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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000278-MR

TRAVIS A. FRITSCH — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 01-CI-01677

GREGORY D. STUMBO — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; HENRY,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellant, Travis A. Fritsch, appeals from orders of the Fayette Circuit Court denying her petition for declaratory relief and granting partial

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statute(s) (KRS) 21.580.

summary judgment in favor of Appellee, Gregory D. Stumbo, in this child support matter. Finding no error, we affirm.

Fritsch and Stumbo, unmarried, are the biological parents of Elliott Maddox Fritsch, born August 23, 1988. Both prior to and after Elliott's birth, the parties attempted to negotiate an agreement resolving custody, support and other related issues. On November 15, 2000, the parties signed a document captioned "Child Support Agreement," which contained the following language:

> WHEREAS, Fritsch and Father[2] desire to acknowledge that the Father's child support obligation for Elliot Maddox Fritsch and other obligations to contribute to his medical, dental, insurance, and other legally mandated needs may be enforced in an amount as determined by any appropriate court of law from the date of this agreement and the beginning date of Father's obligations shall not be forestalled due to the failure of the parties to conclude a comprehensive Custody and Support Agreement.
>
> 1. Fritsch and Father agree that in the event a court action by Fritsch to obtain child support and other obligations of father for Elliott Maddox Fritsch, then the Father's obligation for same shall become effective as of the date of this agreement. The Father acknowledges that he or his estate shall be bound by this agreement.

It is undisputed that the above is the only written agreement executed by the parties.

The record reveals that the parties met again in December 2000 for the purpose of negotiating a more specific superseding agreement. And in February 2001, Fritsch's counsel sent Stumbo a draft of a custody and support agreement

[2] The agreement only refers to Stumbo as "Father."

executed by Fritsch. However, Stumbo did not agree to all of the terms and although further negotiations continued into March 2001, a new written agreement was never executed by both parties.

In May 2001, Fritsch filed a declaratory judgment action in the Fayette Circuit Court. Therein, Fritsch claimed that on March 15, 2001, the parties had reached an agreement regarding the custody and support of Elliott and that Stumbo had agreed to sign the document on the condition that a paternity test verified that he was, in fact, Elliot's natural father. However, Stumbo never executed said agreement. Thus, Fritsch sought a declaration that the unexecuted March 2001 agreement was enforceable and binding upon the parties. Fritsch also filed a petition seeking full and permanent custody of Elliott and requesting "past, current and future child support and medical expenses."

In June 2003, Stumbo filed a motion for partial summary judgment claiming that enforceability of the unsigned March 2001 agreement was barred by the Statute of Frauds because its terms could not be "performed within one year from the making thereof." KRS 371.010(7). Following a hearing and additional briefing, the trial court entered an order on August 19, 2004, denying the motion for partial summary judgment. In so doing, the court observed that appellate courts having addressed the issue have drawn a distinction in child support matters:

> The distinguishing factors [sic] as enumerated by the court is the contingency of the minor child dying within the initial year of any support obligation. With the potential of that contingency the courts have found that such agreements are outside of the statute of frauds.

> *Myers v. Saltry*, Ky., 173 S.W. 1138 (1915), *Conley's Administrator, et al. v. Hall*, Ky., 86 S.W.2d 1015 (1935).

In November 2005, Stumbo filed a second motion for partial summary judgment arguing that Fritsch's claim for a liquidated sum for retroactive child support[3] was barred by KRS 406.031, as well as by the language of the November 2000 written custody and support agreement. Specifically, Stumbo contended that the parties' prior oral negotiations merged into the November 2000 agreement and that pursuant to that agreement any child support obligation would become effective on the date that the agreement was signed.

On October 19, 2006, the trial court conducted a bench trial on Fritsch's declaratory action and, by opinion rendered on November 21, 2006, the court held:

> The issue presented in this declaratory action is whether or not a purported settlement agreement submitted by [Petitioner] to [Respondent] on or about February 15, 2001 and signed by [Petitioner] but unsigned by [Respondent] is a valid and enforceable agreement.
>
> The within case is a clear example of two parties and their counsel having different and distinct recollections of the underlying facts. In its simplest terms Petitioner and her counsel believe and testified the parties came to a full agreement as to all terms in the December 2000 meeting and Petitioner's counsel is convincing regarding the telephone call he received in March 2001 from Respondent's counsel indicating Respondent was in agreement with the tendered document, with the addition of Paragraph 15 pertaining

[3] By November 2005, the only remaining issue was retroactive child support. Pursuant to a 2002 mediation agreement, Stumbo was paying current child support in excess of the statutory guidelines. Further, Stumbo conceded that custody was not in dispute.

> to paternity testing. Conversely, Respondent and his counsel have testified there may have been a general understanding in principal regarding various issues discussed in the December 2000, meeting, however, no agreement was reached as to specific terms and conditions. Further, Respondent's counsel was likewise convincing he at no time indicated to Petitioner's counsel that Respondent was in agreement with the February 15 document.
>
> . . . .
>
> It is impossible for the Court to determine which of the parties or counsel has the faulty recollection or misinterpretation of the discussions that may have occurred between the parties and/or counsel. . . . The Court cannot find as a matter of law based upon the facts presented in this matter that a specific meeting of the minds occurred whereby all material and essential terms were specifically agreed to between the parties and there were no issues left for future negations.

On January 8, 2009, the trial court denied Fritsch's Kentucky Rules of Civil Procedure (CR) 59.05 motion to alter, amend or vacate its opinion. In the same order, the court also granted Stumbo's partial summary judgment motion as to retroactive child support, finding that the parties were bound by the November 2000 written agreement:

> The parties agreed, in writing, in their November 15, 2000 agreement, that any child support obligations for which Respondent may become obligated, either by way of voluntary agreement or a result of court action would be effective as of the date of this November 15, 2000 agreement. The Court finds the parties merged into their written agreement all negotiations leading up to said agreement and accordingly, any obligation for child support, including past or retroactive child support, was restricted, by agreement, to the date of the agreement.

Fritsch now appeals to this Court as a matter of right.

Fritsch argues herein that the trial court erred in ruling that the November 2000 agreement was dispositive of her claim for retroactive child support. Rather, she contends that the agreement was solely for the purpose of fixing a date to exclude the application of KRS 406.031. After reviewing the record herein, we must disagree.

Our standard of review of findings of fact made by the trial court after a bench trial is whether they are clearly erroneous. CR 52.01. Findings of fact are clearly erroneous if they are not supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). Substantial evidence is evidence of a probative value that a reasonable person would accept as adequate to support a conclusion. *Id.* As a reviewing court, we will not disturb the trial court's findings that are supported by substantial evidence, even if we would have reached a contrary finding. *Id.* And, as concerns our review, we must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. CR 52.01. Finally, the trial court's conclusions of law, reached after making its findings, are subject to an independent *de novo* appellate review. *Gosney v. Glenn*, 163 S.W.3d 894 (Ky. App. 2005).

As noted by the trial court, claims for retroactive child support in paternity actions are precluded beyond fours years prior to the initiation of the paternity action. KRS 406.031. As Elliott was thirteen years old at the time Fritsch filed the declaratory judgment action in 2001, she was clearly precluded from claiming retroactive child support under the statute. Thus, the only

mechanism by which Fritsch could prevail on her claim was by way of contract or agreement between the parties. However, the trial court clearly found, and we agree, that the unexecuted March 15, 2001 agreement was not enforceable. As such, the only contract or agreement between the parties is the written November 2000 document, which unequivocally provides that,

> [i]n the event a court action by Fritsch to obtain child support and other obligations of Father for Elliot Maddox Fritsch, becomes necessary, then *the Father's obligation for same shall become effective as of the date of this agreement.* (Emphasis added).

The trial court relied upon the rationale set forth in *Childers & Venters, Inc. v. Sowards,* 460 S.W.2d 343, 345 (Ky. 1970), wherein the Court observed,

> Where the parties put their engagement in writing all prior negotiations and agreements are merged in the instrument, and each is bound by its terms unless his signature is obtained by fraud or the contract be reformed on the ground of fraud or mutual mistake, or the contract is illegal. (Internal citations omitted).

See also Bryant v. Troutman, 287 S.W.2d 918, 920 (Ky. 1956) ("When the negotiations are completed by the execution of the contract, the transaction, so far as it rests on the contract, is merged into the writing.")

We can find no support for Fritsch's claim that the "unexpressed purpose" of the November 2000 agreement was merely to avoid the application of KRS 403.031. While we agree that the parties had not concluded their negotiations in so far as a specific amount of support had not been determined, the language of

the agreement with respect to the effective date of Stumbo's obligation is clear and unambiguous. As noted by Kentucky's highest court in *O.P. Link Handle Co. v. Wright*, 429 S.W.2d 842, 847 (Ky. 1968):

> [W]hen two intelligent parties have read the contract before signing it, and one thereafter says it meant something different, or was subject to some unexpressed condition, reservation, limitation, proviso, or understanding, but the other says it meant just what it said, no more and no less, it is our opinion that stability and a salutary confidence in the written word requires the instrument itself to prevail.

Based upon the plain language of the November 2000 agreement, we conclude that the trial court correctly determined that "the parties merged into their written agreement all negotiations leading up to said agreement and accordingly, any obligation for child support, including past or retroactive child support, was restricted, by agreement, to the date of the [November 2000] agreement."

Fritsch next argues that because Stumbo breached the November 2000 agreement, he cannot now rely on such to defeat her claim for retroactive child support. Essentially, Fritsch contends that despite Stumbo's acknowledgement in the November 2000 agreement that he was Elliott's natural father, he later contested paternity and insisted upon genetic testing. Fritsch characterizes Stumbo's actions as a material breach of the November 2000 agreement.

At the outset, we note that Fritsch concedes that this issue was not presented to the trial court, but urges us to review such as palpable error under

Kentucky Rules of Evidence (KRE) 103.[4] Notwithstanding the procedural deficiency, however, we fail to perceive how Fritsch would benefit even if this Court were to find that Stumbo breached the November 2000 agreement. Repudiating the contract in its entirety has no bearing upon Fritsch's ability to claim retroactive child support. Statutory law clearly prohibits it. Further, the trial court ruled, and we agree, that Fritsch failed to adequately prove there was a "meeting of the minds" in March 2001 such that the unexecuted agreement was binding and enforceable. Thus, without the November 2000 agreement, Fritsch is without any legal mechanism to claim entitlement to retroactive child support. Nevertheless, we are of the opinion that Fritsch has failed to prove that the alleged error, if any, affected her substantial rights and resulted in manifest injustice. CR 61.02.

The orders of the Fayette Circuit Court are affirmed.

ALL CONCUR.

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[4] Stumbo is correct that KRE 103 applies to "[a] palpable error in applying the Kentucky Rules of Evidence . . ." and is not applicable herein. Rather, Appellant's claim is reviewed under CR 61.02, which provides:

> A palpable error which affects the substantial rights of a party may be considered by . . . the appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

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