley's real estate business operated only in the Dayton area. Upon marrying Ms. Ross, he opened a satellite office of Carillon Realty in Columbus, Ohio (T.67). Ms. Ross devotes her full time and attention to selling real estate for Carillon Realty in Columbus. Yet, she shares none of her commissions with Carillon Realty or with Stanley (T.45). Carillon Realty pays the expenses of the Columbus

operation (T.67,68). Stanley reported that Ms. Ross is so successful that she has a whole wall of plaques honoring her accomplishments in the Columbus area real estate business (T.49), and that she "makes eighty some thousand dollars per year" and has made "over $100,000" (T.58). In her first year working for Stanley, she was unable to devote her full time and attention to Carillon Realty, because she was winding up her association with Remax (T.99,100). However, she still produced $62,000 in commissions as Stanley's agent, all of which she kept for herself (T.45).

FIRST ASSIGNMENT OF ERROR

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

Recall, that spousal support in this case is intended to be the amount necessary to equalize the parties' respective incomes. Hence, the more Stanley could lower his income, the better chance he had at reducing his spousal support obligation.

At the time Stanley filed his Motion to Modify Spousal Support, he owned the Benchwood Rental, which generated $5,876 per year in net income, after deducting certain expenses, which included $2,878 of mortgage interest (see Plaintiff's Exhibit 3). Stanley paid off the mortgage debt; and, while his Motion was pending, he contracted to sell the Benchwood Rental. Later he sold it, realizing $123,000 in net proceeds (T.60), which he used, in part, to pay off an $80,000 mortgage debt on the residence in Columbus, Ohio that he and his wife own and share.

At Trial, Frances urged the Court to include Stanley's Benchwood rents in computing his annual income. Those rents would have increased to $8,754 per year as a result of Stanley eliminating the mortgage debt. Stanley argued that since he was in the process of selling the Benchwood Rental, the Court should not include the rents in his income. In overruling the Magistrate's Decision, the Trial Court sided with Stanley and eliminated the Benchwood rents from his income. Frances contends that the Trial Court abused its discretion in doing so.

Clearly, Stanley had a right to sell Benchwood and utilize the proceeds in any manner he chose. However, in doing so, he reduced his income at Frances' expense (reduced spousal support), while, at the same time, benefited himself and his new wife (eliminated marital debt and reduced spousal support). He should not be permitted to profit from his purely voluntary act, knowing that it would damage Frances.

Although this is not a case of financial misconduct, Ohio case law on that subject is instructive and presents strong rationale supporting Frances' position. For there to be a finding of financial misconduct, one of two things must be present. "[T]here must be a clear showing that the offending spouse *either* profited from the alleged misconduct *or* intentionally defeated the other spouse's distribution of assets" (emphasis added). See *Jacobs v. Jacobs*, 4th Dist. No. 02CA2846, 2003 – Ohio – 3466 [2003 WL 21500026]. Both things are present in this case. Stanley profited from the sale of Benchwood (lower spousal support), *and* defeated Frances' expectancy of continued spousal support. In fact, not only did Stanley benefit in the form of reduced spousal support, but he and his new wife also benefited from the payoff of their mortgage debt. Meanwhile, Frances suffers a reduction of monthly spousal support from $1,500 to $925.

Frances urges this Court to correct the Trial Court's error by imputing to Stanley the additional annual income of $8,754, representing the amount of net rents that Stanley would have received had he not voluntarily disposed of the Benchwood Rental. Doing so would cause Stanley's annual income to be $70,630 compared to Frances' income of $40,239.

SECOND ASSIGNMENT OF ERROR

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

As pointed out earlier, Stanley married Carol Ross who makes "eighty some thousand dollars per year" and has made over $100,000 (T.58). Ms. Ross produced commissions of $62,000 for Stanley and Carillon Realty in 2005, which she kept for herself.

Stanley testified that although Ms. Ross " . . . has subsidized me when I need some money in my pocket" (T.18), he pretty much pays his expenses and she pays hers. Ms. Ross testified that she and Stanley keep their finances separate, she pays her expenses and he pays his (T.91). The fact remains that with Stanley paying off the mortgage that debt encumbered his and Ms. Ross' marital home, and with Stanley, or his corporation, paying all expenses of the Columbus real estate office and permitting Ms. Ross to keep all of her commissions, Stanley and his wife have an additional $80,000 per year to met their expenses. Consider that Frances' annual household income is $40,239 while Stanley's is at least $140,000. This Court often has held that it is proper to consider that an obligor benefits from sharing living expenses with a new spouse when modification of spousal support becomes an issue. *McNutt*

v. *McNutt*, Montgomery App. No. 20752, 2005 – Ohio – 3752. In fact, this Court stated in *McNutt* "a new spouse's income is properly considered as part of the "any other factor" section of the statute. R.C. §3105.18(C)(1)(n)." The Trial Court failed to consider Ms. Ross' income in lowering Stanley's spousal support obligation.

THIRD ASSIGNMENT OF ERROR

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 BY HIS NEW SPOUSE IN DETERMINING APPELLEE'S INCOME FOR THE PURPOSE OF MODIFYING SPOUSAL SUPPORT

This Assignment of Error differs slightly from the Second Assignment of Error. Recall, that Stanley's new wife, Carol Ross, generated $62,000 in commissions (T.44) in 2005 as an agent of Stanley's company, Carillon Realty, and that she kept every cent of it, sharing none of it with her broker husband (T.45). Yet Carillon Realty pays all of Ms. Ross' expenses and those of the Columbus office, which reduces the profits Carillon Realty, which, in turn, reduces Stanley's income. Thus Ms. Ross takes her entire commissions home to be enjoyed by her and Stanley. Because Stanley owns 100% of Carillon Realty, Inc. (T.47), the corporate income that normally would pass to him is reduced by the amount of the expenses of maintaining the Columbus office and promoting his wife's career.

Carillon Realty, Inc.'s federal tax return for the fiscal year ending September 30, 2005 (Plaintiff's Exhibit 4), showed a profit of $279.[1] Frances submits that the expenses associated with the operation of the Columbus operation and Ms. Ross' endeavors should not be used as

[1] At the time of the hearings, the return for the year ending September 30, 2006 had not been prepared. In fact, the 2004 return was not signed until December 13, 2005 (Plaintiff's Exhibit 4).

Charles D. Lowe LAW OFFICES

a deduction against Carillon Realty's revenue unless Carillon Realty retains a portion of the commissions that Ms. Ross produces. Said another way, if Carillon Realty really isn't getting the benefit of Ms. Ross' commissions, then Stanley should not be lowering his own income by deducting from the corporate income the expenses associated with the production of her commissions.

Stanley testified that had Ms. Ross shared commissions with Stanley, her broker, or with Carillon Realty, as is the custom, he would have had additional income of at least $6,000 in 2005 (T.68,69). Hence, at the very least, an additional $6,000 should be added to Stanley's income for the purpose of determining whether a downward modification of spousal support is appropriate.

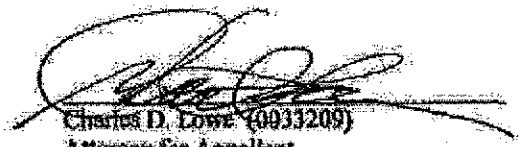
CONCLUSION

As argued in her First Assignment of Error, $8,754 of imputed rent should be added to the $61,876 of that the Trial Court found Stanley's annual income to be, which would bring Stanley's annual income to $70,630. As argued in her Third Assignment of Error, an additional $6,000 should be added to Stanley's income representing a 10% sharing of his wife's 2005 commissions as his agent. That would increase his income to $76,630. As argued in her Second Assignment of Error, additional consideration should be given to Stanley's annual income because of the benefit that Stanley receives from the additional household income that he now enjoys.

With Stanley's annual income at $76,630 and Frances' annual income at $40,239, Stanley should pay Frances $18,195 per year, or $1,526 per month. It follows that there

should have been no reduction of Stanley's $1,500 monthly spousal support obligation. In reducing Stanley's spousal support, the Trial Court abused its discretion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following this 12th day of February 2007 via U.S. Mail:

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Charles D. Lowe

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

FRANCES MANDELBAUM	:	
Appellant/Cross-Appellee	:	Appellate Case No. CA 21817
	:	Trial Ct. Case No. 98-DR-1400
v.	:	
STANLEY E. MANDELBAUM	:	
Appellee/Cross-Appellant	:	

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STATEMENT OF THE CASE

The Appellee agrees with the STATEMENT OF THE CASE as set forth in the Brief of Appellant.

Additionally, Appellant filed her Notice of Appeal on September 22, 2006, and Appellee filed his Notice of Cross Appeal on October 4, 2006.

STATEMENT OF FACTS

Appellee agrees that the STATEMENT OF FACTS set forth in the Brief of Appellant is accurate, so far as it goes. However, Appellant failed to mention the following:

a. Frances meets all of her expenses, and also puts the $813 per month she receives from Social Security into savings. (Tr. 12/20/05, pp. 9-19, 23)

b. Stanley's income from Carillon Realty at the time of the divorce, and for the several years prior to the divorce, fluctuated between $32,000 and $35,000 per year. (Magistrate's Order 12/14/98, Doc. 20; Magistrate's Order 8/14/99, Doc. 26)

c. Stanley's income from Carillon Realty has continued to fluctuate after the parties' divorce. (Tr. 1/17/06, pg. 11)

d. Stanley's realty business has suffered a decline in the years leading up to this hearing. (Tr. 1/17/06, pg. 12; Tr. 2/17/06, pp. 22-23)

e. Stanley set his salary from Carillon Realty at $32,400 per year in 2002 or 2003 in order to even the flow of income, and such figure was based on the average amount Stanley had drawn out of the company the previous years. (Tr. 1/17/06, pg. 12)

f. Stanley lives in his Dayton residence during the week and lives with his wife at their Columbus residence on the weekends. (Tr. 2/17/06, pg. 18)

g. Carillon Realty did not have a Columbus office until Stanley began his relationship with his new wife. (Tr. 2/17/06, pp. 18-19)

h. Stanley's new wife is the only sales person at the Columbus office actively selling real estate, and she performs all of the office management functions without compensation. (Tr. 2/17/06, pp. 18-21; 116-118)

i. The most Stanley's new wife has ever earned in commissions in one year was $129,000, which occurred approximately 8 or 9 years prior to the hearing. (Tr. 2/17/06, pp. 90-91)

j. Even if Carrillon Realty received a percentage of the commissions earned by Stanley's wife in the Columbus area, the amount Carrillon Realty would receive would be far less than what it would cost Carrillon Realty to pay someone to run that Columbus office. (Tr. 2/17/06 pp. 19-20; 117-118).

k. Stanley has a heart condition and is taking 4 medications. (Tr. 2/17/06, pp. 25-26)

l. Stanley has had to dip into his savings to cover normal expenses, and has made no contributions to his IRA accounts the two years prior to the hearings. (Tr. 2/17/06, pp. 80, 82)

m. Stanley pays his own expenses and his wife pays hers. (Tr. 2/17/06, pp. 18, 91)

n. At the age of 67, Stanley is considering retirement and/or restructuring of his business and limiting his hours of work. (Tr. 2/17/06, pp. 24-26, 57-58, 73-74)

CROSS-APPEAL ASSIGNMENT OF ERROR

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

ARGUMENT

I. APPELLANT'S ASSIGNMENTS OF ERROR

As to all of Frances' assignments of error, there are two ways to frame the analysis to be undertaken, two ways that are diametrically opposed to one another. The first is a strict application of the continuing jurisdiction language set forth in the decree. A court has no jurisdiction to modify an award of spousal support unless the decree contains language specifically granting that jurisdiction. *Kimble v. Kimble* (2002), 97 Ohio St. 3d 424, 780 N.E.2d 273; *Johnson v. Johnson* (June 26, 1994), Mont. Ct. App. No. CA 14059, unreported (attached). Trial courts, and parties, are permitted to limit the reservation of continuing jurisdiction. *Kimble, supra; Johnson, supra; Lawson v. Garrison* (Sept. 4, 1998), Lucas Ct. App. No. L-98-1145, unreported (attached); *McLaughlin v. McLaughlin* (March 26, 2001), Athens Ct. App. No. 00CA14, 2001-Ohio-2450; *McHenry v. McHenry* (July 30, 2004), Mont. Ct. App. No. 20345, 2004-Ohio-4047. The essence of this approach is that by using the continuing jurisdiction language in the decree as they did, the parties defined "reasonable and appropriate" to mean equalization of incomes. Given the language used by the parties in the decree, the only question to be resolved, beyond the mathematical equation involved in equalizing their incomes, is whether each party is earning income at a level that is legally acceptable given their ages, physical conditions, experience, etc. Compare *Jordan v. Jordan* (March 17, 2000), Greene Ct. App. No. 99-CA-64, unreported (attached)(". . . the trial court was relieved of its authority and responsibility to fashion an equitable division of marital property by the parties themselves who voluntarily entered into an agreement . . ."). This appears to be the framework within which the trial court analyzed this matter. Not once

in the trial court, nor in her brief, has Frances ever argued that this was not the parties' intention. Indeed, in her STATEMENT OF THE CASE Frances stipulates as much. (Brief of Appellant, pg. 1; "Thus, their respective incomes always were to remain equal, with Stanley paying spousal support to make up the difference.")

The second way to frame the issue is to accept the equalization language used in this decree with a "yes, but . . ." approach, essentially holding that while equalization of incomes was the parties' intention, and even though the trial court approved of such an approach when it approved and filed the parties' final decree, such a limitation is not subsequently binding on the court or the parties and the court is permitted, indeed required, to consider other factors whenever either party requests a modification. In such an approach, the court would be permitted to include in its analysis the extent to which either party had reduced their expenses since the filing of the final decree and consider any increase (or decrease) in "need" or in "ability to pay" when attempting to "equalize" their incomes. The court would also be permitted to consider the extent to which either parties' reduction in expenses results from their subsequent remarriage (or cohabitation, as the case may be). This would appear to be the approach being urged by Frances in her arguments in support of her second and third assignments of error.

Stanley respectfully submits that this court should interpret the continuing jurisdiction language used in this decree as giving the court continuing jurisdiction but with such continuing jurisdiction limited to equalizing the parties' incomes when they change. Stanley further submits that even if this court deems the trial court's continuing jurisdiction to be broader and permits a wider analysis of the factors listed under R.C. 3105.18, the reduction in spousal support ordered by the trial court resulted in a spousal

support award that is reasonable and appropriate under the circumstances presented and should be affirmed.

APPELLANT'S FIRST ASSIGNMENT OF ERROR

In her first assignment of error, Frances argues that the trial court should have imputed income to Stanley as the result of his sale of the Benchwood real estate. Frances argues that she is suffering a reduction in spousal support because Stanley no longer has income from the Benchwood property. Frances' argument fails to acknowledge two key facts, that being that Stanley's income has in fact increased slightly since the divorce (from $60,900 at the time of the divorce to the $61,876 as found by the judge), while Frances' income has greatly increased (from $25,131 at the time of the divorce to the $40,239 as stipulated by the parties at the time of this hearing). The reduction in spousal support is warranted by and due entirely to the increase in Frances' income of over $15,000 since the parties divorce.

The Benchwood property was purchased by Stanley after the parties divorce using funds he had received as an inheritance after the parties divorce. Tr. 01/17/06, pg. 10. In 2002, and even before any deduction for depreciation, the Benchwood property had a loss of $1,105. (Def. Exh. B) In 2003, before any deduction for depreciation, it produced income of $3,546. (Def. Exh. C) Stanley had no obligation to use his inheritance funds to purchase an income producing asset, and he could have chosen to have spent that inheritance on anything. He could have used the entire inheritance to pay off the mortgage on his own residence sooner than he did, or to purchase a second residence (with or without a new spouse). Nor did he have any obligation to retain the Benchwood

property when he made the decision, at the age of 66 years, to reduce his debts in order to either retire, restructure his business or limit his hours of work (from the 60 to 80 hours per week he has been working to something more reasonable for a person of his age and physical condition).

SECOND ASSIGNMENT OF ERROR

In this assignment of error, Frances first asserts that the trial court, in the course of determining Stanley's income, failed to consider the "benefits" Stanley allegedly receives as the result of his remarriage. However, given the fact that no evidence exists showing that his remarriage actually resulted in any increase in Stanley's income, Frances converts this argument into one of Stanley receiving the benefit of the sharing of expenses with his new wife, implying but never really arguing that such has increased Stanley's ability to pay spousal support. Again, evidence that Stanley's expenses have been lowered as the result of his remarriage is entirely lacking. Thus, at the end of this argument Frances resorts to asserting that the reduction of expenses resulting from Stanley's use of money he inherited to pay off the mortgages on his two residences is a factor the trial court should have considered. Frances cites *McNutt v. McNutt* (July 22, 2005), Mont. Ct. App. No. 20752, 2005-Ohio-3752. However, *McNutt* is distinguishable for two reasons: (1) the decree in *McNutt* did not contain language limiting the court's continuing jurisdiction to equalization of the parties' incomes, and (2) unlike the case at hand, evidence existed that in fact the payor spouse in *McNutt* was benefiting from the sharing of expenses with his *new* spouse.

THIRD ASSIGNMENT OF ERROR

In her third assignment of error, Frances argues that Stanley's income would and should be greater if only he would require his new wife to pay to Carrillon Realty a portion of the commissions she receives from selling real estate in the Columbus area. This argument completely ignores the un-refuted testimony of Stanley, his wife, and his accountant, that the amount of commissions Stanley would normally expect to receive from the level of sales his wife had historically generated would never be enough to offset the cost of hiring an office manager to operate the Columbus office instead of having his wife run that office without compensation. Stanley's wife had never generated more than $129,000 in commissions in her entire career, and even with an 80/20 fee sharing arrangement with Carrillon Realty (i.e., the fee sharing arrangement Frances' counsel suggested was common in the Dayton area, contrary to the 90/10 fee sharing arrangement Stanley's wife asserted is more common in the Columbus area, Tr. 2/17/06, pp. 114-115), the 20% of such commissions that would be paid to Carrillon Realty (approximately $26,000) would, at most, offset the salary to be paid to an office manager. In essence, Stanley's wife's compensation for running the office, in addition to selling real estate, was the right to keep all of her commissions, and such an arrangement saved Stanley money rather than costing him. (Tr. 2/17/06 pp. 19-20, 117-118)

Frances' argument also ignores the fact that by her own testimony her expenses remain substantially the same as they were at the time of the original spousal support award, and that she is not only able to pay all of her own expenses but put the $813 per month she receives from Social Security into savings. (Tr. 12/20/05, pp. 9-19, 23) Even

under an "any other factor" analysis as urged by Frances the consideration of her "needs" supports the reduction ordered by the trial court.

APPELLEE'S CROSS-ASSIGNMENT OF ERROR

Stanley asserts in this cross-appeal that the court erred when it made the reduction in spousal support effective March 6, 2006, i.e., the date of the Magistrate's Decision and Order, rather than an earlier date. The earliest date upon which the court could have made its' order effective was the date Frances was served with the motion for modification. *Murphy v. Murphy* (1984), 13 Ohio App. 3d 388, 469 N.E.2d 564. To be sure, such rule is not an absolute. *Harbert v. Harbert* (Oct. 17, 1997), Greene App. Ct. No. 96-CA-0161, unreported (attached). The main criterion for selecting the date of the modification appears to be due process considerations of notice and opportunity to contest the change. *Harbert, supra.* As stated in *Harbert*:

> "The court may order a modification retroactive to the change of circumstances that warrants it when the amount, terms, or duration of the support in the prior order is expressly made conditional upon that change of circumstances. Then, due process is satisfied because the adverse party has been put on notice and been given an opportunity to contest the basis for change before a motion to modify is served on him. Likewise, when an obligor fails to comply with an order requiring him to notify the obligee of a change of circumstances, the court may make its modification retroactive to the date that the change occurred. *Balazs v. Balazs* (Aug. 15, 1997), Montgomery App. No. 16096, unreported."

Although the amount, terms or duration of the original order of spousal support was not made "expressly conditional" upon a change of circumstances, the decree in this case did require the parties to exchange proof of income every year. Stanley's motion to reduce his support due to a reduction in his income was filed on May 27, 2005, and the docket reflects that Frances was served with that motion on June 2, 2005. (Doc. 47) By that

date Frances was well aware that her income had substantially increased and that Stanley's had remained about the same. Stanley respectfully submits that the reduction in his spousal support obligation should have been made effective June 2, 2005. Alternatively, since the hearings began on December 20, 2005 the reduction should have been made effective as of that date. Finally, since the hearings ended on February 17, 2006, at the very least the reduction should have been made effective that date.

CONCLUSION

The trial court correctly interpreted the continuing jurisdiction language set forth in the parties' final decree, correctly determined Appellee's income, and correctly reduced Appellee's spousal support obligation in light of the substantial change in Appellant's income.

The trial court should have made the reduction in spousal support effective June 2, 2005, the date Appellant was served with the motion to modify, or on December 20, 2005, the date the hearing began, or on February 17, 2006, the date the hearing ended.

Respectfully Submitted By:

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Certificate of Service

A copy of the foregoing BRIEF OF APPELLEE/CROSS-APPELLANT was served on Charles D. Lowe, attorney for Appellant/Cross-Appellee, 1500 Kettering Tower, Dayton, OH 45423 by ordinary US Mail postage pre-paid this 26th day of March, 2007.

Mark Edward Stone (0024486)
Attorney for Appellee/Cross-Appellant

Baldwin's Ohio Revised Code Annotated Currentness
Title XXXI. Domestic Relations--Children
Chapter 3105. Divorce, Legal Separation, Annulment, Dissolution of Marriage (Refs & Annos)
Legal Separation; Division of Property; Spousal Support

→3105.18 Spousal support

(A) As used in this section, "spousal support" means any payment or payments to be made to a spouse or former spouse, or to a third party for the benefit of a spouse or a former spouse, that is both for sustenance and for support of the spouse or former spouse. "Spousal support" does not include any payment made to a spouse or former spouse, or to a third party for the benefit of a spouse or former spouse, that is made as part of a division or distribution of property or a distributive award under section 3105.171 of the Revised Code.

(B) In divorce and legal separation proceedings, upon the request of either party and after the court determines the division or disbursement of property under section 3105.171 of the Revised Code, the court of common pleas may award reasonable spousal support to either party. During the pendency of any divorce, or legal separation proceeding, the court may award reasonable temporary spousal support to either party.

An award of spousal support may be allowed in real or personal property, or both, or by decreeing a sum of money, payable either in gross or by installments, from future income or otherwise, as the court considers equitable.

Any award of spousal support made under this section shall terminate upon the death of either party, unless the order containing the award expressly provides otherwise.

(C)(1) In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:

(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;

(b) The relative earning abilities of the parties;

(c) The ages and the physical, mental, and emotional conditions of the parties;

(d) The retirement benefits of the parties;

(e) The duration of the marriage;

(f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;

(g) The standard of living of the parties established during the marriage;

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(h) The relative extent of education of the parties;

(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;

(j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;

(k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;

(l) The tax consequences, for each party, of an award of spousal support;

(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

(n) Any other factor that the court expressly finds to be relevant and equitable.

(2) In determining whether spousal support is reasonable and in determining the amount and terms of payment of spousal support, each party shall be considered to have contributed equally to the production of marital income.

(D) In an action brought solely for an order for legal separation under section 3105.17 of the Revised Code, any continuing order for periodic payments of money entered pursuant to this section is subject to further order of the court upon changed circumstances of either party.

(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:

(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.

(G) If any person required to pay alimony under an order made or modified by a court on or after December 1, 1986, and before January 1, 1991, or any person required to pay spousal support under an order made or modified by a court on or after January 1, 1991, is found in contempt of court for failure to make alimony or spousal support payments under the order, the court that makes the finding, in addition to any other penalty or remedy imposed, shall

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assess all court costs arising out of the contempt proceeding against the person and shall require the person to pay any reasonable attorney's fees of any adverse party, as determined by the court, that arose in relation to the act of contempt.

C Baldwin's Ohio Revised Code Annotated Currentness
General Provisions
Chapter 1. Definitions; Rules of Construction (Refs & Annos)
Statutory Provisions (Refs & Annos)

→ 1.42 Common and technical usage

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

(1971 H 607, eff. 1-3-72)

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)

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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.[FN1] On September 8, 2004, by judgment entry, the trial court approved and adopted the amended magistrate's decision, overruling the parties' objections.

FN1. 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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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
162 Ohio App.3d 89, 832 N.E.2d 809, 2005 -Ohio- 3520

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

Court of Appeals of Ohio,
Sixth District,
Lucas County.
Icephine L. ROLLINS, Appellee
v.
James T. HARVIS, Appellant.
No. L-06-1328.

Decided Nov. 16, 2007.
Peter L. Moran, for appellee.

Theodore B. Tucker, III, for appellant.

SKOW, J.

*1 {¶ 1} Appellant, James T. Harvis, appeals from a judgment entered by the Lucas County Court of Common Pleas, Domestic Relations Division, denying his motion to modify spousal support. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} Appellant and appellee, Icephine L. Rollins, were divorced December 24, 2003. Appellant was ordered to pay spousal support in the amount of $2,000 per month, plus a two percent processing charge, beginning on November 1, 2003. The order of spousal support was based upon a finding by the trial court that appellant, who was self-employed, earned $102,258. This figure was an average based upon the prior three years ending in 2002.

{¶ 3} Appellant never complied with the order to pay spousal support. Instead of paying $2,000 per month, plus the two percent processing charge, he repeatedly paid only $1,200 per month, all the while maintaining that he could not afford any more than that amount.

{¶ 4} On April 14, 2004, appellee filed a motion to show cause for incarceration and for attorney fees and court costs. On September 20, 2004, appellant filed a motion to modify spousal support.

{¶ 5} Hearings on the motions were heard on December 13, 2005 and February 10, 2006. During those hearings, evidence of the following was adduced. At the time of the divorce, appellant operated a trucking company, known as Premium Express, as a sole proprietorship. After the divorce, he began operating the company as a corporation and, further, became an employee of the corporation. Although appellant now draws a wage from the Premium Express--in an amount he himself determines--he continues to pay personal living expenses (including spousal support) through the corporation and, in fact, does not maintain a personal checking account separate from the corporation.

{¶ 6} According to appellant's records, in 2003, Premium Express had gross revenues of $905,394. Appellant did not provide any evidence of the company's gross revenues for the years 2004 and 2005. Instead, he produced only his own personal returns. Appellant's returns showed a gross personal income of $67,509 for 2003; $40,800 for 2004; and $43,350 for 2005.

{¶ 7} The testimony and evidence produced at the hearings demonstrated that the income and expenses of appellee were basically the same as they were at the time of the divorce. That is, she continues to receive social security total disability benefits in the net amount of $499 per month. This, along with her $1,200 per month in spousal support is the only income she receives.

{¶ 8} On May 11, 2006, the magistrate entered his decision denying appellant's motion to modify. In the decision, the magistrate noted that for the year 2002, which was considered by the trial court in the divorce action, appellant only admitted to a personal income of $34,942. This, despite abundant evidence in the in the record demonstrating that during 2002, Premium Express had revenues of $942,594, and, as indicated above, appellant actually had a personal income of $102,258.

*2 {¶ 9} The magistrate determined that in 2003, when Premium Express had revenues of $905,394, appellant had an actual personal income of $192,492. The personal income figure was derived by adding together the following figures: $45,500, which was shown on appellant's W-2; $23,682, which was the amount of profit realized by Premium Express in 2003; $2,043 in reimbursement for business use of appellant's home; $106,867 in depreciation; and

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$14,400 in spousal support that was paid by Premium Express on appellant's behalf.

{¶ 10} Although appellant produced only personal tax returns for the years 2004 and 2005, without producing tax returns for Premium Express, the magistrate took note that the 2004 return, which showed a salary to appellant of $40,800, and the 2005 return, which showed a salary a salary to appellant of $43,350, were consistent with the prior years during which Premium Express had gross revenues in excess of $900,000. The magistrate additionally noted that the complete returns for Premium Express for 2004 and 2005 were within appellant's control, yet he failed to supply them in response to appellee's request by subpoena.

{¶ 11} Appellant timely filed objections to the magistrate's decision. On September 8, 2006, the trial judge issued a judgment entry overruling appellant's objections and adopting the magistrate's decision. Appellant timely appealed, raising the following assignment of error:

{¶ 12} I. "WHETHER THE TRIAL COURT ERRED IN ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DETERMINATION FINDING DEFENDANT/APPELLANT'S MOTION TO MODIFY SPOUSAL SUPPORT NOT WELL TAKEN AND IN DENYING AND DISMISSING SAME AS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 13} Appellate review of a trial court's decision regarding modification of spousal support is under an abuse of discretion standard. *Jeffery v. Jeffery,* 9th Dist. No. 06CA0046, **2007-Ohio-4482, ¶ 7**. The term "abuse of discretion" connotes more than an error of judgment; it signifies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 14} Pursuant to R.C. 3105.18(E), a court considering a request for modification of spousal support must first conduct a two-part analysis to determine whether it has jurisdiction over the matter. *Coker v. Ulch,* 166 Ohio App.3d 778, 2006-Ohio-2349, ¶ 19; *Jeffery,* supra, at ¶ 8. Under the first part of the analysis, the court must determine whether the divorce decree specifically authorizes the court to modify the terms of the spousal support. See *id.* Under the second part of the analysis, the court must determine whether the circumstances of either party have changed. See *id.* "R.C. 3105.18(E) does not require a 'substantial' or 'drastic' change of circumstances, but only a change that '[has] an effect on the economic status of either party." *Jeffery,* supra, quoting *Kingsolver v. Kingsolver,* 9th Dist. No. 21773, 2004-Ohio-3844, at ¶ 21. For purposes of the statute, "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(F).

*3 {¶ 15} If, after conducting this two-part test, the trial court finds that it has jurisdiction to modify the spousal support award, it must next determine whether the existing order should, in fact, be modified. *Id.,* at ¶ 9. This determination requires the court to reevaluate the existing order in light of the changed circumstances, looking, in particular, to the factors set forth at R .C. 3105.18(C). *Id.* The burden of showing that a reduction is appropriate is on the party seeking the reduction. *Riley v. Riley,* 9th Dist. No. 22777, 2006-Ohio-656, at ¶ 11.

{¶ 16} Here, it is undisputed that the divorce decree provides for modification of the amount of spousal support. Thus, the question becomes whether the circumstances of either party had changed in such a way as to establish a basis for modification of spousal support. A reading of the trial court's findings of fact and conclusions of law clearly indicate a determination by the trial court that they had not. Because the record amply demonstrates that there was no actual change having an effect on the economic status of either party, we agree with the trial court that a basis for modification was not been established in this case. We further find that the trial court, in making its determination, did not abuse its discretion.

{¶ 17} As jurisdiction was never established pursuant to R.C. 3105.18(E), we do not reach the question of whether a change in the spousal support order would be appropriate under the factors set forth at R.C. 3105.18(C).

{¶ 18} For all of the foregoing reasons, appellant's assignment of error is found not well-taken and the judgment of the Lucas County Common Pleas Court, Domestic Relations Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

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JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

MARK L. PIETRYKOWSKI, P.J., ARLENE SINGER, J., and WILLIAM J. SKOW, J., Concur.

Slip Copy, 2007 WL 3408230 (Ohio App. 6 Dist.), 2007-Ohio-6121

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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.

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{¶ 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 [FN1]; 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

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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

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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).[FN2] 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."

FN2. 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

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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." [FN3]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

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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.[FN4]

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.

[2]{¶ 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

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{¶ 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

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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,

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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).[FN1] 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.

FN1. 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

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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).[FN2]

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

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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.), 2006 -Ohio- 3879

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C
Cassidy v. Cassidy
Ohio App. 4 Dist.,2005.

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

Court of Appeals of Ohio, Fourth District, Pike County.
Regina L. CASSIDY, Plaintiff-Appellee,
v.
George R. CASSIDY, Defendant-Appellant.
No. 03CA721.

June 17, 2005.

Background: Former wife filed motion asking that former husband be held in contempt for failure to pay attorney fees and repair costs as set forth in judgment granting divorce. Former husband filed motion for modification of child support, and former wife filed motion for modification of spousal support. The Court of Common Pleas, Pike County, Case No. 03CA721, found former husband in contempt, extended spousal support, and refused to consider child support issues. Former husband appealed.

Holdings: The Court of Appeals, Harsha, J., held that:

(1) trial court's refusal to consider child support issues did not amount to deviation from child support guidelines;

(2) trial court abused its discretion in refusing to consider child support issues until former husband's spousal support arrearages were at zero;

(3) remand for clarification of contempt order was required; and

(4) trial court's findings were insufficient to support its extension of spousal support.

Reversed and remanded.

[1] Divorce 134 ⚷278.1

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k278 Appeal
134k278.1 k. In General. Most Cited Cases
Court of Appeals was entitled to accept former husband's statement of facts and issues, on his appeal from trial court's order finding him in contempt of court, extending spousal support, and declining to consider child support issues, and to reverse if former husband's brief reasonably appeared to sustain reversal, where former wife filed no appellate brief and made no other appearance. Rules App.Proc., Rule 18(C).

[2] Child Support 76E ⚷187

76E Child Support
76EV Proceedings
76EV(A) In General
76Ek186 Pleading
76Ek187 k. In General. Most Cited Cases
Former husband's motion for modification of child support was actually motion to establish child support, where no child support order was in place at time of filing of motion.

[3] Child Support 76E ⚷148

76E Child Support
76EIV Amount and Incidents of Award
76Ek148 k. Exceptions and Deviations from Guidelines in General. Most Cited Cases
Trial court's refusal to consider child support issues, in post-judgment proceedings in divorce action, did not amount to deviation from child support guidelines, where trial court did not first consider guideline amount of child support. R.C. § 3119.22.

[4] Child Support 76E ⚷188

76E Child Support
76EV Proceedings
76EV(A) In General
76Ek186 Pleading
76Ek188 k. Issues, Proof, and Variance. Most Cited Cases
Trial court abused its discretion, in post-judgment proceedings in action for divorce, in refusing to consider child support issues until husband's spousal

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support arrearages were at zero, where no evidence was presented, and no argument was made, indicating that husband was in arrears on spousal support; husband testified at hearing that he was current in his spousal support payments and that he was capable of continuing to make such payments at their present level, wife testified at hearing and never indicated that husband was behind in his spousal support payments, and wife's trial brief did not claim that husband was in arrears in his spousal support obligation.

[5] **Divorce 134 287**

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k278 Appeal
134k287 k. Determination and Disposition of Questions. Most Cited Cases
Remand for clarification was required, on husband's appeal from trial court's order holding him in civil contempt for failing to pay wife's attorney fees and certain repair costs, as required by judgment of divorce, where husband claimed that such obligations had been discharged in bankruptcy and trial court's decision did not state that such obligations were either not discharged or nondischargeable support obligations, or otherwise indicate any basis for its decision to hold husband in contempt. 11 U.S.C.A. § 523(a)(5), 524(a).

[6] **Divorce 134 247**

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k247 k. Commencement and Termination. Most Cited Cases
Trial court's findings were insufficient to support its extension of spousal support past period provided for in judgment of divorce, especially in absence of any clear evidence of change in circumstance, where court did not identify change of circumstances giving rise to modification or explain why its one-year extension of spousal support was appropriate and reasonable. R.C. § 3105.18(E).

Michele R. Rout, Chillicothe, Ohio, for appellant.

DECISION AND JUDGMENT ENTRY
HARSHA, J.[FN1]

FN1. This case was originally assigned to former Judge David T. Evans. It was reassigned to Judge Harsha on March 9, 2005.

*1 {¶ 1} George Cassidy appeals from a Pike County Common Pleas Court decision that (1) found him in contempt of court for failing to pay his ex-wife's attorney's fees and van repair costs; (2) refused to enter a child support order; and (3) extended spousal support for an additional year. First, he argues that the trial court cannot hold him in contempt for failing to pay the attorney's fees and repair costs because the debts were discharged in bankruptcy. Clearly, if these debts were discharged in bankruptcy, then Mr. Cassidy could not be held in contempt for failing to pay them. Thus, in holding Mr. Cassidy in contempt, the court must have found either (1) that he did not receive a discharge or (2) that the debts were nondischargeable. Unfortunately, the court's decision does not indicate any basis for its contempt finding. Without knowing the reason behind the court's decision, we cannot engage in a meaningful review of it. Thus, we remand this matter for further clarification.

{¶ 2} Second, Mr. Cassidy argues that the trial court erred in refusing to enter a child support order as a sanction for his purported failure to meet his spousal support obligations. He argues there is no evidence to support the court's finding that he was in arrears on his spousal support obligation. Furthermore, he argues that even if he was behind in his spousal support payments, this would not justify the court's refusal to enter a child support order. In its decision, the trial court stated that it would not issue a child support order until Mr. Cassidy's "spousal support arrears are at zero."However, we have reviewed the record and can find no evidence to support the court's finding that Mr. Cassidy was in arrears on his spousal support obligation. Thus, we reverse this portion of the court's judgment without the necessity of addressing the "linkage" issue and remand for further proceedings.

{¶ 3} Finally, Mr. Cassidy argues that the trial court erred in modifying spousal support since Ms. Cassidy failed to establish a change in the circumstances of either party. When ruling on a motion to modify spousal support, a trial court must set forth the basis for its decision with enough detail to allow for proper appellate review. In this case, the court offered no explanation for its decision to modify spousal support. In particular, it failed to identify the change of circumstances that gave rise to the modification.

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We will not search the record in this matter to see if it supports a finding that the court failed to make. As there is no clear evidence of a change in circumstances and the court failed to make a finding that there had been a change of circumstances, we reverse the court's judgment.

{¶ 4} George and Regina Cassidy married in 1982. Eighteen years later, in October 2000, the Pike County Common Pleas Court granted the couple a divorce. The court awarded the couple split custody of their two children and ordered Mr. Cassidy to pay $328 per month in child support. The court also ordered Mr. Cassidy to pay Ms. Cassidy spousal support in the amount of $400 per month for a period of five years. As for the other orders in the divorce decree, only two are relevant here: (1) the court ordered Mr. Cassidy to pay one-half of Ms. Cassidy's attorney's fees and (2) the court ordered Mr. Cassidy to reimburse Ms. Cassidy for the cost of repairing her van.

*2 {¶ 5} In January 2001, Ms. Cassidy filed a motion asking the trial court to hold Mr. Cassidy in contempt for failing to pay her attorney's fees and repair costs. One month later, Mr. Cassidy filed for Chapter 7 bankruptcy. His bankruptcy petition included the debts for the attorney's fees and van repair costs on the schedule for unsecured nonpriority creditors. After filing his petition, Mr. Cassidy notified the trial court of his bankruptcy and invoked the automatic stay provisions of Section 362, Title 11, U.S.Code.

{¶ 6} Subsequently, Mr. Cassidy filed a motion seeking to modify the child support order. He noted that the couple's oldest child, i.e., the child in Ms. Cassidy's custody, was now emancipated. He stated that although the child support enforcement agency had terminated the earlier child support order, it had not instituted a new order for the remaining minor child. He asked the trial court to order Ms. Cassidy to pay child support for the minor child in his custody.

{¶ 7} Three months later, Ms. Cassidy filed a motion seeking to modify the court's spousal support order. She alleged that there had been a substantial change of circumstances sufficient to warrant modification of the order. However, she did not elaborate on the nature of those circumstances.

{¶ 8} The trial court held a hearing on the parties' motions in April 2002. At the hearing, Mr. Cassidy admitted that he had not paid Ms. Cassidy's attorney's fees or van repair costs. However, he claimed that the debts were discharged in bankruptcy.

{¶ 9} Ms. Cassidy also testified at the hearing. She stated that she has worked as an occupational therapy assistant for the past four and a half years and recently received a slight increase in pay. Additionally, she testified that she recently enrolled in college part time. She testified that it will take about four years for her to complete her schooling. At the hearing, she admitted that her financial situation has not changed with the exception of her school-related expenses, such as tuition and books.

{¶ 10} Following the hearing, the parties submitted written arguments on the various motions. In November 2002, the court issued a conclusory decision in which it (1) found Mr. Cassidy in contempt of court; (2) extended the spousal support order for an additional year; and (3) refused to consider the issue of child support "until [Mr. Cassidy] has no arrearages in support."The trial court directed Ms. Cassidy's attorney to prepare an entry setting forth the decision. For the next year, the parties argued about the contents of the entry. Finally, in November 2003, the court signed an entry finalizing its earlier decision. Mr. Cassidy now appeals, raising the following assignments of error:

ASSIGNMENT OF ERROR NO. 1
The trial court erred in failing to order child support for the care and maintenance of the parties' minor child.

ASSIGNMENT OF ERROR NO. 2
*3 The trial court erred in finding the defendant in contempt for failing to pay debt which had been discharged in bankruptcy.

ASSIGNMENT OF ERROR NO. 3
The trial court erred in ordering the defendant to pay the attorney fees relative to the plaintiff's motion.

ASSIGNMENT OF ERROR NO. 4
The trial court erred in sentencing the defendant to 30 days in jail.

ASSIGNMENT OF ERROR NO. 5
The trial court erred in its purge order.

ASSIGNMENT OF ERROR NO. 6
The trial court erred in granting both judgment and ordering that said judgment be paid by wage withholding in the amount of $500 .00 per month.

ASSIGNMENT OF ERROR NO. 7
The trial court erred in extending spousal support.

[1]{¶ 11} Because Ms. Cassidy has failed to file an appellate brief or otherwise make an appearance in this appeal, we may accept Mr. Cassidy's statement of the facts and issues as correct and reverse the

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judgment if his brief reasonably appears to sustain such action. See App.R. 18(C). However, in the interest of justice, we will review the merits of each assignment of error.

{¶ 12} In his first assignment of error, Mr. Cassidy contends the trial court erred by failing to enter a child support order. He characterizes this failure to make an award as an improper deviation from the child support guidelines because the court failed to make the findings required for a deviation. Mr. Cassidy also contends that there is no evidence in the record to support the court's finding that he was behind in his spousal support payments. Furthermore, he argues that even if he was behind in his spousal support payments, this would not justify a deviation in the child support amount.

{¶ 13} When reviewing child support issues, we apply an abuse of discretion standard. See *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028. An abuse of discretion involves more than an error of law or judgment, it connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary. See *Howland v. Purdue Pharma L.P.*, 104 Ohio St.3d 584, 589, 2004-Ohio-6552, 821 N.E.2d 141;*Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218, 450 N.E.2d 1140.

[2][3]{¶ 14} Before addressing Mr. Cassidy's arguments, we address two related matters. First, although Mr. Cassidy filed a motion to modify child support, his motion reveals that there was no child support order in place at the time. Therefore, Mr. Cassidy's motion is more properly viewed as a motion to establish child support, rather than a motion to modify it. Second, Mr. Cassidy treats the trial court's decision as a deviation from the child support guidelines. However, we do not view the court's decision this way. In order to deviate from the child support guidelines, a court must first consider the guideline amount of child support. See R.C. 3119.22.[FN2] That did not happen here. Instead, the trial court refused to consider the issue of child support until Mr. Cassidy's "spousal support arrears are at zero."

FN2. Mr. Cassidy's brief cites to R.C. 3113.215, the former version of the child support statute. R.C. 3113.215 was repealed, effective March 22, 2001, and replaced with R.C. 3119.01 et seq. Because Mr. Cassidy filed his motion after the new statutes took effect, we apply those statutes in the present case.

*4 [4]{¶ 15} After reviewing the record, we conclude that there is no evidence to support the court's finding that Mr. Cassidy was in arrears on his spousal support obligation. At the hearing, Mr. Cassidy indicated that he was current in his spousal support payments. Moreover, he testified that he was capable of continuing to pay $400 per month in spousal support. Ms. Cassidy also testified at the hearing. At no time during her testimony did she indicate that Mr. Cassidy was behind in his spousal support payments. Moreover, Ms. Cassidy's trial brief does not claim that Mr. Cassidy was in arrears in his spousal support obligation.

{¶ 16} Two and a half weeks before the trial court made its decision in this case,[FN3] Mr. Cassidy filed a motion seeking to terminate spousal support. Attached to his motion was an affidavit in which he stated that he was now unemployed and could no longer afford to pay spousal support. This motion is the only possible thing in the record upon which the court could have based its finding. However, there is no evidence indicating that Mr. Cassidy had ceased paying his spousal support. For all we know, Mr. Cassidy could have continued paying his spousal support obligation while awaiting the court's ruling on his motion.

FN3. We are referring to the conclusory decision filed in November 2002, not the judgment entry filed in November 2003. The judgment entry filed in 2003 merely sets forth the findings in this earlier decision.

{¶ 17} As the record in this case is devoid of any evidence indicating that Mr. Cassidy was in arrears on his spousal support obligation, we conclude the trial court abused its discretion when it refused to consider the issue of child support.

{¶ 18} Moreover, we have serious concerns about the appropriateness of refusing to enter a child support order because of an arrearage in spousal support. Spousal support and child support are separate and discrete matters. The purpose of spousal support is to provide for the financial needs of the ex-spouse, while the purpose of child support is for support of the child. By refusing to enter a child support order because the obligee is in arrears on his or her spousal support obligation, a court does a disservice to the child. However, our resolution of Mr. Cassidy's argument makes it unnecessary for us

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to actually determine whether a court could refuse to enter a child support order if the obligee is behind in his spousal support payments to the obligor. Accordingly, we sustain Mr. Cassidy's assignment of error, reverse this portion of the court's judgment, and remand for further proceedings.

{¶ 19} In his second assignment of error, Mr. Cassidy argues the trial court erred in finding him in contempt of court. A trial court possesses broad discretion in contempt proceedings. See *Denovchek v. Bd. of Trumbull Cty. Commrs.* (1988), 36 Ohio St.3d 14, 16, 520 N.E.2d 1362. Thus, we will not reverse a trial court's finding of contempt unless the court abused its discretion. *State ex rel. Ventrone v. Birkel* (1981), 65 Ohio St.2d 10, 11, 417 N.E.2d 1249. As noted above, an abuse of discretion involves more than an error of judgment; it implies that the court's attitude is unreasonable, unconscionable, or arbitrary. *Blakemore*, 5 Ohio St.3d at 218, 450 N.E.2d 1140. When applying the abuse of discretion standard, we are not free to substitute our judgment for that of the trial court. *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 138, 566 N.E.2d 1181, citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 559 N.E.2d 1301.

*5 {¶ 20} Contempt of court is a disregard of, or disobedience to, an order or command of judicial authority. *First Bank of Marietta v. Mascrete, Inc.* (1998), 125 Ohio App.3d 257, 263, 708 N.E.2d 262. Courts may characterize contempt as either criminal or civil. See *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 554, 2001-Ohio-15, 740 N.E.2d 265. The distinction depends largely upon the character and purpose of the sanction imposed. See *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 253, 416 N.E.2d 610. Criminal contempt sanctions are punitive in nature and are designed to vindicate the authority of the court. *Russo*, 90 Ohio St.3d at 555, 740 N.E.2d 265. Civil contempt sanctions, on the other hand, are remedial or coercive in nature and are for the benefit of the complainant. *Brown*. A sanction for civil contempt must allow the contemnor an opportunity to purge him or herself of contempt. See *Carroll v. Detty* (1996), 113 Ohio App.3d 708, 712, 681 N.E.2d 1383. Thus, "[t]he contemnor is said to carry the keys of his prison in his own pocket."*Brown*.

[5]{¶ 21} Here, the court found Mr. Cassidy in civil contempt for failing to pay Ms. Cassidy's attorney's fees and van repair costs. Mr. Cassidy argues that the court erred by finding him in contempt for failing to pay these debts because they were discharged in bankruptcy.

{¶ 22} A discharge in bankruptcy generally relieves a debtor of the responsibility to pay his or her outstanding debts. Certain financial obligations, however, are excepted from discharge, including:
(5) [any debt] to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record * * * but not to the extent that-
* * *
(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;
* * *
(15) [any debt] not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce of separation or in connection with a separation agreement, divorce decree or other order of a court of record * * * unless-
(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor of a dependent of the debtor * * *; or
(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor; * * *.

Section 523(a), Title 11, U.S.Code. As for the exception in paragraph (15), Section 523(c)(1), Title 11, U.S.Code provides that "the debtor shall be discharged from a debt of a kind specified in paragraph * * * (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph * * * (15) * * * of subsection (a) of this section."

*6 {¶ 23} Mr. Cassidy stated at the hearing that he had received a discharge in bankruptcy. Likewise, his attorney informed the court that he had received a discharge. However, Mr. Cassidy provided no documentary evidence of his discharge. At the hearing, the parties stipulated to the admission of the entire bankruptcy proceeding and Mr. Cassidy's attorney stated that she would provide the court with a copy of the record. However, there is no indication that the trial court ever received a copy of the proceedings. Thus, the only evidence of Mr. Cassidy's discharge is his testimony to that effect.

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{¶ 24} Although the trial court found Mr. Cassidy in contempt of court, it gave no reason for its finding. Furthermore, the court's decision does not address Mr. Cassidy's claim that the debts at issue had been discharged in bankruptcy. Clearly, if the debts were discharged in bankruptcy, then Mr. Cassidy could not be held in contempt for failing to pay them. See Section 524(a), Title 11, U.S.Code. See, also, *Brodnax v. Brodnax* (Aug. 21, 1990), Franklin App. No. 90AP-133.Thus, to hold Mr. Cassidy in contempt, the court would had to have found either (1) that Mr. Cassidy did not receive a discharge in the bankruptcy proceeding or (2) that these specific debts were nondischargeable because they were in the nature of alimony, maintenance, or support, see Section 523(a)(5), Title 11, U.S.Code (State and federal courts have concurrent jurisdiction to determine whether debts are nondischargable support obligations under Section 523(a)(5), Title 11, U.S.Code.*Barnett v. Barnett* (1984), 9 Ohio St.3d 47, 49, 458 N.E.2d 834). Unfortunately, the trial court's decision does not indicate any basis for the decision. Moreover, we refuse to speculate about the reason for the court's decision. Because the court's decision does not allow for meaningful appellate review, we remand this matter for clarification.

{¶ 25} Mr. Cassidy's next four assignments of error challenge the contempt sanctions imposed by the court. However, since we have remanded the contempt matter for clarification of the court's decision, we need not address these assignments of error at this time.

[6]{¶ 26} In his final assignment of error, Mr. Cassidy contends the court erred in extending the spousal support order for an additional year since Ms. Cassidy failed to present any evidence to justify modification of the award. Specifically, he argues that she failed to establish a change in the circumstances of either party.

{¶ 27} A trial court has broad discretion in establishing and modifying a spousal support award. See *Schultz v. Schultz* (1996), 110 Ohio App.3d 715, 724, 675 N.E.2d 55. Thus, we will not reverse a spousal support award absent an abuse of discretion. *Id.* An abuse of discretion involves more than an error of law or judgment; it connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary. *Blakemore*, 5 Ohio St.3d at 218, 450 N.E.2d 1140.

*7 {¶ 28} Under R.C. 3105.18(E), a court that enters a divorce decree lacks jurisdiction to modify the amount or terms of spousal support unless (1) the divorce decree contains a provision specifically authorizing the court to modify the spousal support order and (2) the court determines that the circumstances of either party have changed. In the present case, the trial court specifically retained jurisdiction to modify its spousal support order.

{¶ 29} In determining whether to modify spousal support, the trial court engages in a two-step analysis. See *Kucmanic v. Kucmanic* (1997), 119 Ohio App.3d 609, 613, 695 N.E.2d 1205. First, the court must determine whether there has been a change in the circumstances of either party. R.C. 3105.18(E). Second, if the court determines that a change of circumstances exists, it must then determine the amount of spousal support that is appropriate and reasonable. See *Fallang v. Fallang* (1996), 109 Ohio App.3d 543, 548-49, 672 N.E.2d 730.

{¶ 30} When ruling on a motion to modify spousal support, a trial court must set forth the basis for its decision with enough detail to allow proper appellate review. See *Graham v. Graham* (1994), 98 Ohio App.3d 396, 399-400, 648 N.E.2d 850. See, also, *Smith v. Smith* (June 29, 1999), Scioto App. No. 98CA2615.In the present case, the trial court did not set forth the basis for its decision to modify spousal support nor did it specifically find a change in circumstances. The court's judgment entry simply states: "The Court ORDERS defendant's spousal support obligation of $400.00 per month shall be modified as follows. The order shall be extended through October 4, 2006, rather than terminating on October 4, 2005."Thus, the decision does not identify the change of circumstances that gave rise to the modification. Nor does it explain why a one-year extension of spousal support is appropriate and reasonable. We will not glean the record in this matter to see if it supports a finding that the court failed to make.

{¶ 31} Because there is no clear evidence of a change in circumstances, nor a finding of that prerequisite, we conclude the court erred in modifying the spousal support order. See R.C. 3105.18(E) (Stating that a court does not have jurisdiction to modify the amount or terms of spousal support "unless the court determines that the circumstances of either party have changed * * * ."). Accordingly, we reverse this portion of the court's judgment.

{¶ 32} In summary, we conclude that there is no

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evidence to support the court's finding that Mr. Cassidy was in arrears on his spousal support obligation and thus, the court erred in refusing to enter a child support award. Additionally, we conclude the court's decision on the contempt issue does not allow for meaningful review. Finally, we conclude that there is no finding or evidence of a change in circumstances and thus, the court erred in modifying spousal support. Accordingly, we reverse the court's judgment and remand for further proceedings.
*8 JUDGMENT REVERSED AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND CAUSE REMANDED and that Appellant recover of Appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Common Pleas Court, Domestic Relations Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

ABELE, P.J. and MCFARLAND, J.: concur in Judgment and Opinion.

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

Ohio App. 4 Dist.,2005.
Cassidy v. Cassidy
Not Reported in N.E.2d, 2005 WL 1492000 (Ohio App. 4 Dist.), 2005 -Ohio- 3199

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Friesen v. Friesen
Ohio App. 10 Dist.,2008.

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

Court of Appeals of Ohio,Tenth District, Franklin County.
Timothy H. FRIESEN, Plaintiff-Appellant,
v.
D[a]nise Kaye FRIESEN, Defendant-Appellee.
No. 07AP-110.

Decided March 6, 2008.

Appeal from the Franklin County Court of Common Pleas, Division of Domestic Relations.

John G. Neal, for appellant.
Freeman T. Eagleson, for appellee.
WHITESIDE, J.
*1 {¶ 1} Plaintiff-appellant, Timothy H. Friesen, appeals from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, which overruled his Civ.R. 53 objections to the magistrate's order. For the reasons that follow, we reverse the trial court's judgment and remand for further proceedings.

{¶ 2} Plaintiff and defendant-appellee, Danise Kaye Justice (fka Friesen), were married in 1971 and were divorced pursuant to a February 25, 2000 "Agreed Judgment Entry Decree of Divorce."Two children were born out of the marriage; both were emancipated at the time of the divorce.

{¶ 3} As pertinent here, the divorce decree awarded plaintiff and defendant an accrued benefit of 50 percent of plaintiff's Central States Southeast and Southwest Areas Pension Fund, to be valued as of January 12, 2000, and ordered plaintiff's counsel to prepare appropriate documentation to effectuate a Qualified Domestic Relations Order ("QDRO") [FN1] to that effect. For reasons not clear from the record, the QDRO was not journalized until April 10, 2006.

FN1."A QDRO is a current distribution of the rights in a retirement account that is payable in the future, when the payee retires. It is ordinarily issued subsequent to and separate from the decree of divorce itself, after the employer payor has approved its terms as conforming with the particular pension plan involved. A QDRO is, therefore, merely an order in aid of execution on the property division ordered in the divorce decree."*McKinney v. McKinney* (2001), 142 Ohio App.3d 604, 608.

{¶ 4} The divorce decree also ordered plaintiff to pay 50 percent of defendant's COBRA premium and to pay spousal support of $1,869 per month plus poundage until defendant's death, remarriage, or cohabitation with a member of the opposite sex. The court retained jurisdiction to modify the amount or terms of the spousal support award.

{¶ 5} On December 27, 2005, defendant moved the court for an order requiring plaintiff to show cause why he should not be punished for contempt for his alleged nonpayment of spousal support and defendant's share of plaintiff's retirement benefits under the QDRO. In the same motion, defendant requested the court order plaintiff to pay her attorney fees incurred in the contempt action.

{¶ 6} On January 20, 2006, plaintiff filed a motion seeking a reduction in his $1,869 per month spousal support obligation. Plaintiff argued that, due to his recent retirement, his spousal support obligation "fair [sic] exceed[ed]" the retirement income he currently received. To that end, plaintiff attached his own affidavit averring that his current gross monthly income was $1,800.

{¶ 7} On February 6, 2006, defendant filed a motion requesting that the court order plaintiff to pay her attorney fees incurred in opposing plaintiff's motion for reduction of spousal support.

{¶ 8} The trial court referred the parties' motions to a

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magistrate, who held a hearing on May 16, 2006. At the time of the hearing, defendant was 57 years old. She testified as follows. From May 6, 2005 through May 16, 2006, she received approximately $70 in spousal support from plaintiff. During that period, she relied on a friend to pay her utilities, medical bills, and medications. Defendant received $152 a month in food stamps and obtained food from a local food pantry. She did not pay her $600 per month rent for one year. She sold her car for $6,500 and used the proceeds to pay medical bills.

*2 {¶ 9} At some point after the divorce, she lost her medical insurance because plaintiff failed to pay his portion of the COBRA premium; as a result, she accrued "[t]ens of thousands" of dollars in unpaid medical bills. (Tr. 14.) Approximately one week prior to the hearing she received a lump sum payment of $6,000 from plaintiff's retirement fund, representing the cumulative monthly payment she would have received since plaintiff's retirement had the QDRO been timely processed. Defendant used that money to pay some of her rent arrearages, to reimburse her friend, and to pay her attorney $500 to prosecute the contempt motion. Defendant is uninsurable because she has had cancer three times, has had open heart surgery, and has suffered a stroke. In addition, she is unemployable because she cannot stand or walk for more than four or five minutes at a time. At the time of the hearing, she had not worked for approximately ten years, but occasionally provides child care for her one-year-old grandchild.

{¶ 10} Defendant submitted into evidence certified copies of an account summary from the Franklin County Child Support Enforcement Agency ("FCCSEA") delineating spousal support disbursements totaling $71.74 since May 6, 2005. According to the account summary, plaintiff's spousal support arrearages totaled $22,704.80 as of May 15, 2006.

{¶ 11} Upon examination by the magistrate, defendant testified that the home she was awarded in the divorce decree was foreclosed upon due to plaintiff's failure to pay the mortgage obligation prior to the entry of the final decree of divorce. Consequently, defendant received no proceeds from the sale. She is entitled to a monthly benefit of $604 from plaintiff's retirement fund; however, she opted for the lesser monthly survivorship benefit of $538. As of the date of the hearing, defendant had yet to receive a monthly benefit payment. As a result of the lump sum QDRO payment, she is no longer eligible for food stamps; she may apply again in three months, but does not know how the monthly retirement benefit will affect her eligibility. She applied for Social Security retirement benefits and is awaiting a determination of her eligibility; she was informed a decision would be forthcoming in four to six months.

{¶ 12} Plaintiff testified at the hearing as follows. On June 1, 2005, he retired at age 61 after 32 years of Teamster employment; the last 24 were spent as a tractor-trailer driver for Wonder Bread. He was eligible for retirement after 30 years with the Teamsters with no concomitant minimum retirement age. His monthly retirement benefit is $1,840.

{¶ 13} According to plaintiff, his decision to retire was precipitated, in part, by harassment and pressure from his employer designed to coerce him, an older employee with significant service time, "to either quit, retire, make a mistake and get fired, whatever it might be."(Tr. 43.) By way of example, plaintiff averred he was "written up" several times for minor infractions he was unaware he had committed. (Tr. 44.) As a result, he saw the "handwriting on the wall" and retired. (Tr. 44.)

*3 {¶ 14} Plaintiff further testified that his employer's bankruptcy filing factored heavily into his decision to retire. To that end, plaintiff stated that:

> * * * [I]f the company goes bankrupt before my retirement time, before I actually go, there is going to be a problem, a financial problem with how much I will get per month. * * *
>
> * * *
>
> [In addition,] Central State's, * * * the retirement fund, has made [downward] adjustments in the amount of money that they pay retirees. * * *
>
> * * * [T]here was one adjustment made before I retired. I went ahead and retired. There's been another one since that time. So, in other words, * * * had I stayed working [I would have] been making even less on my retirement than I am now. * * *

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(Tr. 45-46.) According to plaintiff, the first downward adjustment was $25 per month; the second was "maybe $150" per month. (Tr. 47 .) Plaintiff further testified that the employer's financial future was so unstable that, at times, he was not sure whether checks issued by the company would be honored. Plaintiff testified that, given these circumstances, he concluded that "with 32 years in the Teamsters, the time has come to go, I retired. I don't see how it's even a problem."(Tr. 47.)

{¶ 15} Plaintiff also testified that his retirement was motivated, in part, by the fact that he has suffered from back pain for the last ten years arising from his employment as a truck driver. He further testified that he receives routine chiropractic care to alleviate his back pain.

{¶ 16} Plaintiff further testified that he is prohibited by the Teamsters union from obtaining post-retirement employment as a truck driver. He has, however, supplemented his retirement income with a variety of part-time employment. For example, in the two months preceding the hearing, he subcontracted as a collection agent for the Columbus Dispatch; although his expenses currently outweigh his earnings, he hopes the situation will improve in the future. In addition, he earned approximately $200 transporting vehicles for his brother-in-law. He has also worked as an usher for the Columbus Blue Jackets, earning $6.50 per hour for approximately eight hours work per week during the hockey season. He further testified he has applied for Social Security retirement benefits; his $1,340 monthly benefit is set to commence in late September 2006.

{¶ 17} Upon examination by the magistrate, plaintiff testified that his gross income for the 12 months preceding his retirement was $46,000. He was unaware his share of defendant's COBRA premiums had stopped; he assumed the payments were extracted from his payroll check. He further testified that he paid neither healthcare nor pension premiums while he was employed, as both were fully paid by his employer. As of the hearing date, he had healthcare insurance through his wife's employer; however, this coverage was set to terminate in June 2006. He inquired about purchasing healthcare insurance through the Teamsters union; however, preliminary indications suggest that he will not qualify for coverage. He further testified that, due to his retirement, he is no longer required to pay Teamsters union dues of $53 per month and has minimal transportation expenses.

*4 {¶ 18} On July 14, 2006, the magistrate denied plaintiff's motion to modify his spousal support obligation. Specifically, the magistrate found that plaintiff had failed to meet his burden of proving by a preponderance of the evidence that he is entitled to a reduction in spousal support. In so finding, the magistrate determined that "[a]lthough it was reasonable for him to do so under the circumstances that he described, Plaintiff *voluntarily* retired from his long time employment as a driver for Wonder Bread."(Emphasis sic.) (Mag. Dec., 6.) The magistrate further found that, although plaintiff supplemented his retirement and Social Security income with earnings from part-time employment, he was not fully employed and thus had potential income; however, he failed to present evidence of his actual earning ability. The magistrate also noted that plaintiff had failed to establish the extent to which he benefitted financially from his remarriage.

{¶ 19} The magistrate further found that defendant is in "dire need" of continued spousal support and had "barely scrap[ed] by" since the spousal support payments stopped in May 2005. (*Id.* at 6-7.)The magistrate further found that defendant's total monthly income, including spousal support and pension payment, would be $2,407.

{¶ 20} The magistrate concluded that "[u]nder the totality of the circumstances* * * [I] reject[ ] Plaintiff's contention that he has the right to basically be fully retired at the age of 61. The parties were married for 28 years and Plaintiff's spousal support obligation was imposed only a little more than six years ago. While it is conceivable that Plaintiff is entitled to some reduction in his spousal support, under the evidence presented [I am] unable to determine the extent to which that might be true."(Mag. Dec., 7.)

{¶ 21} Next, the magistrate granted defendant's motion to find plaintiff in contempt for spousal support arrearages. The magistrate found that plaintiff had failed to make any spousal support payments for approximately one year and had failed to establish any defense to the contempt that arose

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from that fact. Accordingly, the magistrate found plaintiff in contempt and sentenced him to ten days in jail, suspended on the condition that he immediately resume payments on his ongoing spousal support obligation and pay an additional $150 per month, plus processing fee, to liquidate the $22,704.80 arrearage.

{¶ 22} Finally, the magistrate granted defendant's motion for attorney fees incurred in filing and prosecuting the contempt motion. The magistrate awarded defendant $500 and ordered plaintiff to pay that obligation within 30 days.

{¶ 23} Thereafter, plaintiff filed objections to the magistrate's decision pursuant to Civ.R. 53. In essence, plaintiff argued that the magistrate erred in: (1) failing to find a change of circumstances sufficient to warrant a reduction in spousal support; (2) finding plaintiff in contempt of court for failure to pay spousal support; and (3) awarding attorney fees to defendant. Defendant did not file a response.

*5 {¶ 24} On July 12, 2007, the trial court overruled plaintiff's objections and adopted the magistrate's decision as an order of the court. As to the first objection, the court acknowledged plaintiff's argument that his spousal support obligation should be reduced because his retirement caused his monthly income to decrease from $3,900 per month to $1,840 per month. In addition, the court specifically noted plaintiff's challenge to the magistrate's findings that he voluntarily retired from employment and that he was not entitled to retire at the age of 61.

{¶ 25} To that end, the trial court noted that plaintiff's testimony established that his 32 years as a Teamster qualified him to retire and that three factors convinced him to do so-continued harassment from his employer, his employer's financial instability while in bankruptcy receivership, and his declining health. The court further noted, however, that plaintiff did not testify that he was required to retire.

{¶ 26} The court then averred that, although it was not required to do so, it had reviewed all the factors set forth in R.C. 3105.18(C)(1)(a) through (n) regarding spousal support awards and made specific findings as to those that had changed since the parties divorce. Under R.C. 3105.18(C)(1)(a) and (d), the income of the parties and the retirement benefits of the parties, respectively, the court found that plaintiff received $1,840 per month from his pension, $1,340 per month in Social Security retirement benefits, and earned, through odd jobs, "a few hundred dollars per month, depending on the season."(Judgment Entry, 3.) The court further found defendant received $538 per month in retirement benefits from plaintiff's pension which would continue if plaintiff predeceased her.

{¶ 27} Under R.C. 3105.18(C)(1)(b), the relative earning abilities of the parties, the court found that, although plaintiff could not return to work as a Teamster truck driver, he had been able to find a variety of odd jobs and, while not highly skilled, had some job qualifications. The court further found that, as a Social Security recipient, plaintiff could earn up to $12,000 per year without affecting his eligibility for benefits. The court also found defendant was unable to work due to health problems.

{¶ 28} Under R.C. 3105.18(C)(1)(c), the ages and the physical, mental, and emotional conditions of the parties, the trial court noted that plaintiff, age 62, is treated by a chiropractor for back pain resulting from his years as a truck driver. Defendant, age 57, has a history of poor health and is unable to stand or walk for more than a few minutes at a time.

{¶ 29} Under R.C. 3105.18(C)(i), the relative assets and liabilities of the parties, the court noted that plaintiff offered no testimony as to his assets and liabilities. The court found that defendant had no personal assets. In support of this finding, the court cited defendant's testimony that she received all her furniture as gifts, sold her car to pay medical bills, lost her house to foreclosure due to plaintiff's failure to pay the mortgage, and has tens of thousands of dollars in outstanding medical bills.

*6 {¶ 30} Finally, under R.C. 3105.18(C)(1)(n), any other factor the court expressly finds to be relevant and equitable, the court noted that plaintiff had not offered testimony about increases or decreases in his living expenses since his retirement, but had testified that he and his wife had recently taken three vacations. The court further noted that, in contrast, defendant had no income from the time plaintiff stopped paying spousal support in May 2005 until the QDRO for the pension fund was processed in April 2006, and that she relied on friends, charity, and her

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landlord to sustain her during that period. The court further noted defendant lost her COBRA coverage due to plaintiff's failure to contribute his share of the premium and now claimed she is uninsurable.

{¶ 31} Following consideration of the R.C. 3105.18 factors, the court determined that plaintiff's testimony regarding his working conditions demonstrated that it was reasonable for him to retire; the court nonetheless determined that plaintiff's retirement was voluntary, rendering his decrease in income voluntary. The court found that, since the divorce decree had been entered only six years earlier, plaintiff's retirement should have been contemplated at that time. Accordingly, the court found that plaintiff failed to establish a change in his circumstances sufficient to warrant a reduction in spousal support.

{¶ 32} In addition, the court found that defendant's circumstances had not changed since the divorce decree was finalized. The court determined that defendant needed the spousal support, had no means of earning income, and had significant medical expenses related to her poor health and lack of health insurance. The court further found that defendant's current receipt of retirement benefits was contemplated at the time of the divorce.

{¶ 33} Regarding plaintiff's second objection, the court noted that records from the FCCSEA supported defendant's testimony that plaintiff had paid only $70 in spousal support from May 2005 to the date of the hearing, and that plaintiff neither contradicted the showing of contempt nor provided an affirmative defense.

{¶ 34} As to plaintiff's third objection, the court found that R.C. 3105.18(G) mandates the payment of reasonable attorney fees incurred in prosecuting spousal support contempt actions and that defendant testified that her attorney charged her $500 to prosecute her contempt motion. The court found that amount to be reasonable and to be related to plaintiff's act of contempt.

{¶ 35} Plaintiff now appeals the trial court's judgment, asserting three assignments of error:

1. The lower court abused its discretion by failing to find a change of circumstance sufficient to warrant a reduction in spousal support.

2. The lower court's decision to hold Plaintiff-Appellant in contempt was arbitrary, unconscious [sic], unreasonable, and motivated by bias.

3. The lower court's order granting attorney's fees to Defendant-Appellee was arbitrary, unconscious [sic], unreasonable, and motivated by bias.

*7 {¶ 36} Plaintiff's first assignment of error contends the trial court abused its discretion in failing to find a change of circumstances sufficient to warrant a reduction in his spousal support obligation. A reviewing court may not disturb a trial court's decision to adopt, reject or modify a magistrate's decision absent an abuse of discretion. *Burkart v. Burkart*, Franklin App. No. 06AP-1169, 2007-Ohio-3992, at ¶ 20, citing *Wade v. Wade* (1996), 113 Ohio App.3d 414, 419.Similarly, a reviewing court may not disturb a trial court's determination regarding domestic relations matters, such as spousal support, absent an abuse of discretion. *Id.*, citing *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144.Accordingly, a reviewing court must also review a trial court's decision regarding modification of spousal support for an abuse of discretion.*Id.*, citing *Grosz v. Grosz*, Franklin App. No. 04AP-716, 2005-Ohio-985, at ¶ 9. An abuse of discretion means more than an error of law or judgment; it implies an unreasonable, arbitrary or unconscionable decision. *Id.*, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 37} When a party requests modification of a spousal support award, the threshold question is whether the trial court retained jurisdiction to modify the provisions of its order and whether the circumstances of either party have changed. *Faulkner v. Faulkner* (Nov. 21, 2000), Franklin App. No. 00AP-473, citing *Wolding v. Wolding* (1992), 82 Ohio App.3d 235, 239.As noted, in the present case, the trial court expressly retained jurisdiction to modify the spousal support award.

{¶ 38} R.C. 3105.18(E) provides that the court may modify the amount or terms of a spousal support order upon a determination that "the circumstances of either party have changed."A "change in the circumstances" includes, but is not limited to "any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical

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expenses."See R.C. 3105.18(F). The burden of proving that a modification in spousal support is warranted is on the party who seeks it. *Georgenson v. Georgenson,* Franklin App. No. 03AP-390, 2003-Ohio-7163, at ¶ 11, citing *Joseph v. Joseph* (1997), 122 Ohio App.3d 734, 736;*Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703, 706.

{¶ 39} A change in circumstances justifying a modification of spousal support must be material, not brought about purposely by the moving party, and not contemplated at the time of the prior order. *Georgenson,* at ¶ 11, citing *Kucmanic v. Kucmanic* (1997), 119 Ohio App.3d 609, 613.If the trial court finds a change in circumstances, the court must then determine whether spousal support is still necessary and, if so, in what amount. *Id.* The trial court must set forth the basis for its decision with sufficient detail to allow proper appellate review. *Id.* at ¶ 12, citing *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 96;*Graham v. Graham* (1994), 98 Ohio App.3d 396, 399-400.

***8** {¶ 40} Plaintiff contends the trial court abused its discretion in finding that he voluntarily retired from his former employment, and, thus, voluntarily decreased his income, particularly given the court's finding that plaintiff's decision to retire was reasonable under the circumstances. Plaintiff maintains that this mistaken finding resulted in the erroneous conclusion that his retirement did not constitute a material change in circumstances pursuant to R.C. 3105.18(F)

{¶ 41} Many Ohio appellate courts have concluded that retirement may constitute a material change in circumstances justifying a modification of spousal support, especially where the party does not retire early. *Zahn v. Zahn,* Summit App. No. 21541, 2003-Ohio6124, at ¶ 19, citing *Reed v. Reed* (Feb. 16, 2001), Montgomery App. No.2000 CA 81;*Trotter v. Trotter,* Allen App. No. 1-2000-86, 2001-Ohio-2122. See, also, *Robinson v. Robinson* (Apr. 4, 1994), Butler App. No. CA93-02-027, where the court stated that the obligor's voluntary retirement "does not bar consideration of [the obligor's] decrease in income when determining if there was a substantial change of circumstances. * * * [The obligor] merely took advantage of benefits he was entitled to receive."Accordingly, the court permitted the obligor's voluntary retirement to justify a decrease in his spousal support obligation.

{¶ 42} Even an early retirement can be considered an involuntary decrease in a party's wages when that party demonstrates that it was economically sound to take an early retirement. See *Roach v. Roach* (1989), 61 Ohio App.3d 315, 319;*Tissue v. Tissue,* Cuyahoga App. No. 83708, 2004-Ohio-5968, at ¶ 21;*Melhorn v. Melhorn* (Jan. 30, 1989), Montgomery App. No. 11139 ("[a] change in income due to retirement reasonably in advance of the expected date of retirement does provide a basis for modification of [spousal support] if it was not done in an attempt to avoid a court-ordered obligation to an ex-spouse"). See, also, *Koch v. Koch,* Medina App. No. 03CA0111-M, 2004-Ohio-7192. However, if a party retires with the intent of defeating the spousal support obligation, the retirement is considered "voluntary underemployment," and the party's pre-retirement income is attributed to that party. *Id.* at ¶ 21.

{¶ 43} Here, the record demonstrates that plaintiff did not take an early retirement; he was fully eligible for retirement due to his 32-year affiliation with the Teamsters. Thus, plaintiff was under no obligation to continue working after he was eligible to retire. *Young v. Young.*(Apr. 10, 1987), Lucas App. No. L86-298.Plaintiff merely took advantage of retirement benefits to which he was entitled. See *Robinson,* supra.

{¶ 44} Further, as noted, plaintiff testified his retirement was brought about by the confluence of three factors-harassment and pressure from his employer, the financial instability of his employer, and physical problems arising from his years as a truck driver. Regarding the first factor, plaintiff's testimony suggests his belief that, if he did not retire, his employer would manufacture a reason to terminate him. Indeed, as noted, plaintiff averred he was "written up" several times for minor infractions he was unaware he had committed; accordingly, he saw the "handwriting on the wall" and opted to retire rather than be terminated.

***9** {¶ 45} As to the second factor, plaintiff expressed concern that his retirement income would be compromised due to the employer being placed in receivership. Indeed, he averred that the employer had already made two downward adjustments to his retirement income. Under these circumstances, it

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became financially prudent for plaintiff to retire. As to the third factor, he testified that his physical condition forced him to seek ongoing chiropractic treatment.

{¶ 46} The trial court apparently credited plaintiff's unrefuted testimony about his reasons for retiring; however, the trial court nonetheless found that plaintiff's retirement amounted to a voluntary decrease in income. However, the court made no determination as to whether plaintiff's intent in retiring was to defeat his spousal support obligation. Unless plaintiff retired simply to avoid or decrease his spousal support obligation, plaintiff's retirement should not be considered a voluntary decrease in income. *Zahn,* supra.Since the trial court does not appear to have examined the evidence with an eye to whether plaintiff's intent in retiring was to avoid his support obligation, we will remand this matter to the trial court for such consideration. If the trial court determines that plaintiff did not retire with the intent to defeat his support obligation, given the trial court's finding that his decision to retire was reasonable under the circumstances, the trial court should treat plaintiff's retirement as a change of circumstances justifying a modification of spousal support.

{¶ 47} We further note that, in concluding that defendant's circumstances had not changed since the entry of the divorce decree, the trial court does not appear to have considered the fact that defendant has applied for, and is entitled to, Social Security retirement benefits. In considering the income of the parties and the retirement benefits of the parties under R.C. 3105.18(C)(1)(a) and (d), respectively, the court considered both plaintiff's pension and Social Security retirement benefits. In contrast, the court considered only defendant's pension benefits; it did not consider her probable receipt of the Social Security retirement benefits to which she is entitled. Defendant testified she had applied for such benefits and was awaiting a decision as to her eligibility. As the 28-year spouse of a Social Security contributor, defendant's interest or right to Social Security retirement benefits vested under plaintiff's account. Social Security retirement benefits are an asset to be considered in determining a spousal support award.*Lindsay v. Curtis* (1996), 115 Ohio App.3d 742, 746, citing *Beyer v. Beyer* (1979), 64 Ohio App.2d 280, 284.The divorce decree made no mention of Social Security retirement benefits; thus, it is apparent that the benefits were a new occurrence. Accordingly, the trial court abused its discretion in failing to consider whether defendant's probable receipt of Social Security retirement benefits constituted a substantial change of circumstances justifying a modification of spousal support.

*10 {¶ 48} If, upon consideration of the foregoing, the trial court finds a change of circumstances, the court must then determine whether spousal support is still necessary, and, if so, in what amount. *Georgenson,* supra.We further note that the trial court has discretion to make any order of modification retroactive to the date plaintiff filed his motion for modification. *Bowen v. Bowen* (1999), 132 Ohio App.3d 616, 640.The first assignment of error is well-taken.

{¶ 49} In his second assignment of error, plaintiff argues that the trial court erred in finding him in contempt for failing to pay his spousal support obligation. Plaintiff concedes he did not pay spousal support after he retired in May 2005; however, he argues the contempt finding is unreasonable, given that his income declined from $3,900 per month to $1,840 per month following his retirement. We disagree.

{¶ 50} One who fails to comply with a lawful court order may be punished for contempt of court. *Harrison v. Harrison* (Apr. 15, 1999), Franklin App. No. 98AP-560, citing R.C. 2507.02(A). Pursuant to R.C. 2705.031(B), a spousal support obligee may initiate contempt proceedings against the obligor for failure to pay, and, pursuant to R.C. 2705.031(E), the trial court has jurisdiction to make a finding of contempt for non-payment of support and to impose the penalties provided in R.C. 2705.05. *Id.* A civil contempt finding must be supported by clear and convincing evidence. *Id.,* citing *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 253.A reviewing court may not reverse a trial court's contempt finding absent an abuse of discretion. *Id.,* citing *State v. Moody* (1996), 116 Ohio App .3d 176, 181, citing *State ex rel. Delco Moraine Div., Gen. Motors Corp. v. Indus. Comm.* (1990), 48 Ohio St.3d 43, 44.

{¶ 51} The evidence offered at the hearing clearly and convincingly supports the trial court's finding of contempt. Plaintiff knew he was under a court order to pay defendant $1,869 per month in spousal support

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and concedes that he did not pay that obligation after he retired in May 2005. He did not file his motion to reduce spousal support until January 2006. Defendant testified that she received approximately $70 in spousal support from the time plaintiff retired in May 2005 to the time of the hearing in May 2006. The FCCSEA records support this testimony. Further, the FCCSEA records established that plaintiff's spousal support arrearages totaled $22,704.80 as of May 15, 2006. Neither plaintiff's post-retirement income decline nor his filing of a motion to reduce spousal support excuse his disregard of the court's order. *Id.*, citing *Brockmeier v. Brockmeier* (1993), 91 Ohio App.3d 689, 694.Accordingly, the trial court did not abuse its discretion by finding plaintiff in contempt.[FN2]The second assignment of error is not well-taken.

FN2. We note, however, that the finding of contempt may be affected if, upon remand, the trial court enters an order of modification and makes a discretionary decision to make such order retroactive to the date plaintiff filed his motion for modification.

{¶ 52} Plaintiff's third assignment of error asserts the trial court erred in awarding defendant $500 in attorney fees. Plaintiff contends the court's award was motivated by its bias toward him. We disagree.

*11 {¶ 53} R.C. 3105.18(G) mandates that a trial court assess attorney fees against a party who is found to be in contempt of that court's order regarding spousal support. *Wilder v. Wilder* (Apr. 13, 1993), Franklin App. No. 92AP-1566.That statute provides, in relevant part, that:

> If any person required to pay * * * spousal support * * * is found in contempt of court for failure to make alimony or spousal support payments under the order, the court that makes the finding, in addition to any other penalty or remedy imposed, shall assess all court costs arising out of the contempt proceeding against the person and shall require the person to pay any reasonable attorney's fees of any adverse party, as determined by the court, that arose in relation to the act of contempt.

{¶ 54} An attorney fee award will not be disturbed absent an abuse of discretion. *Id.*, citing *Birath v. Birath* (1988), 53 Ohio App.3d 31.In this case, defendant testified that she paid her attorney $500 to prosecute her contempt motion. The trial court found the amount of the fee to be reasonable and related to the contempt motion. There is no evidence of bias in the record. The trial court did not abuse its discretion in awarding attorney fees or in the amount of the award.[FN3]The third assignment of error is not well-taken.

FN3. The trial court's judgment entry states that "[o]n February 6, 2006, Defendant filed a Motion for Attorney Fees" and purports to award her attorney fees for the contempt action pursuant to that motion. In fact, defendant's December 27, 2005 show cause motion requested attorney fees incurred in prosecuting the contempt; the February 6, 2006 motion requested attorney fees incurred in responding to plaintiff's motion to modify spousal support. As noted, the trial court awarded defendant attorney fees based upon evidence that her attorney charged her $500 for prosecuting the contempt. Accordingly, the trial court's award of attorney fees was, in fact, made pursuant to defendant's December 27, 2005 motion, not the February 6, 2006 motion. The trial court failed to rule on defendant's February 6, 2006 motion for attorney fees incurred in responding to plaintiff's motion to modify spousal support; thus, we must presume the trial court overruled that motion. *Columbus Mtg., Inc. v. Morton*, Franklin App. No. 06AP-723, 2007-Ohio-3057, at ¶ 66, citing *Seff v. Davis*, Franklin App. No. 03AP-159, 2003-Ohio-7029, at ¶ 16.

{¶ 55} For the foregoing reasons, we sustain plaintiff's first assignment of error and overrule plaintiff's second and third assignments of error. Accordingly, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, and remand this cause for further proceedings in accordance with law and consistent with this opinion.

Judgment affirmed in part, reversed in part, and cause remanded.

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TYACK, J., concurs SADLER, J., concurs in part and dissents in part.
WHITESIDE, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.SADLER, J., concurring in part and dissenting in part.
{¶ 56} Though I agree with the majority's disposition of the second and third assignments of error, because I am unable to agree with the majority in sustaining the first assignment of error and reversing the trial court on that basis, I respectfully dissent in part.

{¶ 57} While I concur with the majority's finding that the first two prongs of the change-in-circumstances test are met here, I cannot conclude that the parties did not contemplate appellant's retirement at the time of the prior order. As the majority correctly notes, a change in circumstances justifying modification of a spousal support order must be material, not brought about purposely by the moving party, and not contemplated at the time of the prior order. *Georgenson v. Georgenson*, Franklin App. No. 03AP-390, 2003-Ohio-7163, ¶ 11, citing *Kucmanic v. Kucmanic* (1997), 119 Ohio App.3d 609, 613, 695 N.E.2d 1205.

***12** {¶ 58} This court has refused to reverse a trial court's finding that there was no change in circumstances where, as here, a marriage of long duration ends with one party nearing retirement age, and the parties' agreed judgment entry specifies certain spousal support-terminating events, none of which involves either party's retirement. For example, in *Palmieri v. Palmieri*, Franklin App. No. 04AP-1305, 2005-Ohio-4064, discretionary appeal not allowed, 107 Ohio St.3d 1699, 2005-Ohio-6763, 840 N.E.2d 204, we affirmed the trial court's refusal to find a change in circumstances on account of the husband's retirement nine years after the parties' agreement was incorporated into the divorce decree. We explained:

> The divorce decree lays out three specific terminating events for spousal support. Mr. Palmieri's retirement is not one of them. At the time of the divorce, Mr. Palmieri could have negotiated a provision regarding modification or termination of spousal support upon retirement. He was less than ten years from retirement age at the time of the divorce. He did not do so and cannot now ask the court to relieve him of his choice. A court cannot base modification on a change that was contemplated at the time of the divorce.

Id. at ¶ 19.

{¶ 59} In *Sharp v. Sharp* (Mar. 30, 1995), Franklin App. No. 94APF08-1152, the parties divorced by agreed judgment entry after 37 years of marriage. Four years later, the husband moved to terminate or modify spousal support on the basis of his retirement. We affirmed the trial court's refusal to find a change of circumstances, finding no error in the trial court's conclusion that:

> "The mere fact that Plaintiff may have to make the monthly spousal support payment using a portion of his monthly pension, does not conclusively establish that both parties intended the spousal support payments to terminate upon retirement of the Plaintiff. The court would note, however, that the parties did provide for termination upon death or cohabitation, and * * * Plaintiff was cognizant of the fact that he would be retiring when he entered into the agreed entry. Furthermore, a spousal support termination date is so case-specific in nature, that it would be highly unlikely that the parties would leave such a provision, if intended, out of the Agreed Entry."

Id., 1995 Ohio App. LEXIS 1312, at *11.

{¶ 60} In *Eitel v. Eitel* (Aug. 30, 1994), Franklin App. No. 93APF12-1745, the parties ended their 41-year marriage by agreed judgment entry when the husband was 62 years old. Four years later, he retired and filed a motion to modify the spousal support award. We affirmed the trial court's denial of the motion, noting that, "plaintiff was sixty-two at the time he entered into the agreed divorce decree * * *. At that age, retirement is at least a consideration. Nonetheless, plaintiff agreed to pay defendant $1,650 per month in spousal support until her death or her remarriage, whichever occurs first."*Id.*, 1994 Ohio App. LEXIS 3816, at *11.[FN4]

> FN4. See, also, *Reveal v. Reveal*, 154 Ohio App.3d 758, 2003-Ohio-5335, 798 N.E.2d 1132 (wife's increase in income due to commencement of receipt of retirement benefits 15 years after divorce did not justify

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a reduction for change in circumstances where retirement was contemplated at the time of the decree and husband could have stipulated a reduction in spousal support upon wife's receipt of retirement benefits); cf. *Birath v. Birath* (Dec. 21, 2000), Franklin App. No. 00AP-604, discretionary appeal not allowed, 91 Ohio St.3d 1509, 746 N.E.2d 612 (court of appeals reversed finding of change of circumstances 20 years after divorce, holding, inter alia, emancipation of minor children must have been contemplated at the time of the divorce and was not included as a modifying or terminating event, though remarriage and death were specified as terminating events).

*13 {¶ 61} The rationale of the foregoing cases applies with equal force here. The parties agreed upon specific terminating events, none of which involve retirement, despite the fact that when they divorced, appellant was merely three years from his 30-year retirement eligibility date. Moreover, though appellant seeks chiropractic treatment for back pain, he also stated that he has suffered from such back pain and treated with his chiropractor for the past ten years, while continuing to work as a truck driver; therefore, his back pain does not constitute an unforeseen circumstance bearing upon his decision to retire. On these facts I cannot conclude that the parties did not contemplate appellant's retirement at the time of the prior order. Accordingly, I would affirm the trial court's denial of the motion to modify spousal support. Because the majority has determined otherwise, I respectfully dissent from the analysis and disposition of the first assignment of error. In all other respects, I concur.

Ohio App. 10 Dist.,2008.
Friesen v. Friesen
Slip Copy, 2008 WL 603191 (Ohio App. 10 Dist.), 2008 -Ohio- 952

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Trotter v. Trotter
Ohio App. 3 Dist.,2001.
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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Third District, Allen County.
Sharon Marie TROTTER, Plaintiff-Appellee,
v.
Harry C. TROTTER, Defendant-Appellant.
No. 1-2000-86.

April 18, 2001.

Civil Appeal from Common Pleas Court, Judgment reversed and cause remanded.

Gregory M. Novak, Attorney at Law, Reg. # 0021551, Lima, OH, for appellant.
James C. King, Attorney at Law, Reg. # 0000774, Lima, OH, for appellee.

OPINION

BRYANT.

*1 This appeal is taken by Defendant-Appellant Harry C. Trotter from the judgment entered by the Court of Common Pleas of Allen County denying his motion to modify the spousal support previously awarded Plaintiff-Appellee Sharon Marie Trotter.

On June 28, 1965 Sharon Trotter, Plaintiff-Appellee, and Harry Trotter, Defendant-Appellant, were married. During the marriage two children were born as issue and are presently emancipated. During the marriage Harry was employed by Ford Motor Company. He worked seven days a week and received an annual salary of approximately $90,000. Sharon spent most of the marriage raising their two children and rarely worked outside the home and presently has been diagnosed with a physical condition that does not allow her to work more than three hours a day three days a week.

After 32 years of marriage the parties were divorced on August 13, 1997. The trial court awarded the marital home coupled with the outstanding mortgages to Sharon. To offset the equity in the home that had been granted to Sharon, the trial court ordered Sharon to pay Harry $222.05 per month for ten years. In addition, the trial court found that Harry's pension plan was to be divided equally between Sharon and Harry. Such award was defined and documented by a Qualified Domestic Relations Order or QDRO. Finally, the trial court ordered that Harry pay spousal support to Sharon in the amount of $460.00 per week for a term of eight years.

More than one year after the divorce, Harry retired from Ford Motor Company after serving the company for at least thirty years. After retiring Harry moved to Bradenton, Florida, where he currently lives. While in Florida Harry works at "Taylor Made", a company that manufactures boat windows and doors. His salary is approximately $8.00 per hour. The record does not accurately reflect the amount of time per week that Harry works however, it seems to indicate that he does not work full-time.

After retiring, Harry failed to make any spousal support payments. After several months, the support was deducted from his portion of the monthly pension payments. The spousal support was roughly equal to the amount of money that Harry received from his pension every month and thus Harry failed to receive any more pension checks.

After the divorce, Sharon assumed all of the mortgages on the marital home pursuant to order of the court. Sharon proceeded to consolidate the outstanding debt on the marital home. When Harry began to miss his spousal support payments Sharon, unable to work due to her physical incapacity, was unable to maintain the mortgage, so she sold the home and moved into a trailer.

Sharon has since satisfied all of her remaining marital debt. She receives the entire pension payment from Ford Motor Company every month. Other than rent, medical expenses and ordinary living expenses, Sharon has no outstanding debt. Further, the record indicates that Sharon has consistently failed to make the monthly payment of $222.05 to Harry since the divorce.[FN1] Sharon insists that she is unable to afford the payment.

FN1. The record does not contain sufficient information concerning Sharon's monthly obligation to Harry. There is some testimony

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that Sharon may have made a few payments and that Harry may have excused some but there is no documentation of any actual payment.

*2 When Harry failed to receive his pension checks he filed a motion in the Court of Common Pleas of Allen County to modify his spousal support obligation. After a hearing, the Magistrate issued its decision denying Harry's motion for modification of spousal support. The entry is in part:
The magistrate specifically finds that the change in circumstances was voluntarily brought about by Defendant Harry Trotter. Further, the possibility of his retirement was contemplated at the time of the final divorce hearing herein. Though it can be understood at age fifty-five that Harry would no longer desire to work ten hours a day, seven days a week, he could have reduced his numbers of hours of employment. Even though he wished to enjoy life at a more relaxed pace, he still had a legal obligation to pay his debts. Further age fifty-five is a very young age to contemplate retirement. If everyone in this country chose to retire after thirty years, we would have a large number of people retiring at age forty-eight if they maintained the same job after graduation from high school.

Harry filed objections to the Magistrate's decision. On October 27, 2000, the trial court affirmed the Magistrate's decision. The judgment entry is in pertinent part:Mr. Trotter left his employment at Ford Motor Company where he was earning $92,000.00 a year to take a job working half the amount of hours at about one-third of the amount of hourly pay and still punching the clock but in a warmer climate where he could fish more.
This court must find under these circumstances that Mr. Trotter's retirement was in a substantial portion performed to defeat the spousal child obligation that he had to his wife and the benefits of warm weather and fishing are ancillary benefits to his true intent in this case.
Mr. Trotter's unilateral actions with full knowledge of his existing spousal support responsibility and without demonstrating any factors must be deemed voluntary under the circumstances.

On appeal from that judgment entry Harry presents the following sole assignment of error:The trial court erred in denying the motion to modify spousal support where substantial change of circumstances existed and there was no evidence of improper purpose.

A trial court is generally afforded wide latitude in deciding spousal support issues. *Bolinger v. Bolinger* (1990), 49 Ohio St .3d 120;*Cherry v. Cherry* (1981), 66 Ohio St.2d 348. Where modification of a spousal support award is requested, the threshold question is whether the trial court retained jurisdiction to modify the provisions of its order and whether the circumstances of a party have changed. *Wolding v. Wolding* (1992), 82 Ohio App.3d 235, 239 (reversed on other grounds). In the present case, the trial court specifically retained jurisdiction to modify the provisions of the decree.

R.C. 3105.18(E) states that the court may modify the amount or terms of a spousal support order upon a determination that "the circumstances of either party have changed."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."See R.C. 3105.18(F). To warrant a modification, "the change must be one that is substantial and not contemplated at the time of the prior order."*Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703.

*3 An appellate court reviews the modification of spousal support under an abuse of discretion standard. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. An abuse of discretion connotes more than an error of law or judgment, it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Absent such a showing, the trial court's judgment will be affirmed. *Masters v. Masters* (1994), 69 Ohio St.3d 83. When applying the abuse of discretion standard of review, an appellate court is not permitted to substitute its judgment for that of the trial court. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161.

As stated, in order to obtain a modification of spousal support, Harry must show a substantial change in circumstances. The facts presented above leave no doubt that Harry has experienced a change in circumstances since the final decree of divorce was rendered. Harry has seen a decrease in his income from $92,000 per year to approximately $20,000 annually.[FN2]However, in order to justify modification of the spousal support award, this decrease or change in Harry's income "must" not have been "voluntary".*Melhorn v.. Melhorn* (January 30, 1990) Montgomery App. No. 11139, unreported, citing *Nash v. Nash* (1945), 77 Ohio App. 155.

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FN2. The $20,000 figure was arrived at by adding his annual pension benefits to a yearly salary of $8,000. As stated it is an approximate figure. The record insufficiently represents the incomes and relative debts of Harry as well as Sharon.

In determining whether or not retirement is a "voluntary" or involuntary action justifying a reduction or modification of spousal support the Appellate Courts of Ohio have held that "[a] change in income due to retirement reasonably in advance of the expected date of retirement does provide a basis for modification of alimony if it was not done in an attempt to avoid a court ordered obligation to an ex-spouse."*Melhorn* at *2; See generally *Reed v. Reed* (Feb. 16, 2001) Greene App. No.2000CA81, unreported; *Kozlevchar v. Kozlevchar* (May 18, 2000) Cuyahoga App. No. 76065, unreported; *Rochow v. Rochow* (May 4, 1999) Mahoning App. No. 97 CA 103;*Wolf v. Wolf* (March 12, 1999), Greene App. No. 98-CA-131, unreported.

The record before this court does not contain any evidence supporting the determination made by the magistrate or the trial court, "that Mr. Trotter's retirement was in a substantial portion performed to defeat the spousal child (sic) obligation that he had to his wife."Quite the contrary, the only evidence presented by Harry or Sharon seemed to indicate that both parties and the trial court were aware at the time of the divorce that Harry intended to retire after thirty years of service for Ford Motor Company. Further, testimony by Harry and Sharon establishes that when married the Trotters often discussed Harry's retirement after thirty years of service at Ford Motor Company and moving to Florida to live the remainder of their lives.

The magistrate and the trial court fail to cite any support for their conclusion that Harry purposely retired to avoid paying spousal support. Such a conclusion is arbitrary, unreasonable and not supported by the record before this court. As stated the evidence presented at trial supports only one conclusion, that Harry had intended to retire after thirty years of service to Ford Motor Company and move to Florida throughout most of his marriage. Moreover, the trial court at the time of the divorce was aware of this factor when it ordered the spousal support. Therefore, we find that Harry's retirement from Ford Motor Company after thirty years of service was not done to purposely avoid his continuing spousal support obligation to Sharon, and thus was not a "voluntary" decrease in his income but rather a substantial change in circumstances.

***4** If a change of circumstances is found to exist, the trial court must determine whether spousal support is still necessary and, if so, in what amount. *Binghazn v. Binghazn* (1991), 9 Ohio App.3d 191, 459 N.E.2d 231. The domestic relations court should set forth the basis for its decision with sufficient detail to allow proper appellate review. *Graham v. Graham* (1994), 98 Ohio App.3d 393, 399-400.

Because the trial court failed to find a change of circumstances it did not order or consider the necessity of a modification of spousal support. Further, the record does not contain sufficient evidence of the parties' obligations and incomes to allow for further appellate review.

The judgment of the Court of Common Pleas of Allen County is reversed and remanded for further proceedings in accordance with this opinion.

Judgment reversed and cause remanded.
SHAW and HADLEY, JJ., concur.
Ohio App. 3 Dist.,2001.
Trotter v. Trotter
Not Reported in N.E.2d, 2001 WL 390066 (Ohio App. 3 Dist.), 2001 -Ohio- 2122

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Reeves v. Reeves
Ohio App. 7 Dist.,2007.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.
Court of Appeals of Ohio,Seventh District, Jefferson County.
Mary E. REEVES, Plaintiff-Appellee,
v.
Donald E. REEVES, Sr., Defendant-Appellant.
No. 06-JE-13.

Decided Sept. 19, 2007.

Civil Appeal from Common Pleas Court Domestic Relations Division, Case No. 02-DR-225.

John J. Mascio, Steubenville, OH, for plaintiff-appellee.
Charles C. Amato, Amato Law Office, Wellsville, OH, for defendant-appellant.
DONOFRIO, J.
*1 {¶ 1} Defendant-appellant, Donald E. Reeves, Sr. appeals an order of the Jefferson County Court of Common Pleas overruling his motion to modify spousal support.

{¶ 2} Appellant and plaintiff-appellee, Mary E. Reeves, were married on October 17, 1975. They had one son together, Donald Eugene Reeves, Jr. (Donald Jr.). After twenty-seven years of marriage, the parties were divorced on January 17, 2003. According to the final decree of divorce, appellant, at that time, was residing with a twenty-five year old female "roommate/girlfriend." Appellee was residing with Donald Jr. who, by then, was an adult and employed. Appellee had argued that the income of appellant's female "roommate/girlfriend" should be attributed to him and appellant argued that the income of Donald Jr. should be attributed to her. The trial court rejected both of their arguments, reasoning that neither party was legally entitled to the income of the persons they were residing with. The trial court concluded that the case would be decided upon the assets and incomes of the parties alone.

{¶ 3} Concerning the parties' incomes, appellee was receiving $802.00 per month in Social Security. The trial court determined that she had the ability to earn a part-time minimum wage of $5.15 per hour for a "total reasonably obtainable income" of $14,980.00 ($1248.33 per month). The trial court estimated appellant's "expected income" at $50,000.00 ($4166.67 per month) based on his employment at Wheeling-Pittsburgh Steel, including variable overtime, and his work as a referee.

{¶ 4} The court awarded appellee $1,500 per month in spousal support. The court reasoned that many of the parties' expenses were either fully or partially under control of the parties. However, the court did find that one exception to the controllability issue was appellee's need for COBRA insurance at a monthly cost of $279.56 while appellant received his health benefits at no cost.

{¶ 5} Appellant filed a motion for reconsideration/relief from judgment of the spousal support award arguing, in part, that the trial court had incorrectly determined his income. On May 16, 2003, the trial court modified the January 17, 2003 award, noting that the spousal support award had been erroneously based on appellant's gross income rather than his net income. Accordingly, the court recalculated the monthly spousal support award to $834.17 per month (thirty percent of a $2780.57 per month net income).

{¶ 6} On November 4, 2004, appellee filed a motion for contempt and to modify spousal support. Appellee alleged that appellant was in contempt of the trial court's May 16, 2003 order for failing to pay the $834.17 in spousal support for the month of October 2004. Appellee also asked for an increase in the spousal support award due to a change in circumstances. She maintained that appellant had since married his girlfriend and adopted her three year old son, Patrick, entitling him to her income and Social Security he received on behalf of Patrick. Appellant responded with a motion in opposition and a competing motion for a decrease in the spousal support award. He asserted that his second wife's income and Patrick's Social Security should not be attributed to him and that his income had decreased due to his retirement from Wheeling-Pittsburgh Steel. On January 7, 2005, the trial court denied both parties' motions for a modification of the spousal support award.

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*2 {¶ 7} Later that year, on October 25, 2005, appellant filed a motion seeking a decrease in the spousal support award because his income had "decreased drastically." On December 5, 2005, appellee filed another motion for contempt. Appellee alleged that appellant was in contempt of the trial court's May 16, 2003 order for failing to pay the $834.17 in spousal support for the month of October 2005. Appellee followed that up with a motion to compel discovery seeking certain financial documents in order to ascertain his sources of income.

{¶ 8} The trial court heard both motions on February 6, 2006. Appellant testified on his own behalf. Appellee testified on her own behalf and presented the testimony of an account clerk from the Jefferson County Job and Family Services concerning the missing October 2005 payment. The trial court's efforts to determine the matter were hampered by appellant's continued failure to provide the necessary financial documents. During the hearing, it was apparent that appellant believed it was solely up to him to determine what income should be attributed to him. The court deferred ruling on the matter and ordered appellant to provide the requested financial documents and ordered both parties to thereafter file supplemental memoranda detailing their respective positions. Apparently, appellant relented and provided the requested documents, and both parties filed memoranda in support of their respective positions.

{¶ 9} The evidence established that, in 2005, both parties received Social Security payments-appellant, $1,273.00 per month, and, appellee, $776.00 per month. For 2004, both parties also received pension payments from appellant's pension with the Wheeling Pittsburgh Steel Retirement Income Plan, serviced by the Pension Benefit Guaranty Corporation (PBGC). Appellant received $227.64 per month, appellee receives $204.34 per month.

{¶ 10} At the time of the hearing, appellant testified that he was sixty-three years old. He also verified that after divorcing appellee, he remarried and adopted his new wife's three year old son, Patrick. Because of appellant's age, he receives a derivative Social Security check for Patrick of $835.00 per month. Appellant's second wife made $19,212.51 in 2004. In 2005, she made $48,368.88.

{¶ 11} Evidence also established that Donald Jr. lives with a friend in Wintersville, Ohio. He stays at appellee's house about two nights a week to keep her company. He does receive mail at appellee's house for voting purposes and his mother's house is listed according to his driver's license. He gives appellee $240.00 a month for her car payments.

{¶ 12} On March 10, 2006, the trial court overruled appellant's motion to modify spousal support because, rather than decreasing, appellant's household income had actually increased due to the Social Security benefits received by his son, Patrick, and the dramatic increase in the earnings of his second wife. The court noted that while it did not consider those earnings in the same light as if they were appellant's earnings, they were still a consideration. Citing *Roach v. Roach* (1989), 61 Ohio App.3d 315, 572 N.E.2d 772.Lastly, the court granted appellee's motion for contempt. This appeal followed.

*3 {¶ 13} Appellant raises three assignments of error, each addressed to that part of the trial court's decision denying his motion for modification of the spousal support ward. He does not assign as error that portion of the trial court's decision finding him in contempt for failing to pay the October 2005 spousal support. Appellant's assignments of error will be addressed out of order for ease of consideration.

{¶ 14} Appellant's first assignment of error states:

{¶ 15} "THE TRIAL COURT ERRED BY CONSIDERING DEFENDANT'S WIFE'S INCOME AND SON'S DISABILITY INCOME WHEN MODIFYING SPOUSAL SUPPORT."

{¶ 16} When reviewing a trial court's decision in domestic relations matters, an appellate court must uphold the decision absent an abuse of discretion.*Booth v. Booth* (1989), 44 Ohio St .3d 142, 144, 541 N.E.2d 1028.Abuse of discretion constitutes "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable."*Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140.In other words, an appellate court may not substitute its judgment for that of the trial court unless, considering the totality of the circumstances, the trial court abused its discretion. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131, 541 N.E.2d 597.The appellate court should not independently review the weight of the evidence in the majority of cases but rather should be guided by the presumption that the trial court's findings are correct.*Miller v. Miller* (1988), 37 Ohio St.3d 71, 74, 523 N.E.2d 846.

{¶ 17} R.C. 3105.18(E) governs the modification of

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a spousal support award. "In order for a court to modify an award of spousal support set forth in a divorce decree, it must first have reserved jurisdiction to do so."*Flauto v. Flauto*, 7th Dist. No. 05 MA 100, 2006-Ohio-4909, at ¶ 11.In this case, the trial court clearly reserved jurisdiction and that fact is undisputed.

{¶ 18} Next, a court must find that a change in circumstances for either party has occurred. R.C. 3105.18(E)."The movant has the burden to establish that a substantial change in circumstances has occurred since the time of the trial court's original decision."*Flauto*, 2006-Ohio-4909, at ¶ 11, citing *Leighner v. Leighner* (1986), 33 Ohio App.3d 214, 215, 515 N.E.2d 625."Finally, the trial court must evaluate the appropriateness and reasonableness of the award."*Id.*, citing *Barrows v. Barrows*, 9th Dist. No. 21904, 2004-Ohio-4878 at ¶ 7. See, also, R.C. 3105.18(C)(1).

{¶ 19} Appellant argues that his wife's increase of income should not be considered in the modification. Appellant cites *Carnahan v. Carnahan* (1997), 118 Ohio App.3d 393, 397, 692 N.E.2d 1086, where the Twelfth District stated, "The remarriage of one who owes spousal support does not warrant a modification of the spousal support payments * * *."*Id.* at 398.Appellant contends that only his income should be considered in determining modifications to the spousal support.

*4 {¶ 20} However, in *Carnahan* the court went on to say "the second spouse's income can be considered when there is an allegation of a change in circumstances."Id at 398, citing *Roach v. Roach* (1989), 61 Ohio App.3d 315, 320, 572 N.E.2d 772.In *Roach*, the husband's monthly income was $1,144. His second wife was earning $1,520 per month. The court found this to be a substantial change in circumstances that needed to be considered in calculating the modification.

{¶ 21} Appellant's wife's annual monthly income combined with Patrick's Social Security checks equal $4,865.74. Appellant only gets $1,500.74 per month from his Social Security and pension. The difference in the monthly incomes in this case is much greater than the difference of the monthly incomes in *Roach*.Therefore, appellant's second wife's increased income and Patrick's Social Security checks, adding to the household income, are substantial changes to be considered when determining spousal support modifications.

{¶ 22} In this case, appellant was the party who filed the motion seeking a decrease in the spousal support award because his income had "decreased drastically." As indicated above, the evidence adduced at the hearing did indeed demonstrate a change of circumstances. However, not one to justify a decrease. Appellant's household income actually increased over $2000.00 from the original granting of the divorce. As can be seen by case law, household income can be considered in determining whether a modification is justified. Therefore, it certainly cannot be said that the trial court abused its discretion by declining to modify the spousal support award based on an increase in appellant's household income.

{¶ 23} Accordingly, appellant's first assignment of error is without merit.

{¶ 24} Appellant's third assignment of error states:

{¶ 25} "THE TRIAL COURT ERRED WHEN THEY TOOK DEFENDANT'S WIFE'S INCOME AND SON'S DISABILITY INCOME INTO CONSIDERATION AND NOT PLAINTIFF'S SON WHO RESIDES WITH HER."

{¶ 26} Appellant claims that Donald Jr. lives with appellee and contributes a substantial amount of income to support appellee. Appellant argues that if it was proper to consider his second wife's income and Patrick's Social Security checks in determining his spousal support modification, then the court should have also considered Donald Jr.'s income.

{¶ 27} Donald Jr. is the adult son of appellant and appellee. He lives with a friend. Two nights a week, he stays at appellee's house to visit and keep her company. He is currently trying to move out of his friend's house and get a place of his own.

{¶ 28} Donald Jr. gives appellee $240 per month which is used for half of appellee's car payments. Occasionally, he will give appellee $25 or $50. Sometimes, he will pick up appellee's medications and pay for them. He makes over $40,000 a year. He is under no obligation to assist appellee. Donald Jr. is an independent adult who has been assisting his mother and receives a benefit from his occasional stays with his mother.

*5 {¶ 29} The amount of money appellee receives from Donald Jr. is far less substantial than the amount of money appellant's second wife and Patrick's Social Security checks contribute to appellant's household income. Appellee receives

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$1,814.41 a month from her Social Security, pension, and the spousal support she receives. Donald Jr. contributes an additional $240 a month to help appellee with her car payments. Appellant receives $1,500.64 a month from his Social Security and pension. Appellant's second wife's monthly income and Patrick's Social Security checks contribute $4,865.74 a month to appellant's household income. The additional contributions to appellant's household income are more than twice what appellant receives from his Social Security and pension. Appellant's second wife's income and Patrick's Social Security checks are far more substantial contributions than Donald Jr.'s contributions.

{¶ 30} Because Donald Jr. was under no obligation to give assistance to appellee and because his contributions to appellee were not substantial contributions to appellee's income, the trial court did not abuse its discretion when it did not attribute Donald Jr.'s contributions to appellee's income in regards to modifying spousal support.

{¶ 31} Accordingly, appellant's third assignment of error is without merit.

{¶ 32} Appellant's second assignment of error states:

{¶ 33} "THE TRIAL COURT ERRED BY NOT CONSIDERING A TRUE EQUALIZATION OF INCOME OF THE PARTIES ONLY."

{¶ 34} Appellant argues that both he and appellee should be receiving equal incomes. Appellant believes that the amount he receives a month from his Social Security and his pension should be equal to what appellee receives from her Social Security, pension, and her spousal support. Appellant receives $1,500.64 a month from his Social Security and pension. Appellee receives $1,814.51 a month from her Social Security, pension, and spousal support. Appellant contends that he should be paying $260.15 a month in spousal support as opposed to the $834.31 a month he is currently paying, so appellant and appellee will be receiving equal amounts.

{¶ 35} Appellant cites *Bingham v. Bingham* (1983), 9 Ohio App.3d 191, 193, 459 N.E.2d 231, where the court stated that to modify an order, there must have been a change in circumstances since the order was issued. As already addressed in appellant's first assignment of error, appellant's second wife's dramatic increase in yearly income is a change in circumstances which the court may consider in consideration of a modification of spousal support. As already addressed, the court did not abuse its discretion when it did not consider Donald Jr. paying half of appellee's car payments.

{¶ 36} R.C. 3105.18(C)(1) states, in relevant part:

{¶ 37} "In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:

*6 {¶ 38} "(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;

{¶ 39} " * * *

{¶ 40} "(n) Any other factor that the court expressly finds to be relevant and equitable."

{¶ 41} In this case, the trial court did consider the income of the parties from the sources of Social Security, pensions, and spousal support. The only other factors the court found relevant and equitable were appellant's second wife's income, increase of household income, and Patrick's Social Security checks. The trial court did not attribute Donald Jr.'s contributions to pay half of appellee's monthly car payments to her income. The trial court was within its discretion when making its considerations. When considering the income of the parties, and the other factors the court found relevant and equitable, appellant has a substantially higher household income than appellee. Even if the trial court also considered Donald Jr.'s contributions to appellee's household income, appellant's household income is still substantially higher. Therefore, the trial court did not abuse its discretion by not considering a true equalization of the parties based only on their incomes. The trial court's decision regarding the modification to spousal support was not unreasonable, arbitrary, or unconscionable.

{¶ 42} Accordingly, appellant's second assignment of error is without merit.

{¶ 43} The judgment of the trial court is hereby affirmed.

VUKOVICH, J., and DeGENARO, P.J., concur.
Ohio App. 7 Dist.,2007.
Reeves v. Reeves

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2007 -Ohio- 4988

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Carnahan v. Carnahan
Ohio App. 12 Dist.,1997.

Court of Appeals of Ohio,Twelfth District, Clermont County.
CARNAHAN, Appellant,
v.
CARNAHAN, Appellee.
No. CA96-08-072.

Decided March 3, 1997.

Former husband moved to modify spousal support. The Clermont County Court of Common Pleas, Division of Domestic Relations, modified spousal support. Former husband appealed. The Court of Appeals, Walsh, J., overruling *Alder v. Alder; Hall v. Hall* (Mar. 27, 1995), Butler App. No. CA94-05-104, unreported, 1995 WL 128402; and *Bishop v. Bishop* (Oct. 9, 1995), Clermont App. No. CA95-02-008, unreported, 1995 WL 591257, held that need was essential element in determining propriety and reasonableness of spousal support.

Judgment reversed and cause 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
In proceeding to modify spousal support award, there is a three-step process: trial court must determine (1) if there is a substantial change in the parties' circumstances as to warrant a modification; (2) whether spousal support is necessary; and (3) if necessary, what amount is reasonable.

[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
Modification of spousal support is warranted only when substantial change in circumstances of the parties exists.

[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
Change in circumstances allegedly warranting modification of spousal support must not have been purposely brought about by the party seeking the modification.

[4] 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
Determination whether a change of circumstances has occurred will not be reversed, on review of order modifying spousal support, unless the decision constitutes an "abuse of discretion," meaning it is unreasonable, arbitrary, or unconscionable.

[5] 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 of circumstances" includes, but is not limited to any increase or involuntary decrease in former spouse's wages, salary, bonuses, living

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expenses, or medical expenses. R.C. § 3105.18(F).

[6] 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
Remarriage of one who owes spousal support does not warrant a modification of the spousal support payments, but the second spouse's income can be considered when there is an allegation of a change in circumstances. R.C. § 3105.18(F).

[7] 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
Reduction of more than $50,000 per year in former husband's income was such change in circumstance as might warrant modification of spousal support. R.C. § 3105.18(F).

[8] 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
Once it has been found that there is a change in circumstances, next inquiry is whether spousal support is necessary, and if it is necessary, what amount is reasonable.

[9] 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
Court must follow statutory factors when considering amount of modified spousal support award. R.C. § 3105.18(C).

[10] 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
Trial court does not need to list each factor and comment on factors considered in determining whether and how much to modify spousal support unless there is a request for findings of fact and conclusions of law. R.C. § 3105.18(C).

[11] 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
Reviewing court should not reverse trial court's decision regarding the amount of spousal support award unless it finds that the trial court abused its discretion.

[12] 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
Modification of spousal support is reviewed for abuse of discretion, under which standard reviewing court must look at "the totality of the circumstances" to determine if the trial court acted unreasonably, arbitrarily, or unconscionably.

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[13] 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
Trial court abused its discretion by basing its determination of former wife's need for spousal support on her stated expenses and by considering current wife's income in determining former husband's ability to pay spousal support. R.C. § 3105.18(C, F).

[14] Divorce 134 ⚷237

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k237 k. Grounds. Most Cited Cases
Sustenance spousal support is provided because financially dependent spouse has a right to economic support sufficient to maintain his or her standard of living before the dissolution to the extent that financially supportive spouse has the economic ability to provide that support.

[15] Divorce 134 ⚷237

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k237 k. Grounds. Most Cited Cases
Need is an essential element in determining whether spousal support is appropriate and reasonable; overruling *Alder v. Alder; Hall v. Hall* (Mar. 27, 1995), Butler App. No. CA94-05-104, unreported, 1995 WL 128402; and *Bishop v. Bishop* (Oct. 9, 1995), Clermont App. No. CA95-02-008, unreported, 1995 WL 591257.

[16] Divorce 134 ⚷238

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k238 k. Defenses and Objections. Most Cited Cases
When sustenance spousal support is not limited to payee's needs, award has the effect of punishing the payer and rewarding the payee.

[17] 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
Former wife's contributions to pension account, to savings account, and to charity were not expenses to be deducted from her income in determining her need for spousal support; furthermore, income from pension had to be included.

[18] 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
Trial court was required to give former husband credit, in determining his ability to pay spousal support, for pension funds that were awarded to him in the divorce and that he used to reduce his monthly housing expenses; failure to do so penalized former husband for using his own money to lower his monthly housing expense.

[19] 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
New spouse's income can be considered in determining whether circumstances have changed but cannot be used spousal support obligor's ability to pay. R.C. § 3105.18(F).

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[20] 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
Determination of the amount of spousal support is different from a determination that there was a substantial change in circumstances to warrant a modification. R.C. § 3105.18(C)(1)(a).

[21] 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
It was inequitable and an abuse of discretion to require former husband making $19,000 annually to pay $7,200 each year to support former wife who was earning almost $40,000 annually. R.C. § 3105.18(F).

[22] Divorce 134 ⚷240(2)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k240 Amount
134k240(2) k. Facts Affecting or Controlling Amount. Most Cited Cases
Amount of spousal support is guided by law but is controlled by equity, because whenever equity loses its existence, justice is denied. R.C. § 3105.18(F).

[23] Equity 150 ⚷54

150 Equity
150I Jurisdiction, Principles, and Maxims
150I(C) Principles and Maxims of Equity
150k54 k. Application and Operation in General. Most Cited Cases
Whenever equity loses its existence, justice is denied.

****1088** Marshall McCachran, Cincinnati, for appellant.
John L. McElwee, Cincinnati, for appellee.
WALSH, Judge.
Plaintiff-appellant, Jack F. Carnahan, appeals a decision by the Clermont County Court of Common Pleas, Division of Domestic Relations, modifying his spousal support obligations. We reverse the trial court's modification of spousal support and remand for a recalculation.

Appellant and appellee, Suzanne Carnahan, were married for thirty-nine years. Appellant and appellee were granted a divorce by the Clermont County Court of Common Pleas, Division of Domestic Relations, on December 28, 1990. In the divorce decree, the property was divided equally, and appellant was ordered to pay spousal support of $1,000 per month for one year and $850 per month thereafter, indefinitely. Appellant and appellee's pensions were included in the property settlement. At the time of the divorce, appellant was earning $72,000 annually at KDI Precision Products, Inc., and appellee was earning $28,000 as an office manager for Value City Department Stores.

In 1995, appellant was forced to retire from his position at KDI. Appellant made a motion to modify his spousal support obligations because of his change in circumstances. Appellant's income is now $19,032 annually, consisting of $1,221 per month from Social Security and $365.54 per month from his pension. Since the divorce, appellant has remarried. Appellant's present wife earns approximately $35,000 annually. Appellee presently earns $36,140 to $40,072 annually.[FN1]

FN1. There is some dispute in the record concerning appellee's actual annual income. $36,140 to $40,072 represents the high and low amounts of income credited to appellee.

***397** The domestic relations court found that there was a substantial change in circumstances to justify a modification of appellant's spousal support obligation. The court found that appellant and appellant's spouse's monthly incomes were $3,414 with monthly expenses of $2,510. The court then found that appellant and his present spouse had excess income amounting to $904 per month. The court compared appellee's income with her expenses and found that appellee had a shortfall of $597 per month. The court then modified appellant's spousal support obligation to $600 per month without a

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termination date. Appellant assigns the following two assignments of errors:

Assignment of Error No. 1:

"The trial court abused its discretion in this matter by failing to evaluate properly the financial evidence regarding the parties' income, expenses and property, and thus rendering a decision against the manifest weight of the evidence."

Assignment of Error No. 2:

"The trial court abused its discretion by not terminating spousal support altogether under the circumstances."

[1] In Ohio, spousal support consists of two components: a division of marital assets and liabilities, and periodic payments for sustenance and support. *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 95, 518 N.E.2d 1197, 1200. In the present case, spousal support was granted for sustenance and support. In a proceeding to modify a spousal support award, there is a three-step process: the trial court must determine (1) whether there is a substantial change in the parties' circumstances**1089 so as to warrant a modification, (2) whether spousal support is necessary, and (3) if necessary, what amount is reasonable. *Leighner v. Leighner* (1986), 33 Ohio App.3d 214, 215, 515 N.E.2d 625, 626-627.

[2][3][4] Modification of spousal support is warranted only when a substantial change in the circumstances of the parties exists. *Leighner* at 215, 515 N.E.2d at 627; *Wiggins v. Wiggins* (Sept. 27, 1993), Warren App. No. CA92-12-110, unreported, at 5, 1993 WL 386305. See, also, R.C. 3105.18(E)(1). The change in 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. A reviewing court will not disturb the judgment of the trial court regarding whether a change of circumstances has occurred unless the decision constitutes an abuse of discretion. *Wiggins* at 5. A decision constitutes an abuse of discretion if it is "unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 482-483, 450 N.E.2d 1140, 1142; *Kahn v. Kahn* (1987), 42 Ohio App.3d 61, 66, 536 N.E.2d 678, 684.

*398 [5][6] 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 remarriage of one who owes spousal support does not warrant a modification of the spousal support payments, *Mallow v. Mallow* (1948), 84 Ohio App. 89, 39 O.O. 115, 84 N.E.2d 236, but the second spouse's income can be considered when there is an allegation of a change in circumstances. *Roach*, 61 Ohio App.3d at 320, 572 N.E.2d at 775; *Robinson v. Robinson* (Apr. 4, 1994), Butler App. Nos. CA93-02-027, CA93-03-047, unreported, 1994 WL 110197.

[7] In the present case, the change of circumstances for appellant was his retirement. Appellant's wages before his retirement were about $72,000 annually. After retirement, appellant has a gross income of $19,038.48 annually composed of Social Security benefits of $1,221 per month ($14,652) and a pension of $365.54 per month ($4,386.48). This much of a difference in income is sufficient to show that the trial court did not abuse its discretion in finding that there was a change in circumstances justifying a modification of spousal support.

[8][9][10] Once it has been found that there is a change in circumstances, the next inquiry is whether spousal support is necessary, and if it is necessary, what amount is reasonable. *Leighner*, 33 Ohio App.3d at 215, 515 N.E.2d at 626-627; *Bingham v. Bingham* (1983), 9 Ohio App.3d 191, 193, 9 OBR 302, 303-304, 459 N.E.2d 231, 233-234. A court must follow the factors listed in R.C. 3105.18(C) when considering the amount of the new spousal support award. *Gross v. Gross* (1990), 64 Ohio App.3d 815, 818, 582 N.E.2d 1144, 1145-1146.[FN2] The trial court **1090 *399 does not need to list each factor and comment on the factors unless there is a request for findings of fact and conclusions of law. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 356, 20 O.O.3d 318, 323, 421 N.E.2d 1293, 1299; *Alder v. Alder* (1995), 105 Ohio App.3d 524, 526, 664 N.E.2d 609, 610.

FN2. R.C. 3105.18(C)(1) reads as follows:
"In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, * * * the court shall consider all of the following factors:
"(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section

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3105.171 of the Revised Code;
"(b) The relative earning ability of the parties;
"(c) The ages and the physical, mental, and emotional condition of the parties;
"(d) The retirement benefits of the parties;
"(e) The duration of the marriage;
"(f) The extent to which it would be inappropriate for a party, because he will be custodian of a minor child of the marriage, to seek employment outside the home;
"(g) The standard of living of the parties established during the marriage;
"(h) The relative extent of education of the parties;
"(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;
"(j) The contributions of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;
"(k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;
"(*l*) The tax consequences, for each party, of an award of spousal support;
"(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;
"(n) Any other factor that the court expressly finds to be relevant and equitable."

[11][12][13] In a divorce proceeding, a reviewing court should not reverse a trial court's decision regarding the amount of spousal support award unless it finds that the trial court abused its discretion. *Kahn v.. Kahn,* 42 Ohio App.3d at 66, 536 N.E.2d at 683-684. While this rule applies to a divorce proceeding, it is also the appropriate standard to be used when reviewing a modification decision. *Wiggins,* at 5. In determining if there was an abuse of discretion, a reviewing court must look at "the totality of the circumstances" to determine if the trial court acted unreasonably, arbitrarily, or unconscionably. *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67, 554 N.E.2d 83, 86-87. After reviewing the record, we find that the trial court abused its discretion in its determination of appellee's need and appellant's ability to pay spousal support.

[14] While the trial court found that there was a change in circumstances warranting a modification, it did not properly determine appellee's "need" in its award of spousal support. Sustenance spousal support is provided because a financially dependent spouse has a right to economic support sufficient to maintain his or her standard of living before the dissolution "to the extent that the financially supportive spouse has the economic ability to provide that support." *Wiggins,* at 8, following *Lee v. Lee* (1983), 10 Ohio App.3d 113, 114, 10 OBR 137, 138, 460 N.E.2d 710, 712.

[15][16] "Need" is an essential element when determining whether spousal support is "appropriate and reasonable." See *Kunkle,* 51 Ohio St.3d at 68, 554 N.E.2d at 87-88; *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 414, 75 O.O.2d 474, 482, 350 N.E.2d 413, 423; *Simoni v. Simoni* (1995), 102 Ohio App.3d 628, 637-638, 657 N.E.2d 800, 806-807. See, also, R.C. 3105.18(C)(1). When sustenance spousal support is not limited to the payee's needs, "the award has the effect of punishing the payer and rewarding the payee." *Orley v. Orley* (Dec. 12, 1996), Cuyahoga App. No. 69622, unreported, 1996 WL 715481; *Kunkle* at 70, 554 N.E.2d at 89. Each of the factors in the present statute, ***400**R.C. 3105.18(C)(1)(a)-(n), is "related, directly or indirectly, either to the obligee spouse's need for sustenance or the obligor spouse's ability to pay." *Seagraves v. Seagraves* (Apr. 19, 1996), Montgomery App. No. 15588, unreported, at 16, 1996 WL 185332.

We now overrule our holdings in *Alder v. Alder; Hall v. Hall* (Mar. 27, 1995), Butler App. No. CA94-05-104, unreported, 1995 WL 128402; and *Bishop v. Bishop* (Oct. 9, 1995), Clermont App. No. CA95-02-008, unreported, 1995 WL 591257, to the extent we held that "need or necessity is no longer a prerequisite." We also decline to follow the Tenth District's holding that an award of spousal support is not based upon need. See *Schultz v. Schultz* (1996), 110 Ohio App.3d 715, 724, 675 N.E.2d 55, 61.

[17] In the present case, the trial court determined appellee's "need" by taking appellee's income and subtracting her expenses. However, the trial court erred in its computation of appellee's net income. The court improperly allowed as "expenses" monthly withholdings of $451.74 to a 401(K) plan, $100 to a credit union savings account, and $10 for charity. The court also did not consider as income appellee's

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annual pension of $1,882.44.

Since the time of the divorce, appellee's financial status has improved dramatically. Appellee's income has increased by more than forty percent, and she is now in a better financial situation than at the time of the divorce. Appellee has received spousal support payments of $850 to $1,000 for five years. Appellee has $103,045 in IRA and 401(K) accounts, $10,400 in stocks, $4,805 in checking accounts, and $71,000 equity in her ****1091** condominium, resulting in a net worth of $189,250. Arguably, appellee's need has diminished as her net worth has increased.

The trial court found that appellant's retirement required that appellee "make some modifications in her budget to compensate for the change in [appellant's] income, and consequently her income. It is reasonable to expect [appellee] to make some changes in her expenses." However, in rendering its decision, the trial court allowed appellee all of her present expenses without any reductions. If appellant and appellee were still married, appellee would have had to adjust her expenses to match appellant's drop in income. The court's present decision would still allow appellee to spend at her current rate.

[18] The trial court also erred in determining appellant's ability to pay spousal support. It did not consider appellant's decision to use $60,000 of his 401(K) plan (which was a marital asset that had been previously divided at the time of the divorce) to purchase his present residence. If appellant had not used the $60,000 for his residence, he would have had a much higher housing payment and would have been less able to pay spousal support. The court's blanket ***401** calculation of expenses versus income penalized appellant for using his own money to lower his monthly housing expense.

[19] The trial court also erred by adding appellant's spouse's income to his income to determine the amount of his obligation. The trial court incorrectly cites our decision in *Wiggins*. We did not hold that it is proper to use the obligor's new spouse's income in determining the obligor's ability to pay. We instead held that the obligor's second spouse's income should be considered when there is an allegation of changed circumstances. *Roach*, 61 Ohio App.3d at 320, 572 N.E.2d at 775; *Wiggins*, at 7.

[20] Determination of the amount of spousal support is different from a determination that there was a substantial change in circumstances to warrant a modification. R.C. 3105.18(C)(1)(a) requires that the income of the *parties* is to be considered when determining the amount of spousal support. This does not include income from another spouse. The parties have not cited, nor has our research revealed, any Ohio cases that would allow the trial court to include the new spouse's income for the purpose of determining spousal support.

[21][22][23] When looking at the totality of the circumstances, we conclude the trial court's decision is inequitable and an abuse of discretion. Appellant makes $19,000 annually and is forced to pay $7,200 each year to support appellee, who is earning almost $40,000 annually. The trial court modified the spousal support from $850 per month to $600 per month. When a trial court determines an amount of spousal support, "it is guided by law, but is controlled by equity * * * [because] whenever equity loses its existence, justice is denied."*Simoni*, 102 Ohio App.3d at 635, 657 N.E.2d at 805.

Based upon the totality of the circumstances, we hold that the trial court abused its discretion and its ruling is against the weight of the evidence. We reverse the trial court's decision and remand this case with instruction to recalculate the spousal support award consistent with the factors in R.C. 3105.18(C)(1) and this opinion.

Judgment reversed and cause remanded.

WILLIAM W. YOUNG, P.J., and KOEHLER, J., concur.
Ohio App. 12 Dist.,1997.
Carnahan v. Carnahan
118 Ohio App.3d 393, 692 N.E.2d 1086

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Calabrese v. Calabrese
Ohio App. 8 Dist.,2007.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.
Court of Appeals of Ohio,Eighth District, Cuyahoga County.
Antonio CALABRESE, Plaintiff-Appellant
v.
Linda CALABRESE, Defendant-Appellee.
No. 88520.

Decided June 7, 2007.

Civil Appeal from the Cuyahoga County Court of Common Pleas, Domestic Relations Division, Case No. D-280091.

Carl C. Monastra, James C. Nixon, Cleveland, OH, for appellant.
Madelon Sprague, Zamore & Sprague, Shaker Heights, OH, for appellee.

Before: SWEENEY, J., CELEBREZZE, A.J., and KILBANE, J.

JOURNAL ENTRY AND OPINION
JAMES J. SWEENEY, J.
*1 {¶ 1} Plaintiff-appellant, Antonio Calabrese ("Antonio"), appeals the decision of the Cuyahoga County Court of Common Pleas, Division of Domestic Relations, to award defendant-appellee, Linda Calabrese ("Linda"), modified spousal support and attorney fees, and the trial court's finding of contempt and award of attorney fees. For the reasons stated herein, we affirm.

{¶ 2} The parties to this action were divorced on June 28, 2002. At that time, the parties had been married for 37 years and had seven children, one of whom was still a minor. The divorce decree adopted the terms of a separation agreement. Pursuant to the separation agreement, Antonio agreed to pay spousal support in the amount of $4,000 per month commencing June 2002, which the domestic relations court retained jurisdiction to modify. There was no child support order. At the time of the divorce, Antonio's annual income was $57,600 and Linda's annual income was $8,160.

{¶ 3} As relevant to this appeal, the terms of the separation agreement also required Antonio to provide continuing health coverage for Linda and to obtain a ten-year term life insurance policy in the amount of $250,000 to secure his spousal support, with Linda named as the irrevocable beneficiary thereon. Antonio retained all interest in the parties' companies and assumed all liabilities associated with them.

{¶ 4} On November 22, 2002, Antonio filed his first motion to modify spousal support, asserting that his business had taken a downhill turn since the finalization of the divorce and he was unable to pay all of his bills or afford his spousal support. This motion was denied by the trial court.

{¶ 5} Antonio filed a second motion to modify spousal support on November 30, 2004. Antonio claimed that his financial position was in a downward tailspin and he was no longer able to meet his spousal support obligations. Antonio requested that the court modify his support obligations to "be more in line with his financial ability to pay."

{¶ 6} Linda filed a motion for order to show cause claiming Antonio was in noncompliance with the divorce decree, and she also moved for attorney fees. More specifically, Linda claimed Antonio had failed to make any spousal support payments since September 2004; had failed to continue to provide her health insurance; and had failed to obtain the ten-year term life insurance to secure his spousal support obligation, with Linda named as the irrevocable beneficiary thereon. Other assertions of noncompliance were also made, which are not relevant to this appeal.

{¶ 7} The matter was heard before a magistrate on December 30, 2005. A review of the hearing transcript reflects that the companies in which Antonio retained all interest pursuant to the divorce decree were still in existence but were largely inactive. Antonio's primary business, Calabrese Construction Company, ceased activity in 2002 or early 2003. Antonio claimed that after the divorce, the company "just went down." He testified that Calabrese Construction Company had liabilities at the end of 2002 of about $500,000 that had yet to be

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paid. Antonio stated that this was a debt of the corporation, not his personal debt.

*2 {¶ 8} Around the same time Calabrese Construction Company ceased activity, a company named TLC Construction Company ("TLC") was incorporated. The company was owned by Antonio's girlfriend, Lieselotte Flos. Antonio cohabited with Ms. Flos in a home she owned. However, the home was purchased, in part, with funds received from Antonio's pension plan in the amount of $100,000. Antonio stated the funds were provided to Ms. Flos as reimbursement for money she had spent on his business.

{¶ 9} Antonio conceded that TLC was at the same location where Calabrese Construction Company had been located. TLC used equipment owned by the Tony Calabrese Construction Company. There was some contradiction in the testimony as to whether any money was paid for the lease of this equipment. Antonio worked as a construction manager for TLC and did the same type of work at TLC that he had previously done.

{¶ 10} Testimony was introduced that the gross receipts for TLC were just over $400,000 in 2003 and reduced to just over $200,000 in 2004. Many financial records were not available for review, and several discrepancies were not accounted for at the hearing.

{¶ 11} Antonio testified that between April 2004 and November 2004, he was paid $750 per week. He stated that his work is a seasonal type of employment and that during the months he is unemployed, he receives compensation of $190 per week. He indicated that he made an annual salary of $27,800. He claimed he did not have any other sources of income. Antonio further stated he had monthly expenses of $1,811. He testified that TLC paid for a lease on his vehicle. No documentation was provided to substantiate the amount of Antonio's income and expenses for 2003, 2004, or 2005.

{¶ 12} Antonio admitted that he had not paid any spousal support to Linda since September 2004. He also admitted that he failed to maintain health insurance coverage for Linda. However, he indicated that he no longer received health insurance coverage from TLC. Ms. Flos confirmed that TLC no longer provided health coverage. Antonio also admitted that he allowed the life insurance coverage to expire on December 17, 2004. He stated he could no longer afford to maintain this coverage.

{¶ 13} Linda testified that she had been working for Howard Hanna, a real estate company, since 1994. She testified that she earned between $8,000 and $9,000 in 2003 and a comparable amount in 2004. She stated she had been working in real estate since 1986. She testified she was unable to type because of arthritis in her hand. She felt her age and the fact that she has arthritis were inhibiting her ability to obtain other employment. She had a monthly mortgage expense of $1,300 per month and testified she had total monthly expenses in excess of $3,000 per month. Here again, no documentation was provided. Plaintiff's counsel argued that assuming Linda's expenses were $3,000 per month, she did not need $4,000 per month from Antonio. Linda stated she had not been paid spousal support since September 2004.

*3 {¶ 14} The magistrate issued a decision with findings of fact and conclusions of law on March 23, 2006. The magistrate granted the motion to modify child support and found that Antonio's spousal support obligation was to be reduced from $4,000 per month to $2,000 per month to be applied retroactively to November 30, 2004. The magistrate found that Antonio was in contempt for failing to make any spousal support payments over a period of 16 months, and determined an arrearage of $38,000 as of December 31, 2005. However, the magistrate found Antonio was not in contempt for failing to continue health insurance coverage for Linda or to maintain her as a beneficiary of life insurance, because he had demonstrated an inability to pay for these coverages. The magistrate granted Linda's motion for attorney fees and awarded her $7,000 for her legal fees expended to enforce the order.

{¶ 15} Both parties filed objections to the magistrate's decision. On June 27, 2006, the trial court overruled the objections and adopted the magistrate's decision in its entirety.

{¶ 16} Antonio filed this appeal, raising two assignments of error for our review. Although the assignments raise issue with the magistrate's decision, we shall treat them as challenging the trial court's final ruling that was appealed herein and that adopted the magistrate's decision. Antonio's first assignment of error provides the following:

{¶ 17} "I. The magistrate abused her discretion and committed prejudicial error by failing to terminate appellant's current spousal support obligation."

{¶ 18} In domestic relations matters, a trial court

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possesses broad discretion to determine spousal support issues, including spousal support modification. See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218.Therefore, a trial court's decision regarding the modification of spousal support will not be disturbed on appeal unless the trial court abused that discretion. *Id.* An abuse of discretion connotes that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Id.* at 219.

{¶ 19} R.C. 3105.18 governs a trial court's authority to terminate or modify a spousal support order. In order for a trial court to modify the amount or terms of spousal support, the court must have jurisdiction to make the modification as provided in R.C. 3105.18(E). Here the parties do not dispute that the court has such jurisdiction. Indeed, the divorce decree authorized the court to modify the spousal support.

{¶ 20} Once jurisdiction is established, the court must assess whether the circumstances of either party have changed. R.C. 3105.18(E). 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). Further, a change in circumstances necessary to modify spousal support must be substantial. *Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703, 706, appeal not allowed 77 Ohio St.3d 1480.

*4 {¶ 21} Here again, the parties do not dispute that there has been a change in circumstances. The trial court found that there was a change in circumstances with respect to the caliber of projects Antonio worked on since the divorce. The court found that there was credible testimony that "in the past the company had larger projects such as major road construction, now it has smaller scale projects such as installing cement driveways and roadwork."The court also considered the fact that Antonio was older and had slowed down with respect to his various business entities. After considering the testimony concerning Antonio's income and expenses as well as the financial status of his business entities and TLC, the court found there had been a change of circumstances.

{¶ 22} Once a trial court finds that there has been a change of circumstances, the court must then determine if spousal support is still necessary and, if so, in what amount. *Kucmanic v.. Kucmanic* (1997), 119 Ohio App.3d 609, 613, citing *Bingham v. Bingham* (1991), 9 Ohio App.3d 191.In determining the appropriateness and reasonableness of the award, the trial court must look to the relevant factors listed in R.C. 3105.18(C), which include the following:
"(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;
"(b) The relative earning abilities of the parties;
"(c) The ages and the physical, mental, and emotional conditions of the parties;
"(d) The retirement benefits of the parties;
"(e) The duration of the marriage;
"(f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;
"(g) The standard of living of the parties established during the marriage;
"(h) The relative extent of the education of the parties;
"(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;
"(j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;
"(k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;
"(l) The tax consequences, for each party, of an award of spousal support;
"(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;
"(n) Any other factor that the court expressly finds to be relevant and equitable."

{¶ 23} In this case, the trial court reviewed the testimony provided concerning the above factors. In addition to finding a change with respect to the varying business entities and considering that Antonio was older and had slowed down, the court also found that the evidence showed the financial interests of Antonio and Ms. Flos were clearly intertwined. The court determined "based on the drop in gross receipts of TLC Corporation between 2003 and 2004, and after consideration of all of the factors of R.C. 3105.18(C), most notably, 3105.18(C)(1)(a), the income of the parties; (b) the relative earning abilities of the parties; and (c) the ages of the parties,

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* * * that spousal support should be reduced by one-half to $2,000 per month."

*5 {¶ 24} Antonio claims that this reduction in his spousal support obligation was not reasonable and that his spousal support obligation should have been terminated. We observe that Antonio's motion did not seek a termination of spousal support, but rather, Antonio requested that the court modify his support obligations to "be more in line with his financial ability to pay."

{¶ 25} As the party seeking a modification in spousal support, Antonio maintained the burden of demonstrating that a reduction, or termination, was warranted. See *Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703;*Goldberg v. Goldberg*, Cuyahoga App. Nos. 86588 and 86590, 2006-Ohio-1948.Although Antonio provided testimony concerning his income and expenses as well as the financial status of the varying businesses, little documentation was provided to substantiate this testimony, and in many instances, the record is incomplete.

After reviewing the record, we find that the trial court did not abuse its discretion by failing to terminate Antonio's spousal support. After weighing the factors in R.C. 3105.18(C)(1), the trial court significantly reduced Antonio's spousal support payments. The court found that Antonio "had reason to know the extent of his cement business income when he entered into the Separation Agreement at the end of June 2002."The court did recognize the decline in the gross receipts for TLC from 2003 to 2004.

{¶ 26} Antonio argues that his income has been significantly reduced since the time of the divorce decree. However, he failed to provide documentation to substantiate this claim. Again, Antonio had the burden of demonstrating that a reduction, or termination, was warranted. His argument that the trial court failed to determine his actual current income is wholly without merit in light of the fact that he failed to meet his burden of providing evidence to substantiate his income. Even so, the trial court did take into consideration the testimony that was provided. The trial court also considered Linda's financial position, which the testimony reflected was essentially unchanged since the time of the divorce.

{¶ 27} Insofar as Antonio argues that the trial court should not have considered Ms. Flos's income, we do not find that any of her income was imputed to Antonio. Antonio also objects to the trial court's finding that their business interests were financially intertwined. Upon our review, we find no abuse of discretion as to this finding, which is supported by the record.

{¶ 28} A review of the record indicates that the trial court considered all relevant factors set forth in R.C. 3105.18(C)(1) and found that a reduction, not a termination, in spousal support was appropriate. Under the circumstances, this court finds that the lower court did not abuse its discretion by failing to terminate spousal support or in its determination to reduce Antonio's monthly spousal support obligation from $4,000 to $2,000 per month.

*6 {¶ 29} Antonio's first assignment of error is overruled.

{¶ 30} Antonio's second assignment of error provides as follows:

{¶ 31} "II. The magistrate abused her discretion and committed prejudicial error by finding the appellant in contempt for failing to comply with his spousal support obligation."

{¶ 32} The trial court found that Antonio was in contempt for failing to make any spousal support payments "over a period of sixteen months while he was working."After retroactively applying the reduction in spousal support, the trial court found an arrearage of $38,000 as of December 31, 2005.

{¶ 33} Antonio argues that he should not have been found in contempt of court for failure to pay spousal support because he was unable to pay the support amount. He further contends that the arrearage calculation exceeds his gross income during the pendency of the motions.

{¶ 34} In *Goldberg*, supra, this Court set forth the standard for reviewing a finding of contempt of court, and stated as follows: "A reviewing court will not reverse the decision of the lower court in a contempt proceeding absent a showing of an abuse of discretion. *Cherwin v. Cherwin*, Cuyahoga App. No. 84875, 2005-Ohio-1999. Contempt is defined in general terms as disobedience of a court order. A prima facie case of contempt is established when the divorce decree is before the court along with proof of the contemnor's failure to comply with it. *Dzina v. Dzina*, Cuyahoga App. No. 83148, 2004-Ohio-4497. Once a prima facie case is shown, the burden shifts to the contemnor to present evidence of his inability to pay or any other defenses that may be available to

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him. *Robinson v. Robinson* (Mar. 31, 1994), Wood App. No. 93WD053."

{¶ 35} We find that the trial court did not abuse its discretion when it found Antonio in contempt of court for failure to pay spousal support. Antonio conceded that he had not made any spousal support payments to Linda since September 2004. The record also reflects that Antonio was working during this time period. The trial court took into consideration the reduction in spousal support when calculating the arrearage. While Antonio complains of his inability to comply, we again find that Antonio failed to provide documentary evidence to substantiate his income and that the trial court's determination was supported by the record.

{¶ 36} Antonio also argues that the court abused its discretion in awarding attorney fees to Linda. R.C. 3109.05(C) requires the trial court to impose reasonable attorney fees on a party who is found in contempt of court for failure to make court-ordered child support payments. Specifically, the statute requires the trial court, in addition to any other penalty or remedy imposed, to "assess all court costs arising out of the contempt proceeding against the person and require the person to pay any reasonable attorney's fees of any adverse party, as determined by the court, that arose in relation to the act of contempt."

*7 {¶ 37} Here, Antonio was found in contempt of court for failing to pay his child support obligation as set forth in the divorce decree. Therefore, the trial court was required by R.C. 3109.05(C) to require Antonio to "pay any reasonable attorney's fees * * * as determined by the court."A review of the record reflects that the court found Linda was "entitled by law to recover her attorney's fees expended to enforce the order" and that the parties agreed that the fees should be "reduced to 35 hours at $200.00 per hour."We find the trial court did not err in granting Linda's motion for attorney fees and awarding her a reasonable amount of her requested attorney fees.

{¶ 38} Antonio's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant her costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., A.J., and MARY EILEEN KILBANE, J., concur.
Ohio App. 8 Dist.,2007.
Calabrese v. Calabrese
Slip Copy, 2007 WL 1633059 (Ohio App. 8 Dist.), 2007 -Ohio- 2760

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H
Kucmanic v. Kucmanic
Ohio App. 8 Dist.,1997.

Court of Appeals of Ohio,Eighth District, Cuyahoga County.
KUCMANIC, Appellant,
v.
KUCMANIC, Appellee.
No. 71104.

Decided May 22, 1997.

Husband filed motion to modify his spousal support obligations imposed following divorce. The Court of Common Pleas, Cuyahoga County, granted motion and reduced amount of husband's support payments. Wife appealed. The Court of Appeals, Patton, J., held that: (1) trial court's modification order set forth basis of decision in adequate detail, and (2) wife did not show that court abused its discretion in finding that husband's medical condition which prevented him from working overtime was "changed circumstance" which warranted modification.

Affirmed.
West Headnotes
[1] 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
Court of Appeals reviews spousal support modification orders for abuse of discretion. R.C. § 3105.18.

[2] Divorce 134 ⚷243

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k243 k. Judgment or Decree. Most Cited Cases
When imposing spousal support order in first instance, domestic relations court's order must show that it considered all statutory factors. R.C. § 3105.18(C)(1).

[3] 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
Domestic relations court's spousal support modification order should set forth basis for its decision with enough detail to permit proper appellate review; however, order need not examine all statutory factors. R.C. § 3105.18(C)(1), (E).

[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
Domestic relations court's spousal support modification order, which found that husband's current medical condition prevented him from working enough overtime to keep his income at same level it had been at time of divorce, adequately set forth basis for conclusion that changed circumstances justified modification, even though other statutory factors were not mentioned. R.C. § 3105.18(C)(1), (E, F).

[5] Divorce 134 ⚷285

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k278 Appeal
134k285 k. Record. Most Cited Cases
In absence of transcript of spousal support modification proceeding, wife failed to show that trial court abused its discretion in concluding that husband's medical condition which prevented him

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from working overtime was "changed circumstance" which warranted modification of spousal support obligation. R.C. § 3105.18(C)(1), (E, F); Rules App.Proc., Rule 9(B).

****1206 *610** Joseph & Assoc., and Edward L. Joseph, Cleveland, for appellant.
Zachin, Rich & Sutula, Jonathan A. Rich, Robert I. Zashin, Cleveland, for appellee.
***611** PATTON, Judge.
Appellant-wife Nada Kucmanic appeals from a domestic relations court order that modified the amount of spousal support paid by appellee-husband Stjepan Kucmanic. The issue presented is whether the domestic relations court abused its discretion by finding that husband's health problems, which prevented him from working his usual overtime hours, constituted a valid change of circumstance in husband's earning capacity sufficient to warrant a reduction in spousal support.

Wife and husband were divorced in 1990 after nearly twenty-four years of marriage. After dividing the marital assets, the domestic relations court ordered husband to pay wife $150 per week in spousal support for a period of forty months. Wife challenged the length and reasonableness of the spousal support award on direct appeal. We found that the domestic relations court failed to consider the relative earnings capabilities of the parties, the standard of living established during the marriage and wife's contributions to the household as a homemaker. Consequently, we remanded to the domestic relations court for a further consideration of these factors. See *Kucmanic v. Kucmanic* (Apr. 16, 1992), Cuyahoga App. No. 60205, unreported, 1992 WL 80045.

On December 8, 1993, the domestic relations court issued a new spousal support order. This time, it required husband to pay $1,500 per month for the first three years and five months, and $1,000 per month for the succeeding five years and six months. Additionally, the domestic relations court made the spousal support order retroactive to the date of the divorce, thus finding that husband owed wife $21,000 in back support. It ordered husband to pay off this arrearage with $500 monthly payments. Finally, the domestic relations court ordered husband to pay $3,500 toward wife's attorney fees.

Husband appealed this new order and we affirmed, finding that the domestic relations court's new order "reflected careful consideration of the factors listed in R.C. 3105.18(C) and the supporting evidence offered by the parties." See *Kucmanic v. Kucmanic* (Mar. 2, 1995), Cuyahoga App. No. 66851, unreported, at 4, 1995 WL 92169.

Husband then filed the instant motion to modify spousal support. In that motion, he complained that the December 1993 spousal support order had calculated his earnings based upon the average overtime pay he earned during the period between his divorce and the order. He claimed that health problems prevented him from working the same amount of overtime hours, and he could not keep his current spousal support obligation without adversely affecting his own lifestyle. Moreover, he claimed that the $21,000 lump sum judgment had stretched his financial resources to their limit.

***612** The domestic relations court tried the issue and entered an order modifying husband's support order. The order reads:

"The Court finds based upon the evidence that there has been a substantial change of circumstances with regard to the earning ability of the parties. Specifically, that Defendant's ability to work overtime has become limited due to his worsening medical conditions. As such, the Court finds that ****1207** Defendant's motion to modify support must be granted."

The domestic relations court ordered husband to pay spousal support of $500 per month, in addition to $500 per month on the $21,000 support arrearage. The court ordered husband to make support payments, barring certain contingencies, for sixty-six months. In addition, the domestic relations court specifically declined to reserve jurisdiction to extend the duration of spousal support beyond the time period set forth in its original remand order, but did retain jurisdiction to modify the order up to June 1, 1999. These orders form the basis for the appeal.

Wife argues that the court failed to justify a modification of support because husband did not demonstrate that his physical inability to continue working overtime constituted a substantial change in circumstances.

[1] R.C. 3105.18(E) states that the court may modify the amount or terms of a spousal support order upon a determination that "the circumstances of either party have changed." A "change of circumstances" includes, but is not limited to, "any increase or involuntary decrease in the party's wages, salary,

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bonuses, living expenses, or medical expenses." See R.C. 3105.18(F). We review modification orders for an abuse of discretion. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028, 1030-1031; *Shanley v. Shanley* (1989), 46 Ohio App.3d 100, 546 N.E.2d 477.

Ordinarily, we could summarily affirm the domestic relations court's order because wife has not provided us with a transcript of the trial. The only transcript ordered concerns a hearing held on wife's motion for attorney fees. Absent a transcript or other evidence, we would be bound by a presumption of regularity in the prior proceedings. See *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 15 O.O.3d 218, 400 N.E.2d 384; *Meadows v. Meadows* (Apr. 18, 1996), Cuyahoga App. No. 69245, unreported, 1996 WL 191765.

But we must consider whether the domestic relations court's order fulfills that court's obligations under R.C. 3105.18. In other words, the issue is whether R.C. 3105.18(E) imposes any duty to set forth a factual basis for the court's decision on the motion to modify. If it does, the domestic relations court's very brief judgment entry would not satisfy that requirement.

[2] ***613** When imposing a spousal support order in the first instance, the domestic relations court's order must show that it considered all the factors enumerated in R.C. 3105.18(C)(1). *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 518 N.E.2d 1197, paragraph one of the syllabus. Modification of a spousal support order is a different matter. The domestic relations court must first determine whether there has been a change in circumstance of either party. See R.C. 3105.18(E).[FN1] If it finds a change of circumstance, it must then determine whether spousal support is still necessary and, if so, in what amount. *Bingham v. Bingham* (1983), 9 Ohio App.3d 191, 9 OBR 302, 459 N.E.2d 231.

FN1. Formerly, it had been said that the change in circumstances must be "substantial." *Leighner v. Leighner* (1986), 33 Ohio App.3d 214, 215, 515 N.E.2d 625, 627; *Thacker v. Thacker* (1991), 74 Ohio App.3d 348, 349-350, 598 N.E.2d 1183, 1184. This requirement was apparently imposed as a result of the Supreme Court's characterization of the change of initial spousal support order would not be helpful. For example, circumstances as "where the economic situation of either or both of the parties drastically changes." *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 419, 75 O.O.2d 474, 485, 350 N.E.2d 413, 426. That statement preceded the amendments to R.C. 3105.18(E) and no longer appears valid in view of the statute's failure to mention the word "substantial." Cf. *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 674 N.E.2d 1159 (absence of word "substantial" from R.C. 3109.04 relating to modification of parental rights and responsibilities means that court should only consider whether there has been a change in circumstance).

Some courts have grafted paragraph one of the syllabus of *Kaechele* onto motions to modify spousal support. This apparently stems from the holding in *Leighner, supra,* that once the court determines that a change of circumstance exists, it must then consider whether the support order should be modified after consideration of all relevant factors, including those listed in R.C. 3105.18. 33 Ohio App.3d at 215, 515 N.E.2d at 626-627; *Thacker v. Thacker, supra.*

****1208** [3] We find, however, that there is no express requirement that the domestic relations court's order granting or denying a motion to modify spousal support reexamine *in toto* the factors listed in R.C. 3105.18(C)(1). The domestic relations court should set forth the basis for its decision with enough detail to permit proper appellate review. *Graham v. Graham* (1994), 98 Ohio App.3d 396, 399-400, 648 N.E.2d 850, 851-853. As a practical matter, however, a change in circumstance for one spouse as found under R.C. 3105.18(F) will not affect, for the most part, the otherwise static factors contained in R.C. 3105.18(C)(1). Consequently, a rehash of findings made in the initial spousal order would not be helpful. For example, new findings stating the length of the parties' marriage, their standard of living during the marriage, or the relative extent of their education would add nothing new to the spousal support determination.

[4] In this case, the domestic relations court found that husband's current medical condition prevented him from working enough overtime to keep his ***614** income at the same level it had been at the time of the divorce. Of the factors set forth in R.C. 3105.18(C)(1), only subsection (a), relating to the income of the parties, would arguably apply. This consideration goes to the heart of the modification issue and would seem to be so intuitively obvious as to require no further elaboration by the court. It may

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be that different facts would compel a more complete finding by the court, but this is not such a case.

[5] As we previously stated, wife has not presented any evidence to demonstrate why the domestic relations court erred by modifying the spousal support order. Wife claims that she presented evidence that husband's salary actually increased despite decreasing his overtime, and that this fact is substantiated by documents in the record. This claim is without merit for several reasons.

First, the cancelled checks that wife claims substantiate her position are not paychecks-they are dividend checks in the amount of $22.50 each. Second, those checks are not current-they date from 1990. We fail to see how husband's income for the tax year 1990 would be relevant to contest a modification motion filed in February 1996, especially when the motion to modify support claimed that husband's then-current circumstances had changed. Third, even were these checks husband's current paychecks and thus relevant to the modification issue, we have no indication that the domestic relations court actually admitted those checks into evidence. The exhibits are marked, but without a transcript we have no way of knowing what exhibits, if any, were admitted. Fourth, even if wife produced valid copies of the exhibits actually admitted into trial, the absence of a transcript would make it impossible for us to determine in context what weight the domestic relations court gave those exhibits. Spousal support modification orders are reviewable for an abuse of discretion. *Booth, supra.* Without a transcript we cannot say that the domestic relations court acted arbitrarily or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 5 OBR 481, 450 N.E.2d 1140.

App.R. 9(B) requires the appellant to order from the reporter "a complete transcript or a transcript of the parts of the proceedings not already on file as the appellant considers necessary for inclusion in the record * * *." The duty is always on the appellant to include those portions of the record that will demonstrate the claimed error. *Bates & Springer, Inc. v. Stallworth* (1978), 56 Ohio App.2d 223, 229, 10 O.O.3d 227, 230-231, 382 N.E.2d 1179, 1185. In her praecipe filed pursuant to Cuyahoga App. Loc.R. 4, wife stated, "no transcript necessary nor is a statement of the facts neccessary [*sic*] as there are no facts in dispute only interpretation of the law." Obviously, this was an erroneous statement because we have found that a transcript is necessary to determine the issues raised in this appeal; therefore, wife failed to fulfill her duty under App.R. 9(B).

***615** Accordingly, we find the domestic relations court's order sufficient to state the basis of the judgment. Because wife failed to present any record which would demonstrate her claim that the court erred by finding husband suffered from deteriorating health, we must presume the regularity of ****1209** the proceedings below. The assigned errors are overruled.

Judgment affirmed.

PORTER, P.J., and O'DONNELL, J., concur.
Ohio App. 8 Dist.,1997.
Kucmanic v. Kucmanic
119 Ohio App.3d 609, 695 N.E.2d 1205

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HMcKenzie v. Southworth
Ohio App. 8 Dist.,2007.

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

Court of Appeals of Ohio,Eighth District, Cuyahoga County.
Julie A. McKENZIE, Plaintiff-Appellee
v.
Edward G. SOUTHWORTH, Defendant-Appellant.
No. 88758.

Decided Aug. 2, 2007.

Civil Appeal from the Cuyahoga County Court of Common Pleas, Domestic Relations Division, Case No. D-235530.

Edward G. Southworth, Pro Se, Pensacola Beach, FL, for appellant.
Stephen E.S. Daray, Westlake, OH, for appellee.

Before: BOYLE, J., SWEENEY, P.J., and COONEY, J.

BOYLE, M.J., J.
***1** {¶ 1} Defendant-appellant, Edward G. Southworth ("husband"), appeals from an August 18, 2006 order emanating from the Domestic Relations Division of the Cuyahoga County Court of Common Pleas, modifying and reducing the amount of alimony he was ordered to pay plaintiff-appellant, Julie A. Southworth, nka McKenzie ("wife"). For the following reasons, we affirm.

{¶ 2} We note at the outset that this is the parties' third appeal since their divorce was finalized on October 20, 1997. Husband and wife were married in 1980, when they were in their mid-to-late thirties. It was the second marriage for each of them and there were no children born as issue.

{¶ 3} Wife filed for divorce in 1994 and that same year, she suffered two strokes that left her partially paralyzed and disabled. At the time of the divorce, husband was employed by United Airlines and his annual income was $127,575. Besides a pendente lite order of spousal support, wife's only income at that time was $841 per month from social security disability ("SSDI").

{¶ 4} In the final divorce decree, the trial court awarded wife half of husband's United Airlines Directed Account Plan ("DAP"), valued at $203,914; half of his United Airlines Employee Stock Ownership Plan ("ESOP"), valued at $26,385; half of his United Airlines Fixed Benefit Retirement Plan; and half of his United States Marine Corps ("USMC") retirement benefits. In addition, the trial court awarded wife $4,200 spousal support, per month, until wife remarried or upon either party's death.

{¶ 5} In *Southworth v. Southworth* (1998), 8th Dist. No. 73525, 1998 Ohio App. LEXIS 6239, 1998 WL 896293 ("*Southworth* I"), husband argued, inter alia, that the trial court abused its discretion when it awarded wife $4,200 per month in spousal support, and did not impute income to her from her portion of his DAP and ESOP. He further maintained that wife should invest the principal amounts of those plans, thus allowing the interest and income gained to be used to offset the $4,200 per month he was ordered to pay in spousal support.

{¶ 6} We affirmed the trial court's decision, reasoning that:

{¶ 7}"Given the fact that wife has no retirement benefits we find the magistrate did not abuse its discretion in awarding wife the DAP and ESOP retirement plans * * *. Husband's argument is illogical, he claims wife could make more money if she took the money out of these funds and invested it thereby increasing her monthly income. This argument misses the point that these two plans are intended to benefit wife in her later years. They are not intended for her present living expenses. Moreover, the magistrate is correct in stating wife would suffer significant tax penalties and lose all future growth if she changed these plans to be

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something other than retirement plans."*Id.* at 9-10.

{¶ 8} We concluded that, "[i]n consideration of the relative earning ability of each party and the fact that wife is disabled for the rest of her life we find the trial court did not abuse its discretion in awarding wife $4,200 per month."*Id.* at 10.

*2 {¶ 9} After competing motions to modify spousal support were subsequently filed by the parties in 1999, the trial court increased husband's spousal support obligation by $150 per month, to $4,350. Husband appealed, claiming that the trial court erred when it increased his monthly obligation, and wife cross-appealed, maintaining that the trial court's increase was not adequate.

{¶ 10} In *Southworth v. Southworth,* 8th Dist. No. 80704, 2003-Ohio-4 (*Southworth* II), husband argued that the trial court erred when it increased his monthly spousal support obligation because it failed to consider wife's increased income that she received from husband's retirement accounts.[FN1]He maintained that the interest earned on the accounts should have been imputed to wife as income and used to decrease his support obligation.

FN1. Following our remand of *Southworth* I (remanded for reasons other than spousal support), the trial court reduced wife's share of husband's DAP account to $169,923. On April 15, 1999, the trial court issued a Qualified Domestic Relations Order ("QDRO") for that amount, "plus any interest and investment earnings or losses attributable thereon for periods subsequent to August 1, 1996, until the date of total distribution."Neither party appealed this order, but on March 30, 2000, husband moved to vacate the DAP QDRO because of the interest (which was also an issue raised in *Southworth* II). On April 15, 1999, the trial court issued QDROs for wife's share of husband's other two United Airlines retirement accounts.

{¶ 11} In *Southworth* II, we stated wife's "portion of the pension account was intended as part of the property division and to provide her with retirement income."*Id.* at ----19.We noted that at that time, wife had not taken any distribution from the QDRO or its interest, because the QDRO order had been stayed pending appeal. We affirmed the trial court's modification, concluding, "[w]hether income from this account should be used to decrease the support obligation in the future is not at issue here[.]"*Id.* at ----19.

{¶ 12} On May 30, 2003, pursuant to an agreed judgment entry, the parties agreed to reduce husband's support obligation by $500 per month, resulting in a $3,850 per month obligation. The agreed modification was due to the possibility that husband's retirement income would decrease when United Airlines filed for bankruptcy.[FN2]

FN2. United Airlines filed for Chapter 11 bankruptcy in 2004.

{¶ 13} On October 1, 2005, the non-qualified portion of husband's United Airlines pension benefits terminated, which reduced his income by $3,560.56 per month, or thirty-one percent, leaving him with a total monthly income of $8,101.96.[FN3]

FN3. The Pension Benefit Guaranty Corporation appealed the bankruptcy court's order terminating United Airlines non-qualified retirement benefits. A federal district court reversed the termination. At the time of the magistrate's decision, the matter had been appealed. Since then, in *In re UAL Corp.,* 468 F.3d 444, the Seventh Circuit dismissed the appeal as unripe.

{¶ 14} Wife's monthly income at that time was $6,599.92.[FN4]

FN4. The parties stipulated to their respective incomes. Husband received $4,900 per month from his United Airlines qualified pension, $1,406 per month in social security benefits, and $1,795.25 per month from his USMC pension. Wife received $1,035.20 per month from SSDI, $1,489.97 from husband's qualified United Airlines pension, $224.75 per month from his USMC pension, and $3,850 in spousal support.

{¶ 15} On October 5, 2005, husband filed a motion to

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terminate spousal support, claiming a substantial change in circumstances existed. Husband moved the court to terminate his spousal support obligation as of October 9, 2004, the date wife had reached the age of fifty-nine and a half, claiming she no longer suffered penalties for early withdrawal of retirement benefits.

{¶ 16} The magistrate issued her decision on May 2, 2006, granting husband's motion to terminate in part and denying it in part.[FN5]She modified husband's monthly spousal support obligation to $3,000 per month, an $850 reduction. The trial court adopted the magistrate's decision in its entirety after considering husband's objections, on August 18, 2006. It is from this order that husband timely appealed, raising the following two assignments of error:

FN5. The parties declined to offer testimony and requested the matter be decided upon documents and written final arguments.

{¶ 17}"1. The court erred in failing to impute and identify reasonable income from lump sum retirement distributions directed by the trial court for the retirement support of and received by former spouse.

*3 {¶ 18} {¶ 15} "2. The court erred in failing to explain any of the amorphous $850.00 reduction of spousal support as a function of error # 1, former spouse's reduced expenses and/or appellant's reduced income."

{¶ 19} In *Southworth* II, this court set forth the standard an appellate court must abide by when reviewing modifications of spousal support:

{¶ 20}"A judge has discretion to modify an award of spousal support, and we will not reverse absent an abuse of that discretion. [*Kucmanic v. Kucmanic* (1997), 119 Ohio App.3d 609, 612, 695 N.E.2d 1205.] When addressing such motions, the judge must determine whether either party has had a change of circumstances, and whether such change requires modification of the support award. [*Id.* at 613, 695 N.E.2d 1205.]"

{¶ 21} In his first assignment of error, husband maintains that the magistrate erred by not imputing income of $373,875.88 to wife from her share of the ESOP and DAP funds, an amount he claims would provide wife with "$3,115.63 monthly support in perpetuity."

{¶ 22} In a detailed and thorough decision, the magistrate found that both parties had already received their shares of the ESOP and DAP funds. However, it was not evident from the documentation submitted by the parties whether either of them still had these funds. The magistrate noted that wife claimed that she spent $180,000 of the DAP funds on attorney's fees ($57,900), state and federal income taxes, real estate commissions, moving expenses, and purchasing her home. Wife also spent approximately $119,000 in 2002 and 2003 for state and federal taxes and living expenses during a time when husband was not paying her spousal support.

{¶ 23} The magistrate stated, "[husband] has not argued that [wife] does indeed have these assets. He has concentrated his arguments on the principle that she ought to have an income stream derived from the assets while ignoring the reality that they no longer exist."The magistrate noted that husband bore "some of the responsibility for the loss of those assets to pay for litigation that he initiated at a time when he was better able to absorb the cost with his full income as a pilot, than [wife] who was disabled and relying upon spousal support to get by."

{¶ 24} Nevertheless, the magistrate acknowledged that husband "suffered a serious blow to his financial health in his retirement years" and that this was a misfortune that wife should share. Noting that husband experienced an unforeseeable thirty-one percent decline in income, the magistrate modified his monthly spousal support obligation to $3,000.

{¶ 25} After a review of the evidence submitted and the magistrate's decision, we conclude that the trial court did not abuse its discretion when it adopted the decision in its entirety. We also agree with the magistrate that "[w]hat [husband] argues is difficult to grasp from his writings and exhibits" and the information attached to his motion and his trial brief, "is difficult to decode * * * and is in large part incomprehensible."

*4 {¶ 26} Thus, husband's first assignment of error lacks merit.

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{¶ 27} In his second assignment of error, as much as we can decipher, husband claims that the trial court erred when it arbitrarily reduced wife's spousal support by $850, contrary to the evidence submitted. We disagree.

{¶ 28} The magistrate considered that husband had experienced a reduction in income of thirty-one percent. She also reviewed husband's and wife's monthly expenses, and then reduced his monthly spousal support obligation by $850, or approximately twenty-one percent.

{¶ 29} Under R.C. 3105.18(F), a change in circumstances is required to modify spousal support and includes, but is not limited to, any increase or involuntary decrease in a party's wages, salary, bonuses, living expenses, or medical expenses. However, there is nothing in the statute that requires a spousal support obligation to be reduced by the same amount as an income reduction. There are many other factors that go into that determination. See 3105.18(C)(1)(a). We conclude that the magistrate extensively considered the requisite factors and the trial court did not err when it fully adopted the magistrate's decision.

{¶ 30} Therefore, we conclude that husband's second assignment of error is also without merit.

{¶ 31} The judgment of the Cuyahoga County Court of Common Pleas, Domestic Relations Division, is affirmed.

It is ordered that appellee recover from appellant costs herein taxed. The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, P.J. and COLLEEN CONWAY COONEY, J., concur.
Ohio App. 8 Dist.,2007.
McKenzie v. Southworth
Slip Copy, 2007 WL 2206864 (Ohio App. 8 Dist.), 2007 -Ohio- 3915

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

Court of Appeals of Ohio, Tenth District, Franklin County.

John F. BIRATH, Plaintiff-Appellant,

v.

Jane C. BIRATH (now Wilson), Defendant-Appellee.

No. 04AP-929.

May 10, 2005.

Background: Former husband moved to modify or terminate spousal support. The Court of Common Pleas, Franklin County, Domestic Relations Division, Case No. 85DR09-2900, granted motion, and former wife appealed. The Court of Appeals reversed and remanded. On remand, the trial court denied motion, and former husband appealed.

Holdings: The Court of Appeals, Klatt, J., held that:

1(1) trial court did not abuse its discretion in holding that no change of circumstances had occurred warranting modification or termination, and

3(2) former wife could not be required to liquidate divorce assets to reduce her need for spousal support.

Affirmed.

Brown, P.J., concurred separately with statement.

[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

Divorce 134 ⚷247

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k247 k. Commencement and Termination. Most Cited Cases

Trial court did not abuse its discretion in ruling that increase in former wife's wages from $17,316 per year to $34,086 per year did not amount to change in circumstances warranting termination or modification of spousal support, where such increase occurred over 12-year period and represented five percent annual increase in salary. R.C. § 3105.18(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

Divorce 134 ⚷247

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k247 k. Commencement and Termination. Most Cited Cases

Trial court did not abuse its discretion, in ruling that increased value of former wife's investments did not amount to change in circumstances warranting termination or modification of spousal support, where marital assets awarded to former wife at time of divorce funded majority of savings and investment accounts at issue and some stock was purchased from sale of separate property awarded at time of divorce. R.C. § 3105.18(F).

[3] Divorce 134 ⚷238

134 Divorce
134V Alimony, Allowances, and Disposition of Property

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134k230 Permanent Alimony
134k238 k. Defenses and Objections. Most Cited Cases
Former wife could not be required to liquidate divorce assets to reduce her need for spousal support.

Appeal from the Franklin County Court of Common Pleas, Division of Domestic Relations.

Tyack, Blackmore & Liston Co., L.P.A., and Thomas M. Tyack, for appellant.
Stephen W. Daulton & Associates, and Stephen W. Daulton, for appellee.

OPINION

KLATT, J.
*1 {¶ 1} Plaintiff-appellant, John F. Birath, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, denying his motion to modify spousal support for defendant-appellee, Jane C. Birath. Because the trial court did not abuse its discretion, we affirm.

{¶ 2} On March 6, 1986, the trial court filed a judgment entry ordering the termination of John and Jane's marriage. On January 21, 1987, the trial court ordered John to pay Jane $1,150 per month in sustenance alimony and retained jurisdiction to modify the order. In January 1998, John filed a motion to modify or terminate the spousal support order on the basis that circumstances had changed since the January 1987 order. After a hearing, the magistrate found that there had been a change in Jane's financial position warranting a termination of the spousal support order. Over Jane's objections, the trial court adopted the magistrate's report and recommendation granting John's motion and terminating the spousal support order. Jane appealed the decision to this court in *Birath v. Birath* (Dec. 21, 2000), Franklin App. No. 00AP-604. This court reversed the trial court's judgment and remanded for further consideration of whether there had been a change in circumstances.

{¶ 3} On remand, the magistrate determined there had not been a change in circumstances. John raised objections to this finding, but they were overruled. On August 20, 2004, the trial court adopted the magistrate's report and recommendation, thus denying John's motion to modify spousal support. John appeals from this judgment entry.

{¶ 4} On appeal, John assigns the following errors:
[1.] The finding of the magistrate that there was no change in circumstances is contrary to the evidence.
[2.] The finding of the magistrate that the retirement accounts, as found to exist, cannot be accessed by the defendant without tax penalties, is contrary to law.
[3.] The magistrate's finding that there was no change in circumstances is contrary to [R.C.] 3105.18.

{¶ 5} We will address appellant's first and third assignments of error together because they both relate to the magistrate's finding that there was no change in circumstances justifying a modification of spousal support. An appellate court reviews the modification of spousal support under an abuse of discretion standard. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028. Absent a showing that the trial court's attitude was unreasonable, arbitrary or unconscionable, the trial court's judgment will be affirmed. Id.

{¶ 6} A court may modify an order for spousal support if "[t]he court determines that the circumstances of either party have changed." R.C. 3105.18(E). However, we have previously held that the statute does not permit a modification of spousal support unless the change in circumstances is substantial and the parties did not contemplate the change in circumstances at the time of the prior order. *Leignher v. Leignher* (1986), 33 Ohio App.3d 214, 215, 515 N.E.2d 625. Pursuant to R.C. 3105.18(F):
*2 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.

[1] {¶ 7} By these assignments of error, appellant first argues that because appellee's wages have practically doubled during the time appellant has been paying spousal support, there has been a change in circumstances under R.C. 3105.18(F). We find that the trial court did not abuse its discretion in concluding otherwise.

{¶ 8} At the time of the divorce in 1987, appellee was making $17,316 per year as a schoolteacher. By 1999, appellee was making approximately $34,086 per year as a nurse. This represents only a five percent annual increase over 12 years. The parties must have anticipated at the time of the award that appellee would receive at least cost of living increases in her salary. *Birath,* supra. Therefore, we conclude that the trial court did not abuse its discretion in finding the increase in appellee's wages

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over the 12-year period is not a change in circumstances as contemplated by R.C. 3105.18(F).

[2] {¶ 9} Appellant also argues that there has been a change in circumstances because appellee has acquired substantial assets in savings and investment accounts, as well as retirement benefits that can generate income. Again, we find that the trial court did not abuse its discretion in concluding otherwise.

{¶ 10} The magistrate found that the marital assets awarded to appellee at the time of the divorce funded the majority of these accounts. Some stock was purchased from the sale of separate property awarded at the time of the divorce. It was not unreasonable, arbitrary, or unconscionable for the trial court to conclude that the parties must have contemplated at the time of divorce that appellee would take these assets and invest them for her retirement. *Birath,* supra. The parties must also have contemplated that these investments would generate interest or dividend income. Id. Therefore, the trial court did not abuse its discretion in ruling that the increased value of Jane's investments was not a change in circumstances. Thus, appellant's first and third assignments of error are overruled.

[3] {¶ 11} In his second assignment of error, appellant contends that the magistrate's finding that the retirement accounts could not be accessed without a tax penalty is inaccurate. Irrespective of the tax consequences, a party need not liquidate assets awarded to that party upon divorce just to reduce the need for spousal support or to maintain that party's standard of living. *Fulmer v. Fulmer* (May 5, 2000), Trumbull App. No. 98-T-0146 ("Ohio appellate courts have consistently refused to require the party receiving spousal support to invest his or her portion of the marital property division in order to reduce the need for spousal support.").

{¶ 12} Here, as we stated above, the magistrate found that the majority of Jane's assets were awarded to her as part of the division of property in the divorce. A party need not liquidate divorce assets to reduce the need for spousal support. Therefore, whether the accounts could be accessed with or without a tax penalty is irrelevant. Accordingly, appellant's second assignment of error is overruled.

*3 {¶ 13} For the foregoing reasons, we overrule appellant's first, second, and third assignments of error, and affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgment affirmed.

LAZARUS, J., concurs.
BROWN, P.J. concurs separately.
BROWN, P.J., concurring separately.BROWN, J.
{¶ 14} Taking into consideration the broad discretion of the trial court in these matters, I concur in judgment only in that it cannot be found in this case that there has been an abuse of such discretion.

Ohio App. 10 Dist.,2005. .
Birath v. Birath
Slip Copy, 2005 WL 1109657 (Ohio App. 10 Dist.), 2005 -Ohio- 2295

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H Edmondson v. Edmondson
Ohio App. 2 Dist.,1996.
Only the Westlaw citation is currently available.

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

Court of Appeals of Ohio, Second District, Montgomery County.
Ronald L. **EDMONDSON**, Plaintiff-Appellant
v.
Sammie S. **EDMONDSON**, Defendant-Appellee.
No. 15813.

Nov. 29, 1996.

Terry W. Posey, 7460 Brandt Pike, Huber Heights, Ohio 45424, Atty. Reg. No. 0039666 Attorney for Plaintiff-Appellant
L. Anthony Lush, 2160 Kettering Tower, Dayton, Ohio 45423-1001, Atty. Reg. No. 0046565 Attorney for Defendant-Appellee

OPINION

KERNS, J. (By Assignment).
***1** The parties to this action, Ronald and Sammie **Edmondson**, were married on December 26, 1957 and divorced on February 4, 1994, but the cause returned to the Division of Domestic Relations of the Court of Common Pleas of Montgomery County on September 13, 1995, when the plaintiff, Ronald **Edmondson**, filed a motion to terminate or suspend spousal support.

Thereafter, Mr. **Edmondson's** motion was referred to a magistrate who conducted a hearing and recommended that spousal support should be terminated as of November 1, 1995, but the trial court subsequently sustained objections to the magistrate's decision and reestablished spousal support in the amount of $1,250 per month from the date of February 4, 1994. On March 19, 1996, the trial court filed its order setting forth the reasons for its decision, and on March 27, 1996, the plaintiff filed his notice of appeal to this court.

In the appeal, the first of three assignments of error has been set forth by the appellant as follows:

"1. THE TRIAL COURT ERRED IN HOLDING THAT MR. **EDMONDSON**'S RETIREMENT DOES NOT CONSTITUTE A 'CHANGE OF CIRCUMSTANCE'."

Ordinarily, where one party requests modification of an existing order for spousal support, the threshold determination for the court is whether there has been a change in circumstances since the previous support order was made. See, R.C. 3105.18(E)(1). And the party seeking the modification has the burden of proving the change in circumstances. *Martin v. Martin* (1949), 91 Ohio App. 52. Moreover, the change in circumstances must be substantial and must be such as was not contemplated at the time of the prior order. *Bingham v. Bingham* (1983), 9 Ohio App.3d 191. See also, *Leighner v. Leighner* (1986), 33 Ohio App.3d 214.

In the present case, Mr. Edmondson is not in a position to complain that the initial order of the trial court, which was made only nineteen months prior to the filing of the motion for a modification, was burdensome or unfair. Indeed, at that time, he agreed to pay Mrs. Edmondson $1,250 per month until she either died or remarried, and such agreement does not provide that spousal support would terminate when the appellant carried out his preconceived plan to retire after thirty years of service. (T. 5-6-14).

Here, an objective analysis of the evidence presented at the hearing on October 31, 1995, shows that the "change of circumstances", upon which the appellant relies, is based essentially, if not entirely, upon his voluntary retirement at age fifty-five, but Mr. Edmondson admits that he contemplated this change when he agreed to pay $1,250 per month to his former spouse. Hence, the first assignment of error is without merit.

The second assignment of error has been presented as follows:

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"2. THE TRIAL COURT ERRED IN HOLDING THAT MR. EDMONDSON RETIRED IN ORDER TO AVOID SPOUSAL SUPPORT OBLIGATIONS."

In rendering its decision, the trial court made a factual statement that the appellant "planned his retirement, at least in part, to avoid his spousal support obligations," and this finding provides the sole basis for the second specification of error.

*2 As a matter of record, the finding of the trial court is supported by some reasonable inferences, but in any event, such finding was not controlling, or even of major importance, in the determination of whether the parties had experienced an unplanned change of circumstances. As heretofore indicated, the appellant knew of his forthcoming retirement when he made the agreement to pay spousal support in the stated amount. See, *Leighner v. Leighner, supra;* Nash v. Nash (1945), 77 Ohio App. 155. Moreover, the trial court may have been influenced to some extent by the fact that Mr. Edmondson is now working on a farm in Missouri which is owned by a college teacher with whom he has a romantic relationship. (T. 14).

In the case of *Bauer v. Bauer* (April 15, 1982), Montgomery App. No. 7596, unreported, which has many characteristics similar to those of the present case, this court, speaking through Judge Sherer, commented as follows upon an argument similar to the one posited by the second assignment of error:

"There can be no appeal from the reason given for a judgment. This appeal must be considered to be from the judgment itself and the question to be determined is whether it is correct, whether, in view of all the evidence adduced, it can be said to be so unreasonable as to constitute an abuse of discretion."

Likewise, in this proceeding, there is substantial credible evidence to refute the appellant's claim of a change of circumstances which might justify a reduction in support, and the alleged error is therefore overruled.

The third assignment of error challenges the judgment as follows:

"3. THE TRIAL COURT'S DECISION AND JUDGMENT SUSTAINING DEFENDANT'S OBJECTIONS IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND RESULTS IN BAD PUBLIC POLICY."

Ordinarily, a motion to modify sustenance support payments invokes the discretionary authority of the trial court. See, *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. And in the usual case, the order of the trial court allowing or disallowing a change in spousal support will not be disturbed in the absence of a showing of an abuse of discretion. See, *McCoy v. McCoy* (1995), 105 Ohio App.3d 651;*Bauer v. Bauer, supra.*

Here, the undisputed evidence discloses, among other things, that Ronald **Edmondson** harbored an abiding intention to retire before he made his spousal support agreement, and nothing appears in the evidence to suggest that Mrs. **Edmondson** or her husband agreed or anticipated that voluntary retirement would terminate or suspend her support payments prior to death or remarriage.

As argued by the appellant, this court has held that a reduction in income due to voluntary retirement is literally a change of circumstances. *Lewis v. Lewis* (May 26, 1987), Clark App. No. 2264, unreported; *Melhorn v. Melhorn* (January 30, 1989), Montgomery App. No. 11139, unreported. But the court also recognized in those cases that retirement alone is not necessarily a change as between the parties which might justify the termination or suspension of support. And the record in the instant case, as a whole, under all of the circumstances, fails to reveal any semblance of an abuse of discretion. Accordingly, the third assignment of error is overruled.

*3 Finding no prejudicial error, therefore, the judgment of the trial court will be affirmed.

BROGAN, P.J., concurs.GRADY, J., concurring:
While I believe that the "circumstances" which a movant must show have changed substantially are those which were a part of the record before the court, and not merely those known to one or both of the parties, I am satisfied that on the facts before it the trial court did not abuse its discretion when it denied the motion to reduce spousal support.

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(Judge Joseph D. Kerns, Retired from the Court of Appeals, Second Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)
Ohio App. 2 Dist., 1996.
Edmondson v. Edmondson
Not Reported in N.E.2d, 1996 WL 685783 (Ohio App. 2 Dist.)

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CReveal v. Reveal
Ohio App. 2 Dist.,2003.

Court of Appeals of Ohio,Second District,
Montgomery County.
REVEAL, Appellee,
v.
REVEAL, Appellant.
No. 19812.

Decided Oct. 3, 2003.

Former husband moved to modify spousal support obligation based on material changes in circumstances since divorce. The Court of Common Pleas, No. 1986-DR-01220, denied modification motion. Husband appealed. The Court of Appeals, Montgomery County, Brogan, J., held that: (1) 250% increase in value of former wife's retirement account in 15 years since divorce did not warrant reduction in husband's spousal support obligation, and (2) wife's eligibility for retirement benefits did not warrant reduction in husband's spousal support obligation.

Affirmed.

Grady, J., dissented and filed opinion.

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
To satisfy the statutory test for modification of spousal support order, the change in circumstances must be one that is substantial and not contemplated at the time of the prior order. R.C. § 3105.18(C)(1).

[2] 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
The burden of showing that a reduction of spousal support is warranted is on the party who seeks the reduction. R.C. § 3105.18(C)(1), (E, F).

[3] 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
Ordinarily, a motion to modify sustenance support payments to a former spouse invokes the discretionary authority of the trial court. R.C. § 3105.18(C)(1), (E, F).

[4] 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
In the usual case, an order of the trial court allowing or disallowing a change in spousal support will not be disturbed in the absence of a showing of an abuse of discretion. R.C. § 3105.18(C)(1), (E, F).

[5] Divorce 134 ⚷245(2)

134 Divorce

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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
Increase of 250% in value of former wife's retirement account in 15 years since divorce decree was entered was not a substantial change of circumstances not contemplated by parties which would warrant reduction in former husband's spousal support obligation; rise in value was not remarkable. R.C. § 3105.18(C)(1), (E, F).

[6] 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
Former wife's eligibility for retirement benefits was not a substantial change of circumstances not contemplated by parties which would warrant reduction in former husband's spousal support obligation, where husband knew that wife would be eligible to receive retirement benefits at age 59-1/2 and yet agreed to pay her alimony until her death or remarriage. R.C. § 3105.18(C)(1), (E, F).

****1132*759** F. Ann Crossman, Dayton, for appellee.
Timothy N. Tye, Dayton, for appellant.
BROGAN, Judge.
{¶ 1} Danny L. Reveal, M.D., appeals from the trial court's refusal to reduce the spousal support he was ordered to pay his ****1133** former wife, Lynn, back in 1987 when the Reveals were divorced.

{¶ 2} The Reveals were married in 1961 and had four children. In the final divorce decree, the court ordered Danny to pay Lynn $72,000 a year in "alimony" payable at $6,000 per month until Lynn died or remarried. The court retained jurisdiction to review the alimony award. Danny was ordered to assign Lynn $318,000 out of his interest in a certain profit-sharing plan in accordance with a stipulated qualified domestic relations order.

{¶ 3} Danny remarried in 1988 and has two children from that marriage, ages 13 and 11.

{¶ 4} In March 2002, Danny moved to modify the spousal support (previously "alimony") award, contending that there had been material changes in his circumstances since the divorce. At the hearing, Danny testified that the income from his surgical practice was anticipated to drop from $315,000 in 2001 to approximately $215,000 in 2002. He explained that reimbursements from insurance carriers and Medicare had decreased substantially. He testified that he presently had approximately $200,000 in two separate retirement accounts.

{¶ 5} On cross-examination, Dr. Reveal admitted that his medical corporation provides him a leased car valued at $400 a month and pays for his family's health ***760** insurance in the amount of $1,000 a month. In addition, Dr. Reveal indicated that he usually receives an annual bonus payment of $10,000 towards his 401(K) plan.

{¶ 6} Lynn Reveal testified that she was 60 years of age and that she had not remarried since the divorce. She said that she lives alone on her spousal support. Although she earned two associates degrees over the years, she said that she was presently unemployed. She acknowledged that her retirement account had a value as of May 2002 of $792,410 with income of $5,800 annually.

{¶ 7} In denying Dr. Reveal's motion to modify his spousal support obligation, the magistrate made the following findings:

{¶ 8}"At the time of the parties' divorce, Dr. Reveal filed an affidavit indicating that his annual income was $296,000. The court finds that defendant has failed to demonstrate that a substantial change in circumstances has occurred since the initial determination of spousal support in this matter. In the tax year 2001, Dr. Reveal had annual income of $315,000. For the tax year 2002, Dr. Reveal's own employee information indicates that his income could be anywhere from $250,000 to $300,000. The court finds that there has been no substantial change in Dr. Reveal's income since the initial award for spousal support. Dr. Reveal also argues that as a result of his becoming remarried and having two minor children

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in his household, this would justify a decrease in his spousal support obligation. The court does not find this argument to be persuasive. Dr. Reveal cannot voluntarily enter into another relationship and incur additional expenses that could result in a reduction in his spousal support obligation. Additionally, Dr. Reveal did not demonstrate that the responsibilities of his new family affect his ability to pay the spousal support in any fashion.

{¶ 9} "Additionally, the court has considered that the plaintiff is 60 years old and very unlikely to ever be able to obtain gainful employment. Although plaintiff's IRA account has increased substantially since the parties' divorce, that in and of itself does not constitute a substantial change in circumstances that would warrant a decrease in spousal support. Although defendant requested that the court **1134 take judicial notice of the interest rate on U.S. Treasury Notes, no evidence was submitted demonstrating that plaintiff was realizing any income from her investments."

{¶ 10} In overruling Dr. Reveal's objection to the magistrate's report, the trial court noted that although Lynn Reveal's IRA accounts have increased since the divorce, the increase would have been contemplated at the time of the divorce. The court noted that Mrs. Reveal had monthly living expenses of $5,489.07 and Dr. Reveal had expenses totaling $4,650. The court concluded that Dr. Reveal had failed to demonstrate that there was a substantial change in his circumstances from the initial award in 1987.

***761** {¶ 11} Dr. Reveal argues that the trial court abused its discretion in denying his modification motion because Mrs. Reveal's retirement account grew by approximately 250 percent from 1987 to the present. Dr. Reveal argues that this fact amounts to a substantial change in circumstances justifying the modification of his spousal support obligation to Mrs. Reveal.

{¶ 12}R.C. 3105.18(E) provides that the court that entered the divorce decree does not have jurisdiction to modify the amount of alimony or spousal support unless the court determines that the circumstances of either party have changed. R.C. 3105.18(F) provides that a change of 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.

{¶ 13}R.C. 3105.18(C)(1) provides that in determining whether spousal support is appropriate and reasonable and in determining its amount and "duration" the court shall consider, inter alia, the retirement benefits of the parties.

[1][2][3][4] {¶ 14} The circumstances that a court must find have changed to support modification of a spousal support order are those set out at R.C. 3105.18(C)(1)(a) through (n) as they pertain to either party. To satisfy that test, "the change must be one that is substantial and not contemplated at the time of the prior order." *Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703, 706, 676 N.E.2d 1249. The burden of showing that a reduction of spousal support is warranted is on the party who seeks the reduction. *Haninger v. Haninger* (1982), 8 Ohio App.3d 286, 8 OBR 380, 456 N.E.2d 1228. Ordinarily, a motion to modify sustenance support payments invokes the discretionary authority of the trial court. See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 5 OBR 481, 450 N.E.2d 1140. And, in the usual case, the order of the trial court allowing or disallowing a change in spousal support will not be disturbed in the absence of a showing of an abuse of discretion. See *McCoy v. McCoy* (1995), 105 Ohio App.3d 651, 664 N.E.2d 1012;*Bauer v. Bauer* (Apr. 15, 1982), Montgomery App. No. 7596, 1982 WL 3719.

{¶ 15} In *Edmondson v. Edmondson* (Nov. 29, 1996), Montgomery App. No. 15813, 1996 WL 685783, this court upheld a trial court's refusal to modify a spousal-support order wherein a husband agreed to pay his former spouse $1,250 a month until she died or remarried. Judge Kerns noted in that court's opinion:

{¶ 16}"Here, the undisputed evidence discloses, among other things, that Ronald Edmonson harbored an abiding intention to retire before he made his spousal support agreement, and nothing appears in the evidence to suggest that Mrs. Edmonson or her husband agreed or anticipated that voluntary retirement would terminate or suspend her support payments prior to death or remarriage.

{¶ 17} "* * *

****1135*762** {¶ 18} "As argued by the appellant, this

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court has held that a reduction in income due to voluntary retirement is literally a change of circumstances. *Lewis v. Lewis* (May 26, 1987), Clark App. No. 2264, unreported [1987 WL 11818];*Melhorn v. Melhorn* (January 30, 1989), Montgomery App. No. 11139, unreported [1989 WL 8452]. But the court also recognized in those cases that retirement alone is not necessarily a change as between the parties which might justify the termination or suspension of support. And the record in the instant case, as a whole, under all of the circumstances, fails to reveal any semblance of an abuse of discretion. Accordingly, the third assignment of error is overruled."

[5][6] {¶ 19} Dr. Reveal certainly knew that Lynn Reveal would be eligible to receive her retirement at age 59 1/2 and yet he agreed to pay her alimony until her death or remarriage. He could have stipulated that the alimony was subject to reduction upon Lynn's receiving retirement benefits, but he did not. It is also not clear that Mrs. Reveal would have agreed to such a stipulation. We see no abuse of discretion present in the trial court's refusal to find that there was no substantial change of circumstances not contemplated by the parties. The rise in value of Mrs. Reveal's retirement account since 1987 was not remarkable either. The assignment of error is overruled.

{¶ 20} The judgment of the trial court is affirmed.

Judgment affirmed.

FREDERICK N. YOUNG, J., concurs.
GRADY, J., dissents.
GRADY, Judge, dissenting.
{¶ 21} I respectfully dissent from the majority's decision and would instead hold that the domestic relations court abused its discretion when it failed to find on the record before it that a substantial change of circumstance occurred that warrants a modification of spousal support pursuant to R.C. 3105.18(E).

{¶ 22} We said in *Joseph v. Joseph* (1997), 122 Ohio App.3d 734, 702 N.E.2d 949, which involved facts similar to those here, that the circumstances concerning which a substantial change must be shown in order to warrant a modification of a prior spousal support order are the factors or "circumstances" set out in R.C. 3105.18(C)(1)(a) through (n), which that section directs the court to consider when it orders spousal support. We held in *Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703, 676 N.E.2d 1249, that any such change must be substantial and one that was not contemplated by the court when it entered its prior spousal support order.

***763** {¶ 23} Absent a statement by the domestic relations court when it orders spousal support that it considered some future change, whether the court then considered a change that subsequently occurs must be determined inferentially, by the effect of the change on the court's earlier determination that spousal support is needed and warranted. That determination of need is necessarily co-extensive with the court's decision to order reasonable spousal support pursuant to R.C. 3105.18(B). *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218, 5 OBR 481, 450 N.E.2d 1140, citing *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 75 O.O.2d 474, 350 N.E.2d 413.

{¶ 24} When the domestic relations court ordered Danny Reveal to pay spousal support in the amount of $72,000 per year beginning in 1987, Lynn Reveal had no income of her own to meet her needs. She had been awarded a share of Danny ****1136** Reveal's interest in a qualified retirement plan valued at $308,750 as her share of the marital property. However, she could not be expected to exhaust that asset, and by the terms of the QDRO dividing the property, Lynn Reveal could not commence receiving income benefits under the plan until Danny Reveal retired or Lynn Reveal reached a designated retirement age. (Stipulated Qualified Domestic Relations Order, June 6, 1988.)

{¶ 25} Lynn Reveal has now reached an age at which she may begin receiving income benefits from the plan. The value of her share has increased to $797,981. Income available to her from that sum, without any diminution of principal, would probably be in excess of $30,000 per year. However, she draws only a nominal amount of income from the plan and apparently intends to allow the income now available to her to accumulate into principal, depending instead on the $72,000 she receives each year from Danny Reveal for her needs.

{¶ 26} The circumstance that has changed since the domestic relations court ordered spousal support in 1987 is not the passive increase in the value of Lynn

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Reveal's retirement account. The change is that Lynn Reveal now has an income available to her from that account that she did not have in 1987, which made an award of spousal support in the amount of $72,000 annually reasonable to meet her needs at the time. When a spousal support obligee who was unemployed when spousal support was ordered subsequently obtains employment, the income the employment generates for the obligee may be a change of circumstances for purposes of modification of spousal support. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 5 OBR 481, 450 N.E.2d 1140. There is no difference with respect to a new income that's generated by capital assets the obligee owns. The majority finds a distinction here, because the capital asset was awarded to Lynn Reveal on her share of marital property.

{¶ 27}R.C. 3105.18(C)(1)(a) directs a court that orders spousal support to consider "[t]he income of the parties, from all sources, including, but not limited ***764** to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code."The court is required to look to the same consideration in an R.C. 3105.18(E) motion to modify. *Joseph v. Joseph*, 122 Ohio App.3d 734, 702 N.E.2d 949. Therefore, the court cannot now reject the relief Danny Reveal sought on a finding that the income now available to Lynn Reveal does not constitute a change of circumstances because it is derived from a share of marital property awarded to her pursuant to R.C. 3105.171, the retirement plan.

{¶ 28}R.C. 3105.18(E) is grounded on an understanding that changes occur in people's lives over the course of years. The fact that a later change was possible does not necessarily demonstrate that the court considered its later impact on a recipient's reasonable need for spousal support when spousal support was ordered. Such a narrow interpretation would confine the power conferred by R.C. 3105.18(E) to events which are accidental, fortuitous, or otherwise the product of chance.

{¶ 29} The trial court did not reach the issue of whether the new income available to Lynn Reveal is a "substantial" change, having rejected the claim that it is a change for purposes of Danny Reveal's motion to modify. It is a change, and a substantial change, because it can provide Lynn Reveal an income the amount of which is a substantial portion of the spousal support Danny Reveal was ordered to pay to help Lynn Reveal meet her needs. ****1137** Whether those needs have changed and whether Danny Reveal should be required to pay some different amount of spousal support to help Lynn Reveal meet them is a matter to be determined after a merit hearing on his motion. Judge Brogan suggests that Danny Reveal, when he agreed to pay spousal support in the amount ordered, could have stipulated that it was subject to reduction when Lynn Reveal receives her retirement benefits, and because he did not do that, he cannot now complain about the domestic relations court's decision to ignore those benefits. Stipulations involve facts, not law, and whether the income now available to Lynn Reveal creates a substantial change of circumstances for purposes of R.C. 3105.18(E) is a question of law, not fact. In any event, both parties agreed to reserve the power to modify to the court, and that broad reservation comfortably encompasses these facts. There was no need to be more particular. Indeed, R.C. 3105.18(E)(1) contemplates a broad authorization, not one contingent on certain events.

{¶ 30} I would reverse and remand.

Ohio App. 2 Dist.,2003.
Reveal v. Reveal
154 Ohio App.3d 758, 798 N.E.2d 1132, 2003 -Ohio-5335

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H

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

Court of Appeals of Ohio, Tenth District, Franklin County.

Sandra M. PALMIERI, Plaintiff-Appellee,

v.

Paschal J. PALMIERI et al., Defendants-Appellants.

No. 04AP-1305.

Aug. 9, 2005.

Background: Former husband filed motion to modify or terminate **spousal support**. Magistrate entered order denying motion, and husband filed objections to magistrate's order. The Court of Common Pleas, Franklin County, Division of Domestic Relations, No. 91DR-2463, overruled husband's objections. Husband appealed.

Holding: The Court of Appeals, Travis, J., held that trial court did not abuse its discretion by concluding that there had not been a change in circumstances.

Affirmed.

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

Trial court did not abuse its discretion in proceeding on former husband's motion to modify **spousal support** by concluding that there had not been a change in circumstances sufficient to support **modification** of **spousal support** award, even though husband retired; husband's retirement was contemplated at time of divorce, marital settlement agreement specified three terminating events for **spousal support** but did not include husband's retirement, neither party's income was substantially different from at the time of the divorce, and both parties voluntarily increased their expenses over the years. R.C. § 3105.18(E, F).

Appeal from the Franklin County Court of Common Pleas, Division of Domestic Relations.

William M. Schumann, for appellee.
Tyack, Blackmore & Liston Co., L.P.A., and Thomas M. Tyack, for appellants.

OPINION

TRAVIS, J.

*1 {¶ 1} Appellant, Paschal J. Palmieri ("Mr.Palmieri"), appeals from the Franklin County Court of Common Pleas, Division of Domestic Relations, November 18, 2004 judgment entry overruling his objections to the magistrate's June 21, 2004 order. The magistrate's order denied Mr. Palmieri's request for **modification** or termination of **spousal support** upon finding there had not been a substantial change in circumstances to warrant a **modification**. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} Mr. Palmieri and appellee, Sandra M. Palmieri ("Mrs.Palmieri"), were married in 1957 and divorced pursuant to an Agreed Judgment Entry Decree of Divorce filed June 8, 1992, and made effective May 5, 1992. Three children were born as issue of the marriage; all of whom were emancipated at the time of the divorce.

{¶ 3} As a part of the divorce decree, Mr. Palmieri was ordered to pay **spousal support** of $1,800 per month for seven months and, commencing January 6, 1993, the sum of $1,400 per month until the death of a party, Mrs. Palmieri's remarriage, or Mrs. Palmieri's cohabitation with an unrelated male. The decree divided the parties' assets and liabilities, and the court retained jurisdiction to modify the amount or terms of the **spousal support** provision.

{¶ 4} At the time of the divorce, Mrs. Palmieri was working full-time as an office manager for an agent of State Farm Insurance. In 1991, her annual salary was $18,679, she was 54 years old, a high school graduate, and in good health. During the pendancy of the divorce proceeding, Mr. Palmieri voluntarily resigned his job as a liquor salesman for Vintner's International, where he was making $110,000 per year. He did so based on fears the company was in

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serious financial trouble. Eventually, Vintner's International filed for bankruptcy, but Mr. Palmieri was able to secure new employment in August 1991 with Jim Beam Brands making $65,000 per year. Further, in 1991, Mr. Palmieri was 56 years old, a college graduate, and in good health.

{¶ 5} The total net marital assets amounted to approximately $425,000. Under the terms of the settlement agreement, Mrs. Palmieri retained the family home and its contents, rental real estate, and most of her assets as well as most of the joint assets. Mr. Palmieri retained all of his retirement assets as well as the rest of his assets. All life insurance policies were to be surrendered and the cash split between the two parties. Ultimately, each party received approximately $200,000 of the marital estate, excluding furnishings.

{¶ 6} The parties differ on the extent to which Mr. Palmieri's retirement played in the settlement negotiations. Mrs. Palmieri testified before the magistrate that she compromised on the amount of support she needed each month in consideration of Mr. Palmieri's eventual retirement. Mrs. Palmieri believes the support payments were based on her need for $2,000 per month, rather than on Mr. Palmieri's salary. Mr. Palmieri testified he believes the support amount was based on his $110,000 salary from Vintner's. He further agreed that during the negotiations, he had discussed his retirement with his attorney.

*2 {¶ 7} In early 2000, Mrs. Palmieri sold the marital home, receiving net proceeds of $113,569. She also sold the rental property and received net proceeds of $22,461. The rental property was sold to her daughter for several thousand dollars less than its market value. Mrs. Palmieri then moved to the Cleveland area to be near family; residing in her sister's home from mid-2000 to mid-2002. While she was temporarily unemployed during this time, in 2001, Mrs. Palmieri found employment in the Cleveland area with a Nationwide Insurance agency. Her annual salary was $25,635.

{¶ 8} In 2002, Mrs. Palmieri purchased a home of her own in Avon, Ohio for $227,000, with a mortgage of $179,871. Mrs. Palmieri also found new employment with another Nationwide Insurance agency closer to her new home earning $30,000 per year. The same year, Mrs. Palmieri gave her son a gift of $25,000.

{¶ 9} The value of Mrs. Palmieri's IRA and brokerage investments was $175,361 by June 30, 2003. She also owns three insurance policies with an aggregate value of $17,568 and 15,000 shares in DynaResources, a gold mining company, purchased for $30,000. As of July 1, 2003, Mrs. Palmieri had assets of approximately $295,059 with liabilities of $4,700, not including her mortgage. Her gross monthly employment income is $2,500 per month. **Spousal support** remains at $1,400 a month. She also receives social security benefits of $767 per month and dividends/interest of $333.33 per month. Her total monthly income is $5,000.33. Mrs. Palmieri's monthly expenses, not including investments and savings but including her housing expenses, are approximately $4,040 per month.

{¶ 10} Since the divorce, Mr. Palmieri continued to work for Jim Beam Brands. During this time, his salary increased from $65,000 in 1991 to $129,807.44 in 2001. In 2002, while employed by Jim Beam Brands, Mr. Palmieri left his rental housing in Columbus, Ohio and moved to Las Vegas where he purchased a home for $349,434, with a mortgage of $200,000. Mr. Palmieri's girlfriend, Patsy Bard, is a co-owner of the real estate and is an obligor on the mortgage. However, Mr. Palmieri testified that Ms. Bard did not contribute to the down payment and makes none of the mortgage payments. Additionally, Mr. Palmieri has given Ms. Bard at least $4,000 for her personal use.

{¶ 11} Mr. Palmieri retired from Jim Beam Brands effective April 30, 2003. Since then, his monthly income consists of $1,501.30 from social security, $2,394.76 from his pension plan, $208 from his father's trust, $54.16 from U.S. Treasury Notes, and, at a minimum, $1,067 in retirement investment returns. His total monthly income is $5,225.22. As of July 1, 2003, Mr. Palmieri was worth approximately $880,367 with no other liabilities beyond his mortgage. Mr. Palmieri claimed monthly expenses, not including investments and savings but including his housing expenses and **spousal support** payments, of $5,793.95 per month. Some of those expenses are challenged by Mrs. Palmieri as unreasonable and/or unnecessary.

*3 {¶ 12} On April 26, 2002, Mr. Palmieri filed a motion in the trial court to modify or terminate **spousal support**. He argued that changed circumstances warranted a **modification** or termination of the previously ordered **spousal support**. The magistrate held a hearing August 4, 2003. On June 21, 2004, the magistrate denied the motion. Mr. Palmieri filed objections to the

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magistrate's decision on July 6, 2004. The trial court filed a judgment entry on November 18, 2004 overruling the objections.

{¶ 13} Mr. Palmieri now appeals the trial court decision and asserts two assignments of error:
ASSIGNMENT OF ERROR I:
THE TRIAL COURT ERRED IN FINDING THAT THERE [HAD] BEEN NO CHANGE IN CIRCUMSTANCES PERMITTING THE COURT TO MODIFY DEFENDANT-APPELLANT'S OBLIGATION TO PAY **SPOUSAL SUPPORT**.
ASSIGNMENT OF ERROR II:
THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT'S RETIREMENT AT AGE 67 WHEREIN HIS INCOME WOULD PRIMARILY BE SOCIAL SECURITY AND RETIREMENT BENEFITS EARNED AFTER THE DIVORCE WAS ESSENTIALLY A VOLUNTARY REDUCTION IN INCOME NOT ENTITLING HIM TO RELIEF AS TO HIS **SPOUSAL SUPPORT** OBLIGATION.

{¶ 14} Our review of this case is based on an abuse of discretion standard. "While a reviewing court in any domestic-relations appeal must be vigilant in ensuring that a lower court's determination is fair, equitable, and in accordance with law, an appellate court must refrain from the temptation of substituting its judgment for that of the trier-of-fact, unless the lower court's decision amounts to an abuse of discretion." *Martin v. Martin* (1985), 18 Ohio St.3d 292, 295, 480 N.E.2d 1112. An abuse of discretion means the trial court's decision is unreasonable, arbitrary or unconscionable and is not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 15} In his first assignment of error, Mr. Palmieri argues this court should reverse the trial court and order it to enter a finding that there has been a change in circumstances. Mr. Palmieri contends the **spousal support** award is unjust because Mrs. Palmieri's income has nearly doubled and she voluntarily increased her living expenses since the time of the award, while his income has been reduced due to his retirement. Additionally, Mr. Palmieri believes the court should follow the premise that **spousal support** should terminate at a certain point in time. See *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 554 N.E.2d 83

{¶ 16} Mrs. Palmieri argues the trial court did not abuse its discretion, and therefore, the judgment should be affirmed. She asserts *Kunkle* is not applicable in this situation due to the long duration of the marriage, advanced age of the parties at the time of the divorce, and the fact that she has no real ability to be self-supporting. Further, Mrs. Palmieri contends the divorce agreement was intended to be permanent and Mr. Palmieri's ultimate retirement was fully considered in the negotiations between the parties. It is Mrs. Palmieri's position that she remains unable to support herself despite her gradual increase in income over the years. Therefore, she reasons, her circumstances have not substantially changed.

*4 {¶ 17} Generally, a trial court is afforded great discretion in deciding **spousal support** issues. *Bolinger v. Bolinger* (1990), 49 Ohio St.3d 120, 551 N.E.2d 157; *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293. Where **modification** of a **spousal support** award is requested, the threshold questions are whether the trial court retained jurisdiction to modify the provisions of its order and whether the circumstances of a party have changed. *Wolding v. Wolding* (1992), 82 Ohio App.3d 235, 239, 611 N.E.2d 860. In the present case, the trial court specifically retained jurisdiction to modify the provisions of the decree.

{¶ 18} R.C. 3105.18(E) provides that the court that enters the decree of divorce has jurisdiction to modify the amount or terms of the **spousal support** only where the court determines that the circumstances of either party have changed. R.C. 3105.18(F) specifies that for purposes of division (E), "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." To warrant a **modification**, the change must be "substantial and one not contemplated at the time of the prior order." *Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703, 706, 676 N.E.2d 1249. If a change of circumstances is found to exist, the trial court must determine whether **spousal support** is still necessary and, if so, in what amount. *Kucmanic v. Kucmanic* (1997), 119 Ohio App.3d 609, 613, 695 N.E.2d 1205; *Bingham v. Bingham* (1983), 9 Ohio App.3d 191, 459 N.E.2d 231.

{¶ 19} Considering all the evidence now before the court, we find that the trial court's determination that there was not a change in circumstance was not unreasonable, arbitrary or unconscionable. First, there is testimony in the record that Mr. Palmieri's retirement, and the accompanying reduced income, was thoroughly considered at the time of the divorce.

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Both the magistrate and the trial court found retirement was contemplated, discussed, and debated prior to the ultimate agreement on **spousal support**. Nothing in the record suggests this was not the case. The divorce decree lays out three specific terminating events for **spousal support**. Mr. Palmieri's retirement is not one of them. At the time of the divorce, Mr. Palmieri could have negotiated a provision regarding **modification** or termination of **spousal support** upon retirement. He was less than ten years from retirement age at the time of the divorce. He did not do so and cannot now ask the court to relieve him of his choice. A court cannot base **modification** on a change that was contemplated at the time of the divorce.

{¶ 20} Second, even if retirement had not been contemplated, neither party's income is substantially different now from their income in 1991. At the time of the divorce, Mr. Palmieri was working at Jim Beam Brands making $65,000 per year, or $5,416.66 per month. His current monthly retirement income is $5,225.22, a difference of less than $200 per month. Moreover, his assets have appreciated over 300 percent. If Mr. Palmieri were still working, his monthly income would be approximately $5,000 greater than it is currently, because his income had increased significantly since the divorce. Mrs. Palmieri's employment income has increased approximately $1,000 per month from $1,550 to $2,500 per month; the approximate equivalent to a four percent increase per year. However, her assets have increased only by 50 percent. The court also notes that Mrs. Palmieri is still working full-time and is unable to retire at present. While her income has increased, the trial court was not unreasonable, arbitrary or unconscionable when it determined that increase was not substantial.

*5 {¶ 21} Mr. Palmieri also argues that Mrs. Palmieri has voluntarily increased her expenses since the divorce. According to the record, both parties have increased their expenses over the years, with both incurring mortgages at or near the time the motion to modify or terminate was filed. The court cannot consider Mrs. Palmieri's increases in expenses without also considering Mr. Palmieri's increased expenses.

{¶ 22} Both parties rely on *Kunkle,* supra. Mr. Palmieri believes *Kunkle* supports his view that **spousal support** should be finite, rather than continue endlessly. However, Mr. Palmieri failed to apply the exceptions specified by that court:

Except in cases involving a marriage of long duration, parties of advanced age or a homemaker-spouse with little opportunity to develop meaningful employment outside the home, where a payee spouse has the resources, ability and potential to be self-supporting, an award of sustenance alimony should provide for the termination of the award, within a reasonable time and upon a date certain, in order to place a definitive limit upon the parties' rights and responsibilities.

Kunkle, paragraph one of the syllabus.

{¶ 23} In the present case, the parties were married for 35 years, making it a marriage of long duration. Both parties were over 50 at the time of the divorce, and Mrs. Palmieri was a homemaker-spouse who had had little opportunity to develop meaningful employment outside the home. Additionally, Mrs. Palmieri does not have the ability to be self-supporting. Since every exception to the standard has been met, *Kunkle* has little, if any, application to the instant matter.

{¶ 24} Mr. Palmieri's first assignment of error is overruled.

{¶ 25} In his second assignment of error, Mr. Palmieri contends the trial court should have taken into account his retirement, and the concomitant reduction in income, in determining whether there was a change in circumstance warranting a reduction/termination of the **spousal support**. He argues that, at the time of the divorce, Mrs. Palmieri was awarded the majority of the marital assets with him retaining only his retirement accounts, and it would be unfair to require him to use some of the very assets he was awarded to continue paying the support. Mr. Palmieri contends his retirement should not be considered a voluntary reduction in income.

{¶ 26} Mrs. Palmieri argues that Mr. Palmieri's retirement was fully considered and taken into account at the time the agreement was made and therefore its occurrence is not a change of circumstances, even with a decrease in income. Mrs. Palmieri asserts Mr. Palmieri's retirement income is actually very similar to his income at the time of the divorce, rather than significantly lower. Furthermore, Mrs. Palmieri contends the marital assets were equally divided at the time of the divorce and Mr. Palmieri is not being penalized by the requirement to pay **spousal support**.

*6 {¶ 27} This court has determined that, regardless of whether retirement is or is not considered, there

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has not been a significant change in circumstances to justify a **modification** or termination of the **spousal support** award. We therefore need not specifically determine whether Mr. Palmieri's retirement is a voluntary reduction in income. A determination on the matter would not affect the outcome.

{¶ 28} We hereby overrule Mr. Palmieri's second assignment of error.

{¶ 29} Having overruled all of Mr. Palmieri's assignments of error, the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed.
Judgment affirmed.

PETREE and FRENCH, JJ., concur.
Ohio App. 10 Dist.,2005.
Palmieri v. Palmieri
Slip Copy, 2005 WL 1869706 (Ohio App. 10 Dist.), 2005 -Ohio- 4064

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

Court of Appeals of Ohio,Second District, Clark County.

Kathy Sue HOWELL PlaintiffAppellant

v.

James H. HOWELL, II Defendant-Appellee.

No. 2005-CA-80.

Decided June 16, 2006.

(Civil Appeal from Domestic Relations Court).

Valerie R. Wilt, Atty. Reg. # 0040413, Springfield, for Plaintiff-Appellant.
Keith E. Golden, Atty. Reg. # 0011657, Columbus, for Defendant-Appellee.
BROGAN, J.

*1 {¶ 1} This matter is before us on the appeal of Kathy Howell (Kathy) from a trial court decision regarding her request for increased **spousal support**, increased child support, and attorney fees associated with defending the appeal of the original divorce decree and for prosecuting and defending against various post-decree motions. In support of the appeal, Kathy raises the following assignments of error:

{¶ 2} "I. The trial court erred as a matter of law by requiring that Mrs. Howell demonstrate an increase in her living expenses as a prerequisite to an increase in **spousal support**, and its decision was against the manifest weight of the evidence.

{¶ 3} "II. The court erred as a matter of law by failing to include as income for child support Mr. Howell's substantial inheritance.

{¶ 4} "III. The trial court's decision denying Mrs. Howell's appellate fees was against the manifest weight of the evidence; the court misapplied the facts to the law and abused its discretion.

{¶ 5} "IV. The court erred as a matter of law and abused its discretion in not awarding Mrs. Howell her attorney fees and court cost in the litigation of the proceedings heard on September 2, 2004, November 11, 2004, and February 8, 2005."

{¶ 6} After reviewing the record and applicable law, we find that all four assignments of error have merit. Accordingly, the trial court judgment will be reversed, and this matter will be remanded for further proceedings consistent with this opinion.

I

{¶ 7} Kathy and James H. Howell, II (James) were divorced on June 20, 2002, after nearly 26 years of marriage. The Howells had three children, two of whom were emancipated at the time of the divorce. The third child, Jacob, was eight and a half years old. James had been a deputy in the Clark County Sheriff's Office, but had qualified for permanent disability benefits, due to an eye injury. James was able, however, to operate a business called Electrotech, which was a limited liability corporation that he solely owned. While the amount of income James received from Electrotech was disputed, the trial court decided to impute $10,000 of income for the business.

{¶ 8} Kathy was a full-time home-maker during most of the marriage, but was employed part-time as a school bus driver for the Springfield City Schools at the time of the divorce. Kathy requested custody of Jacob, an equitable property division, child support and $1,000 in **spousal support** per month in order to meet her financial obligations. James requested shared parenting the day before the divorce hearing.

{¶ 9} Following the hearing, the trial court awarded Kathy custody of Jacob, observing, among other things, that James was behind in paying child support despite having financial resources to pay, and that "[i]n essence, Mr. Howell 'chose' to prioritize other expenses which he had during the pendency of this matter over his obligation to pay support to his son." The court went on to note that:

*2 {¶ 10} "The overwhelming credible evidence in this case indicates that Mr. Howell has always placed his own individual interests above those interests of his children and, to this end, it is more likely than not that he will continue to make poor choices which in turn, at some point, are likely to adversely affect the parties' eight year old son."

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{¶ 11} After granting Kathy custody, the court ordered James to pay $400 per month in **spousal support** for twelve years, plus $322.32 per month in child support. As part of the property division, the court also awarded Kathy 36.1% of James' disability pension from the Ohio Public Employees Retirement System.

{¶ 12} In deciding the income to be considered for child support, the court refused to impute income to James in connection with a trust that his grandfather had established. The corpus in the trust was about 1.4 million dollars, and James and his brother had a contingent interest in the trust dependent on the death of their father at some point in the future. During the marriage, James had received significant distributions from the trust, and Kathy had asked the court to impute an additional $12,000 income per year, based on approximately $204,000 in distributions that had been made between 1981 and 1998.

{¶ 13} The trial court refused to impute additional income based on past receipts, because there was no evidence that James had legal control over any money he might receive. The court also mentioned this point when it discussed **spousal support**, noting that James had only a "possible" future inheritance.

{¶ 14} Kathy additionally asked for attorney fees of $14,862.70. The court granted the fees, finding that Kathy lacked financial means necessary to pay her own fees. In this regard, the court also noted that "it is reasonable to conclude that Mrs. Howell would have been prevented from fully litigating her rights and protecting her interests in this matter if the Court would not have awarded * * * her attorney fees herein." And finally, the court observed that James had the ability to pay attorney fees, especially since his living expenses were minimal in that they were shared with a girlfriend. His prior debts had also been discharged in a bankruptcy that became final during the divorce action.

{¶ 15} On July 18, 2002, James filed a notice of appeal from the divorce decree, and raised five assignments of error. We rejected all the assignments of error on September 12, 2003. See *Howell v. Howell*, Clark App. No.2002 CA 60, 2003-Ohio-4842, at ¶ 7-32.

{¶ 16} While the appeal was pending, Kathy filed several post-decree motions. The first was a contempt motion in October, 2002, based on James' failure to pay attorney fees as ordered, or to pay the ordered portion of his disability check for July, August, and September, 2002. This motion was withdrawn several weeks later, after James complied with court orders.

*3 {¶ 17} The second post-decree motion was filed on April 10, 2003, and was a request for attorney fees associated with the appeal that James had filed. In the motion, Kathy stated that she did not have funds to complete the appeal. She also noted that James had now become a vested beneficiary in his grandfather's $1,000,000 trust, because James' father had died. On the same day, Kathy filed a motion to increase **spousal support** due to changed circumstances. Specifically, Kathy claimed that James was no longer the recipient of discretionary funds. Instead, under the terms of the trust, the trust now had to be terminated, with 50% of the corpus being paid to James.

{¶ 18} As we mentioned, we affirmed the divorce judgment in September, 2003. Subsequently, on November 5, 2003, Kathy filed a motion for an increase in child support and for reallocation of the health care order for payment of uncovered medical expenses. She also asked the court to set a date certain for payment of her part of James' disability pension, because James was frequently 30 or more days behind in payment. At this point, the trial court had not yet held a hearing on Kathy's prior requests for **spousal support** and attorney fees.

{¶ 19} On February 4, 2004, Kathy filed another contempt motion, asking the court to impose a contempt sanction that had originally been imposed, but stayed, in the final divorce decree. This particular contempt sanction was based on James' failure to maintain Kathy as a covered dependent on his health insurance. James' actions had cost Kathy $388. In the final decree, the court sentenced James to 30 days in jail, but suspended the sentence on the condition that he pay Kathy the $388. Almost two years later, James had still not paid this sum.

{¶ 20} Although James had become the recipient of more than half a million dollars in funds from his grandfather's trust, he filed a motion with the court on February 12, 2004, asking for a decrease in his child support obligation. Previously, in January, 2004, James had also filed a motion asking the court to order Kathy to pay his attorney fees for responding to her requests for increased spousal and child support.

{¶ 21} James filed several other motions, including a motion to modify provisions in the divorce decree relating to the tax exemption and non-covered medical expenses. In addition, James asked the court

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to decrease his **spousal support** obligation. He followed that with a motion for a vocational evaluation of Kathy, and a motion for an order temporarily stopping wage withholding, due to a credit in the child support account. Finally, James filed a motion asking for adoption of a shared parenting plan. Most of these motions were either unsuccessful or ultimately withdrawn.

{¶ 22} On February 19, 2004, the court filed an entry ordering James to produce various discovery items, and deferring the issue of attorney fees and costs until the final hearing. More than a year after Kathy's request for fees, the court still had not held a hearing on fees, nor had any of the pending motions been resolved, other than a few minor items, like whether a vocational report would be ordered. Consequently, on April 26, 2004, the magistrate issued an order listing all pending motions and indicating the order in which they would be decided. The order specifically stated that almost all the relief was intertwined, and that "for judicial economy the magistrate will not issue a decision until all motions are heard."

*4 {¶ 23} Subsequently, on May 4, 2004, Kathy filed a renewed request for attorney fees, In the motion, Kathy again emphasized that she did not have financial resources to pay attorney fees to pursue the support to which she felt entitled, and that she could not afford to defend James' post-decree motions.

{¶ 24} A hearing was held before a magistrate on September 2, 2004. After the hearing, the magistrate found that James had taken questionable expenses against Electrotech's income. For example, James reported $88,365 in income for the company in 2002, but only $1,299 in profit. At the same time, however, he was using money generated through Electrotech to pay personal legal fees, personal car expenses, and the land contract payment and utilities for his new wife's home.

{¶ 25} The magistrate additionally noted that since the divorce decree, James had become the vested beneficiary of his grandfather's trust, due to the death of both his parents. James was able to access trust proceeds by calling the attorney managing the trust. In May or June, 2004, James withdrew $500,000 from the trust and used the proceeds to purchase land in Maine ($160,000 to $170,000), and a Four Winns boat ($270,000). The expenses for docking the boat, alone, were about $6,000 per year. The trust balance at that time was $270,765, and James was entitled to half the remaining proceeds.

{¶ 26} In addition, James had trust funds and an inheritance due from his parents, who had died in 2003. The magistrate held that the amount and date of receipt of the parental inheritance was uncertain and that it would be "speculative at best" to include this item in **spousal support**. The magistrate further held that the inheritance from the grandfather's trust was not a change in circumstance under R.C. 3105.18(F) because the inheritance was contemplated by the parties and court at the time of the divorce decree. Consequently, the magistrate did not award any increase in **spousal support**.

{¶ 27} Kathy filed timely objections to the magistrate's decision. Subsequently, on November 16, 2004, another hearing was held on the motion to pay medical expenses and impose the contempt sanction, the motion for appellate attorney fees, and the motion to set a date on which James would pay Kathy's portion of the disability pension. At this hearing, the parties stipulated to the report of the vocational expert, who had found that Kathy was fully employed. Among the facts disclosed at this hearing was that James had taken a draw of $40,000 in October, 2004, from one of his parent's trusts, and had expensed $30,000 in attorney fees through Electrotech. The fiduciary accounts for the estates of both of James' deceased parents were also placed into evidence at the hearing.

{¶ 28} Kathy testified that her current balance on attorney fees was $17,226.49, and that she did not have the ability to pay the fees. She had been paying fees at the rate of $25 per month. She indicated that she had been able to obtain representation despite not having money to pay fees. Finally, it was not disputed at the hearing that James did not pay the $388 owed for medical expenses until March, 2004. James claimed he thought that he had paid the money earlier, but had been mistaken.

*5 {¶ 29} Following the hearing, the magistrate found that James' evidence as to the medical expense was not credible. The magistrate awarded attorney fees of $196.88 in connection with Kathy's effort to collect the medical fees. However, the magistrate also rejected the fees of $10,021.55 for the prior appeal, because Kathy failed to establish that she was prevented from litigating her rights. (The rest of the fees were considered at a later hearing.) Kathy again timely objected to this decision.

{¶ 30} On February 8, 2005, James dismissed his

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motion for shared parenting, on the eve of trial. At a hearing held on the same date, James testified about various matters, including amounts in the various trusts and estates. According to documents that had previously been admitted, James was entitled to half of $335,000 in a trust that his father had established, and he could take distribution of that money at any time. James was also entitled to half of his mother's estate, or about $328,000. James indicated that if he had chosen to invest these amounts in addition to the $500,000 minimum from his grandfather's trust, he could have earned $50,000 per year investment income on a conservative rate of return for the combination of all three inheritances. A financial planner who testified on Kathy's behalf indicated essentially the same thing, and included some other rates of earnings as well, based on actual performance statistics for investment funds.

{¶ 31} During this hearing, James also asked that Kathy pay his fees for defending against her motions, as well as for prosecution of his own motions, such as the parenting motion he filed and withdrew, the motion for increased visitation he filed and withdrew, and the motion to reduce child support. James indicated in the hearing that he had expressed concern about the neighborhood in which his son and ex-wife lived, but had not purchased a home for his son in a better area, even though he had the money to do so.

{¶ 32} Following the hearing, the magistrate filed a decision on February 15, 2005, finding that James was "less than credible," particularly about matters relating to his corporate income from Electrotech. The magistrate added $47,384 back into James' income, based on questionable business deductions for personal expenses. He also added a very minor amount of ordinary income from the trust, and $8,000 in net long-term capital gains. Based on these facts, the magistrate increased child support to $687 .95 per month. The magistrate rejected the mutual requests for attorney fees, finding that neither side had been prevented from fully litigating. This included the remainder of the attorney fees that Kathy had sought, i.e., the fees she incurred in filing post-decree motions and in responding to James' motions. Kathy again filed timely objections to the magistrate's decision.

{¶ 33} After an objection hearing that was held on June 28, 2005, the trial court filed an order on July 8, 2005, rejecting all objections. The court did not specifically address the details of the objections, but simply indicated it had conducted a de novo review had found each objection without merit. This appeal then followed.

*6 {¶ 34} The first assignment of error deals with the trial court's rejection of increased **spousal support**. In this regard, Kathy contends that the trial court erred by requiring her to demonstrate increased living expenses, and by finding that the inheritance was not a change in circumstances.

{¶ 35} We review decisions on **spousal support** for abuse of discretion, which means that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. However, we have stressed before that decisions are unreasonable if they are not supported by a sound reasoning process. See, *e.g.*, *Jackson v. Jackson* (2000), 137 Ohio App.3d 782, 799, 739 N.E.2d 1203, citing *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597. After reviewing the **spousal support** decision in this case, we find that it is not supported by a sound reasoning process.

{¶ 36} Under R.C. 3105.18(E), the court may modify a **spousal support** obligation if it finds a change in circumstances. An inheritance has been considered a sufficient change of circumstances to merit alteration in the amount or duration of **spousal support**. See *Tissue v. Tissue*, Cuyahoga App. No. 83708, 2004-Ohio-5968, at ¶ 23-29.

{¶ 37} In the present case, the trial court noted in the divorce decree that the parties had enjoyed a very comfortable lifestyle during marriage. The court further observed that while James would continue to enjoy an above average standard of living, Kathy would be reduced to a more modest standard. The court refused, however, to consider James' potential inheritance when awarding **spousal support**, because his interest was only speculative. At that time, James was merely a contingent beneficiary of the trust, and his parents were both still living.

{¶ 38} After the divorce was granted, both of James' parents died, and he became a vested beneficiary in his grandfather's trust. He thereafter withdrew large sums of money from the trust. Upon his parents' death in 2003, James also became entitled to one-half the amounts in trusts they had maintained, and to one-half their estates. When Kathy asked for an increase in **spousal support**, the magistrate rejected the request, because the inheritance from the grandfather's trust was clearly contemplated at the

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time of the divorce. We find this reasoning process unsound. Although the parties were obviously aware of the prospective inheritance from the grandfather at the time of the divorce, this item was specifically excluded from consideration. What was contemplated at the time of the divorce was that James did not have access to the trust money and was only a contingent beneficiary on the fund.

{¶ 39} In a somewhat similar situation, a trial court found that the amount and receipt of an inheritance was uncertain, and that a **spousal support** award based on the inheritance would be speculative. However, the trial court retained continuing jurisdiction over the support obligation and provided that the wife could seek **modification** of the **spousal support** award upon filing a motion after the husband received anticipated inheritance distributions. *Morgan v. Morgan* (Oct. 24, 2001), Wayne App. No. 01CA0017, 2001 WL 1280277, *2.

*7 {¶ 40} On appeal, the Ninth District Court of Appeals found no abuse of discretion in the decision not to include potential investment income from the inheritance into the **spousal support** award. However, the reason the Ninth District found no abuse of discretion is because the trial court had chosen to allow the ex-wife to file a motion for **modification** upon distribution of the inheritance. Id.

{¶ 41} Based on the preceding discussion, we find that the trial court erred in finding that vesting of funds from the grandfather's trust was not a "changed circumstance" under R.C. 3105.18(C). We also find that the trust funds and other money inherited by James after the death of his parents was a change in circumstances warranting **modification** of **spousal support**. Notably, these issues were not discussed at all in the divorce decree.

{¶ 42} Accordingly, the first assignment of error has merit and is sustained. This matter will be reversed and remanded to the trial court for calculation of the amount of increased **spousal support** that should be awarded, based on the increased income James should have realized for investment of the funds to which he was entitled from all three trusts and the estates of his parents.

{¶ 43} In this regard, we should make one other point. In the decision on **spousal support**, the magistrate noted that it was impossible to consider investment income because Kathy failed to present evidence estimating potential yields on investment. However, the magistrate had filed an order prior to the hearing indicating that the many pending motions were intertwined, that several hearings would be held, and that no decision would be issued until all the hearings were concluded. Evidence was presented at other hearings regarding investment yields, and the magistrate violated his own order by issuing decisions before concluding all the hearings.

{¶ 44} Because a change in circumstances existed, we do not need to extensively address Kathy's claim that the inadequacy of the original support award obviates the need to show a change. However, this assertion does not appear to be a correct statement of law. Under R.C. 3105.18(E), courts may only modify the amount or terms of **spousal support** upon a finding of a change in circumstances of either party, and, in divorce situations, where **modification** is allowed in the decree, or in a separation agreement incorporated into the decree.

{¶ 45} In light of the preceding discussion, the first assignment of error is sustained.

II

{¶ 46} The second assignment of error is based on the trial court's failure to include James' substantial inheritances as income for child support purposes. When the magistrate rejected inclusion of inheritance income, he noted that Kathy had asked the court to find James voluntarily unemployed, and to impute current employment income and interest income from inheritances. However, this was an incorrect factual statement. Kathy did not ask the court to "impute" interest income from inheritances when she requested an increase in child support. Instead, she simply filed a motion asking for an increase in child support. Kathy also did not ask the magistrate at the hearing to "impute" interest income based on voluntary underemployment. And finally, in objecting to the magistrate's decision, Kathy clearly stressed that potential interest income should be included as "gross income" under R.C. 3119.01(C)(7). The trial court did not address this issue when it overruled Kathy's objections to the magistrate's decision. As we noted, the court failed to specifically comment on any of the objections.

*8 {¶ 47} In order to modify child support, the trial court must find a substantial change in circumstances, which is defined in R.C. 3119.79(A) as a ten percent deviation from the amount of child support previously ordered. The magistrate found such a change, by including James' self-employment

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income. However, the magistrate refused to also include potential investment income from the inheritances.

{¶ 48} R.C. 3119.01(C)(5) defines income in two ways. For individuals employed to full capacity, income means "the gross income of the parent." R.C. 3119.01(C)(5)(a). If an individual is fully employed, the definition of "gross income" in R.C. 3119.01(C)(7) applies. For persons who are unemployed or underemployed, income means the parent's gross income plus any potential income. R.C. 3119.01(C)(5((b). In the latter situation, R.C. 3119.01(C)(11) provides methods of imputing potential income to the individual who is underemployed.

{¶ 49} Because the magistrate did not find James to be underemployed, his income would be governed by the definition of "gross income" in R.C. 3119.01(C)(7), which defines "gross income," in pertinent part, as: "the total of all earned and unearned income from all sources during a calendar year, whether or not the income is taxable, and includes income from salaries, wages, overtime pay, and bonuses * * *; commissions; royalties; tips; rents; dividends; severance pay; pensions; interest; trust income; annuities; social security benefits, including retirement, disability, and survivor benefits that are not means-tested; workers' compensation benefits; unemployment insurance benefits; disability insurance benefits; benefits that are not means-tested and that are received by and in the possession of the veteran who is the beneficiary for any service-connected disability under a program or law administered by the United States department of veterans' affairs or veterans' administration; **spousal support** actually received; and all other sources of income. 'Gross income' * * * includes * * * self-generated income; *and potential cash flow from any source.*" (Emphasis added).

{¶ 50} The statutory definition of income is very broad, and includes income from trusts, as well as potential cash flow from any source. This is consistent with R.C. 3103.03(A), which requires a biological or adoptive parent of minor children to support the children "out of the parent's property or by the parent's labor."

{¶ 51} In *Bishop v. Bishop*, Scioto App. No. 03CA2908, 2004-Ohio-4643, the trial court included potential rental income from a property in gross income, even though the property was not currently being rented, nor was it in a condition to be rented. Id. at ¶ 17. See also, *Murray v. Murray* (1999), 128 Ohio App.3d 662, 668, 716 N.E.2d 288 (unexercised stock options are "potential cash flow" and should be included in gross income); and *Sizemore v. Sizemore* (Oct. 16, 1994), Montgomery App. No. 13673, 1994 WL 558917, *3 (non-income producing asset may be considered "potential cash flow" and is properly included in gross income of fully employed obligor). As we pointed out in *Sizemore,* "[n]o finding of voluntary unemployment or underemployment is required to find the existence of potential cash flow." Id. at *3. We also stressed that:

*9 {¶ 52} "one of the purposes of the 'potential cash flow' provision in R.C. 3113.215(A)(2) * * * [is] to prevent a parent from avoiding child support obligations by shifting present income to a cash flow expected to be enjoyed at some future time, when the children have become emancipated." Id. (Parenthetical material supplied.)

{¶ 53} In this regard, James chose to transfer money to items that could produce cash flow at a future point. For example, James testified that he spent $160,000 to $170,000 of the trust proceeds on land in Maine as an investment. His choice to shift present income to a later point, perhaps in an attempt to avoid child support obligations, should not be rewarded. James testified that he could have earned $50,000 per year on the funds that he inherited, but chose not to do so.

{¶ 54} Courts do sometimes use the phrase "imputed income" when referring to potential cash flow, but that does not mean they have made a finding of voluntary unemployment or underemployment under R.C. 3119.01(C)(11). For example, the court referred to "imputed income" in *Murray,* when it discussed the potential income to be attributed to the appreciation in unexercised stock options. 128 Ohio App.3d Id. at 674. However, the obligor in Murray was fully employed and the income was included as "potential cash flow from any source" under R.C. 3113.215(A)(2) (the predecessor to R.C. 3119.01(C)(7). Using the word "imputed" is simply one way of describing potential income, and does not mean a court has made a finding under R.C. 3119.01(C)(11) that income should be imputed because the obligor is unemployed or underemployed. By requiring such a finding in the present case, the magistrate's decision was incorrect and was not supported by a sound reasoning process.

{¶ 55} Accordingly, the second assignment of error has merit and is sustained. This matter will be

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remanded so that the trial court may take the amount of potential investment income from the three inheritances into account in calculating James' "gross income" for child support purposes.

III

{¶ 56} The third and fourth assignments of error raise the issue of attorney fees, and will be considered together. In both assignments of error, Kathy challenges the rejection of attorney fees as against the manifest weight of the evidence and as an abuse of discretion. The third assignment of error deals with appellate fees, and the fourth assignment of error concerns fees for prosecuting various post-decree motions, as well as defending against various post-decree motions that James filed.

{¶ 57} As we noted, the trial court stated in the original divorce decree that Kathy lacked the financial means necessary to pay attorney fees, and that James had the ability to pay attorney fees. The only factor that changed between this decision and the magistrate's rejection of fees was that James inherited more than a million dollars. Kathy's income and expenses remained largely the same. Therefore, the magistrate's decision is not just unsupported by sound reasoning; it is inexplicable.

*10 {¶ 58} The magistrate relied on Kathy's testimony, elicited on cross examination, that her lack of income had not prevented her from obtaining legal services. In a similar situation, the Eighth District rejected a husband's claim that his wife should not be awarded fees because she had managed to pay some of her attorney fees and had money to obtain experts to assist her in the litigation. The Eighth District affirmed an award of $50,000 against the husband, noting that:

{¶ 59} "Husband first contends that the trial court erred in ordering him to pay $50,000 of Wife's attorney fees because there is no evidence that, without the award, she would have been prevented from fully litigating and protecting her interests. Husband argues that Wife was able to pay some of her attorney fees prior to the award, had sufficient funds to buy a house and purchase household items, and had monies to obtain various experts to assist her in the litigation. Therefore, he contends, she had sufficient funds to adequately protect her interests in the litigation. We are not persuaded.

{¶ 60} "The evidence at trial demonstrated that Wife's income was significantly less than Husband's and that she had borrowed money to pay her attorney and household expenses. The fact that Wife was able to borrow money to pay her attorney does not mean that she would be able to pay the remaining fees without an adequate award. Moreover, Husband's argument that Wife was not prevented from protecting her interests because she retained experts to assist her is without merit. Apparently *Husband would have the court award attorney's fees only if Wife's financial situation prevented her from participating in the litigation at all. That is not the standard, however."* Pruitt v. Pruitt, Cuyahoga App. No. 84335, 2005-Ohio-4424, at ¶ 93-94 (emphasis added).

{¶ 61} In the present case, Kathy's income was significantly lower than James' income, and she had borrowed money from her father to pay some attorney fees. Given Kathy's low income level, there is no way she would have been able to pay the remaining fees without an award. As we said, the magistrate's decision is inexplicable in view of the earlier finding that Kathy could not afford to pay fees. The trial court, therefore, abused its discretion in rejecting Kathy's request for attorney fees. Oatey v. Oatey (1992), 83 Ohio App.3d 251, 263, 614 N.E.2d 1054.

{¶ 62} Under the statute in effect at the time of the fee requests, a trial court may award reasonable fees at any stage of the proceedings, if it decides the other party has the ability to pay fees. See R.C. 3105.18(H) (deleted and new provision enacted as R.C. 3105.73, effective April 27, 2005). In the present case, the magistrate found that Kathy's attorney fees were reasonable and necessary, and that James had the ability to pay the fees, when the trust funds were factored in. Therefore, on remand, the trial court should award the full amount of the attorney fees that Kathy requested.

*11 {¶ 63} Based on the preceding discussion, the third and fourth assignments of error have merit and are sustained.

{¶ 64} Because all four assignments of error have been sustained, the judgment of the trial court is reversed. This case is remanded for further proceedings consistent with this opinion.

WOLFF, J., and DONOVAN, J., concur.
Ohio App. 2 Dist.,2006.
Howell v. Howell
Slip Copy, 2006 WL 1661631 (Ohio App. 2 Dist.),

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2006 -Ohio- 3038

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

Court of Appeals of Ohio,Twelfth District, Warren County.
Kristi R. STRAIN, Plaintiff-Appellee,
v.
James M. STRAIN, Defendant-Appellant.
No. CA2005-01-008.

Decided Nov. 14, 2005.

Background: Former husband appealed from a decision of the Court of Common Pleas, Warren County, No. 01DR25743, that modified former husband's **spousal support** obligation.

Holding: The Court of Appeals, Powell, P.J., held that trial court did not abuse its discretion in modifying former husband's **spousal support** obligation.

Affirmed.

Divorce 134 ⚷245(.5)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k245 **Modification** of Judgment or Decree
134k245(.5) k. In General. Most Cited Cases

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
Trial court did not abuse its discretion in modifying former husband's **spousal support** obligation, where trial court considered not only child's emancipation, but totality of circumstances, including parties' salaries, earning capacities, and living expenses, and $300 increase in **spousal support** was reasonable and necessary.

Appeal from Warren County Court of Common Pleas Domestic Relations Division, Case No. 01DR25743.

Robbins, Kelly, Patterson & Tucker, Barry A. Spaeth, Jarrod M. Mohler, Cincinnati, for plaintiff-appellee.
Mark R. Bogen, Lebanon, for defendant-appellant.
POWELL, P.J.
*1 {¶ 1} Defendant-appellant, James M. Strain, appeals the decision of the Warren County Court of Common Pleas, Domestic Relations Division, granting the motion of plaintiff-appellee, Kristi R. Strain, to modify his **spousal support** obligation. We affirm the decision of the trial court.

{¶ 2} The record reveals the following facts relevant to this appeal: The parties were divorced on November 13, 2001. The decree provided that appellant would pay $883 in child support for the parties' 15-year-old son, Evan, until emancipation, and $1,700 in **spousal support** for 72 months. The decree also provided that the court would retain jurisdiction over the amount of **spousal support**, but not its duration.

{¶ 3} At the time of the divorce, Evan lived with his mother, appellee. Evan turned 18 in April, 2004. He quit school in May, 2004, at which time he moved out of his mother's home. On June 8, 2004, due to the fact that Evan reached 18 years of age and was no longer attending school, appellant's child support obligation ended.

{¶ 4} On September 10, 2004, appellee moved to modify **spousal support**, and a hearing was held before a magistrate. The magistrate, in a decision filed on November 23, 2004, granted the motion to modify, ordering that appellant's **spousal support** obligation be increased $300. Objections to the decision of the magistrate were filed on December 2, 2004. By decision and entry filed January 12, 2005, the trial court overruled appellant's objections and adopted the decision of the magistrate. This appeal followed, in which appellant raises the following two assignments of error.

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{¶ 5} Assignment of Error No. 1:

{¶ 6} "THE TRIAL COURT ERRED IN DETERMINING THAT THE TERMINATION OF CHILD SUPPORT WAS A CHANGE IN CIRCUMSTANCE WARRANTING A **MODIFICATION** IN **SPOUSAL SUPPORT** IN FAVOR OF APPELLEE."

{¶ 7} Assignment of Error No. 2:

{¶ 8} "THE TRIAL COURT ABUSED IT [SIC] DISCRETION IN DETERMINING THERE WAS A CHANGE IN CIRCUMSTANCES PERMITTING A **MODIFICATION** OF **SPOUSAL SUPPORT**."

{¶ 9} In his first assignment of error, appellant contends that the trial court erred in concluding that the termination of child support payments qualifies as a change of circumstances for purposes of modifying **spousal support**. In his second assignment of error, appellant argues that the trial court abused its discretion in finding a change of circumstances sufficient to modify **spousal support**. In slightly different ways, both assignments essentially allege that the trial court erred in finding a change of circumstances sufficient to modify the **spousal support** obligation. Thus, for clarity and ease of analysis, we consider them together.

{¶ 10} We first note that a trial court has broad discretion in determining a **spousal support** award, including whether or not to modify an existing award. *Swartz v. Swartz* (1996), 110 Ohio App.3d 218, 673 N.E.2d 972. Thus, absent an abuse of discretion, a **spousal support** award will not be disturbed on appeal. Id. An abuse of discretion is more than an error of law or judgment; an abuse of discretion connotes that the trial court's decision was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Additionally, this court must look at more than just the emancipation of Evan in conducting our review. "[W]e must look at the totality of the circumstances and determine whether the trial court acted unreasonably, arbitrarily or unconscionably * * * " in modifying appellant's **spousal support** obligation. *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67, 554 N.E.2d 83.

*2 {¶ 11} In exercising its discretion to modify an award of **spousal support**, a trial court must determine (1) that the divorce decree contained a provision specifically authorizing the court to modify the **spousal support**, and (2) that the circumstances of either party have changed. R.C. 3105.18(E).

{¶ 12} Neither party disputes that the court was authorized to modify the support obligation. The parties' divorce decree granted the court continuing jurisdiction to modify the amount of **spousal support** throughout its duration. The dispute in this case centers on the court's determination that the change in circumstances requirement was met.

{¶ 13} A change in 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 change must be material, not purposely brought about by the moving party, and not contemplated at the time the parties entered into the prior agreement. *Cooper v. Cooper*, Clermont App. No. CA2003-05-038, 2004-Ohio-1368, ¶ 17.

{¶ 14} Appellant contends that the magistrate's finding of a change of circumstances was based solely on the emancipation of Evan, and that the termination of child support payments accompanying Evan's emancipation was contemplated at the time of the divorce decree. Evan was 15 years old when the decree went into effect, and all parties were aware that in three years, when Evan turned 18, the child support payments to appellee would end. Accordingly, appellant argues, the trial court abused its discretion in finding a change of circumstances. For the following reasons, appellant's contention is not well-taken.

{¶ 15} To begin, the record reveals the trial court considered more than just the emancipation of Evan in rendering its decision. The record reveals the court considered the totality of the circumstances, including the parties' salaries, earning capacities, and living expenses.

{¶ 16} It is also clear from the record that the $300 increase in support is both reasonable and necessary. See *Carnahan v. Carnahan* (1997), 118 Ohio App.3d 393, 692 N.E.2d 1086 (holding that a **modification** of **spousal support** must be reasonable and necessary). Appellant's current annual income is $98,000, up from $94,909 at the decree. His monthly expenses decreased by $883 when his child support obligation ended. Appellee's income remained basically unchanged, while her expenses grew. Her ability to meet her expenses was already suffering and the loss of over $10,000 per year toward these expenses made it impossible. The trial court's finding

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that the increase is both reasonable and necessary is not an abuse of discretion.

{¶ 17} Upon considering the foregoing under the totality of the circumstances, we cannot say the trial court abused its discretion in modifying appellant's **spousal support** obligation.

{¶ 18} Judgment affirmed.

WALSH and BRESSLER, JJ., concur.
Ohio App. 12 Dist.,2005.
Strain v. Strain
Slip Copy, 2005 WL 3031896 (Ohio App. 12 Dist.), 2005 -Ohio- 6035

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Court of Appeals of Ohio,Second District,
Montgomery County.
MOORE, Appellee,
v.
MOORE, Appellant.
No. 21022.

No. 21022.
Decided March 24, 2006.

Background: Former husband filed motion to terminate or reduce spousal support and request for child support. Former wife filed motion to increase spousal support. The Court of Common Pleas, Montgomery County, Domestic Relations Division, No. 2002 DR 383, denied all motions before it, and former husband appealed.

Holdings: The Court of Appeals, Donovan, J., held that:

1(1) evidence was sufficient to support finding that former wife was not voluntarily unemployed as result of her termination;

3(2) income to former wife from her receipt of percentage of former husband's retirement was required to be imputed to her as income; and

6(3) former wife could not be wholly relieved of an obligation to pay child support under the circumstances.

Reversed and remanded.

[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

Divorce 134 ⚷247

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k247 k. Commencement and Termination. Most Cited Cases
Evidence was sufficient to support conclusion of trial court, in proceedings on former husband's motion for termination or reduction of spousal support, that former wife was not voluntarily unemployed as result of her termination; former wife suffered from extreme anxiety attacks, former husband had repeatedly brought former wife's mental health history to court's attention during pendency of the parties' divorce, citing her severe psychological difficulties, suicide attempt and hospitalization in psychiatric unit, and parties' final judgment and decree of divorce contained language addressing former wife's mental health stability and need for ongoing treatment and medications.

[2] Divorce 134 ⚷0

134 Divorce
The trial courts are granted broad discretion concerning awards of spousal support, and their orders will not be disturbed on appeal absent an abuse of that discretion.

[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
Income to former wife resulting from her receipt of percentage of former husband's retirement was required to be imputed to her as income for purposes of former husband's motion to reduce or terminate spousal support obligation, where former wife did not receive such income at time of entry of original spousal support order and thus income represented change of circumstances. R.C. § 3105.18(E).

[4] Divorce 134 ⚷282

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134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k278 Appeal
134k282 k. Presentation and Reservation in Lower Court of Grounds of Review. Most Cited Cases
Error in application of that portion of divorce decree determining which of former husband's streams of income would serve as source of payments from former husband to former wife, from which no appeal was taken by either party, was preserved for review by Court of Appeals on former husband's appeal from denial of his subsequent motion to terminate or reduce spousal support, where error denied former husband relief to which he was entitled on motion.

[5] Child Support 76E 0

76E Child Support
A trial court's decision regarding child-support obligations falls within the discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion.

[6] Child Custody 76D 0

76D Child Custody
Former wife could not be wholly relieved of an obligation to pay child support in at least the minimal amount required by statute, even if it was established that she had medically verified or documented physical or mental disability, where former wife received $22,470 per year as her share of former husband's military retirement, this income was unaffected by any psychiatric condition, and she also received $24,000 annually in spousal support. R.C. § 3119.06.

Robert L. Mues and R. Anne Shale, for appellee.
Dean E. Hines, for appellant.Robert L. Mues and R. Anne Shale, for appellee.Dean E. Hines, for appellant.DONOVAN, Judge.

*1 {¶ 1} This matter is before the court on the notice of appeal of Jeffrey A. Moore, filed April 13, 2005. Mr. Moore and his ex-wife, Sherrie Moore, obtained a final judgment and decree of divorce on June 23, 2003. Mr. Moore received custody of the parties' four children, one of whom is emancipated. The court ordered Mr. Moore to pay spousal support in the amount of $2,000 a month for 60 months, beginning on March 1, 2003. The court retained jurisdiction to modify support, providing that "Husband's retirement may be considered a change of circumstances upon which spousal support could be modified in the future," but Mr. Moore could not seek a reduction in spousal support based upon an increase in wife's income unless Ms. Moore earned in excess of $18,000 a year from employment. The court did not order Ms. Moore to pay child support, because of her lack of work history, noting that Ms. Moore had just begun a job at Stein Mart, earning $5.35 an hour. Ms. Moore now receives, in addition to spousal support from Mr. Moore, 35 percent of his military retirement benefits. The final decree dictated that Mr. Moore could not seek to modify child support unless Ms. Moore earned in excess of $18,000 a year from sources exclusive of spousal support.

{¶ 2} On March 23, 2004, Mr. Moore filed a motion to terminate or reduce spousal support, a request that the court establish a child-support obligation, and a request for a hearing. In June 2004, Stein Mart terminated Ms. Moore's employment. At the time of her termination, she was making $10.75 an hour, or $22,360 a year. On July 20, 2004, Ms. Moore filed a motion to increase spousal support. The magistrate held a hearing on August 6, 2004, and refused to modify Mr. Moore's spousal-support obligation or impose a child-support obligation upon Ms. Moore. The magistrate determined that Ms. Moore had not intentionally lost her job. The magistrate found that Ms. Moore suffered from anxiety attacks and other physical ailments that prevented her from performing her job functions.

{¶ 3} The trial court adopted the magistrate's decision on March 25, 2005, and overruled Mr. Moore's objections thereto. The trial court also denied Ms. Moore's motion for increased spousal support. The trial court made the following finding of fact: "At the time of the August 6, 2004 hearing, defendant had retired from the Air Force and had recently gained employment in the defense aerospace industry. Defendant is currently receiving $5,454 per month in Air Force retirement. That amount is reduced by $104 per month for the cost of a survivor benefit plan. Additionally, pursuant to the terms of the decree, plaintiff receives approximately 35 percent of his retirement benefit. In addition to defendant's retirement income, his position in defense aerospace industry, he receives $92,000 annual [sic]."

{¶ 4} Mr. Moore's first assignment of error is as follows:

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{¶ 5} "The trial court erred and abused its discretion by failing to find that plaintiff/appellee was not voluntarily unemployed and by refusing to impute income to her resulting in a termination or reduction in spousal support"

*2 [1] {¶ 6} Mr. Moore contends that Ms. Moore took deliberate steps to have herself terminated from Stein Mart. He relies on Ms. Moore's supervisors' testimony that Ms. Moore's performance at Stein Mart was initially excellent and began to deteriorate only after Mr. Moore filed his motion to modify spousal support. Mr. Moore argues that "[i]t is inappropriate for the trial court to take into account any 'suspected' or 'presumed' medical or psychological condition of Ms. Moore when no expert testimony was provided concerning this matter at hearing."

[2] {¶ 7} " 'The trial courts are granted broad discretion concerning awards of spousal support. Their orders will not be disturbed on appeal absent an abuse of that discretion." *Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703, 706, 676 N.E.2d 1249. "Abuse of discretion" implies that the court's attitude is unreasonable, arbitrary, or unconscionable. Id.

{¶ 8} We agree with the trial court's determination that Ms. Moore is not voluntarily unemployed. The magistrate had presided over several hearings with Ms. Moore, knew her history, and found her testimony credible on the subject of her termination. Ms. Moore testified that on April 29, 2004, she was hospitalized after suffering "intense pain on [her] lower extremities" that prompted her to call 911. Ms. Moore stated that she was diagnosed with an extreme anxiety attack. Mr. Moore repeatedly brought Ms. Moore's mental health history to the court's attention during the pendency of the parties' divorce, citing her "severe psychological difficulties," "a suicide attempt" and "her hospitalization at the Psychiatric Unit at Kettering Memorial Hospital." The parties' final judgment and decree of divorce contains language that addresses "mother's mental health stability" and the need for ongoing treatment and medications.

[3] {¶ 9} Mr. Moore also asserts that income should have been imputed to Ms. Moore as a result of her receipt of retirement income. We agree. The trial court should have calculated the increase in Ms. Moore's income due to her receipt of 35 percent of Mr. Moore's retirement pay. In affirming the magistrate's decision, the trial court merely noted Ms. Moore's additional retirement income, income that she was not receiving at the time of the final decree. R.C. 3105.18(E) denies jurisdiction to modify a spousal support order entered in a divorce decree "unless the court determines that the circumstances of either party have changed and * * * the decree contains a provision specifically authorizing the court to modify the amount or terms of * * * spousal support." "[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(F) "In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount and terms of payment, and duration of spousal support, * * * the court shall consider * * * (a) The income of the parties from all sources." R.C. 3105.18(C)(1)(a).

*3 {¶ 10} While the trial court did not go on to find exactly what dollar amount Ms. Moore receives as her share of Mr. Moore's military retirement, a calculation based on the finding the court made yields the following result:

$5,454.00 Gross Retirement

- *104.00* Deduction

$5,350.00 Net Retirement

x 0. 35 Ms. Moore's share

$1,872.50 per month

or

$22,470.00 per year

{¶ 11} When the decree of divorce was granted on June 23, 2003, Mr. Moore's $2,000 monthly spousal obligation was ordered to be paid through his military salary. In the proceedings before the magistrate on August 6, 2004, Mr. Moore's attorney represented that because the military refused to withhold more than 60 percent from Mr. Moore's now reduced retirement pay for both his monthly spousal-support obligation and Ms. Moore's 35 percent share, Ms. Moore did not receive the full 35 percent to which she was entitled. A statement that was submitted to the court but not marked as an exhibit reveals that for the month of June 2004, Ms. Moore received only $535.51 from Mr. Moore's retirement pay. Counsel for Mr. Moore proposed that Mr. Moore's monthly postretirement spousal-support obligation of $2,040 be paid instead through his $92,000 annual income

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from his new employer, Ball Aerospace, "and the retirement will take care of itself." It appears that the trial court adopted this agreement. On November 2, 2004, the court ordered the monthly spousal support deduction from Mr. Moore's military retirement pay terminated, and it entered and sent to Ball Aerospace a notice to withhold $2040 per month from Mr. Moore's salary and to remit the amount to Ohio Child Support Payment Central, in Columbus.

[4] {¶ 12} We hold that the trial court erred when it overruled Mr. Moore's motion to reduce his spousal-support obligation, which, the court had imposed in the divorce decree. The source of the error is the spousal-support order in the 2003 divorce decree, from which no appeal was taken. The error the court there committed would be beyond our review here except that as applied in the later order from which this appeal was taken, the error denies Mr. Moore relief to which he may be currently entitled. The error in the decree's application is therefore preserved for our review.

{¶ 13} Ms. Moore now receives $22,470 each year that she did not receive when the prior spousal support order was entered in the divorce decree. The amount she receives is income for purposes of spousal support, and it represents a change of circumstances for Ms. Moore. Thus, the domestic relations court erred when it failed to consider Ms. Moore's additional income as a change of circumstances for purposes of Mr. Moore's motion to modify his monthly spousal-support obligation. Mr. Moore's first assignment of error is sustained, and this matter is remanded for further proceedings on the issue of Mr. Moore's spousal support obligation.

***4** {¶ 14} Mr. Moore's second assignment of error is as follows:

{¶ 15} "The trial court erred and abused its discretion by finding that plaintiff/appellee has no income and by failing to establish a child support obligation for her"

[5] {¶ 16} "It is well established that a trial court's decision regarding child-support obligations falls within the discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion." *Dreher v. Stevens*, Defiance App. No. 4-05-20, 2006-Ohio-351.

{¶ 17} R.C. 3119.06 mandates a minimum child-support award of $50 per month and permits a court to order less or nothing at all only upon proof of the of the nonresidential parent's "medically verified or documented physical or mental disability or institutionalization in a facility for persons with a mental illness or any other circumstances considered appropriate by the court."

[6] {¶ 18} The trial court overruled Mr. Moore's motion to impose a child-support obligation upon Ms. Moore. While the court found that Ms. Moore did not intentionally cause her termination at Stein Mart but rather was unable to perform her job functions because of her mental health problems, it did not specifically address the proof required by R.C. 3119.06 or relate it to the exception to the requirement that the section imposes. Even assuming that the standard was satisfied, the fact remains that Ms. Moore now has $22,470 additional annual income from which she can contribute to her children's needs, income unaffected by any psychiatric condition. When that is added to whatever spousal support she receives, which is now $24,000 annually, no good reason is shown to wholly relieve Ms. Moore of an obligation to pay child support in at least the minimal amount that R.C. 3119.06 requires, if not more. *See McQuinn v. McQuinn,* 110 Ohio App.3d 296, 673 N.E.2d 1383 (holding that wife's share of husband's pension had to be included in her gross income for purposes of calculating wife's child-support obligation). Mr. Moore's second assignment of error is sustained, and this matter is remanded for further proceedings on the issue of Ms. Moore's child-support obligation.

{¶ 19} The judgment reversed, and the cause is remanded for proceedings consistent with this opinion.

Judgment reversed and cause remanded.

GRADY, P.J. and WOLFF, J., concur.
Grady, P.J. and Wolff, J., concur.
Ohio App. 2 Dist.,2006.
Moore v. Moore
--- N.E.2d ----, 2006 WL 759660 (Ohio App. 2 Dist.), 2006 -Ohio- 1431

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

Court of Appeals of Ohio, Fifth District, Stark County.
Thomas L. BARNES, Plaintiff-Appellant,
v.
Marilyn K. BARNES, Defendant-Appellee.
No. 2003CA00383.

Feb. 11, 2005.

Civil Appeal from the Court of Common Pleas, Case No.2002DR01032, Affirmed.

Kristine W. Beard, Canton, OH, for Plaintiff-Appellant.

Arnold F. Glantz, Canton, OH, for Defendant-Appellee.

OPINION

FORD, J.

*1 {¶ 1} The instant appeal stems from a final judgment of the Stark County Court of Common Pleas. Appellant, Thomas L. Barnes, seeks the reversal of the trial court's decision to overrule his motion to modify the amount of spousal support he is obligated to pay to appellee, Marilyn K. Barnes. For the following reasons, this court concludes that the denial of the motion to modify was warranted.

{¶ 2} The parties to the underlying action were married for approximately thirty-one years and had two children. After both children had been emancipated, appellant filed a complaint for a divorce in July 2002. As the factual basis for his claim, he alleged that he and appellee had voluntarily been living separately for more than one year.

{¶ 3} Once appellee had submitted a counterclaim for divorce and the parties had engaged in certain discovery, a trial on the final merits of the case was held before the trial court in February 2003. At the outset of this proceeding, the parties stated that they had been able to reach an agreement as to the majority of the remaining issues in the case. The trial court then proceeded to hear evidence concerning the grounds for the divorce and the separation agreement.

{¶ 4} Two days after the abbreviated trial, the trial court issued the final divorce decree, granting appellant a divorce on the grounds stated in his complaint. The court also expressly found that the terms of the separation agreement were reasonable and fair. Accordingly, the court approved the agreement and incorporated it into the divorce decree.

{¶ 5} The first provision of the parties' separation agreement pertained solely to their marital residence. Specifically, this provision stated that the parties had agreed to sell the residence and then divide any net profit equally between them. In regard to the resolution of any dispute concerning the sale of their residence, the first provision also contained the following sentence: "This Court shall retain continuing jurisdiction of this case to implement the provisions of this Separation Agreement as it pertains to the sale of the aforementioned real estate."

{¶ 6} The second provision of the separation agreement delineated appellant's spousal support obligation. This specific provision stated:

{¶ 7} "2. The Husband consents and agrees to pay spousal support to the Wife for a period of ten (10) years, or until Wife remarries or upon the death of either party, whichever occurs first. Husband agrees to pay to Wife the sum of $1,300.00 per month until the home is sold. At the time the home is sold, Husband agrees to pay to Wife the sum of $1,500.00 per month."

{¶ 8} Besides the foregoing provision, only one other term of the agreement was relevant to the issue of spousal support. The thirteenth provision stated: "The Husband and Wife consent and agree that the within agreement shall be a complete settlement of all rights by way of spousal support, both temporary and permanent, and said Husband and Wife shall make no further demands upon the Husband or Wife by way of spousal support."

*2 {¶ 9} None of the remaining thirteen provisions in the parties' agreement were relevant to appellant's support obligation. Furthermore, except for the one sentence in the provision pertaining to the sale of the

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marital residence, the agreement did not have any other term which granted continuing jurisdiction to the trial court.

{¶ 10} Approximately seven months after executing the separation agreement, appellant submitted a motion to either modify or vacate the spousal support aspect of the agreement. As the basis for this motion, appellant asserted that he was no longer financially able to pay support in accordance with the agreement because he was now unemployed as a result of the elimination of his position as an engineer with the Hoover Company. Appellant further asserted that the trial court still could exercise jurisdiction over the support issue because the amount of his support obligation had been tied to the sale of the marital residence, and that sale still had not been completed.

{¶ 11} An oral hearing on appellant's motion was held on October 14, 2003. As part of that proceeding, counsel for both sides presented legal arguments on the question of whether the trial court had jurisdiction to grant the requested relief. Counsel for appellant continued to argue that, since the marital residence had not been sold, the court still had jurisdiction under the separation agreement. His counsel also contended that, even if the trial court did not have the authority under the separation agreement to modify the amount of support, it could still grant him relief from the support provision under Civ.R. 60(B).

{¶ 12} On the same date of the oral hearing, the trial court rendered its judgment in which it overruled appellant's motion to modify. As to the request to modify, the trial court noted that the parties' separation agreement had not contained any reservation of jurisdiction over the issue of spousal support. Regarding the request to vacate, the trial court concluded that there were no grounds under Civ.R. 60(B) for granting relief from the support obligation under the agreement.

{¶ 13} In now appealing from the foregoing judgment, appellant has assigned the following as error:

{¶ 14} "The trial court abused its discretion by summarily dismissing, for lack of jurisdiction, the appellant's motion to modify spousal support and/or in the alternative, motion to vacate the spousal support clause of the separation agreement."

{¶ 15} Under this sole assignment, appellant has raised two arguments as to the propriety of the appealed judgment. First, he challenges the trial court's interpretation of the term in the separation agreement concerning the extent of its continuing jurisdiction over the divorce proceeding. Specifically, appellant contends that, since the amount of his spousal support obligation was contingent on the sale of their marital residence, the application of the "continuing jurisdiction" term in the "sale" provision extended to any issue pertaining to the payment of support. Based upon this, he further maintains that the trial court had the authority to modify his support obligation in light of the change in circumstances as to his employment.

*3 {¶ 16} As appellant correctly notes in his appellate brief, the authority of any trial court to modify a spousal support award after the issuance of the final divorce decree is governed by R.C. 3105.18(E)(1). This statute provides that if such a decree is released after January 1991 and contains an order concerning the continuing periodic payment of money as spousal support, the court issuing that decree does not have any jurisdiction to alter the terms of the support order unless: (1) a change of circumstances has taken place; and (2) " * * * 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." In applying the second requirement for continuing jurisdiction under the statute, the Supreme Court of Ohio has indicated that any reservation of continuing jurisdiction must be expressly stated in the divorce decree in order for a trial court to properly consider any subsequent motion to modify. *Kimble v. Kimble*, 97 Ohio St.3d 424, 2002-Ohio-6667. Similarly, this court has indicated that an express statement of reservation must be set forth in the separation agreement if the parties to the divorce action intend for the trial court to have the ability to alter a spousal support order. See *Sears v. Sears*, 5th Dist. No.2001CA00368, 2002-Ohio-4069.

{¶ 17} In the instant appeal, our review of the trial court's divorce decree readily shows that it did not contain any provision as to whether that court would continue to exercise jurisdiction over the spousal support issue; thus, the resolution of this aspect of appellant's assignment will turn solely upon our interpretation of the relevant portions of the parties' separation agreement. In regard to the general question of the appropriate interpretation of a separation agreement, this court has consistently concluded that such agreements are subject to the same rules of construction as other types of contracts. See, e.g., *Gaines v. Gaines* (Aug. 14, 2000), 5th Dist.

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No.2000CA00020, 2000 Ohio App. LEXIS 3696. Furthermore, this court has summarized some of the basic rules of construction in the following manner:

{¶ 18} " * * * The question of whether a contract is ambiguous is a question of law to which this court applies a de novo standard of review. * * * The purpose of contract construction is to effectuate the intent of the parties. * * * It is well established in Ohio law that a court must give meaning to all provisions of a contract if possible. * * * Where the parties, following negotiations, make mutual promises which thereafter are integrated into an unambiguous written contract, duly signed by them, courts will give effect to the parties' expressed intentions. * * * Intentions not expressed in the writing are deemed to have no existence and may not be shown by parole evidence. * * * Pursuant to this rule, it has been held that when a term in an agreement is unambiguous, then the words must be given their plain, ordinary and common meaning; however, when the term is not clear, parole evidence is admissible to explain the meaning of the words. * * * " (Citations omitted.) *Schumacher v. Schumacher,* 5th Dist. No.2004-CA-00018, 2004 Ohio App. LEXIS 5233.

*4 {¶ 19} In applying the foregoing basic rules in light of the specific requirement of R.C. 3105.18(E)(1) for continuing jurisdiction, this court has concluded that the fact that the separation agreement made the continuing payment of spousal support contingent upon the existence of certain circumstances was not sufficient to grant the trial court the authority to modify the support order. For example, in *Benincasa v. Benincasa* (Dec. 6, 1993), 5th Dist. No. CA 93-20, 1993 Ohio App. LEXIS 6114, the separation agreement required the husband to pay spousal support in the amount of $3,000 each month, but also conditioned this obligation upon the requirement that the wife use part of the funds to make the monthly mortgage and insurance payments for the marital residence. After the wife had moved from the residence and stopped making the monthly payments, the husband moved the trial court to modify his support obligation. Although the trial court granted the motion to modify, this court reversed that decision on appeal. Specifically, this court rejected the husband's argument that the existence of the condition regarding the payment of spousal support was sufficient to constitute an express reservation of continuing jurisdiction over the issue. That is, in order for a trial court to have the power to alter the terms of the separation agreement, a more specific statement regarding the retention of jurisdiction is necessary.

{¶ 20} A similar decision was rendered in *Gaines,* supra, 2000 Ohio App. LEXIS 3696. In that case, the support obligation was conditioned on the requirement that the wife not earn more than $2,000 per month. Once the wife had taken a position earning approximately $23,000 per year, the husband moved to either modify or terminate his support obligation. On appeal from the denial of his motion, the husband asserted that the "earning" condition in the separation agreement must be interpreted as a reservation of the jurisdiction to modify. In upholding the trial court's decision, this court stated:

{¶ 21} " * * * We are unpersuaded by [the husband's] assertion. The separation agreement language at issue is better classified as a condition precedent to [the husband's] right to cease spousal support payments. The only possible 'modification' intended by the parties is an alteration of spousal support to zero, and no other dollar amount, upon the triggering of the aforesaid economic eventuality in appellee's career. There is thus no open-ended reservation to modify under R.C. 3105.18(E) as suggested by appellant. * * * " *Gaines,* 2000 Ohio App. LEXIS 3696, at 6-7.

{¶ 22} In the instant matter, the condition in the primary "support" provision of the parties' separation agreement was inherently different than the conditions in *Benincasa* and *Gaines,* to the extent that the instant condition did not place any requirement upon appellee in order for the spousal support to continue. Instead, this support provision merely placed a condition upon the amount appellant is obligated to pay. Nevertheless, the underlying logic of *Benincasa* and *Gaines* would still be applicable. Specifically, this court would emphasize that the support provision before us did not state that, after the marital residence has been sold, the trial court could redetermine the amount of support appellant should be required to pay; rather, the provision delineated the exact amount which must be paid after the sale is completed. As a result, the provision did not grant the trial court any discretion in setting the amount of the support. Accordingly, we hold that the conditional language in the support provision of the instant agreement cannot be deemed an express reservation of jurisdiction to modify the basic support obligation. [FN1]

FN1. Our interpretation of the conditional language in the primary "support" provision is further supported by the terms in the

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thirteenth provision of the parties' agreement. As was noted above, that provision indicated that the parties intended for the agreement to constitute a "complete settlement" of all of their respective rights to spousal support. The inclusion of this provision in the agreement would simply be illogical if the parties had truly intended to grant continuing jurisdiction to the trial court over the "support" issue.

*5 {¶ 23} As was noted above, appellant places heavy emphasis upon the fact that the "sale' provision of the instant agreement contains a term which expressly grants the trial court continuing jurisdiction. In light of this, appellant argues that, since the change in the amount of support is tied to the sale of the marital residence, the specific grant of continuing jurisdiction must extend to any issue pertaining to spousal support.

{¶ 24} As to this point, this court would first reiterate that the "jurisdiction" term was set forth in the "sale" provision of the parties' agreement, and that the distinct terms pertaining to appellant's support obligation were stated in a separate provision. Second, the "support" provision does not contain any reference to the "jurisdiction" term in the "sale" provision. Third, and most importantly, the "jurisdiction" term expressly states that the trial court's retention of jurisdiction is for the purpose of implementing " * * * the provisions of this Separation Agreement as it pertains to the sale of the aforementioned real estate." The foregoing unambiguous language clearly limits the scope of the trial court's continuing jurisdiction to any issue which might arise concerning the sale of the parties' home. Even if the language of the "jurisdiction" term is construed in a manner most favorable to appellant, it would still be illogical to conclude that the basic question of whether appellant's support obligation should be modified as a result of a change in circumstances falls within the category of issues which pertain to the sale of the home. Any other interpretation would simply conflict with the plain meaning of the wording of the "jurisdiction" term.

{¶ 25} As an aside, this court would further indicate that, if a dispute ever arose as to appellant's compliance with the "spousal support" provision following the sale of the residence, the trial court's authority to resolve that dispute would not be based upon the "jurisdiction" term of the "sale" provision. Instead, its authority would stem from its inherent power to enforce its own divorce decree. To this extent, we conclude that no question as to the payment of spousal support could properly be considered under the "jurisdiction" term. Even though the increase in support was contingent upon the sale of the parties' home, these two aspects of the separation agreement were not related in any other respect, and the scope of the "jurisdiction" term was expressly limited to the "sale" issue.

{¶ 26} Under the basic rules of contract construction, a separation agreement cannot be subject to interpretation when its terms are both plain and unambiguous. In applying these rules to the relevant portions of the instant separation agreement, this court holds that the document does not have a term which expressly granted the trial court continuing jurisdiction to reconsider the spousal support matter once the divorce decree had been rendered. Thus, since the requirements of R.C. 3105.18(E)(1) were not met in this instance, the trial court was correct in concluding that it did not have the proper authority to go forward on appellant's motion to modify.

*6 {¶ 27} Under his second argument, appellant challenges the merits of the trial court's decision to overrule his alternative request to vacate the support provision in the separation agreement. Appellant maintains that, even if the trial court did not have the jurisdiction to modify his support obligation, that court still had the authority to vacate that aspect of the agreement. Specifically, he contends that he was entitled to relief under Civ.R. 60(B)(4) because it would be inequitable to require him to continue to comply with the support obligation under the present circumstances. In support of this contention, appellant further states that, at the time he agreed to the support provision in the agreement, he could not have foreseen that his position with his employer would be eliminated within six months.

{¶ 28} To state a viable motion for relief from a judgment under Civ.R. 60(B), the moving party must be able to demonstrate, inter alia, that he can satisfy one of the five possible grounds for such relief, as set forth in the rule itself. *Biscardi v. Biscardi* (1999), 133 Ohio App.3d 288, 290. Subsection (4) of Civ.R. 60(B) provides that a trial court can grant a party relief from a final judgment when " * * * it is no longer equitable that the judgment should have prospective application; * * *." In applying Civ .R. 60(B) in the context of a divorce proceeding, the courts of this state have generally held that, even if an express reservation of jurisdiction to modify a spousal support award was not made when the

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divorce decree was issued, a trial court can still grant relief from a support order when the moving party can satisfy the standard for showing that the continuing application of the divorce decree would be inequitable. *Schaefferkoetter v. Schaefferkoetter*, 2nd Dist. Nos. 02CA97, 02CA104, 2003-Ohio-5529.

{¶ 29} Pertinently, the Supreme Court of Ohio has already delineated the basic standard for determining whether a party can satisfy Civ.R. 60(B)(4). In *Crouser v. Crouser* (1988), 39 Ohio St.3d 177, 180, the Supreme Court stated: "In order for the plaintiff to succeed under Civ.R. 60(B)(4), she must show that ' * * * it is no longer equitable that the judgment should have prospective application.' Of importance here are the words 'no longer,' referring to the change in condition that is required to make continued enforcement of the judgment inequitable. Moreover, Civ.R. 60(B)(4) was designed to provide relief when those changed circumstances were not foreseeable, and not within the control of the parties."

{¶ 30} As was noted above, appellant contends that the assertions in his motion before the trial court was sufficient to satisfy the foregoing standard because, at the time the separation agreement was executed, it was not foreseeable that he would lose his job later that year. However, in applying the *Crouser* standard in a prior case, this court has specifically rejected a similar argument.

*7 {¶ 31} In *Sidwell v. Sidwell* (June 4, 1998), 5th Dist No. CT97-0042, 1998 Ohio App. LEXIS 3079, the separation agreement required the husband to pay support to the wife in the amount of $4,000 per month for approximately ten years. At the time of the divorce, the husband worked for a family-owned business in which he was a major shareholder. Six years after the divorce, the business experienced serious financial difficulties which resulted in the reduction of the husband's salary from $200,000 to $46,000 per year. Based upon this, the husband moved the trial court for relief from the support provision in the separation agreement, arguing that it would not be fair for his support obligation to continue under these circumstances. In upholding the denial of the Civ.R. 60(B) motion, this court stated in *Sidwell:* "We find the court did not err in finding these circumstances were foreseeable when the parties entered into the separation agreement, and we also find the parties could have agreed that the court retained jurisdiction over the award in order to adjust for circumstances such as the one that has occurred." Id., 1998 Ohio App. LEXIS 3079, at 7-8.

{¶ 32} To the extent that the husband in *Sidwell* was not totally unemployed, it is arguable that the facts in the instant appeal are distinguishable from those in *Sidwell.* However, the extent of the husband's financial difficulties was not a consideration upon which the *Sidwell* decision was predicated. Instead, that decision was based upon the legal conclusion that, because a change in a person's financial situation is always a possibility, it is considered a foreseeable event for purposes of Civ.R. 60(B)(4) even if there was no immediate reason to believe the change was about to occur when the judgment was issued. In turn, since such a change is foreseeable, the party should have considered this point in negotiating the terms of the separation agreement. The fact that the party failed to ensure that the agreement covered this possibility is not a valid reason for concluding that it would be inequitable to continue to enforce the provisions of the agreement.

{¶ 33} Therefore, as a matter of law, the fact that appellant lost his job would not be sufficient to state proper grounds for obtaining relief from the divorce decree under Civ.R. 60(B)(4). Furthermore, this court would indicate that, even though appellant also requested relief from judgment under the "any other justifiable reason" provision of Civ.R. 60(B)(5), the Supreme Court has held that a party is not eligible for relief under that "catchall" provision when another grounds is clearly applicable and the party is not able to satisfy it. *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174. Thus, appellant has failed to demonstrate that the trial court erred in overruling his request for relief from the "spousal support" provision of the separation agreement.

{¶ 34} Pursuant to the foregoing analysis, appellant's sole assignment of error is without merit. Accordingly, the judgment of the trial court is affirmed.

JUDITH A. CHRISTLEY J., Eleventh Appellate District, sitting by assignment.

ROBERT A. NADER, J., Ret., Eleventh Appellate District, sitting by assignment, concur.

STATE OF OHIO) IN THE COURT OF APPEALS
) SS.
COUNTY OF STARK) FIFTH DISTRICT

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JUDGMENT ENTRY

*8 For the reasons stated in the Opinion of this court, the sole assignment of error is without merit. It is the order and judgment of this court that the judgment of the trial court is affirmed.

JUDITH A. CHRISTLEY, J., Eleventh Appellate District, sitting by assignment.

ROBERT A. NADER, J., Ret., Eleventh Appellate District, sitting by assignment, concur.

2005 WL 327552 (Ohio App. 5 Dist.), 2005-Ohio-544

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

Court of Appeals of Ohio,Ninth District, Summit County.
Amellia MALIZIA Appellee
v.
Roberto MALIZIA Appellant.
No. 22565.

Decided Sept. 30, 2005.

Background: Former wife filed motion for **modification** of husband's **spousal support** obligation of $100 per year. The Court of Common Pleas, No, 2000-08-7268, granted **modification**, and husband appealed.

1**Holding:** The Court of Appeals, Summit County, Whitmore, J., held that substantial change in former husband's economic circumstances warranted **modification** of original **spousal support** order.

Affirmed.

Slaby, P.J., filed dissenting opinion.

[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
Substantial change in former husband's economic circumstances warranted **modification** of original **spousal support** order of $100 per year to $975 per month; husband admitted that he received $700 per month from pension and $1,300 per month in social security, neither of which income sources existed at time of original divorce. R.C. § 3105.18(E, F).

[2] Divorce 134 ⚷286(1)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k278 Appeal
134k286 Review
134k286(1) k. Scope and Extent in General. Most Cited Cases
Former husband was not entitled to relief on appeal from **modification** of **spousal support** based on claim that, by proceeding pro se, he was unable to competently present or effectively rebut evidence presented at hearing on motion.

Appeal from Judgment Entered in the Court of Common Pleas County of Summit, Ohio, Case No.2000-08-7268.

Edmund M. Sawan, Attorney at Law, Akron, for Appellant.
Mary Ellen Leslie, Attorney at Law, Akron, for Appellee.

DECISION AND JOURNAL ENTRY

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

{¶ 1} Appellant Roberto Malizia has appealed the Final Post Decree Judgment Entry of the Summit County Court of Common Pleas, Domestic Division, modifying his **spousal support** obligation. This Court affirms.

I

{¶ 2} Roberto and Amelia Malizia were divorced on April 27, 2001 after 38 years of marriage. A separation agreement, which the parties had previously entered into, was incorporated into the judgment entry of divorce. The terms of the divorce decree provided that Appellant Roberto Malizia would pay Appellee Amelia Malizia **spousal support** in the amount of $100 per year, plus a 2% processing fee. The divorce decree further provided that the

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spousal support was payable on an annual basis until death or further ordered by the court. Additionally, the court retained jurisdiction to modify the amount or term of the **spousal support** upon a determination that the circumstances of either party had changed pursuant to R.C. 3105.18(E)(1).

{¶ 3} On October 7, 2004, Appellee filed a Post Decree Motion to Modify **Spousal Support** based on Appellee's assertion that Appellant's financial circumstances had changed. Both parties prepared Financial Disclosure Affidavits and on November 12, 2004, a hearing was held concerning the matter. Appellee was represented by counsel at the hearing while Appellant appeared pro se.

{¶ 4} The magistrate issued her decision on November 30, 2004. The magistrate determined that Appellant's circumstances had changed and that a **modification** was warranted. The magistrate increased the **spousal support** to $975 per month effective as of the date Appellee's motion was filed.

{¶ 5} On February 16, 2005, the trial court entered a Final Post Decree Judgment Entry affirming the Magistrate's decision. The trial court found that a change in circumstances had occurred. The trial court found that it retained jurisdiction to modify the **spousal support** and affirmed the Magistrate's determination that said support should be increased to $975 per month. Appellant has appealed this decision, asserting one assignment of error.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED IN AFFIRMING THE MAGISTRATE'S DECISION ALLOWING A SUBSTANTIAL INCREASE IN **SPOUSAL SUPPORT**."

[1] {¶ 6} In his sole assignment of error, Appellant has argued that the trial court erred in affirming the magistrate's decision modifying the **spousal support** agreed upon in the original divorce decree. Specifically, Appellant's argument raises two issues: (1) that there was no "change of circumstances" and (2) that because Appellant was not represented by counsel at the dispositive November 12, 2004 hearing, he was unable to present or effectively contest the presentation of evidence. We disagree on both counts.

{¶ 7} We begin by noting that "a trial court had broad discretion in determining a **spousal support** award, including whether or not to modify an existing award." *Kingsolver v. Kingsolver,* 9th Dist. No. 21773, 2004-Ohio-3844, at ¶ 10, citing *Mottice v. Mottice* (1997), 118 Ohio App.3d 731, 735, 693 N.E.2d 1179. This Court reviews a trial court's decision modifying **spousal support** under an abuse of discretion standard. *Barrows v. Barrows,* 9th Dist. No. 21904, 2004-Ohio-4878, at ¶ 4. An abuse of discretion connotes more than a mere error in judgment; it signifies an attitude on the 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. Absent an abuse of discretion, a **spousal support** award will not be disturbed on appeal. *Barrows* at ¶ 4. Finally, "when applying the [abuse of discretion] standard, an appellate court is not free to substitute its judgment for that of the trial judge." *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

*2 {¶ 8} It is well established that before a trial court may 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. First, the court must determine whether the original divorce decree specifically authorized the trial court to modify the **spousal support**, and if so, whether either party's circumstances have changed. *Kingsolver* at ¶ 11, citing *Leighner,* 33 Ohio App.3d at 215, 515 N.E.2d 625; See R.C. 3105.18(E). Second, the trial court must evaluate the appropriateness and reasonableness of the award. *Barrows* at ¶ 7, citing R.C. 3105.18(C)(1).

{¶ 9} It is evident from the record that the trial court retained jurisdiction to modify the **spousal support**. The divorce decree of April 27, 2000 specifically authorized the Summit County Domestic Relations Court to modify the existing **spousal support** upon a showing of changed circumstances of either party. Having satisfied the jurisdictional requirement, we next move to the contested issue of whether "changed circumstances" existed.

{¶ 10} Appellant has argued that there was no real presentation of evidence to justify the change of circumstances and that the receipt of Social Security benefits was "foreseeable" at the time of the divorce decree and thus, was not a change in circumstances. We disagree.

{¶ 11} Pursuant to R.C. 3105.18(F), a change in

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circumstances includes, but is not limited to, any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses. Id. Importantly, this Court has recognized that the appropriate standard for determining changed circumstances is whether there has been " 'any' increase or involuntary decrease in the parties' economic status." *Kingsolver* at ¶ 24. See also *Zahn v. Zahn,* 9th Dist. Nos, 21879, 21880, 2004-Ohio-4881, at ¶ 18 (stating "The standard [to justify modifying **spousal support**] is whether there is 'any change' [in circumstances].").

{¶ 12} It is apparent from the record that Appellant's economic status increased in the approximately 3 1/2 years between the divorce decree and Appellee's motion to modify **spousal support**. Specifically, the trial court found that Appellant obtained two new sources of income-$700 per month from his Firestone pension and $1,300 per month from Social Security.

{¶ 13} Appellant conceded at the November 12, 2004 hearing that he had begun collecting $1,300 per month from Social Security. He also admitted that he had begun receiving a pension check from Firestone in the amount of $700 per month. Neither of the aforementioned sources of income existed at the time of the original divorce decree, therefore, we find that Appellant experienced a change in his economic status. See *Kingsolver* at ¶ 23 (holding "[i]n 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 ... *after* the **spousal support** order was entered into.") (emphasis sic).
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*3 {¶ 14} Appellant's argument that the inevitable receipt of Social Security benefits was foreseeable and thus precludes finding a change in circumstances is untenable. While the *Leighner* court required that the change in circumstances be "substantial" and "not contemplated" (or not foreseeable), at the time of the prior order, this Court has held that changed circumstances can exist absent "drastic," "substantial" or "unforeseen" changes. See *Kingsolver* at ¶ 24. See also *Leighner,* 33 Ohio App.3d at 215, 515 N.E.2d 625. In *Kingsolver,* this Court diverged from the Tenth Appellate District's reasoning in *Leighner.* While we agreed 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[,]" we concluded that 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." (Quotations omitted). *Kingsolver* at ¶ 23.

{¶ 15} In *Kingsolver,* after extensive statutory interpretation, this Court stated:
"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." *Kingsolver* at ¶ 21 n. 3.

{¶ 16} Therefore, the foreseeability of potential Social Security benefits is irrelevant to the change in circumstances analysis.

{¶ 17} Because Appellant has not argued the appropriateness or reasonableness of the modified **spousal support**, we find it unnecessary to address the second prong of the *Leighner* test. It is not the duty of this Court to develop an argument in support of an assignment of error if one exists. *Cardone v. Cardone* (May 6, 1998), 9th Dist. Nos. 18349 and 18673, at 22. As we have previously held, we will not guess at undeveloped claims on appeal. See *McPherson v. Goodyear Tire & Rubber Co.,* 9th Dist. No. 21499, 2003-Ohio-7190, at ¶ 31, citing *Elyria Joint Venture v. Boardwalk Fries, Inc.* (Jan. 31, 2001), 9th Dist. No. 99CA007336.

[2] {¶ 18} Appellant has also argued that because he appeared pro se at the November 12, 2004 hearing, he was unable to competently present or effectively rebut evidence presented at said hearing. Appellant has argued that he was "without the skills or expertise necessary to properly frame the issues and/or present evidence in support of or against these issues." This argument lacks merit.

{¶ 19} It is axiomatic that the pro se civil litigant must accept the consequences of his representation. In *Jones Concrete, Inc. v. Thomas* (Dec. 22, 1999), 9th Dist. No. 2957-M, this Court held that pro se civil litigants "are not to be accorded greater rights and must accept the results of their own mistakes and errors." Id. at 4. We went on to hold that pro se civil litigants "are bound by the same rules and procedures as those litigants who retain counsel." Id.

*4 {¶ 20} Appellant has argued that because of his

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pro se representation, he was unable to effectively cross-examine the Appellee, unable to effectively present or challenge evidence, and unable to properly frame the legal issues. Appellant goes so far as to suggest that the " 'facts and circumstances of each case' can only be presented by (presumably) competent, experienced counsel." This statement is simply untrue. Pro se litigants are "presumed to have knowledge of the law and of correct legal procedure and [are] held to the same standard as all other litigants." *Kilroy v. B.H. Lakeshore Co.* (1996), 111 Ohio App.3d 357, 363, 676 N.E.2d 171. Appellant "cannot expect nor demand special treatment from the [magistrate] who is to sit as impartial arbiter." Id. This Court does not concern itself with the reasons why Appellant chose to forego competent legal representation. We will "not demand that the trial court should have accorded appellant any greater leniency" with regard to the manner in which he conducted his case. See *Cook v. Criminger,* 9 Dist. No. 22313, 2005-Ohio-1949, at ¶ 7.

{¶ 21} After a careful reflection of the record and the arguments made by counsel, this Court cannot conclude that the trial court was unreasonable, arbitrary, or unconscionable when it modified the amount of **spousal support**. Therefore, we find that the trial court did not abuse its discretion.

{¶ 22} Based on the foregoing, Appellant's sole assignment of error is without merit.

III

{¶ 23} Appellant's sole assignment of error is overruled. The judgment of the trial court is affirmed. Judgment affirmed.

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 Appellant.

Exceptions.

BATCHELDER, J. concurs.
SLABY, P.J. dissents, saying.SLABY, P. J.
{¶ 24} I respectfully dissent.

{¶ 25} The majority acknowledges that there is a two part test for increasing **spousal support**. I would agree that there was a change in circumstances to warrant the trial court to consider adjusting the support.

{¶ 26} The original divorce was a negotiated divorce. The majority believes that the change was in both receiving social security benefits and the pension. I believe that it would have been clear in the original negotiated settlements that there would be social security paid at some point and that would have been considered in the original negotiations.

*5 {¶ 27} Therefore, the only increase in unanticipated income would have been the $700 a month pension. I believe that an increase from $100.00 per year to $975.00 per month on a $700 a month income increase is an abuse of discretion and I would reverse.

Ohio App. 9 Dist.,2005.
Malizia v. Malizia
Slip Copy, 2005 WL 2400930 (Ohio App. 9 Dist.), 2005 -Ohio- 5186

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H Jordan v. Jordan
Ohio App. 3 Dist.,2003.

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

Court of Appeals of Ohio,Third District, Hancock County.
Miguel A. **JORDAN**, Plaintiff-Appellant
v.
Nada G. **JORDAN**, Defendant-Appellee.
No. 5-03-07.

Decided Dec. 29, 2003.

Background: In divorce proceedings, the magistrate ordered former husband to pay $6,000 per month in spousal support. Husband objected to the findings and appealed. The Common Pleas Court, Hancock County, Domestic Relations Division, No. 5-03-07, upheld the magistrate's decision. Husband appealed.

Holdings: The Court of Appeals, Cupp, J., held that:
(1) spousal support award of $6,000 per month was appropriate and reasonable;
(2) spousal support award was not against the manifest weight of the evidence;
(3) lifetime spousal support award was not erroneous; and
(4) non-modifiable nature of spousal support award was proper.

Affirmed.

West Headnotes

[1] Divorce 134 240(5)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k240 Amount
134k240(5) k. Excessiveness of Sum Allowed. Most Cited Cases
Spousal support award of $6,000 per month was appropriate and reasonable; parties enjoyed standard of living commensurate with former husband's income, it was not unreasonable for trial court to determine that $6,000 per month was appropriate, under the circumstances, to support former wife in manner consistent with lifestyle she enjoyed during marriage, and, based on evidence presented at hearing, court found that husband had ability to pay spousal support without change to his lifestyle. R.C. § 3105.18.

[2] Divorce 134 239

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k239 k. Application and Proceedings Thereon. Most Cited Cases
Spousal support award of $6,000 per month was not against the manifest weight of the evidence; testimony was presented as to income and earning potential parties, the standard of living to which they had become accustomed, the cost of maintaining a household, the education of the parties, former wife's opportunities for employment following the divorce, the duration of the marriage and the age and physical condition of the parties.

[3] Divorce 134 247

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k247 k. Commencement and Termination. Most Cited Cases
Trial court did not err in adopting statutory default of lifetime spousal support award. R.C. § 3105.18.

[4] Divorce 134 245(1)

134 Divorce
134V Alimony, Allowances, and Disposition of Property

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134k230 Permanent Alimony
134k245 Modification of Judgment or Decree
134k245(1) k. Power and Authority. Most Cited Cases
Non-modifiable nature of spousal support award was proper, where parties had been married 19 years, former wife stayed home to take care of children and was absent from workforce for majority of her marriage, she was terminated from job working for former husband, which was only job she held during marriage, she was almost fifty, and, as testified to by career counselor, she had significant problems reading.

Civil Appeal from Common Pleas Court, Domestic Relations Division.
Frederic E. Matthews, Attorney at Law, Reg. # 0010830, Bowling Green, OH, for appellant.
Michael J. Malone, Attorney at Law, Reg. # 0003277, Findlay, OH, for appellee.
CUPP, J.
*1 {¶ 1}**MiguelJordan** (hereinafter "**Miguel**"), appellant herein, appeals the judgment of the Hancock County Court of Common Pleas, Domestic Relations Division, granting him a divorce from appellee, Nada **Jordan** (hereinafter "Nada"), and awarding spousal support to Nada.

{¶ 2} The parties were married on January 16, 1981. At the time of the parties' marriage, **Miguel** was attending college at The Ohio State University in Columbus, Ohio. In October of 1981, **Miguel**, Jr., was born to **Miguel** and Nada, at which time it was decided that Nada would quit working and stay home to raise their son. The parties had another child, Jorge, born October 1984.

{¶ 3}**Miguel** graduated from Ohio State in 1982 and began medical school. He finished medical school in 1986, completed his residency, and the parties subsequently moved to Findlay, Ohio where **Miguel** began a private obstetrics/gynecology practice. During this time, Nada continued to stay at home to raise the children.

{¶ 4} In 1992, Nada began working as **Miguel's** office manager. She kept the books, did the budget and paid the bills of the business. Nada's salary was approximately $31,000 per year. Nada continued to work as the office manager until 1999, when **Miguel** fired her. Soon thereafter, in 2000, **Miguel** filed for divorce.

{¶ 5} Prior to the final divorce hearing, the parties entered into a stipulated properly settlement. The only issue for the final hearing was the determination of spousal support. Following the presentation of evidence over three days, the magistrate entered a decision ordering Miguel to pay Nada spousal support in the amount of $6,000 per month. The magistrate retained jurisdiction over the award in the event it should be necessary to modify it based on a change in certain circumstances of the parties. Miguel objected to the magistrate's findings and appealed the decision to the Hancock County Court of Common Pleas. The trial court subsequently upheld the magistrate's decision.

{¶ 6} It is from this decision that appellant appeals, asserting two assignments of error for our review.

ASSIGNMENT OF ERROR NO. I

[1]**The trial court's award of $72,000 per year in spousal support was (1) an abuse of discretion because the court failed to properly consider appellee's need and the statutory factors set forth in O.R.C. 3105.18; and (2) against the manifest weight of the evidence.**
{¶ 7} A trial court has broad discretion in formulating spousal support awards and a reviewing court should not alter an award absent a finding that the trial court abused its discretion. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. An appellate court cannot substitute its judgment on factual or discretionary issues for that of the trial court. *Id.* at 218-219, 450 N.E.2d 1140. An abuse of discretion must indicate that the trial court's attitude is unreasonable, unconscionable or arbitrary. *Id.* at 219, 450 N.E.2d 1140.

{¶ 8} The nature, amount and duration of spousal support is determined on the basis of the trial court's evaluation of the evidence under the relevant factors of R.C. 3105.18. Those factors include: the income of the parties; their relative earning abilities; their ages and physical conditions; the retirement benefits of the parties; the duration of the marriage; the standard of living established during the marriage; the relative extent of education of the parties; relative assets and liabilities; the contribution of each party to the

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education, training, or earning ability of the other party; the time and expense necessary for the spouse seeking support to acquire education, training, or job experience so that they may obtain appropriate employment; the tax consequences of an award of spousal support; the lost income production capacity of either party that resulted from marital responsibilities; and any other factor that the court finds to be relevant.

*2 {¶ 9} Miguel herein argues that the trial court abused its discretion by failing to properly consider these statutory factors. Miguel specifically argues that the trial court ignored Nada's ability to produce income. Appellant also maintains that the trial court abused its discretion by failing to consider Nada's need for spousal support and instead awarded an arbitrary amount.

{¶ 10} In the case sub judice, the trial court found that the magistrate had applied the factors set forth by R.C. 3105.18 to determine whether support was appropriate and necessary. In fact, the magistrate's discussion of the statutory factors comprises twelve pages of the decision. The trial court adopted the magistrate's findings of fact in regard to the evidence that related to these statutory factors.

{¶ 11} The magistrate found that there was a huge disparity between **Miguel** and Nada's respective incomes and earning potential. The magistrate found that **Miguel's** annual adjusted gross income was well over $400,000 and that Nada could only expect to earn about $25,000 per year, if she were able to find suitable employment.

{¶ 12} The magistrate further considered the retirement benefits of the parties, the duration of the marriage, the contributions each spouse made to the marriage, the costs of running **Miguel's** household, his payment of the college expenses for his children and the tax consequences of the support award. After considering all of the above factors, the magistrate determined that **Miguel** had the ability to pay $6,083 per month, *without any lifestyle change.*

{¶ 13} The magistrate then considered Nada's need for spousal support. The magistrate evaluated the cost of establishing a household, the standard of living to which Nada had become accustomed, and Nada's ability to work. After considering all of these factors, the court awarded $6,000 per month in spousal support.

{¶ 14} Pursuant to R.C. 3105.18, a reasonable amount of spousal support should be awarded when appropriate. Although it was a factor to be considered under the old statutory scheme, R.C. 3105.18, as modified in April 1991, rejects "need" as the basis for a spousal support award. *Bowen v. Bowen* (1999) 132 Ohio App.3d 616, 725 N.E.2d 1165. It is not significant whether the spouse "deserves" the support; the only relevant question is what is appropriate and reasonable under the circumstances." *Id. Schindler v. Schindler* (Jan. 28, 1998), Summit App. No. 18243.Further, once the factors of R.C. 3105.18 have been considered, the amount of spousal support is within the sound discretion of the trial court. *Young v. Young* (Dec. 29, 1993), Lorain App. No. 93CA005554.

{¶ 15} We find that the spousal support award entered by the trial court was neither inappropriate nor unreasonable. During their marriage, **Miguel** and Nada enjoyed a standard of living commensurate with **Miguel's** income. They belonged to a country club, took frequent vacations, bought mink coats, designer handbags and grand pianos. It was not unreasonable for the trial court to determine that $6,000 per month was appropriate, under the circumstances, to support Nada in a manner consistent with the lifestyle she enjoyed during the marriage. Further, based on the evidence presented at the hearing, the court found that Miguel had the ability to pay the spousal support without a change to *his* lifestyle. Based on the evidence of record, we find the trial court did not abuse its discretion when determining the amount of spousal support.

*3[2]{¶ 16} This finding notwithstanding, Miguel argues that the trial court's decision was against the manifest weight of the evidence. In resolving an appeal based on manifest weight of the evidence, a reviewing court examines the entire record to determine if the record is supported by some competent, credible evidence. *Bucher v. Schmidt* (2002), Hancock App. No. 5-01-48, *2002-Ohio-3933* (citations omitted). Where the lower court's judgment is duly supported, it shall not be reversed as being against the manifest weight of the evidence. *Id.* The Supreme Court of Ohio further admonishes that an appellate court must not substitute its judgment for

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that of the trial court based upon its own opinion as to the veracity of the witnesses or the reliability of the evidence presented, as the trier of fact is in the best position to view the witnesses and observe their demeanor, gestures, and voice inflections, and use those observations in weighing the credibility of the testimony make such determinations. *DeWitt v. DeWitt* (2003) Marion App. No. 9-02-42, *2003-Ohio-851* (citation omitted).

{¶ 17} Based on the evidence of record, the testimony presented as to the income and earning potential of Miguel and Nada, the standard of living to which they had become accustomed, the cost of maintaining a household, the education of the parties, Nada's opportunities for employment following the divorce, the duration of the marriage and the age and physical condition of the parties, we find there was significant evidence to support the trial court's decision. Accordingly, we cannot find that the spousal support award is against the manifest weight of the evidence.

{¶ 18} Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. II

The court erred in making the spousal support (A) payable for life, (B) non-modifiable for five (5) years and (C) not fully modifiable beyond that five (5) year period.

{¶ 19} Under this assignment of error, appellant argues that the trial court erred by not providing for the termination of spousal support within a reasonable time. The trial court retained jurisdiction and stipulated in its award of spousal support that the award could not be modified for a period of five years and is only modifiable after five years if Miguel's income is significantly reduced by the limitation of his medical practice or disability, or when Nada reaches the age of sixty-five, dies, remarries or begins to cohabitate with a male who is not a member of her family.

[3]{¶ 20} As previously noted, R.C. 3105.18 provides that "any award of spousal support made under this section shall terminate upon the death of either party, unless the order containing the award expressly provides otherwise."Accordingly, based on this statutory language and the record in this case, we do not find that the trial court erred in adopting the statutory default of lifetime spousal support in the event none of the other conditions are satisfied.

*4[4]{¶ 21} With respect to the non-modifiable nature of the spousal support award, appellant cites *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 554 N.E.2d 83, for the proposition that a decree normally provides for a reasonable termination of the award at a time and date certain. *Kunkle,* however, makes specific exceptions to this rule "in cases involving a marriage of long duration, parties of advanced age or a homemaker-spouse with little opportunity to develop meaningful employment outside the home."*Id.* at paragraph one of the syllabus.

{¶ 22} In this case, the marriage spanned nineteen years. Although Nada received a bachelor's degree in economics, she stayed home to take care of the children and was absent from the workforce for the majority of her marriage, she was terminated from the only job she held during the marriage, she is almost fifty, and, as testified to by a career counselor, she has significant problems reading. Given these factors, we cannot say that the trial court abused its discretion when it determined the duration of the spousal support award. We find no error in the trial court's award of spousal support.

{¶ 23} Appellant's second assignment of error is overruled.

{¶ 24} Having found no error prejudicial to appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

WALTERS and SHAW, JJ., concur.
Ohio App. 3 Dist.,2003.
Jordan v. Jordan
Not Reported in N.E.2d, 2003 WL 23018581 (Ohio App. 3 Dist.), 2003 -Ohio- 7116

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McLaughlin v. McLaughlinOhio App. 4 Dist.,2001.Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fourth District, Athens County.
Carol McLAUGHLIN, Plaintiff-Appellee,
v.
Sam McLAUGHLIN, Defendant-Appellant.
No. 00CA14.

March 26, 2001.

T.E. Eslocker, Eslocker, Hodson, Oremus, Athens, OH, for appellant.
Richard M. Lewis, Cole & Lewis, Jackson, OH, for appellee.

DECISION AND JUDGMENT ENTRY

EVANS.
*1 This is an appeal from the judgment of the Athens County Court of Common Pleas, which dismissed Defendant Appellant Sam McLaughlin's Motion to Modify Spousal Support on the basis of its lack of jurisdiction to do so. The trial court found that the separation agreement incorporated into the final decree of divorce granted the court jurisdiction to modify spousal support only in limited circumstances. Since none of those specified circumstances are present in this case, the trial court found that it did not have jurisdiction to entertain appellant's motion.

Appellant argues that the trial court erred in dismissing his motion. He contends that the court abused its discretion by awarding spousal support indefinitely and failing to reserve jurisdiction to modify that award. We disagree.

Appellant freely entered into the separation agreement that defined the trial court's continuing jurisdiction to modify spousal support. In addition, appellant waived any error occasioned by the trial court's adoption and incorporation of the separation agreement into the divorce decree since he failed to bring a direct appeal of the final decree of divorce. Accordingly, we affirm the judgment of the trial court.

Appellant and Plaintiff-Appellee Carol McLaughlin were divorced pursuant to a decree of divorce filed by the Athens County Court of Common Pleas on December 16, 1993. This judgment entry and divorce decree incorporated the separation agreement and shared parenting plan, which the parties had agreed upon and entered into previously. The decree provided that the trial court reserved jurisdiction to "enforce and oversee the conveyancing of assets, the performance of executory provisions of the Separation Agreement and all matters relating to the parenting of the children and issues relating to the best interest of the children." However, the decree did not specifically reserve jurisdiction for the trial court to modify the spousal support provisions of the separation agreement.

The separation agreement that was incorporated into the final decree of divorce provides that appellant must pay appellee spousal support in the amount of $60,000 per year. The agreement also grants appellee one-half the royalties from a book published by appellant. The agreement also provides that support payments shall continue until appellee dies, remarries, or cohabits "with an adult male not her kin." The agreement also provides for modification of appellant's spousal support obligation if he experiences an involuntary reduction in income. In that case, the agreement provides that appellant's spousal support obligation shall be reduced proportionately to his loss of income, and that his obligation shall never exceed forty-six percent of his base salary.

The parties' youngest child became emancipated in June 1999 and is now a college student. On July 15, 1999, appellant filed a motion to modify **spousal support**. The parties agreed to submit the issue of whether the trial court retained **continuing jurisdiction** to modify **spousal support**. The issue was submitted to a magistrate for determination at a non-oral hearing. On January 6, 2000, the magistrate issued her decision, finding that the trial court was without **continuing jurisdiction** to modify or terminate **spousal support** because **continuing jurisdiction** to do so was not specifically reserved to the court by the terms of the separation agreement. The magistrate also found that the bases advanced by appellant to modify or terminate **spousal support**

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were not among those specified in the agreement. Appellant filed objections to the magistrate's report. On February 22, 2000, the trial court overruled appellant's objections, affirmed the magistrate's decision, and dismissed appellant's motion.

*2 Appellant filed a timely notice of appeal and presents one assignment of error for our review.

ASSIGNMENT OF ERROR:
THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION BY DISMISSING APPELLANT'S MOTION TO MODIFY **SPOUSAL SUPPORT** FOR LACK OF **JURISDICTION.**

In his sole assignment of error, appellant argues that the trial court erred in finding that it did not have **continuing jurisdiction** to modify **spousal support** in this case. He contends that the facts of this case demonstrate the inequity of the court's failure to reserve **continuing jurisdiction** to modify **spousal support** in the divorce decree. Therefore, he argues that the trial court should have found that **continuing jurisdiction** was implied in the separation agreement. Appellant also argues that an award of **spousal support** for an indefinite period of time is inconsistent with the intent of the parties in executing the separation agreement.

Formerly, a trial court's **continuing jurisdiction** to modify an award of **spousal support** was implied in the decree of divorce. See *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 350 N.E.2d 413. In 1986, the General Assembly amended R.C. 3105.18 to provide that the trial court does not have continuing jurisdiction to modify spousal support unless the court specifically reserves such jurisdiction in the decree of divorce. See R.C. 3105.18(E)(1). The decision to reserve jurisdiction to modify an award of spousal support is left to the sound discretion of the trial court. See *Johnson v. Johnson* (1993), 88 Ohio App.3d 329, 623 N.E.2d 1294. However, several courts have held that the trial court abuses its discretion by failing to reserve jurisdiction to modify an indefinite award of spousal support. See *Nori v. Nori* (1989), 58 Ohio App.3d 69, 568 N.E.2d 730; *Gulia v. Gulia* (1994), 93 Ohio App.3d 653, 639 N.E.2d 822.

Appellant argues that the trial court abused its discretion by failing to follow *Nori* and *Gulia.* He contends that indefinite spousal support awards are strongly disfavored in Ohio. See *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 554 N.E.2d 83, paragraph one of the syllabus. To support this strong public policy, appellant argues that we should look beyond the express terms of the separation agreement and imply the trial court's continuing jurisdiction to modify spousal support.

We find that *Nori* and *Gulia* are distinguishable from the case *sub judice.* In each of those cases, the trial court imposed the spousal support award. In the case *sub judice,* the parties negotiated the terms of spousal support, agreed upon them, including the circumstances under which appellant's support obligation could be modified, and executed the document formalizing their agreement. Thereafter, they indicated their understanding of this agreement in open court and sought its incorporation into their decree of divorce. Ohio courts generally give more deference to terms included in a separation agreement between the parties than to terms of a divorce decree imposed by the trial court. See *Scott v. Scott* (Apr. 29, 1994), Lucas App. No. L-93-251, unreported. Thus, when a separation agreement between the parties to a divorce action defines the terms and conditions of **spousal support**, as well as the circumstances required for its modification, the trial court need not reserve **continuing jurisdiction** to modify **spousal support** should the separation agreement not provide for such **continuing jurisdiction**.

*3 In addition, appellant waived any error by failing to bring a direct appeal from the divorce decree. In *Johnson, supra,* the court ruled that the payee spouse could not bring a collateral attack on the **spousal support** provision of a divorce decree even though the trial court failed to reserve **continuing jurisdiction** to modify **spousal support**. Courts that have considered both *Nori* and *Johnson* have held that a payee spouse must challenge the trial court's failure to reserve **continuing jurisdiction** by way of direct appeal, not through a post-decree motion to modify **spousal support**. See *Lawson v. Garrison* (Sept. 4, 1998), Lucas App. No. L-98-1145, unreported; *Ritchie v. Ritchie* (Jan. 19, 1999), Warren App. No. CA98-05-063, unreported. Appellant did not bring a direct appeal from the decree of divorce, so he cannot now be permitted to challenge the trial court's failure to reserve continuing jurisdiction to modify spousal support by means of a post-decree motion to modify that same spousal support.

Appellant also argues that an indefinite award of spousal support is inconsistent with the intent of the parties in executing the separation agreement. According to appellant, the primary intent behind the

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separation agreement was to protect the parties' daughters from suffering any negative economic impact as a result of the divorce. The parties' youngest daughter has now attained the age of majority and has entered college. Therefore, appellant argues that there is no longer any reason that he should be required to pay $60,000 per year in spousal support.

When the parties to a divorce action enter into a separation agreement, the court must construe that agreement in accordance with ordinary rules of contract law. See *Patel v. Patel* (Mar. 23, 1999), Athens App. Nos. 98CA29 and 98CA30, unreported. The construction of a contract is a question of law and, as such, we review the trial court's construction of a written instrument *de novo*. See *Graham v. Drydock* (1996), 76 Ohio St.3d 311, 313, 667 N.E.2d 949, 952. We must interpret contract language "so as to carry out the intent of the parties." *Skivolocki v. East Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 313 N.E.2d 374, paragraph one of the syllabus. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St.3d 130, 509 N.E.2d 411, paragraph one of the syllabus.

The separation agreement in the case *sub judice* requires appellant to pay appellee $60,000 per year in spousal support. The agreement provides that appellant's spousal support obligation will terminate if appellee dies, remarries, or cohabits with an adult male to whom she is not related. The agreement also provides that appellant's obligation will be reduced if he experiences an involuntary reduction in income. However, the agreement neither provides for the termination of spousal support at a definite date in the future, nor does it reserve continuing jurisdiction for the trial court to modify spousal support.

*4 The plain meaning of the separation agreement with respect to spousal support is to provide for definite support payments for an indefinite period of time barring the occurrence of one of the certain particular events specified therein. The parties certainly contemplated that their daughters would one day reach the age of majority, as the separation agreement provides that appellant is to pay the college expenses for both girls. Nevertheless, the **spousal support** provision does not provide for modification or review of the **spousal support** obligation when the youngest daughter has reached the age of majority and graduated high school, or even when she begins attending college at appellant's expense.

Appellant's **spousal support** obligation was defined in a separation agreement between the parties. The agreement provides for modification of appellant's obligation in certain limited circumstances, and it does not reserve **continuing jurisdiction** for the trial court to otherwise modify **spousal support**. Absent such a reservation, R.C. 3105.18(E)(1) deprives the trial court of **jurisdiction** to hear appellant's motion to modify **spousal support**. Furthermore, the trial court did not abuse its discretion in failing to reserve **jurisdiction** because the parties were free to either expand or limit the court's **jurisdiction** on this issue according to the terms of their separation agreement.

Accordingly, appellant's sole assignment of error is OVERRULED. The judgment of the Athens County Court of Common Pleas is AFFIRMED.

JUDGMENT AFFIRMED.

ABELE, P.J., concurring in judgment and opinion:

I believe that under the law as it currently exists, both the principal opinion and the trial court have correctly determined the issue in the case *sub judice*. Courts must specifically reserve **jurisdiction** in order to modify **spousal support** awards. See R.C. 3105.18. Thus, although indefinite **spousal support** awards are generally disfavored, courts may, in the exercise of their discretion, refuse to reserve **jurisdiction** to modify **spousal support** awards. Of course, parties may also voluntarily agree to bind themselves to a nonmodifiable **spousal support** award.

I am troubled, however, that courts do not inherently possess **continuing jurisdiction** to review **spousal support** awards, especially in light of unforeseen future events. Courts should, in my view, generally possess the authority to review and to modify **spousal support** awards, even if a court did not specifically and explicitly reserve **jurisdiction** to do so. Although a court may, in the exercise of its discretion, choose to reserve **jurisdiction** to modify a **spousal support** award, this requirement may simply be overlooked or may be unknowingly acceded to by an uninformed, and usually unrepresented, party. Additionally, as I point out above, sometimes unforeseen and unimagined events occur after the original **spousal support** award and change the landscape to such a degree that a specific award may no longer be equitable. I believe that the better practice would be to conclude that **spousal support** awards are modifiable if a movant can show a sufficient change in circumstances, unless, however,

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the decree or separation agreement specifically and explicitly states that the award is not modifiable under any circumstances.

*5 Thus, I concur both in the judgment and the opinion herein. I believe, however, that this issue merits further scrutiny and review.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that appellee recover of appellant costs herein taxed.

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

It is further ordered that a special mandate issue out of this Court directing the ATHENS COUNTY COURT OF COMMON PLEAS to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

ABELE, P.J., concurs in judgment and opinion with opinion.
Kline, J., concurs in judgment only.
Ohio App. 4 Dist.,2001.
McLaughlin v. McLaughlin
Not Reported in N.E.2d, 2001 WL 803025 (Ohio App. 4 Dist.), 2001 -Ohio- 2450

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H
Dzina v. Dzina
Ohio App. 8 Dist.,2004.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.
Court of Appeals of Ohio,Eighth District, Cuyahoga County.
Daniel A. DZINA, Plaintiff-Appellee/Cross-Appellant
v.
Nancy B. DZINA, Defendant-Appellant/Cross-Appellee.
No. 83148.

Decided Aug. 26, 2004.

Background: After the parties divorced, both initiated contempt actions. The Court of Common Pleas, Cuyahoga County, No. D-263220, found husband and wife in contempt of court. Husband and wife appealed.

Holdings: The Court of Appeals, Colleen Conway Cooney, J., held that:

(1) wife's post-dissolution award was required to be increased by $153,705.00;

(2) trial court deduction of a capital gains tax of $65,377.00 from wife's proceeds from sale of property was an abuse of discretion;

(3) remand to correct a clerical error regarding the valuation the trial court used to calculate the "buy-out" of husband's obligation to pay spousal support to wife was required;

(4) the trial court's termination of wife's entitlement to spousal support did not constitute a modification of the parties' separation agreement; and

(5) the trial court's failure to award wife statutory interest on her share of the proceeds from the sale of property was not an abuse of discretion.

Affirmed in part; reversed in part; remanded.

West Headnotes
[1] Divorce 134 252.3(5)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.3 Particular Property or Interests and Mode of Allocation
134k252.3(5) k. Sale or Distribution in Kind; Joint Interests and Compensating Payments.
Most Cited Cases
In determining former wife's one-half interest in proceeds from sale of property owned by corporation of which former husband was the sole shareholder, trial court acted within its discretion in deducting, from sale proceeds, amount of loans made by third party to husband; court-appointed accountant found that loans had been made for the benefit of the property.

[2] Divorce 134 252.3(5)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.3 Particular Property or Interests and Mode of Allocation
134k252.3(5) k. Sale or Distribution in Kind; Joint Interests and Compensating Payments.
Most Cited Cases
Proceeds from alleged settlement agreement reached in another case were not compensation to former wife and were thus not relevant in determining former wife's one-half interest in proceeds from sale of property owned by corporation of which former husband was the sole shareholder; there was no evidence that former wife was to benefit from alleged settlement or that it was related to divorce proceedings, and court-appointed accountant neither considered the other case nor deducted settlement amount in making his determination of former wife's interest in the property.

[3] Divorce 134 249.2

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property

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134k249.2 k. Stipulations and Agreements of Parties. Most Cited Cases
Former wife's one-half share of proceeds from sale of property owned by corporation of which former husband was the sole shareholder was not subject to reduction of 30% for capital gains taxes; plain language of separation agreement stated that sale proceeds would be reduced by taxes "payable" at a rate of 30%, but former husband never paid any capital gains tax on the property.

[4] Divorce 134 ⚷253(2)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k253 Proceedings for Division or Assignment
134k253(2) k. Evidence. Most Cited Cases
In computing former wife's one-half interest in properties owned by corporation in which former husband was the sole shareholder, trial court acted within its discretion by adopting court-appointed accountant's deduction of $469,434.75 for legal and professional fees incurred by former husband for the benefit and management of the properties; former wife offered no evidence to show that the amount was exorbitant or to refute accountant's expert opinion, and accountant reviewed hundreds of invoices and investigated each billing entry.

[5] Divorce 134 ⚷249.2

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k249.2 k. Stipulations and Agreements of Parties. Most Cited Cases

Divorce 134 ⚷252.3(5)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.3 Particular Property or Interests and Mode of Allocation
134k252.3(5) k. Sale or Distribution in Kind; Joint Interests and Compensating Payments. Most Cited Cases
In determining former wife's one-half interest in proceeds from sale of property owned by corporation of which former husband was the sole shareholder, trial court acted within its discretion in deducting, from sale proceeds, former husband's salary of $150,000 per year for two years; separation agreement expressly provided for deduction of all costs and operating expenses associated with properties, which would include former husband's salary, and court-appointed accountant opined that salary was reasonable compensation.

[6] Divorce 134 ⚷252.4

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.4 k. Debts and Liabilities, Allocation Of; Creditors' Rights. Most Cited Cases
Trial court acted within its discretion by attributing one-half of husband's tax liability to wife pursuant to divorce decree, despite allegations of husband's self-dealing; there was no evidence that husband engaged in self-dealing, and wife failed to present any evidence that she did not benefit from any alleged self-dealing.

[7] Administrative Law and Procedure 15A ⚷501

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak501 k. Res Judicata. Most Cited Cases

Divorce 134 ⚷249.2

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k249.2 k. Stipulations and Agreements of Parties. Most Cited Cases

Taxation 371 ⚷2680

371 Taxation
371III Property Taxes
371III(H) Levy and Assessment
371III(H)8 Review, Correction, or Setting Aside of Assessment in General
371k2680 k. Conclusiveness and Effect of Decision. Most Cited Cases

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(Formerly 371k490)
Decision of county board of revision setting value of property owned by corporation in which former husband was the sole shareholder was not res judicata in post-divorce proceeding regarding distribution of funds; parties agreed in separation agreement to determine fair market value of property through appraisal.

[8] Husband and Wife 205 279(2)

205 Husband and Wife
205VIII Separation and Separate Maintenance
205k277 Separation Agreements
205k279 Construction and Operation
205k279(2) k. Revocation, Modification, or Rescission in General. Most Cited Cases
The trial court's termination of former wife's entitlement to spousal support did not constitute a modification of the parties' separation agreement, in post-dissolution proceeding to determine the amount due former wife under the property "buy-out" provisions of separation agreement; the separation agreement provided the parties with a "buy-out" option regarding former wife's spousal support, the trial court found that former husband validly exercised his buy-out option, and the agreement expressly provided that former wife was not entitled to future spousal support after she was paid the buy-out amount. R.C. § 3105.18(E).

[9] Divorce 134 269(1)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k260 Enforcement of Order, Judgment, or Decree
134k269 Contempt Proceedings
134k269(1) k. What Constitutes Contempt. Most Cited Cases
Trial court acted within its discretion in finding that wife was in contempt of court for violating three separate sections of divorce decree; wife resisted discussions with husband regarding the quarterly adjustments to spousal support, she failed to pay the monthly hospitalization insurance, and she failed to reimburse husband $72,074.00 for his tax liability. R.C. § 2705.02.

[10] Divorce 134 222

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k220 Allowance for Counsel Fees and Expenses
134k222 k. Condition of Cause. Most Cited Cases

Divorce 134 225

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k220 Allowance for Counsel Fees and Expenses
134k225 k. Defenses and Objections. Most Cited Cases
Trial court acted within its discretion in refusing to award former wife attorney fees on her motions to show cause for former husband's alleged violations of divorce decree, even though former husband was held in contempt; former husband's contempt was not based on failure to pay spousal support, and former wife was also found in contempt for violating various provisions of decree. R.C. § 3105.18(G, H).

[11] Divorce 134 269(12)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k260 Enforcement of Order, Judgment, or Decree
134k269 Contempt Proceedings
134k269(12) k. Trial or Hearing. Most Cited Cases
Trial court acted within its discretion in denying former wife's motion for a new trial during post-dissolution proceedings after parties filed motions to show cause; former wife failed to reveal the factual basis for any of the grounds in her motion. Rules Civ.Proc., Rule 59.

[12] Divorce 134 261

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k260 Enforcement of Order, Judgment, or Decree
134k261 k. In General. Most Cited Cases
The trial court's failure to order the cancellation of a life insurance policy of insurance on former wife's life was not an abuse of discretion, during post-dissolution proceeding, where wife failed to present the issue to the trial court.

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[13] Divorce 134 ⚷249.2

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k249.2 k. Stipulations and Agreements of Parties. Most Cited Cases

Divorce 134 ⚷252.3(5)

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.3 Particular Property or Interests and Mode of Allocation
134k252.3(5) k. Sale or Distribution in Kind; Joint Interests and Compensating Payments. Most Cited Cases

Interest 219 ⚷22(1)

219 Interest
219I Rights and Liabilities in General
219k22 Judgments
219k22(1) k. In General. Most Cited Cases
Trial court acted within its discretion in refusing to award former wife statutory interest on her share of the proceeds from the sale of property owned by corporation in which former husband was the sole shareholder; the parties' separation agreement did not expressly provide for the payment of interest, and former husband's obligation was not determined until court determined amount of former wife's share of proceeds. R.C. § 1343.03(A).

[14] Husband and Wife 205 ⚷279(1)

205 Husband and Wife
205VIII Separation and Separate Maintenance
205k277 Separation Agreements
205k279 Construction and Operation
205k279(1) k. In General. Most Cited Cases
The trial court's refusal to apply the principal payments made on property as a deduction in the determination of net quarterly cash flow owed to former wife was not an abuse of discretion, during post-dissolution proceeding to determine the amount due former wife under the property "buy-out" provisions of separation agreement; trial court relied on court-appointed accountant's finding that principal payments were to be excluded, and husband failed to present any evidence to rebut the finding by accountant.

Civil appeal from Court of Common Pleas, Domestic Relations Division, Case No. D-263220.

Richard A. Rabb, James E. Burns, McCarthy, Lebit, Crystal & Liffman Co., L.P.A., James W. Westfall, Cleveland, OH, for plaintiff-appellee/cross-appellant.
Joyce E. Barrett, Cleveland, OH, for defendant-appellant/cross-appellee.
COLLEEN CONWAY COONEY, J.
*1 {¶ 1} Defendant-appellant/cross-appellee Nancy Dzina ("Nancy") and plaintiff-appellee/cross-appellant Daniel Dzina ("Daniel") both appeal the trial court's finding them in contempt as well as the court's findings regarding distribution of funds under their separation agreement. Finding some merit, we affirm in part, reverse in part, and remand.

{¶ 2} On December 21, 1998, Daniel and Nancy executed an agreed judgment entry for divorce and a separation agreement ("separation agreement"), which governed spousal support and the division of property. At the time of the divorce, Daniel was the sole shareholder of NorthPoint Properties, Inc. ("NorthPoint") which owned two properties in Cleveland-775 East 152nd Street ("Property 152") and 75 Public Square ("Property 75"). Pursuant to the separation agreement, Nancy was entitled to 50% of the "net quarterly cash flow" received by NorthPoint for these properties or, in the event that either property was sold, 50% of the "after-tax net proceeds." It was determined that Daniel would initially pay Nancy $14,000 per month for spousal support with the agreement that such amount would be adjusted when the actual net quarterly cash flow of the properties was determined. The parties were required to mutually agree on the manner for determining the quarterly adjustment.

{¶ 3} The agreement also contained a "buy-out" provision wherein Nancy's right to spousal support, i.e., the payment from the cash flow of the properties, would be terminated upon a payment of an amount equal to 50% of NorthPoint's equity in the two properties. The agreement allowed either party to trigger the "buy-out," subject to certain conditions. In Daniel's case, he could exercise this option if Nancy refused to consent to refinance the properties for purposes of securing additional debt. As for Nancy, she was entitled to exercise her right to the "buy-out" payment at any time and Daniel was required to pay,

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provided that he was able to procure financing to make such payment.

{¶ 4} On December 14, 2000, Daniel sent Nancy a request for permission to refinance the properties. After Nancy failed to respond, Daniel exercised his option to "buy-out" Nancy by paying her 50% of the equity in Property 75.

{¶ 5} Prior to Daniel's exercising this option, Nancy moved to show cause against Daniel and alleged that he violated the divorce decree by ceasing to pay the $14,000 monthly spousal support. She argued that Daniel had ceased paying any spousal support when their son reached age 18 in November 2000. Nancy filed another motion to show cause on May 9, 2001, arguing that Daniel sold Property 152 without disclosing such sale and, further, that he failed to disburse one-half of the proceeds to her.

{¶ 6} Daniel also filed motions to show cause against Nancy. He contended that she failed to cooperate with the quarterly adjustments of cash flow. He further argued that he ceased payment because he believed that he had overpaid spousal support based on the fact that the $14,000 monthly payments had surpassed the actual net quarterly cash flow of the properties.

*2 {¶ 7} The trial court appointed James Flannery ("Flannery"), a certified public accountant, to determine the equity in Property 75 and to review and determine compliance with all financial matters contained in the separation agreement. After a one-year investigation, involving the review of thousands of documents and extensive discussions, Flannery issued his report on July 3, 2002 and allowed additional feedback from Daniel and Nancy. Following the exchange of additional information from Daniel and Nancy, Flannery issued an amended report on August 30, 2002.

{¶ 8} The court conducted a hearing on all post-decree motions on October 8, 9, and 10, 2002, at which Flannery, Daniel, and Nancy testified. The court issued its decision on May 13, 2003. In its order, the court made numerous findings as to the calculation of spousal support, the division of property, and the determination of compliance. Finding that both Daniel and Nancy had failed to comply with the divorce decree, the court found both parties in contempt and sentenced each to 30 days in jail, to be purged upon the payment of each party's financial obligations as delineated in the order.

{¶ 9} From this order, both parties appeal, raising a total of eighteen assignments of error. We will address these assignments of error together and out of order where appropriate.

Standard of Review

{¶ 10} To the extent that Nancy challenges the trial court's findings of fact in her second, third, fifth, seventh, and eighth assignments of error, we review these alleged errors pursuant to an abuse of discretion standard. Similarly, Daniel's first cross-assignment of error is subject to the same standard of review because all of these errors challenge the trial court's findings which enjoy a presumption of being correct, since the trial court is in the best position to view the witnesses and weigh the credibility of the proffered testimony. *Mays v. Mays,* Ross App. No. 01CA2585, 2001-Ohio-2585, citing *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 138, 566 N.E.2d 1181;*Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 23, 550 N.E.2d 178.See, also, *Dombroski v. Dombroski* (Sept. 29, 1999), Harrison App. No. 506, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 461 N.E.2d 1273.Thus, a reviewing court will not reverse factual findings that are supported by some competent, credible evidence. *Sec. Pacific Natl. Bank v. Roulette* (1986), 24 Ohio St.3d 17, 20, 492 N.E.2d 438;*C.E. Morris Constr. Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280, 376 N.E.2d 578.

{¶ 11} Although ordinarily the interpretation of a divorce decree, as with any other contract, involves a question of law and is therefore reviewed de novo, the same standard does not apply when the agreement is ambiguous. See *Patel v. Patel* (Sept. 9, 1999), Athens App. No. 99CA21.Rather, an interpretative decision by the trial court regarding an ambiguous provision in a separation agreement will not be reversed without a showing of an abuse of discretion.*Yaeger v. Yaeger,* Geauga App. No.2002-G-2453, 2004-Ohio-1959, ¶ 27.

*3 {¶ 12} As stated in *In re Dissolution of Marriage of Seders* (1987), 42 Ohio App.3d 155, 156, 536 N.E.2d 1190:

{¶ 13}**"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. An interpretative decision by the trial court cannot be**

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disturbed upon appeal absent a showing of an abuse of discretion. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140."

{¶ 14} Further, when language found in a separation agreement is deemed ambiguous, the trial court may rely on parol evidence for purposes of interpreting it. *Williams v. Williams* (July 12, 2001), Cuyahoga App. No. 78193.

{¶ 15} Insofar as Nancy and Daniel challenge the trial court's interpretation of Sections 7(C) and 7(B) of the separation agreement in assignments of error four, six, and cross-assignment of error two, we likewise apply an abuse of discretion standard because we find these provisions ambiguous. As addressed more fully within each specific assignment of error, these sections pertain to the calculation of spousal support and application of certain deductions to determine the "after-tax net proceeds" and the "net quarterly cash flow." We likewise find no error in the trial court's reliance on Flannery's report and the parties' own testimony to determine their intent behind these terms. We defer to the trial court's interpretation and accordingly uphold its interpretation, absent an abuse of discretion.

Double Deduction

[1]{¶ 16} In her first assignment of error, Nancy contends that the trial court erred by calculating a double deduction from the amount owed to her based on a debt owed to the estate of Rocco Russo. Specifically, she argues that the court erroneously deducted an additional $153,705 from the amount owed to her because the deduction was already made in Flannery's calculation of her share of Property 152's sale proceeds. Daniel concedes this error and, thus, we sustain Nancy's first assignment of error. Accordingly, her award should be increased by $153,705.

Loans from Rocco Russo

[2]{¶ 17} In her second assignment of error, Nancy contends that the trial court erroneously allowed a deduction from the sale proceeds of Property 152 for loans allegedly made by Rocco Russo ("Russo loans"). She argues that because there was neither any recording of the loans nor any claim made by the estate of Rocco Russo to collect the money, the trial court abused its discretion by allowing the deduction. Additionally, she contends that Daniel is barred from claiming a deduction because he failed to disclose the existence of the alleged loans earlier in the proceedings. In response, Daniel counters that the trial court adopted the recommendation of the expert and, therefore, the decision is based on competent, credible evidence.

*4 {¶ 18} In the instant case, Flannery was asked to determine Nancy's 50% interest of "after tax net proceeds" from the sale of Property 152. In making this determination, Flannery deducted all debt related to the property from the sale price and then divided the amount in half. Finding that Rocco Russo had loaned Daniel $374,910 for the benefit of Property 152, Flannery opined that the loans should be deducted from the sale proceeds. This amount accounted for the $67,500 that Daniel had already paid Russo in 2001 and the additional amount of $307,410 still owed to the estate. In his report, Flannery stated that it was obvious that Russo loaned Daniel $307,410 based on the insurance company checks and circumstances surrounding these transactions. Additionally, Flannery relied on an affidavit of Rocco Russo, detailing the loans and allowed only those amounts attested to in the affidavit that were supported by other documentation.

{¶ 19} We find that the trial court did not abuse its discretion by adopting this deduction when determining Nancy's one-half interest in the sale proceeds. However, to the extent that the trial court deviated from Flannery's recommendation, we find some merit to this assignment of error. Flannery recommended that Daniel establish an escrow account for those funds that were calculated as a deduction but had not yet been paid by Daniel. In reference to the Russo loans, Flannery recognized that $307,410 had never been paid to Russo nor his estate and, as a result, he recommended that Nancy's share of the loan, i.e., $153,705, be set aside in the escrow account.

{¶ 20} In accordance with Flannery's recommendation, we find that Daniel should place $153,705 in escrow until the total debt of $307,410 is paid to the estate of Rocco Russo. In the event that the estate fails to make a claim for the money in a reasonable amount of time after our remand, Daniel is hereby ordered to release the funds to Nancy.

{¶ 21} Accordingly, Nancy's second assignment of error is overruled in part and sustained in part.

Other Litigation

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[3]{¶ 22} In her third assignment of error, Nancy contends that the trial court erroneously considered a settlement agreement reached in another case when calculating her interest in Property 75.

{¶ 23} In applying this deduction, the trial court stated:

{¶ 24}**"The Court further finds that Defendant [Nancy] has already acquired compensation of $250,000.00 for part of her equity interest in the property located at 75 Public Square by a settlement reached in Case No. CV374378 in the Cuyahoga County Court of Common Pleas, General Division and this amount should be offset against any amount to be paid to Defendant in compensation for the balance of her equity interest in said property."**[FN1]

FN1.Case No. CV-374378 shall be referred to as the *Crawford* case.

{¶ 25} Nancy argues that the trial court unlawfully deemed the settlement agreement reached in the *Crawford* case as "compensation" for her equity interest. Specifically, she contends that the trial court lacked jurisdiction relating to issues in the *Crawford* case, that the settlement agreement was never executed and, further, that she was never a party to the suit. Daniel counters that because NorthPoint agreed to pay this amount as settlement of a suit instigated by Nancy, the trial court correctly deducted it as part of her interest in Property 75. We disagree.

*5 {¶ 26} Our review of the record reveals no evidence that Nancy was to benefit from the alleged settlement made in the *Crawford* case or that it is related to the divorce proceedings. Further, Flannery neither considered the *Crawford* case nor deducted the settlement amount in making his determination of Nancy's "buy-out" interest in the property. Accordingly, we find that the trial court abused its discretion by subtracting one-half of the settlement amount and attributing it as part of Nancy's buy-out payment.

{¶ 27} Nancy's third assignment of error is sustained and, thus, her award should be increased by $250,000.

Capital Gains Tax

[4]{¶ 28} Nancy argues in her fourth assignment of error that the trial court erroneously attributed a 30% capital gains tax to her on the sale of Property 152, although Daniel never paid any such tax. We agree.

{¶ 29} Section 7(C) of the separation agreement governed the deduction of taxes involved in the sale of property and provided as follows:

{¶ 30}**"In the event NorthPoint sells either or both of the Properties, Husband shall pay Wife fifty percent (50%) of the after-tax net proceeds received by NorthPoint from the sale. 'After-tax net proceeds' means proceeds received by NorthPoint from the sale minus all transaction costs, mortgage debt and/or other liability repayment, taxes payable by NorthPoint and other expenses in connection with the sale, and further minus the income taxes (calculated using a thirty percent (30%) combined federal, state and local income tax rate) payable with respect to the sale."**

{¶ 31} Relying on this provision, Flannery multiplied the amount of money gained from the sale of Property 152 by 30%. Finding that there was a gain of $217,922 in the sale, he deducted $65,377 from Nancy's share of the sale proceeds. However, when determining this amount, he conceded that he did not examine NorthPoint's or Daniel's 2001 tax returns for the year in which the property sold. He further admitted that his calculation was not based on the actual taxes paid.

{¶ 32} Applying an abuse of discretion standard to the trial court's interpretation, we find that no competent, credible evidence exists to support its conclusion. Here, the plain language of the separation agreement states that the sale proceeds shall be reduced by the taxes "payable" at a rate of 30%. Because Daniel never paid any capital gains tax on the property, we find that the trial court abused its discretion by deducting a capital gains tax of $65,377.

{¶ 33} Nancy's fourth assignment of error is sustained and, thus, her award should be increased by $65,377.

Legal and Professional Fees

[5]{¶ 34} In her fifth assignment of error, Nancy claims that the trial court abused its discretion by adopting Flannery's deduction for legal and

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professional fees incurred by Daniel for the benefit and management of the properties. She contends that $469,434.75 is exorbitant for a six-year period and that such an amount cannot be solely attributed to the properties. However, Nancy offers no evidence to support this contention nor to refute Flannery's expert opinion.

*6 {¶ 35} Here, the trial court relied on Flannery's expert opinion after his review of hundreds of invoices and investigation into each billing entry. In fact, Flannery disallowed a considerable amount of the fees Daniel sought, finding that those services pertained to his personal affairs. We cannot say that the trial court abused its discretion by adopting Flannery's finding.

{¶ 36} Nancy's fifth assignment of error is overruled.

Daniel's Salary

[6]{¶ 37} Nancy contends in her sixth assignment of error that the trial court erred and abused its discretion by allowing Daniel to deduct a salary of $150,000 for the years 2001 and 2002. She argues that the separation agreement did not provide for "owner's compensation."

{¶ 38} Section 7(B) of the separation agreement provides in pertinent part:

{¶ 39}" * * * Husband shall pay to Wife as spousal support (alimony) fifty percent (50%) of the net quarterly cash flow received by NorthPoint from the Properties. 'Net quarterly cash flow' means rents received during the quarter from the Properties minus all fees, operating expenses (but not depreciation), taxes payable by NorthPoint, and any other costs (including without limitation capital costs and expenditures) associated with the Properties during the quarter."

{¶ 40} The agreement expressly provided for the deduction of all costs and operating expenses associated with the properties which would include Daniel's salary. Nancy failed to present any evidence that Daniel was neither entitled to a salary nor that a $150,000 annual salary was excessive. In contrast, Flannery opined that $150,000 was a reasonable compensation for the years 2000 and 2001. We find that the trial court did not abuse its discretion in relying on Flannery's expert opinion.

{¶ 41} Nancy's sixth assignment of error is overruled.

Tax Liabilities

[7]{¶ 42} In her seventh assignment of error, Nancy argues that the trial court abused its discretion by attributing one-half of Daniel's tax liabilities to her. Although she concedes that the divorce decree provides that they are jointly liable for any taxes incurred prior to 1998, she nonetheless argues that the provision did not contemplate taxes resulting from Daniel's alleged "self-dealing."

{¶ 43} Section 12 of the divorce decree provides:

{¶ 44}**"The parties have filed separate income tax returns for years prior to 1998 and are in the process of preparing and filing Wife's 1997 income tax returns for which they agree to be jointly liable for payment of any tax due thereon. The parties shall file separate Federal, State and local income tax returns for 1998. All refunds of taxes with respect to any prior tax returns of the parties shall be the joint property of the parties and all liability on any prior tax return filed by either Husband or Wife, including without limitation liability for additional taxes, interest and penalties, shall be the joint liability of the parties."**

*7 {¶ 45} We find that the trial court did not abuse its discretion by attributing one-half of the tax liability to Nancy. First, there was no evidence presented at trial that Daniel engaged in "self-dealing." Second, even if he engaged in such activity during the course of their marriage, Nancy failed to present any evidence that she did not benefit from this conduct. In fact, Flannery indicated that Nancy directly benefited because the equity in Property 75, and in turn her "buy-out" amount, increased as a result of the alleged self-dealing.

{¶ 46} However, the court should place this money in escrow pursuant to Flannery's recommendation until the tax liability is finally determined.

{¶ 47} Accordingly, we overrule Nancy's seventh assignment of error.

Appraisal of Property 75

[8]{¶ 48} Nancy argues in her eighth assignment of error that the trial court abused its discretion by

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failing to utilize the last full appraisal of Property 75 to determine its fair market value. In contrast, Daniel contends in his first cross-assignment of error that the trial court erred by failing to apply the Board of Revision's valuation of the property.

{¶ 49} Section 8(B) of the separation agreement defines "appraisal" and provides:

{¶ 50}" **'Appraisal' * * * shall mean the determination of the value of the subject Property or Properties as determined by a certified appraiser chosen by Husband. Provided, however, that if [Nancy] does not agree with or disputes the value determined by such appraiser, then [Nancy] shall have the option to chose (sic) a second appraiser. Thereafter, if the value of the Property or Properties remains in dispute between [Daniel] and [Nancy], then [Daniel] and [Nancy] shall agree to submit such dispute to an independent Arbitrator which both shall agree upon."**

{¶ 51} In finding that fifty percent of the equity in Property 75 is $1,392,076, the court adopted Flannery's calculation, using an appraisal value of $4,150,000. Nancy argues that the court should have applied the higher value of $4,850,000 because it is based on a full appraisal of the property conducted in October 1998.[FN2] Daniel, on the other hand, contends that the fair market value of the property should be based on the Board of Revision's final determination of $3,400,000.

FN2. Flannery explained that the October 1998 full appraisal was premised on certain improvements being made and upon rental income increases from occupancy. Because some of the improvements were not made and the occupancy projections were not achieved, a second appraisal was done in November 2000. Further, he indicated that the later appraisal was the most recent and accurate at the time of his report and at trial.

{¶ 52} Our review of the record indicates that both parties asked the trial court to consider the valuation of the property assigned by the Board of Revision. In fact, Nancy encouraged the court to apply the then-existing $4,500,000 valuation by the Board of Revision over the appraisal value adopted by Flannery. Similarly, Daniel urged the court to await the resolution of his challenge of the valuation before the Board of Revision and adopt its final decision. Furthermore, neither party objected when the court expressed its desire to use the Board of Revision's valuation in determining the fair market value. The court stated in its February 3, 2003 order:

*8 {¶ 53}" * * * **[T]hat when this court ultimately issues its Judgment Entry regarding the motions heard on October 7, 8 and 9, 2002, the County Auditor's most recent value as adjusted by the Cuyahoga County Board of Revision shall be used by this court for calculating the buy-out of the Plaintiff's obligation to pay spousal support to the Defendant, Nancy Dzina."**

{¶ 54} Based on this order and the parties' statements at trial, we can only conclude that the court's failure to apply the Board of Revision's valuation was a clerical error. Thus, we remand this issue for correction by the trial court.

{¶ 55} Contrary to Daniel's assertion, however, we do not find that the Board of Revision's decision is res judicata. Here, the parties agreed by contract to determine the fair market value of the property through appraisal. We fail to see how the Board of Revision's decision operates as res judicata on a contract matter with individuals not parties to its proceedings.

{¶ 56} Accordingly, Nancy's eighth assignment of error is overruled and Daniel's first cross-assignment of error is sustained, with a remand to correct the valuation.

Modifying Spousal Support Provision

[9]{¶ 57} In her ninth assignment of error, Nancy contends that the trial court erroneously "modified" the separation agreement and divorce decree by terminating her right to continue support.

{¶ 58} Pursuant to R.C. 3105.18(E), a trial court has jurisdiction to modify an order for spousal support only if the divorce decree contains an express reservation of jurisdiction. *Kimble v. Kimble*, 97 Ohio St.3d 424, 780 N.E.2d 273, 2002-Ohio-6667. Nancy argues that the trial court's order terminating her right to any further spousal support and barring her from pursuing any further claim constitutes an unlawful modification of the decree. We find that this argument lacks merit.

{¶ 59} The trial court made numerous orders in the instant case, including ordering that Nancy be paid her total buy-out interest under the separation

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agreement. This order was based on the court's finding that Daniel had exercised his buy-out option. The agreement expressly provided that Nancy was not entitled to any further spousal support once she was paid the buy-out amount. Thus, because the court's order restates only what the separation agreement expressly provides, we do not find that the trial court unlawfully modified the agreement.

{¶ 60} Nancy's ninth assignment of error is overruled.

Contempt of Court

[10]{¶ 61} In her tenth assignment of error, Nancy contends that the trial court abused its discretion by finding her in contempt of court.

{¶ 62}R.C. 2705.02 provides that disobedience of a lawful order of the court may be punished as for a contempt. *Chojnowski v. Chojnowski*, Cuyahoga App. No. 81379, 2003-Ohio-298. A property division in a divorce decree may be enforced by contempt proceedings. *Id.*, citing *Harris v. Harris* (1979), 58 Ohio St.2d 303, 390 N.E.2d 789.We apply an abuse of discretion standard to our review of a lower court's contempt finding. *Marden v. Marden* (1996), 108 Ohio App.3d 568, 571, 671 N.E.2d 331.

*9 {¶ 63} A prima facie case of contempt is evidenced where the divorce decree is before the court along with the contemnor's failure to comply with the decree. *Traxler v. Traxler*, Williams App. No. WM-03-015, 2004-Ohio-1644, citing *Robinson v. Robinson* (Mar. 31, 1994), 6th Dist. No. 93WD053; *Rossen v. Rossen* (1964), 2 Ohio App.2d 381, 208 N.E.2d 764.

{¶ 64} In finding Nancy to be in contempt, the trial court found that she violated three separate sections of the divorce decree. Specifically, it found that she "unreasonably resisted discussions with [Daniel] regarding quarterly adjustments to spousal support," failed to pay the monthly hospitalization insurance of $17,885.28, and failed to reimburse Daniel $72,074 for his tax liability.

{¶ 65} Here, the record contained clear and convincing evidence that Nancy committed these violations. Nancy does not dispute these findings but claims that Daniel's wrongdoings under the separation agreement prevented her from complying with her obligations. We find this defense to be without merit. Based on the evidence before the trial court, including Flannery's report and Nancy's own admissions, we find no abuse of discretion in the court's finding her in contempt.

{¶ 66} Nancy's tenth assignment of error is overruled.

Award of Attorney Fees

[11]{¶ 67} In her eleventh assignment of error, Nancy contends that the trial court abused its discretion by failing to award her attorney fees on her motions to show cause. We disagree.

{¶ 68} A decision to award attorney fees is a matter within the sound discretion of the trial court. *Cimperman v. Cimperman*, Cuyahoga App. No. 80807, 2003-Ohio-869, citing *Rand v. Rand* (1985), 18 Ohio St.3d 356, 359, 481 N.E.2d 609.Absent a clear abuse of discretion, a reviewing court will not reverse the judgment of the trial court. *Birath v. Birath* (1988), 53 Ohio App.3d 31, 39, 558 N.E.2d 63.

{¶ 69} Nancy contends that the trial court should have awarded her attorney fees pursuant to R.C. 3105.18(G), which provides:

{¶ 70}**"If any person required to pay alimony under an order made or modified by a court on or after December 1, 1986, and before January 1, 1991, or any person required to pay spousal support under an order made or modified by a court on or after January 1, 1991, is found in contempt of court for failure to make alimony or spousal support payments under the order, the court that makes the finding, in addition to any other penalty or remedy imposed, shall assess all court costs arising out of the contempt proceeding against the person and shall require the person to pay any reasonable attorney's fees of any adverse party, as determined by the court, that arose in relation to the act of contempt."**

{¶ 71} We find that this section does not control the instant situation. Rather, R.C. 3105.18(H) governs, and provides as follows:

{¶ 72}**"In divorce or legal separation proceedings, the court may award reasonable attorney's fees to either party at any stage of the proceedings, including, but not limited to, any appeal, any proceeding arising from a motion to modify a prior order or decree, and any proceeding to**

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enforce a prior order or decree, if it determines that the other party has the ability to pay the attorney's fees that the court awards. When the court determines whether to award reasonable attorney's fees to any party pursuant to this division, it shall determine whether either party will be prevented from fully litigating that party's rights and adequately protecting that party's interests if it does not award reasonable attorney's fees."

*10 {¶ 73}R.C. 3105.18(G) specifically addresses the failure to pay spousal support, whereas R.C. 3105.18(H) pertains broadly to the enforcement of the divorce decree. At the time that Nancy first moved to show cause for Daniel's terminating the monthly spousal support, it was discovered that he had actually overpaid his monthly obligations. Thus, although the trial court found that Daniel had violated the terms of the divorce decree, the contempt was not based on the failure to pay spousal support. Because the decision to award attorney's fees under R.C. 3105.18(H) is discretionary, we cannot say the trial court abused its discretion in the instant case .[FN3]

FN3. Moreover, Nancy was also found in contempt for violating various provisions of the divorce decree. Thus, the intent of the statute is not served by awarding attorney fees to a party who is also guilty of contempt.

{¶ 74} Nancy's eleventh assignment of error is overruled.

Motion for a New Trial

[12]{¶ 75} In her twelfth assignment of error, Nancy contends that the trial court abused its discretion by failing to grant her motion for a new trial.

{¶ 76} We review a trial court's decision to deny a motion for a new trial subject to an abuse of discretion standard. *McCall v. Mareion* (2000), 138 Ohio App.3d 794, 798, 742 N.E.2d 668.The decision lies within the sound discretion of the trial court and shall not be reversed absent a showing that its decision was unreasonable, arbitrary, or unconscionable. *Id.*

{¶ 77}Civ.R. 59 governs the granting of new trials and provides nine grounds for granting a new trial. In support of her motion, Nancy relied on the following grounds:

{¶ 78}**"(5) Error in the amount of recovery, whether too large or small, when the action is upon a contract or for the injury or detention of property;**

{¶ 79}**(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;**

{¶ 80}**(7) The judgment is contrary to law;**

{¶ 81}**(8) Newly discovered evidence, material for the party applying, which with reasonable diligence could not have been discovered and produced at trial;**

{¶ 82}**(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application; * * * "**

{¶ 83} Furthermore, in reference to bench trials, Civ.R. 59 provides:

{¶ 84}**"On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment."**

{¶ 85} Our review of the record reveals that Nancy failed to identify the factual basis for any of the grounds in her motion. Rather, she broadly asserted that a new trial was warranted because the trial court failed to implement Flannery's recommendations or adopt her proposed findings. However, contrary to Nancy's assertion, most of the trial court's calculations were adopted from Flannery's report. Thus, those calculations were based on competent, credible evidence and the denial of a new trial as to these calculations did not constitute an abuse of discretion.

*11 {¶ 86} Furthermore, to the extent that we have found merit to Nancy's first, third, and fourth assignments of error, we find that the issue of a new trial is moot.

{¶ 87} Nancy's twelfth assignment of error is overruled.

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Cancellation of Life Insurance Policy

[13]{¶ 88} In her thirteenth assignment of error, Nancy argues that the trial court abused its discretion by failing to order the cancellation of a policy of insurance on her life.

{¶ 89} The record reveals that Nancy never raised this issue in any of her show cause motions but later inserted a paragraph in her post-trial brief seeking cancellation of the policy. Furthermore, although Nancy presented some testimony at trial as to NorthPoint and Daniel being named beneficiaries on her life insurance policy, she also indicated to the court that litigation over the issue was still pending in another jurisdiction at the time of trial.[FN4]Because we find that the issue was never properly before the trial court, we cannot say that the trial court abused its discretion by failing to order the cancellation of the insurance policy. See *Holman v. Grandview Hosp. & Med. Ctr.* (1987), 37 Ohio App.3d 151, 157, 524 N.E.2d 903, citing *Republic Steel Corp. v. Bd. of Revision of Cuyahoga Cty.* (1963), 175 Ohio St. 179, 192 N.E.2d 47, syllabus (holding that issues not raised and tried in the trial court cannot be raised for the first time on appeal).

FN4. Although the parties subsequently reached a stipulated agreement in the California case, dismissing their claims without prejudice and preserving the right to litigate in the underlying case or another jurisdiction, Nancy nonetheless failed to properly raise the issue below.

{¶ 90} Accordingly, Nancy's thirteenth assignment of error is overruled.

Interest on Sale of Property 152

[14]{¶ 91} In her final assignment of error, Nancy contends that the trial court abused its discretion by failing to award statutory interest on her share of Property 152 sale proceeds.

{¶ 92} In support of this argument, Nancy relies on R.C. 1343.03(A), which states:

{¶ 93}"In cases other than those provided for in sections 1343.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate of ten per cent per annum, and no more, unless a written contract provides that a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract."

{¶ 94} However, the Ohio Supreme Court has held that in the context of divorce proceedings, R.C. 1343.03 is applicable only to support judgments reduced to a lump sum amount or to child support payment orders issued on or after July 1, 1992. *Dunbar v. Dunbar*, 68 Ohio St.3d 369, 627 N.E.2d 532, 1994-Ohio-509.Here, the determination of Nancy's share of net proceeds was not made until the court's May 2003 decision. Nancy erroneously states that she was entitled to $335,333.27 in March 2001 when the property sold for $670,666.55. However, this amount fails to account for taxes and all other required deductions in determining the "after-tax net proceeds." In contrast to Nancy's assertion, the court determined in its May 2003 decision that her share of the sale proceeds was $239,211. Given that Daniel's obligation to Nancy for the sale of Property 152 was not determined until the court's decision, we cannot say that the trial court abused its discretion by refusing to award interest. Furthermore, the separation agreement does not expressly provide for the payment of interest or any consequences for the delay in payment on Nancy's share of the "after-tax net proceeds" following the sale of Property 152. See *Savage v. Savage* (July 10, 2001), Franklin App. No. 00AP-1371 (refusing to award interest when the separation agreement did not provide for any interest).

***12** {¶ 95} Accordingly, Nancy's fourteenth assignment of error is overruled.

Payments of Principal

{¶ 96} In his second cross-assignment of error, Daniel contends that the trial court abused its discretion by refusing to apply the principal payments made on Property 75 as a deduction in the determination of net quarterly cash flow owed Nancy. We disagree.

{¶ 97} Initially, we note that Daniel erroneously asserts that this argument is subject to a de novo

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standard of review. As stated above, when a contract provision is ambiguous and the court relies on parol evidence for its interpretation, a reviewing court defers to the findings of the trial court. See e.g., *In re Dissolution of Marriage of Seders,* supra;*Williams,* supra.

{¶ 98} In the instant case, the court adopted Flannery's finding that principal payments on Property 75 should be excluded for purposes of determining the net quarterly cash flow of the property. Contrary to Daniel's assertion, we find that this determination is not merely a question of law without any regard to the circumstances surrounding the parties' intent and the parties' prior practice. For purposes of determining cash flow, Flannery reviewed 17 banker's boxes of documents and conducted extensive interviews with Nancy and Daniel regarding the allowance and disallowance of certain deductions. Prior to the hearing, both parties received a copy of his amended expert report. However, despite obvious knowledge of Flannery's deduction of the principal payments, Daniel neglected to present any evidence rebutting Flannery's finding or even challenging the finding at trial.

{¶ 99} Thus, because the trial court relied on competent, credible evidence, we cannot say that it abused its discretion.

{¶ 100} Daniel's second cross-assignment of error is overruled.

$40,000 "Set Aside"

{¶ 101} In his third cross-assignment of error, Daniel argues that the trial court erred by failing to deduct from the final payment the $40,000 it ordered to be set aside for tax liabilities.

{¶ 102} In its order, the trial court stated:

{¶ 103}"The Court further finds that an additional amount of $40,000 may be required to satisfy Defendant's share of any pending tax issues and therefore said amount should be set aside from any amount due Defendant from Plaintiff."

{¶ 104} *Our* review of the record indicates that the trial court accounted for the $40,000 set aside amount when calculating the total payment of $685,035 owed to Nancy. However, consistent with Flannery's recommendation, we find that this $40,000 should be placed in an escrow account for pending tax liabilities.

{¶ 105} Accordingly, Daniel's third cross-assignment of error is overruled.

"Equity Interest"

{¶ 106} In his final cross-assignment of error, Daniel argues that the trial court erred in referring to an "equity interest" held by Nancy in its May 2003 order. Specifically, Daniel contends that the trial court's reference to an "equity interest" essentially rewrites the terms of the separation agreement. Further, he claims it constitutes error because it negatively impacts his future tax liability and allows Nancy to encumber his property.

*13 {¶ 107} In support of this argument, Daniel relies on Section 8(A) of the separation agreement, which provides:

{¶ 108}**"Although Wife is entitled to payments hereunder based on the net quarterly cash flow and/or after-tax net sales proceeds of the Properties, Wife acknowledges and agrees that she is neither owner of the Properties nor a shareholder in NorthPoint, and has no decision making power, authority or control whatsoever with respect to the Properties, all of which shall remain with Husband."**

{¶ 109} Because we find that an "equity interest" is different than a right to payment and, further, that the separation agreement repeatedly and consistently treated the payments due Nancy as support, we sustain this assignment of error. Accordingly, on remand, we order the trial court to correct this misstatement.

{¶ 110} Judgment affirmed in part and reversed in part. Case remanded for further proceedings consistent with the findings in this opinion on pages 7, 9, 11, 12, 15, 17, 27, 28.

It is ordered that the parties bear their own costs herein taxed.

This court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Domestic Relations Division of the Cuyahoga County Court of Common Pleas to

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carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANNE L. KILBANE, P.J. and TIMOTHY E. McMONAGLE, J., concur.
N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

Ohio App. 8 Dist.,2004.
Dzina v. Dzina
Not Reported in N.E.2d, 2004 WL 1902566 (Ohio App. 8 Dist.), 2004 -Ohio- 4497

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CGemmell v. Gemmell
Ohio App. 5 Dist.,2007.

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

Court of Appeals of Ohio,Fifth District, Licking County.
Betty GEMMELL, Plaintiff-Appellant
v.
Walter GEMMELL, Defendant-Appellee.
No. 2006 CA 00077.

Decided Oct. 18, 2007.

Civil Appeal from Licking County Court Of Common Pleas, Domestic Relations, Division Case No. 03 DR 00040.

David L. Martin, Newark, OH, for plaintiff-appellant.
Stephen E. Schaller, Newark, OH, for defendant-appellee.
GWIN, P.J.
*1 {¶ 1} Plaintiff-appellant Betty Gemmell appeals a judgment of the Licking County Court of Common Pleas, Domestic Relations Division which terminated the spousal support payments she had been receiving from her ex-husband, appellee Walter Gemmell. Appellant assigns a single error to the trial court:

{¶ 2} "THE COURT ERRED BY MODIFYING THE SPOUSAL SUPPORT PREVIOUSLY AWARDED, SINCE THERE WAS NO CHANGE OF CIRCUMSTANCES TO WARRANT THE CHANGE."

{¶ 3} Appellant Betty Gemmell and appellee Walter Gemmell were married in January of 1982, and produced no children. Appellee was the majority shareholder in the W.A. Wallace Company, and sold his shares to the Dawson Companies in 1999. As part of the sale, appellee was to receive payments of $6,570.30 a month.

{¶ 4} On January 10, 2003, appellant filed a complaint for divorce. Pursuant to an Agreed Judgment Decree of Divorce filed on February 24, 2004, appellee was ordered to pay appellant spousal support in the amount of $600.00 a month commencing February 1, 2004. The Agreed Entry stated in relevant part:

{¶ 5} "The award of spousal support is based upon consideration of all spousal support factors set forth in R.C. 3105.18, including the long-term capital gain income that the defendant receives from the sale of his stock in the W.A. Wallace Company.

{¶ 6} "The Court reserves subject matter jurisdiction to modify the spousal support award upon receipt of the last payment due and owing from Dawson Companies. In any event, spousal support shall terminate upon the death of either party, plaintiff's remarriage or cohabitation with an unrelated male, or unless otherwise sooner terminated by the Court."

{¶ 7} The trial court awarded appellant one-half of the remaining monthly installments due and owing appellee from the sale of stock to the Dawson Companies. The final payment from the Dawson Companies was received on or about December 10, 2005. On December 15, 2005, appellee filed a motion to terminate and/or modify the spousal support, alleging both cohabitation and a change in his financial circumstances.

{¶ 8} A Magistrate heard the matter on March 13, 2006. Appellee testified he was paying another former spouse, Dorothy, spousal support, plus her automobile, homeowner's and health insurances, for upkeep and maintenance on her dwelling, and any of her medical expenses not covered by insurance, until she remarries or dies.

{¶ 9} At the hearing, appellee testified he receives Social Security, Air Force retirement, a monthly payout from his 401(k) and, starting in March of 2006, a monthly payment from an annuity awarded to him as part of the divorce. Appellee had previously bought out appellant's interest in his Air Force retirement.

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{¶ 10} Appellant was receiving Social Security benefits, and had held a minimum wage job after the divorce. Appellant has back problems and was not employed at the time of the hearing.

*2 {¶ 11} The Magistrate found no reason justifying termination of spousal support, because appellee had not proven cohabitation. The Magistrate found the parties had anticipated some type of modification of spousal support in the terms of the Agreed Entry terminating their marriage. The Magistrate recommended appellant's spousal support be reduced from $600.00 a month to $250.00 a month, because both parties' financial positions changed when the buy-out payments stopped. The Magistrate found appellee's income has been cut in half, while the appellant's income was cut even more drastically, but her living expenses are minimal.

{¶ 12} Both parties filed objections to the Magistrate's Decision. The trial court modified the Magistrate's Decision, ordering appellee's spousal support obligation be terminated effective December 15, 2005, and ordering appellant to repay any overpayments within 60 days. The trial court found much of appellee's income is irrelevant, because the Air Force pension and income from his 401(K) are the result of a property division between the parties. The court found to make a property division involving these two assets, then divide them again as spousal support is contra to the parties' property division agreement. The court found the only sources of income the Magistrate should have considered were the parties' respective Social Security payments and possibly the appellee's annuity. The court found the parties' Social Security benefits are essentially equal, because of appellee's previous commitment to pay spousal support to Dorothy.

{¶ 13} Appellant argues the trial court erred in modifying the spousal support awarded since there was no change of circumstances. We disagree.

{¶ 14} Our review of a trial court's decision relative to spousal support is governed by an abuse of discretion standard. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293.We cannot substitute our judgment for that of the trial court unless, when considering the totality of the circumstances, we find the trial court abused its discretion. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 541 N.E.2d 597.An abuse of discretion implies the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 15} R.C. 3105.18(E) provides that a 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 provision reserving the court's jurisdiction to modify the award of spousal support.*Bowen v. Bowen* (1999), 132 Ohio App.3d 616, 628, 725 N.E.2d 1165.A change in circumstances is defined as, but is not limited to "any increase or involuntary decease in the party's wages, salary, bonuses, living expenses, or medical expenses."R.C. 3105.18(F). In order to constitute a basis for modifying spousal support, the change of circumstances must be material, 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.See also *Tsai v. Tsai*, 162 Ohio App.3d 89, 2005-Ohio-3520, 832 N.E.2d 809.In *Kimble v. Kimble*, 97 Ohio St.3d 424, 2002-Ohio-6667, 780 N.E.2d 273, the Ohio Supreme Court held modification and termination of spousal support were "simply different points or degrees on the same continuum" and a motion to terminate spousal support fell within the definition of a "modification." *Id.* at paragraph 7.

*3 {¶ 16} There is no dispute the trial court in this matter reserved jurisdiction to modify spousal support. While appellant argues there has been no change in circumstances, we note the parties clearly agreed to a review of the spousal support order after the payments from the Dawson Companies ended.

{¶ 17} In *Stewart v. Stewart* (Nov. 22, 1999), Stark App. No.1999CA00015 we found a prior agreement to modify support at a later date relieves the trial court from the necessity of finding a change of circumstances. In *Stewart*, the parties' agreement clearly indicated the potential modification had been part of the bargain. The agreement in *Stewart* stated: " * * * This provision concerning alimony will not be subject to modification by either party or the court until after the wife has reached the age of 65. Upon a request of modification of alimony by either party after the wife has reached the age of 65, both parties will be able to seek a modification from the court

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either increasing or decreasing the alimony to be paid. * * * in making this agreement, the wife is waiving her right until she reaches age 65 to seek additional alimony and the husband is waiving his right to seek a reduction in alimony until the wife reaches the age of 65."

{¶ 18} The language in *Stewart* was broader and included an express waiver, which made the case clearer. Nevertheless, the rationale here is the same. Essentially, the trial court here interpreted the parties' divorce agreement as an agreement which allowed the court to set spousal support de novo upon the termination of the payments from the sale of the W.A. Wallace Company. The parties anticipated a change in one of the financial circumstances of the parties, but neither the parties nor the trial court could anticipate whether there would be any other changes in the parties' financial circumstances.

{¶ 19} Certainly from the standpoint of finality and judicial economy, the best practice is for the parties to provide for anticipated changes in their original agreement. Nevertheless, the law should allow the parties to agree to submit the matter to the court for further review if they feel they cannot accurately and equitably predict the extent and impact of a foreseeable event. To hold otherwise would be to tell the parties they cannot return to court precisely because they agreed it was necessary to do so.

{¶ 20} R.C. 3105.18 sets forth factors to be considered in determining spousal support:

{¶ 21} "(C)(1) In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:

{¶ 22} "(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;

*4 {¶ 23} "(b) The relative earning abilities of the parties;

{¶ 24} "(c) The ages and the physical, mental, and emotional conditions of the parties;

{¶ 25} "(d) The retirement benefits of the parties;

{¶ 26} "(e) The duration of the marriage;

{¶ 27}* * *

{¶ 28} "(g) The standard of living of the parties established during the marriage;

{¶ 29} "(h) The relative extent of education of the parties;

{¶ 30} "(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;

{¶ 31}* * *

{¶ 32} "(l) The tax consequences, for each party, of an award of spousal support;

{¶ 33} "(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

{¶ 34} "(n) Any other factor that the court expressly finds to be relevant and equitable."

{¶ 35} We agree with the trial court there was a change in circumstances sufficient to justify modifying the spousal support order. We also agree the assets awarded to appellee as property division should not be treated as income. We find the trial court's decision was not arbitrary, unconscionable or unreasonable, and was not an abuse of discretion.

{¶ 36} The assignment of error is overruled.

{¶ 37} Accordingly, the judgment of the Licking County Court of Common Pleas, Domestic Relations Division, is affirmed.

GWIN, P.J., and FARMER, J. concur.
EDWARDS, J., dissents.
EDWARDS, J., Dissenting Opinion.
{¶ 37} I respectfully dissent from the analysis and disposition of this case by the majority.

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{¶ 38} The majority relies on the case of *Stewart v. Stewart* (Nov. 22, 1999), Stark App. No.1999CA00015, 1999 WL 1071976. In *Stewart,* the parties agreed to a review of the spousal support order at the time appellant reached age sixty-five. We stated, "This agreement relieves the trial court from the necessity of finding a change of circumstances. R.C. 3105.18 does not apply under the facts sub judice."

{¶ 39} I concurred in the *Stewart* opinion. It is possible that R.C. 3105.18 may not have been applicable because *Stewart* involved a modification of the spousal support, which had been agreed upon in a legal separation agreement, after one of the parties filed a complaint for divorce and such was granted. But, I now disagree that parties in a divorce action can, by agreement, relieve a trial court from the necessity of finding a change of circumstances prior to a modification of periodic spousal support.

{¶ 40} R.C. 3105.18(E) specifically states, in part, the following: "....if a continuing order for periodic payments of money as spousal support is entered in a divorce ...., the court that enters the decree of divorce ... does not have *jurisdiction* to modify the amount or terms of the ... 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 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 ... spousal support...." (Emphasis added)

*5 {¶ 41} R.C. 3105.18(E) provides that a 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 provision reserving the court's jurisdiction to modify the award of spousal support.*Bowen v. Bowen* (1999), 132 Ohio App.3d 616, 628, 725 N.E.2d 1165.A change in circumstances is defined as, but is not limited to "any increase or involuntary decease in the party's wages, salary, bonuses, living expenses, or medical expenses."R.C. 3105.18(F). 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. See also *Tsai v. Tsai,* 162 Ohio App.3d 89, 2005-Ohio-3520, 832 N.E.2d 809.

{¶ 42} There is no dispute that the trial court in this matter reserved jurisdiction to modify spousal support. The parties clearly agreed to a review of the spousal support order upon receipt of the last payment from the Dawson Companies.

{¶ 43} However, as is stated above, a change in circumstances must not be contemplated at the time the parties entered into the prior agreement or order in order to constitute a basis for modifying spousal support. See *Tsai,* supra.In the case sub judice, the parties knew, at the time they entered into the Agreed Decree of Divorce, that the monthly installment payments from the Dawson Companies would terminate in December of 2005. Thus, such "change of circumstances" was contemplated by the parties at the time the Agreed Entry was entered into and cannot constitute a basis for modifying spousal support. See *Tsai,* supra.

{¶ 44} The trial court, therefore, did not have jurisdiction to modify spousal support. The parties cannot, by agreement, confer jurisdiction upon a court that it does not otherwise possess. See for example, *Thomas v. Thomas,* 159 Ohio App.3d 761, 2004-Ohio-2928, 825 N.E.2d 626 and *Huffman v. Huffman,* Franklin App. Nos. 02AP101, 02AP-698, 2002-Ohio-6031 at paragraph 37.

{¶ 45} While I understand the reasoning of the trial court as to the financial circumstances of the parties, and understand that the trial court's order may be fair, I find nothing in the trial court's findings indicating that there has been a change of circumstances that was not contemplated by the parties at the time of the separation agreement. Therefore, there is no jurisdiction for the trial court to order a modification.

{¶ 46} Based on the foregoing, I would find that the trial court erred in modifying spousal support and would reverse its decision.

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Stewart v. Stewart
Ohio App. 5 Dist.,1999.
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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fifth District, Stark County.
Ruth Rodd STEWART, Plaintiff-Appellee,
v.
Robert H. STEWART, Jr. Defendant-Appellant.
No. 1999CA00015.

Nov. 22, 1999.

Appeal from the Court of Common Pleas, Domestic Relations Division, Case No.1998DR00175.

Richard R. Guiley, Canton, OH, for Plaintiff-Appellee.
Mattheuw W. Oberholtzer, Canton, OH, for Defendant-Appellant.

WISE, P.J., and FARMER and EDWARDS, JJ.

OPINION

FARMER.
*1 On January 1, 1954, appellant, Robert H. Stewart, Jr., and appellee, Ruth Rodd Stewart, were married. In 1994, the parties entered into a legal separation. Appellant agreed to pay appellee $950.00 per month.

On February 6, 1998, appellee filed a complaint for divorce. A hearing was held on December 15, 1998. By judgment entry filed same date, the trial court granted the divorce and increased appellant's spousal support obligation to $986.00 per month. The trial court ordered the spousal support shall terminate upon the death or remarriage of appellee.[FN1]

FN1. Due to a clerical error, the judgment entry was refiled under the correct case number on May 28, 1999.

Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

THE TRIAL COURT ABUSED ITS DISCRETION, ERRED AS A MATTER OF LAW, AND VIOLATED APPELLANT'S STATUTORY RIGHTS WHEN IT ORDERED A PAYMENT FROM APPELLANT'S PENSION FOR SUSTENANCE ALIMONY WHICH VIOLATED RC § 3113.21.

II

THE TRIAL COURT ABUSED ITS DISCRETION, ERRED AS A MATTER OF LAW, AND VIOLATED APPELLANT'S STATUTORY RIGHTS WHEN IT INCREASED THE AWARD OF SUSTENANCE ALIMONY WITHOUT FINDING A CHANGE OF CIRCUMSTANCES WHICH VIOLATED RC § 3105.18(D) AND (E).

III

THE TRIAL COURT ABUSED ITS DISCRETION, ERRED AS A MATTER OF LAW, AND VIOLATED APPELLANT'S STATUTORY RIGHTS WHEN IT INCREASED APPELLANT'S PAYMENT OF SUSTENANCE ALIMONY WITHOUT FINDING APPELLEE NEEDED SUSTENANCE ALIMONY WHICH VIOLATED RC § 3105.18(C)

IV

THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW WHEN IT FAILED TO PROVIDE FOR A CUT-OFF DATE FOR PAYMENT OF SUSTENANCE ALIMONY.

I

Appellant claims the trial court erred in ordering spousal support of $986.00 to be withheld from his monthly pension disbursal because said amount exceeds sixty percent of his income in violation of R.C. 3113.21(D)(1)(a) and the Consumer Credit Protection Act [15 U.S.C. 1673(b)]. We agree.

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R.C. 3113.21(D)(1)(a) limits withholding as follows:
However, in no case shall the sum of the amount specified in the notice to be withheld and any fee withheld by the payor as a charge for its services exceed the maximum amount permitted under section 303(b) of the 'Consumer Credit Protection Act,' 15 U.S.C. 1673(b).

Subsection (F)(2)(a) describes how withholding is to be calculated if more than sixty percent of income is attached:
(a) If the total of the amounts designated in the notices as current support exceeds the amount available for withholding under section 303(b) of the 'Consumer Credit Protection Act,' 15 U.S.C. 1673(b), the payor shall allocate to each notice an amount for current support equal to the amount designated in that notice as current support multiplied by a fraction in which the numerator is the amount of income available for withholding and the denominator is the total amount designated in all of the notices as current support.

Given the plain reading of the statutes, we find appellant is correct in that only sixty percent of his monthly pension benefit can be subject to the QDRO.[FN2] The remainder of appellant's spousal support obligation must come from appellant's other income *i.e.*, job and funds received from other sources.[FN3]

FN2. Appellant's monthly pension benefit is $1,290.00. The spousal support order is $986.00. Appellant's income includes $161.00 wages, $905.00 social security and $1,290.00 Ford pension. $986.00 is approximately seventy-six percent of the pension benefit. $774.00 would be sixty percent.

FN3. We note social security benefits are not subject to a wage withholding order.

*2 Assignment of Error I is granted.

II, III, IV

Appellant challenges the trial court's award of spousal support because it did not reflect a change of circumstance, did not reflect appellee's need for sustenance and did not provide for a termination date.

The trial court is provided with broad discretion in deciding what is equitable upon the facts and circumstances of each case. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293. We cannot substitute our judgment for that of the trial court unless, when considering the totality of the circumstances, the trial court abused its discretion. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 541 N.E.2d 597. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment.*Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. We are further guided by the language of *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 554 N.E.2d 83, paragraph one of the syllabus:
Except in cases involving a marriage of long duration, parties of advanced age or a homemaker-spouse with little opportunity to develop meaningful employment outside the home, where a payee spouse has the resources, ability and potential to be self-supporting, an award of sustenance alimony should provide for the termination of the award, within a reasonable time and upon a date certain, in order to place a definitive limit upon the parties' rights and responsibilities.

Furthermore, a judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578. A reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson* (1993), 66 Ohio St.3d 610, 614 N.E.2d 742.

R.C. 3105.18(C)(1) sets forth factors the trial court shall consider in determining spousal support:
(C)(1) In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:
(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 [3105.17.1] of the Revised Code;
(b) The relative earning abilities of the parties;
(c) The ages and the physical, mental, and emotional

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conditions of the parties;
(d) The retirement benefits of the parties;
*3 (e) The duration of the marriage;
(f) The extent to which it would be inappropriate for a party, because he will be custodian of a minor child of the marriage, to seek employment outside the home;
(g) The standard of living of the parties established during the marriage;
(h) The relative extent of education of the parties;
(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;
(j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;
(k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;
(l) The tax consequences, for each party, of an award of spousal support;
(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;
(n) Any other factor that the court expressly finds to be relevant and equitable.

CHANGED CIRCUMSTANCES

As pointed out by appellee, the original separation agreement provided for spousal support as follows:
Wife shall receive spousal support, in the amount of Nine Hundred and Fifth Dollars ($950.00) per month from the husband's pension and social security until this provision of the legal separation is modified. This provision concerning alimony will not be subject to modification by either party or the court until after the wife has reached the age of 65.
Upon a request of modification of alimony by either party after the wife has reached the age of 65, both parties will be able to seek a modification from the court either increasing or decreasing the alimony to be paid. To determine whether to modify the alimony, the Court is to look to the factors set forth in Ohio Revised Code Section 3105.18.
* * *
In making this agreement, both parties are acknowledging that prior to the wife reaching the age of 65, the income of the parties whether from employment, pensions, social security or otherwise may change. And in making this agreement, the wife is waiving her right until she reaches age 65 to seek additional alimony and the husband is waiving his right to seek a reduction in alimony until the wife reaches the age of 65.

Appellee filed for divorce on February 6, 1998. With the complaint for divorce, new financial statements were filed. It is from this filing of divorce that the present spousal support order originated.

The parties clearly agreed to a review of the spousal support order at the time of appellant reaching the age of sixty-five. This agreement relieves the trial court from the necessity of finding a change of circumstances. R.C. 3105.18 does not apply under the facts *sub judice.*

APPELLEE'S NEED OF SUSTENANCE

*4 Appellee's financial statement establishes expenses of $1,383.00 per month. Appellee's current source of income is $411.00 from social security and $950.00 from appellant's pension fund per the separation agreement, for a total income of $1361.00. The trial court increased the spousal support by $36 per month thereby meeting appellee's needs as set forth in the financial statement. The trial court stated its reasons for doing so as follows:
The order of spousal support and modification of same is based upon the enumerated factors set forth in Ohio Revised Code § 3105.18(C). In particular, the Court notes the disparity of income and resources that exist between the parties, the relative earning ability of the parties, the ages and physical condition of the parties, the retirement benefits of the parties, the duration of the marriage, the standard of living that the parties established during marriage and during the legal separation and the relative extend of education of the parties. It is this Court's finding that it would be inequitable due to the 44 year marriage to permit any circumstances other than an attempt to equalize disposable income between the two parties to exist.

Upon review, we find the trial court did not abuse its discretion in so finding.

DURATION

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In the original separation agreement, the parties agreed the spousal support would survive appellant's life. The parties terminated a forty-four year marriage. Clearly a long term marriage wherein both parties mutually agreed to continue spousal support as evidenced by the separation agreements meets the strict standards of *Kunkle.*

Assignments of Error III and IV are denied.

The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed in part and reversed in part.

WISE, P.J., and EDWARDS, J., concur.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed in part, reversed in part and remanded to said court for proceedings consistent with this opinion. Costs to appellant.

Ohio App. 5 Dist.,1999.
Stewart v. Stewart
Not Reported in N.E.2d, 1999 WL 1071976 (Ohio App. 5 Dist.)

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Harbert v. HarbertOhio App. 2 Dist.,1997.Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Greene County.

Kaylin B. HARBERT, Plaintiff-Appellant,

v.

Michael R. HARBERT, Defendant-Appellee.

No. 96-CA-0161.

Oct. 17, 1997.

Richard T. Brown, 2190 Gateway Drive, Fairborn, Ohio 45324,Atty. Reg. No. 0026034 Attorney for Plaintiff-Appellant
David S. Peterson, 670 N. Detroit Street, Xenia, Ohio 45385-2238, Atty. Reg. No. 0007836 Attorney for Defendant-Appellee

OPINION

GRADY, J.

***1** This is an appeal from an order of the common pleas court, domestic relations division, adopting the decision of its magistrate over the objections of Plaintiff-Appellant Kaylin B. Harbert. The court, in accordance with its magistrate's decision, granted Plaintiff-Appellant's motion to modify its prior **spousal support** order and required Defendant-Appellee Michael R. Harbert, to pay **spousal support** of fifty dollars per week. The prior order had not required him to pay no support. The court also modified the period for which it had "retained **jurisdiction**" to modify its prior order, shortening the term from ten years to five years.

Mrs. Harbert filed a timely notice of appeal from the trial court's order. She presents three assignments of error on appeal.

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING THE PLAINTIFF AN INSUFFICIENT AMOUNT OF **SPOUSAL SUPPORT** BASED ON THE CHANGE OF CIRCUMSTANCES.

Mrs. Harbert's motion to modify the prior **spousal support** order alleged that Mr. Harbert's income had increased since the prior order was entered. The magistrate found that it had, and that the increase was a substantial change of the circumstances on which the prior support order was founded. Because the court had retained authority to modify its prior award pursuant to R.C. 3105.18(E), the magistrate proceeded to analyze the basis to modify the prior order, applying the factors in R.C. 3105.18(C)(1). The magistrate concluded that the prior order should be modified to require Mr. Harbert to pay support to Mrs. Harbert at the rate of fifty dollars per week for a period of five years.

Mrs. Harbert objected to the magistrate's decision, arguing that a greater amount of support should be ordered. The trial court overruled that objection, holding that Mrs. Harbert's failure to file a transcript of the proceedings before the magistrate prevented the court from finding that the amount of support that the magistrate ordered was not reasonable and appropriate.

Objections to the decision of a magistrate are governed by Civ.R. 53(E)(3). At section (b), the Rule states: "Any objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of that evidence if a transcript is not available." Greene Loc.R. Title VII, Section 7.02, requires a party who files written objections to a finding of fact to state that a transcript has been requested and will be filed. The local rule also states: "Failure to file a transcript shall constitute grounds for dismissal of said objections."

The magistrate's decision to order spousal support in the amount of fifty dollars per week implies a finding that support in that amount is both "appropriate and reasonable." R.C. 3105.18(C)(1). That is a mixed finding of law and fact, and Mrs. Harbert was required to submit a transcript of the proceedings before the magistrate to support her objection to the magistrate's decision. Mrs. Harbert failed to do that, or to state in her objections that one would be filed. The trial court did not abuse its discretion when it overruled her objection for that reason.

***2** After the trial court overruled her objection and

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adopted the magistrate's decision, and after she filed her notice of appeal, Mrs. Harbert filed a transcript of the proceedings before the magistrate. The transcript is not a part of the record before the trial court. Therefore, it offers no basis for this court to find an error or abuse of discretion in the judgment that the trial court rendered.

The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO MAKE ANY AWARD OF SPOUSAL SUPPORT RETROACTIVE TO THE DATE OF HIS NEW EMPLOYMENT.

The magistrate ordered support paid at the rate of fifty dollars per week effective the date of the hearing on Mrs. Harbert's motion, September 26, 1996. It is not evident when Mr. Harbert's income increased, but it is obvious that the new employment from which that change of circumstances resulted commenced at some earlier time.

The particular change of circumstances that a court finds substantial enough to warrant modification of a **spousal support** order ordinarily precedes the modification itself. Even though **spousal support** orders are founded on equitable considerations, the court may not order a modification retroactive to the date on which the change occurred merely because it finds one.

A request to modify **spousal support** is an entirely different proceeding from the one in which the prior **spousal support** order was made, even though it is based on the **continuing** authority to modify which the court reserved in the order that it made in that prior proceeding. (See Third Assignment of Error.) Because the modification proceeding is a new proceeding, consistent with the requirements of notice and opportunity to be heard embodied in the concept of due process, a court may order a modification resulting from the request retroactive only to the date on which the motion was served on the adverse party, at the earliest. R.C. 3113.21(M)(3) and (4). *See also, Murphy v. Murphy* (1984), 13 Ohio App.3d 388, 469 N.E.2d 564. *Coffman v. Coffman* (June 28, 1995), Greene App. No. 94-CA-104, unreported.

The foregoing rule is not absolute. The court may order a modification retroactive to the change of circumstances that warrants it when the amount, terms, or duration of the support in the prior order is expressly made conditional upon that change of circumstances. Then, due process is satisfied because the adverse party has been put on notice and been given an opportunity to contest the basis for change before a motion to modify is served on him. Likewise, when an obligor fails to comply with an order requiring him to notify the obligee of a change of circumstances, the court may make its modification retroactive to the date that the change occurred. *Balazs v. Balazs* (Aug. 15, 1997), Montgomery App. No. 16096, unreported.

The court's prior order had imposed no spousal support requirement on Mr. Harbert because his income did not justify it. Mr. Harbert may have been aware that an increase in his income would likely result in an order to pay spousal support, but he was not required to notify Mrs. Harbert or the court of any change that took place. Because the prior order was not made conditional on the happening of that event, Mr. Harbert's new support obligation could not be made retroactive to the increase in his income. It could be made retroactive only to the date that Mrs. Harbert's motion to modify was served on him, which is the earliest date Mr. Harbert had notice of the relief that Mrs. Harbert requested of the domestic relations court. R.C. 3113.21(M)(4).

*3 Relief that is granted on a complaint for divorce is effective on the date of the final hearing upon which the decree of divorce is entered. That same rule is generally followed in any subsequent proceeding to modify support. The trial court followed that pattern here, making its modification effective on the date of the hearing on Mrs. Harbert's motion to modify, which was September 26, 1996. It could have made the order retroactive to July 15, 1996, the date the motion was served on Mr. Harbert. It didn't, but we find no abuse of discretion in that respect on the record before us.

The second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION IN REDUCING THE **CONTINUING JURISDICTION** OF THE COURT FROM TEN YEARS TO FIVE YEARS WITHOUT A MOTION BEING FILED.

The prior order that the court modified was entered

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on November 29, 1995. It ordered no **spousal support** paid, but it further provided that the court "**will** retain **jurisdiction** over the issue of **spousal support** for a period of ten years, in the event there is a further change of circumstances." The modification that the court ordered on October 15, 1996, set Mr. Harbert's support obligation at fifty dollars per month for a period of five years and stated: "The Court retains **jurisdiction** over the amount of **spousal support** but not the duration of **spousal support**."

R.C. 3105.18(E) provides that a court which enters an order in a decree of divorce for periodic payments of money as **spousal support** "does not have **jurisdiction** to modify the amount or terms of the alimony or **spousal support**" unless the circumstances of either party have changed and unless "(1) the decree contains a provision specifically authorizing the court to modify the amount or terms of alimony or **spousal support**." R.C. 3105.18(E) was a legislative response to the decision in *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 350 N.E.2d 413, which permitted a modification of a **spousal support** order on a showing of misconduct on the part of the obligee.

The ***jurisdiction*** of the courts of common pleas is established legislatively, pursuant to Article IV, Section 4(B), Ohio Constitution. *Mattone v. Argentina* (1931), 123 Ohio St. 393, 175 N.E. 603. Because a court cannot create its own **jurisdiction**, neither can it "retain **jurisdiction**" to modify its own **spousal support** order when that **jurisdiction** would otherwise expire. Pursuant to R.C. 3105.18(E), a court can only retain the authority to exercise the **continuing jurisdiction** which that section creates.

R.C. 3105.18(E) denies a domestic relations court the **jurisdiction** to make an order that modifies "the amount or terms" of **spousal support** unless the order that is modified contains the affirmative statement prescribed by the statute. That statement requires the court to say that it is authorized "to modify the amount *or* terms of alimony or **spousal support**." [FN*] If the court makes the statement in both respects, it is authorized to do either or both. However, because R.C. 3105.18(H) uses the word "**or**" as a coordinating conjunction connecting alternatives, it also authorizes the court to do one but not the other. That is what the court did here.

FN* We deem the court's statement that it would "retain jurisdiction" to be in substantial compliance with the requirements of R.C 3105.18(H).

*4 When a court is authorized by law to grant a remedy for which the law provides, the court's authority is discretionary. The order will not be reversed on appeal absent an abuse of discretion. An abuse of discretion connotes more than an error of law or judgment: it implies that a court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

This appellate court has held that a domestic relations court which orders payments of spousal support for a period of more than a brief duration abuses the discretion it is granted by R.C. 3105.18(H) if it fails to retain the authority to modify. *Stackhouse v. Stackhouse* (July 25, 1997), Montgomery App. No. 16244, unreported. Here, the court retained the authority to modify the support that it ordered for the duration of the period during which support must be paid. No basis is demonstrated to find that support is required for a time longer than five years. Therefore, no abuse of discretion is demonstrated by the court's order authorizing exercise of its continuing jurisdiction to modify during that period, but no longer.

The third assignment of error is overruled.

Having overruled all assignments of error, the judgment of the trial court will be affirmed.

BROGAN and WOLFF, JJ., concur.
Ohio App. 2 Dist.,1997.
Harbert v. Harbert
Not Reported in N.E.2d, 1997 WL 691506 (Ohio App. 2 Dist.)

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

Court of Appeals of Ohio, Second District, Greene County.
Kathy JORDAN (nka Johnson) Plaintiff-Appellee,
v.
Michael JORDAN, Defendant-Appellant.
No. 99-CA-64.

March 17, 2000.

Arthur L. Sidell, III, 330 North Detroit Street, Xenia, Ohio, Atty. Reg. # 0009180 Attorney for Plaintiff-Appellee.

Charles M. Rowland, II, Cox & Keller, Xenia, Ohio, Atty. Reg. # 0065603 Attorney for Defendant-Appellant.

OPINION

KERNS. [FN*]

FN* Hon. Joseph D. Kerns, Retired from the Court of Appeals, Second Appellate District, Sitting by Assignment of the Chief Justice of the Supreme Court of Ohio.

*1 This is an appeal from the Division of Domestic Relations of the Court of Common Pleas of Greene County.

Pursuant to a petition for dissolution of their marriage, the appellant, Michael Jordan, and the appellee, Kathy Jordan, entered into a separation agreement which settled and adjusted all of their rights and liabilities arising by virtue of their marital relationship.

Among other things, the separation agreement contains a retirement provision which grants Kathy Jordan a percentage interest in the retirement benefits of Michael Jordan based upon one-half of the number of years of service times the amount of the retirement benefits plus any cost of living allowances. This formula was recognized in *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177, 559 N.E.2d 1292, and neither party to this proceeding seriously challenges the manner of determining the percentage of the retirement benefits due the appellee.

Rather, the specific issue before the trial court at the hearing of this matter, according to the appellant's brief, and the only issue presently before this court on appeal, is "whether the Air Force retirement pay of Michael Jordan should be divided before or after the federal government withholds taxes." If the amount is divided before taxes, Kathy Jordan would receive approximately ninety dollars a month more than she would receive after the federal government withholds taxes, but Michael Jordan contends that the trial court is precluded by federal statute, 10 U.S.C. 1408, from allowing any amount which exceeds fifty percent of the total amount of his disposable retirement pay.

In support of his argument, Mr. Jordan relies principally upon *Chase v. Chase* (1983), 662 P.2d 944 and *Arford v. U.S.* (1990), 923 F.2d 229, but more recently, and closer to home, this court has held that the Uniformed Services Former Spouses' Protection Act (10 U.S.C. 1408) **"does not preclude parties to a divorce from using gross military retired pay to calculate an agreed-upon sum for spousal support."** ***Blissit v. Blissit*** **(1997), 122 Ohio App.3d 727, 702 N.E.2d 945**. Although the issues in the ***Blissit*** **case** arose from a divorce decree rather than from a separation agreement, the case has many characteristics similar to those of the present case. In fact, the following commentary therefrom would appear to apply with equal force to the only issue raised in this case:

> **"Despite Mr. Blissit's contentions to the contrary, the Act does not preclude parties to a divorce from using gross military retired pay to calculate an agreed-upon sum for spousal support. If Mr. Blissit objected to such a calculation, he should have said so at the hearing. Rather, Mr. Blissit indicated that this spousal support provision was acceptable to him, and he may not now be heard to complain that it is unfair. Moreover, we find nothing in the Act which would hinder enforcement of such a provision. Although the Act states that the 'total amount of the disposable retired pay of a member payable [pursuant to a court order] may not exceed 50 percent of such disposable retired pay', Section 1408(e)(1), Title 10,**

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U.S.Code, it also states that 'nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted * * *.' Section 1408(e)(6), Title 10, U.S.Code. In other words, the statute does not limit the amount which a retiree may be ordered to or may agree to pay; it merely limits the extent to which the government will make such payments directly to the obligee on the retiree's behalf. Thus, Mr. Blissit's agreement to pay spousal support, which was tied in part to his gross retired pay, did not violate federal law, and the provision is enforceable."
Id., at 733, 702 N.E.2d 945.

*2 Ordinarily, a separation agreement incorporated within a dissolution decree is a binding contract between the parties, and the rights and obligations of the parties relative to the retirement benefits of Mr. Jordan are clearly set forth in the separation agreement. In fact, the trial court, after finding that the separation contract was unambiguous, adopted an explanatory caveat which specifically states that "if existing federal law and regulations do not permit the withholding of an amount necessary to satisfy the interest of Kathy Jordan from the Air Force, then Michael Jordan shall be required to pay the difference to her by direct payments once each month consistent with the terms of this decision and order."

Here, the trial court was relieved of its authority and responsibility to fashion an equitable division of marital property by the parties themselves who voluntarily entered into an agreement to dissolve all of their marital rights and liabilities. Their agreement was approved by the Domestic Relations Court on April 19, 1989, and consistent with the provisions of the separation agreement, the court issued a Qualified Domestic Relations Order on April 19, 1989, which created in Kathy Jordan the right to receive 32.5% of Michael Jordan's military retirement pay. No appeal was taken from the judgment so entered, and nothing has transpired since to justify any interference with the separation agreement.

Accordingly, the alleged error is overruled, and the judgment of the trial court is Affirmed.

WOLFF and FAIN, JJ., concur.

Not Reported in N.E.2d, 2000 WL 282305 (Ohio App. 2 Dist.)

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C Polak v. Polak
Ohio App.,1986.
Only the Westlaw citation is currently available.

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

Court of Appeals of Ohio, Second District,
Montgomery County.
William L. POLAK, Plaintiff-Appellee,
v.
Colleen R. POLAK, Defendant-Appellant.
No. 9993.

Dec. 12, 1986.

Ray A. Cox, Dayton, for plaintiff-appellee.
Don A. Little, Dayton, for defendant-appellant.

OPINION

BROGAN, Presiding Judge.
***1** Appellant, Colleen R. Polak and appellee, William L. Polak, obtained a dissolution of their marriage on September 5, 1980 in Montgomery County, Ohio. Incorporated in the decree of dissolution was a separation agreement whereby the appellant agreed to pay periodic alimony to appellee for a period of five years. The separation agreement also provided the following provision:

The parties agree that any Court of competent jurisdiction shall continue to have jurisdiction over the alimony provisions contained herein both as to amount and as to term. The parties further agree that any court of competent jurisdiction need not have proved to it a change in circumstances in order for such a Court to make a modification in these alimony provisions either as to amount or time; however, the parties agree that any Court of competent jurisdiction may consider any changes in circumstances in considering whether to modify the alimony provisions contained herein.

On May 5, 1985, appellee filed a motion for extension of alimony and modification of term of alimony. Appellee sought to extend the alimony provisions to a term of ten years. The matter was heard by a referee who recommended that the trial court extend the term of alimony for six months following the closing of the marital residence at which time alimony will be terminated unless further hearing and relief is requested by the second petitioner. On September 27, 1985, the trial court adopted this recommendation of the referee.

On April 10, 1986, the appellant made a motion in the trial court for an order extending the term of the periodic alimony herein and for an order increasing the amount of periodic alimony herein. On May 27, 1986, the trial court overruled the motion of appellee and noted in light of the fact that the parties have not voluntarily agreed to this modification of the alimony provision contained in their separation agreement, and that the parties' separation agreement is not subject to Am.H.B. 358, movant's motion is not well taken and is hereby overruled. From that judgment, appellant has timely appealed asserting one assignment of error.

Appellant contends the trial court committed prejudicial error in overruling, as a matter of law, the appellant's motion to extend the term and increase the amount of periodic alimony previously awarded her pursuant to her dissolution and incorporated separation agreement, which decree specifically provided for the trial court's retaining jurisdiction on such matters.

Appellant conceded that Amended House Bill 358, effective May 2, 1986 does not affect dissolutions of marriage that were determined prior to the effective date of the act. This legislation provides, in pertinent part, that a domestic relations court can only modify an order for the payment of periodic alimony in a dissolution where there has been a change of circumstances and the separation agreement incorporated in the decree contains a provision specifically authorizing the court to modify the amount or terms of alimony. *See,* R.C. 3105.18(D)(2); R.C. 3105.63; R.C. 3105.65(B).

***2** Amended House Bill 358 was the legislative

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response to the case of *McClain v. McClain* (1984), 15 Ohio St.3d 289, wherein the Ohio Supreme Court held in its syllabus that a court of common please does not have jurisdiction to modify a provision for periodic sustenance alimony payments contained within a dissolution of marriage decree.

Appellant conceded in his brief that the reasoning underlying its decision in *McClain* was based on two theories. (See appellant's brief at page 7). Appellant concedes that dissolutions are consensual in nature, and thus in the absence of an agreement between the parties, a court cannot award alimony, let alone modify it. Second, appellant concedes that legislature, in enacting R.C. 3105.65(B) and deleting the words "and periodic alimony payments" from those matters which a court granting a dissolution retains jurisdiction thereto, must have intended that a court did not retain such jurisdiction as to matters relating to the modification of periodic alimony payments. (See appellant's brief).

In *McClain, id.* the parties had entered in a dissolution whereby the incorporated separation agreement provided that Martin McClain was to pay Susan McClain $400 per month in alimony for five years or until she remarried, died, cohabited with another, or Martin McClain died. Shortly after the dissolution, Martin McClain became unemployed. Mr. McClain filed a motion to modify his alimony payments, which were so modified by the trial court. the court ordered that further alimony payments be held in abeyance until appellee obtained "substantial employment," and then to be resumed at the prior order...." Mrs. McClain appealed and the Court of Appeals of Cuyahoga County affirmed the trial court. Finding its decision in conflict with the Franklin County Court of Appeals in *Alban v. Alban* (1981), 1 Ohio App.3d 146, the court certified the record to the Supreme Court for its final determination.

In *Alban v. Alban, id,* the Court of Appeals for Franklin County held that R.C. 3105.65(B) does not confer jurisdiction upon a court of common pleas to modify periodic alimony payments provided for in a separation agreement incorporated in a decree of dissolution of marriage, at least in the absence of a provision in the separation agreement for such modification.

Shortly after *Alban v. Alban, supra,* was decided by the Franklin County Court of Appeals, that same court decided the case of *In the Matter of Kathleen and Gerald Fugazzi* (June 2, 1983), Franklin App. 82-AP-184, unreported. In that case the husband sought to terminate alimony based on changed circumstances since the dissolution of the parties' marriage. The court noted at page 6 of its opinion:

This court, in *Alban,* did not attempt to decide the question which is now squarely before us. The separation agreement here incorporated in the dissolution decree provides that "after April 30, 1981, either party hereto may have the alimony award received by the court."

The statute, in this case, having failed to confer jurisdiction in the Common Pleas Court to modify periodic alimony payments, we find that the parties cannot bootstrap themselves by conferring jurisdiction on the court in the separation agreement. The Supreme Court, in the third paragraph of the syllabus of *Miller v. Miller* (1951), 154 Ohio St. 530, held:

*3 "The parties to an action cannot by agreement clothe a court with jurisdiction of subject matter which it does not have."

In *McClain, supra*, there is no mention in the facts before the court of a provision in the parties' separation agreement allowing for modification of alimony. Justice J.P. Celebrezze in writing for the majority stated at page 290-91 of the opinion:

The limitation upon a court's jurisdiction in dissolution cases extends to modifications of separation agreements after a decree is entered. Just as a court lacks authority to set the original amount of alimony payments in a dissolution case, a court also lacks authority to modify the amount of alimony payments originally agreed to by the parties. See, e.g., *Alban v. Alban, supra.*

The legislative history of R.C. 3105.65(B) indicates that the General Assembly has considered the question *sub judice* and has reached the same conclusion as does this court. R.C. 3105.65(B) empowers the court to grant a decree of dissolution of marriage incorporating a separation agreement. As originally enacted in 1974, the final sentence of R.C. 3105.65(B) read: "The court has full power to

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enforce its decree, and retains jurisdiction to modify all matters of custody, child support, visitation, and periodic alimony payments." (135 Ohio Laws, Part II, 603, 616.) One year later the General Assembly amended R.C. 3105.65(B) by deleting the words "and periodic alimony payments." (136 Ohio Laws, Part II, 2451, 2452). The final sentence of R.C. 3105.65(B) now reads: "The court has full power to enforce its decree, and retains jurisdiction to modify all matters of custody, child support, and visitation." *We can infer from this deletion that the legislature specifically intended that a court would not retain jurisdiction to modify periodic alimony payments provided for in a separation agreement incorporated in a decree of dissolution of marriage.*

In light of the consentual nature of separation agreements incorporated into decrees of dissolution of marriage, and the legislative history of R.C. 1305.65(B), we hold that a court of common pleas does not have jurisdiction to modify a provision for periodic sustenance alimony payments contained within a dissolution of marriage decree. (Emphasis ours).

Appellant argues that the parties, by virtue of the provisions of their separation agreement, have conferred jurisdiction upon the common pleas court to modify the alimony provisions of their separation agreement.

It is axiomatic that jurisdiction of the subject matter is always fixed and determined by law and cannot be conferred on the court by any consent or acquiescence of the parties. 22 Ohio Jurisprudence 3d, Courts and Judges, Sec. 299, 300.

Plainly the legislature in amending R.C. 3105.65(B) in 1975, deleted the power of the common pleas court to modify alimony payments. No exception was made for the power of the court to modify alimony upon agreement of the parties to the dissolution.

We are not empowered to second guess the wisdom of legislation. Clearly, R.C. 3106.65(B) as amended can and did produce harsh and inequitable results. The legislation in House Bill 358 has addressed these inequities. Parenthetically, this legislation would be superfluous were we to adopt appellant's contentions in this lawsuit. The trial court property denied the motion to modify alimony. The assignment of error is overruled.

*4 Judgment of the trial court is affirmed.

WILSON and WOLFF, JJ. concur.
Ohio App.,1986.
Polak v. Polak
Not Reported in N.E.2d, 1986 WL 14245 (Ohio App. 2 Dist.)

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Thomas v. Thomas
Ohio App. 11 Dist.,2004.

Court of Appeals of Ohio,Eleventh District, Lake County.
THOMAS, Appellant,
v.
THOMAS, Appellee.
No. 2003-L-098.

Decided June 7, 2004.

Background: Following remarriage, former wife moved to terminate spousal support that was part of earlier decree of dissolution of marriage. The Court of Common Pleas, Lake County, Domestic Relations Division, No. 92 DI 000431, denied the motion. Former wife appealed.

Holding: The Court of Appeals, Diane V. Grendell, J., held that trial court lacked jurisdiction to terminate spousal support.

Affirmed.

West Headnotes

[1] Divorce 134 ⚷247

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k247 k. Commencement and Termination. Most Cited Cases
Trial court lacked jurisdiction to terminate spousal support following remarriage of former wife, where neither separation agreement nor decree of dissolution of marriage contained a reservation of jurisdiction as to spousal support. R.C. § 3105.18(E)(2).

[2] Husband and Wife 205 ⚷278(3)

205 Husband and Wife
205VIII Separation and Separate Maintenance
205k277 Separation Agreements
205k278 Requisites and Validity
205k278(3) k. Nature of Agreement. Most Cited Cases
Although a court lacks the inherent authority to modify an award of spousal support contained in a decree of dissolution of marriage, nothing in the statutes suggests that parties are precluded from voluntarily including a provision for continuing jurisdiction in their separation agreement. R.C. § 3105.18(E)(2).

[3] 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
Parties to a decree of dissolution of marriage may not subsequently confer jurisdiction on the court, with regard to modification of spousal support, where they have failed to do so in the separation agreement. R.C. § 3105.18(E)(2).

[4] Divorce 134 ⚷247

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k247 k. Commencement and Termination. Most Cited Cases
Where separation agreement that was incorporated into decree of dissolution of marriage did not contain a reservation of jurisdiction as to spousal support, but did provide that former husband and former wife were free to modify the agreement, trial court would have jurisdiction to terminate spousal support following remarriage of wife if both parties made a joint request in writing. R.C. § 3105.18(E)(2).

****626*762Gregory M. Gilson, Painseville, for

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appellant.
William D. Thomas, pro se.
DIANE V. GRENDELL, Judge.
{¶ 1} Appellant, Elaine A. Thomas, now known as Elaine A. Soltis, appeals the May 28, 2003, judgment entry of the Lake County Court of Common Pleas, Domestic Relations Division, denying her motion to terminate spousal support. For the reasons that follow, we affirm the decision of the lower court.

{¶ 2} Soltis was formerly married to appellee, William D. Thomas. On June 29, 1992, Soltis and Thomas obtained a decree of dissolution of marriage in Lake County Domestic Relations Court. The court incorporated into the decree of dissolution the separation agreement entered into by Soltis and Thomas. The separation agreement provided for Thomas to pay Soltis spousal support as follows: "Husband agrees to pay the Wife the sum of One Thousand Three Hundred Dollars ($1,300.00) per month as and for alimony until such time as Wife is no longer receiving**627 child support for Amber under section 13 herein at which time said alimony shall be increased to One Thousand Seven Hundred Fifty Dollars ($1,750.00) per month and shall remain so until such time as Wife is not longer receiving child support for the minor child April under section 13 herein at which time said alimony shall be further increased to Two Thousand Two Hundred Dollars ($2,200.00) per month until Wife's death." The separation agreement does not contain any provision for the court's continuing jurisdiction to modify the terms or the amount of spousal support.

{¶ 3} The separation agreement does include the following clause: "*Modification*: [Husband and Wife agree * * *] [t]hat this agreement shall not be altered, changed or modified, except that it be done in writing and signed by both parties."

{¶ 4} Soltis remarried on February 14, 2003. Thereafter, it was agreed between Soltis and Thomas that Soltis no longer needed or wanted spousal support from Thomas. On May 19, 2003, Soltis filed a motion to terminate spousal support in the domestic relations court. Thomas did not respond to this motion. Nonetheless, the court denied the motion on these grounds: "The Court finds that neither the separation agreement nor decree of dissolution contained a reservation of jurisdiction as to spousal support. Accordingly, this Court is powerless to grant the Motion to Terminate Support pursuant to *763O.R.C. Section 3105.18(E)(2), and *Kimble v. Kimble*, 97 OS 3d 424, 2002 [780 N.E.2d 273]." This appeal timely follows.

{¶ 5} Soltis raises the following assignment of error: "The trial court erred in overruling the plaintiff's motion to terminate spousal support."

{¶ 6}R.C. 3105.18 governs the award and modification of spousal support/alimony. The statute provides: "If a continuing order for periodic payments of money as alimony is entered in a divorce or dissolution of marriage action * * *, 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 * * *[,][i]n 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." R.C. 3105.18(E)(2). In applying this statute, the Ohio Supreme Court has held that "a trial court has the authority to modify or terminate an order for alimony or spousal support only if the divorce decree contains an express reservation of jurisdiction." *Kimble v. Kimble*, 97 Ohio St.3d 424, 2002-Ohio-6667, 780 N.E.2d 273, at syllabus.

[1] {¶ 7} Both R.C. 3105.18(E)(2) and *Kimble* support the domestic relations court's conclusion that the court lacked jurisdiction to modify the support order agreed to by Soltis and Thomas. Soltis attempts to distinguish *Kimble* by a variety of arguments, such as the facts that the support order in *Kimble* was time-limited (six years), whereas the order at issue is for an indefinite duration until Soltis's death; that in *Kimble* the separation agreement contained specific language that the court would not retain jurisdiction to modify the award of spousal support; and that in the present case, both parties agree that support should terminate. We find these distinctions to be immaterial to the operation of R.C. 3105.18(E)(2) and to the holding of *Kimble*.

**628 {¶ 8} Soltis finally attempts to rely on a couple of older Supreme Court decisions, *Colizoli v. Colizoli* (1984), 15 Ohio St.3d 333, 15 OBR 458, 474

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N.E.2d 280, and *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 75 O.O.2d 474, 350 N.E.2d 413, to support her position that a court may modify an indefinite award of spousal support without jurisdiction being conferred under R.C. 3105.18. Both of these decisions, however, were issued before significant changes were made to R.C. 3105.18. A brief consideration of the changes in the law will demonstrate the inapplicability of the cases Soltis relies on as well as the weakness of Soltis's attempts to distinguish *Kimble.*

{¶ 9} As originally enacted in 1974, R.C. 3105.65(B) expressly provided for a domestic relations court's continuing jurisdiction to modify an award of spousal ***764** support, then known as alimony. Former R.C. 3105.65(B) ("The court has full power to enforce its decree, and retains jurisdiction to modify all matters of custody, child support, visitation, and periodic alimony payments"), Am.Sub.H.B. No. 233, 135 Ohio Laws, Part II, 616. At that time, R.C. 3105.18 was silent regarding a court's jurisdiction to modify an award of spousal support. In 1975, the General Assembly modified R.C. 3105.65(B) by deleting the words "and periodic alimony payments." Am.H.B. No. 370, 136 Ohio Laws, Part II, 2452; *McClain v. McClain* (1984), 15 Ohio St.3d 289, 290-291, 15 OBR 421, 473 N.E.2d 811 ("We can infer from this deletion that the legislature specifically intended that a court would not retain jurisdiction to modify periodic alimony payments provided for in a separation agreement incorporated into a decree of dissolution of marriage"). The following year, in a decision relied upon by Soltis, the Ohio Supreme Court held that a court's jurisdiction to modify an award of spousal support would be implied in certain circumstances. *Wolfe,* 46 Ohio St.2d 399, 75 O.O.2d 474, 350 N.E.2d 413, at paragraph two of the syllabus ("Where, upon granting a divorce, a court awards alimony to a wife, pursuant to an agreement of the parties, to be paid until the condition subsequent of remarriage or death of the wife, and such award is for her sustenance and support independent of any award arising by adjustment of the property rights of the parties, reservation of jurisdiction to modify the award will be implied in the decree").

{¶ 10} Even under *Wolfe,* however, the lower court would not have had jurisdiction to modify the award of spousal support. In *McClain,* 15 Ohio St.3d 289, 15 OBR 421, 473 N.E.2d 811, the Supreme Court limited *Wolfe to divorce cases only.* Id. at syllabus ("A court of common pleas does not have jurisdiction to modify a provision for periodic sustenance alimony payments contained within a dissolution of marriage decree"). The Supreme Court explained its decision as follows:

{¶ 11}"The jurisdiction exercised by a trial court when granting a divorce is decidedly different than the jurisdiction exercised when granting a dissolution of marriage. In a divorce case the matter of periodic alimony payments is one for determination by the court. * * * In a dissolution case, however, the matter of periodic alimony payments is one to be settled by voluntary agreement between the parties. A court has no jurisdiction to grant a dissolution unless the parties have entered into a separation agreement either providing for alimony or providing that none shall be paid. * * *

{¶ 12} "The limitation upon a court's jurisdiction in dissolution cases extends to modifications of separation agreements after a decree is entered. Just as a court lacks authority to set the original amount of alimony payments in a dissolution case, ****629** a court also lacks authority to modify the amount of alimony payments originally agreed to by the parties." Id. at 290, 15 OBR 421, 473 N.E.2d 811.

***765**[2][3] {¶ 13} Although a court lacks the inherent authority to modify an award of spousal support contained in a decree of dissolution, "nothing in the statutes suggests that parties are precluded from voluntarily including a provision for continuing jurisdiction in their separation agreement." *In re Whitman* (1998), 81 Ohio St.3d 239, 244, 1998-Ohio-466, 690 N.E.2d 535;*Colley v. Colley* (1989), 43 Ohio St.3d 87, 89, 538 N.E.2d 410. The corollary to this principle is that parties may not subsequently confer jurisdiction on the court where they have failed to do so in the separation agreement. Cf. *Fox v. Eaton Corp.* (1976), 48 Ohio St.2d 236, 238, 2 O.O.3d 408, 358 N.E.2d 536 ("parties may not, by stipulation or agreement, confer subject-matter jurisdiction on a court, where subject-matter jurisdiction is otherwise lacking"); *Beatrice Foods Co. v. Porterfield* (1972), 30 Ohio St.2d 50, 59 O.O.2d 76, 282 N.E.2d 355, paragraph two of the syllabus ("parties may not confer jurisdiction upon a court by mutual consent, where none would

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otherwise exist").

{¶ 14} In 1986, the General Assembly amended R.C. 3105.18, as quoted above, so that a separation agreement must expressly confer jurisdiction on the domestic relations court to subsequently modify a sustenance alimony/spousal support award. Three years later, in *In re Adams* (1989), 45 Ohio St.3d 219, 543 N.E.2d 797, the Supreme Court recognized that jurisdiction to modify spousal support could not be implied. Such jurisdiction has to be conferred by the separation agreement. Id. at syllabus ("Pursuant to R.C. 3105.65(B), a court is without jurisdiction to modify or terminate an award of alimony set forth in a separation agreement incorporated into a decree of dissolution of marriage, absent a reservation of jurisdiction in the agreement"). In *Kimble*, relied upon by the lower court, the Supreme Court essentially reaffirmed this holding from *Adams*.

{¶ 15} For the foregoing reasons, Soltis's attempts to distinguish *Kimble* are unpersuasive. The sole assignment of error is overruled.

[4] {¶ 16} Although the trial court does not have jurisdiction to grant Soltis's unilateral motion to terminate spousal support, the trial court would have jurisdiction to terminate spousal support if the parties made a joint request in writing. The separation agreement provides that the parties themselves are free to modify the agreement provided that the modification "is done in writing and signed by both parties." Therefore, were Soltis and Thomas to file a joint motion, pursuant to the terms of the original agreement, reflecting their mutual desire to modify that agreement by terminating Thomas's obligation to pay spousal support, the court would have the authority, as well as the obligation, to give effect to the parties' request. *McClain*, 15 Ohio St.3d at 290, 15 OBR 421, 473 N.E.2d 811 (in a dissolution case, the court does not have authority to grant or modify an award of spousal support, "the matter of periodic alimony payments is one to be settled by the voluntary agreement between the parties").

*766 {¶ 17} The decision of the Lake County Court of Common Pleas, Domestic Relations Division, denying Soltis's unilateral motion to terminate support is affirmed.

Judgment affirmed.

JUDITH A. CHRISTLEY and WILLIAM M. O'NEILL, JJ., concur.
Ohio App. 11 Dist.,2004.
Thomas v. Thomas
159 Ohio App.3d 761, 825 N.E.2d 626, 2004 -Ohio- 2928

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Huffman v. Huffman
Ohio App. 10 Dist.,2002.

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

Court of Appeals of Ohio,Tenth District, Franklin County.
Karen HUFFMAN, Plaintiff-Appellee,
v.
Ronald C. HUFFMAN, Defendant-Appellant.
Nos. 02AP-101, 02AP-698.

Decided Nov. 5, 2002.

Former husband appealed from post-divorce decree contempt judgments entered against him by the Court of Common Pleas, Division of Domestic Relations, Franklin County, by a retired judge. The Court of Appeals, Bryant, J., held that husband waived claim that retired judge lacked authority to hear post-divorce decree contempt proceedings.

Affirmed.

West Headnotes

Divorce 134 ⚷282

134 Divorce
134V Alimony, Allowances, and Disposition of Property
134k278 Appeal
134k282 k. Presentation and Reservation in Lower Court of Grounds of Review. Most Cited Cases
Former husband's participation in post-divorce decree contempt proceedings before retired judge, without objection to retired judge's authority in those proceedings, waived his untimely challenge, brought for the first time on appeal, to retired judge's authority in the proceedings. R.C. § 2701.10.

Appeal from the Franklin County Court of Common Pleas, Division of Domestic Relations.
Philip M. Collins & Associates, and Philip M. Collins, for appellee.
Tyack, Blackmore & Liston Co., L.P.A., and Thomas M. Tyack, for appellant.
BRYANT, J.
*1 {¶ 1} Defendant-appellant, Ronald C. Huffman, appeals from post-divorce decree contempt judgments that a retired judge, sitting pursuant to R.C. 2701.10, entered against him. Defendant assigns a single error:

{¶ 2} "THE RETIRED JUDGE HEARING THE CONTEMPT CITATION[S] LACKED JURISDICTION TO CONDUCT THE HEARING OR ISSUE ORDERS AS THE PURPORTED REFERRAL ISSUED BY THE TRIAL JUDGE TO THAT RETIRED JUDGE IS INVALID IN THAT THE TRIAL JUDGE LACKED JURISDICTION TO ISSUE SUCH AN ORDER."

{¶ 3} Because the retired judge did not lack jurisdiction or authority to conduct the post-decree proceedings and enter the judgments of contempt against defendant, we affirm.

{¶ 4} In July 2000, plaintiff-appellee, Karen Huffman, initiated divorce proceedings against defendant in the Franklin County Court of Common Pleas, Division of Domestic Relations. Pursuant to R.C. 2701.10, the parties agreed to have a retired judge adjudicate their divorce. Accordingly, on January 10, 2001, the active Franklin County Common Pleas Court judge assigned to the case (the "common pleas judge") entered an agreed entry and order of referral, signed by both parties' counsel, referring the matter "in its entirety for trial" to the retired judge the parties specified (the "retired judge"). The order also expressly terminated the matter "on the Court docket as having been referred to a retired judge."(January 10, 2001 Agreed Entry and Order of Referral.)

{¶ 5} On April 5, 2001, the retired judge entered a divorce decree in the matter and, on June 19, 2001, denied defendant's motion for a new trial. On August 27, 2001, plaintiff filed a motion to refer the matter "back to the original trial court for further

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proceedings including post decree motions currently pending."(August 27, 2001 Motion to Refer Matter to Common Pleas Judge.) Attached to the motion was an agreement signed by both parties' counsel to have the retired judge refer the "entire case" back to the common pleas judge. (August 24, 2001 Memorandum of Agreement.)

{¶ 6} In accordance with the parties' motion and agreement, the retired judge entered an order of reference on September 20, 2001, stating that "[p]ursuant to R.C. § 2701.10, the parties in this matter agree and the Court therefore ORDERS that all pending motions and any future post-decree matters and proceedings are referred back to the original trial court [judge]." The retired judge and plaintiff's counsel signed the order; "submitted but not returned" was typed on the line for the signature of defendant's counsel. (September 20, 2001 Order of Reference.)

{¶ 7} In the meantime, on June 18, 2001, plaintiff had moved for an order of contempt against defendant; the common pleas judge set a hearing on the motion and then continued it. On September 28, 2001, on plaintiff's further motion for defendant to appear and show cause why he should not be held in contempt, the common pleas judge entered an order for defendant to appear before the court on November 21, 2001. On the date set for the hearing, defendant moved for a continuance "for [the common pleas judge] to speak with [the retired judge]." The common pleas judge granted the continuance over plaintiff's objection and continued the hearing to November 29, 2001.

*2 {¶ 8} In an entry dated November 29, 2001, the common pleas judge noted that she had been unaware of the retired judge's September 20, 2001 order referring the case back to her, and further noted that neither she nor defendant's counsel had signed the order. The common pleas judge did not note that, following entry of the divorce decree and denial of new trial, the parties had signed and filed a separate agreement to have the entire case referred back to the common pleas judge. Apparently believing the retired judge had jurisdiction over the post-decree proceedings because defendant's counsel had not signed the order, the common pleas judge then sua sponte: (1) vacated the September 28, 2001 order for defendant to appear and show cause, (2) reinstated the January 10 order of reference to the retired judge, and (3) ordered that "[a]ll pending motions and post decree matters, previously referred to [the common pleas judge] by the September 20, 2001 filed Order of Reference, as well as any future post decree matters are hereby referred to [the retired judge], by order of this Court."(November 29, 2001 Entry.) The parties did not sign the court's order or a separate agreement to refer the case back to the retired judge, but both parties signed a motion for continuance for the stated reason of "transfer of case back to [the retired judge]."

{¶ 9} The record reflects that both parties appeared at the continued hearing held before the retired judge on December 10, 2001, where the judge issued a judgment of contempt against defendant, including imposition of a 10 day jail sentence, for defendant's failure to pay plaintiff her share of certain marital assets. On January 16, 2002, the retired judge entered a second judgment of contempt against defendant, with additional jail time imposed, for defendant's failure to pay plaintiff spousal support and her share of equity in the marital home as the court had ordered. In separate judgment entries filed that same day, the retired judge (1) denied *a motion defendant brought* on December 31, 2001 *requesting the retired judge* to modify or terminate defendant's spousal support obligation, and (2) denied a stay of the court's contempt and asset distribution orders. According to the record, after the common pleas judge referred the case back to the retired judge on November 29, 2001, defendant raised no objections below to the retired judge's authority to conduct proceedings or enter any judgment in the case.

{¶ 10} Upon defendant's appeal and motion for stay, this court granted defendant a stay of execution of the January 16, 2002 judgment of contempt, conditioned on defendant posting a supersedeas bond. In his single assignment of error, defendant contends the retired judge lacked jurisdiction to hear the matters referred to him or to issue orders because the common pleas judge's November 29, 2001 referral was procedurally defective.

{¶ 11} More particularly, defendant asserts the parties agreed to have the retired judge hear and decide only the divorce proceedings, not the post-decree proceedings. In support, defendant notes the parties' signed agreement to the January 10, 2001

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order referring the case to the retired judge, and their written agreement to the September 20, 2001 order, after the divorce decree had been entered, referring the post-decree matters and proceedings back to the common pleas judge. Defendant contends the common pleas judge's second referral of the case to the retired judge, on November 29, 2001, was invalid because the parties did not agree in writing to the referral as R.C. 2701.10(B)(1) and (2) require. Defendant claims the retired judge accordingly lacked jurisdiction to conduct the post-decree proceedings and to enter the contempt judgments against defendant. Asserting the contempt judgments therefore are void and must be vacated, defendant contends the case should be remanded for further proceedings to be held before the common pleas judge.

*3 {¶ 12} The common pleas judge's referrals to the retired judge were made pursuant to R.C. 2701.10, a consensual reference statute that provides a form of dispute resolution commonly referred to as "private judging" or "rent-a-judge." Generally, this type of dispute resolution fuses many aspects of private dispute resolution found in arbitration with the judicial authority of the courts. Similar to arbitration, the parties agree to submit any or all issues in a pending dispute to a specified private adjudicator, often a referee or retired judge, and the adjudicator the parties selected issues a binding decision on the matters submitted. Also like arbitration, usually the parties, not the public, pay for the private adjudicator's services and the various costs associated with conducting the proceedings.

{¶ 13} Unlike arbitration, however, the private, or special, adjudicator generally possesses all of the powers and authority of a sitting judge over the matters to be determined in the particular case to which he or she is assigned, including entering judgment from which an appeal may be made. Moreover, unlike arbitrators, the selected special judges are often part of the state court system. See, generally, Private Judging by Consent, 20 Alternatives to High Cost Litigation (2002), 1; Rent-A-Judges and the Cost of Selling Justice, 44 Duke L.J. (1994), 166; The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts (1981), 94 Harv.L.Rev. 1592, 1615; 4 American Jurisprudence 2d (2001), Alternative Dispute Resolution, Rent-A-Judge, Section 21

{¶ 14} In Ohio, R.C. 2701.10(B)(1) expressly provides that "[t]he parties to any civil action or proceeding pending in any court of common pleas * * * unanimously may choose to have the action or proceeding in its entirety referred for adjudication, or to have any specific issue or question of fact or law in the action or proceeding submitted for determination, to a [retired] judge of their choosing * * * ." If the parties unanimously choose to have such a referral made to a retired judge, the statute provides that all of the parties are to enter into a written agreement with the retired judge that does all of the following:

{¶ 15} "(a) Designates the retired judge to whom the referral or submission is to be made;

{¶ 16} "(b) If a submission is to be made, describes in detail the specific issue or question to be submitted;

{¶ 17} "(c) Indicates either of the following:

{¶ 18} "(i) That the action or proceeding in its entirety is to be referred to, and is to be tried, determined, and adjudicated by that retired judge;

{¶ 19} "(ii) Indicates that the issue or question is to be submitted, and is to be tried and determined by that retired judge.

{¶ 20} "(d) Indicates that the parties will assume the responsibility for providing facilities, equipment, and personnel reasonably needed by the retired judge during his consideration of the action or proceeding and will pay all costs arising out of the provision of the facilities, equipment, and personnel;

*4 {¶ 21} "(e) Identifies an amount of compensation to be paid by the parties to the retired judge for his services and the manner of payment of the compensation."R.C. 2701.10(B)(1).

{¶ 22} R.C. 2701.10(B)(2) provides that "[n]o referral or submission shall be made to a retired judge under this section, unless the parties to the action or proceeding unanimously choose to have the referral or submission made, enter into an agreement of the type described in division (B)(1) of this section with

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the retired judge, and file the agreement in accordance with this division."

{¶ 23} The statute further provides that upon a referral to a retired judge in accordance with the statute, the retired judge has all of the powers, duties, and authority of an active judge of the court in which the action or proceeding is pending, including entering judgment in the action or proceeding. R.C. 2701.10(C) and (D). Such a judgment has the same force and effect, and may be appealed, as if an active judge of the court entered it. R.C. 2701.10(D).

{¶ 24} For purposes of our analysis, we assume (1) the January 10, 2001 referral to the retired judge was limited to adjudication of the parties' divorce and did not include any post-decree matters relating to the parties' divorce, and (2) the retired judge's September 20, 2001 transfer of the post-decree proceedings to the common pleas judge, ordered in accordance with the parties' separate signed agreement, was proper. In that context, the case was properly before the common pleas judge as of September 20, 2001 for adjudication of any post-decree matters because (1) the parties did not initially consent to the retired judge adjudicating any post-decree matters, and (2) the case was properly referred back to the common pleas judge after the retired judge's entry of the divorce decree and denial of new trial. The question then resolves to whether the retired judge had the authority, pursuant to R.C. 2701.10, to adjudicate the post-decree proceedings, including the contempt proceedings, where (1) the common pleas judge having jurisdiction over those proceedings transferred them to the retired judge without the statutorily required unanimous written agreement of the parties, but (2) the parties appeared before the retired judge and acquiesced in his judicial authority without objection until this appeal.

{¶ 25} An examination of relevant law regarding arbitration is instructive because R.C. 2701.10, like similar provisions in arbitration statutes, requires the parties' written agreement to submit matters in dispute to a private adjudicator. Cf. R.C. 2701.10(B)(1) and (2), and Ohio Arbitration Act, R.C. 2711.01 and 2711.03. The requirement is based on the premise that a party cannot be compelled to have a disputed matter submitted to arbitration if the party has not so agreed. See *Council of Smaller Enterprises v. Gates, McDonald & Co.* (1998), 80 Ohio St.3d 661, 665, 687 N.E.2d 1352;*St. Vincent Charity Hospital v. URS Consultants, Inc.* (1996), 111 Ohio App.3d 791, 793, 677 N.E.2d 381, appeal not allowed, 77 Ohio St.3d 1492, 673 N.E.2d 148. Indeed, arbitrators derive their authority to resolve disputes from the parties' agreement to have a matter arbitrated. *Council of Smaller Enterprises,* supra.

*5 {¶ 26} Courts in Ohio are generally in accord with the clear weight of authority in other jurisdictions holding that a party who allows a dispute to go to arbitration and voluntarily participates in arbitration proceedings, without objection or challenge to the authority, jurisdiction or power of the arbitrator to resolve a particular dispute, is deemed to have consented to the arbitration and is estopped from contesting the arbitrator's authority after suffering an adverse arbitration award. See Annotation, Participation in Arbitration Proceedings as Waiver of Objection to Arbitrability Under State Law (1998), 56 A.L.R.5th 757. In Ohio, see *E.S. Gallon Co., L.P.A. v. Deutsch* (2001), 142 Ohio App.3d 137, 754 N.E.2d 291 (holding that a party who voluntarily participates in a three-day arbitration hearing without objection is estopped to contest the arbitrator's authority after an adverse award has issued); *Ormandy v. Mechenbier* (1997), 128 Ohio App.3d 536, 540, 715 N.E.2d 1173 (determining that a party's failure to object to a trial court's referral of an action to arbitration until after the arbitrator had entered an adverse decision "suggests consent to the arbitration proceedings"); *M.B. Guran Co., Inc. v. Amsdell* (1983), 9 Ohio App.3d 201, 202, 459 N.E.2d 581;*Rosser v. Hochwalt* (1967), 12 Ohio App.2d 129, 131, 231 N.E.2d 334.

{¶ 27} Conversely, where a party *timely* objects to the submission of a dispute to arbitration, usually as soon as the party has knowledge of any irregularity in the appointment of the arbitrator or a lack of authority in the arbitrator, courts have found that the party's participation in arbitration proceedings under those circumstances does not waive the party's right to subsequently challenge the arbitration of the matter. Annotation, supra;*Teramar Corp. v. Rodier Corp.* (1987), 40 Ohio App.3d 39, 41, 531 N.E.2d 721 (holding that a party's challenge to an arbitration panel's jurisdiction, based upon the absence of a written arbitration clause, is not waived on appeal where the party repeatedly objected during the proceedings to the panel's jurisdiction to make an

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arbitration award).

{¶ 28} In City of Vermillion v. Willard Constr. Co. (July 19, 1995), Lorain App. No. 94CA006008, the court explained the reasoning of courts in arbitration cases where the principle of estoppel has been applied:

{¶ 29} "First, the application of estoppel in such a case prevents a party from taking two bites of the same apple, *i.e.,* submitting the case for arbitration and raising the arbitrator's lack of authority to hear the issues only in the event that an adverse award is rendered. Second, by applying estoppel to such a case a party is prevented from subjecting its opponent to a costly arbitration procedure only to later assert that the arbitrator has no jurisdiction over the dispute."

{¶ 30} Here, although the parties agreed in writing to a *continuance* to transfer the post-decree proceedings to the retired judge, the parties did not give the statutorily required written consent to *referring* the post-decree proceedings to the retired judge. Nevertheless, the record reflects that both parties appeared before the retired judge in the post-decree proceedings and did not object below to the retired judge's assertion of judicial authority over those proceedings. To the contrary, defendant affirmatively invoked the retired judge's authority over the post-decree proceedings when defendant filed a motion on December 31, 2001, requesting the retired judge to modify or terminate defendant's previously ordered spousal support obligation to plaintiff. The first time defendant questioned the retired judge's authority, power, or jurisdiction over the post-decree proceedings was in his appeal to this court from the contempt judgments. Thus, defendant acquiesced in the retired judge's authority over the post-decree proceedings until after the judge had entered several judgments adverse to defendant, including the two contempt judgments at issue here.

*6 {¶ 31} To the extent the common pleas judge's referral of the case to the retired judge, without the written consent of the parties, is analogous to the submission of a matter to an arbitrator without a party's consent, the clear weight of authority of arbitration cases that have decided this question indicates defendant's participation in the post-decree proceedings before the retired judge, without objection to the retired judge's authority in those proceedings, waives defendant's untimely challenge, brought for the first time on appeal, to the retired judge's authority in the post-decree proceedings. *E.S. Gallon Co.; Ormandy; M.B. Guran Co.; Rosser,* supra.

{¶ 32} However, we do not rest our decision solely on that basis. Because a retired judge appointed pursuant to R.C. 2701.10 has the same power and authority of a sitting common pleas court judge as to the matters to be decided, we must determine whether the retired judge, whom the common pleas judge assigned to the post-decree proceedings without the parties' written consent, had the requisite *judicial* authority to enter valid and binding contempt judgments against defendant.

{¶ 33} Judicial power may be conferred upon a person or a court only by authority of law, and in the absence of such authority, a judge cannot delegate his or her judicial authority. Demereaux v. State (1930), 35 Ohio App. 418, 420, 172 N.E. 551. However, where a judge delegates judicial authority under a color of right but the delegation of authority is defective, either because the judge lacked the requisite legal authority to make the delegation or because of a defect or irregularity in the appointment procedure, the person to whom the judicial authority is transferred may become a "de facto" judge, rather than a "de jure" judge. State ex rel. Witten v. Ferguson (1947), 148 Ohio St. 702, 708-709, 76 N.E.2d 886.

{¶ 34} A "de jure" judge occupies judicial office during a constituted term and through a proper and legal appointment or election. *Id.* at 707, 76 N.E.2d 886. The common pleas judge in this case is such a judge. A "de facto" judge is a judicial officer pursuant to an appointment made under some color of authority, and carries out the functions of the judicial office with the acquiescence of those who appear before him or her. *Id.* at 709, 76 N.E.2d 886; *Williams v. Banner Buick, Inc.* (1989), 60 Ohio App.3d 128, 134, 574 N.E.2d 579. See, also, *Ex parte Strang* (1871), 21 Ohio St. 610 (holding that even where the power conferred on a person making a judicial appointment is unconstitutional, the person, otherwise qualified, performing judicial functions under such an appointment is a de facto judge, as having derived judicial authority from one having colorable authority to make the appointment); State

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ex rel. Marshall v. Keller (1967), 10 Ohio St.2d 85, 226 N.E.2d 743 (holding that where one derives appointment to a legally existing office from one having colorable authority to appoint and performs the duties of the office with the acquiescence of those who appear before him until after entry of an adverse decision, the law validates the officer's acts as a de facto judge). A "de facto" judge has all the power and authority of a "de jure" judge, and judicial actions taken by a "de facto" judge are legally valid and binding and not subject to collateral attack or to challenges first raised on appeal. *Williams,* supra.

*7 {¶ 35} In *Williams,* the trial judge disqualified himself from the case due to a conflict of interest. Although the Chief Justice of the Ohio Supreme Court had sole authority to appoint a substitute judge, the trial judge appointed an acting judge but did not journalize an entry of the appointment until after the acting judge dismissed the plaintiffs' claim with prejudice. The appellate court held that the plaintiffs' decision to proceed without objection to the authority of the acting judge, and irregularities in his appointment, waived that error. The court further held "the acting judge, by having 'colorable' authority, is deemed a *de facto* judge with all the power and authority of a proper *de jure* judge[,]" rendering the acting judge's actions legally valid, binding, and not open to attack on appeal. *Id.* at 134, 574 N.E.2d 579. See, also, *Stiess v. State* (1921), 103 Ohio St. 33, 132 N.E. 85;*Barner v. Barner* (1925), 19 Ohio App. 458;*Demereaux* at 422, 172 N.E. 551.

{¶ 36} While the foregoing suggests the retired judge acted as a de facto judge in the proceedings below, defendant contends the issue is more basic and involves subject matter jurisdiction. Defendant is correct that, if subject matter jurisdiction to enter the contempt judgments is lacking, the judgments are void. *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 518 N.E.2d 941, paragraph three of the syllabus. See, also, Civ.R. 12(H)(3). Defendant is further correct that a challenge to a court's subject matter jurisdiction can be raised for the first time on appeal. Civ.R. 12(H)(3); *In re Byard* (1996), 74 Ohio St.3d 294, 296, 658 N.E.2d 735. As this court noted in *In re Kerry Ford, Inc.* (1995), 106 Ohio App.3d 643, 651, 666 N.E.2d 1157:

{¶ 37} "It is well settled that lack of subject-matter jurisdiction may be raised at any stage of the proceedings. Parties may not, by stipulation or agreement, confer subject-matter jurisdiction on a court or administrative body where such jurisdiction does not otherwise exist. Further, '[i]t is a fundamental proposition that just as parties cannot confer subject matter jurisdiction by consent, subject matter jurisdiction cannot be acquired based upon a theory of estoppel or waiver arising from the acts of the parties or their agents.' " (Citations omitted.)

{¶ 38} Here, contrary to defendant's assertion, the parties' consent does not confer subject matter jurisdiction on the retired judge. Rather, the *statute,*R.C. 2701.10, in accordance with Section 4(B), Article IV, Ohio Constitution, confers broad subject matter jurisdiction on a retired judge who is appointed to the legally existing office to adjudicate "any civil action or proceeding pending in any court of common pleas."Moreover, the statute provides that, as to a particular assigned case, the appointed judge is vested with the same jurisdiction and power over the matters the parties submitted as a sitting common pleas judge. R.C. 2701.10. The parties' consent is limited to: (1) whether a retired judge will be appointed as a special judge, in place of the common pleas judge, in the civil action or proceeding, and (2) the scope of the matters to be submitted to and decided by the retired judge during his or her assignment to the case over which the judge has subject matter jurisdiction by virtue of the statute.

*8 {¶ 39} Subject matter jurisdiction is only one form of jurisdiction.*State v. Swiger* (1998), 125 Ohio App.3d 456, 462, 708 N.E.2d 1033;*Bureau of Support v. Brown* (Nov. 6, 2001), Carroll App. No. 00APO742.See, also, *State v. Parker,* 95 Ohio St.3d 524, 529, 769 N.E.2d 846, 2002-Ohio-2833."Subject matter jurisdiction defines the power of the court over *classes of cases* it may or may not hear."(Emphasis added.) *State ex rel. Wright v. Griffen* (July 1, 1999), Cuyahoga App. No. 76299.See, also, *Swiger* at 463, 708 N.E.2d 1033, agreeing with *In the Matter of Waite* (1991), 188 Mich.App. 189, 199-200, 468 N.W.2d 912, 917. Subject matter jurisdiction focuses on whether the court is the proper forum to hear the class of cases within which a particular case falls, such as common pleas court, municipal court, or juvenile court. *Swiger* at 462, 708 N.E.2d 1033.

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{¶ 40} In contrast, jurisdiction of the particular case, otherwise referred to as the "exercise" of jurisdiction, is the trial court's authority to decide *a particular case* within the class of cases within its subject matter jurisdiction. *Id.; Griffen; Brown.*Compliance with statutory requirements or procedural prerequisites are components of a court's exercise of jurisdiction.*State v. Wilfong* (Mar. 16, 2001), Clark App. No.2000-CA-75;*Swiger* at 462-463, 708 N.E.2d 1033;*Griffen,* supra."It is only when the trial court lacks subject matter jurisdiction that its judgment is void; lack of jurisdiction of the particular case merely renders the judgment voidable."*Swiger* at 462, 708 N.E.2d 1033. In accord, *Brown; Wilfong; State v. Filiaggi* (1999), 86 Ohio St.3d 230, 240, 714 N.E.2d 867.

{¶ 41} A California court has held that a trial court's assignment of a matter to a referee without first obtaining the statutorily required written consent of the parties to make the referral is not a component of subject matter jurisdiction. *Jovine v. FHP, Inc.* (1998), 64 Cal.App.4th 1506, 1527, 76 Cal.Rptr.2d 322, 337, fn. 26. Thus, such an assignment was deemed merely voidable, not void. *Jovine,* supra.

{¶ 42} Similarly, courts in Ohio have held that a judgment entered in a case by a judge who is improperly assigned, or transferred, to a case by another judge without proper authority, is merely voidable, not void, on a party's timely objection. *Berger v. Berger* (1981), 3 Ohio App.3d 125, 130, 443 N.E.2d 1375,certiorari denied(1982), 459 U.S. 834, 103 S.Ct. 76, 74 L.Ed.2d 74;*Abood v. Nemer* (June 28, 1995), Summit App. No. 16877.Thus, where parties having knowledge of a judge's improper assignment appear in proceedings before the judge without raising the issue of an improper transfer to or assignment of the judge until after an adverse judgment is entered, courts in Ohio have held that any issue regarding the improper assignment of the judge is waived on appeal. *Id.;Boling v. Valecko* (Feb. 6, 2002), Summit App. No. 20464 (holding that a party's objection presented on appeal to an improper assignment of a case to a retired judge is waived where the parties filed motions indicating the name and status of the retired judge and appeared before the judge for several hearings without objection until the appeal). See, also, *White v. Summit Cty.* (2000), 138 Ohio App.3d 116, 740 N.E.2d 688.

*9 {¶ 43} The court in *Berger* explained that "any party objecting to reassignment must raise that objection at the first opportunity to do so. If the party has knowledge of the transfer with sufficient time to object before the new judge takes any action, that party waives any objection to the transfer by failing to raise that issue on the record before the action is taken. If the party first learns about the transfer after action is taken by the new judge, the party waives any objection to the transfer by failing to raise that issue within a reasonable time thereafter. The definition of a reasonable time may well be controlled by the time limits for motions for rehearing, reconsideration, or a new trial."*Id.* at 131, 443 N.E.2d 1375.

{¶ 44} Here, the common pleas judge, who properly had jurisdiction over the post-decree proceedings, transferred judicial authority on November 29, 2001 to the retired judge. The transfer was not made in accordance with the requirements of R.C. 2701.10, as the parties' written consent to the referral was not obtained. The common pleas judge's failure to comply with the statutory requirements in referring the case resulted in the referral being made not with actual authority provided under R.C. 2701.10, but only with color of authority. *Stiess; Demereaux.*Thus, the common pleas judge's referral of the case to the retired judge constituted an erroneous exercise of the judge's jurisdiction, rendering the November 29, 2001 order of referral voidable, not void, on timely objection to the referral. *Berger; Boling; Abood,* supra.

{¶ 45} Because the retired judge assumed and carried out the functions of the special judicial office with the acquiescence of defendant during the post-decree proceedings, the retired judge became a de facto judge in the proceedings with all the power and authority of a judge appointed in accordance with the lawful authority of R.C. 2701.10. *Williams; Stiess; Keller,* supra. Defendant is estopped from raising his untimely challenge because he waited until he suffered adverse judgments to challenge the retired judge's authority in the post-degree proceedings. *Berger; Abood,* supra. Accordingly, the retired judge's contempt judgments entered against defendant are valid and binding and are affirmed.

Judgment affirmed.

GLASSER[FN*] and BOWMAN, JJ., concur.

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FN* GLASSER, J., retired, of the Sixth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

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