

# Third District Court of Appeal

## State of Florida

Opinion filed November 27, 2019.  
Not final until disposition of timely filed motion for rehearing.

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Nos. 3D18-1468 & 3D18-529  
Lower Tribunal No. 17-3653

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**Vincent J. Thilloy,**  
Appellant,

vs.

**Ann M. Ciccone-Capri,**  
Appellee.

Appeals from the Circuit Court for Miami-Dade County, David H. Young, Judge.

Martinez-Scanziani & Associates Law, and Denise Martinez-Scanziani, for appellant.

Your Support Solution, P.A. d/b/a Support Solutions, and Lawrence J. Shapiro and David L. Bonham, for appellee.

Before SALTER, LOGUE and SCALES, JJ.

SALTER, J.

In these consolidated cases, Vincent Thilloy (“Former Husband”) appeals an order holding him in indirect civil and criminal contempt (Case No. 3D18-529) and a final judgment of dissolution of marriage (Case No. 3D18-1468). The appellee, respondent in the family division of the circuit court, is Ann Ciccone-Capri (“Former Wife”). Based on the record before us and the analysis which follows, we vacate the order of contempt. We affirm the final judgment of dissolution of marriage in part and reverse in part, remanding for further proceedings.

#### Facts and Procedural History

Although the order and final judgment under review emanated from a 2017 petition for dissolution commenced by the Former Husband, he filed a prior petition for dissolution of his marriage to the Former Wife in 2009.<sup>1</sup> The 2009 case was aggressively prosecuted until May 2012, when the parties entered into a Marital Settlement Agreement (the “2012 MSA”).

The 2012 MSA was filed in the 2009 action in July 2012, but languished there until July 2013, when the 2009 action was dismissed (in a dismissal order stating, “Parties failed to comply with previous court orders and failed to appear at the properly noticed final hearing of July 16, 2013.”). The 2012 MSA was never ratified

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<sup>1</sup> Each of the cases was filed and prosecuted in the circuit court for Miami-Dade County.

or confirmed by the trial court in the 2009 case, nor was it incorporated into a final judgment of dissolution of marriage.

There was no further in-court action taken by either party for over three years. In February 2017, the Former Husband filed a new, pro se petition for dissolution by completing the standard forms provided by the Family Court Self-Help Program. The Former Wife, assisted by counsel, filed a motion in April 2017 for adoption and enforcement of the 2012 MSA, and for incorporation of that agreement into a final judgment of dissolution of marriage.

After a non-evidentiary hearing later that month, the trial court ordered the Former Husband to begin paying \$2,500.00 per month for child support and \$4,500.00 per month in alimony, directly to the Former Wife, pending further order. These were the amounts specified in the 2012 MSA, but (as noted) those provisions had never previously been (a) confirmed or adopted in a court order, or (b) enforced by a court. Also, in entering that order, the trial court did not address the then-current financial circumstances of the spouses.

The trial court further ordered the Former Wife to submit a memorandum on her motion to enforce the 2012 MSA, and to set a further hearing on that motion. The Former Husband, who had opposed the motion to adopt and enforce the 2012 MSA on grounds that his financial circumstances had materially and adversely changed, was directed to file a petition for modification of the 2012 MSA provisions.

The Former Husband (by then, represented by counsel) filed a response in opposition to the motion to adopt and enforce the 2012 MSA, as well as a verified petition for modification of child support and alimony. He contended that the 2012 MSA grew “stale once the original case was dismissed,” and that it was barred by laches. His memorandum in opposition alleged that, during the five years between execution of the 2012 MSA and the filing of the 2017 petition for dissolution, the Former Husband “lost several houses to foreclosure,” with boxes of records destroyed or lost, his witnesses were no longer within the jurisdiction of the trial court, and he was “wiped out financially” and “endured long bouts of unemployment.”

The Former Husband had filed a current Family Law Financial Affidavit (Short Form) with the initial 2017 petition for dissolution. The Affidavit showed monthly income of \$2,200.00 and expenses of \$1,960.00 per month, with total assets of \$3,900.00 and debts of \$300.00.<sup>2</sup>

In August 2017, the trial court conducted a non-evidentiary hearing and granted the Former Wife’s motion to adopt the 2012 MSA entered into by the parties over five years earlier. A month later, the Former Wife moved for an order holding the Former Husband in indirect civil contempt for failure to comply with the 2012

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<sup>2</sup> These figures proved to be grossly inconsistent with his later sworn testimony regarding his business activities, and the assets of those businesses, in 2017.

MSA and the temporary support and alimony order entered in April 2017. The Former Wife sought (a) \$383,953.00 in alleged arrearages in alimony and child support payable under the terms of the 2012 MSA from June 2012 through September 2017, (b) the suspension of the Former Husband's driver's license and restriction of his passport, and (c) monetary sanctions for the sale of the Former Husband's business ventures (and diversion of the proceeds) and "dissipation" of the Former Wife's motor vehicle and retention of the sales proceeds, in violation of the 2012 MSA.

Following two days of evidentiary hearings on the Former Wife's motion for **civil** contempt, the trial court granted the motion and also found the Former Husband to be in indirect **criminal** contempt (for dissipation of the proceeds of sale of a vehicle allocated to the Former Wife in the 2012 MSA), sentencing the Former Husband to sixty days in jail, subject to a purge amount of \$380,313.00, payable within thirty days of the order.

The evidentiary hearings disclosed that in 2016 the Former Husband had received \$250,000.00, which he used to start a new restaurant venture and to buy a 48-foot Sea Ray boat for a charter business. None of those funds were remitted to the Former Wife to reduce unpaid amounts of child support and alimony the Former Husband had agreed to pay in the 2012 MSA.

After a final hearing in June 2018, the trial court entered a final judgment of dissolution of marriage, which incorporated the 2012 MSA into the final judgment. The trial court never heard or ruled upon the Former Husband's verified motion for modification of child support and alimony. The trial court concluded that the Former Husband's affirmative defense of laches had been abolished by Florida statute. This appeal from the final judgment and the order finding the Former Husband in indirect contempt followed.

### Analysis

#### A. Standard of Review

Most of the claims of error raised by the Former Husband turn on legal issues—the interpretation and applicability of the 2012 MSA in the 2017 dissolution proceeding, the legal sufficiency of his defenses based on laches and abandonment of the terms of the 2012 MSA, and the due process considerations inherent in his pending petition for modification. The trial court's resolution of these legal issues is reviewed de novo. Rocha v. Mendonca, 35 So. 3d 973, 976 (Fla. 3d DCA 2010) (de novo standard of review applicable to contracts and marital settlement agreements); Lovejoy v. Poole, 230 So. 3d 164, 166 (Fla. 5th DCA 2017) (summary determination regarding laches without an evidentiary hearing is legal error).

The trial court's order of contempt is reviewed for an abuse of discretion. Carter v. Hart, 240 So. 3d 863, 865 (Fla. 5th DCA 2018). An alleged contemnor

who has a pending petition for modification of a support obligation is entitled to have that matter heard before or with the subsequent motion for contempt. Rosenblum v. Rosenblum, 178 So. 3d 49, 50 (Fla. 1st DCA 2015). But the present case also presents a legal issue for de novo consideration: may the contractual commitments of parties in a duly-executed MSA in a case dismissed (with no order approving or adopting the MSA in an order or judgment) be enforced several years later, but nunc pro tunc, in a subsequently filed second dissolution action?

B. Characterization of the 2012 MSA; Enforcement

The enforcement of the 2012 MSA as a binding contract between the parties may be granted as in a routine civil action and even though the 2009 dissolution case was dismissed without a court order approving the 2012 MSA. This scenario is analogous to the enforcement of a prenuptial agreement in a subsequent dissolution action. See Riera v. Riera, 86 So. 3d 1163, 1168 (Fla. 3d DCA 2012) (contractual undertaking in an MSA to pay adult child's college expenses may be judicially enforced, but not by contempt); Southard v. Southard, 756 So. 2d 251, 253 (Fla. 5th DCA 2000) (same).

The question presented in this case is whether the 2012 MSA terms may be enforced nunc pro tunc five years later and (in the case of arrearages of child support and alimony) via contempt, as opposed to enforcement in an ordinary civil money judgment for the months of non-compliance prior to the filing of the 2017 dissolution

and the Former Wife's enforcement case. The Former Husband points to the definition of "obligor" in section 61.046(13), Florida Statutes (2018): "a person responsible for making payments pursuant to an **order** establishing, enforcing, or modifying an obligation for alimony, for child support, or for alimony and child support." (Emphasis provided). The trial court's suspension of the Former Husband's driver's license (section 61.13016, Florida Statutes (2018)), for example, would only be available to punish his delinquency for court-ordered child support as a "support obligor," and not for enforcement of his contractual commitment in the 2012 MSA for periods prior to the second dissolution case.

The Former Wife proffers no reported Florida decision, nor has our research disclosed one, in which: an MSA has been executed in an initial dissolution proceeding; that initial proceeding was dismissed by the trial court without consideration (much less, approval or ratification in an order) of the MSA; a second dissolution case was filed several years later; and a contempt order was issued in that second case declaring the non-moving party a contemnor, and imposing sanctions, for that party's breach of the MSA in the years before the second dissolution case was filed.

The impact of the trial court's retroactive imposition of sanctions for contempt is evident in the Former Wife's breakdown of amounts of child support and alimony allegedly paid, and allegedly unpaid, during the time interval between the execution



of the 2012 MSA and the motion to enforce it by contempt (filed September 21, 2017, seeking enforcement of \$2,500.00 in child support and \$4,500.00 in alimony per month between June 2012 and January 2017, the last full month before the second dissolution case was filed). During that period, a total of 56 months, the total allegedly due was \$392,000.00, the total allegedly paid was \$60,947.00, and the resulting unpaid balance was \$331,053.00.

Between January and August 2017, the Former Wife contended that additional unpaid amounts brought the total child support and alimony arrearages owed by the Former Husband to \$383,953.00. It was essentially that total amount that the trial court accepted as the amount to be enforced via contempt (the purge amount of \$380,313.00 was to be paid within 30 days), as opposed to the amounts unpaid since the commencement of the 2017 dissolution case and the trial court's initial order (\$55,400.00, according to the Former Wife's motion).

### C. Other Findings Regarding Contempt

The contempt order includes other findings established in the two-day evidentiary hearing that do establish the Former Husband's apparent disregard for his contractual obligations under the 2012 MSA. Before the second dissolution was filed, the Former Husband participated in 2016 in the sale of a business which netted him \$250,000.00. The trial court found, "[i]nstead of using the proceeds to pay alimony and child support, he instead invested in a Yacht (which he uses to lease

out for private parties), and a new business venture called the Rock Hostel.” The trial court also found that the Former Husband was in contempt because he “intentionally and willfully dissipated [Former] Wife’s 2006 Range Rover” and retained the proceeds.<sup>3</sup>

The trial court’s findings regarding contempt were not confined to arrearages and actions following the filing of the second dissolution action in February 2017. The great majority of the arrearages in monthly child support and alimony accrued during the period when the 2012 MSA had never been approved or confirmed in a court order.

#### D. Petition for Modification; Affirmative Defenses

The trial court declined to consider or apply the Former Husband’s affirmative defenses of laches and ruled without consideration of the Former Husband’s petition for modification of the monthly child support and alimony amounts (based on the 2017 financial affidavits and alleged materially adverse changes in his ability to pay). The trial court’s conclusion in open court that the doctrine of laches has been

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<sup>3</sup> The 2012 MSA specified that the vehicle was to be transferred to the Former Wife. The Former Husband testified he had paid all taxes, insurance, and maintenance for the vehicle until some point in 2017, when he sold it for \$4,000.00 and retained those proceeds. The Former Husband argues, and our precedent supports the argument, that contempt is an improper means of enforcing a property settlement obligation. Hine v. Hine, 558 So. 2d 496, 498 (Fla. 3d DCA 1990) (“Such provisions are enforceable only by remedies available to creditors against debtors.”).

abolished in Florida is likely based on the heavy burden that must be borne by a party pleading laches in a dissolution proceeding,<sup>4</sup> but it is legally incorrect.

The Former Husband's pending petition for modification and affirmative defenses to the Former Wife's motion for enforcement of the 2012 MSA should have been considered before findings of contempt were entered. The Former Husband did not challenge the 2012 MSA provisions relating to shared parental responsibility for the minor child, and for that reason we decline to review that aspect of the final judgment.

#### Conclusion

This is a novel case and record. While sharing the trial court's view that the Former Husband willfully disregarded his contractual undertakings in the 2012 MSA, we must disagree with the application of remedies for contempt to those breaches occurring before the trial court acquired jurisdiction in the second, current dissolution action. Contempt requires the contemnor's disobedience of a court order and may not be used to enforce what amounts to an intentional breach of a civil contract that has not been approved or adopted by a court.

We thus vacate the contempt order and remand the case to the trial court for (a) enforcement of contractual remedies applicable to the period before the current

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<sup>4</sup> See Ticktin v. Kearin, 807 So. 2d 659, 663 (Fla. 3d DCA 2001) ("In the context of child support arrearage cases, the defense of laches is only applied in extraordinary circumstances where the facts clearly show extreme prejudice.").

action was filed, as available to creditors against debtors; (b) determination of appropriate amounts of alimony and child support in the current proceeding, after considering the Former Husband's petition for modification and evidence regarding the financial circumstances of the parties and other considerations detailed in Chapter 61, Florida Statutes; and (c) such other proceedings as are not inconsistent with this opinion. We affirm the findings and conclusions in the final judgment relating to jurisdiction and venue, the fact that the marriage is irretrievably broken, and the provisions of the 2012 MSA insofar as they related to shared parental responsibility for the minor child, but we reverse the final judgment insofar as it adopts and incorporates the 2012 MSA provisions relating to child support and alimony for periods after the filing of the Former Husband's petition for modification.

Contempt order vacated; final judgment affirmed in part, reversed in part, and remanded for further proceedings.