

[Cite as *Luther v. Luther*, 2010-Ohio-5388.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

SUE ELLEN LUTHER	:	
Plaintiff-Appellant	:	C.A. CASE NO. 2009 CA 112
v.	:	T.C. NO. 95DR0949
TERRENCE E. LUTHER, JR.	:	(Civil appeal from Common Pleas Court, Domestic Relations)
Defendant-Appellee	:	

OPINION

Rendered on the 5th day of November, 2010.

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DONOVAN, P.J.

{¶ 1} Plaintiff-appellant Sue Ellen Luther appeals a decision of the Clark County Court of Common Pleas, Domestic Relations Division, adopting in part and modifying in part a decision of the magistrate regarding a modification of the amounts being paid by

defendant-appellee Terence E. Luther, Jr., for spousal support and child support. Sue Ellen's appeal also involves the trial court's finding that she was in contempt for failure to pay Terence \$10,000.00 as specified by the parties' separation agreement.

{¶ 2} The magistrate's decision was filed on August 3, 2009. The judgment and entry adopting in part and modifying in part the decision of the magistrate was filed by the trial court on November 10, 2009. On December 3, 2009, Sue Ellen filed a timely notice of appeal with this Court.

I

{¶ 3} Sue Ellen and Terence were married in Tucson, Arizona, on July 24, 1981, and two children were born during the course of the marriage: T.L., D.O.B. 10/31/87, and J.L., D.O.B. 7/26/91. Prior to the filing of the divorce decree, the parties entered into a separation agreement in May of 1995 which outlined the responsibilities of the parties during the interim preceding the execution of the divorce decree.

{¶ 4} The separation agreement provided that Terence was required to pay \$1101.90 per month in child support. The separation agreement also stated that the amount of child support being paid would increase by three percent each year in order to provide for cost of living. With respect to spousal support, the separation agreement required Terence to pay Sue Ellen permanent support in the amount of \$125.00 per month for six years. The agreement further stated that the amount of spousal support would increase to \$400.00 per month if Sue Ellen was not actively employed after six years. The separation agreement provided that the spousal support amount would increase by three percent each year as adjusted for cost of living. Lastly, the separation agreement stated that Sue Ellen was

obligated to pay Terence \$10,000.00 as a lump sum property settlement for his interest in any joint financial accounts.

{¶ 5} On September 29, 1995, Sue Ellen filed a complaint for divorce. The final judgment and decree of divorce was filed on January 30, 1996. Sue Ellen and her attorney attended the final hearing. Terence did not attend the final hearing and was not represented by counsel. The divorce decree was prepared by Sue Ellen's attorney, and Terence did not review the document before it was filed. The separation agreement and the final divorce decree differed in some key respects as the documents pertained to spousal support and child support, as well as Sue Ellen's duty to pay Terence \$10,000.00 "as a lump sum property settlement for [Terence's] interest in the financial accounts *** held by the parties."

{¶ 6} The divorce decree provided that Terence was required to pay child support in the amount of \$1291.86 per month. Pursuant to the divorce decree, Terence was obligated to pay child support until the children reached the age of twenty-one or graduated from college, whichever occurred later. There was no provision in the divorce decree for an annual cost of living increase related to Terence's child support obligation. In regards to spousal support, the divorce decree provided that Terence was required to pay Sue Ellen "permanent support for life" in the amount of \$125.00 per month for six years. After six years, the permanent spousal support obligation increased to \$400.00 per month. Unlike the separation agreement, the divorce decree contained no provision regarding Sue Ellen's unemployment as a condition precedent to the increase in spousal support after six years. The divorce decree also stated that the spousal support payments would increase at a rate of three percent every year to compensate for cost of living fluctuations. The divorce decree

specifically stated that spousal support was “for life” and the trial court *did not* retain jurisdiction to modify the amounts stated in the decree. Finally, we note that the divorce decree did not specifically mention the \$10,000.00 payment to be made by Sue Ellen to Terence.

{¶ 7} On March 12, 2009, Terence filed a motion to terminate spousal support, a motion to terminate child support for T.L., a motion to recalculate child support for J.L., and a motion to hold Sue Ellen in contempt for her failure to pay him the remaining \$6,500.00 of the \$10,000.00 payment ordered in the separation agreement. On June 9, 2009, Sue Ellen filed a motion to increase child support and spousal support, as well as a motion to hold Terence in contempt for failure to pay the yearly three percent increase in child support and spousal support as ordered in the divorce decree.

{¶ 8} Afer a hearing held on June 30, 2009, the magistrate issued a decision on August 3, 2009, holding that Terence was in contempt because he had underpaid child support in the amount of \$38,977.25. The magistrate further held that Terence could purge the contempt finding by \$500.00 per month against the child support arrearage. The magistrate also held that child support payments for T.L. had terminated on October 31, 2008, when she turned twenty-one. The magistrate ordered that, pursuant to the separation agreement, child support was to increase by three percent every year from the date the document was executed.

{¶ 9} In regards to spousal support, the magistrate found that the terms of the divorce decree controlled, and Terence was required to pay Sue Ellen permanent support for life. The magistrate also found that Terence had underpaid his spousal support obligation

by approximately \$5,776.57 by failing to pay the yearly three percent increase provided for in the divorce decree. The magistrate found Sue Ellen to be in contempt for failure to pay Terence the full amount of the \$10,000.00 ordered in the separation agreement. The magistrate found that Sue Ellen had paid \$2835.00 towards the total amount, but still owed Terence \$7,165.00. The magistrate then offset the \$7,165.00 debt by the \$5,776.57 that Terence owed on the spousal support obligation, leaving the amount of \$1,388.43, which the magistrate then subtracted from the \$38,977.25, representing the child support arrearage owed by Terence.

{¶ 10} Terence filed objections to the magistrate's decision on August 7, 2009. On November 3, 2009, Sue Ellen filed a memorandum in support of the magistrate's decision. On November 10, 2009, the trial court entered an order which adopted in part and modified in part the judgment rendered by the magistrate. Specifically, the trial court held that the divorce decree was the controlling document for the purpose of determining the parties' continuing obligations to each other. The court held that in regards to Terence's child support obligation, the divorce decree made no provision for a yearly three percent increase in child support. Thus, the court held that Terence had not underpaid his child support obligation and no arrearage was owed. Regarding spousal support, the court agreed with the magistrate and held that Terence had underpaid his obligation in the amount of \$5,776.57. The court further held that the amount was offset by the amount of \$7,165.00 still owed by Sue Ellen to Terence for payment of the original \$10,000.00 ordered in the separation agreement. Thus, the court held that Sue Ellen was still required to pay Terence the amount of \$1,388.43 in order to purge the contempt finding against her.

{¶ 11} It is from this judgment that Sue Ellen now appeals.

II

{¶ 12} The trial court has broad discretion to divide property in domestic relations cases, and its decision will not be disrupted on appeal absent unreasonable, arbitrary, or unconscionable conduct. *Middendorf v. Middendorf* (1998), 82 Ohio St.3d 397, 401, citing *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131; *Martin v. Martin* (1985), 18 Ohio St.3d 292, 294-295; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219; *Berish v. Berish* (1982), 69 Ohio St.2d 318, 319. “If there is some competent, credible evidence to support the trial court’s decision, there is no abuse of discretion.” *Middendorf*, 82 Ohio St.3d at 401.

III

{¶ 13} Sue Ellen’s first assignment of error is as follows:

{¶ 14} “THE TRIAL COURT ERRED WHEN IT FOUND APPELLANT IN CONTEMPT FOR COURT FOR FAILURE TO PAY APPELLEE \$10,000.00 PURSUANT TO THE TERMS OF THE SETTLEMENT AGREEMENT RATHER THAN THE DIVORCE DECREE.”

{¶ 15} In her first assignment, Sue Ellen contends that the court erred when it held her in contempt in light of her failure to pay Terence a total of \$10,000.00 as a lump sum property settlement pursuant to Section V, subsection D of the separation agreement. Sue Ellen argues that the payment provision is not specifically adopted in the divorce decree. Sue Ellen also points out that other than stating that the provision requires her to pay Terence \$10,000.00 as a property settlement, there are no guidelines regarding a timetable for payment, no language

taking into account Sue Ellen's unemployed status, and no enforcement measures.

Thus, Sue Ellen asserts that the trial court abused its discretion by finding her in contempt for failure to pay the full amount of the settlement.

{¶ 16} It is undisputed that Sue Ellen did not object to that portion of the magistrate's decision finding her in contempt for failing to pay the full amount of the \$10,000.00 settlement to Terence.

{¶ 17} Civ.R. 53(D)(3)(b)(iv) states: "Except for plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion *** unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." Due to Sue Ellen's failure to object to the magistrate's decision in regards to the contempt finding against her, she deprived the trial court of the opportunity to correct the alleged errors and thereby waived her right to appeal the findings and conclusions contained in the decision. *Bowers v. Bowers*, Darke App. No. 1699, 2007-Ohio-1739. See, also, *In re Etter* (1998), 134 Ohio App.3d 484, 492, citing *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121; *Jeffries v. Grismer Tire Co.*, Montgomery App. No. 18968, 2002-Ohio-926. Sue Ellen's failure to raise this argument as an objection to the magistrate's decision waived the argument for purposes of appeal.

{¶ 18} Sue Ellen's first assignment of error is overruled.

IV

{¶ 19} Because they are interrelated, Sue Ellen's second and third assignments of error will be discussed together as follows:

{¶ 20} "THE TRIAL COURT ERRED WHEN IT FAILED TO READ

LANGUAGE IN THE SEPARATION AGREEMENT REGARDING ANNUAL COST OF LIVING INCREASES FOR SPOUSAL SUPPORT, DECLARED THE LANGUAGE NOT TO BE PRESENT, THEN STATED THAT THE MAGISTRATE COULD NOT ADOPT LANGUAGE FOR CHILD SUPPORT FROM THE SEPARATION AGREEMENT WHEN HE REFUSED TO DO SO FOR SPOUSAL SUPPORT (WHEN THE COURT ACTUALLY HAD MERELY MISSED READING THE LANGUAGE), THEN LATER BASED CALCULATIONS ON THAT INCORRECT OBSERVATION.”

{¶ 21} “THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ACCEPTED SOME TERMS THAT WERE NOT SPECIFIED IN THE FINAL DIVORCE DECREE.”

{¶ 22} In her second assignment, Sue Ellen contends that the trial court abused its discretion when it miscalculated the amount of spousal support Terence owed. Sue Ellen also argues that the trial court erred when it held that no child support arrearage was owed by Terence since the language in the final divorce decree made no mention of a three percent annual cost of living increase. Sue Ellen points out that the separation agreement, unlike the divorce decree, provided for a yearly three percent increase in child support, and that the magistrate correctly held that Terence owed an arrearage of \$38,977.25. Thus, Sue Ellen asserts that the trial court abused its discretion when it held that no child support arrearage was owed to her. In her third assignment, Sue Ellen, while acknowledging that the final divorce decree supersedes the separation agreement, argues that trial court abused its discretion by failing to adhere to the terms of the separation agreement.

{¶ 23} Initially, we note that the both the magistrate and the trial court held that the terms of the final divorce decree were controlling in regards to the parties' obligations with respect to child support and spousal support. We also note that Sue Ellen acknowledges that the terms of the final divorce decree, not the separation agreement, govern the parties' obligations to each other. "If the agreement is incorporated in the divorce decree, the agreement is superseded by the decree, and any obligations previously imposed by contract are thereafter imposed by decree." *Leblanc v. Leblanc* (May 31, 1996), Greene App. No. 95-CA-43, citing, *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 417.

Spousal Support Payments

{¶ 24} It is undisputed that the magistrate found that Terence owed an arrearage of \$5,776.57 in light of his failure to pay the three percent cost of living increase specified in the final divorce decree in regards to spousal support. The magistrate also found that this amount was offset by the \$7,165.00 Sue Ellen still owed Terence from the \$10,000.00 lump sum property payment specified in the separation agreement. The trial court did not disturb the magistrate's recommendation regarding the spousal support arrearage owed.

{¶ 25} Sue Ellen points out a misstatement on the part of the trial court wherein the court stated that "in the case at hand concerning the issue of spousal support, the Magistrate resolved this conflict by accepting the language set forth in the decree which did, in fact, provide for a 3% increase in spousal support, *which was nowhere mentioned in the separation agreement itself.*" We agree with Sue

Ellen that the trial court was incorrect since the three percent cost of living increase for spousal support was mentioned in both the separation agreement as well as the final divorce decree. This misstatement by the trial court, however, had no effect on the outcome of the proceedings because the court held that the final divorce decree controlled. Pursuant to the divorce decree, Terence's spousal support obligation to Sue Ellen was permanent and increased by three percent annually from the date of the decree was executed. Thus, the trial court did not abuse its discretion when it held that Terence was in contempt for failure to pay the spousal support arrearage which it calculated in the amount of \$5,776.57 that stemmed from his failure to include the yearly three percent cost of living increase in his spousal support payments to Sue Ellen.

Child Support Payments

{¶ 26} In regards to Terence's child support obligation, the separation agreement provided that the support "should increase by three percent on a yearly basis." Sue Ellen does not contend that Terence was delinquent by failing to pay the monthly court-ordered child payment of \$1,291.86 per month. Sue Ellen merely asserts that Terence was in contempt for failing to pay the annual three percent increase mentioned in the separation agreement. The final divorce decree, which is controlling in the instant case and supersedes the separation agreement, specifically provided that Terence was required to pay child support in the amount of \$1291.86 per month. Pursuant to the divorce decree, Terence was obligated to pay child support until the children reached the age of twenty-one or graduated from college, whichever occurred later. There was no provision in the

divorce decree, however, for an annual three percent cost of living increase related to Terence's child support obligation. Thus, the trial court did not abuse its discretion when it held that Terence had not underpaid his child support obligation and no arrearage was owed.

{¶ 27} Sue Ellen's second and third assignments of are overruled.

V

{¶ 28} All of Sue Ellen's assignments of error having been overruled, the judgment of the trial court is affirmed.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

David M. McNamee
John R. Butz
Hon. Thomas J. Capper