

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Ethel Darlene Cox,	:	
	:	
Plaintiff-Appellee,	:	No. 14AP-490
	:	(C.P.C. No. 07DR-3835)
v.	:	
	:	(REGULAR CALENDAR)
Steven Ralston Cox,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 30, 2015

Anthony W. Greco and Lisa K. Meier, for appellee.

Sowald, Sowald, Anderson, Hawley & Johnson, and Eric W. Johnson, for appellant.

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

LUPER SCHUSTER, J.

{¶ 1} Defendant-appellant, Steven Ralston Cox, appeals from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, adopting the magistrate's decision which found Steven in contempt of court for failure to pay spousal support to his former wife, plaintiff-appellee, Ethel Darlene Cox, and denied Steven's motion to modify his spousal support obligation.¹ For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

¹ The trial court also denied Ethel's motion for modification of spousal support; she has not appealed that denial.

I. Facts and Procedural Background

{¶ 2} Steven and Ethel were married on November 5, 1977. Their marriage was terminated via a Judgment Entry/Decree of Divorce ("divorce decree") filed January 19, 2010. As pertinent here, the divorce decree ordered Steven to pay Ethel spousal support of \$1,000 per month, effective October 2, 2007, until the death of either party or Ethel's remarriage, whichever occurred first. The court retained jurisdiction to modify the amount or terms of the spousal support award. Neither Steven nor Ethel appealed the divorce decree.

{¶ 3} On April 1, 2010, Ethel filed a pro se motion for contempt arising from Steven's alleged failure to pay his spousal support obligation.² In April 2010, Steven filed for Chapter 13 bankruptcy protection. On June 3, 2010, Steven filed a motion seeking a reduction in his spousal support obligation. Review of the matter was delayed due to Steven's Chapter 13 bankruptcy filing. Following confirmation of Steven's bankruptcy plan in November 2010, litigation recommenced. On December 5, 2012, Ethel filed a motion seeking an increase in her spousal support award.

{¶ 4} The trial court referred the parties' pending motions to a magistrate, who held a five-day hearing in April 2013. On October 22, 2013, the magistrate issued a decision which denied both parties' motions for modification of the spousal support award and which found Steven in contempt for failure to pay his spousal support obligation. The magistrate determined Steven's spousal support arrearage was \$30,000 as of September 30, 2013, and ordered him to pay \$1,000 per month for his on-going spousal support obligation and an additional \$200 per month to liquidate the \$30,000 arrearage. The magistrate fined Steven \$500 for his contempt, but suspended the fine upon Steven purging his contempt "by paying his obligations under this Order in a timely manner." (Oct. 22, 2013 Magistrate's Decision, 10.) In addition, pursuant to R.C. 3105.18(G), the magistrate ordered Steven to pay Ethel \$500 in attorney fees incurred in filing and prosecuting the contempt motion. That same day, the trial court journalized a judgment entry adopting the magistrate's decision.

² Ethel also alleged Steven failed to comply with certain other aspects of the divorce decree. Those issues are not relevant to this appeal.

{¶ 5} Steven subsequently filed objections to the magistrate's decision pursuant to Civ.R. 53. As to the contempt finding, Steven argued the magistrate erred in failing to recognize his inability to pay the spousal support obligation, incorrectly calculating his spousal support arrearage, failing to afford him a meaningful opportunity to purge the contempt, and improperly awarding Ethel attorney fees related to the contempt. Regarding the denial of his motion to modify spousal support, Steven maintained the magistrate improperly concluded he failed to demonstrate a change of circumstances sufficient to warrant a reduction or termination of his spousal support obligation. The trial court heard oral argument on Steven's objections on March 18, 2014.³

{¶ 6} Thereafter, on May 22, 2014, the trial court issued a decision and entry overruling Steven's objections and adopting the magistrate's decision as an order of the court. As to the contempt issues, the trial court concluded that Steven failed to present sufficient evidence to support his purported defense of inability to pay his spousal support obligation and that Ethel was entitled to an award of at least \$500 in attorney fees pursuant to R.C. 3105.73(B). As to the purge order, the trial court averred, "the Magistrate could have included a thirty-day jail sentence as part of the purge order, to be suspended as long as [Steven] pays the underlying [\$1000.00]⁴ per month spousal support obligation and the \$200.00 per month arrearage payment. The court cannot *sua sponte* change the provision. However, the court will note herein that a second contempt finding against [Steven] may include a substantial jail sentence." (Decision and Entry, 12.) The trial court further found that neither Steven nor Ethel presented evidence constituting a change in circumstances sufficient to warrant a modification of spousal support. Finally, although the trial court acknowledged Steven's objection to the magistrate's calculation of the spousal support arrearage, it did not specifically address that issue. Steven timely appeals.

II. Assignments of Error

{¶ 7} Steven sets forth the following five assignments of error for our review:

³ The record does not include a transcript of the March 18, 2014 hearing.

⁴ The trial court's May 22, 2014 Decision and Entry referenced "the underlying \$100.00 per month spousal support obligation." (Emphasis added.) In an "Agreed Nunc Pro Tunc Entry" filed June 10, 2014, the trial court amended that language to read "the underlying \$1,000.00 per month spousal support obligation." (Emphasis added.)

[1.] The trial court erred in finding [Steven] in contempt of court for non-payment of spousal support when he had shown an inability to pay the ordered obligation.

[2.] The trial court erred by ordering [Steven] to pay attorney fees related to the finding of contempt when [Steven] should not have been found in contempt in the first place.

[3.] The trial court erred in issuing a contempt order without giving [Steven] a meaningful opportunity to purge the contempt.

[4.] The trial court erred by refusing to reduce or terminate [Steven's] spousal support obligation after he had shown a change of circumstances had occurred that warranted a reduction or termination.

[5.] The trial court erred by not correcting the magistrate's incorrect calculation of [Steven's] spousal support arrearages.

III. Discussion

{¶ 8} As noted above, the magistrate conducted a single hearing encompassing Ethel's motions for contempt and modification of spousal support as well as Steven's motion for modification of spousal support. Both Steven and Ethel appeared at the hearing and presented testimonial and documentary evidence. That evidence, along with factual findings derived from the trial court's unappealed January 19, 2010 divorce decree, establishes the following.

{¶ 9} Before the parties' marriage, Steven obtained a bachelor's degree in agriculture. Since 1985, Steven has owned and operated a sole proprietorship, KMA Enterprises ("KMA"), a computer consulting/internet office supply business. For the past several years, KMA has operated at a loss. Although KMA continues to operate at a loss, its financial picture has gradually improved since the time of the divorce. Specifically, KMA's \$7,500 loss in 2011 was significantly less than its \$75,000 loss in 2009.

{¶ 10} In the January 19, 2010 divorce decree, the trial court found the evidence regarding KMA's unprofitability to be credible. However, the court further noted that from the time KMA was created in 1985, Steven had never earned more than \$21,774, with the exception of 2000 and 2005, when he earned approximately \$45,000. The court further noted that despite KMA's continued unprofitability, Steven never engaged in other

employment. Accordingly, the trial court determined that Steven was voluntarily underemployed, that it was unreasonable for him to have earned zero or negative income for the four years preceding the divorce trial, and that, with a college education, Steven should be able to at least earn the minimum wage.

{¶ 11} In April 2010, three months after the divorce was finalized, Steven filed for Chapter 13 bankruptcy protection. The bankruptcy plan was confirmed in November 2010. His monthly bankruptcy payment is \$890.

{¶ 12} At the time of the divorce trial, Steven was living with his girlfriend, Sharon. Steven and Sharon were married in May 2010, and, as she did prior to the divorce trial, continues to provide nearly all of the household income through her employment. She has health insurance through her employer; Steven is covered under the policy. Steven has incurred approximately \$55,000 in legal fees and expenses related to the divorce litigation, which Sharon has willingly paid. However, Sharon has borrowed approximately \$15,000 to do so, and refuses to pay Steven's monthly spousal support obligation or his monthly bankruptcy payment.

{¶ 13} Steven has experienced a number of health problems over the last few years, most of which were detailed in the January 19, 2010 divorce decree. According to Steven, his health has deteriorated since the divorce, resulting in difficulties with driving, walking, and focusing on even small tasks. Sometime after the divorce, Steven began seeing a psychologist, Dr. David Lowenstein, who diagnosed him with major depression; however, Dr. Lowenstein acknowledged Steven was medicated for depression before the parties' divorce. According to Dr. Lowenstein, Steven's depression renders him unable to work full time. Dr. Lowenstein stated Steven's psychological condition has improved since he began treating him.

{¶ 14} Steven applied for Social Security Disability ("SSD") benefits in May 2010. He was awarded benefits in December 2010, but did not receive his first payment until December 2011. His first payment totaled \$8,253, which included back payments from May through December 2011. He made no spousal support payments from these funds. His on-going monthly SSD benefit is \$1,242, which, according to Steven, is his sole source of income and from which he makes his \$890 monthly bankruptcy payment.

{¶ 15} Steven testified that he made \$1,000 spousal support payments on November 24 and December 31, 2010, and January 31, March 7, and May 31, 2011, and a \$2,000 payment in April 2010 prior to the bankruptcy filing. He made no payments after May 2011. He admitted he paid litigation expenses, including fees for attorneys, psychologist experts and private investigators rather than pay his spousal support obligation. Steven acknowledged that paying his spousal support obligation rather than incurring substantial expenses to contest the spousal support award would have made better financial sense.

{¶ 16} Ethel graduated from high school in 1970 and did not pursue a college degree. She performed clerical duties for various employers during her marriage to Steven, including KMA from 1998 until June 2002. She has not been employed since 2002. In 2004, she obtained a medical coding/billing certification, but never completed the examination required to obtain employment.

{¶ 17} Ethel suffers from numerous on-going medical conditions, which the trial court described in the divorce decree. In the decree, the court concluded that Ethel was disabled at the time of the divorce trial based on her emotional and physical conditions, but found she might be able to obtain employment within 12 months. However, in August 2011, Ethel was involved in a serious motor vehicle accident which resulted in two significant surgeries and extensive rehabilitation. In 2012, she was awarded \$250,000.00 as settlement for her accident claim; she received \$90,712.23 from the settlement. According to Ethel, she does not have health insurance coverage because it is cost prohibitive and she is physically unable to obtain sustained remunerative employment. She applied for SSD benefits in May 2010, but was denied because she has not earned a sufficient number of employment credits to qualify for Social Security. Her sole source of income following the divorce is her monthly spousal support award. She has spent over \$10,000 in attorney fees in the post-decree litigation.

{¶ 18} Steven's vocational expert, Dr. Bruce Growick, interviewed Ethel on March 8, 2013 to determine her earning potential prior to the August 2011 motor vehicle accident. Dr. Growick opined that prior to that date, Ethel had annual earning potential of \$21,674 to \$23,400. Dr. Growick agreed that Ethel is incapable of sustained remunerative employment due to the injuries she sustained in the August 2011 accident.

He confirmed Ethel's assertion that she was denied SSD benefits because she had inadequate previous earnings.

A. First Assignment of Error – Contempt

{¶ 19} In his first assignment of error, Steven contends the trial court abused its discretion in holding him in contempt of court. Steven does not dispute that he disobeyed the January 19, 2010 divorce decree mandating that he pay Ethel \$1,000 a month in spousal support, but he asserts the trial court nevertheless erred in holding him in contempt because he established the affirmative defense of impossibility. Specifically, Steven contends he proved his inability to comply with the spousal support order through testimony and evidence establishing that since the divorce, his health has deteriorated to the point that he has incurred significant increases in his medical expenses and has been declared permanently disabled by the Social Security Administration, and his financial circumstances are so dire that he was forced to file for Chapter 13 bankruptcy protection. Steven further maintains the trial court erred in suggesting his current wife is a source of funds from which he could pay all or a portion of his spousal support obligation.

{¶ 20} Contempt of court "results when a party before a court disregards or disobeys an order or command of judicial authority," or otherwise acts in a way that "substantially disrupt[s] the judicial process in a particular case." *Byron v. Byron*, 10th Dist. No. 03AP-819, 2004-Ohio-2143, ¶ 11, citing *First Bank of Marietta v. Mascrote, Inc.*, 125 Ohio App.3d 257, 263 (4th Dist.1998). Contempt is classified as either direct or indirect. *Id.* at ¶ 11. "Direct contempt occurs in the presence of the court in its judicial function. R.C. 2705.01." *Id.* at ¶ 12. Indirect contempt occurs outside the presence of the court and demonstrates a lack of respect for the court or its lawful orders. *Id.*, citing *State v. Drake*, 73 Ohio App.3d 640, 643 (8th Dist.1991). "The distinction between civil and criminal contempt depends upon the character and purpose of the punishment imposed." *Id.* at ¶ 12, citing *State ex rel. Johnson v. Perry Cty. Court*, 25 Ohio St.3d 53, 55 (1986). Civil contempt is remedial or coercive in nature and is imposed to benefit the complainant. *Id.*, citing *Pugh v. Pugh*, 15 Ohio St.3d 136, 139 (1984).

{¶ 21} Generally, contempt proceedings in domestic relations matters, including those based on failure to pay court-ordered spousal support, are civil in nature because the purpose is to coerce or encourage future compliance with the court's orders. *Ryan v.*

Ryan, 10th Dist. No. 14AP-28, 2014-Ohio-3049, ¶ 12, citing *Fidler v. Fidler*, 10th Dist. No. 08AP-284, 2008-Ohio-4688, ¶ 11, citing *Turner v. Turner*, 10th Dist. No. 98AP-999 (May 18, 1999); *Byron; DeMarco v. DeMarco*, 10th Dist. No. 09AP-405, 2010-Ohio-445, ¶ 25.

{¶ 22} In civil contempt proceedings, the complainant bears the initial burden of demonstrating by clear and convincing evidence the other party has violated a court order. *Ryan* at ¶ 12, citing *Rife v. Rife*, 10th Dist. No. 11AP-427, 2012-Ohio-949, ¶ 10, citing *Hopson v. Hopson*, 10th Dist. No. 04AP-1349, 2005-Ohio-6468, ¶ 19. Once the complainant has satisfied his or her initial burden, the burden shifts to the other party to either rebut the showing of contempt or demonstrate an affirmative defense by a preponderance of the evidence. *Ryan* at ¶ 12, citing *Rife* at ¶ 10, citing *Hopson* at ¶ 19, citing *Pugh* at 140. As a general rule, impossibility of performance is a valid defense against a contempt charge. *McDade v. McDade*, 10th Dist. No. 89AP-991 (Sept. 27, 1990). The party raising impossibility of performance must prove that defense by a preponderance of the evidence. *Rife* at ¶ 10, citing *Hopson* at ¶ 9, citing *State ex rel. Cook v. Cook*, 66 Ohio St. 566, 570 (1902). An appellate court will not reverse a trial court's finding of contempt absent an abuse of discretion. *Id.* at ¶ 9, citing *Hopson* at ¶ 9. An abuse of discretion means more than an error of law or judgment; it implies the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 23} Based on the record before us, we cannot conclude the trial court abused its discretion in finding Steven failed to prove the defense of impossibility. We note initially that Steven's financial woes, including KMA's unprofitability, was one of the central issues contested at the divorce trial. In the divorce decree, the trial court noted that KMA had been poorly managed, that KMA generated minimal income over the last seven years, and that KMA had incurred over \$400,000 in debt. The trial court further noted that Steven had considered filing bankruptcy resulting from KMA's unprofitability. The trial court considered this evidence, along with all the factors set forth in R.C. 3105.18, before making its \$1,000 per month spousal support award. Although he vigorously argued his dismal financial picture at the divorce trial, he did not appeal the spousal support award.

{¶ 24} Although KMA continues to be unprofitable, its reported business losses have actually decreased since the January 2010 divorce decree. Further, KMA's gross

income has actually increased since the divorce, and Steven failed to corroborate the business expenses reported on his federal income tax return with additional documentation. *See Roubanes v. Roubanes*, 10th Dist. No. 13AP-369, 2013-Ohio-5778, ¶ 12 (tax returns are not sufficient to establish business expenses); *Wood v. Wood*, 10th Dist. No. 10AP-513, 2011-Ohio-679, ¶ 42 ("a trial court must not blindly accept all of the expenses deducted on previous tax returns as ordinary and necessary business expenses incurred in generating gross receipts.").

{¶ 25} In addition, Steven does not cite any case law supporting the proposition that his bankruptcy filing necessarily required the trial court to find an inability to pay spousal support. Indeed, Steven's bankruptcy filing actually eliminated or reduced most of his debt and expenses.

{¶ 26} Further, as the trial court noted, Steven's wife, Sharon, pays for virtually all of his household expenses. Contrary to Steven's contention, the trial court did not impute Sharon's income to him for spousal support purposes. The trial court merely acknowledged that Steven enjoyed the financial support of his wife, which eliminated all household expenses he would have to pay. As to his alleged inability to work, Steven points to his receipt of SSD benefits after the divorce. Steven appears to suggest that the receipt of such benefits required the trial court to find he is disabled and, therefore, unable to pay his spousal support obligation. However, Steven now receives additional funds through his monthly SSD benefits of \$1,242.

{¶ 27} Finally, as the trial court noted, although Steven claimed his health prevented him from working, he has remained actively involved in KMA since the divorce. Although he relinquished most of KMA's business to his son, David, he still signs KMA checks and interacts with KMA's clients on a regular basis. *See In re: England v. England*, 10th Dist. No. 92AP-1749 (May 18, 1993) (holding contemnor failed to prove impossibility where she claimed she could not make support payments "due to physical disabilities," but she admitted she could perform certain jobs). Indeed, the trial court could view Steven's continued involvement with KMA as contradicting his claimed inability to work. *See Blair v. Blair*, 10th Dist. No. 88AP-1091 (Mar. 13, 1990) (observing that this court has "affirmed judgments based on internal inconsistencies in plaintiff's testimony on inability to work").

{¶ 28} Because Steven failed to establish his affirmative defense of impossibility, the trial court did not abuse its discretion in finding him in contempt for failure to pay his court ordered spousal support. Accordingly, the first assignment of error is overruled.

B. Second Assignment of Error – Attorney Fees

{¶ 29} In his second assignment of error, Steven argues the trial court erred in ordering him to pay Ethel \$500 in attorney fees related to the contempt. Although Steven acknowledges that a trial court may order the payment of attorney fees upon a finding of contempt for failure to pay spousal support,⁵ he contends "[b]ecause the trial court should have accepted [his] defense of inability to pay the spousal support order, and therefore refused to find [him] in contempt, the award of \$500 for attorney fees related to [his] contempt motion was improper and should be reversed." (Steven's Brief, 25.) Because Steven's contention is based solely on the trial court's alleged error in finding him in contempt, and having already determined the trial court properly found him in contempt, Steven's contention is without merit. Accordingly, the second assignment of error is overruled.

C. Third Assignment of Error – Meaningful Opportunity to Purge the Contempt

{¶ 30} In his third assignment of error, Steven contends the trial court abused its discretion in issuing an order that does not provide him a meaningful opportunity to purge his contempt. Steven specifically maintains the court abused its discretion in conditioning the suspension of the \$500 fine imposed on the contempt on future compliance with the spousal support order.

{¶ 31} As noted above, the magistrate determined Steven's spousal support arrearage was \$30,000 and ordered him to pay \$200 per month to liquidate the arrearage. The magistrate fined Steven \$500 for his contempt, but suspended the fine upon Steven purging his contempt "by paying his obligations under this Order in a timely manner." (Oct. 22, 2013 Magistrate's Decision, 10.) In apparent accordance with the

⁵ R.C. 3105.18(G) provides that if a party is found in contempt for failing to pay ordered spousal support, the court "shall require the person to pay any reasonable attorney's fees of any adverse party, as determined by the court, that arose in relation to the act of contempt." R.C. 3105.73(B) states that a court may award reasonable attorney fees associated with a post-decree motion arising from a divorce proceeding "if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' income, the conduct of the parties, and any other relevant factors the court deems appropriate, but it may not consider the parties' assets."

magistrate's recommendation, the trial court imposed the \$500 fine, but suspended it "as long as [Steven] pays the underlying [\$1,000.00] per month spousal support obligation and the \$200.00 per month arrearage payment." (May 22, 2014 Decision and Entry, 12.) In doing so, the court mentioned the possibility of severe sanctions for a second contempt finding concerning future conduct.

{¶ 32} Steven maintains the purge order is invalid under *Tucker v. Tucker*, 10 Ohio App.3d 251 (10th Dist.1983), as an attempt to regulate future conduct. In *Tucker*, the appellant appealed from an order finding him in contempt for failing to make his court ordered child support payments. He paid the support arrearage before the judgment entry was filed, and this court found that the order suspending his punishment on the condition that he comply with the on-going support payments did not properly allow him an opportunity to purge.

{¶ 33} In *Leuvoy v. Leuvoy*, 10th Dist. No. 00AP-1378 (June 26, 2001), the appellant, citing *Tucker*, argued that a purge order cannot include the requirement of paying current support. This court, distinguishing *Tucker*, disagreed:

In *Tucker*, the arrearage had been paid and did not exist at the time the judgment in contempt was entered and the order was directed only to future conduct, and in this case the arrearage was not paid before the judgment entry was filed.

This court has already addressed this argument in [*In re Kenison*, 10th Dist. No. 96APF07-975 (May 29, 1997)]. In *Kenison*, the purge order required a payment of \$1,000 per month on the arrears in addition to the ongoing spousal support obligation. On appeal, appellant argued that this violated *Tucker* and this court found that any reliance upon *Tucker* was misplaced because the arrearage in *Tucker* did not exist at the time of the judgment. Thus, this argument has already been addressed and rejected.

{¶ 34} Here, as in *Leuvoy* and *In re Kenison*, 10th Dist. No. 96APF07-975 (May 29, 1997), *Tucker* is not applicable. We interpret the purge order to be directed at the arrearage obligation only and not the on-going spousal support. Because Steven was provided a meaningful opportunity to purge the arrearage obligation, the third assignment of error is overruled.

D. Fourth Assignment of Error – Change of Circumstances

{¶ 35} In his fourth assignment of error, Steven argues the trial court abused its discretion in failing to find a change of circumstances sufficient to warrant a reduction or termination of his spousal support obligation.

{¶ 36} 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 a 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. *Piliero v. Piliero*, 10th Dist. No. 10AP-1142, 2012-Ohio-1153, ¶ 3, citing *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222.

{¶ 37} A party seeking modification of spousal support bears the burden of demonstrating modification is warranted. *Piliero* at ¶ 3, citing *Burkart v. Burkart*, 191 Ohio App.3d 169, 2010-Ohio-5363, ¶ 22 (10th Dist.). Appellate courts generally afford trial courts wide latitude in considering spousal support issues. *Id.* at ¶ 20, citing *Grosz v. Grosz*, 10th Dist. No. 04AP-716, 2005-Ohio-985, ¶ 8. Accordingly, appellate courts review decisions regarding modification of spousal support for abuse of discretion. *Id.*, citing *Grosz* at ¶ 9.

{¶ 38} Steven acknowledges that the trial court expressly retained jurisdiction to modify the spousal support award. However, Steven contends the trial court abused its discretion in concluding he failed to present evidence establishing a substantial change in circumstances not contemplated at the time of the divorce.

{¶ 39} Steven essentially sets forth the same arguments regarding a substantial change of circumstances as he did in arguing an inability to comply with the spousal support order. Indeed, Steven again argues that since the divorce, his health has deteriorated substantially, he has been declared permanently disabled by the Social Security Administration, and he filed for Chapter 13 bankruptcy protection. We reject Steven's change-in-circumstances arguments for the following reasons.

{¶ 40} As noted above, at the time of the divorce trial, KMA had been operating at a loss for several years, and Steven considered filing bankruptcy as a result of KMA's unprofitability. Since the divorce trial, KMA's financial picture has gradually improved,

and Steven filed bankruptcy. Although Steven pays \$890 per month associated with the bankruptcy, the bankruptcy has reduced or eliminated most of his debt and expenses.

{¶ 41} As further noted above, at the time of the divorce trial, both Steven and Ethel had significant health issues. Since the divorce trial, Steven continues to have significant health issues; however, he now receives \$1,242 per month in SSD benefits. In addition, despite his health issues, he is still involved with KMA at least to a limited extent. Ethel's health issues also persist, and she was in a serious motor vehicle accident which rendered her physically unable to work.

{¶ 42} Given the state of the record, we conclude the trial court did not abuse its discretion in finding that Steven failed to establish an unforeseen, substantial change in circumstances sufficient to warrant a reduction or termination of the spousal support order. Accordingly, the fourth assignment of error is overruled.

E. Fifth Assignment of Error – Miscalculation of Spousal Support Arrearage

{¶ 43} In his fifth assignment of error, Steven contends the trial court erred in failing to correct the magistrate's miscalculation of his spousal support arrearage.

{¶ 44} The divorce decree ordered Steven to pay monthly spousal support of \$1,000. In determining Steven's arrearage, the magistrate explained that there was "sufficient evidence to establish a -0- balance as of January 31, 2011." (Oct. 22, 2013 Magistrate's Decision, 8.) Based on that conclusion, the magistrate calculated Steven's arrearage as \$1,000 a month from January 31, 2011 until September 30, 2013, minus two additional \$1,000 payments for a total of \$30,000 in arrearage.

{¶ 45} In his objection to the magistrate's decision and in his brief on appeal, Steven argued the magistrate miscalculated his arrearage. Specifically, Steven explained that the unmodified spousal support from October 2, 2007 through September 30, 2013 at \$1,000.00 a month would total \$72,000.00. From \$72,000.00, Steven argues, the following should be subtracted: (1) \$14,428.78 in payments made during the divorce litigation; (2) \$22,065.07 in payments made pursuant to the bankruptcy proceedings (Ethel's exhibit No. 7); and (3) \$7,000.00 in payments made directly to Ethel, to reach a calculated arrearage of \$28,506.15.

{¶ 46} The magistrate incorrectly noted that there was no evidence in the record regarding the \$22,065.07 payment made by Steven during the bankruptcy proceeding, despite the evidence contained in Ethel's exhibit No. 7. In reviewing the objections to the magistrate's decision, the trial court mentioned the miscalculation objection but did not explain why the objection was overruled. Accordingly, we remand to the trial court to determine whether, given all the evidence in the record, including the payment documented by Ethel's exhibit No. 7, the arrearage was properly calculated. Therefore, Steven's fifth assignment of error is sustained to the extent described above.

IV. Conclusion

{¶ 47} Having overruled Steven's first, second, third, and fourth assignments of error, but having sustained Steven's fifth assignment, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, and remand this matter to that court for further proceedings consistent with this decision.

*Judgment reversed;
cause remanded with instructions.*

BROWN, P.J., and BRUNNER, J., concur.
