[Cite as *Hickox v. Hickox*, 2016-Ohio-3514.]

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

DEBORAH R. HICKOX,	:	
	:	Case No. 15CA15
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
ROBERT D. HICKOX,	:	
	:	
Defendant-Appellant.	:	**Released: 06/15/16**

APPEARANCES:

Michael P. Vasko, Michael P. Vasko, Legal, LLC, Canal Winchester, Ohio, for Appellant.

Jason Price, Lancaster, Ohio, for Appellee.[1]

McFarland, J.

{¶1} Robert D. Hickox commenced an appeal of the judgment of the Hocking County Court of Common Pleas, General Division, which affirmed the magistrate's decision overruling his objections and finding that he was voluntarily underemployed. Upon review, we find the trial court's decision is supported by competent, credible evidence. Accordingly, we overrule the sole assignment of error and affirm the judgment of the trial court.

[1] Appellee elected not to file a responsive brief.

FACTS

{¶2} Mr. Hickox and his ex-spouse, Deborah R. Hickox (Appellee), were married for 28 years. They divorced on April 16, 2012. Per the divorce decree, Mr. Hickox was ordered to pay spousal support in the amount of $1,700.00 per month until the death of either party or until Appellee married or cohabitated with an unrelated adult male. At the time of the parties' divorce, Mr. Hickox was employed with Packing Corporation of America (PCA).

{¶3} On August 31, 2012, Hickox entered an "Employment Separation Agreement and General Release," (hereinafter "severance agreement") with PCA. On September 10, 2012, Hickox was approved for unemployment benefits, with the stated basis being "let go for lack of work." On September 11, 2012, Hickox filed a motion to modify spousal support due to a substantial change of circumstances.[2] At the time of the parties' divorce, Hickox's income from PCA had been $170,000.00 per year. In the motion to modify, Hickox informed his income was reduced to $1,600.00 per month.

{¶4} On December 11, 2012, Appellee filed a motion for contempt for non-payment of spousal support. The matter came on for trial before the

[2] Branch One of Mr. Hickox's motion requested spousal support be decreased or eliminated. Branch Two requested a temporary order vacating spousal support. Branch Three requested attorney fees.

magistrate on May 29, 2013. The magistrate filed his decision denying Appellant's motion to modify spousal support on August 23, 2013. Hickox timely filed objections to the magistrate's decision. On August 11, 2014, the trial court held a hearing on the objections and allowed additional testimony.

{¶5} The trial court affirmed the magistrate's findings in its decision and Hickox appealed to this court. However, this Court found the trial court's decision not to be a final appealable order. The case was remanded to the trial court.

{¶6} Hickox next filed a motion for a final appealable order. On November 19, 2014, the trial court filed a judgment entry. In this entry, the trial court found that the only "creditable" evidence of Hickox's separation from his employment with PCA was a voluntary agreement he made with PCA. Hickox appealed the trial court's decision a second time. Again, this Court found that no appealable order existed. The case was again remanded to the trial court. On March 9, 2015, the trial court filed its third decision. The March 9, 2015 entry overruling Hickox's objections to the magistrate's decision stated:

> "That as to the first objection, this court agrees with the Magistrate that the only creditable (sic) evidence as to Mr. Hickox's separation from employment from his job at PCA was a voluntary agreement that he reached with PCA in August 2012. This was a sufficient basis to affirm the Magistrate's

> finding. The first objection is overruled and the Magistrate's decision is affirmed."

{¶7} This timely appeal has followed. Hickox filed his brief on June 19, 2015. Thereafter, on July 20, 2015, Hickox's counsel filed a notice of suggestion of death of Mr. Hickox. On July 20, 2015, Appellee filed a motion to dismiss the appeal based on Hickox's death. Also on that date, counsel for Mr. Hickox filed a memorandum contra Appellee's motion to dismiss, informing that a motion for substitution of parties would be filed upon an appointment of a representative of Mr. Hickox's estate.

{¶8} On August 4, 2015, this Court denied Appellee's motion to dismiss. On September 15, 2015, Joyce E. Taylor, Executrix of the Estate of Robert Dennis Hickox, filed a motion to be substituted as "Appellant." On September 21, 2015, this Court granted the motion for substitution of parties.

ASSIGNMENT OF ERROR

> "I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND APPELLANT'S TERMINATION OF EMPLOYMENT BY PCA WAS VOLUNTARY AND DENIED APPELLANT'S MOTION TO MODIFY SPOUSAL SUPPORT."

{¶9} Before we undertake consideration of Appellant's sole assignment of error, we pause to acknowledge that a decedent's obligations under a separation agreement and the divorce decree are enforceable against

his estate. *Davis v. Davis,* 24 Ohio Misc. 17, 258 N.E.2d 277 (P.C.1970); *Hassaurek v. Markbreit,* 68 Ohio St. 554, 67 N.E. 1066 (1903). Where a separation agreement incorporated into a divorce decree provides for support alimony and the obligor dies, the judgment operates to bind the estate of the obligor according to the terms of the agreement. *Michaels v. Habuda,* 11th Dist. Trumbull No. 3803, 1988 WL 38811, (April 22, 1988); *DeMilo v. Watson,* 166 Ohio St. 433, 143 N.E.2d 707 (1957). See also, *Vaught v. Vaught,* 2 Ohio App.3d 264, 441 N.E.2d 811 (12th Dist.1981). As such, we proceed to consider Appellant's arguments.

A. STANDARD OF REVIEW

{¶10} The party seeking a modification of spousal support has the burden of proving a changed circumstance justifying a change in the level of spousal support. *Carlisle v. Carlisle,* ¶ 10. *Joseph v. Joseph*, 122 Ohio App.3d 734, 736, 702 N.E.2d 949 (1997); see also, *Blunden v. Blunden* (May 26, 1994), Cuyahoga App. No. 65595, 1994 WL 236223 (party seeking reduction must present clear and convincing evidence of an inability to pay spousal support). The "changed circumstances" analysis is a threshold inquiry that the court must make before the court considers the appropriateness of the current spousal support order. *Thacker v. Thacker,* 74 Ohio App.3d 348, 350, 598 N.E.2d 1183 (1991); *Leighner v. Leighner,* 33

Ohio App.3d 214, 215, 515 N.E.2d 625 (1986). The trial court is afforded wide latitude in determining spousal support issues, including issues regarding the modification of spousal support. *Bolinger v. Bolinger*, 49 Ohio St.3d 120, 122, 551 N.E.2d 157 (1990); *Carnahan v. Carnahan*, 118 Ohio App.3d 393, 397, 692 N.E.2d 1086 (1997). An appellate court will not reverse a determination on spousal support unless the trial court has abused its discretion. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 218, 450 N.E.2d 1140 (1983); *Foster v. Foster* (Sept. 23, 1997), Athens App. No. 96 CA 1767, 1997 WL 583567.

{¶11} " * * * [W]hether a parent is voluntarily (i.e. intentionally) unemployed or voluntarily underemployed is a question of fact for the trial court. Absent an abuse of discretion that factual determination will not be disturbed on appeal." *Albright v. Albright*, 4th Dist. Lawrence No. 06CA35, 2007-Ohio-3709, ¶ 17; *Rock v. Cabral*, 67 Ohio St.3d 108, 112, 616 N.E.2d 218 (1993). See also, *Kunkle v. Kunkle*, 51 Ohio St.3d 64, 67, 554 N.E.2d 8 (1990); *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 24, 550 N.E.2d 178 (1990). Under the abuse-of-discretion standard of review, we will affirm the trial court's judgment unless the decision is unreasonable, arbitrary, or unconscionable. *Blakemore* at 219, 450 N.E.2d 1140; *Masters v. Masters*, 69 Ohio St.3d 83, 85, 630 N.E.2d 665 (1994). In making this highly deferential

review, an appellate court may not freely substitute its judgment for that of the trial court. *In re Jane Doe 1*, 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181 (1991).

B. LEGAL ANALYSIS

{¶12} A trial court lacks jurisdiction to modify a prior order of spousal support unless the decree of the court expressly retained jurisdiction to make the modification and the court finds that (1) a substantial change in circumstances has occurred, and (2) the change was not contemplated at the time of the original decree. *Walpole v. Walpole,* 8th Dist. Cuyahoga No. 101900, 2015-Ohio-2157, ¶ 9, citing *Mandelbaum v. Mandelbaum,* 121 Ohio St.3d 433, 2009-Ohio-1222, 905 N.E.2d 172, paragraph two of the syllabus; R.C. 3105.18(F). In the case sub judice, the parties' decree provided that the amount of spousal support was modifiable and subject to the continuing jurisdiction of the Court of Common Pleas, Hocking County, Ohio, Domestic Relations Division. The decree also provided spousal support would terminate following the death of either party, or if Appellee remarried or cohabitated with an unrelated adult male.

{¶13} R.C. 3105.18(C)(1) sets forth 14 factors a trial court shall consider when determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, terms of payment, and

duration of spousal support, which is payable either in gross or in installments. While consideration of relevant factors outlined in the statute is mandatory, the trial court is required neither to hear evidence on each factor nor discuss each factor in its analysis. *Justice v. Justice*, 12th Dist. Warren No. CA2006-11-134, 2007-Ohio-5186, ¶ 13. See *Rice v. Rice*, 11th Dist. Geauga No. 2006-G-2716, 2007-Ohio-2056, 54-56; *Rausch v. Rausch*, 8th Dist. Cuyahoga No. 87000, 87147, 2006-Ohio-3847, ¶ 27; *Chapman v. Chapman*, 10th Dist. Franklin No. 05AP-1238, 2007-Ohio-1414, ¶ 12.

{¶14} In order for a modification of spousal support to be granted, there must be a "substantial change in the circumstances of either party that was not contemplated at the time the existing award was made." *Laubert v. Clark*, 9th Dist. Medina No. 03CA0077-M, 2004-Ohio-2113, ¶ 8, quoting *Moore v. Moore*, 120 Ohio App.3d 488, 491, 698 N.E.2d 459 (9th Dist.1997). A change of circumstances may include any increase or involuntary decrease in wages, salary, bonuses, living expenses, or medical expenses. R.C. 3105.18(F). Once a substantial change of circumstances has been demonstrated, the movant has the additional burden of showing that the current award is no longer "appropriate and reasonable." R.C. 3105.18(C)(1).

{¶15} Appellant contends substantial evidence was submitted evidencing Mr. Hickox's termination from PCA was involuntary. Appellant points to Hickox's testimony that he was given no reason for his termination except lack of work, that ODJFS found that the reason for his unemployment was lack of work and that the severance agreement with PCA states his employment was terminated.[3] Appellant argues the trial court's analysis that the agreement with PCA represented "voluntary" underemployment was simplistic and not supported by the evidence. The magistrate's decision, dated August 23, 2013, found:

> "Mr. Hickox (sic) separation from PCA is odd. Apparently, something happened, because he had been promoted just a little over a month prior. However, Mr. Hickox's equally bald assertion that he was terminated because he disciplined a relative of an executive is not proof that he was involuntarily separated from his prior employer. Exactly what happened, the Court has no idea. The only verifiable evidence the Court has is that Mr. Hickox and PCA reached an agreement to terminate his employment in August, 2012. That is it."

{¶16} After Hickox filed objections to the magistrate's decision, the trial court heard the objections and took additional evidence on the issue of Appellant's separation from employment. On direct examination, Mr.

[3] Defendant's Exhibit 15 is a document from the Office of Unemployment Compensation, and is captioned "Determination of Unemployment Compensation Benefits." The document states it is a determination of an initial application for unemployment benefits, issued in accordance with the provisions of Sections 4141.28(D)&(E), Ohio Revised Code. It states "[T]his agency finds that the claimant is totally unemployed from PACKAGING CORPORATION OF AMERICA due to a lack of work."

Hickox was questioned regarding the severance agreement. Mr. Hickox testified as follows:

> Q: Okay. When did you first see that document?
>
> A: Three or four days after my employment was terminated.
>
> Q: Was there at the time of termination any discussions regarding a severance package?
>
> A: No, none at all.
>
> Q: Did they discuss a general release?
>
> A: No.
>
> Q: Did they discuss paying you money?
>
> A: No.
>
> Q: Did they state the reason for your termination?
>
> A: No.

On cross-examination, Mr. Hickox testified as follows:

> Q: And prior to signing that document you had a chance to review it with your lawyer?
>
> A: Yes.
>
> Q: Okay. And you read the document prior to signing it?
>
> A: Yes.
>
> Q: And you also then did sign the document, is that correct?
>
> A: Yes.

{¶17} After reviewing the record and, in particular, the severance agreement with PCA, we disagree with the characterization that the court's analysis is simplistic. We are unable to conclude the magistrate abused his discretion when overruling Mr. Hickox's motion to modify his spousal support based on the evidence before the court. At the hearing on the motion, Mr. Hickox presented testimony regarding the circumstances surrounding the termination of employment. He also submitted documentary evidence in the form of the ODJFS finding and the severance agreement Mr. Hickox entered. The magistrate and the trial court found the only verifiable evidence was that Mr. Hickox and PCA reached an agreement to terminate his employment.

{¶18} The magistrate, trial court, and now this Court have reviewed the severance agreement, guided by the general principles of contract construction. "The construction and interpretation of contracts are matters of law." *Beery v. Turner,* 4th Dist. Highland No. 09CA5, 2009-Ohio-6832, ¶ 27, quoting *Boggs v Columbus Steel Castings Co.,* 10th Dist. Franklin No. 04AP-1239, 2005-Ohio-4783, at ¶ 5, citing *Latina v. Woodpath Development Co.*, 57 Ohio St.3d 212, 214, 567 N.E.2d 262 (1991). It is generally presumed that the intent of the parties to a contract resides in the language the parties choose to employ in their agreement. *Sonedecker v.*

Gahana-Jefferson, 10th Dist. Franklin No. 98AP-1140, 1999 WL 604114, (Aug.12, 1999), *2; *Shifrin v. Forest City Ent., Inc.*, 64 Ohio St.3d 635, 597 N.E.2d 499 (1992). To say that a contract is integrated means that a court will presume that a complete and unambiguous written contract embodies the parties' final and complete agreement. *Worthington v. Speedway Super America LLC,* 4th Dist. Scioto No. 04CA2938, 2004-Ohio-5077, ¶ 17. See *Fontbank Inc. v. CompuServe, Inc.,* 138 Ohio App.3d 801, 808, 742 N.E.2d 674 (10th Dist.2000). The presumption is strongest when the written agreement contains a merger or integration clause expressly indicating that the agreement constitutes the parties' complete and final understanding regarding its subject matter. *Id.*

{¶19} Mr. Hickox's severance agreement contains integration language in its preamble which states as follows:

> "Packaging Corporation of America (the 'Company') and Robert D. Hickox (the 'Employee') agree that this Employment Separation Agreement and General Release (the 'Agreement') constitute the complete agreement and understanding regarding the separation of the Employee's employment with the Company."

{¶20} Integration language is further provided at Paragraph 17: "This Agreement contains the entire agreement between the Employee and the Company." The agreement further provides at Paragraph 1:

> "The Company and the Employee agree that the Employee's employment with the Company shall be terminated effective August 17, 2012."

The plain and unambiguous language of Mr. Hickox's severance agreement with PCA demonstrates the document constituted the complete agreement and understanding between the parties. The plain language further demonstrates Mr. Hickox agreed to the termination, which ultimately led to the decrease in his wages.

{¶21} Appellant argues, however, that there is no evidence the termination was voluntary. Appellant asserts that the agreement was not negotiated before termination, but four days after Mr. Hickox was let go. As such, if the termination was voluntary, it would have been negotiated in advance. Appellant also points to the language which states at Paragraph 5 that "Employee agrees never to apply for employment with or otherwise seek to be hired or reinstated by the company and waives any reinstatement or future employment therewith." Appellant asserts this language is typical for employment separation agreements with a general release of claims to prevent a suit for unlawful termination. Appellant asserts that Mr. Hickox clearly entered into the agreement to receive severance benefits and PCA offered those benefits to avoid litigation for unlawful termination, a claim Mr. Hickox could not make if he simply quit his job.

{¶22} However, the magistrate considered not only the separation agreement but Mr. Hickox's testimony as to whether or not the agreement was negotiated before termination. On May 29, 2013, when the matter came before the court on Hickox's motion to modify spousal support, the magistrate made the following relevant findings of fact:

> "5. In August, 2012, according to Mr. Hickox, he was involuntarily terminated from his employment. He states that it was due to a dispute with a senior management executive of his employer, Packaging Corporation of America, because he disciplined a relative of that executive. He admits that he committed a safety violation during that time period by stepping in front of an automated carrier machine when not electronically locked-out. He believes this was an excuse for the real motive described above;
>
> 6. Exhibit 12 is an Employment Separation Agreement and Release indicating that he agreed to terminate his employment and would receive severance pay through October 26, 2012 and medical, dental, and vision coverage;
>
> 7. Mr. Hickox has decades of experience in the corrugated packing industry and had his own company at one time during the marriage. At the time of the divorce decree, Mr. Hickox worked for Packaging Corporation of America (PCA) for several years. He was a W-2 employee with an expense account. Only just a month prior to his separation from PCA he had been promoted to Production Manager. He was earning over $120,000 per year."

{¶23} While the trial court made no direct comment regarding the credibility of Appellant's testimony, the trial court noted that Appellant's separation from employment was "odd," and stated: "Exactly what

happened, the court has no idea." These comments lead us to the conclusion that the trial court implicitly found Mr. Hickox's testimony not credible or at least self-serving. In *Kelly v. Forbis,* 6th Dist. Wood No. WD-09-050, 2010-Ohio-3071, after reviewing the trial court's failure to grant a motion to modify child support and spousal support payments, and concluding that the trial court did not abuse its discretion, the court noted inconsistencies in the evidence. The appellate court reiterated:

> "As the weight to be given evidence and the credibility of witnesses is primarily for the trier of fact to determine, we therefore conclude that it was within the trial court's discretion to believe or disbelieve Appellant's testimony and submitted evidentiary materials. *Id.* at ¶ 10. See *Lumpkin v. Lumpkin*, 9th Dist. No. 21305, 2003-Ohio-2841, at ¶ 20, citing *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 23, 550 N.E.2d 178 (1990). See also *Eckstein v. Eckstein*, 9th Dist. No. 03CA0048-M, 2004-Ohio-724, at ¶ 11."
>
> **{¶24}** The *Kelly* court further stated:
>
> "We are not suggesting that the conclusion reached by the trial court is the only conclusion that can be drawn from the evidence in this case, but it is certainly a reasonable one. It is often the case that a particular record is capable of supporting differing conclusions."
>
> **{¶25}** We recognize there are scenarios which would support

Appellant's interpretation of the circumstances surrounding Mr. Hickox's willingness to enter a voluntary termination of employment. However, the

magistrate stated he could not determine "exactly what happened" when Mr. Hickox left employment with PCA.

{¶26} Appellant also points out the trial court had evidence of Mr. Hickox's receipt of unemployment benefits. The magistrate referenced this fact in the decision, but made no comment as to the weight of this particular piece of evidence. We have found no cases which analyze the weight of this evidence, but observe that in at least one case, an appellate court found that "the trial court has concluded [appellant] was voluntarily unemployed notwithstanding his receipt of unemployment benefits." *Bing v. Bing*, 2nd Dist. Greene No. 2008CA52, 2009-Ohio-3512, at ¶ 17.

{¶27} We defer to the magistrate's determination as to the credibility of the testimony and the evidence. Mr. Hickox bore the burden of proof in this matter. In *Bing, supra*, the ex-husband appealed an order of the trial court denying his request to terminate spousal support and finding him in contempt for failing to pay a portion of his children's uninsured medical expenses. The appellate court held he was not entitled to a downward modification of his spousal support obligation. In doing so, the court noted that Bing testified he had withdrawn a "one-time lump sum out of [his] 401" in the amount of $80,000.00. He acknowledged that none of the money was used for his child support or spousal support. He testified he used it to cover

living expenses and credit card debts. He also admitted in cross-examination that some of the money was spent on gambling.

{¶28} In the case sub judice, the trial court heard evidence regarding Mr. Hickox's motion for modification of spousal support and attorney fees, as well as Appellee's motion for contempt. Mr. Hickox testified he had withdrawn $20,000.00 from his 401-K. None of this money had gone towards the spousal support obligation. It is possible this information, as well as Mr. Hickox's other testimony about trips and expenditures, had some bearing on his credibility with the magistrate. In reference to the contempt motion, the magistrate's decision states: "It is beyond doubt that Mr. Hickox ignored the spousal support order and that he had other priorities. Whether the Court might ultimately modify a support obligation is irrelevant, Mr. Hickox is obligated to at least make an attempt at paying the support when he has funds available."

{¶29} We are reminded that even "some" evidence is sufficient to sustain a trial court's judgment. Therefore, we find the magistrate did not abuse his discretion in overruling the motion to modify spousal support. As such, we overrule Appellant's sole assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

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

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Harsha, J. & Hoover, J.: Concur in Judgment Only.

For the Court,

BY: _____
Matthew W. McFarland, 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.