J-A09019-13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

VALETTE J. CLARK,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
KEVIN D. CLARK, M.D.,	:	
	:	
Appellee	:	No. 941 WDA 2012

Appeal from the Order May 18, 2012,
Court of Common Pleas, Allegheny County,
Family Court at No. FD 01-01363-005

BEFORE: BOWES, DONOHUE and MUNDY, JJ.

MEMORANDUM BY DONOHUE, J.: FILED: May 15, 2013

Valette J. Clark ("Mother") appeals from the May 18, 2012 order entered by the Court of Common Pleas, Allegheny County, dismissing her exceptions to the order denying her petition for modification of child support. Upon review, we affirm.

This case has a long and contentious history. We need only summarize the facts and procedural history relevant to the resolution of the issues raised on appeal, which are as follows. Mother and Kevin D. Clark, M.D. ("Father") were married in 1985, separated in 2001, and divorced by entry of decree in 2006. Their marriage produced four children who were born in 1987, 1989, 1991, and 1994 ("the children"). On June 27, 2002, the trial court entered an order requiring Father to pay Mother unallocated support for herself and the children in the amount of $6,009.00 per month

from October 2, 2001 through January 1, 2002. Beginning on January 2, 2002, the amount of unallocated support increased to $6,148.00 per month. Additionally, the trial court ordered, *inter alia*, that Father was to pay Mother "41% of any December 2002 bonus, less his effective tax rates as determined[.]" Trial Court Order, 6/27/02.

On February 2, 2006, the parties signed a marital settlement agreement ("the MSA"). Of relevance to this appeal, the MSA provided that Father pay Mother unallocated monthly support in the amount of $5,300.00 through December 31, 2006, and $5,000.00 thereafter. Mother agreed that she had an earning capacity of $32,544.00, as found in the July 15, 2005 addendum to the vocation assessment authored by Celia Evans, and Father represented that his gross income for 2005 was $209,241.00. Pursuant to the MSA, Mother and Father accepted its terms,

> in lieu of and in full and complete settlement and satisfaction of any and all of [Father's] rights against [Mother] or [Mother's] rights against [Father] for any past, present or future claims on account of support and maintenance, child support, alimony, and alimony *pendente lite*; that the parties specifically understand and agree to the payments, transfers and other consideration herein recited so comprehend and discharge any and all such claims by [Father] against [Mother], and [Mother] against [Father], and are, *inter alia*, in full and complete settlement and satisfaction and in lieu of [Father's] and [Mother's] past, present and future claims against each other on account of maintenance and support, alimony and also alimony *pendente lite*, spousal support, child support, equitable distribution of marital property, counsel fees, costs and expense

> and any other claim or right of any nature whatsoever, pursuant to the Pennsylvania Divorce Code of 1980, as amended by the Divorce Code of 1990, as amended, which may be instituted by [Father] in any Court in the Commonwealth of Pennsylvania or any other jurisdiction and/or any proceeding which has been or may be instituted by [Mother] in any Court in the Commonwealth of Pennsylvania or any other jurisdiction.

MSA, 2/2/06, at ¶ 4.B. The MSA was incorporated into a November 9, 2006 child support order by reference.

On November 16, 2007, Mother filed a motion to enforce certain provisions of the MSA relating to health insurance for Mother and the children and life insurance. On November 9, 2009, Mother filed a motion for a complex support hearing, which she subsequently withdrew. On January 24, 2011, she filed another motion for a complex support hearing – the determination of which underlies this appeal – averring that Father was in contempt of the June 27, 2002 order[1] for failing to pay Mother 41% of his "bonuses" as required. Motion for Complex Support Hearing, 1/24/11, at ¶ 6. She further averred that Father had been earning more than $209,000.00 "for many years" without reporting any increase in his income to the trial court. ***Id.*** at ¶ 10. Mother requested that the trial court authorize discovery for the relevant time periods and schedule a complex

[1] Mother erroneously refers to this as the June 24, 2002 order. The hearing summary authored by the hearing officer states that the hearing was held on June 25, 2002. The trial court entered the final order of court on June 27, 2002.

support hearing. Father filed a response and new matter on January 27, 2011, and asserted therein that the MSA resolved all economic claims, that he was contractually bound to pay the amount of child support he was paying, and denied that the June 27, 2002 order continued to have any force or effect. He joined in Mother's request for a complex support hearing, averring that he continued to pay $5,300.00, despite the agreement that it be reduced to $5,000.00, and requested a reduction in the amount of support owed to account for his overpayment.

On January 27, 2011,[2] the trial court granted the parties' requests for a complex support hearing, but denied Mother's request for discovery relating to Father's bonuses and income prior to the date of the MSA. On June 2, 2011, Mother filed a motion to clarify the scope of the support hearing, seeking the ability to address the issue of unpaid bonuses that she believed Father owed her from 2002 through 2006. The trial court denied Mother's request.

The complex support hearing was held before the hearing officer on July 5, 2011. In addition to the testimony of Mother and Father, the hearing officer heard the testimony of Father's witness, Dick Brabender, an expert in the area of net disposable income. At the hearing, Mother testified, *inter*

[2] The trial court dated the order January 11, 2011, which we conclude was in error, as that would have been 13 days prior to Mother filing her motion requesting a complex support hearing. The docket reflects the order was filed on January 27, 2011.

alia, that she did not see the MSA until eight months after she signed it and that she would never have agreed to various provisions contained therein. Mr. Brabender testified regarding Mother's earning capacity and Father's income during the relevant time period.

On August 10, 2011, the hearing officer entered her recommendations. With respect to Father's income, she found as follows:

> Mother offered no expert testimony or other credible evidence that [F]ather's net income was other than that testified to by Richard Brabender. Moreover, she offered no credible testimony that [F]ather had a higher earning capacity in 2006 – 2010. That being so, the hearing officer accepts Mr. Brabender's income findings.

Hearing Officer's Explanation, 8/10/11, at 3.

The hearing officer also found credible Mr. Brabender's testimony regarding Mother's earning capacity, wherein he gave two scenarios for Mother's current earning capacity. The hearing officer chose the most conservative number, assigning Mother the lowest earning capacity for the years in question.

As for child support, the hearing officer did a full evaluation, based upon her findings with respect to Mother's earning capacity and Father's income from 2006 through 2010, of what would have been owed by Father in the absence of the MSA. Using the numbers testified to by Mr. Brabender, the hearing officer found that Father's child support obligation would have ranged from $3,201.00 to $1,713.00 pursuant to the child support

guidelines.[3] Because child support owed never exceeded the $5,000.00 Mother was entitled to pursuant to the MSA and the November 9, 2006 order, the hearing officer found no change to be appropriate during that timeframe.

Mother filed exceptions to the hearing officer's recommendations.[4] On May 15, 2012, the trial court denied Mother's exceptions. Mother filed a timely notice of appeal, and complied with the trial court's order for a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). On appeal, she raises the following issues for our review:

> 1. Whether the trial court erred when it ruled that [Mother] could not recover unpaid child support that accrued prior to February 2006?
>
> 2. Whether the trial court had jurisdiction to modify child support arrears that accrued prior to February 2006?
>
> 3. Whether the trial court erred when it used [Father's] testimony to determine his income for child support, rather than the information set forth in [Father's] federal tax returns?
>
> 4. Whether the trial court erred when it used [Father's] testimony to determine his income for child support, rather than his much larger earning capacity[?]

[3] Pa.R.C.P. 1910.16-3.

[4] Father also filed exceptions regarding the hearing officer's recommendation that he pay $6,000.00 of Mother's counsel fees. The trial court denied Father's exceptions, and he did not appeal that decision.

Mother's Brief at 4.[5]

Our review of a child support order is very limited. We will not disturb a trial court's decision unless there is insufficient evidence to support it or the trial court abused its discretion in determining the award. ***Kraisinger v. Kraisinger***, 928 A.2d 333, 341 (Pa. Super. 2007). "An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by evidence on the record, discretion is abused." ***Id.*** at 341-42 (citation omitted).

In her first issue raised on appeal, Mother asserts that the trial court erred by limiting the July 2011 support hearing and precluding her from recovering unpaid bonus money from Father that accrued from 2002 through 2006. Although recognizing that the MSA contains a waiver provision that would preclude her from litigating this issue, she argues that it is unenforceable because it is not in the children's best interest, she did not

[5] Mother does not include any argument in her brief in support of the second issue raised in her Statement of Questions Involved regarding the trial court's jurisdiction to modify support arrears accrued prior to 2006. As such, it is waived. Pa.R.A.P. 2119(a); ***J.J. DeLuca Co., Inc. v. Toll Naval Associates***, 56 A.3d 402, 419 (Pa. Super. 2012) (stating that failure to present or develop an argument in support of an issue raised on appeal results in waiver of that issue).

receive adequate consideration to waive the child support arrears, and she testified that she did not approve the final version of the MSA.[6]

As the trial court observed, agreements that address economic claims of parties to a divorce, including child support, are common and can be enforced. Trial Court Opinion, 8/31/12, at 5.

> Parties to a divorce action may bargain between themselves and structure their agreement as best serves their interests[.] They have no power, however, to bargain away the rights of their children[.] Their right to bargain for themselves is their own business. They cannot in that process set a standard that will leave their children short. Their bargain may be eminently fair, give all that the children might require and be enforceable because it is fair. When it gives less than required or less than can be given to provide for the best interest of the children, it falls under the jurisdiction of the court's wide and necessary powers to provide for that best interest.

Kraisinger, 928 A.2d at 340-41 (quoting ***Knorr v. Knorr***, 527 Pa. 83, 86, 588 A.2d 503, 505 (1991)).

On appeal, Mother's sole argument supporting the proposition that the children were left "short" and without adequate support by the MSA is that "[t]he children in this case are now college age, and do not have sufficient funds to pay for their education because the unfair terms of the [MSA]

[6] Mother also asserts that there is no statute of limitations for the collection of unpaid child support in Pennsylvania, but recognizes that the trial court did not rely upon a statute of limitations in reaching its decision. Mother's Brief at 11-12; ***see*** Trial Court Opinion, 8/31/12, at 10. Based upon the manner by which we resolve this issue, we need not address Mother's statute of limitations argument.

waived their right to large amounts of support." Mother's Brief at 14. We disagree that this constitutes a deprivation of support. In general, the parental duty to support his or her children terminates once a child graduates from high school or reaches the age of 18, whichever occurs later. ***Blue v. Blue***, 532 Pa. 521, 529, 616 A.2d 628, 633 (1992). There is no obligation for a parent to provide funding for a child's post-secondary education. ***Curtis v. Kline***, 542 Pa. 249, 260, 666 A.2d 265, 270 (1995) (finding unconstitutional as violative of the Equal Protection Clause, 23 Pa.C.S.A. § 4327(a) which provided that "a court may order either or both parents who are separated, divorced, unmarried or otherwise subject to an existing support obligation to provide equitably for educational costs of their child whether an application for this support is made before or after the child has reached 18 years of age"). As such, this argument fails.[7] Moreover, as noted by the trial court, the monthly payments by Father pursuant to the MSA were at all times in excess of the amount of child support required by the guidelines and the MSA made adequate provisions for the children and Mother. Trial Court Opinion, 8/31/12, at 5-7.

We now turn to Mother's argument that the waiver provision of the MSA is unenforceable because of her testimony that she did not review the

[7] We note that this is not the basis for the trial court's decision. ***See*** Trial Court Opinion, 8/31/12, at 5-7. The law is well-settled, however, that if the trial court's decision is correct, "we can affirm on any basis supported by the record." ***R.M. v. J.S.***, 20 A.3d 496, 506 n.8 (Pa. Super. 2011).

final version of the MSA prior to signing it. The record reflects that Mother did not contest the validity of the MSA in her motion for the scheduling of a complex support hearing or her motion to clarify the scope of the support hearing. ***See*** Motion for Complex Support Hearing, 1/24/11; Motion to Clarify Scope of Support Hearing, 6/2/11. Rather, Mother raised the question of the validity of the MSA during her testimony before the hearing officer. ***See*** N.T., 7/5/11, at 26-27, 39-50. It is clear that the hearing officer found her testimony on this point not to be credible, a finding to which we give great deference. ***See Moran v. Moran***, 839 A.2d 1091, 1095 (Pa. Super. 2003) ("[A] master's report and recommendation, although only advisory, is to be given the fullest consideration, particularly on the question of credibility of witnesses, because the master has the opportunity to observe and assess the behavior and demeanor of the parties.").

The record supports the hearing officer's determination. As Mother admitted, she never brought an action challenging the validity of the MSA. N.T., 7/5/12, at 29. To the contrary, Mother brought an action seeking its enforcement in 2007. ***See*** Motion for Enforcement of Property Settlement Agreement, 11/16/07. Mother presented no evidence, other than her own testimony, that she was unaware of the provisions of the MSA prior to signing the document, and the record belies such a finding. Thus, we agree with the trial court that Mother's claim that provisions of the MSA are unenforceable is without merit. Trial Court Opinion, 8/31/12, at 8.

Mother's third and fourth issues on appeal relate to the trial court's findings with respect to Father's income. She asserts that the trial court erred by accepting the hearing officer's calculations of Father's income, as they were based on Father's "self-reported information," rather than on the W-2 and 1099 forms presented by Mother at the hearing. Mother's Brief at 20. As the trial court stated, it was not Father's "self-reported information," but Mr. Brabender's expert testimony on Father's income (which the hearing officer found to be credible) that the hearing officer used to reach her conclusion regarding Father's income for the years in question. Trial Court Opinion, 8/31/12, at 9; Hearing Officer's Explanation, 8/10/11, at 3.

Once again, we accord the hearing officer's credibility determination great weight, ***Moran***, 839 A.2d at 1095, and find that it is supported by the record. The record reflects that Mother presented evidence that suggested Father's income was higher than he reported to the Internal Revenue Service, as he received 1099 forms in his name reflecting additional income not reported on his W-2 forms. Mr. Brabender explained that the income listed on the 1099 Forms was paid to the corporation for which Father worked, Ophthalmology Associates of Osbourne, not to Father individually. N.T., 7/5/11, at 120-21. He testified that although the 1099 form contained Father's social security number, it was the corporation that actually received the money and that this was "extremely common with physicians." ***Id.*** at 121-22. He explained that this occurs

> [b]ecause the entity or individuals who are issuing the 1099s[] are not necessarily the same individuals who are cutting the checks. So [there] doesn't have to be any consistency at their office. Say it's Highmark. Highmark makes the check out to Ophthalmology Associates. But somewhere in their system, they have [Father's] social security number. When it comes time to issue the 1099, they issue the 1099 on [Father's] social security number, which is, of course, inconsistent with what they are doing with the check.

Id. Mother presented no evidence to contradict Mr. Brabender's explanation. As such, the trial court did not abuse its discretion by accepting the hearing officer's calculation of Father's income pursuant to Mr. Brabender's expert testimony.

Mother further argues that the hearing officer should have based the child support award on Father's earning capacity rather than his stated income. Mother's Brief at 21-22. The trial court found this argument to be meritless. Trial Court Opinion, 8/31/12, at 9. We agree.

The record reflects that the only evidence Mother presented before the hearing officer regarding Father's earning capacity was an unauthenticated printout from an unknown website, which Mother believed accurately portrayed the earning capacity for an ophthalmologist in the Sewickley area as double Father's reported income. N.T., 7/5/11, at 110-11. This information was presented to Mr. Brabender, who testified that he disagreed with that finding and questioned the basis for the printout's conclusion. ***Id.*** at 111-12. The printout presented by Mother was not admitted into

evidence, and she offered nothing else to support her claim that Father's earning capacity was higher than his stated income. As such, her argument fails.

Lastly, Mother argues that the hearing officer failed to include the salary Father pays to his current wife, who is also his office manager, in his income for child support purposes. Mother's Brief at 22-23. This argument was not contained in Mother's 1925(b) statement or in the Statement of Questions Involved section of her brief, and is therefore waived. Pa.R.A.P. 1925(b)(4)(vii); Pa.R.A.P. 2116.

Finding no abuse of discretion and the trial court's determination to be supported by the record, we affirm the order entered below.

Order affirmed.

Judgment Entered.

Nicholas V. Cusatti

Deputy Prothonotary

Date: 5/15/2013