

[Cite as *Hutchinson v. Hutchinson*, 2010-Ohio-597.]

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

DENNIS R. HUTCHINSON,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-03-018
- vs -	:	<u>OPINION</u>
	:	2/22/2010
PAMELA S. HUTCHINSON,	:	
Defendant-Appellant.	:	

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 94-DM-001134

Nichols, Speidel & Nichols, Donald W. White, 237 Main Street, Batavia, OH 45103,
for plaintiff-appellee

Fred S. Miller, 246 High Street, Hamilton, OH 45011, for defendant-appellant

YOUNG, P.J.

{¶1} Defendant-appellant, Pamela S. Hutchinson, appeals an order of the Clermont County Court of Common Pleas, Domestic Relations Division, reducing the spousal support obligation of plaintiff-appellee, Dennis R. Hutchinson, upon his retirement.

{¶2} After 31 years of marriage, Dennis filed for divorce in 1995. By divorce

decree filed March 5, 1996, the trial court equally divided the marital property and ordered Dennis to pay Pamela \$1,000 per month in spousal support until death, remarriage or cohabitation with an unrelated adult male.¹

{¶3} At the time of the divorce, Dennis was employed by Ethicon Endo-Surgery, Inc., a division of Johnson & Johnson, earning approximately \$70,000 annually. Dennis retired from Ethicon in 2004, and for the next three years he worked as a part-time consultant for Ethicon and its clients. Dennis retired fully in 2007 at the age of 62 and began collecting monthly retirement benefits from Social Security and various pension plans.

{¶4} In 2008, Dennis moved to modify his spousal support obligation on the ground that his recent retirement had significantly decreased his annual income. In response, Pamela moved to increase Dennis' spousal support obligation on the grounds that she was unable to afford housing and that retirement had not significantly impacted Dennis' income. The matter was heard before a magistrate on November 17, 2008. Dennis testified regarding the reduction in his income after retirement. He also testified that after the divorce, Pamela's gambling habits spun out of control, and according to his calculations, Pamela spent up to \$54,000 at local casinos in 2007. The magistrate found that there was a change in the parties' circumstances justifying a reduction in, but not a termination of, Dennis' spousal support obligation. In reducing the payment from \$1,000 to \$607 per month, the magistrate found that:

{¶5} "[Pamela] has been gambling excessively and has been dissipating not

1. The trial court also reserved jurisdiction to modify the spousal support award upon a demonstration of a change in circumstances.

only her income, but also her assets. [Dennis] should not be expected to subsidize [Pamela's] excessive gambling[.] * * * [U]nder the circumstances of this case \$607.00 per month is the appropriate level of spousal support because it is sufficient to provide for [Pamela's] current needs but does not subsidize her gambling."

{¶16} Pamela filed an objection to the magistrate's decision, stating that the findings were against the weight of the evidence. The trial court overruled Pamela's objection, finding that Dennis successfully established a change in circumstances warranting a modification of the spousal support and that the actual modification was appropriate and reasonable.

{¶17} Pamela challenges the trial court's ruling and raises two assignments of error for our review.

{¶18} Assignment of Error No. 1:

{¶19} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT LACKED JURISDICTION TO REDUCE APPELLEE'S SPOUSAL SUPPORT OBLIGATION."

{¶10} In her first assignment of error, Pamela argues that the trial court lacked jurisdiction to reduce Dennis' spousal support obligation. Specifically, Pamela argues that the only circumstances warranting modification of the spousal support award were those listed in the divorce decree: Pamela's death, remarriage or cohabitation with an unrelated adult male. Additionally, Pamela argues that because Dennis "undoubtedly expected to retire *at some point* in the future," Dennis' retirement was contemplated at the time of the divorce decree under R.C. 3105.18 as interpreted by

the Ohio Supreme Court.² (Emphasis added.)

{¶11} As we understand it, Pamela's argument is that the divorce decree set forth an all-inclusive list of circumstances warranting judicial review of the spousal support award. In support of her argument, Pamela relies on the trial court's statement in the divorce decree that "this spousal support order . . . shall *terminate* when [Pamela] cohabitates with an unrelated adult male, dies or remarries, whichever occurs first." (Emphasis added.) However, Pamela misinterprets the meaning of this statement; this list simply refers to three distinct circumstances, the occurrence of which would automatically *terminate* Dennis' spousal support obligation. The decree reserves separate authority to *modify* the support award, stating "[t]he Court specifically reserves jurisdiction to modify the award upon a change of circumstances." From this language, it is clear that the trial court intended to reserve the authority to modify the spousal support award if the moving party proved a substantial change in circumstances *other than* Pamela's death, remarriage or cohabitation with an unrelated adult male. Thus, Pamela's argument that modification of Dennis' support obligation is limited to the three circumstances specifically listed in the divorce decree is meritless.

{¶12} We address Pamela's argument as to whether Dennis' retirement was contemplated at the time of the divorce decree under Pamela's second assignment of error.

{¶13} Assignment of Error No. 2:

{¶14} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-

2. The Ohio Supreme Court held that the change in circumstances required by R.C. 3105.18 "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." *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, ¶32.

APPELLANT WHEN IT REDUCED APPELLEE'S SPOUSAL SUPPORT OBLIGATION TO HER."

{¶15} Pamela argues that the magistrate failed to consider all relevant factors under R.C. 3105.18(C)(1) in determining the appropriate measure of spousal support and that the trial court abused its discretion in upholding the magistrate's decision.

{¶16} A trial court has broad discretion in determining a spousal support award, including whether or not to modify an existing award. *Strain v. Strain*, Warren App. No. CA2005-01-008, 2005-Ohio-6035, ¶10. Thus, absent an abuse of discretion, a spousal support award will not be disturbed on appeal. *Id.* An abuse of discretion is more than an error of law or judgment; an abuse of discretion connotes that based upon the totality of the circumstances, the trial court's decision was arbitrary, unreasonable or unconscionable. *Id.*; *Carnahan v. Carnahan* (1997), 118 Ohio App.3d 393, 397.

{¶17} In exercising its discretion to modify a spousal support award, a trial court must determine: "(1) that the divorce decree contained a provision specifically authorizing the court to modify the spousal support, and (2) that the circumstances of either party have changed." *Strain* at ¶11; R.C. 3105.18(E). Additionally, the change in circumstances must be substantial, not purposely brought about by the moving party, and not contemplated at the time of the divorce decree. *Mandelbaum*, 2009-Ohio-1222 at ¶31-32. The party seeking to modify a spousal support obligation bears the burden of showing that the modification is warranted. *Hill v. Hill*, Clermont App. Nos. CA2004-08-066, CA2004-09-069, 2005-Ohio-5370, ¶5.

{¶18} In the instant matter, the trial court properly reserved the authority to modify Dennis' spousal support obligation in the divorce decree when it stated, "[t]he

Court specifically reserves jurisdiction to modify the award upon a change of circumstances." Thus, we will focus our analysis on whether either party experienced a substantial change in their circumstances that was not contemplated at the time of the divorce in 1996.

{¶19} Here, the change of circumstances for Dennis was his retirement from Ethicon in 2004. Pamela argues that Dennis' retirement was "voluntary" and therefore cannot be considered in determining whether a substantial change in circumstances occurred. However, this court has held that voluntary retirement "does not bar consideration of [a party's] decrease in income when determining if there was a substantial change of circumstances." *Robinson v. Robinson* (Apr. 4, 1994), Brown App. Nos. CA93-02-027, CA93-03-047, 1994 WL 110197, at *1.

{¶20} In evaluating the effects of Dennis' retirement upon his ability to pay spousal support, the magistrate concluded that "all of [Dennis'] investments have been declining in value." In addition, the magistrate accounted for the sharp decline in Dennis' annual income after retirement. Before retirement, Dennis made roughly \$70,000 annually; after retirement, Dennis made only \$36,300 annually, consisting of Social Security benefits of \$1,600 per month (\$19,200 per year) and a pension of \$1,425 per month (\$17,100 per year). In essence, Dennis' gross annual income after retirement was cut in half – a substantial change in circumstances by any standard. See *Carnahan*, 118 Ohio App.3d 393 (the trial court did not abuse its discretion in finding a substantial change in circumstances where an obligor spouse made \$72,000 annually before retirement and \$19,000 afterward); *Reveal v. Reveal*, Montgomery App. No. 19812, 2003-Ohio-5335, ¶18 ("a reduction in income due to voluntary retirement is literally a change of circumstances").

{¶21} Upon considering the foregoing, we cannot say that the trial court abused its discretion in upholding the magistrate's finding that Dennis' retirement caused a change in circumstances warranting a modification of the spousal support award.

{¶22} However, this does not end our examination of the change in Dennis' circumstances. Pamela also argues that Dennis' retirement was contemplated at the time of the divorce. At the divorce hearing in 1995, Dennis testified that he anticipated Ethicon would offer him an "early retirement package" on his 50th birthday, which fell in the fourth quarter of that year. However, when the offer failed to come, Dennis continued to work for Ethicon for nine more years until 2004. It is clear that the retirement Dennis contemplated at the time of the divorce was his "early retirement" in 1995 and not his actual retirement in 2004. Thus, Pamela's argument that Dennis' retirement in 2004 was necessarily contemplated at the time of divorce is without merit.

{¶23} Pamela next argues that even if the trial court had authority to review the spousal support award based on a change in circumstances, the trial court abused its discretion in adopting the magistrate's modification. Pamela claims that the magistrate failed to consider all relevant factors under R.C. 3105.18(C)(1) when he determined an unreasonably low spousal support figure. Pamela argues that in modifying the support award, the magistrate erred on three distinct fronts: (1) the modification was erroneously based solely on Pamela's "needs," (2) the magistrate failed to consider Dennis' new spouse's income in his financial analysis, and (3) the magistrate's findings regarding Pamela's gambling were not pertinent to the spousal support calculations. We will address Pamela's arguments separately under the

guidelines of R.C. 3105.18(C)(1)(a)-(n).

{¶24} Once a trial court finds there is a change in circumstances, the court must then determine whether spousal support is still necessary, and if so, what amount is reasonable. *Carnahan*, 118 Ohio App.3d at 398. To ensure that the new spousal support award is "appropriate and reasonable," the trial court must consider the factors listed in R.C. 3105.18(C)(1). *Id.* However, the trial court is not required to comment on each factor individually unless there is a request for findings of fact and conclusions of law. *Id.* Rather, "the trial court must indicate the basis for its award in sufficient detail to enable a reviewing court to determine that the award is fair, equitable and in accordance with the law."³ *Campbell v. Campbell*, Warren App. No. CA2009-04-039, 2009-Ohio-6238, ¶22, quoting *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 97.

{¶25} As stated earlier, a reviewing court applies an abuse of discretion standard when reviewing a trial court's decision concerning modification of spousal support. *Carnahan* at 399; *Hill*, 2005-Ohio-5370 at ¶4. In determining whether there was an abuse of discretion, the reviewing court must look at the "totality of the circumstances" to determine if the trial court acted unreasonably, arbitrarily or unconscionably. *Carnahan* at 399.

{¶26} Pamela asserts that the trial court erred in adopting the magistrate's determination that \$607 per month was sufficient to "provide for [Pamela's] current

3. The factors the trial court must consider include "each party's income, earning capacities, age, retirement benefits, education, assets and liabilities, and physical, mental and emotional condition; the duration of the marriage; their standard of living; inability to seek employment outside the home; contributions during the marriage; tax consequences; and lost income due to a party's fulfillment of marital responsibilities." *Campbell* at fn. 3, quoting *Brickner v. Brickner*, Butler App. No. CA2008-03-081, 2009-Ohio-1164, ¶21, citing R.C. 3105.18(C)(1)(a)-(m). In addition, the trial court is free to consider any other factor that the court finds to be "relevant and equitable." R.C. 3105.18(C)(1)(n).

needs." (Emphasis added.) Pamela contends that the only way she survived on her previous spousal support payments of \$1,000 per month was with her children's help; therefore she could not support herself on only \$607 per month. Furthermore, Pamela contends that the magistrate had a statutory responsibility to consider not only her most basic "needs," but also the amount of support that was "appropriate and reasonable" in light of the parties' overall circumstances.

{¶27} Ohio courts have established that "need" is an essential element in determining whether spousal support is appropriate and reasonable under R.C. 3105.18(C)(1). *Carnahan*, 118 Ohio App.3d at 399; *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 68; *Burress v. Burress* (June 28, 1999), Clermont App. No. CA98-09-070, at 4. Each element in R.C. 3105.18(C)(1)(a)-(n) is "related, directly or indirectly, either to the obligee spouse's need for sustenance or the obligor spouse's ability to pay." *Carnahan* at 399-400, quoting *Seagraves v. Seagraves* (Apr. 19, 1996), Montgomery App. No. 15588. The concept of "need" differs from case to case and encompasses more than just providing the essentials of life, e.g. food and shelter; an obligee spouse's "needs" also require that the trial court consider the standard of living the parties enjoyed during the marriage. *Burress* at 4.

{¶28} In this case, the magistrate concluded that Dennis' income and assets decreased after his retirement, and that he should not be responsible for subsidizing Pamela's excessive gambling habits or her general inability to manage her finances. Thus, the magistrate reduced the spousal support award to a level sufficient to maintain a lifestyle similar to the one Pamela enjoyed during the marriage, when she did not gamble nearly as often.

{¶29} After reviewing the record, we find ample evidence supporting the

magistrate's concern for Pamela's financial ineptitude. For example, in 2000 and 2001, a jobless Pamela withdrew excessive funds from her IRA account to purchase a mobile home with her daughter because Pamela "hated living in an apartment." When the mother-daughter relationship foundered, Pamela withdrew additional monies from the same IRA to purchase a second mobile home, resulting in an accumulation of back taxes.

{¶30} Pamela's financial burdens were exacerbated by her admitted gambling habit. Pamela testified that in 2007, she visited local casinos one to three times per week, spending several hours at the slot machines each time. On cross-examination, Pamela could not account for \$40,000 she withdrew from her brokerage account in 2007, but admitted that she may have spent it entirely at local casinos. Further, despite Pamela's assertions that she could not survive on \$607 per month without her children's help, Pamela testified that in 2008, she had ample funds for her own housing and that she was living with her children by choice.

{¶31} In calculating the new spousal support award, the magistrate determined Pamela's "need" by totaling her monthly expenses and comparing them to her current assets, social security income, and benefits she received from Dennis' pension plan. The magistrate also assessed Dennis' post-retirement ability to pay spousal support by reviewing his pension benefits, social security income, and investment assets. Based on the totality of the parties' circumstances, the magistrate concluded that \$607 per month was an appropriate amount of spousal support to support Pamela's lifestyle, minus her gambling habits, and that Dennis had the "ability to pay" this amount, based on his reduced income.

{¶32} In sum, the magistrate factored Pamela's former standard of living into

his calculations and determined that Dennis was not responsible for Pamela's deteriorated lifestyle; rather, Pamela's mismanaged finances and gambling habits were clearly to blame. Upon review of the record, we find that the magistrate's decision modifying the spousal support award is supported by the evidence, and that the trial court did not abuse its discretion in upholding the modification.

{¶33} Next, Pamela claims that the magistrate was required to consider Dennis' new spouse's income in assessing the "entirety of [Dennis'] financial picture." Pamela cites *McNutt v. McNutt*, Montgomery App. No. 20752, 2005-Ohio-3752, which holds that an obligor spouse's ability to share expenses with his new wife was "relevant in deciding whether an obligor's claim of poverty [was] well-taken." *Id.* at ¶15. In that case, when the obligor spouse retired, he was left with an annual pension income of \$17,880. He argued unsuccessfully on appeal that the trial court abused its discretion by failing to terminate his spousal support obligation because paying support would reduce him to "poverty level." *Id.* at ¶8. In assessing the validity of the obligor spouse's claim to poverty, the trial court considered his new wife's wages as part of their combined household income under the statute's catch-all provision, R.C. 3105.18(C)(1)(n), which allows consideration of "any other factor that the court expressly finds to be relevant and equitable." *Id.* at ¶15. The court concluded that the combined household income was enough to keep the obligor spouse out of "poverty," and that the spousal support payments remained reasonable and appropriate. *Id.* at ¶16.

{¶34} There is a major difference between determining spousal support and determining whether there was a substantial change in circumstances to warrant a modification. *Carnahan*, 118 Ohio App.3d at 401. We have held that an obligor's new

spouse's income should be considered when there is an allegation of changed circumstances. *Id*; *Roach v. Roach* (1989), 61 Ohio App.3d 315, 320. However, in determining spousal support, R.C. 3105.18(C)(1)(a) requires the trial court to consider the income of the *parties*, but this does not include income from another spouse. *Carnahan* at 401. In the case at bar, the trial court did not err in failing to consider Dennis' new spouse's income under R.C. 3105.18(C)(1)(n). Unlike the obligor spouse in *McNutt*, Dennis did not claim to be "at poverty level," therefore Dennis' new wife's income is neither "relevant" nor "equitable" for consideration in this case. The magistrate indicated the basis for his award in sufficient detail to show that the award was "fair, equitable and in accordance with the law." *Campbell*, 2009-Ohio-6238 at ¶22. Therefore, we again find that the trial court did not abuse its discretion in upholding the modification.

¶35 In her third and final argument, Pamela contends that the magistrate's findings regarding her gambling were not pertinent to the calculation of spousal support. Pamela claims that it is "not the obligor's business (or the court's) to dictate how spousal support should be spent."

¶36 Despite these assertions, Pamela has failed to establish that the magistrate's determination was arbitrary or irrational. In fashioning the award, the magistrate exercised the discretion he had in determining the amount of support by taking into account the special circumstances of this case. Faced with Dennis' reduced income and concerned about Pamela's ability to manage her finances, the magistrate awarded a smaller amount of spousal support that still covered Pamela's budget, excluding her gambling expenses. We cannot say that, in this situation, the trial court abused its discretion in upholding the magistrate's decision reducing

Dennis' monthly spousal support payments from \$1,000 to \$607. Pamela's second assignment of error is overruled.

{¶37} Judgment affirmed.

BRESSLER and HENDRICKSON, JJ., concur.