

[Cite as *Morgan v. Morgan*, 2018-Ohio-5044.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 106963 and 106996

BARBARA A. MORGAN

PLAINTIFF-APPELLEE
and CROSS-APPELLANT

vs.

MELVIN R. MORGAN

DEFENDANT-APPELLANT
and CROSS-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-10-331959

BEFORE: Kilbane, P.J., S. Gallagher, J., and Blackmon, J.

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MARY EILEEN KILBANE, P.J.:

{¶1} In this consolidated appeal, defendant-appellant/cross-appellee, Melvin Morgan (“Melvin”) and plaintiff-appellee/cross-appellant, Barbara Morgan (“Barbara”), both appeal from the trial court’s judgment, adopting the magistrate’s decision, overruling Barbara’s objections, and ordering Melvin to provide to Barbara’s counsel written quotes from three insurers for term life insurance, with Barbara as policy owner and sole beneficiary.¹ For the reasons set forth below, we affirm.

¹In May 2018, this court granted Melvin’s motion to consolidate Melvin’s appeal (Appeal No. 106963) with Barbara’s cross-appeal (Appeal No. 106996) for briefing, hearing, and disposition.

{¶2} After a 33-year marriage, Melvin and Barbara were divorced in March 2013. During their marriage, Melvin participated in the Ohio Police and Fire Pension Fund. At the time of the divorce, the parties entered into separation agreement that was incorporated into the judgment entry of divorce. As part of the separation agreement, Barbara was assigned a portion of Melvin's retirement benefits. The agreement provided for term life insurance coverage on Melvin to protect Barbara's preretirement survivorship interest. It states:

(D) RETIREMENT ASSETS

* * *

(1) DIVISION OF BENEFITS UNDER THE OHIO POLICE AND FIRE PENSION FUND (INCLUDING DROP).

* * *

Term Life Insurance Policy (Pre-Retirement Survivorship): The member shall cooperate with the alternate payee [Barbara] in obtaining a term life insurance policy on the member's life with the former spouse named as the owner and sole beneficiary of the policy, in the amount of \$1,000,000 (or the actual amount needed to secure [Alternate Payee's] full payment/benefit amount, as determined by QDRO Consultants.) The member shall cooperate in the completion of any necessary paperwork, forms, physicals, etc., necessary to secure such term insurance coverage. An application to secure the entire \$1 million term policy shall be made, by [Melvin], by 3/12/13.

{¶3} Nine months after the divorce, Barbara filed motion to show cause and a motion for attorney fees, alleging that Melvin failed to put in place a life insurance policy to cover the retirement assets in excess of \$1 million coverage, as required by the separation agreement. Melvin filed a motion to modify life insurance provisions on the grounds that "the coverage amount is excessive, burdensome and cost-prohibitive to obtain." After a trial on these matters, the magistrate denied Barbara's motions and Melvin's motion. Both parties objected to the magistrate's decision. In March 2015, the trial court overruled both objections and denied the

motions. With regard to Melvin's motion, the court found:

While the Magistrate properly denied this motion, the Court overruled the objection on a different ground.

The Eighth District rule is:

It is well settled that pension and retirement benefits are marital assets subject to equitable division upon divorce. A trial court cannot modify or amend a marital property division incident to a divorce or dissolution decree, absent expressed consent by the parties. *This prohibition is jurisdictional.* (Emphasis provided.) (Citations omitted.)

Butcher v. Butcher, 8th Dist. Cuyahoga No. 95758, 2011-Ohio-2550, ¶ 8.

Here, the insurance provisions at issue are clearly an intrinsic part of the parties' agreed-to division of retirement assets, protecting [Barbara's] share of those retirement assets during the interim between the divorce and [Melvin's] retirement. The parties have not consented to this Court having continuing jurisdiction over the division of retirement assets; consequently, it cannot entertain [Melvin's] *Motion to Modify Life Insurance Provisions*. *Id.* at ¶ 8. This Objection is overruled.

{¶4} With regard to Barbara's motions, the court found:

[Melvin] was to "cooperate" with [Barbara] "in obtaining a term life insurance policy" on his life, and to "cooperate" in completing the required paperwork to secure the insurance. Further, [Melvin] was directed to "make" an application for \$1 million of insurance by March 12, 2013. By his own admission, [Melvin] did not make application for the required term life insurance by March 12, 2013; at trial in May 2014 he had not done so. * * * However, the Magistrate suggested, and this Court finds that the terms of the Separation Agreement clearly placed the onus on [Barbara] to present [Melvin] with an application for at least \$1 million of death benefits. Evidence at the hearing established that [Barbara] did not do this; therefore, the Magistrate correctly declined to find [Melvin] in contempt.

The Court finds that neither party has complied with the language and intent of their Separation Agreement to obtain life insurance on [Melvin's] life to secure [Barbara's] rights to [Melvin's] retirement benefits * * * by March 12, 2013.

The Court admonishes the parties for failing to do this in the two years since they signed their Separate Agreement. That [Melvin] believed that the insurance provision is "not the best way to put an insurance policy in place," and believed that the \$1,000,000 coverage is "inaccurate" or inappropriate * * * does not negate the provision or allow for complete noncompliance with the provision.

Likewise, having failed to secure a valuation from QDRO Consultants to justify another amount for the life insurance or to present to [Melvin] an application for a \$1 million life insurance policy, [Barbara] has failed to comply with this provision to her own detriment. The Court urges the parties to fulfill their obligations under the Judgment Entry and secure life insurance before again seeking to hold the other party in contempt.

{¶5} Neither party appealed from this decision.² Then, in July 2016, Barbara filed a second motion to show cause and a motion for attorney fees. She again asserts that Melvin has failed and refused to cooperate in obtaining the term life insurance required by the separation agreement to protect her preretirement survivorship interest in Melvin's retirement benefits. The motions were heard by the magistrate, who found that both motions should be denied. Specifically, the magistrate found that Barbara had not presented Melvin with an application for life insurance for his signature since the March 2015 order. As a result, Melvin did not disobey the trial court's order. Barbara objected and Melvin opposed Barbara's objections. On February 28, 2018, the trial court agreed and adopted the magistrate's decision and overruled Barbara's objections. The court thoughtfully stated:

[T]his Court previously held that "the terms of the Separation Agreement clearly placed the onus on [Barbara] to present [Melvin] with an application for at least \$1 million of death benefit." [Barbara] testified that she has never presented [Melvin] with an application for insurance. * * * The Magistrate correctly found, as does this Court, that because [Barbara] never presented an application, [Melvin's] duty to sign and submit the application never arose; consequently, he is not in contempt.

* * * [Barbara] asserts that: "The onus was on [Melvin] to make the application for coverage." This directly contradicts this Court prior, unappealed ruling, by which this Court is bound: "under the doctrine of stare decisis we are required to adhere to the rule adopted in our prior decisions. *DeMell v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 88505, 2007-Ohio-2924, ¶ 30. * * *

²In January 2016, Melvin appealed to this court, challenging the trial court's denial of his postdecree motion to modify the division of property order. We affirmed the trial court's decision in *Morgan v. Morgan*, 8th Dist. Cuyahoga No. 102498, 2016-Ohio-104.

[Barbara] also asserts, without citing any authority, that she cannot obtain applications for life insurance for [Melvin] because she does not have an insurable interest in his life. That assertion is incorrect[.]

* * *

Here, the parties expressly agreed in the Separation Agreement to placing insurance on [Melvin] life to protect [Barbara's] interest in his pension should he die before his retirement. Clearly, she has an insurable interest.

The Court finds, as did the Magistrate, that [Melvin] has not violated any order of this Court and is not in contempt.

* * *

In its March 31, 2015 Judgment Entry, this Court “admonish[ed] the parties for failing to [place the insurance] in the two years since they signed the Separation Agreement. At that time, the Court urge[d] the parties to fulfill their obligations under the Judgment Entry [of Divorce] and secure life insurance before again seeking to hold the other party in contempt.”

Three years further along — five full years since the divorce — the division of property, specifically, retirement benefits, has not been completed. The parties have been unable to agree on who should be responsible for which step in obtaining insurance coverage, or the appropriate amount of coverage (despite the express statement of default value of \$1 million in the Separation Agreement).

While a trial court does not have continuing jurisdiction to modify marital property division incident to divorce or dissolution decree, it has the power to clarify and construe its original property division so as to effectuate its judgment. (Citations omitted.)

Enty v. Enty, 8th Dist. Cuyahoga No. 104167, 2017-Ohio-4177, ¶ 14.

In addition, the *Judgment Entry of Divorce* states, in pertinent part: “The Court also retains jurisdiction to enter further orders as are necessary to enforce the assignment of benefits to the non-participant * * *.” Further, the Separation Agreement, incorporated into the *Judgment Entry of Divorce*, states:

The court shall retain jurisdiction to effectuate the original intent of the parties stipulated herein. The court shall also retain jurisdiction to enter orders as are necessary to enforce the assignment of benefits to the former spouse * * *. Furthermore, the court retains jurisdiction to enter orders, including nunc pro tunc orders, that are just and equitable so long as the orders are not inconsistent with any other provisions of the decree.

(Separation Agreement, Art. 3(D).)

{¶6} The trial court then entered orders to specify the respective roles of the parties, and effectuate the agreed-to division of property as follows:

IT IS FURTHER ORDERED that within 30 days of this Judgment Entry, [Melvin] will provide to [Barbara's] counsel written quotes from three insurers for term life insurance on the life of [Melvin], with [Barbara] as policy owner and sole beneficiary, in the amount of \$1 million. Said quotes are to include statement of the amount of application fee (if any) and initial premium.

IT IS FURTHER ORDERED that within 14 days after receiving the quotes from [Melvin], [Barbara] will notify [Melvin's] counsel, in writing, of her choice of policy, and provide payment of the initial premium and any application fee. (Such payments subject to reimbursement as provide in the Separation Agreement.)

IT IS FURTHER ORDERED that within 14 days after receiving [Barbara's] choice of policy, and payment, [Melvin] shall submit completed application for term life insurance as specified above, initial premium and application fee (if any) to the insurer chosen by [Barbara].

{¶7} It is from this order that Melvin appeals and Barbara cross-appeals, raising the following assignments of error for review.

Assignment of Error

The trial court erred as a matter of law and abused its discretion by issuing an order which directly contradicts the March 31, 2015 judgment entry and March 7, 2013 judgment entry of divorce and prior court orders.

Cross-Assignment of Error

The trial court erred as a matter of law and abused its discretion by failing to hold [Melvin] in contempt of court.

Life Insurance

{¶8} In his appeal, Melvin argues the trial court ignored the law of the case doctrine and improperly modified the separation agreement by shifting the burden of obtaining the insurance policy from Barbara to Melvin. Melvin claims that March 31, 2015 judgment entry clearly provided that Barbara must present Melvin with a life insurance application. Melvin is to cooperate in completing the required paperwork after Barbara presented him with the application. He argues the trial court disregarded this judgment entry when it ordered Melvin, in its February 28, 2018 entry, to present Barbara with three quotes for life insurance.

{¶9} “Domestic relations judges are generally given broad discretion in the fashioning of equitable relief under the specific facts and circumstances of each case.” *Lemke v. Lemke*, 8th Dist. Cuyahoga No. 94557, 2011-Ohio-457, ¶ 24. Indeed, ““while a trial court does not have continuing jurisdiction to modify a marital property division incident to a divorce or dissolution decree, it has the power to clarify and construe its original property division so as to effectuate its judgment.”” *Pruitt v. Pruitt*, 8th Dist. Cuyahoga No. 84335, 2005-Ohio-4424, ¶ 106, quoting *DiFrangia v. DiFrangia*, 11th Dist. Trumbull No. 2003-T-0004, 2003-Ohio-6090, ¶ 10, quoting *Gordon v. Gordon*, 144 Ohio App.3d 21, 23, 759 N.E.2d 431 (8th Dist.2001); see *Enty*, 8th Dist. Cuyahoga No. 104167, 2018-Ohio-4177, at ¶ 14.

{¶10} Here, Melvin and Barbara have not been able to procure the life insurance since their divorce in March 2013. In March 2015, the trial court admonished Melvin and Barbara for failing to secure the life insurance under the separation agreement. Neither party appealed from this decision. Over three and one-half years later, Melvin and Barbara still have not complied with the trial court’s March 2015 order — they have not “cooperated” as set forth in the separation agreement’s provision on obtaining a life insurance policy. The parties have been

unable to agree on who should be responsible for which step in obtaining insurance coverage, or the appropriate amount of coverage despite the express statement of default value of \$1 million in the separation agreement.

{¶11} Section (D), the retirement assets section of the separation agreement, provides that the trial court “shall retain jurisdiction to effectuate the original intent of the parties stipulated herein. The court shall also retain jurisdiction to enter orders as are necessary to enforce the assignment of benefits to the former spouse[.]”

{¶12} In an effort to resolve the matter, the trial court, relying on this section, entered orders to specify the respective roles of the parties and clarify and construe its original property division so as to effectuate its judgment. Consequently, the court ordered Melvin to provide to Barbara’s counsel written quotes from three insurers for term life insurance on his life, with Barbara as policy owner and sole beneficiary, in the amount of \$1 million. These quotes must include a statement of the amount of application fee (if any) and initial premium. Within 14 days after receiving the quotes from Melvin, Barbara must notify Melvin’s counsel, in writing, of her choice of policy, and provide payment of the initial premium and any application fee. Within 14 days after receiving Barbara’s choice of policy and payment, Melvin must submit a completed application for term life insurance to the insurer chosen by Barbara.

{¶13} Based on these orders, the onus is still on Barbara to submit the initial premium and application fee. Here, the parties, over the course of five years and two separate contempt hearings, were unable to determine what “cooperate” means in the context of the decree. In light of the foregoing, the trial court was within its power to clarify and construe its original property division so as to effectuate its judgment when it provided the procedure to do so in its February 2018 order.

{¶14} Accordingly, Melvin’s sole assignment of error is overruled.

Contempt

{¶15} In her cross-appeal, Barbara argues the trial court abused its discretion when it did not find Melvin in contempt of court. Barbara contends that Melvin’s unilateral actions were in direct conflict with the terms and conditions of the March 2013 divorce decree.

{¶16} When reviewing an issue of contempt, appellate courts apply an abuse of discretion standard. *Abernethy v. Abernethy*, 8th Dist. Cuyahoga No. 92708, 2010-Ohio-435, ¶ 27, citing *Denovchek v. Bd. of Trumbull Cty. Commrs.*, 36 Ohio St.3d 14, 16, 520 N.E.2d 1362 (1988); *In re Contempt of Morris*, 110 Ohio App.3d 475, 479, 674 N.E.2d 761 (8th Dist.1996). “The prima facie elements of civil contempt include the existence of a court order and the party’s noncompliance with the terms of that order. The burden then shifts to the defendant to establish any defense he or she may have for [noncompliance].” *Abernethy*, citing *Morford v. Morford*, 85 Ohio App.3d 50, 55, 619 N.E.2d 71 (4th Dist.1993), citing *Rossen v. Rossen*, 2 Ohio App.2d 381, 208 N.E.2d 764 (9th Dist.1964).

{¶17} Barbara claims that she established the terms and conditions of the decree, but Melvin failed to do so. In support of her claim, she refers to trial testimony wherein Melvin admitted to having life insurance agents that Barbara referred to his house for physicals and admitted to receiving the QDRO Consultants’ report listing the amount of required life insurance.

{¶18} With regard to Barbara’s contempt motion, the trial court stated: “[t]he Magistrate correctly found, as does this Court, that because [Barbara] never presented an application, [Melvin’s] duty to sign and submit the application never arose; consequently, he is not in contempt.” A review of the record reveals that since the March 2015 judgment entry, Barbara contacted Melvin one time about the procurement of the life insurance policy. She sent him an

email in May 2016 regarding the amount of coverage needed as a result of a calculation by QDRO Consultants. Melvin replied the next day. Barbara also acknowledged that she has not taken any action to obtain the insurance policy since the March 2015 judgment entry. Barbara did not present any evidence that she presented Melvin with a life insurance application. Based on the foregoing, we decline to find that the trial court abused its discretion when it refused to hold Melvin in contempt.

{¶19} Thus, the cross-assignment of error is overruled.

{¶20} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, domestic relations division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
PATRICIA ANN BLACKMON, J., CONCUR

