

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Thomas P. Piliero,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-1142 (C.P.C. No. 02DR-10-4366)
Franzi L. Piliero,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on August 30, 2011

Solove and McCormick, Ronald L. Solove, Kerry L. McCormick and Elisabeth M. Howard, for appellant.

Tyack, Blackmore, Liston & Nigh Co., L.P.A., and Thomas M. Tyack, for appellee.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations.

DORRIAN, J.

{¶1} Plaintiff-appellant, Thomas P. Piliero ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, regarding objections to the magistrate's decision on defendant-appellee, Franzi L. Piliero's ("appellee") motions to modify spousal support and for attorney fees. For the following reasons, we vacate the trial court's decision granting appellee's motion to modify spousal support.

{¶2} The parties were married on August 29, 1970, and three children were born of their marriage. On October 1, 2003, the trial court granted the parties' divorce in an

agreed judgment entry and decree of divorce ("decree"). The decree provides that appellant shall pay appellee spousal support in the amount of \$2,750 per month, plus processing charge, and that spousal support shall terminate upon the occurrence of any of the following: (1) the death of either party, (2) appellee's remarriage, or (3) appellant's full retirement (no earned income) or November 11, 2011, whichever event occurs later in time. (See Agreed Judgment Entry and Decree of Divorce at 3.) Further, the decree contains a provision regarding the future modification of spousal support, which states, in relevant part, that:

The parties expressly provide that spousal support is MODIFIABLE as to amount only as set forth herein, and as to duration only as set forth above, and the Court shall retain jurisdiction for such purposes only.

** * * The parties agree that the amount of spousal support shall be MODIFIED, from time to time, so that the parties have equal after-tax annual income from earnings (earned income, passive income, imputed income, and retirement income) and from child support, but specifically excluding all income from capital gains, lottery winnings, gifts and the like.*

1. Defendant has a reduction or cancellation of her retirement benefits from UAL, Inc[.]; *child support payments made by plaintiff to defendant are terminated.* In those events, spousal support shall increase by that sum which equalizes after tax income between plaintiff and defendant.

2. Upon the commencement by defendant of her social security benefits; upon the commencement by defendant of her retirement benefits from plaintiff's Federal Civil Service Retirement Plan ("CSRS"). In those events, spousal support shall decrease by that sum which equalizes after tax income between plaintiff and defendant.

(Emphasis added.) (See Agreed Judgment Entry and Decree of Divorce at 3-5.)

{¶3} On June 24, 2008, subsequent to the emancipation of the parties' only remaining minor child, appellee filed a motion to modify spousal support, and on October 3, 2008, appellee filed a motion for attorney fees.

{¶4} On February 24, 2010, a magistrate of the trial court heard testimony regarding appellee's above-cited motions, and on June 15, 2010, the magistrate issued a decision denying both motions. With regard to appellee's motion to modify spousal support, the magistrate found that because (1) it is not possible to implement the "formula" in the decree due to evidentiary deficiencies, and (2) the limited reservation of jurisdiction does not permit the trial court to consider the mandatory factors set forth in R.C. 3105.18(C)(1)(a) through (n), "no jurisdiction exists to permit a modification based upon R.C. 3105.18(E)." (See June 15, 2010 Magistrate's Decision at 4.) Further, with regard to appellee's motion for attorney fees, the magistrate found that, because (1) each party had significant litigation costs, and (2) each party had legitimate issues to present to the trial court, "no award of attorney's fees from either party to the other is equitable." (See Magistrate's Decision at 5.)

{¶5} On June 29, 2010, appellee filed objections to the magistrate's decision, along with a supplemental memorandum on August 31, 2010, and on September 27, 2010, appellant filed a memorandum contra. The record indicates that, on September 10, 2010, the parties waived oral argument on the objections, and on November 22, 2010, the trial court issued its decision.

{¶6} In its decision, the trial court sustained appellee's objection to the magistrate's decision regarding the award of spousal support; however, it declined to award attorney's fees to either party. Having found "a substantial change in

circumstances not contemplated by the parties in that [appellant] has experienced a substantial increase in his earned income since the decree" (Nov. 22, 2010 Decision and Judgment Entry at 9), the trial court ordered appellant to pay appellee the following amounts in spousal support: \$4,772.42 monthly, effective June 24, 2008, through December 31, 2008, \$4,915.42 monthly, effective January 1, 2009, through December 31, 2009, and \$5,005.50 monthly, effective January 1, 2010, and ongoing. In addition, the trial court ordered appellee to pay an additional \$1,000.00 per month to liquidate the arrearage created by the retroactive modification of the spousal support award. (See Decision and Judgment Entry at 9, 12-13.)

{¶7} On December 8, 2010, appellant filed a timely notice of appeal setting forth the following assignments of error for our consideration:

I. THE TRIAL COURT ERRED IN ITS DETERMINATION THAT IT HAD JURISDICTION TO MODIFY THE PARTIES [SIC] PREVIOUS SPOUSAL SUPPORT ORDER.

II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO CONSIDER ALL RELEVANT FACTORS REQUIRED BY STATUTE [R.C. 3105.18(C)(1)] IN MAKING ITS DETERMINATION OF THE AMOUNT AND DURATION OF SPOUSAL SUPPORT.

III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO CONSIDER THE VOLUNTARY DEFERRAL OF SOCIAL SECURITY PAYMENTS BY DEFENDANT-APPELLEE IN ITS DETERMINATION OF THE AMOUNT AND DURATION OF SPOUSAL SUPPORT.

IV. THE TRIAL COURT ERRED, ABUSED ITS DISCRETION, AND DENIED DUE PROCESS OF LAW TO PLAINTIFF-APPELLANT BY ITS EMPLOYMENT OF FINPLAN SOFTWARE TO DETERMINE THE TAX IMPACT OF SPOUSAL SUPPORT, THEREBY PREVENTING PLAINTIFF-APPELLANT FROM EXERCISING HIS RIGHT OF CROSS EXAMINATION.

{¶8} It is well-settled that "[a]n appellate court reviews the modification of spousal support under an abuse-of-discretion standard." *Wilder v. Wilder*, 10th Dist. No. 08AP-669, 2009-Ohio-755, ¶10, citing *Grosz v. Grosz*, 10th Dist. No. 04AP-716, 2005-Ohio-985, ¶8. 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.' " *Id.*, quoting *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Therefore, "[a] trial court is generally afforded wide latitude in deciding spousal support issues." *Grosz* at ¶8.

{¶9} In his first assignment of error, appellant contends that, pursuant to *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, the trial court lacked jurisdiction to modify the award of spousal support because: (1) the parties failed to reserve jurisdiction to modify spousal support in the decree, and (2) appellee failed to prove that an unforeseen, substantial change in circumstances occurred. In response, appellee contends that, per the parties' agreement, the "decree [of divorce] contains express language that the [trial] court is vested with jurisdiction to modify spousal support *from time to time* to equalize their after tax income from earnings and child support" and provides a formula for those adjustments. (Emphasis added.) (See appellee's brief at 5.) We agree that the trial court lacked jurisdiction to modify the parties' spousal support award because: (1) the parties could not reach a mutual agreement per the terms set forth in the decree, and (2) appellee failed to prove that the change in circumstances was not contemplated at the time of the original decree.

{¶10} R.C. 3105.18(E) states, in relevant part, that:

[I]f a continuing order for periodic payments of money * * * as spousal support is entered in a divorce * * * action that is determined on or after January 1, 1991, the court that enters the decree of divorce * * * does not have jurisdiction to modify

the amount or terms of the * * * spousal support unless the court determines that the circumstances of either party have changed and unless * * * :

(1) In the case of a divorce, the decree or a separation agreement of the parties to the divorce that is incorporated into the decree contains a provision specifically authorizing the court to modify the amount or terms of * * * spousal support.

{¶11} In *Mandelbaum*, the Supreme Court of Ohio held that, pursuant to R.C. 3105.18(E), a trial court lacks jurisdiction to modify a prior order of spousal support unless: (1) the decree of the court expressly reserved jurisdiction to make the modification; (2) the court finds that a substantial change in circumstances has occurred; and (3) the court finds that the change was not contemplated at the time of the original decree. See *Mandelbaum* at paragraph two of syllabus.

{¶12} Further, in *Burkart v. Burkart*, 10th Dist. No. 10AP-314, 2010-Ohio-5363, ¶13, this court held that, if the three jurisdictional requirements in *Mandelbaum* have been met, "a court must then determine whether spousal support is still necessary and, if so, in what amount." In addition, we held that the party seeking a modification of spousal support "bears the burden of showing that a modification is warranted." *Id.* at ¶14. In order to show that a modification of spousal support is warranted, the party seeking modification must first present evidence proving "the jurisdictional prerequisites [including] the reservation of continuing jurisdiction in the decree *and* the existence of a substantial change in circumstances not anticipated at the time of the divorce." (Emphasis added.) *Id.* Upon meeting the jurisdictional requirements, the party seeking modification must then present evidence proving "the existing award of spousal support is no longer appropriate and reasonable." *Id.*

{¶13} In the present matter, we note that, after a protracted litigation, the parties unfortunately were unable to reach an agreement regarding the modification of spousal support based upon the formula set forth in the decree. As such, the parties sought the assistance of the trial court to determine whether, based upon the parties' circumstances, a modification of spousal support was appropriate. Had the parties been able to reach a mutual agreement on their own accord, it would be unnecessary for this court to decide if the trial court had jurisdiction to modify spousal support. However, because the parties were unable to reach a mutual agreement, we must now determine whether the trial court had jurisdiction to modify the parties' prior order of spousal support.

{¶14} First, pursuant to *Mandelbaum*, we must determine whether the parties' decree expressly reserved jurisdiction for the trial court to modify spousal support. Here, the decree states, in relevant part, that "[t]he parties *expressly provide that spousal support is MODIFIABLE* as to amount only as set forth herein, and as to duration only as set forth above, and the Court shall retain jurisdiction for such purposes only." (Emphasis added.) (See Agreed Judgment Entry and Decree of Divorce at 3-4.) Appellant argues that this language does not reserve jurisdiction to modify spousal support because it attempts to divest the court of its "ability to consider the mandatory factors of Ohio Rev. Code §3105.18(C)(1)(a) through (n)." (See appellant's brief at 11.) However, appellee contends that the parties' decree "contains express language that the court is vested with jurisdiction to modify spousal support," and that "a domestic relations court does have the authority to give effect to the parties' agreement entered into during the proceedings." (Appellee's brief at 5-6.) Notwithstanding any potential limitations imposed upon the trial court's ability to consider the statutory factors set forth in R.C. 3105.18(C)(1)(a) through

(n), the language in the decree clearly indicates the parties' mutual intent to expressly reserve jurisdiction for future modification of spousal support. Therefore, appellee satisfied the first jurisdictional prerequisite.

{¶15} Second, pursuant to *Mandelbaum*, we must determine whether a substantial change in circumstances has occurred. Here, the record indicates that from October of 2003 through February of 2010, appellant's income increased from \$137,900 to \$165,300 due to annual cost-of-living increases. Further, the record indicates that, as of June 1, 2008, appellant no longer made child-support payments to appellee in the amount of \$801.33 per month (\$9,615.96 annually), due to the emancipation of the parties' only remaining minor child. Based upon the foregoing, we find that both parties incurred substantial changes in income from the date of the original decree. Therefore, appellee satisfied the second jurisdictional prerequisite.

{¶16} Finally, pursuant to *Mandelbaum*, we must determine whether the parties contemplated the change in circumstances at the time of the original decree. First, in addressing whether the parties contemplated the annual cost-of-living increases at the time of the original decree, appellant testified as follows:

Q: Prior to your divorce, you were employed in the same position that you are now?

A: Yes.

Q: Did you receive cost-of-living increases during the time that you were employed during your marriage?

A: Yes.

Q: And those continued after your marriage?

A: Yes.

(Tr. 112.) Further, the parties' decree states, in relevant part, that, "[t]he parties agree that the amount of spousal support shall be MODIFIED, *from time to time*, so that the parties have *equal after-tax annual income from earnings* (earned income, passive income, imputed income, and retirement income) *and from child support*, but specifically excluding all income from capital gains, lottery winnings, gifts and the like." (Emphasis added.) (See Agreed Judgment Entry and Decree of Divorce at 4.)

{¶17} The plain language of the decree suggests that the parties contemplated, at the time of the divorce, that, "from time to time," there would be a need to modify spousal support in order to equalize their after-tax annual incomes, which could reasonably include cost-of-living increases that appellant was receiving both during the marriage and at the time of the parties' divorce. In addition, the record indicates that appellee failed to present any evidence that the parties did *not* contemplate the annual cost-of-living increases at the time of the divorce.

{¶18} Second, in addressing whether the parties contemplated the termination of child support at the time of the original decree, appellant testified as follows:

Q: [Appellant], when you got divorced, you knew, did you not, that eventually child support for [youngest daughter] was going to stop?

A: Yes.

(Tr. 112.) Further, the decree clearly states that the termination of child-support payments, made by appellant to appellee, is one of the triggering events for a modification of spousal support. In addition, the record indicates that appellee failed to present any evidence that the parties did not contemplate the termination of child support

at the time of the divorce. Therefore, appellee did not satisfy the third jurisdictional prerequisite.

{¶19} Based upon the foregoing, we find that appellee failed to prove that (1) the annual cost-of-living increases and (2) the termination of child support, were not contemplated by the parties at the time of the divorce. Therefore, appellee did not satisfy the third jurisdictional prerequisite. Thus, the trial court lacked jurisdiction to modify the spousal support order.

{¶20} Appellant's first assignment of error is well-taken, and his remaining assignments of error are therefore rendered moot.

{¶21} For the foregoing reasons, appellant's first assignment of error is sustained, and his second, third and fourth assignments of error are moot. Because the trial court lacked jurisdiction to modify the original spousal support order, the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is void, and this matter is remanded to that court to determine whether an arrearage or credit is owed to either party.

*Judgment reversed and cause
remanded with instructions.*

BRYANT, P.J., and BROWN, J., concur.
