Third District Court of Appeal

State of Florida, January Term, A.D. 2012

Opinion filed April 25, 2012.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D10-3441 & 3D10-2917
Lower Tribunal No. 92-60018

Jorge Luis Riera,
Appellant,

vs.

Ana Margarita Riera,
Appellee.

An Appeal from a non final order in case No. 3D10-3441 and an appeal from a final order in case No. 3D10-2917, from the Circuit Court for Miami-Dade County, Bernard S. Shapiro, Judge.

Stack Fernandez Anderson & Harris, P.A., and Gregory Anderson and Sammy Epelbaum, for appellant.

Law Offices of Isenberg and Nabat, P.A., and Douglas Isenberg and Deborah Nabat, for appellee.

Before SHEPHERD and ROTHENBERG, JJ., and SCHWARTZ, Senior Judge.

ROTHENBERG, J.

The former husband, Jorge Luis Riera ("Father"), appeals two post-dissolution orders—(1) an order enforcing the parties' Marital Settlement Agreement ("MSA"), requiring the Father to reimburse the former wife, Ana Margarita Riera ("Mother"), for payments she made for their adult son's college expenses, and requiring the Father to pay $800 per month for the son's college expenses starting October 1, 2010 ("Enforcement Order") (Case No. 3D10-2917); and (2) an order holding the Father in civil contempt for willfully disregarding the Enforcement Order ("Contempt Order") (Case No. 3D10-3441). We reverse the orders under review, and remand for further proceedings.

In 1992, the Father and Mother, whose son was born in November 1991, entered into the MSA, which was incorporated into the final judgment of dissolution of marriage. The MSA states in pertinent part:

> 3. Child Support: The [Father] shall pay the [Mother] an amount as set out below to assist with the support of the parties' minor child.
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> . . . .
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> d. That the parties shall equally pay for the cost of the minor child's college tuition, books, supplies and any and all other related expenses. The parties will purchase the Florida four (4) years Pre-Paid College Program the cost of the program shall be equally paid for by both parties.

In July 2010, the Mother filed a "Verified Motion for Contempt to Compel and to Enforce Marital Settlement Agreement and Motion to Order [Father] to Pay Monthly College Expense," alleging that, pursuant to Paragraph 3.d. of the MSA,

the Father is required to pay 50% of their son's college expenses at George Washington University ("GW"), which for the 2010-2011 school year equals $850 monthly, after applying loans, grants, and the Florida Prepaid College Program to the expenses.[1]

At the hearing on the Mother's verified motion, the Father, an attorney, represented himself. He explained that when the parties entered into the MSA, they intended that their son would attend a public university in Florida, and therefore, in the MSA, they voluntarily agreed to purchase the Florida Prepaid College Program. Although the parties' son was accepted to Florida State University and awarded a 100% Bright Futures Scholarship, he chose to attend GW without consulting the Father. As to his financial ability to pay, the Father explained that, although he earns $135,000 per year and his current wife is employed as a school teacher, he cannot afford to make such a large monthly payment towards his son's college expenses because his two daughters attend a private school, he pays $4500 monthly on his first mortgage, he has a second mortgage, and his home is under water.

Following the hearing, the trial court entered the Enforcement Order, finding that the MSA does not place any restrictions on which college the son can attend, and that the Father's "interpretation that the Florida Pre-Paid College Fund

[1] At the hearing, the Mother's counsel acknowledged that the Father's 50% share of the son's college expenses equaled $800 per month, not $850.

reference means that the child would attend a Florida school is flawed." (emphasis in original). The trial court, however, found that the Father's failure to pay was not willful as he believed that he was not required to pay. The trial court ordered the Father to reimburse the Mother, and to start making monthly payments of $800 as of October 1, 2010. The trial court denied attorney's fees, but stated that it would consider assessing fees against the Father if enforcement actions were necessary. The Father timely appealed the Enforcement Order.

In October 2010, the Mother filed a "Second Verified Motion for Contempt to Enforce Order Granting [Mother's] Verified Motion for Contempt, to Compel and to Enforce Marital Settlement Agreement," asserting that the Father failed to make any of the payments required in the Enforcement Order, although he has the ability to comply. The trial court conducted a hearing in December, and entered the Contempt Order, finding the Father in civil contempt for willfully and flagrantly violating the trial court's Enforcement Order; sentencing the Father to sixty days in jail, but allowing him to purge himself of the contempt by paying $5600 to the Mother plus $1500 in attorney's fees; and ordering the Father to surrender by January 25, 2011, unless he pays the purge amount. The Father timely appealed the Contempt Order, and this Court subsequently stayed both orders under appeal.

The Father contends that the trial court erred by finding that, pursuant to

paragraph 3.d. of the MSA, he must pay his adult son's tuition and expenses at a private, out-of-state university. As we conclude that the MSA contains a latent ambiguity, we reverse the Enforcement Order and remand for an evidentiary hearing to allow the trial court to determine the intent of the parties when they executed the MSA.

A marital settlement agreement is "subject to interpretation like any other contract." Ballantyne v. Ballantyne, 666 So. 2d 957, 958 (Fla. 1st DCA 1996); see also Bacardi v. Bacardi, 386 So. 2d 1201, 1203 (Fla. 3d DCA 1980) ("Provisions of a property settlement agreement are interpreted by courts like any other contract."). Therefore, this Court is on "equal footing" with the trial judge in interpreting the MSA. Ballantyne, 666 So. 2d at 958; Geiger v. Geiger, 632 So. 2d 693, 695 (Fla. 1st DCA 1994).

"A latent ambiguity arises when the language in a contract is clear and intelligible, but some extrinsic fact or extraneous evidence creates a need for interpretation or a choice between two or more possible meanings." GE Fanuc Intelligent Platforms Embedded v. Brijot Imaging Sys., Inc., 51 So. 3d 1243, 1245 (Fla. 5th DCA 2011) (citing Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135, 1139 (Fla. 1998)); see also Drisdom v. Guarantee Trust Life Ins. Co., 371 So. 2d 690, 693 n.2 (Fla. 3d DCA 1979) ("A latent ambiguity has been defined as an ambiguity where the language employed in the policy is

clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings.") (citing Ace Electric Supply Co. v. Terra Nova Electric, Inc., 288 So. 2d 544, 547 (Fla. 1st DCA 1973)). When a contract contains a latent ambiguity, the trial court "must hear parol evidence to interpret the writing properly." Mac-Gray Servs., Inc. v. Savannah Assocs. of Sarasota, LLC, 915 So. 2d 657, 659 (Fla. 2d DCA 2005) (quoting RX Solutions, Inc. v. Express Pharmacy Servs., Inc., 746 So. 2d 475, 476 (Fla. 2d DCA 1999)); see also Drisdom, 371 So. 2d at 693 (holding that "extrinsic evidence such as parol evidence is permissible to explain" latent ambiguities).

Here, paragraph 3.d. of the MSA is "intelligible" but it is not so clear, and the extrinsic facts and evidence suggest differing interpretations. The first sentence of paragraph 3.d. provides "[t]hat the parties shall equally pay for the costs of the minor child's **tuition, books, supplies and any and all other related expenses**." (emphasis added). The MSA specifically lists tuition, books, and supplies, but does not list room and board as a covered expense. Because room and board are material, substantial expenses, you would expect them to be listed as covered expenses if they were to be included, especially, since books and supplies, which are not as substantial, are listed. It thus becomes paramount to determine whether "any and all other related expenses" refers to expenses related to tuition,

books, and supplies, or whether it refers to all related expenses associated with attending college. For example, does it include travel expenses, insurance, spending money, etc.? Thus, the MSA is not clear, is subject to differing interpretations, and requires clarification of the parties' intent.

Additionally, "[i]f a contract fails to specify the rights or duties of the parties under certain conditions or in certain situations, then the occurrence of such condition or situation reveals an insufficiency in the contract not apparent from the face of the document." Hunt v. First Nat'l Bank of Tampa, 381 So. 2d 1194, 1197 (Fla. 2d DCA 1980). This insufficiency is also considered a latent ambiguity, and as already stated, permits the trial court to consider parole evidence to determine what the parties would have included in their contract had they anticipated the occurrence they overlooked. Id. (citing Morton v. Morton, 307 So. 2d 835 (Fla. 3d DCA 1975)).

Paragraph 3.d. of the MSA clearly contains the type of insufficiency contemplated in Hunt and Morton. The MSA fails to address the duties of the parties under certain material conditions and circumstances. Specifically, it fails to address what the parties' responsibilities are in given situations, such as here where their son opted to attend an expensive out-of-state private school rather than an in-state public university that offered him a substantial scholarship in addition to the funding provided by the Florida Prepaid College Program that his Mother and

Father paid into pursuant to the MSA. It is understandable that, given the circumstances of this case, the parties did not contemplate the situation presented here. The parties were married for a very short period of time and their marriage was dissolved when their son was only ten months old. Both parents attended a Florida public university, and the Father testified it was anticipated that their son would do the same, which is why the MSA required them to fund the Florida Prepaid College Program.

The MSA also does not address how long the parties must pay for their son's college expenses or provide for any modification based on an ability to pay or any disparity in the resources of the parties. None of these occurrences were anticipated or included in the MSA, thus creating an insufficiency, or latent ambiguity which can only be resolved in the introduction of parole evidence regarding the intent of the parties.

Although we have reversed the Enforcement Order, we nonetheless address the Contempt Order which was based on the Father's failure to comply with the Enforcement Order. The trial court erred by holding the Father in civil contempt of court for failing to comply with the Enforcement Order, and additionally erred in ordering that the Father be incarcerated absent the payment of the purge amount specified by the trial court.

Any duty a parent has to pay an adult child's college expenses is moral

rather than legal. Grapin v. Grapin, 450 So. 2d 853, 854 (Fla. 1984). However, "[w]hen parties to a dissolution proceeding agree to educate their child after the child reaches [the] age of majority, the agreement is valid and may be enforced by either party to the agreement." Winset v. Fine, 565 So. 2d 794, 795 (Fla. 3d DCA 1990); see also Madson v. Madson, 636 So. 2d 759, 761 (Fla. 2d DCA 1994) ("Even though most financially able parents willingly assist their adult children in obtaining a higher education, any duty to do so is a moral rather than a legal one, absent either a finding of legal dependence or a binding contractual agreement by the parent to pay such support."). Where a party is obligated to pay his adult child's college expenses pursuant to a marital settlement agreement, the obligation "**is not child support, but rather a contractual obligation arising from the marital settlement agreement**." Sutton v. Sutton, 701 So. 2d 370, 372 (Fla. 2d DCA 1997) (emphasis added). Thus, contempt is not available to enforce the parties' contractual obligation to pay their adult son's college expenses. Nicoletti v. Nicoletti, 901 So. 2d 290, 292 (Fla. 2d DCA 2005) ("A contractual duty to pay for a child's college expenses cannot be enforced by contempt."); Carlton v. Carlton, 816 So. 2d 254, 256 (Fla. 2d DCA 2002) ("[C]ontempt is not an available remedy to enforce a marital settlement agreement's obligation for one parent to pay college expenses."); Southard v. Southard, 756 So. 2d 251, 253 (Fla. 5th DCA 2000) (holding that contempt is not proper vehicle to enforce father's contractual

obligation to pay adult child's college expense; rather the proper remedy is a "judgment enforceable by ordinary civil proceedings"); cf. Zolonz v. Zolonz, 659 So. 2d 451, 453 (Fla. 4th DCA 1995) (holding that "the court's contempt powers are available to enforce the father's obligation to pay contractual support after the majority of the child" because "the father expressly agreed to the contempt remedy in the property settlement agreement").

Here, the MSA required that the parties equally pay their son's "college tuition, books, supplies and any and all other related expenses." Prior to enrolling at GW, the son had reached the age of majority, and therefore, the Father's obligation was a contractual obligation that cannot be enforced by contempt. Nicoletti, 901 So. 2d at 292; Carlton, 816 So. 2d at 256; Southard, 756 So. 2d at 253. Therefore, even if we had affirmed the Enforcement Order, we would have reversed the Contempt Order.

Additionally, the trial court erred in ordering that the Father be incarcerated unless he paid the purge amount specified in the Contempt Order without making any findings as to the Father's ability to comply with this provision in the Contempt Order. See Bowen v. Bowen, 471 So. 2d 1274, 1277 (Fla. 1985) ("[I]ncarceration for civil contempt cannot be imposed absent a finding by the trial court that the contemnor has the present ability to purge himself of contempt. Without the present ability to pay from some available asset, the contemnor holds

no key to the jailhouse door.").

Reversed and remanded for further proceedings.

SCHWARTZ, Senior Judge, concurs.

SHEPHERD, J., concurring in part, dissenting in part.

I agree with the majority that the former husband, Jorge Luis Riera, cannot be held in contempt for failing to comply with a contractual obligation to pay college expenses. See Nicoletti v. Nicoletti, 901 So. 2d 290, 292 (Fla. 2d DCA 2005) ("A contractual duty to pay for a child's college expenses cannot be enforced by contempt."); see also Gersten v. Gersten, 281 So. 2d 607, 609 (Fla. 3d DCA 1973). However, I would affirm the decision of the trial court that the former husband is required to pay his aliquot share of his son's expenses to attend George Washington University.

The former husband contends the agreement contains a latent ambiguity. This is not so. Under Florida law, the initial determination of whether a contract term is ambiguous is a question of law. See Escobar v. United Auto. Ins. Co., 898 So. 2d 952, 954 (Fla. 3d DCA 2005); Team Land Dev., Inc. v. Anzac Contractors, Inc., 811 So. 2d 698, 699-700 (Fla. 3d DCA 2002). "A latent ambiguity arises when a contract on its face appears clear and unambiguous, but fails to specify the rights and duties of the parties in **certain** situations." Jenkins v. Eckerd Corp., 913 So. 2d 43, 52-53 (Fla. 1st DCA 2005) (emphasis added); see also Whitfield v. Webb, 100 Fla. 1619, 131 So. 786, 788 (1931). This agreement covers **all**

situations. In the first sentence of paragraph 3.d., the parties agreed to "equally pay for the cost of the minor child's college tuition, books, supplies and any and all other related expenses." As the trial court correctly stated, this provision "places no restriction on where the minor child shall attend college." The second sentence, as understood by the parties, obligated them to purchase a four-year pre-paid college tuition plan, which they did.[2] Applying plain meaning to plain language, it is quite apparent this sentence likewise does not limit the parties' joint education obligation to the cost of a Florida public college. In fact, savings from a Florida pre-paid college plan can be drawn upon for use at colleges and universities nationwide. See § 1009.98(3), Fla. Stat. (2010).

It is only by allowing itself to fall under the spell of the former husband's unsworn entreaties and its own surmise that the majority is able to find ambiguity in the agreement. The majority accepts as fact the former husband's unsworn representation concerning the intent of the parties when they executed the Marital Settlement Agreement. It reads into the agreement something that plainly is not there—that the parties might have meant something other than what they wrote.

[2] The parties purchased what then was known as a four-year "University Plan." The plan covered tuition for a specified number of undergraduate semester credit hours, not to exceed the average number of hours required for the conference of a baccalaureate degree, and certain local fees, such as activity and service fees, but excluding laboratory fees. See § 240.551, Fla. Stat. (1992); Fla. Admin. Code 6A-14.054 (1992). It did not cover books, supplies or "other related expenses." Nor does such a plan do so today. See § 1009.98(2)(b)1, Fla. Stat. (2012); Fla. Admin. Code 19B-5.001 (2012).

Then, clenching to other legally irrelevant unsworn claims of the former husband—a free ride available at a Florida public college, the son's failure to "consult" with the father about where he should go to college, and the father's alleged pauperism—the majority reverses the judgment of the trial court so the former husband can seek to re-write the agreement.

It is only if contractual terms **cannot** be reconciled that a court may look to extrinsic sources to determine the parties' intent. See Wagner v. Wagner, 885 So. 2d 488, 492 (Fla. 1st DCA 2004); see also Lloyds Underwriters v. Netterstrom, 17 So. 3d 732, 735 (Fla. 1st DCA 2009) ("[W]here the terms can be reconciled, the clear language of the contract controls."). In this case, all terms of the agreement are easily reconcilable, if indeed any conflict exists. No unaddressed gaps are left in the duties of the parties for the education of their son, as the majority painfully finds to exist in this case. The plain language of the agreement provides "for the cost of the minor child's college tuition, books, supplies and any and all other related expenses." Books and supplies were not covered by the Florida pre-paid college plan purchased by the parties, and the phrase "other related expenses" expands the parties' obligation to the son even more.[3]

[3] The interpretive principle involved here is the doctrine of ejusdem generis. "Under this doctrine, where an enumeration of specific things [i.e. "college tuition, books, supplies"] is followed by some more general word or phrase [i.e. "any and all other related expenses"], the general phrase will usually be construed to refer to things of the same kind or species as those specifically enumerated . . . [unless the

It might have been that the parties intended to limit the extent of their joint obligation to their son to the purchase of a four-year Florida pre-paid tuition plan. However, the question before us is not what intention existed in the minds of the parties, but what intention is expressed in the language used. See Robinson v. Central Props., Inc., 468 So. 2d 986, 988 (Fla. 1985). The unambiguous statement of the parties' intention in this case was to "equally pay for the cost of the minor child's college tuition, books, supplies and all other related expenses." We should enforce the agreement if the former husband has the ability to pay.[4]

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enumeration of specific things] is exhaustive of members of the class in question. . . ." See Brown v. Saint City Church of God of Apostolic Faith, Inc., 717 So. 2d 557, 559 (Fla. 3d DCA 1998) (applying doctrine to limit the phrase "or other materials of any kind" in statute prohibiting the throwing of "waste" on public streets to mean "or any other waste-like or litter-like material of any kind" and not gravel placed in swale to create parking area for church goers); see also Tiny Treasures Acad. & Get Well Ctr., Inc. v. Stirling Place, Inc., 916 So. 2d 991, 994 (Fla. 4th DCA 2005) (applying doctrine to limit the phrase "damages to the premises" to "similar physical damages to premises" and not lost rent); Stuart Sportfishing, Inc. v. Kehoe, 541 So. 2d 169, 170 (Fla. 4th DCA 2005) (finding restaurant and raw bar did not fit into "light marine related business such as marine electronics, sales of new and used boats, ships store, marine canvas, bait shop, **and/or similar ones** which would be permitted under the current zoning of the property" under doctrine) (emphasis added).

[4] Ability to pay has been found to be an implied component of reasonableness when deciding the reasonableness of a college tuition amount. See Carlton v. Carlton, 670 So. 2d 1129, 1130 (Fla. 2d DCA 1996). The length of time the obligation exists also should be subject to a reasonableness standard. See Fox v. Haislett, 388 So. 2d 1261, 1266 (Fla. 2d DCA 1980) ("[A] provision requiring a father to pay tuition, with no limitation expressed, should be construed to require the payment of tuition in a reasonable amount.").