[Cite as *M.F.S. v. B.T.S.*, 2024-Ohio-4680.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

M.F.S.,	:	
Plaintiff-Appellant,	:	No. 113599
v.	:	
B.T.S.,	:	
Defendant-Appellee.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 26, 2024

Civil Appeal from the Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-02-289203

Appearances:

Stafford Law Co., L.P.A., Kelley R. Tauring and Joseph G. Stafford, *for appellant*.

CORDELL | CORDELL, and Danielle C. Kulik, *for appellee*.

MICHAEL JOHN RYAN, J.:

{¶ 1} In this appeal, plaintiff-appellant, Maureen Sullivan, challenges the trial court's December 29, 2023 judgment adopting a magistrate's August 3, 2023 decision with modifications. Relevant to this appeal, the trial court's judgment modified defendant-appellee's, Brian Sullivan, spousal support obligation to Maureen and denied Maureen's motion to dismiss Brian's motion to modify or terminate spousal support. After a thorough review of the facts and pertinent law, we affirm, but clarify that the trial court's judgment was a modification of Brian's spousal support obligation to $0, rather than a termination of the support order.[1]

Factual and Procedural Background

{¶ 2} Maureen and Brian were married in 1985.[2] In 2002, Maureen filed a complaint for divorce. The parties' divorce was finalized in 2007. The divorce decree (which was prepared by counsel for Maureen) ordered Brian to pay Maureen $3,100 in monthly spousal support (Brian also had to pay a processing fee). The judgment further provided that Brian's obligation "shall terminate upon the death

[1] The trial court used the terms "termination" and "modification" interchangeably. For example, in its December 28, 2023 judgment overruling Maureen's objections to the magistrate's decision, the court twice stated that Brian's support obligation was modified to $0. *See* judgment at p. 6 and 8. However, in its December 29, 2023 judgment in which the trial court adopted the relevant portion of the magistrate's decision, the court ordered that Brian's spousal support obligation was terminated. *See* judgment at p. 1. We believe there is a distinction between "termination" and "modification," as will be discussed later in the opinion, and find, that in this case, the appropriate action should be "modification." That is, Brian's spousal support obligation is modified from $3,100 per month to $0.

[2] Two children were born as issue of the marriage; the children were emancipated at the time relevant to the proceedings which are at issue in this appeal.

of either party; the remarriage, or the cohabitation of . . . Maureen . . . with an unrelated male." The judgment provided that "the spousal support is subject to further Order of the Court." Additionally, Brian was ordered to notify the Cuyahoga County Job and Family Services — Office of Child Support Services ("CJFS-OCSS," previously "CSEA") of any change in his employment and both parties were ordered to comply with requests from CJFS-OCSS or the court for financial information, including information related to retirement.

{¶ 3} Records from CJFS-OCSS showed that, pursuant to the divorce decree, Brian began paying Maureen the $3,100 spousal support in May 2007, and paid her consistently until December 2021,[3] totaling approximately $652,000.[4]

{¶ 4} Brian filed several motions to modify his spousal support obligation. The first motion was filed in August 2008; the trial court denied it in May 2009. The second and third motions were filed in November 2009 and March 2012, respectively; the trial court denied those motions in August 2013. Brian filed his fourth motion to modify/terminate spousal support in October 2021, indicating his intention to retire; he amended the motion in January 2022, indicating that he had retired as of December 31, 2021.[5]

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[3] Brian's employer made a payment to Maureen in January 2022. That was the last payment Maureen received.

[4] Brian also paid temporary spousal support to Maureen beginning in 2003, four years prior to the final divorce decree.

[5] We note that this case has been appealed twice before. In the first appeal, *Sullivan v. Sullivan*, 2010-Ohio-5229 (8th Dist.), Maureen appealed and Brian cross-appealed.

{¶ 5} The trial court conducted evidentiary hearings spanning five days — March 13 and 16, 2023, April 11 and 18, 2023, and June 22, 2023 — on Brian's fourth and amended motions to modify or terminate his spousal support obligation, the decision that is the subject of this appeal.

{¶ 6} Prior to the hearings, the trial court issued a trial order. In the order, the court stated that the direct examination of witnesses would be limited to one hour and cross-examination of witnesses would be limited to 30 minutes. The order also stated that the parties were required to submit updated signed and sworn financial disclosure statements in accordance with R.C. 3105.171(E)(3) and (5).

{¶ 7} Further, under a section in the trial court's order titled "Trial Brief," the court set a date certain for trial briefs to be filed and stated that the briefs should "set forth" numerous documents, including those relating to sources of income, such as tax returns, pension and retirement plans, social security benefits, and life insurance policies. Both parties filed updated financial disclosure statements and trial briefs. Brian's financial documents were appended to his amended trial brief, and he testified at trial as to the substance of them.

Relevant to the instant appeal, Brian challenged one of the trial court's decisions denying his motion to modify spousal support. This court noted that he did not "actually challenge the court's refusal to modify his support obligations." *Id.* at ¶ 12. Rather, Brian only challenged the trial court's denial of his motion "'with prejudice,'" contending that that "could be construed to operate as a bar to future motions to modify support, contrary to the terms of the divorce decree under which the court retained continuing jurisdiction." *Id.* This court "decline[d] to provide [Brian] with an advisory ruling about the effect of the court's order on future motions to modify spousal support." *Id.*

Maureen initiated the second appeal, but voluntarily dismissed it. *Sullivan v. Sullivan*, 8th Dist. Cuyahoga No. 96425, *see* motion no. 443715.

{¶ 8} A magistrate presided over the hearings. At the start of the subject hearings, Maureen's counsel objected to the court's time limitations and requested additional time. The court reserved ruling on the objection.

{¶ 9} In general, the testimony from the hearings established that beginning in January 2022, which was the beginning of his retirement, Brian stopped paying spousal support to Maureen; at that time, he had paid her support for about 14 years, totaling approximately $652,000. The more specific testimony is set forth below.

Brian's testimony

{¶ 10} As mentioned, Brian did not submit his financial documents at trial. Rather, over Maureen's objection, he relied on attachments to his amended trial brief in testifying as to his financial situation.

{¶ 11} Brian testified that he had worked in IT at the Jones Day law firm; he did not have a college degree. He retired at the end of 2021, with a salary of approximately $158,000. He was 65 years old at that time and testified that he had worked (generally, not specifically at Jones Day) for 50 years. Brian was eligible for his full Jones Day pension at the time of his retirement. His annual income on his Jones Day pension was approximately $60,996. Brian testified that he was eligible to start collecting $3,258 monthly in social security benefits, but he had not applied for those benefits because it was his intention to live solely off his Jones Day pension until he turned 70 years old. At 70, he would be eligible for an additional $1,000 per month social security benefit.

{¶ 12} According to Brian, he had limited assets and significant debt. He owned a 2018 Toyota with 130,000 miles on it and a motorcycle; both vehicles were paid off. Brian testified that he needed a new car but was unable to afford one. He had one checking account that he used as a revolving account to pay living expenses — as he testified, "money comes in and it goes immediately back out." He had a savings account with approximately $200 in it. Brian also had a 401(k) account valued at $207,000 but was not withdrawing funds from it.

{¶ 13} Regarding debt, Brian testified that he had approximately $26,000 worth. He testified that his monthly expenses consisted of: (1) $170 for Medicare; (2) $100-$200 for a long-term disability insurance policy; (3) $80 for car insurance; (4) $200-$300 for a Citibank credit card; (5) $200-$300 for a Chase Prime credit card; (6) $200 for a PNC line of credit; (7) $595 for a personal loan he took out to pay attorney fees; and (8) $950 for rent. Brian testified that he lived with his girlfriend, Mona Lombardi, who charged him monthly rent, which he had been paying since 2017. Brian was also responsible for his own groceries and occasionally helped with utilities if they were excessive. Brian testified that he also needs medical and dental treatment that he put off and that would require him paying at least some out-of-pocket costs.

{¶ 14} Brian testified that it was his understanding at the time of the divorce that his spousal support obligation to Maureen would terminate when he retired. He believed that once he retired, his spousal support obligation would be

terminated, and that spousal support would be replaced with payment to Maureen of her interest in his Jones Day pension.

Maureen's testimony

{¶ 15} Maureen testified that she was 66 years old. She had worked at a local hospital as an ultrasound technician; she did not have a college degree. Maureen retired in 2021 when she was 64 years old. She explained that she retired early to be a caregiver for her sister who had cancer.

{¶ 16} Maureen was receiving monthly social security benefits in the amount of $2,000 (after her Medicare deduction) and a monthly amount of $1,300 from Brian's Jones Day pension. Maureen testified that, because Brian had stopped his support payments to her, she was forced to take her social security benefits prior to the age of eligibility.

{¶ 17} Maureen received the parties' marital home as part of the divorce settlement. She testified that it was too much for her to maintain on her own and she sold it for $158,000.

{¶ 18} Maureen testified that her monthly income is approximately $3,400 and her monthly expenses are approximately $3,800. She did not own any real estate and lived in a two-bedroom, two-bathroom apartment for which she paid $1,650 in monthly rent. Maureen owned a 2022 Honda vehicle, and her car payment was $317 per month. Maureen testified that she paid $17,500 in attorney fees in the past year and, besides attorney fees, had no other debt.

{¶ 19} Although Maureen testified that she was able to meet all her expenses since Brian stopped paying her support, she also testified that she had to liquidate some retirement assets to be able to support herself. Maureen explained that since the divorce she has suffered substantial health issues, including a cancer diagnosis and mental health issues. According to Maureen, she has lived frugally since the divorce.

{¶ 20}Maureen testified about a Fidelity account she had. In March 2021, she contributed $20,000, in April 2021, she contributed $270,000, and in May 2021, she contributed $70,000 to the account. Maureen testified that the money came from retirement funds she received from her employer.

{¶ 21} The magistrate questioned Maureen about the remaining value of her Fidelity account. Maureen did not know the exact figures as of the date of her testimony, because, as she testified, she had to make withdrawals for attorney fees. Maureen offered, without objection from her counsel, to log onto her account from her cell phone. Maureen confirmed that she had a balance of $391,944.08 in her Fidelity account as of June 22, 2023. *See* June 22, 2023, tr. 29-30.

Mona Lombardi's testimony

{¶ 22}The day before the April 11, 2023 hearing, Maureen subpoenaed Lombardi, requesting that she appear for the April 11 trial with documents relating to the rental agreement she and Brian had and the rent Brian had paid to her. Lombardi was not on Maureen's witness list and Brian initially objected; he later withdrew his objection. Lombardi appeared, without any documentation

(contending that the short notice did not afford her an opportunity to get the documentation) and testified. Lombardi denied that she and Brian were "girlfriend/boyfriend." She testified that they were merely friends from Jones Day and Brian lived with her and paid her rent.

Maureen's motions to dismiss

{¶ 23} Based on Brian's failure to submit his financial documentation in accordance with Loc.R. 19 of the Court of Common Pleas of Cuyahoga County, Domestic Relations Division, Maureen made an oral motion to dismiss Brian's motion for modification/termination of his support obligation at the close of Brian's case; she renewed her motion in writing. Both motions were denied.

Magistrate's decision and trial court's judgment

{¶ 24} The magistrate found that Brian's retirement constituted a substantial change of circumstances, and the spousal support award was no longer reasonable and appropriate. Because Brian stopped paying Maureen support when he retired, the magistrate found that imposing an additional four months of spousal support would be fair and equitable. Thus, the magistrate ordered Brian to pay Maureen spousal support at the rate of $3,100 a month for the months of January, February, March, and April 2022.

{¶ 25} Maureen filed objections to the magistrate's decision. Relative to this appeal, Maureen generally objected to (1) the denial of her motions to dismiss, (2) the time limits placed on the parties at the hearings, (3) the decision to grant Brian's motion, and (4) the magistrate's alleged conduct in acting as an advocate for Brian.

The trial court overruled Maureen's objections as they related to the issues in this appeal and adopted the relevant portions of the magistrate's decision. Maureen appealed and raised the following assignments of error for our review.

Assignments of Error

I. The trial court erred as a matter of law and abused its discretion by failing to dismiss [Brian's] motion to modify and/or terminate spousal support for violating Local Rule 19.

II. The trial court erred as a matter of law and abused its discretion by arbitrarily limiting the presentation of evidence to sixty (60) minutes for witnesses on direct-examination and thirty (30) minutes for witnesses on cross-examination.

III. The trial court erred as a matter of law and abused its discretion by improperly and unfairly advocating on Brian's behalf during the trial.

IV. The trial court erred as a matter of law and abused its discretion by failing to issue a negative inference against Brian concerning his income.

V. The trial court erred as a matter of law and abused its discretion by finding a substantial change in circumstances and terminating Brian's spousal support obligations.

Law and Analysis

Standard of review

{¶ 26} In all her assignments of error, Maureen contends that the trial court erred as a matter of law and abused its discretion. Our standard of reviewing decisions of a domestic relations court is generally the abuse of discretion standard. *Booth v. Booth*, 44 Ohio St.3d 142, 144 (1989). This court applies the abuse of discretion standard to decisions on motions to modify spousal support. *See Mlakar v. Mlakar*, 2013-Ohio-100, ¶ 27 (8th Dist.); *Kline v. Kline*, 2012-Ohio-479,

¶ 3 (8th Dist.); *Abernethy v. Abernethy*, 2010-Ohio-435, ¶ 18 (8th Dist.). We will review the trial court's decision in this case for an abuse of discretion.

{¶ 27} An abuse of discretion occurs if the court's attitude in reaching its decision was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). An abuse of discretion also occurs if a court exercises its judgment in an unwarranted way regarding a matter over which it has discretionary authority. *Johnson v. Abdullah*, 2021-Ohio-3304, ¶ 35.

Cuyahoga Common Pleas, Domestic Relations Division, Loc.R. 19

{¶ 28}In her first assignment of error, Maureen challenges the trial court's decision to deny her motions to dismiss Brian's motion to modify or terminate spousal support. Maureen's motions were made on the ground that Brian violated Cuyahoga C.P., Dom.Rel., Loc.R. 19.

{¶ 29}Loc.R. 19 governs post-decree support modifications and, in regard to spousal support, provides that "[a]t the hearing, each party must submit a completed Financial Disclosure Statement, and documents verifying his or her earnings and other income, including last year's federal income tax return with all supporting W-2's, 1099's, schedules and other attachments." Cuyahoga C.P., Dom.Rel., Loc.R. 19(F)(1). The rule further provides that "[c]opies of all documents submitted to the Court must be exchanged with the opposing party, or counsel, if represented, before the hearing," and that "[f]ailure of a party to submit the required documents may result in sanctions, including, but not limited to, dismissal

of his or her motion or an award of attorney fees." Cuyahoga C.P., Dom.Rel., Loc.R. 19(F)(2) and (4).

{¶ 30}Brian did not submit his documentation in strict accordance with the rule; rather, his documentation was attached to his amended trial brief. The trial court found that Brian substantially complied with the rule, however, and denied Maureen's motions to dismiss Brian's motion for modification/termination of spousal support. Citing case law, including from this court, stating that documents attached to briefs and memorandum are not evidence, Maureen challenges the trial court's decision to accept Brian's documentation.

{¶ 31} One of the cases from this court cited by Maureen, *Mihalic v. Figuero*, 1988 Ohio App. LEXIS 2026 (8th Dist. May 26, 1988), presents a factually distinguishable scenario from the within case. *Mihalic* involved an appeal from a judgment rendered after a bench trial related to liability on the remaining balance of a mortgage. The appellant failed to make the transcript from the trial part of the record on appeal. This court found that it was unable to review the appellant's claim that the trial court erred in its judgment:

> "The trial briefs of the parties, and the exhibits attached to the trial briefs, are not evidence. Neither a court reporter nor the trial court has certified to this Court what documents or testimony were admitted into evidence. Since there is no record of the evidence, this Court of Appeals cannot review the merits of the decision by the trial court."

(Cleaned up.) *Id.* at *9, quoting *Blue Cross of N.E. Ohio v. The Workmen's Comp. Serv. Co.*, 1983 Ohio App. LEXIS 12785 (8th Dist. June 30, 1983).

{¶ 32} Likewise, another case from this court Maureen cites, *Clark v. Clark*, 2012-Ohio-3249 (8th Dist.), is distinguishable from the within case. *Clark* dealt with an award of spousal support to the appellee after a trial. The appellant challenged the award but failed to make an App.R. 9(C) statement of evidence part of the record, as the trial apparently was not recorded. This court presumed the regularity of the proceeding, noting that "[t]he arguments on appeal refer to statements made in [appellant's] trial brief, but statements contained in a trial brief do not constitute evidence." *Id.* at ¶ 5, citing *Inger Interiors v. Peralta*, 30 Ohio App.3d 94, 96 (8th Dist. 1986), and *State v. Mathia*, 1992 Ohio App. LEXIS 6217, (11th Dist. Dec. 11, 1992).

{¶ 33} Here, the transcripts from the hearings at which Brian testified as to his financials are part of the record before us; thus, there is evidence in the record for us to review.

{¶ 34} Courts are given latitude when following their own local rules and the enforcement of those rules is generally within the promulgating court's discretion. *Colosimo v. Kane*, 2015-Ohio-3337, ¶ 42 (8th Dist.), citing *In re D.H.*, 2007-Ohio-4069, ¶ 25 (8th Dist.), and *Jackson v. Jackson*, 2012-Ohio-662, ¶ 30 (11th Dist.). "Local rules are created with the purpose of promoting the fair administration of justice and eliminating undue delay" and "also assist practicing attorneys by providing guidelines for orderly case administration." *Cavalry Invests. v. Dzilinski*, 2007-Ohio-3767, ¶ 16 (8th Dist.). On the record before us, the trial court did not abuse its discretion in finding that Brian had substantially complied with

Loc.R. 19. We note in particular that the trial court's pretrial order directed the parties to append certain documentation, including those relating to sources of income, to their trial briefs.

{¶ 35} We are also not persuaded by Maureen's contention that Brian's testimony about his financials was hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Brian, the declarant, was testifying about his financial status as shown by the documentation. His testimony was not hearsay.

{¶ 36} The trial court did not abuse its discretion by allowing Brian to testify as to his financials appended to his trial brief. The first assignment of error is overruled.

Time limitations

{¶ 37} For her second assignment of error, Maureen challenges the trial court's time limitations during trial. According to Maureen, the limitations "needlessly infringed upon [her] right to present her claims in a meaningful time and manner. . . ."

{¶ 38} Under Evid.R. 611(A), "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

{¶ 39} This court recently addressed the same time limitation — one hour for direct examination and 30 minutes for cross-examination — and held that there was no abuse of discretion without a demonstration of what evidence a party was prohibited from presenting because of the limitation and how the party was prejudiced. *Machen v. Miller*, 2024-Ohio-1270, ¶ 58 (8th Dist.).

{¶ 40} At the start of the subject hearings, Maureen's counsel objected to the court's time limitations and requested additional time. The court reserved ruling on the objection. According to Maureen, she was prevented "from conducting necessary cross-examination of Brian and his girlfriend, Mona Lombardi."

{¶ 41} Regarding Brian, he was called to the stand to testify twice — first, in his own case and, second, by Maureen in her case. Maureen's cross-examination of Brian in Brian's case spans from page 37 through 48 of the March 13, 2023 transcript and ends with counsel stating, "Your Honor, I would reserve the rest of my time." March 13, 2023, tr. 48.

{¶ 42} When Maureen called Brian in her own case, she called him as if on cross-examination and was afforded one-hour to cross-examine him. The examination began on page 35 of the April 11, 2023 transcript, spanned through page 62 of the same transcript, and continued at the next hearing on April 18, 2023. At the April 18 hearing, the court informed Maureen's counsel that he had approximately 30 minutes left and counsel made an objection but stated that he was going to "live within your time parameters, Your Honor." April 18, 2023, tr. 3. The

questioning ended at page 17 with counsel stating, "I have nothing further from this witness, Your Honor." *Id.* at 17.

{¶ 43} Regarding Lombardi, Maureen called her as her witness; Lombardi therefore was subject to direct examination by Maureen, not cross-examination. Maureen's questioning of Lombardi began on page 14 of the April 11, 2023 transcript and concluded on page 34 of the same transcript with counsel stating, "I have nothing further, Your Honor. Thank you. I appreciate the time and opportunity to call a witness." April 11, 2023, tr. 34.

{¶ 44} Maureen was able to complete her examination of Brian and Lombardi and she did not represent to the trial court that there was an area she was unable to examine either witness on because of the court's time limitations. On this record, there was no abuse of discretion regarding the trial court's time limitations. The second assignment of error is overruled.

Trial court's questioning

{¶ 45} In her third assignment of error, Maureen contends that the trial court abused its discretion by asking questions during the trial. According to Maureen, the trial court's "questioning of Brian and Maureen at trial demonstrate[d] a partiality in Brian's favor and constitute[d] reversible error." We disagree.

{¶ 46} Under Evid.R. 614, a trial court, in either a bench or jury trial, "may interrogate witnesses, in an impartial manner, whether called by itself or by a party." Evid.R. 614(B). "This rule exists because the trial court has an 'obligation to control

proceedings, to clarify ambiguities, and to take steps to insure substantial justice.'" *State v. Stadmire*, 2003-Ohio-873, ¶ 26 (8th Dist.), quoting *State v. Kay*, 12 Ohio App.2d 38, 49 (8th Dist. 1967). Additionally, under Evid.R. 611(A), the trial court has discretion to control the flow of the trial. "'This control includes asking questions of the participants and the witnesses in a search for truth.'" *State v. Redon*, 2009-Ohio-5966, ¶ 8 (8th Dist.), quoting *State v. Prokos*, 91 Ohio App.3d 39 (4th Dist. 1993), citing Evid.R. 614.

{¶ 47} Our review of the record demonstrates that the trial court questioned the parties within the bounds of its discretion and without partiality toward either party. For example, one of the areas of questioning Maureen now complains of related to a change of address Brian filed days ahead of the April 18, 2023 hearing. Brian informed the court that he no longer lived with Lombardi. The questioning was relevant to Brian's expenses — he and Lombardi both had previously testified that he paid her $950 in monthly rent. And although Maureen's counsel objected to the questioning and claimed that Brian and Lombardi were "staging things" for the benefit of the proceeding, the court replied that it simply wanted to know more about the circumstances of Brian's new living arrangement.

{¶ 48} Just as much as Brian's testimony could have inured to his benefit, it also could have inured to the benefit of Maureen. Brian testified that he was living with the parties' son, sleeping on his couch; therefore, he no longer had the expense of rent to Lombardi, which ostensibly could have been viewed as a benefit to Maureen. But as the court told the parties, its questioning was "not [meant to be]

beneficial or harmful [to either party], it's intended to get information." April 18, 2023, tr. 30. Further, the parties were afforded time to question Brian based on the court's questioning, and the court told Maureen's counsel he could recall Lombardi if he wanted to, but counsel chose not to.

{¶ 49} We find that the other line of questioning the magistrate engaged in, and which Maureen now complains of, also did not demonstrate that the court was biased in favor or against either party; rather, the questioning was merely aimed at getting information relative to the court ruling on Brian's motion.

{¶ 50} The trial court did not abuse its discretion by questioning witnesses. The third assignment of error is overruled.

Failure to issue negative inference against Brian concerning his income

{¶ 51} For her fourth assignment of error, Maureen contends that the trial court "abused its discretion by failing to make a negative inference against Brian for concealing proof of his income at trial."

{¶ 52} "The concept of negative, or adverse, inference arises where a party who has control of the evidence in question fails, without satisfactory explanation, to provide the evidence." *Brokamp v. Mercy Hosp.*, 132 Ohio App.3d 850, 870 (1st Dist. 1999), citing *Reams v. State ex rel. Favors*, 53 Ohio App. 19, 22 (3d Dist. 1936). In that instance, the factfinder may draw an inference that would be unfavorable to that party. The concept would apply, for example, where the party willfully suppresses evidence that, if produced, would explain that party's conduct.

Brokamp at *id.* However, a strong showing of malfeasance — or at least gross neglect — is generally required before such an inference would apply. *Id.*

{¶ 53} In support of this assignment of error, Maureen reiterates her contentions set forth under her first assignment of error regarding Brian's lack of compliance with Loc.R. 19. As discussed, Brian did not strictly comply with the mandates of the rule; however, the requisite information was provided, albeit through his amended trial brief, and the court found that he substantially complied with the rule, a finding we uphold. On this record, there was no abuse of discretion in the trial court's failure to apply a negative inference. The fourth assignment of error is therefore overruled.

Substantial change in circumstances finding

{¶ 54} For her final assignment of error, Maureen contends that the trial court abused its discretion by finding that Brian had a substantial change in circumstances justifying termination of his spousal support obligation.

{¶ 55} R.C. 3105.18, which governs the award and modification of spousal support, provides, in relevant part:

> (E) If a continuing order for periodic payments of money as alimony is entered in a divorce . . . that is determined on or after January 1, 1991, the court that enters the decree of divorce or dissolution of marriage does not have jurisdiction to modify the amount or terms of the alimony or spousal support unless the court determines that the circumstances of either party have changed and unless one of the following applies:
>
> (1) In the case of a divorce, the decree or a separation agreement of the parties to the divorce that is incorporated into the decree contains a

> provision specifically authorizing the court to modify the amount or terms of alimony or spousal support.

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

{¶ 56} The divorce decree in this case stated that "the spousal support is subject to further Order of the Court"; that language granted the trial court continuing jurisdiction to modify the spousal support award. *See Mizenko v. Mizenko*, 2001 Ohio App. LEXIS 2514, *9 (8th Dist. June 7, 2001) ("until further order of the court" used within body of the paragraph specifying support obligations is sufficient to reserve jurisdiction to modify the support award), citing *Kearns v. Kearns*, 69 Ohio App.3d 305 (9th Dist. 1990); *Meinke v. Meinke*, 56 Ohio App.3d 171 (6th Dist. 1989); *Martin v. Martin*, 1992 Ohio App. LEXIS 6420 (8th Dist. Dec. 17, 1992).

{¶ 57} Further, as mentioned, there is a distinction between "termination" and "modification." Under the terms of Brian and Maureen's divorce decree, Brian's support obligation was subject to "termination" under certain conditions; specifically, "the death of either party; the remarriage, or the cohabitation of . . . Maureen . . . with an unrelated male." None of those conditions occurred in this case — thus, the support order could not be terminated. But under the court's reservation of jurisdiction, the support order could be modified.

{¶ 58} In regard to a change of circumstance, R.C. 3105.18 provides:

> (F)(1) For purposes of divisions (D) and (E) of this section and subject to division (F)(2) of this section, a change in the circumstances of a party includes, but is not limited to, any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or

> medical expenses, or other changed circumstances so long as both of the following apply:
>
> (a) The change in circumstances is substantial and makes the existing award no longer reasonable and appropriate.
>
> (b) The change in circumstances was not taken into account by the parties or the court as a basis for the existing award when it was established or last modified, whether or not the change in circumstances was foreseeable.

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

{¶ 59} The goal of spousal support is to reach an equitable result; there is no set mathematical formula to reach this goal. *Hloska v. Hloska*, 2015-Ohio-2153, ¶ 11 (8th Dist.), citing *Kaechele v. Kaechele*, 35 Ohio St.3d 93 (1988). R.C. 3105.18(C)(1)(a)-(n) sets forth factors for courts to consider in determining whether the existing support order should be modified due to a significant change in circumstances. These factors include: (a) the parties' income from all sources, including income derived from the property division made by the court; (b) the relative earning abilities of the parties; (c) the parties' ages and physical, mental, and emotional conditions; (d) the parties' retirement benefits; (e) the duration of the marriage; (f) minor children; (g) the standard of living during the marriage; (h) the parties' education; (i) the relative assets and liabilities of the parties; (j) the parties' contribution to education, training, or earning ability; (k) the time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience; (l) the parties' tax consequences for a spousal support award; (m) the parties' lost income production capacity that resulted from that party's marital responsibilities; and (n) any other factor that the court finds to

be relevant and equitable. The party seeking the modification of spousal support has the burden of establishing that a modification is warranted. *Brzozowski v. Brzozowski*, 2014-Ohio-4820, ¶ 20 (8th Dist.).

{¶ 60}The trial court is "not required to comment on each statutory factor; rather, the record must only show that the court considered the statutory factors when making its award." *Comella v. Parravano*, 2014-Ohio-834, ¶ 13 (8th Dist.), citing *Neumann v. Neumann*, 2012-Ohio-591, ¶ 17 (8th Dist.), citing *Carman v. Carman*, 109 Ohio App.3d 698, 703 (12th Dist. 1996). Further, when considering a motion to modify a spousal support order, "'[t]he court need only consider the factors which have actually changed since the last order.'" *Comella* at *id.*, quoting *Mizenko*, 2001 Ohio App. LEXIS 2514.

{¶ 61} The testimony and evidence in this case related to several of the R.C. 3105.18(C)(1) factors. Namely, the parties' incomes, earning abilities, ages and health, retirement benefits, duration of marriage, standard of living, education, and assets and liabilities. The court determined that Brian's retirement was a substantial change of circumstances not contemplated at the time of the parties' divorce and, therefore, the award was no longer reasonable.

{¶ 62}We note that Brian testified he thought that when he retired the portion of his pension that Maureen was entitled to would be a substitute for his spousal support obligation. The trial court addressed Brian's testimony, citing *Mlakar*, 2013-Ohio-100, at ¶ 22 (8th Dist.), in that regard, finding that "contemplate" means more than just "think about." As noted by the trial court,

"[c]ourts have misconstrued that standard by applying a test of foreseeability: was the particular circumstance one reasonably to be anticipated? The better test is grounded in the record and contemplates a finding that the circumstance is not one that 'was thoroughly considered at the time of the divorce.'" *Allread v. Allread*, 2012-Ohio-2093, ¶ 16 (2d Dist.), quoting *Palmieri v. Palmieri*, 2005-Ohio-4064, ¶ 19 (10th Dist.).

{¶ 63} Without citation to the record, Maureen contends that her "testimony further established that Brian's retirement was contemplated at the time of the current order and was considered by the parties when they agreed upon the duration of spousal support as well as the terminating events for spousal support." Our review of the record does not support Maureen's contention. The record is lacking concrete evidence that, at the time of their divorce, Maureen and Brian considered the effect Brian's retirement would have on his spousal support obligation. Rather, the very terms of the divorce decree seem to indicate that it was an open issue; that is, the parties were ordered to comply with requests from CJFS-OCSS or the court related to financial information, including retirement.

{¶ 64} This court has previously held that "a spousal support award that requires an obligor spouse who wants to retire to work or to seek employment beyond the customary retirement age for an indefinite period of time, imposes a burden on the obligor spouse that must be carefully weighed in reaching a fair balance." *Mlakar* at ¶ 25. Further, the Supreme Court of Ohio has held that "absent exceptional circumstances, spousal support awards should not be indefinite, but

should terminate upon a date certain." *Kunkle v. Kunkle*, 51 Ohio St.3d 64 (1990), paragraph one of the syllabus.

{¶ 65}The evidence established that prior to retirement, Brian's annual income was approximately $158,000. After his retirement, which he started at age 65 after being in the workforce for 50 years, his annual income, consisting of a work pension, was approximately $60,996. Thus, Brian's income was substantially reduced after his retirement. The evidence further established that Brian and Maureen were married for 22 years, five of which were during the pendency of this divorce action. At the time Brian filed the subject motion to modify or terminate his support obligation, he had been paying Maureen for approximately 14 years and had paid her approximately $652,000.

{¶ 66}Brian's retirement was a substantial change in circumstances that made the original order of spousal support no longer reasonable. The trial court did not abuse its discretion by terminating Brian's spousal support obligation to Maureen. The fifth assignment of error is overruled.

{¶ 67}Judgment modifying Brian's spousal support obligation to $0 is affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

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

MICHAEL JOHN RYAN, JUDGE

EILEEN T. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR