

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-002244-MR

JOHN FRANKLIN GREY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, JUDGE
ACTION NO. 95-CI-5055

KAY ELLEN GREY

APPELLEE

AND

NO. 1996-CA-002346-MR (CROSS)

KAY ELLEN GREY

APPELLANT/CROSS-APPELLEE

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, JUDGE
ACTION NO. 95-CI-5055

JOHN FRANKLIN GREY

APPELLEE/CROSS-APPELLANT

AND

NO. 1997-CA-001264-MR

KAY ELLEN GREY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, JUDGE
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JOHN FRANKLIN GREY APPELLEE
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NO. 1997-CA-001524-MR (CROSS)

JOHN FRANKLIN GREY APPELLANT/CROSS-APPELLEE

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, JUDGE
ACTION NO. 95-CI-5055

KAY ELLEN GREY APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING
** **

BEFORE: GUDGEL, CHIEF JUDGE; COMBS AND GARDNER, JUDGES.

GARDNER, JUDGE: John Franklin Grey (hereinafter referred to as Lin) and Kay Ellen Grey (Kay) each appeal and/or cross-appeal from findings of fact, conclusion of law, and order of the Jefferson Circuit Court rendered on April 3, 1996, as well as from an order of March 31, 1997. We affirm.

Lin and Kay were married in Texas on August 24, 1974. Two children were born of the marriage, Kelly Erin Grey (Kelly) and Lauren Kayle Grey (Lauren). The parties were divorced in 1992. A separation agreement was incorporated into the decree of

divorce. At the time of this proceeding, Lin lived in California and Kay lived in Kentucky with the children.

On September 7, 1995, Lin filed a complaint in Jefferson Circuit Court seeking to terminate his obligation to pay maintenance based on his allegation that Kay was cohabitating with Rick Willis (Rick). Lin directed the court's attention to the separation agreement, which provided that the maintenance obligation "[s]hall cease upon the first happening of the following events: . . . (2) the remarriage or cohabitation (as below defined) of Wife. . . ." Cohabitation was defined in the agreement as "actually residing in a marriage-like relationship with an adult, non-relative male" for more than forty-five days.

On September 25, 1995, Kay filed an answer and counter-petition alleging that Lin's maintenance and child support obligation was in arrears. A hearing on the matter was conducted on February 2, 1996. Upon taking proof, on April 3, 1996, the court issued findings that Kay was cohabitating as defined by the separation agreement, and ordered that Lin's maintenance obligation ceased on September 7, 1995, the date of the filing of the complaint. The court also ordered that Lin was disallowed from claiming a 50% abatement in his child support obligation for periods during the summer when the children visited him, and further found him to owe \$2,650 in child support arrearage. Finally, Lin was ordered to pay Kay's attorney fees in the amount of \$5,408.83.

On February 8, 1996, Kay filed a motion in California seeking an increase in child support and an award of the

dependency exemption for the two minor children. The motion was abated at Lin's request since all other proceedings were occurring in Kentucky, and Kay filed the motion in Jefferson Circuit Court on May 16, 1996. The domestic relations commissioner conducted a hearing on the motion on July 30, 1996, and thereafter rendered recommendations which were adopted by the court. Thereafter, other motions were filed and hearings were conducted, including motions by each party seeking to hold the other in contempt. Ultimately, the court issued an order on March 31, 1997, wherein in relevant part it increased Lin's child support obligation and ordered that the tax exemption be divided equally in accordance with the terms of the separation agreement. Lin has now appealed from the April 3, 1996 order, and Kay has cross-appealed. Kay has appealed from the March 31, 1997 order, and Lin has cross-appealed. Collectively, the parties have presented more than one dozen claims of error for which they seek relief. We will address them seriatim, beginning first with Lin's claims of error arising from the April 3, 1996, order followed by Kay's cross-appeal.

Lin first argues that the circuit court committed reversible error in terminating his maintenance obligation as of the date he filed the complaint (September 7, 1995), as opposed to the date occurring forty-five days after Kay began cohabitating. He notes that the separation agreement provides that the obligation shall cease forty-five days after cohabitation begins, and argues that since the court found the cohabitation to commence in late July 1994, the date of

termination should have occurred no later than September 15, 1994.

We find no error on this issue. Lin directs our attention to Cook v. Cook, Ky., 798 S.W.2d 955 (1990), which he argues holds that cohabitation automatically terminates a maintenance obligation under the terms of a separation agreement.¹ Cook actually states as follows: “[h]ere the issue is not whether a change of circumstances has occurred but whether there has been ‘cohabitation’ which would automatically terminate maintenance under the terms of the contract.” Cook v. Cook, 798 S.W.2d at 957. The Kentucky Supreme Court found that no cohabitation had occurred, and accordingly concluded that the maintenance obligation was not terminated. We cannot rely on this as a basis for tampering with the order now before us. Kay correctly notes that the decree of divorce, which incorporates the separation agreement, may be modified solely by court action. Lin has not overcome the strong presumption that the circuit court’s ruling on this issue was correct, City of Louisville v. Allen, Ky., 385 S.W.2d 179 (1964), overruled in part by Nolan v. Spears, Ky., 432 S.W.2d 425 (1968), and accordingly we find no error.

Lin’s second argument takes issue with the court’s denial of his request to partially abate his child support obligation during the children’s summer visitation. The separation agreement provided that in the event Lin exercised his

¹Lin later states in his reply brief at page five that “[t]he Court in Cook addressed this issue in dicta.”

right to summer visitation, one-half of the child support obligation during that period would be abated. The court found that the visitation period for the children was two months each summer, but that the children stayed with Lin only fifty days in 1994 (twenty days with Lauren and thirty days with Kelly), and thirty-seven days in 1996 (twenty-two days with Lauren and fifteen days with Kelly). Lin abated \$825 for each summer. The court opined that such an abatement was neither equitable nor within the spirit of the agreement. As such, it ruled that Lin was not entitled to the abatement. We are aware of no basis upon which we may conclude that this ruling was clearly erroneous. The agreement provided for a partial abatement if the children stayed with Lin for the "summer visitation." The circuit court construed this to mean the entire summer. Since the children visited with Lin for only a portion of each summer, we cannot conclude that the trial court erred in denying the abatement.

Lin's third argument, i.e., that no child support arrearage existed, is premised on a finding that he was entitled to an abatement of child support in 1994 and 1995. Having found no error on the abatement issue, we hold that this argument is moot.

Lin also argues that the circuit court erred in awarding Kay attorney fees. Specifically, he maintains that attorney fees are allowable under Kentucky Revised Statute (KRS) 403.220 only if the action is brought under Chapter 403. Since, he maintains, only a portion of his claim related to Chapter 403, he argues that the court had no authority to award Kay attorney

fees. We disagree. The allocation of court costs and an award of attorney's fees are entirely within the discretion of the trial court. Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512 (1975). Clearly, a substantial portion of Lin's action related to Chapter 403, and accordingly the circuit court was vested with the discretion to award a fee. No showing has been made that the court abused this discretion, and we therefore find no error.

On her cross-appeal of the April 3, 1996 order, Kay first argues that the parties entered into an oral modification of the cohabitation portion of the separation agreement whereby Lin agreed to continue paying maintenance after Kay's cohabitation with Rick began. She maintains that Lin entered into the agreement because she agreed not to seek additional child support in California, and that the agreement is evidenced by the fact that Lin continued to make maintenance payments for some period of time after Kay's cohabitation began. Upon considering this issue, the circuit court found that Kay failed to prove that the modification existed with reasonable certainty as required by Arnold v. Arnold, Ky. App., 825 S.W.2d 621 (1992). As Lin properly notes, such a conclusion may not be set aside unless it is clearly erroneous. City of Louisville v. Allen, supra. We do not believe that the court's finding was clearly erroneous. On one hand, Kay argues that Lin was required to make maintenance payments until a final order was entered in his action to modify those payments. On the other hand, she argues that his continuing payments evidence his participation in an oral modification of the separation agreement. While we cannot

examine the matter de novo to make our own conclusions on these questions, we can determine that the record does not show the circuit court to be clearly erroneous on the question of whether an oral modification existed. As such, we must affirm on this issue.

Kay also argues that even if the parties had not agreed that maintenance would continue, the circuit court erred in finding that Kay was cohabitating in a marriage-like relationship as defined by the separation agreement. She directs our attention to a number of ways in which her relationship with Rick is not "marriage-like," and maintains that since the relationship was something other than marriage-like, the circuit court was compelled to deny Lin's request to terminate his maintenance obligation. We have closely examined this argument and find it to be specious. It is uncontroverted that Kay and Rick have been living together for an extended period of time in a house owned by Rick, that the relationship is emotionally and sexually intimate, and that Kay's children and Rick's child reside with the couple. It is further uncontroverted that Kay wishes to get married, that they share the use of credit, have jointly purchased a boat, and have attended counseling to help them adjust to a household combining two families. There can be no disagreement among reasonable minds but that the arrangement is properly described as marriage-like cohabitation. The circuit court did not err in so finding.

Alternatively, Kay argues that if the arrangement is properly described as marriage-like cohabitation, Lin should have

been required to continue the maintenance payments through April 1996, the date of the judgment. Kay's argument on this issue is not persuasive. Contrary to her assertion, the court did not act to retroactively modify maintenance, but to ascertain the date of its termination. It determined that maintenance should be terminated concurrently with the court taking jurisdiction of Lin's claim by the filing of the complaint. We find no error.

We will next address the claims of error arising from the March 31, 1997 order wherein the court accepted the commissioner's calculation of Lin's income, and addressed a tax exemption issue, attorney fees, and unreimbursed medical expenses. Kay, as appellant, first argues that the court committed reversible error in its calculation of child support. Lin's income is in excess of \$15,000 per month. The child support table set forth in KRS 403.212 does not provide a fixed monthly child support obligation for income above this amount. Rather, it allows for the court to exercise discretion in such circumstances. The circuit court, in accepting the commissioner's recommendation, adopted a formula of adding additional child support above the \$15,000 per month income level at the rate of 6.6% per \$100 of earned income. It chose this percentage since the same percent exists in the child support table at levels below \$15,000 per month.

Kay maintains that the court should have taken into account the actual needs of the children rather than simply relying on a mathematical formula. She points to expenses such as cheerleading, modeling, photography, and tutoring which she

maintains justify additional child support above the level awarded by the court. We have closely examined this issue and cannot conclude that the circuit court erred in its determination of the appropriate level of child support. KRS 403.212(5) states that, "[t]he court may use its judicial discretion in determining child support in circumstances where combined adjusted parental gross income exceeds the uppermost levels of the guideline table." Clearly, for Kay to prevail on her claim of error, she must show that the circuit court abused its discretion. City of Louisville v. Allen, supra. She has not made such a showing. While one could offer alternative forms of calculation which include the needs or desires of the custodial parent, there exists in the law a rational basis for the methodology adopted by the court. Accordingly, we find no error.²

Next, Kay argues that the court improperly allocated the income tax dependency exemptions equally between herself and Lin. She maintains that because of Lin's high income, he loses some of the benefit of the exemption allocated to him. Kay argues that she should receive both exemptions, because her lower income level would allow for full use of the exemptions and would free up more money for the benefit of the children. Were we reviewing the matter de novo rather than examining the record for errors of law, in all likelihood we would find Kay's argument

²Kay offers as a separate argument her contention that even if the court's mathematical formula is proper, it erred in failing to deviate upward based on the "special disabilities" of one child and "exceptional talents" of the other. Again, we cannot find that Kay has shown the court to have abused its discretion on this issue. KRS 403.212(5).

persuasive. However, the separation agreement provides in clear and unambiguous terms that the parties shall split the deductions, and the trial court has discretion in making this allocation. Pegler v. Pegler, Ky. App., 895 S.W.2d 580 (1995). Thus, even though the overall benefit of the parties' finances may be marginally increased if Kay is allowed to use both exemptions, the parties agreed to share the exemptions and the circuit court did not err by relying on said agreement.

Last, Kay argues that the modification of child support should have become effective when she filed her request for modification in California rather than when the request was subsequently filed in Kentucky. She maintains that had Lin not sought a stay of the proceedings in California, she would not have been compelled to re-file in Kentucky. As such, she argues that she is entitled to receive increased child support payments starting from the time of filing in California.

Kay chose to file in California even though all other issues were pending in Kentucky. Accordingly, it cannot reasonably be argued that Lin is responsible for any delay in the modification of child support. KRS 403.213(1) states that, "[t]he provisions of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of the motion for modification. . . ." Just as we found that the circuit court properly terminated Lin's maintenance obligation on the date of the filing of the complaint, so must we find no error in the circuit court ordering the modified child support to become effective on the date of Kay's filing.

In his cross-appeal, Lin first argues that the circuit court improperly considered "non-continuing" elements of income in determining child support. Specifically, he notes that he received bonuses of approximately \$12,000 in 1994, 1995 and 1996, and that it was his uncontroverted testimony that the court erred in including those bonuses to calculate his income for purposes of establishing child support.

We find no error on this issue. The "continuing" requirement to which Lin directs our attention relates not to specific sources or types of income, but rather to the change in circumstances. As we noted in Kay's last claim of error, KRS 403.213(1) provides in relevant part that,

The provisions of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing.

As it is clear that Lin's circumstances had in fact changed, we find no error in the modification of support nor the manner in which it was calculated.

The final issue raised by Lin is his claim that the circuit court erred in modifying the parties' agreement with respect to unreimbursed medical expenses. He maintains that the court was without authority to alter the parties' prior agreement to split said expenses 50/50. We disagree. While Lin is correct that the parties had agreed to such a split, the court implicitly found that this agreement was unconscionable due to the great disparity in the parties' incomes. As such, the court was

justified in altering the terms of the agreement. KRS
403.180(2); Shraberg v. Shraberg, Ky., 939 S.W.2d 330 (1997).

For the foregoing reasons, this Court affirms the
findings of fact, conclusions of law, April 3, 1996 order, and
the March 31, 1997 order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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