[Cite as *Morgan v. Morgan*, 2010-Ohio-1685.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

CONNIE J. MORGAN NKA KARNS	**:**	
Plaintiff-Appellee	**:**	**C.A. CASE NO. 23371**
vs.	**:**	**T.C. CASE NO. 2002-DM-00652**
	:	**(Civil Appeal from**
DAVID M. MORGAN		**Common Pleas Court,**
Defendant-Appellant	**:**	**Domestic Relations)**

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O P I N I O N

Rendered on the 16th day of April, 2010.

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GRADY, J.:

{¶ 1} On October 11, 2002, the domestic relations court granted a petition dissolving the marriage of David and Connie Morgan. The decree incorporated the parties' Amended Separation Agreement, in which they divided their joint business interests.

Article II.(b) of the Amended Separation Agreement provides, in pertinent part:

{¶ 2} "Business: Both of the parties are equal partners in an Ohio Partnership known as D.C. Investments. Assets of D.C. Investments include 714 and 755 Albany Street, Dayton, Ohio. The parties will dissolve D.C. Investments on December 31, 2002. The property at 714 Albany Street will go to the Wife and she will be solely responsible for the mortgage on said property at National City Bank. . . . The parties shall equally divide all remaining assets and debts of this partnership. . . .

{¶ 3} "The Wife agrees to refinance the mortgage to National City Bank on the 714 Albany Street property within two (2) years from the date of the filing of the Final Judgment and Decree of Dissolution, thereby releasing the Husband's obligation on said property.

{¶ 4} "Wife is the owner of Miami Valley Tank and Trailer Equipment, Inc., and she shall continue to be the owner of this company, free and clear of any claim of the Husband thereto.

{¶ 5} "Husband is the owner of 50% of DEM Technology, LLC, 100% owner of Total Effort Enterprises, LLC and 50% owner of Interactive Global Technologies, LLC. Husband shall continue to be the owner of these businesses, free and clear of any claim of the Wife thereto."

{¶ 6} The real property at 714 Albany Street awarded to Connie[1] was encumbered by first and second mortgages to National City Bank when the parties' marriage was dissolved. Connie paid the balance due on the first mortgage. When she sold the real property at 714 Albany Street in 2008, Connie paid the remaining balance of $46,215.16 due on the second mortgage. Following that, Connie filed charges in contempt and a Civ.R. 60(B) motion, asking the court to order David to reimburse her that amount.

{¶ 7} Connie contended that the Amended Separation Agreement referred to the first mortgage, and that the parties had wholly forgotten about the second mortgage. She argued that David should be responsible for that obligation because the proceeds of the loan secured by the second mortgage had been used to benefit Total Effort Enterprises, LLC, a company David was awarded. Connie pointed out that David made payments on the second mortgage obligation in the years following their dissolution.

{¶ 8} David argued that Connie was responsible for both the first and second mortgage obligations to National City Bank. He pointed out that the terms of the separation agreement that was amended provided that "the property at 714 Albany Street is awarded to the wife and she will be solely responsible for the mortgage

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[1]For clarity and convenience, the parties are identified by their first names.

on said property at National City Bank." David also filed charges in contempt arguing that Connie had failed to pay a debt obligation owed to Wells Fargo Bank on a loan, the proceeds of which had been used to benefit Miami Valley Tank and Trailer Equipment, Inc., the company Connie was awarded.

{¶ 9} On September 2, 2008, the magistrate found that the motions for contempt should be overruled and that the Civ.R. 60(B) motion should be granted, requiring David to reimburse Connie $46,215.16 that she had paid to National City Bank on the second mortgage, and Connie to pay the $15,007.08 debt owed to Wells Fargo. David filed objections to the magistrate's decision. On March 10, 2009, the trial court overruled David's objections. David filed a notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 10} "THE TRIAL COURT ERRED IN DECIDING APPELLEE'S MOTION UNDER CIV.R. 60(B)(5)."

SECOND ASSIGNMENT OF ERROR

{¶ 11} "THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION IN ITS INTERPRETATION OF THE PARTIES' AMENDED SETTLEMENT AGREEMENT."

{¶ 12} The standard of review of a trial court's decision on a Civ. R. 60(B) motion is an abuse of discretion. *Aurora Loan Services, LLC v. Wilcox,* Miami App. No. 2009 CA 9, 2009-Ohio-4577, at ¶16, citing *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77.

"'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 13} "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enterprises, Inc v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161.

{¶ 14} R.C. 3105.171(B) requires a court that grants a decree of divorce to divide the parties' marital property equitably between them. "Marital property" is any real or personal property or any interest therein that either or both spouses currently owns. R.C. 3105.171(A)(3)(a)(i), (ii). R.C. 3105.171 is silent with respect to debts. Generally, when an asset is awarded to one of the spouses in a division of marital property, a debt obligation that encumbers the asset follows the property award. Therefore, as between the parties to a divorce action, the debt becomes an obligation of the party who is awarded the asset, to the extent

that the debt is secured by the asset. The decree may create an exception by ordering a distributive award requiring the other party to pay some or all of the debt obligation.

{¶ 15} The Amended Separation Agreement incorporated into the final decree of dissolution provided that D.C. Investments would be dissolved, that Connie would be responsible for the mortgage to the National City Bank on the property at 714 Albany Street, and that the parties would equally divide the remaining debts of D.C. Investments. Connie asked the court to order David to reimburse her for the $46,215.16 balance remaining on the second mortgage obligation that Connie paid when she sold the property. The second mortgage on the property at 714 Albany Street was a debt on an asset of D.C. Investments which the court found was not specifically identified in the Amended Separation Agreement. The trial court relied on Civ.R. 60(B) to modify the provision of the Amended Separation Agreement regarding the debt obligation on the mortgage to National City Bank, requiring David to be responsible for the entire debt obligation on the second mortgage. We believe the court erred in so doing.

{¶ 16} R.C. 3105.65(B) provides:

{¶ 17} "A decree of dissolution of marriage has the same effect upon the property rights of the parties, including rights of dower and inheritance, as a decree of divorce. The court has full power

to enforce its decree and 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. The court, only in accordance with division (E)(2) of section 3105.18 of the Revised Code, may modify the amount or terms of spousal support."

{¶ 18} R.C. 3105.65(B) impacts Connie's request and the court's order in two ways. First, the provision in that section stating that a court that grants a decree of dissolution "has full power to enforce its decree" has been applied to permit the court to construe a term of a separation agreement which is ambiguous, when there is good faith confusion concerning its requirements. *In re dissolution of Marriage of Seders* (1987), 42 Ohio App.3d 155; *Saeks v. Saeks* (1985), 24 Ohio App.2d 67; *Bond v. Bond* (1990), 69 Ohio App.3d 225; *Smith v. Smith*, Darke App. No. 09CA06, 2010-Ohio-31.

{¶ 19} Second, because per R.C. 3105.65(B) a decree of dissolution has the same effect on the property rights of the parties as a decree of divorce, the decree of dissolution is likewise subject to the limitation regarding property divisions in divorce actions that appears in R.C. 3105.171(I), which states:

"A division or disbursement of property or a distributive award made under this section is not subject to future modification by the courts."

{¶ 20} There may be good faith confusion in this instance: the parties had extensive and intertwining financial interests which they made a good faith effort to divide between them. However, the Amended Separation Agreement, to the extent that it expressly dealt with any mortgage to National City Bank, imposed no obligation on David. The only obligation in that regard was imposed on Connie. Therefore, the court did not construe a term of its decree that was ambiguous. Indeed, the catch-all provision of the Amended Separation Agreement unambiguously requires the parties to equally divide debt obligations not specifically identified. Rather than following that course, the court modified the decree to impose an obligation on David that the Amended Separation Agreement did not. In doing so, the court ordered a distributive award requiring David to reimburse Connie, and thereby modified a property division order, relief which is specifically prohibited by R.C. 3105.171(I).

{¶ 21} Though a property division award may not be modified, a decree in which the award is made may be vacated pursuant to Civ.R. 60(B). Ordinarily, granting Civ.R. 60(B) relief requires that the entire judgment be vacated. However, the Supreme Court has held

that a single provision of a decree of dissolution may be vacated pursuant to Civ.R. 60(B) when the incorporated separation agreement provides for future modifications by the court. *In re Whitman* (1998), 81 Ohio St.3d 239.

{¶ 22} "While the General Assembly has given courts continuing jurisdiction to modify those sections of a separation agreement that pertain to parental rights and responsibilities, R.C. 3105.63 and 3105.65 do not create continuing jurisdiction for a trial court to modify property divisions in separation agreements. However, nothing in the statutes suggest that parties are precluded from voluntarily including a provision for continuing jurisdiction in their separation agreement. . . .

{¶ 23} "Therefore, in a dissolution proceeding, if the parties have incorporated into the separation agreement a clause that allows the court to modify the agreement by court order, and the court has approved this agreement and incorporated it into the decree of dissolution, the court has continuing jurisdiction to enforce this clause. If the parties both consent to a modification of the agreement or actually incorporate a means for modification into their settlement agreement, the element of mutual consent has not been lost, and there is no reason to require vacation of the entire decree in order to grant relief under a Civ.R. 60(B) motion. Consequently, a trial court may grant relief from judgment under

Civ.R. 60(B)(1), (2), or (3) as to the property division in the separation agreement without vacating the decree of dissolution where the parties to a dissolution have expressly agreed in a separation agreement that the agreement may be modified by court order and the agreement has been incorporated into the decree." Id. at 244.

{¶ 24} The trial court relied on Civ.R. 60(B)(5). The court could not rely on Civ.R. 60(B)(1), (2) or (3) because more than one year had passed since the decree of dissolution was granted. Civ.R. 60(B)(5), if it applies, permits relief on broader equitable grounds. Nevertheless, we believe its application is subject to the same constraint announced in *Whitman* regarding modifications of property division provisions in a separation agreement incorporated in a decree of dissolution.

{¶ 25} Article X of the Amended Separation Agreement is entitled "MODIFICATION BY PARTIES," and states: "Except as herein otherwise provided, this agreement shall not be altered, or modified unless it be done in writing signed by both parties." This provision does not allow the court to modify the terms of the Amended Separation Agreement. Rather, only through a subsequent agreement of the parties may the court modify the terms of the Amended Separation Agreement. Clearly, these parties never came to an agreement on an acceptable modification. Therefore, the

trial court erred when it relied on Civ.R. 60(B) to modify the terms of the Amended Separation Agreement. *In re Whitman*.

{¶ 26} The debt owed to National City Bank on the second mortgage on the property at 714 Albany Street was not specifically listed in the Amended Separation Agreement. Therefore, pursuant to the catchall provision in Article II.(b) of the Amended Separation Agreement, the parties are each responsible for one-half of the total amount of money expended to pay the debt owed on the second mortgage obligation to National City Bank since the date of the dissolution decree. It appears from the record that David made payments on that obligation following the dissolution and before the property secured by the second mortgage was sold. On remand, the trial court must determine whether David has fulfilled any or all of his obligation on the second mortgage with National City Bank, giving him proper credit for any amounts he previously paid. The first and second assignment of errors are sustained.

THIRD ASSIGNMENT OF ERROR

{¶ 27} "THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION WHEN IT OVERRULED APPELLANT'S MOTION FOR CONTEMPT OF THE DECREE."

{¶ 28} "A person guilty of any of the following acts may be punished as for a contempt: (A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer[.]" R.C. 2705.02(A).

This includes dissolution decrees. *Felton v. Felton* (1997), 79 Ohio St.3d 34, 38. The decision of whether to find one in contempt of court rests in the sound discretion of the trial court and will not be overturned on appeal absent an abuse of that discretion. *State v. Kilbane* (1980), 61 Ohio St.2d 201, at paragraph one of the syllabus.

{¶ 29} The trial court overruled the motions for contempt "due to the confusion over the wording of the terms of the decree as to the parties' obligations." (Dkt. 58, p.5). Both parties were voluntarily making payments on debt obligations for a number of years after the decree of dissolution. Connie made payments on the Wells Fargo debt until 2005, at which time she told David that he should pay the remainder of the debt. David made payments to cover the amount of interest accruing on the debt, but a principal of $15,007.08 remains on the Wells Fargo debt. The trial court found that Connie was responsible for the remaining $15,007.08, but overruled David's motion to find Connie in contempt for stopping payments in 2005.

{¶ 30} The parties were confused about their debt obligations, which ultimately led the parties to seek the guidance of the trial court in clarifying the debt obligations on the National City Bank second mortgage and the Wells Fargo loan. The Amended Separation Agreement, which was incorporated into the dissolution decree, does not specifically order Connie to pay the debt on the Wells

Fargo loan. Although a debt on an asset normally follows the asset when it is awarded to a party, David has not identified a specific provision of the dissolution decree or Amended Separation Agreement that Connie disobeyed. Therefore, given the unique facts of this case, we do not believe the trial court abused its discretion in denying David's motion for contempt in this instance.

{¶ 31} The third assignment of error is overruled. The judgment of the trial court will be affirmed, in part, and reversed, in part, and the cause is remanded for further proceedings consistent with this Opinion.

FAIN, J. and FROELICH, J. concur.

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