IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

E.C.,	:	
Plaintiff	:	
	:	
v.	:	No. 99-21,013
	:	
R.C. III,	:	
Defendant	:	

OPINION and ORDER

In this case the court has been asked to rule on the validity of a provision contained in an addendum to a separation agreement concerning child support for A.C., the last of three children born while the parties were married. That provision states that in the event Wife files for child support for A.C., Husband is entitled to a credit of $50,000 toward the payment of that support. Wife contends the provision should be declared void because it is a waiver of child support, which is not permitted under Pennsylvania law. Husband contends the provision should be upheld because it represents a pre-payment of child support for A.C.

The court agrees with Wife. Despite Husband's best efforts to beef up the value of the marital estate at the time the agreement was signed and the amount he would have been entitled to, we are forced to conclude there is no way Wife would have owed Husband $50,000 in equitable distribution. Rather, it is clear to this court that Husband did not—and still does not—want to pay child support for A.C. because the child's birth was apparently the result of an adulterous affair. The provision at issue was an ingenious attempt to evade the harsh legal doctrine of paternity by estoppel, which holds Husband responsible for child support despite the biological reality.

DISCUSSION

Under Pennsylvania law, parents are not permitted to bargain away a minor child's right to adequate support; the interests of the child will always be subject to the watchful eyes of the court. Sams v. Sams, 808 A.2d 206 (Pa. Super. 2002); Gaster v. Gaster, 703 A.2d 513, 516 (Pa. Super. 1997) (citing cases). Parties to a divorce action may freely bargain between themselves and structure their agreement to best serve their own interests, but they have no power however, to bargain away the rights of their children. Nicholson v. Combs, 703 A.2d 407, 412 (Pa. 1997). Parents are, however, permitted to come to an agreement regarding child support and so long as the amount agreed upon adequately provides for the needs of the child, courts may not ignore the agreement without a showing of changed circumstances. Koller v. Koller, 481 A.2d 1218 (Pa. Super 1984). An agreement to release one parent from the duty of support will be enforced so long as it is fair and reasonable, was made without fraud or coercion, and does not prejudice the welfare of the children involved. Roberts v. Furst, 561 A.2d 802, 803 (Pa. Super. 1989).

In the recent case of Kost v. Kost, 757 A.2d 952 (Pa. 2000), the issue before the court was whether the mother could seek an increase in child support. The mother had previously agreed not to seek such an increase, due to the father's agreement to extend support payments for the couple's daughter, who was eighteen. Not surprisingly, the Superior Court permitted the mother to file for an increase in support for the son. However, the case contains an interesting tidbit which apparently piqued the interest of at least one clever family law attorney: the parties had also agreed that in lieu of mother paying father the $10,000 owed in equitable distribution upon the sale of the house, that $10,000 would serve as a credit toward any future increases of child support. Neither party, nor the court, baulked at this credit. They simply argued over how much money should be applied against the credit.

In Kost, however, there was no question the mother owed the father $10,000. A property settlement agreement specifically stated the father would pay $1,000 per month for child support and upon the sale of the marital residence mother would pay father $10,000. Later, after the house was sold, the parties modified the agreement to have the $10,000 serve as a credit toward any future increases of child support until the credit was consumed.

In the case before the court, however, it is not at all clear Wife owed Husband $50,000. No discovery was ever done regarding the value of the marital estate before the Agreement and Addendum were signed. At the hearing, Husband attempted to stretch the value of the marital estate to a limit well beyond reason. For instance, he valued the marital residence at between $63,480 and $66,240, based on receiving 92%-96% of the sale price the home was previously listed at. However, the home never sold at that price and a Fish Real Estate appraisal on May 10, 1999 valued it at $52,500, less the mortgage of $24,000. Husband also valued the contents of the marital residence at $25,000, a figure which is highly doubtful, to say the least, and was strongly contested by Wife, who considered the value to be approximately $2400. Husband also considered himself to assume half the $13,974.48 owed on the 1996 Dodge Minivan; however, Husband also kept that vehicle, and traded it in for roughly the debt owed on it. He also credited himself with 22 months of payments averaging $1000 per payment, which included child support for three children, which he probably would have owed in any event and which would not have been credited to him in equitable distribution.

Despite his unrealistic valuations, Husband did not reach his intended figure of $100,000 for the marital estate. Instead, the most he could come up with was $74,000. A more accurate figure, even using his inflated $25,000 value for the contents of the marital residence, would be about $59,000, of which Husband received at least $5000. There is simply no way Husband would have been entitled to $55,000 of a $59,000 estate. Moreover, even if the court were to find the marital estate was worth $74,000, it

is not at all clear Husband would have been entitled to 50% of it. On the contrary, his portion would probably have been less, given his vastly greater income ($60,000+ compared to Wife's $15,000). Husband's attempt to establish that he paid an inordinate amount of marital debt, which might entitle him to the $50,000, also falls flat.

Husband testified the $50,000 was his estimate of what he "walked away from" by taking only the vehicle, $5000, and some personal property. Even if the court were to find Husband actually believed that, which we do not, we could not find he was actually owed $50,000. Therefore, no advantage flowed to A.C. from the so-called credit.

Further, we believe Wife and her former attorney Bradley Hillman, who both testified that neither the couple nor the attorneys ever discussed what an appropriate equitable distribution figure might have been. Wife simply agreed to the $50,000 figure because it was what Husband wanted, and he had threatened to make her affair public if she did not agree to it. Wife was attempting to protect A.C. from the exposure of his true parentage. In fact, Wife stated she would have agreed to any figure Husband demanded.

Since it does not appear Wife actually owed Husband $50,000, no benefit inured to A.C. as a result of the Addendum. For that reason, this case is similar to <u>Sams v. Sams</u>, 808 A.2d 206 (Pa. Super. 2002), where the court struck down an agreement whereby the mother reduced the father's child support obligation in return for the father releasing the escrow money from the sale of the home. The Superior Court found the agreement was void because the father had not promised to do anything he was not already obligated to do, since he already owed the mother an amount far in excess of the value of the escrow account. Therefore, the mother waived the money due to her for child support in exchange for nothing. Not only is such an agreement void as against public policy, but it also fails for lack of consideration.

Husband points to the case of Roberts, supra, where the Superior Court upheld an agreement in which the father paid the mother $9,000 in exchange for being released from child support. That agreement also stated that the mother and her current Husband would take responsibility for supporting the children, and the testimony showed the children had been and would continue to be well provided for financially. The Superior Court noted that if, in the future, the mother and her Husband became incapable of supporting the children, the father would once again become obligated for support. Roberts is distinguishable first because the money father paid was money he did not already owe to the mother, second because the mother's Husband specifically agreed to obligate himself for the children's support, and third because the couple continued to be able to adequately support the children.

If parents wish to create an agreement regarding child support that includes a credit for the obligor, they had better ensure the document establishes an actual debt in the amount of the credit—for instance, by specifying the values of the marital property, the agreed-upon division, and the amount owed to the obligor. Even when these figures are meticulously spelled out, however, these types of child support credit agreements—especially for a large credit—will necessarily be closely scrutinized by the courts, as they are inherently suspicious. After all, why would an obligor want to give the obligee what amounts to an interest-free loan? And given the fact that primary custody frequently changes, what obligor would want to pay a large amount of child support in advance, when that amount might never actually be owed? And lastly, most parents—as well as the courts—would prefer child support payments be made monthly, to eliminate the temptation for the custodial parent to blow the money on large-ticket impulse items, rather than use it for the daily needs of the child.

In the case before the court, it is very clear the $50,000 credit was a fiction invented to avoid child support for A.C. This conclusion is bolstered by Husband's own admission that he was upset about Wife's unfaithfulness and did not want to

“reward” her for her behavior. The conclusion is further supported by the letter from Husband’s attorney at the time of the agreement, which proposes certain language for the Separation Agreement:

> Any language we use must address several problems. First, HUSBAND is not the natural father of A.C. He only recently learned of this when the DNA test results were received. Therefore, he does not want to financially support this child.
>
> Please understand his desire not to support A.C. has nothing to do with the child. HUSBAND does not want to reward WIFE for her marital misconduct.
>
> At the same time HUSBAND loves A.C. He wants to maintain a relationship with him and continue to be his father. It is very important to HUSBAND that he stay involved with A.C.

The letter goes on to propose language that was eventually used in the Addendum:

> The Parties acknowledge that A.C. was born during the Parties’ marriage but that HUSBAND is not the natural father of this child. The Parties agree that HUSBAND is not obligated to pay child support for him.
>
> The Parties’ [sic] also acknowledge that HUSBAND has given WIFE the vast majority of the marital estate. The Parties agree to treat part of the disposition of the marital estate as a prepayment by HUSBAND to WIFE of child support, daycare and all types of medical, dental, eye care or orthodontic bills for A.C., if a request for child support is ever made for him.
>
> The Parties recognize that under current Pennsylvania Law, child support cannot be waived. Therefore, if WIFE or any other guardian or custodian of A.C., including any Commonwealth agency such as the Department of Public Assistance, seeks child support or reimbursement for money expended for A.C.’s benefit from HUSBAND or his estate, for A.C., HUSBAND shall be entitled to a credit of Fifty Thousand Dollars ($50,000) towards his child support effective the date the request for child support is made. This credit will be reduced monthly in an amount equal to the court ordered child support.
>
> . . .
>
> Until such time as any support obligation HUSBAND has for A.C. ceases, under either current law or future changes in the law, HUSBAND shall maintain the right to deny paternity of this child. Mother, on her own behalf and the behalf of any future guardian or custodian of A.C. waives the right to any defenses to HUSBAND’s paternity action based

> on any statute of limitations, laches, collateral estoppel or any similar defense. The purpose of this section is to allow HUSBAND at any time a child support or any other type of claim for monetary assistance is made against him on behalf of A.C., to deny paternity and have the matter heard in court without WIFE or any other person or entity claiming a defense such as those listed above.

This language virtually announces to the world that Husband is bound and determined not to pay child support for A.C. In the event he is ordered to pay support, he will get the $50,000 credit. According to our calculations, such a credit would essentially save Husband from ever paying a cent for A.C.'s support.

In conclusion, the Addendum was a nice try, but it does not hold water. It was not a pre-payment of child support; it was a blatant attempt at non-payment of support. We suspect both parties, being represented by experienced family law attorneys, knew the Addendum would be invalidated if ever challenged. Therefore, this decision probably comes as no surprise to either Husband or Wife. Child support simply cannot be waived, and the courts will closely scrutinize any attempts to do so. Given the state's strong interest in ensuring children receive the support they need, it will take an extremely wily family law attorney to pull one over on the courts.

O R D E R

AND NOW, this _____ day of February, 2003, for the reasons stated in the foregoing opinion, the Addendum to Separation Agreement signed by the parties on June 21, 1999, is found to be void and unenforceable. Therefore, the Petition for Contempt/Petition for Enforcement of Agreement filed by the defendant on September 16, 2002 is dismissed and the Motion to Vacate the Agreement filed by the plaintiff on October 2, 2002 is granted.

BY THE COURT,

____
Clinton W. Smith, P.J.

cc: Dana Jacques, Law Clerk
Hon. Clinton W. Smith
Janice Yaw, Esq.
Joy McCoy, Esq.
Gary Weber, Esq.