[Cite as *Manley v. Manley*, 2020-Ohio-1365.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

KIM M. MANLEY NKA ROSE,

Plaintiff-Appellee,

v.

JAMES M. MANLEY,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 CO 0023

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2013 DR 660

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Carl King, 115 West Lincoln Way, Lisbon, Ohio 44432, NO BRIEF FIELD for Plaintiff-Appellee and

Atty. Dominic A. Frank, Betras, Kopp & Harshman, LLC, 1717 Lisbon Street, East Liverpool, Ohio 43920, *Atty. Jennifer M. Reghetti,* Betras, Kopp & Harshman, LLC, 6630 Seville Drive, P.O. Box 129, Canfield, Ohio 44406 for Defendant-Appellant.

Dated: March 30, 2020

Robb, J.

{¶1} Defendant-Appellant James Manley appeals the decision of the Columbiana County Common Pleas Court denying his motion to modify spousal support payable to Plaintiff-Appellee Kim Manley (nka Rose). Appellant contends the court abused its discretion because he was entitled to modification upon reaching what he alleged was the full retirement age of 62 under the terms of his pension plan. However, there was no evidence presented which showed the pension plan assigned a significance to age 62 and the court previously refused modification based on his retirement at age 61. Under the particular circumstances in this case, we do not find the trial court abused its discretion in assigning age 66 as Appellant's full retirement age for purposes of spousal support modification. The judgment denying modification of spousal support is affirmed.

{¶2} Appellant also appeals the trial court's decision finding him in contempt for failing to pay spousal support, improperly withdrawing money from an account after the divorce, and failing to evenly divide that account by QDRO within a reasonable time after the divorce. He argues the court abused its discretion, claiming Appellee refused to execute a form to release the money in the account to be divided. He wished to pay his spousal support arrearage and reimburse Appellee for his improper withdrawal by instructing a financial institution to divide a retirement account by QDRO at a proportion different than the divorce decree ordered. Appellee refused his proposal because by directly allocating additional funds to her from this account, Appellant was attempting to shift the tax consequences for withdrawals. The contempt judgment is affirmed.

Statement of the Case: Spousal Support Modification[1]

{¶3} The parties were divorced on March 16, 2015. Appellant was 60, and Appellee was 54 years old. The duration of the marriage was 35 years. The court evenly divided the assets, including the following retirement investments: the retirement benefits payable in the future from Appellant's fully vested pension at Vallourec; a retirement

[1] We present the facts, procedural history, and arguments as relevant to Appellant's modification motion before we present these topics as relevant to Appellee's contempt motion.

savings plan worth nearly $400,000; and Ameriprise accounts worth almost $230,000. Each party ended up receiving $80,000 from the sale of the marital residence.

{¶4} Appellant's income was said to average almost $75,000, and Appellee's income was imputed at $15,600. The court awarded Appellee $2,000 per month in spousal support for an indefinite period, finding this amount would equalize the incomes. Each party was required to notify the other of any income change of more than 10%. The court reserved jurisdiction over the amount and duration of spousal support, noting Appellant may retire, his job situation may change, or the Plaintiff may become eligible for disability benefits. There was no appeal from the divorce decree.

{¶5} On April 7, 2015, less than a month after the divorce decree was issued, Appellant filed a motion to modify spousal support. Initially, he accepted a voluntary layoff. He then retired in August 2015. On October 9, 2015, the magistrate denied Appellant's modification motion because he voluntarily took an early retirement. On June 6, 2016, the trial court overruled Appellant's objections and adopted the magistrate's decision. Appellant did not appeal that decision.

{¶6} On October 17, 2016, Appellant filed a motion to terminate spousal support due to his retirement. He cited the clause in the divorce decree reserving jurisdiction to modify spousal support and mentioning retirement; he suggested the clause made a termination of support automatic upon retirement and was comparable to the clause saying spousal support would terminate upon either party's death or Appellee's remarriage or cohabitation. On May 1, 2017, the magistrate denied the modification motion pointing to the differences in the clauses and finding the motion was res judicata to the extent it sought modification on the same basis as his 2015 motion. On September 20, 2017, the trial court overruled Appellant's objections and adopted the magistrate's decision.

{¶7} On appeal, this court affirmed. *Manley v. Manley*, 7th Dist. Columbiana No. 17 CO 0036, 2018-Ohio-2773. We agreed that retirement was not a reason listed in the decree for automatic termination (i.e., retirement was not a condition subsequent for termination). *See id.* at ¶ 26-28. We also agreed that the modification request based on the 2015 voluntary retirement was barred by res judicata as it was decided in the June 6, 2016 judgment which was not appealed. *Id.* at ¶ 29-33. It was additionally noted:

> That conclusion, however, does not necessarily mean Appellant's retirement is foreclosed forever as forming any basis for modification. For instance, when Appellant reaches full retirement age, he could move for modification indicating he is now at full retirement age and seeks modification based on his full retirement age and the fact that he is retired. The magistrate and trial court's decisions were based on the fact that Appellant took a voluntary early retirement. However, once he reaches the age of full retirement that fact may create a new basis for a change in circumstance so that res judicata would not act as a bar.

Manley, 7th Dist. No. 17 CO 0036 at ¶ 34, citing *Comella v. Parravano*, 8th Dist. Cuyahoga No. 100062, 2014-Ohio-834, ¶ 30 (second motion to modify spousal support was not barred by res judicata as material facts that were not at issue at the time of the court's prior order were raised in the second motion.).

{¶8} Appellant immediately filed a modification motion on July 11, 2018. This new (third) motion asked to modify spousal support retroactive to June 16, 2016, which is when he turned 62 years of age. As changed circumstances, he said he reached the "required age of retirement that being sixty-two (62) as well as having completed the years of service required to receive said benefits without reduction." He argued he should not be obligated to continue working after he was eligible to retire under his employer's pension plan. It was also noted that Appellee was receiving her share of his monthly pension.

{¶9} At the October 4, 2018 motion hearing, Appellant was 64. He testified: he was entitled to 100% of the pension benefits at age 60; the parties were receiving 100% of the available pension benefit; a person who retired early would receive less than this; he took a buyout to avoid layoffs at a mill adversely affected by an oil and gas downturn and to obtain a severance package (paying his base rate and insurance for six months); and he did not apply for social security benefits. He said he received $350 a month from his pension and Appellee received less than $300 (due to the date of the retirement being after the date of the divorce decree which evenly split the pension benefit). Appellee argued Appellant's full retirement age should be 66 because that is the age at which he will be eligible for full social security benefits.

{¶10} On November 27, 2018, the magistrate denied Appellant's modification motion. The magistrate found: Appellant took early retirement hoping it would terminate or reduce his spousal support; he was physically and mentally able to work; his retirement benefits were fixed when he chose to retire; he was not looking for work; he had not yet applied for social security benefits; and the parties' income and expenses did not change when he reached 62. The magistrate noted that some cases found a normal retirement age was 65 when that was the age for full social security benefits. It was pointed out that the age for full social security benefits is now 66 for a person with Appellant's date of birth. The magistrate concluded Appellant's full retirement age should be 66 (for purposes of using his retirement as a basis for modifying spousal support).

{¶11} Appellant objected to this decision. He argued the magistrate erred by finding his full retirement age was 66 merely because that was the age for full social security benefits and by failing to use the "normal retirement age" of 62 as (allegedly) defined by his private pension.

{¶12} On June 13, 2019, the trial court overruled the objections and adopted the magistrate's decision. To the extent Appellant sought to retroactively terminate his spousal support obligation due to retirement, the court found res judicata applied. To the extent he sought to prospectively modify (or terminate) his spousal support based on his current age or his surpassing of age 62, the court concluded that he failed to show a substantial change of circumstances. In finding the attainment of age 62 was a distinction without a difference in this case, the trial court observed: Appellant was entitled to his full pension at age 60; he began to collect 100% of his pension benefit when he retired in 2015 at age 61; the pension benefit was fixed when he chose to retire; and Appellant's retirement age for the purpose of collecting full social security benefits is 66. By adopting the magistrate's decision and finding the reasoning sound, the court essentially assigned 66 as Appellant's full retirement age for purposes of spousal support modification. Appellant filed a timely notice of appeal.

Spousal Support Assignments of Error

{¶13} Appellant's first and second assignments of error, which he addresses together, make the following allegations:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT FAILED TO CONSIDER NEW MATERIAL FACTS WHICH FORMED THE BASIS FOR A CHANGE OF CIRCUMSTANCES SUPPORTING APPELLANT'S MOTION TO MODIFY HIS SPOUSAL SUPPORT OBLIGATION."

"THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT FAILED TO FIND APPELLANT'S FULL (NORMAL) RETIREMENT AGE TO BE BASED ON THE TERMS AND CONDITIONS OF HIS EMPLOYMENT ENTITLING HIM TO HIS FULL RETIREMENT BENEFITS."

{¶14} If spousal support is awarded in a divorce, the court has jurisdiction to modify the amount or the terms of the spousal support if the decree contains a provision authorizing the court to modify the amount or terms and the court determines the circumstances of either party have changed. R.C. 3105.18(E). A change in circumstances includes any increase or involuntary decrease in income or expenses. R.C. 3105.18(F)(1). The change must be substantial and must make the existing award no longer reasonable and appropriate. R.C. 3105.18(F)(1)(a). In addition, the change must be one that was not taken into account as a basis for the existing award when it was established (regardless of whether it was foreseeable). R.C. 3105.18(F)(1)(b). These provisions are "subject to division (F)(2)," which provides, "the court shall consider any purpose expressed in the initial order" in determining whether to modify spousal support. R.C. 3105.18(F)(1), citing R.C. 3105.18(F)(2).

{¶15} In general, a trial court's judgment in evaluating the changed circumstances in a spousal support modification motion cannot be disturbed on appeal absent a showing that the trial court abused its discretion. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 218, 450 N.E.2d 1140 (1983). The appellate court cannot substitute its judgment for that of the trial court and can only reverse if the modification decision was unreasonable, arbitrary or unconscionable. *Id.* at 219.

{¶16} Initially, we must point out that the trial court could not have modified spousal support retroactively to a date before Appellant's motion was filed (such as the date he reached age 62 as he requested). The decision that retirement was not an event

resulting in automatic termination is the law of the case and is res judicata. *Manley*, 7th Dist. No. 17 CO 0036 at ¶ 26. The automatic termination clause in the divorce decree applied to either party's death and Appellee's remarriage or cohabitation with an unrelated adult male; it did not encompass retirement. *Id.* The mention of Appellant's future retirement under a different clause (reserving jurisdiction to modify the amount and duration of spousal support) was more akin to an expression of purpose as contemplated by R.C. 3105.19(F)(2).

{¶17} When a court modifies spousal support, it can make the modification retroactive to the date of the motion (if sufficient circumstances had changed by that point), or the court can choose a reasonable date after the motion. *Filicky v. Filicky*, 7th Dist. Mahoning No. 99 C.A. 212, 2000-Ohio-2600 (modification of spousal obligations *may* be made retroactive to the date of the filing of the motion to modify spousal support). *See also Flauto v. Fla*uto, 7th Dist. Mahoning No. 02-CA-12, 2002-Ohio-6430, ¶ 32 (where unemployment had not yet occurred at the time the motion was filed, it was unreasonable to modify retroactively to the date of the motion). However, the court cannot choose a date before the modification motion was filed. *Merkle v. Merkle*, 115 Ohio App.3d 748, 754, 686 N.E.2d 316 (7th Dist.1996) ("accrued and unpaid support could not be modified retroactively to a date prior to the filing of a request for modification"), citing *Rowland v. Mann*, 7th Dist. Jefferson No. 95-JE-26 (Aug. 29, 1996).

{¶18} Moreover, a statute provides: "Except as provided in section 3119.84 of the Revised Code, a court or child support enforcement agency may not retroactively modify an obligor's duty to pay a delinquent support payment." R.C. 3119.83. An exception to this statute is contained in R.C. 3119.84. *Byrd v. Knuckles*, 120 Ohio St.3d 428, 2008-Ohio-6318, 900 N.E.2d 164, ¶ 3-4. This exception provides: "A court with jurisdiction over a court support order may modify an obligor's duty to pay a support payment that becomes due after notice of a petition to modify the court support order has been given to each obligee and to the obligor before a final order concerning the petition for modification is entered." R.C. 3119.84. Together, these statutes prohibit the modification of a court support order to retroactively extend back to a date before the obligor made the petition to modify and gave notice to the obligee. *See Byrd*, 120 Ohio St.3d 428 at ¶ 5 (unless the parties agreed to retroactive modification).

{¶19} These modification restrictions in R.C. 3119.83 and 3119.84 apply to spousal support as well as child support orders. *See Powell v. Powell*, 2d Dist. Montgomery No. 19537, 2003-Ohio-1050, ¶ 13-18 (on a 2001 motion, the trial court could not retroactively modify the spousal support arrearage back to when the obligor filed a prior motion to terminate spousal support as that motion was already denied in 1994). This can be seen in the plain language used. For instance, R.C. 3119.83 speaks of a court (*or* child support enforcement agency) modifying a "delinquent support payment" (not a "delinquent child support payment"). Moreover, one of the statutes cited in R.C. 3119.84 is R.C. 3105.18, which is the statute providing for spousal support and spousal support modification. Most notably, the term "court support order" in R.C. 3119.84 is specifically defined as "either a court child support order *or an order for the support of a spouse or former spouse* issued pursuant to" various statutes. (Emphasis added.) R.C. 3119.01(C)(3), now (C)(5).

{¶20} Appellant turned 62 on June 16, 2016 and filed his latest modification motion on July 18, 2018 (at age 64). He sought retroactive modification to June 16, 2016, which was the date he turned 62 (and which was also the date of the trial court's order denying the first modification motion). In accordance with this district's case law and the aforementioned statutory law, Appellant could not have received modification of spousal support retroactive to the date on which he turned 62; the date of his motion would have been the earliest date within the trial court's discretion but would still not have been required.

{¶21} As to Appellant's retirement being labeled voluntary, early, or not a change warranting modification, his testimony that he was at risk of job elimination near the time of the divorce was not dispositive in the proceedings on his third motion. In earlier proceedings, the trial court already found Appellant voluntarily reduced his income by retiring early and essentially imputed pre-retirement income to Appellant in finding no change of circumstances. *See, e.g., Ogle v. Ogle*, 2018-Ohio-5141, 128 N.E.3d 775, ¶ 22 (10th Dist.) (early retirement can be considered an involuntary decrease in salary if the obligor demonstrates it was economically sound, but if he retires with the intent to defeat a spousal support obligation, then the retirement is considered voluntary underemployment and his pre-retirement income is attributed to him); *Chepp v. Chepp*,

2d Dist. Clark No. 2008 CA 98, 2009-Ohio-6388, ¶ 11 (if it is reasonable to find there was no intent to escape a spousal support obligation, then the trial court should not impute additional income to the retired party); *Friesen v. Friesen*, 10th Dist. Franklin No. 07AP-110, 2008-Ohio-952, ¶ 42 (if the obligor retires with intent to defeat a spousal support obligation, then the retirement is considered voluntary underemployment and pre-retirement income is attributed to the obligor).

{¶22} This matter was decided by the trial court, was not appealed, and was already considered res judicata by this court in reviewing Appellant's second modification motion. *Manley*, 7th Dist. No. 17 CO 0036 at ¶ 32-33. A final judgment on the merits bars subsequent actions based on claims arising out of the occurrence that was the subject of the prior action. *Id.* at ¶ 30, citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 653 N.E.2d 226 (1995). There are not multiple transactions merely because there are different legal theories for liability that may apply to a given event. *Grava*, 73 Ohio St.3d at 382-383 (a primary consideration is the identity of the evidence relevant to proving the claim in each action).

{¶23} Notably, Appellant was 60 at the time of the divorce hearing and decree; he retired soon thereafter causing his income to decrease dramatically; and the trial court refused to modify spousal support twice, essentially finding his retirement so soon after the divorce was not done for sound economic or personal/medical reasons and was done with an intent to decrease the spousal support award. Whether the original spousal support award and the denial of modification based on retirement were unreasonable cannot be relitigated.

{¶24} Appellant's latest modification motion claimed a new occurrence: reaching the "required age of retirement" of 62 and having sufficient years of service to receive full benefits. He objected to the magistrate's decision and said the private retirement plan defined "normal retirement age" as 62. However, in addition to the fact that the delinquent support accruing prior to the July 2018 motion could not be modified, a prospective modification based on the terms of the private pension was unsupported (to the extent it was not res judicata).

{¶25} Appellant had the burden to prove the allegations he made in his motion (and reiterated in his objection). *See Adams v. Adams*, 7th Dist. Jefferson No. 96 JE 12

(Aug. 6, 1997) ("burden of showing that modification of spousal support is warranted is on the party who seeks it."). Contrary to Appellant's contention, there was no evidence presented at the magistrate's hearing that Appellant's former employer placed any emphasis on age 62. No testimony supported the contention in his motion or objection regarding the significance of the age of 62 under the terms of the private pension plan, and no exhibit was introduced regarding the pension plan.

{¶26} In fact, Appellant testified that he was eligible to retire with unreduced benefits at age 60 due to his years of service, a condition that existed at the time his last two motions for modification of spousal support were decided. And again, he was already 62 when he filed the October 2016 motion regarding spousal support, the denial of which was affirmed on appeal. When this court affirmed and spoke in dicta of his future full retirement age as a potential for avoiding the res judicata bar, Appellant was 64 years of age. It was not unreasonable for the trial court to refrain from assigning significance to the fact that he was over 62; i.e., it was reasonable to find the reaching of age 62 was not a changed circumstance and was not what this court intended in speaking of Appellant's ability to seek modification upon reaching full retirement age. See *Manley*, 7th Dist. Columbiana No. 17 CO 0036 at ¶ 34 ("when Appellant reaches full retirement age, he could move for modification indicating he is now at full retirement age and seeks modification based on his full retirement age and the fact that he is retired").

{¶27} In addition to the attainment of age 62, Appellant says other new facts supported modification of spousal support in addition to his age. He points out that both parties were receiving their share of his pension benefit and his retirement savings plan had been divided. However, in objecting to the magistrate's decision, the retirement savings plan was not mentioned, and it was not clear Appellant was relying on Appellee's receipt of a $293 monthly pension benefit as some independent reason for modification as opposed to a supporting argument about how the pension was not reduced by early retirement. *See* Civ.R. 53 (D)(3)(a)(iii), (b)(ii) (object with specificity). Moreover, as to the savings plan: this was a marital asset that was already ordered split under the property division in the 2015 divorce decree; it was contemplated as a future asset with a principal amount determined; and Appellee testified that she could not yet fully access the retirement savings account because she was 58 years old.

{¶28} As to the monthly pension benefit, the trial court pointed out that the pension was divided in the divorce as a marital asset and continued to be paid to the parties. Appellant retired in August 2015, and there was no testimony that Appellee's receipt of her share of the monthly pension benefit ($293) was an event that was not in existence at the time of Appellant's prior motion. Additionally, the decrease in Appellant's income due to his receipt of the pension (instead of wages) was a pre-existing fact in prior proceedings where his pre-retirement income was essentially being imputed to him. We also note the pension benefit did not actually add to Appellees' monthly income as she was not working at the time of the divorce and a minimum wage income was imputed. She testified about the rejection of her application for disability benefits and her attempts to find employment. The addition of the monthly pension benefit need not be considered to have substantially changed Appellee's income (e.g., just as Appellant was not considered to be making more than his imputed income due to his receipt of the pension benefit).

{¶29} Nevertheless, the totality of the circumstances can be considered in reviewing the allegation of substantial changed circumstances, which Appellant based mostly on his increased age. Although it was not unreasonable to reject Appellant's age 62 argument, we must also review whether the trial court abused its discretion in declaring that 66 will be considered Appellant's full retirement age (when applying the dicta in our prior decision). Appellant was 64 years old when he filed the latest modification motion and during the proceedings on this motion.

{¶30} As observed by the magistrate and the trial court, some cases consider the age at which unreduced benefits can be claimed under social security in determining the normal retirement age in divorce (and other) contexts. *See, e.g., Alexander v. Alexander*, 5th Dist. Stark No. CA-4515 (Feb. 9, 1977) (also considering the age at which the obligee could claim reduced social security benefits).[2] In ruling on an initial modification motion

[2] The magistrate cited other cases as support for using the age at which full social security benefits are payable (which was previously 65). However, some of the cited cases merely said age 65 was the normal age of retirement under the terms of the private pension plan. *See Estate of Darnell v. Darnell*, 6th Dist. Wood No. WD-88-46 (May 12, 1989); *Consolidated Gas Supply Corp. v. Ohio Bur. of Emp.*, 1st Dist. Warren No. 52 (July 7, 1975). Another cited case upheld the choice of age 62 in a civil suit (after an economist testified to various work expectancies for the lost wages recovery). *Fisher v. Univ. of Cincinnati Med. Ctr.*, 10th Dist. Franklin No. 14AP-188, 2015-Ohio-3592, ¶ 33-34.

upon retirement, the First District said the social security age for full benefits need not be used as the date for determining whether an obligor retired too early. *Smith v. Smith*, 1st Dist. Hamilton No. C-140391, 2015-Ohio-2258, ¶ 24 (noting the standards for social security were not statutory factors for spousal support and finding no support for requiring the use of the social security age of 67 as the date until which the obligor should work).

{¶31} However, this does not mean a trial court is prohibited from using that date depending on the circumstances of a particular case. The issue is one to be determined on a case-by-case basis. On an original motion, a court could consider items such as: age at the time of divorce; the time between the spousal support award and the retirement (here preceded by a voluntary leave of absence within days of the divorce decree); the physical, psychological, or medical reasons for retiring; the economic justifications for retiring or remaining employed; the validity of concerns over continued employment; and the assets from which spousal support could continue.

{¶32} This case evaluates the third motion for modification filed after the trial court already found Appellant retired early to avoid spousal support and essentially imputed pre-retirement income to him. His intent behind retiring only months after the divorce was res judicata, as was the effect of his retirement, i.e., whether to impute his pre-retirement income notwithstanding the retirement which the court considered early. In addition to these pertinent items, there is the lack of evidence that 62 (or any later age) was a defined retirement age under the terms of his private pension plan. His main argument concerned his reaching a new age (62), which he said had importance under the terms of his private pension, but the evidence presented at the hearing to confirm this claim was non-existent.

{¶33} Appellant's age for receiving unreduced social security benefits was 66. He did not file for reduced social security benefits. His employment was not of the type that exempted him from social security contributions (such as certain government employment which may result in a pension but no social security benefits). Appellant stopped working immediately after the divorce and then retired and sought a spousal support reduction. Considering the amount of the monthly pension benefit totaled less than $670 per month (to be divided between the parties), it is rational to contemplate that social security benefits will be an important income source. Appellant was 60 at the time of his divorce, when he averaged more than $6,000 per month at his long-time employer. Although the

2015 decree contemplated a future modification upon his retirement, later rulings on modifications showed the trial court did not believe his immediate retirement warranted a reduction. We also note Appellant was 64 at the time we released our prior decision stating he could seek modification upon reaching full retirement age.

{¶34} There was no indication the court's use of age 66 was unconscionable, and the date was not arbitrary as it was aligned with a national standard particularly relevant to this specific obligor. As for the reasonableness of the decision, we acknowledge that some judges may have found it reasonable to stop imputing pre-retirement income to Appellant at the time of his 2018 motion (after he turned 64), and other judges may have found it reasonable to stop at age 65 (at the time of the trial court's judgment). Yet, others may still reasonably find age 66 to be an appropriate standard in this case based on the distinct history of the case and the entirety of the evidence (or lack thereof). We cannot substitute our judgment for that of the trial court on this matter in this situation. (We emphasize that we are not adopting a rule that courts should deny all requests to decrease support if the obligor retired before reaching the age for full social security benefits.)

{¶35} After evaluating the totality of the circumstances, this court concludes it was within the trial court's sound discretion to overrule Appellant's modification motion and assign 66 as Appellant's full retirement age. Appellant's first two assignments of error are overruled.

Statement of the Case: Contempt

{¶36} While Appellant's motions for modification of spousal support were pending, Appellee filed various contempt motions. For instance, on February 26, 2016, she filed a contempt motion for failure to pay spousal support. At the time of the hearing, Appellant's arrearage was over $27,000. He was found in contempt in 2016 and could have purged by promptly paying the arrearage in full. He failed to do so despite being provided with multiple opportunities. At one purge hearing, he said he would pay his arrearage from his half of the Ameriprise account. It was disclosed that a QDRO was provided to Ameriprise for pre-approval. In January 2017, the court warned Appellant that he should explore an alternative way to pay his arrearage in case he did not receive the funds from Ameriprise by the next review hearing.

{¶37} At the next hearing in February 2017, defense counsel said they had hoped the Ameriprise funds would have been released. He suggested ordering Ameriprise to pay the arrearage before releasing Appellant's half to him, but opposing counsel noted the added expense this would create. On February 21, 2017, Appellant was sentenced to 20 days in jail, fined $250, and order to pay $500 for attorney's fees. Appellant appealed that decision, and this court affirmed. *Manley v. Manley*, 7th Dist. No. 17 CO 0006, 2018-Ohio-255, 104 N.E.3d 183, ¶ 12.

{¶38} In 2017, Appellee filed motions for contempt, to compel, and for sanctions. The motions were heard in October 2018, when the latest spousal support modification motion was heard. The magistrate decision found Appellant in contempt on November 27, 2018 (at the same time it denied his modification motion). The magistrate listed three grounds for contempt: Appellant continually failed to pay spousal support resulting in an arrearage over $65,000; the Ameriprise accounts were not yet divided by QDRO as ordered in the March 2015 divorce decree; and Appellant withdrew over $33,000 from those accounts after the divorce (without paying half to Appellee). As to the funds available to pay toward the arrearage, the magistrate noted that Appellant received $80,000 from the sale of the marital home and almost $200,000 from the retirement savings plan after it was evenly divided. Considering these funds and those held by Ameriprise, the magistrate found Appellant was able to pay his spousal support obligation, eliminate his arrearage, and correct the improper withdrawal.

{¶39} As this was his second contempt, the magistrate found a sentence of 60 days in jail to be warranted. Appellant was given the opportunity to purge by promptly paying his arrearage in full, dividing his Ameriprise account by QDRO, and curing the improper withdrawal. He was also ordered to pay $500 for Appellee's attorney's fees. In objecting to the magistrate's decision, Appellant argued the magistrate failed to consider his efforts at dividing the Ameriprise account and Appellee's failure to execute the form allowing Ameriprise to transfer to a separate account additional amounts equaling the spousal support arrearage and half of the amount he improperly withdrew.

{¶40} On June 13, 2019, the trial court overruled Appellant's objection and adopted the magistrate's decision. The court found Appellant did not meet his burden of proving a defense such as inability to pay and pointed out that an obligor's pending

modification motion does not allow the obligor to ignore prior court support orders. It was also noted that he could have paid spousal support with the assets he had available (instead of buying a motorcycle and paying for a garage on his son's property). The failure to divide the Ameriprise account by QDRO as ordered more than three years prior was described as unreasonable and willful disobedience. Appellant appealed from this judgment (which also contained the denial of his motion to modify spousal support).

{¶41} The trial court thereafter held a sentencing review hearing. Appellant made reference to how the amount needed to cure the arrearage would be less if his modification motion was successful on appeal. The court noted Appellant was still in contempt on the matter of the arrearage and on the issues with the Ameriprise account. Defense counsel argued it was reasonable for Appellant to wait to see how much spousal support was owed and have that amount along with half of his improper withdrawal placed by Ameriprise in a separate account for Appellee. He reiterated the complaint that Appellee would not sign the forms to accomplish this transaction. Appellee's counsel pointed out this offer was already rejected by the court. It was suggested that Appellant's attempt to shift tax consequences to Appellee for his arrearage was unreasonable as the divorce decree called for an equal division of the Ameriprise account by QDRO and no further formulas were required for compliance with this clause. The court found Appellant failed to purge any of the conditions and sentenced him to 60 days in jail for his contempt. (J.E. 6/28/19).[3]

Contempt Assignment of Error

{¶42} The assignment of error set forth by Appellant to contest the ruling on Appellee's contempt motion alleges:

"THE TRIAL COURT ABUSED ITS DISCRETION TO THE PREJUDICE OF THE APPELLANT-DEFENDANT WHEN IT FOUND THE APPELLANT IN CONTEMPT FOR

[3] Rather than filing an original notice of appeal from the sentencing judgment, Appellant filed an amended notice of appeal in the appeal from the judgment denying modification and finding him in contempt. As we pointed out in Appellant's last contempt appeal, the finding of contempt with purge conditions is a final appealable order; the subsequent purge hearing imposing a sentence is its own final appealable order where the issue is compliance (and the finding of contempt and the propriety of the purge conditions are not at issue). *Manley*, 2018-Ohio-255 at ¶ 13, citing *The Docks Venture LLC v. Dashing Pacific Group Ltd.*, 141 Ohio St.3d 107, 2014-Ohio-4254, 22 N.E.3d 1035, ¶ 20-23, and *Liming v. Damos*, 133 Ohio St.3d 509, 2012-Ohio-4783, 979 N.E.2d 297, ¶ 30.

HIS FAILURE TO PROMPTLY DIVIDE THE REMAINING AMERIPRISE ACCOUNT AND FAILURE TO REPAY THE ARREARAGE PRIOR TO SENTENCING HIM TO JAIL."

{¶43} The trial court's decision on contempt is not disturbed on appeal unless the appellant can show an abuse of discretion. *State ex rel. Celebrezze v. Gibbs*, 60 Ohio St.3d 69, 75, 573 N.E.2d 62 (1991). A court abuses its discretion if the decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). A decision is unreasonable if it is unsupportable by any sound reasoning process. *See AAAA Ents., Inc. v. River Place Community Urban Redev. Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990) (abuse of discretion review typically involves a determination of whether a decision was unreasonable). "When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court." *In re Jane Doe 1*, 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181 (1991).

{¶44} Appellant argues the trial court abused its discretion by failing to consider the effort made by him to divide the Ameriprise funds, repay the improper withdrawal (with interest), and bring his spousal support arrearage current. He complains that Appellee prevented him from accomplishing these three requirements by refusing to sign a release form he presented to her so the division of the Ameriprise accounts could directly satisfy his other obligations. He says Appellee's only reason for refusing to sign was that she did not want to extinguish her right to proceed against him for contempt. (Tr. 33).

{¶45} However, Appellee subsequently explained that she meant she did not wish to extinguish her right to the full amount of spousal support as ordered. (Tr. 35). She testified: the divorce decree required Appellant to pay monthly spousal support and divide the Ameriprise account evenly by QDRO; the account had no relation to spousal support (except to show that he had funds from which *he* could pay his arrearage after they were evenly divided by QDRO); he owed processing fees to the government agency where his support was required to be paid; and he had no right to change the QDRO to shift the tax consequences of the Ameriprise withdrawals to her for his spousal support arrearage. (Tr. 32-33, 39-40).

{¶46} As stated in the prior section, a modification motion cannot eliminate an arrearage accumulated prior to its filing. Appellant acknowledged that he had not paid

any amount toward spousal support or the arrearage in a long time, even though he improperly withdrew over $33,000 from the Ameriprise account. His arrearage was $40,000 higher than when he was last found in contempt. He filed a modification motion immediately after losing the appeal of his prior modification motion. He had been warned in a prior contempt appeal that a modification motion does not justify continued refusal to pay spousal support.

{¶47} In his last contempt appeal, we explained: "The fact a party has a motion to modify or terminate support pending in a case does not allow the party to ignore prior court orders on support; even if the motion is subsequently granted, the acts in contempt remain." *Manley*, 2018-Ohio-255 at ¶ 15, citing R.C. 2705.031(E) ("The court shall have jurisdiction to make a finding of contempt for the failure to pay support and to impose the penalties set forth in section 2705.05 of the Revised Code in all cases in which past due support is at issue even if the duty to pay support has terminated"), *Barton v. Barton*, 2017-Ohio-980, 86 N.E.3d 937, ¶ 76 (2d Dist.) (while an order for payment is in place, the obligor is required to follow it, and the failure to pay under the order can be punished as contempt regardless of whether the order is later reversed on appeal), and *Hickox v. Hickox*, 4th Dist. No. 15CA15, 2016-Ohio-3514, ¶ 28 (whether the court might ultimately modify support was irrelevant as the obligor must at least attempt to pay the support with available funds).

{¶48} Contrary to Appellant's contention, his case is not similar to a non-binding Second District case he cites. *See Doerr v. Doerr*, 2d Dist. Greene No. 2004-CA-15, 2005-Ohio-438. In that case, the appellate court found: "the trial court mistakenly stated that he had not submitted a payment plan on the arrearage issue" when in fact he had submitted a repayment plan. *Id.* at ¶ 16. Here, Appellant's repayment ability had been discussed for years; his plan for repayment was part of the prior contempt action and appeal where we noted the trial court considered it but did not adopt it (instead instructing him to find another plan in case the Ameriprise funds did not get released by the next hearing). *See Manley v. Manley*, 2018-Ohio-255, 104 N.E.3d 183, ¶ 7-8, 18, 22 (7th Dist.). Appellant had the assets to repay the arrearage and said he would do so, but then he refused to do so without Appellee's acceptance of an asset transfer under a QDRO that would place the burden of the withdrawal taxes on her for his spousal support

arrearage. Appellee's refusal to submit to this tactic does not excuse Appellant's refusal to divide the Ameriprise account or his refusal to pay spousal support. And, there was no compelling reason for the trial court to reconsider his proposal at the purge hearing.

{¶49} In sum, Appellant argues that Appellee prohibited him from complying with the court order and the trial court should have implemented his proposal to allocate more than half of the Ameriprise account to Appellee through QDRO (rather than expecting him to use his half of the account after it was distributed to him by QDRO to pay what he owed pursuant to court order). Under the totality of the circumstances, including the past proceedings in this case, it was not unreasonable to reject Appellant's offer to pay the arrearage through a QDRO at odds from the one ordered in the divorce decree (which would shift the tax burden on the additional percentage allocated to Appellee). The argument set forth by Appellant does not demonstrate the trial court abused its discretion in rejecting his proposal and finding him in contempt. Based on the argument set forth by Appellant, this assignment of error is overruled.

{¶50} For the foregoing reasons, the trial court's judgment on modification and contempt is affirmed.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.