

ORIGINAL

IN THE SUPREME COURT OF OHIO

SANDRA L. JANOSEK,

Plaintiff-Appellee,

Case No. 2009-1705

v.

JAMES C. JANOSEK,

Defendant-Appellant.

On Appeal from the Cuyahoga County Court
of Appeals, Eighth Appellate District,
Case Nos. 08-091882 and 08-091914

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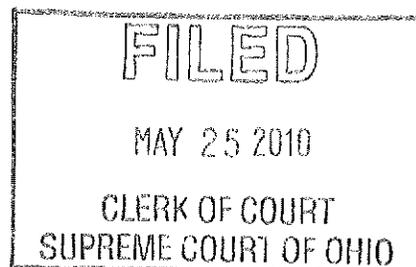


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Preliminary Statement

In 1990, this Court explained in Kunkle v. Kunkle that the alimony statute allowed courts to order alimony only to distribute marital property and to pay additional money for “sustenance and support.” 51 Ohio St.3d 64, 67, 554 N.E.2d 83, 86.

Where a former spouse can satisfy the demands on that spouse’s own finances with that spouse’s own resources, Kunkle ruled that he or she is self-supporting and does not need alimony for “sustenance and support.” In those circumstances, the Court decided, courts should not require alimony. ¶ 1 of the syllabus.

The next year, 1991, the General Assembly rewrote the alimony statute. It dispensed with the undefined “alimony,” and separated payments of marital property from payments for “spousal support.” It defined “spousal support” as payments supplying “sustenance and for support,” the same words Kunkle used. R.C. 3105.18(A).

Ohio’s appellate courts are divided on whether that statutory change ended Kunkle’s validity seven months after this Court decided it.

Here, each former spouse – James and Sandra Janosek – is an independently wealthy multi-millionaire in good health. Sandra’s \$11 million agreed-upon share of the marital property leaves her with mortgage-free \$2 million dollar home and living expenses mostly confined to clothing, dining, entertainment, and travel.

The court of appeals did not disturb the trial court’s findings that Sandra’s cash alone -- \$8 million -- can earn enough interest on “safe investments” to amount to an annual salary of \$320,000 and thus “adequately sustain her standard of living.”

Yet, the court of appeals affirmed the trial court's order that James pay \$15,000/month to Sandra in spousal support for 18 years. Deciding that the 1991 statutory change defused Kunkle, the court broke with its own precedents, over a dissenting judge's objection, by ruling that "need is no longer the standard" for spousal support.

The question for this Court to resolve is pure substantive law arising from undisputed facts: When the General Assembly created "spousal support" in 1991, did it dismantle this Court's comprehensive analysis of sustenance alimony in Kunkle, or did the General Assembly leave it intact?

This Court should answer that question emphatically: the General Assembly left Kunkle and its analysis intact.

Statement of the Case

1. The suit and original trial court judgment.

In 2002, Sandra Janosek sued her husband James Janosek for divorce in the Cuyahoga County Court of Common Pleas, Domestic Relations division.¹ A now-retired visiting judge presided. While the case was pending, the court ordered James to pay \$12,000 per month in spousal support pending final judgment.²

In June, 2005, the trial court adopted verbatim a 107-page judgment that Sandra's lawyer drafted. It granted divorce and divided the couple's multi-million dollar estate comprised of corporations, real estate, investment accounts, and other holdings. In

¹ *Janosek v. Janosek*, Cuya. App. Nos. 86771, 86777, 2007 WL 64703 at *1, 2007-Ohio-68 at ¶ 3 ("1st Janosek").

² 1st *Janosek*, 2007 WL 64703 at *1, 2007-Ohio-68 at ¶ 3.

adopting the proposed judgment, the judge did not change any of the words or numbers.³ The judgment required James to pay spousal support to Sandra: \$22,000 each month until either party died, or until she remarried.⁴

2. The first appeal (2007): reversed and remanded.

On James' appeal, the Cuyahoga County Court of Appeals reversed, ruling that the trial court's judgment included "inaccurate findings and conclusions that are not supported by the record."⁵ The appeals court decided that the judgment had exaggerated the size of the marital estate.⁶ The appeals court instructed the trial court to reassess and redivide the marital estate, which meant also revisiting spousal support.⁷

3. The Ohio Supreme Court (2007).

James sought discretionary review in this Court based on one issue: the trial judge uncritically adopting Sandra's 107-page proposed judgment verbatim. This Court declined to assume jurisdiction, with Justices O'Connor and O'Donnell voting to accept the appeal.⁸ The case returned to the trial court.

³ 1st *Janosek*, 2007 WL 64703 at *1, 17, 2007-Ohio-68 at ¶s 4, 150.

⁴ 1st *Janosek*, 2007 WL 64703 at *17, 2007-Ohio-68 at ¶ 142.

⁵ 1st *Janosek*, 2007 WL 64703 at *17, 2007-Ohio-68 at ¶ 150.

⁶ 1st *Janosek*, 2007 WL 64703 at *2, *4, *5, *7, *8, *16, 2007-Ohio-68 at ¶s 13, 31, 38, 45, 58, 67, 139.

⁷ *Janosek v. Janosek*, Cuya. App. Nos. 91882, 91914, 2009 WL 2400313 at *2 n.1, 2009-Ohio-3882 at ¶ 7 n.1 ("2d *Janosek*"); 1st *Janosek*, 2007 WL 64703 at *17, 2007-Ohio-68 at ¶ 145. (Appdx at 39-63.) "Appdx" is the appendix to this brief, filed separately.

⁸ *Janosek v. Janosek*, 114 Ohio St.3d 1479, 2007-Ohio-3699, 870 N.E.2d 732.

4- **The trial court on remand (2008).**

A different visiting judge presided on remand. The issues on remand were to reassess the value of the marital estate and to divide it; to resolve the parties' dispute about how much James should pay for Sandra's lawyer; and to resolve the parties' dispute over spousal support.⁹

Based on the court of appeals' ruling, the parties established the value of the marital estate and redivided it, and they resolved the attorneys' fees issue.¹⁰ That left spousal support.

The trial court required the parties to submit proposed findings of fact and conclusions of law based on the original trial record.¹¹ James argued that Sandra's wealth from her half of the marital property -- \$11.2 million, mostly cash -- precluded awarding spousal support under Ohio's spousal support statute, R.C. 3105.18. Sandra argued that the trial court had no jurisdiction to alter the original spousal support award.

The trial court rejected Sandra's jurisdictional argument. As for James' argument, the court declined to eliminate all spousal support, but reduced it from \$22,000/month for the life of either ex-spouse (or until Sandra remarries). The court instead ordered James to pay \$15,000/month for 18 years -- until James is in his early 70s.¹²

⁹ 2d *Janosek*, 2009 WL 2400313 at *2, 2009-Ohio-3882 at ¶ 8.

¹⁰ 2d *Janosek*, 2009 WL 2400313 at *2, 2009-Ohio-3882 at ¶ 11. (Appdx at 49.)

¹¹ 2d *Janosek*, 2009 WL 2400313 at *2, 2009-Ohio-3882 at ¶ 9. (Appdx at 47.)

¹² (TC find. & concl., 7/23/08, at 14.) (Appdx at 52.) "TC" means the trial court in this case. "find. & concl." means findings of fact and conclusions of law.

5. The second appeal (2009).

Both parties appealed. On August 6, 2009, a three-judge panel of the court of appeals unanimously affirmed the trial court's ruling that it had jurisdiction to re-evaluate spousal support.¹³

But the panel split 2-1 on James' argument that Ohio law precluded awarding spousal support to a former spouse whose share of the marital property made her an independently wealthy multi-millionaire. The majority affirmed the award over the dissent of Judge Melody Stewart.

6. Appeal to this Court.

On Monday, September 21, 2009, James sought discretionary review in this Court. Sandra did not appeal. This Court accepted review on January 27, 2010.¹⁴

Statement of Facts

1. The Parties.

James Janosek will be 59 years old in November, 2010. Sandra will be 58 in October, 2010.¹⁵ When Sandra sued for divorce in 2002, the Janoseks had been married for 25 years.¹⁶ Their children are now adults.¹⁷ Sandra has a bachelor degree from the University of Dayton as does James; both are healthy.¹⁸

¹³ 2d *Janosek*, 2009 WL 2400313 at *7, *8, 2009-Ohio-3882 at ¶s 51-61. (Appdx. at 45-46.)

¹⁴ *Janosek v. Janosek*, 124 Ohio St.3d 1441, 2010-Ohio-188, 920 N.E.2d 372.

¹⁵ (TC find. & concl., 7/23/08, at 8.) (Appdx at 46.)

¹⁶ (See TC find. & concl., 7/23/08, at 9.) (Appdx at 47.)

2. Welded Ring Products Co.

James and Sandra are multi-millionaires today, largely because of Welded Ring Products Company. Welded Ring Products Company makes specialty steels used in the aerospace and aviation industries; its plant is on W. 114th Street on Cleveland's west side.¹⁹ James' grandfather founded the company in 1960.²⁰

After graduating from college and before marrying Sandra, James began to work for the company in sales.²¹ James eventually became the company's chief executive officer, owning 93% of the shares of corporate stock in the company.²²

When the couple married, Sandra worked for the Cleveland Clinic, supervising a component of its food services.²³ When they had children, Sandra stopped working outside the home until the late 1990s, when she became a sales representative for two

¹⁷ (TC find. & concl., 7/23/08, at 9.) (Appdx at 47.)

¹⁸ (TC find. & concl., 7/23/08, at 10, 8.) (Appdx at 48, 46.)

¹⁹ (Tr. 2691.) See www.weldedring.com. "Tr." means the transcript of the trial in this case. "2691" is the page number of the transcript.

²⁰ (Tr. 2524.)

²¹ (Tr. 2521.)

²² (TC find. & concl., 7/23/08, at 8, 9.) (Appdx at 46, 47.)

²³ (Tr. 1899.)

companies.²⁴ In 2001, Sandra helped to open a new restaurant and worked there as a hostess.²⁵ She sued for divorce the next year.

3. The crux of how the Janoseks settled their marital estate.

A. \$22.4 million.

Based on the ruling in the first appeal, the parties decided to value their estate at about \$22.4 million, to divide that value in half, and they agreed on dividing the particular assets.²⁶ They had no significant liabilities.²⁷

B. Future profits of Welded Ring Products Company.

As the trial court had decided that James' ownership share of Welded Ring Products Company was marital property, the parties valued his share at about \$8.4 million.²⁸

Sandra's expert, Robert Greenwald, performed the valuation.²⁹ James did not call an expert to challenge Greenwald. Greenwald estimated the yearly profits that the company would earn in a fixed number of future years, added those expected profits

²⁴ (Tr. 2055.)

²⁵ (Tr. 2056, 2057.)

²⁶ (TC find. & concl., 7/23/08, at 2, 12.) (Appdx at 40, 50.)

²⁷ (TC find. & concl., 7/23/08, at 10.) (Appdx at 48.)

²⁸ (Ex. XI to Greenwald report – PX 1.) “PX” means Plaintiff’s Exhibit at trial. PX 1 is Greenwald’s report. (Supp. at 48.) “Supp.” is the Supplement filed separately.

²⁹ (PX 1 at 25.) (Supp. at 30.)

together, and then reduced that sum by a “discount rate” to establish the company’s present-day value.³⁰

The underlying idea is that the company’s present value is the amount of money that, if invested today at appropriate rates of return, would produce roughly as much money in each upcoming year as the company is projected to produce in profits during each of those years.³¹

C. Each former spouse gets \$11.2 million.

The parties took the present value of James’ share of the company, \$8.4 million, added the value of related corporate and other holdings, and added the couple’s retirement accounts plus cash. The sum was about \$22.4 million.³²

Dividing that \$22.4 million in half resulted in each receiving \$11.2 million in property and cash.³³ James would continue to own 93% of Welded Ring Products while continuing to manage it, and he paid ½ of the present value of his ownership to Sandra in

³⁰ (PX 1 – Greenwald report -- at 14.) (Supp. at 19.)

³¹ See, e.g., *2d Janosek*, 2009 WL 2400313 at *9, 2009-Ohio-3882 at ¶ 21-22. See generally Gwartnery and Stroup, *Economics: Private and Public Choice* (5th ed.) at 623-625; Samuelson, *Economics* (13th ed.) at 719; *Gustafson v. Gen’l Motors Acceptance Corp.* (8th Cir. 1973), 470 F.2d 1057, 1061; see also *Heller v. Heller*, Franklin App. 07AP-871, 2008 WL 2588064 at *6-*7, 2008-Ohio-3296 at ¶s 18-24.

³² (TC find. & concl., 7/23/08, at 2.) (Appdx at 40.)

³³ (TC agreed JE re prop. div., 12/27/07 & Jnt Ex. 1.) (Appdx at 35-38.) TC find. & concl., 7/23/08, at 2, 10.) (Appdx. at 40, 48.)

cash (\$4.2 million).³⁴ By paying ½ of that present value to Sandra, James, in effect, pre-paid to her ½ of what he expected to receive in future years in company profits.

Of Sandra's \$11.2 million, about \$8.2 million was cash.³⁵ That happens to equate with nearly all of the present value of James' share of Welded Ring Products.

The remaining \$3 million of her \$11.2 million included a \$2 million condominium in Florida that is mortgage-free.³⁶ She also received James' retirement account and her separate retirement account. Combined, those accounts will hold \$1.1 million when she is eligible to draw on them – in about 1½ years.³⁷

4. Spousal support paid & stayed.

Before the trial court had entered its original judgment, James had paid over \$376,000 to Sandra in interim spousal support, which she applied toward buying a condominium in Rocky River, Ohio.³⁸

In addition to the pre-judgment spousal support, James has paid over \$945,000 in spousal support since the date of the trial court's original judgment.³⁹

³⁴ (TC find. & concl., 7/23/08, at 9, 10, 13.) (Appdx at 47, 48, 51.)

³⁵ (TC agreed JE re prop. div., 12/27/07 & Jnt Ex. 1.) (Appdx at 35-38.) TC find. & concl., 7/23/08, at 7, 10.) (Appdx at 45, 48.)

³⁶ (TC find. & concl., 7/23/08, at 10.) (Appdx at 48.)

³⁷ (TC find. & concl., 7/23/08, at 7, 9.) (Appdx at 45, 47.)

³⁸ 1st *Janosek*, 2007 WL 64703 at *10, *11, 2007-Ohio-68 at ¶s 96, 98.

³⁹ (TC find. & concl., 7/23/08, at 15: \$15,000/mo. begins Feb. 2005.) (Appdx at 53.)

In March, 2010, a court magistrate ordered the county support agency to continue to receive James' spousal support payments, but not to disburse them to Sandra, pending the outcome of this appeal. Sandra did not object. The magistrate noted that Sandra had received her half of the \$22 million marital estate and that Sandra already had received about \$1 million in spousal support.⁴⁰

5. **On remand from the court of appeals: the trial court's findings and conclusions in ordering spousal support.**

A. **Sandra's standard of living.**

The trial court found "very little, if any real dispute surrounding the evidence" related to spousal support.⁴¹

"Given her share of the marital estate," the court concluded, "it appears unlikely that she could have exceeded her current wealth by spending a lifetime in the workforce."⁴²

The court recognized that James "does not challenge" Sandra's claimed "standard of living @ \$20,000/month."⁴³ Even though James acquiesced to Sandra's asserted comforts and necessities, the trial court decided that Sandra's actual standard of living was "less than the amount claimed."⁴⁴

⁴⁰ (Magistrate's decision, 3/11/10.) (Appdx at 64-65.)

⁴¹ (TC find. & concl., 7/23/08, at 5.) (Appdx at 43.)

⁴² (TC find. & concl., 7/23/08, at 12.) (Appdx at 50.)

⁴³ (TC find. & concl., 7/23/08, at 4.) (Appdx at 42.)

⁴⁴ (TC find. & concl., 7/23/08, at 10.) (Appdx at 48.)

Except for a mortgage on the Rocky River condominium, Sandra's asserted living expenses are for clothes, dining, entertainment, and travel.⁴⁵ For those things, the court decided that Sandra's "monthly standard of living is not less than \$15,000 per month," or \$180,000/year.⁴⁶

B. Whether Sandra's future income was likely to pay for her \$15,000/month standard of living.

The court found that Sandra's \$8.2 million in cash can produce enough interest "on safe investments" to equate with an annual salary of \$320,000.⁴⁷ That interest, the court found, "would adequately sustain her standard of living."⁴⁸

The trial court also found:

- "Mrs. Janosek is able to meet a handsome standard of living on her share alone of the marital estate." (TC find. & concl., 7/23/08, at 13.)
- "[B]ecause she has adequate wealth to maintain her standard of living, there is no need for her so seek gainful employment." (TC find. & concl. at 11.)
- "While it is probable that Mrs. Janosek is capable of returning to the workforce and earning a decent living, her extraordinary wealth militates against this likelihood." (TC find. & concl., 7/23/08, at 8.)

C. Ruling.

The trial court ruled that Sandra is "entitled" to spousal support.⁴⁹

⁴⁵ PX 279.

⁴⁶ (TC find. & concl., 7/23/08, at 14.) (Appdx at 14.)

⁴⁷ (TC find. & concl., 7/23/08, at 7.) (Appdx at 45.)

⁴⁸ (TC find. & concl., 7/23/08, at 7.) (Appdx at 45.)

⁴⁹ (TC find. & concl., 7/23/08, at 10) (Appdx at 48.)

“The fact that Mrs. Janosek is able to meet a handsome standard of living on her share alone of the marital estate” does not control whether James should pay spousal support, the trial court decided.⁵⁰

The court declined to adopt James’ argument that ordering him to pay \$15,000/month to a healthy, financially independent multi-millionaire violates the statutory definition of “spousal support” because it does not genuinely serve as “sustenance and support.” R.C. 3105.18(A).

The trial court rejected James’ argument that the statute effectively codified this Court’s rulings that applied the predecessor statute, culminating in Kunkle v. Kunkle (1990), 51 Ohio St.3d 64, 67, 554 N.E.2d 83, 86.

The Cuyahoga County Court of Appeals had applied Kunkle in reviewing a spousal support award in a divorce suit that began under the current statute. Simoni v. Simoni (1995), 102 Ohio App.3d 628, 630, 636-637, 657 N.E.2d 800, 801, 806.

The trial court, however, decided that Simoni did not control, citing opinions from other appellate districts that viewed the current statute as dismantling this Court’s reasoning in the Kunkle line of decisions.⁵¹

D. Rationale.

The court decided that, after divorce, James could earn over \$3 million each year from his share of the marital estate: owning and managing the Welded Ring Products

⁵⁰ (TC find. & concl., 7/23/08, at 13.) (Appdx at 51.)

⁵¹ (TC find. & concl., 7/23/08, at 14, 13.) (Appdx at 52, 51.)

companies.⁵² The court compared that to the future earnings that Sandra could receive from “conservative” and “safe” investments of her \$11.2 million.⁵³

Perceiving James’ potential earnings after divorce as being an “imbalance,” the trial court ordered James to pay \$15,000/month to Sandra from his future earnings.⁵⁴ Sandra’s marital share of James’ ownership of Welded Ring Products equated with half of what Sandra’s expert had projected James would receive from the company in the future. The trial court did not say whether it realized that.

When comparing James’ and Sandra’s future earnings after divorce, the court did not rule that each could achieve those earnings by taking the same degree of financial risk. The court observed that, for James to achieve the greater earnings from Welded Ring, he would have to continue managing the company and (obviously) the company would have to continue to succeed.⁵⁵

Sandra, the court found, could earn more than her standard of living without taking risks with her half of the marital estate, nor would she have to spend any of her \$11.2 million or become employed.⁵⁶ “Safe” and “conservative” investments alone could

⁵² (TC find. & concl., 7/23/08, at 8, 12.) (Appdx at 46, 50.)

⁵³ (TC find. & concl., 7/23/08, at 7, 12.) (Appdx at 45, 50.)

⁵⁴ (TC find. & concl., 7/23/08, at 10, 12, 14.) (Appdx at 48, 50, 52.)

⁵⁵ (TC find. & concl., 7/23/08, at 10.) (Appdx at 48.)

⁵⁶ (TC find. & concl., 7/23/08, at 11, 8.) (Appdx at 49, 46.)

produce enough future income to exceed Sandra's standard of living and earn an effective annual salary of \$320,000 (in interest).⁵⁷

6. A divided court of appeals affirms.

A. The majority opinion.

On September 2, 2009, a divided panel of the court of appeals affirmed.⁵⁸

The majority declined to follow Simoni v. Simoni and similarly decided Cuyahoga County appellate cases that Judge Stewart cited in dissent.⁵⁹ The majority chose instead to follow an unreported case decided by another court of appeals one year before Simoni.⁶⁰ The unreported decision viewed the 1991 spousal support statute as invalidating this Court's reasoning in Kunkle and prior decisions, so the majority decided that Kunkle and its rationale no longer applied.⁶¹

Upon disposing of Kunkle and Simoni, the majority did not assess the trial court's rationale for ordering spousal support. Instead, the majority pointed to 14 "factors" that the spousal support statute requires courts to consider when a spouse seeks spousal

⁵⁷ (TC find. & concl., 7/23/08, at 7, 10, 11, 8.) (Appdx at 45, 48, 49, 46.)

⁵⁸ *Janosek v. Janosek*, Cuya. App. Nos. 91882, 91914, 2009 WL 2400313 at *4, 2009-Ohio-3882 at ¶ 31 ("2d *Janosek*").

⁵⁹ *2d Janosek*, 2009 WL 2400313 at *4, 2009-Ohio-3882 at ¶ 31; see *9 at ¶ 64 (Stewart, J., dissenting), citing *Brandon v. Brandon*, Cuya. App. No. 91453, 2009-Ohio-866 and *Torres v. Torres*, Cuya. App. Nos. 885282 & 88660, 2007-Ohio-4443 at ¶ 35. (Appdx at 30.)

⁶⁰ *2d Janosek*, 2009 WL 2400313 at *4, *6, 2009-Ohio-3882 at ¶s 31, 43. (Appdx at 19.)

⁶¹ *2d Janosek*, 2009 WL 2400313 at *5 n.5, 2009-Ohio-3882 at ¶ 33n.5. (Appdx at 22.)

support. The majority decided that, so long as the trial court considered each factor, the trial judge did not abuse its discretion.

B. Judge Stewart's dissent.

In dissent, Judge Stewart insisted that “we have continued to analyze spousal support issues in terms of ‘need.’”⁶²

She argued that if Sandra “could sustain her standard of living by living off the interest generated by her share of the marital estate, I fail to see how spousal support for the total amount of her monthly expenses, \$15,000 per month, is appropriate and/or reasonable.”⁶³

She concluded that the trial court abused its discretion because “the wife has not demonstrated need for support beyond that which she received as a share of the marital property.”⁶⁴

As Judge Stewart urged, this Court should rule that the trial court exceeded its statutory authority by ordering James to pay spousal support.

⁶² 2d *Janosek*, 2009 WL 2400313 at *9, 2009-Ohio-3882, at ¶ 64. (Appdx at 30.)

⁶³ 2d *Janosek*, 2009 WL 2400313 at *9, 2009-Ohio-3882, at ¶ 64. (Appdx at 31.)

⁶⁴ 2d *Janosek*, 2009 WL 2400313 at *10, 2009-Ohio-3882, at ¶ 71. (Appdx at 34.)

Argument

Proposition of law no. 1: Where a trial court's judgment ordering spousal support in divorce rests on a contested question of statutory interpretation, an appellate court must review that judgment *de novo*.

A. This Court reviews judgments based on contested statutory interpretation *de novo*.

When reviewing trial court orders that govern alimony or (now) spousal support, appellate courts usually defer to the trial court, looking to see if the trial court ruled arbitrarily in exercising its discretion.⁶⁵ That abuse-of-discretion standard does not and cannot apply here because this appeal turns on a question of statutory authority, a question of law. As with all questions of law, this Court reviews questions of statutory interpretation *de novo*. *E.g., Riedel v. Consolidated Rail Corp.*, 2010 WL 1816354 at *2, 2010-Ohio-1926 at ¶ 6.

The courts below ruled that the spousal support statute adopted in 1991 legislatively overruled a series of this Court's decisions governing sustenance alimony, ending with *Kunkle v. Kunkle*.⁶⁶ And both courts rejected James' arguments that the General Assembly actually codified this Court's decisions instead of dismantling them. In doing so, both courts abandoned precedents in their own appellate district and conflicted with precedents in some other districts.⁶⁷

⁶⁵ *E.g., Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 94, 518 N.E.2d 1197, 1199.

⁶⁶ *2d Janosek*, 2009 WL 24003143 at *5 n.5, 2009-Ohio-3882 at ¶ 33 n.5. (Appdx at 20.)

⁶⁷ *2d Janosek*, 2009 WL 24003143 at *6, *4, 2009-Ohio-3882 at ¶s 43, 31 (Appdx at 22); *see, e.g., Carnahan v. Carnahan* (12th Dist. 1997), 118 Ohio App.3d 393, 399-400, 692

If this Court agrees with James, it must reverse the judgments below, ruling that the trial court exceeded its statutory authority to award what the legislature defined as “spousal support.”

This Court has opined that an abuse of discretion “connotes more than an error of law.”⁶⁸ Yet no court has the discretion to misapply the law. Indeed, the United States Supreme Court has ruled that a trial court “by definition abuses its discretion when it makes an error of law.” Koons v. United States (1996), 518 U.S. 81, 100.

As the Montgomery County court of appeals has observed:

[W]here a trial court’s order is based on an erroneous standard or a misconstruction of the law, it is not appropriate for a reviewing court to use an abuse of discretion standard.

In determining a pure question of law, an appellate court may properly substitute its judgment for that of the trial court, since an important function of appellate courts is to resolve disputed propositions of law. . . .

A trial court’s purely legal determination will not be given the deference that is properly accorded to the trial court with regard to those determinations that are within its discretion.

Castlebrook, Ltd. v. Dayton Properties Ltd Partnership (1992), 78 Ohio App.3d 340, 346, 604 N.E.2d 808 811.

N.E.2d 1086, 1090; Seagraves v. Seagraves (1996), 2d Dist. no. 15588, 1996 WL 185332 at *6.

⁶⁸ *E.g.*, Harris v. Mt. Sinai Med. Ctr, 116 Ohio St.3d 139, 144, 2007-Ohio-5587, 876 N.E.2d 1201, 1207 at ¶ 35.

The same decision criticized the “more than an error of law” language in abuse-of-discretion cases as an “unfortunate choice of words” that has caused “[c]onfusion.”⁶⁹ A more accurate phrasing would be that trial judges get more leeway to “err” when they make discretionary rulings than when they pronounce what the law is.

In fact, in areas where this Court routinely defers to the trial court’s discretionary decisions, this Court reviews judgments *de novo* when they rest on legal conclusions that the parties contest. *E.g.*, Medical Mut. of Ohio v. Schlotterer (2009), 122 Ohio St.3d 181, 183, 2009-Ohio-2496, 909 N.E.2d 1237, 1240 at ¶ 13.

For example, this Court typically reviews discovery orders for abuse of discretion, but it reviews them *de novo* when they rest on how the trial court construed a statute.⁷⁰

Although the Court typically reviews contested decisions of state agencies for abuse of discretion, it reviews them *de novo* when based on how the agency construed a statute.⁷¹

Although the Court typically defers to trial court decisions denying new trials, it reviews those decisions *de novo* when based on questions of law. The Court has ruled:

[T]o the extent that the trial court decision being challenged did not involve the exercise of discretion, but was based on a question of law, no deference is afforded.

⁶⁹ *Castlebrook, Ltd.*, 78 Ohio App.3d at 346, 604 N.E.2d at 811.

⁷⁰ *Schlotterer*, 122 Ohio St.3d at 183, 2009-Ohio-2496, 909 N.E.2d at 1240 at ¶ 13.

⁷¹ *FirstEnergy Corp. v. Public Utilities Comm’n*, 95 Ohio St.3d 401, 404, 2002-Ohio-2430, 768 N.E.2d 648, 652 at ¶ 11.

Wagner v. Roche Laboratories, 85 Ohio St.3d 457, 460, 1999-Ohio-309, 709 N.E.2d 162, 165.

In divorces, appellate courts typically leave child support orders intact unless the trial court abused its discretion, but those orders get *de novo* review when based on contested conclusions of law. Marder v. Marder, Clermont App. No. CA2007-06-069, 2008 WL 2168415 at *3, 2008-Ohio-2500 at ¶ 19; Slowbe v. Slowbe, Cuya. App. No. 83079, 2004 WL 1068418 at 5*, 2004-Ohio-2411 at ¶s 43-46; see Wolfinger v. Ocke (1991), 72 Ohio App.3d 193, 196, 594 N.E.2d 139, 140 (modifying divorce decree reviewed *de novo*).

B. The court of appeals deferred too much to the trial court.

Here, the court of appeals deferred remarkably to the trial court, declining even to evaluate the trial court’s rationale for ordering the contested spousal support. In affirming the trial court, the majority cited the “many hours of testimony” over “27 days of trial,” the volume of information in the record, and the “detailed analysis of the 14 statutory factors” in the spousal support statute.⁷²

In effect, the majority decided that the *quantity* of information and analysis justifies misconstruing the statute – as though the size of the record trumps the validity of the ruling.

The majority did not mention that, in the trial court’s “detailed analysis” of the 14 statutory factors, the trial court did not identify whether six of the factors (nearly half) weighed for or against spousal support; decided that a seventh was “not relevant”; that an

⁷² *2d Janosek*, 2009 WL 24003143 at *6, *8, 2009-Ohio-3882 at ¶s 37, 62. (Appdx at 23, 22.)

eighth “has minimal application”; and that the parties “are essentially in balance” on a ninth.⁷³

Nor did the majority explain how deferring to “hours of testimony” and the fullness of the trial record squared with the reality that:

- the trial judge who ordered the spousal support was not the same judge who heard the many hours of trial testimony;
- the judge who *did* hear that testimony signed the final 107-page judgment whose findings Sandra’s attorney drafted; he did not change a word or a dollar figure; and he signed it four days before the time had expired for James to object;⁷⁴
- another panel of judges on the court of appeals vacated various parts of the original judgment because the “findings” were “not supported by the record,” sustaining nine assignments of error as arbitrary or unconscionable abuses of discretion;⁷⁵ and
- virtually all of the “thousands of pages of documents” were to identify, value, and divide the couple’s extensive property, unrelated to spousal support.

The point here is not to ridicule, but to pierce the visceral appeal of summarily deferring to the trial court chiefly because of the size of the record and the lower court’s recital of each statutory factor. In large part, the majority did not *genuinely* review the trial court’s order.

⁷³ (TC find. & concl., 7/23/08, at 9-12.) (Appdx at 47-50.)

⁷⁴ 1st Janosek, 2007 WL 64703 at *1, 2007-Ohio-68 at ¶ 4

⁷⁵ 1st Janosek, 2007 WL 64703 at *17, *3, *10, 2007-Ohio-68 at ¶s 150, 19, 93.

Critically, the court of appeals did not decide independently that the 18 years of payments that James must make to a multi-millionaire until James is almost 72 years old qualifies as “spousal support” under the legislature’s definition.

That failure is pivotal, and highlighted in the trial court’s finding that one of the statutory factors is “not relevant to the ultimate decision of this court.”⁷⁶ That factor evaluates the extent to which the wife or husband seeking spousal support is qualified to “obtain appropriate employment.”⁷⁷

The trial court dismissed that factor because, although Sandra is “capable of returning to the workforce,” she can “maintain her standard of living” from her “extraordinary wealth” alone, so “there is no need for her to seek gainful employment.”⁷⁸ The trial court predicted that Sandra would do volunteer work.⁷⁹

Ordering James to supply income to Sandra from his future labor when she is so wealthy that she voluntarily can forgo receiving income from *her own* future labor cannot be ordering “spousal support.” By deferring so fully to the trial court, the court of appeals abdicated its duty to decide independently whether the court-ordered payments qualify as “spousal support” under the statute’s threshold definition.

The trial court had no statutory authority to award spousal support in this case, which invokes this Court’s *de novo* review.

⁷⁶ (TC find. & concl., 7/23/08, at 11.) (Appdx at 50.)

⁷⁷ R.C. 3105.18(C)(1)(k).

⁷⁸ (TC find. & concl., 7/23/08, at 11, 8.) (Appdx at 49, 46.)

⁷⁹ (TC find. & concl., 7/23/08, at 8.) (Appdx at 46.)

Proposition of law no. 2: For over 170 years, Ohio's alimony statutes divided marital property in divorce and gave courts the option to order one spouse to pay money to the other into the future for "sustenance and support."

A. The legislature never defined "alimony," but left this Court's interpretation of it intact.

Through a series of laws adopted and amended since at least 1824, Ohio's legislature allowed courts to order one spouse to pay "alimony" to the other when they separated or divorced. All of the statutes have allowed courts to award alimony as it deems "reasonable."⁸⁰

Some of those statutes specified that alimony was for "the sustenance" of the spouse receiving it, if the couple remained married but lived apart.⁸¹ No statute defined "alimony" in divorce, but each included dividing property as a component.⁸² Thus:

[The wife] shall be allowed such alimony out of her husband's real and personal property as the court deems reasonable, having due regard to the property which came to him by

⁸⁰ 29 Ohio Laws 431, § 5 (1824); 51 Stat. 377, Chapt. 37, § 7 (1853); Ohio R.S. § 5701 (1880); G.C. 11990, 11993 (1932); G.C. 8003-17 (1951); R.C. § 3105.14 (1952); Am. Sub. H.B. No. 233 at 614-615, § 3105.18(A) (1974); Am. H.B. No. 358 at 5-29, § 3105.18(A) (1986); Am. Sub. H.B. No. 509 at 5-572, § 3105.18(A) (1986); Sub. H.B. No. 231 at 5-534, § 3105.18 (1987); Sub. H.B. No. 708 at 5-547, § 3105.18 (1988). (See Appdx at 66-120.)

⁸¹ 29 Ohio Laws 431, § 7 (1824); 51 Stat. 377, Chapt. 37, § 9 (1853); Ohio R.S. § 5701 (1880); G.C. 11994 (1932); G.C. 8003-15 (1951); R.C. § 3105.14 (1952). (Appdx at 66-106.)

⁸² 29 Ohio Laws 431, § 7 (1824); 51 Stat. 377, Chapt. 37, § 9 (1853); Ohio R.S. § 5701 (1880); G.C. 11994 (1932); G.C. 8003-15 (1951); R.C. § 3105.14 (1952); Am. Sub. H.B. No. 233 at 614-615, §§ 3105.17, 3105.18 (1974); Am. H.B. No. 358 at 5-29, § 3105.18 (1986); Am. Sub. H.B. No. 509 at 5-572, § 3105.18 (1986); Sub. H.B. No. 231 at 5-534, § 3105.18 (1987); Sub. H.B. No. 708 at 5-547, § 3105.18 (1988). (See Appdx at 66-120.)

marriage, and the value of his real and personal estate at the time of divorce

Ohio R.S. § 5699 (1880).

Because Ohio's alimony statute included dividing property, this Court recognized that the legislature had used "alimony" in a "more extensive sense than defined by the lexicographers or the courts."⁸³ Alimony usually means "sustenance" in the context of ordering a husband to pay money toward his wife's "requirements of support and maintenance"; it does not usually divide marital property as well. Durham v. Durham (1922), 104 Ohio St. 7, 10, 11, 135 N.E. 280, 280, 281.⁸⁴

From 1932 until 1951, the legislature did not amend the alimony statute. In 1951, the legislature rewrote it to treat husbands and wives identically regardless of which was at fault in the divorce.⁸⁵ When the legislature adopted the Revised Code the next year, it re-enacted the 1951 statute as R.C. 3105.18.

Alimony remained statutorily undefined under newly enacted R.C. 3105.18, leaving intact this Court's interpretation of "alimony" as including payments that divided marital property or financial support.

In 1974, the legislature added "factors" to guide the courts. The 11 factors required courts to consider the ages of the divorcing spouses; the health of each; their post-divorce

⁸³ *Durham v. Durham* (1922), 104 Ohio St. 7, 9, 135 N.E. 280.

⁸⁴ (quotation marks & citation omitted).

⁸⁵ G.C. 8003-17.

retirement benefits; their standard of living; the extent of each spouse's education; and other matters suitable for dividing property or ordering post-divorce support.⁸⁶

The 1974 version of R.C. 3105.18 did not direct courts to award alimony in every case, saying that a court "may" allow alimony "as it deems reasonable." It introduced the 11 statutory factors by saying: "In determining whether alimony is necessary, and in determining the nature, amount, and manner of payment of alimony, the court shall consider all relevant factors. . . ."⁸⁷

Again the legislature did not define alimony, continuing to leave intact its judicially-explained dual purposes.

B. Where a spouse's own income sustained that spouse's reasonable standard of living after divorce, courts could not order the other spouse to sustain it.

Apparently because one of the statutory factors required assessing each spouse's assets, this Court decided that the 1974 statute required trial courts to divide marital property first. "Only after a division of property is made, is the court statutorily authorized to consider if an additional amount is needed for sustenance." Wolfe v. Wolfe (1976), 46 Ohio St.2d 399, 414, 540 N.E.2d 413, 423.⁸⁸

In practice, the spouse requesting sustenance alimony estimated how much money that spouse reasonably expected to spend each month after divorce on comforts, luxuries, and necessities. The trial court determined whether to accept that proposed cost of

⁸⁶ Am. Sub. H.B. No. 233 at 614-615, § 3105.18 (1974). (Appdx at 107-110.)

⁸⁷ Am. Sub. H.B. No. 233 at 614-615, § 3105.18(B) (1974). (Appdx at 107-110.)

⁸⁸ Am. Sub. H.B. No. 233 at 615, § 3105.18 (1974).

living as reasonable under the circumstances, or to modify it, sometimes after an evidentiary hearing and argument.⁸⁹

The question then became whether the spouse requesting sustenance alimony had, or reasonably could acquire, the resources to support that cost of living, or whether the requesting spouse needed the other spouse's help. See Kaechele v. Kaechele (1988), 35 Ohio St.3d 93, 95-96, 518 N.E.2d 1197, 1200; Kunkle v. Kunkle (1990), 51 Ohio St.3d 64, 70, 553 N.E.2d. 83, 89.

In Kunkle, this Court ruled that, when a divorced spouse's own income could pay for that standard of living, the spouse was "self-supporting" and therefore did not "need" the other spouse to pay for that spouse's sustenance. 51 Ohio St.3d 64, 554 N.E.2d 83, paragraph one of syllabus.

Sustenance alimony propped up the financially-dependent spouse for a reasonable period of time while he or she shifts to becoming "self-supporting." Kunkle, 51 Ohio St.3d 64, 68, 69, 554 N.E.2d 83, 87, 88 and paragraphs one and three of the syllabus.

For example, in a 1978 case, the trial court ordered the husband to pay sustenance alimony until the wife remarried or became employed at an annual salary of \$10,000. The court of appeals modified the order so that alimony continued until her salary reached a higher level: \$20,000 a year. This Court affirmed, approving the court of appeals' rationale that, once the wife's salary reached that level, she no longer needed alimony to sustain her. Cherry v. Cherry (1981), 66 Ohio St.2d 348, 358, 421 N.E.2d 1293, 1300.

⁸⁹ E.g., Day v. Day (1988), Franklin App. No. 88AP-774, 1989 WL 10377 at *2.

Proposition of law no. 3: When the legislature revised the alimony statute in 1991, it codified the prevailing jurisprudence governing sustenance alimony.

- A. In 1991, the legislature revised R.C. 3105.18 to nearly its current form, moving the property-division component of alimony into a new statute and dropping the term “alimony.”

In July, 1990, nearly three months after this Court decided Kunkle, the legislature passed House Bill 514, which revised the alimony statute, R.C. 3105.18, and adopted a new statute, R.C. 3105.171.⁹⁰

By then, the legislature had been drafting or revising the bill for just over a year, since May, 1989.⁹¹ The changes took effect in January 1991.

The bill divided alimony’s dual functions between the two statutes, dropping the overarching term “alimony.” The bill removed the property component of alimony from R.C. 3105.18 and placed it in the new statute, R.C. 3107.171.

R.C. 3105.18 retained the “sustenance” function of alimony, allowing courts to order “spousal support” in divorces and legal separations.⁹² Spousal support cannot include payments that disburse shares of marital property.⁹³

⁹⁰ Am. Sub. H.B. No. 514 at 5-808 thru 5-811. (Appdx 125-128.)

⁹¹ See summaries of House Bill 514’s progress after Representative Walsh introduced it in May, 1989, copies of which James is including in a separate appendix to this brief. (Appdx at 132-134.)

⁹² Am. Sub. H.B. No. 514, at 5-810. (Appdx at 121-124.)

⁹³ R.C. 3105.18(A). (Appdx at 129-130.)

As the courts below emphasized, the spousal support statute lists 14 “factors” that the trial judge must weigh in deciding whether to award spousal support and how much.⁹⁴ For example, the trial judge must weigh:

- each individual’s level of education;
- the duration of the marriage;
- the standard of living of the parties during the marriage;
- the relative earning abilities of the parties;
- the ages and the physical and mental health of the parties;
- each party’s income derived from dividing the marital property and other sources.

R.C. 3105.18(C)(1).

House Bill 514 revised the sentence of R.C. 3105.18 that introduces those factors this way:

~~(B)~~ (C)(1) In determining whether ~~alimony~~ SPOUSAL SUPPORT is ~~necessary~~ APPROPRIATE AND REASONABLE, and in determining the nature, amount, and ~~manner~~ TERMS of payment, AND DURATION of ~~alimony~~ SPOUSAL SUPPORT, . . . THE COURT SHALL CONSIDER ALL ~~relevant~~ OF THE FOLLOWING FACTORS: . . .

(Am. Sub. H.B. No. 514, at 5-810.) The bill then listed the 14 factors, eight of which it retained from the prior version of R.C. 3105.18.

B. The courts below and some other appellate districts have misconstrued the statutory change.

The courts below and the courts in some other appellate districts have decided that the lead-in sentence to the 14 factors has reshaped the law dramatically.⁹⁵ They focus

⁹⁴ R.C. 3105.18(C)(1)(a)-(n). (Appdx at 129-130.)

on the words “appropriate and reasonable,” which replaced the word “necessary” in R.C. 3105.18 from when it was an alimony statute.

The appellate court below broke with its own precedent in declaring that “the ‘need’ standard set forth in Kunkle v. Kunkle . . . has been statutorily replaced by an ‘appropriate and reasonable’ standard.”⁹⁶

The 7th appellate district has ruled that “a court should . . . award only an amount which is appropriate and reasonable, not an amount based upon need.”⁹⁷

The 9th district has declared that “need is not a basis for an award of spousal support” and that the “only relevant question is what is appropriate and reasonable under the circumstances,” a view that the 10th district shares.⁹⁸

Those courts misjudge the statute.

⁹⁵ *2d Janosek*, 2009 WL 24003143 at *4, *5 & n.5, 2009-Ohio-3882 at ¶s 31, 33 n.5, 34; (TC find. & concl., 7/23/08, at 13.); e.g., *Berthelot v. Berthelot* (9th Dist.), 154 Ohio App.3d 101, 114, 2003-Ohio-4519, 796 N.E.2d 541, 551, at ¶ 47; *Purden v. Purden* (1994), 10th Dist. No. Apfio-1428, 1994 WL 242523 at *6; *Waller v. Waller* (7th Dist.), 163 Ohio App.3d 303, 318, 2005-Ohio-4891, 837 N.E.2d 843, 854, at ¶ 63.

⁹⁶ *2d Janosek*, 2009 WL 24003143 at *5 & n.5, 2009-Ohio-3882 at ¶ 33 n.5. (Appdx at 20.)

⁹⁷ *Waller v. Waller*, 163 Ohio App.3d 303, 318, 2005-Ohio-4891, 837 N.E.2d 843, 854, at ¶ 63 (quotation marks and citation omitted).

⁹⁸ *Berthelot v. Berthelot* (2003), 154 Ohio App.3d 101, 114, 2002-Ohio-4519, 796 N.E.2d 541, 555, at ¶ 47; accord *Frye v. Frye* (1994), 10th Dist. no. Apf09-1218, 1994 WL 109708 at *6 (maj.), see *12 (Tyack, J., concurring); *Purden v. Purden* (1994), 10th Dist. No. Apfio-1428, 1994 WL 242523 at *6.

“Appropriate” usually means “specially suitable” or “proper.”⁹⁹ But a court cannot know what is “specially suitable” or “proper” without knowing the objective that spousal support is supposed to achieve, *i.e.*, proper or specially suitable for what purpose? Divorced couples are “henceforth single persons” and “strangers to each other.”¹⁰⁰ The mutual duties of the marital relationship – including mutual support – do not survive divorce.¹⁰¹ The legislature must decide for what purpose that single obligation of marriage would continue beyond divorce when divorce permanently ends every other marital duty.

Knowing that purpose is vital. Although the legislature requires courts to divide marital property in divorce, and directs them to try to divide the property equally, the legislature provides nothing so concrete for spousal support.¹⁰²

Indeed, unlike dividing property, ordering spousal support is optional with the judge.¹⁰³ The 14 statutory factors give judges only amorphous guidance. The statute does not tell judges how to weigh any factors separately, together, or against each other, and for what goal.

⁹⁹ Webster’s Third New Internat’l Dictionary (1993). This Court regularly has consulted Webster’s Third New Internat’l Dictionary when considering statutorily undefined words. *E.g.* *State v. Robinson*, 124 Ohio St.3d 76, 83, 2009-Ohio-5937, 919 N.E.2d 190, 196, at ¶ 36; *State ex rel. Heffelfinger v. Brunner*, 116 Ohio St.3d 172, 179-180, 2007-Ohio-5838, 876 N.E.2d 1231, 1239, ¶ 37.

¹⁰⁰ *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 410, 350 N.E.2d 413, 421.

¹⁰¹ *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 410, 350 N.E.2d 413, 421.

¹⁰² Compare R.C. 3105.171(B) with R.C. 3105.18(B). (Appdx at 126-129.)

¹⁰³ R.C. 3105.18(B): the trial court “may” award spousal support. (Appdx at 129-130.)

For example, the statute directs judges to consider the “ages and the physical, mental, and emotional conditions of the parties,” but it does not say what judges should do with that information, or how to weigh it against any other factors, such as the “tax consequences, for each party.”¹⁰⁴

The statute does not say whether some factors deserve greater weight than others, or whether some proportionate range of factors should weigh in favor of spousal support to justify ordering it.

Magnifying that indefinite latitude is factor (n): “Any other factor that the court expressly finds to be relevant and equitable.”

Here, for example, the trial court relied most heavily on the virtually boundless factor (n).¹⁰⁵ The court did not identify whether six factors (nearly half) weighed for or against spousal support, and found that at least three others were either irrelevant or neutral.¹⁰⁶

Ohio courts cannot order spousal support except as allowed by statute.¹⁰⁷ If, indeed, the legislature has placed no greater constraint on individual judges than ordering what each deems to be “appropriate and reasonable,” and each can apply any criteria *not* identified in the statute that each thinks is “relevant and equitable,” then

¹⁰⁴ R.C. 3105.18(C)(1)(c). (Appdx at 129-130.)

¹⁰⁵ (TC find. & concl., 7/23/08, at 12.) (Appdx at 50.)

¹⁰⁶ (TC find. & concl., 7/23/08, at 9-12.) (Appdx at 47-50.)

¹⁰⁷ *E.g.*, *Kunkle v. Kunkle* (1990), 51 Ohio 64, 67, 554 N.E.2d 83, 87; *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 414, 540 N.E.2d 413, 423.

individual judges effectively have unreviewable leeway to order or to withhold spousal support. Appellate courts would have no principled ground for deciding whether any individual judge has exceeded his or her statutory authority or abused judicial discretion. The legislature would have surrendered to individual judges the authority to decide for themselves in any given case the societal objective that spousal support is supposed to achieve.

The courts that rely on the “appropriate and reasonable” provision and its 14 factors isolate that provision from the rest of the statute. That provision is not the wellspring of courts’ authority to award spousal support.¹⁰⁸ The statute’s definition of “spousal support” provides and confines that authority.

C. The legislature did not abandon this Court’s Kunkle line of decisions; it codified them.

When it revised R.C. 3105.18 in 1991, the legislature prescribed the societal objective of spousal support -- not with the unfettered “appropriate and reasonable” language, but by defining spousal support in the opening provision of R.C. 3105.18.

The statutory definition confines spousal support to “payments to be made to a spouse or former spouse . . . for sustenance and for support of the spouse or former spouse.” R.C. 3105.18(A).

¹⁰⁸ 2d *Janosek*, 2009 WL 24003143 at *4, *5 & n.5, 2009-Ohio-3882 at ¶s 31, 33 n.5, 34; (TC find. & concl., 7/23/08, at 13.) (Appdx at 51) ; e.g., *Berthelot v. Berthelot* (9th Dist.), 154 Ohio App.3d 101, 114, 2003-Ohio-4519, 796 N.E.2d 541, 551, at ¶ 47; *Purden v. Purden* (1994), 10th Dist. No. Apfio-1428, 1994 WL 242523 at *6; *Waller v. Waller* (7th Dist.), 163 Ohio App.3d 303, 318, 2005-Ohio-4891, 837 N.E.2d 843, 854, at ¶ 63.

Thus:

- (A) AS USED IN THIS SECTION, "SPOUSAL SUPPORT" MEANS ANY PAYMENT OR PAYMENTS TO BE MADE TO A SPOUSE OR FORMER SPOUSE . . . THAT IS BOTH FOR SUSTENANCE AND FOR SUPPORT OF THE SPOUSE OR FORMER SPOUSE.

(Am. Sub. H.B. No. 514, 1990 Ohio Legis. Serv. at 5-810.)

The legislature did not use the terms "sustenance and support" in the abstract. From at least 1976 through this Court's 1990 ruling in Kunkle, this Court consistently interpreted sustenance alimony under R.C. 3105.18 as payments for "sustenance and support."¹⁰⁹ In doing so, the Court ruled that courts cannot order one "stranger" to pay income earned from that person's future labor to another "stranger" solely because they were once man and wife. Rather, when a former spouse's own income can pay for his or her own comforts, luxuries, and necessities that spouse is "self-supporting" and therefore does not need sustenance payments from the other former spouse to sustain those costs of living. See Kunkle, 51 Ohio St.3d 64, 554 N.E.2d 83, paragraph one of syllabus; Cherry, 66 Ohio St2d at 358, 421 N.E.2d at 1300.

Nothing in the bill that statutorily defined "spousal support" purported to reject the Kunkle line of this Court's decisions. To the contrary, the 1991 bill embraced this

¹⁰⁹ *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 350 N.E.2d 413, paragraph two of syllabus; *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 352, 355-356, 421 N.E.2d 1293, 1299; *Supanick v. Supanick* (1981), 66 Ohio St.2d 360, 360 & 361, 421 N.E.2d 1301; *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 95, 518 N.E.2d 1197, 1200; *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131 n.1, 541 N.E.2d 597, 600 n.1; *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67, 554 N.E.2d 83, 86; see also *Ressler v. Ressler* (1985), 17 Ohio St.3d 17, 19, 476 N.E.2d 1032, 1034 (Celebrezze, C.J., dissenting, joined by Ford, J.).

Court's decisions by adopting verbatim the very words that this Court used repeatedly when describing sustenance alimony: "sustenance and support."

Just last year, this Court resolved appellate disagreement about whether statutory amendments for modifying spousal support had supplanted court readings of earlier statutes with a more liberal standard. This Court decided that, unless the General Assembly expresses an intent to reject them, judicial analyses remain intact and inform the new statutes. Mandelbaum v. Mandelbaum (2009), 121 Ohio St.3d 433, 439-440, 2009-Ohio-1222, 905 N.E.2d 172, 178 at ¶s 29, 31.

Fifty years ago, this Court explained:

If, by what it does, the General Assembly intends in effect to change the law as previously announced by this court, it should express such an intention.

Such an intention will not ordinarily if ever be implied from its silence.

Lynn v. Supple (1959), 166 Ohio St. 154, 159.

Here, instead of silence, the General Assembly adopted this Court's rulings by codifying them as the new definition of "spousal support." Indeed, a legislative summary of the bill that defined spousal support reported that the bill "codifies existing domestic relations law." H.B. No. 514, Summary re Senate Judicial Committee, Jan. 31, 1990 (Appdx at 132).

Several appellate districts agree. The second district emphasized that the statutory definition of "spousal support" cabins the terms "reasonable and appropriate." The court said:

Obviously, a purported award of “spousal support” that does not come within the scope of the statutory definition of “spousal support” (because it is not for the sustenance of the obligee spouse) cannot, by definition, be appropriate, even if it could otherwise be said to be reasonable.

Seagraves v. Seagraves (1996), 2d Dist. No. 15588, 1996 WL 185332 at *6; accord

Hutchinson v. Hutchinson (2010), 12th Dist. No. CA 2009-03-018, 2010 WL 597118 at *5, 2010-Ohio-597 at ¶ 27; Carnahan v. Carnahan (1997) 118 Ohio App.3d 393, 399-400, 692 N.E.2d 1086, 1090; Perry v. Perry (2008), 2d Dist. No. 07-CA-11, 2008 WL 748370 at *3, 2008-Ohio-1315 at ¶s 29-30; Joseph v. Joseph (1997), 12 Ohio App.3d 734, 738, 702 N.E.2d 949, 951-952; see Simoni v. Simoni (1995), 102 Ohio App.3d 628, 636-637, 657 N.E.2d 800, 806.

Proposition of law no. 4: A court has no statutory authority to order one divorced spouse to pay spousal support to a healthy former spouse who has ample income to sustain that spouse’s court-approved standard of living.

As the legislature has prescribed “spousal support,” if court-ordered payments from one ex-spouse to the other do not genuinely function as providing “sustenance and . . . support,” then those payments do not and cannot qualify as “spousal support” and the court has no authority to order them. Where a divorced spouse’s own income can sustain that spouse’s court-approved standard of living, that spouse is self-sustaining, and courts have no statutory authority as a matter of law to order the other spouse to underwrite that standard of living.

The “appropriate and reasonable” provision applies only if the court-ordered payments first satisfy the threshold condition – they must function as providing “sustenance and support.” So, if the payments qualify as providing “sustenance and

support,” the court then applies the 14 statutory factors to decide what would be “appropriate and reasonable.”

Here, the trial court exceeded its authority under R.C. 3105.18 to order James to pay spousal support to Sandra. The court of appeals did not disturb the trial court’s findings that Sandra’s cash alone -- \$8 million -- can earn enough interest on “safe investments” to amount to an annual salary of \$320,000 and thus “adequately sustain her standard of living.”¹¹⁰ As the trial court ruled that Sandra’s “extraordinary wealth” enables her voluntarily to forgo being compensated for any future employment she might choose to undertake, the trial court had no valid ground to order James – a “stranger” – to supplement Sandra’s wealth with \$15,000/month out that he receives when compensated for *his* future labor.

Based on those uncontested findings, the trial court had no statutory authority to order James to pay Sandra’s \$15,000/month costs of living when she is a healthy, independently wealthy multi-millionaire whom the trial court found “is able to meet a handsome standard of living on her share alone of the marital estate.”¹¹¹

Therefore this Court should reverse the judgment below with instructions to order the trial court to vacate its judgment ordering spousal support.

¹¹⁰ (TC find. & concl., 7/23/08 at 7.) (Appdx at 45.)

¹¹¹ (TC find. & concl., 7/23/08 at 13.) (Appdx at 51.)

Proposition of law no. 5: Payments ordered for the purpose of “growing a spouse’s property division” do not qualify as spousal support.

This Court should afford the same relief for the separate and independent reason that the trial court based its decision chiefly because it projected that James was likely to make more money from his future endeavors as a divorced, single man than his multi-millionaire ex-wife was likely to make from her future endeavors.

The trial court ordered James to pay spousal support for two reasons:

- (1) to compensate Sandra because the court presumes that her \$8 million half of the divided marital property will earn less money in the future than James’ half¹¹²; and
- (2) to maximize the potential for Sandra’s half of the marital property to grow with compound interest.¹¹³

The trial court’s stated purpose was not to secure an identified standard of living approved by the court (e.g. for “sustenance and support”). Rather, the trial court expressed concern that, if it did not order James to pay spousal support, Sandra’s “share of the marital estate . . . may not grow in value” because there would be no interest to compound.¹¹⁴ That cannot satisfy the statutory definition of spousal support.

¹¹² (TC find. & concl., 7/23/08, at 12.) (Appendix at 50).

¹¹³ (TC find. & concl., 7/23/08, at 13.) (Appendix at 51).

¹¹⁴ (TC find. & concl., 7/23/08, at 13.) (Appendix at 51.)

The Franklin County Court of Appeals – the same appellate district on which the trial court most relied to justify spousal support here – reversed spousal support because of the same rationale.¹¹⁵

In that case, Thomas v. Thomas, the divorce court ordered the husband physician to pay spousal support to his ex-wife, who had received a large sum of cash as the value of her share of marital property. The court found that she could earn substantial interest income from that cash. But – like the trial court here – the divorce court decided not to require the ex-wife “to live off the interest from her marital property while appellant’s assets continue to grow.”¹¹⁶ So that court declined to reduce the mandated spousal support by the amount of interest that the cash could earn.

The court of appeals reversed, finding that the wife’s interest income was enough to pay 35% of her budgeted monthly living expenses.¹¹⁷ The court required the divorce court to reduce the spousal support by subtracting the amount of monthly interest earned by the wife’s cash.¹¹⁸

Here, James’ payment of “spousal support,” therefore, really functions as a \$3.2 million supplemental property award to Sandra distributed in monthly installments. The trial court’s order that James pay \$15,000 each month to Sandra until the year 2023 is an

¹¹⁵ (TC find. & concl., 7/23/08, at 14, citing Pruden v. Pruden.) (Appendix at 52).

¹¹⁶ *Thomas v. Thomas* (10th Dist.), 1999 WL 252483 at *1, 4.

¹¹⁷ *Thomas*, 1999 WL 252483 at *3.

¹¹⁸ *Thomas*, 1999 WL 252483 at *5.

attempt to supplement the value of divided property through “spousal support” and therefore is invalid as a matter of law.

“Certainly there is no legislative contemplation or authorization that an ex-husband be ordered to pay periodically a sum determined by what he can afford.”¹¹⁹

Where a court has ordered a divorced spouse to pay more than what the other spouse needs for a reasonable standard of living, this Court has invalidated the order.¹²⁰ As the spouse requesting support, Sandra’s income is relevant for determining whether her future income will allow her to independently support and sustain a reasonable lifestyle and, if not, how much extra income she needs. James’s income, however, is relevant only for determining how much of the “extra income,” if needed by Sandra, he can afford to pay.¹²¹

A disparity in income does not justify spousal support beyond what the requesting spouse needs to sustain a lifestyle. “Under no circumstances should spousal support be awarded simply because one spouse has the ability to pay.” *Okos v. Okos* (2000), 137 Ohio App.3d 563, 571-572.

Thus the trial court erred as a matter of law because it ordered James to pay spousal support chiefly to “grow” Sandra’s share of marital property and because it

¹¹⁹ *Wolfe v. Wolfe*, 46 Ohio St. 2d 399, 411, 540 N.E.2d 413, 421 (1976).

¹²⁰ *Kunkle v. Kunkle*, No. 5-86-17, 1988 WL 126740 at *4 (App. 1988); *Kunkle v. Kunkle*, 51 Ohio St. 3d 64, 70, 554 N.E.2d 83, 89 (1990).

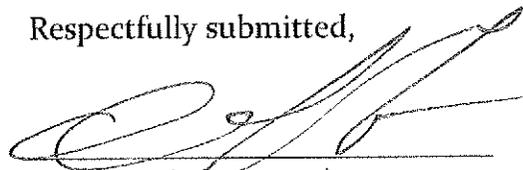
¹²¹ *See Seagraves*, 1996 WL 185332, at *6 (finding husband could afford to pay support); *Lumpkin v. Lumpkin* (8th Dist.), 2003 WL 21276034, at *5, 2003-Ohio-2841, at ¶ 21 (finding husband could not afford to pay support).

perceived that James' future endeavors as a single man would yield more money than it projected Sandra would receive by putting her share of the marital estate in the bank.

Conclusion

For the foregoing reasons, this Court should reverse the judgment of the court of appeals with instructions to require the court of common pleas to vacate its judgment ordering James Janosek to pay spousal support.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Loeb', written over a horizontal line.

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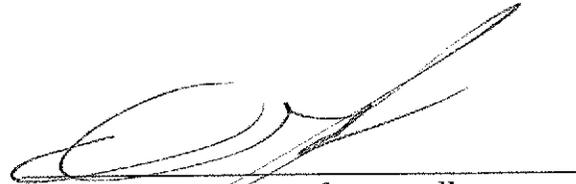
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CERTIFICATE OF SERVICE

A copy of the foregoing merit Brief of Appellant James C. Janosek has been served upon the following counsel for Sandra L. Janosek by regular U.S. Mail, postage prepaid, this 25th day of May, 2010:

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