CHARLOTTE MALPESO *v.* PASQUALE J. MALPESO
(AC 33858)

Beach, Alvord and Borden, Js.

Argued December 6, 2012—officially released February 19, 2013

(Appeal from Superior Court, judicial district of Stamford-Norwalk, Hon. Dennis F. Harrigan, judge trial referee [judgment]; Wenzel, J. [motion for modification].)

Barbara M. Schellenberg, with whom, on the brief, was *Richard L. Albrecht*, for the appellant (defendant).

Charles T. Busek, with whom, on the brief, was *Bettina Grob*, for the appellee (plaintiff).

Elizabeth T. Sharpe, for the minor children.

Opinion

BEACH, J. In this postjudgment marital dissolution matter, the defendant, Pasquale J. Malpeso, appeals from the judgment of the trial court sustaining in part the objection filed by the plaintiff, Charlotte Malpeso, to the defendant's motion for modification of child support that sought to decrease the amount of alimony and child support to be paid to the plaintiff under the separation agreement. We reverse the judgment of the trial court.

The trial court rendered a judgment of dissolution of marriage in June, 2004, which incorporated the parties' separation agreement (agreement). Article 3 of the agreement was entitled "Alimony *and Child Support*." (Emphasis added.) Paragraph 3.1 of the agreement provided in relevant part: "During the lifetime of the [defendant] until the death, remarriage or cohabitation of the [plaintiff], whichever event shall first occur, the [defendant] shall pay to the [plaintiff] as alimony, or separate maintenance for the support of the minor children the sum of $20,000 per month." Paragraph 3.2 provided in relevant part: "The amount and term of *alimony* shall be modifiable only under the following circumstances: (a) Upon a court of competent jurisdiction's determination that the [defendant] has become disabled as defined by the Social Security Administration or in the event that the economy of New York State undergoes a substantial change as a result of a catastrophic event (such as 9/11) . . . (b) After July 1, 2012, upon a court of competent jurisdiction's determination that there has been a substantial change of circumstances as provided for in . . . General Statutes § 46b-84a [and] . . . (d) Only under the circumstances set forth in this paragraph 3.3 shall the [defendant's] obligation to pay alimony pursuant to paragraph 3.1 be modifiable during the first eight years." (Emphasis added.) Paragraph 3.3 provided: "The parties shall endeavor to negotiate child support if alimony terminates while any child or children are minors. If they are unable to agree, the amount of child support to be paid by the [defendant] shall be determined by a court of competent jurisdiction. Child support payments shall be retroactive to the last day on which alimony was paid."

After the defendant filed a motion to modify child support, to which the plaintiff objected, in August, 2011, the defendant filed an amended motion for modification of alimony and child support on the following grounds: (1) the parties' two youngest children had reached the age of majority and had graduated from high school; and (2) the economy of New York had undergone a substantial change as a result of a catastrophic event.[1] Following a hearing, the court determined that the language in article 3 of the agreement was clear and unambiguous and that the amount of monthly alimony *and child support* could be modified only pursuant to the terms of paragraph 3.2. The court determined that the

only rationale for modification that was permissible under the terms of paragraph 3.2 was a substantial change in the economy of New York due to a catastrophic event. The court, therefore, sustained the plaintiff's objection as to all other grounds for modification. This appeal followed.

The defendant argues that the court erred in concluding that the agreement precludes modification. He argues that the agreement lacks clear language precluding modification of child support and thus should be interpreted to permit modification.[2] We agree.

General Statutes § 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support . . . may, at any time thereafter, be . . . modified by the court upon a showing of a substantial change in the circumstances of either party or upon a showing that the final order for child support substantially deviates from the child support guidelines established pursuant to section 46b-215a . . . ." Our Supreme Court has interpreted § 46b-86 (a) generally "to [provide] the trial court with continuing jurisdiction to modify support orders after the date of a final judgment of dissolution. . . . It permits the court to modify alimony and child support orders if the circumstances demonstrate that: (1) either of the parties' circumstances have substantially changed; or (2) the final order of child support substantially deviates from the child support guidelines. The statute, however, expressly stipulates that the court may exercise this authority [u]nless and to the extent that the decree precludes modification . . . . Thus, by its terms, § 46b-86 (a) clearly contemplates that, in certain cases, the parties can, by agreement, restrict the trial court's power to modify alimony or support even when a substantial change in circumstances or a substantial deviation from the child support guidelines has occurred."[3] (Citations omitted; internal quotation marks omitted.) *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 547–48, 46 A.3d 112 (2012).

"Despite the language of . . . § 46b-86 (a), [our Supreme Court has] treated ambiguous orders regarding alimony to be modifiable. . . . This presumption favoring modifiability should apply with equal if not greater force with respect to orders for child support, given the broad grant of power to make and modify child support orders expressed in General Statutes § 46b-56. Thus, although . . . § 46b-86 (a) does permit a court to limit or preclude modification of support in a divorce decree, it must express its intention to do so in clear and unambiguous terms." (Citations omitted.) *Guille* v. *Guille*,196 Conn. 260, 268 n.2, 492 A.2d 175 (1985).

"It is well established that a separation agreement, incorporated by reference into a judgment of dissolution, is to be regarded and construed as a contract.

. . . Accordingly, our review of a trial court's interpretation of a separation agreement is guided by the general principles governing the construction of contracts. . . . A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . If a contract is unambiguous within its four corners, the determination of what the parties intended by their contractual commitments is a question of law. . . . When the language of a contract is ambiguous, [however] the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Remillard* v. *Remillard*, 297 Conn. 345, 354–55, 999 A.2d 713 (2010). Because a determination as to whether a contract is ambiguous is a question of law, our review is plenary. See *Electric Cable Compounds, Inc.* v. *Seymour*, 95 Conn. App. 523, 529, 897 A.2d 146 (2006).

Paragraph 3.1 of the agreement provides that until certain conditions are met, the defendant shall pay the plaintiff $20,000 per month "as alimony, or separate maintenance for the support of the minor children . . . ." The only plausible interpretation of this clause is that it provides for unallocated alimony and child support. Paragraph 3.2 expressly limits only the modifiability of alimony. The agreement is silent as to the modifiability of child support. In light of the presumption favoring the modifiability of child support; see *Guille* v. *Guille*, supra, 196 Conn. 268 n.2; the agreement must be construed to permit the modification of child support. Accordingly, we must reverse the trial court's judgment sustaining in part the plaintiff's objection to the defendant's motion for modification of child support on the ground that payments for child support were subject to the nonmodification clauses of paragraph 3.2.

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion BORDEN, J., concurred.

[1] The defendant represents in his brief to this court that this ground had been withdrawn. This ground is not at issue in this appeal.

[2] The plaintiff's two page brief advanced no discernable argument in opposition.

[3] Our Supreme Court has recognized some restrictions on provisions providing for nonmodification of child support. See *Guille* v. *Guille*, 196 Conn. 260, 266, 492 A.2d 175 (1985) (in enacting § 46b-86 [a], legislature did not intend to depart from common-law rule rendering contracts between parents regarding child support ineffective to limit children's right to parental support); *Favrow* v. *Vargas*, 231 Conn. 1, 22, 647 A.2d 731 (1994) ("a parent cannot, at least without court approval, contract away [his or] her obligation of support for minor children"); *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 546 (facially nonmodifiable child support order modifiable due to change in custody of minor children). These restrictions are not at issue in this case because the agreement does not contain a clear provision providing for nonmodifiable child support.