[Cite as *DeSantis v. Lara*, 2009-Ohio-2570.]

# IN THE COURT OF APPEALS
# FIRST APPELLATE DISTRICT OF OHIO
# HAMILTON COUNTY, OHIO

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| THOMAS DESANTIS, | : | APPEAL NO. C-080482<br>TRIAL NO. DR-0601301 |
| Plaintiff-Appellant, | : | |
| vs. | : | *D E C I S I O N.* |
| DIANA LARA, | : | |
| Defendant-Appellee. | : | |

Civil Appeal From: Hamilton County Court of Common Pleas, Domestic Relations Division

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: June 5, 2009

*John A. Rebel*, for Plaintiff-Appellant,

*James H. Moskowitz*, for Defendant-Appellee.

Note: We have removed this case from the accelerated calendar.

*Per Curiam.*

{¶1} This dispute pivots on whether the parties' settlement agreement that was incorporated but not merged into a divorce decree issued by a New York court contains a choice-of-law clause that required child-support modifications to be decided under New York law. We determine that it does not.

{¶2} Plaintiff-appellant Thomas DeSantis and defendant-appellee Diana Lara were divorced in New York in 2000. Alexandra DeSantis was the only child of the marriage. The divorce decree had incorporated an oral settlement agreement between the parties on several issues including child support. The amount of child support had been calculated pursuant to the New York Child Support Standards Act (CSSA) and had been based upon the 1998 reported income of each party. Under the CSSA, the level of basic child support for one child is presumptively 17% of all income, but the statute allows a deviation if warranted where the combined income of the parties exceeds $80,000. Because DeSantis's income fluctuated, the oral settlement agreement provided that child support was to be recalculated annually.

{¶3} DeSantis's initial child-support obligation did not deviate from the presumptive amount, although it was based upon income exceeding $80,000. The divorce judgment set DeSantis's monthly child-support obligation at $1,761, plus 90% of certain expenses, until Alexandra "reaches the age of twenty-one (21) or is sooner emancipated as defined by law."

{¶4} A New York court issued orders in 2002 and 2005 modifying DeSantis's support obligation in amounts that reflected deviations from the New York presumptive amount. Both orders gave continued effect to the parties' settlement agreement to annually exchange their personal income-tax returns for the

year and to recalculate the amount of support. The 2005 order set DeSantis's monthly child-support obligation at $954.

{¶5} Lara and Alexandra moved to Ohio in August 2004. DeSantis moved to Tennessee in 2005. In 2006, DeSantis registered the New York support orders in Ohio. Ohio's basic child-support schedule provides a lower basic child-support obligation than New York's. DeSantis moved to modify child support under Ohio law, claiming as "a substantial change in circumstances" a greater than 10% differential between his New York child-support obligation and the support obligation calculated under Ohio's basic child-support schedule. DeSantis represented an income of $150,000 for 2005.

{¶6} Lara challenged the application of Ohio law to the dispute. She alleged that the parties had agreed to annually recalculate child support based upon the New York CSSA, and that this agreement included a choice-of-law clause that required the application of New York law in the event that a foreign jurisdiction had to modify support. The parties filed competing motions for partial summary judgment on the choice-of-law issue. A magistrate held in favor of DeSantis, but the trial court sustained Lara's objection and concluded that "[t]he laws of New York shall govern the child support proceedings in this matter."

{¶7} Subsequently, in November and December 2007 and January 2008, hearings were held before a magistrate to determine (1) the amount of support for July 2006 through June 2007, using 2005 income data; (2) the amount of support for July 2007 through June 2008, using 2006 income data; and (3) whether Alexandra had become constructively emancipated under New York law, thus terminating DeSantis's support obligation, even though Alexandra had not reached

the age of majority in New York. The magistrate determined the parties' income for the relevant years and calculated DeSantis's pro-rata support obligations by applying the New York CSSA. However, she refused to consider any deviating factors, adopting Lara's position that the parties had agreed to a strict application of the 17% formula, even for income over $80,000.

{¶8} Additionally, the magistrate determined that Alexandra, who had become 18 years of age in December 2007, had a part-time job and had severed and abandoned her relationship with her father, would become constructively emancipated under New York law upon her high-school graduation. Accordingly, she ordered that child support terminate on June 30, 2008.

{¶9} Both parties filed objections. The trial court adopted the magistrate's determination that DeSantis's support obligation had to be based upon 17% of the parties' combined income, but it sustained several objections concerning the magistrate's determination of DeSantis's support obligation and modified the amount of support accordingly. The court also sustained Lara's objection to the magistrate's finding that Alexandra would become constructively emancipated in June 2008.

{¶10} While his motion to modify support was pending, DeSantis was twice held in contempt for failing to recalculate and pay child support. DeSantis purged both findings of contempt.

{¶11} In three assignments of error, DeSantis now seeks review of several determinations made by the trial court. First, he argues that the trial court erred when it determined that New York law governed the resolution of his motion to modify child support. Second, he argues that the trial court erroneously decided that

his duty to support Alexandra continued. Third, in the alternative, he argues that the court did not correctly set support under New York law. Our resolution of the first assignment of error renders the third assignment of error moot.

## I. Procedural Issues

{¶12} Lara contends that DeSantis's appeal of the choice-of-law issue is barred. She argues that the appeal is untimely because the notice of appeal was filed over a year after the court's February 2007 judgment determining that New York law applied. And she argues that DeSantis did not preserve the issue because he did not specifically refer to the trial court's February 2007 entry in his notice of appeal. We find her arguments flawed.

{¶13} The February 2007 entry was interlocutory until the final judgment that determined the action was entered on May 14, 2008. DeSantis filed the notice of appeal in this case within 30 days of that date, rendering the appeal timely. And DeSantis sufficiently alerted Lara and this court of his intent to contest the interlocutory February 2007 entry: his notice of appeal mentioned the choice-of-law issue, and DeSantis has raised an assignment of error specifically challenging the February 2007 entry in his appellate brief. Thus, we hold that DeSantis's appeal is not barred for those reasons.

{¶14} Lara argues also that appellate review of the choice-of-law issue is precluded by res judicata and the mootness doctrine, because DeSantis was twice found in contempt for failing to pay child support and twice purged the contempt without objecting to the magistrate's use of New York law. But the contempt and

modification proceedings involved different issues, precluding the application of res judicata.[1]

{¶15} The issue in a contempt proceeding is whether the party has failed to comply with a prior court order. The forum court must apply the law of the issuing jurisdiction in an action to enforce a past or current obligation of child support.[2] In this case, the prior court order was issued by a New York court applying New York law. Because of this, the magistrate was compelled to apply New York law in the contempt proceedings. The enforcement of the prior order was independent of the choice-of-law determination with respect to the modification of child support. Accordingly, Desantis's purge of the contempt did not render moot appellate review of the trial court's determination that New York law governed DeSantis's motion to modify child support.

{¶16} Thus, we conclude that DeSantis has preserved the choice-of-law issue for appeal and that he has timely appealed from the final judgment that determined the action.

## II. Choice of Law

{¶17} Lara maintains that the parties' settlement agreement contains a choice-of-law clause, and that because of this clause, New York law must govern any modification. DeSantis asserts that the settlement agreement lacks a choice-of-law clause governing modifications, and that such a clause would be unenforceable under Ohio choice-of-law principles.

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[1] See *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 114 Ohio St.3d 183, 2007-Ohio-3831, 870 N.E.2d 1174, ¶54-55.
[2] R.C. 3115.14. Accord Section 1738B(h)(2), Title 28, U.S.Code, the Full Faith and Credit for Child Support Orders Act ("FFCCSOA").

{¶18} After reviewing the settlement agreement, we conclude that DeSantis is correct in his argument that the agreement lacks a choice-of-law clause governing modifications. Because of this, we do not need to decide the enforceability of such a clause.

{¶19} A choice-of-law clause is "[a] contractual provision by which the parties designate the jurisdiction whose law will govern any disputes that may arise between the parties."[3] The substantive law of jurisdictions can differ significantly, and this type of clause is employed to reflect the justified expectations of the parties who bargained over this term. Ohio has adopted the Restatement of the Law 2d, Conflict of Laws (1971), Section 187(2), to determine whether the state's law chosen by the parties should govern the contractual dispute.[4] But an Ohio court cannot invoke this section unless it is "satisfied that the parties have actually made an express choice of law regarding the issue before the court."[5] The law of the forum state, in this case Ohio, determines whether the parties did in fact choose the law to govern the dispute.[6]

{¶20} Lara's argument that the settlement agreement contains a choice-of-law clause relative to child-support modification is flawed, as illustrated by the following excerpts from the transcript of the oral separation agreement that the parties' attorneys read into the record at the divorce hearing:

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[3] Black's Law Dictionary (8 Ed.Rev.2004) 258.

[4] *Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co.* (1983), 6 Ohio St.3d 436, 453 N.E.2d 683, syllabus; *Ohayon v. Safeco Ins. Co.*, 91 Ohio St.3d 474, 486, 2001-Ohio-100, 747 N.E.2d 206.

[5] *Ohayon* at 486, citing Restatement of the Law 2d, Conflict of Laws (1971) 561-562, Section 187, Comment a. See, also, *Register v. Nationwide Mut. Fire Ins. Co.*, 1st Dist. Nos. C-020318 and C-020319, 2003-Ohio-1544, ¶9-10.

[6] See Restatement, Section 187, Comment a ("The rule of this Section is applicable only in situations where it is established to the satisfaction of the forum [Ohio] that the parties have chosen the state of the applicable law.").

{¶21} "Counsel for DeSantis: Child Support. The parties have each been advised of the provisions of the Child Support Standards Act, DRL 240(1-b) and they are aware that the Court must order the child support sum pursuant to that statute unless the parties opt out or unless there is defined good cause to depart from the statute. In this matter the parties have agreed on child support pursuant to the statute and same has been calculated, based on the last reported incomes of each party on their tax returns which was for 1998 * * *. Based on the statute, the joint parental income requires child support payments on a monthly basis by plaintiff to defendant of $1761 per month. * * *

{¶22} "The parties have agreed to exchange annually that portion of their income tax returns, personal income tax returns which sets forth their gross annual income, as well as documentation of Social Security tax and FICA tax paid. They will annually recalculate child support, periodic child support pursuant to the Child Support Standards Act as follows: The gross income of each parent shall be reduced by the amount of Social Security tax and FICA tax paid by the party. In the event either parties lives in New York City or Yonkers, ---

{¶23} "The Referee: Excuse me, off the record. (Discussion off the record.) I think that we should note for the record that we are striking the recitation of the CSSA."

{¶24} While the parties expressly referred to the CSSA in the settlement agreement, the only clear reference occurred with regard to the calculation of the 2000 child support, which was, in fact, calculated under the CSSA. This does not convince us that the parties had agreed that any future modification of support—no matter where the parties resided—would be decided pursuant to the CSSA.

{¶25} We are firm in this conclusion, notwithstanding that the divorce judgment stated that "pursuant to the parties' oral Settlement Agreement recited on the record dated May 2, 2000, the parties shall annually recalculate, in accordance with the formula set forth in the Child Support Standards Act (CSSA), the amount(s) of child support to be paid for that year * * *." This passage does not reflect the terms of the oral settlement agreement. Because the oral separation agreement was incorporated but not merged into the divorce judgment, the language of the agreement prevails.

{¶26} Lara's argument that a choice-of-law clause governs this dispute fails for an additional reason: she erroneously equates the "annual recalculation" of support, as provided by the agreement, with what DeSantis seeks—an order modifying his support obligation. The parties did not agree that the recalculated amount would become a court-ordered amount of support, such that it would be a "modification" of the prior support order. This is borne out by the absence of a court order for 2003 and 2004.

{¶27} Absent a valid choice-of-law clause, the Uniform Interstate Family Support Act ("UIFSA"), which governs choice-of-law analysis in interstate child-support disputes, directs our analysis.[7] Ohio adopted and codified the 1996 version of the UIFSA in R.C. Chapter 3115 over ten years ago.[8] R.C. 3115.48 authorizes an Ohio court as a responding tribunal to modify a prior child-support order issued by a foreign jurisdiction in certain circumstances, including where (1) none of the parties still resides in the foreign jurisdiction, (2) the child and the obligee live in Ohio, and (3) the obligor does not live in Ohio and registers the decree to be modified in an

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[7] See R.C. 3115.58.
[8] H.B. No. 352, eff. Jan. 1, 1998.

Ohio court.[9] An Ohio court as a responding tribunal may modify only those aspects of a child-support order that is modifiable under the law of the issuing state.[10] When modifying a prior child-support order as a responding tribunal under R.C. 3115.48, the trial court must apply Ohio law.[11] All 50 states have adopted the UIFSA, including the provisions that Ohio adopted in R.C. 3115.48,[12] bringing much needed predictability in this area.

{¶28} In this case, both parties were represented by counsel during the divorce proceedings. Thus, they were presumably aware that if they both moved from New York, the UIFSA's choice-of-law provisions required future modifications to be governed by the laws of the forum state, absent a valid choice-of-law clause. Yet the parties' settlement agreement did not declare that, in the event that New York lost continuing exclusive jurisdiction to modify support, the forum court had to apply the CSSA in modifying support.

{¶29} This case is distinguishable from the decision of the Tenth Appellate District in *Lewis v. Lewis*,[13] where the court held that the parties' separation agreement contained a choice-of-law provision that governed future modifications. That choice-of-law clause read as follows: all matters affecting the interpretation of the Agreement and the rights of the parties hereto shall be governed by the laws of the State of Maryland.[14]

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[9] R.C. 3115.48(A) and 3115.50; *Cook v. Cook* (2001), 143 Ohio App.3d 687, 690, 758 N.E.2d 1159.
[10] R.C. 3115.48(C).
[11] R.C. 3115.48(B); *Cook* at 690. Accord FFCCSOA Section 1738B(h)(1).
[12] Hatamyar, ERISA Article: Interstate Establishment, Enforcement, and Modification of Child Support Orders (2000), 25 Okla.City U.L.Rev. 511, 516.
[13] *Lewis v. Lewis* (Mar. 18, 1997), 10th Dist. No. 96APF07-868.
[14] Id. See, also, *Wagner v. Wagner* (Fla.2004), 885 So.2d 488, 494 (holding that law of the forum state applied to request to modify child support, notwithstanding a clear choice-of-law provision—"[t]he agreement shall be governed by and construed in accordance with the laws of the state of California"—in the parties' separation agreement).

{¶30} The trial court failed to properly resolve DeSantis's motion to modify support under Ohio law, in contravention of R.C. 3115.48. A remand is required for a determination under the procedural and substantive law of Ohio whether DeSantis's support obligation should be modified, and if so, the amount of support owed under the Ohio support guidelines.

## III. Duration of Support

{¶31} Although we are remanding the case for the application of Ohio law to DeSantis's motion for modification, we affirm that part of the trial court's judgment that determined that DeSantis's support obligation would not terminate on June 30, 2008. The parties agree that in a proceeding to modify child support under R.C. 3115.48, the age of emancipation—the terminating point of support—remains defined by the law of the state rendering the initial decree.[15] The issuing state in this case is New York.

{¶32} Under New York law, a parent has a statutory obligation to support his or her child until the child reaches 21 years of age.[16] But the child's right to support and the parent's right to custody and services are reciprocal.[17] Thus "a child of employable age, who actively abandons the noncustodial parent by refusing all contact and visitation, without cause, may be deemed to have forfeited his or her right to support."[18]

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[15] See R.C. 3115.48(B); FFCCSOA Section 1738(B)(h); *Emig v. Massau* (2000), 140 Ohio App.3d 119, 125, 746 N.E.2d 707. See, also, 2001 UIFSA Section 611(d) ("In a proceeding to modify a child support order, the laws of the State that is determined to have issued the initial controlling order governs the duration of the obligation of support.").
[16] N.Y. Fam. Court Act Section I(a); *Matter of Chamberlin v Chamberlin* (1997), 658 N.Y.S.2d 751, 752, 240 A.D.2d 908.
[17] *Chamberlin* at 752.
[18] Id.

{¶33} DeSantis challenges the trial court's finding that the circumstances surrounding his estranged relationship with Alexandra were not sufficient to justify a termination of his child-support obligation. But we cannot say that the trial court's decision was an abuse of discretion, where DeSantis testified that he was partly responsible for the abandonment.[19] Thus, we affirm that part of the trial court's judgment holding that DeSantis's duty of support has not terminated.

## IV. Conclusion

{¶34} Ohio law governs the resolution of DeSantis's motion to modify the amount of his child-support obligation. Thus, the trial court erred when it entered partial summary judgment against DeSantis on the choice-of-law issue with regard to DeSantis's request to modify the amount of his child-support obligation. We reverse that part of the trial court's judgment. On remand, should the trial court conclude that a modification is appropriate, it should determine the amount by reference to Ohio's guidelines.

{¶35} The duration of DeSantis's support obligation, however, remains defined by New York law. The trial court did not err by determining, based on the evidence, that DeSantis's support obligation had not terminated under New York law. Thus, we affirm that part of the trial court's decision. We remand this cause for further proceedings consistent with this judgment.

Judgment accordingly.

**HILDEBRANDT, P.J., CUNNINGHAM** and **DINKELACKER, JJ**.

*Please Note:*

The court has recorded its own entry on the date of the release of this decision.

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[19] See *Matter of Boccalino v. Boccalino* (2009), 875 N.Y.2d 598, 59 A.D.3d 901, 902-903.