

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

LEE REED (Deceased),	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-03-065
- vs -	:	<u>OPINION</u>
	:	5/7/2012
HENRY MORGAN,	:	
Defendant-Appellant.	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DR83040700

Fiehrer & Lane Co., L.P.A., Lawrence P. Fiehrer, Robinson Schwenn Bldg., 10 Journal Square, Suite 400, Hamilton, Ohio 45011-3459, for plaintiff-appellee and Paul Day, Executor Samuel D. Borst, 3247 Camden Road, Eaton, Ohio 45320, for defendant-appellant

RINGLAND, J.

{¶ 1} Defendant-appellant, Henry Morgan, Sr. ("father"), appeals a decision of the Butler County Court of Common Pleas, Domestic Relations Division, finding that he has a child support arrearage. For the reasons stated below, we affirm the trial court's decision.

{¶ 2} Plaintiff-appellee, Lee Reed ("mother"), and father were married in 1979 and

had a child, Henry Reed ("Henry").¹ A few years later, the parties divorced and agreed on monthly child support payments. On September 10, 1997, Butler County Child Support Enforcement Agency ("CSEA") recommended Henry be emancipated and also found that father had a child support arrearage. A few years later, mother passed away and the executor of her estate was substituted as the plaintiff in the child support action against father.² On March 2, 2005, father pled guilty to criminal non-support in violation of R.C. 2919.21, a misdemeanor in the first degree. The court ordered father to make monthly support arrears payments and placed him on probation until May 2008. In 2008, father's probation was extended due to his failure to comply with this order.

{¶ 3} One year later, the executor of mother's estate filed several motions, including a motion to find that father was in contempt of court for nonpayment of child support and a motion to find that father owed a support arrearage. At a hearing before the magistrate, father testified that he and mother entered into an agreement to forgive his support arrearage. According to father, this agreement required him to purchase, title, and license a vehicle for Henry, and in exchange, mother would forgive the arrearage. Father entered into evidence a letter dated May 18, 1999, from mother to an employee at CSEA which indicated that the parties were making an agreement to forgive the child support arrearage. Father did not sign this letter. Despite a suggestion in the letter that mother would follow up with CSEA when father fulfilled his promise, Mother never contacted CSEA again. Henry also testified at the hearing. He stated that he received possession of a car in 1999 but that he never received title to the car and it was never licensed or insured.

{¶ 4} After the hearing, the magistrate filed its decision recommending that father not

1. Henry was named Henry Morgan, Jr. but has since changed his name to Henry Reed.

2. We upheld the substitution of Paul E. Day, Executor of the Estate of Lee Reed, as plaintiff in the child support action against father in *Reed v. Morgan*, 12th Dist. No. CA2008-09-233, 2009-Ohio-4130.

be found in arrears on child support because the evidence was "ambiguous" as to whether he owed any arrearage. Subsequently, in a decision dated July 21, 2010, the trial court overruled the magistrate's decision and found that "there was insufficient evidence of a contract between the parties which forgave any arrears" and that the letter "is not proof of a contract." The court remanded the case to the magistrate to determine the amount of the arrearage or overpayment.

{¶ 5} On remand, the magistrate prohibited father from presenting evidence of child support forgiveness and instead limited the parties to the issue of the amount of child support owed or overpaid. The magistrate then determined that father's child support arrearage was \$98,260.58. Father objected to the magistrate's decision arguing that its finding regarding the amount of arrearage was incorrect and that the magistrate's limitation of evidence at the hearing was in error. The trial court agreed with the magistrate on both counts, affirming the amount of the award and prohibiting father from introducing any evidence that was not relevant to the amount of child support due. Father now appeals.

{¶ 6} In his first assignment of error, father alleges that the trial court violated his due process rights when it restricted the type of evidence he could present at the second hearing before the trial court. Father also argues that trial court lacked subject matter jurisdiction to determine the child support arrearage.

{¶ 7} At the second hearing, the trial court opined that father was prohibited from presenting additional evidence of child support forgiveness due to the doctrine of res judicata. Under the doctrine of res judicata, "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 114 Ohio St.3d 183, 193, 2007-Ohio-3831. Further, as noted by the Ohio Supreme Court, "an existing final judgment or decree between

the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit." (Emphasis deleted.) *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 1995-Ohio-331. In determining whether a decision is a "final judgment" for res judicata purposes, this court has looked to whether the entry would be a final appealable order. *Lucchesi v. Fischer*, 179 Ohio App.3d 317, 320, 2008-Ohio-5934 (12th Dist.); *Clarke v. Warren Cty. Bd. of Commrs.*, 12th Dist. No. CA2005-04-048, 2006-Ohio-1271, ¶ 21.

{¶ 8} Final orders include those orders that affect a substantial right and in effect determine the action and prevent a judgment. R.C. 2505.02(B)(1). For an order to determine the action, it must dispose of the whole case or some separate and distinct branch of it, and leave nothing for future determination. *Dudley v. Dudley*, 12th Dist. No. CA2010-05-114, 2012-Ohio-225, ¶ 12, citing *VIL Laser Sys., L.L.C. v. Shiloh Indus., Inc.*, 119 Ohio St.3d 354, 356, 2008-Ohio-3920. We have held that "where the amount of child support is ambiguous, or left to be calculated at a later date, there is not a final appealable order because the order contemplates further action by the trial court." *In the Matter of B.H.-S.*, 12th Dist. No. CA2009-05-126, 2010-Ohio-2706, ¶ 11, quoting *Coleman v. Vickers*, 4th Dist. No. 480, 1993 WL 120657, *1; *Ossai-Charles v. Ossai*, 188 Ohio App.3d 503, 507, 2010-Ohio-3558 (12th Dist.).

{¶ 9} We disagree with the trial court that res judicata prevented father from presenting evidence at the second hearing of forgiveness of a child support arrearage. In the first hearing, the trial court found that a contract to forgive child support between the parties did not exist and it remanded the case to the magistrate to determine the amount of support arrearage. The trial court's entry that remanded the case for determination of the amount of arrearage contemplated further action by the trial court and was not a final appealable order.

It was therefore also not a "valid final judgment" for res judicata purposes. Accordingly, the trial court was incorrect in reasoning that the doctrine of res judicata prohibited father from

presenting further evidence of the forgiveness of the support arrearage at the second hearing.

{¶ 10} Although we disagree with the trial court's reasoning regarding the prohibition to submit additional evidence of forgiveness at the second hearing, we still do not find that the court erred as a matter of law. After father was given a full opportunity to litigate whether the child support was forgiven, the trial court remanded the case to the magistrate to determine the sole issue of the amount of the support arrearage. The Civil Rules expressly authorize a trial court to limit the issues before a magistrate and also authorize the magistrate to determine only the issues identified by the trial court. Civ.R. 53 (C)(1) & (D)(1)(B). Here the magistrate followed the directions of the trial court and limited father to presenting evidence regarding the amount of the support arrearage.

{¶ 11} Moreover, father's due process rights were not violated by the trial court's limitation of the issues. It is clear from the record that father was given ample opportunity to litigate the issue of child support forgiveness during the first hearing before the magistrate and to make objections to the trial court. Father testified extensively, cross examined Henry, and submitted multiple exhibits regarding the support forgiveness "contract". Essentially, father is arguing that he is entitled to two bites of the same apple, two hearings regarding child support forgiveness. "A hearing before judgment, with full opportunity to present all evidence and arguments which the party deems important, is all that can be adjudged vital under the guaranty of due process of law. Rehearings or new trials are not essential to due process of law * * *." *Armstrong v. Armstrong*, 2nd Dist. No. CA2951, 1993 WL 76940, *2 (Mar. 17, 1993), quoting *Gallagher v. Harrison*, 86 Ohio App. 73, 77 (1st Dist.1949). Because we find father was given a full opportunity to present evidence regarding the issue of child support forgiveness during the first hearing, we find that his due process rights were not violated by denying him another opportunity to do so at the second hearing.

{¶ 12} Father also argues that that the trial court did not have subject matter jurisdiction to determine the amount of the child support arrearage because neither party filed a motion to establish child support. We disagree. "Both common and statutory law in Ohio mandate that a parent provide sufficient support for his or her child. Indeed, the obligation of support follows the parent." *Haskins v. Bronzetti*, 64 Ohio St. 3d 202, 205, 1992-Ohio-140. "The court in which a decree of divorce is originally rendered retains continuing jurisdiction over matters relating to the custody, care, and support of the minor children." *Loetz v. Loetz*, 63 Ohio St.2d 1, 2 (1980). See also *Jefferies v. Stanzak*, 135 Ohio App.3d 176, 181 (12th Dist.1999). Thus, that same "court has full power to enforce its decree to modify it as the parties' changing circumstances require, and to order the payment of support arrearages." *Id.* See also, R.C. 3121.35 and 3121.36. In this case, the parties were divorced in the Butler County Court of Common Pleas, Domestic Relations Divisions. Therefore, the trial court retained continuing subject matter jurisdiction over father's child support obligation and no error occurred when it ordered a determination of support arrearage.

{¶ 13} Father's first assignment of error is overruled.

{¶ 14} In his second assignment of error, father argues that the trial court erred when it found that there was insufficient evidence of an agreement between the parties to waive the child support arrearage between the parties and that father did not overpay support. Also, father again contends that the trial court did not have jurisdiction to remand the case to the magistrate to determine the amount of child support arrearage.

{¶ 15} As an initial matter, we are aware of decisions from this court and other districts which state a trial court's decision modifying, affirming, or reversing a magistrate's decision is reviewed for abuse of discretion. *E.g., Mullins-Nessle v. Cardin*, 12th Dist. No. CA2009-07-036, 2009-Ohio-6748, ¶ 34; *Bartlett v. Sobetsky*, 12th Dist. No. CA2007-07-085, 2008-Ohio-4432, ¶ 8; *Randall v. Randall*, 2nd Dist. No. 1739, 2009-Ohio-2070, ¶ 8-10; *McIntrye v.*

Johnson-Estes, 8th Dist. No. 95445, 2011-Ohio-1696. However, Civ.R. 53 does not mention an abuse of discretion standard for appellate review of a trial court's decision on an objection to a decision of a magistrate. Instead, the rule expressly sets forth the purpose of magistrates as "assist[ing] the courts of record." Civ.R. 53 also states that a magistrate's decision is not effective unless adopted by the court and that a trial court is to conduct an "independent review" of the magistrate's findings upon objection by either party. *Id.* at (C)(1), (D)(4)(a) and (d). See *In re Adoption of S.R.A.*, 189 Ohio App.3d 363, 2010-Ohio-4435. Instead the standard of review turns on the issue presented in the case and not whether the case happened to come before a magistrate. See, e.g., *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983) (Holding that appellate review of a trial court's decision regarding alimony payments is reviewed for abuse of discretion); *Booth v. Booth*, 44 Ohio St.3d 142 (1989) (Stating that absent a showing of an abuse of discretion, a trial court's order of child support and property division will be affirmed).

{¶ 16} Therefore, the standard of review is dictated by the issue presented to the magistrate and affirmed by the trial court. A trial court's finding, with the assistance of a magistrate or not, regarding the existence of a contract will not be reversed unless it is against the manifest weight of the evidence and there is no "competent credible evidence going to all the essential elements of the case." *Choate v. Tranet, Inc.*, 12th Dist. No. CA2005-09-105, 2006-Ohio-4565, ¶ 68, quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus. In reviewing a trial court's decision, an appellate court must give due deference to the trial court's findings as the trial judge is best able to observe the witnesses and use these observations in weighing the credibility of the proffered testimony. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984).

{¶ 17} The Ohio Supreme Court has upheld agreements to modify child support arrearage that are otherwise valid under contract law. *Mullins-Nessle* at ¶ 30, citing *Byrd v.*

Knuckles, 120 Ohio St.3d 428, 430, 2008-Ohio-6318. The essential elements of a contract are "an offer, an acceptance, a meeting of the minds, an exchange of consideration, and certainty as to the essential terms of the contract." *Juhasz v. Costanzo*, 144 Ohio App.3d 756, 762 (7th Dist.2001). A valid contract must be specific as to its essential terms, such as the identity of the parties to be bound, the subject matter of the contract, the consideration to be exchanged, and the price to be paid. *Alligood v. Proctor & Gamble Co.*, 72 Ohio App.3d 309, 311 (1st Dist.1991). Additionally, an enforceable agreement must be mutual and must bind all parties to the contract. *Fanning v. Insurance Co.*, 37 Ohio St. 339, 343-344 (1981).

{¶ 18} At the hearing, father asserted that he is not liable for the child support arrearage because he entered into a settlement agreement with mother in 1999. Father testified that the arrangement between the parties was that he would provide a car to Henry, title the car in Henry's name, and license the car. In exchange, mother would forgive his support arrearage. Father stated that he performed his end of the bargain by paying for and transferring a car to Henry. However, the evidence presented at trial shows that during this time father never transferred the title of the car to Henry nor registered the car. Henry stated that he received possession of a car from father but that father never insured the vehicle, registered the vehicle, nor gave Henry the title to the vehicle. Multiple traffic tickets were presented that showed that the car had expired registration. Father also introduced a letter from mother to a CSEA employee that allegedly created a contract between the parties for forgiveness of child support. However, this letter merely stated mother's intention to enter into the agreement, it was never signed by father and mother never contacted CSEA again, as the letter indicated she would, to inform CSEA that there was an agreement and that father had performed as agreed.

{¶ 19} A review of the record also demonstrates that on March 2, 2005, father pled guilty and was convicted of failing to support his dependent, Henry, in violation of R.C.

2919.21. The statute provides that any person who "fail[s] to provide adequate support" to his "child who is under eighteen" or "fail[s] to provide support as established by a court order" is guilty of a misdemeanor in the first degree. The journal entry reflecting father's criminal conviction is compelling evidence that father never entered into a contract to forgive child support. The alleged contract was agreed upon in 1999 and father's conviction occurred in 2005, thus father had an opportunity to raise as a defense to the criminal charge that he settled the child support arrearage. See *Farmers Insurance of Columbus v. Martin*, 12th Dist. No. CA2004-03-022, 2005-Ohio-556; *McLoughlin v. Sword*, 12th Dist. No. CA93-05-014 (Dec. 13, 1994). Both the ambiguous testimony regarding whether a contract existed at the hearing and father's criminal conviction for failing to pay child support are sufficient credible evidence that a contract did not exist between the parties to forgive the child support arrearage. Thus the trial court's decision was not against the manifest weight of the evidence.

{¶ 20} As noted in the first assignment of error, the trial court had continuing subject matter jurisdiction to determine the amount the child support arrearage. *Loetz*, 63 Ohio St.2d 1, 2. Therefore, father's argument that the issue the child support arrearage was not before the trial court is without merit. Father's second assignment of error is overruled.

{¶ 21} Judgment affirmed.

POWELL, P.J., and PIPER, J., concur.