

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
SHELBY COUNTY

LINDA L. SELANDERS,

PLAINTIFF-APPELLEE,

CASE NO. 17-08-28

v.

JAMES B. SELANDERS,

OPINION

DEFENDANT-APPELLANT.

Appeal from Shelby County Common Pleas Court
Domestic Relations Division
Trial Court No. 07 DV 000037

Judgment Affirmed

Date of Decision: May 18, 2009

APPEARANCES:

Rob C. Wiesenmayer, II for Appellant

Thomas J. Buecker for Appellee

ROGERS, J.

{¶1} Defendant-Appellant, James B. Selanders, appeals the judgment of the Shelby County Court of Common Pleas, Domestic Relations Division, denying his motion to modify spousal support. On appeal, James argues that the trial court erred in failing to adopt the magistrate’s decision or to only consider the findings of fact in the magistrate’s decision when Plaintiff-Appellee, Linda Selanders, failed to properly file a transcript of the divorce proceedings subsequent to her objections to the magistrate’s decision, in violation of Civ.R. 53, and that the trial court abused its discretion by denying his motion to modify spousal support, as it failed to properly consider his involuntary change in circumstances, his ability to pay, and Linda’s earning capacity and decrease in need of spousal support. Based on the following, we affirm the judgment of the trial court.

{¶2} James and Linda Selanders were married in June 1967. They had two children born of the marriage, both of whom were adults at the time of the divorce proceedings. During the course of the marriage, James, with his business partner Tom Brandewie, started and successfully maintained two companies, Fort Loramie Machine Tool, Inc. (“Fort Loramie”), and TJ Co. (“TJ”).

{¶3} In March 2007, Linda filed a complaint for divorce, requesting an equitable division of property and temporary and permanent spousal support. Additionally, Linda filed a motion for temporary spousal support, stating that

James' gross earnings were \$127,000 per year from Fort Loramie, plus an additional \$50,000 per year of other income; that she was a housewife and had no separate income; that she had total monthly expenses of \$2,360; and, that she needed \$1,000 per week to cover expenses and maintain her standard of living.

{¶4} Subsequently, James filed a memorandum in opposition to Linda's motion for temporary spousal support, stating that she exaggerated her monthly expenses; that she failed to disclose all of her assets, including a certificate of deposit; that a reasonable allowance to cover her expenses and maintain her standard of living was \$500 per week; that he did not have \$50,000 of other income, as this was the retained earnings from Fort Loramie that, due to tax elections, was taxed as his personal income; and, that \$43,000 claimed on his tax return as income was also not money available to him, but was also profit of the company that was taxed as his personal income due to tax elections.

{¶5} In April 2007, the magistrate, in an agreed entry, denied Linda's motion for temporary spousal support, but ordered James to pay her \$800 per week to cover the cost of the mortgage, taxes, and insurance on the marital residence in which she resided.

{¶6} In August 2007, the magistrate held a final divorce hearing, and in September 2007, the magistrate issued his decision, dividing the assets of the

parties and stating, in pertinent part, the following findings of fact and conclusions of law:

During the marriage, Jim and Tom Brandewie formed a partnership * * * known as Fort Loramie Machine Tool Company, Inc. * * * Jim and Mr. Brandewie also formed another company, in which they are also equal partners, and the second company is known as the TJ Company. * * * The equipment and the building used in the business of operating the machine tool company is owned by the TJ Company. The machine tool company pays rent to the TJ Company, in order to use the equipment and the building. * * * Rent is not always paid from the machine tool company. It may depend upon whether the machine tool company is having a good year or not.

Both Jim and Tom Brandewie, his equal partner, testified that the total value of the machine tool company is \$150,000.00 and the total value of the TJ Company is \$300,000.00. The two partners have a meeting every year, and agree upon a stock price, which includes the amount of money required to buy out the other partner. * * * John R. Bosse, a certified public accountant, used capitalization of excess earnings method to determine that the total value of the machine tool company as of December 31, 2006 is \$303,418.00. Mr. Bosse testified that the fair market value of a 50% interest in the machine tool company, as of December 31, 2006 is \$151,700.00. Mr. Bosse admitted that he did not know of the buy/sell agreement which puts the total value of the machine tool company at \$150,000.00. Mr. Bosse further admitted that he did not look at the value of the TJ Company. * * * Mr. Bosse did indicate that the tool and die business is a “volatile business.” * * * This indicates to this magistrate that the most likely buyer of either the machine tool company or TJ Company, is one of the partners. The Court should find that the price of the machine tool company and TJ Company, as set forth in the “buy/sell agreement”, is the most accurate indication of the current fair market value of each of those two companies. The Court should find that the machine tool company has a current fair market value of \$150,000.00, and the TJ Company has a current fair market value of

\$300,000.00. Jim has a one half interest in both of these companies, which totals \$225,000.00. * * * Jim should be awarded his share of these two companies as part of the division of the marital property of the parties.

*** * ***

This is a 40 year marriage. The parties have similar education levels. Linda was the homemaker during the marriage and Jim was the breadwinner. * * * Both parties are approximately 57 years old. * * * Linda has not worked for approximately 10 years, but she could probably earn minimum wage, which now equals about \$14,248.00 per year. Jim's earning abilities far exceeded that of Linda. Jim earned \$127,500.00 in 2006. As of June 2007, Jim's projected income for 2007 was \$130,000.00. * * *

Jim testified that his take home pay is \$1,025.00 per week * * *. The undersigned magistrate finds that an award of spousal support is clearly appropriate. The award should be for an indefinite period of time, due to the length of the marriage and Linda's advanced age. The Court should retain jurisdiction over the issue of spousal support. * * * Jim should be ordered to pay spousal support, effectively [sic] immediately, in the amount of \$800.00 per week * * *.

(Aug. 2007 Decision of Magistrate, pp. 3-9).

{¶7} In November 2007, the trial court filed its judgment entry of divorce, adopting all of the magistrate's findings, including ordering James to pay Linda \$800 per week in spousal support and granting him his full interests in Fort Loramie and TJ.

{¶8} In January 2008, Linda filed a motion for contempt and a new hearing, stating that James had only been paying her \$200 per week in spousal

support in violation of the trial court's \$800 per week order; that James failed to transfer title to real estate awarded to her by the trial court; and, that a hearing should be granted due to a newly discovered asset consisting of a government agriculture payment that James did not disclose during the divorce proceedings.

{¶9} The same day, James filed a motion to terminate or modify spousal support, stating that his weekly net income had been reduced from \$1,025 per week to \$326 per week since the trial court's judgment entry, and, as a result, he was no longer able to satisfy his \$800 per week spousal support obligation.

{¶10} In June 2008, the magistrate held a hearing on the motions, at which Linda testified that, according to the trial court's November 2007 divorce decree, James was required to pay her \$800 per week in spousal support; that the last time he made a payment of \$800 per week was December 2007; that, instead, he had only been paying her about \$200 per week since January 2008; that he did make a lump sum payment around the middle of January, but that he was still behind on his payments after the lump sum payment; that he owed her over \$14,000 in back payments; that she was not able to cover her expenses from James' current payments of \$200 per week and the interest that she received on CDs; and, that her current monthly expenses were around \$2,700, even though she stated in her deposition that her expenses were around \$580 per week, or just over \$2,500 per month. Linda continued that, after the magistrate issued his findings of fact,

James received a check for around \$6,000 from his participation in the Current Agricultural Use Value Program (“CAUV”), but that he refused to share the money with her; that she was aware that he would receive the payment at the time of the final divorce hearing; but, that she did not present evidence on the CAUV at the time of the hearing because she thought James would voluntarily give her a share.

{¶11} Linda further testified that she was aware that James’ business partner Tom Brandewie was having health issues at the time of the divorce; that she was also aware that her son Scott was interested in taking over James’s business; and, that she had also been told by James prior to the sale of the business that Brandewie was ready to retire.

{¶12} James testified that, at the time of the divorce, he knew that Brandewie had health problems; that, in December 2007, Brandewie approached him and told him that he was ready to retire due to health concerns; that, testimony was presented at the final divorce hearing that he and Brandewie had a buy-sell agreement that valued each of their half-interests in the businesses at \$150,000; that he could not afford to pay cash to purchase Brandewie’s half of the business, and he did not want to assume that much debt at his age in order to make the purchase; that he did not want his two sons to purchase Brandewie’s share in the business because they had new ideas about how to run the company and it would

create conflicts; that he and Brandewie decided to sell both of their interests to his sons in January 2008 for \$300,000, the total value of the company listed in the buy-sell agreement; that he did not attempt to go into the open market to establish a price for the company; that he and Brandewie also decided to leave an additional \$120,000 in operating income in the business, which his sons were in the process of paying back; and, that the total amount he realized from the sale of his half of the business was \$210,000.

{¶13} James further testified that he began working as a machinist for Fort Loramie in January 2008 and made a gross salary of \$760 per week; that he worked thirty two hours per week; that, when he was the owner of the company, he worked around fifty to sixty hours per week and typically made over \$100,000 per year; that, although the financial statements of Fort Loramie state that there were dividends payable as of December 31, 2007, of \$194,693, he did not authorize any dividend, and he is not aware of the dividend; that, according to his tax returns, he receives \$29,900 in equipment rent and \$6,250 in building rent that Fort Loramie pays to TJ, but that he doesn't actually receive the money, as it is only claimed for tax purposes; that he stopped making \$800 per week spousal support payments in January and started paying only \$200 per week because that was all he could afford based upon his reduction in salary; that he recently

purchased a house for \$200,000; and, that there is only a \$35,000 home equity loan on the new house.

{¶14} On July 14, 2008, the magistrate issued a decision, making the following findings of fact and conclusions of law:

At the time of the divorce, defendant, “Jim”, was earning over \$100,000.00 per year as a co-owner of the Fort Loramie Machine Tool Company, “the company”. Jim and Tom Brandewie were “50/50” partners of the business. Mr. Brandewie had health problems which “plaintiff, Linda”, was aware of. A decision was made between the two partners to sell the business. The business was sold to Scott Selanders and Jamey Selanders, the adult sons of the parties. Jim did not go into business with his sons, because they had new ideas which were different than Jims’ [sic]. Scott and Jamey wanted to take the company in a new direction, and Jim wanted to keep it the way he was used to it [sic]. The undersigned magistrate finds that these are normal and valid reasons for selling a business, and this magistrate finds nothing suspicious about the sale of the business to the parties’ sons.

*** * * Jim is now employed by the company as a machinist, and he runs either a mill or a lathe. Jim works approximately 32 hours per week, and he indicated that he currently earns approximately \$40,000.00 per year. Jim admitted that when he sold the business, he also gave up rental income from equipment which the TJ Company owned and rented to the business. The business was sold for \$150,000.00, and the “boys” still owe Jim another \$58,000.00 which they borrowed to purchase the equipment. * * ***

Linda is also 59 years old. * * * The Court should find that Linda is physically and mentally capable of working and earning at least minimum wage. * * * The Court should find that Linda is capable of earning \$14,560.00 per year. Assuming a person earning minimum wage would be in a 25% tax bracket, this means her take home pay would be approximately \$10,920.00

per year, or \$910.00 per month. Linda also receives interest income from a \$50,000.00 CD, in the amount of \$83.33 per month. She receives interest from a \$100,000.00 CD in the amount of \$333.33 per month. This means that if Linda worked a minimum wage job, she would have disposable monthly income of approximately \$1,326.66. Linda testified her monthly expenses are \$2,736.00, as indicated in plaintiff's exhibit 1. However, she admitted that in her deposition, she stated that her monthly expenses were \$2,513.33. * * * The undersigned magistrate finds that the figure of \$2,513.33 is the more credible number * * *. \$2,513.33 monthly expenses – income of \$1,326.66 = a monthly shortfall of \$1,186.87 per month * * *. If Jim pays Linda spousal support in the amount of \$250.00 per week, that would equal \$13,000.00 per year, or \$1,083.33 per month. It is true that this would still leave Linda about \$100.00 short per month, in order to meet her monthly expenses. However, the undersigned magistrate believes that Linda could earn at least minimum wage, if not more. * * * The Court must also consider the obligor's ability to pay. * * * If Jim pays spousal support in the amount of \$13,000 per year, his gross income after the payment of spousal support is approximately \$27,000.00 per year. Assuming minimum wage is imputed to Linda, her gross income becomes \$27,560.00 per year.

* * *

The Court should find that a substantial change in circumstances has occurred, and Jim's spousal support obligation should be modified, * * * and Jim should be ordered to pay spousal support in the reduced amount of \$250.00 per week * * *.

* * *

After he sold his share of the business on January 1, 2008, [Jim] took matter [sic] into his own hands, and he chose to begin paying spousal support in the amount of \$200.00 per week. Jim admitted that he has not been following this Court's orders. Jim should be found in contempt of Court. * * *

The evidence indicates that Jim received a check in the amount of \$6,002.00, as payment from the government under the CUA V program. * * * Linda should be entitled to one-half of the amount remaining after expenses * * *.

(July 2008 Decision of Magistrate, pp. 2-6).

{¶15} On July 24, 2008, Linda filed objections to the magistrate's decision, arguing that her spousal support should not have been reduced because James' reduction in income was voluntary; because he had substantial assets from the sale of the company from which to pay spousal support; because the sale of the company was fraudulent, as evidenced by the low selling price, the sale to the sons, and the sale occurring within months of the spousal support award; and, because James had chosen to intentionally reduce his income in order to avoid spousal support payments.

{¶16} On August 6, 2008, Linda filed a request for a preparation of the transcript from the June 2008 hearing.

{¶17} On August 24, 2008, the trial court filed an order granting Linda fourteen days from the filing of the transcript to file a memorandum in support of her objections to the magistrate's decision.

{¶18} On September 11, 2008, the transcripts were filed in the trial court, and on September 18, 2008, Linda filed a request for a continuance to supplement her objections to the magistrate's decision. Subsequently, the trial granted an extension of time to file the supplemental objections until October 3, 2008.

{¶19} On October 2, 2008, Linda filed supplemental objections to the magistrate's decision.

{¶20} On November 4, 2008, the trial court filed its decision on Linda's objections to the magistrate's decision, finding that a change of circumstances did not exist to justify a modification of spousal support, and stating the following:

Defendant first complains that this Court should deny the objections of Plaintiff because the Plaintiff failed to request an extension of time to file a transcript and the transcript was not timely filed. It is true that a fairly recent amendment to Civil Rule 53 now requires the transcript to be filed with the Court within thirty days absent an extension of time in writing or other good cause. This Court notes that the Plaintiff made a timely request for a transcript and this Court, sua sponte, issued an Order granting the parties leave to supplement their objections upon the transcript being filed. It is understandable that Plaintiff relied on this Court's order as an extension of time. This Court finds good cause for the filing of the transcript outside the new thirty day time limit.

* * *

Defendant claims that within a few months of the final divorce hearing and within six weeks of the filing of the divorce decree, his business partner chose to leave the business and exercise his right under the Buy-Sell Agreement of the parties. The record raises questions whether this constitutes a change in circumstances not contemplated at the time of the previous order.

The record appears to suggest that the Defendant's business partner's health and possible decision to exercise his rights under the Buy-Sell Agreement were known, contemplated, and presented to the Court at the time of the final divorce hearing. There is some discussion in the record that Defendant's business

partner, Tom Brandewie, had health problems known at the time of the divorce.

*** * * If there was evidence of the poor health of the Defendant's business partner and if there was evidence of contemplation of an early withdrawal from the business at the time of the divorce, then the decision of the business partner at the end of 2007 and early 2008 to exercise his rights under the Buy-Sell Agreement would not be a change in circumstances warranting a modification of the spousal support award. The record supports a finding that the poor health of Defendant's business partner was known and a possible sale contemplated at the time of the divorce hearing. * * ***

This Court must also determine whether the reduction in income is voluntary. A voluntary reduction would not justify a modification of the spousal support award.

*** * ***

This Court finds much of the evidence on this issue to be troubling. The Defendant in this case was the co-owner of a very successful business. He was at the time of the divorce aware of the Buy-Sell Agreement with his business partner. * * * Within a very short period after the awarding of spousal support – within four months of the Magistrate's decision and six weeks of the filing of the divorce decree, the Defendant chose to sell his interest in the business. The business is not sold on the open market in an arms length transaction, but is rather sold to the two sons of the Defendant. The sons then offer to the Defendant a job in the same business purportedly at a significantly reduced income.

There is no evidence before this court that the Defendant was forced to sell his interest in this business. Indeed, the evidence is clearly to the contrary. He made the conscious choice to sell his interests in the business to his sons and to take employment in the same business now owned by his sons at a significantly reduced income. If he did not want to take on additional debt, he could have permitted the sale of Brandewie's interest to his

sons and not incurred the additional debt. His claimed decision that he didn't want to go into business with his sons is a voluntary decision. * * *

Frankly, the timing of this transaction is very suspect. If this motion were before the court when the Defendant was closer to the traditional retirement age (the court notes that the Defendant is not retiring) and some years had passed since the original spousal support order, this Court would find Defendant's claims more credible.

This Court finds that the decision of the Defendant to sell his business to his sons and take employment with them at a reduced income is a voluntary reduction in income taken in attempt to avoid this Court's order of spousal support to the Plaintiff.

Finally, the Magistrate apparently failed to consider the proceeds from the sale of the business in determining whether to reduce the spousal support obligation. * * * The total sale was for \$300,300.00 of which the Defendant's half would equal \$150,150.00. Additionally, according to the testimony of the Defendant, certain cash monies in the amount of \$120,000.00 from a tax refund and the cashing in of insurance policies was left in the company and the company is paying that to the partners. * * *

Factoring in the proceeds from the sale of the business, this court finds that there has not been a change of circumstances supporting the Defendant's request for a reduction in spousal support.

Accordingly, this Court finds that the Defendant has not sustained his burden to prove that a change of circumstances has occurred on facts not known or contemplated at the time of the divorce hearing. Further, this Court finds that the Defendant has not sustained his burden that this was an involuntary reduction in income justifying a reduction in the spousal support award. Finally, factoring in the proceeds from the sale of the business, the Court further finds that the Defendant has not

shown a change in circumstances warranting a modification of the previous spousal support award.

(Nov. 2008 Decision/Order, pp. 3-7).

{¶21} It is from this judgment that James appeals, presenting the following assignments of error for our review.

Assignment of Error No. I

PLAINTIFF/APPELLEE FAILED TO SUPPORT HER OBJECTION TO THE MAGISTRATE'S DECISION WITH A COMPLETE TRANSCRIPT OF THE PROCEEDINGS; NOR DID PLAINTIFF/APPELLEE FILE SAID TRANSCRIPT WITHIN 30 DAYS AFTER THE FILING OF HER OBJECTION; NOR DID PLAINTIFF/APPELLEE REQUEST AN EXTENSION OF TIME TO FILE THE TRANSCRIPT. SAID FAILURE IS IN VIOLATION OF CIVIL RULE 53(D)(3)(B)(III), REQUIRING THIS COURT TO REMAND THE CASE TO THE TRIAL COURT, REQUIRING THE TRIAL COURT TO ADOPT THE MAGISTRATE'S DECISION.

Assignment of Error No. II

THE TRIAL COURT'S DECISION NOT TO MODIFY AND/OR TERMINATE THE APPELLANT'S SPOUSAL SUPPORT OBLIGATION IS CONTRARY TO LAW, CONSTITUTING AN ABUSE OF DISCRETION BY THE TRIAL COURT, AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Assignment of Error No. I

{¶22} In his first assignment of error, James argues that the trial court erred in failing to recognize that Linda neglected to file a transcript request or a request for an extension of time to file the transcript; in sua sponte granting Linda leave to

supplement her objections to the magistrate's decision where no transcript or leave request was made; and, in failing to recognize that Linda did not file a transcript within thirty days after the filing of her objections to the magistrate's decision. Specifically, James argues that these errors resulted in a violation of Civ.R. 53(D)(3)(b)(iii), thereby requiring the trial court to either adopt the decision of the magistrate or to only consider the findings of fact contained in the magistrate's decision. We disagree.

{¶23} Civ.R. 53(D)(3)(b)(iii) provides transcript filing requirements when a party has filed objections to a magistrate's decision. The rule states:

An objection to a factual finding * * * shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. * * * The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

{¶24} A trial court's decision to extend the time for the filing of a transcript past the thirty-day time limit prescribed in Civ.R. 53(D)(3)(b)(iii) and to permit a party to file supplemental objections will not be overturned absent an abuse of discretion. See, generally, *Hanes v. Hanes*, 3d Dist. No. 5-02-55, 2003-Ohio-2131, ¶12; *Brown v. Spitzer Chevrolet Co.*, 5th Dist. No. 2008CA00033, 2009-Ohio-1196, ¶75. An abuse of discretion "connotes more than an error of law

or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court. *Id.*

{¶25} Here, Linda filed her transcript request on August 6, 2008, and on August 24, 2008, the trial court, sua sponte, granted Linda fourteen days after the filing of the transcript to submit a memorandum in support of her objections. However, the transcript was not filed in the trial court until September 11, 2008, outside the thirty-day requirement of Civ.R. 53(D)(3)(b)(iii), and an extension of time to file the transcript was never filed. In its November 2008 judgment entry, the trial court dismissed James' argument that the transcript should be disregarded because it was filed outside the thirty-day limit by stating that Linda reasonably relied on the court's sua sponte August 24, 2008 order as granting her an extension of time to file the transcript, and, consequently, that good cause existed for filing the transcript outside the thirty-day time limit.

{¶26} Although Linda did not file a request for an extension of time to file the transcript, Civ.R. 53(D)(3)(b)(iii) permits the trial court to extend the time for filing for good cause. Here, not only did Linda undertake a diligent effort to make a timely filing of the transcript by submitting a transcript request well before the thirty-day deadline, but the trial court found that good cause existed for the late

filing because of her reliance on the court's August 24 order. Although it may or may not have been reasonable for Linda to rely on the trial court's August 24 order as an extension of time to file the trial transcript, it was certainly within the trial court's discretion to find that such a scenario constituted good cause for the late filing to be waived. Consequently, we find that the trial court did not abuse its discretion in permitting the filing of the transcript outside the thirty-day time limit of Civ.R. 53(D)(3)(b)(iii).

{¶27} Accordingly, James' first assignment of error is overruled.

Assignment of Error No. II

{¶28} In his second assignment of error, James contends that the trial court abused its discretion by denying his motion for modification of spousal support. Specifically, James argues that the trial court's findings that there was no change of circumstances to justify a modification of spousal support and that he voluntarily reduced his income were an abuse of discretion and against the manifest weight of the evidence, as the trial court failed to consider that any decision to sell his business was not contemplated at the time of the divorce proceedings; that Linda had a decrease in her need of spousal support and the ability to work a full time job; and, that he had no alternative viable option apart from selling his business. We disagree.

{¶29} An appellate court reviews the trial court's decision to adopt or reject the magistrate's decision under an abuse of discretion standard, as set forth in our disposition of James' first assignment of error. *Figel v. Figel*, 3d Dist. No. 10-08-14, 2009-Ohio-1659, ¶9, citing *Marchel v. Marchel*, 160 Ohio App.3d 240, 2005-Ohio-1499, ¶7. However, when reviewing the magistrate's decision, the trial court "shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." Civ.R. 53(D)(4)(d); *Goldfuss v. Traxler*, 3d Dist. No. 16-08-12, 2008-Ohio-6186, ¶7. Accordingly, the trial court is free to adopt, reject, or modify the decision of the magistrate under its de novo review. *Id.*, citing *Stumpff v. Harris*, 2d Dist. No. 21407, 2006-Ohio-4796, ¶16; Civ.R. 53(D)(4)(b). Furthermore, a trial court's decision will not be reversed on appeal as being against the manifest weight of the evidence as long as there is some competent, credible evidence to support the decision. *Cichanowicz v. Cichanowicz*, 3d Dist. No. 3-08-04, 2008-Ohio-4779, ¶20, citing *Duer v. Moonshower*, 3d Dist. No. 15-03-15, 2004-Ohio-4025, ¶15.

{¶30} R.C. 3105.18(E), (F) provides for the modification of spousal support and states, in pertinent part:

(E) [I]f a continuing order for periodic payments of money as spousal support is entered in a divorce or dissolution of marriage action 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.

* * *

(F) For purposes of divisions (D) and (E) 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.

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

{¶31} In order to justify a modification of spousal support, any change of circumstances must be one that is substantial and not contemplated at the time of the spousal support order. *Trotter v. Trotter*, 3d Dist. No. 1-2000-86, 2001-Ohio-2122, citing *Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703. The party requesting a modification of spousal support bears the burden of demonstrating that the modification is warranted. *Friesen v. Friesen*, 10th Dist. No. 07AP-110, 2008-Ohio-952, ¶38. Furthermore, “the alleged change in circumstances must not have been purposely brought about by the party seeking modification.” *Roach v. Roach* (1989), 61 Ohio App.3d 315, 319. In making its decision on modification, the trial court must set forth its reasons with sufficient detail to facilitate proper

appellate review. *Friesen*, 2008-Ohio-952, at ¶39, citing *Georgenson v. Georgenson*, 10th Dist. No. 03AP-390, 2003-Ohio-7163, ¶12.

{¶32} We first note that the trial court retained continuing jurisdiction to modify the spousal support award in the magistrate's August 2007 decision. Furthermore, the trial court found that James did not demonstrate the change of circumstances necessary to warrant a modification of spousal support. In reaching its conclusion, the trial court stated that a change of circumstances did not exist because the health of James' partner Tom Brandewie was known, and a possible sale of the business contemplated, at the time of the divorce, and because the \$210,000 James received as a result of the sale of the business could be used to meet his spousal support obligation. The trial court also stated that James' reduction in income was voluntary, as he could have permitted his sons to purchase Brandewie's share and not also sell his share, and that James' sale of the business was nothing more than an attempt to avoid the order of spousal support, evidenced by the sale's timing, within four months of the magistrate's decision to award spousal support, and by the fact that the business was not sold on the open market but purchased by James' sons.

{¶33} While we may have come to a different conclusion than that of the trial court in reviewing the evidence presented, our role is only to review for an abuse of discretion, and we find that the trial court's decision was supported by the

evidence and testimony presented at the June 2008 hearing and well within its discretion. Even though the magistrate found that a modification was warranted by James' change of circumstances, the trial court was not bound by the magistrate's decision and properly conducted its own independent review.

{¶34} First, evidence was presented at the June 2008 hearing to establish that the parties were aware of Brandewie's poor health at the time of the spousal support order. Although there is no indication from the record that the parties also contemplated a potential sale of the business at the time of the order, the trial court drew a logical conclusion that, if the health of Brandewie was known at that time, and he sold his share of the business because of his poor health only months after the support order, it is likely that discussions of a future sale had at least taken place prior to or around the time of the order, thereby meaning that no change of circumstances existed that was not contemplated by the parties at the time of the spousal support order.

{¶35} Second, evidence was also presented at the June 2008 hearing establishing that James' sale of the business, and therefore his reduction in income, was voluntary. While it is true that James testified that he did not want his sons to purchase Brandewie's share of the business because of their conflicting management ideas, no evidence was presented that he was forced to sell his share, even if he might have had no attractive alternatives. Furthermore, we find tenuous

James' argument that he did not have the financial ability to purchase Brandewie's share of the business. James could have purchased the share for \$210,000, and paying for the share would not appear from the evidence to have been difficult, as James was consistently making over \$100,000 per year, and he would have stood to double that income by obtaining a 100% interest in the business. Even if he did not have the cash at the time of sale to make the purchase, he could have obtained a loan and been able to pay it off quickly with his large increase in income.

{¶36} Finally, sufficient evidence also existed to support the trial court's conclusion that James sold the business in an attempt to avoid his spousal support obligation. The fact that the business was sold only four months after the spousal support order; that James voluntarily chose to sell his share of the business; that no attempt was made to sell the business on the open market; and, that he subsequently took a position with Fort Loramie at an income of around \$40,000, all support a finding that the sale of his share of the business was motivated by a desire to reduce his spousal support obligation and not by Brandewie's decision to retire or James' desire to work fewer hours and have less stress.

{¶37} Furthermore, we also find revealing the lack of a thorough explanation and evidence presented on the sale of Fort Loramie and TJ. The magistrate's findings from the final divorce hearing valued Fort Loramie at \$150,000 and TJ at \$300,000. The magistrate also found that both James and

Brandewie testified to these respective values. However, James testified at the hearing on his motion to modify spousal support that the company was sold for \$300,300, plus an additional \$120,000 was left in the business for his sons to pay back. There was never a thorough explanation or evidence presented as to whether this \$300,300 sale was for Fort Loramie, TJ, or both. If we presume that at least TJ was sold, as James testified that he was giving up rental income when he sold the business, we are still left to wonder why an additional \$150,000 was not obtained from the sale of Fort Loramie, as that was its value established by James' prior testimony and the magistrate's findings. If we presume that the \$300,300 sale price included both Fort Loramie and TJ, as the businesses were essentially operated together and enjoyed a symbiotic relationship, we are then left with no explanation as to why the total sale price was \$150,000 less than the companies were valued at in the divorce proceedings. Accordingly, this lack of transparency on the sale of these businesses furthers supports the trial court's findings that this sale was motivated by a desire to avoid paying spousal support, and even suggests to this Court that the entire transaction was quite possibly nothing more than a sham to hide James' true yearly income and net worth.

{¶38} Consequently, we find that the trial court's decision to deny James' motion for modification of spousal support was supported by the evidence and was not an abuse of discretion.

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{¶39} Accordingly, James' second assignment of error is overruled.

{¶40} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

PRESTON, P.J. and WILLAMOWSKI, J., concur.

/jlr