NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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March 9, 2020

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Re: *Melissa Moffett (f/k/a Jones) v. Tony D. Jones, Sr.*
Case No. CL–2016–8437

Dear Counsel and Mr. Jones:

In this child custody and support modification action, the parties reached a day-of-trial settlement between themselves. They stated the terms of their oral settlement on the record, which was transcribed, and the case was continued for entry of the final order. The issue before the Court is whether this constitutes a binding contract, or whether a party can thereafter retract, refuse to endorse the final order, and thereby force a new child custody and support modification trial. This Court holds it ordinarily may not enforce oral agreements between divorced spouses concerning child custody and support, which must be in writing.

However, in the present case, the parties swore that the orated agreement was their "full," "total," and "final" agreement. The Court, which had already studied the case file prior to the trial, then made a reasonableness finding based on its knowledge of the file, the face of the agreement, and the parties' sworn statements. Since the subsequently proposed Final Custody and Support Order appears materially in accord with the transcript of the sworn agreement, and which is attached to the proposed order, the Court accepts the proposed order as a

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memorialization of the Court's prior ruling from the bench and no longer considers it a mere oral agreement between parties, or worse, an unenforceable agreement-to-agree. Once entered, the Order is enforceable.

I. FACTS

This matter came before the Court on Melissa Moffett's ("Mother") Motion to Modify Child Support, Custody, and Visitation. (Pet. Aug. 16, 2019.) Trial was scheduled for January 29, 2020. After the case was called, Mother's counsel informed the Court that he would like to pass the case for a bit, as the parties "are trying to reach a settlement, if we can." (H'rg Tr. 3:19-21.) Tony Jones, Sr. ("Father") agreed that such arrangement "would be productive." (H'rg Tr. 4:14-17.) The Court took a recess. When it returned, the parties announced the case had been settled. (H'rg Tr. 5:6-10.)

Mother's counsel stated, "We have a *full* agreement on child support, as well as custody and visitation, which I will state for the record." (H'rg Tr. 5:22 (emphasis added).) After reciting the terms in detail, Mother's counsel stated, "That is the *total* agreement on custody and visitation" (H'rg Tr. 9:2-3 (emphasis added)); "[t]hat's the *final* agreement on support and custody and visitation, Your Honor" (H'rg Tr. 12:5-6 (emphasis added)) (the "Transcribed Oral Agreement").

Thereafter, the Court conducted a colloquy[1] in which Mother and Father, under oath, affirmed those were the terms to which they agreed and by which they agreed to be bound. (H'rg Tr. 13:8-14:4.) The Court then stated,

> The Court finds that this agreement appears to be very mature and reasonable, and the Court applauds you for reaching that agreement. The Court *orders* that Mr. Van Hook prepare the *order* in writing. He can use *the court transcript for assistance*, and *let's schedule* it for entry of the order.

(H'rg Tr. 14:8:11 (emphasis added).) The parties docketed the presentation and entry of the final order for Friday, February 21, 2020.

On February 21, 2020, the parties informed the Court that Father refused to endorse the final order because he changed his mind about the prior agreement. Father did not assert any inconsistency between the Court's ruling and the proposed final order. The Court took under advisement whether it had the authority to enter the final order despite Father's refusal to endorse, or whether to reopen the matter for another trial.

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[1] Even beforehand, the Court went so far as to tell Father, "If [Mother's counsel] is misstating the agreement, don't be shy, speak up." (H'rg Tr. 6:11-12.) The Court also asked clarifying questions along the way. (*See, e.g.,* H'rg Tr. 9:8-10, 10:8-9, 12:7-17.) At the end of Mother's counsel's recitation of the agreement, the Court also asked Father whether "there was anything else to your agreement," to which Father responded in the negative. (H'rg Tr. 13:5-7.)

II. ANALYSIS

Does an oral child custody and support modification agreement between divorced parents, sworn on the record in open court and transcribed, and accepted by the Court as reasonable in a ruling, legally bind a party who later repudiates? Briefly stated, the answer is yes.

A. The Statutory Exception to the Writing Requirement for Child Custody and Support Agreements Applies Only to Married Couples.

Virginia Code § 20-155, which permits certain oral marital agreements, does not apply to post-divorce child support and custody modification agreements because, by definition, divorced parents are not "married"—a condition necessary for the application of that statute.

The statute reads:

> *Married* persons may enter into agreements with each other for the purpose of settling the rights and obligations of either or both of them, to the same extent, with the same effect, and subject to the same conditions, as provided in §§ 20-147 through 20-154 for agreements between prospective spouses, except that such marital agreements shall become effective immediately upon their execution. If the terms of such agreement are . . . recorded and transcribed by a court reporter and affirmed by the parties on the record personally, the agreement is not required to be in writing and is considered to be executed. A reconciliation of the parties after the signing of a separation or property settlement agreement shall abrogate such agreement unless otherwise expressly set forth in the agreement.

VA. CODE ANN. § 20-155 (emphasis added).

Virginia Code § 20-155 plainly refers to agreements between *married* persons. "Courts are not allowed to write new words into a statute plain on its face." *Flanary v. Milton*, 263 Va. 20, 23 (2002). The language of this statute is unambiguous as to its plain meaning.

> When the language of a statute is unambiguous, [courts] are bound by the plain meaning of that language. Furthermore, [courts] must give effect to the legislature's intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity. If a statute is subject to more than one interpretation, [courts] must apply the interpretation that will carry out the legislative intent behind the statute.

Prop. Damage Specialists, Inc. v. Rechichar, 292 Va. 410, 413 (2016) (citation omitted). The "plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction." *Turner v. Commonwealth,* 295 Va. 104, 109 (2018) (citations omitted).

If the General Assembly wanted to include unmarried persons within Virginia Code § 20-155 it would not have used the words "married persons." This plain reading of Virginia Code § 20-155 is logical and is an *a priori* conclusion in light of the statute's inclusion within the *Premarital* Agreement Act. VA. CODE ANN. § 22-147 *et seq.* (emphasis added) (the "Act"). In the Act, the General Assembly authorized prospective spouses contemplating marriage to enter

into written, binding premarital agreements effective upon marriage. VA. CODE ANN. § 20-149. Through Virginia Code § 20-155, the General Assembly extended that authorization to married spouses.

As originally enacted, the Act required both premarital agreements and marital agreements be in writing. *See* VA. CODE ANN. § 20-149 (premarital agreements); *Flanary*, 263 Va. at 23-24 (holding Virginia Code § 20-149 applied to marital agreements under a prior version of Virginia Code § 20-155). In 2003, the General Assembly amended Virginia Code § 20-155 to permit *married* spouses to enter into oral marital agreements if the agreement is transcribed by a court reporter and affirmed by the parties on the record:

> . . . If the terms of such agreement are (i) contained in a court order endorsed by counsel or the parties or (ii) recorded and transcribed by a court reporter and affirmed by the parties on the record personally, the agreement is not required to be in writing and is considered to be executed.

VA. CODE ANN. § 20-155. However, the General Assembly extended no such permission to *divorced* spouses.

In this case, since Mother and Father are divorced, they are not a married couple able to enter into oral marital agreements as contemplated by Virginia Code § 20-155. Consequently, Virginia Code § 20-155 is inapposite to the Transcribed Oral Agreement.

B. Divorced Couples' Agreements Must be in Writing.

Virginia Code § 20-109.1 provides:

> Any court may affirm, ratify and incorporate by reference in its decree dissolving a marriage or decree of divorce . . . , or by a separate decree prior to *or subsequent to such decree*, or in a decree entered in a suit for annulment or separate maintenance, and in a proceeding arising under subsection A 3 or L of § 16.1-241, any *valid agreement* between the parties, or provisions thereof, concerning the conditions of the maintenance of the parties, or either of them and *the care, custody and maintenance of their minor children*, or establishing or imposing any other condition or consideration, monetary or nonmonetary. *Provisions in such agreements for the modification of child support shall be valid and enforceable.*

VA. CODE ANN. § 20-109.1 (emphasis added).

The question this Court must resolve is: What constitutes a "valid agreement?"[2] Can the agreement be oral? This Court holds that to constitute a "valid agreement," any agreement between *divorced* spouses concerning the custody and support of children must be in writing for it to be incorporated by reference into a decree pursuant to Virginia Code § 20-109.1.

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[2] The Court acknowledges that, generally, valid agreements can be both written and oral. *Cf.* Oral contracts have a three-year statute of limitation; written contracts have a five-year statute of limitation. VA. CODE ANN. § 8.01-246. Nevertheless, the Court must give deference and meaning to the applicable statute at issue.

Written child custody and support settlement agreements are the norm. The Statute of Frauds requires a writing signed by the parties for agreements that are not to be performed within a year. VA. CODE ANN. § 11-2(8). Since child custody and support orders typically remain until the child reaches the age of majority—absent a material change in circumstances such that a modification is in the child's best interests—these agreements ordinarily exceed a year. *Duva v. Duva*, 55 Va. App. 286, 291 (2009); *see also Seddon v. Rosenbaum*, 85 Va. 928, 933-34 (1889) (distinguishing between contracts able to be performed within a year and contracts able to be performed within a year but that contemplate performance beyond the initial year). In the present case, the parties' child is only [redacted]. Accordingly, the custodial arrangement of the Transcribed Oral Agreement clearly contemplated performance of the parties' obligations beyond one year and is therefore subject to the Statute of Frauds.

Although the Act generally requires agreements to be in writing and signed per Virginia Code § 20-149, the General Assembly created an exception for *married* couples to enter into binding oral marital agreements. *See* VA. CODE ANN. § 20-155 and discussion *supra* Section I.A. Nevertheless, the General Assembly has not seen fit to treat *divorced* spouses any differently than *prospective* spouses, whose premarital agreements must be written and signed. Put differently, both § 20-109.1 and § 20-155 require agreements to be in writing, but § 20-155 provides for two exceptions and § 20-109.1 provides for no exceptions. In other words, divorced couples do not get the luxury of the "spoken on the record" exception of § 20-155 (sub (ii)).

There is logic to this differential treatment. Life circumstances are very different between *married* spouses as compared to the life circumstances of *prospective* spouses or *divorced* spouses. Thus, this Court holds that agreements concerning child custody and support between *divorced* spouses must be in writing; oral agreements concerning these matters are unenforceable.[3]

C. Court Rulings and Marital Agreements are Different Concepts.

Antithetical to this Court's conclusion that custody and support agreements between divorced spouses must be in writing to be valid, the Court of Appeals of Virginia issued an unpublished opinion holding that a trial court did not err in entering a final decree based on the terms of an oral child custody modification settlement agreement orated into the record mid-hearing. *Mattingly v. McCrystal*, No. 2556-04-4, 2006 WL 461078, at *4 (Va. Ct. App., Feb. 28,

[3] Consider also Virginia Code § 20-108.1 *Determination of child or spousal support*. This statute is a part of Chapter 6, the same chapter under which § 20-109.1 falls. Subsection (B) addresses presumptive child support amounts. One of several factors a court is required to consider when rebutting the presumptive Guidelines amount is "*[w]ritten* agreement, stipulation, consent order, or decree between the parties which includes the amount of child support . . ." VA. CODE ANN. § 20-108.1(B)(14).

2006).[4] However, the Court of Appeals does not appear to have addressed the statutory interpretation as explored herein[5] and may have reached a different conclusion had it done so.

That said, the *Mattingly* decision is consistent with the principle that an oral agreement with the complete terms sworn in open court, transcribed, and later reduced to writing by a court, is different than a bald oral agreement of the type contemplated by Virginia Code § 20-155 or § 20-109.1. The former is a ruling from the court later memorialized; the latter is a mere oral agreement.

Bolstering this distinction, Virginia Code § 20-155 is silent on a court's role in the married couple's oral agreement on the record. The statute reads, "If the terms of such agreement are . . . recorded and transcribed by a court reporter and affirmed by the parties on the record personally, the agreement is not required to be in writing and is considered to be executed." By its express terms the valid agreement requires (1) recording and transcription by a court reporter; and (2) affirmation by the parties on the record. It does not have a third condition: acceptance by a court. This "missing" third condition is critical. Once a court hears and accepts the recorded terms of the agreement, and issues a ruling consistent with it, that court acts as it does with any evidentiary matter it considers. The sworn agreement on the record effectively becomes a stipulation that the facts are sufficient to support a specific result urged by the parties. Once the court accepts those stipulations, issues a ruling, and asks the parties to submit a sketch order consistent with the court's ruling, there is no longer an agreement between the parties—there is a ruling of the court.

This presupposes, of course, that the parties resolve everything and the court is in a position to accept it as a complete stipulation on which to make a ruling with nothing material left but the ministerial task of reducing the court's ruling to an order. To best illustrate this concept, compare the facts of the present case with that of this Court's similar unpublished Opinion Letter in *In re: Sealed Case*, JA-2018-34, -35, -36 (Sept. 11, 2018) (Oblon, J.). In *In re: Sealed Case*, the parties manifested an intent to orally set out the "parameters" of their agreement "subject to" the formalization of the agreement "with the nuances and details" in a subsequent written agreement. *In re: Sealed Case*, at *6. Citing *Bryant v. McDougal*, 49 Va. App. 78, 86 (2006), the Court found that the parties manifested an intent that that the oral agreement was a condition precedent ("subject to") to the formal, legally binding contract. *Id.* In other words, the agreement in *In re: Sealed Case* was an agreement-to-agree.

The facts in the present case are divergent from those in *In re: Sealed Case* and are more analogous to those in *Mattingly*, as shown by the following hearing transcript citations:

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[4] As an unpublished opinion, however, *Mattingly* carries no controlling precedential value. VA. CODE ANN. § 17.1-413; VA. SUP. CT. R. 5A:1(f); *Castillo v. Loudoun Cty. Dep't of Family Servs.*, 68 Va. App. 547, 572 n.7 (2018) ("Although not binding precedent, unpublished opinions can be cited and considered for their persuasive value.").

[5] Instead, the Court of Appeals addressed whether the parties' oral settlement contained the "essentials of a valid contract." *Mattingly*, 2006 WL 461078, at *2 (quoting *Bangor-Punta Operations, Inc. v. Atl. Leasing Ltd.*, 215 Va. 180, 183 (1974)).

- "We have a *full* agreement . . . which I will state for the record" (H'rg Tr. 5:22 (emphasis added).)
- "That is the *total* agreement on custody and visitation." (H'rg Tr. 9:2-3 (emphasis added).)
- "That's the *final* agreement on support and custody and visitation, Your Honor." (H'rg Tr. 12:5-6 (emphasis added).)

Accordingly, unlike the oral agreement in *In re: Sealed Case* and *Bryant*, the oral agreement here did not "lack all the 'essentials of a valid contract' as compared to the oral agreement in *Mattingly*" (*see In re: Sealed Case*, at *6-7) because there was no reservation/conditional language. A clear meeting of the minds and mutual assent existed. Additionally, the specific terms as stated were reasonably certain, definite, and complete. *Cf. Smith v. Farrell*, 199 Va. 121, 128 (1957) (holding that to be valid and enforceable, the terms of an oral agreement must be reasonably certain, definite, and complete to enable the parties and the courts to give the agreement exact meaning).

Most importantly, the Court accepted the parties' agreement and issued a bench ruling. After reciting the terms of the agreement on the record, and after the colloquy in which both parties under oath agreed to be bound thereof, the Court stated on record:

> The Court finds[6] that this agreement appears to be very mature and reasonable, and the Court applauds you for reaching that agreement. The Court *orders* that Mr. Van Hook prepare the *order* in writing. He can use *the court transcript for assistance*, and *let's schedule* it for entry of the order.

(H'rg Tr. 14:8:11 (emphasis added).)

Therefore, nothing left was to be done but the ministerial task of memorializing the Court's *ruling*—and not the parties' *agreement*. And, indeed, like the trial court in *Mattingly*, the Court found that it would be in the best interests of the child to incorporate the Transcribed Oral Agreement into a final order.

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[6] In *Moreno v. Moreno*, 24 Va. App. 227 (1997), the Court of Appeals explained: "Although [§ 20-108.1 and § 20-108.2] serve to provide a rebuttable presumption of the amount of child support to be paid, a trial judge may determine that the *contractual* amount of child support is *fair and equitable without requiring evidence* and without determining the precise presumptive amount of support. Where, as here, the trial judge can determine that the amount of agreed child support is fair and equitable insofar as the child's best interest is concerned, the court may approve the agreement and deviate from the guidelines. Neither parent will be heard to complain that an agreed amount of child support exceeds the presumptive amount under the guidelines and should be set aside in the absence of fraud, coercion, or overreaching."

III. CONCLUSION

For the reasons stated herein, the Court holds that its ruling based on sworn testimony of a full and complete agreement between the parties, on the record, accepted by the Court as reasonable, is to be treated as any other court ruling. Entry of a final order materially consistent with its ruling is proper notwithstanding a party's repudiation of his prior sworn stipulations underlying the ruling.

The general principle that the Court may not enforce oral agreements between divorced spouses concerning child custody and support, which must be in writing, remains the law. Had the parties in this case entered into an oral agreement and, before presenting it to the Court, one party wished to reconsider and not be bound, he or she would have the statutory prerogative to repudiate it. Or, if the agreement on the record was not a full and complete resolution of the matter (e.g., an agreement-to-agree), or if the court failed to make a ruling, the agreement would be unenforceable.

That is not the case here. In the present case, Mother and Father swore that the presented agreement was their "full," "total," and "final" agreement, and the Court made a reasonableness finding based on the Court's knowledge of the file, the face of the agreement, and the parties' sworn statements. Since the subsequently proposed Final Custody and Support Order appears materially in accord with the transcript of the sworn agreement, and which is attached to the proposed order, the Court accepts it as a memorialization of the Court's prior ruling from the bench. Once entered, the Order is enforceable.

An appropriate Order is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

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