[Cite as *McMillen v. McMillin*, 2010-Ohio-2415.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOHN T. MCMILLEN Plaintiff-Appellant -vs- ANGELA MCMILLEN Defendant-Appellee	JUDGES: Hon. Julie A. Edwards, P.J. Hon. William B. Hoffman, J. Hon. John W. Wise, J. Case No. 2009-COA-033 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Ashland County Court of Common Pleas Court, Domestic Relations Division, Case No. 02-DIV-147
JUDGMENT:	Affirmed in part; and reversed in part
DATE OF JUDGMENT ENTRY:	May 26, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
CATHERINE D. GOLDMAN Weldon, Huston, & Keyser, L.L.P. 76 N. Mulberry Street Mansfield, Ohio 44902	ROBERT C. HUNT 3250 W. Market Street, Suite 203 Fairlawn, Ohio 44333

Hoffman, J.

{¶1} Plaintiff-appellant John T. McMillen appeals the September 24, 2009 Judgment Entry, entered by the Ashland County Court of Common Pleas, Domestic Relations Division, which overruled his objections to the magistrate's June 18, 2009 Decision. Defendant-appellee is Angela McMillen.

STATEMENT OF THE FACTS AND CASE

{¶2} The parties were married on January 15, 1982, in Cleveland, Ohio. Four children were born as issue of said union. On July 3, 2002, Appellant filed a Complaint for Divorce. Appellee filed an Answer and Counterclaim for Divorce. The matter came on for final hearing on December 6, 2002. Via Judgment Entry/Decree of Divorce filed December 9, 2009, the trial court terminated the parties' marriage. The trial court approved and adopted as part of the decree an agreement of the parties, which provided for division of the marital estate, an award of spousal support, custody, child support, and the payment of private high school tuition and expenses for the two minor sons, as well as a provision for the payment of post high school education expenses for all of the children.

{¶3} On February 9, 2006, shortly before the eighteenth birthday of the oldest of their two minor sons, Appellee attempted to file a Motion for Modification of Child Support. The Clerk of Courts did not file the motion until March 13, 2006, after receiving the requisite financial affidavit. Appellee sought the modification of child support in regard to the percentage of expenses each party was to pay for the children's school tuition and related fees, the children's school-related personal activities; the amount of child support Appellant owed; the provisions relative to the engagement and payment of

health insurance for the children; the percentage of uninsured medical expenses which each party was to pay; and the percentage each party was to pay for the post-secondary education of the children. The trial court scheduled the matter for hearing before the magistrate on May 4, 2006. At the request of the magistrate, the parties filed post-hearing briefs in support of their positions; Appellee filing hers on May 25, 2006, and Appellant filing his on May 31, 2006.

{¶4} The magistrate issued his decision some three years later on June 18, 2009. The magistrate found a change of circumstances had occurred as Appellant's income had increased substantially since the divorce and the educational expenses of the children had increased. Having found a change in circumstances, the magistrate concluded it had jurisdiction to modify the parties' agreement regarding college expenses. The magistrate ordered Appellant to pay an increased amount of child support, retroactive to June 1, 2006, and to pay 88% of all the children's expenses which had previously been paid equally by the parties. Appellant filed objections to the magistrate's decision and Appellee filed a memorandum in opposition thereto. Via Judgment Entry filed September 24, 2009, the trial court overruled Appellant's objections, and approved and adopted the magistrate's June 18, 2009 Decision as order of the court.[1]

{¶5} It is from this judgment entry Appellant appeals, raising the following assignments of error:

[1] Appellant only appeals the trial court's approval and adoption of the Magistrate's Decision with respect to the issue of payment of post-high school educational expenses.

{¶6} "I. THE TRIAL COURT LACKED JURISDICTION TO MODIFY THE UNAMBIGUOUS PROVISIONS OF THE PARTIES' AGREED DECREE OF DIVORCE REGARDING THE PAYMENT OF POST HIGH SCHOOL EDUCATIONAL EXPENSES.

{¶7} "II. ASSUMING ARGUENDO THAT THE DECREE OF DIVORCE WAS AMBIGUOUS REGARDING CONTINUING SUBJECT MATTER JURISDICTION TO MODIFY THE POST HIGH SCHOOL EDUCATION EXPENSE PROVISION, THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION BY PRESUMPTIVELY FINDING THAT THE PARTIES INTENDED THE PROVISION TO BE IN THE NATURE OF CHILD SUPPORT AND THEREFORE MODIFIABLE."

I

{¶8} In his first assignment of error, Appellant asserts the trial court lacked jurisdiction to modify provisions of the parties' agreement regarding the payment of post-high school educational expenses.

{¶9} Paragraph 23 of the Divorce Decree provides:

{¶10} "It is further ordered, adjudged and decreed that pursuant to the agreement of the parties, Plaintiff and Defendant shall each contribute 50 percent of the expenses incurred for a child of the parties to attend post high school education. Post high school education expenses shall be defined as room, board, tuition and books. The obligation of Plaintiff and Defendant is contingent upon a child being a full-time student in good academic standing. The obligation for contribution shall terminate upon a child attaining the age of 25 years." December 9, 2002 Judgment Entry/Decree of Divorce.

{¶11} A domestic relations court lacks jurisdiction to order a parent to financially support an emancipated child in the absence of a contract providing for the same. *Miller v. Miller* (1951), 154 Ohio St. 530. Parties may, as Appellant and Appellee did in the instant action, negotiate an agreement providing for the payment of post-emancipation educational expenses, and incorporate such provision into an agreed judgment entry. "An agreed judgment entry is a contract that is reduced to judgment by a court." *Nunnari v. Paul,* Lucas App. No. L-06-1281, 2007-Ohio-5591, at ¶ 16, quoting *Slovak v. Spivey,* 155 Ohio App.3d 479, 801 N.E.2d 896, 2003-Ohio-6717, at ¶ 25, citing *Spercel v. Sterling Industries, Inc.* (1972), 31 Ohio St.2d 36, 39, 285 N.E.2d 324, and *Najarian v. Kreutz* (Aug. 31, 2001), Lucas App. No. L-00-1302 (stating that the law of contracts applies where the parties to a divorce resolve the issues through an agreed judgment entry). "Thus, an agreed judgment entry is subject to the same rules of construction as a contract, in which common, unambiguous words will be given their ordinary meaning, unless some other meaning is clearly suggested from the face or overall contents of the agreement." *Nunnari,* supra, citing *Ronyak v. Ronyak,* Geauga App. No.2001-G-2383, 2002-Ohio-6698, at ¶ 10; *Fabre v. Fabre,* Stark App. No.2007CA00224, 2008-Ohio-5677, at ¶ 19 (stating that a court applying an agreed judgment entry is "required to interpret the provisions of [an] agreed judgment entry according to the common, ordinary and unambiguous meanings of the terms in making its decision").

{¶12} Appellant contends the agreement to pay post-high school education expenses as set forth in paragraph 23 is a division of property; therefore, outside the subject matter jurisdiction of the court to modify pursuant to R.C. 3105.171(I). R.C.

3105.171 addresses the division of marital and separate property. R.C. 3105.171(I) specifically provides: “A division or disbursement of property or a distributive award made under this section is not subject to future modification by the court.”

{¶13} Appellee counters paragraph 23 is an agreement to continue child support beyond the age of majority. Appellee explains, because the parties agreed to pay such expenses and incorporated their agreement into the Divorce Decree, the trial court retained jurisdiction to modify the provision pursuant to R.C. 3119.86.

{¶14} R.C. 3119.86 reads, in relevant part:

{¶15} “(A) Notwithstanding section 3109.01 of the Revised Code, both of the following apply:

{¶16} “(1) The duty of support to a child imposed pursuant to a court child support order shall continue beyond the child's eighteenth birthday only under the following circumstances: * * *

{¶17} “(b) The child's parents have agreed to continue support beyond the child's eighteenth birthday pursuant to a separation agreement that was incorporated into a decree of divorce or dissolution.

{¶18} “ * * *

{¶19} “(C) If a court incorporates a separation agreement described in division (A)(1)(b) of this section into a decree of divorce or dissolution, the court may not require the duty of support to continue beyond the date the child's parents have agreed support should terminate.”

{¶20} Where ambiguity is complained of and where the parties dispute the meaning of clauses in the agreement, it is the duty of the court to examine the contract

and determine whether the ambiguity exists. *Oberst v. Oberst,* Fairfield App. No. 08-CA-34, 2009-Ohio-13, ¶ 21. If an ambiguity does exist, the court has the duty and the power to clarify and interpret such clauses by considering the intent of the parties as well as the fairness of the agreement. Id.; *Houchins v. Houchins,* Stark App. No.2006CA00205, 2007-Ohio-1450, ¶ 21. However, if the terms of the Decree are unambiguous then the courts must apply the normal rules of construction. *Houchins,* supra. The interpretation of the clause is a matter of law and the court must interpret the intent of the parties using only the language employed. Id.

{¶21} The determination of whether an ambiguity exists is a question of law to which we apply a de novo standard of review. *Barnes v. Barnes,* Stark App. No.2003CA00383, 2005-Ohio-544, ¶ 18.

{¶22} We find the terms of the December 9, 2002 Judgment Entry/Decree of Divorce are clear and unambiguous. Paragraph 23 expressly provides Appellant and Appellee "shall each contribute 50 percent of the expenses incurred for a child of the parties to attend post high school education." Because we find no ambiguity, we review the instrument as a whole, looking at the common, ordinary and unambiguous meanings of the terms utilized, to determine the intent of the parties.

{¶23} The maintenance and support of the two minor children is separately addressed in the Decree under sections 13 and 14. Black's Law Dictionary (6 Ed.1990) 953, defines the word "maintenance" as "[t]he furnishing by one person to another, for his or her support, of the means of living, or food, clothing, shelter, etc. * * *." The word "support," by definition, includes "anything requisite to housing, feeding, clothing, health, proper recreation, vacation, traveling expense, or other proper cognate purposes * * *. "

Id. at 1439. The words "maintenance" and "support", as defined, do not encompass post-high school educational expenses. We find the parties' intent was to provide their four children with the gift of a college education. Such gift is separate and distinct from Appellant's obligation to support the two minor children until they were emancipated. Therefore, we find the trial court erred in finding paragraph 23 to be in the form of child support; therefore, modifiable.

{¶24} We find our determination to be supported by the precedent of this Court, which has previously found a trial court improperly determined an agreement between a husband and wife, which obligated the husband to "pay one half of college expenses including tuition, room, board, books and other required expenses", was in the form of child support. *Chester v. Baker* (Aug. 10, 1995), Licking App. No. 95 CA 7, unreported. We disagree with the trial court's conclusion *Rubins v. Rubins* (March 18, 1993), Cuyahoga App. No. 61937, unreported, is factually distinguishable from the instant action based upon the establishment of an educational trust by the *Rubins'*s husband and wife. The fact the parties herein did not create a mechanism through which the children's educations would be funded does not convert the agreement to pay college expenses into an agreement to extend child support beyond the age of majority.

{¶25} Appellant's first assignment of error is sustained.

II

{¶26} In his second assignment of error, Appellant submits, assuming, arguendo, the Decree is ambiguous, the trial court abused its discretion by finding the parties intended paragraph 23 to be in the nature of child support; therefore, modifiable.

{¶27} In light of our disposition of Appellant's first assignment of error, we find Appellant's second assignment of error to be moot.

{¶28} The judgment of the Ashland County Court of Common Pleas, Domestic Relations Division, is reversed with respect to the payment of post-high school educational expenses. All remaining portions of the judgment are affirmed.

By: Hoffman, J.

Edwards, P.J. and

Wise, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ John W. Wise
HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOHN T. MCMILLEN	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
ANGELA MCMILLEN	:	
	:	
Defendant-Appellee	:	Case No. 2009-COA-033

For the reasons stated in our accompanying Opinion, the judgment of the Ashland County Court of Common Pleas, Domestic Relations Division, is reversed in part; and affirmed in part. Costs assessed to Appellee.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ John W. Wise
HON. JOHN W. WISE