

**THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
STARK COUNTY, OHIO**

THOMAS L. BARNES,	:	OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2003CA00383
MARILYN K. BARNES,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2002DR01032.

Judgment: Affirmed. Filed: February 11, 2005

Kristine W. Beard, 4571 Stephen Circle, N.W., Canton, OH 44718 (For Plaintiff-Appellant).

Arnold F. Glantz, 4883 Dressler Road, N.W., Canton, OH 44718 (For Defendant-Appellee).

DONALD R. FORD, P.J., Eleventh Appellate District, sitting by assignment.

{¶1} The instant appeal stems from a final judgment of the Stark County Court of Common Pleas. Appellant, Thomas L. Barnes, seeks the reversal of the trial court's decision to overrule his motion to modify the amount of spousal support he is obligated to pay to appellee, Marilyn K. Barnes. For the following reasons, this court concludes that the denial of the motion to modify was warranted.

{¶2} The parties to the underlying action were married for approximately thirty-

one year and had two children. After both children had been emancipated, appellant filed a complaint for a divorce in July 2002. As the factual basis for his claim, he alleged that he and appellee had voluntarily been living separately for more than one year.

{¶3} Once appellee had submitted a counterclaim for divorce and the parties had engaged in certain discovery, a trial on the final merits of the case was held before the trial court in February 2003. At the outset of this proceeding, the parties stated that they had been able to reach an agreement as to the majority of the remaining issues in the case. The trial court then proceeded to hear evidence concerning the grounds for the divorce and the separation agreement.

{¶4} Two days after the abbreviated trial, the trial court issued the final divorce decree, granting appellant a divorce on the grounds stated in his complaint. The court also expressly found that the terms of the separation agreement were reasonable and fair. Accordingly, the court approved the agreement and incorporated it into the divorce decree.

{¶5} The first provision of the parties' separation agreement pertained solely to their marital residence. Specifically, this provision stated that the parties had agreed to sell the residence and then divide any net profit equally between them. In regard to the resolution of any dispute concerning the sale of their residence, the first provision also contained the following sentence: "This Court shall retain continuing jurisdiction of this case to implement the provisions of this Separation Agreement as it pertains to the sale of the aforementioned real estate."

{¶6} The second provision of the separation agreement delineated appellant's spousal support obligation. This specific provision stated:

{¶7} “2. The Husband consents and agrees to pay spousal support to the Wife for a period of ten (10) years, or until Wife remarries or upon the death of either party, whichever occurs first. Husband agrees to pay to Wife the sum of \$1,300.00 per month until the home is sold. At the time the home is sold, Husband agrees to pay to Wife the sum of \$1,500.00 per month.”

{¶8} Besides the foregoing provision, only one other term of the agreement was relevant to the issue of spousal support. The thirteenth provision stated: “The Husband and Wife consent and agree that the within agreement shall be a complete settlement of all rights by way of spousal support, both temporary and permanent, and said Husband and Wife shall make no further demands upon the Husband or Wife by way of spousal support.”

{¶9} None of the remaining thirteen provisions in the parties’ agreement were relevant to appellant’s support obligation. Furthermore, except for the one sentence in the provision pertaining to the sale of the marital residence, the agreement did not have any other term which granted continuing jurisdiction to the trial court.

{¶10} Approximately seven months after executing the separation agreement, appellant submitted a motion to either modify or vacate the spousal support aspect of the agreement. As the basis for this motion, appellant asserted that he was no longer financially able to pay support in accordance with the agreement because he was now unemployed as a result of the elimination of his position as an engineer with the Hoover Company. Appellant further asserted that the trial court still could exercise jurisdiction over the support issue because the amount of his support obligation had been tied to the sale of the marital residence, and that sale still had not been completed.

{¶11} An oral hearing on appellant's motion was held on October 14, 2003. As part of that proceeding, counsel for both sides presented legal arguments on the question of whether the trial court had jurisdiction to grant the requested relief. Counsel for appellant continued to argue that, since the marital residence had not been sold, the court still had jurisdiction under the separation agreement. His counsel also contended that, even if the trial court did not have the authority under the separation agreement to modify the amount of support, it could still grant him relief from the support provision under Civ.R. 60(B).

{¶12} On the same date of the oral hearing, the trial court rendered its judgment in which it overruled appellant's motion to modify. As to the request to modify, the trial court noted that the parties' separation agreement had not contained any reservation of jurisdiction over the issue of spousal support. Regarding the request to vacate, the trial court concluded that there were no grounds under Civ.R. 60(B) for granting relief from the support obligation under the agreement.

{¶13} In now appealing from the foregoing judgment, appellant has assigned the following as error:

{¶14} "The trial court abused its discretion by summarily dismissing, for lack of jurisdiction, the appellant's motion to modify spousal support and/or in the alternative, motion to vacate the spousal support clause of the separation agreement."

{¶15} Under this sole assignment, appellant has raised two arguments as to the propriety of the appealed judgment. First, he challenges the trial court's interpretation of the term in the separation agreement concerning the extent of its continuing jurisdiction over the divorce proceeding. Specifically, appellant contends that, since the amount of

his spousal support obligation was contingent on the sale of their marital residence, the application of the “continuing jurisdiction” term in the “sale” provision extended to any issue pertaining to the payment of support. Based upon this, he further maintains that the trial court had the authority to modify his support obligation in light of the change in circumstances as to his employment.

{¶16} As appellant correctly notes in his appellate brief, the authority of any trial court to modify a spousal support award after the issuance of the final divorce decree is governed by R.C. 3105.18(E)(1). This statute provides that if such a decree is released after January 1991 and contains an order concerning the continuing periodic payment of money as spousal support, the court issuing that decree does not have any jurisdiction to alter the terms of the support order unless: (1) a change of circumstances has taken place; and (2) “*** the decree or a separation agreement of the parties to the divorce that is incorporated into the decree contains a provision specifically authorizing the court to modify the amount or terms of alimony or spousal support.” In applying the second requirement for continuing jurisdiction under the statute, the Supreme Court of Ohio has indicated that any reservation of continuing jurisdiction must be expressly stated in the divorce decree in order for a trial court to properly consider any subsequent motion to modify. *Kimble v. Kimble*, 97 Ohio St.3d 424, 2002-Ohio-6667. Similarly, this court has indicated that an express statement of reservation must be set forth in the separation agreement if the parties to the divorce action intend for the trial court to have the ability to alter a spousal support order. See *Sears v. Sears*, 5th Dist. No. 2001CA00368, 2002-Ohio-4069.

{¶17} In the instant appeal, our review of the trial court’s divorce decree readily

shows that it did not contain any provision as to whether that court would continue to exercise jurisdiction over the spousal support issue; thus, the resolution of this aspect of appellant's assignment will turn solely upon our interpretation of the relevant portions of the parties' separation agreement. In regard to the general question of the appropriate interpretation of a separation agreement, this court has consistently concluded that such agreements are subject to the same rules of construction as other types of contracts. See, e.g., *Gaines v. Gaines* (Aug.14, 2000), 5th Dist. No. 2000CA00020, 2000 Ohio App. LEXIS 3696. Furthermore, this court has summarized some of the basic rules of construction in the following manner:

{¶18} “*** The question of whether a contract is ambiguous is a question of law to which this court applies a de novo standard of review. *** The purpose of contract construction is to effectuate the intent of the parties. *** It is well established in Ohio law that a court must give meaning to all provisions of a contract if possible. *** Where the parties, following negotiations, make mutual promises which thereafter are integrated into an unambiguous written contract, duly signed by them, courts will give effect to the parties' expressed intentions. *** Intentions not expressed in the writing are deemed to have no existence and may not be shown by parole evidence. *** Pursuant to this rule, it has been held that when a term in an agreement is unambiguous, then the words must be given their plain, ordinary and common meaning; however, when the term is not clear, parole evidence is admissible to explain the meaning of the words. ***” (Citations omitted.) *Schumacher v. Schumacher*, 5th Dist. No. 2004-CA-00018, 2004 Ohio App. LEXIS 5233.

{¶19} In applying the foregoing basic rules in light of the specific requirement of

R.C. 3105.18(E)(1) for continuing jurisdiction, this court has concluded that the fact that the separation agreement made the continuing payment of spousal support contingent upon the existence of certain circumstances was not sufficient to grant the trial court the authority to modify the support order. For example, in *Benincasa v. Benincasa* (Dec. 6, 1993), 5th Dist. No. CA 93-20, 1993 Ohio App. LEXIS 6114, the separation agreement required the husband to pay spousal support in the amount of \$3,000 each month, but also conditioned this obligation upon the requirement that the wife use part of the funds to make the monthly mortgage and insurance payments for the marital residence. After the wife had moved from the residence and stopped making the monthly payments, the husband moved the trial court to modify his support obligation. Although the trial court granted the motion to modify, this court reversed that decision on appeal. Specifically, this court rejected the husband's argument that the existence of the condition regarding the payment of spousal support was sufficient to constitute an express reservation of continuing jurisdiction over the issue. That is, in order for a trial court to have the power to alter the terms of the separation agreement, a more specific statement regarding the retention of jurisdiction is necessary.

{¶20} A similar decision was rendered in *Gaines*, supra, 2000 Ohio App. LEXIS 3696. In that case, the support obligation was conditioned on the requirement that the wife not earn more than \$2,000 per month. Once the wife had taken a position earning approximately \$23,000 per year, the husband moved to either modify or terminate his support obligation. On appeal from the denial of his motion, the husband asserted that the "earning" condition in the separation agreement must be interpreted as a reservation of the jurisdiction to modify. In upholding the trial court's decision, this court stated:

{¶21} “*** We are unpersuaded by [the husband’s] assertion. The separation agreement language at issue is better classified as a condition precedent to [the husband’s] right to cease spousal support payments. The only possible ‘modification’ intended by the parties is an alteration of spousal support to zero, and no other dollar amount, upon the triggering of the aforesaid economic eventuality in appellee’s career. There is thus no open-ended reservation to modify under R.C. 3105.18(E) as suggested by appellant. ***” *Gaines*, 2000 Ohio App. LEXIS 3696, at 6-7.

{¶22} In the instant matter, the condition in the primary “support” provision of the parties’ separation agreement was inherently different than the conditions in *Benincasa* and *Gaines*, to the extent that the instant condition did not place any requirement upon appellee in order for the spousal support to continue. Instead, this support provision merely placed a condition upon the amount appellant is obligated to pay. Nevertheless, the underlying logic of *Benincasa* and *Gaines* would still be applicable. Specifically, this court would emphasize that the support provision before us did not state that, after the marital residence has been sold, the trial court could redetermine the amount of support appellant should be required to pay; rather, the provision delineated the exact amount which must be paid after the sale is completed. As a result, the provision did not grant the trial court any discretion in setting the amount of the support. Accordingly, we hold that the conditional language in the support provision of the instant agreement cannot be deemed an express reservation of jurisdiction to modify the basic support obligation.¹

{¶23} As was noted above, appellant places heavy emphasis upon the fact that

1. Our interpretation of the conditional language in the primary “support” provision is further supported by the terms in the thirteenth provision of the parties’ agreement. As was noted above, that provision indicated that the parties intended for the agreement to constitute a “complete settlement” of all of their respective rights to spousal support. The inclusion of this provision in the agreement would simply be

the “sale” provision of the instant agreement contains a term which expressly grants the trial court continuing jurisdiction. In light of this, appellant argues that, since the change in the amount of support is tied to the sale of the marital residence, the specific grant of continuing jurisdiction must extend to any issue pertaining to spousal support.

{¶24} As to this point, this court would first reiterate that the “jurisdiction” term was set forth in the “sale” provision of the parties’ agreement, and that the distinct terms pertaining to appellant’s support obligation were stated in a separate provision. Second, the “support” provision does not contain any reference to the “jurisdiction” term in the “sale” provision. Third, and most importantly, the “jurisdiction” term expressly states that the trial court’s retention of jurisdiction is for the purpose of implementing “*** the provisions of this Separation Agreement as it pertains to the sale of the aforementioned real estate.” The foregoing unambiguous language clearly limits the scope of the trial court’s continuing jurisdiction to any issue which might arise concerning the sale of the parties’ home. Even if the language of the “jurisdiction” term is construed in a manner most favorable to appellant, it would still be illogical to conclude that the basic question of whether appellant’s support obligation should be modified as a result of a change in circumstances falls within the category of issues which pertain to the sale of the home. Any other interpretation would simply conflict with the plain meaning of the wording of the “jurisdiction” term.

{¶25} As an aside, this court would further indicate that, if a dispute ever arose as to appellant’s compliance with the “spousal support” provision following the sale of the residence, the trial court’s authority to resolve that dispute would not be based upon

illogical if the parties had truly intended to grant continuing jurisdiction to the trial court over the “support” issue.

the “jurisdiction” term of the “sale” provision. Instead, its authority would stem from its inherent power to enforce its own divorce decree. To this extent, we conclude that no question as to the payment of spousal support could properly be considered under the “jurisdiction” term. Even though the increase in support was contingent upon the sale of the parties’ home, these two aspects of the separation agreement were not related in any other respect, and the scope of the “jurisdiction” term was expressly limited to the “sale” issue.

{¶26} Under the basic rules of contract construction, a separation agreement cannot be subject to interpretation when its terms are both plain and unambiguous. In applying these rules to the relevant portions of the instant separation agreement, this court holds that the document does not have a term which expressly granted the trial court continuing jurisdiction to reconsider the spousal support matter once the divorce decree had been rendered. Thus, since the requirements of R.C. 3105.18(E)(1) were not met in this instance, the trial court was correct in concluding that it did not have the proper authority to go forward on appellant’s motion to modify.

{¶27} Under his second argument, appellant challenges the merits of the trial court’s decision to overrule his alternative request to vacate the support provision in the separation agreement. Appellant maintains that, even if the trial court did not have the jurisdiction to modify his support obligation, that court still had the authority to vacate that aspect of the agreement. Specifically, he contends that he was entitled to relief under Civ.R. 60(B)(4) because it would be inequitable to require him to continue to comply with the support obligation under the present circumstances. In support of this contention, appellant further states that, at the time he agreed to the support provision

in the agreement, he could not have foreseen that his position with his employer would be eliminated within six months.

{¶28} To state a viable motion for relief from a judgment under Civ.R. 60(B), the moving party must be able to demonstrate, inter alia, that he can satisfy one of the five possible grounds for such relief, as set forth in the rule itself. *Biscardi v. Biscardi* (1999), 133 Ohio App.3d 288, 290. Subsection (4) of Civ.R. 60(B) provides that a trial court can grant a party relief from a final judgment when “*** it is no longer equitable that the judgment should have prospective application; ***.” In applying Civ.R. 60(B) in the context of a divorce proceeding, the courts of this state have generally held that, even if an express reservation of jurisdiction to modify a spousal support award was not made when the divorce decree was issued, a trial court can still grant relief from a support order when the moving party can satisfy the standard for showing that the continuing application of the divorce decree would be inequitable. *Schaefferkoetter v. Schaefferkoetter*, 2nd Dist. Nos. 02CA97, 02CA104, 2003-Ohio-5529.

{¶29} Pertinently, the Supreme Court of Ohio has already delineated the basic standard for determining whether a party can satisfy Civ.R. 60(B)(4). In *Crouser v. Crouser* (1988), 39 Ohio St.3d 177, 180, the Supreme Court stated: “In order for the plaintiff to succeed under Civ.R. 60(B)(4), she must show that ‘*** it is no longer equitable that the judgment should have prospective application.’ Of importance here are the words ‘no longer,’ referring to the change in condition that is required to make continued enforcement of the judgment inequitable. Moreover, Civ.R. 60(B)(4) was designed to provide relief when those changed circumstances were not foreseeable, and not within the control of the parties.”

{¶30} As was noted above, appellant contends that the assertions in his motion before the trial court was sufficient to satisfy the foregoing standard because, at the time the separation agreement was executed, it was not foreseeable that he would lose his job later that year. However, in applying the *Crouser* standard in a prior case, this court has specifically rejected a similar argument.

{¶31} In *Sidwell v. Sidwell* (June 4, 1998), 5th Dist No. CT97-0042, 1998 Ohio App. LEXIS 3079, the separation agreement required the husband to pay support to the wife in the amount of \$4,000 per month for approximately ten years. At the time of the divorce, the husband worked for a family-owned business in which he was a major shareholder. Six years after the divorce, the business experienced serious financial difficulties which resulted in the reduction of the husband's salary from \$200,000 to \$46,000 per year. Based upon this, the husband moved the trial court for relief from the support provision in the separation agreement, arguing that it would not be fair for his support obligation to continue under these circumstances. In upholding the denial of the Civ.R. 60(B) motion, this court stated in *Sidwell*: "We find the court did not err in finding these circumstances were foreseeable when the parties entered into the separation agreement, and we also find the parties could have agreed that the court retained jurisdiction over the award in order to adjust for circumstances such as the one that has occurred." *Id.*, 1998 Ohio App. LEXIS 3079, at 7-8.

{¶32} To the extent that the husband in *Sidwell* was not totally unemployed, it is arguable that the facts in the instant appeal are distinguishable from those in *Sidwell*. However, the extent of the husband's financial difficulties was not a consideration upon which the *Sidwell* decision was predicated. Instead, that decision was based upon the

legal conclusion that, because a change in a person's financial situation is always a possibility, it is considered a foreseeable event for purposes of Civ.R. 60(B)(4) even if there was no immediate reason to believe the change was about to occur when the judgment was issued. In turn, since such a change is foreseeable, the party should have considered this point in negotiating the terms of the separation agreement. The fact that the party failed to ensure that the agreement covered this possibility is not a valid reason for concluding that it would be inequitable to continue to enforce the provisions of the agreement.

{¶33} Therefore, as a matter of law, the fact that appellant lost his job would not be sufficient to state proper grounds for obtaining relief from the divorce decree under Civ.R. 60(B)(4). Furthermore, this court would indicate that, even though appellant also requested relief from judgment under the "any other justifiable reason" provision of Civ.R. 60(B)(5), the Supreme Court has held that a party is not eligible for relief under that "catchall" provision when another grounds is clearly applicable and the party is not able to satisfy it. *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174. Thus, appellant has failed to demonstrate that the trial court erred in overruling his request for relief from the "spousal support" provision of the separation agreement.

{¶34} Pursuant to the foregoing analysis, appellant's sole assignment of error is without merit. Accordingly, the judgment of the trial court is affirmed.

JUDITH A. CHRISTLEY J.,
Eleventh Appellate District,
sitting by assignment,

ROBERT A. NADER, J., Ret.,
Eleventh Appellate District,
sitting by assignment,

concur.

STATE OF OHIO)
)SS.
COUNTY OF STARK)

IN THE COURT OF APPEALS
FIFTH DISTRICT

THOMAS L. BARNES,

Plaintiff-Appellant,

- vs -

MARILYN K. BARNES,

Defendant-Appellee.

JUDGMENT ENTRY

CASE NO. 2003CA00383

For the reasons stated in the Opinion of this court, the sole assignment of error is without merit. It is the order and judgment of this court that the judgment of the trial court is affirmed.

DONALD R. FORD, P.J.,
Eleventh Appellate District,
sitting by assignment.

JUDITH A. CHRISTLEY, J.,
Eleventh Appellate District,
sitting by assignment,

ROBERT A. NADER, J., Ret.,
Eleventh Appellate District,
sitting by assignment,

concur.