# Hamilton County Law Library News

A Monthly Newsletter from the Hamilton County Law Library Janurary 2010

## Spousal Support: Mandelbaum v Mandelbaum

By Mark Edward Stone, reprinted with permission.

Resolving a conflict among the appellate district courts, the Supreme Court of Ohio has held that as a jurisdictional requirement to modifying a spousal support award a trial court must find that a substantial change in circumstances has occurred, and that such change was not contemplated at the time of the original decree.

In 1986 the Ohio legislature added to R.C. 3105.18 the language that is now found at section (E) of that statute. Under R.C. 3105.18(E), trial courts are deprived of jurisdiction to modify spousal support awards unless two conditions are satisfied: (1) the decree must authorize modification; and (2) the court must determine "that the circumstances of either party have changed." In 1991 the Ohio legislature added the language that is now found at R.C. 3105.18(F), and it reads as follows: "(F) For purposes of divisions (D) and (E) of this section, a change in the circumstances of a party includes, but is not limited to, any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses."

Prior to the adoption of R.C. 3105.18(F), no statute had addressed or set forth the meaning of the term "change of circumstances" in the context of alimony or spousal support.

Since the adoption of R.C. 3105.18(F), appellate courts in Ohio have been divided over its meaning. One line of cases had held that the word "any" as used in R.C. 3105.18(F) is unambiguous, and that if the Ohio legislature had intended the word "any" to mean "substantial" or "drastic" it would have included or used those words. This reading of R.C. 3105.18(F) had been expressly given to the statute by four appellate districts, see e.g., Tsai v. Tien (2005), 162 Ohio App. 3d 89, 2005-Ohio-3520, 832 N.E.2d 809, paragraph one of syllabus (Fifth District); Kingsolver v. Kingsolver, 2004-Ohio-3844, paragraph one of syllabus (Ninth District); Buchal v. Buchal, 2006-Ohio-3879, at ¶ 14 (Eleventh District), and Rollins v. Harvis, 2007-Ohio-6121, at ¶ 14 (Sixth District), and appears to have become the interpretation in the Fourth

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# Tech Tip: The Public Library of Law

**By Julie Koehne**

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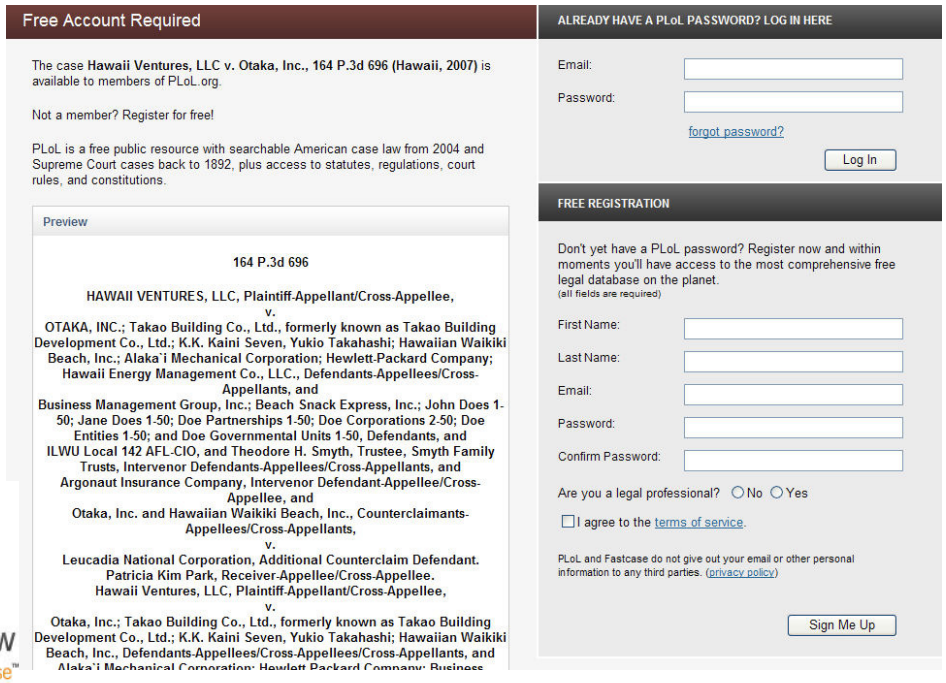


The Public Library of Law
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District as well as reflected in Cassidy v. Cassidy, 2005-Ohio-3199, at ¶ 29.

Taking a different approach, the appellate courts in the Second, Third, Seventh, Tenth and Twelfth appellate districts continued to interpret the language of R.C. 3105.18(F) as requiring a finding of "substantial" or "significant" or "drastic" change of circumstances before a trial court is permitted to modify an existing spousal support award. In the opinion issued by the Second Appellate District in Mandelbaum that court stated "we . . . do not find the language used by the General Assembly to be free from ambiguity" and held that when R.C. 3105.18(F) became effective in 1991 "the General Assembly did not intend to change the well-settled requirement that before modification of a spousal support order can be permitted, the change in circumstances must be substantial . . .". That appellate court further reasoned that to hold otherwise would open the floodgates of litigation. See, also, Trotter v. Trotter, 2001-Ohio-2122, at page 2 (Third District); Reeves v. Reeves, 2007-Ohio-4988, at ¶ 18 (Seventh District); Sweeney v. Sweeney, 2006-Ohio-6983, at ¶ 21 (Tenth District); and Carnahan v. Carnahan (1997), 118 Ohio App. 3d 393, 397, 692 N.E.2d 1086, 1089 (Twelfth District). The Eighth Appellate district appeared to have developed an internal conflict over this issue. Compare, e.g., Calabrese v. Calabrese, 2007-Ohio-2760, at ¶ 20 with Kucmanic v. Kucmanic (1997), 119 Ohio App. 3d 609, 613, 695 N.E.2d 1205, 1207 (fn. 1). And the First Appellate District had not weighed in on the issue.

In Mandelbaum, the parties 2000 divorce decree provided that Husband would pay Wife spousal support of $18,000 per year, in monthly installments of $1,500. The decree further specified that spousal support would "be subject to the ongoing and continuing jurisdiction of this Court" and that "[e]ither party shall have the right to apply to this Court for the purposes of modifying the spousal support, due to a change in the financial circumstances of either party." In this regard, the decree provided: "It is the parties' intent that, for the purpose of spousal support, the parties' combined incomes be equalized between the two of them. The parties, in reaching an agreement as to the annual spousal support payment of $18,000.00 per year by Husband to the Wife, have used $60,900.00 of income for the Husband and $25,131.00 of income for the Wife." In 2005, Husband moved to modify his support obligation, asserting that his annual income had decreased from $60,900 to $17,675. A magistrate conducted a hearing on the matter and found that Husband's gross income had increased to $84,505 and that Wife's gross income had increased to $40,239. The magistrate recommended denying the motion because Husband had not demonstrated a sufficient change in circumstances to justify modifying the support order pursuant to R.C. 3105.18. Husband filed objections to the magistrate's recommendation, and the trial court, after reviewing the record, determined that Husband's income was $61,876, not $84,505, and also found that Wife's income had increased from $25,131 per year to $40,239 per year. The trial court did find that the parties had intended to equalize their incomes on an ongoing basis, and reduced Husband's support obligation from $1,500 per month to $925 per month.

The court, however, made no finding with respect to whether the Wife's increase in income from $25,131 per year to $40,239 per year constituted a substantial change in the parties' circumstances, or whether the parties had contemplated this change at the time of the divorce decree. Frances appealed the trial court's order, contending that it had abused its discretion by underestimating Stanley's income. On review, the appellate court reversed the trial court's modification of spousal support, explaining that "the trial court erred in failing to consider, as a threshold matter, whether the changes in the parties' circumstances were substantial and were not contemplated at the time of the prior order. Although the parties reserved jurisdiction in the decree to modify spousal support, R.C. 3105.18(E) also requires a substantial change of circumstances before a spousal support order may be modified."

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Mandelbaum v. Mandelbaum, Montgomery App. No. 21817, 2007-Ohio-6138. Thus, the court of appeals concluded that the trial court had abused its discretion. Husband appealed that decision, which appeal was accepted by the Ohio Supreme Court. The court of appeals also certified that its ruling was in conflict with decisions of other appellate districts, and the Ohio Supreme Court accepted the certified conflict as well, directing the parties to brief the following question: "May a trial court modify spousal support under R.C. 3105.18 without finding that: (1) a substantial change in circumstances has occurred; and (2) the change was not contemplated at the time of the original decree?"

In a unanimous decision, the court held that when the legislature enacted changes to R.C. 3105.18, first in 1986 then again in 1991, the legislature never "suggested an intent to alter longstanding case law requiring a *substantial* change in the parties' circumstances." It answered the certified question in the negative and affirmed the decision of the lower appellate court. The Ohio Supreme Court *Mandelbaum* decision reasoned that the amendment in 1986, which added the language that is now found at 3105.18(E), was intended to resolve the issues that had arisen in the wake of that court's decision in *Wolfe v. Wolfe* (1976), 46 Ohio St. 2d 399, 75 O.O.2d 474, 350 N.E.2d 413, resolving the question of whether reservation of continuing jurisdiction can be implied or must be expressed in the decree. In noting that the legislature again amended R.C. 3105.18 in 1991 by adding the language that is now found at section (F), the *Mandelbaum* court reasoned that while those amendments did not expressly codify the "common-law requirement that a trial court is required to find that a substantial change in circumstances has occurred . . . the absence of language [in the statutory amendments] does not demonstrate that the General Assembly intended to abrogate what had become well-settled law." In support of that method of determining legislative intent the Mandelbaum opinion then cites the 1907 case of State ex rel Hunt v. Fronizer as standing for the legal principle that "the general assembly will not be presumed to have intended to abrogate a settled rule of the common law unless the language used in a statute clearly supports such intention." (A search in Westlaw for the Fronizer case finds that the only other time the Ohio Supreme Court commented on that language from the Fronizer case was in 1951 in the case of In Re McWilson's Estate 155 Ohio St. 261, 98 N.E. 289, 44 O.O. 262. In In Re McWilson's Estate, that panel of Supreme Court of Ohio justices noted that "[I]n [Fronizer] there is nothing in the syllabus with reference to the rule as to the abrogation of the common law, but in the opinion it is said, 'It is an equally well-established rule that the General Assembly will not be presumed to have intended to abrogate a settled rule of the common law unless the language used in a statute clearly imports such intention.' We thoroughly agree with that statement of the law but we cannot see how the General Assembly could have more clearly expressed an intention to extend the period of unexplained absence beyond the seven years to the date of the decree provided for in Section 10509-28. There is no expression in the Fronizer case that there must be words in an act of the General Assembly expressly abrogating the common law. All that need appear is a provision which clearly does modify or abrogate it, and assuredly the words used in both Sections 10509-25 and 10509-28 are clear and unambiguous." The Supreme Court of Ohio's opinion in Mandelbaum fails to mention the In Re McWilson's Estate case at all.)

The Mandelbaum opinion then makes no effort to explain why the Supreme Court of Ohio's own other longstanding and well settled approach to the discernment of legislative intent did not apply to the interpretation of the language of R.C. 3105.18. These long standing principles of statutory interpretation are expressed, among other decisions from the Supreme Court of Ohio, in Bailey v. Republic Engineered Steels, Inc. (2001), 91 Ohio St. 3d 38, 741 N.E.2d 121, 2001-Ohio-236 ("In determining legislative intent, a court first looks to the language of the statute . . In considering statutory language, it is the duty of the court to give effect to the words used in a statute, not to delete words used or to insert words not used. . . If the meaning of a statute is unambiguous and

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definite, it must be applied as written. . . ) and in *Kimble v. Kimble* (2002), 97 Ohio St 3d 424, 425, 780 N.E.2d 273, 275, 2002-Ohio-6667 ("A word that is not defined in a statute must be afforded its plain and ordinary meaning.") (In *Kimble*, an opinion issued by former Justice Sweeney but in which Chief Justice Moyer, Justice Pfeiffer and Justice Lundburg Stratton concurred, the Supreme Court of Ohio had held that these same statutory amendments in 1986 and 1991, by not including "remarriage" as an event automatically terminating spousal support, had abrogated the public policy that alimony awards terminate upon the remarriage of the recipient spouse, stating ". . . the General Assembly subsequently amended R.C. 3105.18(E), applicable to actions on or after May 2, 1986. . . [s]ince this appeal involves a post-1986 divorce, we can no longer rely on the policy set forth in *Dunaway,* which conflicts with and is superseded by statute.)

In commenting upon its prior case law on spousal support modification the Supreme Court in Mandelbaum notes that it and lower appellate courts have previously used terms such as "significant" and "material" and "drastic" and appears to say that such words or terms are either synonymous with "substantial" or are equally acceptable findings for modification purposes. The opinion equates "not contemplated" with "unforeseen" but doesn't say whether that equates to "unforeseeable" as well. Husband's brief had argued, as the Kingsolver case and others that interpreted the language of R.C. 3105.18(F) in the same manner had held, that the language of section (F) permits a modification due to any change, whether foreseeable or not, so long as the change renders the existing award no longer reasonable or appropriate.

For reasons unexplained in the opinion the Mandelbaum opinion truncates that argument and avers that Husband simply argued that R.C. 3105.18 (F) permits a modification due to "any change" and avoids altogether any discussion of the relevancy or meaning of the term "reasonable or appropriate" contained in the same statute. The opinion makes no attempt to explain how adding the ambiguous and malleable word "substantial" on top of the already ambiguous and malleable term "reasonable and appropriate" that is already the standard for every spousal support award provides any gate keeping function that the proponents of the "substantial" standard proclaim it provides.

*Mark Edward Stone practices family law from Beavercreek, Ohio. If you have any questions about this article, please contact him at 937-431-9990.*

### Membership Renewal

Don't forget to renew your membership. This will ensure your continued access to our remote resources like CCH newsletters, Fastcase.com and HeinOnline law journals. Is your firm looking for ways to save on legal research fees? Firm memberships provide all lawyers and professional staff with access to our resources for a discounted fee. For more information about becoming a member of the law library and the resources available, visit our website http://www.hamilton-co.org/cinlawlib/join.html, or call us at 513.946.5300.

# Law Library Partners with CBA's Lawyer Referral Service to Offer Public Programs

Mary Jenkins, Law Librarian and Director

During a chance meeting at the CBA's Member Benefits Open House in October, representatives of the Law Library and the CBA's Lawyer Referral Service discussed several potential opportunities for collaboration. That conversation led to the development of a series of programs intended for the general public and focused on particular legal issues. The series, called You and the Legal System, will be offered at the Law Library at 12:00 noon on the third Friday of each month throughout 2010.

The series kicks off January 15 with a one-hour program on Bankruptcy, offered by James Grey Wolf and Neal J. Weill and designed for the non-lawyer citizen who is interested in understanding the bankruptcy process. The presenters will speak for approximately 30 minutes, followed by 30 minutes of Q&A. Future programs will include landlord-tenant law, foreclosure, divorce/dissolution, child support, name changes, wills, and other topics of interest to the public.

Lawyer Referral Service Director Michael J. Davis, LRS Assistant Eileen Witker, and LRS chair James Grey Wolf have been instrumental in developing the program by generating enthusiasm within the LRS and identifying potential speakers. The Law Library is providing the meeting space, registration, publicity, and technical support, in addition to the reference assistance it offers library users daily.

In our early conversations, we quickly identified the common questions posed to law library staff and LRS attorneys. In many cases, the member of the public or pro se litigant is seeking basic information about the area of law and the costs involved in legal proceedings and representation.

They have questions about forms and proceedings and whether their issue has merit. The Law Library refers patrons to the Lawyer Referral Services and to Legal Aid Society regularly for, while it provides research guidance and aid in the use of library resources, the library's staff does not offer legal advice. The partnership seems an ideal way to connect people with questions to the attorneys and librarians who can help with their information needs. The Hamilton County Law Library is pleased to help its public patrons get the basic facts they need as they come into contact with the legal system, often at a time of personal distress.

Anyone interested in more information may contact Eileen Witker at the CBA, James Grey Wolf of the LRS, or Mary Jenkins at the Law Library. Registration for the programs is handled by Mary Ann Sweeney at 513.946.5300.

## What Every Borrower Should Know about Circulation of Law Library Materials

It's easy to avoid overdue fines from libraries, right? Just bring the materials back by the due date. Still, it's a good idea to read the fine print regarding transactions, even at a library, so here it is:

Appointed and elected Hamilton County officials and law library subscribers may borrow materials from the library's general and Continuing Legal Education (CLE) collections. The circulation policy is online: http://www.hamilton-co.org/cinlawlib/resources/policies/circulation.html.

Here are the highlights:

- Materials are available for all to use so our loan periods are reasonable and there are disincentives for late or non-return of materials or for damage.
- If an item that a patron wants is checked out, we'll notify the borrower that there is a request for it, just in case that borrower is really finished with it and can return it promptly.
- If an item is checked out and overdue and needed by another patron, we will recall that item right away.
- CLE materials circulate for 2 weeks now and may be renewed once.
- Items from the general collection circulate for 2 weeks and may be renewed for two additional two-week periods. A third renewal is allowed but the materials must be presented at the Library as proof of their continued existence.
- One can renew materials by phoning the Library.
- Users with long-overdue items will have borrowing privileges suspended when the fines reach certain thresholds.
- We do bill borrowers for unreturned or damaged items for the cost of replacement of the same item or a reasonable substitute.

## Lexis for Solo Attorneys

You might have seen Carolyn Elefant's MyShingle.com post back in October, "LEXIS, You Could Have Had Us Solos at Hello" (http://www.myshingle.com/2009/10/articles/legal-research-and-writing/lexis-you-could-have-had-us-solos-at-hello/). In the article, which focuses on a Lawyers.com ad campaign, Ms. Elefant comments on the availability and attractiveness of services like Fastcase, Casemaker, LoisLaw, and VersusLaw to solo attorneys who have found monthly rates for "Wexis" unaffordable. In her conclusion, the author notes, "…Lexis or Westlaw could have had us solo and small firm lawyers ten years ago. If they'd offered affordable services with basics like cite checking and Shepards at a reasonable price, solos and small firms would have come running…".

And solo attorneys have come running to this library! The Hamilton County Law Library and Lexis have been offering affordable remote access to Lexis Ohio, Kentucky, Indiana, and federal materials for solo practitioners for a year and a half. All of our subscribers are welcome to use Fastcase on- or off-site as well as "full" Lexis and "partial" Westlaw here at the library, but if you're a solo attorney and you'd like Lexis at your home or office, you might want to look into the law library's Lexis for Solo Attorneys service. For more information: http://www.hamilton-co.org/cinlawlib/lexis_solos.html

## Free CLE with LEXIS

Meet our new Lexis representative while earning free CLE credit on Tuesday, January 19

### 1:00 - 2:00 - Basic Lexis.COM (1 CLE Credit)

**Explore basic search functionality through both Lexis.COM including:**

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- Table of Contents searching & navigation
- Term & Connector search construction
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### 2:30– 3:30 Shepard's Citation (1 CLE Credit)

This course begins with an overview of Shepard's BriefCheck. BriefCheck identifies cite in your brief document, Shepardizes them, checks them for accuracy and checks your quotes for accuracy. Also covered are advanced FOCUS/Restrict By searching, Shepard's Alerts and Shepard's for Statutes.

# January 2010 Law Library Newsletter

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