

court abused its discretion in sustaining Jessica's objections to the magistrate's decision, and in overruling Kenneth's objections to the decision.

{¶ 2} We conclude that the trial court did not act arbitrarily, unreasonably or unconscionably in refusing to modify spousal support. Kenneth failed to sustain his burden of proving that a substantial change of circumstances had occurred. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} Kenneth and Jessica Leist were married in 1984, and their judgment and decree of divorce was filed in August 2007. Kenneth was ordered in the divorce decree to pay Jessica \$8,000 per month in spousal support, for ten years. The order of spousal support resulted from the agreement of the parties, not from a contested hearing on the support issue. The decree also provided that the trial court would retain continuing jurisdiction over the amount of the support.

{¶ 4} When the decree was filed, Jessica was unemployed, and Kenneth had substantial earnings as director of operations for EBS Asset Management. Kenneth's earnings included a yearly salary, as well as quarterly bonuses, which were based on the quarterly asset levels of the company. As an example, if EBS managed one billion dollars worth of assets on an annualized basis, Kenneth would receive 100% of his base salary each quarter as a bonus during every quarter that the company had a billion dollars under management. If the managed assets were less in a particular quarter, Kenneth's quarterly bonus would be proportionately less.

{¶ 5} When the divorce decree was filed, Kenneth had already received his first

and second quarter bonuses for 2007. Kenneth's base salary was approximately \$71,596, and his bonuses during the first two quarters were about \$60,430, and \$58,595, based on EBS assets being 84.4% and 77.7%, respectively, of the annualized amount. Thus, Kenneth's income for the first two quarters of 2007 was approximately \$154,823. His potential 2007 income for the full year would have been \$309,646, based on similar asset management in the final two quarters of 2007.

{¶ 6} This was a decrease from 2006, when Kenneth had earned \$348,485, and from 2005, when he earned approximately \$455,956. The amount of assets being managed peaked in the fourth quarter of 2005, and had been declining since. Kenneth was aware of these facts when the original decree was filed. In fact, the record indicates that Kenneth originally agreed to pay spousal support of \$10,000 per month for ten years. He then attempted to lower this amount, based on the fact that business had been reduced at his company, and he did not anticipate earning as much as he had in the past. See Plaintiff's Motion for Order in Limine Prohibiting the [Defendant] from Offering any Testimony Regarding Reduction of Income, p. 2. This motion was filed in early August 2007, less than a month before the Final Judgment and Decree of Divorce was filed. By the time the decree was filed, the parties had agreed to reduce spousal support from \$10,000 to \$8,000 per month. The support that Kenneth agreed to in August 2007, would have been approximately 31% of his anticipated gross income for that year, but that percentage could have varied up or down, depending on market conditions and the number of assets or clients managed.

{¶ 7} Within six months after agreeing to pay \$8,000 per month, Kenneth filed a motion to modify spousal support. Kenneth contended that his income had decreased

to about \$268,139 in 2007. At that time, Kenneth projected that he would receive income, including bonuses, of \$173,892 in 2008. Jessica did not appear at the hearing on the motion, and both counsel stipulated to exhibits that provided income information for Kenneth. The magistrate entered a decision in June 2008, decreasing Kenneth's spousal support obligation to \$4,200 per month, which was slightly more than half the current order, but less than Jessica's monthly expenses. The \$4,200 figure was approximately 29% of Kenneth's anticipated gross income. Jessica did not file objections to this decision.

{¶ 8} In November 2008, or about five months later, Kenneth filed a second motion to modify spousal support. A hearing on the motion was held in mid-April 2009. The evidence indicated that Kenneth's actual gross income for 2008 had been about \$147,967. Of this amount, Kenneth had been able to place \$15,000 into his 401(K) plan. Kenneth was also due to receive an \$11,000 tax refund in 2009, for his 2008 taxes. He had previously received a \$20,000 tax refund in 2008. Substantial tax savings resulted from deducting spousal support from his gross income, and from placing money in the 401(K) account.

{¶ 9} In a financial disclosure affidavit filed in April 2009, Kenneth indicated that he had received a \$16,000 bonus in 2009, and that his base yearly income was \$75,000. Since Kenneth's bonuses were calculated on a quarterly basis, payment of further bonuses would have resulted in a projected gross income of approximately \$139,000 in 2009, if performance remained relatively the same during the last three quarters of the year.

{¶ 10} At the hearing, Kenneth claimed to have received a first quarter

commission of only \$6,000. He did not provide any documentation of this amount. He also estimated, without offering supporting documentation, that his bonuses or commissions for the rest of the year would be similar to this amount, or less. Kenneth, therefore, estimated that his yearly income for 2009 would be \$90,000 to \$95,000.

{¶ 11} Kenneth did not explain the disparity between the \$6,000 figure and the \$16,000 figure used in his income disclosure affidavit. Furthermore, the affidavit was prepared in early April 2009, and the second, third, and fourth quarter commissions or bonuses had not yet been paid. The \$16,000 bonus amount, therefore, could only have been attributable to the first quarter of 2009. Even using the \$6,000 figure Kenneth mentioned, his yearly net income would have been at least \$99,000 ²

{¶ 12} David Ray, EBS's chief operating officer, also testified at the hearing. Ray indicated that when he arrived at EBS in 2003, the company was in a phase of accumulating assets both through market appreciation and new customers. In 2007-2008, EBS experienced a significant decrease in assets due to market fluctuation and to a decline in its customer base. Ray indicated, however, that for the first four-and-a-half months of 2009, asset levels had begun in the 600-million-dollar range, had fluctuated downward as low as 490 million, and were currently back in the 600-million-dollar range.

{¶ 13} Ray testified that EBS is an S Corporation, and that EBS had given

²The disparity may have resulted from Kenneth testifying about the net amount of his commission or bonus, rather than the gross amount. The \$16,000 gross amount may have been reduced to a lower net amount, – \$6,000, perhaps – based on deductions for taxes, contributions to Kenneth's 401(K), and so on. But we can only speculate, because Kenneth failed to explain the disparity. We also note that the prior spousal support amounts were based on anticipated gross income, rather than net income.

Kenneth minority partner status in April 2009. This status would provide Kenneth with a five percent share in the company. As of the hearing date, neither Ray nor Kenneth knew what the cost of the partnership share would be. Ray indicated that Kenneth's partnership distributions for three years would be used to pay for the partnership.

{¶ 14} Ray also testified that a new compensation plan went into effect for Kenneth and four other minority partners, beginning in April 2009. Their base salary was increased to, or equalized at, \$75,000 per year, and the basis for bonuses would be "real billed revenue" as opposed to "assets under management." Neither Ray nor Kenneth offered specific facts or figures as to what these amounts would be, nor did they offer documentation or evidence about what "real billed revenue" would have provided in the past. Both men estimated that Kenneth's income would be less than the prior year.

{¶ 15} As indicated, Kenneth estimated his 2009 potential income to be between \$90,000 to \$95,000, but that does not make sense, since Kenneth's affidavit of financial disclosure indicates that he had already earned \$91,000 by April 2009, prior to payment of bonuses for the second, third, or fourth quarters of the year.

{¶ 16} Kenneth's evidence also does not clearly indicate whether the 2009 "partnership" distributions were to take the place of the existing bonuses, or whether Kenneth would receive both bonuses and partnership distributions, with the latter being used to finance the partnership purchase.

{¶ 17} After hearing the evidence, the magistrate concluded that spousal support should be reduced from \$4,200 per month to \$3,000 per month, based on Kenneth's 2009 income of \$91,000. The magistrate concluded that this was a 38% reduction

from 2007 to 2008, and was a substantial change in circumstances. Presumably, the magistrate was comparing Kenneth's actual 2008 income (\$147,967) to his projected 2009 income (\$91,000), because 38% of \$147,967 is \$56,227. Subtracting that amount from \$147,967 leaves \$91,740.

{¶ 18} Both parties objected to the magistrate's decision. The trial court considered the evidence and issued a decision and judgment in October 2009, vacating the magistrate's decision. The trial court concluded that the record was devoid of evidence that Kenneth's income had been substantially reduced, because neither Kenneth nor Ray had offered more than speculation as to what projections for 2009 would be. The court further noted that the "real billed revenue" basis was never fully described nor explained in the proceedings, and that no definitive incomes were projected as an annual income based on the new bonus computation. The court also observed that Ray's testimony about the assets indicated that the effect of market indices on EBS had been non-existent in 2009. And finally, the court found Kenneth's 2009 income projection of \$91,000 to be unsubstantiated. The court, therefore, held that there was no substantial change of circumstances and that spousal support should remain at \$4,200, as previously ordered.

{¶ 19} Kenneth appeals from order of the trial court maintaining spousal support at \$4,200 per month.

II

{¶ 20} Before addressing the merits of the case, we note that Kenneth has combined his discussion of the assignments of error, because they are interrelated. We will likewise consider the assignments of error together.

{¶ 21} Kenneth's First Assignment of Error is as follows:

{¶ 22} "THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED IN SUSTAINING APPELLEE'S OBJECTIONS TO THE MAGISTRATE'S DECISION."

{¶ 23} Kenneth's Second Assignment of Error is as follows:

{¶ 24} "THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED IN OVERRULING APPELLANT'S OBJECTIONS TO THE MAGISTRATE'S DECISION."

{¶ 25} Under these assignments of error, Kenneth contends that he experienced a substantial involuntary decrease of income in recent months, due to the downturn in the stock market. Kenneth further contends that under the circumstances, even the support figure of \$3,000 is too high, and that a support figure of \$2,200 would be more appropriate at this time. Kenneth's arguments are based on his projected yearly income of \$91,000.

{¶ 26} In *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, syllabus, the Supreme Court of Ohio held that:

{¶ 27} "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."

{¶ 28} The Supreme Court further noted in *Mandelbaum* that:

{¶ 29} "The word 'substantial' has been given various meanings by Ohio courts, such as 'drastic[],' *** 'material,' *** and 'significant[.]' *** Moreover, the change in circumstances must be one that had not been contemplated and taken into account by the parties or the court at the time of the prior order." 2009-Ohio-1222 at ¶ 32

(citations omitted).

{¶ 30} “The burden of showing that a reduction of spousal support is warranted is on the party who seeks the reduction. *** Ordinarily, a motion to modify sustenance support payments invokes the discretionary authority of the trial court. *** And, in the usual case, the order of the trial court allowing or disallowing a change in spousal support will not be disturbed in the absence of a showing of an abuse of discretion.” *Reveal v. Reveal*, 154 Ohio App.3d 758, 2003-Ohio-5335, ¶ 14 (citations omitted). An abuse of discretion “ ‘connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.’ ” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (citation omitted).

{¶ 31} After reviewing the record, we cannot say that the trial court acted arbitrarily, unreasonably, or unconscionably. Kenneth claimed in both his motion to reduce support and testimony that he was not able to meet his expenses, and that he had been keeping current by using credit cards, and by liquidating his half of the divorce settlement. Kenneth also claimed that he would run out of money in a few months. However, Kenneth failed to submit any documentation, like bank statements, credit card bills, and other financial documents, to support these assertions. Both Kenneth and EBS’s chief executive officer were vague about important facts concerning Kenneth’s expected earnings, including the cost of the partnership interest and the amount of partnership distributions that Kenneth could expect to receive. It seems unlikely that experienced businesspeople would extend or accept offers of this nature without knowing the details.

{¶ 32} The record can be read to indicate that Kenneth would continue to receive

quarterly bonus payments as well as partnership distributions. Both items, therefore, should have been added to the \$91,000 that Kenneth admitted to having received in his affidavit of financial disclosure. Even if Kenneth were receiving partnership distributions in lieu of bonuses, he voluntarily chose to have those payments apply to the purchase of his partnership interest. Under R.C. 3105.18(F), a change in circumstances includes “involuntary” decreases in salary and bonuses. It does not include voluntary decreases that operate to the benefit of the party requesting the modification. Furthermore, the fact that one spouse invests earned income in an asset, like a partnership interest, does not generally remove that income from consideration in the calculation of spousal support.

{¶ 33} Moreover, Kenneth failed to provide any evidence of the cost of his partnership agreement and the amount of the expected distributions. The trial court, therefore, did not act unreasonably, unconscionably, or arbitrarily in concluding that there had been no substantial change of circumstances warranting a reduction in Kenneth’s spousal support obligation. Kenneth failed to provide the court with evidence on which it could conclude that a substantial change of circumstances had occurred.

{¶ 34} Kenneth’s First and Second assignments of error are overruled.

III

{¶ 35} All of Kenneth’s assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and DINKELACKER, JJ., concur.

(Hon. Patrick T. Dinkelacker, First District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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