[Cite as *Dyrdek v. Dyrdek*, 2010-Ohio-2329.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

JANET DYRDEK, nka MCFERREN,	:	
Plaintiff-Appellant,	:	Case No. 09CA29
vs.	:	
MICHAEL DYRDEK,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellee.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Nancy E. Brum, 200 Putnam Street, Suite 600, Marietta, Ohio 45750

COUNSEL FOR APPELLEE: Jim Fox, 2002 Washington Boulevard, Belpre, Ohio 45714

CIVIL APPEAL FRO COMMON PLEAS COURT
DATE JOURNALIZED: 5-24-10

ABELE, J.

{¶ 1} This is an appeal from a Washington County Common Pleas Court judgment that enforced a divorce decree provision that spousal support would terminate upon cohabitation. The court ordered Janet Dyrdek (nka McFerren), plaintiff below and appellant herein, to reimburse her former husband, Michael Dyrdek, defendant below and appellee herein, $17,056.90 in past spousal support payments.

{¶ 2} Appellant raises the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT'S DECISION IN OVERTURNING THE MAGISTRATE'S DECISION AND TO REQUIRE THE PLAINTIFF TO REPAY TWO YEARS OF PRIOR SPOUSAL SUPPORT PAID WAS UNREASONABLE, ARBITRARY AND SHOULD BE OVERTURNED."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN OVERTURNING THE MAGISTRATE'S DECISION IN THAT IT COULD BE ARGUED THAT DEFENDANT, APPELLEE, MICHAEL DYRDEK GIFTED THE SPOUSAL SUPPORT PAYMENTS TO HIS EX-WIFE FOR THE PAYMENTS MADE IN JANUARY 2007 THROUGH OCTOBER 2008."

{¶ 3} On November 18, 2005, the parties divorced and entered into a separation agreement that provided for spousal support. The agreement provided that appellee would pay $975.22 in monthly spousal support for twenty-four months beginning on September 1, 2005, and then pay $725.22 in monthly spousal support for thirty-six months. The agreement further provided that (1) spousal support would "terminate upon the death, remarriage or co-habitation by Wife as if married or upon the death of Husband", and (2) the amount of spousal support "is non-modifiable and no jurisdiction shall be retained by any Court to modify the same."

{¶ 4} Appellant's father died in September 2008, and she inherited $400,000. On October 31, 2008, appellee filed a combined motion to "terminate" spousal support and to require appellant to reimburse appellee for spousal support improperly paid. Appellee asserted that appellant had been cohabitating as if married since early 2007. He requested that appellant reimburse him for spousal support payments he made since appellant began cohabitating as if married.

{¶ 5} After the hearing, the magistrate determined that appellant began cohabitating as if married in January 2007. The magistrate found, however, that appellant had no obligation to reimburse appellee for the spousal support payments made before the date he filed his motion to terminate spousal support. The magistrate agreed with appellant that the doctrine of laches prohibited appellee from seeking reimbursement. The magistrate observed that even though appellee suspected appellant began cohabitating as early as the fall of 2005, he did not file a motion to terminate spousal support for three years.

{¶ 6} Appellee subsequently filed objections to the magistrate's decision. He asserted that the magistrate improperly determined that the doctrine of laches barred him from recovering spousal support payments that he made to appellant before he filed the motion to terminate.

{¶ 7} On June 9, 2009, the trial court considered appellee's objections and determined that the "sole issue" is whether the magistrate properly applied the doctrine of laches. The court found that appellant failed to establish the prejudice element of laches.

{¶ 8} Therefore, on June 18, 2009 the trial court terminated appellee's spousal support obligation and entered a judgment of $17,056.90 in appellee's favor, plus court costs and interest. The court found that: (1) appellee suspected as early as the fall of 2005 that appellant may be cohabitating, but did not file a motion to terminate spousal support until October 18, 2008; (2) from January 1, 2007 through October 31, 2008,

appellee paid $17,056.90 in spousal support; (3) appellant cohabitated in a state similar to marriage since January 1, 2007; and (4) appellant did not establish laches because she failed to show that she was prejudiced by appellee's delay in filing his motion to terminate spousal support. This appeal followed.

I

{¶ 9} In her first assignment of error, appellant asserts that the trial court abused its discretion by retroactively terminating spousal support upon the date of her cohabitation, rather than upon the date appellee filed his motion.[1] She asserts that the doctrine of laches precludes appellee's nearly two-year delay in seeking to recover spousal support. We note that appellant does not dispute that she cohabitated, and she does not dispute the finding that she began cohabitating in January 2007.

{¶ 10} Before we turn to the merits of appellant's assignment of error, we observe that even though appellee entitled his motion as a motion to "terminate" spousal support, the substance of his motion was to request the trial court to enforce the spousal support provision in the parties' separation agreement. Thus, to the extent that appellant asserts that the trial court's decision constituted an improper "termination"

[1] Initially, we recognize that in the case sub judice, appellee did not file an appellate brief. App.R. 18(C) authorizes us to accept an appellant's statement of facts and issues as correct, and then reverse a trial court's judgment as long as the appellant's brief reasonably appears to sustain such action. See State v. Miller (1996), 110 Ohio App.3d 159, 161-162, 673 N.E.2d 934. In other words, an appellate court may reverse a judgment based solely on a consideration of an appellant's brief. See Helmeci v. Ohio Bur. of Motor Vehicles (1991), 75 Ohio App.3d 172, 174, 598 N.E.2d 1294; Ford Motor Credit Co. v. Potts (1986), 28 Ohio App.3d 93, 96, 502 N.E.2d 255; State v. Grimes (1984), 17 Ohio App.3d 71, 71-72, 477 N.E.2d 1219. In the case at bar, we do not believe that appellant's brief reasonably supports a reversal of the trial court's judgment.

or "modification" of the spousal support provision, we disagree with her argument. See Kimble v. Kimble 97 Ohio St.3d 424, 2002-Ohio-6667, 780 N.E.2d 273, syllabus ("Pursuant to R.C. 3105.18(E), a trial court has the authority to modify or terminate an order for alimony or spousal support only if the divorce decree contains an express reservation of jurisdiction."). Instead, it is well-settled that a trial court possesses inherent authority to enforce its orders, including divorce decrees that incorporate separation agreements. R.C. 3105.65(B) states: "The court has full power to enforce its decree * * *." See, also, McLaughlin v. McLaughlin, 178 Ohio App.3d 419, 2008-Ohio-5284, 898 N.E.2d 79, at ¶13; In re Kirchgessner (Oct. 31, 1978), Columbiana App. No. 1176; Krechman v. Krechman (1959), 110 Ohio App. 554, 170 N.E.2d 91 (holding that courts entering divorce decrees retain "continuing jurisdiction to construe, enforce or implement the rights secured by such provisions by the entry of a judgment ancillary in nature to enforce compliance with the terms of the original judgment * * *"); Stanley v. Stanley (Jan. 7, 1999), Lawrence App. No. CA97-55. Thus, to the extent that appellant asserts that the trial court's decision represents an improper modification or termination of spousal support without proper reservation of jurisdiction, we disagree.

{¶ 11} We next consider appellant's argument that the trial court abused its discretion when it refused to adopt the magistrate's decision that appellant established that the laches doctrine barred appellee from recovering spousal support payments he made before the date he filed his motion to "terminate."

{¶ 12} An appellate court reviews a trial court's action with respect to a magistrate's decision for an abuse of discretion. Fields v. Cloyd, Summit App. No. 24150, 2008-Ohio-5232, at ¶9. Thus, we will not disturb the trial court's decision unless it is arbitrary, unreasonable, or unconscionable. See, e.g., Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. In the case sub judice, we do not believe that the trial court abused its discretion by disagreeing with the magistrate's finding regarding the laches doctrine and by ordering appellant to reimburse appellee for the spousal support payments he made between the date the court found appellant began cohabitating (January 2007) and the date he filed his motion to "terminate."

{¶ 13} Our analysis begins by looking to the separation agreement language that the court incorporated into its divorce decree. "When the parties to a divorce action enter into a separation agreement, the court must construe that agreement in accordance with ordinary rules of contract law." McLaughlin v. McLaughlin (Mar. 26, 2001), Athens App. No. 00CA14, citing Patel v. Patel (Mar. 23, 1999), Athens App. Nos. 98CA29 and 98CA30. Construction of a contract "is a question of law and, as such, we review the trial court's construction of a written instrument de novo." Id., citing Graham v. Drydock (1996), 76 Ohio St.3d 311, 667 N.E.2d 949. Courts "must interpret contract language ''so as to carry out the intent of the parties.'" Id., quoting Skivolocki v. E. Ohio Gas Co. (1974), 38 Ohio St.2d 244, 313 N.E.2d 374, paragraph one of the syllabus. "'The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement.'" Id., quoting Kelly v. Med. Life Ins. Co. (1987), 31 Ohio St.3d 130, 509 N.E.2d 411, paragraph one of the syllabus. Language in the contract must be given its plain and ordinary meaning unless another meaning is

clearly apparent from the contents of the contract. Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶9, citing Alexander v. Buckeye Pipe Line Co. (1978), 53 Ohio St.2d 241, 7 O.O.3d 403, 374 N.E.2d 146.

{¶ 14} In the case at bar, the parties' separation agreement plainly and explicitly provides that spousal support shall terminate upon appellant's cohabitation. Both the magistrate and the trial court determined that appellant started cohabitating in January 2007. Appellant does not dispute this finding, and we therefore have no reason to question this finding. Instead, the issue we must resolve is whether the trial court erred by concluding that the doctrine of laches did not bar appellee from recovering spousal support payments he made between January 2007 (when appellee began cohabitating) and October 31, 2008 (the date appellee filed the motion to "terminate" spousal support).

{¶ 15} Although courts (including this court)[2] have reviewed a trial court's application of the laches doctrine under an abuse of discretion standard, in Kinney v. Mathias (1984), 10 Ohio St.3d 72, 74, 461 N.E.2d 901, the Ohio Supreme Court reviewed it under a manifest-weight-of-the-evidence standard. See id. at 76 (noting that competent, credible evidence supported the trial court's decision regarding laches). The Kinney court explicitly noted that the determination of whether laches is applicable in a given case involves a weighing of the evidence and, thus, is a factual matter. Kinney v. Mathias (1984), 10 Ohio St.3d 72, 74, 461 N.E.2d 901. Appellate courts

[2] See Wiley v. Wiley, Marion App. No. 9-06-34, 2007-Ohio-6423; Walker v. Walker, Summit App. No. 22827, 2006-Ohio-1179; State ex rel. Donovan v. Zajac (1997), 125 Ohio App.3d 245, 250, 708 N.E.2d 254; Scioto Cty. Child Support Enforcement Agency v. Gardner (1996), 113 Ohio App.3d 46, 57, 680 N.E.2d 221.

ordinarily review factual determinations under a manifest-weight-of-the-evidence standard.

{¶ 16} Generally, we will not reverse a judgment as against the manifest weight of the evidence as long as some competent and credible evidence supports it. See, e.g., Shemo v. Mayfield Hts. (2000), 88 Ohio St.3d 7, 10, 722 N.E.2d 1018; C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus. This standard of review is highly deferential and even "some" evidence is sufficient to support a court's judgment and to prevent a reversal. See Barkley v. Barkley (1997), 119 Ohio App.3d 155, 159, 694 N.E.2d 989; Willman v. Cole, Adams App. No. 01 CA725, 2002-Ohio-3596, at ¶24. Moreover, "an appellate court should not substitute its judgment for that of the trial court when there exists * * * competent and credible evidence supporting the findings of fact and conclusion of law." Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶ 17} We noted supra that we have previously applied an abuse of discretion standard when reviewing a trial court's decision regarding the laches doctrine. See Newman v. Group One, Highland App. No. 04CA18, 2005-Ohio-1582, at 16; Walk v. Bryant, Lawrence App. No. 03CA7, 2004-Ohio-1295, at 11; Weber v. Weber (Dec. 27, 2001), 01CA7. Our application of this standard of review appears to have originated from Allen v. Allen (1990), 62 Ohio App.3d 621, 577 N.E.2d 126, which in turn relied upon Thropp v. Bache Halsey Stuart Shields, Inc. (C.A.6, 1981), 650 F.2d 817.823, to support the application of an abuse of discretion standard of review. Despite the apparent confusion regarding the standard of review that applies to a trial court's decision regarding laches, we conclude that in the case sub judice the trial court neither

abused its discretion nor entered a judgment unsupported by credible, competent evidence.

{¶ 18} The doctrine of laches is an equitable doctrine that has been defined as "an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party." Connin v. Bailey (1984), 15 Ohio St.3d 34, 35, 472 N.E.2d 328, quoting Smith v. Smith (1957), 107 Ohio App. 440, 443, 146 N.E.2d 454, affirmed, (1959), 168 Ohio St. 447, 156 N.E.2d 113. To successfully invoke the doctrine, the party invoking the doctrine must establish, by a preponderance of the evidence, the following four elements: (1) unreasonable delay or lapse of time in asserting a right; (2) absence of an excuse for the delay; (3) knowledge, actual or constructive, of the injury or wrong; and (4) prejudice to the other party. See State ex rel. Meyers v. Columbus (1995), 71 Ohio St.3d 603, 605, 646 N.E.2d 173. Delay in asserting a right does not, without more, establish laches. Rather, the person invoking the doctrine must show that the delay caused material prejudice. Connin, 15 Ohio St.3d at 35-36; Smith, paragraph three of the syllabus.

{¶ 19} A party's assertion of financial prejudice does not, as a matter of law, sufficiently demonstrate "material prejudice." See Smith, 168 Ohio St. at 457. "The mere inconvenience of having to meet an existing obligation imposed * * * by an order or judgment of a court of record at a time later than that specified in such * * * order cannot be called material prejudice." Id.; Donovan, 125 Ohio App.3d at 250; Gardner, 113 Ohio App.3d at 58. Instead, to establish "material prejudice," the party invoking the laches doctrine must show either: (1) the loss of evidence helpful to the case; or (2) a change in position that would not have occurred if the right been promptly asserted.

Donovan, 125 Ohio App.3d at 250; see, also, Weber.

{¶ 20} In the case at bar, we believe that competent, credible evidence supports the trial court's decision (and no abuse of discretion occurred) that appellant failed to establish either that: (1) appellee's delay caused appellant to lose evidence helpful to her position; or (2) appellant changed her position due to appellee's failure to promptly assert his right to enforce the spousal support provision. Although appellant may have changed her financial position due to appellee's failure to promptly assert his right to enforce the spousal support provision, the termination of spousal support upon appellant's cohabitation was part of an existing court decree. The decree that incorporated the separation agreement provided, by its plain terms, that spousal support would terminate upon appellant's cohabitation. This court order is an existing condition for appellant's right to payment of spousal support. Once appellant began to cohabitate, her right to the payment of spousal support ceased. Thus, appellant is not entitled to spousal support after the date she began to cohabitate. To the extent she received spousal support payments after that date (January 2007), her receipt of those payments is in direct contravention of the divorce decree. In short, appellant had no right to those payments and cannot claim material prejudice as a result of appellee's nearly two-year delay in seeking to enforce the support provision. Again, under these circumstances, the trial court properly decided not to apply the laches doctrine to bar appellee from seeking to recover spousal support payments that he made before the date he filed the motion to "terminate." Cf. Weber (explaining that "Father is merely being called upon to comply with an obligation imposed upon him by an existing court order. While Father may have changed his financial position in reliance upon his belief

that the order would never be enforced, this prejudice is insufficient as a matter of law to support a defense of laches"); see by analogy Thirty-Four Corp. v. Sixty-Seven Corp. (1984), 15 Ohio St.3d 350, 353, 474 N.E.2d 295 (noting that a party's failure to timely demand payment under a contract does not constitute material prejudice; the converse of this proposition would be that a party's failure to timely stop payment under a contract does not constitute material prejudice). The effect of the trial court's decision is to bring appellant into compliance with the existing divorce decree, and even though it may have caused appellant to change her financial position, this prejudice is not sufficient, as a matter of law, to invoke the laches doctrine.

{¶ 21} Furthermore, in a case with facts similar to those in the case sub judice, the court upheld a trial court's decision to order the cohabitating spouse to reimburse the payor spouse for spousal support payments made since the date of cohabitation. In Jennings v. Jennings (Oct. 26, 1995), Cuyahoga App. No. 68782, the parties' separation agreement provided that spousal support would terminate upon cohabitation. The trial court later determined that the payee spouse began cohabitating on October 1, 1992, and ordered that spousal support terminate as of that date. On appeal, the payee spouse asserted that the retroactive order to terminate spousal support was "unfair." The appellate court disagreed and stated: "A retroactive order terminating support upon cohabitation is permissible when the separation agreement or divorce decree provides that support shall terminate upon cohabitation. A retroactive order was appropriate here because the parties agreed in the separation agreement that spousal support would terminate upon cohabitation." (Citations omitted); see, also, Keeley v. Keeley (Apr. 17, 2000), Clermont App. Nos.

CA99-07-075 and CA99-08-080. Once again, we disagree with appellant that in the case at bar the trial court erred by retroactively terminating appellee's spousal support obligation.

{¶ 22} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's first assignment of error.

II

{¶ 23} In her second assignment of error, appellant asserts that the trial court erred by ordering her to reimburse appellee for the spousal support payments made before the date he filed his motion when the facts demonstrate that appellee "gifted" those payments.

{¶ 24} Our review of the record reveals that appellant did not raise this argument during the trial court proceedings. It is well-established that a party may not raise new arguments for the first time on appeal. See Niskanen v. Giant Eagle, Inc., 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595, at ¶34; State ex rel Zollner v. Indus. Comm. (1993), 66 Ohio St.3d 276, 278, 611 N.E.2d 830. Thus, appellant waived this argument for appellate review. Moreover, we do not believe that appellee's continued compliance with the spousal support order, after suspecting that appellant began cohabitating, does not demonstrate that he made a "gift" of spousal support payments to appellant.

{¶ 25} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is hereby ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

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

McFarland, P.J.: & Harsha, J. Concur in Judgment Only

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.