

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

BARBARA MUSTARD,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2009-06-078 CA2009-09-118
- vs -	:	<u>OPINION</u> 5/17/2010
ANTHONY W. MUSTARD,	:	
Defendant-Appellant.	:	

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 07 DR 30915

Rittgers & Rittgers, Jason A. Showen, 12 East Warren Street, Lebanon, Ohio 45036, for plaintiff-appellee

D. Andrew Batsche, 300 West Main Street, P.O. Box 75, Mason, Ohio 45040, for defendant-appellant

BRESSLER, J.

{¶1} Defendant-appellant, Anthony Mustard, appeals two decisions of the Warren County Court of Common Pleas, Domestic Relations Division, modifying spousal support. We affirm the decisions of the trial court.

{¶2} Anthony and Barbara Mustard were married in 1984 and had three children born issue of the marriage. The Mustards finalized their divorce in February 2008, at which time, one of their three children remained in Barbara's care while the

other two were emancipated. As part of the final divorce decree, Anthony agreed to pay \$500 per month in child support until the youngest child was emancipated, as well as \$750 per month in spousal support for 72 months.

{¶13} Anthony, who was previously self-employed, closed his business and accepted employment at a company where he earned considerably less than he did while self-employed. Anthony filed a motion to modify spousal support, citing a change in circumstances due to his decreased salary. In March 2009, and after a hearing on the matter, the magistrate decreased Anthony's spousal support obligation to \$500, effective January 2009, after finding the requisite change in circumstances. Both Anthony and Barbara filed objections to the magistrate's decision, which the trial court overruled.

{¶14} At the time the magistrate issued her decision, she also set a hearing date for June 2009 in order to determine if Anthony had procured a higher-paying job and to set spousal support once the youngest child graduated from high school and was emancipated. After the June hearing, the magistrate ordered Anthony to continue paying Barbara \$500 per month in spousal support, denied Barbara's request to extend the amount of time Anthony would be obligated to pay spousal support, and ordered Anthony to pay \$1,000 towards Barbara's attorney fees. Both parties objected to the decision, and the trial court sustained Anthony's objections regarding attorney fees, but adopted the magistrate's decision regarding the spousal support. Anthony now appeals the decisions of the trial court, raising the following assignments of error.¹

{¶15} Assignment of Error No. 1:

{¶16} "THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE AND

1. We have consolidated the two appeals for the purposes of writing this single opinion.

ABUSED ITS DISCRETION (sic) IN AWARDING SPOUSAL SUPPORT TO APPELLEE."

{¶7} Anthony asserts that the trial court abused its discretion by lowering his spousal support by only \$250 when the modification should have been much greater. This argument lacks merit.

{¶8} When presented with a spousal support modification, a reviewing court will apply an abuse of discretion standard so that the trial court's decision will only be reversed when it is unreasonable, arbitrary, or unconscionable. *Kelhoffer v. Kelhoffer*, Butler App. No. CA2001-02-031, 2001-Ohio-8659. Upon review, an appellate court may not substitute its judgment for that of the trial court. *Morgan v. Morgan*, Clermont App. No. CA2009-08-050, 2010-Ohio-1101.

{¶9} After finding that a change in circumstances warranted reconsideration of the spousal support order, the trial court considered the factors found in R.C. 3105.18(C)(1) to determine that a decrease in spousal support was appropriate. While Anthony now asserts that the reduction was insufficient given the current earning capabilities of the parties, we disagree.

{¶10} At the time of the divorce, Anthony's income was calculated at \$60,000. However, after Anthony closed his business and began working for his present employer, his salary was calculated at approximately \$40,000. As of the hearing date, Barbara's income as a bus driver for the local school district was calculated at \$36,000.

{¶11} Although Anthony and Barbara have similar earnings, and the income disparity between the two closed once Anthony was no longer self-employed, the trial court considered other factors when determining that \$500 per month in spousal support was appropriate. The court first considered the parties' respective expenses. While

Anthony has since remarried and has a wife to help with expenses, Barbara remains single and would be unable to maintain her residence if she did not receive spousal support. The court also considered the parties' children and that even though all three were emancipated, the children return during college breaks to live with their mother on a full-time basis. Further, because the third child was emancipated, Anthony is no longer obligated to pay child support, and consequently, Barbara no longer received those funds.

{¶12} After reviewing the record, we find that the court properly considered the R.C. 3105.18(C)(1) factors before determining that a reduction in Anthony's spousal support obligation was warranted. Because of the parties' current situations, the court did not abuse its discretion in ordering Anthony to continue spousal support of \$500 per month, and his first assignment of error is overruled.

{¶13} Assignment of Error No. 2:

{¶14} "THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE AND ABUSED ITS DISCRETION WHEN IT CONSIDERED [ANTHONY'S] NEW SPOUSES [sic] INCOME FOR SPOUSAL SUPPORT PURPOSES."

{¶15} In his second assignment of error, Anthony asserts that the trial court improperly considered his new wife's salary when determining the appropriate amount of spousal support owed to Barbara. There is no merit to this argument.

{¶16} The trial court heard evidence that Anthony's new wife, Angela, earns approximately \$45,000 per year. The court considered this factor and determined that "since [Anthony] is remarried and [Barbara] is not, he has help with the basic living expenses, whereas [Barbara] does not."

{¶17} Essentially, Anthony argues that because the trial court considered his

wife's earnings, his income was considered much greater than it actually is. However, the trial court never imputed the \$45,000 salary to Anthony, and instead considered the fact that due to Angela's salary, he has help with his living expenses whereas Barbara does not.

{¶18} Anthony relies on *Leopold v. Leopold*, Washington App. No. 04CA14, 2005-Ohio-214, in which the Fourth District Court of Appeals upheld the trial court's decision not to consider the annual income of the appellant's live-in girlfriend when determining the proper amount of spousal support he owed his ex-wife. In determining that the girlfriend's income was not relevant, the court considered that appellant paid \$500 per month in fixed living expenses and that his share of the expenses was the same regardless of how much his live-in girlfriend made. The court also refused to consider the girlfriend's earnings because there was no evidence to establish that appellant and his girlfriend shared checking accounts or commingled their funds in anyway.

{¶19} While Anthony asks this court to apply the same logic as that applied by the Fourth District, the case at bar is readily distinguishable from *Leopold*. The trial court heard evidence that rather than having a live-in girlfriend who holds no legal status, Anthony has remarried and permanently resides with his new wife. Instead of trying to keep the evidence out of court as the appellant did in *Leopold*, Anthony testified on direct examination that his wife earned \$45,000 per year. Unlike the girlfriend in *Leopold* who did not commingle funds with the appellant, Anthony verified on cross-examination that he deposits his earnings into a joint account with Angela and that their funds are commingled for purposes of paying household bills and expenses. The trial court's determination that Angela's income helps reduce Anthony's living expenses is

markedly different than a trial court considering the income of a live-in girlfriend, and Anthony's reliance on *Leopold* is misplaced.

{¶20} The trial court considered Angela's earnings, as introduced by Anthony during the hearing, when considering the R.C. 3105.18 factors. However, the trial court did not include Angela's salary in Anthony's annual earnings, but rather determined that because of his wife's salary, Anthony's living expenses are reduced. See *Manzella v. Manzella*, Montgomery App. No. 20618, 2005-Ohio-4519, ¶12 (upholding trial court's decision to consider that an "obligor directly benefits from sharing living expenses with his new spouse," and such consideration is properly considered "as part of the 'any other factor' section of R.C. 3105.18[C][1][n]"); and *Fisher v. Fisher*, Fairfield App. No. 2008CA00049, 2009-Ohio-4739, ¶36, (finding no abuse of discretion where trial court considered the fact that appellant directly benefited from sharing living expenses because his new wife's income was "available for living expenses").

{¶21} Having found that the trial court did not abuse its discretion by considering the impact Angela's income has on Anthony, Anthony's second assignment of error is overruled.

{¶22} For ease of discussion, we will address Anthony's final two assignments of error together.

{¶23} Assignment of Error No. 3:

{¶24} "THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE AND ABUSED ITS DISCRETION WHEN IT FAILED TO MAKE THE SPOUSAL SUPPORT MODIFICATION EFFECTIVE BACK TO THE DATE OF DEFENDANT'S MOTION TO MODIFY."

{¶25} Assignment of Error No. 4:

{¶26} "THE TRIAL COURT ERRED IN FAILING TO CONSIDER [ANTHONY'S] MEMORANDUM IN SUPPORT OF HIS OBJECTIONS TO THE MAGISTRATES [sic] DECISION."

{¶27} In his third assignment of error, Anthony asserts that the trial court erred by not making the spousal support modification retroactive to the date of his motion for modification. However, Anthony failed to properly object to the magistrate's decision regarding the effective date. While Anthony now claims in his fourth assignment of error that the trial court erred in not considering a supplemental memorandum as a proper means of objection, we disagree.

{¶28} According to Civ.R. 53(D)(3)(b)(ii), "an objection to a magistrate's decision shall be specific and state with particularity all grounds for objection." Should a party fail to properly object, that party has waived the right of appeal except for plain error. Civ.R. 53(D)(3)(b)(iv). In response to the magistrate's decision, Anthony filed a general objection to the magistrate's decision, which stated, "defendant contends that the Magistrate's decision is incorrect as it was unsupported by the evidence and/or is contrary to the evidence presented." However, Anthony failed to state with particularity the grounds for his objections, as is required by Civ.R. 53(D)(3)(b)(ii).

{¶29} We recognize that within Anthony's general objection to the trial court, Anthony requested the right to supplement his objections once the hearing transcript was made available to the parties. While Civ.R. 53(D)(3)(b)(iii) allows a party to seek leave of court to supplement objections, the trial court never granted leave for Anthony to file any supplemental objections, or a memorandum to raise objections he failed to raise in his original motion.

{¶30} We also note that Barbara also attempted to file additional objections

through a supplemental memorandum. The trial court refused to consider Barbara's objections, as they too failed to comport with the civil rules. See *Beasley v. Beasley*, Adams App. No. 06CA821, 2006-Ohio-5000, ¶ 13 (affirming trial court's decision to disregard "the issues Wife raised in her supplemental memorandum" where those issues were not raised in the original objections to the magistrate's decision and court did not otherwise grant leave to file a supplemental memorandum).

{¶31} Anthony now cites the rules of the Warren County Court of Common Pleas, Domestic Relations Division, which allow parties to file supplemental written memoranda before a hearing or required date of submission. However, the trial court denied leave to file supplemental objections because "[Anthony], and his attorney, were present at trial. [Anthony] knew, or should have known, all alleged errors." Additionally, the trial court noted the difference between supplementing objections through written memoranda and creating additional objections without first going through the formalities required by Civ.R. 53(D). The trial court did not abuse its discretion in deciding as such and Anthony's failure to object results in waiver of his argument on appeal except for plain error.

{¶32} Although Anthony failed to assert plain error on appeal, we nonetheless find that the trial court did not commit plain error in setting the effective date as it did. "In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, paragraph one of the syllabus. These extreme circumstances do not exist in the

case at bar.

{¶33} According to the decision of the trial court, Anthony's reduction in spousal support would take effect on January 1, 2009, rather than the date of his motion to modify, October 27, 2008. While a trial court normally makes the reduction in spousal support obligation retroactive to the date of filing of the motion to modify, the trial court's decision to set a different date was not plain error.

{¶34} Although it did not state a reason for choosing January 1, 2009 as the effective date, we cannot say that the trial court's decision to do so challenges the legitimacy of the modification in any way. Instead, the order diverged from the motion date by only two months, costing Anthony approximately \$500 in the process, and the reduction will effect the remaining 60 months of Anthony's 72-month spousal support obligation. The reduction will therefore save Anthony approximately \$15,000 over the next five years should his obligation remain \$500 per month instead of \$750. Therefore, we cannot say that making the modification effective on a date other than the day Anthony filed his motion for modification constituted plain error.

{¶35} Because Anthony failed to properly object to the magistrate's decision regarding the date his spousal support reduction would become effective, and the trial court's decision did not rise to the level of plain error, Anthony's final two assignments of error are overruled.

{¶36} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.