[Cite as *In re Petition of Netotea*, 2006-Ohio-1445.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

IN THE MATTER OF THE PETITION OF:	:	**O P I N I O N**
LARRY A. NETOTEA,	:	**CASE NO. 2004-T-0120**
Petitioner-Appellee,	:	
and	:	
BARBARA S. NETOTEA,	:	
Petitioner-Appellant.		

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 1998 DS 298.

Judgment: Reversed and remanded.

Robert F. Burkey, Burkey, Burkey & Scher Co., L.P.A., 200 Chestnut Avenue, N.E., Warren, OH 44483-5805 (For Petitioner-Appellee).

Daniel N. Gerin, 144 North Park Avenue, #200, Warren, OH 44481 (For Petitioner-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Barbara S. Netotea ("Barbara"), appeals the September 15, 2004 judgment entry of the Trumbull County Court of Common Pleas, Domestic Relations Division, overruling her objections to a magistrate's decision modifying a

decree of dissolution. For the following reasons, we reverse the decision of the trial court and remand the matter.

{¶2} On March 24, 1979, Barbara and Larry A. Netotea ("Larry") were married in Warren, Ohio. Three children were born of the marriage.

{¶3} On October 19, 1998, Barbara and Larry were granted a decree of dissolution. On December 14, 1998, a supplemental dissolution decree was filed containing an amended separation agreement. Article 4 of the amended agreement, concerning "Child Support," provided:

{¶4} "*** The parties have agreed to share college expenses comparable to a state supported college or university 4 year program, at YSU, JSU or other agreed to school for their children as follows: Wife to pay first quarter tuition, Husband to pay second quarter tuition, alternating thereafter. Reasonable living expenses and books are to be divided equally. Each child is to maintain at least a C average. The parties agree that this clause may be amended if the child chooses a non public supported college or university."

{¶5} Article 16 of the amended agreement, concerning "Amendment or Modification," provided:

{¶6} "This Agreement may be amended or modified only by a written instrument signed by both parties, except as provided otherwise relating to the residential parent status, support and companionship and visitation of the children of the parties if any."

{¶7} In 2002, Lisa Netotea ("Lisa"), Barbara and Larry's youngest child, began attending Kent State University. On December 18, 2003, Barbara filed a motion to

show cause for Larry's failure to comply with the terms of the separation agreement regarding the payment of Lisa's college expenses.

{¶8} The matter was referred to a magistrate. Following a hearing, the magistrate issued his decision August 3, 2004. The magistrate found that $4,076.00 of a student loan obtained by Lisa was available for her "reasonable living expenses." In adopting the magistrate's decision the day it issued, the trial court held "that due to Lisa Netotea having available to her the sum of $4076.00 to be applied toward her reasonable living expenses, plus her employment income, the portion of the parties' agreement contained in Article 4 referring to 'reasonable living expenses' is hereby stricken and held for naught. The balance of Article 4 to remain in effect." The trial court ordered Larry to pay Barbara $3,93*6*.35 as his share of the remaining Article 4 college expenses.

{¶9} On August 17, 2004, Larry filed objections to the magistrate's decision, which were overruled on August 23, 2004. On September 9, 2004, Barbara filed objections to the magistrate's decision, which were overruled. This appeal followed.

{¶10} Barbara raises the following assignments of error:

{¶11} "[1.] The trial court erred to the prejudice of the appellant in striking that portion of Article 4 of the separation agreement dealing with 'reasonable living expenses.'

{¶12} "[2] In a post dissolution motion to show cause the trial court does not have jurisdiction to strike an unambiguous, negotiated agreed upon contract provision in the separation agreement to the payment of 'reasonable living expenses' at college."

{¶13} We will first address the second assignment of error as it is dispositive of this appeal. Barbara's second assignment of error challenges the trial court's jurisdiction to modify the separation agreement. Unlike objections to the trial court's findings of fact and conclusions of law, questions regarding a trial court's subject matter jurisdiction cannot be waived. *State ex rel. White v. Cuyahoga Metro. Hous. Auth.* (1997), 79 Ohio St.3d 543, 544, 1997-Ohio-366 ("[s]ubject-matter jurisdiction may not be waived or bestowed upon a court by the parties to the case."). See, also, *In re Petersen*, 11th Dist. No. 2003-G-2508, 2004-Ohio-2308, at ¶19.

{¶14} In Ohio, the age of majority is eighteen. R.C. 3109.01. "[T]he obligation to pay child support normally terminates when a child reaches the age of eighteen." *Blaner v. Blaner*, 11th Dist. No. 2003-T-0042, 2004-Ohio-3678, at ¶9, citing *Dudziak v. Dudziak* (1992), 81 Ohio App.3d 361, 366. However, parents may provide for the support of their children beyond the age of eighteen in dissolution proceedings. "A separation agreement providing for the support of children eighteen years of age or older is enforceable by the court of common pleas." R.C. 3105.10(B)(1).

{¶15} Courts only retain a limited jurisdiction in dissolution proceedings to modify the separation agreement incorporated into a decree of dissolution. *In re Whitman* (1998), 81 Ohio St.3d 239, 241, 1998-Ohio-466; *Shaffer v Shaffer*, 11th Dist. No. 2002-T-0172, 2003-Ohio-5223, at ¶8, citing *In re Adams* (1989), 45 Ohio St.3d 219, 221. "A court retains continuing jurisdiction to enforce the decree and to modify issues 'pertaining to the allocation of parental rights and responsibilities for the care of children, to the designation of a residential parent and legal custodian of the children, to child support, and to visitation.'" *Whitman* at 241, quoting R.C. 3105.65(B); *Shaffer* at ¶8;

Sutherell v. Sutherell (June 11, 1999), 11th Dist. No. 97-L-296, 1999 Ohio App. LEXIS 2631, at 6-7. Consequently, where the parties have entered into a separation agreement that provides for child support, the trial court may later modify the agreement. *McClain v. McClain* (1984), 15 Ohio St.3d 289, 290.

{¶16} However, "[t]he court has no power to modify a provision of a decree of dissolution which does not concern the allocation of parental rights and responsibilities, custody, parenting time or visitation, unless the power to modify is expressly reserved in the decree." *Basista v. Basista*, 8th Dist. No. 83532, 2004-Ohio-4078, at ¶17, citing R.C. 3105.65(B) and 3105.18(E). Not every payment made to a minor child or emancipated adult is considered child support. See, e.g., *Basista*. Therefore, the preliminary issue in the instant case is whether the separation agreement's provision requiring the parties to equally divide and pay for Lisa's reasonable college living expenses represented child support.

{¶17} A parent is responsible for providing a minor child with "necessaries." R.C. 3103.03. See, also, *Basista* at ¶16. "Necessaries" are current expenses such as food, clothing, and shelter, which are intended to be covered by child support. *Basista* at ¶16. But a parent is not legally responsible to support an emancipated child, as the parental support obligation ends once the child is emancipated. Id.

{¶18} Here, the court modified a portion of the separation agreement that required the parties to equally divide and pay Lisa's reasonable college living expenses. Lisa was emancipated when the modification occurred. The payment of Lisa's reasonable college living expenses are not current expenses for the support of a minor child. See, e.g., *Basista* at fn.1. Accordingly, such a payment does not represent child

support and, therefore, the court lacked jurisdiction to modify this portion of the agreement.

{¶19} Furthermore, the separation agreement did not reserve any authority with the court to modify the agreement. To the contrary, the agreement provided that it could only be modified by a written instrument signed by both parties.

{¶20} It is important that parents who in good faith willingly enter into agreements in a dissolution proceeding be able to rely on those agreements. They must also be able to rely on the court to honor and enforce those agreements in order to ensure the stability and integrity of our system of laws.

{¶21} That being said, a separation agreement is a contract and is subject to the same rules of construction. *Ronyak v. Ronyak*, 11th Dist. No. 2001-G-2383, 2002-Ohio-6698, at ¶10. Accordingly, unambiguous words appearing in a separation agreement will be given their ordinary meaning unless another meaning is clearly suggested from the face of the agreement or its overall content. Id.

{¶22} The relevant terms of the separation agreement are unambiguous and should be given their ordinary meaning. Per the agreement, the parties were required to equally divide and pay Lisa's reasonable college living expenses. Because this payment did not represent child support, the trial court lacked jurisdiction to modify this portion of the agreement. We note that Barbara merely filed a motion to show cause for Larry's failure to comply with the dissolution decree. There was no request to modify the decree. The trial court's mandate and/or authority is clear**.** It must simply decide the issues before it, specifically, the issue of Larry's contempt. Thus, Barbara's second assignment of error is with merit.

{¶23} Based upon the foregoing analysis, Barbara's second assignment of error is with merit and we herby reverse the judgment of the trial court and remand this matter to allow the court to enter judgment accordingly.

CYNTHIA WESTCOTT RICE, J., concurs in judgment only,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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{¶24} The majority holds that the lower court was without jurisdiction to modify that part of the parties' separation agreement prescribing that the parties are to "divide equally" their daughter's "reasonable living expenses and books" at college. This conclusion is contrary to both the statutory and case law on this issue, flatly contradicting our court's own precedent in *Sutherell v. Sutherell* (June 11, 1999), 11th Dist. No. 97-L-296, 1999 Ohio App. LEXIS 2631. Accordingly, I dissent.

{¶25} The parties' separation agreement provided that the parties would continue to support their daughter while she attended a state supported college or university. The separation agreement did not provide for the domestic relations court to have continuing jurisdiction to modify their agreement. Absent an express reservation of jurisdiction in the agreement, courts retain a limited, statutory jurisdiction to modify separation agreements. *In re Whitman*, 81 Ohio St.3d 239, 241, 1998-Ohio-466. Specifically, "[t]he court *** retains jurisdiction to modify all matters pertaining to the allocation of parental rights and responsibilities for the care of the children, to the

designation of a residential parent and legal custodian of the children, to child support, to parenting time of parents with the children, and to visitation for persons who are not the children's parents." R.C. 3105.65(B).

{¶26} The obligation to support a child attending college is a "matter[] pertaining to *** the care of the child[]." Under a plain reading of the statute, the lower court had jurisdiction to modify this part of the Netoteas' separation agreement.

{¶27} The majority construes this statute too narrowly. The majority notes that the Netoteas' daughter "was emancipated when the modification occurred." The majority continues: "The payment of [the daughter's] reasonable college living expenses are not current expenses for the support of a ***minor child.*** *** Accordingly, such a payment does not represent ***child support*** and, therefore, the court lacked jurisdiction to modify this portion of the agreement." (Emphasis added).

{¶28} The majority erroneously reads into the statute the condition that a court's continuing jurisdiction only applies to minor children. There is no support for this reading in the statute itself. The statute does not distinguish between minor and adult children.

{¶29} Instead, the majority cites law for the proposition that a parent is only responsible for providing a child with "necessaries" during the child's minority. This proposition, however, has no relevance to the statute at issue. Regardless of whether the Netoteas were obligated to do so, they have voluntarily agreed to support their daughter while she attends an accredited state institution. In any event, college has never been deemed part of the "necessaries" of raising a child. How the Netoteas came

be responsible for their daughter's college is not relevant to the court's continuing jurisdiction.

{¶30} The majority also places emphasis on the fact that college expenses do "not represent child support." Like the age of the child, this factor, too, has no bearing on the court's continuing jurisdiction in this matter. A court's continuing jurisdiction is not limited to issues of child support, but applies broadly to "all matters pertaining to the allocation of parental rights and responsibilities for the care of the children" as well as to issues of legal custody, parenting time, and visitation. R.C. 3105.65(B).[1] Cf. *Biancarelli v.Biancarelli*, 7th Dist. No. 04 NO 325, 2005-Ohio-4470, ¶42 (pursuant to R.C. 3105.65(B), a trial court may modify "child support issues *** such as tax deduction, monthly payments, college expenses").

{¶31} The issue of whether a court retains jurisdiction to modify the terms of an agreement regarding a child, even after that child becomes an adult, was directly addressed by this court *Sutherell*. In that case, we held that "a court may modify the terms providing for the support of a child, even after that child becomes an adult." 1999 Ohio App. LEXIS 2631, at *13.

{¶32} In *Sutherell*, the parties' separation agreement provided that, if the child attended a college approved by the parties after the age of eighteen, the father would

1. The provision of R.C. 3105.65(B) granting a court jurisdiction "to modify all matters pertaining to the allocation of parental rights and responsibilities for the care of the children" is the same provision that grants a court "full power to enforce its decree." If the majority's holding were applied consistently, the court below would not have power to enforce the parties' agreement after the Netoteas' daughter became emancipated. Instead, the majority inconsistently holds that the court may enforce the provision regarding college expenses but not modify it. The basis for the court's jurisdiction to do either act is the same, i.e. R.C. 3105.65(B). Cf. *Nokes v. Nokes* (1976), 47 Ohio St.2d 1, 3 ("a court retains *continuing* jurisdiction over child support orders contained in divorce decrees *** and is empowered to modify such orders * * * as to future installments * * * ***throughout the duration of the order***'") (emphasis added) (citations omitted).

continue weekly support payments until completion or withdrawal from undergraduate studies and would pay for tuition, books, and supplies. Id. at *1-*2. The mother would be responsible for room, board, and transportation expenses. Id. at *2. The trial court subsequently modified the parties' agreement by terminating the father's obligation to provide support while the child attended college. Id. at *4.

{¶33} The precise issue before this court in *Sutherell* was whether "separation agreements which provide educational benefits for children are *** modifiable once the children reach the age of majority." Id. at *11. After considering conflicting authorities, this court concluded that such agreements are modifiable, "even after that child becomes an adult." Id. at *13. In doing so, we rejected the position, taken by the majority in the present case, that a provision for a child's education beyond the age of majority was purely a matter of contract law. "Once a separation agreement is incorporated into a decree of dissolution, it loses its separate legal identity as a contract and is superseded by the decree." Id. at *12; accord *Bayer v. Bayer*, 11th Dist. No. 2002-L-072, 2003-Ohio-4101, at ¶11.

{¶34} The majority's ruling effectively overrules *Sutherell*.

{¶35} For the foregoing reasons, I respectfully dissent.