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NO. COA04-1510

NORTH CAROLINA COURT OF APPEALS

Filed: 3 January 2006

LINDA SUE WRIGHT,
Plaintiff,

v.

Carteret County
No. 00 CVD 1052

JEFFERY S. ANDERSON,
Defendant.

Appeal by plaintiff from an order entered 15 June 2004, *nunc pro tunc* for 17 December 2003 by Judge Karen A. Alexander in Carteret County District Court. Heard in the Court of Appeals 16 June 2005.

Pennington & Smith, by Tamara Avis Smith and Ralph S. Pennington, for the plaintiff-appellant.

Beswick, Goines & Stephenson, P.A., by George W. Beswick, for defendant-appellee.

JACKSON, Judge.

Plaintiff and defendant were granted a divorce on 23 May 1991 in Maryland. At the time of filing this action, plaintiff was a citizen of New Hanover County, North Carolina and defendant was a citizen of Carteret County, North Carolina. Defendant is a medical doctor and plaintiff is a registered nurse at New Hanover Medical Center.

Plaintiff and defendant had a child of this marriage on 26 December 1986. On 28 March 1991, the Maryland court granted custody in favor of plaintiff and set forth visitation rights for defendant. On 3 December 1991, the Maryland court modified the March order and awarded defendant custody without granting visitation rights to plaintiff. Thereafter on 2 July 1992, the Maryland court issued a consent order ("Maryland Order"), addressing equitable distribution, alimony, and child support.

From 1992 until 25 June 2000, the child lived with defendant. Pursuant to the terms of the Maryland order, plaintiff paid no child support to defendant. On 26 June 2000, the child began living with plaintiff. Defendant paid no child support for the child from 26 June 2000 until ordered to do so in January 2004.

Plaintiff initiated this action on 26 June 2000 in New Hanover County District Court. Plaintiff initially sought temporary and permanent custody of the minor child born of the marriage, and asked the court not to enforce the Maryland Order.

On that same date, plaintiff obtained a Temporary Restraining Order ("T.R.O.") restraining defendant from enforcing the Maryland Order on child custody, and from obtaining physical or legal custody of the minor child. The T.R.O. was extended, and the hearing was continued twice.

On 1 August 2000, defendant filed motions, answers, and counterclaims requesting the court to dismiss plaintiff's action pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Defendant also filed a motion to change venue from New

Hanover County to Carteret County. Defendant then filed a petition to register foreign child custody determination in Carteret County.

On 10 August 2000, an order of temporary custody was entered providing that plaintiff was vested with temporary custody of the child pending an evidentiary hearing. The order further stated that before modification of the order, the court would hold a hearing and hear testimony from the child. On 21 August 2000, plaintiff filed an objection to registration of foreign child custody determination. On 9 May 2003, plaintiff filed a motion to enter permanent child custody order. On 17 December 2003, the trial court heard plaintiff and defendant's claims for child support, child custody, and attorneys' fees.

The trial court found that: (1) defendant must pay plaintiff ongoing child support in the amount of \$1,563.93 per month beginning January 2004; (2) plaintiff owed defendant \$8,351.87 as child support arrears for three years immediately preceding the filing of suit; (3) defendant owed plaintiff \$64,041.06 for the time period from the filing of the complaint through 31 December 2004 as child support arrears; (4) the arrears found to be owed by defendant to plaintiff would be offset by the amount of arrears the trial court found that plaintiff owed defendant, for net arrears owed by defendant to plaintiff of \$55,689.19; (5) arrears were to be paid at a rate of \$200.00 per month, in addition to the \$1,563.93 monthly support payment, until the child reaches 18 years of age, and then at the ongoing child support rate of \$1,565.00 until the balance is paid in full; and (6) plaintiff is not

entitled to attorneys' fees because of the earning abilities of the parties and their present financial state. Plaintiff now appeals.

Plaintiff contends that the trial court erred in failing to find that the Maryland Order prohibited defendant from seeking child support prior to a modification of that previous order. Specifically, plaintiff contends that she does not owe defendant arrears in the amount of \$8,351.87, that she is entitled to interest due on the past child support payments, and that she is entitled to recover attorneys' fees.

Our review of the trial court's child support order is limited to whether the trial court abused its discretion. *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005) (citing *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002)). "Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

"[T]he purpose of our child support law is to ensure that parents meet their legal obligation to secure support commensurate with the needs of the child and [the parents'] ability . . . to meet the needs." *Id.* at 290, 607 S.E.2d at 683 (quoting *Holt v. Holt*, 29 N.C. App. 124, 126, 223 S.E.2d 542, 544 (1976) (internal quotation omitted) (emphasis omitted)). District courts have broad discretion to devise an appropriate child support award in light of the circumstances of all the parties. *Id.* Further, North Carolina General Statutes, section 50-13.4(e) (2003) provides:

Payment for the support of a minor child shall
be paid by lump sum payment, periodic

payments, or by transfer of title or possession of personal property of any interest therein, or a security interest in or possession of real property, as the court may order. The court may order the transfer of title to real property solely owned by the obligor in payment of arrearages of child support so long as the net value of the interest in the property being transferred does not exceed the amount of the arrearage being satisfied. In every case in which payment for the support of a minor child is ordered and alimony or postseparation support is also ordered, the order shall separately state and identify each allowance.

Plaintiff's first argument contends that in the Maryland Order defendant waived his right to child support in exchange for, *inter alia*, plaintiff waiving her right to alimony as well as relinquishing her interest in a jointly-titled sailboat. Based upon these facts, plaintiff disputes the trial judge's ruling that she owes defendant child support in arrears in the amount of \$8,351.87.

Courts generally are reluctant to allow attacks on consent judgments. *Reavis v. Reavis*, 82 N.C. App. 77, 82, 345 S.E.2d 460, 463 (1986). This policy recognizes that, absent duplicitous tactics by either party, a negotiated settlement reflects the desires of both parties, and usually is reached "with an eye to events likely to follow the judgment." *Id.* However, no contract or agreement between a husband and wife can deprive the court of its statutory and inherent responsibility to provide for the welfare of children involved. *Story v. Story*, 221 N.C. 114, 116, 19 S.E.2d 136, 137 (1942). Parents may not contract away their obligation toward their children, *e.g.*, repudiating child support,

because the child was not party to that agreement. *Id.* The Maryland Order reads in pertinent part,

- E. That, based upon the agreement of the parties, ... the Plaintiff [defendant *sub judice*] shall abandon his claim for child support for the minor child, both now and in the future.

In the instant case, the trial judge made no findings regarding the Maryland Order. We first must determine whether the Maryland Order is valid and enforceable in North Carolina. The Maryland Order is interpreted as a child support order under Maryland law. *See Kramer v. Kramer*, 339 A.2d 328, 335 (Md. Ct. Spec. App. 1975) (stating, the review of an agreement that involves child support should follow the objective law of contract interpretation, "what a reasonable person in the position of the parties would have thought the agreement meant at the time it was effectuated"). It is clear in this case that both parties, by specifically addressing the issue of child support in the Maryland Order, intended this document to govern child support matters.

The Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) establishes uniform rules regarding the choice of law that state courts must follow regarding out-of-state child support orders. *See 28 U.S.C. Sec. 1738(B)(g)* (Supp. 1996). When determining the validity of the Maryland Order, according to the guidelines set forth in FFCCSOA, we apply Maryland law in *interpreting* the order, but North Carolina law in *enforcing* it. *Kelly v. Otte*, 123 N.C. App. 585, 589, 474 S.E.2d 131, 134 (1996) (emphasis added); *disc. rev. denied*, 345 N.C. 180, 479 S.E.2d 204

(1996). Here, the distinction is inconsequential because according to the laws in both states the child support provision in the Maryland Order is void *ab initio*. As articulated *supra*, in North Carolina, a husband and wife may freely contract with each other concerning their property rights, *Ritchie v. White*, 225 N.C. 450, 453, 35 S.E.2d, 414, 416 (1945) (citation omitted), however, neither party may contract away the rights of their children. See *Story*, 221 N.C. at 116, 19 S.E.2d at 137. Consent orders in which a parent contracts away a child's right to child support are also void *ab initio* in Maryland for similar reasons. See *Lacy v. Arvin*, 780 A.2d 1180, 1186 (Md. Ct. Spec. App. 2001) (noting, that the parents of a child . . . owe the child a legal, statutory obligation of support); see also, *Rand v. Rand*, 392 A.2d 1149 (Md. Ct. Spec. App. 1978) (holding a parent owes this obligation of support to the child, not to the other parent), *vacated on other grounds*, 374 A.2d 900 (Md. 1977); *Lieberman v. Lieberman*, 568 A.2d 1157, 1163 (Md. Ct. Spec. App. 1990) (holding "[a] parent cannot agree to preclude a child's right to support by the other parent, or the right to have that support modified in appropriate circumstances").

In the case *sub judice*, this couple effectively contracted away the property rights of the child, e.g., child support, by entering into the Maryland Order. In entering into this contract, defendant did not waive a claim he had a right to waive, but instead waived a prospective property right of the child. Defendant was not entitled to make such a waiver. See *Story*, 221

N.C. at 116, 19 S.E.2d at 137. This prospective waiver of a claim to any child support "both now and in the future" always is adverse to the best interest of the child. Any number of factors could have arisen severely compromising defendant's ability to provide support for his minor child, *e.g.*, loss of his medical license, disability, unforeseen medical expenses related to the child. If this court allows such agreements to be enforced, the child is the party who will suffer if her needs can no longer adequately be met by the party who abdicated his "right" to her child support. In this instance, the absolute bar on the right to recover any child support spelled its doom, and it is not necessary to remand this issue to the trial judge for further findings of fact. For the reasons stated above, the trial court's ruling is affirmed as to the award of \$8,351.87 in child support arrears owed by plaintiff.

Plaintiff's second claim assigns error to the trial judge's failure to award attorneys' fees. Specifically, plaintiff asserts that defendant refused to provide support which was adequate under the circumstances existing at the time of the filing of this action and that defendant had the means and ability to pay the child support but failed to do so. We disagree.

In child support cases, the award of attorneys' fees is governed by North Carolina General Statutes, section 50-13.6 (2003) which provides:

In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court *may in its discretion* order payment of reasonable

attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

(Emphasis added).

In the instant case, the trial judge made no findings of fact, nor was there any evidence in the record that defendant had been "ordered to furnish support" and had "refused to provide support," a prerequisite to the awarding of attorneys' fees. On the contrary, the order issued by the trial judge is the first and only such order requiring defendant to furnish child support. The fact that the order requires payment of back support is of no consequence in determining whether plaintiff is entitled to attorneys' fees. The trial judge concluded as a matter of law that "based on the earning abilities of the parties and their present financial state," neither party was entitled to attorneys' fees. This determination falls squarely within the purview of the trial judge, and we see no reason to disturb her ruling. Consequently, we affirm the trial judge's decision not to grant attorneys' fees to plaintiff.

Plaintiff's final claim assigns error to the trial judge's decision not to award interest on the past child support she is

due. Specifically, plaintiff contends that defendant did not pay child support for three and one half years although defendant had the means and ability to pay child support, and plaintiff now has lost the use of those funds until it is paid. Plaintiff further charges that if the court is to allow the defendant to pay that past due amount over a period of years going forward, she is entitled to interest on those installment payments. We will address each argument in turn.

"When determining a child support award, a trial judge has a high level of discretion, not only in setting the amount of the award, but also in establishing an appropriate remedy." *Taylor v. Taylor*, 128 N.C. App. 180, 181, 493 S.E.2d 819 (1997) (quoting *Moore v. Moore*, 35 N.C. App. 748, 751, 242 S.E.2d 642, 644 (1978)). "Absent a clear abuse of discretion, a judge's determination of what is a proper amount of support will not be disturbed on appeal." *Taylor*, 128 N.C. App. at 181, 493 S.E.2d at 819 (1997) (quoting *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985)). To support the conclusions of law, the judge also must make specific findings of fact so that we may determine whether the judge gave due regard to the facts of this particular case. *Plott*, 313 N.C. at 69, 326 S.E.2d at 868. "Such findings are necessary to an appellate court's determination of whether the judge's order is sufficiently supported by competent evidence." *Id.* (quoting *Crosby v. Crosby*, 272 N.C. 235, 158 S.E.2d 77 (1967)). To disturb the trial judge's calculation, the appellant must demonstrate that the ruling was manifestly unsupported by reason.

Id. (quoting *Clark v. Clark*, 301 N.C. 123, 128-29, 271 S.E.2d 58, 63 (1980)).

Here there is adequate evidence in the record that the trial judge in this case took a reasoned and thorough approach to the determination of total child support allocations, as well as each party's share of that total, to wit she devoted more than seven pages in the record to explaining the model she used to determine the award. North Carolina General Statutes, section 50-13.4 was designed to be intentionally broad, allowing the trial judge great discretion in fashioning an appropriate remedy. *Griffin v. Griffin*, 103 N.C. App. 65, 404 S.E.2d 478 (1991). While the trial judge had the discretion to order interest on the past due child support, thereby increasing the net award of \$55,689.19 that plaintiff was due, she elected not to do so. That determination was properly within her discretion and, therefore, plaintiff's assignment of error is overruled.

Plaintiff's second challenge rests upon the trial judge's decision to allow defendant a period of approximately four years during which to pay the \$55,589.19. In citing to our general statutes, this Court stated that "[u]nder North Carolina law, past due child support payments vest when they accrue." *Taylor*, 128 N.C. App. at 182, 493 S.E.2d at 820 (citing N.C. Gen. Stat. § 50-13.10(a) (1995)). In holding that interest may be awarded, this Court reasoned that "[a]llowing plaintiff to defer payment for years of his obligations...without paying interest on the award,

would effectively grant him an interest-free loan from his ex-wife." *Id.*

The trial judge in this case determined that plaintiff was entitled to \$55,689.19, a sum certain if it were due today. If defendant were simply to write plaintiff a check for the arrearages, he would be entitled to do so without penalty of interest. Equity dictates however, that if defendant chooses to extend the payments he owes his ex-wife over a period of time, she be compensated for the loss of use of those funds, barring a finding by the trial judge to the contrary. *See generally Id.* In other commercial transactions this compensation usually takes the form of interest.

The trial judge made no findings of fact or corresponding conclusions of law justifying the decision to allow defendant to repay the past due child support amount in installments over a period of approximately four years, without having to pay any interest on that amount going forward. Absent findings by a judge to the contrary, this installment arrangement qualifies as a forced interest free loan from plaintiff to defendant. *Id.*

We affirm as to the trial judge's rulings on the amount of child support arrears owed by plaintiff, and to the judge's rulings denying attorneys' fees. We also affirm the trial judge's decision not to award interest on the past due child support, and we remand to the trial court to make further findings of fact regarding interest due on the installment plan for the payment of the accrued child support going forward sufficient to allow this court to conduct an adequate review of the award.

Affirmed in part, remanded in part.

Judges HUDSON and STEELMAN concur.

Report per 30 (e).