[Cite as *Cattaneo v. Needham*, 2010-Ohio-4841.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LORRAINE CATTANEO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009 CA 00142
REX J. NEEDHAM	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Domestic Relations Division Case No. 07-DR-0029
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	September 23, 2010

APPEARANCES:

For Appellant:	For Appellee:
VICKY M. CHRISTIANSEN 172 Hudson Ave. Newark, OH 43055	ADAM K. VERNAU 1288 Brittany Hills Dr. Newark, OH 43055

Delaney, J.

{¶1} Defendant-Appellant Rex J. Needham appeals the November 17, 2009 judgment entry of the Licking County Court of Common Pleas, Domestic Relations Division, which modified the order of spousal support he must pay to Plaintiff-Appellee Lorraine Cattaneo.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant and Appellee were married on October 14, 1977. Two children were born as issue of the marriage and are now emancipated. In 2007, Appellee filed a complaint for divorce and Appellant filed an answer and counterclaim.

{¶3} On May 23, 2008, the trial court entered the Final Decree of Divorce. In the Decree and relevant to this appeal, the trial court awarded Appellee one-half of Appellant's G.E. retirement account. QDRO Consultants were to prepare the division documents and Appellant was responsible for the cost.

{¶4} The Decree also held that as to the parties' personal property, "defendant is awarded the items listed on Exhibit H * * *. Final division of these items shall take place within thirty (30) days of the filing date of this decree. The plaintiff shall cooperate with the transfer of those items on Exhibit H to the defendant." Items listed on Exhibit H included Heisey glassware[1], Longaberger baskets, a Navy knife, and a World War II firearm.

{¶5} The trial court considered the factors listed in R.C. 3105.18(C) and awarded Appellee spousal support. At the time of the divorce, Appellant was 59 years old and in good health. Appellant had worked full-time for G.E. and more recently, at

[1] A.H. Heisey & Co., once located in Newark, Ohio, produced decorative glassware. The company closed in 1957 and the glassware is a collector's item.

Momentive Performance Materials, which took over G.E. Appellant had worked for Momentive for four months. He earned an annual salary of $68,000. Appellant testified at the hearing that he planning to retire on November 1, 2008, when he could collect his G.E. retirement.

{¶6} Appellee was 52 years old, had some health issues, and worked part-time at J.C. Penney. The trial court found that Appellee was capable of working forty hours per week and thus imputed an annual income to her of $14,560. The trial court found the duration of the marriage to be 30 years.

{¶7} Based upon its consideration of those and other factors, the trial court ordered Appellant to pay Appellee $1,500 per month for 60 months, effective June 1, 2008, as spousal support. After 60 months, the spousal support was reduced to $1000 per month for life or until Appellee remarried, cohabitated with an unrelated male, or upon the death of either party. The trial court reserved jurisdiction on all aspects of spousal support.

{¶8} The trial court also ordered Appellant to maintain COBRA insurance for Appellee through his employer for maximum period of 36 months from May 23, 2008. Appellant was responsible for paying the monthly premium in the amount of $465.01.

{¶9} On July 1, 2008, Appellant filed a motion for contempt against Appellee for her failure to return some of the property items listed on Exhibit H of the Divorce Decree. Appellant requested a judgment in the amount of $42,980 for the value of the missing items.

{¶10} Appellant then filed a motion to terminate or reduce spousal support on August 28, 2008. Appellant stated that he would be retiring from G.E. on November 1,

2008, and the retirement benefit payments to both parties would begin on December 1, 2008. Appellant argued that because Appellee would be receiving retirement benefit payments, spousal support should terminate. Appellant maintained that the trial court retained jurisdiction over spousal support because the parties anticipated this change in Appellant's employment status.

{¶11} The trial court set the motions for hearing and the matter was heard before the magistrate. On May 20, 2009, the magistrate ruled on the motions. The magistrate overruled Appellant's motion for contempt, finding insufficient and conflicting evidence as to the status and value of the property items listed in Exhibit H.

{¶12} The magistrate then granted Appellant's motion to reduce spousal support. At the hearing, Appellant testified that he had retired from G.E. and was collecting retirement. He further testified that he was still employed at Momentive Performance Materials and he earned an annual salary of $63,000. After a voluntary layoff with Momentive, Appellant was called back to work on January 19, 2009. Momentive laid Appellant off again on April 3, 2009 and a representative of Momentive testified that the second layoff was potentially permanent.

{¶13} At the time of the motion hearing, Appellant received $1,182.79 per month in G.E. retirement benefits. The QDRO distributing the retirement benefits had not been completed at the time of the hearing. When the QDRO went into effect, Appellant would receive one-half of that amount.

{¶14} Based on the evidence presented, the magistrate held:

{¶15} "* * * it is appropriate for the Trial Court to enter an order granting this motion to the following extent only: the defendant's spousal support obligation is to be

modified such that he shall pay to the plaintiff a sum equal to one-quarter (e.g. 25%) of the monthly total of net retirement benefits he receives each month from General Electric as and for spousal support. The effective date of this recommended order is to be the date that the QDRO becomes in full effect and the plaintiff actually receives her portion of the defendant's retirement income. * * * Once the defendant returns to work with his employer, the original amount of spousal support ordered in the divorce decree will be reinstated. The Magistrate also notes that the amount to be paid by the defendant under this temporary modification will change once the QDRO is in full effect and the plaintiff actually begins receiving her portion of the defendant's retirement payments." (May 20, 2009 Magistrate's Decision).

{¶16} The magistrate further found that the trial court knew of Appellant's retirement plans and it took that into consideration when it entered its spousal support order.

{¶17} Appellant filed objections to the Magistrate's Decision. On November 17, 2009, the trial court issued its judgment entry. The trial court overruled Appellant's objections as to Appellant's motion for contempt. The trial court affirmed the decision of the magistrate to temporarily modify Appellant's spousal support obligation, due to Appellant's unemployment, to one-quarter of the monthly total of net retirement benefits Appellant received from G.E. The modification was to take effect on the date the QDRO came into effect and Appellee received her portion of the retirement benefits. When Appellant returned to work, the original amount of spousal support as specified in the Divorce Decree would be reinstated.

{¶18} It is from this decision Appellant now appeals.

{¶19} Appellant raises four Assignments of Error:

{¶20} "I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT REFUSED TO GRANT A JUDGMENT FOR CERTAIN ITEMS OF PERSONAL PROPERTY NOT RETURNED TO APPELLANT.

{¶21} "II. THE TRIAL COURT COMMITTED AN ERROR OF LAW AND ABUSED ITS DISCRETION WHEN IT REFUSED TO CONSIDER PERSONAL TESTIMONY AS EVIDENCE OF THE VALUE OF PERSONAL PROPERTY ITEMS.

{¶22} "III. THE TRIAL COURT COMMITTED AN ERROR OF LAW AND ABUSED ITS DISCRETION WHEN IT IMPROPERLY MODIFIED A FINAL PROPERTY DISTRIBUTION THAT IT DID NOT HAVE AUTHORITY TO MODIFY.

{¶23} "IV. THE TRIAL COURT COMMITTED AN ERROR OF LAW AND ABUSED ITS DISCRETION WHEN IT CONSIDERED APPELLANT'S RETIREMENT BENEFITS WHEN ALTERING HIS SPOUSAL SUPPORT OBLIGATION.

{¶24} "V. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DID NOT TERMINATE SPOUSAL SUPPORT WHERE APPELLANT'S CIRCUMSTANCES HAD CHANGED AND THE CONTINUED PAYMENT CONSTITUTED A FINANCIAL HARDSHIP."

I., II.

{¶25} We consider Appellant's first and second Assignments of Error together because they are interrelated. Appellant claims the trial court abused its discretion when it denied Appellant's motion for contempt for Appellee's alleged failure to return certain property items listed in Exhibit H of the Divorce Decree.

{¶26} An appellate court's standard of review of a trial court's contempt finding is abuse of discretion. *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 573 N.E.2d 62. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶27} The magistrate classified Appellant's claim against Appellee as indirect civil contempt. Indirect contempt occurs when a party engages in conduct outside the presence of the court that demonstrates a lack of respect for the court or its lawful orders. *Bierce v. Howell*, Delaware App. No. 06CAF050032, 2007-Ohio-3050, ¶ 16. The burden of proof in a civil contempt action is proof by clear and convincing evidence. *Jarvis v. Bright,* Richland App. No. 07CA72, 2008-Ohio-2974 at ¶ 19, citing *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 416 N.E.2d 610. The determination of "clear and convincing evidence" is within the discretion of the trier of fact. The trial court's decision should not be disturbed as against the manifest weight of the evidence if the decision is supported by some competent, credible evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

{¶28} At the hearing, Appellant and Appellee testified regarding the personal property items that Appellee was to return to Appellant within 30 days of the divorce. The specific items mentioned by Appellant in this appeal are Heisey glassware, Longaberger baskets, a WWII firearm, and a Navy knife.

{¶29} After the divorce, Appellee moved from the marital residence to Michigan. Appellee hired a moving company to return some of the items listed in Exhibit H to Appellant. The parties testified that Appellant recovered some of the items listed in

Exhibit H when Appellee returned them; some of the items were left at the marital residence when Appellee moved; Appellee could not find the items; or the items were disposed of during the course of the marriage. Upon that record, the magistrate determined "there was simply too much conflicting and uncertain evidence for him to conclude, by clear and convincing evidence, that these items were (a) either in the possession of either party at the time of the divorce or (b) that the plaintiff improperly held onto or converted these items for her own benefit."

{¶30} Upon a review of the record, we agree with the trial court's determination as to the status of the evidence. It was Appellant's burden to show by clear and convincing evidence that Appellee was in possession of the items and she did not return the items in Exhibit H within 30 days of the divorce. The trial court found that Appellant did not meet his burden and we cannot find an abuse of discretion in its determination.

{¶31} Appellant's first Assignment of Error is overruled.

{¶32} Appellant argues in his second Assignment of Error that the trial court erred when it denied Appellant's motion for a monetary judgment for the personal property he alleged Appellee failed to return to him pursuant to the Divorce Decree. At the contempt hearing, Appellant testified as to the valuations of the property items that he argued Appellee failed to return to him. Appellant stated that upon his research, he valued the property at $42,980.

{¶33} The trial court denied the motion based upon its denial of Appellant's contempt motion in regards to the personal property items and because it found Appellant's valuation evidence to be unreliable.

{¶34} Upon our affirmance of trial court's determination that Appellee was not in contempt for the failure to return the personal property items listed in Exhibit H, we likewise find that the trial court did not abuse its discretion in denying Appellant's motion for a monetary judgment as to those same items.

{¶35} Appellant's second Assignment of Error is overruled.

III., IV., V.

{¶36} Appellant's third, fourth, and fifth Assignments of Error involve the trial court's decision to modify his spousal support obligations. As stated above, the trial court reduced Appellant's spousal support obligation, due to Appellant's unemployment, to one-quarter of the monthly total of net retirement benefits Appellant received from G.E. The modification was to take effect on the date the QDRO came into effect and Appellee received her portion of the retirement benefits. When Appellant returned to work, the original amount of spousal support as specified in the Divorce Decree would be reinstated.

{¶37} Appellant argues that when the trial court modified the spousal support obligation, it engaged in an unauthorized modification of a prior property division. Appellant states that the Divorce Decree divided the G.E. retirement benefits between Appellant and Appellee. By modifying the spousal support obligation to distribute an additional one-quarter of the G.E. retirement benefits to Appellee, Appellant states that the trial court modified the property division.

{¶38} Modifications of spousal support are reviewable under an abuse of discretion standard. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 541 N.E.2d 1028. In order to find an abuse of discretion, we must determine that the trial court's decision

was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. The burden of establishing the need for modification of spousal support rests with the party seeking modification. *Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703, 676 N.E.2d 1249.

{¶39} R.C. 3105.18(E) governs the trial court's consideration in modifying an existing spousal support order. The statute provides in relevant part:

{¶40} "(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:

{¶41} "(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."

{¶42} In this case, the original decree provides continuing jurisdiction on all aspects of spousal support.

{¶43} R.C. 3105.18(F) defines a change in circumstances as including any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses.

{¶44} Although R.C. 3105.18(F) sets forth a partial listing of what can be considered as a change in circumstances for purposes of establishing trial court jurisdiction, it does not alter the requirement that a trial court must find a substantial change in circumstances before modifying a prior order for spousal support. *Mandelbaum v. Mandelbaum,* 121 Ohio St.3d 433, 905 N.E.2d 172, 2009-Ohio-1222, ¶ 1 of the syllabus. A trial court lacks jurisdiction to modify a prior order of spousal support unless the decree expressly reserved jurisdiction to modify 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. Id. at syllabus 2.

{¶45} R.C. 3105.18 does not require the lower court to make specific findings of fact regarding spousal support awards. The factors a court considers in making its original award of spousal support are set out in R.C. 3105.18(C)(1):

{¶46} "(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;

{¶47} "(b) The relative earning abilities of the parties;

{¶48} "(c) The ages and the physical, mental, and emotional conditions of the parties;

{¶49} "(d) The retirement benefits of the parties;

{¶50} "(e) The duration of the marriage;

{¶51} "(f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;

{¶52} "(g) The standard of living of the parties established during the marriage;

{¶53} "(h) The relative extent of education of the parties;

{¶54} "(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;

{¶55} "(j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;

{¶56} "(k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;

{¶57} "(l) The tax consequences, for each party, of an award of spousal support;

{¶58} "(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

{¶59} "(n) Any other factor that the court expressly finds to be relevant and equitable."

{¶60} Appellant argues the trial court erred in considering Appellant's G.E. retirement benefits when altering the spousal support obligation. We find this argument to be unsupported when considered under the application of R.C. 3105.18(C)(1)(a) and R.C. 3105.171. R.C. 3105.18(C)(1)(a) states that in determining the appropriateness of a spousal award, the trial court shall consider, "[t]he income of the parties, from all sources, including, but not limited to, *income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code*[.]" (Emphasis added).

{¶61} R.C. 3105.171 "concerns the division of marital property, and it includes the parties' retirement benefits. R.C. §3105.171(A)(3)(a)." *Duvall v. Duvall*, Belmont App. No. 04 BE 41, 2005-Ohio-4685, ¶56. Accord, *Johns v. Johns*, Summit App. No. 24704, 2009-Ohio-5798.

{¶62} We find that while the trial court stylized the modified amount of spousal support as a percentage of Appellant's monthly retirement benefits rather than using a monetary figure, the consideration of Appellant's retirement income was permissible. We find no modification of a previous property division but rather a consideration of Appellant's income. The trial court properly considered the factors of R.C. 3105.18(C)(1) to include Appellant's retirement benefits when determining his income for spousal support purposes, even though those benefits were subject to a property division in the original divorce decree.

{¶63} Appellant argues the trial court's determination is in conflict with our decision in *Mizer v. Mizer*, Coshocton App. No. 08CA0004, 2009-Ohio-1390. In that case, this Court affirmed the trial court's decision to deny the appellant-husband's motion for reduction of his spousal support obligation because the appellee-wife began to receive her portion of his retirement benefits as divided by the divorce decree. We stated,

{¶64} "Regarding appellee's receipt of a portion of appellant's retirement benefits, the retirement benefits were awarded to appellee as part of the property division. The only value of the retirement benefits was the future payout available to appellee when appellant retired. We find under these circumstances the retirement

benefits should not be treated as part of appellee's income, because they represent a portion of the marital property the court previously awarded to her." Id. at ¶40.

{¶65} In the present case, Appellant relies on *Mizer*, supra, to argue that his retirement benefits should not be included as a part of *his* income because they represent a portion of the marital property previously divided. (Appellant's Brief, p. 12). Appellant does not in this appeal raise as an Assignment of Error the issue of whether this amount should be considered as part of Appellee's income to determine a modification of spousal support and therefore, we decline to consider the matter.

{¶66} Because we found the trial court properly considered Appellant's retirement benefits as part of Appellant's income, the next issue before us is whether the trial court abused its discretion in failing to terminate Appellant's spousal support obligation.

{¶67} As stated above, the trial court cannot modify a spousal support obligation 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*, supra.

{¶68} The trial court determined that a substantial change in circumstances, not contemplated at the time of the original decree, occurred when Appellant was laid off from Momentive Performance Materials.[2] The trial court found, and the parties agree, that Appellant's retirement from G.E. was contemplated at the time of the divorce.

[2] This Court will note that Appellant's motion for modification of his spousal support referred only to his pending retirement from G.E. as the change of circumstances warranting a modification. It was not until the hearing before the magistrate did Appellant raise the issue of a change in circumstances due to his layoff from Momentive.

Appellant testified at the divorce hearing that he was employed by Momentive. He also testified that he was planning to retire from G.E. in the near future.

{¶69} In consideration of the evidence of Appellant's eventual voluntary retirement from G.E., his receipt of retirement benefits, and his employment with Momentive, the trial court made the following spousal support order: Appellant was to pay Appellee $1,500 per month for 60 months, effective June 1, 2008, as spousal support; After 60 months, the spousal support was reduced to $1,000 per month for life or until Appellee remarried, cohabitated with an unrelated male, or upon the death of either party.

{¶70} Appellant retired from G.E. on November 1, 2008. The change in circumstances not contemplated at the time of the original decree, however, was Appellant's layoff from Momentive.

{¶71} Appellant argues the trial court erred when the trial court reduced, rather than terminated, Appellant's spousal support obligation because he was laid off from Momentive and now his only source of income is his retirement income. Based on the record, we find the trial court did not abuse its discretion in temporarily reducing Appellant's spousal support obligation due to the change in circumstances of Appellant's layoff from Momentive.

{¶72} If there has been a change of circumstances, the trial court must next consider the R.C. 3105.18(C)(1) factors to determine if spousal support is appropriate and reasonable. *Bishman v. Bishman*, Washington App. No. 07CA30, 2008-Ohio-1394, ¶13. One of the factors in this case is a long-term marriage of the parties for thirty years. Another factor properly considered was Appellant's income. While Appellant's

income currently consists of his monthly retirement benefits, as we found above, retirement income is properly considered as part of Appellant's income under R.C. 3105.18(C)(1). We also find the evidence of Appellant's voluntary retirement was considered by the trial court when the trial court originally ordered Appellant to pay spousal support in the amount of $1,500 for 60 months and $1,000 indefinitely thereafter. It was Appellant's burden to show a modification was necessary. In this case, the record supports the conclusion that Appellant demonstrated to the trial court a reduction was necessary because of his lack of employment, but not a termination since his voluntary retirement and reliance on his retirement income was previously contemplated. We can find no abuse of discretion in such a finding.

{¶73} Accordingly, Appellant's third, fourth and fifth Assignments of Error are overruled.

{¶74} The judgment of the Licking County Court of Common Pleas, Domestic Relations Division, is affirmed.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

[Cite as *Cattaneo v. Needham*, 2010-Ohio-4841.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

LORRAINE CATTANEO	:	
	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
REX J. NEEDHAM	:	
	:	
	:	Case No. 2009 CA 00142
Defendant-Appellant	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Licking County Court of Common Pleas, Domestic Relations Division is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE