[Cite as *Chevalier v. Chevalier* , 2009-Ohio-6599.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

WILLIAM C. CHEVALIER,	:	
	:	
Plaintiff-Appellee,	:	Case No. 08CA11
	:	
vs.	:	**Released: December 9, 2009**
	:	
ALICE F. CHEVALIER,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Stuart Y. Itani and Natasha A. Plumly, Southeastern Ohio Legal Services, Athens, Ohio, for Appellant.

William C. Chevalier, Reedsville, Ohio, Appellee, pro se.[1]

McFarland, J.:

{¶1} Appellant, Alice Chevalier, appeals from a decision of the Meigs County Court of Common Pleas granting Appellee's motion to terminate spousal support. On appeal, Appellant contends that the trial court erred by exercising subject matter jurisdiction and terminating spousal support when the divorce decree contained no provision specifically authorizing the court to modify the amount or terms of alimony or spousal support as required by

[1] Appellee was represented at the trial court level by Denise L. Bunce; however, on March 18, 2009, Ms. Bunce filed with this Court a Notice of Withdrawal of Counsel indicating that Appellee had not retained her on appeal. Further, although Appellee filed a document purporting to be a pro se appellate brief on May 15, 2009, by entry dated May 19, 2009, we ordered the brief stricken for failure to comply with the appellate rules. Appellee thereafter has failed to file a corrected brief and, thus, is not participating in this appeal.

R.C. 3105.18(E)(1). Because the trial court's order did not expressly reserve jurisdiction over spousal support, and because Appellee waived any arguable abuse of discretion related thereto when he failed to file a direct appeal of the matter, we sustain Appellant's sole assignment of error. Accordingly, we reverse the decision of the trial court and remand this matter for further proceedings consistent with this opinion, including reinstatement of the prior award of spousal support.

FACTS

{¶2} The record reveals that the parties herein were granted a divorce on December 4, 2001, after forty one years of marriage and raising seven children. Appellee was represented in the divorce proceedings and Appellant was not. The decree of divorce provided that "Husband shall pay to the wife $200.00, per month, as and for spousal support, which shall terminate upon the death of either." Despite the fact that this spousal support award was indefinite, the decree contained no reservation of jurisdiction over the issue of support. A further review of the decree of divorce indicates that the document itself was prepared by Appellee's counsel. Appellee did not appeal the trial court's failure to reserve jurisdiction over this issue.

{¶3} Subsequently, on June 6, 2008, Appellee filed a motion to terminate spousal support. Appellee was again represented and through counsel, argued he was entitled to a modification as a result of a change in circumstances regarding his finances. Appellant was not represented by counsel, but she participated in the proceedings and objected to the motion for termination. After conducting a hearing on the matter, the trial court granted Appellee's motion to terminate spousal support. It is from this entry that Appellant brings her timely appeal, setting forth a single assignment of error for our review.

ASSIGNMENT OF ERROR

"I. THE TRIAL COURT ERRED BY EXERCISING SUBJECT MATTER JURISDICTION AND TERMINATING SPOUSAL SUPPORT WHEN THE DIVORCE DECREE CONTAINED NO PROVISION 'SPECIFICALLY AUTHORIZING THE COURT TO MODIFY THE AMOUNT OR TERMS OF ALIMONY OR "SPOUSAL SUPPORT ' AS REQUIRED BY R.C. 3105.18(E)(1)."

LEGAL ANALYSIS

{¶4} In her sole assignment of error, Appellant contends that the trial court erred by exercising subject matter jurisdiction and terminating spousal support when the divorce decree contained no provision reserving jurisdiction over the issue of support. Based on the following reasoning, we agree.

{¶5} Formerly, a trial court's continuing jurisdiction to modify an award of spousal support was implied in the decree of divorce. See *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 350 N.E.2d 413; See, also *McLaughlin v. McLaughlin*, Athens App. No. 00CA14, 2001-Ohio-2450 (*McLaughlin I*). However, in 1986, the General Assembly amended R.C. 3105.18 to provide that the trial court does not have continuing jurisdiction to modify spousal support unless the court specifically reserves such jurisdiction in the decree of divorce. See R.C. 3105.18(E)(1). Further, the decision to reserve jurisdiction to modify an award of spousal support is left to the sound discretion of the trial court. See *Johnson v. Johnson* (1993), 88 Ohio App.3d 329, 623 N.E.2d 1294. Nevertheless, several courts have held that the trial court abuses its discretion by failing to reserve jurisdiction to modify an indefinite award of spousal support. See *Nori v. Nori* (1989), 58 Ohio App.3d 69, 568 N.E.2d 730; *Gullia v. Gullia* (1994), 93 Ohio App.3d 653, 639 N .E.2d 822.

{¶6} Appellant contended below that he was entitled to a modification of spousal support despite the trial court's failure to expressly reserve jurisdiction over the issue, based upon the fact that the award was indefinite, as opposed to temporary, relying on *Dickson v. Dickson* (1991), 74 Ohio App.3d 70, 598 N.E.2d 58. We find *Dickson* to be distinguishable from the

case presently before us as it involved a divorce decree and spousal support award entered prior to the 1986 amendments to R.C. 3105.18.

{¶7} We do recognize that there is a difference between a temporary and indefinite award of spousal support. However, consistent with our handling of this issue in *McLaughlin I*, we conclude that Appellee waived any error with respect to the trial court's failure to expressly reserve jurisdiction over the indefinite award of spousal support herein when he failed to bring a direct appeal from the divorce decree. *McLaughlin I*. Additionally, as we noted in *McLaughlin I*:

"In *Johnson*, supra, the court ruled that the payee spouse could not bring a collateral attack on the spousal support provision of a divorce decree even though the trial court failed to reserve continuing jurisdiction to modify spousal support. Courts that have considered both *Nori* and *Johnson* have held that a payee spouse must challenge the trial court's failure to reserve continuing jurisdiction by way of direct appeal, not through a post-decree motion to modify spousal support. See *Lawson v. Garrison* (Sept. 4, 1998), Lucas App. No. L-98-1145, unreported; *Ritchie v. Ritchie* (Jan. 19, 1999), Warren App. No. CA98-05-063, unreported."[2]

Because Appellant did not bring a direct appeal from the decree of divorce, he cannot now be permitted to challenge[3] the trial court's failure to reserve continuing jurisdiction to modify spousal support by means of a post-decree motion to modify that same spousal support.

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[2] Although the *Johnson* court applied a waiver theory to the payee spouse, in *McLaughlin* we also applied the waiver theory to the payor spouse.

[3] We note that because Appellee did not file a brief on appeal he has technically not made this argument; however, we assume for purposes of appeal that such argument was implied in making his motion for modification below.

{¶8} As such, Appellee's reliance on *Dickson* below, and argument that the trial court should be permitted to modify the spousal support award were misplaced. Thus, we conclude that the trial court erred when it exercised jurisdiction over the issue of spousal support when the divorce decree at issue contained no express reservation of jurisdiction to do so. Accordingly, we sustain Appellant's sole assignment of error, reverse the decision of the trial court, and remand this matter for further proceedings consistent with this opinion, including a reinstatement of the prior order of spousal support.

JUDGMENT REVERSED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED and that the Appellant recover of the Appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Kline, P.J. and Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.