

2013 IL App (2d) 120756-U
No. 2-12-0756
Order filed March 26, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
MICHAEL BLEIER,)	of Lake County.
)	
Petitioner-Appellee,)	
)	
and)	No. 05-D-1821
)	
KAREN ECHT,)	Honorable
)	Jay W. Ukena,
Respondent-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court erred in dismissing respondent's citation filed in section 2-1402 proceedings because there was an underlying enforceable judgment entered by operation of law under section 505(d) of the Illinois Marriage and Dissolution of Marriage Act. The judgment was reversed and the cause remanded.
- ¶ 2 Respondent, Karen Echt, appeals from the trial court's order granting petitioner, Michael Bleier's, motion to quash a citation notice and dismiss the proceedings on the citation to discover assets filed by Karen pursuant to section 2-1402 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1402 (West 2012)). For the following reasons, we reverse.

¶ 3

BACKGROUND

¶ 4 Karen and Michael were married in 1996 and had twin girls in 2000. In 2005, Michael filed a petition for dissolution of marriage under the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/101 *et seq.* (West 2012)). On October 7, 2005, the trial court entered a judgment of dissolution incorporating the parties' joint parenting agreement (JPA) and their marital settlement agreement (MSA). The JPA awarded the parties joint legal custody of the children. The MSA provided that Michael would pay Karen child support in the amount of "[n]ine thousand and 00/100 (\$9000.00) dollars per month, or twenty percent [*sic*] (28%) of his 'net' income per month, in accordance with guidelines set forth in the [Act]."

¶ 5 On October 13, 2011, Michael filed a motion to modify child support, alleging a significant decline in his income over the past 11 calendar quarters. Michael asserted that, based on his 2011 net income, he should be paying "guideline child support" (750 ILCS 5/505(a) (West 2012)) of \$4,000 per month. While his motion to modify was pending, Michael made support payments in the amount of \$9,000 per month in November and December 2011 but only \$3,875 in January 2012.¹

¶ 6 On January 13, 2012, Karen filed a "Petition for Adjudication of Indirect Civil Contempt" (contempt petition), alleging that Michael "willfully and contumaciously violated" the MSA by unilaterally reducing his support payment from \$9,000 to \$3,875. On January 27, the trial court

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The record contains a December 29, 2011, letter from Michael's attorney to Karen's attorneys, indicating his advice to Michael that, given the likelihood of prolonged litigation, and in light of the MSA and the Act's support guidelines, Michael begin paying \$3,875 per month in January 2012 until a further court order was entered. The letter stated that this amount was 28% of Michael's net income as calculated by Michael's certified public accountant.

entered a rule to show cause, finding probable cause to believe that Michael failed to comply with the MSA. Michael again paid Karen \$3,875 for child support in February 2012.

¶ 7 On March 1, 2012, Karen filed a third-party citation notice and citation to discover assets (the citation) against JP Morgan Chase, seeking to discover any of Michael's assets being held by JP Morgan Chase. The citation asserted that judgments against Michael had been entered on January 31 and February 29, 2012, and that \$10,365.31 remained unsatisfied. On March 15, 2012, Michael filed a motion to quash and dismiss the citation.

¶ 8 On Karen's motion, the trial court entered an agreed order on March 22, 2012, consolidating the citation proceedings into the "pending post-decree domestic relations proceedings."

¶ 9 On June 21, 2012, the trial court entered a "Memorandum Opinion and Order" granting Michael's motion to quash and dismiss the citation. The court concluded that Michael's reduced child support payments did not constitute an immediately enforceable judgment as required under section 2-1402 of the Code. The court reasoned that there was "no final judgment with respect to child support for the months after the filing" of the pending motion to modify child support because "the support amount for those months may be changed." The court further reasoned that the 2005 judgment of dissolution, which incorporated the MSA's child support provision, including its requirement that Michael pay "\$9,000 or 28%" of his income, was "sufficiently vague to serve as the basis for [Michael's motion to modify], and therefore requires that the court determine the correct amount of child support [Michael] should be paying." The court concluded, "Since this court has issued no such judgment on the issue of support arrearages, [Karen] lacks the necessary judgment for a citation to discover assets." The court dismissed the citation.

¶ 10 On July 5, 2012, Karen filed a petition for declaratory relief or reformation of the MSA. In the alternate prayers for relief, Karen sought either a declaration that the MSA required Michael to pay “the greater of \$9,000 or 28% of his monthly ‘net income’ ” or an order reforming the MSA to say the same.

¶ 11 On July 6, 2012, Karen filed a notice of appeal from the court’s June 21, 2012, order dismissing her citation.

¶ 12 ANALYSIS

¶ 13 As an initial matter, we address Michael’s argument that this court lacks jurisdiction to entertain Karen’s appeal. In her opening brief, Karen asserts that we have jurisdiction pursuant to Illinois Supreme Court Rules 301 (eff. Feb. 1, 1994) and 304(b)(2)² (eff. Feb. 26, 2010). “A final and appealable judgment for purposes of Rule 301 is one that fixes the rights of the parties absolutely and finally in the litigation and terminates the litigation on the merits so that if the judgment is affirmed, the only thing left to do is to proceed with the execution of the judgment.” *In re Application of County Collector*, 395 Ill. App. 3d 155, 159 (2009). “Where issues remain to be decided, the judgment is not a final one and an appeal may not be taken, unless otherwise authorized by the supreme court rules.” *County Collector*, 395 Ill. App. 3d at 160. Illinois Supreme Court Rule 304 (eff. Feb. 26, 2010) addresses appeals from final judgments that do not dispose of an entire proceeding. *In re Miller*, 396 Ill. App. 3d 910, 913 (2009). Specifically, Illinois Supreme Court Rule 304(b)(4) (eff. Feb. 26, 2010) makes immediately appealable a “*final* judgment or order entered in a proceeding under section 2-1402 of the Code.” (Emphasis added.)

²Karen’s citation of Rule 304(b)(2), which addresses final orders in “receivership, rehabilitation, liquidation, or other similar proceeding[s],” appears to be a typographical error.

¶ 14 In the present case, several matters remained pending following the trial court's dismissal of the section 2-1402 citation, including Michael's motion to modify support and Karen's contempt petition, as well the petition for declaratory relief or reformation that Karen filed after the court dismissed her citation. Thus, our jurisdiction over this appeal can arise only under Rule 304(b)(4), and only if the trial court's June 21, 2012, order was a final order.

¶ 15 Section 2-1402 of the Code "provides a mechanism by which a judgment creditor may initiate supplementary proceedings to discover assets of a judgment debtor in the possession of a third party and apply those assets to satisfy the judgment." *Tobias v. Lake Forest Partners, LLC*, 402 Ill. App. 3d 484, 488 (2010). An order entered in a section 2-1402 proceeding is final "when the citation petitioner is in a position to collect against the judgment debtor or a third party, or the citation petitioner has been ultimately foreclosed from doing so." *D'Agostino v. Lynch*, 382 Ill. App. 3d 639, 642 (2008). Obviously, the trial court's June 21, 2012, order did not put Karen in a position to collect. However, the order did ultimately foreclose Karen from collecting on the judgments at issue.

¶ 16 Michael contends that the order was not final because the court "manifested its intent to determine the amount of child support owed by Michael and the existence and amount of any arrearage, at which time Karen will be free to resume the [c]itation process to collect any amount due her." We agree with Michael that the trial court essentially ruled that Karen's citation was premature. That conclusion, however, does not address the finality of the June 21, 2012, order dismissing Karen's citation.

¶ 17 Karen's third-party citation recited that it was based on judgments entered on January 31 and February 29, 2012. Those judgments were created by operation of law from the original 2005

judgment of dissolution that incorporated the MSA's child support provision. Under section 505(d) of the Act, the child support order in the 2005 judgment is deemed to be a "series of judgments *** and each such judgment [is] deemed entered as of the date the corresponding payment" became due. 750 ILCS 5/505(d) (West 2012). Section 505(d) further provides that such judgments have the "full force, effect and attributes of any other judgment ***, including the ability to be enforced." 750 ILCS 5/505(d) (West 2012). Thus, by operation of law, Michael's monthly child support obligations for January and February 2012 were individual, enforceable judgments by the end of each of those months. Michael's underpayment of those two enforceable judgments resulted in an unsatisfied amount on each judgment. When the trial court dismissed Karen's citation, it ultimately foreclosed her from collecting the unsatisfied amount on the judgments as entered by operation of law on January 31 and February 29, 2012. This is true regardless of any future action that the trial court may take with respect to the matters pending before it. Accordingly, the court's June 21, 2012, order was final, and therefore, appealable under Rule 304(b)(4). See *D'Agostino*, 382 Ill. App. 3d at 642 (concluding that, because the trial court's denial of the petitioners' motion for turnover of funds foreclosed them from "collecting the funds in question from [the respondents]," the order was final and immediately appealable under Rule 304(b)(4)); *Levaccare v. Levaccare*, 376 Ill. App. 3d 503, 506, 511 (2007) (explaining that orders compelling third-party citation respondents to liquidate assets were final and appealable under Rule 304(b)(4), despite the pendency of a contempt petition and rule to show cause against the judgment debtor).

¶ 18 Having determined that we have jurisdiction, we now turn to the merits of Karen's appeal. Karen argues that the trial court erred as a matter of law in granting Michael's motion to quash and dismiss the citation. The parties disagree about our standard of review. Karen argues that our

review is *de novo*; Michael argues that our review is for abuse of discretion. We agree with Karen that the issue presented for our review—whether there was an enforceable judgment on which to proceed under section 2-1402—is a purely legal question, subject to *de novo* review. See *Eclipse Manufacturing Co. v. United States Compliance Co.*, 381 Ill. App. 3d 127, 134 (2007) (reviewing *de novo* the trial court’s turnover order in section 2-1402 proceedings where the trial court had not been called upon to make any factual findings); *In re Estate of Burd*, 354 Ill. App. 3d 434, 436 (2004) (“In order to determine the appropriate standard of review, we must not simply look to the type of ruling being appealed, but we must analyze the contentions made by the appellant.”).

¶ 19 In support of his position, Michael cites *In re Marriage of Hardy*, 191 Ill. App. 3d 685 (1989). In *Hardy*, the trial court conducted an evidentiary hearing on the petitioner’s contempt petition and the respondent’s petition to modify child support. *Hardy*, 191 Ill. App. 3d at 687. The trial court made factual findings and entered an order denying the contempt petition, granting the petition to modify, and entering judgment against the respondent for child support arrearages. *Hardy*, 191 Ill. App. 3d at 687-88. However, the court stayed execution on the arrearages, thus delaying the petitioner’s collection of arrearages “until further order of the court.” *Hardy*, 191 Ill. App. 3d at 687. The appellate court affirmed, concluding that the trial court had not abused its discretion in entering the stay. *Hardy*, 191 Ill. App. 3d at 691-92.

¶ 20 Unlike in *Hardy*, the trial court here decided a motion to quash and dismiss a citation, not a motion to modify or a contempt petition. The court here made no determination of whether there was any child support arrearage; indeed, the court made no factual findings at all. Most significant, the court here did not enter a stay (discretionary or otherwise) but completely dismissed Karen’s citation based on its legal conclusion that section 2-1402 was not satisfied. Thus, *Hardy* is inapposite.

¶ 21 As previously noted, section 2-1402 of the Code entitles a “judgment creditor” to prosecute supplementary proceedings to examine the judgment debtor or a third party to discover the judgment debtor’s assets and to compel application of those assets to satisfy the judgment. 735 ILCS 2-1402 (West 2012); *Tobias*, 402 Ill. App. 3d at 488. Thus, commencement of section 2-1402 proceedings requires an underlying enforceable judgment. Ill. S. Ct. R. 277(a) (eff. Jan. 4, 2013); *Tobias*, 402 Ill. App. 3d at 488. In the present case, the requisite enforceable judgment was the 2005 judgment of dissolution, which incorporated the MSA’s child support provision. As discussed above, under section 505(d) of the Act, the 2005 judgment was deemed to be a series of enforceable judgments entered against Michael each month. Thus, by operation of law, enforceable judgments were entered against Michael on January 31 and February 29, 2012, in the amount of the difference between the amount owed (\$9,000) and the amount actually paid (\$3,875). See *In re Marriage of Thompson*, 357 Ill. App. 3d 854, 860 (2005) (holding that child support orders considered as a series of judgments by operation of law under section 505(d) did not need to be “reduced to a court-ordered money judgment in order to accrue interest under section 2-1303 of the Code [735 ILCS 5/2-1303 (West 2004)]”). Accordingly, the trial court erred in dismissing Karen’s citation for lack of an enforceable judgment.

¶ 22 Moreover, notwithstanding Michael’s argument to the contrary (or the trial court’s reasoning), the January 31 and February 29, 2012, judgments were not rendered nonfinal, and therefore unenforceable, by Michael’s pending motion to modify child support. It is true that, if the trial court decides to grant Michael’s motion, it may make the modified support amount retroactive to the date that Karen received notice of the motion to modify. See 750 ILCS 5/510(a) (West 2012) (“support may be modified only as to installments accruing subsequent to due notice by the moving party of the

filing of the motion for modification”); *In re Marriage of Zukauskys*, 244 Ill. App. 3d 614, 618 (1993) (same). However, “the law is clear that a party cannot stop or reduce his child support payments unless the trial court has approved the modification.” *In re Marriage of Ingram*, 259 Ill. App. 3d 685, 691 (1994). Thus, the potential retroactive application of any modification does not relieve Michael of his current support obligation during the pendency of his motion. *Ingram*, 259 Ill. App. 3d at 691 (holding that the father’s \$660 per month child support obligation under the parties’ marital settlement agreement continued during the pendency of his motion to modify). Furthermore, our legislature anticipated situations such as the present one and provided that a motion to modify “shall not delay any child support enforcement litigation or supplementary proceeding on behalf of the obligee.” 750 ILCS 5/510(f) (West 2012). Therefore, that the trial court may in the future retroactively modify Michael’s support obligation alters neither Michael’s current obligation under the 2005 judgment nor Karen’s current right to enforce that judgment.

¶ 23 Based on the foregoing, Michael’s argument that “Karen was not entitled to use the citation process to collect a disputed arrearage that had not been adjudicated and reduced to judgment by the court,” misses the mark. Here, judgments for unpaid support entered against Michael on January 31 and February 29, 2012, by operation of law. No further adjudication was required. Indeed, section 2-1402 states, “It is not a prerequisite to the commencement of a supplementary proceeding that a certified copy of the judgment has been returned wholly or partly unsatisfied.” 735 ILCS 5/2-1402 (West 2012).

¶ 24 In support of his position, Michael relies on *Gonzalez v. Profile Sanding Equipment, Inc.*, 333 Ill. App. 3d 680 (2002), and *In re MJK Clearing, Inc.*, 241 F.R.D. 491 (N.D.Ill. 2007). In *Gonzalez*, the court held that the particular asset requested in a section 2-1402 turnover motion, a potential chose

in action for legal malpractice, was not an asset that the legislature contemplated for turnover because the plaintiff's request was based on a presumption that was "nothing if not premature." *Gonzalez*, 333 Ill. App. 3d at 695. In *MJK Clearing*, the court held that section 2-1402 proceedings were not available to enforce a judgment awarding injunctive relief (requiring the respondent either to transfer non-monetary assets or to transfer those assets and help the petitioner sell the assets).³ *MJK Clearing, Inc.*, 241 F.R.D. at 493-94. Neither case is apposite here.

¶ 25 Michael further contends, and the trial court agreed, that the MSA child support provision incorporated into the 2005 judgment was ambiguous because it required monthly child support payments of \$9,000 or 28% of Michael's net income. According to Michael, because the judgment was ambiguous, it was not enforceable for purposes of section 2-1402.

¶ 26 Marital settlement agreements are to be construed under the principles of contract construction. *In re Marriage of Kehoe & Farkas*, 2012 IL App (1st) 110644, ¶ 18. Our goal is to ascertain and effectuate the parties' intent, which is best indicated by the plain language of the agreement. *In re Marriage of Hahn*, 324 Ill. App. 3d 44, 46 (2001). A term is ambiguous if it is susceptible to more than one reasonable meaning. *Hahn*, 324 Ill. App. 3d at 46. However, a marital settlement agreement is not rendered ambiguous by the mere fact that the parties disagree as to its

³The court in *MJK Clearing* specifically addressed the petitioner's motion to turnover certain stock to partially satisfy the underlying injunctive order. *MJK Clearing, Inc.*, 241 F.R.D. at 492. In determining that section 2-1402 proceedings were not available to enforce injunctive relief, the court noted that section 2-1402 did not contemplate the "intermediate step" of determining the dollar value of the respondent's obligation to comply with the injunction. *MJK Clearing, Inc.*, 241 F.R.D. at 494.

meaning. *In re Marriage of Michaelson*, 359 Ill. App. 3d 706, 714 (2005). Whether an agreement's language is ambiguous presents a question of law that we review *de novo*. *Hahn*, 324 Ill. App. 3d at 47.

¶ 27 The MSA provided that Michael would pay Karen child support in the amount of “[n]ine thousand and 00/100 (\$9,000) dollars per month, or twenty percent [*sic*] (28%) of his ‘net’ income per month, in accordance with guidelines set forth in the [Act].” Section 505(a)(1) of the Act (750 ILCS 505(a)(1) (West 2012)) establishes guidelines for child support as a percentage of the obligor’s net income, based on the number of children the parties have. Where, as here, the parties have two children, the guidelines provide that child support should be 28% of the obligor’s net income. 750 ILCS 505(a)(1) (West 2012). The plain language of the MSA’s child support provision obligated Michael to pay \$9,000 per month, which was 28% of his income at the time the judgment was entered. The word “or” in this provision functions to indicate “the synonymous, equivalent, or substitutive character of two words or phrases.” Webster’s Third New International Dictionary 1585 (1993). In other words, \$9,000 and 28% of Michael’s net income were equivalent terms at the time of the dissolution judgment. Thus, the provision is not ambiguous.

¶ 28 Michael asserts that “or” operates as a disjunctive, indicating an alternative between two different things.⁴ However, reading “or” as a disjunctive in this context would lead to absurd results.

⁴Michael points out that, in the court below, Karen took the position that the MSA was ambiguous, but on appeal, Karen asserts that the provision was unambiguous. Michael urges that Karen be estopped from changing her position. Given our determination that the MSA was unambiguous as a matter of law, we need not address Michael’s estoppel argument. Nor do we address Michael’s contention that Karen’s argument in her motion to consolidate—that the citation

There is no rational reason that Michael would agree to pay more than what the guidelines required (under Karen’s “floor” interpretation—that Michael pay the greater of \$9,000 or 28% of his net income) or that Karen would agree to accept less than what she would be entitled to under the guidelines (under Michael’s “ceiling” interpretation—that he pay the lesser of \$9,000 or 28% of his net income). We will not read the MSA to produce absurd results. *In re Marriage of Sweders*, 296 Ill. App. 3d 919, 923 (1998) (declining to read the MSA as urged by the wife because it would produce “an unusual, unreasonable, absurd, and inequitable result”).

¶ 29 Moreover, the parties’ “ceiling” and “floor” interpretations contravene section 505(a)(2) of the Act, which mandates that the guidelines “shall be applied in each case unless the court finds that a deviation from the guidelines is appropriate after considering the best interest of the child.” 750 ILCS 5/505(a)(2) (West 2012). After enumerating the factors to be considered in determining what support amount would be in the child’s best interests, section 505(a)(2) directs: “If the court deviates from the guidelines, the court’s finding shall state the amount of support that would have been required under the guidelines, if determinable. The court shall include the reason or reasons for the variance from the guidelines.” 750 ILCS 5/505(a)(2) (West 2012).

¶ 30 Here, at the October 7, 2005, prove-up hearing, the trial court incorporated the MSA into the judgment of dissolution, finding that the MSA was not unconscionable. The court specifically found that “the child support agreed upon by the parties meets the statutory guidelines.” This finding supports our plain-language reading of the MSA’s child support provision as simply applying the

proceedings were “intertwined” with the pending post-dissolution matters—supports the trial court’s dismissal of the citation as premature, because we decide as a matter of law that Karen had an enforceable judgment on which to proceed under section 2-1402.

guidelines to Michael's net income at the time. Further, the absence of any findings regarding reasons to deviate from the guidelines undermines the parties' interpretations that would permit child support over or under the guideline amount.

¶ 31 Based on the foregoing, we conclude that the trial court erred in dismissing Karen's section 2-1402 citation. Accordingly, we reverse the judgment of the circuit court of Lake County and remand for further proceedings.

¶ 32 Reversed and remanded.