2012 IL App (2d) 111193-U
No. 2-11-1193
Order filed September 10, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF JENNIFER L. TOVO, Petitioner-Appellee, and JOSEPH R. TOVO, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 07-D-2117 Honorable Rodney W. Equi, Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

Held: The trial court did not err in denying respondent's petition to terminate his maintenance obligation.

¶ 1 Respondent, Joseph R. Tovo, appeals from the trial court's judgment denying his petition to terminate the maintenance he was paying petitioner, Jennifer L. Tovo. We affirm.

¶ 2 I. BACKGROUND

¶ 3 Joseph and Jennifer were married on July 19, 1997. They adopted two children during their marriage: Clayton, born in November 1999, and Chloe, born in June 2001. During the dissolution

proceedings, Jennifer was represented by an attorney while Joseph was *pro se*. The parties' marriage was dissolved on January 15, 2008, and the judgment incorporated their marital settlement agreement (MSA).

¶ 4 The MSA states that Joseph represented that his gross income was $330,000, and it provides for $4,000 per month in child support. The agreement states that the child support is less than the statutory guidelines "in part because of the maintenance Jennifer is receiving." The maintenance provision states:

> "Joseph shall pay to Jennifer as and for maintenance the sum of $107,000.00 per year ($8,916.67) per month. Payments shall be made on the 1st day of each month following the execution of this Agreement, and on the first day of each successive month thereafter. Joseph's obligation to pay maintenance shall terminate upon Jennifer's death or on Joseph's death."

¶ 5 A couple of years later, on August 7, 2010, Jennifer married Michael Nagy. Shortly thereafter, on August 12, 2010, Joseph filed a petition to terminate maintenance under section 510 of the Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/510 (West 2010)). He argued that he should no longer have to pay maintenance, alleging that Jennifer cohabited with Michael on a conjugal basis prior to August 7. Joseph alternatively requested that maintenance be terminated as of the date of Jennifer's remarriage.

¶ 6 On September 2, 2010, Jennifer filed a motion to dismiss Joseph's petition. The trial court granted the motion without prejudice on November 15, 2010, allowing Joseph leave to amend. Joseph filed an amended petition on April 14, 2011. Count I sought automatic termination of

maintenance based upon Jennifer's cohabitation and/or remarriage. Count II, pled in the alternative, sought a modification of maintenance based on a substantial change of circumstances.

¶ 7 A trial on the petition took place on August 2 and 3, 2011. Following the submission of written closing arguments, the trial court issued a letter ruling dated August 25, 2011. The trial court denied Joseph's request to terminate maintenance, as sought in count I. It ruled that under the language of the MSA, maintenance did not terminate upon Jennifer's cohabitation or remarriage. The trial court granted Joseph's alternative request, as plead in count II, to modify maintenance. It reduced maintenance to $4,000 per month retroactive to September 1, 2010.

¶ 8 On September 22, 2011, the trial court entered an order incorporating the letter ruling. The same day, Jennifer filed a motion to clarify the ruling. The trial court granted that motion in part on October 26, 2011, stating that Joseph was not in contempt of court for ceasing to pay maintenance while his petition was pending, because the cessation was based on his legal theory and was not willful and without compelling cause. Joseph timely appealed.

¶ 9 II. ANALYSIS

¶ 10 On appeal, Joseph argues that the trial court erred in denying his request to terminate maintenance to Jennifer upon her conjugal cohabitation with, and subsequent marriage to, Michael. Joseph cites section 510(c) of the Marriage Act, which states:

> "*Unless otherwise agreed by the parties in a written agreement set forth in the judgment or otherwise approved by the court*, the obligation to pay future maintenance is terminated upon the death of either party, or the remarriage of the party receiving maintenance, or if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis." (Emphasis added.) 750 ILCS 5/510(c) (West 2008).

Joseph argues that in their MSA, neither party expressly excluded the section 510 termination factors, nor did they limit the termination of maintenance to only the death of the parties.

¶ 11 In support of his argument, Joseph cites a series of cases: *In re Marriage of Snow*, 322 Ill. App. 3d 953 (2001); *In re Marriage of Sweders*, 296 Ill. App. 3d 919 (1998); *In re Marriage of Harris*, 284 Ill. App. 3d 389 (1996)*; Rosche v. Rosche*, 163 Ill. App. 3d 308 (1987); and *In re Support of Halford*, 70 Ill. App. 3d 609 (1979).

¶ 12 In *Snow*, the MSA stated that " 'maintenance shall terminate after the above payments have been made or earlier upon order of the court.' " *Snow*, 322 Ill. App. 3d at 954. The appellate court held that the MSA provision did not limit the termination of maintenance to only those two instances, and under section 510, maintenance terminated upon the wife's conjugal cohabitation. *Id.* at 957.

¶ 13 In *Harris*, the MSA provided that the husband would pay the wife maintenance for ten years, at which time the maintenance would terminate. *Harris*, 284 Ill. App. 3d at 390. The husband subsequently sought termination of maintenance based on his wife's conjugal cohabitation. The trial court dismissed the husband's petition, finding that the agreement was nonmodifiable by its express terms. *Id.* The appellate court reversed, holding that the maintenance was periodic maintenance that was subject to modification or termination. *Id.* at 392.

¶ 14 In *Rosche*, the MSA stated that maintenance would be nonmodifiable except in specified circumstances, which included " 'by operation of law.' " *Rosche*, 163 Ill. App. 3d at 312. The appellate court held that this phrase included the section 510 factors. *Id.* at 312-13.

¶ 15 Joseph argues that *Snow*, *Harris*, and *Rosche* show that all three of section 510(c)'s termination factors are implied terms of a MSA unless they are clearly and specifically excluded.

¶ 16 In *Sweders*, the MSA defined emancipation as until the child reached the age of majority or completed his education, up until age 22. *Sweders*, 296 Ill. App. 3d at 920. Custody of the youngest child subsequently changed from the wife to the husband, and the wife argued that the emancipation definition applied to the husband but not to her. The appellate court disagreed, stating that the agreement did not expressly contain such a limitation and that a "strong presumption exists against provisions that could easily have been included in the agreement but were not." *Id.* at 922. Joseph argues that, following this presumption, if the parties' intent was to limit the section 510(c) factors to include only death, they would have used the word "only." Joseph argues that just as maintenance is modifiable unless the parties expressly make it nonmodifiable (see *Blum v. Koster*, 235 Ill. 2d 21, 42 (2009)), the statutory termination events of section 510(c) should apply unless the parties expressly state that they do not.

¶ 17 The *Sweders* court further stated that even if the agreement were susceptible to the wife's interpretation, her interpretation could not prevail because it would lead to an unusual, unreasonable, absurd, and inequitable result. *Id.* at 922-23. Joseph argues that, similarly, the MSA here is ambiguous and subject to both his and Jennifer's interpretation, but his is the fair and rational interpretation; Joseph argues that it is unbelievable that a man in his 30s would agree to support his ex-wife's new husband for the rest of his life. Joseph also argues that (1) the ambiguity should be construed against Jennifer because she drafted the agreement and was the only party represented by an attorney and (2) the trial court should have allowed the admission of parol evidence, set forth in his offer of proof, that he had no intent of continuing to pay Jennifer maintenance if she ever cohabited or remarried.

¶ 18 Last, in *Halford* the couple was divorced before section 510 provided for the termination of maintenance based on conjugal cohabitation. The husband filed a petition to terminate maintenance on this ground, and the appellate court agreed that he could do so, stating, "We believe that it was the intention of our legislature to provide for the termination of an ex-spouse's obligation to pay future maintenance whenever the spouse receiving the maintenance has entered into a husband-wife relationship with another, whether this be by legal or other means." *Halford*, 70 Ill. App. 3d at 612.

¶ 19 Joseph recognizes that a case from this district, *In re Marriage of Arvin*, 184 Ill. App. 3d 644 (1989), is contrary to his position. There, the parties' MSA stated:

> " 'The husband agrees to pay to the wife as and for maintenance the sum of Two Hundred Dollars ($200.00) per month. The parties agree that the maintenance provided for herein shall be terminable upon the wife's remarriage or upon the wife's death.' " *Id.* at 646.

The husband thereafter sought to terminate maintenance based on the wife's conjugal cohabitation. The trial court found that the wife had engaged in conjugal cohabitation, but it ruled that it was not a ground for termination of maintenance because the MSA provided for termination only in the event of the wife's death or remarriage. *Id.* at 647.

¶ 20 The appellate court agreed with the trial court, reasoning that because the agreement stated that the maintenance obligation was terminable upon the wife's death or remarriage, the "omission of conjugal cohabitation as a condition for termination indicates that the parties did not intend to have this statutory condition apply." *Id.* at 648. The court stated that the husband's interpretation of allowing each statutory termination condition to remain in effect would render superfluous the provision stating that maintenance was terminable upon the wife's death or remarriage; the provision

had meaning only "if it is interpreted in such a manner that [the wife's] death or remarriage [were] the only grounds for automatic termination of maintenance." *Id.*

¶ 21 Joseph argues that because the MSA in *Arvin* did not expressly exclude the section 510 factors from applying, the court's conclusion is flawed and inconsistent with *Snow*, *Harris*, *Rosche*, and *Halford*. Joseph argues that another problem with *Arvin*'s reasoning is that the husband's death would also not be a factor terminating maintenance, as it is not specifically listed in the MSA there. Joseph cites *In re Estate of Lundahl*, 332 Ill. App. 3d 646, 652-53 (2002), where this court stated that a late spouse's estate is not required to continue paying maintenance unless the marital judgment or settlement agreement expressly states so. Thus, this court held that an agreement stating that the party would receive payments for " 'the balance of her natural life' " did not affirmatively establish the intent to bind the decedent's estate. *Id.* at 653.

¶ 22 Jennifer argues that *Arvin* is controlling, reasoning that if all statutory terminating events are effective, the last sentence in the parties' MSA maintenance provision would be rendered superfluous, contrary to rules of contract construction. Joseph responds that it is more practical to assume that the sentence was included to comply with the Internal Revenue Code, which states that for payments to be considered maintenance, there must, among other things, be "no liability to make any such payment for any period after the death of the payee spouse ***." 26 U.S.C. § 71(b)(1)(D) (2006).

¶ 23 Jennifer further cites *In re Marriage of Tucker*, 148 Ill. App. 3d 1097 (1986), and *In re Marriage of Giles*, 197 Ill. App. 3d 421 (1990). In *Tucker*, the maintenance provision stated that the husband would pay maintenance "until the first to happen of the following," those events being: (1) the wife's death, "notwithstanding the intervening prior death of" the husband; (2) the wife's

remarriage; or (3) the 121st maintenance payment. *Tucker*, 148 Ill. App. 3d at 1098-99. The husband sought to terminate maintenance based on the wife's conjugal cohabitation. *Id.* at 1098. The appellate court affirmed the trial court's denial of his petition, stating that the agreement's provisions clearly showed that the parties did not intend to have section 510's termination provisions apply. *Id.* at 1100. Joseph argues that *Tucker* is factually distinguishable because the MSA there included the phrase "the first to happen," which is not present in the parties' agreement.

¶ 24 In *Giles*, the MSA stated that the maintenance "shall continue to be paid by [the husband] until the death or remarriage of [the wife]." *Giles*, 197 Ill. App. 3d at 422. The husband later petitioned to terminate maintenance based on conjugal cohabitation. *Id.* The appellate court affirmed the trial court's grant of the wife's motion to dismiss, stating that "the parties [had] expressly provided in clear and unequivocal language for maintenance and for its termination upon the occurrence of either of two conditions, the death or the remarriage of the respondent." *Id.* a t 425 The court stated that:

> "the execution of this agreement, voluntarily signed by both parties, who were each represented by counsel, constitutes a clear, unequivocal, and decisive act from which it may be inferred that [the husband] waived conjugal cohabitation as a condition for the termination of maintenance, having otherwise agreed that maintenance would be terminable only upon the respondent's death or remarriage." *Id.* at 426.

¶ 25 Joseph argues that *Giles* is distinguishable because there the MSA's use of the words " 'shall continue to be paid ' " described the duration of the obligation and left no room for the other section 510(c) terminating factors, while the parties' agreement here "describes how the obligation can terminate without expressly excluding the other factors." Joseph also argues that the *Giles* court

found extremely relevant the fact that both parties were represented by attorneys, whereas he was *pro se* in the dissolution proceedings.

¶ 26 Jennifer argues that under the unambiguous words chosen by the parties, the only event that would terminate Joseph's maintenance obligation would be the death of either of them. Jennifer argues that none of the cases Joseph cites calls for a different result, because while the relevant statutes become implied terms of a contract, the parties may vary those terms by agreement. See *In re Marriage of Brent*, 263 Ill. App. 3d 916, 921 (1994) (where parties' agreements include terms altering the court's ability to terminate and modify maintenance, the terms take precedence over statutory conditions upon which maintenance may be terminated or modified).

¶ 27 Regarding the cases Joseph cites, Jennifer argues that the difference between *Snow* and *Harris* versus the present case is that the language in those cases did not refer to any statutory termination events, so there was no indication that they would not apply, while here the specific mention of only two of the statutory terminating events means that the others were excluded from consideration. Jennifer argues that *Sweders* actually supports her position because the court ruled that the parties had specifically agreed to alter the presumptive age of emancipation. Jennifer maintains that *Rosche* also supports her position because the court reaffirmed that parties could agree to vary from the statutory termination events. Jennifer argues that the cases she cited, as well as *Sweders* and *Rosche*, all confirm that by specifically including certain terms in their settlement contracts, the parties exclude the other, unmentioned terms.

¶ 28 Having set forth the parties' arguments, we now turn to our principles of review. A marital settlement agreement is construed in the same manner as any other contract. *Blum*, 235 Ill. 2d at 33. Our main objective in construing a marital settlement agreement is to give effect to the parties'

purpose and intent at the time they entered into the agreement (*In re Marriage of Schurtz*, 382 Ill. App. 3d 1123, 1125 (2008)), which we ascertain from the agreement's language (*Blum*, 235 Ill. 2d at 33). "We consider the instrument as a whole and presume that the parties included each provision deliberately and for a purpose." *In re Marriage of Turrell*, 335 Ill. App. 3d 297, 305 (2002). We give the agreement's terms their plain and ordinary meaning. *In re Marriage of Bohnsack*, 2012 IL App (2d) 110250, ¶ 9. A term is ambiguous if it is susceptible to multiple meanings or interpretations. *In re Marriage of Osborne*, 327 Ill. App. 3d 249, 251 (2002). Where the language is clear and its meaning is unambiguous, we must give effect to the language. *In re Marriage of Kehoe and Farkas*, 2012 IL App (1st) 110644, ¶ 26. The interpretation of a marital settlement agreement is a question of law, which we review *de novo*. *Blum*, 235 Ill. 2d at 33.

¶ 29 As stated, section 510(c) provides that maintenance will be terminated upon the death of either party or the remarriage or conjugal cohabitation of the party receiving maintenance "[u]nless otherwise agreed by the parties in a written agreement set forth in the judgment or otherwise approved by the court." 750 ILCS 5/510(c) (West 2008). Thus, section 510(c) clearly allows the parties to supercede, by agreement, the statutory termination factors. See also *In re Marriage of Kozloff*, 101 Ill. 2d 526, 534 (1984) (the provision "clearly enable[s] parties to enter into separation agreements which may call for maintenance payments beyond the recipient's remarriage").

¶ 30 Here, the dispute centers on the MSA's language that "Joseph's obligation to pay maintenance shall terminate upon Jennifer's death or on Joseph's death." We agree with Jennifer that, consistent with *Arvin*, this language unambiguously limits the termination of maintenance to either party's death. Further, as stated, marital settlement agreements are construed like a contract. *Blum*, 235 Ill. 2d at 33. We must construe a contract such that no terms are rendered meaningless

or superfluous. See *Salce v. Saracco*, 409 Ill. App. 3d 977, 982 (2011). As in *Arvin*, Joseph's interpretation, which automatically incorporates all of the statutory terminating factors, would render the MSA's actual termination provision superfluous; the provision has meaning only if it is construed as limiting termination to either party's death. See *Arvin*, 184 Ill. App. 3d at 648.

¶ 31 Contrary to Joseph's argument, the parties' termination provision cannot be explained away as a means "to comply with the Internal Revenue Code," which defines maintenance as payments where, among other things, there is no liability to make any payments after the payee's death. See 26 U.S.C. § 71(b)(1)(D) (2006). A dissolution judgment is not always required to expressly provide for the payments to terminate upon the payee's death for it to be deductible for tax purposes. See *Johanson v. C.I.R.*, 541 F.3d 973, 977 (9th Cir. 2008). Moreover, the Internal Revenue Code's definition does not include the death of the payor, which the parties also listed, and the parties already stated that they intended for the payments to be "within the meaning and intent of the Internal Revenue Code ***." Even otherwise, to accept Joseph's argument would require us to go against the plain meaning of the termination provision, which limits the termination of maintenance to either party's death.

¶ 32 Although Joseph also argues that *Arvin*'s reasoning is flawed because it would result in the husband's death not being a factor terminating maintenance, as it is was not specifically listed in the MSA there, the circumstances of the case did not require *Arvin* to address such a scenario. The same is all the more true here, as the agreement includes Joseph's death as a terminating factor. Moreover, the *Arvin* decision could be limited such that where the parties restrict termination to certain statutory termination factors, all other termination factors are excluded except for the payor's death, because

the agreement must affirmatively establish that the parties' intent to bind the decedent's estate. See *Lundahl*, 332 Ill. App. 3d at 653.

¶ 33 The decision in *Arvin*, along with our decision here, is consistent with *Tucker* and *Giles*. Joseph attempts to distinguish the latter cases because the *Tucker* agreement stated that the husband would pay maintenance "until the first to happen of the following" (*Tucker*, 148 Ill. App. 3d at 1098-99), and the *Giles* agreement stated that maintenance "shall continue to be paid by" the husband until certain terminating events (*Giles*, 197 Ill. App. 3d at 422). However, there is no meaningful difference between stating that maintenance will be paid until certain events occur and that maintenance will terminate upon the occurrence of certain events. Indeed, the language in the parties' MSA is arguably even more direct than that in *Tucker* and *Giles*.

¶ 34 The cases Joseph cites do not compel a different result. As Jennifer points out, *Snow* and *Harris* are distinguishable because the agreements did not mention *any* statutory terminating factors, so the factors were implied by the court. The *Rosche* agreement included the phrase "by operation of law," which the court interpreted to include the statutory terminating events (*Rosche*, 163 Ill. App. 3d at 312-13), but no such affirmative language is present in the MSA here. The *Halford* court allowed the husband to terminate maintenance based on conjugal cohabitation even though the divorce occurred before this factor was included in section 510 as a terminating event, but, as stated, the statute also clearly allows parties to supercede the statutory termination factors by agreement.

¶ 35 Joseph relies on *Sweders*'s language that there is a strong presumption against provisions that could have easily been included in the agreement but were not (*Sweders*, 296 Ill. App. 3d at 922) to argue that the parties would have included the word "only" if they intended to limit the section 510(c) to just death. This argument is not persuasive as the language "Joseph's obligation to pay

maintenance shall terminate upon Jennifer's death or on Joseph's death" is unambiguous even without the inclusion of "only." Although Joseph argues that it is unbelievable that he would agree to permanent maintenance, such a provision is not facially absurd or inequitable considering that the agreement states that Joseph was earning $330,000 per year and allows him to retain any funds from the sale or transfer of the business "DNJ."[1] Joseph also raises his lack of representation in the dissolution proceeds, but his significant income and the report of proceedings make it apparent that he deliberately chose to proceed *pro se*.

¶ 36 As the parties' MSA unambiguously limits the termination of maintenance to either party's death, the trial court did not err by denying Joseph's request to terminate maintenance based on Jennifer's alleged conjugal cohabitation or her remarriage.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the judgment of the Du Page County circuit court.

¶ 39 Affirmed.

[1]Joseph testified that he purchased the "DNJ companies" from his parents at the end of 2007 for $5,155,000, with that amount being paid off over time through company revenue.