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No. 3-10-0115

Order filed April 14, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

In re MARRIAGE OF)	Appeal from the Circuit Court
)	of the Twelfth Judicial Circuit
CELESTE BESSETTE FIGURA n/k/a)	Will County, Illinois
CELESTE BESSETTE JOHNSON,)	
)	
Petitioner-Appellee,)	
)	
and)	No. 99-D-882
)	
MARK FIGURA,)	The Honorable
)	Robert J. Baron,
Respondent-Appellant.)	Judge Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Wright concurred in part and dissented in part.

ORDER

Held: Where judgment of dissolution of marriage obligated parties to share certain expenses equally only upon agreement between the parties to incur the expense, trial court's judgment that obligation to share expense did not require agreement was reversed and the case remanded to determine whether an attempt at conditional agreement constitutes agreement with the meaning of the judgment as a whole.

Following an oral prove up of the parties' petition for dissolution of marriage in August

2000, petitioner, Celeste Bessette Figura, n/k/a Celeste Bessette Johnson, and respondent, Mark Figura, obtained a judgment of dissolution of marriage in the circuit court of Will County. In September 2006 Celeste filed a pleading titled “Petition for Contribution to School Expenses” seeking 50% of one of the minor children’s parochial school expenses from Mark. The trial court’s judgment ordered Mark to pay 50% of the private school tuition, fees, and expenses incurred for the benefit of the parties’ minor children. For the reasons that follow, we reverse.

BACKGROUND

The judgment of dissolution contains a provision that reads as follows:

“[C]onsistent with the parties’ existing agreement, all parochial school, day-care, extra-curricular activity, and the like expenses incurred for the benefit of the parties’ minor children shall be paid fifty percent (50%) by the Plaintiff and (50%) by the Defendant.”

The judgment of dissolution incorporates a joint parenting order which contains a provision that reads as follows:

“[C]onsistent with the parties’ existing agreement, all parochial school, day-care, extra-curricular activity, and the like expenses incurred for the benefit of the parties’ minor children shall be paid fifty percent (50%) by the Mother and (50%) by the Father.”

The judgment of dissolution also specifically incorporates the parties’ marital settlement agreement that reads, in pertinent part, as follows:

“[C]onsistent with the parties’ existing agreement, all parochial school, day-care and extra-curricular activity, and the like expenses

(as agreed upon by the parties, or provided by order of Court)
incurred for the benefit of the parties' minor children shall be paid
fifty percent (50%) by the Wife and (50%) by the Husband.”

The trial court found that a conflict exists between the judgement of dissolution, joint parenting order, and marital settlement agreement on the issue of whether either party's agreement to incur the expense is a prerequisite to that party's liability for 50% of the expense. The court informed the parties it would consider extrinsic evidence of the parties' intent.

Following a hearing on the petition, which included evidence of the parties' intent as to whether responsibility for 50% of parochial school expense is contingent upon agreement to incur the expense, the trial court found that the parties did not intend that either had to agree to the expense to be liable for 50% of the expense. Alternatively, the trial court ruled that the judgment of dissolution controlled over the conflicting language in the marital settlement agreement.

The trial court found that the testimony at the oral prove up of the petition for dissolution was significant in determining the parties' intent. The transcript of the prove up reveals that the following exchange with Celeste occurred:

“Q. Your and your husband have also agreed that each of you shall share equally 50 percent by your self and 50 percent by your husband the costs associated with parochial school, day-care expenses, extracurricular activities and such like expenses that are incurred for the benefit of your children, is that correct?”

A. Yes.”

Mark's counsel failed to question Celeste as to any agreement that Mark must consent to the expense before his obligation for half of the expense arose. Mark's counsel did not ask any questions about the general agreement that the parties would share certain expenses equally. At the hearing on Celeste's petition, that is the subject of this appeal, the trial court indicated that in its experience, in a situation such as this, "the other attorney speaks up and says, 'No, that's not correct, it's only as agreed by the parties.'" In the proceedings below, the court expressed doubt that it could find a contrary intent to the intent expressed in "an agreement which says the opposite and a judgment *** that was the opposite of what you want" in the absence of any objection at the prove up.

The trial court found that the parties' intent was that neither party had to agree to incur the expense to be liable for 50% of the expense.

This appeal followed.

ANALYSIS

Mark argues that the trial court abused its discretion in relying on the testimony at the prove up of the parties' petition for dissolution of marriage because the testimony at the prove up addressed the parties' agreement in general terms but failed to address specific and qualifying portions of the parties' agreements. He asserts that the "agreement clause" in the marital settlement agreement as to school and extracurricular expense is a specific and qualifying portion of the parties' agreement to share such expenses. Mark also argues that the agreement as a whole (which includes the judgment of dissolution, joint parenting order, and marital settlement agreement) is not ambiguous because it can be construed to resolve the apparent conflict. Moreover, the contract must be construed to give effect to every provision, and such that no

provision is rendered surplusage. Mark asserts that the trial court's judgment has the precise effect of rendering the clause "as agreed upon by the parties" superfluous and ineffective.

Celeste argues that the agreement is ambiguous because the provision in the joint parenting order requiring the parties to share certain expenses equally cannot be reconciled with the provision in the marital settlement agreement that requires an agreement by the parties or a court order before the parties are required to share the expense. Celeste argues that the opposing terms in the agreement create an ambiguity that required extrinsic evidence to resolve. Celeste argues that the trial court properly relied on the testimony from the prove up proceedings as persuasive evidence of the parties' intent. According to Celeste, the testimony was specific and unequivocal and, had Celeste's description of the parties' agreement as to the expenses in question not been accurate, Mark's counsel would have noted it.

"Interpreting the terms of a marital settlement agreement is a matter of contract construction and the court should seek to effectuate the parties' intent. [Citation.] Ordinarily, the best guide to the parties' intent is the language they used. [Citation.] The trial court should consider parol evidence to decide what the parties intended only when the language contained in the settlement agreement is ambiguous. [Citation.] The interpretation of a marital settlement agreement is a question of law." *In re Marriage of Carrier*, 332 Ill. App. 3d 654, 658 (2002).

We first dispense with the trial court's erroneous alternative judgment that the judgment of dissolution controls over the joint parenting order and marital settlement agreement. That judgment is erroneous because the judgment of dissolution, joint parenting order, and marital settlement agreement must be construed as a single agreement rather than multiple agreements.

“Contracts which specifically incorporate other documents by reference are to be construed as a whole with those other documents. [Citation.]” *Kirschenbaum v. Northwestern University*, 312 Ill. App. 3d 1017, 1029 (1999). The judgment of dissolution incorporates both the joint parenting order and marital settlement agreement. Therefore, the document must be construed as a whole.

Next, we find that the contract is ambiguous.

“Courts should neither exercise their inventive powers to create an ambiguity where none exists nor approve of the distortion of language to reach a desired result. [Citations.] Rather, a court should examine the [agreement] as a whole and, to the extent possible, give effect to all provisions and interpret words according to their plain, ordinary, and popular meanings.” *American Standard Insurance Co. v. Allstate Insurance Co.*, 210 Ill. App. 3d 443, 447 (1991).

In this case, the agreement generally requires the parties to share certain expenses equally. When considered with the pertinent language in the marital settlement agreement, that provision may mean that the obligation only arises when the parties have agreed to incur the expense. That same requirement, when considered with the pertinent language in the joint parenting order, may mean that the obligation to share in the named expenses arises regardless whether the parties have agreed to incur the expense. Thus, a provision the agreement, requiring shared expenses, is susceptible to two reasonable but conflicting interpretations, when viewed with other pertinent provisions in the same agreement.

“[A] contract is ambiguous when, considered with other pertinent provisions as a whole, ‘a *** provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.’ [Citation.]” *Old Republic Insurance Co. v. Ace Property and Casualty Insurance Co.*, 389 Ill. App. 3d 356, 364 (2009).

Therefore, this contract is ambiguous.

“In construing an ambiguous or inconsistent contract, the fundamental question is always the intent of the parties. [Citations.] ***.” *Lima Lake Drainage District of Adams County v. Hunt Drainage District of Hancock County*, 204 Ill. App. 3d 521, 525-526 (1990).

Accordingly, our next task is to attempt to ascertain the parties’ intent with regard to the provision requiring them to share certain expenses equally.

“Illinois courts follow the ‘four corners’ rule when interpreting contracts, which requires:

“ ‘An agreement, when reduced to writing, must be presumed to speak the intentions of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used.

It is not to be changed by extrinsic evidence.’ [Citation.]” [Citation.]’ ”
Bright Horizons Children's Centers, LLC v. Riverway Midwest II, LLC,
403 Ill. App. 3d 234, 247 (2010).

Under this rule, we look first within the four corners of the instrument to attempt to resolve the apparent conflict in the agreement. “[A]ny contract[] is to be construed as a whole, giving effect to every provision, if possible, because it must be assumed that every provision was intended to serve a purpose. [Citation.]” *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004). Where, as here, we are presented with two conflicting provisions which, read in isolation, create an apparent ambiguity as to the parties' intentions, “we must consider the document as a whole ([citation]) and determine if these two subparts are reconcilable.” *Premier Title Co. v. Donahue*, 328 Ill. App. 3d 161, 165 (2002).

This court has repeatedly held that "where one intention is expressed in one clause of an instrument and a different, conflicting intention appears in another clause of the same instrument, effect should be given to the clause which is more specific, and the general clause should be subjected to such modification or qualification as the specific clause makes necessary." *Lima Lake Drainage District of Adams County*, 204 Ill. App. 3d at 525-526, *Herington v. J.S. Alberici Construction Co., Inc.*, 266 Ill. App. 3d 489, 493 (1994) (“ ‘Where one intention is expressed in one clause of an instrument and a different, conflicting intention appears in another clause of the same instrument, full effect should be given to the clause which is the more principal and specific, and the general clause should be subjected to such modification or qualification as the

specific clause makes necessary.’ [Citation.]”). Again, in *Boyd v. Peoria Journal Star*, 287 Ill. App. 3d 796, 798 (1997), this court held that

“while it is axiomatic that contracts are considered as a whole, and are not read in isolated pieces [citations], full effect should be given to more principled and specific clauses, and general clauses should be subject to modification or qualification necessitated by specific clauses.” *Boyd*, 287 Ill. App. 3d at 798.

In this case, two apparently conflicting subparts of the agreement are reconcilable. *Donahue*, 328 Ill. App. 3d at 165. The agreement to share certain expenses only when both parties have agreed to incur the expense is more specific than the general agreement to share those expenses. See *Preuter v. State Officers Electoral Board*, 334 Ill. App. 3d 979, 991 (2002) (“It is well-established that “where a document contains both general and specific provisions relating to the same subject, the specific provision is controlling”). The requirement that the parties have agreed to incur the expense before the obligation to pay half of the expense arises is a “modification or qualification” of the broader requirement that the parties share certain named expenses. See *Boyd*, 287 Ill. App. 3d at 798.

After construing the parties’ agreement, as a whole, we find that each party must agree to incur the expenses in question before becoming liable for half of the expenses. The parties are obligated to share those expenses equally only if the parties’ agreed to the expense or the expense is the subject of a court order. Celeste’s petition does not allege that the parochial school expenses are the subject of a court order. However, the petition does allege that Mark “will only agree to pay one half of [one child’s] parochial school expense if she maintains a B average.”

Although the marital settlement agreement qualifies the general provision that the parties share certain expenses equally, nothing in the written agreement addresses whether the “agreement” to the expense itself can be qualified with conditions not provided in the parties’ written agreement. The parties have not pointed to any language in the agreement, or even addressed, what constitutes “agreement by the parties” within the meaning of the parties’ agreement.

The trial court’s judgment was that “[t]he intent of the parties as evidenced by the oral prove up, was that Mr. Figura need not agree to the activity to be liable for 50% of its cost, or in the alternative the Judgment controls notwithstanding it’s conflict with the marital settlement agreement.” Based on that finding, the trial court ordered Mark to pay "50% of private school tuition and fees/expenses of the parties’ minor children." The trial court’s judgment must be reversed because, construing the agreement as a whole, the parties are obligated to share those expenses equally only if the parties’ agreed to the expense. The trial court’s judgment is reversed, and the cause remanded for further proceedings.

CONCLUSION

The circuit court of Will County’s judgment is reversed and the cause remanded for further proceedings consistent with this judgment.

Reversed and remanded.

JUSTICE WRIGHT, concurring in part and dissenting in part:

I agree with the majority that the trial court erred in concluding that the judgment of dissolution of marriage took precedence over the judgment order which incorporated both the

parties' joint parenting order and marital settlement agreement. *Kirschenbaum v. Northwestern University*, 312 Ill. App. 3d 1017, 1029 (1999). I also agree with the majority that the judgment which incorporated both agreements was ambiguous.

Although a court determines whether a contract is ambiguous as a matter of law, the interpretation of an ambiguous contract presents a question of fact. *Pepper Construction Co. v. Transcontinental Insurance Co.*, 285 Ill. App. 3d 573, 575-76 (1996), (quoting *Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill. 2d 281, 288-89 (1990)). When a trial court determines that an ambiguity exists, "its subsequent construction of the contract will not be disturbed on review unless it is against the manifest weight of the evidence." *Dow v. Columbus-Cabrini Medical Center*, 274 Ill. App. 3d 653, 659 (1995), (citing *Myers v. Popp Enterprises, Inc.*, 216 Ill. App. 3d 830 (1991)). This standard of review has been interpreted to mean that the opposite conclusion is " 'clearly evident' or the finding is 'unreasonable, arbitrary or not based on the evidence.' " *Farmers Auto Insurance Ass'n v. Gitelson*, 344 Ill. App. 3d 888, 892 (2003), (quoting *1350 Lake Shore Associates v. Mazur-Berg*, 339 Ill. App. 3d 618, 628-29 (2003)), citing *Brody v. Finch University of Health Sciences/The Chicago Medical School*, 298 Ill. App. 3d 146, 153 (1998)).

I write separately because I respectfully suggest that the majority's interpretation of intent is contrary to the deferential standard of review required of this court. Unlike the majority, I believe the trial court's ruling regarding the parties' intent is not against the manifest weight of the evidence.

Here, the record supports the trial court's finding that the parties agreed to equally share in the minor children's parochial school expenses. Namely, at the time of the dissolution

hearing, Celeste testified, in response to a question from counsel, that she and Mark agreed to equally share the parochial school expenses. Mark's counsel was present in court during Celeste's testimony. Yet, Mark's attorney did not question Celeste's testimony on this issue or offer any further clarification to the court regarding the possibility that parochial school expenses had not become the subject of the agreement as of the date of this hearing. Accordingly, based on this testimony, I conclude that the trial court's determination that the parties agreed to *unconditionally* share parochial school expenses at the time of the judgment of dissolution was not against the manifest weight of the evidence. Therefore, I would affirm the ruling of the trial court.

Further, I do not believe that the language of the marital property agreement supports a contrary conclusion. I submit that the parentheses contained in the marital property agreement clause at issue modifies only the "like expenses" provision, and not the agreed expenses of parochial school, daycare and certain activities. If for some reason, parochial school was no longer an option for the parties' child or children, then this clause would mandate that these "like expenses" for another educational institution, such as a non-parochial, private school, would require the approval of both parents before they could require each other to split the educational costs.

Here, Mark obviously reconsidered the previously established, mutual agreement to pay for parochial school that existed at the time Celeste testified before the court. I respectfully suggest that the majority has allowed Mark to modify their agreement by injecting the B average condition to avoid his previous decision to unconditionally share the parochial school expenses.

For these reasons, I respectfully dissent.