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Forseeability and Jurisdiction in Spousal Support Cases

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One perhaps unforeseen consequence of the decision of the Ohio Supreme Court in *Mandelbaum v. Mandelbaum*, 121 Ohio St. 3d 433, 2009-Ohio-1222, 905 N.E.2d 172 (2009), has been an aggressive use of the foreseeability test to challenge the jurisdiction of courts to modify spousal support orders. Since *Mandlebaum* several appellate districts have addressed jurisdictional issues pertaining to the contemplation of the parties and modification triggers and have arrived at varying conclusions.

Jurisdiction to modify a spousal support order post decree derives from R.C. § 3105.18 which permits modification of a periodic spousal support obligation if the court determines that "…the circumstances of either party have changed…" and if the divorce decree contains a reservation of jurisdiction. R.C. § 3105.18(E). *Mandlebaum's* certified question was "…whether a trial court may modify a prior order of spousal support without finding that a substantial change in the circumstances of the parties has occurred and that the parties had not contemplated such a change at the time of the original divorce decree." *Id.*, at ¶1. While the focus of *Mandlebaum* was on the issue of whether a change in circumstance need be "substantial," the issue of the contemplation of the parties was addressed in the decision. And it is this issue—whether the parties contemplated the change, i.e., the foreseeability of the change—that has been at the heart of the post-*Mandlebaum* jurisdictional challenges addressed in this article.

The Supreme Court noted that the 1991 amendments to R.C. § 3105.18 did not codify a common law requirement that a court is required to find "…that a substantial and unforeseen change in circumstances has occurred…" before it has jurisdiction to modify. *Id.*, at ¶29. The court, at paragraph 2 of its Syllabus, then held that a court lacks jurisdiction to modify spousal support unless the substantial change in circumstance "was not contemplated at the time of the original decree." In dicta at ¶32 the Court wrote that "…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." (Emphasis added.)

Following *Mandlebaum*, the Tenth District Court of Appeals squarely addressed the foreseeability issue in *Burkart v. Burkart*, 191 Ohio App. 3d 169, 2010-Ohio-5363, 945 N.E.2d 557 (10th Dist. Franklin County 2010), appeal not allowed, 128 Ohio St. 3d 1426, 2011-Ohio-1049, 943 N.E.2d 573 (2011). James Burkart filed a motion to modify his spousal support order within 10 months of the entry of the divorce decree arguing that his landscape architectural business had substantially declined due to the economy, especially after September 11, 2001. (The original agreed judgment entry decree of divorce was filed January 3, 2002.) In contemplating the foreseeability issue, the Court of Appeals noted that, in addition to being substantial, the change must be "unforeseen." *Id.*, at ¶19, and concluded that trial court lacked jurisdiction to modify the spousal support award because Mr. Burkart did not meet his burden on proving "…that he did not contemplate a substantial decline in his income at the time of the divorce." *Id.*, at ¶22. The court noted that "[t]he record is devoid of any evidence indicating that in late 2001 and early 2002, James was unaware that his income would soon substantially decrease. Moreover, James's testimony suggests that he actually anticipated earning less in the future." *Id.* Specifically, the court concluded that "…James never testified that he did not

anticipate a substantial drop in income in late 2001 (when he agreed to the terms of the divorce decree) or early 2002 (when the trial court journalized the divorce decree). In fact, James testified that in late 2001, he perceived a downturn in the landscape architectural business. James foresaw that this downturn would lead to a decline in his income, and he raised the issue prior to the entry of the divorce decree." *Id*., at ¶20. Consequently, the court held that there was no jurisdiction to modify the award.

Burkart was followed in the Tenth District by the case of *Piliero v. Piliero*, 2011-Ohio-4364, 2011 WL 3843936 (Ohio Ct. App. 10th Dist. Franklin County 2011), appeal not allowed, 131 Ohio St. 3d 1438, 2012-Ohio-331, 960 N.E.2d 987 (2012) and on reconsideration, 2012-Ohio-1153, 2012 WL 949812 (Ohio Ct. App. 10th Dist. Franklin County 2012). In *Piliero* the court also held that the trial court lacked jurisdiction because of a failure of the party seeking a modification "…to prove that the change in circumstances was not contemplated at the time of the original decree." *Id*., at ¶9. Unlike the situation in *Burkart* where Mr. Burkart testified that he was concerned that his business was threatened at the time of agreeing to the decree, Mr. Piliero's jurisdictional barrier was the language of his divorce decree which contained this "trigger" language:

> "The parties expressly provide that spousal support is MODIFIABLE as to amount only as set forth above, and the Court shall retain jurisdiction for such purposes only.
>
> "…*The parties agree that the amount of spousal support shall be MODIFIED, from time to time, so that the parties have equal after-tax annual income from earnings* (earned income, passive income, imputed income, and retirement income) and from child support, but specifically excluding all income from capital gains, lottery winnings, gifts and the like.
>
> > "1. Defendant has a reduction or cancellation of her retirement benefits from UAL, Inc[.]; *child support payments made by plaintiff to defendant are terminated*. In [**3] those events, spousal support shall increase by that sum which equalizes after tax income between plaintiff and defendant.
> >
> > "2. Upon the commencement by defendant of her social security benefits; upon the commencement by defendant of her retirement benefits from plaintiff's Federal Civil Service Retirement Plan ('CSRS'). In those events, spousal support shall decrease by that sum which equalizes after tax income between plaintiff and defendant." (Emphasis sic.) *Id*., at ¶2.

The court had found that the spousal support obligor's income had increased from October of 2003 (the date of the decree was October 1, 2003) through February of 2010 from $137,900 to $165,300 due to annual cost-of-living increases. Additionally, child support had ceased during that period due to the emancipation of the youngest child. Therefore, the income of the obligor had increased and the income, including child support, of the obligee had decreased. Nonetheless, the court concluded that the jurisdictional requirement of *Mandlebaum* had not been met because the parties knew at the time of the divorce that the cost of living increases were being received and that the child support would end upon the emancipation of the youngest child, and, the court defined the burden as one which a litigant must meet by proving that such facts were unknown at the time of the decree: "Based upon the foregoing, we find that appellee [obligee] failed to prove that (1) the annual cost-of-living increases and (2) the termination of child support, were not contemplated by the parties at the time of the divorce." *Id*., at ¶19.

Thus, in the Tenth District, James Burkart was denied jurisdiction to modify because he testified in his postdecree case that he had been concerned that his landscape business was threatened, even though at the time of the agreement of the divorce decree, he would not have been able to prove a lower income for spousal support based upon those concerns. And, the Pilieros could not obtain jurisdiction to modify their agreed spousal support order which called for continuing equalization of incomes because at the time of the agreement the husband was receiving cost-of-living increases, which he continued to receive post-decree, thus creating an income imbalance over time. They had no jurisdiction, then, to modify spousal support in accordance

with the "triggers" they had expressly negotiated. Even more striking what the court's conclusion that the Pilieros would have had to prove somehow that they never contemplated that their youngest daughter would eventually reach the age when child support would cease, thus creating more income for Mr. Piliero. The court did not provide guidance as to how such a fact might be proven.

Given this situation, a motion for reconsideration of Piliero was filed and an amicus curiae brief written by attorney Gary J. Gottfried on behalf of the Ohio Chapter of the American Academy of Matrimonial Lawyers (AAML). The AAML argued that neither R. C. § 3109.18 nor Ohio common law support a literal interpretation of *Mandlebaum* that an agreed upon "trigger" event would not constitute a basis for modification of spousal support and that public policy does not support such a literal interpretation of "contemplated." The Tenth District agreed and issued a new decision on March 20, 2012 in *Piliero v. Piliero*, 2012-Ohio-1153, 2012 WL 949812 (Ohio Ct. App. 10th Dist. Franklin County 2012). In the reconsideration decision, the court cited cases from the Seventh, Eighth, and Second Districts which reached a contrary interpretation of the foreseeability issue.

The Seventh District decided *Ballas v. Ballas*, 2009-Ohio-4965, 2009 WL 3003982 (Ohio Ct. App. 7th Dist. Mahoning County 2009), appeal not allowed, 124 Ohio St. 3d 1445, 2010-Ohio-188, 920 N.E.2d 374 (2010) on the issue of whether the trial court lacked jurisdiction to modify spousal support because the parties had contemplated the obligor's bankruptcy at the time of the decree. Noting that "…a court may specify triggering events that would constitute a change of circumstances, *id*., at ¶39, the Court went on to conclude that "[a]though the resolution of Steven's bankruptcy case was an eventuality, and thus contemplated at the time of the divorce, the timing and consequences of the bankruptcy could not be adequately contemplated in the original decree." Consequently, the trial court had jurisdiction to consider a modification.

The Eighth District case of *Kaput v. Kaput*, 2011-Ohio-10, 2011 WL 86382 (Ohio Ct. App. 8th Dist. Cuyahoga County 2011), was cited for its consideration of what contemplation of a change means. In *Kaput*, the obligor had painted a picture of "gloom and doom" for the future of his company at the time of the divorce. The issue then upon his motion for modification due to his decreased income was whether the change had been contemplated. The Eighth District looked at the common sense dictionary definition of "contemplate" and concluded that it did not mean "to think about" or "to reflect upon." The better meaning was "[t]o have purpose; intend." *Id*., at ¶22. The court found that the husband-obligor had no intent or purpose to cause the decline of his business. The court further noted the absurd result that would occur from a contrary reading of "contemplate": the wife-obligee would be barred from seeking an increase if she had ever "contemplated" that the husband's company might succeed.

In the Second District case of *Wertz v. Wertz*, 2009-Ohio-6001, 2009 WL 3790663 (Ohio Ct. App. 2d Dist. Montgomery County 2009), appeal not allowed, 124 Ohio St. 3d 1509, 2010-Ohio-799, 922 N.E.2d 971 (2010), the wife-obligee's physical health deteriorated seriously after the decree. Although the wife's health was poor at the time of the decree, the decline was not contemplated by the parties.

Taking these cases into account, the Tenth District reversed itself in Piliero stating:

> "We believe 'contemplated' means more than just 'thought of' or 'discussed.' In our view, 'contemplated' means, in part, that the parties or court already took some fact or circumstances into account in resolving an issue. For example, if a wife agrees to accept less in spousal support because the husband's financial situation is deteriorating, the husband cannot subsequently seek a downward modification of his spousal support obligation based upon the same consideration because the parties already 'contemplated,' or took into account, this circumstance at arriving at their agreement. The parties' mere discussion of the husband's deteriorating financial situation without taking it into account in some respect would not be a bar to a later modification."

Id., at ¶14. The court further noted that "…mere discussion is not sufficient to constitute 'contemplation.'" *Id*.

Despite the above language, the court distinguished *Burkart* finding that the 10 month time period between the journalization of the decree of divorce and the filing of the motion to modify rendered "…dubious that any non-contemplated change in circumstances could have occurred in that short period." *Id*., at ¶19. The court offered no suggestion from the record, though, to support the proposition that the parties had taken Mr. Burkart's concern for his business future into account in the spousal support agreement or that Mrs. Burkart accepted a lesser amount of spousal support in contemplation of the business future. To that extent, it is difficult to justify the distinguishing of *Burkart* from the dicta of *Piliero*. Consequently, while foreseeability seems to be subject to a clear rule in the Second, Seventh, and Eighth Districts, there is some question in the Tenth District as to whether concerns expressed prior to a decree might come back to haunt an obligor whose income has decreased, or other circumstances changed, as he or she might have feared.

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