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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-1394-MR

SARAH NICHOLE JESENSKY — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE ACENA JOHNSON BECK, JUDGE
ACTION NO. 21-CI-00207

DALE ROBERT JESENSKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ECKERLE, GOODWINE, AND MCNEILL, JUDGES.

GOODWINE, JUDGE: Sarah Nichole Jesensky ("Sarah") appeals the October 30, 2023 order of the Kenton Circuit Court, Family Division. We affirm.

BACKGROUND

In 2005, Sarah and Dale Robert Jesensky ("Dale") were married. One minor child was born of the marriage. In 2021, Dale petitioned to dissolve the

marriage. Thereafter, the parties entered into a marital settlement agreement ("MSA") resolving all pending issues. In part, the parties agreed to the following:

> The parties are joint owners of real property located at 4741 Buttonwood Drive Independence, Kentucky 41051. The property is encumbered by a mortgage with PennyMac in the approximate amount of $120,000.00. This property shall be awarded to the Wife as her sole and exclusive property. She shall pay the debt thereon and hold the Husband harmless therefrom. She shall refinance the mortgage within 120 days of the date of entry of the Decree of Dissolution of Marriage herein. If she is unable to do so, the property shall be sold and she shall receive all the proceeds therefrom. The Husband shall sign a Quitclaim deed in conjunction with the refinance of the mortgage herein. . . .
>
> . . .
>
> The Wife shall pay all marital debts in her name. The Husband shall pay all debts in his individual name. The parties acknowledge and agree there is a Loan to Learn debt incurred by the parties with a remaining balance of approximately $35,879.99 owed to Citizens Bank, Account #00003, One Citizens Bank Way, Attn: Asset Recovery Dept., Johnston, RI 02919. The parties agree to equally divide and pay this debt.

Record ("R.") at 50-52. On April 17, 2023, the family court entered findings of fact, conclusions of law, and a decree incorporating the MSA by reference and dissolving the parties' marriage.

On August 23, 2023, Dale moved for Sarah to be held in contempt and ordered to pay $1,000 in his attorney fees for failure to refinance the property at 4741 Buttonwood Drive ("the marital residence") within 120 days as required by

the terms of the MSA. He also requested the court order the sale of the residence.[1] The family court entered a show cause order. Before the show cause hearing, Dale filed a second motion for contempt, alleging Sarah failed or refused to make payments on her half of the Loan to Learn debt to Citizens Bank ("the loan").

Sarah then filed a motion for Dale to be held in contempt for failure to sign a quitclaim deed "in conjunction with the refinance of the mortgage herein." *Id*. at 105-06. She claimed his failure to sign effectively prevented her from refinancing the marital residence. She requested Dale be ordered to sign a quitclaim deed, and for the 120 days she was given to refinance the residence under the terms of the MSA to begin from the date of execution of the deed. She also requested attorney fees.

The family court heard the three motions on October 13, 2023. Both parties testified. Regarding the loan, Dale testified that he received notice that Sarah had not made payments since May 2023, the month after the parties were divorced. Because of this, he contacted Citizens Bank and negotiated to settle the debt for $20,479.49, reducing the amount owed by approximately $15,000. He paid the entirety of the reduced debt and requested that Sarah be ordered to reimburse him for half of it under the terms of the MSA. Sarah testified that she

[1] Dale's motion also requested that he be allowed to enter the residence to "ensure that it is in sellable condition." R. at 91. The family court denied this request and it is not at issue on appeal.

could not make payments toward the loan because it now had a zero balance. When questioned by the court, Sarah's counsel admitted the debt was meant to be divided under the MSA but again claimed she could not make payments on a loan that had been paid off.

As to the marital residence, Dale testified he had been notified that Sarah was two months behind on mortgage payments. He testified that Sarah's delinquent payments on their shared debts had decreased his credit score by more than 100 points. On cross-examination, he admitted he had not yet signed a quitclaim deed for the marital residence. He reasoned that "in conjunction with," as used in the MSA, meant that he would sign such a deed at the closing of the refinancing.

Sarah testified that she had spoken to PennyMac, the current mortgage holder, and "a couple of banks" about refinancing the marital residence. When questioned by the court about whether she had taken steps to apply for refinancing, she was nonresponsive and provided no proof of applications or denials. She testified that she "believes" she cannot refinance the residence without Dale first executing a quitclaim deed. Initially, she testified that Dale's failure to cooperate was the only impediment to her refinancing. However, she admitted that her low credit score prevented her from securing new financing. She also acknowledged

she was behind on her mortgage payments. Ultimately, Sarah informed the court that she intended to sell the marital residence rather than refinance it.

On October 30, 2023, the family court entered an order on the motions. The court found Sarah in contempt for failing to refinance the home within 120 days and ordered her to pay Dale $1,000 for his legal fees. The court also ordered the marital residence to be sold. The court declined to find Sarah in contempt for her failure to make payments on the loan but ordered her to pay Dale $10,239.75, half of the negotiated payoff of the loan. The court did not set out the repayment terms but ordered the parties to make such arrangements. The court did not find Dale in contempt for failing to sign a quitclaim deed before refinancing or closing. The court ordered him to "cooperate fully and [promptly]" with Sarah's sale of the residence. *Id*. at 114.

This appeal followed.

STANDARD OF REVIEW

Courts have the inherent power and "nearly unfettered discretion in issuing contempt citations." *Crowder v. Rearden*, 296 S.W.3d 445, 450 (Ky. App. 2009) (citation omitted). We will reverse a family court's decision only where its imposition of a sentence is an abuse of discretion. *Id*. (citation omitted). A court abuses its discretion when its decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id*. (citations omitted).

ANALYSIS

On appeal, Sarah argues: (1) the family court erred by finding her in contempt for failure to refinance the marital residence; (2) Dale has "unclean hands" because he failed to assist Sarah in refinancing the marital residence; (3) the family court contradicts itself in its findings of fact; (4) as to the loan, Sarah cannot repay a debt that is no longer a debt; and (5) the family court improperly modified the parties' MSA.

First, contempt is "willful disobedience of – or open disrespect for – the rules or orders of a court." *Crowder*, 296 S.W.3d at 450 (citation omitted). Contempt may be civil or criminal. *Id*. (citation omitted). Civil contempt is "the failure . . . to do something under order of court, generally for the benefit of a party litigant." *Id*. (citation omitted). The purpose of civil contempt is to coerce compliance. *Blakeman v. Schneider*, 864 S.W.2d 903, 906 (Ky. 1993).

> In a civil contempt proceeding, the initial burden is on the party seeking sanctions to show by clear and convincing evidence that the alleged contemnor has violated a valid court order. Once the moving party makes out a prima facie case, a presumption of contempt arises, and the burden of production shifts to the alleged contemnor to show, clearly and convincingly, that he or she was unable to comply with the court's order or was, for some other reason, justified in not complying.

Nienaber v. Commonwealth ex rel. Mercer, 594 S.W.3d 232, 236 (Ky. App. 2020) (citing *Commonwealth, Cabinet for Health and Family Servs. v. Ivy*, 353 S.W.3d 324, 332 (Ky. 2011)).

Here, it is uncontested that Sarah did not refinance the marital residence within 120 days, creating the presumption of contempt. Therefore, we turn our analysis to whether Sarah proved by clear and convincing evidence that she could not comply with the family court's order. While a party cannot be sanctioned for failing to complete an impossible act, "[t]he inability to comply must be shown clearly and categorically by the defendant, and the defendant must prove [she] took all reasonable steps within her power to [e]nsure compliance with the court's order." *Crowder*, 296 S.W.3d at 450-51 (citations omitted). Sarah argues she could not refinance the marital residence because (1) she has a poor credit rating and (2) Dale did not execute a quitclaim deed after the parties entered the MSA.

First, Sarah did not prove her credit rating prevented her from refinancing the marital residence by clear and convincing evidence. She argues her failure to make mortgage payments negatively impacted her credit. A document in the record shows her credit score as 567. It may be true that this score would hinder her ability to secure refinancing; however, she did not prove this at the hearing. She testified to contacting PennyMac and "a couple of banks" about

refinancing. Still, she did not offer proof that she had applied for or was denied refinancing because of her credit rating. Although she acknowledges that she was behind on her mortgage payments, which led to the decrease in her credit rating, she also provided no proof that her financial circumstances had changed in such a way that payment was impossible. *See Crowder*, 296 S.W.3d at 451. It is the "exclusive province" of the family court to weigh evidence and judge the credibility of witnesses. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnotes omitted). The court was unconvinced by Sarah's uncorroborated testimony, and we will not disturb its conclusion.

Sarah's argument that she could not refinance the marital home because Dale did not execute a quitclaim deed fails on the same grounds. Without clear and convincing proof that she attempted to secure refinancing and, but for Dale's action, she would have complied with the court's order, we will not reverse the family court's decision. *See Crowder*, 296 S.W.3d at 450-51 (citations omitted).

Furthermore, we are unpersuaded by Sarah's arguments regarding the meaning of "in conjunction with" as used in the MSA.[2] An MSA is enforceable as

[2] In her argument, Sarah mischaracterizes the holdings in several cases. Despite her assertions, *Stinnett v. Stinnett*, 915 S.W.2d 323 (Ky. App. 1996), *abrogated by Fenwick v. Fenwick*, 114 S.W.3d 767 (Ky. 2003); *Mennemeyer v. Mennemeyer*, 887 S.W.2d 555 (Ky. App. 1994), *overruled by Scheer v. Zeigler*, 21 S.W.3d 807 (Ky. App. 2000); and *Squires v. Squires*, 854 S.W.2d 765 (Ky. 1993), do not define "in conjunction with" as a term. Two of the three cases,

a contract. *Nelson v. Ecklar*, 588 S.W.3d 872, 878 (Ky. App. 2019) (citation omitted); *see also* KRS[3] 403.180(5). Terms of a contract are "construed according to their plain and ordinary meaning." *Hugenberg v. West American Ins. Company/Ohio Cas. Group*, 249 S.W.3d 174, 185 (Ky. App. 2006) (internal quotation marks and footnote omitted). "In conjunction with" means "'the state of being conjoined,' *i.e.* 'being, coming, or brought together so as to meet, touch, overlap, or unite[.]'" *Brownwood Property, LLC v. Thornton*, 621 S.W.3d 434, 442 (Ky. 2021) (footnote omitted).[4]

The parties agreed that Dale "shall sign a Quitclaim deed **in conjunction with** the refinance of the mortgage herein." R. at 51 (emphasis added). Based on *Brownwood*, we read this to mean that his action should be conjoined with or overlap with Sarah's act of refinancing. This means that Dale was under no obligation to preemptively execute the quitclaim deed when Sarah had not yet taken any steps to refinance the residence. The family court's

Mennemeyer and *Squires*, do not contain any mention of the phrase. None of these cases are relevant to our analysis in this matter.

[3] Kentucky Revised Statutes.

[4] In *Brownwood*, the Supreme Court of Kentucky interpreted "in conjunction with" as used in a statute. Although the rules for contract interpretation are not identical for those for statutes, "[t]he most commonly stated rule in statutory interpretation is that the plain meaning of the statute controls." *Commonwealth v. Estate of Cooper*, 585 S.W.3d 253, 257 (Ky. App. 2019) (citation omitted). Because the *Brownwood* Court was giving "in conjunction with" its plain meaning, as defined by Merriam-Webster, we find its interpretation applicable herein.

reasoning that Dale's execution of the deed should have been contemporaneous with the closing of Sarah's refinancing was appropriate under the terms of the MSA.[5]

In arguing that she should not have been found in contempt, Sarah compares this matter to *Miranda v. Miranda*, 536 S.W.3d 196 (Ky. App. 2017). However, the facts herein are easily distinguished from *Miranda*. Therein, the family court denied Wife's motion to force the sale of the marital residence. *Id*. at 197. Under the parties' MSA, Husband received the residence and had 90 days to refinance it. *Id*. If he was unable to refinance, the house was to be sold. *Id*. at 198. The family court found, despite Husband's diligent efforts during the 90 days, he was prevented from refinancing because of a lien that had been placed on the property after a default judgment was entered against Wife without his knowledge. *Id*. at 197.

On appeal, this Court found the family court's decision was "supported by substantial evidence." *Id*. at 199 (citation omitted). The Court lists specific evidence submitted by Husband, including a pre-qualification letter, the names of the banks he contacted, and the exact dates on which he attempted to refinance. *Id*. Sarah presented no such evidence to prove she had taken any steps

[5] The family court did not make written findings to this effect but addressed the issue of when Dale would be required to sign the quitclaim deed orally during the hearing.

to refinance the marital residence, nor did she prove Dale's actions prevented her from securing new financing. Therefore, *Miranda* is inapplicable to this matter.

Because Sarah did not prove by clear and convincing evidence that she was unable to refinance the marital residence, the family court did not abuse its discretion in finding her in contempt and ordering her to pay Dale's attorney fees.[6]

Sarah's argument that she cannot repay the loan because it is no longer a debt also fails. Although Sarah has acknowledged that the parties agreed to divide the debt equally, introduced evidence at the hearing of the paid off balance, and conceded she had not been the one to pay it off, she maintains that she is not obligated to repay Dale. We disagree.

The MSA states, "[t]he parties acknowledge and agree there is a Loan to Learn debt incurred by the parties with a remaining balance of approximately $35,879.99 owed to Citizens Bank[.] . . . The parties agree to equally divide and pay this debt." R. at 52. The MSA is silent as to the manner or method by which they would divide and pay the debt.

As previously stated, settlement agreements are contracts and are governed by the same rules of construction. *See Cagata v. Cagata*, 475 S.W.3d

[6] Sarah also claims she was unable to put the marital residence on the market because Dale had not yet signed a quitclaim deed. We need not address this argument because she was not found in contempt for failure to list the residence for sale.

49, 56 (Ky. App. 2015) (citation omitted). The primary objective in construing any contract is to give effect to the intentions of the parties. *Cantrell Supply, Inc v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384 (Ky. App. 2002). A court should construe a contract as a whole and give effect to every provision. *Big Sandy Company, L.P. v. EQT Gathering, LLC*, 545 S.W.3d 842, 845 (Ky. 2018) (citation omitted). "Where a contract is ambiguous or silent on a vital matter, a court may consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties." *Cantrell Supply*, 94 S.W.3d at 385. "A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations." *Id*. (citation omitted).

This matter is comparable to the facts of *Gauntt v. Gauntt*, No. 2003-CA-001141-MR, 2004 WL 2413782 (Ky. App. Oct. 29, 2004).[7] Therein, the parties agreed Wife would receive the marital residence, but Husband would continue to make the mortgage payments until the debt was satisfied. *Id.* at *2. Thereafter, Wife sold the marital residence and purchased a new home. *Id*. Husband argued he was no longer obligated to make the mortgage payments because "the original mortgage on the marital residence had been satisfied and the

[7] We cite to this unpublished as persuasive, nonbinding authority. Kentucky Rules of Appellate Procedure ("RAP") 41(A).

property had been sold[.]" *Id.* The family court was unconvinced by this argument because the intent of the parties' agreement was for Husband's payment of the mortgage to be part of his maintenance and child support obligation. *Id.* On appeal, this Court agreed with the family court, reasoning that

> [t]he trial court essentially found that the parties' separation agreement was ambiguous relative to the issue of whether [Husband's] mortgage payment obligation would continue if [Wife] sold the marital residence[.] . . . We agree that the separation agreement was ambiguous because it contained no provision regarding the sale of the marital residence. We likewise agree with the trial court's interpretation of the agreements and its conclusion that the parties intended that [Husband] would pay off the entire amount of the original mortgage as part of his maintenance and child support obligation, regardless of whether [Wife] sold the property.

Id. at *3.

Herein, like in *Gauntt*, there is an ambiguity in the MSA. Specifically, where the MSA is silent, it would be reasonable to have different interpretations regarding the method or manner by which the parties could repay the loan. *See Cantrell Supply*, 94 S.W.3d at 385. Therefore, the family court considered evidence outside the MSA. The court heard Dale's testimony that, a month after the parties were divorced, he received notice that Sarah had stopped making payments on the loan.[8] Sarah concedes that her failure to make payments

[8] It is unclear what, if any, payments Sarah made prior to Dale's settlement of the debt.

on the parties' debt negatively impacted both parties' credit ratings. Because of this, Dale chose to contact Citizens Bank and negotiate a payoff. He negotiated approximately $15,000 in forgiveness and paid off $20,479.49. Evidence shows, at the time of the hearing, the balance of the account was zero.

Just as Husband in *Gauntt* attempted to claim that because the mortgage on the parties' marital residence had been paid off, he no longer had an obligation to make payments, Sarah claims she cannot make payments on an account that no longer has a balance. Her argument is not supported by the terms of the MSA. As evinced by the language of the MSA, the parties clearly intended to equally divide this debt. The method for repayment is the only ambiguity. Sarah claims she agreed to pay the bank directly, but this is not proven by the terms of the MSA or evidence in the record. Sarah's obligation to pay her half of the debt is not contingent upon the balance of the Citizens Bank account. *See Gauntt*, 2004 WL 2413782, at *3. Regardless of Dale's actions, she has an obligation under the terms of the MSA. Therefore, we agree with the family court's interpretation that Sarah must pay $10,239.75 to Dale.[9]

[9] In *Gauntt*, Husband was ordered to continue to pay the original payment amount until the original payoff date regardless of what Wife's new mortgage obligation may have been. *Id*. at *3. While Husband's maintenance and child support obligation are distinguishable from the facts here, we note this to remind Sarah that she is saving approximately $7,700 under the family court's order.

Finally, any remaining argument Sarah raises is not properly before us. An appellant's brief must include, at the beginning of her argument, "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." RAP 32(A)(4). Sarah's brief is devoid of such statements. Although we are not required to do so, we reviewed the record for preservation of each argument. *See Koester v. Koester*, 569 S.W.3d 412, 415 (Ky. App. 2019) (citing *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003)). In our analysis, we considered all issues that were properly preserved. As to any remaining issues, Sarah failed to argue them before the family court and could not raise them for the first time on appeal. *See Sunrise Children's Services, Inc. v. Kentucky Unemployment Insurance Commission*, 515 S.W.3d 186, 192 (Ky. App. 2016) (citation omitted).

CONCLUSION

Based on the foregoing, we AFFIRM the October 30, 2023 order of the Kenton Circuit Court, Family Division.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Mark C. Eppley Cincinnati, Ohio	John A. Berger Covington, Kentucky