[Cite as *Aichlmayr v. Aichlmayr*, 2015-Ohio-1291.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101428

RITA LUCILLE AICHLMAYR

PLAINTIFF-APPELLANT
and CROSS-APPELLEE

vs.

RONALD L. AICHLMAYR

DEFENDANT-APPELLEE
and CROSS-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-92-218573

BEFORE: S. Gallagher, J., Kilbane, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: April 2, 2015

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SEAN C. GALLAGHER, J.:

{¶1} Plaintiff Rita Lucille Aichlmayr ("Wife") appeals the trial court's decision modifying her 2012 spousal support award effective for only one day and the court's denial of an award of attorney fees. Defendant Ronald Lawrence Aichlmayr ("Husband") filed a cross-appeal challenging the trial court's determination that it lacked jurisdiction to modify the spousal support award, to award supposal support commencing on January 1, 2013, in an amount based on his pre-retirement income, and to treat his retirement income as "income" pursuant to the terms of the separation agreement. The trial court erred in denying Husband's motion to modify the support order, and therefore, in upwardly modifying the spousal support obligation pursuant to Wife's September 4, 2013 proposed judgment entries. For the following reasons, we reverse and remand for further proceedings. Our decision renders all other assignments of error moot.[1]

{¶2} On May 18, 1993, after a 25-year marriage, the parties were granted a decree of legal separation. The parties' separation agreement was incorporated into that decree. As it relates to the current appeal, Husband agreed to an award of spousal support as follows:

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[1]In her assignments of error, Wife claims the trial court erred in modifying the 2012 support obligation for only one day and failing to award attorney fees. We recognize that part of the trial court's decision for denying fees rested with the amount of spousal support. As a result, both assignments of error are moot. Further, in his assignments of error not specifically mentioned, Husband claims that the trial court erred by refusing to dismiss Wife's September 4, 2013 proposed judgment entries for lack of service and precluding the introduction of the parties' intent in drafting the 1993 spousal support agreement. Both issues are also moot.

> Husband shall pay to Wife as spousal support the greater of $615.38 per week, or Forty percent (40%) of Husband's gross annual income [("40% requirement")]. Commencing on the effective date Husband shall pay Wife $615.38 per week, the first such payment to be made on or before April 15, 1993, and each subsequent payment to be made on or before Monday of each week thereafter. In order to effectuate this obligation of Husband's, each year *Husband shall furnish Wife with a true and accurate copy of his federal income tax Return as soon as the same is filed with the Internal Revenue Service*. The dollar amount of spousal support shall remain modifiable in order to effectuate the foregoing Forty (40%) requirement. Such spousal support payments shall continue until the first to happen of the following: (a) death of Wife or (b) death of Husband.

(Emphasis added.) Wife sought only two modifications between 1993 and 2004, all based on Husband's previous year's income but only effective after the date of Wife's motion to modify the support amount. Early in 2004, Wife filed a motion to modify the spousal support award. In August of that year, the parties filed an agreed judgment entry, in part modifying the procedure for effectuating the 40 percent requirement. In that entry, Wife agreed that

> on or before April 15, 2005, and every year thereafter on the fifteenth (15th) day of April of each and every year; the parties agree to file an Agreed Judgment Entry specifically as it relates to any increase or decrease in [Husband's] gross income from the previous year, pursuant to his tax return. If either party fails to adhere to this provision, the other shall be permitted to submit the entry with evidence of the [Husband's] tax return from the previous year.

The 2004 modification altered the above-emphasized language in the 1993 agreement, and patently presumed that Husband would file his tax returns by April 15 every year thereafter. Wife sought five modifications between 2005 and 2009. However, at no point did either party adhere to the terms of the amended agreement by submitting an entry for the year in question by April 15. The closest was in 2005 when the agreed

judgment entry was filed on May 5, effective April 15, 2005. In 2006, the entry was not filed until July 6, 2006, effective the following August. In July 2007, Wife filed a motion to modify the spousal support, even though she agreed that she could unilaterally file an agreed judgment entry, to be effective April 15, 2007.[2] In 2008, the entry was filed on June 25, effective the following July. And finally, in 2009, the entry was filed on June 15, also effective the following July.

{¶3} After 2009, Wife did not seek a modification of the spousal support until filing the proposed judgment entries for 2012 and 2013 on September 4, 2013. Neither judgment entry was filed pursuant to the parties' 2004 agreement, which required the entries to be filed by April 15th. Apparently there is little to be concerned with over that deadline; the parties' subsequent conduct indicated that deadline was honored more in the breach than by the letter of the agreement. Nevertheless, none of the modifications were effective the first of the year in which the modification was sought and all were the product of agreed judgment entries. Wife, in a post-festum explanation for the lateness of the proposed entries, alleged that she never received the pertinent tax returns. Nothing in the record, however, indicates that Wife took any action to procure the tax returns, assuming Husband timely filed his tax return in those two years.

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[2]Incidently, 2007 was the only year in which the parties agreed to a retroactive amendment to the spousal support obligation. We note, however, this was a product of an agreed judgment entry and not the trial court's resolution of a contested issue as to the effective date of the amended obligation. In 2005, the amendment was marginally retroactive, but again, it was a product of an agreed judgment entry, filed two weeks after the effective date of the amendment.

{¶4} More important, even assuming that Husband was dilatory in providing his tax returns, Wife never filed a motion to modify the spousal support award as she did in 2007 complaining of the delay. On December 29, 2012, Husband filed a motion to modify the spousal support award, arguing his 2013 income would be significantly lower in light of the fact that he retired at the end of 2012. Wife opposed Husband's motion, primarily claiming the trial court lacked jurisdiction to modify the terms of the spousal support award because the parties waived any modification beyond enforcement of the 40 percent requirement.

{¶5} In the magistrate's decision, ultimately adopted by the trial court, the magistrate determined: that the trial court lacked jurisdiction to modify the spousal support award based on the parties' contractual agreement; that the modification of Husband's 2012 spousal support obligation was retroactive to the December 29, 2012 date of Husband's motion, the 2013 obligation being made retroactive to January 1, 2013; and that Wife was not entitled to attorney fees because she was more financially stable than Husband.

{¶6} We review spousal support issues under an abuse of discretion standard. *See Dean v. Dean*, 8th Dist. Cuyahoga No. 95615, 2011-Ohio-2401, ¶ 13-14, citing *Dunagan v. Dunagan*, 8th Dist. Cuyahoga No. 93678, 2010-Ohio-5232, ¶ 12. "However, whether a trial court has jurisdiction to consider a modification of spousal support presents a question of law[,]"which is reviewed de novo. *Murphy v. Murphy*, 10th Dist. Franklin No.

12AP-1079, 2013-Ohio-5776, ¶ 13, citing *Koehler v. Koehler*, 12th Dist. Warren Nos. CA2012-06-058 and CA2012-07-059, 2013-Ohio-336.

{¶7} Wife confuses the concept of the trial court's jurisdiction to resolve issues, with the parties' right to contractually waive known rights. "Many decisions by the Supreme Court over the last 30 years [instruct] that 'jurisdiction' means adjudicatory competence." *Adkins v. Nestlé Purina Petcare Co.*, 7th Cir. No. 14-3436, 2015 U.S. App. LEXIS 3270 (Mar. 2, 2015). Courts must draw distinctions between the jurisdiction to resolve issues and contractual waivers, which are nothing more than rules determining how matters can be judicially resolved. "A court has 'jurisdiction' when it has been designated by statute as an appropriate forum for a dispute of a given sort; other rules are non-jurisdictional." *Id.*

{¶8} The spousal support award at issue was the product of a decree of legal separation. R.C. 3105.18(D) expressly provides that "[i]n an action brought solely for an order for legal separation under section 3105.17 of the Revised Code, *any* continuing order for periodic payments of money entered pursuant to this section is subject to further order of the court upon changed circumstances of either party." (Emphasis added.) *Id.* Further, R.C. 3105.18(F) provides:

> a change in the circumstances of a party includes, but is not limited to, any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses, or other changed circumstances so long as [t]he change in circumstances is substantial and makes the existing award no longer reasonable and appropriate [and] [t]he change in circumstances was not taken into account by the parties or the court as a basis for the existing award when it was established or last modified, *whether or not the change in circumstances was foreseeable*.

(Emphasis added.) *Id.* Even a "voluntary retirement 'does not bar consideration of a party's decrease in income when determining if there was a substantial change of circumstances.'" *Mlakar v. Mlakar*, 8th Dist. Cuyahoga No. 98194, 2013-Ohio-100, ¶ 23, citing *Robinson v. Robinson*, 12th Dist. Butler Nos. CA93-02-027 and CA93-03-047, 1994 Ohio App. LEXIS 1436, *2-3 (Mar. 4, 1994); *Patti v. Patti*, 11th Dist. Portage No. 2013-P-0048, 2014-Ohio-1156, ¶ 24. The legislature thus conferred jurisdiction upon the trial court to modify the spousal support award in this case.

{¶9} Parties, of course, are free to waive those statutory rights, but that does not alter the jurisdictional analysis. R.C. 3105.18(F)(2) ("[i]n determining whether to modify an existing order for spousal support, the court shall consider any purpose expressed in the initial order or award and enforce any voluntary agreement of the parties"). Although Husband and Wife are "parties [who] could agree to waive their right to seek a modification, they could not agree to divest the court of its jurisdiction to modify the [support] award." *Murphy v. Murphy*, 10th Dist. Franklin No. 12AP-1079, 2013-Ohio-5776, ¶ 32-33, citing *Condit v. Condit*, 190 Ohio App.3d 634, 2010-Ohio-5202, 943 N.E.2d 1041, ¶ 13 (1st Dist.), and *Bohl v. Hauke*, 180 Ohio App.3d 526, 2009-Ohio-150, 906 N.E.2d 450, ¶ 11 (4th Dist.). In *Murphy*, the Tenth District determined that although the parties waived the right to seek modification of the alimony order, that agreement could not divest the trial court of the right to modify the support order. *Id.* at ¶ 32. The court remanded for application of the contractual waiver, which expressly set forth the parties' agreement to waive any modifications of the support order.

Id.; *see also Koehler*, 12th Dist. Warren Nos. CA2012-06-058 and CA2012-07-059, 2013-Ohio-336 (finding no waiver of court's jurisdiction to modify support order because no waiver was expressly included as term of decree of legal separation); *Condit* (the agreement that "such spousal support shall not be subject to further review of the Court" was an express waiver of the right to seek judicial modification of the support order).

{¶10} The trial court undoubtedly possessed jurisdiction to modify the spousal support award, established via a decree of legal separation,[3] pursuant to Husband's motion, or as a matter of contractual interpretation, to determine whether the parties waived the statutory right to seek modification. The sole dispositive issue, therefore, is whether the parties waived any right to seek modification beyond that intended to effectuate the 40 percent requirement. The trial court indicated, through quoting Wife's argument, that because the agreement provides a minimum amount of support subject to modification by the 40 percent requirement, the parties expressly agreed that any modification was limited to effectuating the 40 percent requirement. In other words, if the Husband's income drops significantly, he must pay the minimum owed regardless of his ability to pay because the parties established a range instead of an amount certain. This is illogical.

[3]It bears noting that a decree of legal separation is treated differently than a decree of divorce pursuant to R.C. 3105.18. *See, e.g., McLaughlin v. McLaughlin*, 4th Dist. Athens No. 00CA14, 2001-Ohio-2450. If the spousal support is a product of a divorce decree, a trial court's jurisdiction to modify must be expressly retained.

{¶11} In any decree of separation in which spousal support is awarded, the court must establish the amount of support, which can be viewed as both the minimum owed and the maximum owed if its defined in terms of an amount certain. No court could interpret the agreement to an amount certain as a waiver of the right to seek modification without more. The whole purpose of R.C. 3105.18(D) is to allow modification of a spousal support obligation issued from a decree of legal separation. In other words, and hypothetically speaking, one party's agreement to pay the fixed amount $615.38 per week until the death of either party is not a waiver of his statutory right to seek modification of spousal support. In both *Condit* and *Koehler*, for example, the dispositive issue was whether the separation agreement included language expressly waiving the ability to seek judicial modification of support orders.

{¶12} In this case, the specific amount ordered was not an amount certain, but rather the greater of $615.38 or 40 percent of Husband's income as determined from the income denoted on his tax return for the previous year. Allowing for a range within which the support can be ordered is no more a waiver of the right to seek modification based on changed circumstances than had the parties agreed to a sum certain — again without some language indicating a voluntary waiver of the right to invoke R.C. 3105.18(D), which was in effect in 1993. There is no legal or logical reason to treat a support obligation imposed as a range different from an amount certain. Contrary to Wife's argument, it is not an unduly burdensome requirement to include a specific waiver of the right to seek modification of the support order in a decree of legal separation. It is

one additional sentence. In fact, as will be discussed, a waiver could have been achieved in this case with the inclusion of a single word.

{¶13} In further support of her waiver argument, Wife claims Husband waived the right to modify the support award because he agreed that "[t]he dollar amount of spousal support shall remain modifiable in order to effectuate the foregoing Forty percent (40%) requirement" and "[s]uch spousal support payments shall continue until" the death of either party. As a result, Wife argues that Husband's retirement is inconsequential.

{¶14} The above language is not indicative of a waiver. R.C. 3105.18(B) provides that the death of either party is the default termination date absent language indicating otherwise. It is not a forgone conclusion that either of their deaths will occur after Husband's retirement. Further, the clause does not provide that the support order is "only" modifiable in order to effectuate the 40 percent requirement, an inclusion that may have required the conclusion that the parties' waived the right to invoke R.C. 3105.18(B). As recognized in *Kohler* and *Condit*, the waiver of the right to seek modification must be expressly set forth in the separation agreement.

{¶15} Essentially, Wife is implying that in order to preserve his right to seek modification, Husband must have included a specific phrase indicating that the spousal support awarded shall continue until modified. We decline to reach this conclusion. Although a party can expressly waive the right to seek modification of spousal support ordered in the decree of legal separation, that party need not expressly retain the statutory right to modify in the absence of a specific waiver. Upholding Wife's argument would

eviscerate the legislature's grant of jurisdiction to modify spousal support imposed pursuant to a decree of legal separation.

{¶16} The trial court erred in its determination that it lacked jurisdiction to modify the spousal support order pursuant to Husband's motion. Further, the parties' separation agreement did not contain any language waiving the right to seek modification pursuant to R.C. 3105.18(F). The 1993 spousal support order, including the 2004 modification, is modifiable based on a change in circumstances.[4] In light of the fact the trial court did not consider Husband's arguments pertaining to his motion to modify the spousal support order, including whether the definition of "income" includes his retirement income, all other assigned errors are moot. The decision of the trial court — denying Husband's motion to modify, but upwardly modifying the support obligation based on Wife's September 4, 2013 proposed judgment entries — is reversed, and the case remanded to the lower court for further consideration consistent with this opinion.

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

The court finds there were reasonable grounds for this appeal.

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[4] Finally, although the issue is moot in light of our resolution of Husband's assigned error regarding the trial court's jurisdiction, we must note that a "trial court cannot retroactively modify a temporary spousal support award in a final divorce decree in the absence of a motion to modify." *Walpole v. Walpole*, 8th Dist. Cuyahoga No. 99231, 2013-Ohio-3529, ¶ 41, citing *Lewis v. Lewis*, 7th Dist. Jefferson Nos. 06 JE 49 and 07 JE 27, 2008-Ohio-3342, ¶ 72. Wife never filed a motion to modify, thereby putting Husband on notice of her intent to modify the 2009 agreed judgment entry.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

SEAN C. GALLAGHER, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR