

ORIGINAL

12-0963

IN THE SUPREME COURT OF OHIO

RONALD L. NELSON	)	On Appeal from the Medina
	)	County Court of Appeals,
Appellant,	)	Ninth Appellate District
	)	
-vs-	)	Court of Appeals
	)	Case No. 10CA0115-M
PATRICIA D. NELSON	)	
	)	
Appellee.	)	

---

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT RONALD L. NELSON

---

DAVID H. FERGUSON, #0032038  
Third Floor  
57 South Broadway Street  
Akron, Ohio 44308  
(330) 762-9933  
(330) 762-1013 (fax)  
fattorneydavid@neo.rr.com

COUNSEL FOR APPELLANT, RONALD L. NELSON

Steve C. Bailey, #0042706  
Suite 202  
60 Public Square  
Medina, Ohio 44256  
(330) 723-4140

COUNSEL FOR APPELLEE, PATRICIA D. NELSON

**RECEIVED**  
JUN 06 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

**FILED**  
JUN 06 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC . . . OR GREAT GENERAL INTEREST	1
STATEMENT OF THE CASE AND FACTS . . . . .	2
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW . . . . .	4
<u>Proposition of Law No. I: A spousal support</u> . . . . .	4
obligation is to be based, <i>inter alia</i> , on the parties' incomes.	
<u>Proposition of Law No. II: A spousal support</u> . . . . .	5
award is to be reasonable and appropriate, and it is error for a spousal support award to be based on a mathematical formula.	
<u>Proposition of Law No. III: A support obligor</u> . . . . .	7
can only be found in contempt if he has the power to perform the obligation.	
CONCLUSION . . . . .	8
CERTIFICATE OF SERVICE . . . . .	9
APPENDIX	<u>Appx. Page</u>
Journal Entry of the Ninth District Court . . . . .	A-1
of Appeals (April 25, 2012)	
Decision and Journal Entry of the Ninth . . . . .	A-5
District Court of Appeals (Dec. 5, 2011)	
Findings and Judgment Entry, Medina County . . . . .	A-22
Domestic Relations Court (Oct. 7, 2010)	
Magistrate's Decision, Medina County Domestic . . . . .	A-33
Relations Court (Dec. 16, 2009)	

EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST

The question presented in this case can be stated as follows: What should a trial court consider as income when determining a spousal support obligation in a divorce action?

Along with common forms of income, such as salary, wages, bonus, etc., Ohio courts have found that other forms of income, such as certain corporate pass-through income and capital gain income, should be included in an obligor's total income for spousal support purposes. Demchak v. Demchak, 2010-Ohio-3798, 09CA0076-M (OHCA9), ¶12; Karis v. Karis, 2007-Ohio-759, 23804 (OHCA9), ¶13.

In this case, the trial court has expanded the definition of "income" to include money that an unemployed obligor borrowed to meet expenses. It is the Appellant's position that borrowed funds cannot be income, as they must be repaid.

If permitted to stand, the decision made by the court of appeals would have far-reaching effects on divorcing parties in Ohio. In order to promote consistent application of Ohio statutory and case law regarding spousal support awards, this Court must grant jurisdiction to review this case and the erroneous decision of the court of appeals.

STATEMENT OF THE CASE AND FACTS

The parties' marriage was terminated by Judgment Entry of Divorce filed on June 5, 2003. Pursuant to the decree, Mr. Nelson had an obligation to pay spousal support to Ms. Nelson in the amount of \$3,000.00 per month. The trial court retained jurisdiction to modify the amount but not the term of spousal support.

Mr. Nelson filed a motion in the trial court to modify his spousal support obligation; and Ms. Nelson filed a motion to find Mr. Nelson in contempt. An Agreed Judgment Entry was filed in which the parties agreed that any modification of spousal support would be effective January 1, 2008.

The trial court issued a Magistrate's Decision modifying Mr. Nelson's spousal support obligation to \$2,175.00 per month effective January 1, 2008; ordered Mr. Nelson to pay \$125.00 per month on a support arrearage; found Mr. Nelson in contempt; and awarded Ms. Nelson attorney fees and costs in the amount of \$1,230.00.

Mr. Nelson timely filed Objections to the Magistrate's Decision regarding, *inter alia*, the trial court's determination of his income and the modified amount of spousal support. The trial court issued Findings and Judgment Entry adopting the Magistrate's Decision and overruling Mr. Nelson's Objections.

Mr. Nelson timely appealed to the Ninth District Court of Appeals. The appellate court affirmed the trial court decision by Decision and Journal Entry filed on December 5, 2011. Mr. Nelson filed an Application for Reconsideration based on the appellate court's indication that it had not received the exhibits entered at the trial court hearings. The appellate court granted leave for the exhibits to be entered, and then reviewed the exhibits. After review, the court of appeals denied Mr. Nelson's Application for Reconsideration.

The court of appeals erred in affirming the trial court's determination of Mr. Nelson's income for the years 2007, 2008 and 2009; erred in affirming the modified amount of Mr. Nelson's spousal support obligation; and erred in affirming the finding of contempt against Mr. Nelson.

In support of his position on these issues, Mr. Nelson presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. I:** A spousal support obligation is to be based, *inter alia*, on the parties' incomes.

R.C. §3105.18(C)(1)(a) indicates that in determining a spousal support obligation, a trial court is to consider (among other factors) "[t]he income of the parties, from all sources ..."

The court of appeals affirmed the trial court's finding that Mr. Nelson's 2009 income was \$90,564.00. This figure was arrived at by the trial court multiplying Mr. Nelson's monthly expenses (\$7,547.00) by 12, based on the fact that Mr. Nelson testified that his monthly expenses were current at that time, but only because he borrowed the funds to pay them.

Mr. Nelson testified that at the time of the hearing before the trial court, he had personal debt totaling \$681,445.00 and that his business entity owed total debt of over \$1,000,000.00 and operated at a loss.

A party can receive income from a variety of sources, but certainly borrowed money cannot be included as income. Income from wages, interest, dividends, etc., belongs to the party who receives it. Borrowed funds must be repaid.

In addition, the court of appeals found that the trial court used incorrect figures in determining Mr. Nelson's income for 2007 and 2008, yet still affirmed the trial court decision.

This Court has previously held that a trial court is to consider all of the factors set forth in R.C. §3105.18(C)(1) in fashioning an equitable spousal support award. Kaechele v. Kaechele, 35 Ohio St.3d 93, 95-96 (Ohio 1988). If a trial court uses incorrect and/or arbitrary income figures in making an award, an equitable result is impossible.

**Proposition of Law No. II:** A spousal support award is to be reasonable and appropriate, and it is error for a spousal support award to be based on a mathematical formula.

In Kaechele, this Court held that R.C. §3105.18 does not require that spousal support provide the parties with either "an equal standard of living or a standard of living equivalent to that established during the marriage". Id. at 95-96. The goal of spousal support is to reach an equitable result, and the method of achieving that goal "cannot be reduced to a mathematical formula". Id.

In Kunkle v. Kunkle, 51 Ohio St.3d 64, syllabus, 71 (Ohio 1990), this Court held that spousal support must be based on the payee's need, should be reasonable and should not be based on a fixed percentage of the payor's income.

After calculating a three-year average income (using each party's income for 2007, 2008 and 2009) for each party (although based on incorrect amounts for Mr. Nelson), the trial court

found that the original spousal support order gave Ms. Nelson "50.8% of the after tax cash". The trial court then modified the amount of spousal support to \$2,175.00 per month based on a "FinPlan" calculation.

A review the FinPlan calculation indicates that the modified spousal support award of \$2,175.00 per month (\$26,100.00 per year) gives to Ms. Nelson 50.6% of the after-tax cash available to the parties. Other than referring to this FinPlan exhibit, the trial court offered no other explanation of how it arrived at the modified support amount. Ms. Nelson testified that her monthly expenses totaled \$1,800.00, and that she had funds in excess of her monthly expenses which she used to pay expenses for her adult children and her grandchildren.

In establishing the modified amount of spousal support, the trial court merely performed a mathematical calculation in order to arrive at \$2,175.00 per month. There is no other explanation offered by the trial court for the spousal support amount. The court of appeals found that the trial court did review the factors as set forth in §3105.18(C)(1), and affirmed the modified award.

The method used by the trial court to establish the amount of spousal support is in direct conflict with Ohio case law. Moreover, the spousal support award is not based on Ms. Nelson's need and is unreasonable and arbitrary.

**Proposition of Law No. III:** A support obligor can only be found in contempt if he has the power to perform the obligation.

"Contempt can only occur where the contemnor has the power to perform the act listed in the court order but fails to do so." Wilson v. Columbia Cas. Co. (1928), 118 Ohio St. 319, 328-329. The inability to pay an order is a valid defense in a contempt proceeding. Courtney v. Courtney (1984), 16 Ohio App.3d 329, 334.

Mr. Nelson paid his spousal support obligation through August, 2008. The uncontroverted evidence presented at the trial court hearings showed that Mr. Nelson had no ability to pay his obligation after that time. His only income in 2009 (through the second hearing date) was approximately \$17,000.00 in unemployment benefits.

All of Mr. Nelson's assets, including his residence, auto and business entities, were encumbered by debts in excess of the asset value - he could not sell any of his assets in order to pay his support obligation.

Despite the uncontroverted evidence of Mr. Nelson's income and unemployment in 2008-2009, the court of appeals affirmed the contempt finding against him. Ohio law provides a defense to contempt in such circumstances. The court of appeals failed to apply the law correctly.

CONCLUSION

For all of the reasons set forth herein, this case involves matters of public and great general interest. The Appellant respectfully requests that this Court accept jurisdiction in this case so that these issues may be reviewed on the merits.

Respectfully submitted,

  
DAVID H. FERGUSON

COUNSEL FOR APPELLANT, RONALD L.  
NELSON

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been sent by regular U.S. mail to Steve C. Bailey, Attorney for Appellee, Suite 202, 60 Public Square, Medina, Ohio 44256, this 5th day of June, 2012.

  
DAVID H. FERGUSON

COUNSEL FOR APPELLANT, RONALD L.  
NELSON

**A P P E N D I X**

COURT OF APPEALS

STATE OF OHIO )  
 )ss:  
COUNTY OF MEDINA )

12 APR 25 AM 10:30

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

FILED  
DAVID B. WADSWORTH  
MEDINA COUNTY  
CLERK OF COURTS

PATRICIA NELSON

C.A. No. 10CA0115-M

Appellee

v.

RONALD NELSON

Appellant

JOURNAL ENTRY

Appellant has moved this Court to reconsider its December 5, 2011 decision, affirming a judgment that modified his spousal support obligation and found him in contempt. Appellee has not responded to the application for reconsideration.

In determining whether to grant an application for reconsideration, a court of appeals must review the application to see if it calls to the attention of the court an obvious error in its decision or if it raises issues not considered properly by the court. *Garfield Hts. City School Dist. v. State Bd. of Edn.*, 85 Ohio App.3d 117 (10th Dist.1992). Appellant argues that we should reconsider our decision because we decided the appeal without the benefit of the exhibits. *See Nelson v. Nelson*, 9th Dist. No. 10CA0115-M, 2011-Ohio-6200, ¶ 13-18 (presuming regularity with regard to Appellant's income level for the three years in dispute). According to Appellant, he was unaware that the appellate record did not include the exhibits until this Court issued the decision in this matter. Appellant, therefore, requests that this Court grant his application for reconsideration so as to decide this entire matter on the merits.

After receiving Appellant's application for reconsideration, this Court's magistrate ordered Appellant to cause the exhibits to be filed with the clerk of the appellate court.

Appellant complied with the order and caused the exhibits to be filed. Accordingly, this Court now has before it and has reviewed all the exhibits missing from the appellate record at the time it determined this appeal.

In reviewing the direct appeal in this matter, this Court presumed regularity with regard to the lower court's determination of Appellant's income levels for 2007, 2008, and 2009 due to the fact that the exhibits were missing. *Nelson* at ¶ 12-18. The trial court adopted the magistrate's determination that Appellant's income levels were as follows: (1) \$110,415 for 2007; (2) \$87,774 for 2008; and (3) \$90,564 for 2009. Appellant argued his actual income levels for those years were: (1) \$106,521 for 2007; (2) \$80,702 for 2008; and (3) \$17,000 for 2009. In considering Appellant's application for reconsideration, this Court has reviewed Appellant's W-2 for 2007 and 1040 Tax Return for 2008, both of which are exhibits that are now in this Court's possession. Appellant's 2007 W-2 lists his gross wages as \$106,521, and his 1040 Tax Return for 2008 lists his wages as \$81,902. For the most part then, the figures from the foregoing exhibits are consistent with the figures Appellant alleged in his brief on appeal.

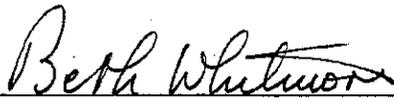
As for 2009, the trial court agreed with the magistrate's decision to annualize Appellant's monthly expenditures to compute his income and arrived at an income level of \$90,564. Appellant argued that he only received unemployment income in 2009 because he was unemployed and all his assets were currently valueless. On appeal, this Court ultimately refused to make assumptions about Appellant's 2009 income level due to the fact that, in the absence of exhibits, we did not have a complete picture of Appellant's financials. *Nelson* at ¶ 18.

The exhibits upon which Appellant relied in support of his 2009 income level are not particularly helpful. The three exhibits he provided only list Appellant's personal debt,

business debt, and monthly expenditures and are all self-created documents, unsupported by any further documentation. Appellant's 2008 tax return for his car wash does list an ordinary business income of a negative value, but other than his own testimony, Appellant did not offer any proof that his rental properties were operating at a loss. Further, as the trial court noted, Appellant clearly managed to remain current with all of his own monthly expenses with the one notable exception of his spousal support payment. Appellant has not, therefore, demonstrated that this Court made an "obvious error" when it upheld the trial court's determination that Appellant's income level for 2009 was \$90,564. *Garfield Hts. City School Dist.*, 85 Ohio App.3d at 127.

The trial court here averaged Appellant's three income amounts to arrive at an average income level of \$96,251. *Nelson*, 2011-Ohio-6200, at ¶ 12. If this Court were to instead average the following income levels: (1) \$106,251 for 2007 (the amount from Appellant's 2007 W-2); (2) \$81,902 for 2008 (the wages listed on Appellant's 1040 Tax Return); and (3) \$90,564 for 2009, Appellant's average income level would be \$92,905.67. The difference between that amount and the amount the trial court used, therefore, is only a difference of \$3,345.33 per year. Furthermore, the trial court heavily relied on the other factors set forth in R.C. 3105.18(C)(1) in determining the reasonableness of Appellant's spousal support obligation. In particular, the court relied upon Appellant's relative earning ability in comparison to Appellee's, the stark difference in the parties' relative assets and liabilities, their different standards of living, and other relevant factors, including Appellant's failure to produce supporting documentation to establish his income, assets, and liabilities. *Nelson* at ¶ 19-25. Now having the benefit of having reviewed the exhibits, this Court cannot say that the application for reconsideration in this case calls attention to an obvious error.

Based on the foregoing analysis, the application is denied.

  
\_\_\_\_\_  
Judge

Concur:  
Belfance, P.J.  
Carr, J.



further indicated that the trial court would retain jurisdiction over the amount, but not the duration of, spousal support for purposes of future modification.

{¶3} Husband was a pilot for U.S. Airways when he and Wife divorced. In the years following the journalization of the divorce decree, U.S. Airways experienced numerous financial difficulties. Husband, anticipating a decrease in income, voluntarily took an extended leave of absence from the airline to pursue an offer to pilot for a company in Bahrain. The offer ultimately fell through and left Husband unemployed as a pilot, as he could not obtain employment elsewhere and did not have the option to return to U.S. Airways until a three-year period expired. Husband incurred a sizeable debt and ultimately stopped making his spousal support payments.

{¶4} On March 3, 2008, Husband filed a motion for modification, seeking to lower his support obligation. Wife filed a motion to show cause, asking the court to hold Husband in contempt based on his failure to pay his support obligation. A magistrate held hearings in May and August 2009 and issued her decision on December 16, 2009. The magistrate determined that a downward modification of spousal support was warranted and decreased Husband's monthly obligation to \$2,175, but required him to pay \$125 per month toward arrearages. The magistrate also found Husband in contempt, but indicated that he could purge the contempt by paying his support obligation and the arrearages.

{¶5} Husband filed objections to the magistrate's decision, and the trial court held a hearing on the objections. On October 7, 2010, the trial court issued a judgment entry, overruling Husband's objections and adopting the magistrate's decision to reduce Husband's support obligation and find him in contempt.

{¶6} Husband now appeals from the trial court's judgment and raises five assignments of error for our review. For ease of analysis, we consolidate several of the assignments of error.

## II

### Assignment of Error Number One

"THE TRIAL COURT ERRED IN DETERMINING APPELLANT'S 2007, 2008 AND 2009 INCOMES."

### Assignment of Error Number Two

"THE TRIAL COURT ERRED IN ITS MODIFICATION OF APPELLANT'S SPOUSAL SUPPORT OBLIGATION."

{¶7} In his first assignment of error, Husband argues that the trial court improperly calculated his annual income for 2007, 2008, and 2009. In his second assignment of error, Husband argues that the trial court abused its discretion in modifying Husband's spousal support obligation to the extent that the court did not further lower the amount of the award. We disagree with both propositions.

{¶8} This Court generally reviews a trial court's action with respect to a magistrate's decision for an abuse of discretion. *Fields v. Cloyd*, 9th Dist. No. 24150, 2008-Ohio-5232, at ¶9. "In so doing, we consider the trial court's action with reference to the nature of the underlying matter." *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18. This Court reviews a trial court's ultimate award of spousal support under an abuse of discretion standard. *Brubaker v. Brubaker*, 9th Dist. No. 22821, 2006-Ohio-1035, at ¶7. An abuse of discretion means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. In awarding spousal support, however, a trial court also must make factual determinations as to the income level of each spouse. *Bucalo v. Bucalo*, 9th Dist. No. 05CA0011-M, 2005-Ohio-6319, at ¶44. See, also, *Zemla v. Zemla*, 9th

Dist. No. 09CA0019, 2010-Ohio-3938, at ¶7-8; *Kent v. Kent*, 9th Dist. No. 25231, 2010-Ohio-6457, at ¶9-15. “Such determinations are findings of fact, and this Court will not reverse the trial court’s findings of fact if the findings are supported by some competent, credible evidence in the record.” *Bucalo* at ¶44.

“A trial court lacks jurisdiction to modify a prior order of spousal support unless the decree of the court expressly reserved jurisdiction to make the modification and unless the court finds (1) that a substantial change in circumstances has occurred and (2) that the change was not contemplated at the time of the original decree.” *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, at paragraph two of the syllabus.

If jurisdiction exists, a court then must determine whether modification is warranted by considering the factors set forth in R.C. 3105.18(C). *Tufts v. Tufts*, 9th Dist. No. 24871, 2010-Ohio-641, at ¶8.

{¶9} R.C. 3105.18(C)(1) provides, in relevant part, as follows:

“In determining whether spousal support is appropriate and reasonable, \*\*\* the court shall consider all of the following factors:

- “(a) The income of the parties, from all sources \*\*\*;
- “(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 education of the parties;
- “(i) The relative assets and liabilities of the parties \*\*\*;
- “(j) The contribution of each party to the education, training, or earning ability 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.

“The burden of showing that a reduction of spousal support is warranted is on the party who seeks the reduction.” *Harvey v. Harvey*, 9th Dist. Nos. 09CA0052 & 09CA0054, 2010-Ohio-4170, at ¶10, quoting *Reveal v. Reveal*, 154 Ohio App.3d 758, 2003-Ohio-5335, at ¶14.

{¶10} The trial court here expressly reserved jurisdiction to modify the amount of the spousal support that it awarded Wife at the time of the divorce. Further, the record reflects that a substantial change in circumstances occurred, as Wife’s spousal support award was calculated based on Husband and Wife receiving annual salaries of approximately \$120,132 and \$25,000, respectively. Both Husband and Wife experienced a large shift in their income levels due to changes in their respective employments, and both agree that a substantial change in circumstances occurred. See R.C. 3105.18(F) (noting that a change of circumstances includes “any increase or involuntary decrease in the party’s wages [or] salary”). Because the record supports that conclusion, the remaining issue is whether the downward modification the court ordered was reasonable and appropriate. See R.C. 3105.18(C)(1).

{¶11} Although the magistrate expressly set forth her findings on all the factors contained in R.C. 3105.18(C)(1), Husband only challenges four of the factors. Specifically, he argues that the following four factors support a more significant downward modification than the court ordered: (1) the income of the parties; (2) the relative earning abilities of the parties; (3) the

relative assets and liabilities of the parties; and (4) the standard of living during the marriage. We discuss the foregoing factors below.

### **Income of the Parties**

{¶12} The magistrate determined that Husband's annual income was as follows: (1) \$110,415 for 2007; (2) \$87,774 for 2008; and (3) \$90,564 for 2009. The trial court adopted the income figures, as determined by the magistrate. The three figures then were averaged to produce an annual income level of \$96,251 for Husband. Husband does not take issue with the court's decision to average his income figures for the three years, but argues that the evidence does not support the individual figures.

{¶13} As to the figures for 2007 and 2008, Husband argues that his testimony and the exhibits introduced at the hearing before the magistrate establish that his annual income was actually \$106,521 in 2007 and \$80,702 in 2008. The record reflects that multiple exhibits were introduced and admitted at the hearing. The exhibits included Husband's tax returns and W-2s, as well as the tax returns for the entities he owned. The magistrate cited several of the exhibits in her written decision. Moreover, the trial court stated in its judgment entry that "[t]he Magistrate obtained the income figures for [] Husband from tax documents and testimony." The exhibits, however, are not a part of the record that was filed with this Court on appeal. Although the transcripts from the hearings before the magistrate and the trial court were part of the appellate file that this Court received, none of the exhibits were included.

{¶14} "An appellant is responsible for providing this Court with a record of the facts, testimony, and evidentiary matters necessary to support the assignments of error." *Boston Twp. Bd. of Trustees v. Marks Akron Medina Trucks & Parts, Inc.*, 9th Dist. No. 24880, 2011-Ohio-4223, at ¶11, citing *Volodkevich v. Volodkevich* (1989), 48 Ohio App.3d 313, 314. Specifically,

the record must contain papers and exhibits that were filed in the trial court. App.R. 9(A). In the absence of evidence that is necessary to resolve an assignment of error, “the reviewing court has ‘no choice but to presume the validity of the [trial] court’s proceedings, and affirm.’” *Cuyahoga Falls v. James*, 9th Dist. No. 21119, 2003-Ohio-531, at ¶9, quoting *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶15} As the appellant, it was Husband’s duty to ensure that the record on appeal was complete. *Boston Twp. Bd. of Trustees* at ¶11. Because Husband’s argument with regard to his income levels for 2007 and 2008 depends upon evidence that is absent from the record before this Court, we must presume regularity and conclude that there was no error in the determination of those figures. *Knapp*, 61 Ohio St.2d at 199. Husband’s argument that his 2007 and 2008 annual income figures are incorrect is overruled.

{¶16} With regard to Husband’s 2009 annual income, the record reflects that the magistrate calculated that figure by annualizing Husband’s monthly expenditures. Husband testified that he did not receive any income in 2009 other than unemployment. He further testified, however, that his monthly debts amounted to \$7,547 per month and that, at the time of the hearing, he had been able to pay those debts on time and in full through credit cards, loans, and lines of credit. Because Husband stated that he did not have any income for 2009, the magistrate relied upon Husband’s testimony that he was spending \$7,547 per month to calculate his income level for the year.

{¶17} R.C. 3105.18(C)(1)(a) directs that, in making a spousal support determination, a court must consider the “income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed[.]” “R.C. 3105.18(C) does not limit the sources from which income may be derived or the characteristics of income that may be

considered for purposes of determining an appropriate award of spousal support.” *Karis v. Karis*, 9th Dist. No. 23804, 2007-Ohio-759, at ¶11. The magistrate heard testimony that Husband sold a car wash in Medina in 2006 for 1.95 million dollars, on which he largely avoided tax repercussions by using the money in a like-kind exchange to purchase another car wash and a large rental property in Florida. Husband acknowledged at the hearing that he owned the car wash; the Florida rental property, which he purchased for \$533,000; a home worth between \$500,000 and \$525,000; a time-share in Aruba; and three vehicles: a Lexus, BMW, and Infiniti. Husband’s accountant also testified that, at the time of the hearing, Husband had a credit rating of 774; a low risk rating. He insisted, however, that he did not have any income except for unemployment and had borrowed significant amounts of money in an attempt to stay current on his expenses.

{¶18} Husband asserts that the magistrate and trial court erred by determining that his annual income for 2009 would be \$90,564.<sup>2</sup> He argues that he was using borrowed money to pay all of his debts and that borrowed money is not income because it must be repaid. The magistrate, however, simply relied upon Husband’s testimony that he had been able to afford \$7,547 per month to assign a numerical value and to estimate his income level for purposes of calculating his support payment. See, generally, *Ruiz-Bueno v. Ruiz-Bueno*, 11th Dist. No. 2207-L-180, 2008-Ohio-3747, at ¶45. There was testimony that Husband owned multiple pieces of property, including a car wash and rental property. The foregoing could be considered sources of income for purposes of R.C. 3105.18(C). See *Karis* at ¶11-13 (concluding that the husband’s

---

<sup>2</sup> The 2009 figure represented a projected income for 2009, as the hearings took place in May and August of that year.

capital gains, obtained from selling properties and renting others, could be considered income for purposes of spousal support). See, also, *Demchak v. Demchak*, 9th Dist. No. 09CA0076-M, 2010-Ohio-3798, at ¶6-12 (rejecting the husband's argument that pass-through income from his corporation could not be considered in calculating income for purposes of spousal support). In the absence of any exhibits, this Court has an incomplete picture of Husband's financials for years in question and cannot make assumptions as to what the record showed as to the income from Husband's properties. Unlike this Court, the lower court had the benefit of all of the evidence produced and admitted at the modification hearing.

### **Relative Earning Ability**

{¶19} Wife never had a professional career and primarily raised the couple's two children during the marriage while Husband worked for U.S. Airways. The parties stipulated that Wife earned approximately \$47,300 annually in a sales position that she obtained after the divorce. Husband enjoyed a salary in excess of \$100,000 as a pilot until he left U.S. Airways. Husband testified that after he lost the job offer, he was able to pilot a few corporate flights for another entity in 2008, but had not been able to find any long-term employment as a pilot. Further, Husband did not yet have the option to return to U.S. Airways. Although Husband retained his seniority when he took an extended leave and had the option to return to the airline in the future, he could not yet do so at the time of the hearing because other pilots were furloughed and he had to remain on leave for at least three years.

{¶20} Husband argues that he diligently sought employment after losing the job offer in Bahrain, but that he was unable to secure another job because of the state of the economy and the discovery of a medical condition he possessed. Husband testified that he applied for a pilot position in China, but also lost that offer after blood testing revealed that he was pre-diabetic.

Husband testified that a diabetic condition could prevent him from piloting. He admitted, however, that he was not yet diabetic and could retain his first-class medical certificate so long as he could keep the condition under control. He also did not present any evidence, other than his own testimony, as to any jobs that he had applied for and had not been offered. See *Harvey* at ¶10. Moreover, Husband had the option of returning to U.S. Airways after his leave period expired and owned and operated a car wash and rental property. There was no evidence that Wife was capable of earning anywhere near the income that Husband was capable of earning, and had earned in the past, as a pilot and businessman. See *Collins v. Collins*, 9th Dist. No. 10CA0004, 2011-Ohio-2087, at ¶18-20 (discussing relative earning ability and noting that R.C. 3105.18(C)(1)(b) allows a court “to juxtapose one spouse’s earning ability against the other spouse’s earning ability”).

#### **Relative Assets and Liabilities**

{¶21} At the time of the hearing, both Husband and Wife had financial difficulties. Husband lost his U.S. Airways retirement after the company experienced a bankruptcy, and Wife borrowed against her 401(k) and sold several personal items to meet her living expenses after Husband stopped paying his support obligation. Husband testified that he had a significant amount of business and personal debt, including a mortgage and additional line of credit debt amounting to \$643,000. Even so, Husband admitted that he still had a low-risk credit rating and had remained current on his monthly expenses, with the exception of spousal support. Husband also admitted that he owned a home worth between \$500,000 and \$525,000; a Florida rental property that he purchased for \$533,000; a car wash that he purchased for over one million dollars; a time-share in Aruba; and three vehicles: a Lexus, BMW, and Infiniti. Although Husband’s home was encumbered by a mortgage and line of credit, he testified that he owned the

Florida property outright. Husband indicated that he did not want to sell the property, in part, because he had procured it through a like-kind exchange and would incur significant tax repercussions as a result of the sale. Wife, on the other hand, testified that her home had been foreclosed upon because she had been unable to pay the mortgage without Husband's support payments and that she did not own her own vehicle.

{¶22} Husband argues that the lower court gave little weight to the fact that his assets were encumbered by debt and disregarded Wife's testimony that she had sometimes financially helped her children because she had money in excess of her expenses. As noted above, however, not all of Husband's assets were encumbered by debt. And while Wife testified that she had been able to help her children at some points in 2008, there also was testimony that she had lost her home to foreclosure and sold several personal possessions to try to offset her dwindling support payments.

#### **Standard of Living and Other Relevant Factors**

{¶23} There was no specific testimony at the hearings before the magistrate as to the standard of living that the parties enjoyed during the marriage. The magistrate determined, based on Husband's salary level of approximately \$120,000 per year, that the parties "would have enjoyed a fairly high standard of living" during the marriage. The magistrate further noted that Wife had since "settle[d] for a much lower standard" than Husband. Husband argues that there was no evidence to support either finding, particularly in light of Wife's testimony that she sometimes had been able to help her children when she had funds in excess of her expenses. He has not explained, however, why the magistrate could not infer that Wife enjoyed a higher standard of living while married to Husband, given his substantial salary at the time and the fact

that, since that time, she had experience a foreclosure and other financial difficulties. See App.R. 16(A)(7).

{¶24} Husband and Wife were married for almost twenty-six years. After the divorce, Husband voluntarily decided to take an extended leave from U.S. Airways to pursue another job opportunity. Husband spent approximately \$34,000 of his own money to train for the new job in Bahrain, despite already being in arrears on his spousal support payments at that point in time. He also was able to remain current on all of his monthly bills with the exception of spousal support. Husband informed U.S. Airways of his decision to leave in June 2008, but did not inform Wife that he had left his job until after receiving his last paycheck from the airline. He then stopped making his spousal support payments in August 2008 and informed Wife that he would not be making any additional payments until he obtained other employment. In considering other relevant factors under R.C. 3105.18(C)(1)(n), the magistrate noted that Husband did not produce any supporting documentation for the income levels he reported and that she did not believe Husband's testimony that he had no income, given his ability to remain current on his sizeable monthly expenses. Thus, while the lower court agreed that a spousal support modification was appropriate given the position of the parties, the court determined that Husband should still pay Wife \$2,175 per month, in addition to arrearages; a reduction of \$825 per month from Husband's previous support obligation.

{¶25} Other than criticizing the lower court for using a FinPlan calculation to aid in calculating Husband's new support obligation, Husband fails to offer an argument or justification for further reducing the amount of the obligation. The lower court considered all the factors under R.C. 3105.18(C)(1) and determined, in its discretion, that lowering Husband's support obligation to \$2,175 per month was reasonable and appropriate under the circumstances.

*Brubaker* at ¶7. Based on our review of the record, we cannot conclude that the trial court abused its discretion by adopting the magistrate's decision and reducing Husband's obligation to the above-stated amount. Husband's first and second assignments of error are overruled.

Assignment of Error Number Three

“THE TRIAL COURT ERRED BY EXTENDING THE TERM OF THE APPELLANT’S SPOUSAL SUPPORT OBLIGATION IN VIOLATION OF R.C. §3105.18(E)(1) AND THE SPECIFIC TERMS OF THE JUDGMENT ENTRY OF DIVORCE FILED IN THIS MATTER.”

{¶26} In his third assignment of error, Husband argues that the court erred because it extended the term of his spousal support obligation. Specifically, he argues that the court's modification order is unclear as to the duration of his support obligation. We disagree.

{¶27} The trial court's modification order reads, in relevant part, as follows:

“Effective January 1, 2008 [Husband] shall pay spousal support in the amount of \$2,175 per month plus 2% processing charge through the Medina County Child Support Enforcement Agency. This spousal support amount shall be paid for the balance of the original term, until the earlier occurrence of Husband's death, Wife's death, Wife's remarriage, Wife[’s] cohabitation with an adult male not related by marriage; or the completion of the term of one hundred twenty (120) consecutive months, provided, however, that Husband makes each consecutive monthly payment as required herein.”

Husband argues that the language the court employed could be read to order 120 months of spousal support from January 1, 2008 instead of from the date provided in the original decree. He objected to the magistrate's decision, which employed similar language, on the same basis. The trial court rejected Husband's argument that his spousal support term had been extended. Further, the court noted that an increase in the duration of Husband's obligation was not even an option as the court had not expressly reserved jurisdiction to modify its duration. See *Mandelbaum* at paragraph two of the syllabus.

{¶28} We agree that the foregoing language does not impose a longer term of spousal support upon Husband. The plain language of the order specifies that, absent some event causing an earlier termination of support, the support amount shall be paid “*for the balance of the original term*, until \*\*\* the completion of the term of one hundred (120) consecutive months[.]” (Emphasis added.) That language would be nonsensical if the court meant for Husband to pay support beyond the balance of the original term. Husband’s third assignment of error is overruled.

Assignment of Error Number Four

“THE TRIAL COURT ERRED BY FINDING THE APPELLANT IN CONTEMPT.”

{¶29} In his fourth assignment of error, Husband argues that the trial court abused its discretion by finding him in contempt based on his failure to pay his support obligation. We disagree.

{¶30} “A court’s decision in a contempt proceeding should not be reversed absent an abuse of discretion.” *Young v. Young*, 9th Dist. No. 25640, 2011-Ohio-4489, at ¶17. “Contempt of court may be defined as disobedience of a court order or conduct that brings the administration of justice into disrespect or impedes a court’s ability to perform its functions.” *Freeman v. Freeman*, 9th Dist. No. 07CA0036, 2007-Ohio-6400, at ¶45, quoting *Willis & Linnen Co., L.P.A. v. Linnen*, 9th Dist. No. 22452, 2005-Ohio-4934, at ¶17. “A prima facie case of contempt is established where the divorce decree is before the court along with proof of the contemnor’s failure to comply therewith.” *Riley v. Riley*, 9th Dist. No. 22777, 2006-Ohio-656, at ¶25, quoting *Robinson v. Robinson* (Mar. 31, 1994), 6th Dist. No. 93WD053, at \*3.

{¶31} Husband concedes that he stopped paying Wife spousal support in August 2008 and owed arrearages to Wife. The trial court held Husband in contempt for his failure to pay his

support obligation, but further held that he could purge the contempt by paying his monthly obligation in the reduced amount of \$2,175 per month, plus an additional amount of \$125 per month toward his arrearages. Husband argues that the lower court abused its discretion by holding him in contempt because a litigant's good faith inability to pay money in accordance with a court order is a valid defense to contempt. See *Courtney v. Courtney* (1984), 16 Ohio App.3d 329, 334.

{¶32} Here, the magistrate and trial court rejected Husband's argument that he had a good faith inability to pay his spousal support obligations. Husband testified that, although he was overdue on his spousal support payments to Wife at the time, he spent approximately \$34,000 of his own money to train for a job offer in Bahrain. He also admitted that, while he had altogether stopped paying spousal support, he had been able to remain current on all of his own monthly expenses, which totaled approximately \$7,547 a month. Husband did not make any attempt to pay even a portion of his support obligation. Indeed, Husband informed Wife that he would not be paying support at all until he obtained another job. The lower court determined that Husband chose to pay all of his own expenses rather than his court-ordered obligation. Based on the record before us, we cannot conclude that the court's determination amounted to an abuse of discretion. Husband's fourth assignment of error is overruled.

#### Assignment of Error Number Five

**"THE TRIAL COURT ABUSED ITS DISCRETION BY MAKING FACTUAL FINDINGS AND LEGAL CONCLUSIONS ARBITRARILY AND CAPRICIOUSLY."**

{¶33} In his fifth assignment of error, Husband argues that the trial court erred in several of its factual determinations, which then affected the legal conclusions that trial court reached.

{¶34} Husband challenges several of the specific factual findings that the magistrate reached and the trial court adopted. The record reflects, however, that Husband did not specifically object to any of the magistrate's factual findings in his written objections to the magistrate's decision. Civ.R. 53 provides that, except for a claim of plain error, a party shall not assign error to a factual finding on appeal unless the party specifically objects to that finding in accordance with the rule. Civ.R. 53(D)(3)(b)(iv). By failing to object with particularity to the factual findings that Husband now challenges, Husband forfeited his argument. *Id.* Moreover, he has not argued plain error on appeal. Because Husband forfeited his challenge to the factual findings at issue and has not argued plain error, this Court will not address his arguments. *Young v. Young*, 9th Dist. No. 25640, 2011-Ohio-4489, at ¶18.

{¶35} Husband's fifth assignment of error also includes a brief argument that he was wrongfully required to appear pro se at the May hearing before the magistrate because his counsel unexpectedly withdrew and the magistrate refused to continue the hearing. Once again, however, Husband did not enter any objection to the magistrate's decision on this basis or argue plain error on appeal. Thus, we also do not reach any argument that he was wrongfully denied a continuance. *Id.* Husband's fifth assignment of error is overruled.

### III

{¶36} Husband's assignments of error are overruled. The judgment of the Medina County Court of Common Pleas, Domestic Relations Division, is affirmed.

Judgment affirmed.

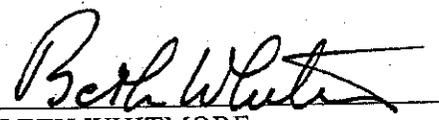
---

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 Medina, 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.

  
BETH WHITMORE  
FOR THE COURT

BELFANCE, P. J.  
CARR, J.  
CONCUR

APPEARANCES:

DAVID H. FERGUSON, Attorney at Law, for Appellant.

STEVE C. BAILEY, Attorney at Law, for Appellee.

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

FILED  
KATHY FORTNEY  
MEDINA COUNTY  
CLERK OF COURTS

PATRICIA NELSON,	)	CASE NO. 01DR0714
	)	
Plaintiff,	)	
	)	JUDGE MARY R. KOVACK
vs.	)	
	)	
RONALD NELSON,	)	FINDINGS AND
	)	JUDGMENT ENTRY
Defendant.	)	
	)	

This matter came on for hearing on March 23, 2010 before Judge Mary R. Kovack on Mr. Nelson's objections to a Magistrate's Decision issued on December 16, 2009. Ms. Nelson was represented by Attorney Steve Bailey and Mr. Nelson appeared and was represented by Attorney David Ferguson.

In her decision, the Magistrate modified Mr. Nelson's spousal support obligation based upon substantial changes in both parties' incomes. Upon consideration of R.C. 3105.18 factors, the Magistrate reduced Mr. Nelson's spousal support obligation to \$2,175 per month plus 2% processing charge effective January 1, 2008 for the remainder of the original spousal support term.

The Magistrate also found Mr. Nelson did not pay spousal support since the end of August 2008, though he was able, and found him in contempt of the Court's spousal support order. For his contempt, she recommended a fifteen day jail term with no

fine. To purge the contempt, the Magistrate set forth the following requirements for a period of four months: 1) pay the spousal support in the amount of \$2,175 per month plus 2% processing charge; and 2) pay an additional \$125 per month plus 2% processing charge toward his arrearages. The Magistrate also awarded Ms. Nelson attorney fees in the amount of \$1,230 with interest accruing at the statutory rate if not paid within sixty days of the date of the judgment entry.

Mr. Nelson now raises six written objections to the Magistrate's Decision.

1. THE MAGISTRATE ERRED BY FAILING TO PROPERLY DETERMINE THE DEFENDANT'S INCOME.

The Magistrate found Defendant's testimony lacked credibility inasmuch as he claimed to timely pay monthly expenses of \$7,547 (\$90,564 per year) with no income. She calculated his income for spousal support by averaging his income from 2007, 2008 and 2009 (\$110,415, \$87,774 and \$90,564).

The Magistrate similarly averaged Ms. Nelson's income from the same three years (\$41,486, \$54,836 and \$45,592).

The Magistrate obtained the income figures for the Husband from tax documents and testimony.

It is well settled a court can average three years of income for the calculation of spousal support. See e.g., *Bils v. Bils*, 2009 Ohio 6679, P. 5; *Meyer v. Meyer*, 2005 Ohio 6249. P. 5; *Carroll v. Carroll*, 204 Ohio 6710, P. 24; and *Emmer v. Aronson* (August 19, 1998), Summit App. No. CA18675, unreported at 9 - 10.

The Court also notes R.C. 3105.18(C)(1) permits a court to consider a party's earning potential as well as what the party could earn if he or she tried to work to potential. *Carroll v. Carroll*, 2004 Ohio 6710, P. 22-25.

In the instant case, the evidence introduced by Mr. Nelson established he was not furloughed from U.S. Airways, but took a voluntary leave to seek what he thought would be a more lucrative employment. (Tr. 16-17)

This objection is not well taken and is overruled

2. THE MAGISTRATE ERRED BY FAILING TO CONSIDER DEFENDANT'S DEBT.

In contravention to Mr. Nelson's assertion, at pages 2-3 of her Decision, the Magistrate found he had monthly expenses of \$7,547, which he timely pays, and he has a credit score of 774. At page 4 of her Decision, the Magistrate also noted Mr. Nelson claims business debt in the amount of \$1,012,530. She also noted his assets: a home valued at more than \$500,000, an Aruba timeshare, a \$500,000 rental property in Naples, Florida, a car wash valued at \$1,500,000, a Lexus, BMW and an Infinity.

A review of the transcripts of the proceedings before the Magistrate reveals Mr. Nelson resides in an extravagant home, drives expensive cars and has significant debt to maintain his high standard of living. The evidence also shows he can timely pay the debt and maintains a very high credit rating. The Magistrate clearly considered Mr. Nelson's debt and concluded he chose to maintain his business ventures and high standard of living over his court ordered spousal support obligation.

This objection is overruled.

3. THE MAGISTRATE ERRED BY FAILING TO PROPERLY DETERMINE THE DEFENDANT'S ABILITY TO PAY SPOUSAL SUPPORT.

The Magistrate considered Defendant's ability to pay spousal support. In her decision, she thoroughly explained Defendant's employment situation and the voluntariness of it. She likewise explored Defendant's business interests and enterprises. She expressed skepticism regarding Defendant's claims he has no income because of evidence presented that shows he is able to timely pay \$7,547 in monthly expenses and maintain a high credit score of 774. Review of the transcript shows Mr. Nelson took a voluntary leave of absence from his employment. (Tr. 16-17). In the relevant time period, he also expended \$33,340 for training that he could have used to pay spousal support, but chose not to. (Tr. 28-29, 53).

The Magistrate correctly found Mr. Nelson able to pay spousal support. This objection is not well taken.

4. THE MAGISTRATE ERRED IN FINDING THE DEFENDANT IN CONTEMPT WHEN HE CLEARLY DID NOT HAVE THE ABILITY TO PAY THE PRIOR SPOUSAL SUPPORT AWARD.

A review of the transcript reveals that Mr. Nelson voluntarily decided to leave his U.S. Airways position on June 25, 2008, effective September 1, 2008. He acknowledged that he waited until he received his last U.S. Airways paycheck and well after he knew he did not have another job lined up to inform Ms. Nelson of his change of circumstances and, in writing, declared

he would cease paying spousal support until he secured another job. (Tr. 48).

Mr. Nelson spent nearly \$34,000 on training and claims that while his purported medical condition (of which there is no evidence other than his self-serving testimony) would prohibit him from flying commercial airplanes in China, the FAA has no such restrictions in the United States. The Court also notes that the unrefuted testimony shows Defendant made no payments after August 2008, not that he simply could not pay the full amount of spousal support as ordered.

This objection is overruled.

5. THE MAGISTRATE ERRED BY EXTENDING THE TERM OF SPOUSAL SUPPORT WHEN THE COURT LACKED JURISDICTION TO DO SO.

The Magistrate did not extend the term of spousal support. The Magistrate changed the amount of child support effective January 1, 2008, but retained the language as to term found in the original spousal support order. On page 1 of her Decision she specifically notes the Court lacks jurisdiction to expand the term of the spousal support award.

This objection fails and is overruled.

6. THE MAGISTRATE ERRED BY GRANTING THE PLAINTIFF AN AWARD OF ATTORNEY FEES TO BE PAID BY THE DEFENDANT.

R.C. 3105.73(B) permits a Court in any post-decree motion or proceeding to "\*\*\*\* award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable." The statute goes on to permit the court to

“\*\*\* consider the parties’ income, the conduct of the parties, and any other relevant factors the court deems appropriate.”

The parties in the instant case have a long history of acrimony over financial issues, particularly spousal support. The Magistrate found Mr. Nelson can and does earn significantly more than Ms. Nelson. She found he voluntarily diminished his income while still maintaining a high standard of living. Ms. Nelson, to the contrary, has depleted her 401(K) to meet living expenses, has lost her home and has to borrow a car to get to work.

Finally, Mr. Nelson was found to be in contempt of court for failing to pay spousal support as ordered for more than one year.

The evidence overwhelmingly supports an award of attorney fees and expenses to Ms. Nelson.

The objection is overruled.

#### 7. MISCELLANEOUS ORAL OBJECTIONS.

Mr. Nelson noted in his initial objections that he would supplement them with a brief detailing his objections. He did not.

Instead, at oral argument on the objections his counsel orally alleged the Magistrate did not treat his client fairly because his attorney withdrew and did not give him adequate notice or adequate trial preparation, and the Magistrate denied his continuance and allowed Mr. Nelson to proceed *pro se* and allegedly sustained all of opposing counsel’s objections while overruling all of his.

Civ.R. 53(D)(3)(b)(iii) requires objections to be in writing and to state with specificity what is objected to. As these miscellaneous oral objections do not comply with Civ.R. 53(D)(3)(b)(iii), they are overruled.

Even if the objections complied with Civ.R. 53(D)(3)(b)(iii), the court would nonetheless overrule them because:

- 1) A review of the transcript (pages 4-6) reveals Mr. Nelson's complaints against prior counsel are in the nature of a grievance and this Court lacks jurisdiction to determine grievances;
- 2) The Magistrate denied Mr. Nelson's continuance because the motion was filed more than a year before the hearing and was pending well past the Supreme Court guidelines and Mr. Nelson had witnesses present to testify and was prepared for trial;
- 3) While there were some rulings on objections that the court may disagree with, evidentiary ruling errors in a bench trial are harmless inasmuch as there is no jury and the trier of fact is presumed to consider only competent and credible evidence. *State v. Post* (1987), 32 Ohio St. 3d 380, 384). Additionally, though the Magistrate sustained many objections, as Mr. Nelson was proceeding without counsel, she also admitted documents he offered that may have otherwise been ruled inadmissible and sustained his objections as well, though he made far fewer than opposing counsel. Finally, the information that Mr. Nelson had

trouble introducing *pro se* at the first hearing was presented at the second hearing when he was represented by experienced counsel.

In addition to not complying with Civ.R. 53 (D) (3) (b) (iii), this objection is overruled on the merits.

The Court adopts the Magistrate's Decision as if fully rewritten herein and orders as follows:

1. Mr. Nelson's motion to modify spousal support is GRANTED. Effective January 1, 2008 Mr. Nelson shall pay spousal support in the amount of \$2,175 per month plus 2% processing charge through the Medina County Child Support Enforcement Agency. This spousal support amount shall be paid for the balance of the original term, until the earlier occurrence of Husband's death, Wife's death, Wife's remarriage, Wife cohabitation with an adult male not related by marriage; or the completion of the term of one hundred twenty (120) consecutive months, provided, however, that Husband makes each consecutive monthly payment as required herein.
2. Mr. Nelson has an arrearage in spousal support. He shall pay an additional \$125 per month plus 2% processing charge toward his arrearages until they are paid in full or until further order of the court.
3. Mr. Nelson is in contempt of court for his failure to pay spousal support as ordered. For his contempt, he shall

serve fifteen consecutive days in the Medina County Jail with no fine.

4. To purge his contempt and avoid serving the jail time, Mr. Nelson must do the following for a period of four months from the date of this judgment entry:
  - a. Pay spousal support in the amount of \$2,175 per month plus 2% processing charge; and
  - b. Pay an additional \$125 per month plus 2% processing charge toward his arrearages.
5. Mr. Nelson shall pay Ms. Nelson \$1,230 in attorney fees with interest accruing at the statutory rate if not paid within sixty days of the date of this judgment entry.
6. All support shall be paid through Ohio Child Support Payment Central (OCSPC), P.O. Box 182372, Columbus, Ohio 43218-2372.

All child support and spousal support under 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 Chapters 3119., 3121., 3123., and 3125. of the Revised Code or a withdrawal directive issued pursuant to Sections 3123.24 to 3123.38 of the Revised Code and shall be forwarded to the Obligee in accordance with Chapters 3119., 3121., and 3125. of the Revised Code. [Per O.R.C. 3121.27(A)]

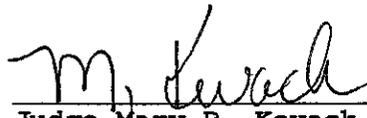
DUTY TO NOTIFY CSEA [R.C. 3121.29]

NOTICE:

EACH PARTY TO THIS SUPPORT ORDER MUST NOTIFY THE CHILD 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 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 GIVE THE REQUIRED NOTICES, 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.

IF YOU ARE AN OBLIGOR AND YOU FAIL TO GIVE THE REQUIRED NOTICES, 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 SO ORDERED.

  
\_\_\_\_\_  
Judge Mary R. Kovack

cc: Steve C. Bailey, Esquire  
David H. Ferguson, Esquire

MRK/amh

Last Name: Nelson

Filing Status: Mar Joint

No. of Children 17 and Over: 0

No. of Children Under 17: 0

Children Residing With: 0

Monthly Budget Amount: 96,251

Salary from Basic Input: 47,305

Self-Employment Income: 0

Automatic CS: Yes

Child Support: 0

Allimony: 26,100

Non-Taxable Maintenance: 0

2008 MONTHLY

Ronald 4,458

Patricia 4,571

2008 ANNUAL

Ronald 53,500 49.4%

Patricia 54,853 50.6%

Total 108,353 100%

OH Guideline Child Support  
Incl Child Care & Hosp  
Payor's Share 0

Max 2008 Allimony  
No Recapture  
41,100

After Tax Cash for Living Expenses

% Share

Budget Cash

Over/Under Budget

Cash for Child Support

Child Support

Taxes Saved Child Dep Exempt

Taxes Saved Under 17 Child Credit

Child Credit Not Allowed

Tax Savings from Allimony

Alt Min Tax Incl in Federal Tax

Marginal Tax % Includ. State Tax

Adjusted Gross Income

Federal Income Tax

State Income Tax

Local Income Tax

Additional Federal Tax from

High Income Child Dependency

Exemption Phaseout Reduction

(2/3 of reduction is eliminated in 2008 & 2009 - fully eliminated in 2010)

53,500	54,853	108,353
70,151	73,405	143,556
0	0	0
0	0	0
0	0	0
0	0	0
6,452	(7,654)	(1,202)
0	0	0
70,151	73,405	
7,035	12,458	19,493
2,252	2,475	4,727
0	0	0
0	0	0

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

COMMON PLEAS COURT  
2009 DEC 16 PM 3:34

FILED  
KATHY FOSTNEY  
MEDINA COUNTY  
CLERK OF COURTS

PATRICIA NELSON  
Plaintiff  
Vs.  
RONALD NELSON  
Defendant

CASE NO. 01DR0714  
JUDGE MARY R. KOVACK  
MAGISTRATE'S DECISION

This matter came up for hearing on May 28, 2009, and August 21, 2009, on Defendant's motion to modify spousal support and Plaintiff's motion to show cause re spousal support before Magistrate Jackie L. Owen to whom it was referred by the Honorable Mary R. Kovack. Plaintiff was present with Attorney Steve Bailey. Defendant was present pro se on May 28 and represented by Attorney David Ferguson on August 21.

Per the Judgment Entry of Divorce filed June 5, 2003, the duration of the marriage was September 17, 1977 to May 19, 2003. Beginning September 1, 2002 until April 1, 2003, Defendant was ordered to pay \$3,000 per month in spousal support. Beginning April 1, 2003, Defendant was to pay \$2,700 per month in spousal support until the reinstatement of the war deferral at which time he would again pay \$3,000 per month. The war deferral was expected to last about eighteen months from April 1, 2003. Defendant was under a duty to provide confirmation of the existence/non-existence of the reinstatement. Spousal support was to continue until the earlier of either party's death, Plaintiff's remarriage or cohabitation with an unrelated adult male, or the expiration of one hundred twenty consecutive months provided Defendant made each consecutive monthly payment as required. The court did retain jurisdiction as to the amount but not so as to lengthen the term. The spousal support was calculated using \$120,132 gross annual income for Defendant and \$25,000 for Plaintiff. Based on these numbers Plaintiff received 50.8% of the parties' total after tax cash.

Per the Agreed Journal Entry filed January 21, 2009, Plaintiff's motion to reinstate spousal support filed June 22, 2007, was granted. Plaintiff's spousal support

MF 12/16/09

was reinstated to \$3,000 per month effective October 22, 2004. Defendant's motion to modify spousal support, if granted, would be effective January 1, 2008.

Per Defendant's testimony at the time of hearing he had no income. Defendant agreed to a voluntary furlough from US Airways effective September 1, 2008, in order to pursue employment with a company in Bahrain at which he felt he could make more money. However, after paying for his training on the aircraft himself, the employment opportunity disappeared due to the downturn in the economy. Due to his seniority at US Airways he can go back, but he has to wait three years. Defendant also pursued employment in China flying aircraft in early 2009. However, Defendant did not pass their physical because they discovered that he was pre-diabetic and withdrew their offer of employment. Defendant is signed with a temporary service for pilots and got three flights in 2008 but none in 2009. Also since the divorce Defendant is a 99% partner in LKB Ltd. and sole shareholder in a subchapter S corporation, North Olmsted Laser Wash, Inc. The partnership owns the land and building, which the Laser Wash rents to run the carwash. Defendant claims that neither enterprise has ever made a profit.

Plaintiff testified that her income has increased since the time of the last order. At the time of the divorce Plaintiff agreed to imputed income of \$25,000. She had gross annual income for 2008 in the amount of \$54,835 and projected 2009 income of \$45,592.

Per R.C. 3105.18(E) the court may not modify a prior award of spousal support unless jurisdiction was retained and there has been a change in circumstances for either party, which changes include any increase or involuntary decrease in the party's income. The court must find that a substantial change in circumstance has occurred and that the change was not contemplated at the time of the original order. *Mandelbaum v. Mandelbaum*, 121 Ohio St.3<sup>rd</sup> 433, 2009-Ohio-1222, at 33.

The Magistrate finds that there have been substantial changes in both parties' incomes which changes were not contemplated at the time of the original decree.

Next the court must look to the factors in R.C. 3105.18(C)(1) to determine whether the award of spousal support is reasonable and appropriate.

R.C. 3105.18(C)(1)(a)-Income of the parties from all sources. Defendant claims to have no income as he has been unable to find employment as a pilot. However, Defendant also testified that his monthly expenses are \$7,547 all of which are paid and

current, which annualizes to \$90,564. Defendant's Exh. 6. His credit score is 774. Defendant owns 99% of the partnership LKB Ltd. and 100% of the shares of North Olmsted Laser Wash, Inc., and S corporation. Defendant's Exh. 12 & 13. LKB owns the land on which the car wash is located. Defendant claims that he has no income from either business per his tax returns for 2008. Plaintiff had gross annual income for 2008 of \$54,835 and is projected to make \$45,592 in 2009 from her employment as a sales person. She has no other source of income. The parties stipulated to Plaintiff's numbers.

R.C. 3105.18(C)(1)(b)-Relative earning abilities of the parties. Defendant has the potential to earn \$100,000 or more per year as a pilot. Plaintiff will probably remain at her income level.

R.C. 3105.18(C)(1)(c)-Ages and physical/mental/emotional health of the parties. Both parties are fifty-five years old and indicated no problems with their health.

R.C. 3105.18(C)(1)(d)-Retirement benefits of the parties. Plaintiff has a 401(k) through her employment but has been forced to borrow against it to meet living expenses. Defendant lost his retirement benefits from US Airways due to the company's two bankruptcy filings.

R.C. 3105.18(C)(1)(e)-The duration of the marriage. The parties were married twenty-six years.

R.C. 3105.18(C)(1)(f)-Does not apply.

R.C. 3105.18(C)(1)(g)-Standard of living the parties established during the marriage. The parties would have enjoyed a fairly high standard of living during the marriage with Defendant's income as a pilot while Plaintiff stayed home to raise the parties' two children. Defendant still seems to enjoy that lifestyle whereas Plaintiff has had to settle for a much lower standard.

R.C. 3105.18(C)(1)(h)-Extent of education of the parties. Unknown.

R.C. 3105.18(C)(1)(i)-Relative assets and liabilities of the parties. Plaintiff does not own real property or a vehicle. She lost her home to foreclosure after Defendant cut spousal support by \$700 per month in October, 2004. Defendant has a home valued at \$500,000-525,000, an Aruba timeshare, a rental property in Naples, FL valued at about \$500,000, a car wash valued at about 1.5 million and three vehicles-a Lexus, a BMW and an Infinity. Defendant claims to owe more than the residence is worth due to first and

second mortgages, owes more than the 2005 vehicle is worth, and LBK and the car wash have never shown a profit. He claims to have \$1,012,530 in business debt.

R.C. 3105.18(C)(1)(j)-Each party's contribution to the education, training, or earning ability of the other party. No evidence was presented on this factor.

R.C. 3105.18(C)(1)(k)-Does not apply.

R.C. 3105.18(C)(1)(l)-The tax consequences to both parties of an award of spousal support. Not addressed by either party.

R.C. 3105.18(C)(1)(m)-Lost income production capacity of either party that resulted from that party's marital responsibilities. Plaintiff lost income production due to her responsibilities in raising the parties' two children, while Defendant pursued his career as a pilot.

R.C. 3105.18(C)(1)(n)-Any other factor.

The Magistrate finds that Defendant's testimony was not entirely credible. He had no explanation for how he could be completely current on monthly expenses of \$7,547 with allegedly no income. Annually he has \$90,564 in expenses, which he pays on time. There was no supporting documentation on how he arrived at the numbers used in his tax returns. Defendant deducted his aircraft training as a business expense but the only business he has is a laser car wash.

Plaintiff testified that she has a hard time meeting her expenses. She does not own a home or a vehicle. She borrows a car from her stepfather to get to work. In May, 2009, Plaintiff had to empty her 401(k) account to catch up on her rent. In July, 2009, Plaintiff sold her jewelry to help meet expenses. Plaintiff's Exh. P.

The Magistrate concludes that an award of spousal support is appropriate and reasonable.

In order to calculate what is appropriate and reasonable the Magistrate averaged the incomes for both parties for 2007, 2008 and 2009 (Plaintiff-\$41,486, \$54,836 and projected \$45,592 and Defendant \$110,415, \$87,774 and \$90,564). The parties did agree that the original spousal support award gave Plaintiff 50.8% of the after tax cash.

Defendant should pay \$2,175 per month plus 2% processing charge effective January 1, 2008, to Plaintiff as spousal support. See attached exhibit. Spousal support should continue until the earlier happening of either party's death, Plaintiff's remarriage

or cohabitation with an unrelated adult male, or the passage of 120 months. The court should retain jurisdiction over the amount but not the term of spousal support.

Defendant does have an arrearage in spousal support. Defendant should pay an additional \$125 per month plus 2% processing charge towards his arrearages until they are paid in full or until further court order.

**All support shall be paid through Ohio Child Support Payment Central (OCSPC), P.O. Box 182372, Columbus, Ohio 43218-2372.**

All child support and spousal support under 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 Chapters 3119., 3121., 3123., and 3125. of the Revised Code or a withdrawal directive issued pursuant to Sections 3123.24 to 3123.38 of the Revised Code and shall be forwarded to the Obligee in accordance with Chapters 3119., 3121., and 3125. of the Revised Code. [Per O.R.C. 3121.27(A)]

**DUTY TO NOTIFY CSEA [R.C. 3121.29]**

**NOTICE:**

**EACH PARTY TO THIS SUPPORT ORDER MUST NOTIFY THE CHILD 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 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 GIVE THE REQUIRED NOTICES, 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.**

**IF YOU ARE AN OBLIGOR AND YOU FAIL TO GIVE THE REQUIRED NOTICES, 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.**

Plaintiff has moved for Defendant to show cause why he should not be held in contempt for failure to pay spousal support as previously ordered.

Defendant admitted that he has paid no spousal support since the end of August, 2008. Defendant admitted that he did have at least \$11,000 in income at the end of 2008 but that he chose to pay his own bills with the money and contributed nothing to spousal support. By his own testimony and exhibits Defendant has assets of over \$2,000,000. Also, per Defendant's Exh. 12 he took a loan from LKB in the amount of \$89,220 in 2008. Defendant has speculated and lived beyond his means and now expects Plaintiff to pay for it. Defendant admitted that he did not tell Plaintiff that he took a furlough from US Airways and had no income until the furlough was in effect. Defendant unilaterally stopped paying spousal support with no notice to Plaintiff. He had no thought to how she would cope with a \$3,000 shortfall in her budget every month.

Plaintiff's motion to show cause is granted.

The Magistrate finds Defendant in contempt for failure to pay spousal support as previously ordered. For his contempt Defendant should serve fifteen (15) days in the Medina County Jail with no fine.

In order to purge himself of contempt and avoid serving his jail sentence Defendant must do all of the following for a period of four months effective December 15, 2009:

1. Pay his spousal support of \$2,175 per month plus 2% processing charge; and
2. Pay an additional \$125 per month plus 2% processing charge towards his arrearages, which should continue beyond the purge period until the arrearages are paid in full or until further court order.

There will be a purge hearing before the Honorable Mary R. Kovack on April 23, 2010 at 9:00 am to determine whether Defendant has purged himself of contempt. Defendant is cautioned he must appear or a capias will issue for his arrest.

Plaintiff has requested an award of attorney's fees. Plaintiff's counsel did submit a fee bill as evidence, which indicates an hourly charge of \$180. The hours charged are for the prosecution of the motion to show cause as well as defending the motion to modify spousal support. Plaintiff's Exh. M.

The Magistrate finds that an award of \$1,080 in attorney's fees is appropriate and reasonable plus \$75 in expenses and \$75 court cost for a total of \$1,230.

Defendant should pay to Plaintiff and her attorney the amount of \$1,230 within sixty (60) days of the judgment entry. If Defendant pays as ordered, no interest should attach. If Defendant does not pay as ordered, interest at the statutory rate should attach to the amount due and owing from the date of judgment.

Costs to Defendant.

Per Civ.R. 53 parties may file written objections to this Magistrate's Decision within fourteen (14) days of the time-stamped date.

**A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law in that decision unless the party timely and specifically objects to that finding or conclusion as required by Civ.R. 53(D)(3)(b).**

The Court shall prepare the judgment entry.

  
\_\_\_\_\_  
Jackie L. Owen, Magistrate

Cc: Steve Bailey, Esq.  
David Ferguson, Esq.

Last Name: Nelson

Filing Status: Mar Joint

No. of Children 17 and Over: 0

No. of Children Under 17: 0

Children Residing With: 0

Monthly Budget Amount: 0

Salary from Basic Input: 96,251

Self-Employment Income: 0

Patricia: Single

Automatic CS: 0

Child Support: 0

Alimony: 26,100

Non-Taxable Maintenance: 0

**2008 ANNUAL**

After Tax Cash for Living Expenses % Share: 53,500 (49.4%)

Budget Cash Over/Under Budget: 70,151

Cash for Child Support: 0

Child Support: 0

Taxes Saved Child Dep Exempt: 0

Taxes Saved Under 17 Child Credit: 0

Child Credit Not Allowed: 0

Tax Savings from Alimony: 6,452

Alt Min Tax Incl in Federal Tax: 0

Marginal Tax % Includ. State Tax: 19.3%

Adjusted Gross Income: 70,151

Federal Income Tax: 7,035

State Income Tax: 2,252

Local Income Tax: 0

Additional Federal Tax from High Income Child Dependency Exemption Phaseout Reduction (2/3 of reduction is eliminated in 2008 & 2009 - fully eliminated in 2010): 0

Patricia: 54,853 (50.6%)

Total: 108,353 (100%)

**2008 MONTHLY**

Ronald: 4,458

Patricia: 4,571

Total: 9,029

OH Guideline Child Support Incl Child Care & Hosp Payor's Share: 0

Max 2008 Alimony No Recapture: 41,100

Patricia: 73,405 (7.654%)

Total: (1,202)

Patricia: 12,458

Total: 19,493