

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

JEFFREY K. HEINICHEN,	:	APPEAL NO. C-090625
	:	TRIAL NO. DR-9501640
Plaintiff-Appellant,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
NOEL K. HEINICHEN,	:	
	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Plaintiff-appellant Jeffrey K. Heinichen and defendant-appellee Noel K. Heinichen were divorced in 1995. At the time of the divorce, the couple had three minor children. The parties' separation agreement, which was incorporated into their divorce decree, indicated that neither the parties nor the trial court could change the spousal-support order unless Noel² remarried.

From the time of the divorce until August 7, 2000, Jeffrey paid \$1000 per month in child support (\$333 per child) and \$1000 per month in spousal support. On August 7, 2000, however, the parties filed an agreed entry, signed by the trial court, that set the spousal-support payment at zero and set the monthly child-support payment at \$8,200. The aggregate amount was to remain the same even as the children reached the age of emancipation—only the amount per child changed. Thus, the agreement was that the monthly support for each child was to be \$2,733 at first, that the support was to increase to \$4100 for each remaining child when the

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² Since the parties share a surname, we refer to them by their first names in this entry.

eldest reached the age of emancipation (on June 8, 2007), and that the support for the youngest child was to increase to \$8200 when the second child reached the age of emancipation (on August 17, 2008).

The parties followed this agreed entry until May 1, 2008, when Jeffrey filed a motion to modify the child-support order. At the hearing on that motion, Noel claimed that the 2000 agreed entry was void ab initio. Jeffrey and the trial court agreed, but the court chose to treat the void entry as a contract between the parties. On April 27, 2009, the magistrate modified the amount Jeffrey had to pay in child support to \$5000 per month. The trial court overruled his objections. In five assignments of error, Jeffrey now appeals.

In his first assignment of error, Jeffrey argues that the trial court improperly found that the 2000 agreed entry was an enforceable contract. In his second assignment of error, he claims that the trial court should have recomputed the support order based upon the amounts contained in the original decree.

The parties and the trial court all agreed that the trial court lacked jurisdiction to modify the spousal-support order. Absent a reservation of jurisdiction in the decree, a trial court cannot modify a spousal-support order.³ A judgment rendered by a court that lacks jurisdiction is void ab initio.⁴ The Ohio Supreme Court has said that “[t]he effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment.”⁵

Noel argues that the trial court properly concluded that, even if the entry was void, it was a contract between her and her husband. That may be true. But that

³ See R.C. 3105.18(E).

⁴ *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 518 N.E.2d 941.

⁵ *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267, 227 N.E.2d 223; see, also, *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, at ¶12.

does not change the fact that the document, as a court order, was void. The parties could not confer jurisdiction on the trial court where it had none simply by calling the agreed entry a contract. Under these circumstances, the parties were required to follow the terms of the decree—the only document the trial court had the jurisdiction to enforce. Giving the trial court the authority to enforce, as an order of the court, a “contract” containing terms it could not enforce would defeat the jurisdictional limitations on the modification of spousal support contained both in R.C. 3105.18 and in the parties’ divorce decree.

The fact that the parties entered into this agreement is a factor that the trial court can consider when it determines whether Noel will be required to pay back the child-support overpayment, which Jeffrey estimates at over \$600,000. The trial court may find that the parties agreed to this amount—knowing that they did not have the authority to make such an agreement—that Jeffrey was a “volunteer,” and that the overpayment should be deemed a gift. But that is not an issue for this court to decide.

We further note that, in the 2009 modification, the magistrate seems to have included some consideration of support for Noel when she was making the child-support determination. The magistrate wrote, “After reviewing Mother’s expenses and income, including her mortgage payment and expenses for utilities, property taxes, home insurance, and groceries, the Court finds Mother requires \$5000 per month from Father *to maintain her, and Claire’s, needs* and the standard of living while Claire is an unemancipated minor.” (Emphasis added.) But spousal support could not be modified by the trial court, as it had no jurisdiction to do so. We cannot determine, from this record, what portion of the amount was intended to maintain Claire and what portion was intended to maintain Noel. Since the trial court did not

begin its analysis with the support figures in the decree, which included spousal support, the trial court must reconsider its 2009 modification.

Since the agreed entry was void, the trial court should not have used it as a basis to modify the support amounts in 2009. For these reasons, we sustain Jeffrey's first two assignments of error. On remand, the trial court will have to reassess its 2009 modification order based upon the amounts listed in the decree, not in the void agreed entry. It will also be required to calculate the amounts of overpayment of child support and underpayment of spousal support, and determine what, if any, amounts should be paid, credited, or reimbursed.

In his third assignment of error, Jeffrey argues that the trial court improperly computed his income when it modified his child-support obligation in 2009. Since this court has already determined that the trial court must recalculate its 2009 modification order, this assignment of error is moot.

In his fourth assignment of error, Jeffrey claims that the trial court abused its discretion when it awarded attorney fees to Noel and when it failed to award attorney fees to him. Jeffrey claims that the decision on fees was based on what the magistrate called "underhanded trial tactics." He also cites numerous instances where, he claims, the actions of Noel needlessly delayed the litigation. The magistrate noted that "[w]hile the Court prefers the parties and counsel to cooperate, counsel are free to make motions in court they believe are necessary for the proper representation of their clients. It was the Court's decision, not the decision of Mother's counsel, to continue the hearing to allow for additional research and argument on the subject of jurisdiction and contract construction." It was on this basis that Jeffrey's motion was denied. The magistrate also noted the "disparity of income between the parties, Husband's conduct and other equitable principles." It was on this basis that Noel's motion was granted.

Based upon the record before this court, we cannot say that the trial court abused its discretion when it granted Noel's request for attorney fees and denied Jeffrey's. We overrule his fourth assignment of error.

In his final assignment of error, Jeffrey claims that the 2009 entry placed of record by the trial court does not accurately reflect the decision that it made from the bench. But Jeffrey does not indicate what those discrepancies are, and he does not point to where they can be found in the record. Therefore, we overrule his fifth assignment of error.

Having considered all five of Jeffrey's assignments of error, we reverse the judgment of the trial court and remand this case for further consideration consistent with this judgment entry.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., HENDON and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on September 1, 2010

per order of the Court _____.

Presiding Judge