2015 IL App (2d) 140629-U
No. 2-14-0629
Order filed March 16, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re THE MARRIAGE OF	)	Appeal from the Circuit Court of Du Page
CARA J. JOESTEN, n/k/a,	)	County.
Cara J. Calvo,	)	
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 10-D-865
	)	
GREGG A. JOESTEN,	)	Honorable
	)	Robert A. Miller,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Schostok and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court had subject matter jurisdiction and its construction of the marital settlement agreement was supported by the language of the agreement and the evidence adduced at the hearing; affirmed.

¶ 2 Respondent, Gregg A. Joesten, appeals from the trial court's order clarifying the marital settlement agreement (MSA). Respondent argues that the trial court did not have subject matter jurisdiction to clarify the MSA, and if it did, respondent contends that the trial court's construction of the MSA was contrary to the plain and obvious language of the agreement. We

hold that the trial court did have subject matter jurisdiction and that its decision was supported by the language of the agreement and the evidence adduced at the hearing. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The parties were married on August 19, 1989, and the judgment for dissolution was granted on May 18, 2010. At that time, the parties' oldest child, K.J., who was 19, was attending Knox College. The youngest child, A.J., was 14 years old. The judgment of dissolution incorporated the parties' MSA.

¶ 5 On November 15, 2012, petitioner filed a rule to show cause against respondent claiming, *inter alia*, that he failed and refused to comply with his obligation to pay the college expenses for K.J.

¶ 6 On December 7, 2012, respondent filed against petitioner (1) a petition for indirect civil contempt for failing to supply respondent with grade reports; (2) a petition for indirect civil contempt concerning property distribution; and (3) a motion to modify his responsibility for college expense obligations. Respondent claimed that the MSA required the existence of certain conditions precedent to any obligation for his contribution to any post-high school educational costs and expenses, as well as certain specific financial limitations upon those costs once the conditions precedent were met. Respondent raised the requirement that his obligation to pay the children's post-high school educational expenses should be reduced by the availability of funds for the children's education including, but not limited to, scholarships, grants in aid, fellowships, or other financial assistance awarded to the children. Respondent also raised the limitation set forth in the MSA, which he contended limits the costs for post-high school education to those costs for a resident student at the University of Illinois in Champaign.

¶ 7 The trial court conducted a hearing on all pending petitions, including the motion to modify college expense obligations. After hearing argument on the petitioner's petition for rule to show cause, the court conducted a hearing on respondent's motion to modify college expense obligations.

¶ 8 Respondent testified that he thought the MSA relating to his college expenses was to be reduced by the amount of all funds available to his daughter and that she had qualified for various loans, scholarships, grants, and similar aid. Respondent stated that he subtracted K.J.'s total "financial Aid Award" for the year 2012-2013 from the total University of Illinois costs of $29,000, and he paid the difference to Knox College as and for his contribution to the post-high school educational costs and expenses.

¶ 9 On May 13, 2013, the trial court issued its findings and decision. The court would not issue a finding of contempt against respondent for failing and refusing to comply with his obligation to pay college expenses for K.J. because the parties' MSA had to be subject to only one clear interpretation and, if it was subject to multiple interpretations, the court could not find respondent in contempt.

¶ 10 In construing the MSA, the court found that the parties must first start with the actual tuition of Knox College, subtract from that the scholarships, grants in aid, fellowships, or financial assistance awarded to K.J., except that loans and work study should not be subtracted as they are something that is not awarded to the child, and loans and work study funds are not what was intended by the MSA. The court found that any financial aid, other than scholarships and grants awarded to the child such as loans or work study, shall be deemed the child's contribution to the costs of her education and shall not reduce respondent's obligation. In other words, the court found that loans and work study amounts are excluded, but the other financial assistance

given to the child would be deducted from Knox College expenses. And if "that calculation brings the number below the University of Illinois standard then [respondent]'s obligation would be limited to that figure; however, if the subtraction of the financial assistance defined [in the trial court's order] does not bring the costs under the University of Illinois standard, then [respondent] is on the financial hook for the entire amount of the University of Illinois standard for that year."

¶ 11 The MSA requires bonuses received by respondent must be used to fund the parental portion of the college expenses for the parties' children. Respondent testified that 10-15% of his regular paychecks were withheld for federal taxes. The court determined that, from respondent's yearly bonuses, the federal taxes should be calculated by deducting 15% from the gross figure. The trial court determined that the parties intended a net amount with a deduction at the rate of respondent's regular paychecks based on the evidence presented at the hearing, including respondent's testimony.

¶ 12 The court entered an order denying petitioner's petition for rule to show cause and denying respondent's motion to modify responsibility for college expenses. However, the order also granted leave to respondent to re-notice the petition for indirect civil contempt against petitioner for failing to supply respondent with grade reports for hearing on another day, which left that petition pending.

¶ 13 Respondent appealed from the order regarding the motion to modify college expenses before the court resolved the grade report contempt petition. Accordingly, we held that respondent's appeal was premature and thus, we dismissed the appeal for lack of jurisdiction. *Joesten*, 2014 IL App (2d) 131130-U (summary order). We presumed that respondent could timely file a notice of appeal upon the trial court's resolution of any pending claims in this

matter. On June 25, 2015, the parties voluntarily dismissed the pending claim. Since there was no longer any matter pending, the September 27, 2013, order became final. Respondent now timely appeals from the trial court's September 27, 2013, order.

¶ 14 II. ANALYSIS

¶ 15 A. Subject Matter Jurisdiction

¶ 16 Respondent argues that, "after failing to find respondent in contempt of court," the trial court erred "by invoking subject matter jurisdiction to modify and interpret the provisions of the parties' [MSA] dealing with post-high school educational costs and contributions without there first being a petition on file seeking such relief." We could not consider this argument in the context of respondent's initial appeal because we did not otherwise have appellate jurisdiction. *Universal Underwriters Insurance Co. v. Judge & James, Ltd.*, 372 Ill. App. 3d 372, 383-84 (2007). However, we now have appellate jurisdiction over respondent's present appeal, and, as pointed out by respondent, any order entered in the absence of subject matter jurisdiction is void *ab initio* and may be attacked at any time. See *In re M.W.*, 232 Ill. 2d 408, 414 (2009).

¶ 17 Respondent cites *Ottwell v. Ottwell*, 167 Ill. App. 3d 901 (1988), which found that a circuit court's jurisdiction in a dissolution of marriage action is conferred by statute and must exercise its authority only within the limits conferred by statute. *Id*. at 908. The only petition pending before the court was a petition for citation alleging arrears in child support. *Id.* The court held that the pending petition for citation was insufficient to place the petitioner on notice that her rights to receive past due and future child support were to be considered at the hearing, and without a petition to modify support on file, the circuit court's subject matter jurisdiction was not invoked. *Id*. at 908-09. Respondent asserts that the circuit court in this case was also limited to the exercise of authority conferred upon it by statute.

¶ 18 The kind of argument respondent makes has been superseded. The supreme court rejected such reasoning in *People ex rel. Graf v. Village of Lake Bluff*, 206 Ill. 2d 541, 553 (2003), *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 335-36 (2002), and *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 529-30 (2001). Under the rule of those cases, the sole source of subject matter jurisdiction is article VI, section 9, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 9), not by the requirements of statute, and in cases not involving administrative review, such jurisdiction's existence depends solely on the existence of a justiciable matter. *Belleville Toyota*, 199 Ill. 2d at 335-36. Failures by the circuit court to follow statutory mandates do not divest it of jurisdiction. See, *e.g.*, *In re Antwan L.*, 368 Ill. App. 3d 1119, 1128 (2006).

¶ 19 Contrary to respondent's assertion, he had filed a motion to modify his obligation to pay college expenses, in which he requested the trial court to enter an order modifying the post-high school educational costs and expenses of his daughter. A justiciable matter is a "controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests." *Belleville Toyota*, 199 Ill. 2d at 335. Respondent's motion was a justiciable matter invoking the jurisdiction of the circuit court to address the issues regarding modification of the MSA.

¶ 20 We observe also that it was respondent who filed the motion and the court conducted a hearing and rendered a decision on that motion. As pointed out by petitioner, respondent cannot complain that the trial court lacked subject matter jurisdiction to address the motion when it was respondent who filed the motion. See *In re Marriage of Yelton*, 286 Ill. App. 3d 436, 442 (1997) (because parties adjudicated their rights before court to final judgment without objection to

court's right to hear the cause, parties will be bound on appeal so far as question of jurisdiction over particular case is concerned).

¶ 21 Respondent appears to argue that the trial court was not authorized to construe the MSA *after* it had determined that it would not find respondent in contempt pursuant to petitioner's petition for rule to show cause. Respondent's motion was up for hearing the same day as the petition for rule to show cause. In both the petition and the motion, the prayers for relief requested "any other relief the court deems is just." Based upon the issues presented in the petition and the motion, it was reasonable and just for the court to construe the intent of the parties concerning college expenses as set forth in the MSA.

¶ 22 B. Intent of the Parties

¶ 23 We turn to respondent's second argument that the trial court erred by placing a construction on the MSA contrary to or different from the plain and obvious meaning of the MSA regarding the post-high school educational costs and expenses of the parties' children.

¶ 24 A marital settlement agreement is a contract subject to the same rules of construction as any other contract; the court seeks to effectuate the parties' intent. *In re Marriage of Hulstrom*, 342 Ill. App. 3d 262, 269 (2003); *In re Marriage of Agustsson*, 223 Ill. App. 3d 510, 518 (1992). In analyzing settlement agreements, the parties' intent must be determined from the instrument as a whole, and it is presumed that the parties inserted each provision deliberately and for a purpose. *In re Marriage of Druss*, 226 Ill. App. 3d 470, 475 (1992). We review the MSA *de novo*.

¶ 25 Respondent points to the following three areas of the MSA in which he contends that the trial court's construction of the MSA was contrary to the intent of the parties: (1) student loans and work study; (2) University of Illinois costs; and (3) tax rate.

¶ 26 The section of the MSA dealing with responsibility for college states:

"A. [Respondent] shall be responsible to pay the costs of a college, university, or vocational school education for the parties' children, pursuant to Section 5/513 of the Illinois Marriage and Dissolution Act (citation), or any successor statutory provision, subject to the terms and conditions set forth below. [Respondent]'s obligation to pay the children's post-high school educational expenses shall be reduced by the availability of funds for the child's education including, but not limited to, scholarships, grants in aid, fellowships or other financial assistance awarded to a child.

B. [Respondent]'s obligation to contribute toward these college expenses is conditioned upon the following:

1. The child has at that time the desire and aptitude for a trade school or college education.

2. The trade school or college is limited to five (5) years or the attainment of a Bachelor's degree, whichever first occurs after graduation from high school, except that the time shall be extended in case of serious illness.

3. The child carries the required number of hours or classes or units so that he or she is considered by the school attended to be a full-time student and the child maintains a passing grade point average as prescribed by the said school and the child is making reasonable progress toward a recognized degree program.

4. Copies of all grade reports of the child are forwarded to both parents by the child and/or the physical custodial parent within ten (10) days after same are issued.

5. The cost for post-high school education shall be based upon the costs for a resident student at the University of Illinois in Champaign.

> C. The parties agree and acknowledge that [respondent] receives a bonus on an annual basis for his performance from the prior year. The parties have agreed that this bonus will be used exclusively to fund the parental portion of the higher education expenses for the parties' children. [K.J.] is currently attending Knox College and [A.J.] will begin college approximately when [K.J.] completes college, therefore the parties will be funding college for approximately seven consecutive years following the entry of their Judgment for Dissolution of Marriage."

¶ 27 1. Student Loans and Work Study

¶ 28 Respondent argues that the trial court improperly construed the provision of the MSA which provides that respondent's obligation to pay college costs "shall be reduced by the availability of funds for the child's education including, but not limited to, scholarships, grants in aid, fellowships or other financial assistance awarded to the child." Respondent contends that loans and work study funds should also be deducted from his obligation to pay post-high school educational expenses. The trial court interpreted this provision to mean that student loans and work study funds "shall not be included in the definition of 'funds available for the child's education' because they are not something awarded to the child."

¶ 29 We agree with the trial court's interpretation of this provision. Clearly, respondent is obligated to pay for his child's post-high school expenses, and there is nothing in the MSA indicating that the child must pay anything toward student loans or work to receive work study money. These funds are not included in the definition of "funds available for the child's education." Scholarships, grants in aid, fellowships, or other financial assistance are based on academic achievement that do not need to be repaid; whereas money earned through work study and loans that must be repaid by the child represents an ongoing obligation of the child to use for

college expenses. The plain language of the MSA makes respondent, not the child, responsible for the child's post-high school expenses and respondent should not profit from the loan or work-study funds.

¶ 30 Petitioner's *ejusdem generis* argument supports the trial court's determination. Under this doctrine, "where general words follow an enumeration of specific things of a particular class, the general words are to be construed as applying only to the things of the same general class as those enumerated." *Save Our Little Vermillion Environment, Inc. v. Illinois Cement Company*, 311 Ill. App. 3d 747, 752 (2000) (*SOLVE*).

¶ 31 In *SOLVE*, the plaintiff owned an undivided three-fifths interest in the mineral rights reserved by a land grantor. The plaintiff filed a complaint for declaratory and injunctive relief against the grantee's successor, the defendant, seeking to prevent the company from mining limestone on the property. A provision in the deed reserved to the plaintiff "the coal and other minerals underlying the property." The issue under consideration was whether limestone was included with the phrase "coal and other minerals." Applying the doctrine of *ejusdem generis*, the Third District Appellate Court determined that limestone was not included in the deed as "other minerals underlying the property" because limestone is "of an entirely different nature than coal," as coal is a source of energy that can be mined without disturbing the surface, while limestone is not combustible and cannot be mined without destroying the surface. *Id.* at 752.

¶ 32 Here, the question we must consider is whether "student loans" and "work study" money is "other financial assistance" in the nature of "scholarships, grants in aid, and fellowships." As stated, scholarships, grants in aid, and fellowships are awards to a student for academic achievement, which do not have to be repaid. On the other hand, money earned through work study and loans borrowed for a post-high school education represents an ongoing obligation of

the child to pay toward college expenses for which respondent is responsible. The list in the MSA clearly includes only funds which are available and need not be repaid or earned by the children through employment.

¶ 33 2. University of Illinois Costs

¶ 34 The first sentence of paragraph A of the MSA states respondent is obligated to pay the costs for college education subject to the terms and conditions of the MSA. Paragraph B conditions respondent's obligation to contribute expenses for post-high school education based upon the costs for a resident student at the University of Illinois in Champaign. As to how the parties should be using the University of Illinois tuition standard as respondent's cap and how to calculate what respondent should pay, the court determined that the parties must first start with the actual tuition of Knox College and then subtract from that any scholarships, grants, aids, fellowships, or financial assistance awarded to the child from the Knox College tuition cost. If that brings the number below the University of Illinois standard, the court indicated that respondent then pays up to that number. If not, then respondent must pay the entire amount of the University of Illinois standard for that year.

¶ 35 Respondent contends the trial court failed to correctly ascertain the intent of the parties and used its own construction on the terms governing respondent's obligation toward college costs. Respondent asserts that his obligation to pay college expenses should be determined by the actual cost of a University of Illinois education before making deductions, rather than beginning with the cost of a Knox College education, as interpreted by the trial court.

¶ 36 We agree that this provision, in the abstract, is ambiguous as to whether University of Illinois costs are a starting point, as respondent argues, or a cap, as the trial court determined. The provision simply states that "[t]he cost for post-high school education shall be based upon

the costs for a resident student at the University of Illinois in Champaign" and there is nothing in the MSA which specifically provides that respondent's obligation must begin with Knox College costs.

¶ 37 When a term is susceptible to two different interpretations, the court must follow the interpretation that establishes a rational and probable agreement. *In re Marriage of Hahn*, 324 Ill. App. 3d 44, 47 (2001). Paragraph C of the MSA provides that respondent's bonus "will be used exclusively to fund the parental portion of the higher education expenses for the parties' children" and the parties' daughter "is currently attending Knox College." Therefore, at the time of the judgment of dissolution, it was reasonable to conclude that the parties intended to formulate the MSA to fund their daughter's education at Knox College, not the University of Illinois. If the parties intended University of Illinois costs to be a starting point, the MSA certainly would have clarified this. It also reasonably can be inferred that the parties intended to include paragraph B 5 in order to cap the contribution to their children's college education to the "costs for a resident student at the University of Illinois in Champaign," regardless of which college they attended.

¶ 38 Additionally, in responding to a question by his attorney during the hearing on the motion, respondent agreed that, prior to the 2012-2013 academic year, he had paid more than the cost of the University of Illinois for his daughter to attend Knox College. As noted by petitioner, if respondent really believed that his educational contributions were limited to the cost of a University of Illinois education, there would be no reason to pay more than that amount for his daughter to attend Knox College. See *In re Marriage of Michaelson*, 359 Ill. App. 3d 706, 714 (2005) (where language is ambiguous, trial court may receive parol evidence to decide what parties intended).

¶ 39 3. Tax Rate

¶ 40 Respondent last contends that the trial court erred by "unilaterally" selecting a 15% tax rate to be applied to his yearly bonus.

¶ 41 The MSA is ambiguous as to whether the bonus language refers to a gross amount or a net amount after taxes, and if it is a net amount, at what rate would the taxes be deducted. As previously noted, when language is ambiguous, the trial court may consider the parol evidence from the hearing and determine the parties' intent. See *Id*. at 714.

¶ 42 Respondent testified at the hearing that 10-15% of his regular pay checks are withheld for federal taxes, while the bonuses had a 25% deduction. The trial court found that, from respondent's annual bonuses, 25% was taken out for federal taxes, and the court did not know why or whether it was respondent's doing, if it was his employer's doing, or if it was some other Internal Revenue Service guideline. The court noted that, when respondent receives his annual bonus in February, he does not receive any portion of that 25% withholding for a year since the taxes he files the next year would include the bonus. Thus, the court concluded that it was appropriate "looking back at this point to determine that fifteen (15%) should be deducted from the gross amount of the bonus as and for appropriate Federal tax rate, in addition to the State tax deduction, FICA and Medicare deductions as evidenced on respondent's paystubs."

¶ 43 The trial court was free to take into consideration the parol evidence from the hearing, including respondent's testimony, and determine that the parties intended a net amount with a deduction at the rate of respondent's regular paychecks.

¶ 44 CONCLUSION

¶ 45 Based on the preceding, the judgment of the circuit court of Du Page County is affirmed.

¶ 46 Affirmed.