STATE OF MICHIGAN

COURT OF APPEALS

BRADLEY S. STOUT, Plaintiff-Appellant,	UNPUBLISHED January 25, 2011
v	No. 293396 Oakland Circuit Court
KELLY E. STOUT a/k/a KELLY E. SIDDIQUI, Defendant-Appellee.	LC No. 1999-624216-DM

Before: WHITBECK, P.J., and ZAHRA and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's opinion and order regarding his motion to modify child support. We affirm in part, reverse in part, and remand the case to the trial court for a recalculation of plaintiff's support obligation consistent with this opinion.

Plaintiff and defendant divorced in 2001. The judge awarded the parties joint legal custody of their two minor children, entrusted defendant with the children's physical care and custody, and set forth plaintiff's child support obligation. Per the terms of the consent judgment of divorce, plaintiff agreed to waive application of the Shared Economic Responsibility Formula ("SERF"). Plaintiff's support obligation has been adjusted over the years based on changes in the parties' respective incomes and the births of children with their current spouses. The instant appeal concerns plaintiff's most recent motion to modify child support, and the trial court's opinion and order regarding that motion.

In his first issue on appeal, plaintiff argues that the trial court erred in enforcing his agreement to waive application of SERF and contends that it should have applied the Parental Time Offset Formula set forth in the 2008 Michigan Child Support Formula Manual ("MCSF") to calculate his support obligation. We disagree. Whether a trial court may depart from the child support formula for a given reason is a question of law that we review de novo. *Burba v Burba*, 461 Mich 637, 647; 610 NW2d 873 (2000). A judgment of divorce entered as a result of a settlement agreement between the parties represents a contract. *Holmes v Holmes*, 281 Mich App 575, 587; 760 NW2d 300 (2008). If unambiguous, the contract interpretation presents a question of law. *Id.* We review questions involving contract interpretation de novo. *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008).

Plaintiff first argues that his agreement to waive application of SERF contained in the parties' divorce judgment does not set contain a statement that adhering to the child support

formula would elicit an unjust or inappropriate result, as statutorily required. Therefore, plaintiff argues, the waiver is invalid. Pursuant to MCL 552.605(2)(d), a court may deviate from the child support formula if it states in writing or on the record "[t]he reasons why application of the child support formula would be unjust or inappropriate in the case." See also *Holmes*, 281 Mich at 588. A court may enforce an agreement between parties to deviate from the child support formula, as here, *only if* the requirements of MCL 552.605(2) are met, MCL 552.605(3). *Id*. at 588-589. Here, other than stating in the consent judgment of divorce that plaintiff agreed to waive application of SERF, the court failed to state on the record, explicitly, that plaintiff's agreement provided a reason why adhering to the formula would be unjust or inappropriate. For several reasons, however, this is not a basis for finding the waiver unenforceable.

This Court, in *Holmes*, 281 Mich App at 591, noted that a circuit court has the authority to exercise its discretion in enforcing voluntary agreements to pay additional child support contained in divorce judgments:

> [W]here the parties entered into an agreement that was incorporated by the court in its judgment, and the parties concede they knew [the terms] at the time [], it would be an invitation to chaos to hold that such provision was not enforceable. It would permit parties to divorce actions to play fast and loose with the court and with the other parties to the action by entering into agreements which they had no intention of performing. [Quoting *Ovaitt v Ovaitt*, 43 Mich App 628, 638; 204 NW2d 753 (1972).]

Further, it would be inequitable to allow plaintiff to challenge the waiver now because he failed to challenge the waiver's validity in a previous matter regarding his child support obligation. The Michigan Supreme Court, in *Paschke v Retool Industries*, 445 Mich 502, 509-510; 519 NW2d 441 (1994), stated that courts use the doctrine of judicial estoppel as a tool to impede parties from playing "fast and loose" with the legal system:

> [A] party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. … [T]he mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent. [Internal citations, quotations, and emphasis omitted.]

Here, plaintiff brought a motion to reduce child support in 2002, wherein he did not challenge the validity of the waiver. Rather, plaintiff took the position that, pursuant to his agreement to waive application of SERF, 127 overnights should be used to calculate his support obligation, even though the actual number of overnights exceeded 127. The court accepted plaintiff's position as true and calculated his support obligation accordingly. Wholly inconsistent with that position, plaintiff now argues that the actual number of overnights should be used to calculate his support obligation, rather than 127 overnights as agreed. This is an attempt to play fast and loose with the legal system, which we will not permit.

Moreover, plaintiff cannot challenge the child support calculation contained in the consent judgment of divorce because plaintiff's support obligation has been modified multiple times in the nine years since its issuance. A challenge to a support obligation no longer in effect is moot. Plaintiff challenges the consent judgment of divorce for failure to satisfy MCL 552.605(2), but the support obligation contained therein is no longer in effect. Indeed, each time a court modified plaintiff's support obligation, it deviated from the child support formula pursuant to plaintiff's waiver, thereby triggering the statutory requirement to provide a reason why adhering to the formula would be unjust or inappropriate. Yet plaintiff does not challenge the opinion and order that is the subject of this appeal, which sets forth plaintiff's current child support obligation, on the ground that *that* trial court failed to state a reason on the record pursuant to MCL 552.605(2). Even had plaintiff brought such challenge, review of the record reveals that the trial court clearly fulfilled its statutory obligation by acknowledging the parties' contractual settlement agreement and the equities of the situation.

Similarly, plaintiff's assertion that none of the eighteen deviation factors apply to this case is without merit. The final deviation factor provides that strict application of the child support formula may be found unjust or inappropriate based on "[a]ny other factor the court deems relevant to the best interests of a child." 2008 MCSF § 1.04(E)(18). The court's decision to enforce the parties' contractual agreement clearly falls within this catchall factor.

Plaintiff next argues that the waiver is unenforceable for lack of consideration and that the trial court relied on facts not in evidence to conclude that plaintiff waived application of SERF in exchange for no spousal support. We disagree. As a general matter, courts will not inquire into the adequacy of consideration. *GMC v Dep't of Treasury*, 466 Mich 231, 239; 644 NW2d 734 (2002). Consideration requires a bargained for exchange, meaning a promise that provides a benefit to one side or a detriment to the other. *Id*. at 238-239. Here, viewing the consent judgment of divorce, it is clear that each party gave up certain rights in exchange for promises on the part of the other. In addition to setting forth plaintiff's child support obligation, the judgment provided that there shall be no spousal support, that the parties shall have joint custody of their two minor children, and that plaintiff shall be allotted parenting time. Further, plaintiff testified that he agreed to waive application of SERF because he wanted to make sure that defendant had enough money to care for their children. In other words, it was important to plaintiff—i.e., a benefit to him—that their children received proper care. Thus, adequate consideration supported the waiver, and the trial court did not err in enforcing the parties' agreement as written.

Plaintiff next argues that, because the 2008 amendments to the MCSF eliminated SERF, the trial court should have applied SERF's successor, the Parental Time Offset Formula. We disagree. Before 2008, SERF applied where each parent had at least 128 overnights annually, and resulted in a lower child support obligation, with the understanding that "as parents spend more time with their children they directly contribute toward a greater share of all expenses." 2004 MCSF § 3.05. Now, under the Parental Time Offset Formula, "[p]resuming that as parents spend more time with their children they will directly contribute a greater share of the children's expenses, a base support obligation needs to offset some of the costs and savings associated with time spent with each parent." 2008 MCSF § 3.03(A)(1). Accordingly, a parental time offset that is dependent on the actual number of overnights should be applied to adjust the base support obligation. 2008 MCSF § 3.03(C).

Here, plaintiff waived application of SERF with the understanding that 127 overnights were to be used to calculate his support obligation, even though his actual number of overnights exceeded this figure. In essence, plaintiff agreed that his support obligation would not be based on actual number of overnights. Logically, then, the trial court construed plaintiff's agreement to extend to waive application of the Parental Time Offset Formula, presumably because it believed that this was most consistent with the parties' intent. Indeed, applying the Parental Time Offset Formula would run directly counter to the parties' intent that plaintiff's child support obligation not depend on actual number of overnights.

Plaintiff, however, argues that the Parental Time Offset Formula should apply despite the waiver because, according to the 2008 MCSF Manual, "[a]n offset for parental time generally applies to every support determination whether in an initial determination or subsequent modification, whether or not previously given." 2008 MCSF § 3.03(B). We disagree. As this Court stated in *Holmes*, 281 Mich App at 592, "because the child support guidelines set forth a parent's minimum support obligation, a voluntarily assumed obligation to pay an amount in excess of the minimum is not inherently objectionable." Accordingly, "a contract enhancing a parent's child support obligation should be enforced, absent a compelling reason to forbear." *Id*. This principle is no less true today than when this Court decided *Holmes*. In other words, contrary to plaintiff's position, it makes no difference that this Court decided *Holmes* before the 2008 amendments went into effect. The insight *Holmes* provides with respect to agreements to overpay child support remains applicable regardless of what formula is in place to calculate child support *absent* such agreement.

We also disagree with plaintiff's argument that there exists a compelling reason to forbear enforcement of his agreement to overpay child support. Plaintiff points out that his income has decreased, he has no money set aside for retirement, and he has accumulated substantial debt. Even considering this information, however, plaintiff has not established a compelling reason to forbear the parties' agreement. Having found that plaintiff established a change in circumstances, the trial court took plaintiff's decreased income and defendant's increased income into account when it recalculated plaintiff's support obligation. Paying the reduced amount that the court ordered would not cause plaintiff such hardship that this Court must forbear plaintiff's agreement to waive application of the child support formula.

In his second issue on appeal, plaintiff argues that the trial court erred in adding amounts listed as deductions on his tax return for motor vehicle, insurance, and telephone expenses to his income for the purpose of calculating child support. We agree in part. "Whether a trial court properly operated within the statutory framework relative to child support calculations and any deviation from the child support formula are reviewed de novo as questions of law." *Peterson v Peterson*, 272 Mich App 511, 516; 727 NW2d 393 (2006).

Relevant portions of the 2008 MCSF Manual are as follows:

> 2.01(A) The term "net income" means all income minus the deductions and adjustments permitted by this manual. A parent's "net income" used to calculate support will not be the same as that person's take home pay, net taxable income, or similar terms that describe income for other purposes.

***

> 2.01(E) Do not consider expenses consistent with a parent's business or occupation as part of a parent's income. Unless otherwise counted, a parent's income includes the following expenses if they are inconsistent with the nature of the parent's business or occupation:
>
> ***
>
> (3) Home office expenses, including rent, hazard insurance, utilities, repairs, and maintenance.
>
> ***
>
> (5) Travel expense reimbursements, except where such expenses are inherent in the nature of the business or occupation (e.g., a traveling salesperson), and do not exceed the standard rates allowed by the State of Michigan for employee travel.
>
> (6) Personal automobile repair and maintenance expenses.

Plaintiff first argues that the cost of insurance constituted an expense consistent with his business or occupation, which should not be included in his income for the purpose of determining child support pursuant to MCSF § 2.01(E). Plaintiff testified that the insurance at issue was for legal malpractice and workers' compensation. We agree with plaintiff that these expenses are consistent with running a law firm and that the trial court erred in adding this deduction from his tax return to his income for the purpose of determining his child support obligation.

Plaintiff also challenges the inclusion of one half of plaintiff's telephone expenses which is listed as a deduction on plaintiff's tax return. It appears that plaintiff uses the same cell phone for business and personal use. It also appears that the trial court, without any proofs from plaintiff establishing the percentage of telephone use that could fairly be attributed to his business, took a reasonable approach by splitting the difference and including only half of plaintiff's telephone expense in his income for the purpose of calculating his support obligation. Plaintiff has failed to produce any proof, such as a cell phone bill, to rebut the trial court's reasonable division. Thus, in this regard, the trial court did not err.

Plaintiff next challenges the trial court's decision to include in his income for the purpose of determining his support obligation certain travel expenses related to his business, listed as a deduction on his tax return. Similar to plaintiff's legal malpractice and workers' compensation expenses, business travel is consistent with plaintiff's occupation under MCSF § 2.01(E), and the trial court erred in including this expense in his income. Traveling to and from court, depositions, and meetings is "inherent in the nature of [plaintiff's] business." MCSF § 2.01(E)(5).

Finally, plaintiff argues that the trial court erred in including in his income for the purpose of calculating child support an amount of $6,184 for "shareholder insurance," which

plaintiff does not dispute constituted the cost of his personal health insurance. According to plaintiff, the court mistakenly assumed that plaintiff's income reflected a deduction for this amount, when it did not, and added the amount to plaintiff's income for the purpose of calculating his support obligation, with the result that plaintiff's income used to calculate his support obligation included the amount twice. According to an affidavit prepared by plaintiff's accountant, an amount of $6,184 was never deducted from gross revenues on plaintiff's tax return, and his $61,140 income in 2008 does not reflect a deduction for the $6,184 "shareholder insurance" expense. Yet, in the court's opinion and order, it stated that it was including certain *deductions* in plaintiff's income. Among these purported deductions was $6,184 for "shareholder insurance." Because plaintiff's tax return does not reflect an actual deduction for "shareholder insurance," however, the court erred in including this amount in plaintiff's income under MCSF § 2.01(E).

We affirm the trial court's decision to enforce plaintiff's agreement to waive the child support formula. With regard to the inclusion of certain deductions in plaintiff's income for the purpose of calculating his support obligation, however, we reverse and remand to the trial court for a recalculation consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood