[Cite as *Smith v. Smith*, 2010-Ohio-31.]

IN THE COURT OF APPEALS OF DARKE COUNTY, OHIO

DEBORAH SMITH :

Plaintiff-Appellant : C.A. CASE NO. 09CA06

vs. : T.C. CASE NO. 02DIS60188

NELSON SMITH :

Defendant-Appellee :

. . . . . .

O P I N I O N

Rendered on the 8th day of January, 2010.

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Defendant-Appellee, Pro Se

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WOLFF, J.:

{¶ 1} Plaintiff, Deborah Smith, appeals from a final judgment of the court of common pleas holding her in contempt.

{¶ 2} On January 9, 2009, Defendant, Nelson Smith, filed a motion asking that Deborah[1] be found in contempt for her failure to comply with an order in a decree of dissolution the court had granted on November 18, 2002, terminating their marriage. The

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

decree adopted the terms of a separation agreement the parties signed and filed.

{¶ 3} Their Separation Agreement designated Deborah the legal custodian and residential parent for the parties' minor child, Dana, who was then twelve years of age. The Separation Agreement also provided:

{¶ 4} "ARTICLE XII - Post-Secondary Education

{¶ 5} "It is the intention of the parties that they shall equally share the minor child's college educational expenses. The Husband shall timely pay to the Wife sums of money equal to fifty (50%) percent of all such expenses, including, but not limited to, room and board, tuition and fees, books and other similar and ancillary and tangential items. The Husband and Wife shall consult with one another concerning the education of the child. Husband's obligation to pay fifty (50%) percent of the aforesaid expenses shall be limited to a four (4) year State College in Ohio, and shall not be payable past the minor child's attainment of the age of twenty-three (23) years. In the event that Dana elects to attend a College outside the State of Ohio, then Husband shall be responsible to pay fifty (50%) percent of the equivalent cost of the Ohio State University."

{¶ 6} Nelson's motion alleged that he had paid $4,752.70 to Wright State University for Dana's education during the preceding

school year, and that Deborah failed to reimburse him for her one-half share of those expenses in the amount of $2,376.35. Nelson asked that Deborah be held in contempt for her failure to comply with her obligation to share equally in paying Dana's college expenses that the Separation Agreement and Decree imposed.

{¶ 7} The matter was referred to a magistrate. Deborah testified at hearing before the magistrate that while it was her "intention" to pay an equal share when she signed the Separation Agreement, that intention was conditioned on her ability to do so. Deborah testified that she now lacks that ability, and therefore did not reimburse Nelson the amount he asked her for.

{¶ 8} The magistrate filed a written decision recommending that Deborah be found in contempt, applying breach of contract principles. The magistrate held that the Separation Agreement is a written contract, and that its terms regarding the intentions of the parties are unambiguous. The magistrate then reasoned that because "the parties specifically stated their intent to share costs equally," . . . "it was inherent in the language that [Deborah] has the same obligation" as Nelson. The magistrate recommended that Deborah be ordered to pay Dana's college expenses for the following year, up to the amount that Nelson paid for the prior year, and to share any additional costs equally.

{¶ 9} Deborah filed objections to the magistrate's decision.

Deborah argued that the magistrate's decision is contrary to the terms of the Separation Agreement and is unreasonable. Deborah also argued that her conduct does not amount to contempt, as that is defined by law, and that the magistrate should have considered her inability to pay.

{¶ 10} The court overruled Deborah's objections and adopted the magistrate's decision. The court rejected Deborah's contention concerning her intention, reasoning that Nelson's "obligation would (then) similarly be only a contingent declaration of intent – a conclusion which is clearly not consistent with the language of Article XII." The court found that Deborah's obligation is not subject to any contingency pertaining to her stated intention, and that the Separation Agreement creates a mutual obligation. The court also found that Deborah "possessed sufficient income to pay at least a portion of the college expenses," and that her failure constitutes a contempt.

{¶ 11} Deborah filed a timely notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 12} "THE TRIAL COURT ERRED IN HOLDING APPELLANT RESPONSIBLE TO PAY ONE-HALF OF THE MINOR CHILD'S COLLEGE EXPENSES, FOR THE REASON THAT SUCH DETERMINATION IS CONTRARY TO THE EVIDENCE THAT WAS PRESENTED AT TRIAL, CONTRARY TO THE PROVISIONS OF THE PARTIES' SEPARATION AGREEMENT, AND UNREASONABLE IN VIEW OF THE OVERALL FINANCIAL CIRCUMSTANCES OF THE PARTIES."

SECOND ASSIGNMENT OF ERROR

{¶ 13} "THE TRIAL COURT ERRED IN FINDING THE APPELLANT IN CONTEMPT FOR FAILURE TO PAY ONE-HALF OF THE MINOR CHILD'S COLLEGE EDUCATIONAL EXPENSES."

I

{¶ 14} A petition for dissolution of a marriage must have attached a separation agreement signed by the parties. R.C. 3105.63(A)(1). The separation agreement is a contract. If at a hearing on the petition the court approves the separation agreement, "it shall grant a decree of dissolution that incorporates the separation agreement." R.C. 3105.65(B). That same section states that "[t]he court has full power to enforce its decree." The method of enforcement is a contempt proceeding in the court that issued the order. *Harris v. Harris* (1979), 58 Ohio St.2d 303.

{¶ 15} A person may be punished for contempt who is guilty of "[d]isobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer." R.C. 2705.02(A). Each of those matters is a coercive pronouncement by or on behalf of a court that imposes a specific duty to act or refrain from acting on the person or persons to whom it is directed.

{¶ 16} The critical question in this appeal is whether Article

XII of the parties' separation agreement creates an enforceable contractual obligation of the parties to equally share their child's college expenses, or instead merely states an aspirational, unenforceable goal that they do so.

{¶ 17} We agree with the finding of the magistrate, implicitly adopted by the trial court, that the separation agreement is not ambiguous. Accordingly, the parties' intent is to be found solely within the four corners of the agreement. *Blasser v. Enderlin* (1925), 113 Ohio St.121

{¶ 18} Confining ourselves to the language of the agreement we can only conclude, as did the magistrate and trial court, that the parties obligated themselves to equally share their child's college expenses.

{¶ 19} The parties anticipated that their child would attend college. The first sentence of Article XII makes clear the parties' "intention" to equally share the child's college expenses. Any possible doubt about whether the word "intention" is merely aspirational is dispelled by the word "shall" in each of the remaining four sentences, particularly the second and fifth sentences. "Shall" is a word of obligation, not aspiration. Nelson wouldn't be obligated to pay 50% of the expenses to Deborah, or 50% of equivalent expenses should the child attend an out-of-state school, if Deborah is not obligated to pay the other 50%. The agreement does not obligate the parties' child to pay

these expenses. That Nelson is to pay his share to Deborah recognizes that Deborah was the child's custodial parent, as of the time the marriage was dissolved, as the magistrate observed.

{¶ 20} The first assignment is overruled.

II

{¶ 21} Under the second assignment, Deborah first argues that it was error to find her in contempt because she was not required to pay 50% of her child's college expenses by the decree of dissolution, which incorporated the separation agreement. We reject this argument on the basis of our disposition of the first assignment.

{¶ 22} Deborah next argues that Nelson lacked standing to pursue contempt proceedings because the record doesn't show he paid more than 50% of the child's expenses and the child herself displayed no interest in collecting from her mother because she did not testify at the contempt proceeding. Although Nelson claims in his brief he has paid more than half the child's expenses, the record does not support this claim. His claim in his brief that the child was instructed not to testify is likewise not supported by the record. Nelson's unrefuted testimony was, however, that the child's efforts to enlist her mother's help with her expenses were futile:

{¶ 23} "I just remember Dana telling me, 'Mom said whatever

you don't pay I have to pay.' And Dana confronts me and says, 'Dad, I got to get this bill paid.' So we paid it."

{¶ 24} The trial court responded to Deborah's objection based on standing as follows:

{¶ 25} "Based on the mutuality of obligation in the Separation Agreement, and based upon Defendant's completion of the Separation Agreement by paying his half of college expenses, the Court finds that Defendant possessed standing to compel completion of the terms of the Separation Agreement. The Magistrate's decision is supported by the evidence. The Court adopts the Magistrate's decision and overrules this objection."

{¶ 26} In our judgment, the record supports Nelson's standing to pursue contempt proceedings. The child is not a party to these proceedings and Nelson has an understandable interest in the child's receiving a college education, financed according to the parties' agreement.

{¶ 27} Finally, Deborah argues that the magistrate and trial court failed to recognize that her inability to pay her share of the child's expenses was a defense to a charge of contempt.

{¶ 28} The trial court found that Deborah "possessed sufficient income to pay at least a portion of the college expenses of the child" which, according to the trial court, supported the magistrate's determination that Deborah was in contempt.

{¶ 29} Deborah testified that her expenses exceeded her net income, but she also testified that her gross income was $42,745. While Nelson did not refute her testimony, the trial court appears on this record to have reasonably determined that Deborah was capable of making some payment of her child's college expenses. The factfinder is not required to credit testimony or other evidence simply because it is unrefuted. There is nothing of record to indicate that Deborah has other dependents for whom she is responsible.

{¶ 30} In any event, the magistrate recommended that Deborah be permitted to purge the contempt by paying the child's expenses for the following school year up to the amount Nelson paid for the preceding year, with any excess over that amount to be divided equally. If Deborah does so, she will purge the contempt. If not, and if Nelson again seeks to have Deborah held in contempt, she will have the opportunity to again demonstrate her claimed inability to abide by the terms of the separation agreement.

{¶ 31} The second assignment is overruled.

III

{¶ 32} The judgment will be affirmed.

FROELICH, J. concurs.

GRADY, J. dissenting:

{¶ 33} I respectfully dissent from the decision of the majority. I would find that the trial court erroneously employed the contempt procedure to modify its decree of dissolution.

{¶ 34} R.C. 3105.65(B) provides that a domestic relations court "has full power to enforce its decree" of dissolution. The proper method of enforcement is in a contempt proceeding. *Harris v. Harris* (1979), 58 Ohio St.2d 303. Contempt consists of "[d]isobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer." R.C. 2705.02(A). The evidence must be clear and convincing to support a finding of civil contempt. *Sancho v. Sancho* (1996), 114 Ohio App.3d 636.

{¶ 35} The decree of dissolution imposes an express duty on Nelson Smith to reimburse Deborah for one-half of certain costs of their daughter's college education that Deborah voluntarily pays. The decree imposed no like duty of reimbursement on Deborah for expenses Nelson voluntarily pays. The court nevertheless construed the decree as imposing that duty on Deborah, and then found Deborah in contempt for her refusal to reimburse Nelson for one-half their daughter's college expenses that Nelson voluntarily paid.

{¶ 36} The basis of the court's finding is the first sentence in Article XII of the parties' separation agreement, which per

R.C. 3105.65(B) was incorporated into the decree of dissolution and states: "It is the intention of the parties that they shall equally share the minor child's college educational expenses." That declaration is followed by a statement of the specific duty of reimbursement imposed on Nelson, but not on Deborah.

{¶ 37} The intention the parties stated is no more than aspirational. More to the point, as a term of the decree, it imposes no affirmative duty on either party. Nevertheless, applying contract law principles, the court's magistrate construed the statement in the decree as imposing the same specific duty of reimbursement on Deborah that the decree and separation agreement expressly impose on Nelson.

{¶ 38} Contract law principles could apply in a breach of contract action brought on the separation agreement itself, to determine what duty, if any, the parties intended to impose on Deborah. However, when a separation agreement is incorporated into a decree, the agreement is thereafter superseded by the decree and its rights and duties are no longer imposed by the contract, but by the decree. *Greiner v. Greiner* (1979), 61 Ohio App.2d 88; *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399. The standards for contempt in R.C. 2705.02(A) then apply. The magistrate and the trial court instead applied contract law principles in construing the "intention of the parties," and found Deborah in contempt for failing to comply with the construction the court gave to that

phrase. That finding involves at least two analytical errors.

{¶ 39} First, the court applied a preponderance of evidence standard applicable in a breach of contract action to the question of contempt, which requires proof by the greater standard of clear and convincing evidence. *Sancho*. It is undisputed that Deborah refused to reimburse Nelson. The evidence is less than clear and convincing with respect to the "intention of the parties" stated in the separation agreement, and therefore whether the decree imposes any enforceable duty of reimbursement on Deborah.

{¶ 40} Second, when exercising the power conferred on it by R.C. 3105.65(B) to construe an ambiguity in its own decree of dissolution, when there is good faith confusion concerning its requirements, the court should resolve the dispute by considering not only the intentions of the parties but also the equities involved. *In re dissolution of Marriage of Seders* (1987), 42 Ohio App.3d 155; *Saeks v. Saeks* (1985), 24 Ohio App.3d 67; *Bond v. Bond* (1990), 69 Ohio App.3d 225; *Bell v. Bell*, Hancock App. No. 5-04-34, 2005-Ohio-421. The terms of the decree are clear, though one-sided, being a product of negotiation that gives Deborah the option to voluntarily pay any of her daughter's college expenses at all. The equities involved do not support the requirement the court imposed on Deborah to reimburse Nelson for college expenses he voluntarily paid, because equity will not aid one volunteer as against another. *Lyon v. Balthis* (1926), 24 Ohio App. 57.

{¶ 41} R.C. 3105.65(A) provides that if either spouse is not satisfied with the separation agreement, "the court shall dismiss the petition and refuse to validate the proposed separation agreement." R.C. 3105.65(B) authorizes the court to grant a decree of dissolution if neither party expresses dissatisfaction and "the court approves the separation agreement and any amendments to it agreed upon by the parties." The time to make the changes that Nelson and the court later wanted was prior to the court's issuance of its decree, by a proper amendment to which Deborah agreed, not post-decree, and not by finding Deborah in contempt for failing to perform a duty the decree doesn't impose on her.

{¶ 42} I would reverse.

(Hon. William H. Wolff, Jr., retired from the Second District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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