

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002082-MR

OMAR THOMAS COLEY

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE JEFF HINES, JUDGE
ACTION NO. 1997-CI-00096

ANITA EDGING

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: COMBS, HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: This is an appeal from an order and judgment of the McCracken Circuit Court, enforcing the provisions of an Indiana dissolution decree and entering a judgment against the appellant for a child support arrearage. We conclude that the trial court correctly determined that an alleged oral agreement to modify child support could not be enforced. Hence, we affirm.

The appellant, Omar Thomas Coley, and the appellee, Anita Edging, were married in 1984. On March 12, 1996, their marriage was dissolved by a decree of the Vanderburgh Superior Court in the State of Indiana. The Indiana decree adopted a

written settlement agreement which, among other things, required Coley to pay the sum of \$300.00 per week in child support for the parties' two (2) children.

Shortly thereafter, Coley became unemployed and fell behind in his child support payments. In 1997, Edging, now a resident of Kentucky, brought an action in McCracken Circuit Court to enforce the Indiana decree. Coley, who is also a resident of Kentucky, did not respond to the complaint. On April 30, 1997, the trial court entered an order granting full faith and credit to the Indiana decree.

Subsequently, Edging filed a motion to obtain a judgment for the child support arrearage and to enforce several other provisions of the decree. In response, Coley alleged that in June 1996 he and Edging entered into an oral agreement wherein his child support obligation would be modified depending on his income from his new employment. The matter was referred to the domestic relations commissioner, who conducted a hearing and issued findings of fact, conclusions of law, and a recommended order. The commissioner found that Coley had established the existence of an enforceable oral agreement to modify child support. However, the trial court sustained Edging's objections to the commissioner's report.¹ The court found that the original

¹ In the instant case and widely throughout this jurisdiction, the term "exception" or some form thereof is used to denote the procedure by which one obtains trial court review of the report of a domestic relations commissioner pursuant to CR 53.06. The rule in question does not use the term "exception," but rather speaks of "objections." The terms "exception" and "objection" are synonymous. Black's Law Dictionary (6th ed., 1991) p. 559. In the interest of consistency with the rule, we will use the term "objection" herein.

child support amount as set out in the Indiana decree had not been modified by a subsequent oral agreement. The trial court calculated Coley's child support arrearage accordingly.² Coley now appeals from this portion of the judgment.

As a preliminary matter, Edging argues that the trial court's order of April 30, 1997, enforcing the Indiana decree voids any prior oral agreements. We disagree. After the trial court entered its April 30 order, the Indiana decree became enforceable in Kentucky to the same extent that any Kentucky decree would be. However, the trial court's order did not reduce the child support arrearage to a judgment against Coley. Consequently, we do not believe that the trial court's order granting enforcement of the Indiana decree precluded Coley from raising the alleged oral agreement as a defense to the arrearage.

The substance of this appeal concerns whether Coley proved the existence of an oral agreement to modify his child support obligation with reasonable certainty. The commissioner found that the alleged oral agreement to modify child support made by the parties on June 5, 1996, contained the following terms: No support obligation was due to Edging while Coley remained unemployed. Once Coley became employed the parties were to use his income at the time of employment to determine the amount of child support and arrearage that would be due after

² The commissioner recommended that Coley's child support obligations be modified to a base support amount of \$870.00 per month, of which he is obligated to pay \$431.00 per month retroactive to the date of the oral agreement. Although the trial court set aside the portion of the recommended order retroactively modifying his child support obligation, it appears that the trial court adopted that portion of the commissioner's recommended order which reduced Coley's prospective payments.

June 5, 1996. The commissioner found Coley's evidence establishing this agreement to be compelling. He also found Edging's testimony to the contrary to be less than credible.

Coley first argues that the trial court erred in setting aside the commissioner's recommended findings of fact and conclusions of law. We disagree. A trial court is not bound by the domestic relations commissioner's factual findings. The trial court has wide discretion to adopt, modify or reject the commissioner's recommendations. CR 53.06(2). The court is free to disregard those findings and to review the matter *de novo*.³ Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997). See also Basham v. Wilkins, Ky. App., 851 S.W.2d 491 (1993) and Haley v. Haley, Ky. App., 573 S.W.2d 354 (1978). The role of this Court is to review the trial court's findings of fact and conclusions of law, not those made by the commissioner. A trial court's findings of fact shall not be set aside unless they are clearly erroneous. CR 52.01.

In the present case, the trial court did not state any specific disagreement with the commissioner's factual findings. Rather, the trial court held that Coley had not carried his burden of proving that an enforceable oral agreement existed. An oral agreement modifying child support payments must be proven

³ Having said this, we note that the commissioner is frequently in the best position to judge the demeanor and credibility of witnesses. When the trial court chooses to make new factual findings based solely on the evidentiary transcript, it loses the benefit of the commissioner's observations. Thus, the trial court should carefully consider all of the commissioner's observations and findings before making new factual findings.

with reasonable certainty and must be reasonable in its terms. Whicker v. Whicker, Ky. App., 711 S.W.2d 857, 859 (1986). In addition, the agreement will be enforced only if a modification of child support might reasonably have been granted had such modification been sought at the time the agreement was made. Furthermore, such private agreements are enforceable only prospectively, and will not apply to support payments which had already become vested at the time the agreement was made. Id.

Regardless of the credibility of the witnesses, we agree with the trial court that the alleged oral agreement to modify child support was not proven with reasonable certainty. The alleged agreement did not prospectively modify child support. Rather, Edging merely agreed to suspend her efforts to collect child support until Coley obtained employment. The parties then agreed to recalculate the amount of child support, including the arrearage, at some future date.

It is well-established that an agreement which leaves essential terms to be decided at a future date is not an enforceable contract. Walker v. Keith, Ky., 382 S.W.2d 198 (1964). Furthermore, this lack of definiteness as to its terms would have prevented the trial court from enforcing the agreement had a motion been made at the time the agreement was made.

We recognize that this holding may place Coley in a difficult position, facing a large and unexpected child support arrearage. However, parties who decline to obtain a modification of a child support obligation from the courts run the risk of having their private agreements declared invalid by a court when they attempt to have the agreements judicially enforced. Whicker

v. Whicker, 711 S.W.2d at 859. Although the courts will enforce such oral agreements when possible, we find as a matter of law the trial court correctly determined that the alleged oral agreement could not be enforced.

Accordingly, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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