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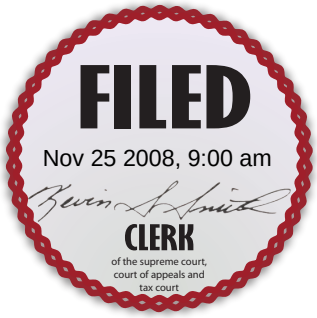

ATTORNEY FOR APPELLANT:

ROBERT C. HAGEMIER
Hagemier, Allen & Smith
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

STEVEN F. FILLENWARTH
Fillenwarth & Associates
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CHARLES W. MARLOWE,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A05-0802-CV-87
	)	
KATHERINE D. MARLOWE,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
The Honorable Burnett Caudill, Magistrate
Cause No. 49D03-9210-DR-1895

November 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Respondent Charles W. Marlowe ("Father") appeals from the trial court's order determining Father's college-expense arrearage for his two sons, B.M. and D.M. to be $10,780.50. Father contends that the trial court abused its discretion in imposing a retroactive support order and imposing a 50-50 shared expense standard on all prior college education expenses despite the court's findings that the Mother's income accounted for roughly seventy percent of the parties' net income. We reverse and remand to the trial court with instructions.

FACTS AND PROCEDURAL HISTORY

Father's marriage to Katherine Marlowe ("Mother"), which was dissolved on January 27, 1994, produced two children, B.M., born July 27, 1984, and D.M., born August 12, 1987. At the time of their divorce, the parties entered into a Settlement Agreement ("Agreement"), awarding Mother the marital residence, which the trial court incorporated into the parties' divorce decree. Section 4.4 of the Agreement provided the following:

> Section 4.4 Trust for Children. In order to equalize the division of marital property, the parties agree that at such time as the marital residence … is sold, Thirty-Five Thousand Dollars ($35,000) of the net proceeds of the sale shall be placed in trust for the benefit of the parties' two children [B.M. and D.M.], under the terms of a separate Trust Agreement that the parties agree to execute. Said real estate may never be encumbered so that the equity is less than Thirty-Five Thousand Dollars ($35,000); the legal description of the real estate is attached hereto as Exhibit B. In the event the residence is not sold prior to the time the oldest child of the parties attains eighteen (18) years of age, at such time as the oldest child of the parties attains eighteen (18) years of age, [Mother] shall deposit the sum of Thirty-Five Thousand Dollars ($35,000) in trust for the benefit of the parties' two children under the terms of a separate Trust Agreement that the parties agree to execute. Said funds shall be used for the education and maintenance of the children with the remainder to be paid to the children, in equal shares, at the time of completion of their education or the completion of the collegiate education of the younger child. *The trust shall be*

> *exhausted before [Father] shall be obligated to contribute to college education expense.*

Appellant's App. pp. 43-44 (emphasis added).

On April 1, 2002, Mother filed a petition for college educational expenses. The trial court determined that, because no evidence was presented relating to college expenses, an order for the apportionment of college expenses was not ripe for consideration. The trial court noted that as of the date of Mother's petition, neither of the parties' children had enrolled in college, and it was not yet known if or where the children would attend college, the costs attendant thereto, or the degree of the children's contribution to their education from scholarships, loans, work, and other unforeseen factors.

At the beginning of the 2003-04 academic school year, B.M. enrolled at Millikin University, a private university located in Decatur, Illinois. College expenses for the 2003-04 academic year at Millikin University, minus B.M.'s contribution, were approximately $16,000. College expenses for the 2004-05, 2005-06, and 2006-07 academic years, minus B.M.'s contributions, were approximately $17,000, $15,000, and $16,000 respectively. At the beginning of the 2006-07 academic school year, D.M. enrolled at Columbia College for the Arts and Media, a private university located in Chicago, Illinois. College expenses for the 2006-07 academic year at Columbia College, minus D.M.'s contribution, were nearly $31,000.

On September 27, 2005, Mother filed a petition for modification of support which sought a declaration that her $35,000 trust obligation had been satisfied and an order for college education expenses. On July 9, 2007, the trial court entered its "Findings of Fact,

Conclusions of Law and Judgment," in which the trial court released the $35,000 lien against the marital residence and ordered that Father should pay thirty percent of the children's college expenses and Mother should pay seventy percent of the children's college expenses as computed on the basis of in-state tuition. Appellant's App. pp. 12-25. Mother filed a motion to correct error, and on January, 14, 2008, the trial court issued its order on Mother's petition clarifying its findings pertaining to Father's college-expense arrearage and ongoing obligation. The trial court determined that the parties' obligations to contribute to their children's education expenses would be calculated using in-state tuition rates. The trial court further found that Father's arrearage for college expenses incurred for the 2003-04 through 2006-07 academic school years was $10,780.50. Father now appeals.

DISCUSSION AND DECISION

Father contends that the trial court abused its discretion by imposing a retroactive support obligation. Father also contends that the trial court abused its discretion by imposing a 50-50 shared expense standard on all prior college education expenses despite the court's finding's that at all times relevant to the court's order, Mother's income accounted for roughly seventy percent of the parties' net income.

Initially, we observe that upon dissolution, parties may enter into settlement agreements encompassing issues of maintenance, disposition of property, and the custody and support of the parties' children, including college expenses. *Borth v. Borth*, 806 N.E.2d 866, 869 (Ind. Ct. App. 2004).

> Such agreements are contractual in nature and become binding upon the parties once the trial court merges and incorporates such into the divorce decree. This

> court will enforce an agreement concerning the custody and support of children even though the divorce court would otherwise not have the authority to do so as the parties agreed. When interpreting such agreements, we apply the general rules applicable to construction of contracts.
>
> The interpretation and construction of contract provisions is a function for the courts. Upon appeal, we employ the same standard of review as applied by the trial court, that is, unless the terms of the contract are ambiguous, they will be given their plain and ordinary meaning. Where the terms of a contract are clear and unambiguous, the terms are conclusive, and we will not construe the contract or look to extrinsic evidence, but will merely apply the contractual provisions. The terms of a contract are not ambiguous merely because the parties disagree as to the proper interpretation of the terms.

Ogle v. Ogle, 769 N.E.2d 644, 647 (Ind. Ct. App. 2002), *trans. denied* (citations omitted).

Here, the parties' Agreement, which was incorporated into the parties' divorce decree, provided that Mother was to create a trust in the amount of $35,000 either when she sold the marital residence, or when B.M. reached the age of eighteen, whichever occurred first. In its September 19, 2002 order, the trial court held that Section 4.4 of the Agreement was "approved and incorporated into the Decree dissolving the marriage of [the] parties" and it could not, at that time, be modified. Appellant's App. p. 31. The trial court determined that Mother's obligation to fund the trust was "a binding, enforceable [] obligation." Appellant's App. p. 31. Furthermore, the trial court specifically ordered that Mother "shall immediately fully carry out, implement, and fund the obligation set forth in Article IV, Section 4.4 of the Settlement Agreement, and deposit $35,000.00 to a trust, under a trust agreement and with a trustee acceptable to the parties." Appellant's App. p. 34. To date, Mother has failed to fund the trust. Upon review, we agree with the trial court's September 19, 2002 interpretation of the parties' Agreement and conclude that Section 4.4 was clear and unambiguous, and its terms will therefore be deemed conclusive. *See Ogle*, 769 N.E.2d 644, 647.

Section 4.4 did not provide that any portion of the $35,000 trust fund would be allocated to either party, but rather specifically stated that "[t]he trust shall be exhausted before [Father] shall be obligated to contribute to [the children's] college education expense." Appellant's App. p. 44. We conclude that the plain and ordinary meaning of these terms establishes that Father had no obligation to contribute to the children's college education expenses until such time when the $35,000 trust, if established, was exhausted. Mother's failure to create the aforementioned trust, in violation of the terms of the Agreement and the trial court's September 19, 2002 order, does not alter Father's obligation. Therefore, pursuant to the plain terms of the parties' Agreement, Father was only obligated to contribute to the children's college education expenses following the exhaustion of Mother's $35,000 obligation.

Upon reviewing the financial resources of each party, the trial court determined that the parties' education expense obligations would be calculated using in-state tuition rates from Indiana University, Bloomington, rather than the actual rates associated with each child's respective private institution. Neither party contests this determination, and the parties agreed that the in-state rates for the children's college education expenses, minus the individual child's contributions, are as follows:

2003-04 Academic School Year (B.M.)	$12,361
2004-05 Academic School Year (B.M.)	$11,772
2005-06 Academic School Year (B.M.)	$9967
2006-07 Academic School Year (B.M.)	$9774
2006-07 Academic School Year (D.M.)	$12,687
Total	$56,561

Exhibit 2. Therefore, we conclude that Mother's $35,000 obligation included all of B.M.'s college education expenses for the 2003-04 through 2005-06 academic school years, and $900 of B.M.'s expenses for the 2006-07 academic school year. Father did not become obligated to contribute to the children's educational expenses until the 2006-07 academic school year. Father's arrearage on the children's educational expenses should therefore be derived from $21,561, the total remaining for the children's educational expenses accrued during the 2006-07 academic school year.

Additionally, we conclude that the language in the trial court's order stating that Father's college expense arrearage for the 2006-07 academic school year should be determined by equally dividing the expenses between the parties is also against the logic and the effect of the facts and circumstances before the court because an order for college expenses, when appropriate, shall be roughly proportional to the parties' respective incomes. *See Borum v. Owens*, 852 N.E.2d 966, 969 (Ind. Ct. App. 2006) (providing that "[i]f the trial court determines that an order for college expenses is appropriate, the parents' contributions shall be roughly proportional to their respective incomes"). Here, the evidence established that, during the 2006-07 academic school year, the parties' joint income was apportioned roughly seventy percent to Mother and thirty percent to Father. Therefore, on remand, the trial court shall calculate the arrearage owed by Father by attributing only thirty percent of the expenses for in-state college tuition for the 2006-07 academic school year to Father.[1]

[1] Having concluded that Father's obligation to contribute to the children's college education expenses did not commence until the 2006-07 academic school year, we need not address Father's contention that the trial court abused its discretion by imposing a retroactive support order.

In sum, Section 4.4 of the parties' Agreement was clear and unambiguous and its terms, which stated that "the trust shall be exhausted before [Father] shall be obligated to contribute to college education expense," should be given their plain ordinary meaning. *See Shorter*, 851 N.E.2d at 383. Therefore Father was not obligated to contribute to the children's college education expenses until after the exhaustion of Mother's $35,000 obligation at the beginning of the 2006-07 academic school year. Appellant's App. p. 44. Additionally, the parents' contributions shall be roughly proportional to their respective incomes, and therefore only thirty percent of the remaining college expenses shall be attributed to Father. *See Borum*, 852 N.E.2d at 969. We reverse and remand to the trial court for proceedings not inconsistent with this opinion.

The judgment of the trial court is reversed and this matter is remanded to the trial court.

RILEY, J. and BAILEY, J., concur.