

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

RUSSELL G. FOSTER

C.A. No. 09CA0058

Appellee

v.

SHARON L. FOSTER

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE No. 06-DR-0518

Appellant

DECISION AND JOURNAL ENTRY

Dated: September 30, 2010

BELFANCE, Presiding Judge.

{¶1} Appellant, Sharon Foster, appeals the judgment of the Wayne County Court of Common Pleas that granted the motion for modification of spousal support filed by Appellee, Russell Foster. For the reasons that follow, we reverse and remand.

BACKGROUND

{¶2} Sharon (“Wife”) and Russell (“Husband”) Foster were granted a divorce after thirty-two years of marriage on October 29, 2008. In lieu of trial, the parties entered into a separation agreement that was incorporated into the decree of divorce. With respect to spousal support, the parties agreed that Husband would pay Wife \$1,529 per month for 180 months, subject to certain terminating conditions. The separation agreement provided that the court would retain jurisdiction of spousal support in order to modify the amount, but not the term, of support to be paid. The parties also included a statement of their “current circumstances” relevant to spousal support. The separation agreement contained a statement that Wife was

currently employed at slightly less than full-time status and had certain specified medical conditions that could affect her ability to work. Concerning Husband, the separation agreement provided that Husband was on sick leave from his employment with General Motors at the time of the divorce. The separation agreement further provided that the possibility existed that Husband would be laid-off, terminated, or offered mutual separation with severance pay.

{¶3} Husband executed the separation agreement on October 22, 2008. Wife executed the agreement the day after. Prior to executing the separation agreement, Husband had been presented with a document from General Motors, his employer. The document, entitled “General Motors Corporation Mutual Separation Policy Release Agreement” (“GM Agreement”) contains a notation that Husband was presented with the document September 5, 2008, more than one month prior to the execution of the separation agreement. Husband did not disclose his receipt of this agreement. Further, Husband did not disclose that on September 29, 2008, several weeks prior to the execution of the separation agreement, he executed the GM Agreement. Pursuant to the GM Agreement, Husband’s last day of employment was October 31, 2008. Thereafter, Husband would receive his full, monthly salary for the next six months. Thus, at the time that Husband executed the separation agreement, he knew that his employment terminated as of October 31, 2008 and that he would receive his monthly salary for the next six months.

{¶4} Approximately five months after the parties’ divorce, Husband filed a motion to modify spousal support. In this motion, Husband requested a reduction in spousal support because he was no longer employed with General Motors. He further alleged that he would have no income after April 1, 2009.

{¶5} The magistrate held a hearing on Husband’s motion. The magistrate found a sufficient change of circumstances warranting a modification of Husband’s spousal support

obligation. By order filed May 7, 2009, the magistrate reduced spousal support from \$1,529 to zero. The trial court adopted the magistrate's decision the same day it was issued. Wife subsequently filed objections to the magistrate's decision. The trial court overruled all of Wife's objections and reaffirmed its initial order adopting the magistrate's decision. Wife has appealed, assigning seven errors for our review. Wife argues that the decision to modify Husband's spousal support obligation was erroneous because: (1) Husband did not demonstrate a substantial change in circumstances since the prior order; (2) Husband voluntarily became unemployed; (3) Husband should have had income imputed to him, and; (4) Husband did not make a good faith effort to find new employment. Wife further assigns errors with respect to the magistrate's proceedings, namely that: (1) Husband was permitted to offer hearsay testimony during the magistrate's hearing; (2) the court's order is based in part on the inadmissible hearsay, and; (3) Husband's motion to modify should have been dismissed because he failed to sustain his burden.

MODIFICATION OF SPOUSAL SUPPORT

{¶6} 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. "[A] reviewing court in any domestic-relations appeal must be vigilant in ensuring that a lower court's determination is fair, equitable, and in accordance with law[.]" *Martin v. Martin* (1985), 18 Ohio St.3d 292, 295. Although the trial court has discretion when finding facts and applying those facts to the law, the trial court commits an error of law if it does not follow the law. See *Irish v. Irish*, 9th Dist. Nos.

09CA009577, 09CA009578, 2010-Ohio-403, at ¶12. Wife’s first assignment of error presents us with a question of law, namely, whether the trial court correctly applied the law under the circumstances of this case thus, we review that issue de novo. *Johns v. Johns*, 9th Dist. No. 24704, 2009-Ohio-5798, at ¶5.

{¶7} In her first assignment of error, Wife challenges the propriety of the trial court’s modification of spousal support, alleging in part that modification of Husband’s spousal support obligation was not warranted because Husband had not experienced a substantial change in circumstances since the time of the order in which the trial court awarded Wife support.

{¶8} R.C. 3105.18(E)(1) provides that “the court that enter[ed] the decree of divorce * * * does not have jurisdiction to modify the amount or terms of the alimony or spousal support unless the court determines that the circumstances of either party have changed” and that “the decree contains a provision specifically authorizing the court to modify the amount or terms of alimony or spousal support.” In 1991, the legislature amended R.C. 3105.18 to include R.C. 3105.18(F) which provides that 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.” *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, at ¶26, quoting Am. Sub. H.B. No. 514, 143 Ohio Laws, Part III, 5426, 5427.

{¶9} Recently, the Supreme Court of Ohio examined these statutory provisions in *Mandelbaum*. The *Mandelbaum* Court was faced with the certified question of “whether a trial court may modify a prior order of spousal support without finding that a substantial change in the circumstances of the parties has occurred and that the parties had not contemplated such a change at the time of the original divorce decree.” *Id.* at ¶1. In deciding that question, the *Mandelbaum* Court acknowledged that R.C. 3105.18 does not explicitly require a *substantial*

change in circumstances or a change outside the contemplation of the parties. *Id.* at ¶29. However, the *Mandelbaum* Court noted that these requirements had become well-established common law. *Id.* It thus reasoned that the absence of such language in R.C. 3105.18 did not demonstrate a legislative intent to abrogate well-established common law. *Id.* The *Mandelbaum* Court concluded that:

“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.) *Id.* at ¶33. See, also, *Johns* at ¶8 (adopting the holding of *Mandelbaum*).

{¶10} In light of *Mandelbaum*, a trial court does not have jurisdiction to modify an award of spousal support unless there is a specific reservation of jurisdiction in the decree, there exists a substantial change of circumstances, and further, that “the change in circumstances [is] one that had not been contemplated and taken into account by the parties or the court at the time of the prior order.” *Mandelbaum* at ¶¶32-33.

{¶11} There is no dispute that the trial court in the case at bar reserved jurisdiction to modify spousal support. Thus, the issue before the court is whether there was a substantial change of circumstances that was not contemplated by the parties at the time of the decree thereby satisfying the jurisdictional requirements contained in R.C. 3105.18(E) and *Mandelbaum*. We conclude that the jurisdictional requirement was not satisfied given that the change in Husband’s circumstances was contemplated at the time of the divorce.

{¶12} The parties’ separation agreement contains a specific recitation of the circumstances that were contemplated by the parties at the time of the divorce. Article 9 of the separation agreement provides in part:

{¶13} “B. The current circumstances of the parties include the following:

“1. The Wife’s medical condition is as set forth on Exhibit A and she is currently employed at 37.5 hours per week by the Barberton Health Department. In addition, the Wife’s medical condition causes her chronic pain, depression, stress, and chronic fatigue which may compromise her work-performance ability.

“2. The Husband is currently employed by General Motors, on sick leave for the reasons set forth in Exhibit B. The current state of the economy as it relates to the Husband’s employment includes the possibility of involuntary layoffs, termination or the offer of mutual separation with severance to avoid same.”

{¶14} The evidence discloses that Husband was presented with the offer of mutual separation with severance prior to executing the separation agreement and well before the parties appeared before the court to finalize their divorce. It is also undisputed that Husband accepted General Motors’ proposal of mutual separation with severance several weeks prior to the execution of the separation agreement and before the entry of the divorce decree. As noted above, in order to satisfy the jurisdictional requirements of R.C. 3105.18(E) and *Mandelbaum*, there must be a substantial change of circumstances that was not contemplated at the time of the prior order. *Id.* at ¶33.

{¶15} In the instant matter, it is clear that Husband’s circumstances at the time of the divorce decree included “the possibility of involuntary layoffs, termination or *the offer of mutual separation with severance* to avoid the same.” (Emphasis added.) In light of the parties’ agreement, Husband’s mutual separation from General Motors with severance was both contemplated and taken into account by the parties at the time of the decree of divorce. Thus, we necessarily conclude that Husband did not demonstrate a substantial change of circumstances that was not contemplated by the parties at the time of the decree of divorce. See, e.g., *Palmieri v. Palmieri*, 10th Dist. No. 04AP-1305, 2005-Ohio-4064, at ¶19 (because husband’s retirement and reduction in income were thoroughly contemplated at time of divorce, husband could have negotiated a provision for modification upon retirement); *Reveal v. Reveal*, 154 Ohio App.3d

758, 2003-Ohio-5335, at ¶19 (husband was aware at time of divorce that wife would be eligible for retirement benefits and could have chosen to include the provision that his spousal support obligation would terminate upon wife’s receipt of such benefits).

{¶16} We conclude that the trial court erred in modifying Husband’s spousal support obligation as the jurisdictional prerequisites to modification were not met. *Mandelbaum* at ¶33 (a trial court lacks jurisdiction to modify spousal support unless it finds a substantial change of circumstances not contemplated at the time of the prior order). See, also, *Hackman v. Hackman*, 10th Dist. No. 08AP-516, 2009-Ohio-820, at ¶17 (wife’s increased costs for health insurance in the future were known to parties at time of divorce and “will not constitute the change in circumstances necessary to allow a trial court to modify the amount of [wife’s] spousal support award.”); *Palmieri* at ¶19 (“A court cannot base modification on a change that was contemplated at the time of the divorce.”). We sustain Wife’s first assignment of error.

{¶17} As our resolution that the court erred in granting Husband’s motion to modify spousal support is dispositive of Wife’s appeal and renders her remaining assignments of error moot, we decline to address them. See App.R. 12(A)(1)(c).

CONCLUSION

{¶18} Wife’s assertion that the modification of spousal support was erroneous is well taken. The judgment of the Wayne County Court of Common Pleas is reversed. The matter is remanded to the trial court for proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

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 Wayne, 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 to Appellee.

EVE V. BELFANCE
FOR THE COURT

WHITMORE, J.
BAIRD, J
CONCUR

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(C), Article IV, Constitution.)

APPEARANCES:

JAMES M. RICHARD, Attorney at Law, for Appellant.

R. J. HELMUTH, Attorney at Law, for Appellee.