

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO**

NANCY A. MENCINI,	:	O P I N I O N
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2009-G-2930
JOHN T. MENCINI, et al.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 96 D 000267.

Judgment: Affirmed.

Stanley Morganstern, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Plaintiff-Appellant).

Heidi M. Cisan, Thrasher, Dinsmore & Dolan Co., L.P.A., 100 Seventh Avenue, #150, Chardon, OH 44024-1079 (For Defendant-Appellee).

MARY JANE TRAPP, P.J.

{¶1} Nancy A. Mencini appeals from a judgment of the Geauga County Court of Common Pleas, Domestic Relations Division, which adopted the magistrate’s decision denying her post-decree motion to extend spousal support. For the following reasons, we affirm.

{¶2} **Substantive Facts and Procedural History**

{¶3} The Mencinis were divorced in 1998 after a 25-year marriage. They have two children, who were both grown at the time of the divorce. Pursuant to the final judgment entry of divorce, the trial court divided the parties' assets, awarding Mr. John T. Mencini and Mrs. Nancy A. Mencini marital property valued at \$1.1 million and \$300,000 respectively. To equalize the property division, the court ordered Mr. Mencini to give Mrs. Mencini a promissory note in the amount of \$400,000 payable over ten years with 6% annual interest; under the note, Mrs. Mencini would receive \$24,000 in annual interest income. The court also required Mr. Mencini to pay his ex-wife spousal support of \$3,500 per month for eleven years. The duration of the spousal support was apparently calculated to provide for Mrs. Mencini until she would be eligible for Social Security.

{¶4} Just before Mr. Mencini made his final spousal support payment, Mrs. Mencini filed a "Motion to Modify Spousal Support," asking the court to extend Mr. Mencini's spousal support obligations beyond eleven years.

{¶5} She contended the extension was warranted because Mr. Mencini's income has continued at a high level while her income has dropped. Following a hearing, the magistrate overruled her motion. The magistrate concluded that she failed to demonstrate a change in circumstances not contemplated at the time of the divorce warranting a modification of spousal support, and, because that threshold requirement was not met, the court need not determine whether an extension of the spousal support is reasonable and appropriate pursuant to R.C. 3105.18(C). The magistrate, however, went on to consider the factors listed in R.C. 3105.18(C)(1) and concluded that, even if

there had been a change in circumstances, an extension of the spousal support is not appropriate or reasonable under the totality of the circumstances in this case.

{¶6} Mrs. Mencini filed objections to the magistrate’s decision. The court overruled her objections and denied her motion. On appeal, Mrs. Mencini presents two assignments of error for our review:

{¶7} “[1.] The trial court erred to the prejudice of plaintiff-appellant in overruling her objections and entering judgment adopting the magistrate’s decision denying her motion to modify an order for spousal support.

{¶8} “[2.] The trial court erred to the prejudice of plaintiff-appellant in overruling her objections and entering judgment adopting the magistrate’s decision which determined that a spousal support award was neither appropriate nor reasonable.”

{¶9} **Standard of Review**

{¶10} A trial court’s decision on a motion to modify spousal support is reviewed for an abuse of discretion and its judgment cannot be disturbed on appeal absent a showing that the trial court abused its discretion. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218. The term “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.* at 219.

{¶11} Furthermore, the party seeking to modify a spousal support obligation bears the burden of showing that the modification is warranted. *Reveal v. Reveal* (2003), 154 Ohio App.3d 758, 2003-Ohio-5335, ¶14.

{¶12} **Jurisdictional Requirement for a Motion to Modify Spousal Support**

{¶13} The Revised Code did not expressly provide for the modification of prior orders of spousal support until 1986, when the legislature amended R.C. 3105.18 and added a subsection to R.C. 3105.18 allowing for modification of spousal support *if* the divorce decree or separation agreement specifically authorizes the court to modify it and “the circumstances of either party have changed.” *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, ¶19; R.C. 3105.18(E).

{¶14} In 1991, the legislature further amended the statute and added the following subsection:

{¶15} “(F) For 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.” Am.Sub.H.B. No. 514, 143 Ohio Laws, Part III, 5426, 5457. See *Mandelbaum* at ¶26.

{¶16} Independent of the statute, the courts in Ohio have long held that a prior order of spousal support may be modified only when a trial court found that a “substantial and unforeseen” change in circumstances has occurred. Subsequent to the 1991 amendment of the statute, there was a split among the appellate districts regarding whether the amended statute eliminated this well-established common law requirement for spousal support modification. See *Mandelbaum* at ¶27-28. That was the conflict question certified to the Supreme Court of Ohio in *Mandelbaum*.

{¶17} The Supreme Court of Ohio, emphasizing that an agreement for spousal support entered in a divorce decree is entitled to “expectations of finality,” answered the question in the negative. It held 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.” *Mandelbaum* at ¶33; see, also, *Humphrey v. Humphrey*, 11th Dist. No. 2008-A-0077, 2010-Ohio-968, ¶48-50. The second requirement relates to the question of whether the change in circumstances was contemplated and accounted for at the time of the previous order. *Wertz v. Wertz*, 2d Dist. No. 23180, 2009-Ohio-6001, ¶18.

{¶18} Analysis

{¶19} With that decisional foundation laid, we now consider whether the trial court in this case abused its discretion in denying Mrs. Mencini’s request to extend the spousal support beyond the eleven years ordered in the original divorce decree.

{¶20} After a hearing on June 24, 2009, the magistrate found the following circumstances:

{¶21} Mr. Mencini, now age 66, holds a one-half interest of a Chrysler dealership as he did at the time of the divorce. However, he retired from the manager position on June 1, 2009, and no longer earns the \$120,068 salary for that position. He still receives investment income and distributions of profits from the dealership, as he did at the time of divorce. However, due to the difficult economic conditions in the automobile industry and the Chrysler bankruptcy and restructuring, much of the dealership profits are being reinvested to make facility upgrades, thus, less profits are available for distribution. Mr. Mencini remarried in 2005, and his wife earns \$30,000 in income a year.

{¶22} Mr. Mencini suffered three heart attacks in 2007, which required surgery to implant three stents. He also had a stroke that year, which required hospitalization and six weeks of rehabilitation. He takes daily medication for high blood pressure and cholesterol.

{¶23} Mrs. Mencini contended that Mr. Mencini could have earned more income if he had not retired; however, the magistrate found that he did not retire in order to escape his spousal support obligation, but did so only when he turned 66 and became eligible to receive Social Security -- the magistrate cited his testimony that he would like to have retired in 2007 when he suffered the heart attacks and stroke, but continued to work in order to fulfill his spousal support and property settlement obligations to his ex-wife.

{¶24} Mrs. Mencini, age 63, is unemployed, as she was at the time of the divorce. At that time the court imputed \$7,000 a year in earned income to her. After the divorce, she did part-time work in several law offices for six of the eleven years.

{¶25} At the time of the divorce, the court determined her annual investment income to be \$20,000. Her spousal support was \$3,500 per month. She also received property settlement payments of almost \$700,000 over the past ten years, obtaining her final "balloon" settlement payment of \$338,852 in 2008. She currently has over \$640,000 in investments. She is now also eligible for Social Security.

{¶26} The magistrate, applying *Mandelbaum*, concluded Mrs. Mencini failed to show the existence of an unforeseen change in circumstances that would warrant the court's exercising its jurisdiction to modify the spousal support. The magistrate stated that because the threshold requirement was not met, the court need not determine

whether an extension of the spousal support beyond eleven years is reasonable and appropriate pursuant to R.C. 3105.18(C). Despite that conclusion, the magistrate nonetheless went on to consider the factors listed in R.C. 3105.18(C)(1) and concluded that *even if* Mrs. Mencini demonstrated an unforeseen change in circumstances existed, an extension of the spousal support is not appropriate or reasonable given the totality of the circumstances. The trial court adopted the magistrate's findings of fact and conclusions of law.

{¶27} Based on this record, we do not find an abuse of discretion by the trial court denying Mrs. Mencini's motion to extend spousal support. First of all, it is undisputed that the trial court expressly reserved jurisdiction to modify spousal support in the divorce decree. However, in order for the trial court to exercise jurisdiction, Mrs. Mencini must also demonstrate "(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.

{¶28} To demonstrate a change in circumstances, Mrs. Mencini points to Mr. Mencini's "ever improving economic condition" and the dramatic drop of her investment income since 2008 due to "the national financial crises and equity market failures." She contends there is a "widening gap" between their incomes. She alleges Mr. Mencini had total annual income of \$277,000 in 2006, \$338,800 in 2007, and \$308,000 in 2008, based on his W-2 income, profits distribution from the auto dealership, and a partnership which owns real estate. Her own income, however, remained static during the same period -- she received \$42,000 in annual spousal support and \$24,000 annual

interest income on the \$400,000 note, in addition to investment income, which totaled \$18,000 in 2006 and \$19,350 in 2007, but dwindled to \$14,200 in 2008.

{¶29} There is no doubt that Mrs. Mencini's income has decreased significantly and the parties' income gap has further widened now that she no longer receives spousal support or the annual interest income on the \$400,000 note. However, this is not the kind of unforeseen "change in circumstances" that would satisfy the jurisdictional requirement for modification of spousal support pursuant to *Mandelbaum*. The change in her income after 2008 when she no longer received spousal support or the interest income was not only contemplated, but, in fact, specifically anticipated in the divorce decree. As to the decrease in investment income after 2008, the fluctuation of the stock market is a reality of our economy. When one is going to rely on investment income, risk is anticipated. The recent downturn of the equities market, although dramatic, does not qualify as an unforeseen change in circumstances for the purposes of spousal support modification. In any event, the poor economic condition impacts Mrs. Mencini and Mr. Mencini equally and, therefore, is not the type of "change in circumstances" that would warrant a court's reconsideration of spousal support.¹

{¶30} Because Mrs. Mencini failed to show a substantial change in circumstances not contemplated at the time of the original decree pursuant to *Mandelbaum*, the magistrate correctly concluded Mrs. Mencini did not meet the threshold jurisdictional requirement to allow the court to entertain her motion to modify spousal support. Although the magistrate went on to find that *even if* the court had the

1. Mrs. Mencini cites *Fallang v. Fallang* (1996), 109 Ohio App.3d 543, and *Latimer and Latimer*, 179 Ohio App.3d 90, 2008-Ohio-5655, both issued before *Mandelbaum*, to support her claim. These cases are inapplicable because they are factually different, and more importantly, they applied the incorrect standard for spousal support modification rejected by *Mandelbaum*.

jurisdiction to consider the motion, an extension of support would not be appropriate or reasonable under the enumerated statutory factors. That determination is moot, and we need not review it.

{¶31} We conclude the trial court did not abuse its discretion in adopting the magistrate's decision and overruling Mrs. Mencini's motion. Her first assignment lacks merit, and her second assignment is overruled as moot.

{¶32} For the foregoing reasons, the judgment of the Geauga County Court of Common Pleas Court is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.