[Cite as *Allread v. Allread*, 2011-Ohio-1271.]

IN THE COURT OF APPEALS FOR DARKE COUNTY, OHIO

CONNIE ALLREAD :

Plaintiff-Appellee : C.A. CASE NO. 2010 CA 6

v. : T.C. NO. 07DIV64119

CRAIG ALLREAD : (Civil appeal from Common Pleas Court, Domestic Relations)

Defendant-Appellant :

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O P I N I O N

Rendered on the 18th day of March, 2011.

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FROELICH, J.

{¶ 1} Craig Allread appeals from a judgment of the Darke County Court of Common Pleas, which denied his motion to reduce his spousal support payments to Connie Allread.

I

{¶ 2} The Allreads divorced in November 2008, after more than forty years of marriage. The Final Decree of Divorce ordered Mr. Allread to pay Mrs. Allread $800 per month in spousal support, and the trial court retained jurisdiction as to the amount and duration of spousal support.

{¶ 3} Mr. Allread had worked for CSX throughout the marriage. It is undisputed that his retirement benefits were classified in two "tiers:" pursuant to the federal Railroad Retirement Act, his Tier I benefits were akin to and in lieu of Social Security benefits and were not divisible in the divorce; his Tier II benefits were akin to a private pension plan and were divisible. In the divorce decree, the trial court ordered that Mrs. Allread receive half of the Tier II benefits that accrued during the marriage. Mr. Allread was eligible to retire at the time of the divorce, but he had not yet done so. Mrs. Allread had also worked throughout the marriage and had paid into Social Security; at the time of the divorce, she was not yet old enough to retire.

{¶ 4} In September 2009, Mr. Allread filed a Motion to Reduce Spousal Support, in which he alleged that he "had a decrease in his retirement from CSX and *** a substantial reduction in income," whereas Mrs. Allread had become "entitled to, and may be, receiving railroad benefits." Mr. Allread retired several months after the parties' divorce was finalized, and he viewed his retirement, coupled with the Tier II benefits Mrs. Allread received due to his retirement, as a change in circumstances warranting a reduction in his spousal support obligation.[1]

[1]Mr. Allread also moved to have all spousal support placed in escrow. The trial court overruled this part of the motion.

{¶ 5} The magistrate held a hearing on Mr. Allread's motion on December 7, 2009. According to Mr. Allread's testimony at the hearing, he had earned $66,073.37 and $63,203.24, respectively, while working in 2007 and 2008. Mr. Allread retired in May 2009 because his "shoulder was completely shot and [he] couldn't perform his job anymore, and [he] wanted to retire instead of going on disability." He testified that his retirement income was greater than his disability income would have been. He had shoulder replacement surgery in June 2009. After the surgery, he was limited to lifting twenty-five pounds, and he claimed that he would not have been able to return to work under such a restriction. He received $28,003.80 annually (or $2,333.65 per month) in pension benefits after his retirement (including Tier I and Tier II), from which he paid $9,600 per year in spousal support, for a net income (before taxes) of $18,403.80. Mr. Allread had no other income. His Tier I retirement benefits were valued at $235,724 at the time of the hearing, but they could not be divided through a domestic relations order and could not be withdrawn except through a defined monthly benefit.

{¶ 6} Mrs. Allread testified[2] that she worked for Personnel Leasing 28-30 hours per week, grossing approximately $19,000 per year, and worked at J.C. Penney 10-15 hours per week, grossing $6,000 per year. She also received $9,600 per year in spousal support and $6,492 per year in Tier II retirement benefits. Thus, her gross income was approximately $41,092 per year.

{¶ 7} On January 7, 2010, the magistrate filed a Decision and Order in which she

[2]As discussed under the first assignment of error, below, the transcript of the magistrate's hearing ordered by Mrs. Allread contained only Mr. Allread's testimony. After Mr. Allread's appeal was filed, a complete transcript was filed with this court.

concluded that Mr. Allread was entitled to a reduction in spousal support. "As things now stand, [Mr. Allread] is retired, with no intentions of returning to work at all, while [Mrs. Allread] is working seven days a week, with no prospects of retiring any time soon. However, [Mrs. Allread's] receipt of the Tier II benefits are [sic] a change of circumstances which warrant a reduction in the total spousal support award. When Mrs. Allread retires, the award may need to be adjusted again, in order to balance the equities between [Mr. Allread's] Tier I benefits and her Social Security Benefits." The magistrate recommended that spousal support be reduced from $800 to $275 per month.

{¶ 8} Mrs. Allread filed timely objections to the magistrate's decision and requested that a transcript of Mr. Allread's testimony at the December 7 hearing be transcribed "preparatory to [her] filing of Objections." In her objections, she claimed that the award of $800 in spousal support in the divorce decree was actually in the nature of a property division, because it was designed "to compensate [her] for the loss of her interest in [Mr. Allread's] Tier I benefits." In support of this argument, Mrs. Allread relied on the magistrate's statement in its decision filed during the divorce proceedings that "the inequality of the amounts received from Social Security by [Mrs. Allread] and from Tier I by [Mr. Allread] would be best equalized through a spousal support order;" she claimed that this statement established that his retirement was contemplated at the time of the divorce and did not constitute a change of circumstances.

{¶ 9} The partial transcript (containing only Mr. Allread's testimony) was filed on February 9, 2010.

{¶ 10} On March 10, 2010, the trial court sustained Mrs. Allread's objections to the

magistrate's decision. The court concluded that Mr. Allread's retirement was "anticipated" at the time of the original hearing and that the spousal support award of $800 was based on his anticipated retirement. The court stated that the "change of circumstances regarding future modifications to spousal support is determined by the Court to be the date when [Mrs. Allread] reaches age 62, which is the earliest date when she can receive social security benefits – in an amount greater than the current spousal support order. Further, even if [Mr. Allread's] retirement were determined to be a change of circumstances for spousal support purposes, the Court finds that the needs of [Mrs. Allread], and other factors set forth in R.C. 3105.18, all mitigate against any reduction at this time."

{¶ 11} Mr. Allread appeals from the trial court's decision, raising five assignments of error.

II

{¶ 12} "THE TRIAL COURT ERRED IN FAILING TO ADOPT THE MAGISTRATE'S FINDINGS OF FACT AND SUSTAINING THE OBJECTING PARTY'S OBJECTIONS WHEN THE OBJECTING PARTY FAILED TO PROVIDE A TRANSCRIPT."

{¶ 13} When Mrs. Allread filed her objections to the magistrate's decision, her request for a transcript of the hearing before the magistrate asked only that Mr. Allread's testimony be transcribed. Mr. Allread contends that Mrs. Allread's objections to the magistrate's decision should have been overruled because she failed to provide a "transcript of all evidence" presented to the magistrate.[3] Mrs. Allread claims that Mr. Allread's

[3]Mr. Allread did not challenge Mrs. Allread's reliance on a partial transcript

testimony was "the only testimony pertinent to [her] objections," and thus was the only testimony that she was required to transcribe in support of her objections.

{¶ 14} Civ.R. 53(D)(3)(b)(iii) provides:

{¶ 15} "Objection to magistrate's factual finding; transcript or affidavit. An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ. R. 53(D)(3)(a)(ii), 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.***"

{¶ 16} As we discuss below, numerous cases hold that a party that objects to factual findings of a magistrate must produce a transcript for the trial court to review or the *objecting* party will be deemed to have waived any objection to a factual finding. In this case, the objecting party (Mrs. Allread) only filed a portion of the transcript , and we can find no cases where that results in any sort of waiver by the non-objecting party to the objector's non-compliance with Civ.R. 53(D)(3)(b)(iii). It is true that the non-objecting party, when faced with objections and only a partial record could have brought this to the trial court's attention. Such an argument might carry weight if the excluded part of the record were something of questionable relevance to the finding of a change of circumstances. But in a situation where the missing portion is the testimony of the objector herself, we cannot find any implicit waiver by the non-objector of the objector's non-compliance with the Civil Rules.

{¶ 17} "Where the failure to provide the relevant portions of the transcript or suitable

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when he filed his Memorandum in Opposition to Mrs. Allread's objections.

alternative is *clear* on the face of the submissions, the trial court cannot then address the merits of that factual objection because the objecting party, whether through inadvertence or bad faith, has not provided all of the materials needed for the review of that objection. It was [the] duty [of the person filing the objections] to provide *all* of the relevant materials needed for the trial court to properly address his objections. It is disingenuous for a party to submit only those portions of the evidence presented that supports [sic] his position, while omitting all evidence that was contrary to his position." *Wade v. Wade* (1996), 113 Ohio App.3d 414, 418 (emphasis in original). See, also, *Carro v. Carro* (June 7, 2001), Cuyahoga App. No. 78011.

{¶ 18} If the objecting party fails to file a proper transcript of all relevant testimony, "a trial court's review is necessarily limited to the magistrate's conclusions of law." *Dayton Police Dept. v. Byrd*, Montgomery App. No. 23551, 2010-Ohio-4529, ¶8, citing *Leibold v. Hiddens*, Montgomery App. No. 21487, 2007-Ohio-2972, ¶16. See, also, *State Farm Mut. Auto. Ins. v. Fox*, 182 Ohio App.3d 17, ¶17 (holding that the trial court abused its discretion by rejecting magistrate's reasoning where the evidence and testimony on which it was based were never provided); *In re E.B.*, Cuyahoga App. No. 85035, 2005-Ohio-401, ¶20. See, also, *Crawford v. Crawford*, Richland App. No. 10CA36, 2010-Ohio-4239, ¶16 (holding that the rationale prohibiting appellate courts from considering assigned errors when portions of the transcript necessary for their resolution are omitted from the record also applies to a magistrate's decision where the objector fails to produce the entire transcript for the trial court; in either case, the reviewing court has nothing to pass upon and thus has no choice but to presume the validity of the lower court's or magistrate's proceedings.)

{¶ 19} A trial court has the authority to modify the amount of spousal support if the court determines that "the circumstances of either party have changed" and the decree (as it did here) contains a provision authorizing the court to modify the amount or terms of spousal support. R.C. 3105.18(E). A change of circumstances "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(F). The burden of showing that a reduction of spousal support is warranted is on the party who seeks the reduction. *Reveal v. Reveal*, 154 Ohio App.3d 758, 2003-Ohio-5335, ¶14. Ordinarily, a motion to modify spousal support payments invokes the discretionary authority of the trial court. Id. (Internal citations omitted.) This usually will not be overturned on appeal in the absence of a showing of an abuse of discretion. Id.

{¶ 20} The trial court found that "there is no change of circumstances to warrant a change in the spousal support order *** [because] at the time of the original hearing, the retirement of [Mr. Allread] was anticipated."

{¶ 21} The magistrate's decision determined that Mr. Allread was entitled to a reduction in spousal support based on factual findings, including events that had happened since the divorce, such as exactly when Mr. Allread retired, that he had surgery resulting in certain work restrictions, the determinations of precisely what his Tier I and Tier II benefits are, that he has remarried, and that his new wife has substantial medical problems. Likewise, facts were considered involving Mrs. Allread's income and health issues. Based on these findings, the magistrate decided that Mr. Allread was entitled to a reduction, but not elimination, of spousal support.

{¶ 22} Mrs. Allread's testimony was certainly relevant to the magistrate's consideration of whether a change of circumstances had occurred. Thus, she failed to comply with Civ.R. 53(D)(3)(b)(iii)'s requirement that she support her objections with a transcript of "all the evidence submitted to the magistrate relevant to that finding."

{¶ 23} The trial court recognized that "a complete transcript was not provided." Therefore, citing *Patterson v. Patterson*, Clark App. No. 2003-CA-60, 2004-Ohio-4368, and Civ.R. 53(D)(3)(a)(ii), it reviewed the magistrate's decision "based on the Decision, arguments of law, exhibits, and pleadings previously filed herein." *Patterson* held that a court will not review a party's objections to a magistrate's factual findings when the objections are not supported by a transcript of the hearing before the magistrate.

{¶ 24} It is conceivable, as the majority held in *Reveal*, that all the facts lead to the conclusion that there was no substantial change in circumstances that was not contemplated by the parties at the time of the divorce. Regardless, whether there was such an unanticipated change is almost the embodiment of a "question of fact." Thus, the court's decision overruling the magistrate's factual decision that there was a change of circumstances that was not contemplated by the parties was necessarily itself a factual finding. As such, it must be based on a transcript of the hearing before the magistrate.

{¶ 25} If Mrs. Allread's objections had presented only questions of law, the trial court could have reviewed them without the benefit of a transcript. However, the decision to modify spousal support – which requires a substantial change in circumstances that was "not *** contemplated at the time of the original decree," *Chepp v. Chepp*, Clark App. No. 2008 CA 08, 2009-Ohio-6388, ¶9, citing *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433,

2009-Ohio-1222, paragraph one of the syllabus – requires factual determinations. Except in exceptional circumstances, the existence of a change of circumstances is a factual determination. In many instances, what the parties "contemplated at the time of the original decree" would also require a factual determination. Here, the court found, apparently based on facts beyond the magistrate's decision, that "the needs of [Mrs. Allread] and other factors set forth in R.C. 3105.18" did not warrant a reduction. Absent a transcript or appropriate affidavit as provided in the rule, a trial court is limited to an examination of the magistrate's conclusions of law and recommendations; the findings of fact may be revisited only if the trial court elects to hold further hearings. *Wade,* 119 Ohio App.3d at 418.[4]

{¶ 26} Mrs. Allread claims that the spousal support payments were in the nature of a property settlement because a large portion of Mr. Allread's pension was not divisible. She also contends that Mr. Allread's retirement was contemplated at the time of the divorce, and therefore did not constitute a change of circumstances. However, neither the divorce decree nor the magistrate's decision that preceded it supports, as a matter of law, only this interpretation of the divorce decree. With respect to spousal support, the divorce decree simply stated that "The Defendant shall pay the Plaintiff $800.00 per month spousal support, with the court retaining jurisdiction as to the amount and duration." The section related to the property settlement did not list the pension plan as an asset and divided the other assets and liabilities equally.

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[4]We recognize that a court is required to undertake an independent review to determine whether a magistrate's recommendation should be adopted pursuant to Civ.R. 53, regardless of whether an objecting party filed a transcript or appropriate substitute. See Civ.R. 53(D)(4)(d).

{¶ 27} The magistrate's original divorce decision acknowledged that there might be an "inequality" between the amount Mrs. Allread would receive from Social Security and the amount Mr. Allread would receive from Tier I of his pension plan, but it stated only that the inequality "would best be equalized through a spousal support order, as neither of those benefits [Social Security or the Tier I pension] can be divided through a domestic relations order." This could have meant that the magistrate somehow factored in unknown future Tier I receipts or that the magistrate believed a future court, once the facts were known, could adjust the spousal support. And the magistrate, in the decision on the motion to modify, stated that "when Mrs. Allread retires, the award may need to be adjusted again, in order to balance the equities between [Mr. Allread's] Tier I benefits and her Social Security benefits."

{¶ 28} In our view, the magistrate's references to the effects of Mr. Allread's retirement benefits on spousal support could be reasonably interpreted as a willingness to modify spousal support as the parties' incomes and circumstances change with their impending retirements, the timing of which was unknown at that time. Neither the magistrate's decision nor the decree of divorce explicitly holds that the $800 spousal support award entered at the time of the divorce was intended to be fixed for any particular period of time or was based on a calculation intended to offset the value of Mr. Allread's pension fund. The magistrate noted that Mr. Allread was not permitted to withdraw funds from his pension "in any way other than through the defined monthly benefit" and noted the similarities in how the Tier I benefits and Social Security benefits would be paid. Although the divorce decree anticipated that Mr. Allread would retire, there is no indication in the decree that the spousal support awarded at that time was calculated based on Mr. Allread's retirement income or that

it precluded a finding of a substantial change of circumstances when he did retire. In sum, we find no support in the record for Mrs. Allread's claim – or the trial court's conclusion – that the $800 spousal support payment was intended, as a matter of law, to offset Mr. Allread's future eligibility for Tier I retirement benefits.

{¶ 29} The magistrate's decision on the motion to reduce spousal support was based on specific factual findings about the parties' incomes, their eligibility for various retirement benefits, their health, and their lifestyles. The trial court was not permitted to rule on the objections to the magistrate's factual findings without reviewing the evidence submitted to the magistrate relevant to those objections. Civ.R. 53(D)((3)(b)(iii); *Wade*, 113 Ohio App.3d at 418. In the absence of a complete transcript of the hearing before the magistrate, the trial court erred in rejecting these factual findings and in making other findings, for example, regarding the first date or occurrence of an event (Mrs. Allread's retirement) at which a change of circumstances would be considered, and in concluding that Mrs. Allread's "needs *** and other factors set forth in R.C. 3105.18, all mitigate against any reduction in spousal support" without consideration of all relevant evidence presented to the magistrate.

{¶ 30} In this case, the trial court did not limit itself to an independent examination of the magistrate's decision while reaching a different legal conclusion. Rather, the court necessarily considered and addressed Mrs. Allread's objections, which were supported only by a partial transcript. "The trial court's action of addressing appellee's objections when [she] submitted obviously inadequate materials pursuant to Civ.R. 53(E) was simply unreasonable." *Wade*, 113 Ohio App.3d at 419.

{¶ 31} The first assignment of error is sustained.

III

{¶ 32} Mr. Allread's other assignments of error challenge the trial court's conclusion that he was not entitled to a modification of his spousal support award. Because we concluded under the first assignment of error that the trial court erred in considering objections to the magistrate's decision that were not supported by a transcript of all relevant proceedings, where such a transcript was available, we need not address the remaining assignments of error.

IV

{¶ 33} The judgment of the trial court will be reversed. This matter will be remanded to the trial court for it to either adopt the magistrate's decision or to consider all relevant evidence in reviewing the magistrate's decision. If the trial court elects to conduct further review of the magistrate's decision, the court may, in its discretion and with proper notice to the parties, take additional evidence, including any evidence relative to claimed changes in circumstances since the time of its prior judgment.

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GRADY, P.J. and DONOVAN, J., concur.

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