ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 2009-1705
On Appeal from the Cuyahoga County Court of Appeals,
Eighth Appellate District,
Case Nos. 08-091882 and 08-091914

SANDRA L. JANOSEK,
Plaintiff-Appellee,

v.

JAMES C. JANOSEK,
Defendant-Appellant.

Reply Brief of Appellant James C. Janosek

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Argument in Reply

1. To affirm the courts below, this Court must decide that the legislature adopted an organic change in society's objectives for alimony, abandoning at least a century of establishing alimony's essential purpose.

A. The net effect of what Sandra and James do not dispute crystallizes the pivotal legal issue in this appeal.

Sandra emphasizes that spousal support "should be measured by whether the payee-spouse will be able to support herself in some reasonable degree to that established during the marriage."[1]

No one disputes that. But Sandra obscures what really happened here, and what happens in virtually every spousal support case. That is, before the court decides whether to award spousal support or how much, the court decides what standard of living the spouse seeking support should expect.

The court starts with what the spouse proposes on a court form that invites him or her to estimate and project, item by item, what that spouse proposes as a fitting standard of living after divorce.[2] That is the trial court's starting point.

Thus the trial court here said:

- "According to Mrs. Janosek, her budgeted standard of living amounts to $22,000 per month."[3]

- "[T]he husband does not challenge the wife's standard of living @

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[1] Sandra's merits brief at 20.

[2] Sandra's completed form proposing her standard of living is Plaintiff's Exhibit 279.

[3] TC find. & concl., 7/23/08, at 10; Appdx. at 48 (top of page).

$20,000/month."[4]

- "[T]his court finds her standard to be less than the amount claimed."[5]

- "This court finds that Mrs. Janosek's monthly standard of living is not less than $15,000 per month."[6]

The trial court's repeated use of the phrase "standard of living" is telling because it derives from what Sandra proposed as her desired "lifestyle" after the marriage, as her brief puts it.[7] A standard of living encompasses bare necessities, but also much more. It is "the necessities, comforts, and luxuries enjoyed or aspired to by an individual." Webster's Third New Internat'l Dictionary (1993).

Indeed, this Court has adopted a form for budgeting a proposed standard of living that trial courts must use "to determine . . . spousal support amounts."[8] On the form, the movant for spousal support is to estimate and project how much he or she would spend on necessities (rent or mortgage payment, groceries, and clothing). And, consistently with what a standard of living is, the movant is supposed to estimate and project how much he or she would spend on such comforts as lawn service, nail care, internet, and

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

5 TC find. & concl., 7/23/08, at 10; Appdx. at 48 (top of page).

6 TC find. & concl., 7/23/08, at 14; Appdx. at 52 (bottom ¶).

7 Sandra's merits brief at 21.

8 Uniform Domestic Relations Form – Affidavit of Income & Expenses, approved under Ohio Civil Rule 84, eff. July 1, 2010.

satellite tv, and such luxuries as club memberships, travel, vacations, and restaurant dining.

The form further invites the movant to add desired comforts, luxuries, and necessities that it doesn't list.

So Sandra's repeated emphasis on "minimal sustenance," "the simple costs of living," and the like have never been the focal point of either sustenance alimony before 1991 or spousal support after 1991. In our era, domestic relations courts are not confining former spouses to "minimal sustenance."

Here, based on the standard of living that Sandra proposed, the trial court decided that she should expect to spend about $15,000 every month.[9] Sandra has not contested that adjudicated standard of living.

For those of us who devote most of our time and energy to working for others despite never coming close to receiving $15,000 a month, getting that much in interest from just a bank account hardly would reduce anyone to "minimal sustenance."[10] Sandra, however, would get about twice that every month from *her* bank account. Indeed, our employers might fire us, cut our pay, or go out of business, while Sandra's savings account continues to churn out $27,000 in interest every month for the rest of her life.

The question then becomes – where should the money to fund Sandra's $15,000/month standard of living come from and why?

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9 TC find. & concl., 7/23/08, at 14; Appdx. at 52 (bottom ¶).

10 Sandra's merits brief at 15.

B. Sandra argues, and the courts below decided, that James has to be the funding source of first resort.

The trial 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 and thus "adequately sustain her standard of living."[11] That would produce about $27,000 in interest each month. Sandra does not contest that.

The trial court, however, decided that the money to fund Sandra's standard of living would not have to come from the $27,000/month that she'd collect in interest.

The trial court also endorsed Sandra voluntarily forgoing a paycheck if she chooses to go back to work. The court found that Sandra *could* become employed and be paid for her services, but "her extraordinary wealth militates against this likelihood, in favor of volunteer work."[12] Sandra does not contest that finding either.

So Sandra does not contest that:

(a) the standard of living that she should expect amounts to $15,000/month;

(b) her own $8.2 million in cash would provide at least $15,000/month in interest without spending or risking any of the $8.2 million; and

(c) she probably would forgo payment for her services if she went back to work.

Despite Sandra's multi-millionaire capacity to pay for her own $15,000/month standard of living, the trial court decided that *James* must pay for it. And $15,000/month

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[11] TC find. & concl., 7/23/08, at 7; Appdx. at 45 (bottom ¶).

[12] TC find. & concl., 7/23/08, at 4; Appdx. at 46.

is exactly what the trial court ordered James to pay.[13]

Ultimately, then, to affirm the courts below, this Court must justify ordering James to pay for Sandra's standard of living from his future labor when the trial court approved Sandra voluntarily forgoing income from *her own* future labor and where Sandra's interest on safe investments would fund *more* than her uncontested adjudicated lifestyle.

C. This Court must decide whether the legislative objective of spousal support is to provide sustenance and support, or to try to "balance" the recompense that each divorced spouse may gain from the separate risks and efforts that each undertakes as single individuals.

Sandra and the trial court justify ordering James to pay spousal support to his independently wealthy ex-wife by saying that "the overall earning potentials of both parties were left "imbalanced," or "asymmetrical."[14]

Sandra argues that James "was left with marital assets that had a far greater income producing capacity than the liquid and passive investments that were owned by Appellee."[15]

After valuing James' future profits from Welded Ring Products at $8.4 million, Sandra and James split that amount with Sandra getting ½ of it in cash.[16] It was that and other cash that Sandra received upon which the trial court decided Sandra could collect

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13 TC find. & concl., 7/23/08, at 14; Appdx. at 52.

14 Sandra's merits brief at 18; TC find. & concl., 7/23/08, at 8, Appdx. at 46.

15 Sandra's merits brief at 18; *accord* TC find. & concl, 7/23/08, at 50.

16 (Ex. XI to Greenwald Report – Plaintiff's Exhibit 1 at trial; Supp. at 48.) (TC agreed JE re Prop. div., 12/27/07 & JE Ex. 1; Appdx. at 35-38.) (TC find. & concl., 7/23/08, at 2, 10; Appdx. at 40, 48.)

$27,000/month in interest.

But just as Sandra's future income from interest in a savings account is "not in balance" with James' future income from managing and owning a business, so are Sandra's future risks and future labor.

If James successfully manages Welded Ring Products Co. into the future and steadily vaults the risks that accompany owning a business, we would expect him to earn more money than if he performed no services and took no risks. Indeed, we would expect anyone to quit working for a company, and to quit assuming the risks of owning it, if he could gain as much money by selling the company and collecting interest from proceeds in a bank account.

The overriding point, however, rests on the trial court's (and Sandra's) focus on how much they expect Welded Ring Products Co. to compensate James as he proceeds to manage and own that company after divorce. That is their linchpin. It eclipses Sandra's independent wealth and her ability to fund her own $15,000/month standard of living without depleting her $11.2 million in marital property or expending any of her own time and energy.

Sandra and the trial court can be correct only if this Court decides that the legislature has abandoned 100 years of awarding post-divorce alimony for sustenance and support, and replaced it with a new societal objective. That new objective would be to use "spousal support" to seek symmetry in how much reward each spouse may get from that spouse's own risks and efforts after divorce – even if each can fund their own desired or adjudicated standard of living.

The legislature did not adopt that organic change when it split into two statutes alimony's functions of dividing a couple's property and paying post-divorce support, R.C. 3105.171 and 3105.18.

2. This Court should reverse the courts below because the legislature codified this Court's jurisprudence governing sustenance alimony.

A. As this Court interpreted sustenance alimony, independently wealthy spouses did not get it.

Despite quibbling about what Kunkle v. Kunkle technically held, Sandra seems to agree that, before the legislature separated alimony's functions, most spouses weren't eligible for post-divorce payments if they were financially independent.[17] That is, if a spouse could fund his or her court-approved standard of living with that spouse's own income, the courts usually would not order sustenance alimony.[18]

And Sandra tacitly acknowledges that she wouldn't be eligible for spousal support if, as James insists and some appellate courts have ruled, the legislature codified this Court's interpretations of sustenance alimony when splitting R.C. 3105.18 into two statutes in 1991.

Under today's 3105.18, Sandra argues, she's eligible for spousal support despite her independent wealth.

B. By isolating the statutory phrase "appropriate and reasonable," Sandra ducks the statutory definition of "spousal support."

As have several appellate courts, Sandra rivets her attention on the spousal

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17 *See* Sandra's responsive proposition of law.

18 *See Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 553 N.E.2d 83, paragraph one of syllabus; *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 358, 421 N.E.2d 1293, 1300.

support statute's introduction to its 14 factors for assessing spousal support.[19] That is: "In determining whether spousal support is appropriate and reasonable, . . . the court shall consider" the 14 factors.

Sandra argues, and several appellate courts have opined, that deciding "whether spousal support is appropriate and reasonable . . . is a different consideration" and "more expansive" than deciding "whether spousal support is necessary."[20]

But "appropriate and reasonable" for what? Neither Sandra nor the courts below identify the goal that the court is supposed to try to achieve – the legislative objective.

They assume the truth of the very thing being questioned here. By labeling court-ordered post-divorce payments as "spousal support," Sandra and the cited statutory passage already *assume* that those payments *are* "spousal support" as the legislature has defined it.

By specifying that "spousal support" must be for "sustenance and support," the legislature allows courts to order post-divorce payments only if they serve that distinct and specific function: "sustenance and for support." R.C. 3105.(A). Sandra mentions the statutory definition of spousal support only in passing in two sentences.[21]

Labeling post-divorce payments as "spousal support" doesn't mean they *are* spousal support. It doesn't mean that they actually or automatically serve the function that the legislature has prescribed.

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19 Sandra's merits brief at 3, 4, 14, 16, 17.

20 Sandra's merits brief at 17.

21 Sandra's merits brief at 21, 4.

Suppose, for example, a court ordered an ex-wife to pay $500 a month for three years to compensate her former husband because the divorce humiliated him. Or, suppose that a court ordered an ex-husband to pay $2,000 a month for 18 years to his former wife because he had refused to have children and now she cannot bear children.

If dubbed "spousal support," all of those payments might be "appropriate and reasonable" under statutory factor (n). Factor (n) allows the court to order payment for whatever reason it "expressly finds to be relevant and equitable."[22]

Here, the trial court relied heavily on that wild-card factor – (n) – citing factor (n), the trial court ordered James to pay spousal support to correct the perceived "imbalance" arising from how much money he is likely to make from investing the time, effort, and risk in running and owning the business that his grandfather founded.[23]

3. The legislature's use of "appropriate and reasonable" codifies this Court's steps in assessing sustenance alimony.

In separating alimony's functions in 1991, the legislature did not adopt a new societal objective under the rubric "spousal support." It did not replace sustenance alimony with a new direction: where divorced men and women must pay large chunks of their future incomes to each other to try to achieve future "balance" despite their individual financial independence.

Sandra mistakenly insists that, by inserting the phrase "appropriate and reasonable," and striking the word "necessary," the legislature opened the way for that

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22 R.C. 3105.18(C)(1)(n).

23 TC find. & concl. at 12; Appdx. at 50 (bottom ¶).

new direction and rejected this Court's jurisprudence.

She insists that "appropriate and reasonable" can't coexist with this Court's jurisprudence without expanding post-divorce alimony beyond "sustenance and support."[24]

But Sandra ducks the source of those words and what the legislature did. She forgets that, before 1991, alimony had no statutory definition. This Court's unbroken series of decisions created a body of caselaw that gave meaning and bounds to sustenance alimony. And when the legislature separated alimony's functions into two statutes, it codified that caselaw.

Thus, in defining spousal support as post-divorce payments for "sustenance and for support," the legislature adopted the precise phrase that this Court used in Kunkle v. Kunkle and a string of other decisions to describe and confine sustenance alimony.[25]

And coupling "sustenance and support" with "appropriate and reasonable" doesn't depart from Kunkle, it adopts the Court's analysis.

When the Court decided Kunkle, the alimony statute did not direct judges to first divide marital property and then decide whether to award sustenance alimony. The Court outlined what steps to follow. It said:

> In Ohio, alimony consists of two components: a division of marital assets and liabilities, and periodic payments for sustenance and support. [citation]

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[24] *See* Sandra's merits brief at 17.

[25] See cases cited in James' merits brief at 32 & n.109.

> As part of a divorce proceeding, a trial court has equitable authority to divide and distribute the marital estate, and then consider whether an award of sustenance alimony would be appropriate.

Kunkle, 51 Ohio St.3d at 67, 554 N.E.2d at 86-87.

To those steps, the Court added another tier: the trial court should decide for what amount and for how long sustenance alimony would be "reasonable."[26]

The 1991 enactment follows the same steps. It dictates: "In divorce . . . proceedings . . . and after the court determines the division or disbursement of property . . ., the court of common pleas may award reasonable spousal support to either party." R.C. 3105.18(B).

The enactment confines "spousal support" to payments for "sustenance and support." And then it says that those payments for "sustenance and support" must be "appropriate and reasonable."

Adopting the same steps and even the phrases that this Court used in Kunkle and the decisions that led to Kunkle leaves no valid doubt that the legislature codified this Court's jurisprudence.

If the legislature had meant spousal support to "balance" the future incomes of divorced spouses even if those separate individuals are financially independent, it hardly would have confined spousal support to "sustenance and support," adopting this Court's phrases. It would have said explicitly that courts are now supposed to divide future incomes of divorced spouses to seek "balance" or "symmetry."

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26 *Kunkle*, 51 Ohio St.3d at 69, 71, 554 N.E.2d at 88, 90, and paragraphs one and three of syllabus.

Realizing that the legislature codified this Court's caselaw does not usurp 20 years of appellate jurisprudence as Sandra claims. As James' jurisdictional memorandum details, the appellate districts do not agree with each other, and several districts agree with the analyses that James advocates here. Moreover, the courts of appeals of this state do not dictate the jurisprudence of Ohio; this Court does.

4. This Court should reject Sandra's suggestion that James' merits brief goes beyond his initial proposition of law.

Sandra asserts that she (and by implication this Court) need not consider James' five propositions of law, because they are worded differently than the single proposition of law in James' jurisdictional memorandum. Sandra is mistaken.

Only in cases where an appellant has raised a completely new issue has this Court declined to consider a proposed proposition of law. *See, e.g.,* In re Timken Mercy Med. Ctr. (1991), 61 Ohio St. 3d 81, 87; 572 N.E.2d 673, 677 (an issue "not raise[d] or even allude[d] to" in the jurisdictional memorandum is not properly before the Court; appellant's jurisdictional memorandum was addressed solely to the interpretation of R.C. 3702.58; interpretation of another statute was not, therefore, before the court).

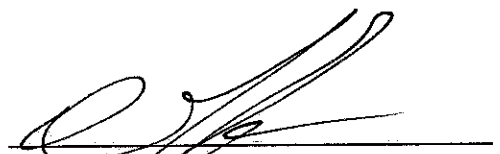
That is not what occurred here. The propositions of law in James' merit brief are simply dividing the overarching legal issue and argument on which this Court accepted jurisdiction into constituent parts.

Thus, because all of the propositions of law are directed at the interpretation and construction of the same legal issue, James' propositions of law and underlying argument are valid.

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,



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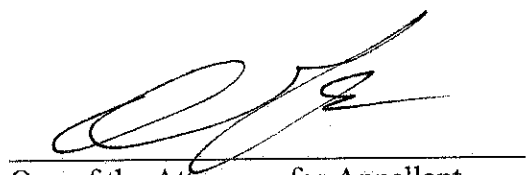

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