**[Cite as *Johns v. Johns*, 2009-Ohio-5798.]**

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| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF SUMMIT | ) | |

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| BARBARA A. JOHNS | C.A. No. 24704 |
| Appellee | |
| v. | APPEAL FROM JUDGMENT ENTERED IN THE |
| JOHN C. JOHNS | COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO |
| Appellant | CASE No. 1979-12-4892 |

DECISION AND JOURNAL ENTRY

Dated: November 4, 2009

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BELFANCE, Judge.

**{¶1}** John Johns ("Husband") appeals the judgments of Summit County Court of Common Pleas, Domestic Relations Division modifying his spousal support payments to Barbara Johns ("Wife") and holding him in contempt for failure to make spousal support payments. For reasons set forth below, we affirm in part, reverse in part, and remand this matter for proceedings consistent with this opinion.

I.

**{¶2}** Husband married Wife on July 5, 1958, at which time Husband had just completed his first year of medical school. Husband and Wife had three children and were married for twenty-two years. Husband and Wife divorced November 10, 1980. Husband remarried in 1981, and as of the time of this appeal remained married to his second wife. At the time of the divorce, Husband had a successful medical practice and earned approximately $112,000 a year. The divorce decree provided, via the separation agreement, that Husband

would pay Wife $2,400 per month in spousal support and would make Wife the beneficiary of a $75,000 life insurance policy. Wife would keep the marital home, subject to the mortgage, and upon her remarriage, death, or sale of the home, Husband would receive the sum of $15,000. At some point subsequent to the divorce, Husband and Wife agreed that instead of maintaining a life insurance policy with Wife as a beneficiary, Husband would create a trust with Wife as a $75,000 beneficiary.

**{¶3}** Husband retired in 2000 and moved to Arizona. Husband continued to pay spousal support through 2007. From January 2008 through April 2008, contrary to the decree of divorce, Husband paid Wife $1,150 per month in spousal support. On April 11, 2008, Wife filed a post-decree motion for contempt against Husband for failure to pay the appropriate amount of spousal support. On May 23, 2008, Husband filed a post-decree motion to terminate or modify spousal support. From May 2008 through September 2008, Husband paid Wife $500 per month in spousal support. In October 2008, Husband paid Wife $250 in spousal support. In November 2008, Husband stopped making spousal support payments.

**{¶4}** The case was assigned to a magistrate, who held a hearing on the matter on December 3, 2008. The magistrate issued a decision finding in favor of Wife on the contempt charge and in favor of Husband on the motion for spousal support modification. The magistrate held Husband in contempt, ordered him to pay $14,059.31 in past due spousal support, and reduced Husband's spousal support payment to $1600 per month effective May 23, 2008 (the date of Husband's motion to modify/terminate spousal support). Husband filed objections to the magistrate's decision. The trial court issued a written decision with findings of fact and conclusions of law, overruling the objections to the magistrate's decision and essentially

adopting the determinations made by the magistrate. Husband has appealed, raising four assignments of error for our review, which we will address out of sequence to aid our review.

II.

**{¶5}** This Court reviews a trial court's action with respect to a magistrate's decision for an abuse of discretion. *Fields v. Cloyd*, 9th Dist. No. 24150, 2008-Ohio-5232, at ¶9. "In so doing, we consider the trial court's action with reference to the nature of the underlying matter." *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18. Generally, we review a trial court's order modifying spousal support for an abuse of discretion. *Johnson v. Johnson*, 9th Dist. No. 24159, 2008-Ohio-4557, at ¶5. 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. However, when the issue with respect to spousal support presented on appeal concerns an issue of law, we review that issue de novo. See, e.g., *Callahan v. Akron Gen. Med. Ctr.*, 9th Dist. No. 24434, 24436, 2009-Ohio-5148, at ¶25.

III.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED IN FAILING TO TERMINATE [HUSBAND'S] SPOUSAL SUPPORT OBLIGATION."

**{¶6}** The Supreme Court of Ohio recently held that pursuant to R.C. 3105.18 as amended, "a trial court lacks jurisdiction to modify a prior order of spousal support unless the decree of the court expressly reserved jurisdiction to make the modification *and unless the court finds (1) that a substantial change in circumstances has occurred and (2) that the change was not contemplated at the time of the original decree*." (Emphasis added.) *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, at ¶33. "If the trial court concludes that it

does have jurisdiction to modify the spousal support award, it must then determine whether or not the existing order should be modified. This inquiry requires the court to reevaluate the existing order in light of the changed circumstances. The court looks to the factors provided by R.C. 3105.18(C) in order to conduct this reevaluation." (Internal citations and quotations omitted.) *Johnson v. Johnson*, 9th Dist. No. 24159, 2008-Ohio-4557, at ¶7.

**{¶7}** *Mandelbaum* was decided by the Supreme Court of Ohio on March 24, 2009, six days after the trial court issued its March 18, 2009 decision in this matter. Prior to *Mandelbaum*, this Court determined that the amended version of R.C. 3105.18 did not require the change in circumstances to be substantial. See *Kingsolver v. Kingsolver*, 9th Dist. No. 21773, 2004-Ohio-3844, at ¶23. In doing so we examined R.C. 3105.18(F) which states that "[f]or 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." (Emphasis added.) We concluded that "[b]ased on Webster's definition, this Court finds that the Ohio legislature did not intend to have the term 'any,' as the word is used in R.C. 3105.18(F), interpreted to mean 'substantial' or 'drastic.'" *Kingsolver* at ¶21.

**{¶8}** Nonetheless, we are bound by the Supreme Court's precedent which abrogated our holding in *Kingsolver* and concluded that in order to modify spousal support a trial court must have continuing jurisdiction and must find "(1) that a substantial change in circumstances has occurred and (2) that the change was not contemplated at the time of the original decree." *Mandelbaum* at ¶33.

**{¶9}** In the instant matter, the parties' separation agreement incorporated into the decree states that "[s]aid payments for alimony shall be subject to the further order of the

Domestic Relations Court of Summit County, Ohio." The trial court, citing *Zahn v. Zahn*, 9th Dist. No. 21541, 2003-Ohio-6124, also determined that Husband's "retirement is a change of circumstances which may be the basis for a modification of spousal support." The trial court then proceeded to analyze the R.C. 3105.18(C) factors and concluded that a modification was appropriate. Neither the trial court's decision, nor the magistrate's decision include the findings that the change of circumstances was substantial and that the change was not contemplated at the time of the divorce. See *Mandelbaum* at ¶33.

**{¶10}** Because the trial court's entry does not include these findings, we must conclude that the trial court erred in modifying the spousal support award and we are required to remand the matter to the trial court for a determination of whether the change in circumstances was substantial and whether the change was contemplated by the parties at the time of the divorce. See, e.g., *Mandelbaum v. Mandelbaum*, 2nd Dist. No. 21817, 2007-Ohio-6138, at ¶95 ("Accordingly, the order of modification in this case must be reversed, and this cause must be remanded so that the trial court can consider whether a *substantial* change of circumstances has occurred that was not contemplated by the parties at the time of the original decree. If this threshold inquiry is satisfied, the court may then determine whether the existing order should be modified and what amount of support is reasonable and appropriate.").

**{¶11}** Thus, to the extent Husband in his second assignment of error argues that the trial court's modification was error, we agree, albeit not for the reasons advanced by Husband.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED IN FINDING THAT [HUSBAND'S] 'INCOME' INCLUDES DISTRIBUTIONS FROM HIS INDIVIDUAL RETIREMENT ACCOUNT."

**{¶12}** Husband argues in his first assignment of error that the trial court erred in its modification of spousal support when it concluded that distributions from Husband's IRA constitute income for purposes of determining spousal support. We cannot address this specific assignment of error, in this particular context, as we determined above that the trial court was without jurisdiction to modify spousal support; if we were to review the trial court's determination that a distribution from an IRA constitutes income in the context of modifying spousal support, we would be reviewing an issue that is not ripe. On remand, the trial court *could* reexamine the case and the issues and determine that the change in circumstances was not substantial, thereby again depriving this Court of jurisdiction, and erasing any need to address the issue of whether an IRA distribution is income in the specific context of modifying spousal support.

IV.

ASSIGNMENT OF ERROR III

> "THE TRIAL COURT ERRED BY FAILING TO TERMINATE [HUSBAND'S] OBLIGATION TO MAINTAIN [WIFE] AS A BENEFICIARY OF HIS TRUST IN THE AMOUNT OF $75,000.00"

**{¶13}** The divorce decree, via the separation agreement in this case provides that that Husband would make Wife the beneficiary of a $75,000 life insurance policy. Sometime after the divorce, Husband and Wife agreed that Husband would create a trust with Wife as a $75,000 beneficiary instead of maintaining Wife as a beneficiary to a $75,000 life insurance policy.

**{¶14}** The separation agreement, incorporated into the decree states that "Husband * * * shall continue to pay the premiums [on the life insurance policy] during such time as he is obligated for alimony payments." As we previously determined that the trial court did not make the requisite finding in its entry in order to modify spousal support, and thus spousal support

payments are still in effect as provided in the original decree, we conclude this assignment of error is without merit.

V.

ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ERRED BY FINDING [HUSBAND] IN CONTEMPT FOR FAILING TO PAY SPOUSAL SUPPORT AS PREVIOUSLY ORDERED AND GRANTING [WIFE] JUDGMENT IN THE AMOUNT OF $14,059.31"

**{¶15}** Generally, we review a court's ruling on a contempt motion for an abuse of discretion. *Riley v. Riley*, 9th Dist. No. 22777, 2006-Ohio-656, at ¶23. "A prima facie case of contempt is established where the divorce decree is before the court along with proof of the contemnor's failure to comply therewith." Id. at ¶25, quoting *Robinson v. Robinson* (Mar. 31, 1994), 6th Dist. No. 93WD053, at *3. "'[A] person charged with contempt for the violation of a court order may defend by proving that it was not in his power to obey the order.'" *Riley* at ¶24, quoting *Poitinger v. Poitinger*, 9th Dist. No. 22240, 2005-Ohio-2680, at ¶31, quoting *Courtney v. Courtney* (1984), 16 Ohio App.3d 329, 334.

**{¶16}** The trial court found Husband in contempt for failure to make spousal support payments. Husband does not contest that he made only $7,350 in spousal support payments from January 1, 2008 through November 30, 2008. During that time, under the original decree, Husband was required to make $26,400 in payments. Husband's defense to the contempt charge was that he was unable to pay the spousal support payments. Essentially, Husband argues that the trial court erred in concluding that distributions from Husband's IRA constituted income for purposes of determining spousal support, and it erred in using that income in determining that Husband was able to afford the spousal support payments.

**{¶17}** We do not believe that the trial court erred in concluding that distributions from Husband's IRA constitute income for purposes of determining Husband's ability to pay spousal support. We recognize that we were unable to undertake review of this issue in the context of a spousal support modification, as set forth in Husband's first assignment of error. However, we undertake review of this issue in the context of the trial court's finding of contempt, because here, Husband is not challenging the trial court's determination of Husband's income for purposes of modifying the support obligation. Rather, Husband's argument concerning the IRA distributions relates to his asserted defense that he had no ability to pay the existing support obligation.

**{¶18}** R.C. 3105.18(C)(1)(a) provides that:

> "[i]n determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors: (a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code[.]" (Emphasis added.)

The determination of whether distributions from an IRA constitute income under R.C. 3105.18(C)(1) presents us with a question of law, which we thus review de novo. See, e.g., *Callahan* at ¶25. While we have not examined this precise issue, we have analyzed R.C. 3105.18(C)(1)(a) before. See *Karis v. Karis*, 9th Dist. No. 2380, 2007-Ohio-759. In *Karis* we noted that "R.C. 3105.18(C) does not limit the sources from which income may be derived or the characteristics of income that may be considered for purposes of determining an appropriate award of spousal support." Id. at ¶11. As noted by the Seventh District, "R.C. § 3105.171 concerns the division of marital property, and it includes the parties' retirement benefits. Thus, a court considering the parties' incomes for spousal support purposes must consider both parties'

'income derived from' retirement benefits, including * * * 401(K) distributions." (Internal citations omitted.) *Duvall v. Duvall*, 7th Dist. No. 04 BE 41, 2005-Ohio-4685, at ¶56. While an IRA is distinct from a 401(K) plan, it is nonetheless a retirement account. Further, the Internal Revenue Code itself provides that "* * * any amount paid or distributed out of an individual retirement plan *shall be included in gross income* by the payee or distributee, as the case may be, in the manner provided under section 72." (Emphasis added.) Section 408(d)(1), Title 26, U.S. Code; see, also *Gallagher v. Commissioner*, T.C. Memo. 2001-34, at *1 ("Generally, any amount paid or distributed out of an individual retirement plan is included in gross income by the payee or distributee.").

**{¶19}** The cases Husband cites, *Rapp v. Rapp* (1993), 89 Ohio App.3d 85 and *Hoblit v. Hoblit* (May 15, 1991), 2nd Dist. No. 90 CA 43, involve rollovers of IRAs, not distributions that are not reinvested in an IRA within the sixty day time limit. See Section 408(d)(3), Title 26, U.S. Code. Contributions that meet the criteria for rollovers established by the IRS are not included in gross income. See id. Husband makes no argument that his IRA distributions were timely rolled over. Husband has provided us with no convincing reason why 401(K) distributions, see *Duvall* at ¶56, and social security benefits, see *Harris v. Harris*, 6th Dist. No. L-08-1152, 2009-Ohio-3913, at ¶32, should be considered income for spousal support purposes but IRA distributions, also a retirement benefit, should not be. As such, Husband's defense of impossibility to pay is also without merit. Thus, the trial court did not abuse its discretion in holding Husband in contempt under the factual circumstances of the case and did not err in concluding as a matter of law that the IRA distributions constitute income.

**{¶20}** However, we cannot determine that the award of past due spousal support was appropriate given that the trial court used both the original amount and the modified amount in

calculating the amount Husband owed. As we have previously determined that the trial court did not make the appropriate findings necessary to modify spousal support, we conclude that the trial court abused its discretion in concluding that Husband owed $14,059.31 in past due spousal support. Husband's arrearage can only be calculated upon remand after the trial court determines whether the findings necessary under *Mandelbaum* are present. Thus we sustain in part and overrule in part Husband's fourth assignment of error.

VI.

**{¶21}** In light of the foregoing, and pursuant to *Mandelbaum* we remand this matter to the trial court so that it can determine whether the change in circumstances was substantial and not contemplated by the parties at the time of the divorce, thereby allowing the trial court to determine if a modification is appropriate. We also remand the matter, so that following that determination the trial court can reevaluate the amount Husband is past due in his spousal support obligation.

Judgment affirmed in part,
reversed in part,
and cause remanded.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

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