

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

BECKY JOSE

Appellant

v.

PHILLIP JOSE

Appellee

C.A. No. 31653

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. DR 2008-05-1392

DECISION AND JOURNAL ENTRY

Dated: September 30, 2026

SUTTON, Judge.

{¶1} Plaintiff-Appellant, Becky Jose (“Wife”), appeals from the judgment of the Summit County Court of Common Pleas, Domestic Relations Division. This Court reverses.

I.

Relevant Background

{¶2} This appeal arises from Wife’s March 12, 2024 motion to modify spousal support. In *Jose v. Jose*, 2020-Ohio-3953, (9th Dist.), this Court set forth background information on the parties’ on-going litigation relevant to this appeal. The *Jose* Court stated:

Mr. Jose (“Husband”) and [Wife] divorced on November 12, 2014. With respect to the parties’ assets, the trial court found that Husband “is presently retired from the Army Reserve on disability retirement for PTSD. He receives disability retirement pay of \$4,600 per month which is the subject of a property division in this matter.” As part of the property division, the divorce decree addressed Husband's military disability pension:

[Husband] has a DFAS military disability retirement pension which is in payout. The marital portion of this pension is 73% of the total monthly benefit paid. [Wife's] one-half share of the marital portion of this total monthly benefit paid is 36.50%.

[Wife] shall therefore receive 36.50% of [Husband's] total net monthly disability retirement paid each month commencing June 1, 2014. She shall also receive a pro-rata share of any cost of living adjustment (COLA) or any other economic improvements made to [Husband's] benefit on or after the date of his retirement. If DFAS can only pay [Wife] 36.50% of [Husband's] gross disability retirement benefit, [Wife] shall be responsible to pay taxes on the amount she receives on an annual basis. [Husband] shall elect survivor benefit plan (SBP) coverage for [Wife], if possible.

The trial court reserved jurisdiction “to establish, maintain and enforce this order[,]” specifically noting that “[i]f necessary, the court may enforce other orders including the recharacterization of the benefits if payable under another retirement system or as spousal support, if applicable.” The trial court also ordered Husband to pay spousal support for a period of fifteen months commencing June 12, 2014. The divorce decree provided that the spousal support award was “modifiable within the term upon a showing of a substantial change of circumstances by either party.”

Approximately seven months later, Wife filed a motion captioned “Ex Parte Motion to Recharacterize Pension as Permanent Spousal Support.” In that motion, Wife argued that because Husband's pension consisted of disability benefits, she could not directly receive the portion of those payments assigned to her as part of the property division. Consequently, she argued that the trial court should recharacterize the proportion of Husband's pension allocated to Wife as part of the property division as permanent spousal support.

On July 26, 2016, the magistrate issued an order recommending that the trial court grant Wife's motion. The trial court approved the magistrate's decision on the same date pursuant to Civ.R. 53(D)(4)(e)(i) and ordered Husband to pay spousal support in the amount of \$1,810.77 per month “[e]ffective June 1, 2014.” Husband filed timely objections, arguing, among other things, that the magistrate erred by concluding that Wife was entitled to 36.50% of his disability payment, by recharacterizing the pension aspect of the property division as spousal support, and by modifying spousal support in the absence of a substantial change in circumstances.

On December 5, 2017, the trial court ruled on Husband's objections. The trial court concluded that the magistrate did not err by determining that spousal support was at issue because in the divorce decree “the Court also reserved jurisdiction to make an order of spousal support if the benefits received by [Husband] were re-characterized.” The trial court also noted that “[Husband] elected to waive his retirement pay so that he could receive the disability payments instead.” The trial court resolved Husband's objection that Wife was not entitled to receive 36.50% of his disability payments from the Veteran's Administration (“VA”) with reference to the reservation of jurisdiction in the divorce decree. The trial court concluded that Wife's inability to receive her share of the property division constituted a substantial change in circumstances. Although the order that ruled on Husband's

objections did not provide an effective date for the change to spousal support, the July 26, 2016, order provided that it was effective as of June 1, 2014.

Id. at ¶ 2-5.

{¶3} In her March 12, 2024 motion to modify spousal support, Wife indicated:

[Wife] is now petitioning this Court to modify the spousal support amount awarded. The Court originally determined that [Wife] be awarded \$1,810.77 per month because that amount was 36.50% of [Husband's] total pension benefits at the time, \$4,961.04. Along with [Wife's] award of support, she was also entitled to any increases in income due to COLA. It has been almost ten (10) years since this [c]ourt has reviewed [Husband's] monthly income. [Wife] believes that [Husband] is receiving a substantial increase in monthly benefits due to numerous COLA increases throughout the years. As such, [Wife] argues that there has been a substantial change in circumstances that would require a modification of her monthly award of spousal support.

Husband responded in opposition to Wife's motion arguing that: (1) any action by the trial court to recharacterize Husband's "combat disability pay is clearly prohibited" under federal law; and (2) the trial court did not reserve jurisdiction to modify spousal support.

{¶4} At a hearing held by videoconference, a magistrate of the trial court heard arguments from the attorneys for both parties, without clients present, as to whether the trial court retained jurisdiction to modify spousal support. No evidence of Husband's current income was presented at this hearing. During the hearing, the magistrate stated her "hang-up" is about jurisdiction because the July 26, 2016 "operative order" does not reserve jurisdiction. Further, the magistrate indicated she got herself "completely confused[,]" and both arguments on jurisdiction "could be right[.]" The magistrate then stated "[b]ut I have to pick one-right? – because that's what you guys are asking me to do." At that time, both attorneys argued their respective position regarding jurisdiction to modify spousal support based upon the COLA increases Husband received over the course of a decade. The hearing concluded with the magistrate advising the parties that Wife can maintain her current spousal support but she did not think Wife was entitled to any COLA

increases because “the [c]ourt in this case didn’t retain that jurisdiction for that COLA specifically[.]” Further, the magistrate indicated she would discuss the issue of jurisdiction with the judge before she issued a decision.

{¶5} In her decision, the magistrate indicated that the July 26, 2016 decision did not retain any jurisdiction to modify that order and also stated the original divorce decree reserved jurisdiction to modify spousal support upon a showing of a substantial change in circumstances by either party. The magistrate stated, “[a]s we sit here today, nothing substantial has changed.” Based upon the foregoing, the magistrate denied Wife’s motion to modify spousal support. The trial court adopted the magistrate’s decision and Wife filed objections arguing the magistrate abused her discretion in finding Wife failed to show a substantial change in circumstances without first holding an evidentiary hearing on Husband’s current income. Husband did not file a response. In overruling Wife’s objection, the trial court stated:

A review of the transcript of the evidentiary hearing indicates that neither of the parties appeared for the hearing with their counsel on March 10, 2025, although no reference is made to their failure to appear. The magistrate provided an opportunity for counsel to argue their position. [Wife’s] attorney did not object to the format nor did he state on the record any evidence that would warrant the magistrate finding a substantial change of circumstances. At the conclusion of the evidentiary hearing, [Wife] did not request another hearing date to provide such information or request another opportunity [] to be present to testify as to a substantial change of circumstances.

{¶6} Wife now appeals raising two assignments of error for our review. We address Wife’s assignments of error out of order to facilitate our discussion.

II.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED BY ADOPTING A FACTUAL DETERMINATION, WITHOUT GIVING WIFE AN OPPORTUNITY TO PRESENT HER CASE.

{¶7} In her second assignment of error, Wife argues the trial court erred in adopting the magistrate's factual determination that there was no substantial change in circumstance necessary to modify Wife's spousal support.

{¶8} Civ.R. 53(D)(4)(d) states:

Action on Objections. If one or more objections to a magistrate's decision are timely filed, the court *shall rule on those objections*. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues *and appropriately applied the law*. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

(Emphasis added.) "Whenever objections are filed, therefore, a trial court must consider whether the magistrate properly determined the factual issues and whether the magistrate appropriately applied the law." *Tillman v. Hyde Park Condominium #3 Owners' Assn.*, 2013-Ohio-2432, ¶ 6 (9th Dist.).

{¶9} R.C. 3105.18 states, in relevant part:

(E) If a continuing order for periodic payments of money as alimony is entered in a divorce or dissolution of marriage action that is determined on or after May 2, 1986, and before January 1, 1991, or if a continuing order for periodic payments of money as spousal support is entered in a divorce or dissolution of marriage action that is determined on or after January 1, 1991, the court that enters the decree of divorce or dissolution of marriage 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 unless one of the following applies:

(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 alimony or spousal support.

(2) In the case of a dissolution of marriage, the separation agreement that is approved by the court and incorporated into the decree contains a provision specifically authorizing the court to modify the amount or terms of alimony or spousal support.

(F)(1) For purposes of divisions (D) and (E) of this section and subject to division (F)(2) 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, or other changed circumstances so long as both of the following apply:

(a) The change in circumstances is substantial and makes the existing award no longer reasonable and appropriate.

(b) The 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.

{¶10} Here, the record indicates that counsel for the parties appeared by videoconference for a hearing in front of a magistrate. Clearly, the topic of the hearing was whether the trial court retained jurisdiction to modify Wife's spousal support. The magistrate advised counsel she believed the trial court had not retained jurisdiction to modify Wife's spousal support based upon the language in the July 26, 2016 decision. However, in the magistrate's decision, based upon the original divorce decree, the magistrate indicated the trial court *did* retain jurisdiction to modify spousal support if there is a substantial change in circumstances. The error arose in that the magistrate then found there was no substantial change in circumstances because "the [c]ourt in this case didn't retain that jurisdiction for that COLA specifically[.]" The trial court then adopted this erroneous finding. Neither the magistrate nor trial court based its findings on Husband's actual and current income to determine if a substantial change in circumstances in fact existed. Numbers were never discussed at the hearing because the discussion solely focused upon the issue of jurisdiction.

{¶11} Based upon R.C. 3105.18(F)(1)(a) and (b), whether the trial court retained jurisdiction specifically over Husband's COLA increases is not relevant to the appropriate legal analysis used to determine if a substantial change in circumstances existed in this matter for purposes of modifying spousal support.

{¶12} As such, the trial court must determine, in the first instance, whether a substantial change in circumstances existed as to any increase in Husband's wages due to COLA increases over the past ten years.

{¶13} Accordingly, Wife's second assignment or error is sustained.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN FINDING THAT WIFE WAS REQUIRED TO SHOW A SUBSTANTIAL CHANGE IN CIRCUMSTANCES IN ORDER TO ENFORCE THE PERCENTAGE SHARE SPOUSAL SUPPORT ORDER IN THIS MATTER.

{¶14} In her first assignment of error, Wife argues the trial court erred in finding she was required to show a substantial change in circumstances in her attempt to modify, or increase, spousal support. Based upon our resolution of Wife's second assignment of error, Wife's first assignment of error is moot. *See* App.R. 12(A)(1)(c).

III.

{¶15} Wife's second assignment of error is sustained. Wife's first assignment of error is moot. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division is reversed and remanded for further proceedings consistent with this decision. Further, Husband's motion to dismiss the appeal is denied.

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 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(C). 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.

BETTY SUTTON
FOR THE COURT

FLAGG LANZINGER, P. J.
STEVENSON, J.
CONCUR.

APPEARANCES:

LESLIE S. GRASKE, Attorney at Law, for Appellant.

JOHN DOHNER, Attorney at Law, for Appellee.