E.H.,		: IN THE COURT OF COMMON PLEAS OF
	Plaintiff	: LYCOMING COUNTY, PENNSYLVANIA
		:
	vs.	: NO. 08-21,441
		:
A.H.,		: DIVORCE
	Defendant	: CONTEMPT

Date: October 19, 2009

OPINION AND ORDER

This Opinion and Order are issued in relation to the Contempt Petition for Breach of Marital Settlement Agreement filed by the Defendant/Petitioner, A.H. (hereinafter "Mother"), on June 2, 2009. A prior order relating to the custody contempt issue as raised in that petition was entered by the Court on July 13, 2009. We deferred a decision at that time as to whether or not the Plaintiff/Respondent, E.H. (hereinafter "Father"), was in contempt of Court as asserted in the petition for failure to make $600.00 per month child support payments from April 1, 2009 as provided under the parties' Marriage Settlement Agreement dated October 30, 2008 (hereinafter "Agreement"), which was in accordance with its terms incorporated into but not merged with the parties divorce decree entered on March 26, 2009. The relief that Mother requests, a finding of contempt and enforcement of the Agreement to the effect of payment under the agreement from April 1, 2009 forward, is hereby denied.

Background

Paragraph 7 of the Agreement provides that Mother is entitled to child support in the amount of $600.00 per month to be paid by the Father on the 1st day of each month for two minor children. On April 6, 2009, Mother filed a Complaint for Support to the Domestic

Relations Section of the Lycoming County Court of Common Pleas under docket number 09-20, 390, PACSES case number 531110785. The Complaint alleged that she last received support in February 2009 in the amount of $600.00 and that Husband was currently $1,200.00 in arrears. The Complaint reported that the children resided both in Montoursville, presumably with Father, and in Williamsport, presumably with Mother. Interestingly, in the Complaint, Mother first wrote Father's address in Montoursville as the children's address; her Williamsport address was written in after Father's address at a later time, evidenced most obviously by being in different handwriting along with any other corrections or additions to the Complaint. On her Application for Child or Spousal Support Services, attached to the Complaint, Mother stated she was the "applicant/custodian" and Father the "non-custodial parent."

On April 8, 2009, in response to the allegations of Mother's Complaint for Support, the Domestic Relations Section issued an order directing Father to pay Mother $660.00 per month, $300.00 per child, effective as of April 1, 2009, $635.50 was determined as being the total arrears. This support order provides:

> This is an administrative order for child support for two minor children based on the divorce order dated for October 30, 2008. Per the Divorce Order, the [Father] is ordered to pay $600.00 per month for child support. As well, he is ordered to pay $60.00 per moth towards the arrears effective April 1, 2009. [Father] is ordered to provide medical insurance for the minor children if it becomes available to him at a reasonable cost.
>
> April 8, 2009 Order, 4/9/2009, p. 3.

This order, therefore, was based on paragraph 7 of the Agreement and did not make any finding of a net monthly income for the Mother or Father, but instead attributed them with a monthly net income of zero. This order was enforced, in part, through an Order/Notice to

Withhold Income for Support issued on May 5, 2009 to Father's employer effectively garnishing $662.00 per month from Father's wages.

On May 12, 2009, pursuant to a notice of April 15, 2009 a further support conference was held (the record not being clear as to who initiated the request for this conference). Upon completion of the conference process the Domestic Relations Section issued an order suspending entirely Father's payment of support to Mother, having made a factual finding that in actuality Father was the custodial parent and Mother was the non-custodial parent, stating:

> [Mother] does not have more than 40% of the overnights with either child. Therefore, the children are primarily residing with [Father]. The child support is suspended and the complaint is dismissed at this time. [Mother] may reopen the case at such a time as the custody has changed. This case will begin the 60 day closure process.

May 12, 2009 Order, 5/13/2009, p. 1. Thus, on May 13, 2009 another Order/Notice to Withhold Income for Support was issued to Husband's employer effectively ending any garnishment of Father's wages $662.00 per month from Father's wages. The Domestic Relation's case was subsequently closed by the Domestic Relations Section on July 20, 2009 and has not been reopened.

This contempt petition, however, was filed by Mother on June 2, 2009 alleging that Father was in contempt of sections 6, having to do with physical custody, and 7, having to do with child support, of the parties Agreement. Paragraph "5" of the petition acknowledged that the Agreement was incorporated but not merged into the parties divorce decree. Mother's petition was filed under the parties divorce action. A hearing was held before this on July 13, 2009. The Court found the Father to be contempt of court as would relate to custody matters in that the Father had deprived Mother of her right to custody of the children on weekends in

accordance with the agreement, as instead of providing Mother with custody of the children every weekend, he provided Mother custody only on alternating weekends. We reserved our decision as to the support contempt in order to give consideration to the arguments of the parties concerning whether or not Father could be held in contempt of court for failure to make the $600.00 per month child support agreements from April 1, 2009 forward as provided by the terms of the agreement.[1]

Divorce, Custody and Support are processed through the Family Division of the Lycoming Court of Common Pleas. Civil actions whether in assumpsit or in equity, are not processed through the Family Division, and follow a different procedure than that which is followed in the Family Division.

Discussion

We find that even *if* Mother is entitled to monies owed under paragraph 7of the Agreement, providing that the Wife is entitled to child support, Wife has not filed an action which entitles her to recovery of child support based upon said Agreement.

Our reasoning is based upon the decision made by the Pennsylvania Supreme Court in ***Nicholson v. Combs***, 703 A.2d 407 (Pa. 1997) as interpreted and applied by the Superior Court in ***Patterson v. Robbins***, 703 A.2d 1049 (Pa. Super. 1997).[2] As held in the referenced cases, because the parties hereto Mother and Father have agreed that the Agreement would be

[1] On July 16, 2009, Father filed a petition to modify custody, under the divorce action. This modification petition was resolved through an order filed September 30, 2009, entered by agreement following a custody conference held September 29, 2009. A slight modification of the weekend custody time of Mother was made by that order.
[2] Had the agreement been signed prior to the 1988 amendment to the divorce code, a different line of cases would have been guiding (***Saunder v. Saunder***, 549 A.2d 155 (Pa. Super 1988) as interpreted and implied in ***Dechter v.***

incorporated into but not merged with the divorce decree, its enforcement is as a separate contract, not a court order. As such, an order of contempt on the issue of support is not proper to compel Father's compliance with the support provision of the Agreement. We therefore can not grant Mother's contempt petition as relates to support issues.

The parties Agreement was executed October 30, 2008, signed after the amendment to the divorce code, effective February 12, 1988 as set forth in 23 Pa.C.S. § 401.1, amending section 3105(b) which now provides;

> "b. A provision of an agreement regarding child support, visitation or custody shall be subject to modification by the Court upon a showing of changed circumstances."

Since the agreement was entered into "following the enactment of Pa.C.S. § 3105(b), the court has the power to modify the terms of the agreement with regard to child support upward or downward based on "changed circumstances." ***Patterson***, 703 A.2d 1051. Mother initiated a support action on April 6, 2009 in the Domestic Relations Section of Lycoming County under case #09-20, 390. This action was authorized under section 3105(b), supra. In taking this action Mother sought to enforce and perhaps increase the child support obligation Father was obliged to pay under the terms of the Agreement, ostensibly due to changed circumstances. Initially, Mother was successful through the administrative order issued on April 8, 2009 in a subsequent garnishment order of May 5, 2009 to the extent that Mother had through this process transformed her non-court-enforceable right to support under the agreement into a court-enforceable support obligation of the Father. Without such court action garnishment of Father's wages would not have been possible. (See, Pa.R.C.P. 1910.20, .21).

Kaskey, 549 A.2d 588 (Pa. Super 1988) ***McMahon v. McMahon***, 612 A.2d 1360 (Pa. Super 1992) and ***Peck v.***

The final result, however, of this support action was that instead a finding was made that Mother did not have more than 40% of overnights with either child and as the children were therefore primarily residing with Father, child support was suspended and the support complaint dismissed. (See, Pa.R.C.P. No. 1910.16-4(c)). Thus, Father cannot be held in contempt of court as the court has determined that he owed no child support after April 1, 2009.

Mother now argues, however, that her present Contempt Petition is to obtain recovery of the support owed by Father under the Agreement. In making this claim Mother relies upon the statement in ***Patterson,*** supra. which, after denying the contempt of court request in similar circumstances stated: "However, nothing in the trial court's decision should be construed as impinging on [Mother's] right to maintain a separate contract action on the settlement agreement." ***Id***. at 1052.

This seemingly contradictory theory, modifiable in Family Division but a separate action remaining viable in contract, was explained in ***Dechter v. Kaskey***, determining the legal effect of a support agreement that is incorporated but not merged within a divorce decree:

> [B]oth agreements and support Orders under certain circumstances could be given independent effect. Obviously, double recovery cannot be allowed on both the agreement and the support Order. To the extent the agreement is not completely satisfied by giving credit for the amount paid pursuant to the support Order, a debt is accumulated which may be recovered in an action of assumpsit or in equity. However… the enforcement remedies are not those pursuant to the support laws, therefore, attachment of the person and wage attachment are not permissible.

Dechter v. Kaskey, 549 A.2d 588 (Pa. Super 1988). The Court in ***Dechter*** went on to reason that when an agreement is incorporated but not merged it is incorrect to require enforcement as a support order: "To do so would permit attachment of the person for a debt arising out of contract, which is impermissible. ***Id***.

Peck, 707 A.2d 1163 (Pa. Super 1998)).

Mother's reliance upon the doctrine set forth in ***Patterson,*** permitting the enforceability of a child support obligation as a separate contract based upon the non-merged marital settlement agreement, correctly recognizes that both ***Patterson*** and ***Dechter*** involved agreements that were entered after the 1988 amendment to the Divorce Code section 3105(b) (above referenced). Prior to the 1988 amendment the statute had made such agreements modifiable by court for custody actions, even though they were not merged into the parties divorce decree. The 1988 amendment made the child support provisions of such an agreement similarly subject to modification by the court regardless of not being merged into the divorce decree.

Mother fails to recognize, however, that to the extent that the holdings of ***Patterson*** and ***Dechter*** still permit her to pursue an action under the Agreement that she can not do so through a contempt petition. Such is expressly disapproved in ***Patterson*** and ***Dechter***. Mother has not initiated a separate contract action in the civil division of this court to enforce the Agreement but instead has sought contempt. Mother has not filed any request to amend her contempt petition into a request for special relief under the Agreement without enforcement by contempt. Because Mother still pursues contempt, she may not proceed further under the current petition.

This court is compelled to note, however, our concern as to the seemingly impracticable result that appears to be approved in the holdings of ***Patterson*** and ***Dechter*** which would permit the party to a support agreement that is not merged into a divorce decree to pursue the enforceability of the original terms of that agreement and at the same time to avail themselves of a court enforceable support order under the authority of the divorce code section 3105(b).

We can not imagine that such a result was in fact intended by the legislature in enacting the 1988 amendment.

If there are child custody provisions in a marital dissolution agreement which is not merged into a divorce decree and the best interests of the child require a modification of those custody provisions, a Family Court action would be appropriately initiated under the authority of section 3105(b) to modify custody and, if justified, an order of court entered modifying the agreements terms. Certainly, no court would then tolerate the parents, whose rights under the agreement as to custody might be modified, to bring any type of contract action that would supplant the modification order with the terms of the agreement. In fact, to do so would be contrary to the best interests of the child. It also would create an obviously circular and never ending chain of orders. Similarly, since 1988 child support obligations created through an agreement not incorporated into a court order can now be modified and the so modified court order subsequently enforced by contempt under the authority of section 3105(b). This statutory authorization has obviously been enacted in recognition that there should be a uniform approach to child support obligations, their enforcement and application of the standards that apply to such obligations because child support rights exist for the best interests of the child. (See, generally, explanatory comment – 1981 under actions for support Pa.R.C.P. 1910).

We believe that in pursuance of a uniform policy of imposing support obligations for the benefit of child beneficiaries of support orders that the legislature, by the 1988 amendment to section 3105(b), as well as our Courts through the Pennsylvania Rules of Civil Procedure pertaining to child support (including the statewide support guidelines), intended to remove the right to maintain a separate contract action for collection or enforcement of a child support

obligation under agreements, regardless of whether they were merged into or not merged into a final divorce decree. To the extent that the decisions in ***Patterson*** and ***Dechter*** failed to recognize this, we respectfully suggest that they are not practically nor appropriately reasoned because rather than simplifying the issues for the parents it exposes parents to multiple avenues of litigation and may result in conflicting findings, all of which are certainly to the detriment of appropriate and timely payments of child support.

Although the central issue as to whether or not Mother is now entitled to payment from Father under the terms of the Agreement can not be determined by us in the present action, we would be hard pressed to rule that Mother could make such a recovery from Father unless, in appropriate litigation, we would find that we are compelled to do so by the holdings in ***Patterson*** and ***Dechter.*** If so restricted, we would urge that any decision favoring Mother's enforcement of support rights under the Agreement would be appealed with the hope that such a mandate from our appellate courts would be reversed.

Finally, we comment that although our authority to hold Father in contempt of custody under Mother's present petition was not challenged by Father, a strict reading of section 3105 could question such authority. We recognize that enforcement of custody provisions not merged into a divorce decree has routinely been done through contempt proceedings such as initiated by Mother in this case, at least such is the manner of practice in Lycoming County. Section 3105(b), however, does not specifically state the provisions of such a child support custody or visitation agreement are "enforceable" but only makes them "modifiable" by a court. It is arguable that in order to hold Father not only in contempt of support, but also in contempt of custody, section 3105 should read as follows: "b. A provision of an agreement

regarding child support, visitation or custody shall be subject to modification ***and enforcement*** by the Court upon a showing of changed circumstances ***or failure to comply***."

We suggest the legislature amend section 3105 to definitively allow the court to enforce custody provisions of agreements incorporated but not merged into divorce decrees, as we believe such to be the best practice for the benefit of the involved children. Whereas, modification is often a long and arduous legal process for parents to endure, hearings for contempt allow for immediate remedy in the court's discretion.

BY THE COURT,

William S. Kieser, Senior Judge

cc: Domestic Relations Section (Attn: Jodi Shilling)
The Honorable Judge Dudley N. Anderson
Melissa Clark, Esquire
Andrea Pulizzi, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Terra Koernig, Esquire (Law Clerk)