[Cite as *Piliero v. Piliero*, 2012-Ohio-1153.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Thomas P. Piliero,	:	
Plaintiff-Appellant,	:	
		No. 10AP-1142
v.	:	(C.P.C. No. 02DR-10-4366)
Franzi L. Piliero,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 20, 2012

Solove and McCormick, Ronald L. Solove, Kerry L. McCormick, and Elisabeth M. Howard, for appellant.

Tyack, Blackmore, Liston & Nigh Co., L.P.A., and *Thomas M. Tyack*, for appellee.

Gary J. Gottfried, Counsel for amicus curiae American Academy of Matrimonial Lawyers – Ohio Chapter.

ON APPLICATION FOR RECONSIDERATION/
APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations.

BROWN, P.J.

{¶ 1} Pursuant to App.R 26(A)(1)(a), defendant-appellee, Franzi L. Piliero, has filed an application for reconsideration of this court's decision in *Piliero v. Piliero*, 10th Dist. No. 10AP-1142, 2011-Ohio-4364, in which we reversed a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, that modified appellee's award of spousal support. Plaintiff-appellant, Thomas P. Piliero, has filed a memorandum contra appellee's application. The American Academy of Matrimonial

Lawyers – Ohio Chapter ("AAML") has filed an amicus curiae brief. Appellee has also filed a motion for en banc consideration.

{¶ 2} When reviewing an application for reconsideration, this court must consider whether the application "calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Matthews v. Matthews*, 5 Ohio App.3d 140, 143 (10th Dist.1981).

{¶ 3} Here, in sustaining appellant's first assignment of error, appellee claims we made an obvious error in the application of the third jurisdictional requirement from *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222. In *Mandelbaum*, the Supreme Court of Ohio set forth three jurisdictional criteria which must be met in order for a court to modify a spousal support order: (1) the decree of the court must expressly reserve jurisdiction to make the modification, (2) the court must find that a substantial change in circumstances has occurred, and (3) the court must find that the change was not contemplated at the time of the original decree. *Mandelbaum* at paragraph two of syllabus. The movant bears the burden of proving that the parties did not contemplate the substantial change in circumstances at the time of the divorce. *Burkart v. Burkart*, 191 Ohio App.3d 169, 2010-Ohio-5363, ¶ 22 (10th Dist.).

{¶ 4} In *Mandelbaum*, the parties' settlement agreement, which was incorporated into the decree of divorce, provided that spousal support would " 'be subject to the ongoing and continuing jurisdiction of this Court' " and that " '[e]ither party shall have the right to apply to this Court for the purposes of modifying the spousal support, due to a change in the financial circumstances of either party.' " *Id.* at ¶ 6. In this regard, the agreement further stated, " '[i]t is the parties' intent that, for the purpose of spousal support, the parties' combined incomes be equalized between the two of them.' " *Id.* The trial court found that the parties had intended to equalize their incomes "on an ongoing basis" and reduced the spousal support obligation by approximately $600 per month. The trial court did not, however, make a finding with respect to whether a substantial change in the parties' circumstances had occurred or whether the parties had contemplated this change at the time of the divorce decree. *Id.* at ¶ 8. The Second District Court of Appeals reversed the trial court's decision, finding that " 'the trial court erred in failing to consider, as a threshold matter, whether the changes in the parties' circumstances were substantial

and were not contemplated at the time of the prior order.' " *Id*. at ¶ 10. The Supreme Court affirmed the appellate court and remanded the matter to the trial court for determination of these threshold matters.

{¶ 5} The facts in this case are similar to the facts in *Mandelbaum*. Here, the parties entered into an agreement that was adopted by the court via the agreed judgment entry and decree of divorce (sometimes referred to as "decree"), which provided that spousal support "is MODIFIABLE as to amount only as set forth herein, and as to duration only as set forth above, and the Court shall retain jurisdiction for such purposes only" and that "[t]he parties agree that the amount of spousal support shall be MODIFIED, from time to time, so that the parties have equal after-tax annual income from earnings * * * and from child support." *Piliero* at ¶ 2. Subsequent to the emancipation of the parties' only remaining minor child, appellee filed a motion to modify spousal support. In its decision, the trial court correctly reasoned that, pursuant to *Mandelbaum*, it was required to consider threshold matters to determine whether it had jurisdiction. The court then found that the termination of child support payments was anticipated at the time of the decree and that the parties contemplated this termination would trigger modification of spousal support. The court also found appellant's substantial increase in his earned income was not contemplated by the parties at the time of the decree.

{¶ 6} We found error with this finding and determined that appellant's annual cost-of-living increase was contemplated at the time of the decree. In doing so, we relied upon appellant's testimony that he was employed in the same position at the time of the divorce and he received the same cost-of-living increases at the time of the divorce. We also relied upon the language of the decree that suggested that the parties contemplated, at the time of the divorce, that, "from time to time," there would be a need to modify spousal support in order to equalize their after-tax annual incomes, which could reasonably include cost-of-living increases that appellant was receiving both during the marriage and at the time of the parties' divorce. We also cited appellant's testimony that the parties knew, at the time of the original decree, that child support for the youngest child would stop, as well as the language in the decree that the termination of child support payments was one of the triggering events for a modification of spousal support. Based upon the foregoing, we found appellee failed to prove that the annual cost-of-living

increases and the termination of child support were not contemplated by the parties at the time of the divorce. Therefore, we concluded appellee did not satisfy the third jurisdictional prerequisite, and the trial court lacked jurisdiction to modify the spousal support order.

{¶ 7} Appellee argues that our decision "allows [a]ppellant to escape the agreed and stipulated consequences of anticipated economic changes simply by virtue of the fact that those future economic changes were anticipated." Appellee contends this court's application of the jurisdictional criteria set forth in *Mandelbaum* is "inappropriate and unduly broad." Specifically, appellee contests our application of the third jurisdictional requirement and the meaning of the term "contemplate." In support of her argument, appellee cites *Dean v. Dean*, 8th Dist. No. 95615, 2011-Ohio-2401, and *Ballas v. Ballas*, 7th Dist. No. 08 MA 166, 2009-Ohio-4965.

{¶ 8} In its amicus brief in support of the motion to reconsider, the AAML asserts that it reads our decision to "stand for the proposition that circumstances agreed to by the parties in final orders as 'trigger' events calling for the modification of spousal support are self-defeating and precluded under a strict interpretation of *Mandelbaum v. Mandelbaum*." The AAML argues that such a literal application of *Mandelbaum* is not supported by Ohio Law or public policy. The AAML also cites *Dean* and *Ballas*, as well as *Kaput v. Kaput*, 8th Dist. No. 94340, 2011-Ohio-10, and *Wertz v. Wertz*, 2d Dist. No. 23180, 2009-Ohio-6001, as cases that have rejected a literal application of "contemplated."

{¶ 9} In *Ballas*, the husband was ordered to pay the wife spousal support, but the court reserved jurisdiction to revisit spousal support specifically in light of the husband's recent bankruptcy and his formation and eventual completion of his bankruptcy payment plan. The husband subsequently filed a motion to modify or terminate his spousal support based upon greater than expected deficiencies resulting from the bankruptcy plan. The wife filed a motion requesting an increase in spousal support, based upon the emancipation of a child, loss of child support, and increased debt. The husband countered that the emancipation of their child was contemplated at the time of the trial court's original order. The trial court concluded it had expressly retained jurisdiction, and the change in the husband's bankruptcy plan alone satisfied the requirement of a substantial change in circumstances allowing the court to revisit the issue of spousal support. The

court granted the wife's motion to increase support and denied the husband's motion to decrease or terminate support.

{¶ 10} Upon appeal, the appellate court in *Ballas* overruled the husband's assignment of error that argued the trial court lacked jurisdiction to modify spousal support because the parties had contemplated his bankruptcy at the time of the decree. The court, after acknowledging the jurisdictional requirements in *Mandelbaum*, found that a court may specify triggering events in a decree that would constitute a change of circumstances. The court noted that the ideal practice is for the trial court to account for all foreseeable changes in the original order for spousal support; however, a trial court should be able to reserve jurisdiction for further consideration of a specific issue if it finds that it is unable to adequately predict the timing, extent, and impact of a foreseeable change. Otherwise, a trial court would lack jurisdiction to revisit the issue precisely because it found that it would be necessary to do so. The court stated that, although the resolution of the husband's bankruptcy case was an eventuality, and thus contemplated at the time of the divorce, the timing and consequences of the bankruptcy could not be adequately contemplated in the original decree.

{¶ 11} In *Kaput*, the parties divorced, and the original separation agreement and divorce decree gave the court jurisdiction to modify the terms of the lifetime spousal support. The husband subsequently moved to either terminate or modify the spousal support order. The trial court reduced the spousal support, and the wife appealed, arguing the husband painted a picture of "doom and gloom" for the future of his company at the time of the divorce; thus, they "contemplated" his decrease in income at the time of the decree. The appellate court noted that the Supreme Court in *Mandelbaum* analyzed only the word "substantial" and provided no insight into what it meant to "contemplate" change. The court did not believe that "contemplate" meant "to think about" or "to reflect upon"; rather, the better meaning was "[t]o have as a purpose; intend." *Id*. at ¶ 22, citing *Random House Webster's Unabridged Dictionary*, 2d Edition. Using this definition of "contemplate," the court found no evidence that the husband had as a purpose or intended the decline of his business. The court noted that to hold otherwise would be to say that had the wife contemplated (or "thought about") the success of the husband's company at the time of the decree, she would equally be barred from ever seeking an

increase in spousal support. The court did not believe that such an absurd result was contemplated by the Supreme Court.

{¶ 12} In *Dean*, the husband was ordered to pay spousal support to the wife, and the court retained jurisdiction to modify the amount of spousal support specifically due to the husband's precarious health and employment situations. After the husband lost his job, he filed a motion to modify spousal support and the wife filed a motion for contempt based upon the husband's unilaterally reduced support payments. The court reduced the husband's spousal support payments for some periods and suspended it for other periods, and denied the motion for contempt. The wife argued on appeal that the parties had contemplated the husband's loss of job at the time of the decree, citing *Mandelbaum*, and, thus, the trial court had no jurisdiction. The court of appeals affirmed the trial court's decision, relying upon *Kaput* and *Ballas*. The court concluded there was no evidence that the elimination of the husband's job was purposely brought about by the husband, and the trial court intended that the husband have an opportunity to seek a reduction in support should a change in his health or employment occur.

{¶ 13} In *Wertz*, the wife filed a motion to modify the spousal support she received, arguing that, although her health and financial circumstances were not good at the time of the decree, they both had deteriorated significantly since the decree. On this basis, the trial court granted the wife spousal support for an additional period. The husband appealed, arguing that the parties knew of the wife's poor health at the time of the decree, but the appellate court affirmed the trial court. After acknowledging the "contemplated" language in *Mandelbaum*, the court found that, at the time of the decree, the parties had not contemplated her serious and rapid decline in health, which would cause a significant increase in her medical expenses.

{¶ 14} We believe these courts correctly interpreted *Mandelbaum*. The focus of *Mandelbaum* appears to be a change of circumstances and whether any change is sufficient or whether a substantial change is required. The focus was not an interpretation of "contemplated." The court in *Mandelbaum* found that the change must not have been "contemplated and taken into account by the parties or the court at the time of the prior order." *Mandelbaum* at ¶ 32. However, there is no definition or interpretation of "contemplated." *See Kaput* at ¶ 21. We believe "contemplated" means more than just "thought of" or "discussed." In our view, "contemplated" means, in part, that the parties

or court already took some fact or circumstances into account in resolving an issue. For example, if a wife agrees to accept less in spousal support because the husband's financial situation is deteriorating, the husband cannot subsequently seek a downward modification of his support obligation based upon that same consideration because the parties already "contemplated," or took into account, this circumstance in arriving at their agreement. The parties' mere discussion of the husband's deteriorating financial situation without taking it into account in some respect would not be a bar to later modification. To be sure, if the husband's financial situation deteriorated more than what the parties had "contemplated," or took into account, a motion for modification may be in order, but mere discussion is not sufficient to constitute "contemplation."

{¶ 15} Furthermore, in *Ballas*, the court approved including in decrees "triggering events" that would constitute a change of circumstances pursuant to R.C. 3105.18. If triggering events, such as emancipation of a child, preclude modification of spousal support because it was discussed that spousal support should be modified at the time of emancipation, the parties would not be permitted to enter into agreements to equitably manage spousal support. The long standing policy of being able to agree to such terms would no longer be possible. The only possibility would be to reserve jurisdiction without any ability to agree to further terms.

{¶ 16} If the parties and their attorneys could account for all foreseeable changes in the lives of the parties when entering into an agreement, there would be no need for reservation of jurisdiction. While finality of court orders is a worthy and important goal, when orchestrating the division of responsibilities where two people are terminating a relationship, it is almost impossible to know whether there will be unanticipated events. As the court in *Ballas* noted, if a court cannot reserve jurisdiction to consider an issue because it found that it may be necessary to revisit that issue, the task of attorneys representing clients in a divorce becomes almost impossible. Therefore, the present parties' decree may properly contain triggering events which prompt modification consistent with *Ballas*.

{¶ 17} We also find our decision in *Burkart* distinguishable. In *Burkart*, the divorce decree provided that the court would retain jurisdiction to modify the parties' spousal support provision. Within a short ten months of the decree, the husband moved for a modification of his spousal support obligation, based upon his diminished income

resulting from the faltering economy and 9/11. We found that, at the time of the decree, the husband had anticipated a downturn in the landscape architectural business was coming, and he foresaw this downturn would lead to a decline in his income. Thus, we found the husband as the moving party did not sustain his burden of proving that he did not contemplate a substantial decline in his income at the time of the divorce.

{¶ 18} Importantly, in *Burkart*, there was no specific triggering event indicated in the original decree. Therefore, we did not address the impact of a triggering event in a decree upon the jurisdiction of the court. In the present case, however, as found by the trial court, the decree specifically includes a triggering event that would constitute a change of circumstances. The triggering event provided in the decree here is termination of the child support obligation. Although both the trial court and the parties may have been aware of appellant's probable future cost-of-living raises and anticipated the eventual termination of child support, neither the trial court nor the parties "contemplated," or took into account, these factors in fashioning the spousal support award in the original decree because the extent of change over a significant period of time is not ascertainable. Instead, the trial court chose to retain jurisdiction to reconsider and modify, if necessary, the spousal support amount as these circumstances presented themselves in the future.

{¶ 19} Furthermore, *Burkhart* and the present case are distinguishable on the basis that, in *Burkhart*, only ten months elapsed between the issuance of the decree and the husband's filing of his motion to modify spousal support, rendering dubious that any non-contemplated change in circumstances could have occurred in that short period. This time factor is not an issue here. We note that we do not mean to say that under no circumstances could ten months be too short of a period in which to seek modification of spousal support based upon a change in circumstances. To the contrary, this would be a factual issue for the trial court to decide based upon the circumstances of the case. In turn, this court's review of such a determination as to whether something was contemplated at the time of divorce would be subject to an abuse of discretion standard. See *Hines v. Hines,* 3d Dist. No. 9-10-15, 2010-Ohio-4807, ¶ 18; *Ballas* at ¶ 44.

{¶ 20} We are also mindful of our standard of review in this case. A trial court is generally afforded wide latitude in deciding spousal support issues. *Grosz v. Grosz*, 10th Dist. No. 04AP-716, 2005-Ohio-985, ¶ 8, citing *Bolinger v. Bolinger*, 49 Ohio St.3d 120

(1990), and *Cherry v. Cherry*, 66 Ohio St.2d 348 (1981). An appellate court reviews the modification of spousal support under an abuse of discretion standard. *Grosz* at ¶ 9, citing *Booth v. Booth*, 44 Ohio St.3d 142, 144 (1989). Abuse of discretion is an extremely high standard; it demands that the trial court exhibited a "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993), citing *State v. Jenkins*, 15 Ohio St.3d 164, 222 (1984). Given this high standard, we do not find the trial court erred in this instance. Therefore, based upon *Ballas*, *Dean*, *Wertz*, and *Kaput*, we find the trial court properly retained jurisdiction over spousal support. We find appellee's application for reconsideration well-taken. Furthermore, because we have granted appellee's application for reconsideration, appellee's motion for en banc consideration based upon the analysis in our original decision is moot.

{¶ 21} Having granted appellee's application for reconsideration, we overrule appellant's first assignment of error and proceed to address his second, third, and fourth assignments of error, which had been previously rendered moot. In his remaining assignments of error, appellant asserts:

> II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO CONSIDER ALL RELEVANT FACTORS REQUIRED BY STATUTE [R.C. 3105.18(C)(1)] IN MAKING ITS DETERMINATION OF THE AMOUNT AND DURATION OF SPOUSAL SUPPORT.
>
> III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO CONSIDER THE VOLUNTARY DEFERRAL OF SOCIAL SECURITY PAYMENTS BY DEFENDANT–APPELLEE IN ITS DETERMINATION OF THE AMOUNT AND DURATION OF SPOUSAL SUPPORT.
>
> IV. THE TRIAL COURT ERRED, ABUSED ITS DISCRETION, AND DENIED DUE PROCESS OF LAW TO PLAINTIFF–APPELLANT BY ITS EMPLOYMENT OF FINPLAN SOFTWARE TO DETERMINE THE TAX IMPACT OF SPOUSAL SUPPORT, THEREBY PREVENTING PLAINTIFF–APPELLANT FROM EXERCISING HIS RIGHT OF CROSS EXAMINATION.

{¶ 22} Appellant argues in his second assignment of error that the trial court erred when it failed to consider all relevant factors required by R.C. 3105.18(C)(1) in making its determination of the amount and duration of spousal support. R.C. 3105.18(C)(1)

provides that, "[i]n determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider" all of the listed factors (a) through (n). Appellant contests the trial court's conclusion that, because the parties' decree set forth limitations on the matters and methods to be considered in modifying spousal support, it was not required to consider the statutory factors in R.C. 3105.18(C)(1). Appellant claims that several of the factors in R.C. 3105.18(C)(1) support a finding that the original level of spousal support provides sufficient income for appellee to maintain her standard of living.

{¶ 23} Appellant cites no authority for the proposition that a trial court must consider the factors in R.C. 3105.18(C)(1) when the parties have agreed that future modifications must be determined based upon specific, limited factors delineated in their agreed judgment entry and decree of divorce, and we find no authority for such proposition. In the present case, the parties' decree provides, in pertinent part:

> The parties expressly provide that spousal support is MODIFIABLE as to amount only as set forth herein, and as to duration only as set forth above, and the Court shall retain jurisdiction for such purposes only.
>
> * * * The parties agree that the amount of spousal support shall be MODIFIED, from time to time, so that the parties have equal after-tax annual income from earnings (earned income, passive income, imputed income, and retirement income) and from child support, but specifically excluding all income from capital gains, * * * lottery winnings, gifts and the like.
>
> 1. Defendant has a reduction or cancellation of her retirement benefits from UAL, Inc[.]; child support payments made by plaintiff to defendant are terminated. In those events, spousal support shall increase by that sum which equalizes after[-] tax income between plaintiff and defendant.
>
> 2. Upon the commencement by defendant of her social security benefits; upon the commencement by defendant of her retirement benefits from plaintiff's Federal Civil Service Retirement Plan ("CSRS"). In those events, spousal support shall decrease by that sum which equalizes after[-]tax income between plaintiff and defendant[.]

> The parties further agree, and the Court so finds, that all earned income by defendant in excess of Twelve Thousand Dollars ($12,000.00) per year shall be included in future calculations related to the modification of spousal support and that all earned income by plaintiff in excess of One Hundred Thirty-seven Thousand Nine Hundred Dollars [$137,900.00] per year shall be included in future calculations related to the modification of spousal support.

{¶ 24} In *Oberst v. Oberst*, 5th Dist. No. 08-CA-34, 2009-Ohio-13, the court discussed the type of agreed judgment entry and decree of divorce at issue in the present case. The court explained:

> * * * [T]he parties had an Agreed Entry and Decree of Divorce, meaning the parties agreed upon the terms of the Entry issued by the court. It is not uncommon for parties to later question the interpretation of clauses in such agreements. Sowald Morganstern Domestic Relations Law, 4th Ed. Thomson West Publishing (2002), Section 9:48. Where ambiguity is complained of and where the parties dispute the meaning of clauses in the agreement, it is the duty of the court to examine the contract and determine whether the ambiguity exists. If an ambiguity does exist, the court has the duty and the power to clarify and interpret such clauses by considering the intent of the parties as well as the fairness of the agreement. *Id*., citations omitted.
>
> If ambiguity exists as to the provisions of an agreement in a domestic case, or if there is a conflict as to interpretation of the provisions of such an agreement, the court may take testimony regarding the parties' "intention to assist in construing the language of a separation agreement. The court may consider parol evidence." *Id*., citations omitted. The court may also interpret and enforce its property division orders when later disagreements arise. *Id*. See also, *Kincaid v. Kincaid* (1997), 117 Ohio App.3d 148, 690 N.E.2d 47.

Id. at ¶ 21-22.

{¶ 25} Here, we do not find the parties' agreed judgment entry and decree of divorce to be ambiguous. To the contrary, it is patent by the terms in the decree that the parties limited the court's consideration of spousal support modification to the factors specifically set forth therein. Pursuant to the explicit terms in the decree, the parties clearly intended that the trial court be able to modify the amount of spousal support "only

as set forth herein." The decree contains no provision for consideration of R.C. 3105.18(C)(1) factors.

{¶ 26} As for whether the trial court could modify spousal support without consideration of the factors in R.C. 3105.18(C)(1), despite the language in that provision that indicates a court "shall" consider the listed factors when modifying spousal support, we find that it could. Although we find no authority that applies specifically to a trial court's authority to modify spousal support without consideration of the factors in R.C. 3105.18(C)(1) when the parties, in their agreed judgment entry and decree of divorce, have specifically limited the factors that the trial court may consider, there exists authority to support the trial court's general authority to act as it did in this case. This court has before recognized that a domestic relations court has the authority to give effect to the parties' agreement entered into during the proceedings by incorporating their agreement into the decree, even if the court otherwise would not have the power to make such decree on its own. *O'Connor v. O'Connor*, 71 Ohio App.3d 541, 544 (10th Dist.1991), citing *Robrock v. Robrock*, 167 Ohio St. 479 (1958), paragraph four of the syllabus. Thus, where the parties reach an agreement during the proceedings, the domestic relations court may incorporate the agreement into the decree and give the agreement the force of law. *See id*., citing *Sedam v. Sedam*, 52 Ohio Law Abs. 141 (1948). Accordingly, the domestic relations division, although having no power to make some order in the first instance, may nevertheless give effect to the parties' agreement in a subsequent proceeding. *Id*. Applying these tenets to the present case, we find the trial court had the authority to give effect to the parties' agreement to limit the trial court's considerations when modifying spousal support and to disregard the factors in R.C. 3105.18(C)(1), even if the court otherwise would not have had the power to disregard the R.C. 3105.18(C)(1) factors absent the parties' agreement. For these reasons, appellant's second assignment of error is overruled.

{¶ 27} Appellant argues in his third assignment of error that the trial court erred when it failed to consider appellee's voluntary deferral of social security payments, despite her attainment of the minimum age for receiving such benefits, in its determination of the amount and duration of spousal support. Appellant asserts that R.C. 3105.18(C)(1) requires a trial court to consider the relative earning abilities of the parties, pursuant to R.C. 3105.18(C)(1)(b), and the retirement benefits of the parties, pursuant to R.C.

3105.18(C)(1)(d), when modifying spousal support. However, as we have determined under appellant's second assignment of error that the trial court was not required to consider the factors under R.C. 3105.18(C)(1), based upon the specific terms of the agreed judgment entry and decree of divorce, appellant cannot rely upon those factors to support his current argument.

{¶ 28} Furthermore, the agreed judgment entry and divorce decree contains no provision that requires appellee to commence receiving social security benefits at any certain age, and we cannot read any such requirement into it. The only pertinent reference in the decree to appellee's social security benefits is the passage, "[u]pon the commencement by defendant of her social security benefits." This passage makes no mention of the minimum age at which appellee must begin to receive social security benefits. Accordingly, because the decree does not require appellee to commence receiving her social security retirement benefits at any certain age, we cannot find that the trial court abused its discretion when it failed to take into account the fact that appellee had not yet started receiving such benefits. Therefore, appellant's third assignment of error is overruled.

{¶ 29} Appellant argues in his fourth assignment of error that the trial court erred when it used "FinPlan" software to determine the tax impact of spousal support, thereby preventing appellant from exercising his right of cross-examination. As already noted above, an appellate court reviews the modification of spousal support under an abuse of discretion standard. *Wilder v. Wilder*, 10th Dist. No. 08AP-669, 2009-Ohio-755, ¶ 10, citing *Grosz* at ¶ 8. Therefore, "[a] trial court is generally afforded wide latitude in deciding spousal support issues." *Grosz* at ¶ 8.

{¶ 30} Appellant argues here that the trial court erred in using the computer software FinPlan to calculate the amount of spousal support to be paid in order to equalize the parties' after-tax income. Appellant maintains that, although the trial court claimed the only information it lacked to perform the FinPlan calculation was the applicable federal and state tax rates to calculate the tax effect upon the respective incomes of the parties, the trial court was also missing other information. Appellant also contends that the court drafted its own FinPlan report, thereby denying him the opportunity to cross-examine evidence presented against him.

{¶ 31} We first note that the record before us is woefully inadequate regarding what FinPlan actually is and how it works. In its decision, the trial court indicated it was software produced by Thompson/West that assisted with mathematical calculations necessary to compute the equalized after-tax incomes of the parties. Appellant does not provide further detail to this court.

{¶ 32} Insofar as appellant may be seeking a blanket disapproval of the use of FinPlan software, based upon his statement that FinPlan "has not been accepted in the Tenth District Court of Appeals as a substitute for appropriate calculation," the record before us is insufficient to make such a determination. We do note that other courts have approved the use of FinPlan software. In *Cramblett v. Cramblett*, 7th Dist. No. 05 HA 581, 2006-Ohio-4615, the court found no fault with the trial court's use of FinPlan software. *Id*. at ¶ 56. The court also acknowledged that many appellate districts have accepted the use of the FinPlan software when determining spousal and/or child support. *Id*. at ¶ 55, citing *Ridgeway v. Ridgeway*, 7th Dist. No. 04-HA-570, 2005-Ohio-6444; *Carroll v. Carroll*, 5th Dist. No. 2004-CAF-05035, 2004-Ohio-6710; *Lumpkin v. Lumpkin*, 9th Dist. No. 21305, 2003-Ohio-2841, ¶ 24 (rejecting wife's argument that FinPlan is not law and noting that trial courts in Summit County routinely rely on FinPlan analyses to determine the financial responsibilities of parties involved in domestic actions); *Carter v. Carter*, 9th Dist. No. 21156, 2003-Ohio-240; *Gockstetter v. Gockstetter*, 6th Dist. No. E-98-078 (June 23, 2000).

{¶ 33} Appellant also contests the trial court's claim that the only information it lacked to perform the FinPlan calculation was the applicable federal and state tax rates to calculate the tax effect upon the respective incomes of the parties. Appellant maintains that the trial court was also missing other relevant data, "such as itemized deductions, tax rates, and other information required to calculate the full tax impact of a spousal support award." With regard to the tax rates, the trial court already addressed the applicable tax rates and explained that the federal and state income tax codes are public record and readily verifiable through official publications from the federal and state governments. Appellant does not contest this finding; thus, appellant's argument is rejected in this respect. With regard to the "other information" reference, this contention is too vague for the court to address; thus, we must reject it as well. As for the "itemized deductions,"

appellant fails to provide any argument in support of this contention and fails to specify what effect such deductions would have on the FinPlan analysis.

{¶ 34} Appellant also asserts he was denied his "right to cross-examine evidence presented against him" because the trial court drafted its own FinPlan reports, and no FinPlan reports were submitted to the magistrate at the hearing on the motion. We also reject this argument, as the trial court indicated that the record contained all of the evidence necessary to recalculate the modification of spousal support, except applicable tax rates. Appellant could have presented any evidence he desired at the hearing before the magistrate and cross-examined appellee on any evidence she presented. Lacking any further specificity as to precisely what "evidence" appellant wished to "cross-examine" and why, we must reject the argument. For all of the foregoing reasons, appellant's fourth assignment of error is overruled.

{¶ 35} Accordingly, we grant appellee's application for reconsideration and overrule appellant's first, second, third, and fourth assignments of error. Having granted the application for reconsideration, and having overruled appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations. Appellee's motion for en banc consideration is moot.

Application for reconsideration granted;
Judgment affirmed.

BRYANT, J., concurs.
DORRIAN, J., dissents.

DORRIAN, J., dissenting.

{¶ 36} For the reasons outlined below, I respectfully dissent from the majority's decision to grant reconsideration of our decision to reverse the judgment of the trial court that modified appellee's award of spousal support.

{¶ 37} The Ohio Supreme Court in *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, emphasized the court's long-settled proposition that "an agreement for spousal support that has been entered in a divorce decree by a trial court is entitled to expectations of finality." *Id.* at ¶ 15. The Supreme Court also recognized, referencing *Wolfe v. Wolfe*, 46 Ohio St.2d 399 (1976), and other previous cases, that "a prior order of spousal support may be modified in *some instances* where the circumstances of the

parties have changed." (Emphasis added.) *Mandelbaum* at ¶ 16. The remainder of the *Mandelbaum* decision, in essence, discussed and defined, within the context of R.C. 3105.18 and common law, what constitutes "some instance," where an order of spousal support may be modified by a court. As noted by the majority, the Supreme Court set forth three jurisdictional criteria which must be met in order for a court to modify a spousal support order: (1) the decree of the court must expressly reserve jurisdiction to make the modification; (2) the court must find that a substantial change in circumstances has occurred; and (3) the court must find that the change was not contemplated at the time of the original decree. *Mandelbaum* at paragraph two of the syllabus; ¶ 33.

{¶ 38} Appellee argues that our decision "allows Appellant to escape the agreed and stipulated consequences of anticipated economic changes simply by virtue of the fact that those future economic changes were anticipated." (Application to Reconsider, 2.) Here, appellee seems to suggest that a court may disregard the jurisdictional requirements set forth in *Mandelbaum*, particularly when the parties, in an original decree, contemplate specific changes in circumstances and stipulate that the court may modify spousal support under those circumstances. I do not agree that *Mandelbaum* allows a court to do so, and appellee has not presented any case which persuades me such authority exists.

{¶ 39} Appellee cites to two cases in support of her argument: *Robrock v. Robrock*, 167 Ohio St. 479 (1958), and *Wright v. Wright*, 10th Dist. No. 08AP-353, 2008-Ohio-5895. Both of these cases were decided prior to *Mandelbaum*. Although the case involves a modification of child support, appellee cites to *Robrock* to support her statement that "the law is well settled that the terms and conditions of a divorce decree, if approved by the court, may be enforced only if the provisions thereof could, and under certain circumstances absent those agreements, render the court without jurisdiction." (*See* Application to Reconsider, 2.) Appellee's statement is not entirely clear, but it appears that she is referring to paragraph four of the court's syllabus in *Robrock*, which states: "In a divorce case, the court, to give effect to a separation agreement, has the power to incorporate it in the divorce decree or base the decree on its provisions, *even though the court, in the absence of an agreement of the parties, would not have the power to make the resultant decree*." (Emphasis added.) I note and find persuasive Judge Zimmerman's dissent from paragraphs four and five of the syllabus: "[i]t is axiomatic that 'parties can

not by agreement clothe the court with jurisdiction it does not possess.' " *Id*., dissent at 491. More significantly, however, I note that 18 years after *Robrock* was decided (and 33 years before *Mandelbaum* was decided), the Ohio Supreme Court found that "paragraphs four and five [of the syllabus in *Robrock*] are aberrations, isolated in time and circumstance * * * [and] we must conclude that the vitality of paragraphs four and five of the syllabus in *Robrock* is no longer apparent." *Nokes v. Nokes*, 47 Ohio St.2d 1, 6-7 (1976). For these reasons, *Robrock* does not persuade me that the jurisdictional criteria set forth in *Mandelbaum* may be disregarded in the event the parties, in the original decree, agree.

{¶ 40} Nor does *Wright v. Wright*, 10th Dist. No. 08AP-353, 2008-Ohio-5895, persuade me that the jurisdictional criteria set forth in *Mandelbaum* may be disregarded in the event the parties, in the original decree, agree. In *Wright*, this court examined the enforceability of a separation agreement, incorporated into a dissolution judgment, which provided that it could be amended or modified only by a written document signed by both parties. *Id*. at ¶ 2. There are three important differences between the facts in *Wright* and the facts in this case. First, *Wright* involved a dissolution; whereas, this case involved a divorce. Second, *Wright* involved modification of division of property; whereas, this case involved modification of spousal support. Third, in *Wright*, the parties were able to reach an agreement regarding the modification of their division in property; whereas, in this case, the parties could not agree on the modification of spousal support.

{¶ 41} We noted in *Wright* that "mutual consent is the cornerstone of dissolution law, and despite the need for finality of judgments, parties are not precluded from voluntarily including a provision for continuing jurisdiction in their separation agreement." *Wright* at ¶ 10, citing *In re Whitman*, 81 Ohio St.3d 239 (1998). Our holding in *Wright* was specific to a dissolution decree, and I do not see that it applies here.

{¶ 42} Furthermore, the jurisdictional requirements set forth in *Mandelbaum* apply specifically to modification of spousal support orders, not to modification of division of property orders. Perhaps for this reason, in determining that the parties' mutual agreement regarding the modification of division of property in *Wright* was enforceable, this court did not discuss this or other courts' case law, upon which *Mandelbaum* was established and referred to as "settled law." *See Leighner v. Leighner*, 33 Ohio App.3d 214, 215 (10thDist.1986), quoted in *Mandelbaum* at ¶ 17-18 (" 'Where

modification of an existing order for the payment of sustenance alimony is requested, the threshold determination is whether the order *can* be modified, which requires a finding of a change in circumstances since the order was entered. The change in circumstances must be substantial and must be such as was not contemplated at the time of the prior order.' " (Emphasis sic.)

{¶ 43} Finally, in *Wright*, the parties agreed to the modification. In this case, however, the parties did not agree on the spousal support modification. In our decision, we specifically stated that, had the parties been able to agree upon the terms of their modification, our analysis of the three jurisdictional requirements set forth in *Mandelbaum* would be unnecessary. *See Piliero* at ¶ 13. It would only be necessary for the trial court to enforce or implement the parties' agreement. However, the parties could not agree upon the implementation of their own formula for modification; i.e., they could not agree on the sum that equalizes after tax income between them after the child was emancipated or the appellant's annual income changed from the cost of living ("COLA") increase and after the occurrence of other so-called "trigger" events specifically enumerated in the separation agreement. Therefore, they sought the assistance of the trial court to determine whether a modification of spousal support was appropriate under the circumstances and, if appropriate, to determine the proper modification. As such, it became necessary for this court, pursuant to *Mandelbaum*, to determine whether the trial court had jurisdiction to modify.

{¶ 44} Notwithstanding her suggestion that a court may disregard the jurisdictional requirements set forth in *Mandelbaum*, appellee argues that this court's application of the jurisdictional criteria set forth in *Mandelbaum* is "inappropriate and unduly broad." (Application for Reconsideration, 2.) In particular, appellee points to our application of the third jurisdictional requirement and the meaning of the term "contemplate." In support of her argument, appellee cites *Dean v. Dean*, 8th Dist. No. 95615, 2011-Ohio-2401, and *Ballas v. Ballas*, 7th Dist. No. 08 MA 166, 2009-Ohio-4965.

{¶ 45} With regard to *Mandelbaum's* third jurisdictional requirement, the Eighth District Court of Appeals in *Kaput v. Kaput*, 8th Dist. No. 94340, 2011-Ohio-10, defined the word "contemplate" as " '[t]o have as a purpose; intend.' " *Kaput* at ¶ 22, citing *Random House Webster's Unabridged Dictionary*, 2d Edition. In *Dean*, the Eighth District cited the *Kaput* definition of the word "contemplate" as being "intentional." *Dean*

at ¶ 17. The Seventh District Court of Appeals, in *Ballas,* stated that "a trial court should be able to reserve jurisdiction for further consideration of a specific issue if it finds that it is unable to adequately predict the timing, extent and impact of a foreseeable change." *Ballas* at ¶ 43.

{¶ 46} Unlike the decisions in *Dean*, *Kaput,* and *Ballas,* in the instant case, we did not specifically opine as to the definition of the word "contemplate." However, even in applying the definitions of the word "contemplate" proposed in *Dean, Kaput, and Ballas*, I would still reach the same conclusion based upon the unique set of facts in this case. Here, at the time they entered into the divorce decree: (1) the parties knew that child support would cease upon the emancipation of their only remaining minor child, and (2) the parties knew that appellant had been receiving, and expected he would continue to receive, COLA increases in income every year at his current job. As such, the parties included language in their divorce decree acknowledging that child support would cease and that, from time to time, spousal support would be modified in order to account for anticipated changes in the parties' income. Based upon the unique facts of this case, I am unable to say that the parties did not contemplate these changes in circumstance.

{¶ 47} As to child support, the parties knew the exact year that the minor child would emancipate and the exact amount of child support that appellee would stop receiving from appellant as part of her monthly income as a result of emancipation. According to the parties' divorce decree, the minor child was born on October 16, 1989, and appellee would receive monthly child support in the amount of $801.33 until the minor child emancipated under the law. (Parties' Joint Plan for Shared Parenting, 3.) The record indicates that appellee stopped receiving child support payments as of June 1, 2008. (*See Piliero* at ¶ 15.) It is evident that the parties intended child support to cease and that, upon emancipation, the timing, extent, and impact of the change in support was adequately predictable. Therefore, our conclusion that the parties contemplated this change in circumstance at the time of their divorce would not have been different even in applying *Dean*, *Kaput,* and *Ballas's* suggested interpretations of the word "contemplate."

{¶ 48} As to the COLA increases in income, the parties knew at the time of their divorce that appellant received COLA increases from his employment with the Social Security Administration. (Tr. 35; 101-102; 112.) Appellant testified that he received COLA increases during the parties' marriage and after their divorce. (Tr. 112.) There is no

evidence that appellee was unaware of the COLA increases during the parties' marriage, and she did not dispute appellant's testimony regarding the same. In their divorce decree, the parties acknowledge that "spousal support shall be [modified], from time to time, so that the parties have equal after-tax annual income from earnings." (Agreed Judgment Entry and Decree of Divorce, 3-5.) Appellant testified that, from the time the parties filed their divorce, his increases in income only represented COLAs and were not merit based. (Tr. 101.) Further, the record is void of any evidence suggesting that appellant would stop receiving COLA increases in the future. It is evident that the parties intended for appellant to receive ongoing COLA increases. Furthermore, the timing, extent, and impact of the cost-of-living increases were adequately predictable. First, appellant testified that, if he received an increase, it would be at the beginning of the first pay period. (Tr. 34-35.) Second, COLA increases are not discretionary in nature. Appellant's counsel characterized the increase as being "3 percent" per year. This approximate amount[1] is reflected in calculations made from annual salary amounts contained in the parties' Agreed Judgment Entry and Decree of Divorce at 4, and appellee's Exhibits D and E submitted at the hearing on February 24, 2010. Therefore, our conclusion that the parties contemplated this change of circumstance at the time of their divorce would not have been different even in applying *Dean*, *Kaput*, and *Ballas's* suggested interpretations of the word "contemplate."

{¶ 49} For these reasons, I do not believe that appellee's disagreement with our conclusion and logic in our decision provides sufficient grounds to support granting her application for reconsideration. *See State v. Owens*, 112 Ohio App.3d 334, 336 (8thDist.1996). Therefore, because appellee has failed to cite an obvious error in this court's decision or to raise any issue that this court did not previously consider, I would deny appellee's application for reconsideration.

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[1] The actual amount reflected varies between 2.2 and 2.6 percent.